The Treasury

Foreign Trust Inquiry Information Release

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[1]	to prevent prejudice to the security or defence of New Zealand or the international relations of the government	6(a)
[2]	to protect the privacy of natural persons, including deceased people	9(2)(a)
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In preparing this Information Release, the Treasury has considered the public interest considerations in section 9 and section 18 of the Official Information Act.

By email: [4]

20 May 2016

Government Inquiry into Foreign Trust Disclosure Rules
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Attention: Mr John Shewan

GOVERNMENT INQUIRY INTO FOREIGN TRUST DISCLOSURE RULES

1. Introduction

1.1 We refer to the Government Inquiry into Foreign Trust Disclosure Rules established by the New Zealand Gazette Notice No. 33 dated 19 April 2016.

1.2 Our specific submissions are set out in sections 3 to 6 and broadly describe what we consider are the options for enhancing not only the existing foreign trust disclosure rules, but also the regulation of those persons involved in the establishment, administration and management of foreign trusts.

1.3 We believe a consideration of the appropriateness of current disclosure rules and of any regulatory measures that should apply must be considered in the context of, and be informed by, the purposes for which foreign trusts are established in New Zealand.

2. Background to the foreign trust regime

2.1 In our view, trusts, whether domestic or foreign, are typically established for the purpose of protecting and managing family assets and for providing orderly succession to the next and future generations of a family.

2.2 In the domestic context:

(a) Trusts are established by local families as a means of transferring the benefits of wealth to succeeding generations, to provide for the proper stewardship of family assets, and to provide a mechanism to quarantine legacy assets from the risks arising from the bad decisions of current and future generations. With respect to risk, typically there is a desire to protect assets from unforeseen failures such as those arising from bad financial decisions and relationship breakdowns.

(b) Confidentiality and privacy are important factors. The objective here is to ensure that unauthorised persons do not have unrestricted access to family information. Trust law and trustee duties regulate the beneficiaries' access to information. In the case of families with significant wealth there is now also a growing recognition that certain information must be made available to family members to alleviate concerns about good governance and proper stewardship. The concern, therefore, is not to deny information to those who may have a legitimate interest but to ensure information is protected from those who do not have a legitimate interest.

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(c) Since the flattening of the progressive tax rate and the introduction of measures such as the minor beneficiary rule, tax reasons are not significant reasons for establishing trusts in New Zealand. It is accepted that trustees have significant tax compliance obligations, such as the keeping of adequate records, the duty to file income tax and other returns and the duty to provide information to the Inland Revenue if legitimately required. The risk of penalties and other sanctions under existing law, in our view, provide an adequate deterrent.

2.3 In the international context, individuals who wish to establish a foreign trust in New Zealand are, in our experience, motivated for substantially similar reasons but certain points of distinction do exist:

(a) Individuals and families will often have significant businesses and other assets in a number of jurisdictions around the world and with family members, spanning several generations, may live in different parts of the world. For these families the establishment of a trust provides a central location from which the relevant assets can be administered and managed. Moreover the use of the trust enables the benefit of these assets to be enjoyed by successive generations without title having to change hands. Because the individuals who establish such trusts are resident outside New Zealand, tax neutrality is a relevant consideration. But New Zealand does not lose any tax since the individual is not tax resident and would not have paid tax in New Zealand. How a foreign country taxes its residents is a matter for each country, but in our view, New Zealand should, and we believe does, observe international obligations (through bilateral agreements (for example tax treaties and exchange of information agreements)) and other multilateral arrangements (such as the OECD's initiatives regarding the automatic exchange of information) regarding disclosure and exchange of information in tax matters.

(b) An important consideration for individuals in determining the jurisdiction to establish a trust is whether the location is stable, has a good system of government, is economically sound and where contracts and other obligations will be enforced. The presence of a competent professional services sector is also important, but most significantly the jurisdiction must have laws that will enforce property rights and regulate those who manage trust assets. The existence of a robust legal system that is free from corruption is also a major consideration. The issue is whether the chosen jurisdiction is a safe place or not.

2.4 The choice of jurisdiction is also associated with another safety issue that is more basic, and personal. In many countries, knowledge that a person has wealth places that person and members of his or her family at grave risk to extortion, kidnap and other harm. For these people, confidentiality and privacy are important matters because it is fundamental to their life and well-being.

2.5 While at an individual level there is a desire for confidentiality and privacy, for some time now the world is moving to greater transparency. There is an acceptance that global initiatives, to improve fiscal transparency (such as the Foreign Account Tax Compliance Act ("**FATCA**") and the automatic exchange of information regime (known as the Common Reporting Standard ("**CRS**")) will inevitably lead to greater disclosure about the structures such as trusts. In our experience, many trustees have proactively put in place administrative processes to enable them to comply with the requirements of those initiatives.

2.6 The point that we wish to emphasise is that individuals who wish to establish foreign trusts are motivated by substantially similar reasons for doing so as individuals who wish to establish domestic trusts although certain unique factors do apply. New Zealand is preferred by some because it is a safe jurisdiction with a reliable parliamentary form of government and a non-corrupt legal system. With those general comments in mind, we set out below our specific comments.

3. Disclosure issues and options for reform

3.1 Under paragraph (b) of the Inquiry's terms of reference, the Inquiry is to consider whether the existing foreign trust disclosure rules and enforcement of those rules are sufficient to ensure New Zealand's reputation is maintained when considered alongside New Zealand's commitments to various initiatives relating to fiscal transparency, such as BEPS, CRS, anti-money laundering and counter-financing of terrorism laws and other related regimes. New Zealand has adequate AML/CFT legislation although its application could be extended (see paragraph 6.1(c)). Our comments are therefore limited to CRS and related matters.

3.2 CRS establishes a framework under which "financial institutions" in jurisdictions that have agreed to implement CRS are required to collect and report certain tax information on relevant entities to their local tax authority (Inland Revenue in New Zealand's case) so that such authority can exchange the information with the jurisdiction where such entities (and their controlling persons) are resident.

3.3 In the context of trusts, this will require financial institutions to provide the information on settlors, trustees, protectors, beneficiaries who receive distributions and individuals who have ultimate effective control over the relevant trusts (together, "**trust persons**"). Information that is to be reported in respect of each trust person includes the name, address, foreign tax information number, date and place of birth and the account balance or value referable to that person's interest in the trust, together with any payments that have been made by the trust to that individual each year.

3.4 Subject to the introduction of appropriate domestic legislation, CRS is intended to be implemented in New Zealand on 1 July 2017 (with disclosure of information being made to Inland Revenue in early to mid-2018).

3.5 Accordingly, from those dates, financial institutions will be required to provide to Inland Revenue significant information on trust persons who are resident in participating jurisdictions. We believe the availability of that information will substantially increase the transparency of those trusts.

3.6 An issue arises in respect of trust persons that are resident in jurisdictions that have not agreed to (or are not likely to) participate in CRS. CRS does not oblige New Zealand to obtain information in respect of such "non-CRS trust persons". Accordingly, the information in paragraph 3.3 will not be required to be reported to Inland Revenue under CRS. In order to address this information gap, we suggest the following:

(a) The domestic legislation implementing CRS oblige financial institutions to obtain the information required under CRS from non-CRS trust persons and report that information to Inland Revenue.

(b) The information obtained from non-CRS trust persons would **not** be automatically exchanged but could, of course, be provided to the non-CRS trust person's jurisdiction pursuant to a double tax treaty (if any) or similar bilateral or multi-lateral arrangement independent of CRS).

3.7 Ultimately, CRS will provide substantial information on trusts to Inland Revenue, which is consistent with our international commitments in respect of initiatives designed to increase fiscal transparency

3.8 We do not believe that any further disclosure of information is required. We do not consider that a public register of foreign trusts is desirable and in our view the establishment of such a register would be a fundamental departure from the laws that currently regulate trusts in New Zealand and contrary to what we consider is a basic right of privacy that applies to personal affairs and arrangements that is an inherent part of our law. The situation is not similar to that applying to companies whose shareholders and directors appear on a public register. There

is a significant trade-off for losing privacy in that case: the shareholders achieve limited liability something that is a significant and valuable advantage. None of that applies in the case of trusts. In our view enhanced disclosure made under a modified CRS regime, as suggested above, provides sufficient information to address the current issues relating to the transparency of such trusts.

4. Options to enhance the integrity and reputation of foreign trust disclosure rules

4.1 While the Inquiry's terms of reference, on their face, are limited to addressing issues around disclosure of information, it is our view that consideration should also be given to implementing a regulatory regime that applies to those individuals and entities that are involved in providing "trustee services" to foreign trusts. We consider that an adequately monitored regulatory regime will support the efficacy of the enhanced disclosure regime described above, and enhance integrity of the foreign trust industry.

5. Licensing of trustees and trust administrators

5.1 Consideration should be given to the introduction of a regulatory regime to apply to persons providing "trustee services", meaning those involved in the administration and management of trusts, similar in concept to that which applies to authorised financial advisers. Such a regime should reflect similar regimes that currently exist in many jurisdictions. Such a regime could provide that:

(a) Persons who wish to act as trustees of foreign trusts must apply to an appropriate authority (for example, the Financial Markets Authority) for a licence to provide such trustee services;

(b) The applicants must provide evidence that they are fit and proper persons, and have the appropriate experience, systems and financial substance (for example, minimum capital requirements) to do so;

(c) Licensed trustee service providers must comply with ongoing information disclosure to the regulatory authority in relation to their operations (for example, financial accounts); and

(d) The regulatory authority has sufficient resources to monitor the operations and financial accounts of the trustees to ensure compliance with the regime.

5.2 In our view, the implementation of a regulatory regime for providers of trustee services would be welcomed by individuals who wish to establish foreign trusts in New Zealand as it will provide additional assurance in terms of the factors described in paragraph 2.3(b). There is already precedent for the introduction of licensing regimes for trustee service providers under the Financial Markets Supervisors Act 2011 which establishes a licencing regime for retirement village providers and provides for oversight of such providers by the Financial Markets Authority.

5.3 Our experience is that many people who wish to establish foreign trusts in New Zealand seek to ensure that the persons who are charged with the responsibility of administering and managing the trusts are "fit and proper", and ideally subject to certain oversight or regulation. The establishment of a formal regulatory regime in conjunction with the additional disclosure requirements above will enhance the foreign trust industry and at the same time provide the information transparency that currently does not exist. As an alternative, or in parallel with a regulatory regime of the type described above, consideration could also be given to accelerating the Law Commission's proposed review of the legislation that currently applies to "trustee companies". Any review could consider incorporating aspects of the regime discussed above – see our comments in paragraph 6.1(b).

6. Acceleration of proposed reforms

6.1 As noted above, we believe that other regulatory reforms, including those described below, could be implemented in parallel to support and enhance the reputation of the integrity of the trust industry as a whole (including the foreign trust industry):

(a) Acceleration of the proposed review and reform of the Trustee Act 1956. Aspects of that legislation apply to participants (and in particular, trustees) involved in the administration and management of foreign trusts (and provision of trustee services).

(b) Bringing forward the proposed review and reform of the Trustee Companies Act 1967, and the associated Trustee Companies Management Act 1975 and Trustees Companies Management Amendment Act 1978, with a view to broadening the class of entities that are entitled to be trustee companies or, more generally, providers of trustee services, for domestic and foreign trusts, and bringing such entities within a regulatory (licensing) regime that might be established following that review.

(c) Acceleration of other reforms that are relevant to the establishment and ongoing administration of foreign trust structures. In this regard, we note that government officials are currently working on implementing the second phase of the anti-money laundering legislation that will remove the exemption of certain groups (accountants, lawyers, etc) from the requirements of that legislation. Many of these groups have been identified as being involved the provision of services to foreign trusts. The requirement for persons who fall within these groups to comply with the verification of the identity of clients and the beneficial owners of such assets, and undertake ongoing monitoring of such information, will enhance the integrity of the industry. This is particularly so if these groups are also subject to an enhanced disclosure regime of the type described in section 3.

7. Conclusion

7.1 While we appreciate that the terms of reference of the Inquiry are limited to disclosure rules, reform of the disclosure rules should be considered alongside improvements to the regulation of the participants in the industry for the reasons we have given. We consider that a carefully thought out and integrated disclosure and regulatory regime will enhance New Zealand's reputation as a responsible member of the international community, and as a place to do business (including in connection with the establishment of foreign trusts).

7.2 If you would like us to elaborate on any aspect of the above, we would be more than happy to do so.

Yours faithfully
TGT Legal

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