Financial Action Task Force Groupe d'action financière

Consultation on Proposed Changes to the FATF Standards

Compilation of Responses from designated non-financial business and professions (DNFBP's)

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Submission by

The Alderney Gambling Control Commission

In respect of

The review of the Standards – Preparation for the 4th Round of Mutual Evaluations.

By email to fatf.consultation@fatf-gafi.org

Introduction

The Alderney Gambling Control Commission ("AGCC") regulates remote gambling taking place on the Island of Alderney. Alderney forms part of the Bailiwick of Guernsey, a jurisdiction which was subject to a 3rd Round inspection by the International Monetary Fund ("IMF") in respect of Anti-money Laundering and combating the Financing of Terrorism in May, 2010. The report prepared as a result of the IMF's inspection as currently awaiting the approval of the IMF Board prior to publication. Having been a party to the IMF inspection process the AGCC welcomes the opportunity to respond to the Financial Action Task Force ("FATF") consultation in preparation for the fourth round of mutual evaluations.

Background

Alderney is one of the main global locations with a significant remote eGambling sector. Whilst remote gambling takes place in many global locations, not all operate with the levels of regulation imposed by the AGCC. The regime imposed by the AGCC has been determined by the United Kingdom to have equivalence with the regulatory regime imposed there for remote gambling.

Other jurisdictions both in the European Union and further afield have chosen to study the regulatory regime in force on Alderney with a view to modelling their regulatory regimes on that operating in Alderney.

From this position AGCC is well placed to comment on issues facing the eGambling industry.

It is AGCC's view, supported by independent expert opinion that "house" casino games (such as roulette and slot machines) which, when played remotely, are considered by the FATF to be an eCasino, present a low risk of money laundering and terrorist financing for a number of reasons[1]. **This does not accord with the FATF assessment of non-face-to-face business. AGCC welcomes the proposed re-appraisal of risk in INRBA**

However some greater levels of AML/ CFT risk do exist in eGambling, in areas currently excluded from the FATF/ IMF's practical interpretation of e-Casino; namely in peer to peer ("P2P") betting and gambling. The most significant distinction between P2P and a house casino is the involvement of an external counterparty to the bet, in P2P, opening up the possibility of switching ownership of funds which is otherwise practically impossible in a house casino when properly regulated. **AGCC suggests that the concept of e-casino should be extended to include such areas.**

AGCC Concerns in summary

The AGCC notes that the current FATF Recommendations date back to June 2003. In the time since their promulgation the world has seen significant changes in both technology and the way consumers interact with those who supply them with goods and services. This renders certain previously held beliefs in respect of the physical documents to be redundant. The arrival of the digital age has brought with it more sophisticated, accurate and safer methods of identification and more importantly, verification, than previously available. This dynamic looks set to continue, leading to the following more detailed suggestions re FATF principles:-

1. The principles should dilute the current requirement that eCasinos rely upon physical player identification documents exposes the sector to the risks of counterfeit and forged documents, using cheap easily available computer technology, that are becoming increasingly prevalent in this area, being used to verify a customer's identity.
2. The definition of an eCasino should be amended to include P2P games (such as poker) and sports betting/events based wagering. The AGCC's own risk assessments of its licensees has drawn it to conclude that these areas post the greatest risks of player collusion (such as "chip dumping" (deliberate loss to a known associate) which would facilitate money laundering and terrorist financing) as well as presenting integrity issues for the sports or events which are the subject of the wagers.
3. FATF principles should approve and encourage the growth of on-line verification techniques for online business. The current FATF principles provide such encouragement in principle but then inhibit this by stating that such systems can only form part of a basis for identity verification.

[1] Firstly there is the risk of total loss. It is accepted wisdom that those seeking to engage in money laundering and terrorist financing are prepared to incur "costs" whilst attempting to hide the origin of their funds. The level of losses launderers are prepared to incur will remain a subject of debate and the AGCC does not seek to enter the debate on what levels criminals consider uneconomic other than to stress the point that eCasinos, with their "house win" games poses a risk to the launderer of total loss which is unacceptable. Secondly the vigilance of each Licensee polices those who seek to deposit funds to withdraw them with no or minimal game play; such conduct rendering the customer as suspicious and thereby triggering the submission of a Suspicious Transaction Report to the relevant Financial Intelligence Unit. Thirdly, and perhaps most importantly, the use of credit and debit cards within the sector makes the placement of funds harder by virtue of the prohibition on the use of cash as well as leaving a clear audit trail of all transactions

4. FATF principles should endorse the use of on-line criminal records as a valid alternative to police record checks, which are frequently very manual and slow being subject to resource and priority constraints in some jurisdictions
5. On a risk adjusted basis, PEP risk in eCcasinos does not justify the onerous pre-activation identification regime that is currently required. This limited risk position of Politically Exposed Persons is already recognised in the land-based sector where PEPs are free to wager to a certain level prior to being identified

Recommendation 5 – Customer due diligence

AGCC welcomes the greater clarity that would come from a more detailed interpretive note in respect of customer due diligence. Further focusing of Recommendation 8 in respect of emerging technologies would be of great assistance although the AGCC does note that technological advances are taking place at exponential rates and that prescription of what is adequate verification at the beginning of the five year period of the Fourth Round may create loopholes for exploitation and may miss opportunities for enhancement of practical verification measures; a more generic statement of requirement would avoid both failings.

AGCC has grave concerns regarding the reliance still persisting in FATF principles on actual identification documents for player verification. The AGCC routinely works with providers of electronic identification and verification services, and is aware of the greater reliability of the information they hold which cross references various official databases, in relevant jurisdictions; and is also aware of the rapid influence that commercial pressure has on the spread in range and depth internationally of such data-base services; and which offers a greater level of comfort that the customer is indeed who they say they are. It is an anachronism that in the digital age paper based methods are still considered by the FATF and IMF to be better than on-line database search methodology.
In the United Kingdom, electronic identification and verification is performed by a number of private sector organisations who have access to and make use of a variety of available of datasets and algorithmic checks. This is done by verifying Identity information such as Name, Address and Date of Birth against comprehensive data population datasets such as the Electoral Roll, Credit Data, Births, Mortality and Postal files, providing both positive and negative verification of claimed identity residence and age. This extends to various regulatory driven files such as Sanctions.

In addition these organisations are able to overlay the ability for their clients to effectively perform anti-impersonation checks. This is done using techniques such as Credit/Debit card checks and integrity document checks around items such as passports, driving licences and utility bill information.

Traditionally, before the adoption of electronic identification and verification, checks were performed via manual paper checks. One major challenge to successful businesses around Identity verification using traditional paper processes is the high cost around legacy paper processes such as capture, mail, storage and staff required. Using an online product many organisations have been able to entirely remove paper from their system, thus reducing identification costs by over 90% whilst cutting existing fraud in some cases by up to 40% due to the more effective approach.

In the compliance area, licensed businesses are required to prove that identity verification checks have been performed. The use of an electronic identification and verification system allows the creation of a secure structured audit trail instead of traditional paper storage. There is a major commercial attraction, encouraging compliance using on-line technology, in the improved customer experience and extra security given to their personal information. Thanks to the high quality data currently available in the UK and elsewhere, those using electronic identification and verification methods are able typically to register their customers anywhere between 70-95% instantly with match rates (ie certainty scores) being dependent on demographic and risk around their customers and/or product range.

The protection of minors is extremely important for many industries and no more so than in the online gaming sector. Where only manual documentation and processes are used or available, the industry is vulnerable to the variety of cheap accessible forgery tools available on the internet Electronic identification and verification, the combining of data and other checks, is the only repeatable and effective way to combat this.

Recommendation 6 – Politically Exposed Persons.

AGCC notes the changes proposed by the FATF in respect of foreign and domestic PEPs.

AGCC does however wish to comment that PEPs are human beings and as such are entitled to participate in leisure activities such as eGambling. Obliging eCasinos to identify PEPs upon registration with no trigger threshold creates a glaring disparity with the land based sector where they could enter a casino in the United Kingdom and play with no identification or verification taking place and using CASH to fund their gambling AGCC does not submit that the remote sector be excused from screening for PEPs and the procedures that must be undertaken in the event that one is found but rather that the FATF takes a risk based view that only once a certain threshold of deposit or wager has been reached that customers be screened to identify whether they are a PEP.

Recommendation 9 – Third Party Reliance

AGCC notes that FATF is considering making explicit indications of the types of third parties that could be relied upon in respect of the CDD process to include institutions, business and professions as long as they are subject to AML/CFT requirements and effective supervision/monitoring.

Any clarification of the scope of third party reliance as opposed to outsourcing and agency is to be welcomed.

AGCC notes that the FATF is considering a flexible approach for intra-group reliance. At present AGCC requires its licensees who operate branches and subsidiaries in a number of jurisdictions to adhere to the AML/CFT framework of the jurisdiction which operates the highest framework of compliance. The adoption of an acceptance of group programmes would enable those operating in multiple jurisdictions (such as Alderney and the United Kingdom) to be satisfied that the identification data held by say one company meets the needs of the parent company in the other jurisdiction.

Mutual Legal Assistance

AGCC welcomes any efforts the FATF makes to reinforce the requirements for competent authorities in jurisdictions to offer mutual legal assistance. AGCC is aware of a number of investigations in the gambling sector that have been hampered by competent authorities in other jurisdictions declining to co-operate citing other legislation (notably Data Protection) to justify their position. Influencing competent authorities to prioritise AML/CFT over other legislation such as Data Protection could be highly beneficial in the fight against financial crime

Usefulness of Mutual Evaluation Reports

AGCC makes use of Mutual Evaluation Reports in order to identify issues which affect fellow competent authorities. The AGCC notes the length of the reports, which is perhaps unavoidable due to the number of areas each evaluation must report upon.

AGCC would welcome a change to the structure of the reports whereby the risk information together with mitigating features employed are given greater emphasis.

In addition AGCC would welcome a change to the structure of the report along sectoral lines so that all information relating to a specific sector, for example the DNFBP sector is contained within one easy to locate section. AGCC appreciates that this may cause there to be some duplication but feels that those working in a specific industry or sector will derive greater value from seeing all the information relating to that sector in one place.

Conclusion

AGCC is grateful for the opportunity to provide its thoughts in respect of the FATF's consultation and offers the FATF any such assistance that the FATF may seek in increasing its understanding of the remote gambling industry and the AML/CFT risks involved in the sector.

Alderney Gambling Control Commission

7th January, 2011.

Defending Liberty
Pursuing Justice

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Re: Comments to Consultation Paper—The Review of the Standards—Preparation for the 4th Round of Mutual Evaluations

Dear John:

Thank you again for hosting the November 22, 2010 meeting in Paris to discuss the above-referenced Consultation Paper. The American Bar Association ("ABA"), which has almost 400,000 members, greatly appreciates the willingness of the Financial Action Task Force ("FATF") to engage the ABA and other private sector representatives to discuss matters of mutual concern. As Chair of the ABA Task Force on Gatekeeper Regulation and the Profession, I am pleased to offer the ABA's comments below on the Consultation Paper and have been authorized to express the association's views on this important topic. These comments are arranged in the order in which they appear in the Consultation Paper. We would like to preface these comments, however, with a number of general observations.

GENERAL REMARKS

1. The consultation process should be made more productive and enriching, thereby resulting in a final product that is truly reflective of the interests, goals, and concerns of the private and public sectors. The format of the Paris meeting left a number of private sector representatives with the distinct impression that FATF had already determined a particular course of action or resolution of a matter and was simply reporting on it at the Paris meeting. It would have been more helpful, at least from the perspective of the private sector representatives, for FATF to engage in a meaningful dialogue with these representatives on these issues before deciding on a course of action or resolution of a matter. As you know, there was little or no debate on any substantive issues, thereby underscoring the point that FATF may have already decided how to address an issue.

2. As we discovered during the consultative process leading to the adoption of the Risk Based Approach for Legal Professionals in October 2008, it was helpful to propose draft language so that the interested stakeholders could weigh in with their views prior to the adoption of the guidance paper. Circulating draft language allows the stakeholders, both private and public sector, to identify issues that may not have been apparent during the initial discussions, to detect language nuances or ambiguities that may lead to unintended results, and to tease out concepts that need further elaboration and clarification. A process that presents language as "final" short circuits the consultative process and precludes the adoption of language that truly reflects a balance of private and public sector interests and goals.

3. The overall timing for the second phase of the consultation seems too compressed. As we understand it, the second phase of the consultation will occur after the completion of the initial consideration in July 2011. It would appear that the public consultation would occur, at the earliest, in September 2011, with FATF's goal to issue the revision in October 2011. If the public consultation is to occur a mere month before the scheduled adoption of the revision, it is unclear to the private sector how meaningful the public consultation will be. The ABA therefore respectfully requests that FATF reconsider the timetable so as to afford sufficient time for meaningful dialogue between the private and public sectors.

4. At the Paris meeting, FATF reported that the member states continue to debate what changes, if any, should be made to Recommendations 33 and 34. As part of the revision process, we think it is important that FATF engage with the private sector on developments with these Recommendations so that the private sector can better understand what impact these proposed changes will have on beneficial ownership issues and the actions member states might be encouraged to take under these Recommendations. Absent this engagement, the ABA is concerned that the private sector will not have an adequate opportunity to discuss these matters with FATF in a meaningful and constructive fashion. Our concerns about the timing of the completion of the consultation expressed above are particularly acute with respect to Recommendations 33 and 34 since work on those Recommendations is already delayed. We respectfully request FATF to take adequate time to consider Recommendations 33 and 34, even if that means revisions of those Recommendations must be separated from the rest of the consultation process.

5. The Hiring Incentives to Restore Employment ("HIRE") Act of 2010 was enacted by the United States government on March 18, 2010. The Foreign Account Tax Compliance Act ("FATCA") constitutes Title V of HIRE (Sections 501 and following), and it imposes significant increased reporting responsibilities on Foreign Financial Institutions and Non-Financial Foreign Entities. We understand that the U.S. Treasury Department ("Treasury") is drafting regulations under FATCA, which we understand will be responsive to a number of the concerns expressed by FATF during the most recent mutual evaluation process of the United States.

SPECIFIC REMARKS

1. THE RISK-BASED APPROACH

1.1 The Risk-Based Approach.

If and to the extent FATF revises the 40+9 Recommendations to set forth a comprehensive statement of the Risk Based Approach ("RBA"), it is critical that this statement not override or render meaningless the RBA for Legal Professionals. The legal profession spent a considerable amount of time and effort in working with the FATF to develop a carefully balanced RBA for the legal profession. Any changes to the 40+9 Recommendations must respect the work that was done on the RBA for Legal Professionals.

1.2.1 Recommendation 5 and its Interpretative Note.

The Consultation Paper notes that FATF plans to give "a more detailed and balanced list of examples of lower/higher ML/TF [money laundering/terrorism financing] risk factors, as well as examples of simplified/enhanced CDD [client due diligence] measures." It is important that FATF demonstrate appropriate sectoral sensitivity to the risk based approach applicable to designated non-financial businesses and professions ("DNFBPs") in the application of simplified CDD measures. For instance, examples of simplified CDD measures must be reflective of the unique client and practice setting characteristics of legal professionals.

1.2.2 Recommendation 8. New Technologies and non-face-to-face business.

We understand that FATF plans to incorporate the issue of non-face-to-face business into the Interpretative Note on the RBA ("INRBA"). As the legal profession noted during the development of the RBA for Legal Professionals, non-face-to-face interaction is neither unusual nor suspicious in delivering legal services to clients. By virtue of electronic communications (such as telephone and e-mail communication), lawyers may deliver legal services to clients without ever meeting them face-to-face. Non-face-to-face communication is not inherently higher risk for the delivery of legal services by legal professionals, and the INRBA should not suggest otherwise.

2. RECOMMENDATION 5 AND ITS INTERPRETIVE NOTE

2.1 The impact of the Risk-Based Approach on Recommendation 5 and its Interpretive Note.

We were pleased to see that the Consultation Paper says that the revised INR.5 will provide a flexible approach to the implementation of the RBA. Endorsement of the RBA by FATF is an important indication that FATF recognizes that placing unnecessary requirements on the private sector is inappropriate. We look forward to reviewing and commenting on the examples that FATF has prepared, as well as the additional guidance on "Risk Variables." To repeat a

comment we have already made, we urge FATF to make available the new text as soon as possible to allow adequate time for review and comment.

2.2 Legal persons and arrangements – customers and beneficial owners.

The Consultation Paper suggests that the revised INR.5 will make clear that the RBA applies to the identification of beneficial owners by financial institutions. We support the application of the RBA to the identification of beneficial owners, and look forward to reviewing and commenting on the new guidance.

We are concerned, however, that FATF has not extended its endorsement of the RBA for determining beneficial owners to Recommendations 33 and 34. Those recommendations have the broadest scope of any of the 40+9 Recommendations and impose compliance costs on the entire private sector without any recognition that the vast majority of private businesses covered by Recommendation 33 and trusts covered by Recommendation 34 pose no ML/TF threat.

Following the consultation meeting in Vienna in May 2010, Messrs. Henry Christensen and William H. Clark, Jr. submitted comments to FATF on Recommendations 33 and 34. The ABA encourages FATF to engage in further substantive dialogue with the private sector, including our Task Force on Gatekeeper Regulation and the Profession, on the May 2010 comments and possible revisions to Recommendations 33 and 34.

2.3 Life insurance policies.

Paragraph 23 of the Consultation Paper states that FATF has concluded that the beneficiaries of life insurance policies cannot be satisfactorily considered as either a customer or a beneficial owner, because their rights are not fixed or determinable until the death of the insured, and that a new rule needs to be developed treating the beneficiary of a life insurance policy as a stand alone concept in the FATF Glossary to the 40+9 Recommendations, with a different level of disclosure required for the potential beneficiaries of life insurance policies.

We suggest that the study of appropriate treatment and disclosure of information concerning the beneficiaries of life insurance policies should be extended to the treatment and disclosure of information concerning the beneficiaries of discretionary trusts, because the same principles apply. A named beneficiary of a life insurance policy has a potential interest, but not a vested interest, because his or her interest can always be changed, diminished, or eliminated by the owner of the policy until the insured dies. Similarly, a named beneficiary of a discretionary trust—either identified by name or "named" as being a member of a named class—has no enforceable interest in receiving income or principal of a trust until the trustee elects to make a distribution to the beneficiary. Thus, the potential beneficiaries of discretionary trusts should be given the same treatment as FATF determines for the beneficiaries of life insurance policies.

3. RECOMMENDATION 6: POLITICALLY EXPOSED PERSONS

We generally believe it is appropriate to reference the United Nations Convention Against Corruption 2003 in the guidance with regard to the 40+9 Recommendations, subject to having a clearer understanding of the language that would be used to do so. We agree that the proceeds of corrupt activity, as well as corrupt payments themselves, can and do raise ML risks. Recent enforcement actions in the United States, for example, have frequently seen ML and corruption charges being brought with regard to the same defendants or illicit scheme. Like any other illicit or criminal act involving financial inducements or payoffs, the perpetrators often take steps to disguise the funding for and ill-gotten gains from such conduct. Therefore, anti-money laundering ("AML") recommendations and guidance can be more complete by reference to other legal or policy frameworks intended to combat the underlying criminal conduct.

We suggest, however, that referencing the UN Convention Against Corruption should not be to the exclusion of referencing other international anti-corruption conventions, such as those developed by the Organization for Economic Cooperation and Development, the Organization of American States, and others. In referencing the UN Convention, the explicit or implicit message should not be to endorse the legal principles and approach set forth therein, as compared to any other national or multi-national anti-bribery framework. This is because the principles and approach of the UN Convention do not reflect the only common standard, and other well-conceived and effective multi-lateral conventions embrace different legal norms and methods for combating corruption.

The issue of how to address Politically Exposed Persons ("PEPs") within the framework of the guidance to the 40+9 Recommendations requires further attention. We observe that domestic and foreign PEPs may be indistinguishable from a corruption risk perspective, since the risk presented by PEPs is based on their governmental position or influence. However, there are practical and still-unresolved legal difficulties in conducting due diligence for ML risks presented by PEPs. Some of these challenges are evident in current practice with regard to "list-based" regulatory regimes, such as the United Nations Consolidated Sanctions List and the Specially Designated Nationals list of prohibited parties administered by Treasury's Office of Foreign Assets Control under U.S. law.

Although both lists contain individuals, entities, and organizations with whom persons cannot engage in transactions and each entry includes some identifying information, any compliance program designed to screen against the lists will still have to address false positives. Problems generated by list-based programs include defining who is the target of the enhanced due diligence, application of due diligence to those related to the target, false positives and how they are resolved, and addressing risks arising from historical circumstances that may no longer be current. Therefore, we suggest that any reference to due diligence for PEPs adopt a risk-based approach for due diligence, consistent with the notion that different circumstances present different risks, and different types of financial and non-financial actors have different risk profiles and resources available.

Furthermore, there is still lack of agreement on the definition, scope, duration, and vulnerabilities of PEPs. RBA due diligence must be informed by the continuing lack of a uniform approach to "who is a PEP"; whether the PEP status ends a year or longer after government service end; and how to treat relatives and close business associates of PEPs (and who is a covered "relative" or "business associate"). Although we can appreciate the enhanced risk that a PEP presents from an AML perspective, we also believe that more work is needed before elaborating on an appropriately adequate guidance document for compliance purposes. Regulatory officials and bodies need to recognize that while regulating private sector engagement with PEPs is wholly consistent with the regulatory agenda, there are practical and operational challenges for those subject to regulation. We thus urge more study on this issue, including the domestic vs. foreign divide, whether a more precise and informative definition of PEP can be achieved, and how long a PEP should be so considered once he/she leaves a position of public trust. More outreach to the private sector, including the ABA and other bar association groups, would assist in this regard.

4. RECOMMENDATION 9: THIRD PARTY RELIANCE

With respect to the issue of who can be relied upon in the context of Recommendation 9, we understand FATF is considering amending Recommendation 9 to make clear that countries have the discretion to determine the types of third parties that can relied upon, and to go beyond the banking, securities, and insurance sectors to include other types of institutions, businesses, or professions as long as they are subject to AML and CFT [combating the financing of terrorism] requirements and to effective supervision or monitoring. We believe it is appropriate to extend the countries' discretion in this fashion.

The proposed changes to Recommendation 9 appear to create an explicit two-part test for third party reliance, i.e., third parties that may be relied upon must be subject to AML/CFT requirements and to effective supervision and monitoring. In the U.S., the state courts and their state bar association agencies license and then closely supervise, regulate and discipline all lawyers. The second prong of this test, supervision and monitoring, is thus satisfied for the legal profession. The first prong of the text, dealing with AML/CFT regulations, would not be able to be satisfied because neither federal nor state law specifically regulates the legal profession in the area of AML/CFT, apart from certain general prohibitions against lawyer misconduct contained in various state bar ethical rules[1]. Pursuant to United Nations Security Council Resolution 1260

[1] *See, e.g.*, ABA Model Rule of Professional Conduct 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer (stating in part that "(d) a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent..."); Model Rule 4.1: Truthfulness in Statements to Others (stating that "in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (2) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6); and Model Rule 8.4: Misconduct (stating in part that "it is professional misconduct for a lawyer to...(b) commit a criminal act that

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and its progeny, however, most governments have implemented sanctions regimes prohibiting their nationals (including members of the bar) from engaging in transactions with designated terrorists and their supporters.

It seems incongruous, and indeed inefficient, for a lawyer who has an effective AML/CFT voluntary good practices regime in place not to be able to serve as a third party another lawyer may rely upon. For example, assume Lawyer A has an effective AML/CFT voluntary good practices regime that hews to the ABA's voluntary good practices guidance protocols. Assume further that Lawyer A refers a matter to Lawyer B. In that situation, Lawyer B, knowing that Lawyer A has an effective AML/CFT regime in place, should be allowed to rely on the CDD performed by Lawyer A. Otherwise, Lawyer B would have to perform duplicative CDD on the same client, waste valuable resources in doing so, and from a risk based approach, devote limited resources where the risk does not demand it. FATF should engage with the legal profession in a principled discussion on this precise issue and not reject out of hand such an approach.

5. Tax Crimes as a Predicate Offence for Money Laundering

We understand that FATF is considering including tax crimes as a predicate offense for money laundering in the context of Recommendation 1. The premise behind Recommendation 1 is to recommend that countries apply the crime of money laundering to all serious offenses, with a view to including the widest range of predicate offenses. We are concerned that including tax crimes as a predicate for money laundering would have a number of adverse implications, including the following: (a) discouraging persons from voluntarily repatriating funds from secrecy jurisdictions to their home jurisdictions where there is a tax amnesty provision in play; (b) undermining due process protections in tax prosecutions by providing prosecutors with the alternative of prosecuting under a money laundering statute; and (c) subjecting even minor tax fraud cases to potentially higher fines under applicable money laundering statutes.

If Recommendation 1 were revised to include tax crimes as a predicate offense, it could discourage taxpayers from repatriating and disclosing funds held in previously unreported accounts out of concern that they would be prosecuted for money laundering offenses. Although many nations have entered into tax treaties with each other, there remain a significant number of nations sheltering off-shore funds. We are concerned that Recommendation 1 could undercut these tax treaties and encourage taxpayers to continue to maintain their funds in off-shore secrecy jurisdictions.

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reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer ...(or) (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...")

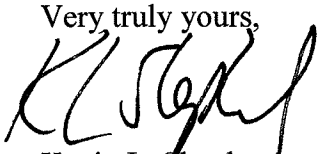
If tax crimes are made a predicate for money laundering, we are also concerned that many of the due process protections inherent in the tax code could be eroded. For example, prosecutors in the U.S. must follow detailed procedures when exercising IRS Code seizures and forfeitures. Where a prosecutor instead pursues a money laundering charge, the prosecutor could circumvent these protections. Similarly, prosecutors may be encouraged to use a money laundering statute rather than a specific tax statute. Where the legal requirements for a tax fraud case are more stringent than for a money laundering case and the latter contains higher penalties, there are serious questions as to whether certain international business transactions linked to tax fraud should be subject to the harsh money laundering penalties.

8. USEFULNESS OF MUTUAL EVALUATION REPORTS

Apart from the mutual evaluations, it would be helpful for FATF to provide typologies where lawyers are being used unwittingly to facilitate ML/TF. The legal profession has repeatedly requested these typologies so as to assist the profession in understanding the vulnerabilities of the legal profession to ML/TF.

The ABA appreciates the opportunity to provide its comments to FATF on the Consultation Paper.

Very truly yours,



Kevin L. Shepherd

APPLEBY

APPLEBY (BERMUDA OFFICE)
RESPONSE TO FATF CONSULTATION PAPER

Introduction:

Appleby (Bermuda Office) ("Appleby") wishes to thank the Financial Action Task Force ("FATF") for this opportunity to provide a response to the FATF consultation paper The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations (the "Consultation Paper").

Bermuda's economy is dominated by the insurance, reinsurance and captive insurance sectors, which contributed more than 50% of Bermuda's GDP in 2006. Appleby understands that various industry sectors and organizations in Bermuda, may respond independently to this Consultation Paper, and accordingly the following comments are on behalf of Appleby.

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General Comments:

Appleby would like to see that the FATF Recommendations to be produced are clear, concise, effective and workable. Also in keeping with a Risk-Based Approach, it is important that the financial and administrative burdens of compliance are not disproportionate in relation to the potential risk.

Appleby agrees with FATF's fundamental principle of "Inclusiveness, openness and transparency", and would like to see increased opportunities for industry to participate in the review process, and greater disclosure of the detailed proposals being considered by FATF. However, we find the window of opportunity to respond together with the timing of this request to be most unfortunate, and not in the best interests of a full and frank discussion with many interested persons with valuable expertise to share in this discussion, not being available over the Christmas and New Year holiday period.

Specific Comments:

Recommendation 5 and its Interpretative Note:

Appleby believes that, if drafted correctly, the use of suitable examples of risk factors and enhanced Customer Due Diligence measures, and new text on "Risk Variables" will make it easier for all to understand and comply with the FATF Recommendations. However, we would like there to be as wide a range of examples or scenarios provided. We acknowledging that examples and scenarios provided cannot be expected to be exhaustive, however use of as many examples and scenarios as possible will provide greater clarity to and interpretation of, the Notes. The guidance will assist greatly in reducing the wide range of interpretations made possible as part of a Risk Based Approach.

Without an opportunity to review such examples we are not able to assess and comment on whether the examples and new text will actually achieve the intended purpose. Furthermore it makes it even more difficult to assess the financial and administrative burden on institutions, and whether the costs of compliance are disproportionate in relation to the potential risk.

We would submit that public consultation should be sought regarding the examples and text in keeping with the principle of "Inclusiveness, openness and transparency".

Legal persons and arrangements – customers and beneficial owners:

As indicated above, Appleby believes that the FATF Recommendations must be clear, concise, effective and workable.

Appleby is not opposed to the concept of a greater understanding of the ownership and control structure of legal persons and arrangements and concise clarification on this will assist.

However, with respect to beneficiaries (beneficiaries of trust structures and insurance policies), we believe there should be greater flexibility to allow for changing circumstances.

We are of the opinion that the best approach is to focus on identifying beneficiaries at the time of any payment to them or when the beneficiary intends to exercise vested rights. This is essentially the approach being considered by FATF for insurance policies at outlined in Paragraph 24 of the consultation document and should be extended to all industries where beneficiaries are involved in the business arrangement as a practical and workable solution.

Recommendation 6 – Politically Exposed Persons:

Appleby has no further comment and believes that the FATF Recommendations in this regard must be clear, concise, effective and workable.

Recommendation 9 – Third Party Reliance:

Again Appleby believes that the FATF Recommendations in this regard must be clear, concise, effective and workable.

To the extent that FATF wishes to retain the status quo on who can be relied upon and that the responsibility remains with the institution relying on a third party it would be helpful in avoiding duplication, keeping down costs and help create a global level playing field if:

i) All third parties and outsourcing or agency relationships are required to consent to being relied upon and make available to the institution relying on

them, the necessary customer due diligence information upon request for whatever reason. This would address expectations, help avoid duplication and make it easier for all institutions to perform random checks on a sample basis, regarding what documentation is actually held by such third parties;

ii) Guidance/interpretation notes should instruct that third parties be required to give written confirmation to the institution relying upon it, of any 'material' changes on an ongoing basis. Materiality may be defined as significant to the issue or matter at hand or the estimated effect that the presence or absence of an item of information may have on the accuracy or validity of a statement; and

iii) As in the United States, greater consideration should be given to the notion that liability for failure to perform, may fall on a third party, but only under very strict circumstances e.g. regarding the use of tax experts.

Collectively, this would address costs and the expectations of all parties involved.

Tax Crimes as a predicate offence for money laundering:

It is unclear from the Consultation Paper whether public consultation will be undertaken in relation to the amendment of this Recommendation. Regrettably there are no definitions provided. In particular the definition of 'tax crimes' will be of particular significance and could greatly impact the financial and administrative burden of compliance, as many organisation would not lay claim to being tax experts. Reliance on tax advice by most institutions particularly regarding a different jurisdiction to the one in which the institution is domiciled in is very likely to be via a third party. This impacts the previous section whereby an institution may have no option but to rely on a third party with the necessary expertise, yet are forced to bear sole responsibility for the service they are provided.

There is also great debate as to what constitutes legitimate tax avoidance and illegal tax evasion depending on the laws of different countries and varying interpretations by different OECD countries. This therefore requires important, adequate and meaningful consultation with all interested parties before FATF recommendations on this issue are passed.

We would submit that meaningful public consultation should be sought regarding the amendment of this Recommendation in keeping with the principle of "Inclusiveness, openness and transparency".

Special Recommendation VII:

The recommendation raises the issue of unnecessary duplication of effort if all institutions are required to perform checks on the same persons (originator and beneficiaries) involved with a wire transfer. This is likely to add to the cost of operations unnecessarily.

Appleby believes that there could be a division of responsibility (if necessary into primary and secondary responsibilities) and in doing so reduce the time and costs involved, with institutions retaining responsibility to perform adequate checks and due diligence on the person (originator and/or beneficiaries) involved that is their client.

Further Comments:

Appleby is aware there is currently a debate on whether Recommendation 34) should be applicable to all countries (i.e. Countries should take measures to prevent the unlawful use of legal arrangements in relation to money laundering and terrorist financing by ensuring that it's commercial, trust and other laws require adequate transparency concerning the beneficial ownership and control of trusts and other legal arrangements) and is of the opinion that Recommendation 34 should be applicable to all countries and in doing so creates a level playing field for all concerned.

To assist the Risk Based Approach that gives greater flexibility and at the same time places greater responsibility with institutions, the FATF Mutual Evaluation Reports, that provide a summary of the review undertaken should be more concise, written in plain language, be much less ambiguous in their conclusions and give much better direction as to what is the FATF's position on the anti-money laundering and anti-terrorist financing controls in place in a country under review.

Finally, FATF in being transparent on the criteria involved could assist the process greatly if it could itself, risk rate a country it has reviewed, as is expected of others using their reports in addition to other information publicly available. Currently, senior management, compliance and risk professionals are expected to take a view and shoulder the responsibility in risk rating a jurisdiction using in great part, a report that FATF (who have access to public as well as private information not available to the general public) is unwilling to do. Doing so we believe would greatly assist law abiding organisations (that stand to be judged with the benefit of hindsight if and when an incident does occurs) in their performance to help prevent money laundering, terrorist financing or weapons proliferation.

Financial Action Task Force

AAT Response to the Review of the FATF Standards – Preparation for the 4th Round of Mutual Evaluations

Introduction

The AAT is a professional body and recognised as the money laundering supervisory authority (SA) for accounting technicians under Schedule 3 of the UK Money Laundering Regulations 2007. Established in 1980 to provide a recognised professional qualification and membership regulatory body for accounting technicians, the AAT is now well-established and respected worldwide, with more than 120,000 members, including qualified accountants and students.

The AAT is sponsored and supported by the four main UK chartered accountancy bodies, each of which has three nominated members on the AAT Council:

- Chartered Institute of Public Finance and Accountancy (CIPFA)
- Institute of Chartered Accountants in England and Wales (ICAEW)
- Chartered Institute of Management Accountants (CIMA)
- Institute of Accountants of Scotland (ICAS)

AAT 'membership' consists of students and qualified accountants. Students are officially classified as members for very limited purposes of the AAT's Articles and Memorandum of Association. They are not regulated by the AAT and are prohibited from describing themselves as members, associates of, or otherwise publicising their relationship with the AAT when engaging in self employed accountancy work.

Qualified members act as internal and external accountants. The internal accountants are employed by commercial entities or by Government bodies, such as the NHS and local government. Approximately 3000 members are external accountants within the meaning of the Money Laundering Regulations 2007. Individual members who act as external accountants are referred to by the AAT as Members in Practice (whether they are sole traders or principals of firms). Their practice profiles vary, from part-time sole practitioners performing purely bookkeeping services, to highly successful group practices dealing with complex matters.

Members in Practice are strictly governed by the AAT, and are obliged to comply with rigorous professional and ethical standards encoded in the document *Regulation and Guidelines for Members in Practice*, available at www.aat.org.uk. AAT monitors quality control and regulatory compliance of members' practices through annual returns and review visit activities. In particular, the AAT has dedicated significant resources to understanding the anti-money laundering and counter terrorism legislation as it relates to AAT members' practices and has developed detailed guidance and Continued Professional Development events to assist AAT members' compliance with their legal obligations within the context of their practices.

Our members in practice can be licensed in all or any of the following areas, following demonstration of their competence:

- Book keeping
- Financial Accounting and Accounts Preparation
- Budgeting & Forecasting

- Managment Accounting
- Payroll
- Independent Examination
- Limited Assurance Engagement
- Taxation *(VAT,Personal, Business, Corporation,Capital Gains, Inheritance)*
- Business Plans
- Computerised Accountancy Systems
- Company Secretarial Services.

Our members are not permitted to undertake self employed work in the areas of audit or insolvency unless they are additionally regulated by another regulatory body in these areas. Some of our student members are self employed providing accountancy services. They explicitly fall outside the AAT's jurisdiction for AML supervision because they are not entitled to register on the AAT's scheme for members in practice, and are directed toward HMRC for supervision.

The AAT has profession-long contact with its members, including:

- awarding its NVQ accountancy qualification
- providing CPD for members
- supporting a network of regional branches
- issuing practising certificates
- providing practice support
- conducting quality control review visits
- conducting Anti Money Laundering/Counter Terrorist Financing (AML/CTF) reviews

It is the policy of AAT to respond to public consultations where we have an opinion or where the issues are directly relevant to AAT members or a sub category of members. Our comments on the relevant sections of this consultation reflects the views of our members as evidenced in feedback received on the relevant sections of the 3rd Money Laundering Directive as implemented in the UK Money Laundering Regulations 2007 and as part of our contribution towards our object of promoting the sound administration of law for the public benefit. We have limited our response to the issues raised in this consultation which will affect our members in public practice and in industry.

The Risk Based Approach

1. Recommendation 5 and its Interpretative Notes

AAT welcomes the move to incorporate a single comprehensive statement on the RBA into the FATF standards as a New Interpretative Note. AAT members' niche within the wider accountancy profession is, in the main, providing low-complexity, low-turnover accountancy and taxation services. The introduction of a single statement on the RBA by FATF will go a long way in removing the perceived ambiguity inherent in the definition of a RBA and also its practical application by members when verifying the identity of their clients, applying the RBA to ongoing monitoring and enhanced CDD and establishing and maintaining appropriate AML policies for their firms. The adoption of uniform criteria will also assist AAT when producing interpretative guidance to its members. The AAT believes that the development of basic principles and objectives of RBA will address the challenge faced by members in applying the RBA particularly to due diligence which has always been the determination of the extent of verification to apply. The provision of a detailed balanced list of examples of lower/high risk factors as well as simplified enhanced due diligence measures will not only assist firms in drafting their internal policies but also assist supervisors when producing guidance on money laundering controls. It is however important that such lists are clearly drafted to indicate that they are only a framework to avoid a situation where firms revert to adopting a tick box approach to compliance. This can be achieved by providing clear positive and negative indicators and principles of risk factors that

practitioners need to take into account when determining appropriate risk mitigation measures. It is important that an element of flexibility and subjectivity is maintained as they facilitate risk analysis.

AAT believes that the introduction of RBA to the AML/CFT regime as introduced by the 3rd Directive was a positive step and introduced a proportionate approach to the application of AML legislation. The RBA in practice ensures that firms are able to focus their resources on transactions and individuals/entities that are considered as high risk.

AAT supports the proposal to maintain the requirement for firms and individuals within the regulated sector to identify and assess the money laundering risks they face and also to apply enhanced due diligence to high risk transactions and entities. AAT also supports the proposal to maintain the supervisory responsibilities for competent authorities and SRO's. The expansion of this responsibility to include the monitoring of firm risk assessment is welcome. AAT currently monitors firm risk assessments as part of the money laundering compliance review exercise which covers a percentile of members selected annually, however if the new FATF proposal is implemented, there is the scope to include the provision of firm risk assessment information during the licence application or renewal process.

The proposal to apply simplified due diligence in low risk cases is important to our members who routinely provide low complexity accountancy services and to a predominantly UK based clientele. The introduction of exemptions in proven low risk situations is a welcome addition to the FATF standards as this approach will provide flexibility for firms to make risk based decisions when deciding which aspect of the implemented standards are applicable in certain situations.

2. Recommendation 8: new technologies and non face to face business

Regulations 14 (2) of the UK Money Laundering Regulations 2007 mandates the application of enhanced due diligence measures to non face to face customers and identifies these types of business relationships as high risk. Verification measures are recommended to mitigate the higher risk posed by such transactions. These measures highlight the risk of impersonation and obscuring of ownership inherent in such relationships. AAT welcomes the proposal to incorporate the issue of non face to face business into the Interpretative Notes for the RBA.

Due to the nature of accountant/client relationships, majority of our regulated audience will as a matter of course have to meet their clients at the initial stage to obtain full instructions. However, as more products are offered electronically, firms may chose to adapt their business models to allow for online client engagement. For example, there has been a noted increase in firms providing online bookkeeping services to clients and this may become normal practice in future. AAT therefore supports the proposals on making more explicit risk based requirements to firms on developing new business practices and methods of delivery.

3. Recommendation 20: other non-financial businesses and professions

The implementation of recommendation 20 within the UK Money Laundering Regulations 2007 has seen the expansion of the definition of regulated activities and relevant persons to cover non financial businesses. This was a welcome development which addressed the perceived shortcoming of the regime to cover businesses which may not engage in core financial services but may provide avenues for criminals to launder the proceeds of crime. It is AAT's view that including other types of financial institutions within the remits of the FATF recommendations would be a welcome development and will address the imbalance between the professions. However, the implementation of such extension of coverage should not create additional burden on businesses that may only provide nominal financial services to their customers. For instance in the UK, holders of a consumer credit licence under the Consumer Credit Act 1974 must be registered with the Office of Fair Trading for money laundering supervision and are deemed to fall within the regulated sector. While the rationale for this requirement is sound particularly as it relates to businesses that offer credit and lend money, it has resulted in a

situation where membership bodies like AAT who only hold the licence to allow members pay their membership subscription by instalment are required to apply the full provisions of the 2007 Regulations. This may create an undue compliance burden on such businesses and discourage compliance. In reviewing recommendation 20, the FATF should consider whether membership bodies that do not engage in financial activities offering credit or lending money should remain within the remits of AML regime. It is the view of AAT that this is unnecessary as the instalment payment of professional subscription fees does not pose a heightened risk of money laundering or terrorist finance since in most cases the fees are nominal and fixed in advance.

4. Legal persons and arrangements customers and beneficial owners

AAT welcomes the proposals to clarify the information required to identify and verify the identity of customers who are legal persons or arrangements. The nature of our members' professional responsibilities mean that they will often have to deal with corporate entities and there has always been some confusion on how to apply CDD measures to legal persons. Regulation 5(b) of the UK Money Laundering Regulations 2007 stipulates that in the case of a legal person, trusts or other arrangements, regulated persons must put in place measures to understand the ownership structure of the legal person, trust or other arrangement. Regulation 6 goes on to explain the meaning of beneficial owner in detail.

The AAT is of the view that the FATF proposal to clarify the extent of verification when dealing with legal entities and also to clarify that firms ought to be confirming that individuals who act on behalf of legal persons have appropriate authority to act will standardise requirements across the FATF jurisdiction.

Politically Exposed Persons

5. Recommendation 6 and its Interpretative Notes

AAT have been asked on a number of occasions by our regulated audience to explain the reasoning behind the exclusion of local politicians including UK members of the European Parliament and their associates/family members from the definition of Politically Exposed Persons in Regulation 14(5) which implements recommendation 6 of the FATF recommendations. Some of the queries we have received have suggested that if the intention of the Regulation is to identify potentially corrupt politicians, there is no justification for excluding local politicians who may be exposed to the same threats of corruption and money laundering. .AAT does not express any views on the appropriateness of including local politicians within the definition of PEP's and our general advice to members has been that adopting the risk based approach should mean that a UK politician can still be subject to Enhanced Due Diligence checks if factors exists that heightens the risk of money laundering and/or terrorist finance on a risk sensitive basis.

Our views are reflected in the proposed FATF approach in dealing with PEPs. AAT believes that providing clear provisions for assessing the risks of money laundering posed by PEPs whether domestic or foreign will remove the perceived ambiguity on the application of CDD measures to PEPs although we suspect that firms in the UK are already following this approach as best practice as it is consistent with industry guidance.

Applying CDD measures to family members of PEPs have always presented a challenge to firms. Feedback received from our supervised audience suggests that firms struggle to assess the extent of CDD measures to apply and to whom. The current regulation stipulates a blanket application of enhanced due diligence measures to family members and associates of PEPs without providing a clear definition of who falls within these categories. The proposal to limit enhanced due diligence requirements to family members and close associates of PEPs who have a business relationship with firms and where it is suspected that the PEP is the beneficial owner of the funds will provide adequate and clear guidance to firms on applying enhanced due diligence when entering into a business relationship with a PEP.

Third Party Reliance

6. Sectoral coverage: who can rely on a third party and who can be relied upon?

AAT welcomes the proposal to maintain the requirements on who can rely on a third party. Informal feedback from members suggests that at times undertaking CDD when working to tight deadlines can be difficult and in such cases being able to rely on CDD carried out by a third party can be an effective tool in ensuring continuity of business relationships. However, in the UK, the implementation of recommendation 9 means that a distinction has been drawn between firms who are supervised by a competent authority in part I and II of Schedule 3 of the 2007 Regulations. This means that while firms supervised by part I authorities can be relied on, firms that fall under part II supervision cannot be relied on for the purpose of Regulations 17. Our experience of being a statutory supervisor is that such a distinction is unnecessary and cannot be justified using the RBA. It should be sufficient that a firm is subject to effective supervision and monitoring and an extension of the application of reliance by virtue of removing the distinction between part I and part II supervisors may support the ease of any transitional relationships, bearing in mind that in normal circumstances an accounting technician would send a professional clearance letter to a former accountant in line with ethical requirements. AAT maintains robust supervision arrangements for our members in practice similar to that of part I supervisors and the proposal to extend the scope of who can be relied on to include other types of businesses and professions subject to effective monitoring and supervision is particularly welcome.

7. Delineation between third party reliance and outsourcing or agency

Although majority of our members in practice operate in a low complexity business environment without the need to outsource due diligence or engage in agency relationships, AAT welcomes the proposals to better delineate what constitutes third party reliance through a functional definition. AAT understands the confusion inherent in the present provisions relating to third party reliance. The proposal to introduce clear positive and negative indicators which are characteristic of a third party reliance relationship will help address issues faced by members when acting as sub contractors to other accountants or when engaging the services of sub contractors. The feedback we have received from our members suggests that there is still an element of confusion regarding which entity is responsible for CDD and whether an accountant can rely on the CDD of a sub contractor. This may arise in cases where our members have been engaged to provide bookkeeping services or accounts preparation work and the full accounts and auditing work will be carried out by another firm of accountants.

Tax crimes as a predicate offence for money laundering

AAT welcomes the opportunity to comment on the FATF proposals relating to the status of tax crimes within the wider AML/CFT regime. This is an aspect of the regime which is directly relevant to our members in practice who assist members of the public with filing tax returns to HMRC and general tax planning. The AAT is of the view that expressly including tax crimes in the global standards will unify practices across FATF jurisdictions. For instance in the UK, the Proceeds of Crime Act 2002 expands the predicate offences which triggers money laundering to include all criminal offences wherever committed. The interpretation given to this section of the legislation is that tax offences will trigger a money laundering offence and are reportable to the Serious Organised Crime Agency (SOCA). This has been the consistent guidance given to our members and the Consultative Committee of Accountancy Bodies (CCAB) guidance on money laundering (our guidance is closely modelled on this) has an extensive section for tax practitioners.

There is clear evidence to suggest that money laundering is sometimes used to disguise the proceeds of direct and indirect tax evasion. AAT believes that unifying the standards across FATF jurisdictions will remove the potential that money launderers will chose to launder the proceeds of tax evasion using the services of professionals in jurisdictions that do not have a similar legislation to the UK

Proceeds of Crime Act 2002. The implementation of this proposal will also ensure healthy competition between the professions across jurisdictions.

Usefulness of mutual evaluation reports

In response to the specific consultation questions:

- Do you use FATF reports and how?

AAT as a statutory money laundering supervisor uses the FATF reports to keep up to date with global trends and methodologies of money launderers. This informs our guidance to members in practice on particular emerging themes and money laundering standards in overseas jurisdictions. Also as an organisation that engages in business relationships in overseas jurisdictions, the FATF high risk jurisdiction report also assists our organisational decision making when assessing the money laundering and financial crimes risks inherent in doing business in certain overseas jurisdictions.

- Which elements of current reports are most useful?

AAT finds the methods and trends, high risk and non-cooperative jurisdictions elements most useful. The high risk jurisdictions report is particularly useful when advising members on the risk assessment measures to put in place when establishing business relationships with overseas clients.

- How would you like to see the FATF report improved?

AAT commends the efforts made by the FATF in setting global policy and standards on money laundering. However, the feedback from our members is that the standards and the regime focuses heavily on core financial institutions and this sometimes makes it difficult for other professionals particularly smaller entities to understand how they are affected by certain provisions of the standards. To ensure that all sectors involved in the anti money laundering efforts continue to be engaged with anti money laundering and anti terrorist finance efforts, it is important to provide more content that can be easily understood and applied to smaller entities that fall within the regulated sector.

AAT

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Il Presidente

FATF Secretariat
2 fue André Pascal
75775 Paris Cedex 16
FRANCE

4 January 2011

Via e-mail: fatf.consultation@fatf-gafi.org

Re: Response to the consultation on "The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations"

Sirs,

the FATF has promoted a consultation process relating to the review of its 40 Recommendations and, within this framework, a consultation paper has been issued "The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations" dated October 2010.

Assirevi, the Italian Association of Audit Firms, is a private not-for-profit association set up in 1980. Its members currently include the majority of the audit firms included in the Consob (the Italian Commission for Listed Companies and the Stock Exchange) register, which audit almost all of the companies listed on the Italian stock exchange.
Assirevi encourages and carries out scientific analyses supporting the adoption of auditing standards (professional ethical guidelines, technical audit procedures and audit report preparation techniques). It also follows changes in legislation and regulations.
Accordingly, it works with Consob and other bodies and organisations to define and revise auditing and accounting standards and their circulation.

Auditors are, pursuant to Law Decree no 231/2007, which implements in Italy the EU Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, covered entities with respect to anti-money laundering and counter- terrorism obligations, including, *inter alia*, Customer Due Diligence (CDD) and the Risk Based Approach (RBA).

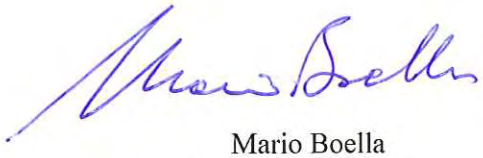
Assirevi is therefore a concerned stakeholder in the current review process; in such quality it has been informed and invited by the Italian FATF delegation, chaired and coordinated by the Italian Ministry of Economics, to propose its comments on the above captioned consultation paper.

In particular, in the attached document, Assirevi wishes to propose its comments on the following items:

- The Risk-Based Approach
- Recommendation 5 and its Interpretative Note: Customer Due Diligence and Record Keeping
- Recommendation 9: Third Party Reliance.

As regards other issues/recommendations considered in the consultation paper, Assirevi has no comments, either due to their non applicability to audit companies, or since nothing needs to be added to that proposed by the FATF.

Best Regards,



Mario Boella
Chairman of Assirevi

ASSIREVI

RESPONSE TO THE FATF CONSULTATION "THE REVIEW OF THE STANDARDS – PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATIONS"

INTRODUCTION

The FATF (Financial Action Task Force) has promoted a consultation process relating to the review of its 40 Recommendations.

Within this framework, a consultation paper has been issued "The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations" dated October 2010.

All interested parties are required to submit their comments within 7 January 2011.

Assirevi, the Italian Association of Audit Firms, is a private not-for-profit association set up in 1980. Its members currently include the majority of the audit firms included in the Consob (the Italian Commission for Listed Companies and the Stock Exchange) register, which audit almost all of the companies listed on the Italian stock exchange.

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Assirevi is therefore a concerned stakeholder in the current review process; in such quality it has been informed and invited by the Italian FATF delegation, chaired and coordinated by the Italian Ministry of Economics, to propose its comments on the above captioned consultation paper.

In particular, Assirevi wishes to propose its comments on the following items:

- The Risk-Based Approach
- Recommendation 5 and its Interpretative Note: Customer Due Diligence and Record Keeping
- Recommendation 9: Third Party Reliance.

As regards other issues/recommendations considered in the consultation paper, Assirevi has no comments, either due to their non applicability to audit firms, or since nothing needs to be added to that proposed by the FATF.

THE RISK BASED APPROACH

We understand that the FATF is considering to formulate a comprehensive statement on the RBA.

We herein below submit some remarks relating to Risk Based Approach (RBA), particularly focused on the peculiar and low risk professional activity of auditors.

Preliminarily, as a general observation, we wish to point out the contradiction between flexibility and decision-making power, which should be inherent to the RBA and the formal, rule-based nature of the content of Customer Due Diligence (CDD) activities.

This results from the EU and domestic legislation, as well as guidance of the competent authorities, but may also be inferred from the Recommendations (in particular, Recommendation 5), which require always the performance of all CDD activities, irrespective of the risk classification.

Accordingly, in practice, regardless of the client's risk class and the absence of objective risk in the provision of professional services typical of an audit company (as it will be better explained below), the legislative framework and effective application of the approach leaves no space for any effective "proportioning", as it instead requires the full and constant performance of all client due diligence activities. As a consequence thereof, the RBA seems to have influenced more the quantity of activities to be performed, basically by extending the same, than to impact quality of Anti-Money Laundering (AML) accomplishments.

With respect to audit firms in particular, it must then be considered the following.

First, the audit firms' services are, by their very nature, at "low risk" of money laundering, since they involve *ex post* assessments, required by the law.

These assessments have to be carried out pursuant to specific legal provisions, performed in accordance with the relevant auditing standards and to the aims set forth by the legislator. They cannot, by definition, be willingly or unwillingly used as a tool for money laundering or terrorist financing.

Second, with respect to "transactions" (which are taken as one of the main parameters for the risk assessment), we wish to emphasise that audit firms' typical activities do not involve preventive analysis or assistance in the design or performance of transactions, but rather an ex post check that encompasses all of the client company's activities, on a sample basis and following procedures set forth by auditing standards.

Accordingly, an audit firm establishes a risk profile solely in relation to its client's subjective characteristics and its operations as a whole, rather than with respect to individual transactions.

Finally, general risk proportioning criteria proposed so far by international sources and domestic legislation are, to a significant extent, inapplicable to audit firms typical services, which are largely regulated by law.

In particular, there are specific criteria set forth depending on the type of professional service provided, the term, amount and methodologies, which appear non applicable to audit firms profession (see above on law and auditing standards), while other criteria appear generic or, in any case, difficult to interpret/apply (such as the client's legal status and reasonableness) also considering the particular nature of audit firms' business activity.

All that being said, we welcome FATF's intention to propose a set of examples of ML ("money laundering")/TF risks ("terrorist financing").

As a matter of fact, it would be useful to have a clearer statement on non applicability of certain parameters (in particular, relating to products/services/transactions) with respect to certain DNFP ("Designated Non Financial Professions"), namely audit firms/auditors.

Moreover, within the scope of the risk parameters applicable to audit firms, it would be useful to have more specific indications, for instance relating to geographical areas considered to be at higher risk (there are a number of references now, not always clear and uncontroversial) as well as the meaning to be given, for the purposes at hand, to parameters such as those relating to the client's legal status and nature, or high risk economic sectors.

Furthermore, it would be ideal if there were a systematic connection between preventive risk assessment criteria and the guidance concerning suspicious transactions issued by the competent domestic authorities for the different economic players.

A final remarks refers to the issue of non-face to face businesses, as dealt with in the Consultation Paper. It must be pointed out that these do not necessarily imply, in particular when referred to DNFP, a higher risk of ML/TF.
Non-face to face professional relationships are quite common nowadays, especially when considering the "referral" engagements of audit firms.
Hence, we think that the appreciation of a higher risk should be case by case, instead of a general assumption.

RECOMMENDATION 5 AND ITS INTERPRETATIVE NOTE: Customer Due Diligence (also comments on Recommendations 33-34).

Our remarks herewith concern the risk based approach and the clarification of the requirements regarding legal persons and arrangements, thus relating to INR.5, but also extending to Recommendations 33 and 34 (Transparency of legal persons and arrangements).

In the first instance, we wish to highlight which are the difficulties experimented in complying with the CDD implementing regulations.

In particular, where audit firms' client entities, or their controlling entities, are set up and are governed under foreign laws, there is strong difficulty to classify the client entity, in order to understand, as a preliminary step, whether the client entity qualifies for ordinary or simplified CDD, and thus the actual activities to be carried out, their scope and extension.

Besides, audit firms may encounter difficulties, in particular with respect to foreign entities, in interpreting and applying the notion of the beneficial owner to such entities, due to the peculiarities of the different legal forms and also considering the dichotomy of the ownership and control concepts.

From the standpoint of substance, when audit firms have client entities that belong to multinational groups/companies, they mainly come across the following difficulties: (i) the professional relationship is frequently managed with the domestic company, which is a foreign subsidiary, and the audit company's contacts state that they are not aware of the name of the beneficial owner; (ii) the client or foreign entity that conferred the engagement very often does not collaborate in the fulfilment of these obligations, justifying its lack of cooperation by citing differences in national anti-money laundering legislation or confidentiality and personal data protection issues based on national legislation; this also occurs within the EU where, despite the provision of performance through third parties and the obligations that this entails, there is a very weak culture of cooperation; (iii) public sources do not always enable audit firms to reconstruct the ownership and control structure (this is true to an even high extent, although not exclusive, for trusts and similar structures) and, in any case, they do not provide all information (e.g., identification document details) required by Italian implementation legislation.

Beneficial Owner. CDD, in general

The existing dichotomy of ownership and control, as well as the introduction of *ex se* presumptions of control, provided for by the EU and Italian rules should be solved. As a matter of fact, they can lead to a duplication of activities, and a confusion over the notion of beneficial owner.

To this aim, our impression is that what is contained in the Consultation Paper, *eg* effective control vs. controlling ownership interest, and in particular the notions of "*mind and management*" and "*exerting influence over the directors of a company*" given their discretionary character, could complicate even more the scenario and the applicability rules, especially where unrelated to the corporate arrangements and rules of a country's legal system.

In our view, the definition of control to the purposes of the identification of the beneficial owner/s should be based on a systematic approach, and be interpreted by covered entities according to their national legal system (in particular corporate and supervisory) which features the different relevant situations: for instance, in our case, controlling ownership, dominant influence and *de facto* control. Excluding any other criteria which is *alien* with respect to the overall legal system.

Another aspect which, in our view, needs to be clarified is that of the extent of the CDD activities and verifications to be carried out with respect to beneficial owners. DNFP should be able to determine, based on their risk assessment of client/engagement, which documents/data they should collect with respect to beneficial owners.

In particular, we believe that when an audit firms' client company is assigned by the DNFP a low money laundering risk level (and provided that straight-forward simplified obligations do not already apply, in compliance with national legislation), the following simplified measures can be applied.

(a) With respect to the beneficial owner, it could be sufficient:

    (i) to gather the client's representation and information on the beneficial owner/s, without requesting "identification information", particularly without requesting an identification document/the identification document details and tax code and without performing additional checks of the client's representation;

(ii) if the natural person (client's proxy) is not aware of the name of the client's beneficial owner, to gather adequate and reasonable information on the client's corporate ownership and control structure, unless/until a different risk assessment is assigned;

(b) as regards the purpose and nature of the service: given the typical nature of an audit firms' activities, this check is superfluous for all clients, and not only those at low risk of money laundering;

(c) not requesting the person who signs the engagement letter to provide documentation demonstrating that they have representation powers.

We would consider helpful if the legislators would specify these indications and establish, in general, the limits to and the actual reach of the proportioning of obligations.

As anticipated, our general impression is that, in spite of the "risk based approach" rule, there is not much flexibility, and all the activities comprised in the CDD, have all to be performed to the larger extent in all cases.

Lastly, we wish to point out that the audit firms, even if applying a lower formality level compared to the one required by the AML legislation, have consolidated professional standards relating to the acceptance procedures, which imply, inter alia, the knowledge of the client's ownership and control structure, as well as the scope and intended nature of the engagement.

Therefore, it should be clarified that such procedures entirely satisfy the CDD requirements, and no additional measures should be requested/necessary.

Simplified CDD

We suggest to add to the existing categories for which Countries may provide simplified due diligence, *i.e.* financial institutions, government administrations, listed companies, all entities subject to the direct or indirect control of the former entities, as well as insurance companies operating in non-life businesses.

How to obtain the relevant data

In our opinion, information on the beneficial owner can be considered adequate, updated, accurate and reliable when it comes from a reliable source and, therefore, enables the auditor to determine and identify one or more people who fall under the definition of beneficial owner in the Decree, or to conclude that there is no beneficial owner.

In most cases, the primary source for the identification of the beneficial owner is information provided by the audit firms' clients, under their own responsibility, except, where necessary, when additional information is gathered to support, confirm and, potentially, integrate the clients' representations (see also *infra*).

Where enhanced CDD applies, or the information provided by client is incomplete or unreliable, the audit firms gather any available additional documentation (such as additional identification documents or other documents confirming the identity of the client and beneficial owner), considering the RBA parameters in Italian and EU legislation *(including the FATF Recommendations and the RBA Guidelines).*

Where deemed necessary, audit firms check this information by comparing it with other documents that enable audit firms to examine their client company's control/ownership structure and verify the identity of the beneficial owner(s). The auditor first uses the documents acquired for the conferral of the engagement or other documents available considering the professional activities performed, primarily utilising public archives, where available.

We believe that public registers/archives (i.e. in Italy Chamber of Commerce) constitute a helpful auxiliary tool in identifying the beneficial owner.
However, they do not solve any applicable issues since:

i. in many cases, the information acquired directly from public registers (in both Italy and abroad) does not enable audit firms to determine and identify the people who own or control the client (e.g., the registers do not contain sufficient information on the control chain of a corporate group; they do not contain the complete identification information of people, identification document details in particular, etc.);

ii. practice has shown that access to public registers in foreign countries is, in most cases, very complex and therefore often ineffective (e.g., the name of the offices that keep the registers are often unknown, it is not easy to understand which documents are most suitable for a comprehensive consultation, the documents are prepared in the local language only, the information provided is not adequate or sufficient, etc.).

We propose that Recommendation 34 compulsory requires to all Countries to implement measures to allow prompt and quick access to beneficial ownership and control information to those DNFP belonging to other countries which need to comply with their AML duties.

This should be done in the first instance through public archives/registers which grant full transparency of legal entities' ownership and control structures. In addition to this, it could be done through designated professionals, or public officials; we suggest that an obligation is placed upon certain subjects to provide exhaustive and reliable information.

Lastly, but more importantly, we observe that it would be useful that the Recommendations suggest that all Countries provide the clients' duty of cooperation in supplying the relevant information, in particular, on beneficial ownership, also upon request of DNFPs established in jurisdictions different from that of the client, providing dissuasive sanctions for non cooperative behaviour.

Within this context, it should be clarified that differences in the national legislations should not be an excuse or justification for non comply with CDD information duties.

RECOMMENDATION 9 – THIRD PARTY RELIANCE

In our view, Third Party Reliance is an extremely valuable way to comply with AML duties, especially in international and non face-to-face businesses.

Hence we agree with the Consultation Paper to basically extend the types of institutions and DNFP that can be relied upon, including all those which are covered entities; on the other hand, contrary to that suggested in the Consultation Paper, we request that all DNFP may benefit of third party reliance.

As noted above, audit firms have experienced very strong difficulties in obtaining information by third parties which introduce potential clients to audit firms.

Our main suggestion is that Countries should force third party Financial Institutions and DNFPs to accede to Third Party Reliance requests with respect to clients they introduce or, in any event, have a relationship with. (*i.e.*, Countries should provide the obligation of such Financial Institutions/DNPFs to timely provide, whenever requested, the necessary information relating to the CDD process, and any underlying documentation, including copies of identification data, and this also with respect to cross border reliance).

In addition to this, Countries should adopt measures/provisions to clarify that cooperation through Third Party Reliance, to the purposes of AML duties, shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, in particular in relation to data protection.

Lastly, we suggest that, whenever the audit firms' client is introduced by (referred to) another entity, whether or not a covered entity, CDD shall concern exclusively the ultimate client and its beneficial owners, with exclusion of any activity with respect to such referring entity.

Finally, we request that infra-group reliance is extended not only with respect to Financial intermediaries but also with respect to audit firms' network.

CCBE RESPONSE TO FATF CONSULTATION PAPER "THE REVIEW OF THE STANDARDS, PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATIONS

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CCBE response to FATF consultation paper "The review of the standards, preparation for the 4th round of mutual evaluations

General remarks

1. The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

2. In the view of the CCBE, the requirements on a lawyer to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence is a violation of a fundamental right. For this reason the CCBE continues to call for the removal of the reporting requirement in relation to members of the legal profession.

3. The CCBE appreciated the invitation to participate in the FATF Consultation on 22 November 2010 in Paris regarding the consultation paper on "The review of the standards, preparation for the 4th round of mutual evaluations" ("Review") as these are important topics that are of mutual concern.

   However, at the end of the day we left with the impression that decisions had already been made and that the comments of the private sector representatives may not have a real chance of being of influence to the final version.

4. Further, the Review proposes several adjustments, the scope of which highly depends on their final elaboration which has not yet been presented by the FATF. The FATF consultation paper announces, for instance:

   – exemptions "in strictly limited and justified circumstances" (Review paragraph 7.b.iv);

   – "giving a more detailed and balanced list of examples of lower/higher ML/TF risk factors" (Review, paragraph 9);

   – "FATF has prepared a set of examples of both higher and lower ML/TF risk factors"(Review, paragraph 16);

   – "new text is being considered relating to "Risk Variables" (Review, paragraph 17);

   – "the information that is necessary" in relation to the identification and the verification of the identity of legal persons or arrangements (Review, paragraph 18).

   One needs to know the wording of these announced proposals in order to be in a position to make substantive comments on the effects these changes will have in practice. The CCBE would request an opportunity to comment on further proposed changes within a timeframe that enables stakeholders to provide substantive comments.

5. The CCBE supports the FATF recommendations insofar as they aim to prevent the DNFBP's from becoming involved in money-laundering. From the consultation, the impression has risen that many of the suggested changes do not add (sufficient) value to the ultimate aim compared to the disproportionate increase in the administrative burden that would result from these changes. The CCBE takes the position that changes should only be made if it is absolutely clear that such a change is necessary and proportionate and no other alternative measure could lead to the same result.

Risk Based Approach

6. The CCBE understands, as is referred to in paragraph 5 of the consultation paper, that the risk-based approach (RBA) has been included (in 2003) "*in a manner that would allow resources to be allocated in the most efficient way to address the most pressing ML/TF risks"* to introduce flexibility into the FATF Recommendations. Thus, the RBA would allow the institutions to select the transactions/services/customers which have a (lower/higher) risk to ML/TF, thus enabling the institutions to conduct made-to-measure cdd and monitoring.

7. Flexibility and the made-to-measure approach do not benefit from introducing new interpretative notes or from «*giving a more detailed and balanced list of examples of lower/higher ML/TF risk factors as well as examples of simplified/enhanced cdd measures*". RBA allows the institutions to conduct their cdd obligations in a made to measure manner, thus addressing the most pressing ML/TF risks. Introducing more and more lists of detailed examples will bring us back more and more to a rule-based "*ticking the box*" manner of cdd, which will lack the awareness of the institutions that may be so valuable in combating ML/TF risks. Increasing the alertness and awareness of those who may be confronted with anti-money-laundering is a far more efficient way to address the most pressing ML/TF risks. It is likely that lists of examples will result in more reports, not because the transaction involved actually has a ML/TF risk, but merely because one is afraid that in retrospect it could be argued that a mistake has been made.

8. It is the CCBE's opinion that a new interpretative note on the RBA will not increase the required awareness, but rather may lead to (more) unnecessary administrative burdens and will not assist the institutions to focus their efforts on cases that require attention.

Supervising and monitoring of the implementation by lawyers

9. As the money laundering risks experienced by each sector covered by the standards vary, so to will the application of the risk based approach between sectors. We believe that the relevant self-regulatory organisations will be better placed than the competent authorities to properly judge the adequacy of the risk assessments being made within their own sector and the effectiveness of the policies and procedures put in place to mitigate those risks. While the relevant Bars and Law Societies can review such material and still protect the fundamental rights around legal privilege, a competent authority cannot. As the FATF and courts across Europe have recognised the importance of legal privilege applying in the context of anti-money laundering compliance, we believe that only self-regulatory organisations should be permitted to supervise the legal sector for compliance with the risk-based approach.

(Domestic) politically exposed persons (Recommendation 6, 35)

10. Due to the very broad definition of the PEP, the obligation to determine whether or not the client is a PEP in practice is hard to fully comply with, even if one has the support of a professional private service provider that provides a PEP list.

11. Taking into account that the institutions already have the obligation to identify and verify their customers and, where applicable, the customer's beneficial owner in a risk-based manner, there does not seem to be any doubt that a person who would qualify as a PEP will be already identified and monitored carefully in the risk-based verification of the identification of the client and/or the beneficial owner. This goes all the more for a domestic person with governmental influence. Consequently, inclusion of the domestic PEP is not necessary.

    The CCBE therefore does not see any added value in such an inclusion. It is clear, however, that such a measure would disproportionately increase the administrative burden.

Third party reliance (Recommendation.9)

12. The CCBE welcomes the proposal to extend the third parties that can be relied upon to all types of institutions, businesses or professions as long as they are subject to AML/CFT

requirements and to effective supervision or monitoring. The purpose of this recommendation is to prevent double, and therefore unnecessary, customer due diligence.

13. As a consequence preventing double cdd and the fact that the party that can be relied on is a regulated party implies that the relying person can assume that the regulated party has carried out the cdd with sufficient effort and according to proper procedures. The relying person can also rely on the regulated party's risk-based approach, unless there is evidence to the contrary.

14. This should also imply that the relying person should not be held responsible if afterwards it turns out that the party that can be relied upon has made a mistake, unless the relying person should have been aware thereof. The relying party stays, of course, responsible insofar as new circumstances have occurred after the moment he relied on the other party.

Tax crimes as a predicate offence for money-laundering

15. The CCBE does not see any added value in including tax crimes as a predicate offence for money-laundering. It would frequently lead to difficult discussions regarding the line between a tax crime and legitimate tax planning. It would further lead to a lot of AML reports that would not result in further criminal investigations and, therefore, would not contribute to the FATF's purpose of mitigating serious crimes and preventing proceeds of serious crimes from being transferred, concealed and/or invested in the legal economy as if its sources were legitimate.

16. As the response of the Law Society of England and Wales clearly explains[1], money-laundering focuses on assets directly or indirectly derived from a predicate offence and a further act dealing with those assets for a specific purpose. According to FATF recommendation 1, countries should apply the crime of money-laundering to all serious offences and most countries comply with this recommendation. As a result, all conversion or transfer of assets for the purpose of concealing or disguising the illicit origin and all concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of those assets are considered to be money-laundering if the perpetrator knows that those assets are, directly or indirectly, derived from a serious offence. The FATF recommendations and the AML regulations aim at preventing assets that have an illicit origin being concealed (etc.) or invested in the legal economy as if its origin was legitimate.

17. If a person dishonestly fails to declare money from a legitimate income to the Revenue, that money (asset) has not been derived, directly nor indirectly, from a criminal offence and therefore does not fulfil the definition of money-laundering. He may commit a tax crime by not fully declaring his assets to the revenue, as a result of which he has retained (legally derived) money that he is no longer entitled to due to the tax regulation. The mere fact that this person does not comply with his obligation to declare his income fully to the Revenue, does not make the origin of the income illegal.

In addition, though punishable, these kinds of tax crimes can hardly be considered similar to serious, organised offences the recommendations aim at.

18. Furthermore, retaining money that a person is no longer entitled to due to his tax obligations leads to complex discussions as to which part of the person's income (asset) can be considered the specific part that has been retained as a result of the incorrect declaration. Ascertaining that a specific part seems to be a prerequisite of the definition of ML, it should be established whether that specific asset has been derived from a crime. Should it be accepted that retaining money that should have been paid to the Revenue leads to all income being tainted as derived from the tax crime, then every further expenditure from the income would qualify as ML. This would make it almost impossible for that person ever to conduct his affairs lawfully again.[2]

19. We appreciate that there are other types of serious tax crimes which occur when people submit false declarations for the purpose of obtaining payments from the revenue which they

[1] http://www.lawsociety.org.uk/productsandservices/antimoneylaundering/consultations.page
[2] See further as explained in the Law Society's response, page 22.

are not entitled to. MTIC fraud is one such example. Fraud is already listed as a predicate offence for money laundering in most countries and the money received can properly be described as being derived from the crime. Therefore the inclusion of tax crimes as a predicate offence in the standards is not required to ensure that money laundering charges can be brought against perpetrators of such crimes.

20. Furthermore, it should not be forgotten that most countries already impose significant penalties for all tax offences. This allows criminals to be sent to jail for lengthy terms, back taxes to be collected with interest and improperly claimed amounts to be recovered

21. Inclusion of tax crimes as a predicate offence in the view of the CCBE would not add any value to the combating of money-laundering, but would, on the other hand, lead to a lot of complex discussions as to whether or not, and to what part, an asset could be considered to be derived from an offence and as to whether or not it concerns legal tax planning instead of illegal tax evasion. Such inclusion would therefore unnecessarily increase the burden on the institutions.

Non-face-to-face business

22. While it is clear that a money-launderer might prefer not to be on the front stage and therefore may tend to limit his contacts to non-face-to-face contacts, it cannot be denied that at the same time legitimate non-face-to-face business and legal advice is not only a reality, but takes place daily to a very large extent. It is neither unusual nor suspicious. Considering mere non-face-to-face contact to be a high risk under all circumstances therefore seems to be incredibly disproportionate. The risk-based approach, included in 2003 to increase the flexibility of the recommendations, can play a very efficient role here and enable the private sector to focus on those cases that really represent a higher risk by combining a non-face-to-face contact with other circumstances or indications, such as the risk of the branch the client is working in, the risk of the service/product to be rendered/delivered etc. Focusing on cases where higher risks are expected will result in a more mindful monitoring of those actual higher risk cases and prevent a "ticking the box" mind which is far less efficient.

Conclusion

23. The CCBE will appreciate an early opportunity to comment on the next stage of the FATF consultation. In the meanwhile, please do not hesitate to contact us should the FATF require any further information or clarification on the above-mentioned comments.

Comments of the Council of the Notariats of the European Union (CNUE) on the *Consultation Paper, Review of the Standards – Preparation for the 4th Round of Mutual Evaluations*, FATF, October 2010

Introduction

We, the Notaries of Europe, welcome the offer made by the FATF to take part by providing suggestions in the process of updating the content of the 40+9 Recommendations in preparation of the 4th round of mutual evaluations.

Adjusting the intensity of the measures to the risk level (risk based approach) is a substantial improvement in terms of implementation, as it allows releasing resources and concentrating them where necessary. Nevertheless, it will not be easy to reach a comprehensive understanding of the risks present in all the transactions that can be performed before a notary, although it is our understanding that the risk assessment will improve our efficiency in preventing ML-FT. We are looking forward to working together with the FATF in order to produce a fair and comprehensive analysis on the risk level of the different types of transactions, as a key principle not only to improve efficiency but also to reach a framework for the common understanding of AML-FT measures among the EU notaries.

Some thoughts can be found in the next paragraphs on our perception of the global fight against ML-FT and their lights and shadows, in our view. Particular attention could be given to Recommendation 9 and the openness to new possibilities in order to make it more practical.

Role and position of the notary

The Notaries of Europe are aware that States tend to evolve toward models in which the very idea of order and public safety, economic and criminal justice, redraws the boundaries between public and private, and delegates what were traditionally public service responsibilities to structured intermediate entities in society that are capable of a reactivity that the public service is no longer able to match.
AML/TF rules reflect these policies.
In this model, the Notaries of Europe, representing an organic infrastructure -the worldwide system of civil law notaries serving the rule of law and faithfully interpreting the legal system-, given its natural tendency toward legality, transparency and the sure traceability of transactions, is able to and wishes to play a cardinal role in assuring legality. For this reason it is a natural partner for the State in programs intended to protect the legality and the security of the business and legal systems, since there is now a clear need for practitioners in close contact with the

public to collaborate with the State in assuring the public interest in matters relating to security and public order in the market.

Recent history has seen multiple examples where blanket guarantees have been abandoned and rights and liberties have been overridden in the name of security, this being the State's reaction, inspired by the goal of protecting collective security, to a sort of permanent state of emergency in the democracies. The effective level of protection of fundamental rights and liberties has noticeably fallen as States have felt the urgency of finding instruments better calibrated to the danger (the doctrine of "protected democracy").

The notariat is also legally charged with being the custodian of privacy and the business freedom of private individuals. In this role, it feels it is right to point out that the field of potential tension in the ML/TF area is a dialectic that recognises, on the one hand, the requirements of the public authority that is engaged in countering global threats and crime; and on the other, the legitimate demand of individuals that the aim should not be achieved at excessive cost or in violation of the private sphere or with interference by surveillance techniques.

Therefore, not putting into question the functioning and the decision-making process of democratic states, what concerns the notariat as much as the affirmation of legality, because it is the other face of the rule of law, is finding a suitable balance between the effectiveness of repression and the protection of the individual, within a framework of renewed but intact legality.

Even knowing that it falls outside FATF responsibilities, European notaries, having had delegated to them vicarious public competencies that would normally be those of the public administration, nevertheless call for the consideration of the following principles and statements:
-that their involvement be commensurate with the skills and talents they can bring to bear if used in an appropriate and sustainable manner;
-that the system should not be pointlessly onerous, and that models of ML/TF tracking and repression should be avoided in which professionals are charged with tasks and objectives that are beyond their abilities, their culture and their reach, given that there is a lack of means, powers and/or a vocation for enforcement (it would be more logical to base the approach on the concept of "interviews" and "questionnaires");
-that the notarial profession be used in the role of sentinels, as much as this role may match the core of the functions performed by the notary or other complementary measures which may fit this core activities.

In combating ML/TF, police forces and judicial authorities have to be able to count on the information provided by the holders of the data.
But it must be stated plainly that this type of processing must follow a few basic rules in order to be considered just, including the following:

-*legality and prior determination* of the basic legal framework (Article 8, Paragraph 2 of the European Convention on Human Rights and Fundamental Freedoms): any interference in the individual's private life must be in accordance with the law, whose effects are foreseeable.
-*principle of proportionality*: the data must be adequate but not excessive in relation to the scope of an inquiry and take RBA into account, avoiding the "*you never know*" mentality instead of the correct mentality that limits itself to a "*need to know*".

(...)
In the consultation paper under discussion, there is no assessment of the impact of the AML programs on the professionals obliged to cooperate, whereas that is an essential aspect, given that the new rules have been imposed on them by law with the risk of heavy penalties, so it is time to ask whether the effect of the action on those obligatorily involved is being expressly addressed: these considerations reflect the policies proposed by the worldwide assemblage of notaries in Marrakech (October 2010) for the 26th International Congress of the Latin Notariat (UINL), where the professional sessions concentrated on the subject of "Collaboration of the Notary and the State in facing the new challenges of society: transparency of financial markets, money laundering, urbanisation, environment".

On Recommendation 5

The RBA refers to a flexible approach, but only with reference to measures that are commensurate with the ML/TF risks. Proportionality is used as a synonym for suitability for neutralising the risk.
This model,
- release some workload previously done by the notaries, as not all the CDD measures will have to be always fulfilled. This is a clear improvement that will allow notaries to apply more intense measures in those areas or situations where the risk level is high.
- allows us to be more efficient in allocating resources and work,
- obligate us to make a thorough risk assessment, not necessarily the same as the one produced by the rest of the legal professions, something which is not an easy task, but will undoubtedly bring benefits to the notaries, once completed.

(..)

On Recommendation 6

Assuming the principle that foreign PEPs are of a higher risk, Recommendations should make it mandatory for the country to produce and update a reliable list of its own PEPs, publicly available. Otherwise, the impact of the cost of buying a list for small DNFBP, such as a notary, is simply unaffordable if the notary is required –as it seems to be the case- to perform some diligence on this particular point. If an official, public list cannot be made available for this purpose, a simple declaration by the client

could be sufficient. It would simply not be possible to get both aims at the same time: to make the notary perform diligence to find if a customer is a foreign PEP and, at the same time, not to be able to provide reliable tools and sources for that purpose.

On Recommendation 9

Certainly all notaries from countries that are members of the NGO UINL (International Union of Notariats, http://www.uinl.org) (36 in Europe, 23 in the Americas, 18 in Africa, 4 in Asia), offer the necessary guarantees to qualify as *reliable third parties* since admission to the Union is conditional upon thorough verification carried out by national professional representatives and the relevant governments to ensure that the laws and the professional organisation comply with the standards of reliability and public confidence that are the hallmark of the notary public's function (the definition of notary is that of *civil law notary* as recognised in *FATF, RBA GUIDANCE FOR LEGAL PROFESSIONALS (2008), ANNEX 2 - Glossary of Terminology*, under *"Legal Professional" - "civil law notaries").* A further condition is that their countries must have adopted AML/TF rules in line with the FATF guidelines.

In this respect, consideration should be given to modify the rule by which the responsibility of an obliged person when relying upon a third party is not transferred to the one relied. It makes full sense to keep this principle in those situations where the relied person is not an obliged one by AML-FT regulation. However, it would be wiser to modify this principle whenever the relied person is also subject to the same AML-FT framework: responsibility should be transferred to the relied person in this particular case. Guided by the natural caution in the inception moment, this current rule is now limiting the real development and use of the reliance techniques in practice. In doing so, some of the CDD obligations could be performed by those obliged persons that are in a better position to apply them, producing at the same time a real profit for the whole system.

Vienna, 14 January 2011

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ECA observations on FATF Consultation paper: the review of the standards – Preparation for the 4th Round of Mutual Evaluations

1. Introduction: the European land-based casino industry is subject to strict regulatory and licensing regimes

The FATF guidance for casinos reflects a broad variety of knowledge and experiences from operators and regulatory bodies. All the aspects from the Casino industry, that could have any relation to money laundering or terrorist financing, regardless whether important or not, realistic or not and possible under the existing regulations or not, are covered by the very general language used throughout the whole document.

However this very broad approach gives many of our members the feeling, that the guidance puts an additional, unsupportable and ineffective burden on our industry.

We are convinced, that compared to the Finance Industry and other DNFBP's, the abuse of casinos for ML/FT is rather rare and the amounts involved are small. The dangers for the Casino industry, at least under the European conditions, are no bigger than for many other industries or gaming operations that are not covered by the FATF recommendations and guidance.

The general, but mistaken view, seems to be that land based casinos in general may represent a very high risk for high-value ML/FT.

The biggest risk related to gambling operations lies within the ownership. If criminals become owner or a major shareholder of such an operation, all the doors are open for ML/FT in substantial amounts. Here lies the real danger and this fact has certainly heavily damaged the image of our industry in the public eye. Also Europol admitted that the risk of Organized crime (I don't know what this means) is most prominent through ownership of gaming companies.

In Europe however the licensing system for land based casinos and propriety checks are 100% effective and under control.

In this context, we would like to draw your attention to the risks, that a certain trend for liberalizing the gambling markets will bring regarding ML/FT. A sole country of origin control does, as recognised by the Court of Justice of the EU in the Liga Portuguesa de Futebol case (C42/07), not provide the necessary guarantees for the integrity of the operations. The ECA supports this view.

We fail to see, how an effective control of the ownership and the other operational aspects should be tackled by the national authorities if hundreds of internet gambling operation licenses would be prescribed in order to assure an open market. Even more so when these companies deliver their „services" from third countries, which have been poorly regulated and are driven by the off shore revenues. The current rules do not sufficiently consider the serious problems and higher risks caused by the independent (this is not related to any land based licensee) on line gambling industry who are currently not regulated by the 3rd EU AML Directive.

We just would like to remind that for our operations, many laws, rules and regulations, obligations and controls existed long before we started our businesses.

2. FATF threshold for Casinos

ECA welcomes the risk based approach in comparison to a rules based approach since it is more cost and resource efficient. A rules based approach is very inefficient since 99.9% of the cases that need to be examined (and checks that need to be carried out in that regard) do not entail any risks. Less time can be spend to the cases in which there is a real risk for money laundering.

Although ECA welcomes a risk based approach which is installed by FATF in its recommendations, it has to be noted that in practice, casinos need to comply with a mixture of risk and rules based approach. Indeed, the Third money laundering directive entails a rules based approach, which is too time and resource consuming. In practice, casinos do not experience the flexibility of the risk based approach. Therefore, the risk based approach should be enhanced even more.

Unfortunately, considering the FATF threshold from 3.000 US$/EUR that FATF usually applies for Casinos, a risk-based approach will not be of use.

In the actual version of the guidance, we only distinguish a general obligation for enhanced CDD that is unique for our sector, compared to the other DNFBPs. We believe that this could not have been the FATF's intention.

Paragraph 115 states that enhanced CDD measures have to be applied to all customers who reach the 3.000 US$/EUR threshold.

Yet, according to the guidance on the RBA, the level of risk should decide which measures are to be taken. As stated in Paragraph 41a, enhanced CDD should only be required if higher risks are identified; as for lower risks, the required measures may be reduced or simplified (Paragraph 41b).

We would like to invite the FATF to reconsider this threshold which, in our opinion, makes no sense in relation to the RBA.

In Europe, this guidance together with the 3rd EU AML Directive, would oblige every Casino, no matter if a ML/FT risk was identified or not, to CDD all the customers who buy or sell chips worth 2.000 € or more (or, alternatively, to CDD every customer), and to enhance CDD for all customers who carry out financial transactions, at once or combined, from 3.000 € on.

Moreover, such a threshold approach is not consistent with many other parts of the guidance, e.g. Paragraph 29: "Applied effectively, the approach should allow a more efficient and effective use of resources and minimise burdens on customers and counterparties."

We recommend to set the threshold to 15.000 € for enhanced CDD on all transactions where no higher risks are identified, just as for the other DNFBP's.

3. Observations regarding specific recommendations

New technologies and non-face-to-face business

Very important since it concerns the discussion regarding the regulation of online games. The risks are very high regarding online games, especially in a non-regulated environment. One can argue that in an online context, all transactions are always traceable, but this does not mean that they are controlled as most of them are unregulated or poorly regulated. A strict regulatory approach of on line gambling is necessary in this regard.

Legal persons and arrangements – customers and beneficial owners

This is not really applicable for casinos, especially not the small ones. Very rarely it can happen that somebody uses 3 or 4 persons to play, and collects the money for himself at the end of the day. It should be mentioned that this risk is very low for the ECA members.

Politically exposed persons

This is again a rules based measure which is inefficient and impossible to apply. This is politically a very important problem and involves both domestic and foreign political persons. As a general statement, it should be emphasized that it should be the governments coming up with a list of such persons and not the operators. It is not possible to put the responsibility on casinos (and other operators) if the authorities are not able themselves to provide such a list. Small casinos cannot bear this burden.

Tax crimes as a predicate offence for money laundering

A distinction should be made between real criminal money (used for terrorist activities, generated by drugs and other trafficking etc.) and between money 'generated' by tax fraud by smaller companies.

AML measures are an important tool to fight the severe forms of crime. Their purpose is not to be applied to a simple tax evasion by small companies etc.

Federation of European Accountants
Fédération des Experts comptables Européens

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17 December 2010

Ref.: AML/HvD/HOL/MBR

Dear Mr President,

Re: FEE Comments on the FATF Consultation "The Review of Standards - Preparation for the 4th Round of Mutual Evaluations"

I am pleased to provide you the comments of FEE on the FATF Consultation Paper "The Review of the standards - Preparation for the 4th Round of Mutual Evaluations".

FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 43 professional institutes of accountants and auditors from 32 European countries, including all of the 27 European Union (EU) Member States. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 500.000 professional accountants, working in different capacities in public practice, small and big firms, government and education, who all contribute to a more efficient, transparent and sustainable European economy.

FEE commends the FATF for having put in place a consultation of stakeholders on its proposals to amend the Recommendations through the Consultative Forum. It welcomes the opportunity to provide additional written comments.

Our positions are influenced by the fact that the European Union approved the Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, generally referred to as the Third Anti-Money Laundering Directive, that implements and in some instances goes further than the 40+9 FATF Recommendations. In transposing the Directive in their national legislation, some EU Member States already put in place measures that are proposed in the consultation.

We understand that the current review aims at maintaining the necessary stability in the standards while addressing new or emerging threats and any deficiencies or loopholes in the current FATF standards. We also noted in paragraph 3 of the Consultation Paper that further issues will be considered in the year ahead on which further consultation will be organised.

1. The Risk-Based Approach (RBA)

FEE supported the adoption of a Risk-Based Approach (RBA) and contributed to the FATF guidance on RBA for the accounting profession. FEE believes that the standards must remain principles based and avoid recommending rules-based procedures leading to a rarely effective "ticking the box" reaction of Designated Non-Financial Business and Professions (DNFBPs).

Therefore, FEE supports the introduction of a single comprehensive statement on the RBA, which could be incorporated into the FATF Standards as a new Interpretative Note. We would like however to make following observations:

- The general principles set out in the Interpretative Note should be sufficiently clear and precise, especially on definitions so that a consistent implementation is made possible;
- A list of examples can be useful in the Interpretative Note but FATF must be very careful in drafting the text to avoid that this list is misunderstood and interpreted as a rule. Considering the Recommendation as the Standard, it should be limited to setting the principles; examples should not be part of it.
- FATF should consider that solutions applicable to financial institutions are not per se applicable in DNFBPs. In particular, consideration should be given to the different situation of those professions which are not handling money.
- FEE very much agrees with Recommendation 20 which provides that "countries should consider applying the FATF Recommendations to businesses and professions, other than designated non-financial businesses and professions that pose a money laundering or terrorist financing risk". We would observe however that the concept of profession is not always very clear. For example, in some countries, accounting (by opposition to auditing) is a non regulated profession or a partly regulated profession. If the entire activity is not covered, this represents a loophole in the system and also to some extent an argument for unfair competition.

2. Recommendation 5 and its Interpretative Note

The main changes proposed relate to the Note and address the clarification of requirements regarding legal persons and arrangements and the definition of customers and beneficial owners.

Introducing more clarity regarding the information that is necessary in such circumstances is certainly supported. However, here again we would like FATF to be as precise as possible on definitions. The concept of "mind and management" of the legal person or arrangement could be clarified.

It would be useful to introduce into the concept of beneficial owners generally, the idea that a class of beneficiaries who may have no control can qualify as a beneficial owner.

FEE welcomes the objective to clarify the measures that would normally be needed to identify and verify the identity of the beneficial owners for legal persons and legal arrangements. Greater emphasis on understanding the ownership and control structure of legal persons and arrangements can be supported. However, it must be clear that there are limits in what accountants or auditors can do to identify the beneficial owner.

In a one-off transaction, it the professional could possibly raise the question with the client and if he is not satisfied with the answer, refuse the business. This is very different when the professional has an ongoing relationship with the client. The professional can provide services to the company without being aware that ultimate beneficial owner of a company has changed. If he has to carry out Customer Due Diligence (CDD) on that issue, there should be some indication on the periodicity of the procedure, even in a RBA.

We appreciate the reference to "reasonable measures". It must be clear that a professional does not have the investigation powers of criminal authorities to identify the ultimate beneficial owner. This is even more obviously the case in cross-border cases. This situation is not necessarily liked to dispersed ownership but also to a pyramid mechanism or other structures precisely designed to conceal the ultimate beneficial owner.

3. Politically Exposed Persons (PEPs)

The proposal is to widen the category of PEPs to domestic PEPs. However, taking into account the fact that the money laundering risks differ, depending on whether the customer is a foreign or a domestic PEP, the FATF is considering to require financial institutions to take reasonable measures to determine whether a customer is a domestic PEP; and to require enhanced CDD measures for domestic PEPs if there is a higher risk.

FEE underlines that domestic PEPs are already included in the AML legislation in several EU Member States and does not see major difficulties with the proposed evolution.

In our views, all PEPs could be treated in the same way, i.e. there would be a presumption that enhanced CDD would be required whether domestic or foreign, but that the CDD required could be rEduced on a justifiable risk appraisal. Care is needed in terms of the reference to when family members are involved, or a close associate, as the approach proposed appears somewhat circular.

4. Third Party Reliance

FEE believes that the sectors on which reliance can be placed safely depends on the maturity of the sector concerning AML and so should be defined country by country in practice. The existence of a supervisory authority able to verify the existence of group policies is an important pre-condition for intra-group reliance.

5. Tax crimes as a predicate offence for money laundering

The FATF is considering including tax crimes as a predicate offence for money laundering in the context of Recommendation 1.

The EU Directive already includes tax crime in the scope of the AML legislation. However, in a survey carried out by FEE in 2008, we observed that the Directive has been transposed very differently among the EU Member States. This results for example in wide variation in the number of reports of suspicious transactions.

FEE believes that, to be effective and supported by those who have to apply them, AML legislations should focus on cases of serious and organised crime. It may sometimes be difficult in practice to clarify a tax treatment as a predicate offence for money laundering. We also recommend being as precise as possible in the definition, especially when related to the scope of the AML measures to be applied by financial institutions and DNFBPs.

6. Other amendments

At this stage, FEE has no comments on other proposed amendments to the 40+9 Recommendations.

Yours sincerely,

Hans van Damme
President

VIA E-MAIL

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Re: Comments upon Consultation Paper – The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations

17 January, 2011

1. Introduction

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies.

The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world.

It has a membership of more than 40,000 individual lawyers and 197 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community.

The Anti-Money Laundering Legislation Implementation Group (AMLLIG) is a specialised working group of the IBA's Public and Professional Interest Division. The group focuses upon the challenges for the legal profession presented by compliance with anti-money laundering legislation throughout the world. The aims of the group are to:

- seek a dialogue with the Financial Action Task Force (FATF), the European Commission, local regulatory bodies, bar associations and others to share information and encourage greater co-operation and co-ordination and to ensure the special role that lawyers play in society is both fully recognised and appropriately addressed in any existing and proposed legislation;
- monitor all legislative and regulatory anti-money laundering requirements affecting lawyers worldwide;
- analyse the impact on law firms and private practitioners of the implementation of the FATF Recommendations and Standards, the EU Money Laundering Directives and other national and international legislative initiatives;
- ensure appropriate awareness of legal professionals around the world of legislative developments, both internationally and nationally, that apply to them as lawyers and of the issues that may be encountered as a result of money laundering by their clients; and
- act as an information resource through our website - www.anti-moneylaundering.org - for practitioners and academics to promote greater awareness of the implications of anti-money laundering regulations as they impact lawyers.

The IBA's Anti-Money Laundering Legislation Implementation Group is hereafter referred to as IBAAML. IBAAML welcomes the opportunity to respond to FATF's review of the standards in preparation for the 4th round of mutual evaluations.

IBAAML recognises that money laundering is a significant issue and publicly supports action to prevent it. IBAAML strongly believes that lawyers should never knowingly assist criminals in concealing ill-gotten gains. Lawyers found guilty of breaching laws against money laundering should in no way be protected or supported by the legal profession. Evidence that has been provided by some FATF members and organisations such as Global Witness that are used to support the case that lawyers are actively involved in money laundering. In virtually all of these instances, lawyers are indeed involved in money laundering but these are corrupt individuals who happen to be lawyers and who are knowingly involved and who should be subject to relevant criminal laws for direct involvement in crime and/or money laundering. Placing a reporting obligation on such persons will not result in them diligencing and reporting the clients with whom they are conspiring with and/or committing criminal acts in conjunction with. We would strongly support a clear and formal addition to the evaluation process by which member states were required to share with FATF and to publish for the benefit of the regulated community examples of the unwitting involvement of lawyers and other gatekeepers. We think this would be an extremely important step forward in identifying in an extremely practical way the areas where lawyers should be focused in the fight against money laundering.

IBAAML is concerned that the FATF standards, and the application of those standards in many countries, are not sufficiently focused to produce the most proportionate and effective contribution by lawyers to the aims of an effective anti-money laundering regime and, as applied to lawyers, fail to properly respect client/lawyer relationships and the role of lawyers in upholding the independent rule of law. This concern has been supported by judgments in various countries; most notably Canada where the application of the standards to lawyers has been rejected by the courts.

The standards were designed for financial institutions, with lawyers subsequently being identified as "gatekeepers" and the standards applied to them. However, little consideration was given to the different nature of the relationship between lawyers and their clients resulting in inefficiencies, confusion to clients (on a global level) and significant costs. These negatives must be weighed against a lack of evidence that lawyers are unwittingly supporting money laundering on a scale that warrants such negatives (on top of the costs and actions undertaken in connection with the same individuals and transactions by the financial sector).

If the standards are to continue to apply to lawyers (and other gatekeepers) IBAAML would strongly support a much more extensive "Risk Based Approach"; not just to some aspects of the customer due diligence measures but to all aspects of the money laundering regime. In addition, much more emphasis needs to be placed on avoiding duplication of the actions required by the standards among several regulated entities by undertaking a complete review of reliance as we suggest further below.

2. General comments about the consultation

IBAAML was pleased to be represented at the consultation session held in Paris on 22 Nove mber 2010 and is pleased to have a continuing dialogue with FATF. In

addition to the specific points that we go on to discuss below, we would initially like to make some general comments about the consultation process:

- We encour age FATF to consider how they could make the consultation process more interactive in a meaningful way. We believe there was an impression on the part of the private sector that the session in Paris was merely a reporting of what FATF had already decided to do on several issues, rather than an intercha nge of ideas as to what should be done. Similarly, reading through the consultation document, one is given the sense that decisions have already been taken on what changes may be discussed and even how some of those changes will be made. This all suggests that there is little scope for the private sector to provide suggestions for how the standards could be refocused to promote more effective and efficient engagement from the private sector. We believe it is vital to the effectiveness of the prop osals for F ATF to bett er appreciat e the pract ical implications for the private sector.

- As is common in most regulatory and consultation situations, a regulator should at some stage during the consultation process issue draft regula tions and/or changes thereto that are also consulted upon with the regulated. There are many instances of regulators proposing wording which has unintended consequences, fails to achieve its goals and/or is unclear to the regulated - it is therefore usually a benefit to give the regulated a chance to comment upon the actual wording . A process that presents language as "final" short circuits the consultativ e process and preclude s the adoption of language that truly reflects a balance of private and public sector interests and goals. While in principal some of the proposals may seem attractive generally, there is a real risk that in translating these into detailed standards, the specific wording may produce unint ended consequences which consultees (and FATF itself) would not have supported. We would encourage FATF to consider how this can be done in the context of its consultation processes. We would note that this was well done in the context of its consultations on the RBA Guidance.

- We are further concern ed that the private sect or are asked to effectively sign up to some changes in principal, wit hout a clear idea of how that change will in fact be implemented . A clear ex ample of this is at para graph 16 of the consultation document, where consultees are asked to comment upon lists which have been drawn up but are not provided.

- As we noted in Paris, we are concerned about the proposed timetable for the second pha se of consultation. It appears that this will take place fo llowing completion of "initial consideration" in July 20 11, it would therefore appear unlikely that there would be public consultation until say, September and FATF have indicated th ey would expect to con clude the re vision in October 2011. We are concerned therefore that there will be no meaningful consultation on these further issues and would ask FATF to reconsider the timing.

- As we also stated in Pa ris we think it is unhelpful that there are two sets of consultation involving is sues that are in many instances closely inter-related. We mentioned and would repeat again the fact that it is hard to come to conclusions with regard to beneficial ownership, without at the same time

understanding how changes might be made and/or how member states might be encouraged to take more actions pursuant to Recommendations 33 and 34. Accordingly, we would ask FATF to ensure that there is an opportunity to further consult fully on these issues from the first round in the second round of consultation.

3. Interpretive note on the risk based approach

IBAAML notes that extensive work has already been undertaken to produce the RBA guidance on the risk-based approach for the legal sector (and other sectors). IBAAML has long been supportive of the risk based approach in anti-money laundering compliance. Due to the varied nature of anti-money laundering risk, IBAAML greatly appreciated the fact that FATF accepted the need to produce sector specific guidance on the risk based approach to customer due diligence. IBAAML was pleased to have been able to contribute to the preparation of the RBA guidance on the risk-based approach for the legal sector. However a number of issues that are covered by the consultation touch on the risk-based approach and it is unclear whether the extensive work that has already been carried out on the RBA guidance is now being side-lined and/or amended without the full involvement of the "sectors".

The current proposals seems to be promoting a return to a one-size-fits-all approach, while duplicating provisions contained elsewhere in the standards. In light of some FATF countries applying the standards at their most stringent, gold plating them and then adding criminal sanctions for breach, we are concerned that this approach will undermine the effectiveness of the risk-based approach and the work already undertaken with the provision of the sector specific RBA guidance.

In terms of the focus on risk assessments in the proposals, FATF need to consider the size, complexity and resources of the vast majority of the regulated entities to whom their standards apply. While there are a number of large multinational banks, the vast majority of lawyers and law firms are very small to medium sized "businesses". Again, this demonstrates the fact that standards that are applicable to the financial sector are being equally applied to sectors where the standards simply do not take account of the differing nature of the work carried out and the nature and size of the entity carrying out the work. Many law firms around the world have fewer than 4 partners and therefore do not have the resources to be able to conduct detailed risk assessments. It should not be unacceptable for them to take a more generalised risk based approach to the areas of law in which they specialise and limit their focus to particularly unusual clients. This approach has been recognised in the RBA guidance for the legal sector. We would be concerned if such proportionality were to be lost through a new interpretative note.

In terms of the risk management and mitigation proposals, this in essence duplicates but slightly changes Recommendation 15. This approach seems inconsistent, particularly as Recommendation 15 is not being consulted upon. The requirement for senior management to sign off on the policies, controls and procedures initially appears to focus on promoting greater buy-in from senior management to anti-money laundering compliance. However, in practice, mandating this requirement may lead to over complicating the compliance approach. It is also unclear as to how this additional requirement will have any real practical consequences in terms of tackling money laundering. It is another administrative measure which adds to inefficiencies and costs whilst having limited benefit in terms of combating money laundering. It also ignores the fact that most law firms do not have a management structure in the same way as a bank or another corporation.

We would also suggest that any reference to policies and procedures complying with guidance should be to the RBA sector specific guidance.

As we mentioned as part of the preparation of the RBA Sector's specific guidance we think it is important that FATF takes every opportunity to emphasise to regulators in individual countries a need to have a fair and proportionate approach to a risk based approach by the regulated and not to seek to second guess with the benefit of hindsight. In the context of preparing for the fourth round of mutual evaluations, we would suggest there is some merit in FATF considering a way of confirming that the approach by the regulators in a country truly and completely supports the risk based approach and is not indirectly encouraging a tick box approach through unduly formalistic requirements and/or a hindsight mentality.

4. Amendments to Recommendation 5 – client due diligence

4.1. High and low risk situations

As mentioned above, IBAAML is concerned at having to respond without being provided with the pre-decided lists of high and low risks . As emphasised above, we are concerned that this approach does not make for effective and complete consultation, and it is in the detail that problems or issues often present themselves.

IBAAML strongly supports the idea of more information being provided on different risk situations – based on real typologies of unwitting involvement - but queries whether the standards and interpretative notes are the most effective place to provide that information. As FATF has accepted, anti-money laundering risks are varied for the different sectors and even between regulated entities within sectors and there is a risk that specifying that certain types of clients, services or jurisdictions will always be a higher risk for all regulated entities and all of the services they provide moves away from the risk-based approach to a more rigid process-driven approach.

As we reiterated at the Paris Meeting it would be helpful for FATF to provide typologies where lawyers are being used unwittingly to facilitate ML/TF. The legal profession has repeatedly requested these typologies so as to assist the profession in understanding the vulnerabilities of the legal profession to ML/TF.

A clear example of a too rigid approach is the current treatment of politically exposed persons (PEPs) on which we elaborate further below. Essentially the theory is that PEPs are at greater risk of money laundering because they have more power and greater access to government funds than for the average citizen. However that does not mean that all PEPs in all jurisdictions are corrupt. Where a PEP is carrying out an ordinary course transactions, such as buying a family home, there is no greater money laundering risk than that of a purchase of a family home by an ordinary citizen. Yet because PEPs have been singled out in the standards as a specific high risk indicator, regulated entities are required to conduct enhanced due diligence and monitoring irrespective of the real risk of the individual client and the individual transaction. The matter should be left to a complete risk based approach. The approach that we currently have is very much a rigid process driven approach which disregards the real risk in the particular circumstances. The basic risk based approach should also apply to PEPs. This will be even more essential if, contrary to our views, domestic PEPs are included.

We believe that rather than producing lists of high-risk situations, a more "in-principle" statement about dealing with higher risk situations would be appropriate, while leaving provision of information about what could, in certain circumstances, constitute higher risk to methodologies and sector specific guidance.

4.2. Beneficial ownership

IBAAML accepts that sophisticated criminals may seek to hide behind business structures and agents to help facilitate money laundering. For this reason we appreciate that a greater understanding of the client's ownership and control structure can be of use to regulated entities so as to better understand the motivation behind transactions and spot anomalous activities or relationships which may be indicative of money laundering.

However, the existing standards require regulated entities to actively seek out an individual at the top of a corporate tree with the requisite interest, irrespective of the inherent risk posed by the client or the transaction. Often this results in the firm simply confirming that there is in fact no such beneficial owner in existence.

This failure to fully apply a risk based approach to the identification of beneficial owners is of significant concern to IBAAML, in part because of the waste of resources for both the regulated entity and the client and because such investigations very rarely result in the regulated entity having a money laundering suspicion. We are pleased that FATF are looking at the proportionality and effectiveness of the client due diligence requirements as they apply to beneficial owners and strongly believe that a risk based approach should be adopted.

Comments on the key issues are set out below:

4.2.1. Agency

The existing standards already require that you identify your client and the beneficial owners, which includes a person on whose behalf the transaction is undertaken. This clearly covers agency situations although the focus is on identification, to reduce the risk of criminals using false identities and money mules to help in the concealment of the proceeds of their crime.

However to go further and insist upon obtaining evidence of authority to act, is to create an entirely new legal burden on parts of the private sector. It is confusing client identification and verification with corporate authority. This is primarily an issue for contract law. To make it a legislative requirement, potentially backed with criminal sanctions, is a clear example of inappropriate regulatory "creep" and obtaining such confirmations will not have any material bearing on the fight against money laundering.

4.2.2. Mind and management of the firm

The absence of clear drafting proposals on this issue makes it difficult to comment although the general impression given is that the task of identifying and verifying beneficial owners will become less pragmatic and risk based. The current proposals appear to continue to require firms to search for one or more named individuals who control the entity in addition to searching for some other person or group of people who may be considered to be the

"mind and management" of the entity, even though they possess none of the classic indicators of control.

In practical terms, it is difficult to understand how regulated entities might approach this and get comfortable that they have taken all the necessary steps in order to comply with the obligation. Information on control rights such as voting rights is often difficult to obtain in any event and with the requirement to seek customer due diligence information in advance of undertaking business, the task becomes almost impossible. How does FATF propose regulated entities actually carry out what is suggested? How does FATF propose regulated entities can be confident they have made appropriate endeavours to comply such that they can withstand scrutiny from regulators?

We would encourage FATF to engage in detailed consultation with the private sector to look at ways to actually address the real issues around beneficial ownership in a way which is practically achievable, proportionate and effective and which is then clearly drafted into any proposed change.

4.2.3. The practical problems

IBAAML is supportive of the provision in Recommendation 5 which enables regulated entities to verify the information on beneficial ownership by non-independent means, because often it is the only way in which one can actually comply with the requirements.

In practice, much of the beneficial ownership information that might be required is not available through independent channels. If FATF were to conclude that beneficial ownership information should be independently provided then the only realistic way this could be achieved is through government involvement and legislative change at a national level. Clearly making governments responsible for collecting beneficial ownership information would not only facilitate the identification process but, more fundamentally, would be a very important step in the fight against money laundering. The requirement to provide such information and the governmental scrutiny that would go with it would deter criminals from using complex structures. Given that many governments have expressed their unwillingness to get involved in the process of providing independent information IBAAML is extremely concerned that regulated entities will have to seek independent information without the assistance of government at much greater cost to the private sector and that even after incurring such costs the information may simply not be definitively available from an independent source. IBAAML is concerned that the collateral benefits of governmental responsibility has not been fully aired and considered.

Where there is no ability to independently verify beneficial ownership information, what is the efficacy in taking the time to collect information which could turn out to be completely false? The lack of reliable information tends to result in regulated entities seeking numerous documents, irrespective of the risk presented, in an attempt to understand the structure but without actually being able to confirm its veracity.

The multi-layering of business entities is a reality of global corporate life. For lawyers operating in an international context they often find themselves following a corporate chain of not merely two or three levels, but of many more. At this point, even the most forthcoming and well meaning client is

unable to assist in identifying the ultimate individual who beneficially owns them, possibly because one simply does not exist or because if they do, they are so far removed from the client that actually they do not exert any real control over the client or their transactions. Needless to say, many reputable clients fail to see the relevance or benefit for themselves or the fight against money laundering in providing such information. Law firms acting in a global market place, where other lawyers either have no requirement to undertake these checks or do not undertake them diligently are finding that this can be a disincentive for international clients to instruct them, all other things being equal. This clearly has a potential impact on global competitiveness and merely drives the activities of criminals intent on money laundering to those jurisdictions.

Added to the above, there is also the issue of costs of beneficial ownership CDD, which in many cases far outweighs the benefits. Huge amounts of time and money are spent in collecting evidence that only in extremely rare situations lead to any suspicion that the client is involved in money laundering.

4.2.4. Suggestions for change

In light of these practical problems IBAAML would advocate the following changes to Recommendation 5:

1. Subject to 2 below, identification of beneficial ownership, rather than just the verification of such ownership, be permitted to be undertaken on a risk-sensitive basis
2. A greater focus be placed on the existing requirement to understand the general ownership and control of the client, rather than a specific pursuit of named natural persons, unless there are other warning signs of potential money laundering.

We believe that this approach would ensure that regulated entities would still be required to understand who their client is, but would limit the resource intensive profiling of clients ownership chains to those situations where there is some evidence of a real risk of money laundering.

We do not believe that a requirement for regulated entities to establish the 'controlling mind' of the organisation will be more effective and we believe there will be significant practical challenges in applying such a requirement.

These views are of course subject to reviewing any proposals for change regarding Recommendations 33 and 34.

4.3. Life Insurance policies

IBAAML welcomes the proposals to refine the application of client due diligence requirements for life insurance policies and to understand that beneficiaries under the policies are not beneficial owners or customers as currently understood within the standards. It would be helpful if similar consideration would be given to trusts as similar principles apply. We hope that a similarly pragmatic and effective approach will be offered in the consultation on Recommendation 34.

5. Amendment to Recommendation 8 – high and emerging risks

5.1. Non face-to-face requirements

IBAAML welcomes the review of the blanket assessment of enhanced money laundering risk for non face-to-face clients. In the modern world the conducting of business at a distance is a reality and the vast majority of such transactions are legitimate. Different sectors will be exposed to non face-to-face risk in different ways and will have different ways of effectively mitigating that risk, for example by enhanced monitoring rather than obtaining more information. Non face to face clients should not automatically be assumed to be high risk but should be assessed on a risk based approach. We would also suggest that this does not require mention in an interpretive note, but would be more appropriately addressed in typologies and sector specific RBA guidance.

5.2. Risks of new technologies

, IBAAML is concerned that FATF should not seek to be too prescriptive in the standards on the issue of the risks posed by new technologies. The private sector who develop new technologies are well placed to aid government and law enforcement in identifying risks and suggesting appropriate steps to mitigate those risks. The detail of the steps to be taken to mitigate these risks should be included in typologies and sector specific RBA guidance not “hard wired” into standards.

6. Amendment to Recommendation 20 – application to new entities

It is not clear from the consultation what ‘other financial institutions or businesses’ exist which are not already covered by the definition, or which might to be covered by the proposals for a quite wide right to extend the scope of the standards. IBAAML is concerned about the risk of regulatory “creep” being permitted by FATF without clear evidence of specific risks and an indication that the application of the standards will assist in mitigating the specific risks.

7. Amendment to Recommendation 6 - politically exposed persons

Recommendation 6 requires all firms to apply enhanced due diligence on all foreign politically exposed persons (PEPs), irrespective of the risk posed by the individual PEP or the specific transaction. As highlighted already, this non-risk based approach is costing lawyers large amounts of money, providing practical difficulties in terms of establishing source of funds, and at times limiting the provision of legal services to legitimate individuals.

7.1. Evidence of the threat posed by PEPs

Research from the World Bank suggests that between US$20 billion and US$40 billion is taken from developing countries by corrupt leaders and applied for their own

personal use, outside of their home country. However, that research, while not attempting to quantify the number of PEPs, acknowledges that not all PEPs are corrupt. In fact most are not and those that are, are likely to be a small percentage of PEPs.

Despite the suggestion that this is not a general problem but limited to corruption by a small number of PEPs in higher-risk jurisdictions, there is a call for greater action on the part of regulated persons, to tackle the 'risk' of money laundering by all PEPs.

At present, it is IBAAML's view that there is no evidentiary-based assessment of the actual risks posed by PEPs of money laundering, to enable a proper assessment of how to effectively and proportionately tackle those risks. Accordingly, IBAAML is strongly of the view that PEPs should be dealt with on a risk-based approach that can take into account, on a reasonable basis, the risk presented by that particular PEP or that class of PEP (eg from a particular jurisdiction) as a result of which some will be low risk and can be treated "normally" whereas some will be high risk and require additional information.

7.2. Government lists

All of the persons who fall within the definition of a primary PEP are appointed by government. In making those appointments government will generally undertake checks on the background of those persons, both in terms of their family members and business associates and their income and assets.

It has long been recognised that governments are the most efficient and effective provider of this information, which they are best placed to both collect and maintain.

We appreciate that some governments around the world are actually themselves the target of these laws because of their corrupt activities within their own jurisdiction. We appreciate that such jurisdictions would be unlikely to provide such lists. However the absence of such lists would of itself flag to regulated entities that PEPs from this jurisdiction should be treated with enhanced care.

If the risk of money laundering from PEPs is as significant as government and law enforcement allege, the IBAAML strongly believes that FATF should call on governments to assist the regulated sector to combat this risk by the provision of PEP lists.

Currently the lack of any such assistance is causing firms to turn to commercial providers, whose products are costly and the information in them is not consistent and varies in terms of who is to be classified as a PEP, with some providers taking the approach that once a PEP, one is always a PEP, regardless of whether that person has retired from office some time before. The costs of these commercial providers are also high; this is a particular burden on smaller law firms and sole practitioners. There is no regulation of the fees charged by these commercial providers.

7.3. Domestic PEPs

The IBAAML is strongly of the view that the standards should not be extended without further clear evidence of the risks posed by domestic PEPs as an entire group and that such extension is the most effective way to mitigate that risk. PEPs are also individuals who must carry out day-to-day transactions many of which will be low risk. The rationale for looking more closely at foreign PEPs is that we should ask

additional questions as to why the individual is doing business in another jurisdiction. However, in a more globalised world, it is not unusual for individuals generally to be undertaking transactions in other jurisdictions, even this generalisation is becoming less appropriate and is the reason why we are suggesting a much more complete RBA to PEPs.

In practice, a domestic PEP will still be subject to client due diligence and ongoing monitoring, and will, in those jurisdictions which have applied the relevant provisions to lawyers, be the subject of suspicious activity reports where there is information which raises a suspicion of money laundering. There appears to be no evidence that putting more names on databases and requiring management committees to scrutinise asset declarations will be likely to prevent more instances of money laundering.

7.4. Family members and business associates

The consultation outlines proposals from FATF to limit enhanced due diligence on secondary PEPs only to situations where there is a direct link with the PEP in the transaction being undertaken or the product or service being utilised. IBAAML agrees this is likely to be a more proportionate approach. However we would like the opportunity to comment on the exact wording to better understand how it will work in practice.

8. Amendment to Recommendation 9 - reliance

8.1. Who can rely

Consistent with what we believe was the original spirit of Recommendation 9 IBAAML would argue that the basic premise should be that one regulated entity is able to rely on another regulated entity. We believe that there should be a regime which provides for complete reliance. By complete reliance we mean reliance without continued responsibility. As presently structured, the ability to rely but providing that the relying party remains responsible will never be effective in encouraging responsible reliance and avoiding unnecessary duplication.

IBAAML accepts, as a practical matter, the proposals in the consultation that the decision as to who can be relied upon should remain with national governments. Each government will have a better understanding of the level of compliance and supervision within each sector, which will affect the standard and reliability of the CDD being relied upon. However, wider access to the reliance provisions is likely to promote greater use of the reliance provisions and achieve the aim of reducing red-tape. Therefore IBAAML suggests that the interpretive note for Recommendation 9 encourages governments to apply the reliance provisions as broadly as is possible where there is appropriate compliance and supervision.

8.2. 3rd party reliance and outsourcing

IBAAML accepts that attempting to define the concepts of reliance, outsourcing and agency could be problematic practically and result in unintended consequences. In light of the challenges faced in obtaining CDD information, particularly for beneficial owners, it is vital that regulated entities have access to the widest range of

information sources, including other people more closely associated with the client. IBAAML believes that where regulated entities are still conducting their own risk assessments and reviewing the identity information themselves, they should not be restricted to only using the sources approved for complete reliance.

8.3. Intra group reliance

IBAAML welcomes the proposals to promote greater intra group reliance, as it recognises how the private sector conducts business. We believe it is extremely important that any amendments recognise the structure adopted by all regulated entities, including lawyers, and that any changes be extended to all designated non financial businesses. This is another amendment where IBAAML would be interested in commenting on the detailed drafting to ensure that the amendments will be applicable to the business structures utilised by law firms.

8.4. The real problems with reliance

The reliance provisions flow from FATF recommendation 9. The purpose of these provisions was to reduce red-tape and the costs of secondary and unnecessary CDD processes being carried out by multiple parties in the regulated sector for the same client and the same transaction. These are very positive aims which have the potential to reduce the cost of unnecessary compliance which has little or no benefit in the fight against money laundering. However, as we have articulated in previous discussions with FATF the specific requirements which have been placed on the use of the reliance provisions means that they cannot be used to their full capacity in practice – see memorandum submitted to FATF on 5 November 2009. One of the key concerns is the fact that the firm who is "relying" remains liable and could face potential criminal sanctions in the event that the CDD evidence is deemed to be insufficient – this defeats the object of reliance. It is IBAAML's view that you cannot sensibly place responsibility (and potential sanctions) on a person for something beyond their control. As such we suggest that the proper approach is to only require a person to take reasonable steps or make reasonable enquiries before placing complete, without liability, reliance on another person. It should be the case that a regulated person can assume that another regulated person has put sufficient procedures in place and can also rely on their risk-based judgement, unless there is evidence to the contrary.

Unfortunately this key issue has not been addressed in the consultation document. As we believe the reliance provisions are of very limited use without the introduction of reasonable reliance, we feel it is important to repeat our concerns in this response. Although we understand FATF has given consideration to more fundamental changes, we further understand that these are not being pursued and/or further considered. We believe that this is inconsistent with the original intent of Recommendation 9 and would strongly suggest FATF reconsider on this issue. Many law firms also now use a number of service providers for electronic verification, which often provides evidence of incorporation, registered address and director or shareholder details. All of the information obtained in this way is subject to license and therefore cannot be passed on. Accordingly this leads to gaps in the CDD documentation that can be provided to a third party. This means that if a firm relies on another regulated person, not all of the relevant information can be provided upon demand, even if it has been collected. This leaves the party relying upon them at risk of criminal sanctions and may stop other firms from offering "reliance".

Sometimes, even though reliance has been agreed, the other party fails to supply the relevant documents upon request. As the liability remains with the party seeking to rely, there are real concerns about the position that this puts them in. These issues should be addressed by FATF.

Where firms have received requests to be relied upon, many are reluctant to do so in case it gives rise to a subsequent civil claim if the risk-based judgement turns out to be misjudged. This could be addressed in an amendment to the standards.

8.5. Suggested amendments on Reliance

As stated in previous consultation and correspondence, IBAAML believes the following changes to Recommendation 9 would enhance its effectiveness and applicability:

- All regulated persons should be able to reasonably rely on other regulated entities and presume that the regulated entity has in place appropriate risk-based CDD procedures, unless there is evidence which rebuts that presumption.
- Where reasonable reliance is demonstrated, the party being relied upon is responsible for carrying out CDD in accordance with its own laws and procedures and that the regulated persons relying is not liable either for its 'failure' to carry out CDD or the failings of the party relied upon.
- The party being relied upon should not be subject to any civil or other legal responsibility to the relying party.
- A reliance certificate should be sufficient for reliance. While the regulated person who is relying should be entitled to seek copies of the evidence, there should be no legal obligation on them to obtain it.
- If law enforcement wants copies of the evidence, they should make the request directly to the regulated person who is relied upon through inter-governmental co-operation where necessary.

9. Amendment to Recommendation 1 - inclusion of tax crimes as predicate offences

The consultation outlines that FATF are proposing including tax evasion in the list of predicate offences for money laundering.

IBAAML have a number of concerns with this suggestion which we believe need to be fully considered.

1. There is no universally accepted definition at law of tax evasion.

2. There are a number of difficult practical consequences which flow from trying to define tax evasion which may in fact not be intended by FATF.

IBAAML believes there is a real question as to whether the secondary criminalisation through application of money laundering laws is the most effective way to reduce fraud on the revenue.

9.1. Definition of tax evasion

Tax evasion has different meanings in different jurisdictions and it would be appropriate to clarify what is in fact intended by the proposals. To the extent that it is intended to be limited to fraudulent evasion of tax, we can understand the mischief that FATF is trying to address, although there will remain challenges with this as a concept, as outlined below. However, it would be necessary to understand and consult upon the detailed proposals.

Some countries may permit individuals and companies to structure their tax affairs in a particular manner legally, while the same conduct would not be legal in another country. For individuals and companies who operate in both jurisdictions, the foreign legal conduct may still amount to a predicate offence in the other country. As many countries have applied an extraterritorial application to their anti-money laundering laws, such individuals could find themselves reported for money laundering in one country for conduct which is legal in the country in which it is undertaken. We believe this needs to be addressed by FATF.

Further, given the complexity of taxation laws, and the fact that reporting is on the basis of suspicion, the regulated sector will take a cautious approach. This is likely to see FIUs receive a significant increase in reports where there is limited prospect of a conviction, recovery of money or even useful crime fighting intelligence.

9.2. Risks for the private sector

In the consultation it is suggested that this change will only alter reporting for regulated entities and will not put them at risk of a principal money laundering offence.

IBAAML does not believe this will be the case. For example, in some countries, individuals can commit a principal money laundering offence on the basis that they suspect criminal property is involved, even where they have no intention to conceal or disguise the property. Therefore intermediaries could all be committing principal money laundering offences by dealing with those funds if they had any suspicion about any tax evasion giving rise to those funds.

10. Amendment to Special Recommendation 7 – transparency of wire transfers

The inclusion of client identification information in wire transfers is of use to regulated entities in confirming client identification. However IBAAML appreciates that the inclusion of this data needs to be balanced with the technical challenges and costs to the financial sector.

11. Usefulness of mutual evaluation reports

At present mutual evaluation reports are too dense, too infrequent, provide limited statistics and appear in some cases to have been “agreed”. We are greatly in favour of the approach taken by Moneyval, requiring yearly updates from member states particularly the statistical information on suspicious activity reports and assets seized as a result.

IBAAML also finds the existing ratings lacking in transparency. It is not always clear whether compliance means that the standards are merely transposed into national law or whether it is actually being applied. Further, there is no recognition in the ratings that where member states have gold plated the standards this may in some cases result in a less effective regime. We would like to see greater clarity in the ratings to make them more useable for the private sector.

12. Conclusion

IBAAML greatly appreciates the opportunity to have a continuing dialogue with FATF and to be involved in consultation processes.

We hope you find our comments helpful and will be delighted to provide greater clarity and/or input should it be required.

Anti Money Laundering Legislation Implementation Group

International Chamber of Commerce
The world business organization

Position Paper

Prepared by the ICC Banking Commission

Counter Terrorist Financing / Financial Crimes Group ("CTF/FC Group")

ICC Response to FATF Consultation on the Review of the Standards

- FATF Consultation of 29 October 2010
- Preparation for the FATF 4th Round of Mutual Evaluations

International Chamber of Commerce
The world business organization

Department of Policy and Business Practices

Luis Urrutia
President
Financial Action Task Force (FATF)
2 rue André Pascal
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France

7 January 2011

Subject: FATF Consultation on its review of the 40+9 Recommendations in preparation for the 4th round of mutual evaluations (Sent by email: fatf.consultation@fatf-gafi.org)

Dear Mr. Urrutia,

We would like to thank the Financial Action Task Force (FATF) for the opportunity offered to the International Chamber of Commerce (ICC) to participate in the FATF review of the 40+9 Recommendations in preparation for the 4th round of mutual evaluations.

We are pleased to provide below ICC comments as prepared by the ICC Banking Commission and its Counter Terrorist Financing / Financial Crimes Group ("CTF/FC Group"). With over 500 institutional members in 85 countries, the ICC Banking Commission is a leading global forum which supports the development of a fair and rules-based multilateral trading system. It produces universally accepted rules and guidelines for international banking practice, notably letters of credit, demand guarantees and bank-to-bank reimbursement. ICC rules on documentary credits, UCP 600, are the most successful privately drafted rules for trade ever developed and are estimated to be the basis of trade transactions involving more than one trillion dollars a year.

We thank you again for the opportunity provided to ICC to comment on a FAFT Consultation Paper. We believe that such a commitment to open the consultations to the private sector provides a "window of opportunity" for business to work more closely with policymakers and thus ensure that all solutions are considered to avoid negative and unintended effects that could impair the well functioning of the banking system and the economy.

We would be pleased to be given any further opportunity to work with the FATF and, if requested, present our positions in a more detailed manner.

Yours sincerely,

Thierry Senechal
Senior Policy Manager, Banking Commission

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SECTION 1.

Background

ICC Banking Commission

1.1 The ICC Banking Commission is the leading global rule-making body for the trade finance industry, as well as a worldwide forum for trade finance experts whose common aim is to facilitate international trade finance. The commission has more than 500 members in 85 countries, many of them from developing countries.

1.2 The Banking Commission is known for producing universally accepted rules and guidelines for documentary credits, documentary collections, bank-to-bank reimbursements and bank guarantees. ICC's voluntary market-based approaches have often been praised for levelling the playing field in trade finance practices.

ICC Process under the FATF Consultation

1.3 At the request of the FATF, the ICC Banking Commission has undertaken a thorough review of the Consultation Paper "The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations" as issued to ICC on 29 October 2010.

1.4 The members of the ICC Banking Commission once again responded to the call to provide inputs to FATF under short notice. Placed under the umbrella of the ICC Banking Commission. The Counter Terrorist Financing / Financial Crimes Group ("CTF/FC Group") drafted the present response under the advisory power of ICC AML Task Force.

1.5 It shall be noted that ICC participated in the FATF Consultative Forum of 22 and 23 November 2010 engaging the private sector on most of the issues addressed in this document.

1.6 The ICC thanks the FATF for its continued engagement with the private sector on these important issues and makes itself available to discuss with the FATF working groups any issues where better understanding of the private sectors businesses and processes will lead to more effective measures.

SECTION 2.

ICC Response to FATF Consultation Paper

The Risk-Based Approach (RBA)

2.1 FATF is now considering developing a single comprehensive statement on the RBA, which could be incorporated into the FATF Standards as a new Interpretative Note dedicated to the RBA and applicable to a set of Recommendations - R.5, 6, 8-11, 12, 15, 16, 21 & 22.

2.2 ICC is strongly supportive of the risk-based approach in contrast to more narrow or rigid rules based approach and efforts to develop one interpretation that would apply to all FATF standards. ICC believes that the risk-based approach provides the flexibility for financial institutions to appropriately weight the risk related to customers, countries and transactions as they apply to their various lines of business. It should be noted that the ICC believes that the RBA is the most effective way of achieving the desired results of the FATF's policies.

2.3 However, ICC would caution that developing a narrower risk-based approach may jeopardize its flexibility and the ability to apply the risk-based approach within various types of financial institutions and their business profiles.

2.4 New technologies and non-face-to-face business should not necessarily be considered as high risk and each product should be evaluated specifically in relation to the overall risk-based approach. Often non-face-to-face business is less risky, particularly as it might relate to consumer or retail business.

Recommendation 5 and Its Interpretative Note

2.5 Recommendation 5 (R.5) and its Interpretative Note (INR.5) contain important references to ML/TF risks. The main changes proposed by FATF for R.5 and INR.5 linked to the RBA consist in giving a more detailed and balanced list of examples of lower/higher ML/TF risk factors, as well as examples of simplified/enhanced CDD measures. ICC believes that the RBA approach should not be based on a list of "risk variables" to avoid financial and non financial institutions to be constrained by such "one-size-fits-all" approach. Rather, FATF should consider creating a number of self contained structures applicable to different types and sizes of institutions, one of which should be able to form a basis for an institution to develop an appropriate risk policy for agreement with its regulator.

2.6 Recommendation 5 (R.5) and its Interpretative Note (INR.5) also propose a number of changes in relation to identification and verification of the identity of customers that

are legal persons or arrangements. In particular, the proposed changes seek to reorganise the measures and information that would normally be needed in relation to customers that are legal persons or arrangements, and make it clearer that details of the "mind and management" of the legal person or arrangement must be obtained (Page 6 Review of the Standards).

2.7 ICC would like to point out that, globally, there are differing understandings of beneficial ownership and we would welcome a clear definition that could be applied across jurisdictions. Any definition should be sufficiently clear to provide for a risk-based approach to determine the ownership level, managerial control or share holding of an entity. We find the term "mind and management" unclear as to its exact conditions that would be required to determine beneficial ownership. If, by the term "mind and management" it is meant the "effective management of a company" then this is more understandable, however any recommendations by FATF should provide for a clear interpretation of the term beneficial ownership by various jurisdictions.

2.8 Regarding life insurance policies, we would find it important for any guidance to more specifically define the differences between the beneficiary and the beneficial owner. It would also help if the different types of "life insurance policies" were detailed as there are, we believe a number of different schemes of arrangement that are covered by this general title. These differences are difficult for a financial institution to determine in verifying the party to whom funds should be paid.

Recommendation 6: Politically Exposed Persons

2.9 FATF is proposing taking into account the fact that the money laundering risks differ, depending on whether the customer is a foreign or a domestic PEP. "The FATF is considering the following approach: (i) to leave the FATF requirements related to foreign PEPs as they are, i.e. foreign PEPs are always considered to be higher risk; (ii) to require financial institutions to take reasonable measures to determine whether a customer is a domestic PEP; and (iii) to require enhanced CDD measures for domestic PEPs if there is a higher risk" (Page 8, Review of the Standards).

2.10 ICC concluded that the statement made in the consultative document that "foreign PEPs are always considered to be high risk" is unclear as to its specific meaning and should be clarified. The determination of whether a person is considered a PEP may be based on the type and amount of a transaction rather than their specific origin in relation to a financial institution.

2.11 A more troubling issue relates to the consideration of domestic PEPs. The position of a person in determining whether they are a PEP in a domestic situation may be difficult and particularly as it may relate to their position nationally or locally. We would suggest that the definition and status of a domestic PEP should be left to local jurisdictions to determine.

2.12 A more difficult situation is the determination of whether a person should be classified as a PEP simply based on being a family member or close associate and may better be

defined in relation to beneficial ownership in relation to the primary PEP. For instance, ICC noted that it would be difficult to block a payment under a specific contract, e.g. life insurance, to a beneficiary who appears to be related to a domestic PEP when its definition is opened to various interpretations based on the seniority of the PEP, its activities and/or business, all of them being affected by the passage of time.

Recommendation 9: Third Party Reliance

2.13 Based on the information contained in the consultation paper we would welcome further guidance in relation to third party reliance. We support an effort to harmonize the concepts of third party reliance among jurisdictions and to provide clearer distinctions between outsourcing, agency and intra-group reliance. We would welcome a definition of what is meant by third party reliance, as this is a defined legal term and is not the same as the lay persons understanding.

Tax Crimes as a Predicate Offence For Money Laundering

2.14 The FATF is considering including tax crimes as a predicate offense for money laundering in the context of Recommendation 1. More precisely, it proposes to amend the list of designated categories of predicate offence for money laundering as follows:

- To clarify the current designated category of "smuggling" by referring to: smuggling (including in relation to customs and excise duties and taxes).

- To add a separate designated offence category: tax crimes - related to direct taxes and indirect taxes.

2.15 The ICC noted that, as a category, tax crimes have varying meanings in different jurisdictions particularly in relation to the differences between tax avoidance and tax evasion and serious crimes. These differences are difficult for financial institutions to determine based on the tax compliant status of their customer since this information is not easily ascertainable and even more difficult in a cross-border context.

2.16 Given the difficulties in determining a tax crime, greater clarification needs to be provided as to the circumstances that would give rise to suspicious activity reporting in relation to tax crimes.

Special Recommendation VII and Its Interpretative Note

2.17 With regard to the information provided in the consultative document our principal concern relates to requiring additional beneficiary information as part of SR VII. Most domestic Payment standards currently require only the account number and bank for a wire transfer. For Payments using SWIFT the Beneficiary Customer details are required, however, obtaining the beneficiary name is not normally required for the straight through processing (STP) of the payment in many domestic payment and

clearing systems, where the bank and branch identifying code and the account number is sufficient. Where the domestic payment or clearing system is based on SWIFT standards, the name of the beneficiary would be included, but not necessarily the address.

2.18 The inclusion of additional beneficiary information above that of the name of the beneficiary, would not be practical at the point of initiation of a wire transfer. The originator of a transfer would not usually have information beyond the name, account number and bank. While the originator may be able to provide the address of the beneficiary this information will likely not be available and it would not be feasible to require such additional information, nor will the remitting bank be in a position to verify that information. The determination of the completeness of information contained in a transfer is not usually possible. While a financial institution may be able to determine if required information is missing, it is almost impossible to determine if data that is present is complete or correct.

2.19 On the basis that we believe that the FATF is looking at identifying a standard approach, it is important to understand that the payments system is not limited to one system and standard, and therefore a "one size fits all" approach will not be effective. It is essential that if such "standardisation" is contemplated, which we believe is the aim of the FATF, that the payments industry is specifically invited to assist(confusion between different data formats and content will lead to an increase in "standards" rather than one clear standard) as it will be counter productive if each country introduces its own variations on the detail requirements envisaged by the FATF; c.f. the introduction of the SWIFT MT 202 COV which has been extraordinarily successful. A requirement that all institutions be required to screen international transfers under the UN regulations is something that we would support.

2.20 We would caution that if Financial Institutions are required to obtain increased information, it may have the effect of driving more of the payments business out of the international bank payments system and into other, less regulated systems with the concomitant loss of visibility to the regulators and appropriate agencies.

2.21 Due to the complexity and interdependency of the global payment system we would encourage FATF, in consultation with the industry, to provide comprehensive guidance relating to implementation of any changes to SR VII. More comprehensive guidance would better ensure more uniform global implementation and compliance. The ICC has payment experts within its membership upon whom we can call to assist the FATF in better understanding how the system works, and its limitations.

Usefulness of Mutual Evaluation Reports

2.22 Most financial institutions use the Mutual Evaluation Reports to supplement their analysis of the risk assessment related to transactions within a jurisdiction. From that perspective they are useful. Greater information related to specific overall compliance and strengths and weaknesses within a country would be helpful.

Financial inclusion

2.23 Awareness is indeed growing that access to a wide set of financial instruments and markets provides low-income people with capacity to increase or stabilize their income and build assets. The ICC, as the world's business organisation, is very supportive of any moves to improve or maintain the inclusion of persons, companies and countries in the world's financial systems. We believe that financial exclusion leads to poverty, dissatisfaction and a lack of investment in people and in a country. Financial inclusion ensures stable economies and encourages growth.

2.24 The models of inclusive finance being implemented in developing countries — e.g. branchless banking, microfinance, use of new and innovative technologies such as mobile phones — can be unique opportunities for providing adequate financing solutions to the forty percent of the world's people living on incomes of two dollars a day or less. At the same time, ICC believes that it is important to ensure that the pursuit of financial inclusion and the pursuit of financial integrity through appropriate AML/CFT regimes remain complementary. The challenge will be to implement AML/CTF standards that work proportionate to the risk of drawing the unbanked populations to the formal financial system, in particular in less developed countries where financial and governance institutions are still maturing.

SECTION 3.

Conclusions

3.1 Risk Based Approach; The ICC considers that the RBA is the most effective way of implementing AML,CTF and Sanctions/NPWMD policies. We believe that a narrow, rules based approach is less effective, and adds to the additional costs of inefficiency without increasing the effectiveness of FIs processes.

3.2 Recommendation 5; ICC encourages FATF to define exactly what is meant by Beneficial Ownership, as the legal definitions differ between jurisdictions. Any definition should be sufficiently clear to provide for the use of the RBA to determine the ownership level, management control or share holding of an entity. As with the above, in respect of insurance policies a clear definition of beneficiary or beneficial owner is important, and we would encourage engagement with the "life industry" in agreeing to those definitions.

3.3 Third Party Reliance; Again we welcome further guidance on the definition of third party reliance, as there is a difference between the legal and lay definitions which can lead to confusion.

3.4 Tax Crimes; Again the ICC welcomes any further clarification of what circumstances will lead to a "tax crime" being committed so that, using the RBA, FIs can determine effective measures for identifying potential suspicious incidences for reporting.

3.5 SR vii; ICC recommends that the FATF engage with the payments industry as soon as possible in their deliberations. A "one size fits all" solution, whilst admirable may not be practicable in the short to medium term, and the danger is the introduction of a plethora of differing "standards" in different jurisdictions, none of which actually achieve the end goal of the FATF.

3.6 Mutual Evaluation Reports: As indicated, these are a source of information included by many firms in their RBA assessments of countries. Improvements in layout, frequency and measurability would make them more useful.

3.7 Financial inclusion: The ICC remains committed to the ideal of financial inclusion, not only of individuals, companies or social groups, but also to countries as this ensures stable economies, economic growth and reduces poverty.

3.8 We once again thank the FATF for giving the ICC the opportunity to be included in the continuing dialogue, which we find extremely productive and believe leads to effective measures to implement the FATF policies and goals.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization, the G20 and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.

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International Consortium of Real Estate Associations

Mr. John Carlson, Secretary
FATF / GAFI
2, rue André Pascal
75775 Paris Cedex 16
FRANCE

Chicago, Kandersteg, 21 January, 2011

Re : **The Review of the Standards-Preparation for the 4th Round of Mutual Evaluations**

Dear Mr. Carlson, dear John,

We welcome this consultation as part of the ongoing dialogue between the private sector and the FATF but we are disappointed by the relatively limited scope of the consultation. In our view the starting place should be whether the current sectoral coverage of the Recommendations is justifiable or complete.

We question whether the FATF should persist with a one size fits all approach in relation to the preventive measures to be taken by Financial Institutions and Non Financial Businesses and Professions (DNFBPs). As the Recommendations apply to a wide range of sectors undertaking very different activities with very different risk profiles we suggest that the value of each preventative measure should be analysed with reference to each individual sector. The FATF should consider a sector specific structure for the Recommendations.

Finance is the central purpose of Financial Institutions. In contrast DNFBPs offer a range of services and their handling of client money is a peripheral activity undertaken via accounts held with Financial Institutions. On this basis stringent preventative measures may be justifiable for Financial Institutions and some DNFBPs involved with financing transactions. However the role of estate agents is inherently peripheral as agents do not get involved in the financing of transactions, do not handle client money, and do not execute transactions. In fact the role of estate agents is limited to facilitating the initial arms length introduction of seller to buyer. Agents have little or no subsequent involvement because Financial Institutions and lawyers/ independent legal advisers steer transactions to completion without their input. For these reasons fewer preventative measures are justifiable for estate agents, and/or a more sympathetic approach should be taken in areas such as Customer Due Diligence (CDD), particularly with respect to the dual CDD requirement which applies to agents and third party reliance.

If the FATF maintain that preventative measures are necessary for real estate agents then some definitional issues should be addressed. There should be greater clarity as to whether residential

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and/or commercial property agents are in scope. Property developers who act as estate agents by facilitating direct sales should also be explicitly brought into the definition. And a solution must be found for real estate transactions which do not involve the services of a real estate agent, i.e. non-assisted transactions between consumers and/or legal persons.
In terms of the consultation we have focused our thoughts on those areas of most relevance to our member associations.

Yours sincerely

Thijs Stoffer
CEO ICREA

Attachment

1. THE RISK BASED APPROACH – GENERAL OBSERVATIONS

1.1. General

ICREA led the FATF's work on guidance on the Risk Based Approach (RBA) for real estate agents and ICREA strongly supports embedding the RBA more firmly into the Recommendations and related policies including the evaluation process.

The RBA statement may be applicable to additional Recommendations. In our view countries should be allowed to use a RBA to decide which of the DNFBP sectors they wish to bring into scope rather than this being a prescriptive requirement, especially as the activities of the different DNFBPs vary significantly from country to country. We are unsure if this is what is intended by the application of the RBA statement to Recommendation 12. The function of the real estate broker/agent can vary greatly between markets, impeding implementation of highly specific guidance on a global scale. The most effective approach is to identify broad areas of risk relative to the core function of a real estate broker/agent and determine appropriate roles for real estate professionals in anti-money laundering initiatives. One must first understand the role of the real estate broker/agent in the transaction process, relative to the potential risk.

1.2. Recommendation 20

Recommendation 20 states that countries should consider applying the Recommendation to business and professions, other than DNFBPs, that pose a money laundering or terrorist financing threat. We would have thought that the decision to extend the application of the Recommendations should be taken on a risk basis and therefore the RBA statement should apply. For this reason we would suggest caution in relation to proposal to add examples to Recommendation 20, although we agree that in order to cater for actual ML/TF risks Recommendation 20 should be extended to refer to financial activities.

1.3. Recommendation 17

The RBA statement should also apply to Recommendation 17 concerning sanctions for non compliance. Although Recommendation 17 refers to proportionality and refers to criminal, civil, or administrative sanctions we would prefer member countries to be allowed greater flexibility as to whether they wish to apply sanctions. The threat of sanctions may be counter-productive in some countries and for some DNFBP sectors as it can damage the cooperative approach with the FATF is trying to encourage and prevents equal partnerships.

1.4. Obligations & decisions

At present the obligations & decisions for countries and the obligations & decisions for financial institutions and DNFBPs includes mandatory and optional approaches. However the ability to opt out of lower risk measures and exemptions makes a nonsense of risk assessments and therefore all elements must be mandatory.

2. RECOMMENDATION 5 AND ITS INTERPRETATIVE NOTE

The FATF is already aware of the concerns we have regarding the dual CDD obligations for real estate agents as outlined in our letter to a previous president of the FATF, Mr. Vlaanderen, dated 15

September 2009. The problem is that the Methodology requires real estate agents to conduct CDD on both sides to a transaction, even though this goes further than Recommendation 5. This problem amplifies the specific problems real estate agents have with following all aspects of Recommendation 5, and therefore we hope that this underlying issue will be resolved as part of this review.

CDD requirements for legal persons and arrangements are extremely difficult for real estate agents and other sectors. Greater emphasis on ownership & control or mind & management will not assist as these concepts are subjective, and linking these areas with beneficial ownership requirement will only complicate this area even further.

We feel strongly that the burden must shift to member countries to devise systems for collating the relevant information connected to when and how legal arrangements and persons are formed and change, e.g. transparency through registers or other disclosure mechanisms.

At the same time we support CDD measures for persons acting on behalf of a customer whether the customer is a legal person or arrangement or an individual. This makes good business sense as well as assisting with frauds arising from identity theft.

3. RECOMMENDATION 6: POLITICALLY EXPOSED PERSONS

Although the application of the RBA statement to Recommendation 6 is welcomed, it is insufficient. Notwithstanding UNCAC we question whether the Recommendations should include a specific PEPs requirement. The RBA requires a comprehensive assessment of risks, including risks posed by employment or office and jurisdictional risks. Prescriptive and inflexible categories do not fit with the RBA.

We disagree with the proposition that money laundering risks differ dependent on whether the customer is a foreign or domestic PEP. This is an artificial distinction which doesn't fit with the RBA because whether a PEP falls into either category depends entirely upon where the PEP accesses services. In other words one person's foreign PEP will be another person's domestic PEP.

Similarly we question whether all business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. Again this approach is not risk based. Therefore whilst we support the proposed limitation to circumstances where the PEP is a beneficial owner, in our view this change is insufficient and a more radical approach is needed to remove the prescription which is preventing a true RBA.

We hope that a more general review can be made of the PEPs requirement, but meanwhile of the three options currently presented our preference is to retain the current focus on foreign PEPs only.

Notwithstanding that the definition of a PEP centres on country of appointment rather than nationality, this limitation still goes some way to aid practical compliance. If domestic PEPs were included in the definition then compliance costs would disproportionately increase as all customers would become potential PEPs. Some may even opt to apply Enhanced Due Diligence routinely in order to avoid any risk of falling foul of the requirements but this cannot be what is envisaged by a RBA.

4. RECOMMENDATION 9: THIRD PARTY RELIANCE

It is a great shame that the key issue here is not being addressed, namely why ultimate responsibility for CDD must remain with the Financial Institution or DNFBP relying on the third party. Alteration in this area is crucial to avoiding wasted compliance costs arising from unnecessary duplication.

We agree that it should be possible for all sectors to rely on third parties. For real estate agents we would like to see greater flexibility on timing of verification in low risk situations as this would allow real estate agents to rely on Financial Institutions and lawyers/independent legal advisers who get involved in transactions at a later stage.

Similarly we believe it should be possible for all sectors subject to the Recommendations to be relied upon. The current limitation to those who are regulated and supervised for AML/CFT means that many real estate agents cannot be relied upon as a number of member countries have been reluctant to delegate AML/CFT supervision to self-regulatory organisations or to undertake AML/CFT supervision themselves. Some countries do not have general licensing requirements for real estate agents, but even some countries with general licensing have failed to add AML/CFT. We feel it is unfair for consumers to be prejudiced by this reluctance.

We do not think it is necessary for the relying party to satisfy themselves that copies of identification data and other relevant documentation relating to the CDD requirements will be made available from the third party upon request and without delay. Only sectors subject to the Recommendations can be relied upon and they should have this information in any event.

The barriers to third party reliance arising from data protection and privacy laws should be considered by the FATF in the context of its work in this area.

5. TAX CRIMES AS A PREDICATE FOR MONEY LAUNDERING

Many struggle with understanding the subtle differences between tax avoidance and tax evasion, and whether attempted tax evasion only becomes a crime when it is successful. Therefore if FATF wishes to extend Recommendation 1 in this way it must require member countries to assist the private sector with these technical issues.

6. USEFULNESS OF MUTUAL EVALUATION REPORTS

We have mentioned above our concerns about the dual CDD requirement for real estate agents. At the moment it is not possible to extract information on this issue from the published mutual evaluation reports. On this basis we hope that future mutual evaluation reports can contain such sectoral information. However in general we believe the greatest challenges for the evaluation process are consistency and how to embed the RBA so that it is central to the evaluation process.

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NCiF

Response to FATF

The Review of Standards
Preparation for the 4th Round of Mutual Evaluations

The National Casino Industry Forum represents over 93% of casinos in The UK and on behalf of its members is very pleased to have the opportunity of responding to this consultation paper.

1. RESPONSE

Recommendation 6: Politically Exposed Persons
28. The inclusion of the UNCAC in the FATF Standards also impacts Recommendation 6, which deals with politically exposed persons (PEPs). Specifically, Article 52 of the UNCAC relates to the prevention and detection of transfers of proceeds of crime, including by PEPs. The Convention does not distinguish between foreign or domestic PEPs, and refers to "individuals who are, or have been, entrusted with prominent public functions and their family members and close associates". UNCAC leaves discretion to state parties regarding the types of natural persons to whose accounts enhanced scrutiny should apply. Based on the principle that a Convention should be interpreted in the widest sense possible, it is the understanding that Article 52 requires enhanced scrutiny on both domestic and foreign PEPs.

NCiF Response

NCiF welcome a clarification that enhanced due diligence checks are to be applied to both domestic and foreign PEPs.

Recommendation 9: Third Party Reliance
34. Who can be relied upon? Although there is no explicit indication in R.9 on who can be relied upon, the requirements to be "supervised" de facto limits the types of entities that could be relied upon as a third party. The FATF is considering amending R.9 to explicitly extend countries' discretion regarding the types of third parties that can be relied upon, and to go beyond the banking, securities and insurance sectors to include other types of institutions, businesses or professions, as long as they are subject to AML/CFT requirement and to effective supervision or monitoring.

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NCiF Response

NCiF supports the FATF initiative to extend countries' discretion regarding the types of third parties that can be relied upon. Despite the fact that casinos are part of the regulated sector, we are currently unable to place any reliance on third party customer due diligence from the casino sector.

We contend here, and in our separate response to the Review of the UK Money Laundering Regulations 2007 (MLR2007), that this onerous restriction is unnecessary and only serves to hamper our investigations.

NCiF have also responded to the MLR2007 identifying a similar anomaly with regards to the €15,000 threshold limit applied to banks, or indeed the €3,000 threshold limit applied to casinos within the 3rd EU Money Laundering Directive; that have been inexplicably reduced to €2,000 for UK casinos.

2. SUMMARY

Casinos in The UK operate in one of the most highly regulated environments in the world, and we would contend that our track record for combating money laundering and terrorist financing is exemplary.

Indeed, we believe that the FATF Interim Report in March 2009 – Vulnerabilities of Casinos and Gaming Sector, reflects the highest standards that are maintained within the UK casino sector.

To that end, the main tenet of our response is made in support the FATF initiative to encourage countries to extended sectorial discretion and reverse the existing apparition of applying tighter controls than the international standards maintain.

End.

STEP RESPONSE TO FATF CONSULTATION PAPER - December 2010
The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations

This paper forms **The Society of Trust and Estate Practitioners** (STEP) response to the Financial Action Task Force (FATF) consultation paper *The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations.*

STEP is the worldwide professional body for practitioners in the fields of trusts and estates, executorship and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. With over 16,000 members around the world, STEP promotes the highest professional standards through education and training leading to widely respected professional qualifications.

In its consultation paper FATF highlighted measures to secure timely access to beneficial ownership information of legal entities and arrangements.

These measures include:

1. "First identify and take reasonable measures to verify the identity of the natural persons who ultimately have a controlling ownership interest."

2. Where the ownership interest is too dispersed to exert control or there are other persons who have control of the legal person or arrangement, then it would be necessary to identify and take reasonable measures to verify those other persons that have effective control through other means (e.g. by exerting influence over the directors of a company).

3. If there are no other persons identified as beneficial owners, then in such cases the beneficial owners might be the "mind and management" that has already been identified."

We note the language used in the consultation paper including; "controlling interest", "exerting influence over the directors of a company" and "mind and management" is taken from a corporate rather than trustee perspective. Whilst this makes it more difficult to ascertain FATF's precise objectives we believe we are in a position to comment on the proposals in a manner which is consistent with the FATF's aims to secure timely access to beneficial ownership information of legal arrangements.

Our recommendations include extending the meaning of "beneficial ownership" for legal arrangements to include "Protectors, Enforcers and the like" where they have control over a trust and identifying and verifying all beneficiaries before they benefit. We also believe that there needs to be better international agreement of the legal concepts surrounding the control of trusts.

Controlling interests: Trustees, Protectors, Enforcers and the like

Currently under Recommendation 34 service providers are required to identify the settlor, the trustees and the beneficiaries.

In some jurisdictions, however, other individuals may have powers which grant them considerable influence over the operation of a trust. These can have variety of names depending on the jurisdictions (including 'protector', 'enforcer' and 'guardian', among others) and their powers can vary considerably depending on the trust deed. In some cases, nevertheless, they can have powers that give effective control over the appointment of beneficiaries and/or the distribution of trust funds. In some jurisdictions (such as Jersey and Switzerland) the identification of any third party with such powers is already the norm but we propose it would be useful to make this a more general requirement. Indeed the requirement to undertake customer due diligence on the Protector is already referenced in FATF's RBA Guidance for Trust and Companies Service Providers (TCSPs), June 2008 (see http://www.fatf-gafi.org/dataoecd/19/44/41092947.pdf

p. 21, footnote 4). We believe this should be made more explicit.

The key test should be based on the powers someone has rather than the title attached to their role since there can be considerable variability in this across jurisdictions and across trusts.

The powers vested in the Protector or similar role vary both according to the proper law of the trust and the terms of the trust instrument. The powers we believe give rise to a defining power of control are:

1. the power to approve the addition or removal of beneficiaries;
2. the power to approve proposed trust distributions;

The absence of a specific reference to individuals who wield such powers in Recommendation 34 mean that under national laws not all service providers will be required to identify individuals with these powers.

We believe it would be sensible to extend the obligation on service providers to identify the Protector (if such a Protector exists, which is not always the case) to all countries.

STEP is happy to work together with FATF to define the Protector and similar roles and, once agreed, recommends FATF change the interpretive notes to Recommendation 34 to include this.

STEP Recommendation: That the interpretive notes to Recommendation 34 should include reference to obtaining information on the Protector of a trust.

Timely access information on the beneficiaries of trusts

If a trust is to be valid, there is clear requirement in common law for the beneficiaries to be clearly identifiable. Indeed the identities of beneficiaries of a trust are always clear at the time of payout or when the beneficiary intends to exercise vested rights.

The issue of beneficiaries is complicated by the fact that many trusts are drafted in a way that allows beneficiaries to be added over time. This allows for changing circumstances, such as the arrival of new children or grandchildren, but it can mean that the initial trust deed is drafted very broadly. The simplest approach is to focus on identifying beneficiaries at the time of any payment to them or when the beneficiary intends to exercise vested rights. This is essentially the approach being considered by FATF for insurance policies.

Paragraph 24 of the consultation document states in relation to insurance products:

"… consideration is given to clarifying which CDD measures should be applied in relation to identification and verification of the identity of the beneficiary, and when this should occur. It is proposed that, in addition to conducting CDD measures on the policyholder and its potential beneficial owner, financial institutions should:

- *Take the name of the beneficiary(ies) that is the specifically-named natural or legal person(s) or legal arrangement(s); or*

- *Where there is a class of beneficiaries, obtain sufficient information concerning the beneficiary to satisfy themselves that they will be able to establish the identity of the beneficiary at the time of the payout or when the beneficiary intends to exercise vested rights.*

- *For both cases, the verification of the identity of the beneficiary(ies) should occur at the time of the payout or when the beneficiary intends to exercise vested rights."*

We believe that this wording is also appropriate for trusts. Indeed we note that because 95% of insurance products in the UK are held by trusts that the application of these rules to trusts is already in place to some degree.

This clarification would provide reliable and accurate information of who benefits from a trust and focus resource on a key area of risk, when the money leaves the trust.

Some jurisdictions go further, either requiring the identification of anyone 'likely to benefit from the trust' (this approach is used, for example, in Guernsey) or the identification of all named beneficiaries or those defined by reference to a relationship (e.g. 'children of the settlor'). This latter approach is widely adopted in

Switzerland. In both the Guernsey and Swiss cases the relevant identification procedures are carried out during the course of establishing the business relationship.

As regards appropriate thresholds, in practice legislation often applies a threshold test. In the EU, for example, the 3rd Anti Money Laundering Directive is framed in terms of either "the natural person who exercises control over 25% or more of the property in a legal arrangement or entity" or "the natural person who is the beneficiary of 25% or more of the property". The same approach has been copied over into the domestic legislation of most EU member states.

In reality the 25% benchmark, while widely used in the corporate world, makes little sense in the case of trusts and is often difficult to calculate. Moreover the 25% benchmark simply creates a significant potential loophole as discretionary trusts can be framed to ensure no beneficiary is entitled to the trust assets until the time of payout or they exercise vested rights in which case the beneficiary will not need to be identified for regulatory purposes. Although the trustee will almost certainly identify all beneficiaries for common law purposes, he may be under no legal obligation to share that information with the competent authorities. The effectiveness of the legislation could thus be improved relatively simply by requiring all beneficiaries to be identified without any percentage threshold level.

STEP Recommendation: FATF guidance should help focus on timely access information on all the beneficiaries of trusts by focusing on those who benefit.

The "mind and management" of a trust

In its consultation paper FATF discusses the "mind and management" of a trust. However it may be problematic for FATF to refer to the "mind and management" of a trust in this way in its consultations because we are not aware that the meaning of "mind and management" as a legal concept for trusts has been established internationally.

Article 25 of the OECD "Model Tax Convention on Income and on Capital" discusses both the 'permanent establishment' and the 'place of management' for a business or an enterprise. The discussion in Article 25 is framed wholly in the context of companies and other legal entities and does not fit well with trusts. In EU discussions around revising the Savings Tax Directive the concept of 'place of effective management' has been suggested as an alternative although practitioners again find difficulties with this concept. The strategic decisions about a trust may be taken in one jurisdiction but day-to-day management may take place in another. This can lead to extremely finely balanced judgements based on the facts of a case.

The UK tax authorities have recently published revised guidance on trustee residence but the uncertainties have resulted in some high profile court cases in several jurisdictions. In the UK's Court of Appeal has recently ruled that key test should apply to the location of the top tier management of a trust. Even more recently, in the so-called Garron case, the Canadian Federal Court of Appeal rejected the view that the place of residence of the majority of trustees determined the place of residence of the trust and instead focused on the location of a trust's "central management and control" as the key determinant of location for tax purposes. These two Appeal Court cases highlight the uncertainty that has dogged this area. There is now a danger that we will see inconsistent rulings emerge in a series of national jurisdictions.

In view of the international inconsistencies emerging STEP has already made representations at both the international (to both the OECD and EU) and the UK to attempt to establish an effective and consistent approach internationally.

We are aware that at FATF this debate is ongoing. For example, some have suggested that a trustee could be required to be resident in the jurisdiction under whose laws the trust is operative and this would become the main focus of regulatory supervision. It is clear that this would be inconsistent with the focus by many major tax authorities on the location of the "central management and control" or 'top tier management'. We believe that this issue requires substantial further discussion to ensure an effective and practical solution. STEP would be keen to participate in and assist in these discussions.

In the meantime we believe that, to avoid this historical confusion, FATF should only seek to use legal language which has some basis in internationally agreed legal concepts.

STEP Recommendation: That legal concepts which apply to the "mind and management" of a trust should be agreed before this language can be applied internationally

Further comments – definition of beneficial owner

The definition of 'beneficial ownership' itself is problematic. 'Beneficial ownership' is a term legislators and regulators and have borrowed from the corporate world but its meaning in the trust context, where the owners are the trustee who is acting in the interests of the beneficiaries, can be unclear. It would be better to draft legislation and regulations in terms of two distinct groups; those with control of a trust and beneficiaries who benefit from a trust.

Further comments – Application of R.34

We are aware there is currently a debate on whether Recommendation 34 should be applicable to all countries. STEP believes recommendation 34 should be applicable to all countries.

There is a significant regulatory gap relating to jurisdictions where there is little or no formal regulatory structure around trust service providers in spite of their being a large and active sector providing trust services. In practice in many such jurisdictions, such as the US, trust service providers will usually be in regulated professions such as law or accountancy. It could therefore be relatively straightforward to extend the existing regulatory structures in such professions to include the requirement to collect, retain and provide, if requested, the information needed to ensure that necessary information is available to the competent authorities.

As we noted above, Swiss based trust managers are typically managing trusts written under the laws of other jurisdictions and it is sometimes argued that the responsibility for regulation should lie with the jurisdiction under whose laws a trust has been written. Most practitioners, however, would argue that such an arrangement is unrealistic and likely to be ineffective. It would be preferable instead for trustees' residence (see above) to be the basis of regulatory responsibility for a trust.

STEP believes that action in those jurisdictions with significant regulatory gaps around the provision of trust services would be useful in helping address concerns about the transparency of the trust sector. We note that a recent FATF report highlighted the danger that there could be a "proliferation of TCSPs (Trust and Company Service Providers) whose management/staff do not have the expertise, knowledge or understanding of key matters that are relevant to the operation of their businesses, such as their client affairs."[1] The same lack of expertise and knowledge could potentially also pose a risk to tax compliance but appropriate responses have been developed in the form of the templates laid down by the

[1] "Money Laundering Using Trust and Company Service Providers", FATF, October 2010.

Offshore Group of Banking Supervisors and the OECD Steering Group on Corporate Governance. These cover measures designed to ensure that trust service providers are fit and proper and meet minimum standards of competence and training. They have been widely adopted in a range of jurisdictions and provide a coherent framework that could usefully applied in those jurisdictions that currently lack such arrangements.

Moreover there has been some suggestion that those countries who do not recognise trusts do not need to implement recommendation 34.

For example, somewhat surprisingly in our view, Recommendation 34 was judged "not applicable" for Switzerland on the grounds that Swiss law does not recognise trusts. While true at the time of the FATF peer review (2005), Switzerland ratified the Hague Convention on the Law Applicable to Trusts and their Recognition shortly afterwards. In any event Switzerland has long had a large number of trusts managed by Swiss based practitioners, even if those trusts are invariably written under the laws of another jurisdiction (such as Jersey), since Switzerland has no domestic trust law of its own. More generally, it is not necessary for a jurisdiction to recognise trusts for its citizens and institutions to interact with trusts (as settlors, beneficiaries, advisors, etc.) and for a jurisdiction's practitioners to operate as trustees for trusts established in another jurisdiction.

For example a trust established by a settlor whose wife is French, with children residing in France may have trustees in Jersey or Denmark who would make payments to beneficiaries in France via a French financial institution, or purchase property in France using a French notary.

Further comments - How R.34 may be applied

We further understand there is some debate as to whether, if Recommendation 34 should be applied to all countries, how this may work in practice.

We believe countries should take measures to prevent the unlawful use of legal arrangements in relation to money laundering and terrorist financing by ensuring that it's commercial, trust and other laws require adequate transparency concerning the beneficial ownership and control of trusts and other legal arrangements.

We believe that an effective way to do this is to require trust service providers to obtain, verify and retain records of the details of the beneficial owners of trusts or other similar legal arrangements.

However, it should be noted that the regulation of trust service providers (TSP's) is done differently in different countries. In some countries such as the UK and the USA the TSP's are largely, but not exclusively, professional lawyers, accountants or bankers who are already regulated.

We believe that where TSPs are already regulated, but not yet required to collect beneficial ownership information, that additional obligations to collect beneficial ownership information should be considered.

If any such obligations are created then further consideration should be given to building on existing regulatory structures as it may not always necessary to create an entirely new regulatory structure for professional TSPs.

To the extent that countries rely on the investigative powers of their competent authorities, these authorities should not only have sufficiently strong compulsory powers for the purpose of obtaining the relevant information, they should also ensure that the information is collected in their jurisdiction.

Further comments – unregulated TSPs

We are aware that there has been some debate on the issue of unregulated trust company service providers.

Normally regulation will only be directly applied by those trust service providers who are paid to act professionally. However, it is common for individuals in the UK, the US and elsewhere to act as trustees for trusts in a voluntary capacity. These are known colloquially as "lay trustees". Information on the identify of such lay trustees will be captured by Financial Institutions where there is an associated bank account and by other, regulated TSPs or by charity regulators where the trust is a charity. The number of lay trustees is significant and, as volunteers, it is unlikely many would be fit to apply AML regulation effectively.

Further comments - Helping identify the scale of the problem

We understand that work is being done to collect information on how widespread is the use of trusts in criminal activity.

We understand that the World Bank has studied this issue and is about to release a report from its Stolen Assets Recovery Programme. We understand that they have studied the uses of trusts and companies in illegal activity and found that trusts are not commonly used.

January 2011.

c/o Randall Krebs (STEP Bermuda Chairman)
Canon's Court 22 Victoria Street PO Box HM 1179 Hamilton HM EX Bermuda

7th January 2011

FATF Secretariat
By email only: fatf.consultation@fatf-gafi.org

Dear Sirs,

Re: Draft Response to FATF Consultation Paper

Further to your request for comments, please find attached the submissions of STEP Bermuda regarding the Consultation Paper dated October 2010.

Please contact the writer if you have any questions or require clarification of any of our submissions.

Best regards,

Yours faithfully

Randall Krebs,
STEP Bermuda Chairman

Enc.

THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS (BERMUDA BRANCH)
RESPONSE TO FATF CONSULTATION PAPER

Introduction:

The Bermuda Branch of the Society of Trust and Estate Practitioners ("STEP Bermuda") wishes to thank the Financial Action Task Force ("FATF") for this opportunity to provide a response to the FATF consultation paper The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations (the "Consultation Paper"). The Bermuda Branch of STEP has approximately 250 members representing a broad cross section of Bermuda's trust industry.

Bermuda was judged to be fully compliant with Recommendation 34 in its FATF peer review. Bermuda has recently completed the Global Forum Phase 1 Peer Review, where it was concluded that "In respect of ownership and identity information, the obligations imposed by Bermuda on companies, partnerships and trusts are generally sufficient to meet the international standard." Bermuda continues to improve its legislative and regulatory framework as a result of its commitment to international standards for exchange of tax information and to working with the Global Forum to ensure a mutual understanding of the applications of the standard. To this end Bermuda is preparing for Phase 2 and the assessment of Bermuda's effective implementation of these standards.

Bermuda's economy is dominated by the insurance, reinsurance and captive insurance sectors, which contributed more than 50% of Bermuda's GDP in 2006. We understand that Bermuda's insurance and banking sectors will be providing their own response to the Consultation Paper, and accordingly the following comments shall be directed to those matters of particular concern to the trust industry.

General Comments:

STEP Bermuda would like to see FATF Recommendations that are clear, concise, effective and workable. In keeping with the Risk-Based Approach, it is important that the financial/administrative burdens of compliance are not disproportionate in relation to the potential risk.

STEP Bermuda strongly agrees with FATF's fundamental principle of "Inclusiveness, openness and transparency". In keeping with this principle, we would like to see more detailed disclosure of the amendments being proposed and more opportunity for industry to actively participate in the review and amendment of the Recommendations.

Specific Comments:

Recommendation 5 and its Interpretative Note:

As indicated in our General Comments above, STEP Bermuda believes that, if drafted correctly, the use of suitable examples of risk factors, examples of enhanced CDD measures and new text on "Risk Variables" will make it easier for the trust industry to understand and comply with the FATF Recommendations. Without an opportunity to review the examples it is not possible to assess and comment on whether the examples and new text will actually achieve the intended purpose. Further it is not possible to assess the financial/administrative burden on trustees, and whether the costs of compliance are disproportionate in relation to the potential risk.

We would submit that public consultation should be sought regarding the examples and text in keeping with the principle of "Inclusiveness, openness and transparency".

Legal persons and arrangements – customers and beneficial owners:

As indicated in our General Comments, STEP Bermuda believes that the FATF Recommendations must be clear, concise, effective and workable. The trust industry has had, and will continue to have a problem interpreting company law concepts of „mind and management' and „beneficial ownership' which are used in the FATF Recommendations. It would be better to draft legislation and regulations in terms of two distinct groups; those with control of a trust and beneficiaries who benefit from a trust.

While the use of company law terminology in relation to trusts makes it difficult to ascertain FATF's precise objectives we would make two proposals:

1. Expand Recommendation 34 to include Protectors/Enforcers;
2. Identify trust beneficiaries at the time of any payment or when the beneficiaries intends to exercise vested rights (being the approach being considered for insurance policies)

Protectors/Enforcers:

Currently under Recommendation 34 service providers are required to identify the settlor, the trustees and the beneficiaries. In some cases other individuals may have powers which grant them considerable influence over the operation of a trust. These can have a variety of names depending on the jurisdictions (including „protector', „enforcer' and „guardian', among others) and their powers can vary considerably depending on the trust deed. In some cases, these individuals can have powers that give effective control over the appointment of beneficiaries and/or the distribution of trust funds. We would suggest that the identification of any third party with such powers should be a more general requirement.

The key test should be based on the powers the individual may exercise rather than the title attached to the role. The powers vested in the Protector or similar role vary both according to the proper law of the trust and the terms of the trust instrument. The powers we believe give rise to a defining power of control are:

1. the power to approve the addition or removal of beneficiaries;

2. the power to approve proposed trust distributions;

Trust Beneficiaries:

If a trust is to be valid, there is clear requirement in common law for the beneficiaries to be clearly identifiable. Indeed the identities of beneficiaries of a trust are always clear at the time of payout or when the beneficiary intends to exercise vested rights.

The issue of beneficiaries is complicated by the fact that for perfectly legitimate reasons many trusts are drafted in a way that allows beneficiaries to be added over time. This allows for changing circumstances, such as the arrival of new children or grandchildren, but it can mean that the initial trust deed is drafted very broadly. The simplest approach is to focus on identifying beneficiaries at the time of any payment to them or when the beneficiary intends to exercise vested rights. This is essentially the approach being considered by FATF for insurance policies.

Paragraph 24 of the consultation document states in relation to insurance products:

> "… consideration is given to clarifying which CDD measures should be applied in relation to identification and verification of the identity of the beneficiary, and when this should occur. It is proposed that, in addition to conducting CDD measures on the policyholder and its potential beneficial owner, financial institutions should:
>
> • Take the name of the beneficiary(ies) that is the specifically-named natural or legal person(s) or legal arrangement(s); or
>
> • Where there is a class of beneficiaries, obtain sufficient information concerning the beneficiary to satisfy themselves that they will be able to establish the identity of the beneficiary at the time of the payout or when the beneficiary intends to exercise vested rights.
>
> • **For both cases, the verification of the identity of the beneficiary(ies) should occur at the time of the payout or when the beneficiary intends to exercise vested rights**."

We believe that this wording is also appropriate for trusts. This clarification would provide reliable and accurate information of who benefits from a trust and focus resource on a key area of risk, when the money leaves the trust.

Recommendation 6 – Politically Exposed Persons:

Due to the size of Bermuda and the nature of its local trust business, the issue of the treatment of domestic PEPs will be different than for most other countries. The proposals for treatment of Bermuda's domestic PEPs would be acceptable, and would agree that Bermuda trustees should continue to take a risk based approach to domestic PEPs.

Recommendation 9 – Third Party Reliance:

The FATF's proposals to extend the types of third parties that can be relied upon to other sectors which are subject to supervision and AML/CFT requirements is acceptable since it would be useful for trust businesses to be able to rely upon a wider group of third parties.

With regard to the outsourcing and agency, it is difficult to comment on the proposal without having the benefit of reviewing the functional definition of third-party reliance.

Tax Crimes as a predicate offence for money laundering:

It is unclear from the Consultation Paper whether public consultation will be undertaken in relation to the amendment of this Recommendation. In particular the definition of „tax crimes' could be of particular significance to the trust industry, and unreasonable provisions could greatly impact the financial/administrative burden of compliance.

We would submit that public consultation should be sought regarding the amendment of this Recommendation in keeping with the principle of "Inclusiveness, openness and transparency".

Further Comments:

STEP Bermuda has had an opportunity to review the submissions that have been made by STEP Worldwide. Their response to the Consultation Paper contain a number of further comments in respect of matters not contained in the Consultation Paper. STEP Bermuda wishes to echo those comments:

Further comments – Application of R.34

We are aware there is currently a debate on whether Recommendation 34 should be applicable to all countries. STEP believes recommendation 34 should be applicable to all countries.

There is a significant regulatory gap relating to jurisdictions where there is little or no formal regulatory structure around trust service providers in spite of there being a large and active sector providing trust services. In practice in many such jurisdictions, such as the US, trust service providers will usually be in regulated professions such as law or accountancy. It could therefore be relatively straightforward to extend the existing regulatory structures in such professions to include the requirement to collect, retain and provide, if requested, the information needed to ensure that necessary information is available to the competent authorities.

As we noted above, Swiss based trust managers are typically managing trusts written under the laws of other jurisdictions and it is sometimes argued that the responsibility for regulation should lie with the jurisdiction under whose laws a trust has been written. Most practitioners, however, would argue that such an arrangement is unrealistic and likely to be ineffective. It would be preferable instead for trustees' residence (see above) to be the basis of regulatory responsibility for a trust.

STEP believes that action in those jurisdictions with significant regulatory gaps around the provision of trust services would be useful in helping address concerns about the transparency of the trust sector. We note that a recent FATF report highlighted the danger that there could be a "proliferation of TCSPs (Trust and Company Service Providers) whose management/staff do not have the expertise, knowledge or understanding of key matters that are relevant to the operation of their businesses, such as their client affairs." The same lack of expertise and knowledge could potentially also pose a risk to tax compliance but appropriate responses have been developed in the form of the templates laid down by the Offshore Group of Banking Supervisors and the OECD Steering Group on Corporate Governance. These cover measures designed to ensure that trust service providers are fit and proper and meet minimum standards of competence and training. They have been widely adopted in a range of jurisdictions and provide a coherent framework that could usefully be applied in those jurisdictions that currently lack such arrangements.

Moreover there has been some suggestion that those countries which do not recognise trusts do not need to implement recommendation 34.

For example, somewhat surprisingly in our view, Recommendation 34 was judged "not applicable" for Switzerland on the grounds that Swiss law does not recognise trusts. While true at the time of the FATF peer review (2005), Switzerland ratified the Hague Convention on the Law Applicable to Trusts and their Recognition shortly afterwards. In any event Switzerland has long had a large number of trusts managed by Swiss based practitioners, even if those trusts are invariably written under the laws of another jurisdiction (such as Jersey), since Switzerland has no domestic trust law of its own. More generally, it is not necessary for a jurisdiction to recognise trusts for its citizens and institutions to interact with trusts (as settlors, beneficiaries, advisors, etc.) and for a jurisdiction's practitioners to operate as trustees for trusts established in another jurisdiction.

For example a trust established by a settlor whose wife is French, with children residing in France may have trustees in Jersey or Denmark who would make payments to beneficiaries in France via a French financial institution, or purchase property in France using a French notary.

Further comments - How R.34 may be applied

We further understand there is some debate as to whether, if Recommendation 34 should be applied to all countries, how this may work in practice.

We believe countries should take measures to prevent the unlawful use of legal arrangements in relation to money laundering and terrorist financing by ensuring that its commercial, trust and other laws require adequate transparency concerning the beneficial ownership and control of trusts and other legal arrangements.

We believe ideally the most effective way to do this is to require trust service providers to obtain, verify and retain records of the details of the beneficial owners of trusts or other similar legal arrangements.

However, it should be noted that the regulation of trust service providers (TSP's) is done differently in different countries. In some countries such as the UK and the USA the TSP's are largely, but not exclusively, professional lawyers, accountants or bankers who are already regulated.

We believe that where TSPs are already regulated, but not yet required to collect beneficial ownership information, that additional obligations to collect beneficial ownership information are necessary. However, often this can be done through existing regulatory systems. This means it is not always necessary to create an entirely new regulatory structure for professional TSPs, and consideration should be given to building on existing regulatory structures.

To the extent that countries rely on the investigative powers of their competent authorities, these authorities should not only have sufficiently strong compulsory powers for the purpose of obtaining the relevant information, they should also ensure that the information is collected in their jurisdiction.

Further comments – unregulated TSPs

We are aware that there has been some debate on the issue of unregulated trust company service providers.

Normally regulation will only be directly applied by those trust service providers who are paid to act professionally. However, it is common for individuals in the UK, the US and elsewhere to act as trustees for trusts in a voluntary capacity. These are known colloquially as “lay trustees”. Information on the identity of such lay trustees will be captured by Financial Institutions where there is an associated bank account and by other, regulated TSPs or by charity regulators where the trust is a charity. The number of lay trustees is significant and, as volunteers, it is unlikely many would be fit to apply AML regulation effectively.

Further comments - Helping identify the scale of the problem

We understand that work is being done to collect information on how widespread is the use of trusts in criminal activity.

We understand that the World Bank has studied this issue and is about to release a report from its Stolen Assets Recovery Programme. We understand that they have studied the uses of trusts and companies in illegal activity and found that trusts are not commonly used.

The Law Society

Financial Action Taskforce Consultation Response

Reviewing the standards - preparing for the 4th round of mutual evaluations

January 2011

supporting solicitors

Contents

1. Introduction

This response has been prepared by the Law Society of England and Wales (the Society), which represents over 140,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and lobbies regulators, governments and others. The Society is the anti-money laundering supervisor for solicitors in England and Wales and also supports them in compliance through the provision of advice, awareness raising and education.

The Society welcomes the opportunity to respond to FATF's review of the standards in preparation for the 4th round of mutual evaluations.

1.1. The role of the legal sector

For many years the Society has publicly recognised:

- that there is a clear social justification for a prohibition on concealing and using the proceeds of crime;
- there is no role for solicitors in actively assisting criminals to launder the proceeds of their crime, such conduct being prohibited by our professional code of conduct as well as the criminal law; and
- as gatekeepers to the legal system and facilitators of many significant commercial transactions, solicitors have a role in achieving the aims of anti-money laundering measures.

However, for some time the Society has been concerned that the current application of the standards is not sufficiently focused to produce the most proportionate and effective contribution by the private sector to the aims of global anti-money laundering regime. The direct application of standards designed for financial institutions to law firms, without proper consideration of the different way in which law firms interact with clients and how money laundering risks can crystallise within retainers, is causing inefficiencies. There are a number of other aspects within the standards where a blanket approach to certain types of risks has been applied. This is resulting in wasted resources which cannot then be targeted to the areas of real risk.

The Society is committed to advocating for anti-money laundering standards which are clear in law, practically achievable by regulated entities and proportionate to identified risks. We hope that the comments within this submission assist in reviewing the standards so that the standards can better achieve those aims.

1.2. Preparation of this response

This response has been informed by numerous consultations and our work on anti-money laundering with the legal profession in England and Wales over the past decade.

This response has specifically been prepared with assistance from the members of the Society's Money Laundering Taskforce, with representatives from:

- BCL Burton Copeland
- Boys & Maughan

- Byrne & Partners
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith LLP
- Hogan Lovells LLP
- Irwin Mitchell LLP
- Kingsley Napley LLP
- Pannone LLP
- Slaughter and May

1.3. Terminology

Where we have referred to regulated entities in this response, we are referring to both financial institutions and designated non-financial businesses which are covered by the standards. Where we are referring solely to law firms in England and Wales and to our members, we have made this clear.

2. General concerns about the consultation

While the Society welcomes the opportunity to contribute to the first public consultation on the standards in many years, we do have some concerns about the current consultation process.

Reading through the consultation document, one is given the sense that decisions have already been taken on what changes may be discussed and even how some of those changes will be made. This suggests that there will be little scope for the private sector to provide suggestion as to how the standards could be refocused to promote more effective engagement from the private sector. Whilst we support many of the principles, we believe that in order for the proposals to be truly effective, it is vital to understand and take account of the practical implications on the private sector of nuances in the drafting.

We are further concerned that we are asked effectively to sign up to change in principal, without a clear idea of how that change will in fact be implemented. A clear example of this is at paragraph 16 of the consultation document, where consultees are asked to comment upon lists which have been drawn up but are not provided. While in principal some of the proposals may seem attractive generally, there is a real risk that in translating these into detailed standards, the specific wording may produce unintended consequences which consultees and FATF itself may not have supported.

We would encourage FATF to consider how the private sector can be given an opportunity to comment on the actual proposed drafting in the context of its general consultation processes. We would note that the involvement of the private sector was very effective in the context of the consultations on the risk based approach (RBA) guidance for the different sectors.

We are also concerned that the time frames for the consultation leave very limited time for assessing and assimilating any new ideas which are clearly supported as a result of this public consultation and more importantly for the public consultation on Recommendations 33 and 34. We are concerned therefore that there will be no

meaningful consultation on the se further issue s and would ask FATF to recon sider the proposed time table.

Finally, a number of the issues cov ered in this consultation are significantly inter-related to the application of recommendati ons 33 and 34 on ben eficial owne rship. Without information about the pr oposed changes to those recomme ndations, it is quite diff icult to form a clear view on the effect of the changes proposed in this consulta tion. Accordingly, we would ask FATF to ensure that t here is an o pportunity to further con sult fully on these issues in th e second ro und of consultation, so that any changes take into accoun t the very real challenges faced by the private sector relating to beneficial ownership.

3. Interpretive note on the risk based approach

The Society has long been supportive of the risk based approach in anti-money laundering compliance. Each segment of the regulated sector, each client and each product or service line has different risks and as a result, there are different opportunities for mitigating those risks. The risk based approach, when properly applied, allows regulated entities to tailor their compliance so that they can meet the risks that they face most effectively.

The Society believes that the work undertaken by FATF in producing sector specific guidance on the risk based approach was of significant value, due to the varied nature of anti-money laundering risk. We are pleased to have contributed to the preparation of the RBA guidance for the legal sector.

Given that there has been such valuable work undertaken on these guidance documents, we do wonder what can be added to the fight against money laundering by the introduction of an interpretive note on the risk-based approach, particularly with respect to regulated entities.

Our perception, which may be misplaced, is that the initial outline of proposals promotes a return to a one-size-fits-all approach. We are particularly concerned that where FATF requirements have been gold-plated nationally, statements that a particular type of client or transaction will always be high risk can undermine the effectiveness of the risk based approach and the work already undertaken in the sector specific RBA guidance.

When considering the focus on the proposed risk assessments FATF needs to consider the size, complexity and resources of the vast majority of the regulated entities to whom their standards apply so that firms can apply a proportionate, flexible and risk based approach. It is important to note that while there are a number of large multinational banks, lawyers, accountants and casino operators, the vast majority of regulated entities are small to medium sized businesses[1]. While most are determined to comply with their legal and ethical obligations, given the size and make-up of such firms few will have the resources to conduct detailed risk assessments. Most will be taking a more generalised risk approach to areas of law and then to particularly unusual clients. This approach has been recognised as realistic for some law firms in the RBA guidance for the legal sector.

[1] In the legal profession in England and Wales around 40% of law firms are sole practitioners and a further 45% of law firms have 4 partners or less.

http://www.lawsociety.org.uk/secure/file/183555/e:/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/asr2009report.pdf

We would be concerned if such proportionality were to be lost as a result of a new interpretative note.

In terms of the proposals regarding risk management and mitigation, we would also suggest that any reference to policies and procedures complying with guidance should be to national sector specific guidance, as this is the standard which firms are actually assessed against.

4. Amendments to Recommendation 5 – client due diligence

4.1. Examples of high and low risk situations

As outlined at point 2 above, our response on this point would have been more focused had the pre-decided lists of high and low risks been included in the consultation. We will try to address the issues to the extent they have been foreshadowed in the consultation.

The Society supports the idea of more information being provided on different risk situations, but again questions whether the standards and interpretative notes are the most effective way of providing that information. As outlined previously, anti-money laundering risks vary according to the different sectors and even between regulated entities within sectors. The provision of more "nuanced or focused information through methodologies and the RBA guidance is preferable to statements that certain types of clients, products or jurisdictions will "always" be a higher risk for all regulated entities and all of the products or services they provide, which does not reflect the reality.

A clear example of this is the current treatment of politically exposed persons (PEPs) on which we elaborate further at point 7 below. At present, all PEPs are assumed to be a risk simply because they have access to government or state funds. While it is accepted that there is a risk that a PEP will have accepted a bribe or misappropriated government funds because s/he has greater access to these funds than the average citizen, that does not mean that all PEPs are corrupt. Where a PEP is purchasing a modest family home with the proceeds of the sale of their former home and a mortgage, there is very little money laundering risk. The risk is even less so when it is the sibling of a primary PEP undertaking the same transaction. Yet because PEPs have been singled out in the standards as a specific high risk indicator, regulated entities are required to conduct enhanced due diligence and monitoring irrespective of the real risk of the individual client and the individual transaction. This is leading to firms undertaking significant due diligence to protect themselves from sanctions for regulatory breach rather than from a real risk of money laundering.

By contrast, it is not generally accepted that simply because accounts clerks have increased opportunity to steal from their employer or pharmacists have increased access to prescription medication which they could be selling illegally, they should all be treated high risk. That would not generally be considered risk based or proportionate, and the key focus should be on situations where there are other warning signs of money laundering, such as attempted use of unexplained private funds. Arguably, therefore the same should be said for the approach to PEPs.

We believe an "in-principle" statement about how to approach higher risk situations would be more effective within the standards, rather than an interpretive note specifying set situations which should always be treated as high risk even if in fact they are not. More targeted information could then be provided about situations which may pose a higher risk to different sectors in methodologies and sector specific guidance.

4.2. Beneficial ownership

The Society accepts that sophisticated criminals will seek at times to hide behind business structures and agents to help facilitate money laundering. For this reason we appreciate that a greater understanding of the client's ownership and control structure can be of use for regulated entities to better understand the motivation behind transactions and spot anomalous activities or relationships which may be indicative of money laundering.

However the existing standards require regulated entities to actively seek out an individual at the top of a corporate tree with the requisite interest, irrespective of the inherent risk posed by the client or the transaction. Often this results in the firm simply confirming that there is in fact no such beneficial owner in existence. There are real challenges involved in the current requirements resulting in detailed due diligence regardless of any concern that there is any risk in terms of the overall transaction.

This failure to fully apply a risk based approach to the identification of beneficial owners is of significant concern to the Society and our members, in part because of the waste of resources. We are pleased that FATF is looking at the proportionality and effectiveness of the client due diligence requirements as they apply to beneficial owners.

4.2.1. Agency

The Society appreciates that ensuring a person is authorised to act as an agent is a useful fraud prevention step. However we are concerned that these proposals are seeking to impose a legislative requirement on regulated entities to prevent predicate offences as well as money laundering.

The existing standards already require that you identify your client and the beneficial owners, which includes a person on whose behalf the transaction is undertaken. This clearly covers agency situations. The focus is on identification, to reduce the risk of criminals using false identities and money mules to help in the concealment of the proceeds of their crime. The Society believes this is an appropriate topic for FATF to deal with.

However to go further and insist upon obtaining evidence of authority to act, is to create an entirely new legal burden on parts of the private sector. Such an approach would confuse client identification and verification with corporate authority. While many firms will already make some enquires about such authority, this is an issue of contract law and the law of negligence not one of money laundering regulation. To make it a legislated requirement, potentially backed with criminal sanctions, is a clear example of inappropriate regulatory creep and obtaining such confirmations will not have any bearing on the fight against money laundering.

4.2.2. Mind and management of the firm

As we have already said, the Society is in favour of a more pragmatic and risk based approach being taken to beneficial ownership. We understand from discussions with others who have been more closely involved with FATF that this proposal is meant to achieve such an aim. Over many years, at all levels, we have seen that despite the best of intentions, a failure to achieve precise drafting results in those intentions being frustrated. Our concern here is that not only will the actual drafting will be crucial to achieving the stated aim but also that at present the suggestions outlined in the consultation document seem to be making the task of identifying and verifying beneficial owners more not less complicated.

Rather than allowing for a more pragmatic and broad brush approach to beneficial ownership in low risk situations, the current proposals appear to require full compliance with the existing regime in all cases; namely searching for one or more named individuals who control the entity. We are very concerned that the proposals then seem to be applying an additional obligation, that should such named individuals not be located, regulated entities must then go in search of some other person or group of people who may be the mind and management of the entity, even though they possess none of the classic indicators of control – such as voting rights.

We believe that this is an impossible request. It may be that we have misunderstood the intention regarding changes in this area. Alternatively, FATF may be planning to provide clear, practical guidance as to how regulated entities should, regardless of risk, not only locate such individuals but also be confident that they can demonstrate to the regulators that they have undertaken sufficient due diligence, in a cost effective manner.

We encourage FATF to engage in detailed consultation with the private sector to discuss how the real issues and risks around beneficial ownership can be addressed in a way which is practically achievable, proportionate and effective.

4.2.3. The practical problems

The Society and our members are supportive of the provision in Recommendation 5 which enables regulated entities to verify the information on beneficial ownership by non-independent means, because often it is the only way in which they can actually comply with the requirements.

In practice, even within the UK, much of the beneficial ownership information that regulated entities must obtain is not available through independent channels. Recent amendments to the UK legislation governing the inclusion of data on the Companies House register saw the removal of the private addresses of company directors, to help combat fraud and harassment from activists. While verification of this particular piece of identifying information is not specifically required in the UK, in practice it has been useful for higher risk entities and transactions. The removal of such information from publicly available sources demonstrates that there are competing interests to be taken into account when setting the standards for anti-money laundering compliance and when assessing the actual achievability of the measures by regulated entities.

When trying to establish beneficial ownership in jurisdictions outside of the UK, possibly where the risk of money laundering increases, such information is practically impossible to obtain from an independent source. Where there is no ability to independently verify this information, our members feel particularly vulnerable and question the efficacy in taking the time to collect information which could turn out to be completely false. This lack of reliable information tends to result in our members seeking copious amounts of documentation from a wide range of intermediaries (such as banks, other legal advisors, accountants, investment advisors and auditors) as well as the client to seek to develop a consistent picture of the ownership and control structure of the client. This is irrespective of the level of risk posed by the client generally or by the specific transaction. The costs of such research are considerable, often not recoverable and create significant tensions with the client who cannot understand the purpose of such detailed investigation.

The multi-layering of business entities is a reality of global corporate life. For firms operating in an international context they often find themselves following a corporate chain of not merely two or three levels, but of many more. At this point, even the most forthcoming and well meaning client is unable to assist in identifying the ultimate individual who beneficially owns them, possibly because one simply does not exist or because if they do, they are so far removed from the client that actually they do not exert any real control over the client or their transactions. Our members are finding that they then have to get the contact details of management or general counsel of an entity three-quarters of the way up the corporate chain, explain to them that they have this subsidiary which would like to undertake a basic transaction, but UK law requires this entity to provide extensive details about their own ownership structure. Needless to say, many such entities when contacted fail to see the relevance or benefit for themselves or how such information will assist in the fight against money laundering. Law firms acting in a global market place, where other non-UK lawyers either have no requirement to undertake these checks or do not undertake them so diligently are finding that this can be a significant disincentive for international clients to instruct them, all other things being equal. This clearly has a potential impact on global competitiveness.

Added to the above, there is also the issue of costs of beneficial ownership CDD, which in many cases far outweigh the benefits. Unfortunately most law firms, in common with most banks and other regulated financial entities, fail to record time spent on AML compliance specifically.[2] Therefore it is difficult to accurately estimate the cost of client intake for different size corporate clients. However, we have been advised by some of our members that the opening of a new international corporate client matter can cost in the region of £5,000 due to the chargeable time lost by fee earners and compliance staff in chasing documents and undertaking research, even in circumstances that generally would not be considered to give rise to a risk of money laundering. Even for smaller law firms, the opportunity cost of time spent on conducting due diligence checks on any client who is other than the absolute standard, is more than the fees they are able to charge for the work being undertaken. This either results in them taking on the client at a loss in the hope of future work or in simply turning away possible legitimate business.

4.2.4. Suggestions for change

In light of these practical problems the Society would advocate the following changes to Recommendation 5:

1. Identification of beneficial ownership, rather than just the verification of such ownership, be permitted to be undertaken on a risk-sensitive basis
2. A greater focus be placed on the existing requirement to understand the general ownership and control of the client, rather than a specific pursuit of named natural persons, unless there are other warning signs of potential money laundering.

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[2] Anti-Money Laundering Survey. PWC, 2007, page 4 http://www.ukmediacentre.pwc.com/Content/Detail.asp?ReleaseID=2384&NewsAreaID=2

Anti-money laundering compliance by the legal profession in England and Wales, Law Society, 2009, page 19 http://www.lawsociety.org.uk/new/documents/aml/amlcompliancereview.pdf

We believe that this approach would ensure that regulated entities are still required to understand who their client is, but would limit the resource intensive profiling of clients' ownership chains to those situations where there is a real risk of money laundering.

We do not believe that a requirement for regulated entities to establish the 'controlling mind' of the organisation will be more effective and we believe there will be significant practical challenges in applying such a requirement.

These views are of course subject to reviewing any proposals for change regarding Recommendations 33 and 34.

4.3. Life Insurance policies

The Society welcomes the proposals to refine the application of client due diligence requirements for life insurance policies and to understand that beneficiaries under the policies are not beneficial owners or customers as currently understood within the standards.

We believe that consideration should be given to taking a similar approach with trusts due to their similarities with life insurance policies. If the money which is placed into them at the start is clean, it is only the trustee investing the money who can commit criminal activities to taint the property. Beneficiaries of both common law trusts and life insurance policies have no real control over the funds until such time as they are paid out. Further, even if the beneficiary is a convicted criminal, it is not money laundering to give them money which is actually clean. Therefore it would seem unproductive to be focusing limited resources on identifying people for money laundering purposes when they are not the source of the funds and are unable to control how the funds are dealt with. We hope that a similarly pragmatic and effective approach will be offered in the consultation on Recommendation 34.

5. Amendment to Recommendation 8 – high and emerging risks

5.1. Non face-to-face requirements

The Society welcomes the review of the blanket assessment of enhanced money laundering risk for non face-to-face clients. In the modern world the conducting of business at a distance is a reality and the vast majority of transactions are legitimate. Different sectors will be exposed to non face-to-face risk in different ways and will have different ways of effectively mitigating that risk. For some, enhanced initial CDD will be appropriate, but for others enhanced monitoring and information on source of funds will be more effective for mitigating money laundering risks. In line with our earlier comments, we are of the view that Recommendation 5 already requires higher risk categories to undertake enhanced due diligence. In line with our earlier comments, we believe that the removal of this section from Recommendation 8 does not require replication in an interpretive note, but would be more appropriately addressed in the relevant typologies and sector specific RBA guidance.

5.2. Risks of new technologies

Turning to the issue of the risks posed by new technologies, the Society is concerned that FATF should not seek to be too prescriptive in the standards on this issue. The private sector who develop new technologies are well placed to aid government and law enforcement in identifying risks and suggesting appropriate steps to mitigate those risks. Further, the detail of the steps to be taken to mitigate these risks should be included in the typologies reports and sector specific RBA guidance.

6. Amendment to Recommendation 20 – application to new entities

It is not clear from the consultation what 'other financial institutions or businesses' exist which are not already covered by the definition, or which might be covered by the proposals for quite a wide right to extend the scope of the standards. The Society is concerned about the risk of regulatory creep being permitted by FATF without clear evidence of specific risk and an indication that the application of the standards will assist in mitigating the specific risks.

7. Amendment to Recommendation 6 - politically exposed persons

Recommendation 6 requires all firms to apply enhanced due diligence on all foreign PEPs, irrespective of the risk posed by the individual PEP or the specific transaction. As highlighted already, this non-risk based approach is costing firms significant amounts of money, providing practical difficulties in terms of establishing source of funds, and at times limiting the provision of legal services to legitimate individuals.

7.1. Evidence of the threat posed by PEPs

Research from the World Bank suggests that between US$20 billion and US$40 billion is taken from developing countries by corrupt leaders and applied for their own personal use, outside of their home country. However, that research, while not attempting to quantify the number of PEPs, acknowledges that not all PEPs are corrupt, in fact most are not and those that are, are likely to be a small percentage of PEPs. [3]

Recent reports from the World Bank[4] and Transparency International[5] on politically exposed persons failed to:

- provide any evidence for the scale of the PEP threat of money laundering globally other than 'guestimates'

[3] Stolen Asset Recovery, Politically Exposed Person, A policy paper on strengthening preventive measures, World Bank, 2009 http://siteresources.worldbank.org/EXTSARI/Resources/5570284-1257172052492/PEPs-ful.pdf

[4] Note 3

[5] Combating Money Laundering and Recovering Looted Gains, Transparency International UK, 2009 http://www.transparency.org.uk/publications

- provide any detailed methodologies being used by less obvious PEPs or information on the number of these less obvious or related PEPs actually being used or discovered
- really consider the costs incurred by the regulated sector and whether those costs could actually produce greater benefits
- appreciate the fact that the majority of businesses required to apply these PEP requirements are not large banks with computerised client databases and large compliance budgets, they are small businesses with paper-based systems
- take into account the infringement of fundamental human rights of privacy for the vast majority of non-corrupt PEPs being covered by their wide ranging and very intrusive recommendations

The Transparency International report and a further series of case studies from Global Witness[6] reports did provide some actual examples of activities by corrupt PEPs. In all of the examples provided it was clear to the regulated entity that they were dealing with a high level PEP, there were significant corruption risks in the home jurisdiction of the PEP, and generally the funds being used were not funds to which the PEP should have had access at all or should not have been used for the purposes they were used. In all of the examples provided the regulated entity simply needed to comply with legal and ethical imperatives not to engage in money laundering rather than succumbing to the financial incentive to continue with the transaction until caught. None of the examples required the use of expensive commercial lists, daily screening of client databases for emerging PEPs or extensive reviews of source of wealth or source of funds.

None of the reports were able to:

- estimate the number of PEPs in existence, either as a base figure or by comparison to the number of 'regulated' customers or transactions processed in a year
- estimate the percentage of PEPs who, on the basis of historical evidence, are likely to pose a real risk of money laundering, rather than the hypothetical risk that all could be corrupt or corruptible
- provide numbers of cases where secondary PEPs had sought to move corruptly obtained funds on behalf of primary PEPs
- provide numbers of suspicious activity reports made relating to PEPs in the last year
- provide numbers of investigations into PEPs which were commenced in the last year
- provide any evidence that the enhanced compliance being voluntarily undertaken by some regulated persons was beyond the requirements of the Regulations actually producing improved outcomes and the extent of the benefit from those outcomes.

Despite this lack of evidence, all reports called for greater action on the part of regulated persons, to tackle the 'risk' of money laundering by PEPs.

[6] Undue Diligence, Global Witness, March 2009 http://www.globalwitness.org/media_library_detail.php/735/en/undue_diligence_how_banks_do_business_with_corrupt

At present, it is the Society's view that there is no evidentiary-based assessment of the actual risks posed by PEPs of money laundering in the UK, to enable a proper assessment of how to effectively and proportionately tackle those risks.[7]

7.2. The legal sector experience of PEPs

In the Society's survey of AML compliance by law firms in England and Wales in the Autumn of 2008[8], the following key findings were:

- 67% of respondents said that they did not have PEPs as clients
- Of those who had PEPs as clients, 30% were primary clients and 45% were beneficial owners of primary clients.
- The highest percentage of PEPs in a client base was 10%
- 60% of respondents were using commercial e-verifiers to help them identify PEPs
- 33% of respondents had turned down work because of the perceived risk posed by PEPs – they did not say this was because they actually suspected money laundering

7.3. Commercial providers

The current list of people who qualify as a PEP under Recommendation 9 is already very wide. It encompasses:

A person who has been entrusted with a prominent public function in a foreign country. They are:

- heads of state, heads of government, ministers and deputy or assistant ministers
- members of parliament
- members of supreme courts, of constitutional courts, or of other high-level judicial bodies whose decisions are not generally subject to further appeal, except in exceptional circumstances
- members of courts of auditors or of the boards of central banks
- ambassadors, charges d'affairs and high-ranking officers in the armed forces
- members of the administrative, management or supervisory bodies of state-owned enterprises

It also covers family members and close known associates of primary PEPs.

Because of differences in the definitions of PEPs at an international level, some commercial providers take a broader approach to the definition of PEPs while others include a wide range of persons who may pose a reputational risk to the firm for other reasons, rather than just money laundering. We understand that some commercial providers also include as PEPs all persons who are members of the ruling political party, at least in some jurisdictions. These can lead to significant over-compliance, particularly in relation to countries like China.

[7] See also the Law Society response to the draft Transparency International report

http://www.lawsociety.org.uk/newsandevents/topics/aml/consultations.page

[8] Anti-money laundering compliance by the legal profession in England and Wales, Law Society, 2009, http://www.lawsociety.org.uk/new/documents/aml/amlcompliancereview.pdf

In any event, because these lists predominantly rely upon publicly available information they are often incomplete in terms of the coverage of persons and the individual details contained. This can result in high levels of false-positive identification of clients as PEPs, which then requires a large amount of time to be spent checking other sources of information and seeking further evidence from clients to establish whether the client is in fact a PEP or not.

The costs of these commercial providers are also high. The Society has used its purchasing power as a representative body for the legal profession in England and Wales to negotiate better pricing for our members, so that smaller firms may be able to access these resources. However, even small firms can be spending a few hundreds of pounds a year simply to prove that they do not have a secret PEP hiding in their client base. Larger firms can find themselves spending hundreds of thousands of pounds in licence fees and thousands of pounds in search fees each year.

There is no regulation of the fees charged by these commercial providers, other than the market. In the absence of reliable evidence on the risks actually faced (that these databases are said to help mitigate) and in the face of criminal sanctions for non-compliance in some FATF countries, it is clear that the market is unlikely to be a rational or efficient regulator of such costs.

7.4. Government lists

All of the persons who fall within the definition of a primary PEP are appointed by government. In making those appointments a government will generally undertake checks on the background of those persons, both in terms of their family members and business associates and their income and assets.

The Society, our members, and others in the regulated sector, have long requested that governments should provide this information, which they are best placed to collect and retain, to the regulated sector to enable compliance with the PEP obligations.

The World Bank, in considering this request which was widely made by those financial institutions it interviewed, stated that it was neither physically possible nor politically desirable for governments to provide such lists[9]. The report did not address why it was then appropriate to pass the requirements and costs on to the regulated sector.

We appreciate that some governments around the world are actually themselves the target of these laws because of their corrupt activities within their own jurisdiction. We appreciate that such jurisdictions would be unlikely to provide such lists. However the absence of such lists would of itself flag to regulated entities that PEPs from this jurisdiction should be treated with enhanced care.

If the risk of money laundering from PEPs is as significant as government and law enforcement allege, the Society cannot understand why FATF is unwilling to call on governments to assist the regulated sector to combat this risk. In light of this unwillingness, we consider it ethically questionable to threaten private citizens with civil liability and criminal sanctions for failing to do what governments will not or cannot do.

7.5. Domesti c PEPs

The consult ation refers to the ad option of the United Nations Convention against Corruption and asks whether the standards sho uld require application t o domestic PEPs,

[9] Note 3

rather than highlight this as something for member states to consider. We are strongly of the view that there should not be any extension without further clear evidence of the risks posed by domestic PEPs as an entire cohort and that this is the most effective way to mitigate that risk. It is vital to bear in mind that PEPs are also private individuals who will need to carry out day-to-day transactions many of which will be low risk. Under the United Nations Declaration of Human Rights, these persons also have the right to a private life in which to carry out those transactions. The rationale for looking more closely at foreign PEPs is that we should ask additional questions as to why the individual is doing business in another jurisdiction. However, in a more globalised world, it is not unusual for individuals generally to be undertaking transactions in other jurisdictions; even this generalisation is becoming less appropriate.

In practice, a domestic PEP will still be subject to client due diligence and ongoing monitoring, and will be the subject of suspicious activity reports where there is information which raises a suspicion of money laundering. There is no evidence that putting more names on databases and requiring management committees to scrutinise asset declarations will be likely to dramatically increase the number of such reports, in the UK at least.

While the Society appreciates that some firms will already be applying some level of enhanced due diligence to domestic PEPs, we do not believe there is sufficient evidence of unmitigated risk in this area to warrant the legislating of such voluntary practice, and the possible enforcement of it with criminal sanctions.

7.6. Family members and business associates

The consultation outlines proposals from FATF to limit enhanced due diligence on secondary PEPs only to situations where there is a direct link with the PEP in the transaction being undertaken or the product or service being utilised. The Society agrees this is likely to be a more proportionate approach. However we would like the opportunity to comment on the exact wording to better understand how it will work in practice.

8. Amendment to Recommendation 9 - reliance

8.1. Who can rely

The Society agrees with the proposals in the consultation that that the decision as to who can be relied upon should remain with national governments. Each government will have a better understanding of the level of compliance and supervision within each sector, which will affect the standard and reliability of the CDD being relied upon. However, wider access to the reliance provisions is likely to promote greater use of the reliance provisions and achieve the aim of reducing red-tape. Therefore the Society suggests that the interpretive note for Recommendation 9 encourages governments to apply the reliance provisions broadly where there is appropriate compliance and supervision.

8.2. 3rd party reliance and outsourcing

The Society supports FATF's view that attempting to define the concepts of reliance, outsourcing and agency could be problematic practically and result in unintended consequences. In light of the challenges faced in obtaining CDD information, particularly for beneficial owners, it is vital that regulated entities have access to the widest range of

information sources, including other people more closely associated with the client. The Society believes that where regulated entities are still conducting their own risk assessments and reviewing the identity information themselves, they should not be restricted to only using the sources approved for complete reliance.

8.3. Intra group reliance

The Society welcomes the proposals to promote greater intra group reliance, as it recognises that is how the private sector conducts business. We believe it is important that any amendments recognise that all regulated entities, including lawyers and accountants, and accordingly be extended to designated non financial businesses.

8.4. The real problems with reliance

The Society has been supportive of the development of the reliance provisions through the European directives and in national law. The reliance provisions flow from FATF recommendation 9. The purpose of these provisions was to reduce red-tape and the costs of secondary and unnecessary CDD processes being carried out by multiple parties in the regulated sector for the same client and the same transaction. The Society and our members see these as very positive aims which have the potential to reduce the cost of unnecessary compliance which has little or no benefit in the fight against money laundering. However the specific requirements which have been placed on the use of the reliance provisions means that they cannot be used to their full capacity in practice. It is the Society's view that you cannot sensibly place responsibility (and potential sanctions) on a person for something beyond their control. As such we suggest that the proper approach is to only require a person to take reasonable steps or make reasonable enquiries before placing reliance on another person.

We understand that these concerns have been raised directly with FATF through the IBA, the CCBE and the American Bar Association (ABA) and we are supportive of the representations they have made. It is an issue which has also been made across the regulated sector within the UK. Unfortunately this key issue has not been addressed in the consultation document. As we believe the reliance provisions are of very limited use without the introduction of reasonable reliance, we feel it is important to raise them in this response.

8.4.1. Use of the provisions by law firms

In the Society's Autumn of 2008 survey[10] we specifically considered the issue of reliance. We received 55 responses to the survey the key findings on reliance were as follows:

Firms who had relied on others in the UK

- 57% had relied on another solicitor
- 41% had relied on a financial institution
- 28% has relied on an external accountant
- 4% had relied on an auditor

Firms who had relied on others outside of the UK

[10] Anti-money laundering compliance by the legal profession in England and Wales, Law Society, 2009, page 19 http://www.lawsociety.org.uk/new/documents/aml/amlcompliancereview.pdf

- 40% had relied on another independent legal professional
- 25% had relied on a financial institution
- 10% had relied on an external accountant
- 4% had relied on an auditor

Why reliance was not occurring

- 64% said they did not want to use the reliance provisions, either at all or in a more wide spread way, because of the criminal sanctions which apply to them if the other person relied upon makes an error
- 48% said they were not happy with the CDD standards being applied by others
- 34% found it difficult to assess whether equivalence applied so that they were able to use the reliance provision.
- only 48% of respondents were willing to let others rely on them - the main reason for not doing so was a concern that they would be held civilly liable for any mistakes they made

The above does not however indicate how regularly each of these firms is using reliance. In further discussions with our members, it appears that it is smaller law firms who are making greater use of the reliance provisions. In many of these cases it is because they personally know the other regulated entity they are relying upon, which is a much stricter test than envisaged by Recommendation 9. In other cases it is not clear if the smaller firms have fully considered the potential criminal and civil ramifications of the reliance provisions or the actual CDD standards of the regulated entities upon whom they are relying.

8.4.2. Variation of CDD standards

One of the key concerns is the fact that the firm who is "relying" remains liable and could face potential criminal sanctions in the event that the CDD evidence is deemed to be insufficient. In the absence of actually obtaining the documentation from the other party, it is not possible to assess whether the standard of due diligence applied will meet the expectations of the firm seeking to rely upon that party. This is largely due to the differences in the application of the risk-based approach.

A number of law firms have indicated that when documents are in fact requested, the documentation is not adequate for their purposes (leaving them concerned about criminal penalties). There are a number of reasons why the documents provided fail to meet the standards required by the party relying upon them. One reason stems from the difference in the way that the equivalence provisions are applied for the purpose of determining whether simplified due diligence applies. By way of explanation:

> In the case of financial institutions, simplified due diligence can be applied to a non-EEA entity which is subject to requirements equivalent to those set out in the third directive. HM Treasury issued a list of jurisdictions for this purpose; however it included a statement that *'firms should note that the list does not override the need for them to continue to operate risk-based procedures when dealing with customers based in an equivalent jurisdiction'.* Accordingly, the approach of simplified due diligence differs from firm to firm. Some firms completely rely on the list, while others take precautionary measures in relation

to certain jurisdictions on the list where corruption is perceived to be more prevalent. Thus the level of information held on file by firms will also differ.

Similarly, in the case of companies whose securities are listed, for the purposes of the third directive, the question is whether the entity is subject to the disclosure requirements that are 'consistent with' EU legislation. The Regulations set out a list of those disclosure requirements. On one interpretation, a firm could require all of those requirements to be faithfully reflected in the relevant market's obligations. Another firm may consider it enough to satisfy the majority of those provisions. Again this means that different approaches will be taken towards simplified due diligence.

This problem is also exacerbated by the different rules introduced in different EU jurisdictions; for example the Dutch rules require the collection of name and date of birth details for the representative of an entity. This is not required elsewhere. In the UK the relevant industry guidance only recommends obtaining the names of directors for a private company and only where it is not a well known company or there are higher levels of risk. [11]

Even for due diligence on individuals or small businesses within the UK, the process is not straightforward. Some firms in the UK still have procedures customarily requiring passport details of directors of companies whereas others only request such information in high risk situations. Furthermore, some firms still expect to receive a utility bill dated within the last three months for individuals, even through the client may have been taken on some time before the reliance certificate is provided.

In summary, unless a firm knows that another entity has procedures that match its expectations, that firm is taking a risk in using the reliance provisions because liability remains with them. It should however be the case that a regulated person can assume that another regulated person has put sufficient procedures in place and can also rely on their risk-based judgement, unless there is evidence to the contrary.

8.4.3. Restrictions on providing material

Many law firms also now use a number of service providers for electronic verification, which often provides evidence of incorporation, registered address and director or shareholder details. All of the information obtained in this way is subject to license and therefore cannot be passed on. Accordingly this leads to gaps in the CDD documentation that can be provided to a third party. This means that if a firm relies on another regulated person, not all of the relevant information can be provided upon demand, even if it has been collected. This leaves the party relying upon them at risk of criminal sanctions and may stop other firms from providing reliance certificates.

Sometimes, even though a reliance certificate has been provided, the other party fails to supply the relevant documents upon request. As the liability remains with the party seeking to rely, there are real concerns about the position that this puts them in, i.e. at risk of criminal sanction.

[11] see 5.3.127 of the JMLSG guidance (Part 1) and 4.6.3 of the Law Society Practice Note

8.4.4. Civil liability

Where firms have received requests to be relied upon, many are reluctant to do so in case it gives rise to a subsequent civil claim if the risk-based judgement turns out to be misjudged. Many firms therefore seek to provide the information upfront (subject to licensing and data protection considerations).

8.5. Suggested amendments on Reliance

The Society believes the following changes to Recommendation 9 would enhance its effectiveness and applicability:

- All regulated persons should be able to reasonably rely on other regulated entities and presume that the regulated entity has in place appropriate risk-based CDD procedures, unless there is evidence which rebuts that presumption.
- Where reasonable reliance is demonstrated, the party being relied upon is responsible for carrying out CDD in accordance with its own laws and procedures and that the regulated persons relying is not liable either for its 'failure' to carry out CDD or the failings of the party relied upon.
- The party being relied upon should not be subject to any civil or other legal responsibility to the relying party.
- A reliance certificate should list the details of the evidence that has been collected and this should be sufficient for reliance. While the regulated person who is relying should be entitled to seek copies of the evidence, there should be no legal obligation on them to obtain it.
- If law enforcement wants copies of the evidence, they should make the request directly to the regulated person who is relied upon.

9. Amendment to Recommendation 1 - inclusion of tax crimes as predicate offences

The consultation outlines that FATF are considering including tax evasion in the list of predicate offences for money laundering.

The Society has a number of concerns with this suggestion which we believe need to be fully considered.

1. There is no universally accepted definition at law of tax evasion. Even in the UK this is no specific offence of tax evasion.
2. It is not clear that simply adding the offence to the list of predicate offences will be sufficient to result in money laundering offences automatically following from the predicate tax offence.
3. In the UK tax evasion type offences have been included in the money laundering regime, not simply because of the all crimes approach, but because the legislation refers to obtaining a benefit or pecuniary advantage as a result of the crime. There are a number of difficult practical consequences which flow from this definition, such as unending tainting, which may in fact not be intended by FATF.

9.1. Definition of tax evasion

There is no universally accepted definition at law of tax evasion. Traditionally, as a general approach, this concept has required an element of dishonesty and a deliberate act on the part of the individual. However in recent times there has been an increasing trend for law enforcement, government and media commentators to merge this concept with legal tax planning and minimisation in discussions on the topic.

We believe that FATF should clearly articulate the actual criminal activity and social ill they wish to target and achieve agreement as to its scope. It may be that the use of the term Fraud on the Revenue / Government is more helpful in this context.

Even by taking a clearer definition of the criminal activity, there will be challenges internationally due to the differing enactments which proscribe Fraud on the Revenue. Some countries may permit individuals and companies to structure their tax affairs in a particular manner legally, while the same conduct would not be legal in another country. For individuals and companies who operate in both jurisdictions, the foreign legal conduct would still amount to a predicate offence in the other country. As many countries have applied an extraterritorial application to their anti-money laundering laws, such individuals could find themselves reported for money laundering in one country for conduct which is legal in the country in which it is undertaken. Further, given the complexity of taxation laws, and the fact that reporting is on the basis of suspicion, very few in the regulated sector will take the time to assess whether offences are actually occurring. This is likely to see FIUs receive a significant increase in reports where there is limited prospect of a conviction, recovery of money or even useful crime fighting intelligence.

9.2. Existing international instruments on money laundering

For money laundering to occur under international instruments, you must have a predicate offence committed, property derived from the predicate offence, and then a further act dealing with that property for a specific purpose.

While we appreciate that FATF are well aware of the international instruments on money laundering, for ease of understanding our concerns, we thought it appropriate to set out some of the relevant definitions, as the exact wording is important.

Definition of property

> Vienna Convention article 1 – "property means **assets** of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and legal documents or instruments which evidence title to, or interest in, such assets. "

Definition of money laundering

> Vienna Convention article 3(1) – "Each party shall … establish a criminal offence under its domestic law when committed intentionally:
>
> (i) the conversion or transfer of property, knowing that such a property is **derived from** [a predicate drug offence], for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such a [predicate drug offence] to evade the legal consequences of his actions.
>
> (ii) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, ownership of property, knowing that such property is **derived from** [a predicate drug offence]."

Predicate offence

While the predicate offences under the Vienna Convention related to drug offences, they were expanded under the Palermo Convention.

> Palermo Convention article 6 – "Each State party shall seek to apply [the money laundering offences] to the widest range of predicate offences. Each State Party shall include as predicate offences all serious crimes as defined in article 2, and the offences established in accordance with this convention [participation in an organised criminal group, corruption and obstructing justice]. In the case of State Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such a list a comprehensive range of offences associated with organised criminal groups.
>
> Palermo Convention article 2 - "serious crime shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."
>
> FATF recommendation 1 – "money laundering should be criminalised on the basis of the Vienna and the Palermo conventions. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. This may include all offences or to a list of offences based on seriousness of offence or penalty. "

9.3. Applying the existing definitions to tax evasion

Effectively, under existing international instruments, fraud in most countries, including Fraud on the Revenue, could be a predicate offence for money laundering. This does not, however, automatically mean under international law that an offence of money laundering will always follow upon every Fraud on the Revenue.

Where a Fraud on the Revenue is committed by asking for a benefit, allowance or rebate to be paid, such as MTIC fraud, the individual will have derived an asset from the fraud. Further specified dealing with that asset under international law will be money laundering.

Where however the person has derived money (the asset) from legitimate income and then dishonestly failed to declare that fully to the Revenue, so that they retain the funds, it cannot be said the asset is derived from the criminal offence. What in effect has occurred is that the person has obtained a notional benefit from the offence committed, in that they have retained money to which they are no longer entitled. It would require quite a stretched interpretation of the provisions to conclude that specified dealing with the originally legitimately derived money is then money laundering.

Should FATF pursue its interest of including the latter form of Fraud on the Revenue within the ambit of money laundering predicate offences, they will need to reconsider the type of property to be covered and the actual offence of money laundering. Learning from the UK experience, such reconsideration is fraught with difficulty.

9.4. The UK experience

9.4.1. Risks for individuals

In the UK criminal property is defined in section 340 of the Proceeds of Crime Act 2002. It is an extensive definition and includes the following provisions:

> Property is criminal property if it constitutes a person's benefit from criminal conduct or it represents such a benefit, in whole or in part and whether directly or indirectly.
>
> A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is taken to obtain as result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

The problem with bringing these concepts of benefit, pecuniary advantage and therefore notional property in to the offence of money laundering is that once a person has committed an offence which generates this type of criminal property, it can make it almost impossible for them ever to conduct their affairs lawfully again.

For example:

> A person dishonestly fails to declare the income they received for working a second job. This amounts to £1,000 over the year in tax savings. That £1,000 represents the benefit from their Fraud on the Revenue.
>
> They then put that £1,000 into their mortgage, increasing the equity in their home and decreasing the interest they are required to pay on that loan. The extra equity in the home and the money saved in interest are also the indirect benefit of their Fraud on the Revenue. Any re-mortgaging enabled because of the inflated value will also be the indirect benefit of the fraud.
>
> If that extra money from saved interest enables them to buy any other asset, then that asset also becomes the indirect benefit of their fraud, in whole or in part.
>
> If they sell the property, any increase in value or return of equity will in part also be the indirect benefit of the fraud.
>
> Should the person then seek to correct their tax affairs, even if they pay the taxes owed and a fine, it is unlikely that they will have fully accounted for the indirect benefits accrued. As such their assets will remain tainted with criminal property.
>
> Even if they simply leave that money in a bank account, an every day transaction out of that account will be money laundering, because all of the money is now tainted.

If you expand this example to larger scale failure to declare income for individuals or for companies, the scale of the negative consequences becomes even more apparent.

As discussed below, FATF need to consider whether such consequences are intended and are desirable in considering overall economic policy.

9.4.2. Risks for the private sector

In the consultation it is suggested that this change will only alter reporting for regulated entities and will not put them at risk of a principal money laundering offence.

The Society does not believe this will be the case. For example, in the UK, individuals can commit a principal money laundering offence on the basis that they suspect criminal property is involved, even where they have no intention to

conceal or disguise the property. Therefore in the above example, the banks and the solicitors and the estate agents would all be committing principal money laundering offences by dealing with those funds if they had any suspicion about the earlier tax evasion.

9.5. Implications for promoting inclusion in the legitimate economy

The Society believes there is a real question as to whether the secondary criminalisation through application of money laundering laws is the most effective way to reduce Fraud on the Revenue and promote the re-integration into legitimate financial markets of those who have engaged in such criminal activity in the past. This is a question which has been raised by the OECD in their 2010 paper on Offshore Voluntary Disclosure arrangements, and one which individual member states will need to carefully consider.

10. Amendment to Special Recommendation 7 – transparency of wire transfers

The inclusion of client identification information in wire transfers is of use to regulated entities in confirming client identification. However the Society appreciates that the inclusion of this data needs to be balanced with the technical challenges and costs to the financial sector.

11. Amendments to Recommendations on investigation and enforcement

The Society appreciates that these proposals are most relevant to government and law enforcement. However, we would still be interested in commenting on the detailed amendments as it is important to ensure that they adequately take into account the rule of law and human rights.

12. Usefulness of mutual evaluation reports

The Society does refer to the mutual evaluation reports to assist us in providing advice to the legal profession on jurisdictional risk and equivalence. At present they are too dense, too infrequent, provide limited statistics. We are greatly in favour of the approach taken by Moneyval, requiring yearly updates from member states particularly the statistical information on suspicious activity reports and assets seized as a result.

The Society also finds the existing ratings lacking in transparency and appear to have been “agreed” suggesting that there may have been some form of political intervention in finalising the report. While the FATF methodology guidance provides that mere legislative transposition is insufficient for achievement of a ‘compliant’ rating, our members practical experience in some countries is not always consistent with the ratings awarded. Further, there is no recognition in the ratings that where member states have gold plated the standards this may in some cases result in a less effective regime.

While we appreciate that there is an extensive methodology guide for assessors, this is not practically usable for the private sector in their day to day compliance. We would like to see greater clarity in the ratings and the basis on which the were awarded on the face of the report, to better assist firms to assess risks and equivalence.

Advokatforeningen

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Deres ref: Vår ref: #106607v1/jn 21.01.2011

The Norwegian Bar Association's response to the FATF consultation paper "The review of the standards – Preparation for the 4th Round of Mutual Evaluations"

The Norwegian Bar Association has been invited by the Norwegian Ministry of Finance to comment on the FATF consultation paper "The review of the standards – Preparation for the 4th Round of Mutual Evaluations".

The Norwegian Bar Association supports the FATF consultation paper's significance in the work to prevent money laundering. It is the Norwegian Bar Association's opinion that the prevention of such crimes is an important matter. That being said, we have concerns in regard to some of the recommendations in the consultation paper.

While a new Interpretive Note can be useful and clarifying in regard to the Risk-Based Approach, it is the Norwegian Bar Association's opinion that one should take precautions so that the suggested changes do not lead to an increase in the administrative burden. This view is also relevant when it comes to the recommendations in the paper made under recommendation 6 "Politically Exposed Persons".

The Norwegian Bar Association is familiar with the response to the consultation paper from the CCBE, and would like to express our full support to the matters of CCBE's response. In particular we would like to highlight CCBE's views on supervising and monitoring of the implementation by lawyers, which the Norwegian Bar Association endorses. This also applies to CCBE's views on tax crimes as a predicate offense for money laundering.

Kind regards,

Merete Smith
Secretary General

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Monsieur le Président, Mesdames, Messieurs,

Je fais suite au courriel que vous a fait parvenir hier mon prédécesseur, Me Corrado de Martini, avocat à Rome.

Au nom et pour le compte de l'Union Internationale des Avocats, organisation internationale d'avocats constituée en 1927, réunissant aujourd'hui près de 2000 avocats et près de 200 barreaux de traditions et de culture juridiques diverses dans le monde, soit, indirectement, plus de 2 millions d'avocats, je viens vous faire part des remarques du groupe de travail constitué pour étudier le document mis en consultation par le GAFI et intitulé « The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations ».

La première a trait au projet de faire du « crime fiscal » une infraction sous-jacente au blanchiment d'argent.

L'on ignore la définition du « crime fiscal », ce qui est pour le moins surprenant pour des juristes et regrettable lorsqu'il s'agit d'édicter des règles répressives portant atteinte aux libertés individuelles. Cela dit, l'UIA part de l'idée qu'en application de R1, par. 3, ce devraient être des infractions passibles d'une peine maximale de plus d'un an d'emprisonnement ou, pour les pays qui ont un seuil minimum pour les infractions dans leur système juridique, d'une peine minimale de plus de six mois d'emprisonnement.

Si l'on se rappelle que le GAFI avait pour objectif premier la lutte contre le recyclage de l'argent provenant du crime organisé, on peut se demander s'il est admissible, voire seulement judicieux d'étendre le champ d'application des 40 Recommandations aux violations des règles en matière fiscale. Les institutions financières et les entreprises et professions non financières désignées par la R12 ne sont pas des experts en matière fiscale et nul ne peut prétendre connaître le droit fiscal de tous les Etats de la planète. Comment donc vont-elles s'y prendre pour déceler une violation du droit fiscal et échapper au grief d'avoir omis de faire sans délai une déclaration d'opérations suspectes auprès de la cellule de renseignements financiers (CRF) comme requis par la R13 ? A vouloir étendre au « crime fiscal » le champ d'application des 40 Recommandations, ne court-on pas le risque de paralyser tous mouvements de capitaux dès lors que les obligations de diligence et de vigilance s'imposent à tout participant à un mouvement de capital et à chaque étape du transfert de fonds ?

Même s'il est incontestable que l'avocat n'a pas pour vocation de faire obstacle à l'application des lois fiscales, l'UIA ne peut pas taire ces préoccupations. Le risque pour l'avocat de se voir reprocher une omission de déclaration d'opérations suspectes en cas de « crime fiscal » est intolérable. Il n'est pas équipé pour déceler les violations du droit fiscal d'un Etat étranger à celui dans lequel il exerce.

La deuxième remarque a trait au ch. 53 (page 13). Les mesures envisagées sous lettre (b) à propos de R27 et sous lettres (a), (c) et (d) à propos de R28 sont inadmissibles car manifestement contraires aux art. 6 et 8 CEDH.

Un Etat de droit ne peut tolérer que, sans cautèles précises ni autorisation préalable d'une autorité judiciaire indépendante soumise à des règles de procédure garantissant l'exercice des droits et libertés fondamentaux de tout sujet de droit, les autorités de poursuite pénale spécifiques prennent des initiatives proactives parallèlement à l'instruction proprement dite des infractions, ordonnent des mesures coercitives ou entreprennent des investigations secrètes qui violeraient la sphère privée, telles l'interception de communications, l'intrusion dans des ordinateurs, le contrôle de la correspondance et des comptes bancaires. Des règles précises sur l'exploitation des informations recueillies et sur leur destruction devraient être exigées.

En m'excusant du léger retard mis à répondre à votre consultation, je vous remercie de l'attention que vous voudrez bien porter à ces observations et vous prie d'agréer, Monsieur le Président, Mesdames, Messieurs, l'expression des mes sentiments distingués.

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