



THE DRIVE FOR INTERNATIONAL TRANSPARENCY

SECRECY IS DEAD AND GOOD RIDDANCE BUT WILL PRIVACY FOLLOW?

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The past thirteen or so years have seen an inexorable move against secrecy in the offshore jurisdictions. Governments, with an eye on tax evasion and avoidance, have moved to gather information about financial assets of their taxpayers held outside the home jurisdiction – starting with the Foreign Account Tax Compliance Act (FATCA) in the USA in 2010, followed by the Organization for Economic Cooperation for Development (the OECD)'s Common Reporting Standard (CRS) in 2014. Notwithstanding that FATCA's primary focus is tax avoidance, it opened the floodgates for wider automatic exchange of information between governments and tax authorities on a near global scale¹ in their efforts to additionally tackle corruption, money laundering, and organised crime.

In Europe, the various OECD/ EU regimes include:

1 CRS (of which many offshore jurisdictions are signatories such as the Cayman and the BVI) which compels the disclosure of information about trusts (including the name of the trust) details of the trustees and beneficiaries and other

power holders (including protectors) to home jurisdiction tax authorities, which is then automatically exchanged with other jurisdictions².

2 DAC 6 and the Mandatory Disclosure Regime³ which aim to provide tax administrations with information on arrangements (including cross border) that (purport to) circumvent CRS or disguise the beneficial owners of assets held offshore. These regimes are emphasizing the 'nowhere to hide' message. Trying to circumvent CRS is reportable in itself. So, trying to avoid it is not an option.

The UK has been and continues to be (post Brexit) an advocate for transparency and is known for taking a hard line on tax evasion and economic crime.

This is seen through:

1 The UK's General Anti-Abuse Rule which was introduced in 2013,

2 followed by various transparency regimes and tools such as unexplained wealth orders and beneficial owner registers, including the Trust Registration Service (TRS), Register of People with Significant Control (PSC), and the Register of Beneficial Owners of Overseas Entities owning a UK property that came into force in March 2022 following the invasion of Ukraine by Russia under the Economic Crime (Transparency and Enforcement) 2022 Act. Information to be disclosed⁴ under these regimes may include (depending on the factual circumstances) details of offshore trusts, assets, and trust fiduciaries.

Not only do offshore jurisdictions signed up to FACTA and CRS participate in the automatic exchange of information between governments, but these jurisdictions are also impacted by other countries' national reporting legislation (such as TRS).

Further, offshore jurisdictions such as Cayman and the BVI have also put in place their own national legislation to counter CRS or FATCA contravention, and they are also increasing their beneficial ownership reporting.

¹ The US had entered bilateral FATCA agreements with over 115 other jurisdictions by 2015, including the UK, BVI and Cayman.

² Over 100 countries have signed up to it (including the UK, Cayman, BVI, but notably not the USA). This information is not made public

³ The UK has now enacted legislation in the form of the International Tax Enforcement (Disclosable Arrangements) Regulations 2023 to give effect to MDR in the UK and replace the existing rules which implement part of the EU DAC6 rules

⁴ Also beneficial owners of trusts, including certain information about beneficiaries, trustees, settlors, grantors, interested persons. The latter two registers are publicly searchable on Companies House, and although not all trust information will be made public, it is still disclosable to Companies House (and to HMRC with regards to the TRS).

1 In Cayman, subject to certain prescribed exemptions, Cayman incorporated companies, LLCs and LLPs are required to keep a register of their beneficial ownership filed at their registered office address with a licensed service provider. The register is not public but can be searched by certain law enforcement and tax authorities. It can also be shared with the UK authorities on the basis of an agreement for sharing beneficial ownership information.

2 The BVI does not have a Trusts register – however, some BVI trusts will still need to be registered with the TRS e.g., if the trust has a UK tax liability. All title to real estate is evidenced by a central public register which is maintained at Land Registry Department⁵ and the Beneficial Ownership Secure Search System Act, 2017 (the BOSS Act) requires registered agents (RA) in the BVI to create a database of beneficial ownership information relating to in-scope entities for which they act as RA⁶.



Impact on Private Clients

As we can see from the above, secrecy is nearly dead. However, currently privacy remains very much alive as access is generally limited to governmental enquiries rather than journalists or the public more generally. However, many argue that the end of secrecy is not sufficient to properly tackle money laundering, organized crime and corruption. The future is another country and they do things differently there. Nevertheless, we expect that the next decade will continue to see the drive for public access to information on trusts and beneficial owner registers.

This drive for transparency coupled with data exposure risks (such as data leaks and hacks including the widely publicized Pandora, Panama and Paradise Papers), have meant that

there is a lot more information on trusts making its way into the public domain (or is at risk of being disclosed), leading to a number of advantages and risks for private clients and trust fiduciaries, including:

1 safety and security concerns for those who legitimately set up structures in a jurisdiction such as the Cayman and BVI that is protected from corruption and political unrest (and who now worry about potential kidnapping and ransom risks for their family members);

2 attacks from within structures by younger family members and often beneficiaries if they find out details of trust assets and disagree with the manner in which wealth was generated.

3 the exposure of family secrets leading to inter-family strife and cultural rifts, often in circumstances where families have structured wealth not for tax reasons but because confidentiality is important to their way of life;

4 efforts to disrupt corruption and crime may reduce business expense and oligopolistic behaviors.

5 greater certainty as to the legitimacy of their counterparts and their source of wealth; and

6 the increased likelihood that looted artifacts and art will be returned to their rightful owners.



Top tips:

1 When establishing a structure for clients, emphasize and advocate greater transparency from the outset. Too many trust disputes arise because of secrecy amongst family members that could be avoided if information is shared during their lifetime, rather than fearing inevitable confrontation post death of the economic settlor.

2 Understand and manage how and where your clients' information is reported and exchanged to avoid high risk and targeted jurisdictions.

3 Caution is advised and good advice is itself necessary when navigating disclosure regimes and requests.

Consider:

- The basis on which the information is requested i.e., if under the PSC regime (e.g., do you agree they are a PSC on a proper analysis)?
- Who is in possession or control of the information requested?
- Is the information subject to privilege?
- Is there a risk of sanctions including financial penalty and/or criminal prosecution for failure to comply?
- The form of disclosure, and whether it is appropriate to redact any third party or irrelevant subsidiary material contained in the documents?
- Appropriate levels of security on disclosure (including encryption) and safe custody of files?
- Whether complying with the request give rise to any obligations to report under applicable anti-money laundering or anti-bribery regulations?
- Whether information disclosed in one jurisdiction might give rise to exposure in any other jurisdiction?

4 In times of increased geographical uncertainty, the evolving social landscape and modern familial objectives, clients and practitioners must ensure that the right and expectation to privacy remains an important part of the discussion if trusts are to remain a vital and flexible vehicle.



⁵ In the BVI any person can inspect the register and may take notes. However, making copies of any entry is prohibited

⁶ The RA databases are private but may be searched upon request from certain authorities via the beneficial ownership secure search system