



Arusha
Berlin
Brussels
Buenos Aires
Lima
London
Manila
Nairobi
New Delhi
Washington

April 8th, 2019

**Re: “Comments of Financial Transparency Coalition on the draft RBA Guidance”
Input by the Financial Transparency Coalition to the FATF Public Consultation on the Draft Risk-Based Approach Guidance for Legal Professionals, Accountants and Trust and Company Service Providers**

Sent to: FATF.Publicconsultation@fatf-gafi.org

To whom it may concern,

The Financial Transparency Coalition is a global civil society network¹. We work to curtail illicit financial flows through the promotion of a transparent, accountable and sustainable financial system that works for everyone.

I am pleased to submit this input to the FATF consultation on behalf of the Financial Transparency Coalition (FTC). We welcome the publication of these draft guidance documents on the RBA, and the FATF’s initiative in opening them up to public consultation.

Overall, the draft guidance is comprehensive, and we in particular welcome the focus on beneficial ownership information, as well as the detailed list of risk factors as regards client and transaction risk.

The FTC’s comments will first focus on specific recommendations in section A, and then move to the broader enabling context for the implementation of the RBA guidance in section B.

A.Feedback to the RBA draft guidance documents

1. General comments

The sections of the RBA guidance on **nominees** state that “There are legitimate reasons for a company to have a nominee shareholder including for the settlement and safekeeping of shares in listed companies where post

¹ This submission is endorsed by the Financial Transparency Coalition, a global civil society network working to curtail illicit financial flows through the promotion of a transparent, accountable and sustainable financial system that works for everyone. The members of the Financial Transparency Coalition’s coordinating committee are the Asian Peoples Movement on Debt and Development, the Centre for Budget and Governance Accountability, Christian Aid, European Network on Debt and Development, Fundacion-SES, Global Financial Integrity, Global Witness, Latin American Network on Debt, Development and Rights, Pan-African Lawyers Union, Tax Justice Network, Tax Justice Network Africa, and Transparency International.

traded specialists act as nominee shareholders. Company law may impose requirement for a legal person to have more than one member, which may also give rise to nominee arrangements. “

We would suggest to qualify this statement, as the RBA guidance itself recognizes that nominees are also a risk factor for money-laundering. For listed companies, even if nominee accounts are used for listed companies/portfolio investment, the BOs should always be disclosed to authorities and publicly available.

Regarding **bearer shares**, we recommend that the full ownership chain be collected, and use of bearer shares should automatically be considered high risk.

Regarding **checks on the origin of wealth/funds** for high-risk clients such as PEPs, we would point to the ICRICT proposed Roadmap for a Global Asset Registry as a useful tool which would facilitate confirming how much wealth high risk customers actually own and whether they can prove with which legal income they acquired them [1].

A **unique identifier for individuals** as proposed by the Tax Justice Network’s paper on verification of beneficial ownership, would also facilitate customer due diligence in particular as regards cases of homonyms or where there is not enough information about a person.

The FATF publication “AML/CFT-related data and statistics” from 2015 emphasises the benefits of high quality **AML/CFT statistics**, among others as an input to National Risk Assessments and allowing national authorities to measure threats more accurately and allocate resources accordingly [2]. We recommend making a link to this publication in the RBA guidance. In addition, we would recommend the **regular publication** of key aggregate AML/CFT data to inform the RBA implementation by relevant sectors and supervisory bodies [3].

2. Specific feedback to draft RBA guidance for legal professionals

- In the section 1.1.1 “Services provided by legal professionals and notaries and their vulnerabilities for ML/TF” we would encourage a specific mention to Golden Visas as a high-risk activity. The following could be included “Acting as intermediaries in the trade of citizenship and residency or acting as advisors in residence and citizenship planning.”
- For section 1.2. on documentation of risk assessments, we suggest a specific mention to ensure that risk assessments are shared with the relevant supervisory authority. This can also help inform future national risk assessments and also understand if the suspicious activity reports submitted by the professions are in line with the risks identified (quantity and content-wise).
- For Section 1.2.1 on initial and ongoing CDD (R.10 and 22), we suggest legal professionals should **always** be required to identify and verify (at least asking for a copy of passport / photo ID) the beneficial owner of clients. In high-risk cases, they should be required to take additional steps to independently verify the information provided by customers (use independent sources, web check, etc.).
- Finally, the section on Enhanced CDD recommends “*An increased level of CDD for those clients that are reasonably determined by the legal professional to be of higher risk*”. We would recommend that national authorities should provide guidance on general risk profiles that should always be subject to enhanced due diligence. In addition to those, legal professionals can determine other clients and situations to also be considered of higher risk.

B. The enabling environment for effective implementation of RBA guidance

1. More consistent and effective implementation of FATF standards

As the introduction and key concepts sections of the draft guidance note, the RBA is central to the implementation of the FATF standards.

However, the implementation of the FATF standards themselves continues to be limited. As the consolidated assessment ratings for the ongoing round of mutual evaluations show, for critical recommendations such as R.22 (DNFBPs: Customer Due Diligence); R.23 (DNFBPs: Other measures), and R.28 (Regulation and supervision of DNFBPs), implementation at the country level is overall poor [4].

With over 70 countries now having been assessed since 2014, just one country is rated compliant (C) with R.22; five countries are assessed as compliant with R.23 and three countries are compliant with R.28.

In addition, the effectiveness ratings for relevant Immediate Outcomes confirm the limited practical application of AML/CFT measures by member countries. No country under the current MER round has yet been rated as highly effective (HE) for three key Immediate Outcomes (IOs): IO3 - which refers to appropriate supervision of financial institutions and DNFBPs; IO4 - which refers to the application of AML/CFT measures by financial institutions and DNFBPs; nor IO5, which refers to the prevention of misuse of legal persons and arrangements. The majority of countries were rated as having low or moderate effectiveness on these IOs.

The draft RBA guidance notes that “The FATF Recommendations do not have direct application and are implemented in accordance with the fundamental principles of each jurisdiction’s domestic law.”

At the same time, the FATF network of members have committed at the highest political level to implementing the FATF recommendations [5], with these political commitments being re-emphasised repeatedly at global fora such as the G20[6]. The recent resolution of the United Nations Security Council, UNSCR 2462, which recognizes the essential role of FATF, again urges all countries to implement the FATF recommendations [7].

While we recognize the main purpose of the RBA guidance is not to refer to the implementation of FATF standards, we would suggest a stronger case could be made throughout the documents as to why the effective implementation of standards is important as related to the RBA guidance.

2. Areas for further guidance or potential revision of standards

The draft RBA documents mention several aspects which relate to the FATF standards, where further guidance or potential revision of FATF standards should be considered.

2.1. Beneficial ownership data

We welcome the emphasis in the draft RBA guidance on identifying the ultimate beneficial owner. We in particular note the various references to public registers of beneficial ownership as a source of data. Public registers of beneficial ownership are a critical tool to facilitate due diligence, as well as the prevention and detection of financial crime [8]. The 5th EU Anti-Money Laundering Directive has already made a public register a requirement for EU countries. Ghana, Nigeria, Ukraine and the UK have also adopted public central beneficial ownership registers [9].

Embedding the requirement for beneficial ownership data to be public in the FATF standard would be a major step forward in enabling obliged entities, supervisory and law enforcement bodies to effectively implement CDD requirements.

As regards verification, the draft RBA guidance notes the challenges of verifying beneficial ownership information, for example, “Finally, whether the source of beneficial ownership information is a public registry, another third party source, or the client, there is always potential risk in the correctness of the information, in particular where the underlying information has been self-reported.”

It is critical that beneficial ownership data is made public and is both verified and validated, with authorities cross-checking the data across additional sources such as data held by tax authorities. For more details, please refer to the recent paper by FATF member Tax Justice Network on Beneficial Ownership verification [10].

2.2. Client confidentiality, professional secrecy and legal professional privilege

The draft RBA guidance refers to aspects related to confidentiality, secrecy and professional privilege, for example:

- “Subject to certain limitations, such reporting is not required if the relevant information is directly encompassed within a legitimate claim of professional secrecy or legal professional privilege.”
- “In addition to obligations they may owe through the contracting of their services, legal professionals owe special duties both to their clients (e.g. duties of confidentiality and loyalty), as well as ‘public’ duties to the legal institutions of their jurisdictions (e.g. through roles such as ‘officers of the court’). These duties are designed to assist in the administration of justice and promote the rule of law, and generally set legal professionals apart from other professional advisors. In many jurisdictions, these duties and obligations are enshrined in law, regulations or court rules pursuant to historic and well established practices.”

Under the current FATF standards, as noted in the draft RBA guidance, “Each country needs to determine the matters that would fall under legal professional privilege or professional secrecy.” As a result, “The degree and scope of legal professional privilege and professional secrecy and the consequences of a breach of these protections vary from one country to another. In some jurisdictions, the protections of privilege and secrecy may be overridden by the consent or waiver of the client or by express provisions of law.”

This has led to a variety of interpretations at the country level, including cases such as Canada, where the 2016 MER found that “AML/CFT requirements are inoperative towards legal counsels, legal firms and Quebec notaries. These requirements were found to breach the constitutional right to attorney-client privilege by the Supreme Court of Canada on 13 February 2015” [11].

In this context, further guidance from FATF regarding good practice both in terms of legislative implementation and private sector interpretation would be welcome.

2.3. Suspicious Transaction/Activity Reporting

The draft RBA guidance notes that the transaction monitoring systems of the type used by financial institutions may not be the most appropriate for DNFBPs. For example, “The ongoing nature of the advice and services a legal professional typically provides means that automated transaction monitoring systems of the type used by financial institutions will not be appropriate as the exclusive solution for most legal professionals.

The legal professional's knowledge of the client and its business will develop throughout the duration of what typically would be expected to be a longer term and interactive professional relationship (in some cases, such relationships may exist for short term clients as well, e.g. for property transactions)."

This finding is consistent with outcomes from direct engagement with the accountancy and real estate sectors by FTC member Transparency International [12]. Further guidance and potentially adaptation of STR requirements to DNFBP sectors, potentially to be developed with input from professional membership bodies, would be of great value.

2.4. Information exchange

Concrete examples of information exchange between the private and public sector are still relatively limited. A relevant project for the financial sector which is mapping ongoing initiatives to propose good practice principles and lessons learned is the Future of Financial Intelligence Sharing (FFIS) project [13].

A Transparency International project is also looking at the potential for information sharing in the accounting and real estate sectors [14], with initial findings confirming that few initiatives of this kind are yet available.

Specifically regarding information sharing policies, we recommend the possibility of allowing banks and DNFBPs to share relevant information with each other about suspicious or risky clients, in addition to Financial Intelligence Units.

In addition, the FATF and FIUs should propose mechanisms and model memoranda of understanding to increase cooperation between FIUs and tax authorities. This should also contemplate information on foreign bank accounts (obtained by tax authorities pursuant to the OECD's Common Reporting Standard for automatic exchange of bank account information) to also be used to tackle corruption and anti-money laundering, even if it's not related to tax issues.

2.5. Role of Self-Regulatory Bodies (SRBs)

The draft RBA guidance recognizes the role that SRBs may play in supervision and enforcement of AML/CFT measures by DNFBPs. It also notes the potential for conflict of interest at the individual level:

"If a SRB contains members of the supervised population, or represents those people, the relevant person should not continue to take part in the monitoring/ supervision of their practice/law firm to avoid conflicts of interest."

However, it is important to note that SRBs may also have institutional conflicts of interest between their lobbying roles as representatives of the profession and their anti-money laundering roles. This institutional conflict may be particularly relevant when it comes to enforcement, including sanctions, which should be sufficient to have a deterrent effect and also remove the benefits of non-compliance.

In the UK, for example, a 2015 review by Transparency International UK concluded that 15 of 22 supervisors have "serious conflicts of interest between their private sector lobbying roles and their enforcement responsibilities" [15]. In 2018, the UK set up OPBAS, the Office for Professional Body Anti-Money Laundering Supervision, which has the "duties and powers to ensure the professional body AML supervisors meet the standards required by the Money Laundering regulations 2017. [16]"

We would urge the FATF to consider, potentially during a revision of the FATF Standards following the ongoing MER round, looking at the role of SRBs in supervision and enforcement from an effectiveness perspective.

We are happy to provide further detail and background on these recommendations. Please feel free to contact Max Heywood of Transparency International at mheywood@transparency.org or Sargon Nissan, Director, Financial Transparency Coalition, at snissan@financialtransparency.org.

Best regards,



Sargon Nissan
Director
Financial Transparency Coalition

-
- [1] <https://www.icrict.com/press-release/2019/3/25/icrictnew-paper-a-roadmap-for-a-global-asset-registry-measuring-and-tackling-inequality-curbing-tax-avoidance-tax-evasion-corruption-and-illicit-financial-flows>
- [2] <http://www.fatf-gafi.org/media/fatf/documents/reports/AML-CFT-related-data-and-statistics.pdf>
- [3] https://www.transparency.org/whatwedo/publication/top_secret_countries_keep_financial_crime_fighting_data_to_themselves
- [4] <http://www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html>
- <http://www.fatf-gafi.org/publications/fatfgeneral/documents/un-fatf-2019.html>
- [5] <http://www.fatf-gafi.org/publications/fatfgeneral/documents/un-fatf-2019.html>
- [6] <http://www.fatf-gafi.org/media/fatf/documents/reports/Report-G20-Leaders-Summit-Nov-2018.pdf> :
“...the G20 has continued to express its support for the FATF with a view to promoting swift and effective implementation of FATF standards worldwide.”
- [7] <http://www.fatf-gafi.org/publications/fatfgeneral/documents/un-fatf-2019.html>
- [8] <https://financialtransparency.org/issues/beneficial-ownership/>
- [9] <https://voices.transparency.org/anti-money-laundering-towards-a-two-way-street-f5f7f72c3a80>
- [10] https://www.taxjustice.net/wp-content/uploads/2019/01/Beneficial-ownership-verification_Tax-Justice-Network_Jan-2019.pdf
- [11] <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf> page 7
- [12] <https://voices.transparency.org/anti-money-laundering-towards-a-two-way-street-f5f7f72c3a80>
- [13] <https://www.future-fis.com/>
- [14] <https://voices.transparency.org/taking-a-step-back-why-do-we-care-so-much-about-public-registers-of-beneficial-ownership-263f212f8362>
- [15] https://transparency.eu/wp-content/uploads/2016/11/TI_UK_Dont_Look_Wont_Find.pdf
- [16] <https://www.fca.org.uk/opbas>