

Beneficial Ownership and Special Purpose Vehicles: The Barita Scenario

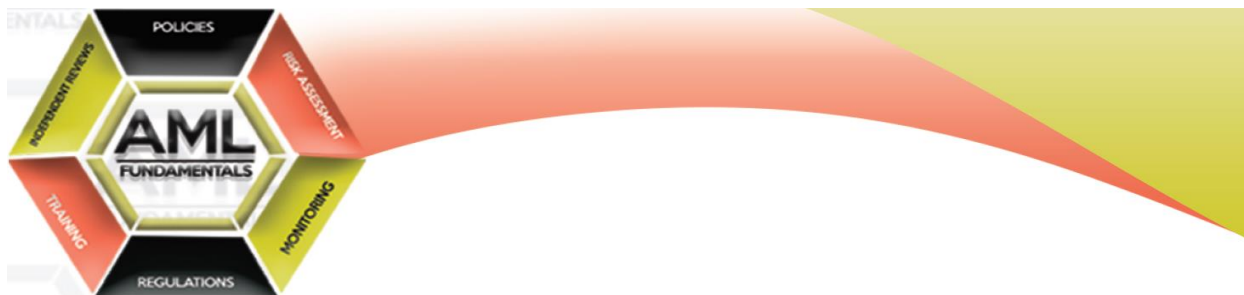
On the cusp of its second Additional Public Offering (APO) which opened on September 6, 2021, Barita Investments Limited was the subject of questions asked in a series of articles in the Trinidad Express newspaper. The titles of the articles include: “Who is on Barita’s Case – published August 24, 2021; Who controls Barita Finance? - published August 31, 2021; Cornerstone acquires more shares in Barita – published September 2, 2021; Should Jamaican regulators suspend Barita APO – published September 8, 2021; and FSC breaks silence on Barita affair – published September 11, 2021”, all surrounding the connection between Barita Finance Limited, a registered St. Lucian company and Barita Investments Limited domiciled in Kingston Jamaica, among other connected entities.

My interest was piqued in reading an article published in the Jamaica Observer dated September 10, 2021, written by David Rose, business writer with the Observer, entitled “No wrongdoing Barita addresses concerns about its activities; Nothing underhanded, says exec.” The quote attributed to Jason Chambers, Chief Investment Officer of Cornerstone United Holdings Jamaica Limited caught my attention¹. Chambers said, *“Barita Finance Limited is a special finance purpose vehicle whose shares are held in trust by an independent trustee, and as such there are no ultimate beneficiaries of the shares. The independent director is independent of Barita Investments and Cornerstone or any other entity in the group. It’s called an orphan trust because the shares are held in trust by an independent trustee, and as such there is no beneficial owner”*. Relying on my knowledge of international anti-money laundering standards, such as those recommended by the Financial Action Task Force (FATF) in its 40 Recommendations on combating money laundering and the counter financing of terrorism, and as stated in Recommendations 24 and 25, I was curious as to the legal arrangement in which there could be “no beneficial owner” of an entity, as espoused by Mr. Chambers in the article.

In view of the foregoing, this paper seeks to explore:

1. the ‘correctness’ of a legal entity having no ultimate beneficial owner, in keeping with the FATFs interpretative notes of Recommendation 24 and 25;
2. what exemptions, if any, are made in the case of Special Purpose Vehicles (SPV) as it concerns beneficial ownership information;
3. the impact of the corporate veil on transparency and the disequilibrium of information available to the public as it pertains to the beneficial ownership; and
4. the possible outcomes of the corporate veil/secrecy on obtaining beneficial ownership information, how this undermines transparency and supports the disequilibrium of information available to the investing public to better understand company activities, while making investment decisions.

¹ Cornerstone United Holdings Jamaica Limited is the parent of Barita Investment Limited



1. Correctness of Legal Entity Having no Beneficial Owner

Mr. Chambers was represented in the Observer article to have indicated that on account of the shares for Barita Finance being held in trust by an independent trustee, Barita Finance essentially had no beneficial owner. The FATF in its Guidance on transparency and beneficial ownership², while acknowledging the economic good of corporate vehicles (such as SPV), acknowledged that such vehicles, like trusts (among others), have been misused for illicit purposes. It also highlighted that the misuse of these vehicles can be avoided where the legal and beneficial owners of such vehicles are known.

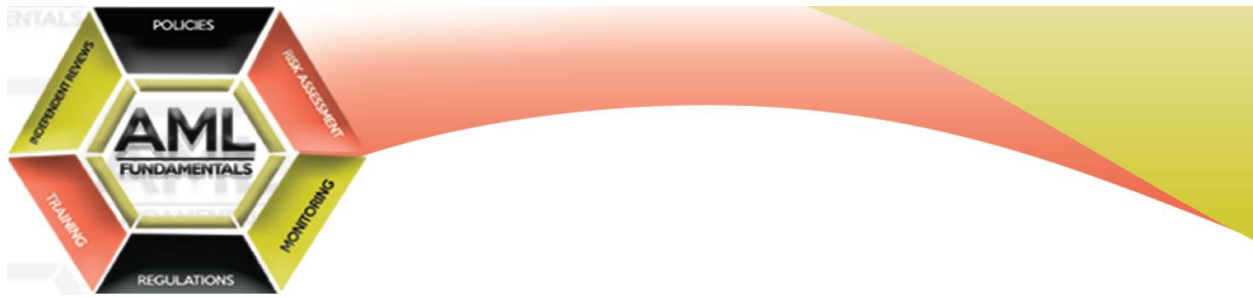
The FATF in its Interpretive Notes to Recommendation 24, Transparency and Beneficial Ownership of Legal Persons³ recommends that competent authorities should have accurate and current information on beneficial ownership and control of companies. At the local level, authorities should have mechanisms that provide for identifying and describing the different types, forms, and features of legal persons; the process enabling their creation and on obtaining and recording basic beneficial ownership information, while making such information publicly available. This also includes an assessment of the money laundering and terrorist financing risks associated with types of legal persons created. The Interpretive Note goes on to prescribe the minimum basic information to be obtained and recorded by a company to include:

- i. Company name, proof of incorporation, legal form and status, address, basic powers, and list of directors.
- ii. A register of shareholders to include name, number of shares held, category of shares.

Recommendation 25 which addresses Transparency and Beneficial Ownership of Legal Arrangements championed that, *"Countries should require trustees of any express trust governed under their law to obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust. This should include information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. Countries should also require trustees of any trust governed under their law to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors."*

² FATF Guidance on Transparency and Beneficial Ownership, October 2014

³ International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – the FATF Recommendations updated June 2021



In its 2019 publication entitled “A Beneficial Ownership Implementation Toolkit⁴” the Inter-American Development Bank (IDB) and the Organisation for Economic Co-operation and Development (OECD), in defining what is beneficial ownership wrote, *“the issue of ultimate beneficial owner or controllers has become increasingly important internationally: it plays a central role in transparency, the integrity of the financial sector, and law enforcement. Beneficial owners are always natural persons who ultimately own or control a legal entity or arrangement, such as a company, a trust, a foundation, etc.”*

The IDB/OECD also considered in its publication why it is important to identify a beneficial owner. In so doing it highlighted that, *“anonymity enables many illegal activities to take place hidden from law enforcement authorities, such as tax evasion, corruption, money laundering, and financing of terrorism.”* It went on, *“that is why the FATF, and later the Global Forum, have included beneficial ownership requirements in their standards and conduct assessments across jurisdictions on availability of beneficial ownership information in their systems. Determining whether the countries have access to information on the BOs of legal entities and arrangements is important in combatting tax evasion, corruption, money laundering, and the financing of terrorism.”*

The toolkit also highlighted how to go about identifying beneficial owners. It recommended, *“as regards financial institutions’ identification of a trust’s BOs, rather than identifying based on the cascading tests (as for legal persons), financial institutions should identify all parties of the trust including:*

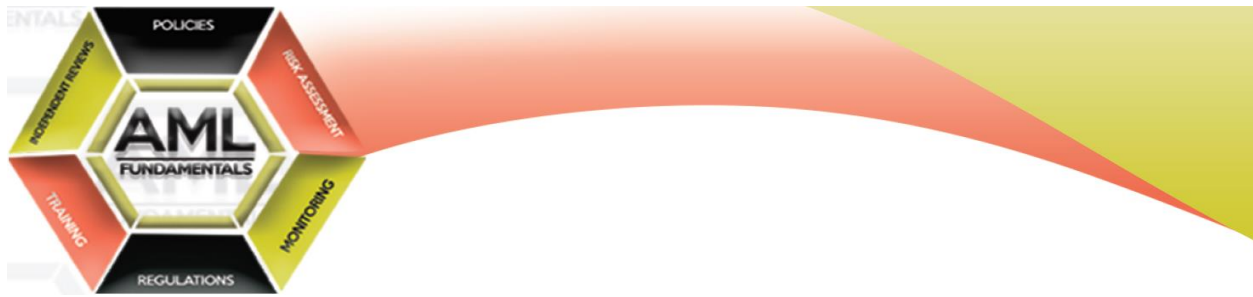
- *Settlor*
- *Trustee(s)*
- *Protector (if any)*
- *Beneficiaries or classes of beneficiaries*
- *Any other person exercising effective control of trust.*

This list is always identified as beneficial owners regardless of whether or not any of them exercise control over the trust.”

2. SPVs and Beneficial Ownership Requirements

In October 2019, the international law firm White and Case, LLP, published a paper via its website (whitecase.com) which considered the challenges posed to SPVs as it relates to FINCEN customer due diligence rule. The article entitled “structured finance special purpose

⁴ Global Forum on Transparency and Exchange of Information for Tax Purposes – Inter-American Development Bank – A beneficial Ownership Implementation Tool Kit, published 2019



vehicles and FinCENs CDD rule”⁵ opened by raising the point that, “FinCENs new customer due diligence rule can present significant difficulties for financial institutions that do business with SPVs in structured finance transactions.” The writer went on to indicate that SPVs can create compliance challenges under the Financial Crimes Enforcement Network’s (FinCEN) customer due diligence rule for banks, brokers or dealers in securities, mutual funds, and futures commission merchants or introducing brokers in commodities with which they have formal financial relationships. In expanding on the challenges faced by SPVs in applying FinCEN’s CDD rule, the writer indicates that SPVs, in meeting the legal entity definition, are required to provide beneficial ownership information to financial institutions with whom they enter financial relationships, which can be a difficult task. One such difficulty surrounds the absence of hierarchical managerial or directorial staff. Additionally, SPVs, according to the writer, “can be owned by its sponsor or investors or, interestingly, no one. Some SPVs are established as so-called “orphan trust” – the sole shareholder is a trust controlled by a corporate trustee. In this situation no single individual can be identified as beneficial owner under the CDD rule’s ownership prong.”

3. Corporate Veil



The Organisation for Economic Co-operation and Development (OECD) in its publication entitled *Behind the Corporate Veil, Using Corporate Entities for Illicit Purposes*⁶, made several observations as its concerns the misuse of corporate vehicles for illicit purposes. To paraphrase the OECD in its report, to successfully combat and prevent the misuse of corporate vehicles for illicit purposes, it is imperative for jurisdictions to have effective mechanisms that enable the authorities to obtain information on beneficial ownership and control of corporate vehicles within country to facilitate the probing of illicit activities, meet regulatory requirements and for information sharing with local and international authorities. The report references the often-strict secrecy laws attributable to offshore jurisdictions which do not permit confidential information to be passed on to authorities in appropriate circumstances. In its publication, the OECD highlighted the types of corporate vehicles often misused, synonymous with those that offer greater anonymity. They are, “international business corporations, exempt companies, trusts, and foundations established in jurisdictions that offer high degree of secrecy...”

Notwithstanding the legitimate, financial, and economic good of trust to commercial activity, the OECD in its publication noted that, “*the trust is a vehicle that provides for the separation of legal ownership from beneficial ownership.*” It goes on to indicate that, “*part of the attractiveness of misusing trust lies in the fact that trusts enjoy a greater degree of privacy*”

⁵ Whitecase.com - [Structured Finance Special Purpose Vehicles and FinCEN’s CDD Rule | White & Case LLP \(whitecase.com\)](#)

⁶ *Behind the Corporate Veil, Using Corporate Entities for Illicit Purpose*, published 2001 by the Organization for Economic Co-operation and Development



and autonomy than other corporate vehicles.” Further, “one form of misuse of trusts is to conceal the existence of assets from tax authorities, creditors, ex-spouses, and other claimants or to conceal the identity of the beneficial owner of assets. Trusts often constitute the final layer of anonymity for those seeking to conceal their identity.”

In exploring further, the mechanisms by which anonymity is achieved through the various types of corporate vehicles, the OECD in its report highlighted the use of “nominee directors and ‘corporate’ directors.” The report imparted that nominee directors and corporations serving as directors can be misused to conceal the identity of the beneficial owner, and their use undermines the usefulness of director information recorded on a company registry. Additionally, it pointed to, in essence, the nominee director being a ‘front’ of sorts as the actual functions of nominee director are carried out by the beneficial owner of the company.

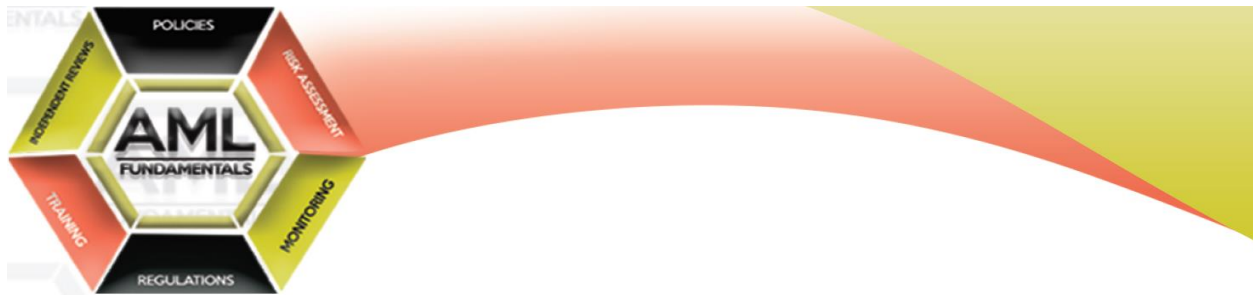
4. Outcomes Attendant to the Corporate Veil

The OECD’s report also considered the types of activities perpetrated using corporate vehicles. Cited were money laundering, bribery/corruption, hiding and shielding assets, illicit tax practices, self-dealing/defrauding assets/diversion of assets, market fraud, and circumvention of disclosure requirements.

In the context of the premise on which this paper is penned, the outcomes of self-dealing and market fraud as referenced in the OECD’s publication, from a securities perspective, are frontal. In its report the OECD pointed out that corporate vehicles established in jurisdictions with obscured ownership information may be abused by dealing in self-dealing and defrauding assets. These vehicles it argues could “provide a façade of legitimacy to an otherwise improper transaction between related parties in a corporation.” The report also highlighted that, “corporate vehicles can also be misused to engage in market fraud and to circumvent disclosure requirements.” As an example, it cited, “insiders of publicly traded corporations have been able to abuse their access to material, non-public information by using corporations established in foreign jurisdictions to carry out illicit buying and selling of shares.” It went on, “individuals have been able to use the anonymity provided by certain corporate vehicles to hide their control of entities that are being used to manipulate the market for publicly traded securities.” The issue of anonymity and its potential illicit off springs remain true today, as it was in 2001, and 2019 in keeping with the referenced publications.

Are SPVs Exempt from Beneficial Ownership Information?

Relying on the guidance from the FATF, coupled with other sources quoted in this paper, we can reasonably conclude that the international standard is that all legal person and arrangements are subject to disclosing beneficial ownership information. While the information from research on beneficial ownership and SPVs raises the concern of legal arrangements such as trusts, being able to meet the beneficial ownership information



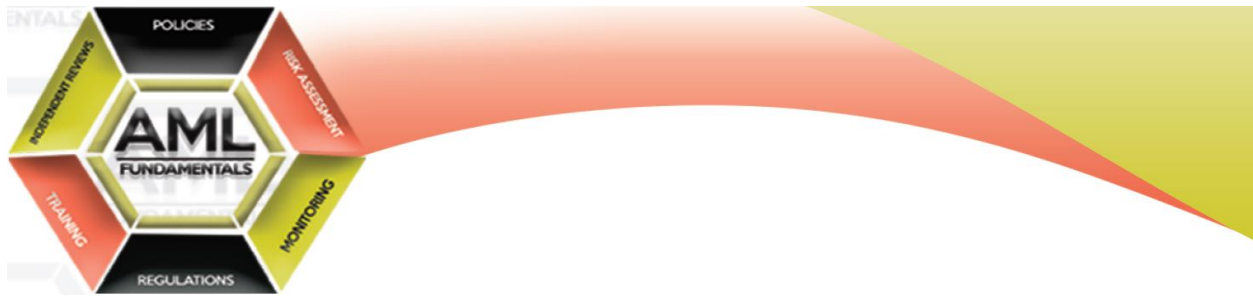
requirement, and while the legal construct of the trust creates the avenue by which beneficial and legal ownership information is separated, and seemingly cease to be known, there appears to be no carved out exemption that would put SPVs beyond the reach of the international standard as it relates to countries and the appropriate company registry being expected to capture and obtain this information. Further, as highlighted from the IDB/OECD publication, a prescribed methodology was advanced to identify the beneficial owners of trusts, further exemplifying that there are no exemptions, thus undermining the representation by Mr. Chambers concerning the beneficial ownership of Barita Finance Limited.

Observing the Interpretive Notes for recommendations 24 and 25, and mindful of the mutual evaluation process which the FATF employs in assessing compliance with the Recommendations, any exclusion of certain vehicles from full compliance with the requirements of the Recommendation as devolved in law by jurisdictions that implement the FATF Recommendations, would only serve to undermine the standards and the global objectives of fighting money laundering, terrorist financing and proliferation, as well as, in keeping with the observations from the IDB/OECD publication, tax evasion and corruption. The absence of beneficial ownership information to aid the authorities in their probe of illicit activity would run counter to these objectives. In the end, there appears to be more than a palpable conflict between what the international standard calls for, and what the law permits to be obscured in secrecy as it concerns legal and beneficial ownership in relation to certain trust arrangements. It however remains that beneficial ownership information is a key ingredient to upholding transparency and integrity within the financial sector.

Issues of Transparency, Disequilibrium of Information Resulting in Potential Inferences of Self-Dealing and Market Fraud Explored from a Purely Securities Perspective

In the introductory paragraph of this paper, reference was made to several articles published in the Trinidad Express newspaper, which explored issues of ownership and trading of shares specific to Barita Finance. These questions could be considered to have been reasonably posed by any member of the investing public in their attempt to better understand the functioning of both entities, whilst coming to an informed investment decision upon understanding the business models, corporate structures, the transactions and trades referenced in the articles published August 31 and September 8, 2021, respectively, and ultimately, how this redounds to profits and future dividend payments, as well as the prospects for capital gains on the stock market. The Trinidad Express in its reporting also cited that their attempts to obtain information of the shareholders of Barita Finance, the St. Lucian registered entity, bore no results.

If Mr. Chambers, in his response to the Jamaica Observer, intended to dispel any notion of wrongdoing relating to the optics of the relationship between Barita Finance and Barita Investment, he missed the mark. His response failed to quell the perception of a lack of transparency and instead has opened both companies to further probing by regulators in the



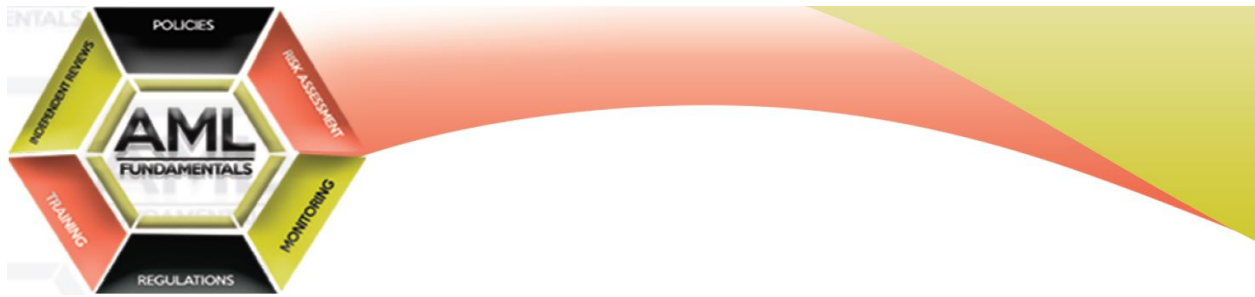
interest of the investing public having a better understanding of the relationship and interplay between both companies as well as eliminate the possibility of self-dealing or market fraud.

There is no intention to cast any aspersions or motives in respect of Barita Finance, Barita Investments or their connected parties in expounding on this subject. However, without full disclosure concerning Barita Finance and its beneficial ownership, and the scheme of arrangement on how Barita Investments, as investment manager, executes instructions in keeping with its fiduciary responsibilities, there remains a disequilibrium of information available to Barita as investment manager when compared to what is available to the market. This could result, directly or indirectly, in self-dealing. Extended further, the closeness of both entities could lead to the blurring of the investment manager's fiduciary responsibilities, resulting in trades which seek to influence the market price of shares and thereby benefiting insiders/connected parties – to the detriment of the average investor and the integrity of the market.

Of note in these questions surrounding both entities, the Jamaican regulator, the Financial Services Commission (FSC), did not speak directly to the questions raised by the Trinidad Express publications that would impact on the subject of ownership of Barita Finance – a company not directly under its purview, but connected to one of its licensees. In the article published by the Trinidad Express, “FSC Breaks silence on Barita affair,” the FSC outlined in its statement (which is available on its website) that, “the FSC believed it was prudent for the issuer to formally release an addendum to the prospectus to ensure an orderly disclosure of material information relevant to the public offer.” It went on, “the disclosures have been reviewed in line with our requirements for disclosures in Management Discussion and Analysis. Based on that assessment, the FSC has no objection to the release of the addendum.” Whether or not information carried in the addendum addressed any of the questions posed by the Trinidad Express reporting, remains to be deciphered.

Conclusion

In the final analysis, as supported by the FATF international standards on beneficial ownership information pertaining to legal persons and legal arrangements, as well as the IDB/OECD publication referenced, we can prudently conclude that trusts/SPVs are not exempted from providing this information as part of their registration with the relevant local authorities across jurisdictions, particularly those who have signed onto implementing the FATF Recommendations and having them devolved into local laws. Notwithstanding, Trust law gives SPVs an avenue to exploit beneficial ownership disclosures through the creation of a vehicle that seemingly bears no legal or beneficial owner. Further, this scenario as created by the corporate veil, has the potential to manifest illicit outcomes, borne by the secrecy in which SPVs are clothed and facilitated through offshore financial centres. This secrecy, lack of transparency and disequilibrium of information available to the public create fertile ground for the misuse of SPVs. Since misuse could result in money laundering, self-dealing and market fraud, corruption and tax evasion by actors in the financial industry, it is important



that jurisdictions ensure that market players adhere to international standards and best practices that lift the veil of secrecy and champion transparency in relation to market conduct.

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