

An Update on the FATF Guidance for Legal Professionals and Development of Good Practice Guidelines¹

Creation of FATF: In 1989 the G-7 ministers issued an Economic Declaration covering numerous issues concerning international monetary developments. In connection with this declaration, the leaders agreed to the creation of the Financial Action Task Force on Money Laundering (“**FATF**”) which was tasked with coordinating efforts to prevent money laundering in both domestic and international arenas. The FATF has 34 members: 32 countries and territories and 2 regional organizations. At the 1999 meeting of the G-8 finance ministers, they coined the term “gatekeeper” in their communiqué calling for countries to consider various means to address money laundering through the efforts of professional gatekeepers of the international financial system, including lawyers, accountants, company formation agents, notaries and others (aka the “**Gatekeeper Initiative**”).

FATF Recommendations: In 1990, the FATF issued the “Forty Recommendations” to provide a set of counter-measures against money laundering. The recommendations covered a wide range of topics, including an effective criminal justice system, structure for a country’s regulation of its financing system and international cooperation. These recommendations are intentionally general, so as to provide a country with flexibility to enact regulations consistent with its particular circumstances. The recommendations are not a binding international convention, but many countries (including the United States) have committed to implementing them to combat money laundering. After September 11, 2001, FATF expanded its focus to include anti-terrorism financing provisions – which are the subject of an additional “Nine Special Recommendations.” Collectively, all 49 recommendations are referred to in this article as the “FATF Recommendations.”

Of particular interest to transactional lawyers are Recommendations 33 and 34, which address the exploitation of “*legal persons*” (i.e. legal entities such as trusts, LLCs, corporations, partnerships and the like) and legal arrangements by money launderers. In addition, legal professionals should be aware of Recommendations 13 through 16 which deal with suspicious transaction reporting (“STR”) and the no tipping off rule (“NTO”). The latter set of recommendations is applied to financial institutions and the application of the STR and NTO recommendations to the legal profession is controversial and is subject to continued discussion.

¹ Kathleen J. Hopkins, chair of the ABA-BLS ComFin Real Estate Financing Subcommittee, prepared this article. For ease in reading, the author is not providing footnotes for the information contained in this article; all the information contained herein is derived from the following sources: (1) the July 17, 2008 Memorandum by Martin E. Lybecker to the Council and Officers of the Section of Business Law captioned “Report on the ABA Task Force on the Gatekeeper Regulation and the Profession,” (2) the article by Kevin L. Shepherd entitled “Guardians at the Gate - The Gatekeeper Initiative and the Risk Based Approach for Transaction Lawyers,” which will appear in the *Real Property, Trust & Estate Journal*, Vol. No. 43, Issue No. 3 (Winter 2009); and (3) the report accompanying ABA Resolution 300, which the ABA House of Delegates passed at its August 2008 session.

The FATF also issued guidance on the FATF Recommendations, including its recommendation to apply anti-money laundering regulations to non-financial businesses and professions, such as lawyers. In 2002, an FATF Consultation Paper outlined various options for strengthening national anti-money laundering measures and sought comment. That paper proposed that certain anti-money laundering measures be extended to lawyers including (1) increased regulation and supervision of the profession, (2) increased due diligence requirements on clients, (3) new internal compliance and record keeping requirements for lawyers and firms, and (4) new STR requirements mandating that lawyers report to a government enforcement agency or a self regulatory organization information that triggers a “suspicion” of money laundering relating to client activities. It also recommended enforcement through criminal, administrative or other sanctions. The ABA Task Force on Gatekeeper Regulations and the Legal Profession (the “ABA Gatekeeper Task Force”) provided formal comments to this paper, including criticism about the absence of input from the legal profession on the roles and work of the legal profession. In addition, in February 2003 the ABA House of Delegates passed a resolution opposing any mandatory STR obligation that would compromise the confidentiality of client information or adversely affect the attorney-client relationship in the U.S. justice system.

FATF Evaluation of United States: In 2006 the FATF conducted an evaluation of the United States’ compliance with the FATF Recommendations and found the United States non-compliant with Recommendation 33 and gave the U.S. until July 2008 to make progress toward compliance. Its conclusions included: (a) there were no measures in place to ensure adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be accessed in a timely fashion by competent authorities; (b) there were no measures taken by those jurisdictions which permit the issue of bearer shares to ensure bearer shares are not misused for money laundering; and (c) a general criticism of the U.S.’s lack of available information of private companies registered within its borders.

Proposed Federal Legislation: In 2007 Senators Levin, Coleman and Obama proposed S. 681 (Stop Tax Haven Abuse Act) that proposed subjecting persons involved in formation of companies to the anti-money laundering requirements of the Bank Secrecy Act. The definition of those covered by the proposed legislation was broad enough to include lawyers and others involved in the process. In response, the ABA and other groups began to work with the U.S. Departments of Justice and Treasury to, hopefully, resolve law enforcement’s information gathering concerns other than through federal legislation. Although many believed progress was being made, in May 2008 Senators Levin, Coleman and Obama introduced an updated version of S.681: S. 2956, which similarly sought to impress federal regulation on this issue. In response, the ABA House of Delegates, at its August 2008 meeting, passed a resolution which, *inter alia*, urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and defer to the states as they consider amendments to their various entity formation laws (“ABA Resolution 300”).

FATF Guidance for Legal Professionals:² The FATF Recommendations encourage countries to develop a risk-based approach to anti-money laundering and to combating terrorism financing. This approach envisions that limited resources will be employed to address the greatest risks. The FATF in 2007 issued the Financial Institution Guidance and in October, 2008 issued its Guidance for Legal Professionals (the “Lawyer Guidance”).

The Lawyer Guidance addresses both the private sector and public authorities, outlines the risk factors lawyers need to consider in developing a risk-based system and identifies issues specific to legal professionals.

The Lawyer Guidance only covers lawyers when they prepare for or carry out transactions for their clients concerning: (a) buying and selling of real estate, (b) managing client money, securities or other assets, (c) management of bank, savings or securities accounts, (d) organization of contributions for the creation, operation or management of companies, and (e) creation, operation or management of legal persons or arrangements, and the buying and selling of business entities. Under the Lawyer Guidance, it is envisioned that the listed activities should trigger certain activities designed to respond to the corresponding level of risk – including client due diligence, internal controls, and the oversight and monitoring of legal professionals.

For client due diligence, the most commonly used risk criteria are country and geographic risk, client risk, and risk associated with the particular service provided. At present, the parties have not agreed on a definition of which countries or geographic areas represent higher risk. For client risk, the Lawyer Guidance identifies 12 situations where the client’s activities may indicate higher risk. For risks associated with specific services, the Lawyer Guidance identifies 18 factors that a lawyer should take into account for assessing the risk involved in providing the services listed in the immediately prior paragraph. Where the lawyer’s risk assessment indicates a higher risk client, the Lawyer Guidance lists measures and controls the FATF deems appropriate to mitigate the potential for money laundering or terrorism financing.

Implementing the Lawyer Guidance for U.S. Transactional Lawyers: Like the FATF Recommendations, the Lawyer Guidance is a 50,000 foot level approach – providing a broad framework for implementing a risk-based approach and leaving the specifics to be worked out by each country, in a manner consistent with its own particular realities. The ABA already adopted a policy consistent with the Lawyer Guidance’s emphasis on development of good practice in the design and implementation of an effective risk-based approach: ABA Resolution 300 included a provision urging state and local bar associations, and other constituencies, to develop risk-based guidance for legal professionals, with the assistance of the ABA’s Gatekeeper Task Force.

² This article is intended as a summary update, for detailed information see the Kevin L. Shepherd article cited in footnote 1 and the Lawyer Guidance which is available at <http://www.fatf-gafi.org/dataoecd/5/58/41584211.pdf>.

The development of good practices guidance for U.S. transactional lawyers is the next step. Some specialty bars, such as the American College of Trust and Estate Counsel already have a set of good practices for its fellows. Representatives from the ABA Gatekeeper Task Force along with numerous other legal professional groups recently formed a working group on the development of the good practices guidance.³ It is hoped this collaborative approach will produce a uniform set of good practices that can be implemented at the national, state and local levels in lieu of federal regulation and legislation.

³ The working group includes 3 members identified as representing the ABA Section of Business Law: Jamie Boucher, Kathleen Hopkins and Christopher Rockers (although numerous other members of the working group are ABA BLS members and active in its leadership).