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AMERICAN BAR ASSOCIATION
TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION

**COMMENTS OF THE ABA TASK FORCE ON GATEKEEPER REGULATION AND
THE PROFESSION ON THE FINANCIAL ACTION TASK FORCE CONSULTATION
PAPER DATED MAY 30, 2002**

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The views in this report are solely those of the Task Force on Gatekeeper Regulation and the Profession. This report has not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Viewpoints expressed herein are those of the Task Force and do not necessarily represent the official position or policies of the ABA, unless expressly stated.

I. Introduction & Summary

The use of legitimate financial markets and investments for money laundering, terrorist financing and other criminal activities, long a concern of law enforcement authorities around the world, took on increased significance following the terrorist attacks on September 11, 2001. Law enforcement authorities around the world have attempted to eliminate criminals' access to legitimate financial markets by a variety of recommendations and initiatives. At the forefront of this initiative is the Financial Action Task Force on Money Laundering ("FATF"), an inter-governmental body established by the G-7 Summit that was held in Paris in 1989 for the purpose of developing and promoting policies, both at national and international levels, to combat money laundering. In its May 30, 2002 Consultation Paper, FATF identified a number of new initiatives to strengthen national and multinational anti-money laundering activities. One of these new initiatives is the "Gatekeeper Initiative."

Originally proposed at a meeting of the G-8 in 1999, the Gatekeeper Initiative is directed at certain professionals, including lawyers, accountants, and auditors, who are involved in assisting clients with domestic and international financial transactions and business dealings. It calls on countries to consider enlisting these professionals as "gatekeepers" to the domestic and international financial and business markets to prevent money laundering and terrorist financing by, among other things, adopting certain recommendations promulgated by the FATF.

In its May 30, 2002 paper entitled "Review of the FATF Forty Recommendations: Consultation Paper," FATF proposed changes to the FATF framework, including extending the application of various anti-money laundering measures described in the FATF Forty Recommendations to certain non-financial businesses or professions, including attorneys. The Consultation Paper identifies options for applying anti-money laundering measures to lawyers. See Consultation Paper § 5.4, at 97-103 (Attached as Addendum 1). Among other things, these measures could subject lawyers to increased

regulation and supervision and require lawyers to apply new customer due diligence rules, report suspicious transactions by clients, and increase training and internal compliance plans concerning money laundering. The Consultation Paper invited comments by August 31, 2002.

Within the United States Government, an Interagency Working Group, led by the Department of Justice, is developing a government position on the Gatekeeper Initiative as it applies to lawyers.¹ One of the fundamental issues confronting the working group is the extent to which attorneys can or should be conscripted to join the battle against money laundering and terrorist financing by requiring attorneys to investigate prospective clients, monitor proposed and consummated transactions, maintain records, and submit Suspicious Transaction Reports (“STRs”) regarding the activities of their clients, similar to the Suspicious Activity Reports that financial institutions are now required to submit under 31 U.S.C. § 5318(g).

In February 2002, then ABA President Robert Hirshon created a Task Force on the Gatekeeper Regulation and the Profession (the “Task Force”) to address these issues. The Task Force was asked to respond to anti-money-laundering initiatives proposed by the Justice Department and the Interagency Working Group that could affect the attorney-client relationship; review and evaluate relevant ABA policies and model rules concerning disclosure of information relating to the representation of a client; identify issues and programs for appropriate ABA action and involvement, and develop additional ABA policies and legal education programs; and solicit the views of appropriate ABA entities and suggest that they consider developing policies to fill any existing policy gaps. This paper sets forth the ABA Task Force’s comments on the FATF’s proposal to extend certain of its recommendations to attorneys.²

¹ Members of the ABA Task Force on Gatekeeper Regulation and the Profession have had several meetings with U.S. government officials involved in the Interagency Working Group.

² See Addendum 2 for a list of FATF Recommendations that may be made applicable to lawyers.

The Task Force commends the FATF for its efforts to reinforce the fight against money laundering and terrorist financing and believes that a number of areas exist in which lawyers can and should assist in that effort. The Task Force has concluded, however, that some of FATF's proposals should not be implemented for attorneys because they would adversely affect the attorney-client relationship and detract from the role that lawyers play in assisting members of society to understand and comply with the rule of law. To the extent that the FATF Recommendations are applied to lawyers, they should be carefully tailored and focused primarily on attorneys who, when acting as financial intermediaries, receive and transfer funds on behalf of clients. Any application of anti-money laundering rules to lawyers must be carefully considered in consultation with bar organizations so that the interests of society, as well as those of law enforcement authorities, can be accommodated without adversely affecting the legitimate needs of bona fide clients, the administration of justice, and the global economy.

As more fully explained below, the Task Force supports in principle FATF recommendations that would require attorneys, when acting as financial intermediaries, to verify the identity of clients, maintain records on domestic and international transactions, and develop training programs that would help attorneys identify potential money-laundering schemes or other situations in which the domestic or international monetary system could be used for criminal purposes.

The Task Force opposes proposals that would require attorneys to submit STRs to authorities and the related proposal that would prevent attorneys from notifying a client that such information has been so reported (the so-called "no tipping off" provision). These novel and far-reaching obligations would be squarely contrary to the ethical rules that govern lawyers throughout the United States, would have the unintended effect of impairing client compliance with law, and could potentially undermine the fundamental principles underlying the legal system in the United States and elsewhere, and the civil liberties protected by those legal systems.

II. Background on Money Laundering

Money laundering is a criminal offense encompassing a wide range of activities that involve the movement of ill-gotten financial assets into legitimate businesses in order to hide proceeds or turn them into productive assets to support underlying criminal activity. See 18 U.S.C. § 1956. The Consultation Paper noted that detecting and preventing money laundering is difficult because money laundering methods and techniques change as new measures to combat money laundering are implemented and new technologies are developed. Consultation Paper, sec. 1, at i. The Consultation Paper observed:

FATF members and other countries have noted increasingly sophisticated combinations of techniques, with increased use of legal entities and other corporate vehicles. FATF studies have shown that companies, trusts and other types of business entities are commonly used as part of the laundering process or to disguise the true ownership and control of illegally acquired assets.

Id., sec. 2.2.4, at 1. One premise of the Gatekeeper Initiative, as applied to lawyers, is that lawyers are frequently used to facilitate money laundering and transactions that facilitate terrorist financing, and that imposing reporting and record-keeping requirements upon lawyers is necessary to detect and deter such activity. See Consultation Paper, sec. 2.2.5, at 1-2.

III. The Attorney-Client Relationship

The historical independence of lawyers, combined with the duties of loyalty and confidentiality, distinguish attorneys from other businesses and professions that assist clients with financial and business transactions. Any evaluation of the proposals to extend FATF Recommendations 10-12 and 14-19 to attorneys must occur in the context of the critical role played by attorneys in the system of justice in the United States, which preserves and protects civil liberties and individual rights and depends upon lawyers to advise clients regarding the scope, meaning and application of the law to business transactions. Given the growing complexity of legal requirements in the United States and throughout the world, the ability of clients to comply with the law and at the same time expand economic growth necessarily requires access to legal

professionals and their sound advice. In addition, the FATF options must be viewed and evaluated in the context of the existing laws and ethical rules governing the attorney-client relationship and prescribing the limited instances in which those laws and ethical rules permit disclosure of confidential information relating to a client. These principles are expressed in the ABA Model Rules of Professional Conduct and in the ethical rules adopted by the states and other jurisdictions to govern lawyers' professional conduct.

The independence of the bar, the role of the lawyer as a counselor and expert in the meaning of laws, and the right to effective legal assistance form the basis for the system of justice and administration of law in the United States. The preamble to the Model Rules recognizes that “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” The United States Supreme Court has repeatedly recognized the importance of an independent bar to our society and system of justice.³ The independence of the bar underlies the adversarial system of justice in the United States, which promotes the search for truth and the protection of civil liberties. The preamble to the Model Rules recognizes that “[a]s advocate, the lawyer zealously asserts the client’s position under the rules of the adversary system.” Moreover, in an increasingly complex, dynamic and global economy, clients must have access to independent legal experts and counselors who can provide candid and complete advice based on a thorough understanding of the client’s situation. Therefore, although attorneys may serve as gatekeepers to the domestic and international

³ See, e.g., *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (“[a]n informed, independent judiciary presumes an informed, independent bar”); *Application of Fre Le Poole Griffiths for Admission to the Bar*, 413 U.S. 717, 732 (1973) (Burger, C.J. & Rehnquist, J., dissenting) (“The very independence of the lawyer from the government on the one hand and the client on the other is what makes law a profession. . . . It is as crucial to our system of justice as the independence of judges themselves”); *In re Criminal Contempt of Thomas C. McConnell*, 370 U.S. 230, 236 (1962) (“[a]n independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice”); *Sacher v. United States*, 343 U.S. 1, 39 (1952) (Frankfurter, J., dissenting) (“[o]ur whole conception of justice according to law, especially criminal justice, implies an educated, responsible, and independent bar”).

monetary system, they also serve as gatekeepers to the system of justice and administration of law for citizens of the United States and other countries.

The duties of loyalty and confidentiality remain bedrock principles of the attorney-client relationship, and promote the independence of attorneys and the adversarial system. The duty of loyalty to the client is expressed in Model Rule 1.2, which requires the attorney to abide by the client's decisions unless the attorney knows the client's conduct is unlawful or unethical. Model Rules 1.7 through 1.11 also address the duty of loyalty, by prohibiting attorneys from representing clients in the face of conflicts of interest. The attorney's independence is embodied in the foregoing rules, and also in Model Rule 5.4, which prohibits attorneys from sharing legal fees with non-lawyers except in limited and clearly delineated circumstances, and from entering into partnerships with or employing non-lawyers for activities constituting the practice of law.

Equally important to the attorney-client relationship is the duty of confidentiality. Model Rule 1.6(a) prohibits an attorney from revealing "information relating to the representation of a client unless the client gives informed consent," subject to certain limited exceptions set forth in the Rule. Model Rules 1.9(c) and 1.11(c) extend the prohibition to the confidential information of former clients. The comments to Model Rule 1.6 explain the basis for this rule:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (1983).

The duty of confidentiality is also expressed in the attorney-client privilege, which is the oldest privilege for confidential communications known to the common law. "Its purpose is to encourage full and frank communication between attorneys and their clients," which, in turn, "promotes broader public interests in the observance of law and the administration of justice." See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The duties of loyalty and confidentiality are not absolute. The crime-fraud exception renders otherwise privileged information subject to disclosure when the client made or received the communication with the intent to further an unlawful or fraudulent act, and the client ultimately carries out the crime or the fraud. See, e.g., *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997).

Furthermore, and notwithstanding the role of lawyers as zealous advocates on behalf of their clients, existing laws and ethical rules prohibit lawyers in every state from knowingly assisting clients in illegal or fraudulent activity, financial or otherwise. Rule 1.2(d) of the Model Rules provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rule 8.4 provides that it is professional misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation," or conduct "that is prejudicial to the administration of justice." Sections 1956 and 1957 of Title 18 of the United States Code provide criminal sanctions for any lawyer who aids in the commission of a money laundering offense. Therefore, to the extent that lawyers knowingly allow their services to be used by clients to facilitate money laundering or other illegal activity, they are violating existing law as well as rules of professional conduct. These existing laws and rules of professional conduct impose devastating personal and professional consequences upon an attorney who crosses the line from

counselor to co-conspirator. *See, e.g., United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001); *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001). However, it is imperative that a clear line be drawn between a co-conspirator in money laundering activity, and an innocent person who is unwittingly involved in another's misconduct. As discussed below, certain aspects of the Gatekeeper Initiative blur that distinction and could pull innocents into potential criminality.⁴

Ethics rules requiring lawyers to preserve client confidences are already subject to certain exceptions. The Model Rules provide, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; ... or (4) to comply with other law or a court order." Model Rule 1.6 (emphasis added). The states have adopted this rule with various modifications. In many states, a lawyer is authorized (but not required) to disclose client misconduct when the lawyer "reasonably believes" it necessary to avoid "substantial injury" to the person or property of another. In four states, such disclosures are mandatory.

Federal statutes prescribe other reporting requirements applicable to attorneys. Lawyers must report to the Internal Revenue Service the receipt of currency in amounts over \$10,000, on reports (IRS Form 8300) that require the lawyer to disclose the source of the payment and whether that source is a client. 26 U.S.C. § 6050-I. Federal courts have upheld this law against claims that it abridges the attorney-client privilege and the Sixth Amendment right to counsel in criminal cases. *E.g., United States v. Goldberger & Dubin P.C.*, 935 F.2d 501 (2d Cir. 1991).⁵ The statute does not, however, require or

⁴ In its Interpretative Note to Recommendation 33, the FATF recognizes that differences exist in the definition of money laundering under the laws of its member jurisdictions, some of which have extended money laundering to include tax crimes. For example, U.S. law does not include tax evasion as predicate offense to money laundering. We are concerned that requiring STR's in the context of the representation of individuals suspected or accused of engaging in U.S. tax crimes could impose unworkable burdens on lawyers and clients, and have a chilling effect on the lawyer-client relationship. The same concern exists in other areas of the law.

⁵ The courts have reasoned that generally, identity of clients and information regarding fees is not privileged, although when a showing is made that a Form 8300 disclosure would reveal the substance of

suggest that the lawyer, in making such reports, pass judgment on the propriety of the client's conduct.

Lawyers are also required by law to report misconduct by their clients when a failure to do so would constitute fraud on a tribunal. The law, as well as ethics rules in every jurisdiction, requires a lawyer who learns, during the course of a proceeding, that he or she has offered false evidence (including client perjury) to the tribunal to take remedial measures, including disclosure if necessary. MODE RULES OF PROF'L CONDUCT R. 3.3(a)(3).

IV. Specific Task Force Comments⁶

A. The Task Force Supports the Application of Reasonable Client-Identification, Record-Keeping, and Compliance-Program Measures to Attorneys Serving as Financial Intermediaries

The Task Force supports ABA cooperation with governmental authorities on the adoption of reasonable proposals that would subject attorneys who serve as financial intermediaries—those who receive or transfer funds on behalf of clients—to certain FATF recommendations. Specifically, the Task Force believes further cooperation should be pursued on recommendations requiring attorneys to verify the identity of clients, maintain records on domestic and international transactions, and develop training programs that would help attorneys identify potential money laundering schemes or other situations in which the domestic or international monetary system could be used for criminal purposes. These proposals are set forth in FATF recommendations 10 through 12 and 19.⁷

a confidential communication, courts have held that disclosure is not required. *E.g., In re Grand Jury Proceedings (Anderson)*, 906 F.2d 1485, 1488 (10th Cir. 1990).

⁶ The Task Force has focused its comments on several of the FATF options discussing the application of existing FATF Recommendations to attorneys. There may be other aspects of the FATF Consultation Paper on which the Task Force would be prepared to provide additional views and comments.

⁷ The Task Force recognizes that the definition of financial intermediary is critical in this regard. The definition proposed herein may need to be modified so that it encompasses those discrete activities where attorneys are acting as money transmitters. Lawyers in specialty fields such as tax, corporate, and estate planning have voiced concerns about the parameters of the definition of a financial intermediary.

Recommendation 10 states that covered persons, which would include attorneys, “should not keep anonymous accounts or accounts in fictitious names, but instead should be required to identify and record the identity of their clients when establishing business relations or conducting transactions.” Covered persons “should take measures to verify the legal existence and structure of the customer and to verify that any person purporting to act on behalf of the customer is so authorized and identify that person.” *Id.* Recommendation 11 states that “covered persons should take reasonable measures to obtain information about the true identity of their clients on whose behalf an account is opened or a transaction conducted if there are any doubts as to whether these clients are acting on their own behalf.” Recommendation 12 would require covered persons to maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from competent authorities. Firms would also be encouraged to keep records on customer identification, account files and business correspondence for at least five years after the account is closed. These documents should be made available to competent authorities in the context of relevant criminal prosecutions and investigations. Finally, Recommendation 19 provides that “[c]overed persons should develop programs against money laundering,” and lists as examples internal policies, employee training, and audit functions to test the system.

Client Identification. The Task Force believes that attorneys serving as financial intermediaries should be subject to reasonable requirements to verify the identity of their clients. Although the Model Rules of Professional Conduct contain no requirement that attorneys verify the identity of prospective or active clients, or engage in any of the other activities suggested in Recommendations 10 and 11, most attorneys have client intake procedures that are designed to identify their clients and ensure, among other things, that no conflicts exist with other firm clients. Attorneys also customarily

We believe that further consultations with the profession are essential in order to develop an appropriate definition consistent with the concerns identified by the Task Force.

undertake due diligence at the outset of the representation to determine the extent of a client's financial resources and legitimacy of the client's operations.

Therefore, attorneys functioning as financial intermediaries can be expected to take reasonable steps to obtain proof of their client's identity. Additional investigation should be unnecessary in the absence of certain objective criteria that would put an attorney on notice that an issue concerning the client's true identity or intentions was present. Focusing on objective criteria, rather than dollar thresholds or size of law firm or client, minimizes the opportunities for structuring transactions or taking other actions to avoid detection. Identifying the source of the funds in a transaction is, however, not always possible.

Implementation of these recommendations must not impose unreasonable costs on attorneys or taint the attorney-client relationship at the outset. For example, it would be unreasonable to impose on attorneys the same types of due diligence required of banks and other financial institutions. Unlike attorneys, banks and other financial institutions have long been subject to extensive federal regulation and have developed compliance and monitoring programs to satisfy regulatory requirements.

Implementation of these recommendations must also respect that clients do not always want to identify other partners or business associates in the client's business enterprise. For example, if the client wants the attorney to form a limited liability company that envisions multiple members, the attorney may not have the ability to discern the identity of all of the members. The recommendation should not be implemented in a way that requires the attorney to perform any due diligence on the non-client members in a business enterprise created by the attorney and the client. And any implementation should establish a bright line for determining that the attorney has satisfied this requirement. In addition, government regulators considering client due diligence rules or procedures should consult and collaborate with the organized bar to address these questions and to tailor such regulations and procedures to the nature of the client and

matter, the resources of the attorney or law firm, the particular industry in which the client is engaged, and the scope of the services to be rendered to the client.

Similarly, clients are not always comfortable providing information concerning their structure or organization unless it is relevant to the representation. A client might object to an examination of its business structure each time it engages an attorney. Requiring attorneys to obtain this information from clients may make clients more reluctant to provide full and complete information, or, in some instances, from engaging an attorney in the first place. The recommendations also raise the possibility that the initiation of an investigation and the level of diligence required could depend upon the client's country of origin, domicile, religious and political beliefs, or ethnicity, which would raise disturbing issues of racial or ethnic stereotyping.

As noted above, Recommendation 11 would require covered persons to take measures to identify their true client if there are any doubts as to whether their purported clients are acting on their own behalf. The phrase "any doubts" underscores concerns with the imprecise and overly broad triggers for liability contained in these recommendations. This phrase raises the possibility that an attorney would later have to prove that he or she had "no doubts" as to the client's true identity or whether the client was acting on his or her own behalf. This possibility could force attorneys to interrogate or investigate potential and actual clients beyond the normal client intake procedures, damaging the trust that is necessary in the attorney-client relationship.

Care must also be taken so that legitimate business interests are not harmed by applications of these recommendations to attorneys. Although it is reasonable to require clients to disclose their identities to their attorneys, clients often have legitimate business reasons for not disclosing their identities to the general public or potential adverse parties. Often, those on the other side of a transaction may alter demands or strategy based on the identity of the client. A prime example is the Walt Disney Company, which had legitimate business reasons for making vast purchases of land in the Orlando area over many years without its identity being known. Another example is

the Rouse Company's acquisition of the properties now comprising the planned community of Columbia, Maryland.

Record-Keeping. Recommendation 12 would require covered persons to maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from competent authorities. Firms are also encouraged to keep records on customer identification, account files and business correspondence for at least five years after the account is closed. The recommendation provides that these documents should be made available to competent authorities in the context of relevant criminal prosecutions and investigations.

The Task Force supports the reasonable and measured application of Recommendation 12 to attorneys acting as financial intermediaries. We recognize that such records could serve as the only means available to governmental authorities to investigate possible criminal activity. With regard to any such records retained by lawyers, the Task Force anticipates that law enforcement authorities would be required to resort to traditional law enforcement processes, such as judicial subpoenas and statutory investigative demands, to obtain the records.

Any such record-keeping system should be the result of a dialogue between the government and the bar, given the conflict between the historical independence of the bar and the government's desire to dictate what records must be kept and the length of time they must be kept. The costs of compliance must be reasonable. Moreover, attorneys must be protected if the client objects to the attorney's retention of the records or demands the return of the records or destruction of copies at the conclusion of the representation.

Internal Controls and Training. The Task Force strongly supports the development of programs that would enable attorneys serving as financial intermediaries to identify money laundering or other misuse of the legal system to further criminal purposes.

FATF Recommendation 19 states, “Covered persons should develop programs against money laundering (e.g., internal policies, employee training, audit function to test the system).”

Application of this recommendation to attorneys must account for the needs of small firms and sole practitioners, which lack the means to conduct extensive in-house training, compliance, and monitoring programs. Participation in programs offered by the ABA, state and local bar associations, and other continuing legal education programs should suffice. In this regard, the President of the ABA has asked the Task Force to assist in developing educational programs that would inform lawyers of the nature and risks of money laundering transactions, ensure that ethical standards are well understood and observed, and help lawyers render legal services in accordance with practices intended to deter actual money launderers and terrorist financiers from engaging the legal profession.

The Task Force believes that information regarding money laundering, terrorist financing, and use of the domestic and international financial system to foster criminal purposes should be made part of the law school curriculum -- in criminal law, professional responsibility, banking, and other courses. It is important that bar associations not simply urge law schools to educate their students about money laundering, but that they ease law schools’ burden of doing so by providing speakers and course materials on money laundering and terrorist financing so law faculty, who may not be familiar with these subjects, can prepare themselves to educate their students on their legal and professional responsibilities. The ABA should encourage its Law Students Division to support increased attention in law school education to money laundering and terrorist financing issues.

B. The Task Force Opposes Applying FATF’s Recommendations Concerning Suspicious Transaction Reports and “No Tipping-Off” to Attorneys

The Task Force opposes subjecting attorneys to FATF Recommendations 14-18, which would require attorneys to submit STRs to government authorities based on a mere

suspicion that the funds involved in a client's transaction stemmed from some type of illicit activity and would prevent attorneys from informing their clients that they had done so. Even if limited to attorneys serving as financial intermediaries, these recommendations would fundamentally and adversely alter every aspect of the attorney-client relationship, turning a trusted advisor and counselor into a potential government informant, acting inimically to the best interests of his or her client.⁸ We believe that these recommendations are so fundamentally at odds with the confidentiality underlying the attorney-client relationship and the attorney's role as compliance counselor to the client, that subjecting attorneys to these recommendations could harm clients, the economy, and efforts to foster compliance with the law.

Recommendations 14 & 15. The recommendations would require "covered persons" to "pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions with no apparent economic or visible lawful purpose," and to "examine and keep a written record of the background and purpose of these transactions, and make it available to help supervisors, auditors, and law enforcement agencies." Recommendation 14.⁹ The recommendations go on to state that "[c]overed persons should promptly report to competent authorities any suspicions that funds stem from a criminal activity." Recommendation 15 (emphasis added).

These recommendations would impose a duty on lawyers to investigate their clients beyond that necessary for the representation. Based on a mere suspicion, attorneys

⁸ Although the FATF recommendations purportedly exempt privileged information from the STR requirements, the distinction between privileged and non-privileged information is unlikely to be clean or workable. The vagueness and breadth of the STR and "no tipping-off" requirements, combined with the prospect of criminal sanctions, would likely chill even privileged communications.

⁹ That portion of Recommendation 14 that would require attorneys to pay special attention to complex, unusual large transactions and unusual patterns of transactions with no apparent economic or lawful purpose would, with respect to attorneys who serve as financial intermediaries, be promoted by adopting the training and education programs required by Recommendation 19. As noted above, attorneys are already prohibited from assisting clients with transactions designed to promote unlawful activity like money laundering or terrorist financing.

would be obligated to investigate their clients and determine, at their own peril, the legality of a particular transaction.

Practitioners would be forced to determine the point at which an unusual or creative transaction becomes suspicious. The determination would be based on a host of factors, including price, identity of the parties and types of business entities involved, source and routing of funds, and the seller's apparent intentions and motivations regarding investment or disposition of the proceeds. Attorneys would be required to expend resources and establish procedures to investigate these and myriad other questions. Such costs may impose particular financial hardships on sole practitioners and could result in an overall increase in the cost of legal services, which would be passed on to clients and, ultimately, to the economy.

These requirements would likely prove problematic when clients seek legal advice to structure an unusual or difficult transaction. Assisting clients in developing lawful solutions to difficult or complicated problems is one measure of outstanding performance by an attorney. These recommendations would discourage attorneys from undertaking representation for certain unusual or difficult transactions. Similarly, attorneys are regularly asked by their clients to provide advice concerning the legal limits of transactions. The STR and no tipping-off requirements could, therefore, undermine society's interest in promoting compliance with law to the extent these requirements would deter clients from seeking such advice.

Even though the recommendations purportedly exempt privileged communications, litigation and possibly attorney work-product from the investigation and disclosure obligations (see Consultation Paper at 101), the point at which transactional work and counseling ends and litigation begins is not always clear, placing attorneys at risk of prosecution or civil liability if they guess wrongly. Because the exception to this privilege is based on the use of legal services for improper purposes, many attorneys, out of an abundance of caution, are likely to err on the side of disclosure. This recommendation could deter businesses from engaging attorneys to conduct internal

audits or investigations for fear that facts learned during the course of such audits or investigations would be revealed to authorities, possibly without the business learning of the disclosure until many months or years later. See Recommendations 16 and 17. Moreover, to the extent that the ethical rules would compel attorneys who have submitted STRs to governmental authorities to withdraw from representation, the withdrawal would likely alert the client that such a report had been submitted.

The recommendations' use of "suspicion" as the predicate for filing an STR also raises troubling issues concerning stereotypes and racial profiling. For example, this could be interpreted to require different treatment for prospective clients who are from the Middle East or who are Muslim. This has the potential to introduce an abhorrent factor into the attorney-client relationship.

Recommendations 16-18. In addition to discouraging full disclosure of facts by clients to their lawyers, the FATF Recommendations would not necessarily protect attorneys from the consequences of the disclosure. Recommendation 16 purportedly would protect attorneys "from criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith to competent authorities." This recommendation does not necessarily protect attorneys from disciplinary proceedings for breach of rules prohibiting the disclosure of confidential information relating to the representation of a present or former client. Reporting suspicious information could result in an increase in breach of contract or malpractice suits, especially when the lawyer withdraws from the representation after filing an STR and the government takes no action on the STR, or the client is ultimately exonerated after being subjected to an investigation or prosecution.

Although the "good faith" standard embodied in Recommendation 16 appears to offer attorneys significant protection, in reality, it is just as likely to lead to litigation over whether the attorney acted in good faith. Attorneys filing such reports could subject themselves to investigation and criminal prosecution depending on the role played by the attorney or the firm in the subject transaction. Satisfaction of the good faith

standard could vary depending on the jurisdiction in which an attorney is licensed to practice and on which individual countries ultimately adopt the recommendations.

Significantly, this recommendation affords no protection to attorneys who choose not to report a client based on an incorrect, albeit “good faith,” determination that reporting was not required. Prosecutors may seek to pursue attorneys for not reporting, while persons injured by the client as a result of an attorney determining that reporting was unnecessary may seek to hold the attorney liable for civil damages.

Other unanswered questions concern the attorney’s proper course of action from an ethical perspective after having filed an STR concerning a client. Recommendation 17 would prohibit attorneys from informing clients that the attorney had submitted an STR, and Recommendation 18 directs covered persons to comply with instructions from competent authorities. Withdrawal from the representation would seem appropriate, but withdrawal (no matter what explanation is given) may alert the client that the attorney had provided information to governmental authorities, especially if the terms of the engagement had notified the client of the STR requirement (as ethical rules would presumably require). Terminating a relationship in the middle of an engagement could lead to liability due to breach of contract, malpractice, breach of ethical obligations, or commercial losses to the firm due to loss of work and overall loss of clients. In addition, if an attorney did not follow instructions to the satisfaction of the authorities, the lawyer could presumably face criminal prosecution. It is unclear whether an attorney’s good faith would be a defense in such an action. And continuing the client relationship at the direction of the government would clearly place the lawyer in an uncomfortable, perhaps unethical, position, and would act as a catalyst to eroding the critical role the lawyer plays in representing clients in a democratic society.

Other Factors Militating Against the STR and No Tipping-Off Recommendations. The proposed disclosure obligations contained in the other recommendations could harm the attorney-client relationship in other ways. Engagement letters and other documents defining the terms of the attorney-client relationship would likely have to inform clients of

the potential disclosure, investigative, and record-keeping obligations. Attorneys would feel compelled to insert broad clauses warning potential clients of their obligations to disclose information to governmental authorities without informing the client that this was occurring, and seeking waivers of their ethical obligations to ensure privacy, maintain the confidentiality of information, and zealously represent the client. These terms and other considerations would have a chilling effect on the attorney-client relationship.

Adopting and enforcing these recommendations, and the resulting threat of litigation and disciplinary proceedings, could increase the cost of lawyers' professional liability insurance. Lawyers may also be forced to purchase insurance (if it is or were to become available) or join self-insurance consortiums to cover the risk that they might be prosecuted for not cooperating fully. Increased insurance premiums would likely result in an increase in attorney's fees, which would be passed through to clients and, ultimately, to the economy.¹⁰

In sum, the proposal to require lawyers to report to the government suspicious transactions by their clients is truly unprecedented. As noted above, the American system of justice rests on the notion that an independent bar and the adversarial system best serves the administration of justice, promotes adherence to the rule of law, reinforces the truth-seeking function, and supports the protection and preservation of civil liberties. Existing law and ethics rules prevent attorneys from engaging or assisting clients in criminal activity, and already require disclosure of confidential information relating to the representation of a client in limited circumstances. None of these circumstances is comparable to the STR and no tipping-off recommendations in the FATF Consultation Paper. It should be acknowledged that Recommendations 14-18

¹⁰ In this regard, the Task Force notes that the Attorneys' Liability Assurance Society, Inc. (ALAS) is already "closely monitoring" developments with regard to potential disclosure obligations for lawyers practicing before the Securities and Exchange Commission. ALAS Bulletin No. 2002-20 (July 30, 2002). This bulletin indicates that the insurance industry is already concerned with the additional risks that reporting requirements may impose on the profession.

would infringe on the core elements of the attorney-client relationship and the independence of the bar. These Recommendations would impose an irreconcilable conflict of interest, forcing attorneys to choose between acting in the best interest of their client versus alerting authorities to activities that, despite the attorney's suspicions, will likely prove to be wholly innocent.

V. Conclusion

The Task Force fully supports governmental and private actions designed to prevent domestic and international money laundering and terrorist financing, and believes that the FATF recommendations concerning due diligence, record-keeping, education and training can be adapted for application to attorneys serving as financial intermediaries. The Task Force is steadfastly opposed, however, to subjecting attorneys to FATF recommendations that would require them to file STRs and prevent them from informing clients that they have done so. Implementing these recommendations would fundamentally alter the relationship between attorney and client. Security and freedom can be protected in ways that do not contravene the principles underlying the United States system of justice or the attorney-client relationship. The Task Force urges government authorities to consult and collaborate with the organized bar in developing rules and procedures in these areas.

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ADDENDUM 1

Relevant excerpts from the May 30, 2002 FATF Consultation Paper

A -- NON-FINANCIAL BUSINESSES AND PROFESSIONS (FATF Consultation Paper, at pages 79- 80.)

226. The FATF Forty Recommendations already contain several recommendations that apply to businesses and professions that are not financial institutions. Recommendation 9 asks countries to consider applying Recommendations 10-21, and 23 to the financial activities (as defined in the Annex) of non-financial businesses or professions. In addition, Recommendation 27 requires the designation of competent authorities to supervise and regulate the implementation of the Recommendations in professions that deal in cash.

227. Currently, more than two-thirds of FATF members have applied some or all of the anti-money laundering measures contained in Recommendations 10-21 to persons or entities other than financial institutions. The second EU AML Directive, amending the 1991 directive, was adopted on 4 December 2001, and now applies anti-money laundering obligations to several additional classes of businesses and professions:

- Auditors, external accountants, and tax advisors.
- Real estate agents.
- Casinos
- Dealers in high value goods, e.g. precious stones or metals or works of art, when there is a payment of € 15,000 or more in cash.
- Notaries and other independent legal professionals - when they participate in planning certain types of transactions for their clients, or if they act on behalf of and for their clients in any financial or real estate transaction.

228. EU member states have until 15 June 2003 to transpose the new Directive into national law. It extends the anti-money laundering obligations, in particular the requirement to identify customers and the obligation to report any fact which might be an indication of money laundering, to a series of non-financial businesses and professions.

229. For several years FATF Typologies reports have referred to the increasing role played by professional service providers and non-financial businesses in money laundering schemes. For example, the 2001 Typologies Report states:

"Lawyers, notaries, accountants and other professionals offering financial advice have become the common elements to complex money laundering schemes. This trend is mentioned by almost all FATF members."

230. The money laundering risks associated with such businesses and professions have also been expressly recognised by the European Commission, the European Parliament, and the United Nations. The 1998 United Nations report entitled "Financial Havens, Banking Secrecy and Money Laundering" states -

"Money launderers frequently use lawyers and accountants to help them hide funds. All too frequently, unscrupulous lawyers provide advice on money-laundering to their clients on the assumption that they will be protected by the rules of privilege that protect the confidentiality of the lawyer/client relationship."

and

"Gambling casinos have been used to hide the proceeds of drug sales for more than 50 years. Casinos are ideal vehicles for laundering because they generate large amounts of unaccounted for cash... Because of the vulnerability of casinos to money-laundering operations, it is essential that the industry be more carefully regulated".

231. Taking these significant risks into account, the FATF is therefore considering extending the application of Recommendations 10-21 and 26-29 to seven types of non-financial businesses or professions. Those seven categories are:

- Casinos and other gambling businesses
- Dealers in real estate and high value items
- Company and trust service providers
- Lawyers
- Notaries
- Accountants and auditors
- Investment advisors

232. For each category of business or profession, the paper focuses on the options for several key issues that would be relevant to the application of an anti-money laundering system:

- (a) a more precise description of the businesses or professions, and the activities to be covered;
- (b) customer due diligence rules;
- (c) suspicious transaction reporting and increased diligence; and
- (d) regulation and supervision.

233. For certain businesses or professions, it might also be possible to consider alternative or additional options (see paragraph 10 above). In addition, except where explicitly provided for e.g. professional secrecy obligations, a necessary component of all systems would be that there are no secrecy laws, regulations or rules that prevent the various businesses or professions from providing the relevant information or making it available to law enforcement or regulatory authorities when they have legitimate inquiries. Similarly, the laws must provide the necessary gateways for exchange of information internationally, and must not prevent or unduly restrict the flow of such information.

234. Consideration should also be given to the interaction between the earlier sections of the paper, particularly section 3, and this section. If AML obligations are widened, clarified or amended pursuant to the discussion in earlier sections, this could have an impact on the proposals and options in section 5.

* * *

B -- LAWYERS AND LEGAL PROFESSIONALS (FATF Consultation Paper, at pages 97-103.)

272. Since the FATF first commenced studying money laundering methods and techniques on a systematic basis in 1995-96, lawyers have been consistently mentioned in FATF typologies reports as being linked to money laundering schemes and cases. A variety of reasons have been cited as to why lawyers appear to be frequently involved in money laundering:

- It has been commonly observed that criminals use lawyers client accounts for the placement and layering of funds. In many countries, this offers the advantage to the launderer of the protection that is afforded by legal professional privilege or professional secrecy.
- In a number of countries, lawyers provide a service as a "gatekeeper", that is, through their specialised expertise they are able to create the corporate vehicles, trusts, and other legal arrangements that facilitate money laundering.
- Lawyers offer the financial advice that is a required element of complex money laundering schemes.
- The use of lawyers and the corporate entities they create can provide the criminal with a veneer of respectability for the money laundering operations.

273. In addition, it has been uniformly observed both by FATF members and other international organisations that as anti-money laundering controls are effectively implemented in the financial sector, money launderers are turning to other sectors, including the use of professionals, to launder their illegal proceeds. For example, the involvement (unknowingly and otherwise) of lawyers and other professionals in money laundering cases is frequently noted in the 1998 Report of the UN Office for Drug Control and Crime Prevention on financial havens, banking secrecy and money laundering.

274. The particular role, history and status of the legal profession and the rules that attach to it, means that very careful attention will need to be given when considering the application of anti-money laundering obligations to such professionals. In particular, due to the professional secrecy or privilege that exists in relation to certain

types of communications with clients, the application of the requirement to report suspicious transactions will need to be closely examined. Professional secrecy or privilege is a principle that exists in all members, but its precise boundaries vary, depending on the structure of the relevant legal system. The objective is to make it more difficult for actual or potential money launderers to attempt to misuse the services of the lawyer, while still taking into account fundamental rights.

The measures currently in place

275. Several FATF countries have already brought lawyers under the scope of their antimoney laundering regimes. New Zealand applies AML measures to lawyers engaged in certain financial activities for their clients. A number of FATF members, such as the UK, and Hong Kong, China have legislation that requires all persons to report suspicious transactions. In Canada, legal counsel are subject to AML obligations when they receive or pay funds; purchase or sell securities, real property or business assets or entities; and transfer funds or securities on behalf of any person or entity, including giving instructions in respect of those activities. However there are certain exceptions if a matter is subject to legal professional privilege.

276. Switzerland is another FATF jurisdiction where action has been taken to include lawyers within the scope of their AML regime. All financial intermediaries are covered, and lawyers that provide the requisite financial services are regarded as financial intermediaries, though not with respect to the core business of a lawyer i.e. business covered by legal privilege. All intermediaries must be licensed, and are subject to customer due diligence and reporting obligations, including the obligation to report suspicious transactions to the FIU. Lawyers are also subject to supervision for anti-money laundering purposes, being supervised by an SRO, which is itself supervised by a supervisory authority.

277. The increased misuse of lawyers was noted by the European Commission and European Parliament, and led to the inclusion of lawyers under the Directive. Lawyers, who are referred to as "independent legal professionals", fall within the scope of the Directive when they are acting in the exercise of their professional activities and either:

- (a) assist in the planning or execution of transactions for their client concerning the
 - (i) buying and selling of real property or business entities;
 - (ii) managing of client money, securities or other assets;
 - (iii) opening or management of bank, savings or securities accounts;
 - (iv) organisation of contributions for the creation, operation or management of companies;
 - (v) creation, operation or management of trusts, companies or similar structures; or

(b) act on behalf of and for their client in any financial or real estate transaction.

278. In essence, under the Directive, independent legal professionals are brought into the fight against money laundering when they are involved in particularly vulnerable lines of business. They will be subject to know-your-customer rules and to an obligation to report suspicions of money laundering. Professional secrecy or legal professional privilege may be upheld when the lawyer is representing a client in court proceedings or is providing legal advice to ascertain the client's legal position. Thus, as stated in the preamble to the Directive, legal advice remains subject to the obligation of professional secrecy, unless the lawyer knows¹¹ that the client is seeking legal advice for money laundering purposes.

279. The Directive also allows each EU Member State to legislate and provide that STR are not to be sent by lawyers (or notaries) directly to the FIU but can be sent to "an appropriate self-regulatory body of the profession". Each State will then determine how that self-regulatory body will co-operate with the competent government authorities, in particular the FIU.

280. At this time, it is proposed that the FATF framework should cover, with several options, independent legal professionals. This term is intended to cover lawyers and legal professionals that are licensed or admitted to practice and who work in law firms or are self-employed; it does not cover lawyers who have the status of employees in a legal undertaking that is not in the business of providing legal advice to third parties. A similar interpretation is taken in relation to accountants (see paragraph 294 below).

Notaries

The notarial profession

281. The profession of the notary is an ancient one and in many countries is closely linked with or is a branch of the legal profession. In almost all countries a notary or notary public (as they are referred to in some countries) is usually appointed by the government, but sometimes by the judiciary or the church. In civil law countries, a notary is a generally a public official, and the State delegates power to the notary to publicly certify and authenticate the documents that he draws up, conferring upon them probatory strength and executive force i.e. they are admissible in court without further proof of their authenticity. The notary also secures their preservation. In many jurisdictions, only "authentic acts" may be inscribed in the public records. Thus the mechanics of various registry systems, such as the registry of land ownership, often rests upon the notarial profession.

¹¹ In some FATF members (both within Europe and elsewhere), legal professional privilege does not apply where a lawyer suspects or strongly suspects that the client is seeking legal advice for money laundering purposes.

282. In order to allow independence, the notary is recognised professional status in the way the notary goes about her/his functions, which include all the activities carried out by lawyers except appearing in court. The notary has an important advisory function, ensuring compliance with the law, legal certainty and the avoidance of litigation. The notary is supposed to perform their services as an objective and neutral advisor, and can act for both parties to a transaction provided there is no conflict of interest. A notary cannot normally refuse to provide services unless the act demanded is clearly contrary to the law.

283. Notaries are required to have high educational qualifications and are subject to stringent disciplinary rules. Notaries are normally appointed for life and, except for unfitness or serious misbehaviour, cannot be removed from office. Notaries are subject to a strict obligation of professional secrecy. The nature of this obligation is slightly different from that enjoyed by other lawyers, given that notaries do not represent clients before the courts.

284. In common law countries, the functions of a notary are primarily just to witness and authenticate documents and to certify copies of those documents. However, in civil law countries or in parts of countries that apply a civil law system, notaries usually perform a much wider range of functions. The notary will typically be involved in providing legal advice, in all aspects of the conveyancing of real property, in drawing up all types of contracts, in matters of matrimonial law, inheritance law, including the drafting of wills, and the constitution and modification of companies and other commercial entities. Duties will often include advice on matters of tax law. Notaries will often handle clients' money though the situation will vary from one member to another. For example, in Japan notaries public are not supposed to keep in custody or manage their clients' money or act as gatekeepers.

Notaries and the fight against money laundering

285. Given the fields in which they are active, notaries are likely to encounter potential money laundering operations. In the 2000 FATF Typologies Report it was noted that:

"62. The use of professionals specialising in the creation of legal entities as mechanisms for money laundering has already been described in the discussion of company formation agents. FATF members continued this year to note that other professions -- solicitors, notaries, and accountants, for example - frequently play a role in money laundering schemes."

Belgium identified the creation of companies and the purchase and sale of real property as the areas in which notaries were most likely to be confronted with money laundering operations. The Netherlands reported that there had been cases in which lawyers and notaries were intentionally or unintentionally involved in suspicious transactions.

286. The notarial profession within the European Union, as well as in some other FATF members, appears to accept a role in the prevention of money laundering. A paper

dated 2001 of the Conference des Notariats de l'Union Europeenne (CNUE) states (informal translation):

"Transparency of transactions: the notary is obliged to verify the identity of the parties and participates, as a public authority and in the public interest, in the fight against money laundering and tax evasion".

The measures currently in place

287. At a national level, only a few FATF members currently require notaries to comply with anti-money laundering measures, e.g. Argentina, Belgium, Luxembourg, Spain, and Switzerland. For example, Argentina and Belgium require notaries to identify their customers, keep records and report suspicious transactions in a similar manner to banks and financial institutions. Switzerland also imposes anti-money laundering obligations on notaries when they are acting as financial intermediaries (see section on lawyers below for more detail).

288. The EU Directive now applies to notaries (as with other independent legal professionals) in respect of the listed types of business (financial, property and company law and fiduciary business). When legislation is enacted by each State, notaries will have to fulfil the normal client identification obligations, and will also be obliged to report suspicious transactions and implement internal control measures and train their staff concerning money laundering issues. The provisions on professional secrecy in respect of legal advice, and on the reporting obligations are the same as for lawyers (see paragraphs 277-279 above).

Options for coverage of lawyers' and notaries

1. Professions to be covered

A. Lawyers

Option 1 - Lawyers and independent legal professionals in all their activities.

Option 2 - Lawyers and independent legal professionals, but only where they are acting as financial intermediaries on behalf of or for the benefit of the client.

Option 3 - Lawyers and independent legal professionals where they are involved in the planning or execution of financial, property, corporate or fiduciary business for the client.

B. Notaries

Option 1 - Notaries or notaries public, in all countries.

Option 2 - Notaries or notaries public, but only where they are acting as financial intermediaries on behalf of or for the benefit of the client.

Option 3 - Notaries or notaries public where they are involved in the planning or execution of financial, property, corporate or fiduciary business for the client.

2. Customer due diligence

Lawyers and notaries should be subject to the same customer due diligence obligations that apply to financial institutions in respect of customers activities covered in (1)- above (Professions to be covered) i.e. Recommendations 10 and 11 would apply. It is also proposed that the standard set out in Recommendation 12 should apply, namely, retain records of transactions and customers for a minimum period of 5 years.

3. Suspicious transaction reporting and increased diligence

The general principle should be that lawyers and notaries would be obliged to comply with Recommendations, 14-19, and in particular the reporting of suspicious transactions (though note the discussion in section 3.7.3.4. of reporting suspicious activity). However, there are several options available regarding when the reporting obligation would apply: -

Option 1 - A general obligation in respect of all their activities.

Option 2 - An obligation limited to their involvement in: certain listed vulnerable activities e.g. where they act as a financial intermediary.

Option 3 - apply option 1 or 2, but allow countries to decide whether STR are to be sent directly to the FIU or to the appropriate SRO (where one exists) for that profession. Each jurisdiction could determine the details of how that SRO would then co-operate with the FIU and other competent authorities.

In considering, option 3 and the desirability of a level playing field, the FATF invites views on whether the SRO should have a discretion to withhold STR from the FIU.

Under all the options above, there would be no obligation to report the suspicious transaction if the relevant information came to the lawyer or notary in circumstances in which the lawyer or notary is subject to professional secrecy or legal professional privilege*. It should be noted that the rule of secrecy or privilege may not apply (depending on the laws of the country concerned) if the lawyer or notary has knowledge or a strong suspicion (in some countries, this extends to 'suspicion') that their services are being abused for money laundering or criminal purposes. Such issues or secrecy or privilege would not be relevant in countries where the notary exercises a more limited function that excludes the giving of legal advice.

Whichever option is adopted, and with one possible exception, Recommendations 14 and 1619, which lay out other measures that are required for additional diligence should also apply. The only possible exception could be that consistent with the option provided for in the EU

Directive, Recommendation 17 would not apply to lawyers and notaries, who would be permitted to tip-off their clients that they had made a report. There are two options:

Option 1 - "Tipping-off" is permitted:

Option 2 - "Tipping-off" is not permitted.

The FATF may also give further consideration as to whether it would be "tipping-off" if lawyers are required to dissuade their clients from being involved in any illegal activity.

4. Regulation and supervision

Both the legal and notarial professions are normally subject to some type of self-regulation, under which a body that represents the profession, and which is made up of member professionals, has a role in regulating the persons that are qualified to enter and who practice in the profession, and also performs certain supervisory type functions. For example, it would be normal for these self-regulatory organisations (SROs)-to enforce rules to ensure that high ethical and moral standards are maintained by those practising the profession. Neither lawyers nor notaries are "supervised" in the same way as financial institutions, and would not be subject to similar supervisory processes.

As there are already systems and controls governing the persons that can practice the profession, often directly or indirectly involving the State, a number of the regulatory and supervisory issues that arise concerning non-financial businesses may not be relevant to the professions. Thus, the authorities should be able to determine from such existing systems whether the persons are entitled to practice as notaries in their jurisdiction:

Similarly the State or the SRO would have in place rules and requirements that are designed to prevent or at least limit criminals from being able to own or be engaged in a legal or notarial practice, let alone run that practice for illegal purposes. It is also commonplace that there are rules and regulations that are designed to ensure that these, professionals are fit and competent to practice their profession.

As regards oversight and supervision, there are several options, though some may be more practical to implement than others:

Option 1 - Self-regulatory oversight by an SRO.

Option 2 - Self-regulatory oversight by an SRO, which could itself be subject to supervision itself by a government body on compliance with AML obligations.

Option 3 - Oversight or supervision by one or more designated competent authorities (part of government):

Under both options, the relevant body would need to have the appropriate powers to conduct assessments of whether a lawyer or notary is meeting their obligations:

The system should also allow for sanctions for failing to comply with the relevant obligations. Those sanctions should be broadly proportionate and consistent with sanctions applicable to financial institutions in similar circumstances. They could be criminal, administrative or other sanctions'.

* It would be for each jurisdiction to determine the matters that would >fall under legal professional privilege or professional secrecy relating to lawyers, notaries or other professionals. This would normally cover information they receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client and (b) performing their task of defending or representing that client in, or concerning judicial proceedings, including giving advice on instituting or avoiding proceedings.

ADDENDUM 2

FATF Recommendations that May Be Made Applicable to Lawyers

Customer Identification and Record-keeping Rules

Recommendation 10

Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self-regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions).

In order to fulfill identification requirements concerning legal entities, financial institutions should, when necessary, take measures:

- i. to verify the legal existence and structure of the customer by obtaining either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity.
- ii. to verify that any person purporting to act on behalf of the customer is so authorised and identify that person.

Recommendation 11

Financial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or a transaction conducted if there are any doubts as to whether these clients or customers are acting on their own behalf, for example, in the case of domiciliary companies (i.e. institutions, corporations, foundations, trusts, etc. that do not conduct any commercial or manufacturing business or any other form of commercial operation in the country where their registered office is located).

Recommendation 12

Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of

currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal behaviour.

Financial institutions should keep records on customer identification (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence for at least five years after the account is closed.

These documents should be available to domestic competent authorities in the context of relevant criminal prosecutions and investigations.

Increased Diligence of Financial Institutions

Recommendation 14

Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Recommendation 15

If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

Recommendation 16

Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

Recommendation 17

Financial institutions, their directors, officers and employees, should not, or, where appropriate, should not be allowed to, warn their customers when information relating to them is being reported to the competent authorities.

Recommendation 18

Financial institutions reporting their suspicions should comply with instructions from the competent authorities.

Recommendation 19

Financial institutions should develop programs against money laundering. These programs should include, as a minimum :

- i. the development of internal policies, procedures and controls, including the designation of compliance officers at management level, and adequate screening procedures to ensure high standards when hiring employees;
- ii. an ongoing employee training programme; an audit function to test the system.