



Consultation on Proposed Changes to the FATF Standards

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

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September 16, 2011

VIA E-MAIL (fatf.consultation@fatf-gafi.org)

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

Dear John:

The American Bar Association (“ABA”), which has almost 400,000 members, is pleased to offer these comments to the Financial Action Task Force (“FATF”) on the issues raised in the Second Public Consultation. As Chair of the ABA Task Force on Gatekeeper Regulation and the Profession, I have been authorized to express the ABA’s views on this important topic. We would like to preface these comments, however, with a general observation.

In my letter to you dated June 17, 2011, and my e-mail message to you on September 2, 2011, the ABA urged the FATF to continue to reach out and engage in an active dialogue with all stakeholders, including the ABA and other legal sector representatives. To date, that has not occurred. I understand that the FATF may convene a public consultation meeting in early November to discuss the Consultation Paper and that the FATF plans to adopt the revised Standards at its February 2012 plenary meeting. In light of this compressed timetable, it is difficult to envision that the private sector will have ample opportunity to engage in a robust, meaningful manner with the FATF on various complicated issues that affect financial institutions, the business community generally, governments, and designated non-financial businesses and professions (“DNFBPs”) (including lawyers).

The ABA believes that to improve compliance with the Standards, the FATF needs to have a substantive dialogue with all stakeholders to identify the shortcomings in the current Standards. Meaningful engagement with the legal sector is particularly important not only because of its “gatekeeper” role, but also because of its role in advising both financial institutions as well as other DNFBPs.

The ABA is concerned that the FATF may issue revisions to the Standards as a *fait accompli*. The Consultation Paper explains that the FATF intends to “consider its proposed revisions to the Standards, and the contributions to the consultation process, in the months after September, and will provide substantive feedback on its response to both rounds of consultation when the revised Standards are adopted in February 2012.” Based on this language, it seems that the FATF plans to provide “substantive feedback” only after the FATF has already made its key decisions (i.e., “when the revised Standards are adopted”), and not before that time when there would still be an opportunity to adjust the Standards in a manner that accommodates the reasonable and meritorious views of the interested stakeholders.

The ABA urges the FATF—sooner rather than later—to engage with the legal profession on the substantive issues raised in the Consultation Paper, especially those issues that permeate Recommendations 33 and 34. Absent this engagement, there is a likelihood that the revised Standards will fail to achieve the desired goals. That outcome misses an opportunity to enhance compliance, and indeed would run the risk of undermining the credibility of the Standards. Impractical and excessively burdensome Standards may in fact inadvertently subvert the process.

The ABA recommends that the FATF have public deliberations on the Consultation Paper with a written record of the decisions, so that a legislative history exists of the choices and reasons for its choices. The provision of enhanced transparency in its decision-making will strengthen the rationale and overall legitimacy of the Consultation process. The fact that the FATF is a body with a relatively small membership makes transparency even more vital to the integrity of the process.

In general some of the requirements, while well intentioned, do not seem to take account of the cost-benefit of the proposed task and some of the mandatory requirements (e.g., see the discussion in Recommendation 5). Many of the requirements in the Consultation Paper assume that a lawyer will undertake a large and extensive relationship with a client. Most legitimate clients, especially start-up and/or small ones are not intending and perhaps cannot afford to pay for the amount of due diligence the Consultation Paper is proposing for a modest assignment with a professional with which it has no or little experience and hence does not know the extent of the potential relationship. Requiring 4-5 hours of due diligence for a two-hour consultation is not practically feasible.

The comments below are arranged in the order in which they appear in the Consultation Paper, and the numbering reflects the paragraph, page, and other references in the Consultation Paper.

1.1 Recommendation 5 (paragraph 8, page 5)

The suggested methodologies for verifying beneficial ownership under Recommendation 5 raise a number of feasibility, complexity, and cost issues. For example, the proposed revisions to Recommendation 5 would require lawyers to undertake additional client intake steps, including a directive that lawyers identify “and verify” the customer’s persons who hold senior management

positions. There is no explanation of what “verify” would mean in this context, and lawyers will likely be unable to do so in any meaningful way. Certainly for international clients, the data privacy, logistics, and in many instances nature of the work will present major obstacles. For instance, a lawyer would be hard pressed to verify the identity of senior officers generally at the customer due diligence stage, and specifically if the request for legal service might be small or limited, or of a nature where verification of senior officers will make little sense. Complying with the rule would not be cost-effective in many one-off arrangements. Hence, the requirement lacks practicality in many relationships in the real world.

Unlike the beneficial ownership sub point in paragraph 11 referenced below, there is no carve out for identification and verification of senior officers for publicly-traded companies. At a minimum, given the significant costs and burdens that Recommendation 5 would impose on lawyers and other DNFBPs, there should be a parallel scope of requirement between the customer verification and beneficial ownership verification provisions. Our comments on paragraph 11 below will elaborate on this point in more detail. As we have expressed previously, lawyers will have difficulty identifying and verifying beneficial owners, other than the senior managing official. Law firms and lawyers are not well-equipped to obtain or otherwise demand beneficial ownership information.

Paragraph 8 lists the information “that would normally be needed in order to satisfactorily perform” the functions of identifying and verifying the identity of customers that are legal persons or legal arrangements and understanding the nature of their business and their ownership structure. The first bullet point states that customer identification and verification entails the need to obtain and review, among other things, the entity’s articles of association. Imposing a non-risk based, mandatory obligation of this nature on financial institutions and DNFBPs will likely yield little useful information while, at the same time, forcing these stakeholders to undertake a compulsory review of an entity’s formation documentation irrespective of the risk profile of the entity and the requested work.

If the goal of such a mandatory review is to gain a better understanding of the customer during the customer due diligence phase, it is difficult to understand how this type of forced review will advance compliance goals and the detection of money laundering and terrorist financing. It is unlikely that a review of an entity’s articles of association or other formation documents will lead to a greater understanding of the customer and the types of transactions in which it will be involved. Indeed, this type of approach appears mechanical and serves to dissuade a more piercing review of matters of greater relevance under a true risk-based approach.

On a related point, the Consultation Paper does not provide direction on what is to be done with the collected articles of association. For example, must financial institutions and DNFBPs review the articles to assist in the verification of the customer’s identity? That type of requirement would be contrary to the typical—and traditional—purpose of obtaining and reviewing an entity’s articles so as to determine whether the entity possesses the power to undertake certain actions. Mandating that financial institutions and DNFBPs review the articles

for customer verification purposes, again without regard to the risk profile of the customer, would represent an ill-advised and radical change to the customer due diligence process and would invariably impose significant review costs on the affected stakeholders. The disproportionate impact of such an approach is obvious.

The first bullet point in Paragraph 8 obligates financial institutions and DNFBPs to obtain, among other things, “proof of existence” of the customer. It is unclear whether FATF intends for the financial institutions and DNFBPs to obtain the certification of incorporation or formation for the entity in question or whether FATF wants them to obtain evidence of good standing for the entity in question. A good standing certificate in most jurisdictions simply states whether the entity exists and is in “good standing” (i.e., whether it has paid all applicable taxes and fees). In some jurisdictions, such as the United Kingdom, it is not possible to obtain a U.S.-style good standing certificate.

The second bullet in Paragraph 8 refers to the “controlling ownership interest in a legal person,” but does not define what is meant by that phrase. Nor does the Consultation Paper shed light on what is meant by “natural persons exercising control through other means.” These ambiguities foster non-compliance or lack of compliance with the Standards, thereby underscoring the need to impart clarity in the use of these phrases.

1.2 Recommendation 33—Legal Persons

In General (paragraph 10, pages 5-6)

The proposed revisions to Recommendation 33 raise a number of nuanced, complex beneficial ownership issues that affect the legal profession and other DNFBPs. We understand that the member states of FATF have grappled with these issues. Engagement with the legal profession is critical. Recommendations 33 and 34 are areas where the FATF and the legal profession need to collaborate to work toward a balanced and workable approach that accommodates the concerns of the relevant stakeholders.

At the outset, it bears repeating that in 2008 the ABA House of Delegates, the principal policy making body of the organization, adopted a resolution (Resolution 300) dealing with beneficial ownership issues. This policy provides, in pertinent part, as follows:

[The ABA] urges that the manner in which lawyers conduct client due diligence for purposes of rendering legal services and the manner in which record or beneficial ownership of business entities is documented, verified, and made available to law enforcement authorities, not conflict with the ethical requirements and regulations imposed by state authorities on the legal profession and be risk-based and take into account:

- (1) the actual risk of money laundering and terrorist financing in the formation of business entities; and
- (2) the burdens that such requirements or regulations might impose on state and territorial authorities, those involved in the formation of such entities, and the bona fide investment community[.]

The ABA continues to adhere to the view that the verification of beneficial ownership information and its availability to law enforcement authorities be risk-based and not conflict with applicable ethical requirements that govern the legal profession. Notably missing from the narrative accompanying proposed changes to Recommendation 33 is any notion that the risk-based approach has any bearing on these beneficial ownership issues. That certainly cannot be the case.

Set forth below are comments on the proposed changes to Recommendation 33.

Beneficial Ownership Information (paragraph 10, page 6, 1st bullet).

To the extent Recommendation 33 suggests that lawyers (i.e., professional intermediaries) should hold beneficial ownership information and be compelled to disclose it to law enforcement authorities, the FATF must consider a lawyer's obligation under professional ethical rules to protect the attorney-client privilege, the client-lawyer relationship that is fundamental to the functioning of democracies, and confidential client information. Court orders can obviously require or permit the disclosure of this information under current U.S. federal and state law in certain exceptional situations not present here, but this issue raises important ethical and professionalism considerations that are uniquely applicable to lawyers and the legal profession. The same concerns similarly apply to Recommendation 34 in the context of trusts.

In addition to these legal ethics and privilege issues, granting access to information to competent authorities faces a host of privacy and constitutional issues under U.S. law. With respect to privacy issues, the ability to obtain information from third parties, such as professional intermediaries (including lawyers) or government authorities raises numerous privacy related issues well beyond the scope of this letter. Competent authorities may, through the use of subpoena power and the appropriate constitutional protections afforded to that process, obtain access to information. However, special care needs to be taken to ensure that Recommendation 33 does not suggest that private information can be accessible merely because it constitutes the type of information that Recommendation 33 attempts to make available. Accordingly, the process of making information accessible should be circumscribed to provide careful consideration of constitutional and other legal safeguards to unwarranted governmental intrusion.

The Consultation Paper identifies two options (options (a) and (b)) regarding access to beneficial ownership information. A third possible option, not discussed in this portion of the Consultation

Paper, is reliance on the risk-based approach. It is unclear why the FATF does not offer the risk-based approach as a viable third alternative.

Options (a) and (b) suffer from fundamental shortcomings. United States law has never given an entity either the right or power to compel disclosure of its beneficial owners. Instead, United States entity law has always been based on the concept of record owners. An entity should always know the direct owners of interests in the entity. But legitimate business enterprises may not know the identity of their beneficial owners and often do not need to know that information.

Even if it were possible in all cases for an entity to identify its initial beneficial owners, that information would quickly become stale unless there were a way to update the beneficial ownership information initially filed with the corporate registry. At this point the focus of Recommendation 33 on beneficial owners becomes even more problematic. United States law does not provide an entity with either the right or power to inquire about changes in its beneficial owners, as opposed to the entity's record owners.

The system by which ownership is transferred can be informal and is often private. The occasions on which an entity learns informally about a change in its beneficial owners are most likely to be associated with a meeting of its owners at which a vote is to be taken. But those meetings typically occur annually and some entities may go for years without holding a meeting. Even when a meeting is held, a person other than a beneficial owner may be the person who attends and exercises the voting power of the beneficial owner. Absent some new power to compel disclosure of the indirect owners of the entity, the entity will be unable to identify its beneficial owners.

The focus of Recommendation 33 on beneficial owners creates particularly troublesome issues in the international context. Assume, for example, that a New York corporation has a majority shareholder that is a Canadian corporation, and that Canadian corporation in turn has a majority shareholder that is an English corporation. If United States law required the New York corporation to file beneficial ownership information with a corporate registry, the New York corporation would need to look through both the Canadian corporation and the English corporation to identify an individual (who might even be a citizen of a fourth country) who controls the English corporation and who thus is able to control the Canadian corporation and through it the New York corporation. The obvious question raised by this example is how the United States can force the Canadian corporation – let alone the English corporation – to provide information to the New York corporation.

Problems such as those discussed above could be avoided if every country required disclosure of the record owners of entities formed under its laws. If systems for disclosure of record owners were in place around the world, it would be possible to use the information in corporate registries to trace the ownership of any entity back to the individual human beings at the start of the ownership chain. At the same time, such a system would avoid the problems inherent in the

current focus of Recommendation 33 on beneficial owners. We would like to understand from the FATF why this approach would not be workable.

Bearer Shares (paragraph 10, page 6, 3rd bullet)

The FATF is considering whether to prohibit bearer shares, converting them to registered shares or share warrants, immobilizing them by requiring that they be held with a regulated financial institution or financial intermediary, or requiring shareholders with a controlling interest to notify the company, and the company to record their identity.

A prohibition on the issuance of bearer shares may be appropriate, but with an important caveat. The Delaware General Corporation Law, which is the most widely-used corporation law in the United States, as well as a number of other state corporation laws, prohibit the issuance of bearer shares. See, e.g., 8 Del. Code § 158. Those prohibitions have not proven to be a problem for legitimate businesses.

If the FATF decides to impose a prohibition on the issuance of bearer shares, we believe further study and definition is needed before prohibiting the issuance of bearer share warrants. A variety of derivative securities are used to conduct legitimate hedging activities that could be seen as “bearer share warrants” under an expansive definition of that term. FATF should be careful to prohibit only those types of securities whose function is limited to circumventing the prohibition on bearer shares.

Nominee Shareholders (paragraph 10, page 6, 4th bullet)

United States corporate law principles do not define the precise nature of nominee shareholders. There is no central clearinghouse for registering nominee shareholders. There is no regulatory mechanism, nor has one ever been viewed as required, to license a nominee. Perhaps the closest analogy to such a register is the well-recognized mechanism by which public company shares are often held by a broker in “street name.” This complicated and cumbersome mechanism, however, relates only to record share ownership of companies that generally would be considered as exempt from the requirements of Recommendation 33 as listed on a recognized stock exchange. Thus, to set up a register for nominee shareholders would entail the creation of both an accepted definition of what is and what is not a nominee shareholder and a gathering of information that has never been centrally maintained in the past. If, as suggested earlier, there is a mechanism in place focused on record ownership, competent authorities could track ownership back to ultimate owners directly through such a mechanism.

From a practical viewpoint, the use of nominee shareholders advances at least three important objectives: the nominator’s personal privacy, the personal safety of nominators in high risk jurisdictions, and the need for anonymity in certain business transactions. A nominator’s right to personal privacy may be violated if the nominee is forced to disclose publicly the identity of the nominator. In high risk jurisdictions, the public disclosure of the identity of the nominator may

expose the nominator to criminal activity (such as kidnapping) or other form of personal harm. In some business transactions, it may be prudent for legitimate business reasons not to disclose the identity of the nominator. Mandating disclosure in all cases of the identity of the nominator seems excessively broad and promises to create more challenges than it cures.

Other Legal Persons; Proposed Exemptions (paragraph 11, page 6)

With respect to the comment in paragraph 11 that measures similar to that outlined in paragraph 10 should be applied to other legal persons, we believe that whatever reasonable and appropriate measures regarding maintenance of ownership information are ultimately adopted should be applicable to all types of entities (with the exceptions noted and perhaps others). To provide additional flexibility to one type of entity over another merely will drive the growth of use of the more flexible entities because the compliance costs that will be inherent in whatever scheme is adopted will be significant, particularly for the millions of small business entities formed by legitimate citizens every year. Thus, it would be inappropriate to exempt one type of entity (such as a limited partnership) while requiring compliance by a corporation or a limited liability company.

In terms of the proposed exemptions, clarity is needed in defining a “recognised stock exchange” and “state-owned enterprises.” Who confers the recognition on the stock exchange? Are regional and second-tier stock exchanges “recognised” for purposes of Recommendation 33? Ambiguity also lurks in the meaning of a state-owned enterprise. For example, Exxon Mobil recently announced a business arrangement with Rosneft, the Russian state oil company, to explore for oil in the Russian portion of the Arctic Ocean. Would Exxon Mobil be a state-owned enterprise for purposes of the FATF exemption (in addition to being exempt because it is listed on the New York Stock Exchange)? Does a state-owned enterprise have to be 100% owned by the sovereign? Would investments by others in this enterprise remove it from the definition of a state-owned enterprise?

1.3 Recommendation 34—Legal Arrangements (paragraph 12, pages 6-7)

This portion of the Consultation Paper seeks input on an effective set of measures to prevent the misuse of trusts. The Consultation Paper enumerates five possible measures. The comments below will discuss these measures in turn. We understand that the American College of Trust and Estate Counsel (“ACTEC”) has submitted comments on the Consultation Paper to the FATF. The comments below highlight and expand on several key points made by ACTEC in its well-reasoned comment letter.

- *Giving trustees a legal obligation to obtain and hold beneficial ownership information about trusts (as noted above in the context of Recommendation 5).*

The trustee of a trust is responsible for the custody, protection, conservation, and care of the trust assets. The trustee needs to know the beneficiaries and their details and will know how

to effectuate the distribution of the assets to the beneficiaries. Among those involved in a trust arrangement (i.e., settlor, beneficiary, and trustee), the trustee is best positioned to perform anti-money laundering due diligence on the settlor and the beneficiaries.

- *Ensuring that competent authorities in all countries are able to access information on the identity of the trustee, the beneficial ownership of the trust, and the trust assets from one or more sources including financial institutions and DNFBBs; registries of assets or trusts; or other competent authorities (e.g., tax authorities); of any trusts with a nexus to their country (i.e., where trusts are managed; trust assets are located, or where trustees live in the country).*

The trustee is the “legal owner” (possesses legal title) of the trust assets and the beneficiaries are their “beneficial owners.” The settlor thus has no continuing role with respect to the trust or its assets unless the settlor is also a beneficiary.

Because the first measure places the legal obligation on the trustee, and, if that measure is fulfilled, the following four measures will likewise be fulfilled, it is unnecessary to require other sources of information. Although financial institutions that are not the trustee may conduct their own due diligence, requiring them to demand all the details of the trust would be excessively burdensome and necessarily violate legitimate privacy rights of the parties to the trust. The same is true with respect to any DNFBB who is involved but who is not acting as a trustee.

A trust registry is impractical from any number of perspectives. The identity of beneficiaries under a trust is not static. Indeed, it is not unusual for a trust to have multiple beneficiaries whose identity may change based on evolving circumstances. Further, if there are contingent beneficiaries, they may not be aware of the trust and may never receive a distribution from the trust. As ACTEC explained in its comment letter, “[t]hese contingent beneficiaries have few or limited rights. To require a trustee to obtain and file in some registry information on all such contingent beneficiaries would be unduly burdensome and time consuming, would produce information of little or no value, and would not further the goals of the FATF.”

Thus, when addressing trusts, the focus should be solely on the trustee. It is the trustee who receives the assets from the settlor, who administers the trust and has all the records, who controls the assets and who must be able to identify the beneficiaries who receive distributions.

- *Requiring trustees to disclose their status to relevant authorities; and to financial institutions and DNFBBs when entering a business relationship.*

No comment.

- *Competent authorities should have powers to obtain information regarding trusts and share it as necessary; and*

As noted in the comments to Recommendation 33 above, the ability of competent authorities to obtain and share trust information must be tempered by privacy, legal ethics, and constitutional considerations. These comments apply with equal force in the context of Recommendation 34.

- *Analogous requirements should also apply to other legal arrangements including Treuhand, Fiducie, and Fideicomisos.*

No comment.

5. Targeted financial sanctions in the terrorist financing and proliferation contexts (paragraphs 20 and 21, page 9)

As drafted, it appears that Paragraph 20 is calling for the wholesale freezing of persons designated pursuant to relevant United Nations Security Council Resolutions. In order to more accurately reflect United Nations, European Union, United States and other local law accommodations for humanitarian purposes, we suggest that Paragraph 20 recognize that exceptions and exemptions (for humanitarian purposes) are present and that the United Nations Security Council Resolutions contemplate that some frozen assets will be released for certain purposes. For example, in many jurisdiction, including the United States, persons who have been designated are eligible for licenses allowing the release of funds to pay for legal expenses, living expenses, medical treatment and other humanitarian purposes.

Because the UNSCRs are not generally self-implementing, local jurisdictions must implement the freeze or block pursuant to relevant local law. To do so in the United States, the Treasury Department, in consultation with the Departments of Justice and State (and others), designates persons who meet the local law criteria for designation; there is not a mirror image overlap between the United Nations Al-Qaeda list and those designated pursuant to Executive Order 13224. Rather than mandating that persons' assets should be frozen without delay, Special Recommendation III should acknowledge the implementation process and state that, *to the extent possible*, persons should freeze without delay those designated pursuant to a UNSCR.

Paragraph 21 poses challenges within the United States if the intent is to mandate that a government authority maintain periodic audit or regulatory authority over DNFBPs because not all financial institutions and DNFBPs are subject to compliance monitoring. For example, under the U.S. Bank Secrecy Act, neither lawyers nor persons involved in corporate formation are regulated. All U.S. persons must comply, however, with the Treasury designations. Perhaps Paragraph 21 should more appropriately provide that financial institutions and DNFBPs should be subject to fines (rather than an audit function) if they fail to comply with relevant legislation, rules, or regulations governing their obligations.

September 16, 2011

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6. The Financial Intelligence Unit: Recommendation 26 (paragraph 23, pages 9-10)

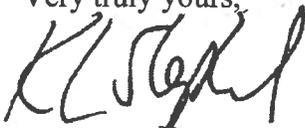
To the extent any bar association or other entity is designated as a Financial Intelligence Unit (“FIU”) for lawyers, there must be accommodations made that recognize the same concerns the ABA has articulated for regulation of lawyers themselves. For example, an FIU for lawyers would most assuredly not be willing or able to receive STRs from lawyers since the ABA has steadfastly opposed the application of STR requirements on lawyers.

8.3 Further Consideration of Politically Exposed Persons (paragraph 30, page 11)

Although it may be logical to expand Politically Exposed Persons (“PEP”) obligations to family members and close associates, the FATF will need to provide meaningful guidance on the scope of covered individuals. The Standards do not define “family members and close associates,” and it is unclear how one is expected to inquire and verify whether someone is a “close associate” of a PEP. The expansion of this requirement will obviously impose additional compliance burdens on lawyers. Information is already abundant that the PEP obligations are more difficult to comply with as international and national standards cast a wide net in defining a PEP and provide no guidance on who is a PEP. Expecting small firms and sole practitioners in an on-off relationship to spend the resources required to determine if a client is a PEP is unrealistic and will further undermine the already low compliance with this and other FATF standards.

The ABA appreciates the opportunity to provide its comments to the FATF on the Consultation Paper. If we can address any of these comments in more detail or if we can be of further assistance, please feel free to contact me at 410.244.7772 or klshepherd@venable.com.

Very truly yours,



Kevin L. Shepherd

cc: Members, ABA Task Force on Gatekeeper Regulation and the Profession
Thomas M. Susman, Director, ABA Governmental Affairs Office
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THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

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August 8, 2011

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Re: Consultation Paper, June 2011

Dear Mr. Carlson,

The American College of Trust and Estate Counsel (“ACTEC”) submits the following comments in response to the invitation by the FATF to provide written comments on the Consultation Paper, June 2011.

ACTEC is a national professional association of approximately 2,600 lawyers elected to membership by their peers on the basis of professional reputation and ability in the field of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in rendering advice to taxpayers on matters of federal taxes, with a focus on estate and gift tax planning and compliance. ACTEC offers technical comments about the law and its effective administration, but does not take positions on matters of policy or political objectives.

Principal responsibility for preparation of these comments was exercised by Duncan E. Osborne, of Osborne, Helman, Knebel & Deleery LLP in Austin, Texas (512) 542-2010, Leigh-Alexandra Basha, of Holland & Knight LLP in McLean, Virginia (703) 720-8081, Robert C. Lawrence III of Cadwalader, Wickersham & Taft LLP in New York, New York (212) 504-6211, and Henry Christensen, III of McDermott, Will & Emery in New York, New York (212) 547-5658. Members of your staff should not hesitate to contact any of them for more information regarding these comments.

These comments primarily address paragraph 1.3 of the Consultation Paper “Recommendation 34 – Legal Arrangements” as its focus is trusts.

As a preliminary matter, it is essential to emphasize that trusts are not legal entities: they have no separate juridical identity.¹ As the Consultation Paper states, the trust is a legal arrangement. It is created when a settlor transfers assets to a trustee pursuant to an agreement,

¹ *What is a trust?*, BANKING IN SWITZERLAND & LIECHTENSTEIN NEWS QUARTERLY (B.S.L. Law & Consulting, London), Issue No. 6 of 2011, at 3.

whereby the trustee agrees to, and has the duty to, protect, conserve and administer those assets for the benefit of one or more third parties, the beneficiaries. The trustee has legal title to the trust assets in its capacity as trustee, with trust assets being held separately from the trustee's own assets for any legal purpose.

The trust is an arrangement used frequently in common law jurisdictions primarily for estate planning purposes (e.g., transmitting wealth to family members, dealing with the incapacity of the settlor, dealing with the special needs of the beneficiaries, avoidance of the administrative burdens of probate, etc.). Once established by the settlor, the primary parties to the relationship are the trustee and the beneficiaries. The trustee owes fiduciary duties and obligations to the beneficiaries, and the beneficiaries are the only persons who can enforce their rights under the trust agreement. The trust agreement and the proper law of the trust jurisdiction (e.g., by statute or common-law) govern these duties, obligations and rights.

It is important to note that the trust arrangement, the parties and the trust administration may involve many jurisdictions. In order to focus on the goals of the FATF, consider the following somewhat artificial, but didactically helpful example.

Settlor who is domiciled in Austria wants to create a trust. He retains a lawyer in Belgium to draft the trust agreement. They decide to use the trust law of a province in Canada (other than Quebec) as the governing law of the trust. The Trustee is in Denmark. The assets are to be custodied in Switzerland. A Beneficiary is in France. Another Beneficiary is in Italy. A third Beneficiary is in Germany. The Trustee hires an investment advisor from Japan. The Trustee hires a bookkeeper from the Netherlands to keep the books and records.² The Trustee hires a tax specialist from Luxembourg to prepare all tax returns.²

Thus, the challenge is to determine in which of the eleven (11) countries would the FATF recommend that laws be passed to require transparency and prevent money laundering and terrorist financing? Although the above example may go to extremes by having connections with 11 countries, it is necessary to keep in mind that under The Hague Convention on the Law Applicable to Trusts and Their Recognition numerous civil law countries, including Italy, the Netherlands, Switzerland and Luxembourg, now recognize trusts.

Emphatically important is the first measure set forth in the Consultation Paper for the prevention of the misuse of trusts:

- “● Giving trustees a legal obligation to obtain and hold beneficial ownership information about trusts (as noted above in the context of Recommendation 5).”

This first measure is appropriate and correct. It is the trustee who has the duty and the responsibility to custody, protect, conserve and care for the assets of the trust. Furthermore, it is the trustee who must know the beneficiaries and their details and who will know and effectuate

² Please note that in the subsequent paragraphs of this letter, where the terms Settlor, Trustee and Beneficiary are capitalized, they are referring back to this example.

the distribution of the assets to the beneficiaries. Requiring the trustee to perform “know your client” and other due diligence on the settlor and to perform initial and ongoing “know your client” and due diligence on the beneficiaries is consistent with the trustee’s duties.

The Consultation Paper sets out four (4) additional measures that are important. They are:

- “• Ensuring that competent authorities in all countries are able to access information on the identity of the trustee, the beneficial ownership of the trust, and the trust assets from one or more sources including financial institutions and DNFBDs; registries of assets or trusts; or other competent authorities (e.g., tax authorities); of any trusts with a nexus to their country (i.e., where trusts are managed; trust assets are located, or where trustees live in the country).
- Requiring trustees to disclose their status to relevant authorities; and to financial institutions and DNFBDs when entering a business relationship.
- Competent authorities should have powers to obtain information regarding trusts and share it as necessary; and
- Analogous requirements should also apply to other legal arrangements including Treuhand, Fiducie, and Fideicomisos.”

We concur with the last three suggested measures. With respect to the second measure beginning with “Ensuring that competent authorities...,” we have two observations which we believe are consistent with that measure.

First, in the context of trust law it is the trustee who is the “legal owner” (possesses legal title) of the trust assets and the beneficiaries who are the “beneficial owners” of them.³ It is conceptually impossible for the “beneficial ownership” to lie anywhere else. Furthermore, unless the settlor is also a beneficiary, the settlor has no continuing role with respect to the trust or its assets.⁴

Second, since the first measure places the legal obligation on the trustee, and, if that measure is fulfilled, the following four measures will likewise be fulfilled, it is unnecessary to require other

³ We understand that in the FATF’s terminology “beneficial ownership” means the controlling person or the person with ultimate control, i.e., the trustee in the trust context. Indeed, the FATF’s concept of “beneficial ownership” does not strictly apply to a trust at all, because the beneficiaries of a trust are not like shareholders who have ultimate voting power. Instead, they are passive individuals who benefit ultimately from the actions taken by the trustee. If anything, the lack of control by a beneficiary of a trust emphasizes why it is the trustee, and only the trustee, that should matter to the FATF as a reporting person.

⁴ A possible exception to this analysis is a trust that can be revoked or amended in which case the duties of the trustee and the rights of the beneficiaries are subject to alteration if the right of revocation or amendment is exercised. Even in that circumstance, the trustee must necessarily know about the change.

sources of information. Although financial institutions which are not the trustee may conduct their own due diligence, requiring them to demand all the details of the trust would be excessively burdensome and necessarily violate legitimate privacy rights of the parties to the trust. The same is true with respect to any DNFBP which is involved but which is not acting as a trustee.

The concept of a registry of trusts is impractical. Undoubtedly, there are millions of trusts in the United States, and trusts often have multiple beneficiaries whose identity may change as circumstances change. These contingent beneficiaries have few or limited rights, may know nothing of the trust and may never receive a distribution. To require a trustee to obtain and file in some registry information on all such contingent beneficiaries would be unduly burdensome and time consuming, would produce information of little or no value, and would not further the goals of the FATF. Furthermore, in many cases the beneficiaries are listed in the trust deed as a class, such as “the descendants” or “issue,” of a person. In that sense, the trust deed itself is not even definitive in determining the identity of the beneficiaries.

Thus, when addressing trusts, the focus should be solely on the trustee. It is the trustee who receives the assets from the settlor, who administers the trust and has all the records, who controls the assets and who must be able to identify the beneficiaries who receive distributions.

In the context of the above example, it is Denmark, the Trustee’s country of residence which should have a law requiring the Trustee to have a legal obligation to obtain and hold information about the Settlor, the Beneficiaries and the assets. This law should be in effect even if Denmark does not otherwise recognize trusts. Additionally, the financial institutions in Switzerland would need to perform due diligence, but beyond that no other country in the example should have, or should need to have, laws, rules, or regulations with respect to persons or activities in its jurisdiction insofar as the trust is concerned.

It is particularly inappropriate to suggest that the country whose law is the governing law, i.e., Canada in the example, has any obligation or responsibility. There is no way Canada would even know that a Settlor in another country has chosen Canadian law as the governing law of the trust agreement.

With respect to the Beneficiaries in France, Italy and Germany, the Trustee could be obligated to inform the competent authority in the Trustee’s jurisdiction (Denmark) of a distribution. The competent authority in Denmark could forward relevant information to France, Italy, or Germany, as appropriate. The support personnel in Japan, the Netherlands, and Luxembourg do not have the power or permanency in their roles to have any obligations because the trust agreement gives them no authority and the Trustee can replace them at will.

We hope that you will give serious thought to our comments and allow us to work with you in the future to implement practical and effective anti-money laundering and counter-terrorist financing rules with respect to trusts. It is our goal to help the FATF meet its objectives without burdening private parties or law enforcement with time consuming or costly processes which serve no real practical function.

Sincerely,



Mary F. Radford
ACTEC President

cc: Chip Poncy, Director, Office of Strategic Policy
Terrorist Financing and Financial Crimes
Gary Sutton, Senior Legal Advisor for Financial Crimes,
United States Department of the Treasury
Sarah K. Runge, Policy Advisor, Office of Terrorist Financing and Financial Crimes,
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Michael Rosen, Policy Advisor, Office of Terrorist Financing and Financial Crimes
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Kevin L. Shepherd, Esq., Chair, American Bar Association Gatekeeper Task Force
Edward J. Krauland, Esq., American Bar Association Gatekeeper Task Force
Cari N. Stinebower, Esq., American Bar Association Gatekeeper Task Force
Bruce Zagaris, Esq., American Bar Association Gatekeeper Task Force
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Stephen Revell, International Bar Association
Peter McNamee, Council of Bars and Law Society of Europe
Ron McDonald, Canadian Bar Association
Roy Millen, Canadian Bar Association
Tatsu Katayama, Japan Federation of Bar Associations
Desmond Hudson, Chief Executive, Law Society of England and Wales



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

Second Public Consultation

June 2011

Introduction

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, AAT is now well-established and respected worldwide, with more than 120,000 members, including qualified accountants and students.

AAT is sponsored and supported by four of the 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 AAT's Articles and Memorandum of Association. They are not regulated by AAT and are prohibited from describing themselves as members, associates of, or otherwise publicising their relationship with 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 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 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, 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.

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 this consultation reflect the views of our members as evidenced in feedback received on the relevant sections of the 3rd EU Directive as implemented in the UK Money Laundering Regulations 2007 and as part of a contribution towards our object of promoting the sound administration of law for the public benefit. As with our responses to the first public consultation, we have limited our comments to issues raised in this consultation which will affect our members in public practice and in industry.

Beneficial Ownership: Recommendations 5, 33, and 34

1. Recommendation 5

We welcome the proposal to specify more clearly the types of measures that regulated entities should undertake in order to (a) identify and verify the identity of customers that are legal persons or legal arrangements, and (b) understand the nature of their business and their ownership and control structure. We believe providing such clarity will assist regulated practitioners when deciding the extent of due

diligence measures to apply to their clients. The proposed information requirement is consistent with industry guidance produced in the UK, for example the JMLSG guidance, and it is our view that specifying these requirements in the FATF standards will ensure consistency of approach across jurisdictions resulting in simplified procedures for practitioners. It is however important that these are set as minimum information requirements, as the extent of verification to apply to entities must continue to be risk-informed.

We welcome the proposal to clarify the identification and verification measures required for beneficial owners. The proposals are consistent with the provisions of the UK Money Laundering Regulations 2007 and guidance issued in the UK. It is our view that specifying these requirements in the FATF standards will ensure consistency of approach across FATF jurisdictions.

2. Recommendation 33 and 34

The wide variances in the nature and quality of trusted publicly available information across different jurisdictions have always proved a challenge for practitioners conducting due diligence on legal persons. For instance in the UK all incorporated companies must register with Companies House and a quick search of the Companies House website will reveal basic information about the company including company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers (e.g. memorandum & articles of association) and a list of directors. Many of the professional bodies in the UK also keep a publicly searchable database of their members. However, in our experience practitioners trying to obtain similar information from other jurisdictions (including some FATF countries) have found this to be almost impossible or only available after incurring significant expense. This means that such practitioners will either have to decline the engagement or bear the additional costs for obtaining the information, thereby increasing their operating costs. It is our view that the proposals being considered will ensure consistency across jurisdictions and in the long term reduce a key compliance burden for practitioners.

We agree that requiring companies to hold basic information and information about beneficial ownership will assist with the above. However, it should also be required that such information is available from an independent public body like the Registrar of Companies to enable practitioners conducting enhanced due diligence access such information from a trusted and independent source.

We agree with the suggestion that certain entities could be exempt from the information requirements.

Data protection and privacy: Recommendation 4

3. Recommendation 4

We agree with the proposal to add a general requirement to recommendation 4 on transfer of data. In the UK for example, there is a general prohibition on the transfer of personal data outside the EEA except in very limited circumstances). We agree that there should be closer cooperation between authorities responsible for AML/CFT and those responsible for data protection.

Other Issues included in the revision of the FATF Standards

4. Risk-based approach in supervision

We welcome the proposal to apply a risk-based approach to supervision of financial institutions and DNFBPs. However, we note that this has been the approach adopted by UK supervisors since the implementation of the 3rd EU Directive. The risk-based approach to supervision is also enshrined in the

UK Regulators Compliance Code which applies to all UK regulators carrying out a statutory regulatory function. Compliance monitoring on a risk-based approach enables supervisors to allocate resources effectively and also reduces the compliance burden on businesses. This is particularly of relevance when making decisions on when and how to carry out compliance reviews (visits).

We are of the view that consideration should be given to whether it will be appropriate for FATF to provide a list of compliance risk indicators/behaviours that supervisors should take into consideration when carrying out their risk assessments. The benefit of such a list will be a consistent application of the risk based approach to supervision across FATF jurisdictions.

Ayo Salam
Members in Practice Compliance Manager
AAT

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September 2011



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Al Presidente

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16 September 2011

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

Response to the Consultation on “The review of the FATF standards – Preparation for the 4th round of mutual evaluations” second public consultation

Dear Sirs,

the FATF is promoting a consultation process on the review of its 40 Recommendations and, within this framework, issued a consultation paper “The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations” dated October 2010.

Assirevi offered its comments in a Response dated 4 January 2011, to which it makes full reference here.

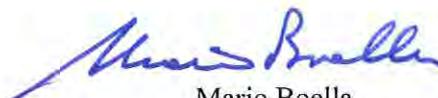
Subsequently, a second phase of the review has been undertaken by the FATF, focusing on specific aspects, and a second consultation paper has been issued. Remarks have to be submitted to the FATF by 16 September 2011.

As regards the second public consultation paper, Assirevi wishes to offer its comments on the following items:

- 1. Beneficial Ownership: Recommendations 5,33 and 34
- 2. Data Protection and Privacy: Recommendation 4

With reference to other issues/recommendations reported in the second public consultation paper, Assirevi has no additional comments, as they were already covered by Assirevi in its response to the first public consultation, or as Assirevi agrees with the proposals of the FATF.

Yours faithfully,



Mario Boella
Chairman of Assirevi

RESPONSE TO THE FATF CONSULTATION “THE REVIEW OF THE STANDARDS – PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATIONS” – SECOND PUBLIC CONSULTATION

INTRODUCTION

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

Within this framework, a first consultation paper was issued: “The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations”, dated October 2010.

Assirevi, the Italian Association of Audit Firms, like other interested parties, submitted its comments, which were subsequently published in the “Compilation of Responses from designated non-financial business and professions (DNFBP’s)”.

Subsequently, a second phase of the review has been undertaken by the FATF, focusing on specific aspects, and a second consultation paper has been issued. Remarks should be submitted to the FATF by 16 September 2011.

For an introduction to Assirevi and its activities, as well as general remarks on the activity of auditors in Italy, we refer in full to the observations made in our first response dated 4 January 2011.

As regards the second public consultation paper, Assirevi wishes to offer its comments on the following items:

- § 1. Beneficial Ownership: Recommendations 5, 33 and 34
- § 2. Data Protection and Privacy: Recommendation 4

1. BENEFICIAL OWNERSHIP: RECOMMENDATIONS 5, 33 AND 34

Recommendation 5

In principle, Assirevi agrees with the FATF’s suggested approach.

However, it points out that not all of the details required by domestic anti-money laundering rules for the identification of customers (which, in the case of auditors, are mainly legal entities) can be obtained from public sources in Italy: while some identification details of natural persons may be available (*eg* date and place of birth), ID document details are not publicly available. In addition, Assirevi points out that the available information may regard the “senior managing official” of the customer (*ie* the legal entity with which the business relationship is established) and not the “senior managing official” of any controlling entity (whose identification details would not be publicly available). However, information on the “senior

managing official” should not be added to the existing CDD activities, as it would generate additional costs and be more time consuming.

Lastly, please note that Chamber of Commerce certificates would indicate only the direct controlling entity, and not the entire controlling structure; hence, beneficial owner information can be obtained from Chamber of Commerce certificates only if the customer has a very simple ownership structure, while this is extremely difficult if the customer belongs to a complex or multinational group.

We believe that the rules under discussion should also apply to companies controlled by trusts or other legal arrangements, such as “società fiduciarie” (see also our comments below).

Recommendation 33 – Legal Persons

We welcome the FATF’s suggestion that companies should be directly responsible for holding and providing details on their beneficial owner/s; we recommend extending this obligation to all companies (not only to small ones) as this would help to solve one of the major difficulties in carrying out CDD, *ie* customers claiming that they do not have knowledge about the beneficial owner/s, especially when dealing with large multinational groups.

However, we recommend that companies should mandatorily and promptly disclose/give details of beneficial ownership not only to the competent authorities but also to entities subject to CDD duties, such as DNFBPs, including auditors. This might be achieved by including, for instance, an obligation to insert a statement on beneficial ownership in the Board of Directors’ Report included in the company’s financial statements, also when a legal arrangement is involved in its ownership/controlling structure.

On the other hand, it is not clear which entities are those that would be required as “professional intermediaries” to supply information to the competent authorities.

Recommendation 34 – Legal Arrangements

Firstly, we entirely agree with the FATF’s assertion that there should be an equivalent level of transparency about legal arrangements, as there is about legal persons.

In addition, since legal arrangements sometimes control/own legal persons, lack of transparency about legal arrangements will ultimately result in a lack of transparency about ownership of legal persons.

Trustees should be required to disclose details of beneficial ownership not only to the competent authorities but also to entities subject to CDD duties, such as DNFBPs, including auditors.

Moreover, audit firms, as DNFBPs, should not be regarded as a “source” of information on trusts or similar entities since, unlike other professions and countries, Italian auditors do not incorporate or administer any legal arrangements.

2. DATA PROTECTION AND PRIVACY: RECOMMENDATION 4

We welcome the FATF's suggestion to extend Recommendation 4 to cover and mitigate any possible conflicts between CDD duties and data protection/privacy regulations.

Indeed, one of the major arguments used by non-Italian customers and DNPBPs, especially in cross-border relationships, is that the disclosure of the beneficial owner, or of the details of natural persons in general, would be in conflict with privacy or confidentiality duties in the relevant foreign jurisdiction.

BIAC comments on the 2nd public consultation launched by FATF in June 2011

September 2011

BIAC is grateful for the opportunity to comment on the 2nd public consultation launched by the Financial Action Task Force (FATF) in June 2011 and is prepared to engage with its experts in the further work, including at open hearings.

The BIAC comments which follow are based on the consultation document, and our comments are formulated in a general style, similar to the consultation document. BIAC looks forward to commenting on concrete wording proposals for the new text of the Recommendations in due course.

General comments

BIAC strongly supports efficient and effective measures against money laundering and financing of terrorism. At the same time, these measures should avoid unnecessarily burdening the legitimate running of business. Therefore, *all actions have to be clearly balanced and unnecessary costs to financial intermediaries as well as any legitimate business have to be avoided*. It would be contradictory to conduct important trade negotiations in order to reduce red-tape and transaction costs while creating new obstacles in the handling of related financial transactions. The implementation of the FATF Recommendations has to be checked against these considerations.

Uneven implementation of the Recommendations not only undermines a coherent global fight against money laundering and financing of terrorism, but also creates a distortion of competition at the same time. Thus, BIAC welcomes the effort undertaken to improve a *coherent implementation* by giving more guidance on critical issues. In doing so, due respect has to be given to the different legal systems. This can be done most effectively by relying more on the principle of functional equivalence than on a formalistic box-ticking. BIAC notes that such an approach is reflected in a number of the proposed steps to be taken.

The effective fight against money laundering and financing of terrorism cannot only be obstructed by a lack of relevant information, but also by an overflow of information as well. An overflow not only causes disproportional costs to all parties concerned, but can even conceal key elements. Therefore, BIAC strongly supports *strengthening the "risk based*

approach". This enables all parties involved in transactions as well as the supervisory authorities to focus on those elements bearing the highest risks.

Specific Comments

Beneficial Ownership (Recommendations 5, 33 and 34)

The determination of beneficial ownership is a core aspect of the "know your customer" principle ("KYC"), which is fundamental issue for the efficiency of the fight against money laundering and terrorism financing. It is regrettable that this cornerstone has not yet been satisfactorily implemented. BIAC shares the view that the respective FATF Recommendations are sufficient and should not be changed fundamentally, but should be clarified in order to ensure a more homogeneous and effective implementation. Such clarifications should not go beyond what is necessary for the principle of "KYC".

Ad Recommendation 5

In general we agree with the clarifications. However, it has to be realised that the identification of the primary contractual partner will usually go further than that of the beneficial owner (e.g. an eventual obligation to keep copies of identity documents on the files), even if the wording is "to identify the beneficial owner". We would also like to point out that it is important that a clear distinction be made between "beneficial owners" (exercising ultimate effective control) and beneficiaries.

Ad Recommendation 33

Clarifications on measures related to the use of legal persons are welcomed. These should not go beyond the necessary steps and not unduly restrict opportunities provided for in the different legal systems. Notably, such measures have to take account of information through public registers and should not oblige financial intermediaries to almost duplicate such public registers. In that spirit, BIAC agrees with FATF that there is no particular need for additional transparency among listed companies. Listed companies are already subject to extensive disclosure obligations under stock market law.

An overly broad implementation of new regulations for legal entities would lead to unnecessary administration costs not only for financial intermediaries, but also for the economy as a whole. This would send a negative signal to trade and investment, and it should be particularly avoided in the current fragile economic situation. Information on legal persons should mainly rely on strengthening existing registers (e.g. commercial registers with easy access and based on verified information) and ensuring the "paper trail", rather than on introducing new registers (such as an eventual register of beneficial owners).

For bearer shares, nominee shareholding and trusts or similar institutions, the existing methods of determining beneficial owners are sufficient for the purposes of combating abuse. Financial intermediaries must identify and maintain written records on beneficial owners after applying the risk-based approach. Furthermore, the identity of responsible persons should be accessible through the existing registers.

Ad Recommendation 34

As far as trusts and similar institutions are concerned, unnecessary costs and administrative burdens have to be avoided. Furthermore, it must be noted here that not all countries have a specific trust law, but those that do not generally allow the administration of trusts established according to a foreign substantive law. As long as the KYC-principle is respected (including the identification of the beneficial owners and the risk based approach) by the administrator of a trust according to the rules in his territory, no additional steps are necessary to ensure the efficient fight against money laundering and financing of terrorism. On the other hand, imposing a double supervision in the country of administration as well as in the territory of applicable law would not only constitute an unnecessary burden but would also unduly distort competition in such activities.

Further, any registration and related disclosure of beneficial owners as well as the assets of a mandate such as a trust should not infringe upon the protection of privacy (especially for international succession planning).

Data protection and privacy (Recommendation 4)

Protection of personal data is a fundamental right and OECD has done extensive important work in that respect for years. It is crucial that duties related to the fight against money laundering and rights related to this data and personal protection should not come into conflict. For this reason, the implementation must only be carried out within the limits of national laws and internationally agreed standards (e.g. OECD, Council of Europe) so that it does not result in a circumvention of data protection laws and legislation on protection of privacy. BIAAC welcomes efforts to more effectively coordinate respective measures and to respect legitimate privacy needs in the fight against money laundering and financing terrorism without undermining the ultimate objectives. Further, financial intermediaries should not be exposed to conflicting requirements. The exchange of information must remain limited and consistent with data protection laws, in particular to territories in which standards on the protection of personal data are insufficient.

Group-wide compliance programmes (Recommendation 15)

BIAAC considers effective compliance programmes as a cornerstone of good governance of any company. They have to be balanced and adequately reflect risks involved, but also measured as not to create an undue burden to the legitimate business activities. In that spirit, BIAAC welcomes the suggestion to rely on group-wide programmes aiming to combat money laundering and to exchange information for financial intermediary groups. This will relieve the parent company of some of the burden. Consistency with other rules such as the requirements of the Basel Committee on Banking Supervision is important. Further, conflicts with applicable national regulations concerning the exchange of information have to be avoided. Finally, there should be no distortion of competition in applying such rules.

Wire Transfers (Special Recommendation VII)

This aspect will have the most impact on business and the economy as a whole. A measured approach is elementary in order not to unduly burden legitimate business transactions. It would be illogical and counterproductive to undertake important steps at

WTO and in other International Organisations to streamline international business transactions in order to stimulate trade and investment, while at the same time to impose unnecessary burdens on related financial transactions. This would be disastrous to the world economy, notably given its current state. Therefore, it is important to conduct a critical and in-depth cost-benefit analysis on any measure and new obligation in this field.

It seems logical that in addition to originator details, questions regarding beneficiary data should be regulated. In this regard, however, it must be ensured that only those financial intermediaries who are actually able to perform a check must do so and that all other financial intermediaries are released from the obligation to do so. Taking into account the cost/benefit aspect, it must be noted that due diligence cannot be performed for every stage of transfers involving multiple stages. Further, usual commercial practices and obligations for the handling of payments have to be respected (e.g. use of letter of credits). In particular, if a UN sanction is affected, payments for intermediaries are rejected. These duties must be performed by the paying or receiving bank. Intermediary banks are only able to do this to a limited extent as not all information is available to them.

Targeted Financial Sanctions

BIAC supports the proposed clarifications. However, often financial sanctions are not imposed at UN level, but instead by individual countries or groups of countries with a different reach. Therefore, BIAC requests that respective FATF obligations should be limited to financial sanctions at UN level in order to avoid conflicting requirements.

Financial Intelligence Unit (Recommendation 26)

The proposed update of Recommendation 26 in order to ensure compatibility with Recommendations 27 and 28 is supported by BIAC.

International cooperation (Recommendation 40)

A strengthening of international cooperation between competent authorities is supported by BIAC, but should not go beyond the objective of the fight against money laundering and financing of terrorism. Notably, such exchanged information should not be used for other objectives and legitimate confidentiality has to be ensured. Any exchanges of information may only take place within the framework of legitimate national legislation (legal and administrative assistance) and the national legislator must define who can exchange which information with whom and under which conditions within the framework of the relevant administrative assistance. Strong safeguards must be put in place to ensure the exchange of information as well as the necessary protection of confidentiality. These safeguards must also be agreed to at the international level in order to create a level playing field.

Other issues

Consistent implementation of the risk-based approach under supervision is very welcome. This should be done by applying the principle of functional equivalence, as was effectively done in implementing the OECD Anti-Bribery Convention. In this regard, a standard national risk policy in dealing with national PEPs is also required. The standard should help countries define risk policies which are based on the degree of domestic corruption and the obvious

irregularities in the shadow economy as a corruption-like part of the economy. We wish to point out that the money laundering risk related to domestic PEPs in Switzerland is low. For this reason, a pragmatic procedure tailored to each individual country is preferable to a general broadening of regulation.

About BIAC

BIAC is the formally recognised voice of the OECD business community. It is composed of the major national business organisations in OECD countries and in several major emerging economies, and also includes many international sector-specific associations. BIAC's 37 policy committee and task forces contribute business expertise and perspectives to the broad range of OECD policy activities.



**CCBE RESPONSE TO FATF CONSULTATION PAPER
"THE REVIEW OF THE STANDARDS - PREPARATION FOR
THE 4TH ROUND OF THE MUTUAL EVALUATION,
2ND PUBLIC CONSULTATION" (JUNE 2011)**

CCBE response to FATF consultation paper "The review of the standards - preparation for the 4th round of the mutual evaluation, 2nd public consultation" (June 2011)

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.

General remarks

1. The CCBE has used the opportunity to participate in the 1st FATF consultation round on 22 November 2010 in Paris and to submit a response to that first consultation round. The CCBE response has been submitted on 21 January 2011 (appendix 1).
2. The CCBE was disappointed that - until now - it did not receive any feedback on the first CCBE response, although the first FATF consultation paper contains a considerable amount of topics that are especially relevant to the practice of lawyers.
3. This second consultation paper seems much more focussed on the financial institutions and the obligations of Member States to make beneficial owner information accessible to competent authorities and institutions and does not contain any feedback on the first CCBE response either. Such feedback, or at least further discussion, either in a formal or informal framework, on topics referred to in the first consultation paper which are of importance to lawyers, seems important if FATF seriously "*values this input from the private sector and civil society*" as is stated in the foreword of this second consultation paper. At the moment the wordings in which the FATF intends to review the Recommendations have still not been made public or at least shared with the CCBE, yet.¹
4. Therefore, the CCBE would very much appreciate to open further discussion with the FATF as a follow-up of its response to the first consultation paper.

Beneficial ownership: recommendations 5, 33 and 34

5. The obligation to identify the beneficial owner and, if applicable, to verify that identity in a risk-based manner, is one of the most burdensome administrative AML regulations. It takes a lot of time to obtain these data in writing and clients, most of them having no or a low level of ML/TF risk, do not always understand the efforts they have to make to provide the lawyer with the requested data. Two circumstances make this regulation especially burdensome. First of all, the vast majority of services rendered by lawyers do not have any money-laundering risks at all, or at most a low risk level. These clients nevertheless are subject to extensive client due diligence, of which the verification of the identity of the beneficial owner is a substantial element. Furthermore, these CDD measures take time and subsequently prevent the lawyer from rendering his services, as the client mostly wishes, as fast as possible.
6. Therefore, the CCBE would welcome any measure imposed upon authorities that would ease these CDD efforts, provided that the right to privacy and the protection of the stored data are guaranteed as much as possible.
7. The proposed change in recommendation 34 may touch on one of the key principles in the lawyer-client relationship, namely that of legal professional privilege and professional secrecy. Providing authorities with the competence to access information on an identity from, amongst

¹ See CCBE response 21 January 2011, sub 4.

others, lawyers² would clearly interfere with this principle of legal professional privilege and professional secrecy and should therefore be firmly rejected. The importance of a confidential relationship between a lawyer and his client has been established and confirmed by, amongst others, the European Court of Human Rights and the Luxembourg Court of Justice. Therefore, lawyers should at any rate be fully exempt from any obligation to provide information to competent authorities. General principles of the right of access to law, access to justice and the human right of privacy would otherwise unjustifiably be infringed.

Data protection and privacy: recommendation 4

8. Though the CCBE understands that unnecessary cross-border barriers in transferring information which is relevant to the combating of money-laundering and the financing of terrorism, should be diminished as much as possible, the large amount of data stored nowadays by various authorities, the (lack of) control regarding these stored data and the possible uncontrolled or at least not sufficiently controlled use of those data for other purposes, is of concern to the CCBE. Any recommendation referring to the collecting and transferring of (personal) data by authorities should therefore be accompanied by guarantees to protect this data from being (mis)used for another purpose than the one they were collected for. Further, regulations to prevent possible misuse should be effectively enforced and monitored.

The Financial Intelligence Unit: recommendation 26

9. Here again FATF announces an interpretative note without disclosing the wording of it. The wording, however, establishes to a large extent its scope. Therefore, the CCBE invites the FATF to provide it with the proposed wording of the interpretative note to enable to CCBE to give a more founded response.

International cooperation: recommendation 40

10. Here again the CCBE would like to prevent the cross-border transfer of data or information from being used for other purposes than that which the data and information is collected for.

Other issues

11. Money-laundering and terrorist financing are acts that can be committed anywhere, depending on the perpetrator's preference. Some countries appear to be more vulnerable to those activities than others, but to generally apply an enhanced due diligence on all transactions related to a country³ seems very far-reaching and, again, increases the administrative burden. The risk-based approach suits very well to distinguish those transactions, products or clients that have a high(er) ML/TF risk from those that have not. After all, even in countries which are more vulnerable to ML/TF risks than others there are still low or standard risk level transactions, products and clients. The CCBE has the view that the current risk-based approach can be used in these vulnerable countries as well.
12. The CCBE appreciates that the FATF confirms that a risk-based approach should apply to the supervision of DNFBP's, including by self-regulatory organisations⁴.

PEP

13. In its first response⁵ the CCBE has already given its view that adding a domestic PEP to the group of persons that should be monitored on a high risk basis has no added value.

² 2nd FATF consultation paper sub 12, 2nd bullet (page 7)

³ 2nd FATF consultation paper, sub 27

⁴ 2nd FATF consultation paper, sub 29

⁵ Appendix 1, page 3, sub 11.

The FATF now proposes⁶ to add another group to the group of PEP's, namely those individuals who have been entrusted with prominent functions by an international organisation. As a result, enhanced CDD measures would automatically be required for family members and close associates of these added individuals leading to another increase in the administrative burden.

Conclusion:

14. The CCBE will appreciate an early opportunity to comment on the next stage of the FATF consultation and, especially an opportunity to comment on the actual proposed wording of announced changes to the recommendations or their interpretative notes. Furthermore, the CCBE would like to discuss its response to the first consultation paper, especially the topics that are of importance to the legal professionals. Meanwhile, please do not hesitate to contact us should the FATF require any further information or clarification on the above-mentioned comments.

⁶ 2nd FATF consultation paper, sub 30



FATF Consultation paper - The review of the standards – preparation for the 4th round – second public consultation, June 2011

The following observations on **Recommendations 5 and 33**, are submitted for the June 2011 FATF consultation paper - The review of the standards – preparation for the 4th round – second public consultation.

Taking into account that notaries have to employ all possible means to fight against money laundering and in order to enable them verify and identify customers that are legal persons or legal arrangements, we are putting forth the following suggestions:

a) First of all we agree on the idea of requiring that a certification system be established and kept constantly updated on the premises of the legal representative of the customer (using a single model at least at the national level). The certificate should comprise information concerning both the legal person itself and its ownership structure. We strongly support the idea of placing the obligation to gather information to identify and verify the beneficial owner in the legal person itself, as long as it is not feasible for the notary (and –we think- for other obliged persons) to reach that information in some relevant cases. The obligation for the notary to require that certificate for ML-FT purposes should be devised on a risk-based basis or limited to those cases where a major transaction or other relevant risk factors are present in the operation. The certificate would contain the following data and documents:

- Legal form, name, address of the registered office, and, where available, registration with the Register of Businesses (proof of existence).
- The control structure and powers that regulate the body, full identification of the people holding senior management positions.
- Ownership structure (full data as above for legal persons; full personal identity data of natural persons).
- If deposited with the Register of Trade, with the Head Office of the company, with one of the offices of the company or with a trusted professional: union agreements, ownership deeds of beneficial owners, any other agreements uniting several natural or legal persons). If no individual person owns shares above minimum thresholds (25%), it will be sufficient to make a statement of this in the certification.
- This certification must be compounded by a certificate issued by a Public Register, and the administrative body shall certify that the two documents are consistent;
- A similar certificate shall be issued by the trustee and by the protector stating that a trust or similar structure has been set up and indicating the identity of its governing bodies, auditors and beneficiaries;
- The responsibilities of the person holding this certificate shall include the function of ensuring that the information is correct and updated;
- In addition the person representing the client shall provide the DNFBP with any other information that is deemed useful for identifying beneficial owners.



b) Where the above expressed needs were to be in conflict with confidentiality needs as to the identity of the individuals and the relationships between individuals (some confidential information could be exploited in many ways by competitors or for insider trading purposes), the certification could be in an encrypted electronic format and only authorized individuals are given temporary access through passwords lasting only for the time required to carry out the checking activity.

The need for confidentiality is linked to the fact that the disclosure of data concerning the beneficial owner must be conceived in such a way as to enable the public authorities and the obliged subjects access to the information, but not to the rest of the private subjects (e.g. other business partners, other contracting parties), which do not have the authority to know the internal structures. In order to satisfy the obligation to provide information for the public office-holders or persons obliged to carry out anti-money laundering tasks, whilst respecting the need for confidentiality between private individuals, a solution could be to provide information through encrypted systems only accessible to the authorities and obliged subjects thanks to specific IT codes.

c) It may happen that even the representative of a legal person is oblivious to the existence of any beneficial owners; and in addition there may be reluctance in providing such information.

In these cases a full and satisfactory identification is not achieved.

S

ince this would not be the equivalent of a suspect case to be reported (unless there is other evidence), a solution might be that of setting up archives at national level with FIU to which any individual who deems that the due diligence was not complete should notify the operation and the client, attaching all the documents provided by the client. Just like any other authority (judicial or tax authority), the FIU will have access independently of any element of suspicion on the operation. This model could, in and of itself, be a deterrent and hence induce people to provide exhaustive information; and if such comprehensiveness were not possible, it would provide access to a “rational place” where any information not related to a report could be retrieved, without being overwhelmed by the confusion of the large amount of various and disorderly information that would be contained in a generic report to FIU. It would furthermore be clear that the archive meets a different and autonomous need, other than that of reporting cases.

In order to make an efficient use of this information, access to certificates or to the piece of information concerning beneficial owners could be also open to other competent administrative or judicial Authorities, in addition to FIUs. This will turn out to be a clear benefit for the whole AML-CFT system. Therefore, we do support the idea of providing Authorities with this precise information.

d) In order for the due diligence to be even more effective, the CNUE strongly supports to expressly include in the future Recommendations a provision encouraging the exchange of



public information among notaries associations or central bodies within these associations. We could suggest that the central bodies of all the professions registered with an Association, at least at the EU level, could come together in a network of mutual aid to share the information available in the public registers of their respective sectors.

Recommendation 4

We share the concerns regarding the need to protect privacy and the data that are not the object of the AML/CFT measures but that could indirectly be weakened by these measures.

Brussels, 16 September 2011



Mr Luis Urrutia
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75775 Paris Cedex 16

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

22 September 2011

Ref.: AML/KSI/PWE/MBR

Dear Mr President,

Re: FEE Comments on the FATF Consultation June 2011 Second Public Consultation "The Review of Standards - Preparation for the 4th Round of Mutual Evaluations"

FEE (the Federation of European Accountants) is pleased to provide you below with its comments on the FATF Second Public Consultation Paper "The Review of the standards - Preparation for the 4th Round of Mutual Evaluations".

FEE (Fédération des Experts-comptables Européens – Federation of European Accountants) is an international non-profit organisation based in Brussels that represents 45 institutes of professional accountants and auditors from 33 European countries, including all of the 27 EU Member States. FEE has a combined membership of more than 700.000 professional accountants, working in different capacities in public practice, small and big accountancy firms, businesses of all sizes, 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 consultation. It welcomes the opportunity to provide 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 5 of the consultation paper that substantive feedback will be provided on adoption of revised standards in February 2012.



1. Beneficial Ownership: Recommendations 5, 33 and 34

1.1 Recommendation 5

We note that in paragraph 8 that an assumption is made that in all cases the identity of the beneficial owners of legal persons and legal arrangements should be subject to verification. This would appear to be counter to a risk-based approach as, whilst we agree in all cases the identity of the beneficial owners requires to be established, the nature and extent of the measures necessary to achieve this should be determined on a risk-based basis.

1.2 Recommendation 33 – Legal Persons

We would support the FATFs consideration of requiring companies to hold both basic information and information about their beneficial ownership. As well as improving accessibility of information to competent authorities, this would also provide significant efficiency gains for financial institutions and DNFBPs in conducting customer due diligence. This should supplement the routes suggested in bullet (b) of paragraph 10.

We broadly support the other proposals made in paragraph 10 and 11. Better recording of information in the public domain should be required but we also respect the legitimate rights to confidentiality of natural persons. As such, we do not support compulsory public disclosure of beneficial ownership but support the mechanisms described that require companies and similar arrangements to have access to, and record, this information.

1.3 Recommendation 34 – Legal Arrangements

We broadly support the proposals made in paragraph 12 and 13. Again, better recording of information in the public domain should be required but we also respect the legitimate rights to confidentiality of persons. As such, we do not support compulsory public disclosure of beneficial ownership but support the mechanisms described to enable other legal arrangements to have access to and record this information.

2. Data Protection and privacy: Recommendation 4

The issue identified of conflict between data protection and privacy with AML/CFT measures is a practical issue for many businesses. Whilst ideally countries should be encouraged to exempt from data protection and privacy laws movement of legitimately held data for AML/CFT purposes within groups of businesses regulated for AML/CFT, this is likely to be complex. Interim solutions are likely to continue to rely on those groups of businesses including in their terms and conditions clauses to obtain customer consent to move information for this purpose.

3. Group-wide compliance programmes: Recommendation 15

We agree in broad terms with the FATF considerations but unless support is forthcoming from the authorities referred to in paragraph 15, FEE believes that barriers to achieving these aims will inevitably persist.



4. *Special Recommendation VII (Wire Transfers)*

We make no comment on this matter.

5. *Targeted financial sanctions in the terrorist financing and proliferation financing contexts*

We agree in broad terms with the FATF considerations.

6. *The Financial Intelligence Unit: Recommendation 26*

We agree in broad terms with the FATF considerations.

7. *International cooperation: Recommendation 40*

We agree in broad terms with the FATF considerations.

8. *Other issues included in the revision of the FATF standards*

8.1 Adequate/inadequate implementation of the FATF Recommendations

We endorse the proposals contained in paragraph 27, and in paragraph 28, provided the additional countermeasures are expressed as genuine examples and options, and not as a compulsory list of measures.

8.2 Risk-based approach in supervision

We endorse the position taken in paragraph 29.

8.3 Further consideration of Politically Exposed Persons

We agree with the FATF considerations concerning international organisations, and family members and close associates. However, we maintain the opinion as set out in our response to the first round of public consultation that all PEPs should be treated in the same way, i.e. there would be a presumption that enhanced CDD measures would be required whether domestic, foreign or international, but that the CDD required could be reduced on a justifiable risk appraisal in respect of both foreign and domestic PEPs.

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



For further information on this letter, please contact Ms Petra Weymüller
from the [FEE Secretariat](#).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Philip Johnson', with a long, sweeping horizontal stroke extending to the right.

Philip Johnson
FEE President



FIAIP – 9 SETTEMBRE 2011

Second public consultation The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations Consultation Paper, JUNE 2011

PROPOSAL FOR THE OPERATIONAL STREAMLINING FOR EFFICIENCY THE REVISION OF GAFI STANDARDS: FINANCIAL INTELLIGENCE UNIT GUIDE LINES ITALY

Money laundering legislation has over the last few years and, in particular, since 2006 with approximation of the II Directive, marked the transition from a general obligation to identify clients to a more extensive duty for the parties working in the financial sphere and also in the property market, for customer due diligence to be carried out through more complete information and continuous monitoring of relations with customers. An attempt is made to curb the phenomenon through measures aimed, by way of repression, at extending the criminal-oriented instruments and cooperation and, by way of prevention, introduce the obligation to co-operate for financial brokers and other categories of non-financial professionals (see estate agents), accountants, lawyers etc. into various laws.

The need felt, also during the revision of the standards contained in the forty-nine GAFI regulations, is that of bringing forward the protection, specifying specific money laundering obligations for many professional categories and non-financial operators including the Estate Agents on the register of business brokers specified in Law 39/1989, the involvement of whom becomes fundamental, as experts and guarantors of an important sector of the market.

The main new departure introduced is constituted by the conversion of the obligation to identify the client into the duty of a proper check that aims at greater attention to obtaining the certainty of the identity of the client and, above all, the need to check who the actual beneficiary of the transaction is.

For the purposes of satisfying the above obligation the professional/non-financial operator cannot use a single, standard procedure limited to the simple gathering of information, from documents and deeds and declarations by the client must actually uprate the required behaviour on the basis of the degree of risk that, in that case the individual relationship, entails being based principally on the direct knowledge of the customer.

There is a movement towards an extension of the objective environment of the fulfilments imposed; we pass in fact from a fulfilment in which the acquisition of data regarding the identity of the client was prevalent to one focused on the reality and the context of the relationship for which use is made of the aid of the responsible, operator/non-financial professional.

The need also arises for a constant check during the regular relationship, the occasional transaction or the professional service that, anyway, imposes the rethinking of the methods and with which the responsible party, non-financial operator/professional must respond in his or her role, by having to guarantee a check that goes beyond the mere identification, both in terms of mere identification and in terms of the necessary critical assessment by him or her of the data

relating to the client, his or her business and the service required in terms of the permanence of such an assessment over time that is very often subjective.

A further burden on the responsible party in fact lies in the constant monitoring of the ongoing relationship or the professional service. The aim of this monitoring must be to permit the checking that the transaction performed by the client is compatible with the knowledge that the party required to make the identification has of the customer, his or her business and his or her risk profile, that includes the origin of the funds.

It is a fairly burdensome operation for an responsible party such as a non-financial operator , like an estate agent, who is required to acquire and verify, in substance, all contracts, dealing, transformation of company structures etc., attributable to the customer and to acquire all the other information necessary to make possible to continuously monitor the origin of the financial resources used or moved, as if he or she had the power and the authorisation to carry out investigative activities.

The clear risk is of heaping duties on the estate agent the type and extent of which go far beyond the actual potential ability of the responsible individual to fulfil them .

FAIP considers it is necessary for the proper application of the measures taken to fight money laundering, to introduce the compliances gradually to the effective characteristics of the category required to comply in this way

Money laundering regulations as seen from studies carried out at our Study Centre are implemented only at 30 % of Italian Estate Agencies, a clear sign of an abnormal application of the rules, compared with the specific nature of the category in question.

From what is shown above it is deduced that estate agents should be responsible for merely indicating suspect operations with strict criteria with regard to the cases where such indication is given, provided every six months by the responsible authorities and not yet to carry out "inspections" for which they are absolutely untrained.

In general it is believed that the activity of the non-financial operator should not tend towards the authoritative acquisition of data and information needed for the adequate checking of the customer and the actual owner, rather it is considered the signed declaration by the customer pursuant to art. 21 of Legislative Decree 231/2007, correlated with identity papers or searches at the Chamber of Commerce Industry Trades and Agriculture for companies with a legal personality is enough to establish the identity.

Actually Gafi recommendations, partly in light of the indications emerging from the revision of the standards focus attention on a reinforcement of the active conduct of the responsible parties, the so-called customer due diligence, aiming to acquire information related to the nature and the ends of the operation, that is to say further information beyond that which emerges from the deeds and documents in possession of the operator.

To fulfil the obligation of a proper verification and the connected obligation of indicating any suspect operations, even in the light of the interpretation of it that emerges from the GAFI indications, the non-financial operator should be able to know what business the customer carries out and the transactions already performed, the instruments used, any interposition of third parties or the use of corporate, associative or trust instruments possible previous links or relations with countries characterised by preferential tax or money laundering systems, or the involvement in unlawful activities. Largely he needs to be able to have a historical picture of the customer and its activity, above all when it is question legal persons.

This type of knowledge could be obtained in concrete terms through the institution of a centralised public services, a sort of single computerised archive managed by an institutional body (MEF/FIU for example), in which every responsible party can input the client's data whether natural or legal persons and the data of the actual owners, in other words find and update the same if already identified by other responsible parties as well as where evidence of all dealing transactions, contracts and transactions carried out by each responsible party.

Such a form of centralised public system would guarantee, in the first place, the historical nature of the data relative to the natural persons and to the legal persons and therefore the greater completeness thereof.

In this way the possibility of a more complete and objective risk analysis by each individual responsible party and the manager of the system would be guaranteed. In effect the individual operator would have the possibility of acquiring complete and updated information regarding the legal nature of the client, the main activity conducted, the geographical area in which the client operates and has operated in the past, the type and frequency of the operations carried out, that is to say knowledge of all the main criteria necessary for effective customer due diligence and an objective assessment of the risks of money laundering and financing of terrorism.

Of course the single centralised public archive must also allow the automatic consultation of the black lists, to date posted entirely by the agent who does it at his own expense, as well as the consultation of an official list drawn up by the institutions partly on the basis of co-operation with the other countries belonging to GAFI, Politically Exposed Persons – PEPs – for whom reinforced adequate verification procedures are required, but for whom, to date, there is no that can be consulted with official probatory value, rather just lists provided by private software companies.

It would be possible furthermore to contemplate the elimination of the individual paper anti-money laundering archives referring to the individual responsible parties with consequent streamlining of the obligations bearing on every operator in the market as well as, furthermore, the improvement level of data protection in terms of both security and privacy.

Precisely in terms of privacy, the institution of a centralised registration system obviously means that data registration and the consultation comply with the regulations regarding personal data protection; the archive must therefore be managed in such a way as to ensure that the data input and held therein is pertinent, complete and is not more than purpose for which it was collected and subsequently treated, and it is only accessible to authorised parties with the adoption of suitable security measures that permit the control of activities carried out by each person authorised the data regarding the data in the database.

Paolo Righi
Presidente Nazionale Fiaip

Con la collaborazione di:
Armando Barsotti
Esperto Antiriciclaggio Fiaip

Financial Action Task Force

fatf.consultation@fatf-gafi.org

CONSULTATION ON THE REVIEW OF THE STANDARDS – PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATIONS

Financial Action Task Force has launched a public consultation on the Review of the Standards – Preparation for the 4th Round of Mutual Evaluations. Finland Chamber of Commerce submits the following statement.

The FATF is considering whether companies should be responsible for holding both basic information and information about their beneficial ownership. Furthermore, the FATF is considering whether competent authorities should be able to access beneficial ownership information from companies.

Finland Chamber of Commerce points out that companies cannot and should not be responsible for holding information about their beneficial ownership or providing this information for authorities. This is due to the fact that beneficial ownership is structured so that companies don't hold this sort of information. The suggested requirements would cause considerable administrative burden and costs for companies. They would also be a barrier to growth and stock exchange listings.

This does not mean that companies have no information about their beneficial ownership. Listed companies have information about their significant owners due to flagging responsibilities. Also, some large companies acquire information about their beneficial ownership from certain service providers from time to time. This information is not detailed enough to fulfil a duty to hold information about their beneficial ownership or provide authorities with this information.

FINLAND CHAMBER OF COMMERCE

Leena Linnainmaa
Deputy Director General

Shri Abhishek Kumar
FATF Cell, Ministry of Finance

Dear Sir,

Pleased find placed below the views of the ICSI on Consultation paper on **Review of FATF Standards – Preparation for the 4th Round of Mutual Evaluation Second Public Consultation** as desired.

Regards

Dr. S K Dixit
DIRECTOR (ACADEMICS)
ICSI

=====

1004: 7: DR: FATF

September 14, 2011

Shri Abhishek Kumar
FATF Cell, Ministry of Finance
Department of Economic Affairs
(Capital Market Division)
Room No. 223A, North Block
North Block
New Delhi

Dear Sir,

Sub Review of FATF Standards – Preparation for the 4th Round of Mutual Evaluation Second Public Consultation

This is with reference to your letter no. F.No. 2/151/FATF/2011 dated August 25, 2011 inviting Views of the Institute of Company Secretaries of India (ICSI) on the Consultation Paper – The Review of the Standards – Preparation for the 4th Round of Mutual Evaluation issued by FATF.

We are pleased to submit the views of the ICSI as under :

Beneficial Ownership

The current FATF Standards require transparency about legal persons and legal arrangements, through Recommendation 5 which requires financial institutions to identify the beneficial owners of customers which are legal persons or legal arrangements; and Recommendations 33 and 34 which require countries to prevent the misuse of legal persons and legal arrangements. The FATF has sought to clarify what countries and financial institutions are expected to do to implement the requirements; and the types of measures which could be used to ensure that the beneficial ownership information is available.

1. Mandatory disclosures as to the details of beneficial ownership

The disclosures as to the details of beneficial ownership and the transfer of the same may be made mandatory for all companies, trust, NGOs receiving foreign contribution, as per FATF standards. This would help in identifying the beneficial owners who ultimately have a controlling ownership interest.

2. Disclosures as to beneficial ownership with regulators may be kept in public domain.

Section 187(C) of the Companies Act, 1956 deals with filing of disclosure of beneficial interest in e-form 22B with Registrar of Companies. As disclosures regarding Shareholding pattern in the Annual Report, does not generally covers all the details as to beneficial interest, such disclosure may be kept at the public domain for inspection, that would help in identifying beneficial owners and in the process of customer due diligence too.

3. Intimation to Financial Intelligence Unit (FIU)

The regulators with whom the disclosures as to beneficial ownership or its transfer is filed, may be required to intimate the details of the same to FIU, beyond a reasonable thresholds. This filing with FIU may also be made mandatory for holders and beneficiaries also.

4. In depth Customer due diligence in certain cases

NGOs, politically exposed persons, family owned enterprises, high networth individuals may be subject to in-depth customer due diligence.

5. Compliance Audit

Compliance audit by a professional like Company Secretary, as to customer due diligence, transfer of beneficial ownership, disclosure of cash/suspicious transactions etc may be introduced.

6. Capacity building programmes

The capacity building programmes may be organised for professionals covered under the ambit of Designated Non financial business or professions (DNFBPs). These programmes may be organised in association with professional bodies.

We shall be pleased to provide any other information you may desire in the matter

Thanking you,

Yours faithfully,
(N K JAIN)
SECRETARY & CEO



International Chamber of Commerce

The world business organization

**Consultation
Response**



Prepared by the ICC Banking Commission

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

ICC response to FATF 4th
round 2nd consultation paper.



International Chamber of Commerce

The world business organization

Department of Policy and Business Practices

Mr. Giancarlo del Bufalo
President
Financial Action Task Force (FATF)
2 rue André Pascal
75775 Paris Cedex 16, France

16 September 2011

Subject: FATF Consultation on its review of the 40+9 Recommendations in preparation for the 4th round of mutual evaluations – Second Public Consultations

(Sent by email: fatf.consultation@fatf-gafi.org)

Dear Mr. del Bufalo,

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, Second Round of Consultations.

We are pleased to provide below ICC comments as prepared by the Counter Terrorist Financing / Financial Crimes Group (“CTF/FC Group”) of the ICC Banking Commission. 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 FATF 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,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a stylized flourish at the end.

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 CTF/FC Group of 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. On 7 January 2011, the ICC Banking Commission provided its comments on the first consultation organized by FATF in respect of the revision of the 40 + 9 recommendations, 4th Round of FATF Mutual Evaluations.
- 1.4 On 6 July 2011, the members of the ICC Banking Commission were provided a second public consultation paper relating to its review of the FATF Recommendations, containing a set of policy proposals concerning issues that were considered during the second phase of the review. In particular, there are certain proposals that may be of interest to the wider business community relating to the need to ensure that information on the beneficial ownership of companies and other legal persons or arrangements can be accessed in a timely way by governmental authorities.
- 1.5 Once again the ICC Counter Terrorist Financing / Financial Crimes Group ("CTF/FC Group") drafted the present response under the advisory power of ICC AML Task Force. 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

Summary of key issues

- 2.1 **Risk-Based Approach (RBA):** The ICC continues to support the FATF’s initiatives to adopt a Risk Based Approach (RBA) in both its directions to regulators and enforcement agencies as well as for FIs to assess the levels of risk and the appropriate responses to those risks in determining any policy.
- 2.2 **Beneficial Ownership (BO):** The key issue with any attempt at defining Beneficial Ownership is the different interpretations applied by different jurisdictions (e.g. Common law versus civil law). We acknowledge that the FATF is trying to provide such a definition, however for any FI operating in many countries/jurisdictions, there needs to be a definition of how far down an FI is expected to delve bearing in mind that obtaining information cross border depends on the quality and quantity of data available in the public domain and the imposition of data protection regulation on the sharing of that data cross border. We believe that the FATF could derive more benefit from addressing this issue in more detail rather than trying to determine a universal definition of BO. Furthermore we believe, that the interpretation should not lead to an extension of the agreed definition for a BO.
- 2.3 **Meaning of “Directly and indirect”:** In paragraph 20, bullet point 2 the use of the terms “directly or indirectly” are too loose in their definition, thus any application would be fraught with anomalies within in and between jurisdictions implementing the same regulation. To what level is indirect, and how is an FI to determine this?
- 2.4 **Workability:** All of the above issues relate to this issue. As we have stated on previous occasions, the regulation in respect of AML, CTF, NPWMD and TFS needs to be cognisant of the limitations faced by FIs in their ability to “police” transactions. As we describe later, FIs do not have full view of a transaction at any stage until after completion, or when an agency, with the ability to have arranged all of the related data in order, has asked a FI to carry out a review. Even then, an FI will only have a view of the part of the transaction which it is handling which may be considerably less than 100% of the whole. The more cognisant of these limitations the regulation is the more effective will be the FIs screening and monitoring.

Detailed response

Beneficial Ownership: Recommendations 5, 33, and 34 (Paras 6 to 13)

- 2.1 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), paras 6-8:* Whilst clarification with regard to obtaining beneficial ownership information is to be welcomed, we have a concern about the phrase “the identity of the natural persons (if any, whether acting alone or together) who ultimately have a controlling ownership interest in a legal person” (See para 8, bullet point #2).
- 2.2 We see two problems arising from this. Firstly, the natural persons may be hidden behind the facade of other legal persons and; secondly, how far does the word 'ultimately' require firms to go back in the chain.
- 2.3 Whilst the word “reasonable” is used in relation to verification of identity, the greater problem is often identifying the beneficial owner(s) in the first place where the concept of “reasonableness” is not used. Also, use of the word 'ultimately' implies a requirement for far more investigation than is required by the existing Recommendation 5. Whilst recognising the desirability of identifying the ultimate controlling owner(s), this can give rise to real practical difficulties, not to mention the cost and resource implications, which can be compounded by overzealous national regulators and data protection regulation.
- 2.4 In particular, we would like to highlight the following issues:
- 2.5 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 8, first bullet point:* Whilst some of this information may be available at the time of opening an account, and subject to reconfirmation at the review point, the exact nature of the executive roles that persons holding senior management positions (who may not even be directors of the company) may have, are not usually requested, nor do they appear in many of the public sources of information available to FIs and in respect of some jurisdictions data protection regulations, requesting this information may not be allowed. Furthermore the interpretation to include persons, holding senior management position goes far beyond the definition of ownership and control and therefore does not seem to be a specification, but a change to the accepted concept of BO. We recommend not changing the accepted approach of ownership and control.
- 2.6 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 8, second bullet point:* We would suggest that going through the chain of (all) legal structures and arrangements to ultimately reach the natural persons having a controlling ownership interest would be prohibitive in resource cost. It is essential that there is a point at which discovery efforts can stop.

- 2.7 Identifying changes in ownership is another challenge, particularly if this takes place further back in the chain and across jurisdictions. Similar considerations apply to legal arrangements.
- 2.8 In this context it would be appreciated if the FATF guidance in this respect stressed the need for a Risk Based Approach rather than a list based approach which could result in many legitimate companies being denied access to the international banking system, as the most conservative approach using lists, would make it prohibitive for FIs to implement.
- 2.9 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 9:* Apart from the potential difficulty in obtaining the information in the first place, we find it difficult to understand this statement. Specifically, how can identification of the beneficial owner and verifying their identity define what is meant by beneficial ownership and what should be considered to be adequate information?
- 2.10 To summarise, whilst recognising FATF's wish not to establish a mechanical process in relation to beneficial ownership which can be relatively easily evaded by fraudsters, we fear that, as drafted, these proposals could put firms in a no win situation where dependent on national law/regulation, they could be exposed to civil or criminal penalties however much they have tried to comply.
- 2.11 By FATF promoting the use of RBA in determining the levels of search and data required in respect of BOs, FIs will be in a better position to develop policies and processes, and regulators will be in a better position to identify where their own policies/regulations need to be better defined, which in turn should lead to more effective implementation.

Recommendation 33 – Legal Persons

- 2.12 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 10:* We consider that the challenge for FIs will be in the difference in availability of information between jurisdictions. Any suggested regulation should be towards the data requirements of the licensing/registry agencies in a jurisdiction. The level of data being suggested would be beyond that that an FI would keep except where the information is part of an account opening process. In many cases the costs of, and capacity, of FIs to carry out remediation of long established account relationships also needs to be considered if suggested regulation requires this.
- 2.13 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 10, first bullet point (a):* The existence of such information could be very helpful to FIs, but would require having a standard definition of BO in every jurisdiction and would possibly require amending company laws accordingly in all states.
- 2.14 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 10, second bullet point:* Such proposal would definitely be very helpful to FIs in identifying their customers.

- 2.15 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 10, third bullet point:* We would favour solution (d), to put the burden on the companies as to the ownership interests rather than on the FIs and registries.
- 2.16 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 10, fourth bullet point:* likewise, we would favour solution (a) for transparency purposes towards the company itself.
- 2.17 Consideration should be given to cross- referencing to the suggested amendments to Recommendation 4 (see 14 and 15) Data Protection, as for many FIs trying to establish BO etc, across borders, both domestic and international.
- 2.18 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 11:* Again, cross referencing to the statements in 14 and 15 would be appropriate. In respect of the exemptions, it would seem logical to restrict state owned enterprises to countries complying with FATF standards, however we recognise that this may not be possible, and so related issues re this need to be acknowledged.

Recommendation 34 – Legal Arrangements

- 2.19 *Section 1, Beneficial Ownership: Recommendations 5, 33, and 34 (FATF Paper), para 12:* This suggestion is strongly supported but does not overcome all the difficulties referred to above in relation to beneficial ownership, particularly in a cross-border situation.
- 2.20 We would suggest that the FATF recommend the use of RBA by regulators to determine what the thresholds and characteristics for BO are.
- 2.21 There are differences in the definition of trusts between common law and civil law jurisdictions and this does lead to significant problems for FIs today. For example are trust beneficiaries to be defined? Some trusts are established for unborn children either by grandparents to be or parents to be. Does the suggestion include settlors or settlement agents?
- 2.22 Because of this complexity we would recommend that the RBA is encouraged rather than a proscriptive list of definitions that cannot be applied across all jurisdictions or legal codes. However, if the FATF believes that all member states would accept a standard definition of who or what exactly are the BO(s) of a trust (settlors, trustees only, beneficiaries (all of them), protectors), as this is badly needed in jurisdictions whose laws do not provide for the creation of trusts, then we would support.

Data protection and privacy: Recommendation 4 (Para 14 and 15)

- 2.23 We agree with the need to provide “safe harbour” for FIs in meeting the data protection regulations and their obligations under the various AML, CTF, sanctions and NPWMD regulations that they are variously subject to.
- 2.24 For international banking groups, the transfer of information across borders for consolidated AML/CFT risk management is a recurrent issue. While such groups must indeed have a clear view of their global risks, one should also respect the privacy of the customers if there is no good reason to circulate their data “worldwide”. The cross border transfer of information of a customer should therefore respect a number of rules to be defined by each regulator, following R.4.

Group-wide compliance programmes: Recommendation 15 (Para 16)

- 2.25 We are pleased to see this statement from FATF recognising the need for international standards of information sharing within international FI groups. In this context it would be helpful if FATF would cover two additional points in their review and recommendations on this:
- address the possible conflict between national implementing measures; and
 - provide suggestions to manage possible privacy issues.
- 2.26 We would also caution the FATF to recognise that it may be more effective to recognise that any such programme should be jurisdictional based under a Risk Based Approach (RBA) otherwise the unintended effect will be to encourage a proscriptive catch-all approach that may be less effective.

Special Recommendation VII (Wire transfers) (Para 17 and 18)

- 2.27 The ICC would like to thank the FATF for addressing many of the suggestions made in the first round of consultations. For the second round of consultations we have a few suggestions and clarifications that we believe would provide further clarity to Special Recommendation VII.
- 2.28 To provide further clarification and avoid any misunderstanding we would suggest that in section 17 the term “electronic funds transfers (EFT)” be aligned with the definition used in the *Revised Interpretative Note to Special Recommendation VII* of “wire transfer and funds transfer”. Aligning this definition will avoid any misunderstanding that the term may include products such as debit cards and credit cards that are not intended to be included in SR VII.
- 2.29 We appreciate the clarification provided in section 17 regarding the beneficiary information required however we would suggest that the word “full” be deleted since the wording in parenthesis states “name, and account number or unique

transaction reference number” which limits the information and would avoid confusion with the term “full”.

2.30 Point (ii) of section 18 provides a footnote for the term “meaningful”. We would suggest that the words “on its face” be deleted from the definition since this term has no specific meaning when dealing with data as opposed to paper in which context the term is typically used. It should also be noted that when processing wire transfers in a “straight through” automated process, systems can generally determine whether data is or is not present, however it is not feasible in the normal course of processing to determine the context, usage or accuracy the data in relation to a specific wire transfer.

2.31 Paragraph 18 raises several questions on current procedures and processes for cross border funds transfers. The Payments Market Practice Group (PMPG) has provided specific comment on these procedures and processes. We would agree with the PMPG comments and as such have not commented separately here.

Targeted financial sanctions (TFS) in the terrorist financing and proliferation financing contexts (Para 19 to 22)

2.32 *Section 5, Targeted financial sanctions in the terrorist financing and proliferation financing contexts (FATF Paper), para 20:* The phrase “directly or indirectly” is already causing major problems since leaving aside cost and resource implications, it is almost impossible to be sure of complying with reliance having to be placed on subjective judgement notwithstanding potentially heavy penalties for getting it wrong. A major problem is, of course, how far down the chain are firms expected to go? Practical and workable guidance from FATF would be very much appreciated.

2.33 We note that the FATF is attempting to ensure that member states recognise that the UNSCRs are implemented in a consistent manner and as such, reference should be made to the necessity of national or relevant implementing law reflecting the UNSCR clearly.

2.34 In respect of the UNSCRs, which usually include Targeted Financial Sanctions (TFSs), it is important to note that in these cases FIs will employ screening techniques which are “rules based” and not “risk based”, and therefore the sanctions wording and the enabling regulation needs to be specific. It must also recognise the limitations that FIs work under, i.e. what an FI can actually do in respect of enforcing a TFS.

2.35 We believe that it is important for FATF to recommend that it is essential to ensure the reasonable and timely implementation of UN sanctions in member states. It is also important that these sanctions are implemented in as close a state as the original UN wording rather than implementing the sanction in a partial or translated version or “gold plating”.

- 2.36 We would also urge the FATF to address the need for protective legislation for FIs when implementing and adhering to these various regulations, including a recommendation that all jurisdictions recognise that international FIs will be subject to different sanctions implementing regulations in many different jurisdictions.

The Financial Intelligence Unit: Recommendation 26 (Para 23)

- 2.37 *Section 6, The Financial Intelligence Unit: Recommendation 26 (FATF Paper), paras 23-25:* We welcome the direction to FIUs but would request that the FATF and FIUs recognise that in respect of published typologies, the FI rarely has any view of the whole transaction, only that part which it is directly involved in, and that all of the so called “red flags” or indicators are usually only visible after the transaction is completed and is reviewed post event.

International cooperation: Recommendation 40 (Para 24 and 15)

- 2.38 *Section 6, The Financial Intelligence Unit: Recommendation 26 (FATF Paper), paras 23-25:* We welcome the direction for increased cooperation between agencies and would request that there should be direction related to more consistent application of TFS, not just national jurisdiction approaches.

Other Issues included in the revision of the FATF Standards (Para 26 to 30) - Adequate/inadequate implementation of the FATF Recommendations

- 2.39 *Section 8, Other Issues included in the revision of the FATF Standards (FATF Paper), paras 26-28:* We have no comments other than any countermeasures employed should be cognisant of the limitations that FIs face in implementing cross border policies, and that the none reliance on third parties in a particular jurisdiction could disenfranchise legitimate persons from engaging in international trade to the detriment of the general population. A definition in this case of “third party” and what reliance is referred to would be useful.

Risk-based approach in supervision

- 2.40 *Section 8, Other Issues included in the revision of the FATF Standards (FATF Paper), paras 29:* We would encourage the FATF to encourage regulators to instruct supervisors to follow a RBA approach when reviewing a firm’s systems and not to employ a list based approach which inevitably leads to conflict and a more proscriptive interpretation.

Further consideration of Politically Exposed Persons

- 2.41 In respect of the issues under consideration relating to foreign and domestic PEPs, we believe that further clarification on who is to be considered to be a family member, and particularly a close associate, would be appreciated. The concept of “close associates” must be further defined should the FATF wish to include them in scope as PEPs.
- 2.42 Should the decision to include domestic PEPs in the regulations be taken, we would recommend that each jurisdiction should be able to decide for itself who is to be regarded as a PEP, or else FATF will need to decide how far down the local government/community route the regulation will need to cover. We ask the question in this respect of “where do we stop?” For example; is the mayor or council leader of a small town or village included as a domestic PEP, and if so, to what extent do we consider family or extended family members as being included?

SECTION 3.

Conclusions

- 3.1 Risk Based Approach: The ICC continues to support the FATF's initiatives to adopt a Risk Based Approach (RBA) in both its directions to regulators and enforcement agencies as well as for FIs to assess the levels of risk and the appropriate responses to those risks in determining any policy.
- 3.2 Beneficial Ownership: The key issue with any attempt at defining Beneficial Ownership is the different interpretations applied by different jurisdictions (Common law versus civil law for e.g.). We believe that the FATF could derive more benefit from addressing this issue in more detail rather than trying to determine a universal definition of BO.
- 3.3 This is an issue of great concern to FIs, since failure to comply may well expose both them and possibly their officials to severe criminal and/or civil penalties notwithstanding that they believed the enquiries they had made were reasonable in the light of the information available to them at the time.
- 3.4 Workability/Effectiveness: As we have stated on previous occasions, the regulation in respect of AML, CTF, NPWMD and TFS needs to be cognisant of the limitations faced by FIs in their ability to "police" transactions. FIs do not have full view of a transaction at any stage until after completion, or when an agency, with the ability to have arranged all of the related data in order, has asked a FI to carry out a review.
- 3.5 Moreover FIs are increasingly required to develop policies that could be seen as being in breach of some countries' laws in order to comply with key regulators' requirements.
- 3.6 The more standardisation of implementation of UNSCRs and related enabling legislation is something that the FATF could aspire to, as is the recognition by regulators of the limited ability of FIs to police transactions based on these regulations and set against the typologies used by agencies.
- 3.7 The more cognisant of these limitations that the regulation is, the more effective will be the implementation of those regulations and so will be the FIs screening and monitoring processes.

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

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

6 October 2011

Dear Mr. Carlson

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

Please accept our apologies for the delay in our response. We have commented in high level terms upon the topics of most interest and relevance to ICREA member associations, but we hope to have an opportunity to comment further on the detail of these proposals as they develop.

The FATF places a particularly onerous requirement upon real estate agents in relation to CDD. Footnote 24 of the FATF Methodology refers to CDD on both sides of property transactions. The extent of this requirement is unique to real estate agents as the CDD obligation for every other sector is limited to their own customers. ICREA wrote to the ex President of the FATF on 15 September 2009 regarding this issue, and we disappointed that over two years later the matter is still unresolved.

It is because of this background that ICREA is particularly interested in the proposals relating to Recommendations 5, 33, & 34.

Recommendation 5

We are unsure whether the information laid out in the three bullet points in paragraph 8 of the consultation paper describe what is normally needed, or whether this section is a loose collection of the types of checks that may be made on a risk basis. For example information about the powers that regulate and bind entities may be useful and relevant in some incidences, but we struggle to think of this particular check as compulsory for all customers.

If it is intended that all FIs and all DNFBPs obtain all of this information in all circumstances then we are frankly alarmed. ICREA members already struggle to obtain any information about beneficial ownership and therefore we find any proposal to increase the requirement unacceptable.

Recommendations 33 & 34

FATF appears to be recognising that the beneficial ownership element of Recommendation 5 isn't working and ICREA shares this view. If member countries took control of this issue then it should no longer be necessary for the regulated sector, including real estate agents, to collate information about beneficial ownership. Although there will be challenges ahead, such as how to keep a register of companies up to date as well as human rights concerns, many of these challenges are currently faced by the regulated sectors who come at the issue from a more difficult perspective.

Recommendation 4

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We would welcome any review of data protection which might result in FIs being more receptive about sharing the customer information which they hold with real estate agents.

Recommendation 26

Please don't forget the importance of FIU's providing feedback to reporting entities. We appreciate that this feedback can't always specifically relate to individual STRs and that it can't always be addressed to individual reporting entities. However FIU's should provide generic feedback to whole sectors concerning their sectors' performance in terms of submission of STRs. FIUs should also provide information about the threats that particular sectors faces so that this information can help inform and encourage future STRs.

Adequate/inadequate implementation of the FATF Recommendations

Would the strengthened obligations apply to DNFBPs as well as FIs?

Risk-based approach in supervision

We very much support this proposal, which is critical to the success of the risk based approach.

Politically Exposed Persons

We would have liked to have known the background to the issue of treatment of individuals who work for international organizations. What problems are these individuals ensuring which has led to their position being given prioritised attention over and above other issues?

There are also definitional problems. Firstly what is an international organisation in this context? For example many FIs are international.

Consideration also needs to be given to where the relevant individuals are domestic and where are they foreign. We are conscious that the definition of a PEP centres on country of appointment rather nationality. If this approach is read across to individuals who work for international organisations then clarity will be required around whether the country of appointment is where the individual is currently working or where their international organisation is headquartered. Whichever approach is taken it would be illogical to claim that an individual can be domestic in more than one country.

Given the problems that real estate agents have with identifying who is a PEP, or a friend or close associate of a PEP, we cannot agree that EDD should be automatic for family members and close associates of foreign PEPs. FATF takes the concept of family members beyond immediate family members, and close associates is also undefined.

Yours sincerely



Elizabeth Richards
Chair of ICREA money laundering working group.

cc. Thijs Stoffer
CEO ICREA

September 16, 2011

Via E-mail to: fatf.consultation@fatf-gafi.org

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Principal Administrator
FATF Secretariat
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75775 Paris Cedex 16
FRANCE

RE: Comments to the Consultation Paper on Review of the FATF Standards – Preparation for the 4th Round of Mutual Evaluations

Dear Mr. Carlson:

The National Association of Secretaries of State (NASS) appreciates the opportunity to submit comments in response to the Financial Action Task Force (FATF) Consultation Paper issued in June 2011. NASS is a nonpartisan, professional organization that represents Secretaries of State (or the equivalent officials) throughout the United States. Our members are responsible for overseeing the company formation process in their respective states, to include the registration and filing information that is required to create and maintain the various types of legal entities available in each state.

Our comments with regard to the Consultation Paper address Recommendation 33 and its focus on ensuring access to information on the beneficial ownership and control of legal persons. As you know, FATF's 2006 Mutual Evaluation of the United States concluded that the U.S. was not in compliance with Recommendation 33 and called for greater transparency and uniformity in the provision of beneficial ownership information for non-public companies as part of law enforcement investigations..

However, we would point out that legal entities such as corporations in the U.S. are typically formed by filing documents with the Secretary of State, and regulation of the company formation process is largely a matter of state law. Since 2008, NASS has maintained a position in opposition to federal legislation introduced in the U.S. Congress that would require Secretary of State offices to collect beneficial ownership information from corporations and limited liability companies (LLCs) during the formation process. To the extent that this legislation seeks to bring the United States into compliance with Recommendation 33, our concerns are relevant to the findings and recommendations of your organization.

Our comments on the Consultation Paper reflect these concerns, and we respectfully request that FATF take this input into consideration, both as your organization seeks to clarify the various mechanisms for implementing Recommendation 33, and as it prepares for its next mutual evaluation of the United States.

If you have any questions about our comments, or we can be of any further assistance, please feel free to contact NASS Executive Director, Leslie Reynolds.

Sincerely,



Hon. Jeffrey Bullock
Delaware Secretary of State
NASS Company Formation Task Force Co-Chair



Hon. Glenn Coffee
Oklahoma Secretary of State
NASS Company Formation Task Force Co-Chair

Comments:

1. The term —beneficial owner” is overly vague and FATF should work with U.S. stakeholders, including states, on clarifying the definition of this term.

Recommendation 33 calls on countries to provide authorities with access to information on the beneficial ownership of legal persons, and it defines —beneficial owner” in this context as —those persons who exercise ultimate effective control over a legal person or arrangement.”¹ Pending federal legislation in the United States Senate uses a similarly vague definition of this term, and despite various attempts, federal policymakers are still unable to develop a clear, workable definition.² For example, during a congressional hearing on the previous version of the Senate bill, a representative of the United States Department of the Treasury stated the following with regards to the definition of beneficial ownership:

*The ambiguity and breadth of the definition of beneficial ownership, coupled with burdensome disclosure requirements, makes compliance uncertain, time-consuming and costly. The definition and application of beneficial ownership information requirements should be sufficiently straightforward and simple in application to work for the full range of covered legal entities – from small, start-up businesses to large, complex legal entities – and regardless of whether the applicant is a foreign or U.S. person.*³

Despite these comments, the current version of the Senate bill includes a definition that is no less ambiguous than the previous definition. As a result, implementation of any legislation that utilizes this term, without significant clarification, would be impractical and would likely result in non-compliance by a large number of legal entities that would not be aware of their status. Since federal lawmakers in the United States continue to develop legislative proposals based on Recommendation 33, and assuming that FATF will continue to deem countries non-compliant with this recommendation for not making beneficial ownership information available, FATF should work to clarify the definition of a beneficial owner. In doing so, NASS requests that FATF work not just with federal agencies such as the United States Department of the Treasury, but with the states, business organizations, and other stakeholders that have oversight and knowledge of the policies and procedures surrounding the company formation process.

2. Any clarification on ways to implement Recommendation 33 should recognize ownership information available through federal tax filings as an effective compliance mechanism.

¹ See Financial Action Task Force, *Glossary of Definitions Used in the Methodology*. Available online at http://www.fatf-gafi.org/document/61/0,3746,en_32250379_32236963_44826237_1_1_1_1,00.html

² The bill defines “beneficial owner” as a natural person who, directly or indirectly exercises substantial control over a corporation or limited liability company; or has a substantial interest in or receives substantial economic benefits from the assets of a corporation or limited liability company. See Sen. 1483, 112th Cong. (2011).

³ Sen. Comm. on Homeland Security & Government Affairs, *Business Formation and Financial Crime: Finding a Legislative Solution*, 111th Cong. 9 (Nov. 5, 2009) (testimony of David S. Cohen, Assistant Secretary for Terrorist Financing, U.S. Department of the Treasury).

In 2010, the United States Internal Revenue Service (IRS) revised its Form SS-4 (Application for Employer Identification Number) to require that legal entities identify a responsible party. The definition of “responsible party” includes “a person who has the authority to control, manage, or direct the entity and the disposition of its fund and assets.” With this data available to law enforcement agencies for investigations related to criminal or terrorist activity, the United States currently has an effective mechanism in place for complying with Recommendation 33. In fact, a recent report by the Organization for Economic Cooperation and Development (OECD) highlighted the effectiveness of United States tax reporting and disclosure obligations as a means for obtaining company ownership information.⁴

Because IRS tax filings provide United States law enforcement with an effective mechanism for accessing company ownership information, we request that FATF consider recognizing the availability of ownership information through a country’s tax authority as an effective means of complying with Recommendation 33.

Additionally, please note that current U.S. anti-money laundering provisions include measures for obtaining and verifying identification information and beneficial ownership information for legal entities that open accounts with financial institutions. As part of a Customer Identification Program (CIP), financial institutions are required to obtain the address and Employee Identification Number of each legal entity that opens an account. Financial institutions are also required to institute a Customer Due Diligence (CDD) program that includes measures for identifying and verifying the beneficial owners of customers that present a high risk for money laundering and other illicit activities. Guidance issued by the United States Treasury Department’s Financial Crimes Enforcement Network (FinCEN) in 2010 identified business entities as customers that may pose a heightened risk, and emphasized the importance of obtaining beneficial ownership information on these entities in order to detect suspicious activity and provide useful information to law enforcement.⁵

Therefore, there are existing processes by which federal entities may assist each other in the collection of entity ownership data that can aid law enforcement investigations into potentially illicit activities.

As a final comment, NASS would like to note a number of highly effective, state-based approaches to assisting law enforcement in this regard. Since the release of FATF’s 2006 Mutual Evaluation report, individual states—including those that were scrutinized in the report—have implemented specific measures to prevent the misuse of legal entities and to enhance the process by which law enforcement may gain access to company ownership information. The State of Nevada for example, amended its law in 2007 to require that companies maintain a list of record owners at a registered office or principal place

⁴ See OECD (2011), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: United States 2011: Combined: Phase 1 + Phase 2*, Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Reviews, OECD Publishing. <http://dx.doi.org/10.1787/9789264115064-en>

⁵ See FinCEN Guidance on Obtaining and Retaining Beneficial Ownership Information (2010). Available online at http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2010-g001.pdf

of business; file the name of the custodian of the list with the Secretary of State's office; and make the list available to law enforcement in the course of a criminal investigation.⁶

Under the federalist system of government in the United States, state laws regulate the formation of business entities. NASS strongly supports maintaining this core principle of Constitutional state sovereignty with respect to these regulations. Secretaries of State do not believe that a one-size fits-all approach to this issue is wise or practical, given the unique nature of each state's company formation laws. NASS believes that the United States has effective measures in place for identifying the beneficial owners of legal entities that open accounts with financial institutions, and we request that FATF recognize these mechanisms as an effective means of complying with Recommendation 33.

We welcome the opportunity to discuss our recommendations and comments with you further. Please contact our office if we may be of assistance.

⁶ Nevada Model Registered Agents Act (NRS 77.310), Chapter 77. Sec. 010-270. Available online at <http://www.leg.state.nv.us/nrs/NRS-077.html>

8th September 2011

To: The FATF Secretariat

Response to FATF

The Review of the Standards

Preparation for the 4th Round of Mutual Evaluations

Second Public Consultation

The National Casino Industry Forum ("NCiF") represents over 93% of casinos in the UK. On behalf of its members it is pleased to have the opportunity to consider providing a further response to our earlier submission in December 2010.

After careful consideration of the latest public consultation, NCiF is pleased to confirm that it has no further submissions to make at this time.

However, we would like to take this opportunity to remind FATF that we continue to support their initiative to extend countries discretion to decide the types of third parties that can be relied upon (Recommendation 9 – Third Party Reliance). Land-based casinos operate in a highly regulated supervisory and reporting regime and are subject to the same controls accorded to the financial and legal sectors. As stated before, we are currently unable to place any reliance on third parties from the casino sector and ask that you continue to support this initiative to bring about change that will enable third party reliance to be extended to casino operators as soon as possible.



Doug Reeman

NCiF – AML Sub-Committee Forum



Financial Action Task Force
Secretariat

By e mail to fatf.consultation@fatf-gafi.org

8th September 2011

Dear Sir,

REVIEW OF THE STANDARDS – PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATION

I am writing on behalf of the Remote Gambling Association (RGA) in response to the above consultation exercise which was launched in June.

Further information about the RGA including a list of our members can be found at www.rga.eu.com, but we are a trade association for companies who are involved in the online gambling sector and, as such, we have restricted our comments to those issues in the consultation which have a direct bearing on that sector.

Beneficial ownership

We would support the changes in recommendations 5, 33, & 34. The extension of due diligence requirements in these areas is not onerous and would help to clarify and bring a greater degree of consistency in identifying beneficial owners.

Data protection and privacy

We believe the changes proposed in relation to recommendation 4 are important ones. Conflicting data protection rules can create real problems for companies that operate internationally and we are aware that it can also hamper the exchange of information between financial intelligence units in different jurisdictions. If a way can be found to improve co-operation and co-ordination between different states then it would strengthen the fight against money laundering.

Group-wide compliance programmes

The consultation paper refers to group-wide programmes for 'financial groups' and we would be grateful for confirmation that this means all groups of companies that have a common corporate structure rather than just companies in the financial sector. However, for our members that have entities in the same or different jurisdiction this is already common practice subject, of course, to any statutory or regulatory rules that are applicable in different states.

Special Recommendation VII (wire transfers)

We would support any moves to 'enhance the transparency of electronic funds transfers'. One additional measure that we would urge FATF to consider would be a new requirement that called for financial institutions to pass the relevant originator information on to retailers, in our case online gambling operators, as this would inevitably strengthen their own due diligence procedures without apparently causing detriment to anyone.

The Financial Intelligence Unit (FIU)

Changing Recommendation 26 to more fully describe the core functions of FIUs and the applicable standards would be a worthwhile amendment.

Other issues included in the revision of the FATF standards

We support the principle of a risk-based approach in the application of the standards and the suggestion in paragraph 29 that it should apply to the supervision of 'financial institutions and DNFBPs' is a logical extension of that approach.

Paragraph 30 of the consultation paper addresses the subject of Politically Exposed Persons (PEPs) and explains that the intention is to broaden the definition of who might fall into this category by (i) including certain people who are close to already identified PEPs; and (ii) key figures involved with international organisations. In many cases determining who qualifies as a PEP can be problematic under the present system, but, as mentioned above, as long as companies and organisations can rely on a risk-based approach in making the necessary judgements then that should provide reasonable comfort for all involved.

If it would be helpful for us to expand on any of the answers given or to provide further background information then do please let us know,

Yours faithfully,

Clive Hawkswood

The Review of Standards – Preparation for the 4th Round of Mutual Evaluation

Second Public Consultation

Response from the Society of Trust and Estate Practitioners

1. The Society of Trust and Estate Practitioners (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. STEP promotes the highest professional standards through education and training leading to widely respected professional qualifications. STEP has almost 17,000 members around the world, with branches in 9 EU Member States, North America and Australasia as well as a range of international financial centres.
2. STEP welcomes the opportunity to respond to the Financial Action Task Force consultation ahead of the 4th round of mutual evaluations. We very much support the stated strategic aims of the Review of Standards in terms of establishing measures aimed at addressing any deficiencies in current AML provisions in the context of maintaining the necessary stability in the Standards as a whole. We would add that we also strongly support a risk based approach and believe that reforms should be concentrated in those areas which pose the greatest risk.
3. In that context we would observe that we know of no evidence that suggests that trusts are a high risk sector in the context of money laundering and terrorist financing. For example, the recent FATF report “Laundering the Proceeds of Corruption” (July 2011) surveyed “the use of corporate vehicles and trusts” in laundering the proceeds of corruption. In all but one of the case studies presented, the problems highlighted relate to corporate vehicles and shell companies being used for illicit purposes. Even in the single case presented where a trust was used, the main means of hiding assets appears to have been the establishment of shell corporations in jurisdictions that at the time had weak AML controls. It seems fair to conclude that in jurisdictions with adequate AML controls, trusts do not inherently represent a high risk sector for money laundering activity.
4. We would also observe that a STEP survey of Mutual Evaluation Reports for a range of jurisdictions where trusts are common (“Trust Reporting Systems – An International Comparison”, October 2010) found that the major practical problem with respect to trusts was not that the relevant information was unavailable but that there were, in a few specific instances, limitations on competent authorities sharing information. Where information is

shared effectively, the comment from the UK authorities that “current and prospective investigatory powers are generally considered by law enforcement and financial investigators to be adequate to probe the suspected criminal use of trusts” (Mutual Evaluation of United Kingdom, July 2007, paragraph 1151, page 238) appeared to summarise the views of most jurisdictions with wide experience of trusts.

5. There is therefore no compelling evidence arguing for a root and branch reform of the way information on trusts is currently collected for anti-money laundering and counter-terrorism purposes. We note, and welcome, the work that FATF is undertaking around Recommendation 40 with the aim of ensuring more effective cooperation and sharing of information between competent authorities and believe that progress here, subject to appropriate safeguards, would make a useful contribution to improving the effectiveness of the current system. We also welcome several of the other changes suggested in the consultation document and view them as sensible in the context of shifts in the environment over recent years.
6. The following more detailed comments focus on those areas of primary interest to trust practitioners, in particular the consultation document discussion on potential changes to Recommendations 5, 34 and 4. STEP would welcome the opportunity to discuss these issues further with FATF or assist in any other way.

Recommendation 5

7. We support the proposal that the definition of beneficial owners of legal arrangements should be widened to include the protector (if any) and any other natural person exercising effective control over the trusts. We proposed such a change in our submission to last year’s FATF consultation where we argued that the key test for those, such as protectors, guardians, etc., with effective control of a trust should be if they have the power to approve the addition or removal of beneficiaries or to approve proposed trust distributions. Indeed, while the proposed changes in Recommendation 5 are welcome, many practitioners would suggest that in the context of trusts it would be a useful clarification to go further. Rather than using the term ‘beneficial owner’, FATF should recast the approach by clearly identifying two groups, ‘beneficiaries’ and ‘effective controllers’. This was discussed in greater detail in STEP’s submission to the OECD’s recent consultation on beneficial ownership.¹

Recommendation 34 – Legal Arrangements

8. We support the principle that the beneficial ownership of trusts and other legal arrangements should be transparent to competent authorities. We note, however, that the consultation document draws a comparison between the availability of information on the beneficial ownership of trusts and the availability of equivalent information on companies and other types of legal persons. There are important differences between companies and trusts which have significant implications for who has access to information on them.

¹ (See <http://www.step.org/pdf/OECD%20Beneficial%20Owner%20Final%20letterhead.pdf?link=contentMiddle>)

9. Companies both enter trading arrangements with outside parties and seek credit from others. In most jurisdictions, therefore, there is a high degree of transparency regarding beneficial ownership of companies to both the competent authorities *and* the broader public.
10. Trusts, in contrast, are typically family arrangements for estate planning purposes that do not trade publicly or seek to make borrowings or raise capital from others. In that context, while we agree that trusts should be subject to the equivalent transparency to *competent authorities* as companies, we think it is important to recognise that, given the confidential nature of trusts, they should not be subject to the same degree of *public* transparency as companies. Rather than the comparison the consultation document draws between trusts and companies, it is therefore more appropriate to compare the appropriate degree of transparency for trusts with the degree of transparency for bank accounts. Details regarding bank accounts, while generally available to the competent authorities, are, like trusts, also generally regarded as confidential and not made more broadly available.
11. Looking at the specific issues being considered in FATF's work on Recommendation 34, we would make the following points:

- **Giving trustees a legal obligation to obtain and hold beneficial ownership information**

The common law places multiple overlapping obligations on trustees – such as to have a full knowledge of all the trust documents, to act in the best interest of the beneficiaries and to only distribute assets to the right person. These obligations carry the implicit requirement to identify correctly all the beneficiaries of the trust since this is the only way the trustee can ensure that the obligations have been met. In addition one of the core duties of trustees under the common law is to keep accurate accounts. A trustee must keep detailed records of his dealings with trust assets and income since beneficiaries can at any time insist that the trustee present them with accounts. These common law obligations on trustees are generally further reinforced by existing AML legislation that also requires trustees to obtain and hold beneficial ownership information. These are all issues discussed at greater length in a paper (“The Legal Obligations on Trustees in Common Law Jurisdictions”) STEP prepared for the Global Forum on Transparency and Exchange of Information for Tax Purposes earlier this year. There are therefore very few, if any, jurisdictions where introducing additional requirements requiring trustees to be put under legal obligation to obtain and hold beneficial ownership information would do other than replicate already existing arrangements. If there are jurisdictions which, for whatever reason, do not have such obligations we would agree that this deficiency should be addressed.

- **Ensuring that competent authorities in all countries are able to access information on the identity of the trustee, the beneficial ownership of trust and the trust assets from one or more sources including financial institutions and DNFBPs.**

As we noted in our introductory comments, the evidence of previously published STEP research suggests that while problems are limited, where they do exist the practical difficulty in obtaining relevant information on trusts is often that those competent authorities with the information are not able to share it with other competent authorities, not that the information is unavailable from the trustees. From an efficiency perspective it also obviously makes sense to have one effective reporting system rather than multiple, often costly, reporting systems to differing competent authorities. There should thus be a clear reporting line for trustees to provide relevant information to one competent authority that is then responsible for ensuring that competent authorities in other countries are able to access necessary information, with the only caveat being that there must be strong safeguards to ensure that confidentiality will be respected by any authority with access to information on trusts.²

It is important, however, to be clear as to the appropriate source of information on trusts. This should be the trustee, not financial institutions and DNFBPs. While financial institutions and DNFBPs may well have some information on a trust as a result of their own CDD procedures, full information on the trust and, in particular its assets, are available to the trustee and requiring others to collect such information would be intrusive, costly and deliver little if any further benefit.

- **Establishing “registries of assets or trusts” as one of the means by which competent authorities can access information on trusts.**

A limited number of jurisdictions do have trust registries, although these are generally not particularly useful sources of up to date information to competent authorities and it is difficult to see how they could be without extensive (and expensive) very regular auditing procedures. The beneficiaries of a trust will generally change over time; for example, as children or grandchildren are born or as a relatives die. The assets of a trust may also vary; for example, as markets fluctuate or investments are bought and sold on a regular basis.

Rather than a registry of assets or trusts most jurisdictions where trusts are common find it much more practical to rely on a regulatory approach based upon ‘obligations on services providers’.³ We would identify the hallmarks of a strong regulatory approach as being clear requirements regarding professional standards and competence alongside as few as possible gaps in regulatory supervision. The “Statement of Best practice for Trust and Company

² Not only are there concerns about the potential abuse of information for political purposes by some regimes, but there are also jurisdictions where the ability to ensure the security of confidential information is subject to widespread doubt.

³ See “Trust Reporting Systems – An International Comparison”, STEP, October 2010, http://www.step.org/publications/reports/trust_reporting_systems.aspx?link=contentMiddle)

Service Providers' published by the Offshore Group of Banking Supervisors provides a good template. Further, the evidence of successive FATF Mutual Evaluation Reports is that where jurisdictions have a strong and effective regulatory framework to enforce the obligations on service providers this approach is effective in ensuring that full and accurate information on trusts is available to the competent authorities in a timely fashion. In many jurisdictions trustees and other trust service providers are required to register with competent authorities as part of the regulatory framework.

- **Competent authorities are able to access information on any trusts with a nexus to their country (i.e. where trusts are managed, trust assets are located or where trustees live in the country).**

Most of the current information on trusts, whether for tax or AML purposes, is collected by the competent authorities in the place of effective management i.e. where the trustees meet and make decisions. These arrangements generally work well and match the tax system in those jurisdictions taxing trusts, with tax authorities in these circumstances also typically focusing on place of effective management in terms of requiring information to be provided. It is not clear if the proposal under consideration is that competent authorities in countries with another form of nexus to a trust (such as assets located in the country and trustees who are resident) can simply access information via the competent authorities in the place of effective management or if they would be required to collect the information themselves. The latter would impose multiple, and expensive reporting systems on trusts and trustees. In practical terms, jurisdictions where trusts have assets, such as listed securities, may find it extremely difficult to collect the necessary information themselves. Similarly the fact that trustees may be resident in a range of jurisdictions raises severe practical problems in terms of collecting the necessary information on a consistent basis anywhere other than the place of effective management.

- **Requiring trustees to disclose their status to relevant authorities; and to financial institutions and DNFBPs when entering a business relationship.**

In most jurisdictions trustees (or trust service providers) already have to disclose their status to the relevant authorities. Typically trustees are regulated and as part of the regulatory process they are required to disclose their status to the authorities. In jurisdictions where trusts are taxed they are also required to provide a return to the relevant tax authorities although the tax authorities often exempt trustees of trusts with no taxable income or capital gains from such reporting requirements. This exemption appears sensible given the large number of very small or inactive trusts that are established in many jurisdictions. Broadly these approaches work well in practice and should be regarded as appropriate solutions.

As we noted earlier, trustees are under strong obligations to keep accurate and timely records and accounts of the trust and to facilitate record keeping it is generally regarded as

good practice to hold trust funds in accounts which are designated in some way as being associated with the trust. Similarly most financial institutions and DNFBPs require trustees and others making transactions on behalf of trusts to indicate the fact when accounts are opened. Formalising these arrangements in Recommendation 34 would be a welcome development.

- **Competent authorities should have powers to obtain information regarding trusts and share it as necessary.**

Typically the practical issues that hamper easy investigation of suspicious activity are legal barriers to competent authorities sharing information. These barriers often reflect public concern about the uses to which shared information will be put and the adequacy of security arrangements to prevent information falling into the wrong hands or otherwise being abused. We note that this issue is also being considered in the context of Recommendation 4 but would nevertheless highlight the need to address public concerns about preserving legitimate confidentiality⁴ as an essential first step in some key jurisdictions in building the capability for authorities to share information. Too often the argument is used that AML requirements should somehow transcend legitimate data protection and personal privacy concerns without any serious attempt to re-assure public anxieties in this area.

- **Analogous requirements should also apply to other legal arrangements including Treuhand, Fiducie and Fideicomisos.**

While there are differences between the various legal arrangements that are found in differing jurisdictions and legal traditions, we agree that all such legal arrangements should be treated equivalently for AML purposes and be subject to effective information gathering procedures.

The balance of responsibilities between source of law countries and others.

12. We note with interest that FATF is considering what the right balance of responsibilities is between countries which are the source of law for legal arrangements and those which are not. Currently the oversight, regulation and, if applicable, taxation, of trusts is centred on the place of effective management. A change here would constitute a substantial shift, involving very significant costs for both trusts and regulatory authorities alike. It would therefore be justifiable only if it promised a high probability of significant benefits.

13. Settlers have the power (recognised under Article 6 of The Hague Convention on the Law Applicable to Trust and on their Recognition) to select the applicable law of the trust, which might well be different from either the place of management of the trust or, indeed, the place of

⁴ Article 12 of the UN Declaration of Human Rights states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

residence of either the settlor or the beneficiaries. The settlor has no obligation to report to the relevant jurisdiction that a trust has been established under its laws, nor generally would such reporting serve any useful purpose since in case of dispute any action would be brought in the jurisdiction where the trust was managed. Even in jurisdictions that do not have their own trust law and are not signatories to The Hague Convention, in cases of dispute with the trustees the courts will generally have regard to the law of the jurisdiction chosen by the settlor. The situation of trustees in such circumstances is analogous to the situation in which a UK resident director of a French company has a duty of care to the company and its shareholders which will be enforced by the English courts in line with French law.

14. Any significant shift in responsibilities towards countries which are the source of law for a trust or other legal arrangement would therefore first require these jurisdictions to set up a new reporting mechanism, with associated costs, so that they knew the trust had been established. The more important issue, however, would be how such jurisdictions might enforce any responsibilities they might have for the trust or legal arrangement. No one among the settlor, beneficiaries or trustees would necessarily be resident in the country whose source law had been chosen by the settlor, raising the question of how the source law country could realistically impose reporting requirements on them or impose penalties on them.

15. We are aware that occasionally when this problem is raised commentators suggest that there should be changes to allow the source law country to better supervise the various parties to a trust, such as for example requiring every trust to have at least one trustee resident in the source law country, but this would require many trusts to be re-written and involve very substantial costs. We would also note that in practice the place of management of a trust is normally carefully chosen on the basis of strong judicial frameworks and effective access to fund management and other financial services. Many trusts, if required to come under a new regulatory regime in the source law country, would in practice choose to review the chosen law under which they are written to achieve the best mix of source law, regulatory and judicial oversight and access to financial services. This would be both costly and likely to prompt significant international flows of both trusts and, probably, their underlying assets. We have, to date, seen no empirical evidence that such major changes (and the associated costs) would produce any significant improvement in the effectiveness of AML enforcement.

16. Examples where a trust has been established under the chosen law of one jurisdiction but is managed from another jurisdiction are typically confined to a limited number of civil law jurisdictions with strong asset management industries but no domestic trust law – although such jurisdictions may well be signatories to The Hague Convention. The more proportionate solution to any problems in ensuring the availability of beneficial ownership information would be to ensure that all such jurisdictions have effective regulatory systems that ensure the necessary information is easily available.

Data protection and privacy: Recommendation 4

17. We agree with the consultation document's observation that data protection and privacy rules can in some cases limit the implementation of AML/CFT requirements. We would observe that too often AML/CFT requirements are drafted without due regard to legitimate expectations in the area of data protection and confidentiality. In terms of achieving the greater co-operation and co-ordination between competent authorities in the areas of data protection and AML we believe it would be helpful if bodies such as FATF did more to address public concerns about potential abuse of information collected for AML/CFT purposes. We would also note that public trust has been eroded because too often financial institution and others have gathered information "for AML purposes" that in reality far exceeds the information actually needed to meet regulatory requirements.

STEP
13/9/2011

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

Introduction:

The Bermuda Branch of the Society of Trust and Estate Practitioners (“STEP Bermuda”) has approximately 250 members representing a broad cross section of Bermuda’s trust industry. 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 – Second Public Consultation (the “Consultation Paper”).

Bermuda has recently completed the 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 the insurance sector 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 is of the view that the FATF Recommendations must be clear, concise, effective and workable. In keeping with FATF’s 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”, 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.

Specific Comments:

Recommendation 5 and its Interpretative Note:

As stated in the General Comments above, STEP Bermuda believes that, if drafted correctly, changes to Recommendation 5 to clearly specify the types of measures that financial institutions and DNFBPs are required to take will make it easier for the trust industry to understand and comply with the FATF Recommendations.

STEP Bermuda would, however, again reiterate that 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.

For ease of reference, we have treated the bullet points as if they were 8(a), 8(b) and 8(c).

8(a) - We would suggest that precise wording will assist in ensuring that the Recommendation is not misinterpreted. To demonstrate we will use two examples from the Consultation Paper:

1. 'proof of existence' might mean:
 - a. Obtaining a copy of the certificate of incorporation of the company, or
 - b. Visiting the physical office of the legal person.
 - c. The certificate of incorporation would show the company has been formed, but will not indicate that there is any substance to the company. A visit to the physical office will show there is substance to the entity, but does not show it has been correctly created.
2. 'powers that regulate and bind the entity' might mean:
 - a. obtaining a copy of all legislation, regulations and policies that impact a multinational company that does business in dozens of countries around the world.
 - b. Alternatively, it might mean obtaining copies of all legal agreements that govern the operation of the business, e.g. borrowing documents, lease agreements, software license agreements, shareholders agreements, etc. ; or
 - c. it might mean obtaining copy of the companies 'boiler plate' Articles of Incorporation which provide that the company has all the powers of a natural person.

- d. In this example, none of the foregoing will actually provide usable information. In 2(a) and 2(b) above the Financial Institution will be required to gather a voluminous amount of material that it will neither be qualified to review nor, in all likelihood, be able to comprehend. In 2(c) the Articles of Incorporation provides no valuable information

STEP Bermuda is also concerned about the suggestion that information needs to be retained on persons holding “senior management positions”. For a large company this could include the heads of HR, Marketing, IT, Accounting, Finance, Operations, etc. The administrative burden and costs associated with obtaining and maintaining this type of information far exceeds any possible value. We are concerned that this obligation will be interpreted as a requirement to gather information in respect of each of these individuals, together with the additional obligation to keep such information current. It is believed that the current recommendation is sufficient for this purpose - it already provides that “For legal persons and arrangements this should include financial institutions taking reasonable measures to understand the ownership and control structure of the customer.” The existing Recommendation 5 provides that this is to be applied on a risk sensitive basis.

8(b) – This proposal seems to suggest that some common sense can be exercised in determining the identity of beneficial owners. If so, then we believe this is a productive step forward.

Our interpretation of this recommendation is that it may be sufficient to obtain information on the natural person who ultimately has a controlling ownership interest. We applaud the recognition by FATF that in some legal structures there are no natural persons who are owners or who exercise control through an ownership interest. When presented with such a structure the current Recommendations have Financial Institutions engaged in a desperate search for ‘beneficial owners’ where none exist. We would agree that a sensible approach is to recognize that a financial institution can meet their obligations by obtaining information on a person who ‘controls’ rather than a person who ‘owns’.

We would suggest that the final version of Recommendation 5 clearly set out that this approach is available to financial institutions.

8(c) – for this recommendation, we would request that the Recommendation or Interpretive Notes make it clear that:

- not all trusts have beneficiaries. For example, a charitable or purpose trust does not have beneficiaries; it has ‘purposes’ which may be charitable or commercial; and

- it is not necessary to identify and gather information on every member of a class of beneficiaries or every contingent/remote beneficiary of a trust. We had proposed in our earlier submissions that a more practical approach would be to identify and gather information on beneficiaries at the time of payout or when the beneficiary intends to exercise vested rights.

Recommendation 33 – Legal Persons:

Recommendation 33 was originally intended to ensure that countries implemented measures to ensure that legal structures were not used for unlawful purposes, and that information was available to the local competent authority should it become necessary.

Various countries have implemented different methods to address these concerns. Some onshore jurisdictions such as Canada have implemented expensive government operated procedures such as FINTRAC. FINTRAC has over 300 employees with an annual budget of approximately \$54,000,000.

Other countries do not have this level of resources, and in the current economic environment, are very concerned about increasing government expenditures. An elegant and efficient model that has been adopted by some countries that have a well regulated licensing regime involves tasking licensed service providers with the responsibility of monitoring and reporting.

In short, we do not believe that it is appropriate for FATF to dictate the approach that countries should use to address the objectives of Recommendation 33, since clearly there is not a 'one size fits all' solution.

We are also concerned that a number of the proposals being considered do not to sufficient weight to the privacy rights recognized by Article 12 of the UN Declaration of Human Rights. We would submit that if the country's competent authority has created a mechanism that allows it to satisfy the objectives without impacting the privacy rights of its citizens, then it would be inappropriate for FATF to recommend the imposition of mechanisms such as public registers which disclose the private information of individuals who are not using legal structures for unlawful purposes.

We are also strongly opposed to mechanisms that would result in the exposure of individual's private information to competent authorities of other countries without appropriate safeguards to ensure that the individual has had the benefit of 'due process' to establish whether the legal structures are being used for unlawful purposes.

Countries have engaged in extensive negotiations to establish treaties and tax information exchange agreements. Some countries have exercised their sovereign right to refuse to negotiate with certain countries. It is our view that FATF should not introduce Recommendations that would circumvent the sovereign rights of countries to protect their citizens through the negotiation of treaties and agreements designed to protect the rights of their citizens.

Recommendation 34 – Legal Arrangements

12(a) – 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, the USA and Bermuda the TSP's are largely, but not exclusively, professional lawyers, accountants, bankers or trust companies 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.

Should FATF adopt the proposal that countries should legislate to create a legal obligation upon trustees to obtain and hold beneficial ownership information about trusts, then we would ask that FATF give consideration to our comments above in relation to Recommendation 5.

In particular, the proposals regarding Recommendation 5 indicate that amendments will be made to clearly provide that a common sense approach can be exercised in determining the identity of beneficial owners, and that in certain instances it would be sufficient to obtain information on the natural person who ultimately has a controlling ownership interest.

Further, that amendments to Recommendation 5 will recognize that in some legal structures there may not be any natural persons who are owners or who exercise control through an ownership interest. An acceptable approach in such cases would be for that financial institution to meet their obligations by obtaining information on a person who 'controls' rather than a person who 'owns'.

Finally that Recommendation 5 or the Interpretive Notes will clearly recognize that where a trust structure has a large class of potential beneficiaries it will not be necessary to identify and gather information on every possible member of a class of beneficiaries or every contingent/remote beneficiaries of a trust - that other measures can be adopted such as identifying and gathering information on beneficiaries at the time of payout or when the beneficiary intends to exercise vested rights.

12(b) - We would repeat our earlier comments - we are strongly opposed to mechanisms that would result an indiscriminate disclosure of private information. We would suggest that the appropriate approach for a country seeking information regarding an individual or legal person/structure in another country would be to approach the competent authority of the host country to request the information. The treatment of that request will then be determined by the laws of the host country and any treaties or agreement entered into between the countries.

Substantially all countries have engaged in extensive negotiations to establish treaties and information exchange agreements. The negotiation process often involves an exchange of concessions designed to protect the citizens of the countries involved in the negotiation process. Some countries have exercised their sovereign right to refuse to negotiate with certain countries where they are of the view that to do so will adversely impact the rights, liberties and security of their citizens.

It is our view that FATF should not make recommendations that would circumvent the sovereign rights of countries to negotiate treaties and agreements designed to protect their citizens.

The suggestion that to be compliance a country must establish registries of assets, trusts, beneficiaries, etc. is contrary to the spirit of Article 12 of the UN Declaration of Human Rights and infringes the legislative sovereignty of countries. We also take issue with the suggestion that governmental agencies of one country could freely disclose confidential personal information to other countries without due process - this would be contrary to the laws of many countries.

Recommendation 4 – Data Protection and Privacy

It can not be denied that there are no universal standards of Data Protection and Privacy.

Certain autocratic governments give little weight to the privacy rights of their citizens, and freely use and distribute confidential information for many purposes unrelated to combating money laundering and terrorist financing. Other more liberal countries see their roll as preserving and protecting the rights of their citizens.

It is also undeniable that some countries do not have the appropriate policies, procedures, technology and mechanisms to protect data from unauthorized use and disclosure.

Until there is universal agreement on the use of private information, and common standards for the protection of information, it is premature to discuss 'diagonal cooperation' and sharing of information with non-counterparts.

Other Issues:

In paragraph 28 an number of proposals have been made regarding possible sanctions that could/should be used against non-compliant countries.

We would suggest that caution needs to be exercised when implementing and proposing sanctions against individuals and businesses resident in a non-compliant country.

We are not sure that FATF truly appreciates the financial burden that is imposed upon a country and its people through the introduction of many of its proposals. Many developing countries do not have the resources and infrastructure to implement the policies being proposed.

We are concerned that imposing sanctions against a developing country that has been unable to comply with the recommendations will cause significant financial damage to the economy of the non-compliant country. The introduction of sanction will actually be counter productive, since it will reduce the ability of the country to finance the cost of introducing the proposals made by FATF.

It is also important for FATF to remember that it is not countries that are damaged by these economic sanctions, it is people. Imposing sanctions are likely to further depress the local economy – driving the citizens deeper into poverty.

What may be more appropriate is to consider ways to assist in the financing of the costs of compliance. For example, requiring that the requesting jurisdiction pay the costs of obtaining the information that it seeks.

Concluding Remarks:

STEP Bermuda wishes to thank FATF for the opportunity to participate in the second public consultation.

Please contact us if we can provide any clarification regarding any of the foregoing recommendations or comments.

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E-mail: fatf.consultation@fatf-gafi.org

Bern, September 15th 2011 sgv-Sc

Comments on the consultation paper entitled – The Review of the FATF Standards – Preparation for the 4th Round of Mutual Evaluations (second public consultation)

Dear Sir or Madam

The Swiss Federation of Small and Medium Enterprises (sgv) is the largest umbrella organization for private businesses in Switzerland. As such, it represents over 99 percent of all Swiss enterprises and specific professional organizations. In our understanding, it is primordial for business to assume responsibility in the social, economic and regulatory realm; however, overbearing regulation must be avoided by allowing the business sector to self-govern itself.

Basing on these core-values, we see three important shortcomings in the consultation paper (a more detailed explanation of our position follows below):

- Unclear and inconsistent updates regarding beneficial owners (Rec. 5, 33 and 34)
- Overly strict measures for managing a register of beneficial owners, bearer shares and nominee shareholders (Rec. 33)
- No expansion of international cooperation for the purpose of exchanging information between the responsible authorities (Rec. 40)

I. Introductory remarks

The recommendations made in the consultation paper seem overly vague, making thus the task of commenting them difficult. It is with unease that general assumptions on the specificity of the recommendations have to be made in order to infer on how they could influence Swiss regulations. The more un-determined the recommendations are, the more open they become in the process of their implementation. This, on its turn, impacts the reliability of the recommendations negatively. From our point of view, a revision of the recommendations made seems also premature.

Furthermore, the suggested changes would result in immense additional costs for financial institutions. In some cases, the proposed requirements extend beyond the framework of combating money laundering and the financing of terrorism, and must therefore be regarded as inappropriate. It is essential that a clear cost/benefit analysis be conducted for these changes.

II. Comments on the individual recommendations and suggested changes

II.a Beneficial ownership

Ad Recommendation 5

In general we agree with the changes. However, we assume that the pursuit of clarity will not entail a requirement to identify the beneficial owner in the same manner as the contractual partner, even if the wording is "to identify the beneficial owner". If in effect identification of the beneficial owner is meant, then this suggestion must be unequivocally rejected. Furthermore, we also reject more extensive measures for verifying beneficial owners.

The clear distinction between beneficial owners and beneficiaries is crucial.

The suggested changes pertaining to the identification of contractual partners and the understanding of their business activities as well as determining beneficial owners have already been implemented in Switzerland. Swiss financial intermediaries identify the contractual partner (legal entities and asset-holding entities), verify their identity and determine the beneficial owners by means of Forms A and T, created specifically for this purpose by applying a risk-based approach. We are of the opinion that Forms A and T are sufficient for legal arrangements for the purpose of verifying identity. Expansion of this Swiss standard is thus rejected based on the risk-based approach and on the fact that Switzerland has already achieved a very good standard and consistently implements the regulations.

Ad Recommendation 33

We welcome the fact that the FATF recognizes that there is no particular need for transparency among listed companies and thus has not planned any provisions to this effect. Listed companies are already subject to disclosure obligations under stock market law.

However, the general implementation of new regulations for legal entities will lead to unnecessary administration costs for the producing economy and should clearly be rejected.

The benefits of introducing a requirement to maintain a register of beneficial owners are far outweighed by the costs of such a measure. Moreover, the requirement that the basic information in registers be available to the public is already met in Switzerland through the Commercial Register, which is available to the public and can be viewed free-of-charge worldwide via the basic data. We would like to emphasize that all persons representing companies and foundations entered in the Commercial Register have been formally and personally identified at a counter or by notarization – this includes the provision of an identification document.

The measures to combat abuse of bearer shares are very extensive. Suggestions a to c are generally rejected. Suggested changes a and b would lead to the elimination of bearer shares, which is rejected due to its far-reaching impact. Possible abuse could be sufficiently avoided by means of the existing system in place in Switzerland to determine the beneficial owner.

The suggested measures in connection with combating abuse with regard to nominee shareholders also go too far. Solution a requires changes to other legal areas as well as intervention in the private sphere, which is not desirable. In this area too, the existing method of determining beneficial owners is sufficient for the purposes of combating abuse. Here it must also be noted that it is not at all clear who should be in charge of market oversight in relation to the battle against unregistered nominee shareholders. We feel that this should not be the FATF.

The call for similar measures in connection with foundations, institutions and limited liability partnerships is also rejected. The existing provisions are wholly sufficient: financial intermediaries must identify and maintain written records on beneficial owners after applying the risk-based approach. More extensive measures are not required.

The FATF's aim of striking a balance between avoiding unnecessary burdening of the producing industries and collecting required information in the financial sector (RBA) can best be achieved by adopting the Swiss standards for distinguishing between operational companies that use their own resources to develop a business activity and vehicles that serve financial control, governance and optimization purposes. No further recommendations are therefore necessary.

Finally, the FATF intends via Recommendation 33 to render more precise definitions in connection with the steps that the countries must take in order that the required information on beneficial owners can be accessed quickly. The requirements create a conflict regarding the right to the protection of privacy. It must therefore be ensured that an automatic exchange of information is not snuck in through the back door (see the comments below regarding Rec. 4 and 40). In addition, Swiss administration, criminal and civil law already provide the responsible authority (particularly in the areas of legal and administrative assistance) with sufficient access to information on shareholders and beneficial owners.

Ad Recommendation 34

We ultimately reject the suggestions regarding responsibility between countries with applicable jurisdiction which forms the legal basis for agreements (so-called applicable law), and countries with non-applicable jurisdiction, but where the actual administration of a mandate takes place. The result could be that a large part of regulatory responsibility regarding trusts, foundations, fiduciary companies, etc. would have to be administered in countries with applicable law, rather than in the country actually responsible for the administration of the mandate, as has been the case. The benefits of such a regulation would not outweigh the costs and would increase administrative expenses. Furthermore, it must be noted here that not all countries have trust law, which would create additional problems for the implementation.

The suggested changes made under Recommendation 33, such as the registration and related disclosure of beneficial owners as well as the assets of a mandate such as a trust, must also be clearly rejected. This type of registration obligation (especially for international succession planning) would massively infringe upon the protection of privacy.

A similar guarantee of quick access to information regarding beneficial owners for asset-holding entities such as trusts, fiduciary companies and entailed estates may not, we wish to repeat, be permitted to result in an indirect exchange of information sneaking in through the back door.

II.b Data protection and privacy

Ad Recommendation 4

The duties related to the fight against money laundering and the rights related to this data and personal protection could come into conflict. For this reason, the implementation must only be carried out within the limits of national laws so that it does not result in a circumvention of national data protection laws and legislation on protection of privacy.

Another reason for this restriction is to ensure that international financial intermediaries are not faced with unsolvable problems. The exchange of information must remain limited, in particular due to the lack of international (i.e. extending beyond the EU) standards on the protection of personal data.

Financial intermediaries cannot and should not be forced to disregard recognized regulations on the protection of personal data by submitting this data to states with insufficient levels of protection.

II.c Group-wide compliance programs

Ad Recommendation 15

The changes suggested by the FATF that group-wide programs aiming to combat money laundering and to exchange information are to be introduced for financial intermediary groups are fundamentally a good idea. This will relieve the parent company of some of the burden. However, the changes could come in conflict with national regulations because information is being exchanged.

In addition, there is the danger of placing companies at a disadvantage if they are domiciled in a country with very strict requirements and consequently necessitates all branches to fulfil the requirements for these group-wide programs, while companies domiciled in a country with fewer regulations are at an advantage.

Swiss law already recognizes such group-wide harmonization regarding the most important policies (see Art. 5 of the Ordinance of the Swiss Financial Market Supervisory Authority on the Prevention of Money Laundering and Terrorist Financing (FINMA Anti-Money Laundering Ordinance, AMLO-FINMA)).

II.d Special Recommendation VII (wire transfers)

It seems logical that in addition to originator details, questions regarding beneficiary data should be regulated. In this regard, however, it must be ensured that only those financial intermediaries who are actually able to perform a check must do so and that all other financial intermediaries are released from the obligation to do so. Taking into account the cost/benefit aspect, it must be noted that due diligence cannot be performed for every stage of transfers involving multiples stages.

In particular, if a UN sanction is affected, payments for intermediaries are rejected. These duties must be performed by the paying or receiving bank. Intermediary banks are only able to do this to a limited extent as not all information is available to them.

Swiss law already takes this aspect into account. It stipulates that an intermediary (i.e. the correspondence bank) must only perform manual risk-based spot checks with regard to completeness of data (see Art. 34 para. 2 AMLO-FINMA).

II.e Targeted financial sanctions in the terrorist financing and proliferation financing contexts

We welcome the suggested measures in principle and they have already been implemented in Switzerland. However, the proposed measures should not extend beyond those of the UN resolutions.

II.f International cooperation

Ad Recommendation 40

The proposal for an automatic exchange of information between FIUs should obviously be rejected. Any exchanges of information may only take place within the framework of national legislation (legal and administrative assistance) and the national legislator must define who can exchange which information with whom and under which conditions within the framework of the relevant administrative assistance.

If Recommendation 40 is modified as suggested despite our rejection, strong safeguards must be put in place. These safeguards must also be agreed to at the international level in order to create a completely level playing field.

II.g Other issues included in the revision of the FATF Standards

Due to the fact that the recommendations have not been implemented in some countries, the question of implementing the standards for individual partners is no longer of importance. The key issue is in fact the risk concerning individual countries and their implementation of the recommendations. This approach is clearly rejected as it could increase pressure on individual countries. It could result in a black list, which is not the aim here.

However, consistent implementation of the risk-based approach under supervision would be very welcome. In this regard, a standard national risk policy in dealing with national PEPs is also required. The standard should help countries define risk policies which are based on the degree of domestic corruption and the obvious irregularities in the shadow economy as a corruption-like part of the economy. It should be pointed out that the money laundering risk related to domestic PEPs in Switzerland is low. For this reason, a pragmatic procedure tailored to each individual country is preferable to a general broadening of regulation.

Furthermore, we must also stress, as previously explained in the response to "Consultation Paper 1", that an expansion to include domestic PEPs in Switzerland is fundamentally rejected.

Yours sincerely

Schweizerischer Gewerbeverband sgv



Hans-Ulrich Bigler
Director



Henrique Schneider
Economist

Good Day:

Please be advised that the Administrators Sub-Committee (ASC), a sub committee within Business Bermuda has completed their review of the attached. As a result of our review we have provided feedback & comments which are also attached.

Business Bermuda is a non-profit business organization of (i) Bermuda-resident service providers and (ii) international businesses which provide quality banking, insurance, reinsurance, legal, accounting, financial, infrastructure, e-business, trust and management services, and products. Business Bermuda works with Bermuda's international business industry and government to develop and promote Bermuda as one of the world's foremost centers for international business.

The ASC is one the committees which supports the functions of Business Bermuda. If you want to know more about the ASC and Business Bermuda, please click onto the below link:

<http://www.businessbermuda.org/bm/about-us/our-structure/committees/investment-funds-committee>

We hope our feedback of the 4th Round of Mutual Evaluations is well received, and we look forward to any and all comments.

Best regards,



Peter Barrett CA, Group Manager-Compliance (North America) & MLRO (Bda & Cayman)

4th Floor, Rosebank Centre, 11 Bermudiana Road, Pembroke, HM 08, Bermuda

<http://www.bfgl.com>

FEEDBACK RE: PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATION. JUNE 2011

Recommendation and Page No.	Section	Comment
<p>Recommendation 5 Page 5</p>	<p>8</p>	<p>We note that exemption is granted only to publically listed companies on a recognized stock exchange. We feel that it is too restrictive to only exempt publically listed companies. It is our belief that exemption should <u>also</u> be granted to:</p> <ol style="list-style-type: none"> 1. Any company, (publically listed or otherwise) regulated and supervised by a recognized regulator. This would naturally include any trust where the Trustee is a regulated company. 2. Any not-for-profit which is registered by a recognized commission or equivalent. 3. Any type of organization which is under the control of a public authority. 4. Any type of collective investment scheme administered by a regulated administrator. 5. Any type of professional organization which is licensed and supervised by an authoritative body. For example: <ul style="list-style-type: none"> • A law firm registered with their local Bar Association. • An accounting firm registered with their local Institute. • Any other organization which must register their business and disclose the controllers of that business with a recognized authoritative body/supervisor. <p>We would also like (if not done so already) the FATF to reinforce the notion that identifying and understanding customers is a process which requires professional judgment. And the process of exercising professional judgment requires that persons “think risk”.</p> <p>We would therefore like the FATF to support the notion (or reiterate) that the amount (or “intensity”) of KYC collected to verify customer identity and understanding their business and control structure is also a function of:</p> <ul style="list-style-type: none"> • Their reputational profile; • How well-known the customer is and; • The quality and volume of public information that exists about the customer.

Recommendation and Page No.	Section	Comment
<p>Recommendation 33 Page 6</p>	<p>11</p>	<p>Again, we believe the following types of entities should <u>also</u> be exempted from the requirements on the basis that they are subject to other requirements that ensure adequate transparency.</p> <ol style="list-style-type: none"> 1. Any company, (publically listed or otherwise) regulated and supervised by a recognized regulator. This would naturally include any trust where the Trustee is a regulated company. 2. Any not-for-profit which is registered by a recognized commission or equivalent. 3. Any type of organization which is under the control of a public authority. 4. Any type of collective investment scheme administered by a regulated administrator. 5. Any type of professional organization which is licensed and supervised by an authoritative body. For example: <ul style="list-style-type: none"> • A law firm registered with their local Bar Association. • An accounting firm registered with their local Institute. • Any other organization which must register their business and disclose the controllers of that business with a recognized authoritative body/supervisor.

Recommendation and Page No.	Section	Comment
Recommendation 15 page 7/8	16	<p>We agree that having a global framework is desirable for those who have multi-jurisdictional operations.</p> <p>That said, it is important that the FATF does not appear to be endorsing the adoption of only one methodology of exercising due diligence because AML/CTF laws in different countries and jurisdictions are not all the same.</p> <p>Therefore, the FATF should recognize that any group-wide program should be designed so that AML/CTF rules in various jurisdictions are respected.</p>
Special Recommendation VII Page 8	17 & 18	<p>We believe that the FATF is thinking about certain regulated institutions and not all. This looks very “bank orientated”. Can the FATF clarify? It would be good if the FATF could provide a listing of EFT systems which are deemed “FATF compliant”. For example, has the FATF specifically given its approval of the SWIFT system?</p>
Politically Exposed Persons Page 11	30	<p>We note that the FATF want family members or close associates of PEP’s to be equally considered as PEP’s.</p> <p>If not done so already, we believe that the FATF should define who a “family member” is and, more importantly, what a “close associate” is. The FATF should understand that having complete and accurate information about such persons can be very onerous.</p> <p>We therefore believe that the FATF should state that regulated entities should only be duly advised of who all the family members and close associates of PEP’s are, based on information which has been widely disseminated in the public domain.</p>

Sincerely,



SEPT 13 '11

Peter Barrett
Chairman
Administrators Sub-Committee



The Law Society

Response to second consultation on FATF standards

September 2011

SUPPORTING
solicitors

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1. Introduction

This response has been prepared by the Law Society of England and Wales (the Law Society), which represents over 140,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession and lobbies regulators, governments and others. The Law 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 Law Society welcomes the opportunity to respond to FATF's review of the standards in preparation for the 4th round of mutual evaluations.

1.1. 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 Law Society's Money Laundering Taskforce, Company Law Committee and Wills and Equity Committee.

We have also had the benefit of seeing the responses of the International Bar Association, the American College of Trust and Estate Counsel, and the Society of Trust and Estate Practitioners, with which we broadly concur.

1.2. 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.

1.3. General comments

While the Law Society welcomes the opportunity to comment on these proposals, it is still difficult to fully understand the ramifications of the proposals without seeing the actual drafting. As we advised in our response to the first consultation, the potential unintended consequences of amendments only truly become apparent when one seeks to apply the actual drafting to real life circumstances. We therefore request the opportunity if at all possible before February 2012 to review the actual drafting and provide feedback to FATF on the practical consequences of the changes.

2. Beneficial ownership

The main proposals relating to corporate vehicles and legal arrangements focus on the beneficial ownership aspect of due diligence. However it is important to view these requirements in the wider anti-money laundering context.

Identification and verification of beneficial ownership is but one of the four arms of effective client due diligence required under Recommendation 5, the others being:

- identification and verification of the client;
- understanding the nature and purpose of the business relationship; and
- conducting ongoing scrutiny of the transactions including where necessary the source of funds.

As we stated in our January response, the Law Society accepts that sophisticated criminals will at times 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 for regulated entities to better understand the motivation behind transactions and spot anomalous activities or relationships which may be indicative of money laundering.

However, it is also true that the percentage of individuals who use companies, trusts and agents for a legitimate purpose¹, significantly outweigh the percentage who use them for criminal means. It is this very point which is at the heart of FATF's adoption of the risk-based approach and must be borne in mind when assessing the proportionality of the proposals.

Further, from FATF's 2010 typology research on the misuse of trust and company service providers² it is apparent that the warning signs of money laundering often come not from who the owners are; but rather from the nature of their business, the specific transactions they are undertaking and the size and source of funds they are utilising. This observation is supported by the experience of our members.

In these circumstances, the continued insistence on seeking out an ultimate beneficial owner irrespective of risk would seem to be not only disproportionate but also counter productive.

Such a requirement wastes resources which could be better deployed on identifying and managing real areas of risk; while seriously impinging the fundamental human right of privacy for millions of law abiding individuals who are involved with companies and legal arrangements.

Such a requirement incurs significant costs for individuals who are conducting legitimate business and seeking to comply with the law; while it does nothing to prevent criminals from providing false details on beneficial ownership either to regulated entities or on business registers.

2.1. Recommendation 5

It is proposed that Recommendation 5 refer to specific types of documents that a regulated entity would normally need to obtain to demonstrate that they had adequate identity information on the client or the beneficial owner.

¹ The European Business Register alone holds information on over 20 million companies

² http://www.fatf-gafi.org/document/0/0,3746,en_32250379_32237202_46706112_1_1_1_1,00.html

While Interpretive Note 4 to Recommendation 5 already provides some guidance on this issue, the Law Society believes that the further specification of documents, either in the Interpretive Note or the Recommendation itself, will significantly undermine the risk-based approach.

2.1.1. Identifying and verifying the client

Considering in turn the specific documents suggested as verification documents for a corporate client; we have a number of concerns relating to the lack of clarity around some of the proposals and how they will undermine the application of the risk-based approach:

- Proof of existence of incorporation.

It is not clear what is envisaged by this requirement. Will a print out from a company register be sufficient? Will a certificate of incorporation be required? Is there an expectation that all countries will now issue certificates of good standing? Will regulated entities need to be able to show photographs of a physical premises and obtain copies of detailed accounts?

- Powers that regulate and bind the entity such as the memorandum and articles of association.

These documents are not obtained as a matter of course for anti-money laundering compliance, as often the identity information will also be included on the face of the register.

When considering the cost/benefit implications of the proposals, it should be noted that company registries generally levy extra charges to obtain these documents. When clients are foreign corporations, such documents are often difficult to obtain and will generally be in the language of the country of incorporation, incurring costs for translation so that obtaining the information is meaningful.

- Names of persons holding senior management positions.

This proposal constitutes a departure from the current obligations, which may include reviewing a list of directors or obtaining details of a number of directors, which is usually available from existing registers. It is really not clear what FATF means by this concept of senior management. There is a risk that attention will be focussed deeper into the organisation and onto people who are actually not in a position to bind the company with their decisions. There is a further challenge as to where the information will be obtained from, other than the company itself, which means it will not be from an independent source.

2.1.2. Corporate beneficial owners

The proposals for verification of beneficial owners also appear to add further obligations to the current requirements without justification.

The proposals appear to suggest that an exhaustive process must be undertaken for a natural person with the requisite ownership. If such a person does not exist, then the regulated entity will have to search for any

person who may possibly exercise any other unspecified control. If they do not exist, then the regulated entity will have to spend time identifying this undefined group of senior management officials.

In practice this will mean that the most beneficial ownership checks will be undertaken on companies where there is no one with sufficient power to subvert the legitimate running of the company for nefarious means. This approach seems very wasteful of precious and finite due diligence resources for no demonstrable benefit.

Further, the amendments do not assist regulated entities in assessing how they can prove the negative requirement of showing that: there is no person with control other than through ownership interests. For the FATF Recommendations to be effective it must be possible to clearly explain how a regulated entity could actually be compliant.

It remains our preference that regulated entities are able to continue to consider the matter on a risk sensitive basis, rather than introducing additional requirements, particularly given the associated costs.

Finally, the exemption for public companies appears to have been restricted further than at present. Interpretive Note 4 (c) to Recommendation 5 permits simplified due diligence for a public company which is subject to regulatory disclosure requirements. The new proposals refer to companies listed on recognised stock exchanges and subject to proper disclosure requirements. It is not clear which stock exchanges FATF deems to be recognised nor which disclosure requirements FATF considers to be proper. The Law Society is not aware of any evidence of extensive abuse of public companies for money laundering purposes and certainly not to a degree which would warrant the proposed changes. We are concerned that such changes are not proportionate.

2.1.3. Legal arrangement beneficial owners

The proposals regarding legal arrangements are a new addition to the standards. The Law Society would support an amendment to Interpretive Note 4 which made reference to normally conducting due diligence on the trustees and the protector.

We also accept that there may be a justification to require identification of the settlor, although they in fact do not have ownership rights. We would point out though that this requirement is more relevant at the formation of the legal arrangement, rather than during the existence of the trust, especially as some legal arrangements can be in existence 100 years or more after the settlor's death.

As expanded at point 3 below, we do not agree that the beneficiaries of a legal arrangement should be considered to be beneficial owners as they do not have ownership of or control over the property in the legal arrangement.

2.2. Recommendation 33

Recommendation 33 currently provides:

Countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.

2.2.1. Adoption of a companies' register

Having considered all of the proposed changes, the Law Society would support either the addition of an Interpretive Note or an amendment to the Recommendation which required that:

Certain basic information on legal persons should be freely available from Register of Companies, including at a minimum:

- the company name,
- a statement of incorporation,
- information on the legal form and status,
- the address of the registered office,
- basic regulating powers,
- a list of directors, and
- a list of shareholders³.

This is currently required in the UK and is a very useful source of information for the regulated sector and law enforcement when they are seeking to verify information on beneficial ownership or trace ownership chains in criminal investigations.

We understand that it is when ownership chains move into jurisdictions without such registers that searching for the ultimate beneficial owners becomes burdensome for regulated entities and the endeavours of law enforcement can be frustrated.

This simple requirement to register all companies could make a significant difference in the fight against money laundering.

For the individual company, the requirement to provide the information once to the register, and update the register if there was a change, would limit the amount of times they have to provide this information to their bank, accountant, lawyer or any other regulated entity.

The list of shareholders should be restricted to a list of the direct shareholders of the company, rather than the ultimate beneficial owners. Further, as we discuss below, careful consideration should be given to what identifying

³ Or a list of members where the company is incorporated by way of guarantee rather than by shareholding

information is required about the directors and the shareholders, taking into account legitimate expectations of privacy and protection of individual safety.

Requiring the company registries to verify the information provided, or at least undertake verification processes by way of random and/or risk-based sampling⁴, would enhance the effectiveness and reliability of the registers, for both regulated entities and law enforcement.

2.2.2. Holding of all ultimate beneficial ownership information

The Law Society does not support either of the proposals for one individual or entity to hold and keep up to date all of the information about ultimate beneficial ownership for each entity.

An individual company will and should know who its direct shareholders are, as that is to whom they are accountable. Where they are owned by a number of other entities, particularly if it is via minority shareholdings, who are in turn owned by other entities, they will often not be aware of the identity of these ultimate beneficial owners. While they can ask for information through the ownership chain as to who the ultimate beneficial owner is; unless they make that request everyday (or even more frequently), if the ultimate beneficial owner changes, the information they hold will be out of date and completely worthless.

These accuracy limitations will equally apply if the ultimate beneficial owner information is required to be held by regulated entities, company registers or competent authorities.

The Law Society appreciates that being able to access ultimate beneficial ownership information is important for those few companies who are misused by criminals. However this approach will simply incur significant costs for businesses who, particularly in the current economic climate, are in no position to afford it; while providing no assurance to law enforcement that the information is accurate. Further, criminals will simply hold or provide false information, so it will not actually assist in stopping money laundering, which should be the actual aim of any requirements.

2.2.3. Bearer shares

Bearer shares are not a common feature of the UK corporate landscape, so any changes will have a limited impact on our members.

However, we understand that bearer shares are admissible and the most common security used by German corporations. We understand that a prohibition on bearer shares would mean that around 6,800 non-listed stock corporations and some hundred listed companies would need to change their articles. Unless grandfathering rules are put in place, a prohibition of bearer shares would require significant resources and incur significant costs for these corporations.

In terms of the proposals, we can see benefits in immobilising the shares by requiring them to be held with a regulated financial institution or professional

⁴ As stated above, the European Business Register holds information on 20 million companies, while the UK's Companies House register advised in its 2010/11 annual report that there were 2.5 million active companies on the register. Any verification measures to be undertaken by the company registries would need to be cost effective.

intermediary, particularly as most bearer shares are already held by these organisations or individuals.

The other proposals are likely to incur significant costs and fail to take into account the legitimate privacy concerns of the share holders which are outlined below in relation to nominee shareholders.

2.2.4. Nominee shareholders

There are quite a number of examples of where nominee shareholders are utilised for legitimate reasons, including:

- Where companies are involved in controversial but legal activities, such as vivisection research, and the shareholders have concerns about harassment and physical harm should their identities be revealed.
- In countries where there are higher levels of corruption and the rule of law is not particularly strong, wealthy individuals are often targeted in kidnapping and extortion cases.⁵
- By companies who are seeking to invest in competitors, which they see as a potential acquisition target, while remaining anonymous and reducing potential market distortion.
- By investors who have a broad investment policy and would prefer not to reveal a particular investment which may seem contradictory, avoiding unnecessary market speculation⁶.
- Where stocks and shares are held in a discretionary managed portfolio by an investment manager (who is regulated eg by the FSA) so that the stock can be dealt with on a timely basis and bargains completed effectively. This approach is common in the UK.
- Where a large number of employees have small shareholdings in the company, for ease of administration these are generally held by a nominee shareholder who acts on behalf of all of the employees.

One of the proposals is that the details of the nominators should be on a public register, irrespective of whether they hold a controlling share and irrespective of the money laundering risks associated with the company generally. The Law Society believes that this is a completely disproportionate infringement on the fundamental right to privacy of these individuals.

The Law Society notes that most nominee shareholders are actually regulated financial intermediaries and so are already regulated for money laundering compliance. If there is significant evidence of misuse of nominee shareholdings, then encouraging countries who do not regulate nominee shareholders to do so, to have their nominee status noted in the share register and for the nominee to keep details of their nominators, may be a more proportionate and effective approach to mitigate this misuse.

⁵ These risks are highlighted in the recent FATF typology report on Organised Maritime Piracy and related Kidnapping for Ransom. Although the recent Australian case of the extortion attempt on the Pulver family shows that these risks can still be real even in quite stable and democratic countries.

⁶ There are rules against this practice in some jurisdictions if the companies are public companies, but it is otherwise a legitimate practice.

2.2.5. Extensions and exemptions

The Law Society agrees that the registration process we support should be applied to foundations, anstalts and limited liability partnerships, to promote a level playing field, as these are also legal entities. We think the existing provisions in the Recommendations and the Interpretive Notes regarding simplified due diligence are sufficiently flexible to enable an appropriate risk-based approach to apply. Further examples may only result in a tick-box approach being applied upon implementation, which the Law Society believes would be neither effective nor proportionate.

2.2.6. Alternative ways to increase effectiveness

Corporate vehicles are a very common business structure around the world. In most instances the purpose behind their use is completely legitimate

The real money laundering risk associated with corporate vehicles occurs where the company is set up with the purpose of disguising the proceeds of crime from other activities undertaken by its owners. This is why the company formation stage is so important, as is the regulation of those who are permitted to form a company.

In the UK, trust and company service providers who provide these services by way of business are regulated for money laundering purposes. Lawyers and accountants are supervised by their professional bodies, while others without affiliation to a professional body are supervised by HM Revenue and Customs.

FATF should encourage member countries to regulate company formation agents. This will mean the company formation agents are required to:

- conduct due diligence on the beneficial owners at the point of formation,
- understand the reason for the specific incorporation of the company and the business it will conduct, and
- consider whether there are any warning signs that the new company will be utilised for money laundering.

In addition, by requiring company formation agents to make suspicious transaction reports where there are unexplained warning signs of money laundering, law enforcement will be alerted to individuals who are in possession of the proceeds of crime before they are able to set up the company and dissipate the funds. Supervision of company formation agents will mean that they face greater scrutiny and any corrupt individuals are likely to be identified and removed from business more quickly than conventional criminal law processes would usually achieve.

2.3. Recommendation 34

Recommendation 34 provides that:

Countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.

2.3.1. Assessing the risk of the misuse of trusts

Trusts were created in England in the 11th century as a way to protect the interests of vulnerable individuals who were not permitted by law to hold property.

In essence a trust is a relationship, which places full legal ownership of the property in a trustee or group of trustees, which they must hold for another individual or group of individuals. The trustee is not permitted to enjoy the use of the property for themselves, but must instead deal with the property in a way which is in the best interests of the beneficiaries, which may include allowing them to enjoy either the property (for example to live in a house owned by the trust) or the income from the property.

A trust is not an arrangement where the trustee is bound to follow the instructions of the beneficiaries⁷, it is not a legal person in its own right, and the settlor has no rights relating to the property other than those expressly set out in the trust instrument.

In a personal context, trusts are generally used to:

- pass on assets to children or grandchildren
- provide for a specific need such as paying education fees
- manage the money of and pay for the living expenses of an individual who is unable to effectively manage their own affairs whether that is as a result of physical or mental disability or frailty due to age
- ensure that children do not receive an inheritance before a certain age
- make donations to charitable causes.

In the vast majority of these cases, trusts involve information about the settlor and the beneficiaries which is extremely sensitive and personal, such that a legitimate expectation of privacy would arise.

In a business context, trusts are generally used to:

- run local sporting clubs and other social or community groups
- provide charitable, research and educational services
- manage employee pension schemes
- facilitate venture capital funding for small and medium sized enterprises
- issue sovereign debt

⁷ Except where all the beneficiaries are absolutely entitled and of full age and capacity

However, as the above examples demonstrate, trusts are actually common features of our everyday lives and used by people across the economic spectrum. This is in contrast to the often cited perception of trusts, namely that trusts are only used by the extremely wealthy or by determined criminals to put their assets out of reach of law enforcement and the tax authorities.

The Law Society accepts that trusts may on occasion be used by criminals as a means of distancing the apparent ownership of criminal property from themselves. However, having reviewed the research published by FATF on the misuse of trusts for money laundering purposes, we remain to be convinced that the problem is so wide spread as to warrant the measures proposed or to justify the attention paid to the beneficiaries.

In the 2010 typology review conducted by FATF into money laundering using trust and company service providers⁸, only four cases were provided where an actual trust was utilised⁹.

While two of the examples were undated, one occurred in 2002, before trust and company service providers were included in the relevant country's anti-money laundering regime and the other took place in 2004. As such the examples do not allow one to assess the extent to which the existing measures are effective.

Further, in three of the cases, the trust and company service provider was clearly complicit in the criminal conduct. In one of those cases the trust and company service provider lied about the beneficial ownership of the trust to the competent authorities.

Finally, in one case the criminal was the trustee and in the other two cases the criminals were the settlor. As such the identity of the beneficiary was irrelevant to the money laundering methodology or to the warning signs which helped identify those particular trusts as suspicious.

The 2010 typology report recommended that FATF undertake further investigation into the way trusts were misused in the laundering of the proceeds of corruption. FATF released this further report in July 2011.¹⁰ Despite repeated references to the abuse of trusts for laundering of the proceeds of corruption in the commentary of the report, only one example is given where a trust is explicitly referred to as part of the laundering methodology. This case occurred in the late 1990's and the trust was set up by a US bank, before the current regulatory regime was in place.

Five case examples out of the millions of trusts which are in existence around the world does not give one much scope from which to draw robust conclusions. However due to their inclusion in these typologies one must draw the inference that these are the key cases which law enforcement considered illustrated the main areas of money laundering concern with trusts.

The Law Society simply does not see how the proposals contained in the consultation will effectively help to prevent the manner in which trusts are currently being abused by money launderers as described in FATF's own

⁸ http://www.fatf-gafi.org/document/0/0,3746,en_32250379_32237202_46706112_1_1_1_1,00.html

⁹ We have discounted the examples relating to lawyers' client accounts which is an agency relationship rather than an express trust.

¹⁰ http://www.fatf-gafi.org/document/63/0,3746,en_32250379_32237202_48472703_1_1_1_1,00.html

research. Instead the proposals will disproportionately infringe legitimate expectations of privacy for law abiding individuals, and place extensive burdens on legitimate arrangements which can easily be circumvented by determined criminals who will simply lie about beneficial ownership details.

2.3.2. Trustees' legal obligations

The first proposal is that trustees should be given a legal obligation to obtain and hold beneficial ownership information about trusts.

This proposal demonstrates a fundamental misunderstanding about trusts, as such an obligation already exists. Under common law, there are a number of legal obligations with which a trustee must comply.

Upon becoming a trustee, the trustee must:

- establish the assets which comprise the trust;
- review all documents relating to the trust so that they are familiar with the terms of the trusts including the identity of all current trustees and beneficiaries, and
- avoid conflicts of interests between their fiduciary duties and their own self interest. It is widely recognised that to do this, they again need to establish who all the beneficiaries are.

When managing a trust, a trustee must:

- comply with the terms of the trust unless generally authorised by all of the beneficiaries (the only exemptions are when the trustee is authorised to make changes by the trust instrument, the courts or by statute);
- exercise reasonable skill and care;
- act fairly and impartially between beneficiaries;
- fulfil a duty of 'real and genuine consideration', which requires that they consider the implications of any action or inaction they undertake on the beneficiaries;
- act in the beneficiaries' best interests;
- distribute assets to the right people; and
- keep records and accounts.

It is widely recognised that in order to undertake all of these duties it is essential that the trustee establishes and keeps under review who the beneficiaries are.

This does not however mean that they need to verify identity in the same way it is usually undertaken for anti-money laundering compliance, namely the collection of copies of passports and utility bills.

The Law Society believes that the reiteration of a requirement to obtain and hold information on beneficial owners for trustees in the anti-money laundering standards is superfluous and is likely to simply add extra bureaucratic burdens to processes which have already been working effectively for hundreds of years.

2.3.3. Access to information

The second proposal is that competent authorities in all countries should be able to access information on the identity of the trustee, the beneficial ownership of the trust and the trust assets from one or more sources including financial institutions and DNFBs; registries of assets or trusts; or other competent authorities, of any trust with a nexus to their country. A nexus to the country is defined as where the trust is managed, the trust assets are located or where trustees live.

Recommendation 34 already requires that such information should be able to be accessed by competent authorities.

Regulated entities are already required to obtain the relevant information when conducting due diligence on client trusts and are required to conduct ongoing monitoring at appropriate and risk-sensitive intervals throughout the retainer. There are legal processes in each jurisdiction already in existence which allow competent authorities to obtain such information as is held by the regulated entity at any given time. It is not clear what more this proposal is attempting to achieve.

The Law Society is of the view that a trusts register would:

- infringe disproportionately on the fundamental human right to privacy of the millions of individuals who utilise trusts legitimately;
- create significant administrative costs for both government and legitimate businesses and individuals;
- be difficult and costly to keep up to date; and
- be easily circumvented by criminals who would simply not register or would register false information.

The costs and challenges for ensuring accuracy have been noted in the FATF review of South Africa, which is the only jurisdiction to institute a trusts register. Further, South Africa only received a rating of partially compliant for Recommendation 34 in that review. The existence of such a register, where the accuracy of information is questionable is likely to lull regulated entities into a false sense of security which can only impinge on the effectiveness of the AML regime.

In light of our comments at 2.3.1 above, we simply do not see that the creation of such costly and rights infringing registers are warranted by the scale of reported trust misuse evidenced in the FATF reports or that they are likely to disrupt and prevent the methodologies outlined in those reports.

With respect to the exchange of information between competent authorities generally, please see our comments at point 2.3.5 below.

The application of the final point in the proposal, namely 'of any trust with a nexus to their country' is unclear, on both a linguistic and a practical level. It is not clear whether that is meant to apply to all possible sources or only to the competent authorities.

If it is meant to apply to all possible sources there are fundamental practical challenges with the proposals. Regulated entities will only have the relevant information for those trusts who are their clients, not for every trust that has a nexus with the country. The costs which would be incurred through trust registers, as outlined above, would be come even more disproportionate if a trust is required to be registered in every country where there is a nexus.

Competent authorities will have information on a trust if the trust is required to pay tax in that country. The legal basis for the requirement to pay tax may not correlate with the definition of nexus envisaged in these proposals, creating both confusion and increased administrative burdens.

The Law Society does not believe that these proposals will result in Recommendation 34 becoming any more effective than it currently is and that they will instead create unwarranted burdens on governments, as well as businesses and individuals who are using trusts for lawful purposes.

2.3.4. Trustee disclosure

The third proposal is that trustees should be required to disclose their status to:

- relevant authorities, and
- financial institutions and DNFBs when entering a business relationship.

It is not clear when trustees would be required to disclose their status to relevant authorities and which authorities would be considered relevant. As such the Law Society cannot comment on this proposal other than to reiterate the concerns raised in other parts of this response to similar proposals.

The Law Society is not aware of there being a significant issue with trustees failing to mention to regulated entities that they are engaging their services as a trustee rather than for their own purposes. In the UK this information simply has to be provided by the trustee in order to fulfil their role properly. Further it is a part of the basic due diligence requirements for regulated entities to understand the nature of their client's business and the purpose of specific transaction or retainer. Fairly simple questioning should actually reveal that the client is acting in their capacity as a trustee. As such it is not clear what mischief or deficiency this proposal is seeing to address or that it is justified.

2.3.5. Sharing of information by competent authorities

The fourth proposals is that competent authorities should have powers to obtain information regarding trusts and that they should share it as necessary.

In many countries the competent authorities already collect information each year on trusts for the purposes of taxation. The Law Society agrees that it makes sense for competent authorities to look at ways that they can share relevant information where there is a legitimate law enforcement need for the information. We believe that the proper application of data protection principles would help ensure that only relevant information is shared, to the extent actually required, in a manner which is appropriately secure given the personal and sensitive nature of the information. This would effectively enable law enforcement to continue to detect and bring to justice those engaging in money laundering, while still protecting the privacy of millions of individuals who are using trusts for legitimate purposes.

2.3.6. Registration in source of law jurisdictions

Finally, the consultation raises the question of whether additional measures should be taken by jurisdictions which provide the source law for trusts or other such arrangements. One suggestion of possible additional measures is registration in the jurisdiction of the source law. It is not clear whether this registration would be of the trusts, the trustees or the trust and company service providers.

It is simply not clear how FATF envisages that one country would exercise this level of control over individuals and legal arrangements which exist in other jurisdictions without significantly impinging on the sovereignty of those jurisdictions.

The effect of these proposals on Switzerland is perhaps a pertinent example of the challenges faced. Swiss domestic law does not provide for the creation of a trust, yet they have a thriving trust industry. Switzerland has ratified the Hague Convention on the Law Applicable to Trusts and their Recognition, meaning that the trusts created in Switzerland are governed by the law chosen by the settlor. In practice the law selected is often the law of England and Wales, Jersey, Guernsey, the Cayman Islands or the BVI, among others.

With respect to these proposals, it is not clear how the governments in any of those jurisdictions would be able to:

- require registration of the trust, trustee or trust and company service provider in their country,
- monitor for non-compliance or
- take enforcement action against such non-compliance.

This is especially the case if the trust has no other connection with the jurisdiction and the relevant government has no control over the actual trust and company service providers. A requirement for Swiss trust and company service providers to register with, for example the UK's default trust and company service provider supervisor - HM Revenue and Customs, is likely to be a very undesirable prospect for the Swiss authorities, let alone the individuals providing the services.

The Law Society is not aware of this registration approach being applied in any other context, let alone being applied successfully. The proposal is quite unlike that of listing on a foreign stock exchange, where the company voluntarily consents to comply with the listing requirements and can be delisted if they fail to comply. Accordingly the Law Society does not envisage that such a shifting of jurisdictional responsibility would be practically achievable or effective in limiting the misuse of trusts and other legal arrangements by money launderers.

2.3.7. Alternative ways to enhance effectiveness

As evidenced in the FATF typologies reports referred to above, the real problem with trusts is the rare occasions (taking into account how many trusts exist) when they are set up with the purpose of hiding criminal money.

Therefore, in the Law Society's view, it is critical to ensure that individuals who are setting up trusts are effectively regulated for anti-money laundering compliance in the country in which they are conducting business. This would mean that they are required to undertake due diligence on the relevant people and entities involved with the trust, that they understand the purpose for setting up the trust and that they understand the source of the trust property.

By requiring trust formation agents to make suspicious transaction reports about unexplained warning signs of money laundering, law enforcement will be alerted to individuals who are in possession of the proceeds of crime before they are able to set up the trust and dissipate the funds. Supervision of trust formation agents will mean they face greater scrutiny and corrupt individuals are likely to be identified and removed from business more quickly than conventional criminal law processes usually achieve.

The registration and monitoring approach applies in the Cayman Islands, one of the few jurisdictions to be rated as compliant on Recommendation 34 in their FATF review. The UK has also followed the registration approach, with trust and company service providers not supervised by relevant professional bodies now being subject to monitoring by HM Revenue and Customs, which addresses the only deficiency noted in the UK's compliance on this Recommendation. The Law Society strongly suggests that FATF pursues this approach in enhancing the effectiveness of Recommendation 34.

3. Data protection and privacy

The Law Society is concerned at the inference in the consultation paper that data protection and privacy laws should be amended to allow anti-money laundering and counter terrorist financing (AML/CTF) laws to operate unfettered.

As discussed elsewhere in this consultation, anti-money laundering compliance often involves the accumulation of sensitive personal data. The sensitivity of the data may relate not only to clients and beneficial owners, but also to those in regulated entities who are making suspicious transaction reports. The need to have safeguards around the handling of this information is, we would suggest, self-evident.

In our view fully integrating the AML/CTF regime within the privacy and data protection framework will provide clearer gateways and processes for the collection and sharing of information. This can only strengthen the legitimacy of AML/CFT activity, provide greater confidence to those applying the regime, ensure a proper balance in its application and discourage the view that privacy and data protection are obstacles rather than enablers of effective AML/CFT.

Therefore it is the Law Society's view that FATF should have regard to the Article 29 Data Protection Working Party Opinion 14/2011¹¹ on data protection issues related to the prevention of money laundering and terrorist financing. This calls, above all, for a clear legal basis for AML/CFT data processing, reflecting the status of privacy and data protection as human rights recognised by law.

¹¹ http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp186_en.pdf

4. Financial sanctions

The Law Society recognises the importance of targeted financial sanctions as a diplomatic and practical tool to limit the ability of individuals, entities and governments to sponsor terrorism. However in light of recent court judgements reflecting upon the appropriate balance between the need to protect the public from terrorism and the need to provide due process and consideration for individual's human rights, the Law Society makes two observations on the current proposals.

Firstly, as these requirements are directed at ordinary members of the public, rather than just regulated entities, it would be prudent to require that competent authorities take reasonable steps to bring the lists of designated individuals to the public's attention. Ensuring that the lists are publicised, easily locatable and easily searchable will enhance compliance and promote the rule of law.

The second observation is a corollary to the first, in that there should be a defence available to an individual if they deal with assets, economic resources or provide relevant resources to a designated person when they did not have any reason to believe that the individual was so designated.

From an implementation perspective, FATF should take care to restrict the scope of the Recommendations regarding sanctions to terrorist financing. Many governments will also make use of sanctioning powers for a range of reasons which they see as nationally legitimate ends, such as preventing serious abuses of human rights by governments in foreign countries or activities which could destabilise the national economy. While the Law Society is not challenging the right of national governments to utilise sanctioning powers for these purposes, they should do so within their own authority rather than by seeking to extend the remit of the FATF Recommendations.

5. FIUs and international cooperation

The Law Society generally supports efforts by FATF to enhance the role of and cooperation between FIUs.

With respect to confidentiality, we commend to FATF the approach taken in the UK by the Serious Organised Crime Agency. The creation of a confidentiality breach helpline, where complaints are investigated independently and reports made directly to the relevant government minister has improved the confidence of regulated entities in making reports.

With respect to the exchange of information, the Law Society appreciates the importance of effective gateways for sharing of intelligence. However we are aware that in certain circumstances FIUs will choose not to pass on information to other FIUs where there is a real concern that human rights abuses will result. We would support FIUs retaining discretion as to when they will share information in circumstances such as these.

6. Other issues

6.1. Assessment of implementation

As we stated in our response to the first FATF consultation, the current mutual evaluations are quite dense and lacking in up to date statistics. It would be useful for our members to more easily assess the anti-money laundering risks of different jurisdictions if FATF were to provide a quick reference table of all jurisdictions who have been mutually evaluated and their compliance ratings.

6.2. Risk based approach in supervision

The Law Society supports supervisors applying a risk-based approach to their supervision roles. The small number of regulated entities being convicted in relation to money laundering offences justifies supervisors generally starting from the position that most of their supervised population are trying to conduct themselves in compliance with the law. Therefore they should focus their monitoring activities on the higher risk regulated entities.

The Law Society would also commend the UK's approach to supervision to FATF. The UK has allocated supervisory responsibility, especially for the designated non financial business sectors, to the relevant professional bodies. This has resulted in more tailored support and education being provided to regulated entities to assist them with compliance and a higher level of actual monitoring of firms that would have been possible for a single governmental supervisory authority.

6.3. Politically exposed persons

The Law Society has reviewed our representations on the issue of politically exposed persons (PEPs) in light of the recent FATF typology on money laundering the proceeds of corruption issued in June 2011.¹² We stand by our views that the enhanced due diligence should only be required for PEPs on a risk-based approach.

The case examples provided in the typology were quite dated, with some occurring prior to PEPs being covered by the FATF standards and others occurring even before the FATF standards were in existence.

In all of the cases provided, standard due diligence would have made it clear that the regulated entity was acting for a politically exposed person who was accessing more significant funding than they were legally entitled to access.

The clear issue highlighted in each case was not a lack of due diligence. Rather it was either individuals who did not care about the legal consequences and continued to help launder the funds, or regulated entities who decided to take a risk-based approach to whether they would keep the client and / or the account.

FATF needs to send a clear message that where, as a regulated entity, you have a client who is a PEP who is clearly stripping assets from their countries, you

¹² http://www.fatf-gafi.org/document/63/0,3746,en_32250379_32237202_48472703_1_1_1_1,00.html

need to make a report and cease acting¹³ and/or close the account. Supervisors and law enforcement need to be clear that they will take enforcement action where this does not occur.

¹³ Unless of course you are an independent legal professional providing litigation or legal advice services, as even PEPs accused of corruption have the right to legal advice and representation.



TRUSTS & ESTATES ACCOUNTS INSTITUTE OF CANADA
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VIA REGISTERED MAIL

October 4, 2011

FATF - GAFI Secretariat
2, rue André Pascal
75775 Paris Cendex 16
France

Dear Sirs:

By way of re-acquaintance, I prepared and delivered to you my comments on the FATF 40 Recommendations in 2002 through the written invitation of then Minister of Finance, The Honourable John Manley, P.C., M.P.. My comments included the need for implementing measures with regard to express trusts (estates and trusts). In 2003, I was informed by the Honourable Minister that you had incorporated my comments for recommended Legislation by all listed Allied Nations. The Canadian Government changed leadership shortly thereafter and I have had no further communications in that regard.

Those comments and recommendations I delivered were premised on a standardized system of estates and trusts accounting control measures. Some ideas for improved detection measures of terrorist funding and money laundering activities through express trusts were discussed with Minister Manley's Officials before he left Office, but I have no further information on the implementation of such measures. If detection action has been taken, then International adoption of TEAIC's education and accreditation programs may serve those concerns through the uniform professional practise of Fiduciary Accounts and Accountability on a consistent basis.

Testamentary Estates and Fiduciary Trusts in Canada, the United States of America, and throughout the British Commonwealth have now evolved into financial significance. In Canada, applications have increased for accountability of Executors and Fiduciary Trustees in the Court through a process known as the Passing of Accounts. This process has been utilized to evaluate the Executor's administration of trust assets, to test legal issues that may arise, and to award an Executor Fee for fulfillment of the incumbent fiduciary duties. Greater demands for proper fiduciary accounting have come to the forefront as a result of emerging complexities in the financial landscape, sophisticated estate and trust taxation schemes, increased expectations of beneficiaries, and a lack of public awareness as to the rights of interested parties. In addition, the legal and accounting communities have failed to provide the necessary education and training programs for their members to learn the intricacies involved with the

Website: <http://www.teaic.ca>



Passing of Accounts process and to apply time-tested Doctrines to the current financial activities. Perhaps professional complaisance or too much reliance on computer technology are at fault, but the fact of the matter remains that this unique application of combined legal and accounting aspects may have been left in abeyance. The results observed are substantial delays in the Passing of Accounts process through the filing of substandard Accounts largely by untrained professionals. The apparent lack of standardized fiduciary accounting practises over express trusts should cause your some concerns to your organization and those persons having a financial interest in the fiduciary entities.

During my professional career, particularly in the past ten years, I have observed an increasing need for expressed standards applicable to the Passing of Accounts process. I have written extensively on this topic in my three binder published text that currently attracts global subscribers. Indeed, I have developed comprehensive principles and standards for application in the preparation and characterization of Fiduciary Accounts for Accountability purposes in the Passing of Accounts process. I have also developed an extensive education curriculum and corresponding education text entitled: *T.E.A.I.C. Fiduciary Studies in Accounts and Accountability* for those lawyers and accountants who may be interested to enrol into our education program for accreditation purposes. This is a unique field of professional practise designed to combat the current challenges that exist in the Passing of Accounts process and to provide the general public with awareness of our mandate.

We are currently commencing recruitment activities for eligible candidates into our education program and funding support of our initiative as outlined in the enclosed financial projections. A standardized system of Fiduciary Accounts and Accountability should auger well for domestic concerns, but also international applications on a consistent basis. Support of TEAIC may then have measurable values, nationally and internationally. Therefore, I ask for your valued consideration of support toward TEAIC through whatever means are appropriate.

Thank you for your attention. I remain sincerely yours,

John M. Jensen
Chairman and President
Trusts & Estates Accounts Institute of Canada (TEAIC)

Encl.

Christopher McCall Q.C.

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London WC2A 3SZ

13 September 2011

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The Secretariat
Financial Action Task Force,
fatf.consultation@fatf-gafi.org

I am a member of the Executive Committee of the Trust Law Committee, an independent body established in London for the purpose of combining expertise from academic judicial and practitioner sources in the field of the English trust, and which accepts as its primary task the responsibility of putting forward informed comment above all on areas where trust law reform may be needed or is proposed. As such it works in particular in close conjunction with the Law Commission. I have myself been a member of the Executive since its inception and am a Queen's Counsel specializing in trusts with some 45 years experience of the relevant area of law acquired in a wide range of work both as a private practitioner and as Counsel retained by Her Majesty's Revenue and Customs (or as it then was known the Commissioners of Inland Revenue) as standing counsel from 1977 until I became Queen's Counsel in 1987, and then (it not having been the practice to retain standing Queen's Counsel) on numerous individual cases over subsequent decades.

As a member of the Executive I have been sent a copy of what I am told is a final draft of submissions apparently intended to be made on behalf of STEP concerning the proposals for the registration of trusts contained in the FATF Consultation Paper published in June 2011 under the title Review of Standards - Preparation for the 4th Round of Mutual Evaluation.

Unlike STEP the TLC has a purely English and not an international concern, while it does not seek to represent practitioners so much as to look at the way in which the law can most helpfully be developed to meet the legitimate concerns and aspirations of those in England who have an interest in the relevant field whether as regulators or as users.

But that said the views of STEP are of great interest to the TLC and indeed it is true to say that STEP has always been generous in its financial support of the TLC though not seeking in any way to influence the expression of our views.

Unfortunately our Executive is not able to meet within the time scale applicable to your consultation and so it is not possible for us to send a formal response to your Consultation Paper, but it is regarded by our members as a paper of great significance and I have been authorized by

our chairman Sir Peter Gibson a former Judge of the Court of Appeal to say that he like myself regards the STEP draft as a very cogent statement, and one to which no member of the Executive (to all of whom the draft has been circulated) has expressed any contrary views; a majority of the Executive have in fact responded expressing their support for what is said below.

For my part in echoing what is said by STEP I wish to make plain that I do in particular find very great force in the concept of the trust as a legal relationship which does not need public surveillance in the way which applies to a trading entity such as a company, but is closer in its need for confidentiality to the contract underlying a bank account. As such the case for limited regulatory registration seems to have much force but public registration would almost certainly disclose things which neither need to be nor should be disclosed generally unless one is to move to a world in which all holdings of assets are disclosable including those in absolute individual ownership. I would regard such general disclosure as wholly unacceptable as it would put information within the reach of those with no legitimate interest, and involve unacceptable personal risk for the individual of criminal use of information on a scale which society would in my view be wrong to countenance. It cannot be right that those who do not use public entities in which to hold their wealth should be faced with publicity for their financial affairs any more than they should be faced with publicity in relation to their medical history; the right to privacy for the individual's family life is of course one of the fundamentals of the structure of human rights, and a system of public registration of family trusts would seem clearly inconsistent with that right. Trusts are not entities with a legal persona but the products of legal relationships and so far as I am aware there has never been any suggestion that the public has a right to know the full nature of the generality of legal relationships into which an individual enters or in which he is interested in which case it is hard to see why the trust is a special case though it is readily conceded that regulators and fiscal authorities have the right to know those facts which are material to the discharge of their functions. It is in truth not clear to me that if trusts call for public registration exactly the same would not follow in the case of bank accounts and other forms of relationship in which property rights are enjoyed against another similar to those which a trustee owes to a beneficiary absolutely entitled.

I would however make one further point in relation to trusts. There is normally one very big distinction between the trust and the company. Normally the company will be open to direction by persons having a more or less personal interest in the affairs of the company whether as shareholders or employees. By contrast trust law supposes that the trustee must so far as possible take a disinterested view of the matters under his control and not in any sense personally interested in or employed by those concerned to take the benefit of the trust. Thus the trust might in some ways be regarded as a particularly advantageous form of relationship from the point of view of regulatory control since there is an individual on whom the responsibility for tax returns already lies even though he may be expected to have no personal interest in the tax quotient, and on whom any other appropriate regulatory duties could be imposed with no expectation that he would have any interest not fully to comply. I cannot but feel that this factor is a reason for expecting that any reasonable system of limited disclosure of the trust's affairs within the regulatory sphere would be both practicable and effective for the purpose of excluding abuse, and amply sufficient to ensure the lack of any need for wider disclosure of the nature of circumstances of the relevant trust.

I would be grateful if these views could be taken into account for the purposes of your consultation.

Yours faithfully

Christopher McCall QC

From: Mccallqc
Sent: Thursday, September 15, 2011 10:54 PM
To: FATF Consultation, DAF/FATF
Cc: john.wood
Subject: Review of Standards - Preparation of 4th Round of Mutual Evaluation

to the Secretariat, FATF

earlier today I submitted from my email address maitlandchambers.com a paper dated 13th September concerning my views as a member of the Trust Law Committee on the general ambit of the various proposals for the registration of trusts.

Since the preparation of that paper our secretary, to whom I am copying this email, and who combines his role as a solicitor with a regulatory duty as a member of our Charities Commission, a body acutely concerned in the registration of trusts, albeit only those of a public nature, has raised with me an interesting aspect of what in England at least would be a common form of trust in which a grandparent seeks to make provision for his grandchildren.

Such a trust might be set up when the first grandchild or grandchildren comes or come into existence, in which case the class of beneficiaries can be expected to comprise minors and an unknown number of unborn persons, or even on the marriage of one or more of the children when it is common to assume that there will be grandchildren somewhere in the family but to put in a general charitable trust to cover the remote possibility that there will be none.

These cases make it plain how difficult it is to specify a beneficial owner for many a very common form of trust; for the unborn cannot be specified while it is strongly arguable that it would be against public policy for a minor to face public disclosure of property in which he may in due course come to have some interest; we are attuned to anonymity even for those minors who have committed criminal offences in which case it seems hardly right to publicize what may be misleading information about the personal affairs of a wholly innocent minor whose only fault if fault it be is that he may share in the eventual distribution of a fund which in large part at least is intended for persons as yet unborn.

I hope that these comments may serve to underscore the difficulties English trust practitioners have in conceiving of any practicable register of trusts on the basis of a supposedly identifiable beneficial ownership of the trust property. We find no difficulty in regulatory and fiscal registers of trusts, indeed I think in many ways we take it for granted that any trusteeship must be established on the basis that some such registration will be the automatic consequence of setting up the trust because an English trusteeship will constitute the trustees a fiscal person bound to give the revenue authorities all necessary information as to the details of the trust.

But the trust does not lend itself to the operation of notions of beneficial ownership precisely because it is a vehicle in which the beneficial ownership is put in suspense pending the happening of events which may well involve a substantial element of the unknown and the unknowable such as how a discretion will be operated (in the case of a standard discretionary trust) or how many unborn persons of a given description will come into existence or how many minors will live to full age (in the case of a more simple trust such as instanced above where a grandparent wishes to provide for the class of his grandchildren). It is of the essence of the trust that the trustees may be expected to accept obligations to persons not able to speak for themselves either because they are not of full capacity or because they are as yet unborn or unascertained. The concept of beneficial ownership under a trust in any meaningful sense is in truth a concept which could be relevant only to a tiny minority of trusts, and those trusts would be ones which depart fundamentally from the concepts of the trust as generally understood by those who practise in this sphere.

Yours faithfully
christopher mccall