To Be Perfectly Transparent

In a recent joint discussion, Zac Lucas (Head of Private Wealth, Gateway Law Corporation Singapore), and Shawn Wang (Head of Trust Services, Ocorian Singapore Trust Company) delve into the evolving AML expectations placed on Singapore Financial Institutions and Trust and Company Service Providers.

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Zac Lucas:

The global regulator in the fight against money laundering and terrorist financing: the Financial Action Task Force ("FATF"), has been busy over the last few years consulting and updating their transparency and beneficial ownership requirements in relation to both companies and trusts. The FATF official guidance or "Recommendations" 24 (companies) and 25 (trusts) have now been formally updated, as at February 2023.

In respect of companies (legal persons) the FATF have also followed up with new guidance on Beneficial Ownership of Legal Persons (March 2023).

As a response, Singapore has made amendments to the Companies Act 1967, for instance introducing a separate register of nominee shareholder to supplement the existing register of nominee directors.

Work will no doubt continue, particularly in relation to foreign companies and entities that have sufficient links with Singapore that merit bringing them under the formal regulatory umbrella – a key area of concern for the FATF.

Singapore has not opted to create a central register of beneficial ownership information or to make such information publicly available. Instead, Singapore companies hold and maintain beneficial ownership information, accessible by regulatory and law enforcement agencies.

Singapore will be formally assessed (peer reviewed) by the FATF in August 2025, much has happened since the last formal evaluation, including 1MDB, Indonesia Amnesty and of course the recent dramatic money laundering case, no doubt Singapore public authorities (MAS/ACRA) will be anxiously preparing for this formal review.

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Shawn Wang:

Further, in the wake of the one of Singapore's largest anti-money laundering operations, the Monetary Authority of Singapore (MAS) has issued an Information Paper titled *"Strengthening AML/CFT Controls and Practices to Detect and Mitigate Risks of Misuse of Legal Persons / Arrangements and Complex Structures"* [1] ("Paper") to all financial institutions (FIs) including trust companies in August 2023.

The Paper sets out the typologies and case studies observed by MAS during recent inspections of FIs, and the high-level supervisory expectations to ensure robust AML/CFT controls.

Chiefly, the main typologies observed in the Paper include a lack of clear economic purpose for legal arrangements and complex structures, and complex layers of ownership without clear legitimate reasons that obscure the ultimate beneficial owner.

At the onset, MAS comments on the failure of an FI to seek additional information to assess whether there were "legitimate reasons" for the use of the said

[1] Strengthening AML/CFT Controls and Practices to Detect and Mitigate Risks of Misuse of Legal Persons / Arrangements and Complex Structures, *https://www.mas.gov.sg/regulation/guidance/amlcft-controls-on-risks-of-misuse-of-legal-persons-arrangements-and-complex-structures*

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complex structure. This demonstrates the exacting expectations of our regulator, as what is "legitimate" is a higher standard than what is "legal" and can only be concluded in the context of the intended purpose and objectives of the structure.

Interestingly, the Paper also presents by way of example, a foundation as a settlor of a trust holding an insurance policy wrapper, that in turn holds other offshore companies that are ultimately controlled by the "True BO (i.e. Beneficial Owner)". Whilst the method of control is not specified, the "True BO" of one of the offshore companies is noted to be the same party as the founder of the foundation ("Party A").

This is noteworthy. MAS addresses Party A as the True Beneficial Owner of the assets under an insurance policy wrapper that is held under a trust. I repeat: *True beneficial owner.*

This illustrates the increasingly pronounced tension in an evolving regulatory environment between a "legal position" and a "regulatory compliance position".

THE MECHANICAL APPROACH TOWARDS BENEFICIAL OWNERSHIP

Zac Lucas:

That MAS should highlight in the Paper a mixed insurance, trust, fund and company combination structure is indeed interesting. As Shawn correctly points out, the Paper shows the broad approach adopted by the regulator in assessing complex structures. It also serves as a clear warning to insurance brokers and agents actively marketing insurance solutions that in the search for beneficial owners a purely mechanical approach concentrating on ultimate share ownership (life company) or percentage share ownership (>25%) is not without risk.

Broadly, the FATF's definition for controlling persons for a company would be natural persons controlling more than 25% (directly or indirectly) of the ordinary voting shares of the entity, or in its absence, persons with effective control, failing which senior managers are identified as relevant beneficial owners. For trusts, this includes the settlor, trustee, protector (if any), any beneficiary receiving a distribution or a vested interest, and any other natural person(s) exercising ultimate effective control over the trust. In the case of full discretionary trusts, the ultimate effective control rests solely with the trustee.

It is instructive that in the latest FATF Guidance on Beneficial Ownership of Legal Persons (March 2023) the FATF sets out a number of examples where beneficial ownership is satisfied by effective control, including debt instruments, shareholder agreements (power to appoint majority of the board) control through informal and undocumented means.

Thus, what MAS is doing (and indeed ACRA in its recent guidance dealing with registers of controllers (April 2023)) in their recent Paper is illustrative of the wider approach in identifying beneficial owners in the absence of a person holding a controlling ownership (>25%) interest.

Shawn Wang:

Yes, the regulator's expectation is impartial to the legal constructs. To the regulatory lens, there is no such thing as a beneficial ownership "blocker". Who is the true beneficial owner of the structure and its assets? That is the key regulatory question to MAS, and where the FI was faulted in the Paper for failing to correctly identify the true BO. MAS seems to suggest a wider interpretation pointing at who ultimately wields influence over the essence of the structure in the context of its purpose and intent.

The evolving regulatory environment poses challenges to the typical Singapore trust structure, where a trust holds an underlying investment or trading company. Typically, the trust is arranged so that the directors of

the underlying company are afforded a level of autonomy and freedom of administration – the trust would typically contain protective provisions so that a trustee is not obliged or liable to interfere in the activities of the underlying company, what is typically called "anti-Bartlett" clause.

However, an anti-Bartlett clause may result in a conundrum: trustees are protected from liability if they don't get involved in the affairs of the underlying company but this might risk a regulatory breach.

Which raises an interesting point: should a trustee stand aloof of its trust underlying company? Importantly, should the trustee leave the management of the underlying company solely to the directors?

There is no ambiguity from MAS as to their regulatory expectations – the trustee is required to undertake ongoing monitoring of the affairs of any underlying company.

In the *Industry Best Practice Paper: Managing Money Laundering and Terrorism Financing ("ML/TF") Risks Associated with Complex Trust Structures*[2] paper, despite acknowledging that the trustee might not have the legal standing to interfere with the underlying Non-Trustee Managed Entities (NTMEs), STA and MAS (as an observer) still set out the "best practices" on the level of information they exhort the trustee to obtain and evaluate for any discrepancies. This is a compliance regulatory expectation, independent of the anti-Bartlett clause.

Zac Lucas:

Should the trustee get involved in the underlying company (i.e. trustee-managed underlying entities), there are even lesser arguments for the effectiveness of the anti-Bartlett.

Further, even if a trustee's fiduciary obligations are excused, there remains fiduciary duties that the directors owe to the company. Anti-Bartlett provisions are concerned chiefly with the immediate underlying company of the trust. It does not cast a blanket exoneration of ignorance down the entire structure.

Fundamentally, regardless of anti-Bartlett provisions, a trustee has an irreducible core duty to protect the safety of the trust assets, which follows an irreducible core duty to account for the assets. In a way, the regulatory expectation for transaction monitoring fits nicely with that.

CLOSING REMARKS

As the regulatory landscape continues to mature, our Singapore regulator has made commendable progress in communicating their regulatory expectations to the industry.

With amendment to the FATF Recommendation 25 (trusts) and the ongoing consultation by the FATF (due to close on the 8th December 2023) on the appropriate risk based approach to trusts, domestic regulatory activity can be expected in the near term, particularly in the run up to August 2025. Different types of trusts and there uses and AML risks are a key area of concern for the FATF and therefore MAS can be expected to look at risk segmentation as a key area when addressing Singapore's compliance with new Recommendation 25.

For 2024, continued regulatory focus by MAS will be placed on asset and wealth managers[3] , as Singapore prepares for its upcoming mutual evaluation in August 2025.

However, some areas of risk, such as client-managed underlying companies of a trust structure and the misuse of a trust itself as a legal arrangement, remain inadequately addressed. Especially in situations where the trustee might not have sufficient equity ownership and legal standing to obtain complete and thorough financial records of the company. It is no surprise that various FIs and trust companies have pivoted to "de-risk" their client book following the pronounced regulatory expectations.

As Singapore continues to position itself as the jurisdiction of choice for family offices, businesses and succession planning, there remains a delicate task of raising the regulatory bar to preserve Singapore's reputation as a global financial hub without casting a regulatory noose that suffocates growth out of the industry. ■

[2] Industry Best Practice Paper: Managing Money Laundering and Terrorism Financing ("ML/TF") Risks Associated with Complex Trust Structures, *https://www.sta.org.sg/wp-content/uploads/2022/06/Industry-Best-Practice-Paper-Managing-ML-TF-Risks-Associated-with-Complex-Trust-Structures.pdf*

[3] MAS Enforcement Report January 2022 to June 2022, *https://www.mas.gov.sg/-/media/mas/news-and-publications/monographs-and-information-papers/4th-enforcement-report.pdf*