



## MEET THE REGULATOR

17<sup>th</sup> July, 2007

**TOPIC:** *ANTI-MONEY LAUNDERING/COUNTERING THE FINANCING OF TERRORISM – CHANGES AND EMERGING DEVELOPMENTS*

### 1. **CURRENT LEGISLATION:**

- (a) Proceeds of Criminal Conduct Act, 1997
- (b) Anti-money Laundering Code of Practice, 1999
- (c) Proceeds of Criminal Conduct (Designated Countries and Territories) Order, 1999
- (d) Drug Trafficking Offences Act, 1992
- (e) Criminal Justice (International Cooperation) Act, 1993
- (f) Drug Trafficking Offences (Designated Countries and Territories) Order, 1996
- (g) Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture Orders) Order, 1996
- (h) The Terrorism (United Nations Measures) (Overseas Territories) Order 2001
- (i) Anti-Terrorism (Financial and Other Measures) (Overseas Territories) Order 2002
- (j) Financial Investigation Agency Act, 2003
- (k) Financial Services Commission Act, 2001

### 2. **CURRENT POLICY DOCUMENT**

Anti-money Laundering Guidance Notes

### 3. **CHANGES: CFATF RECOMMENDATIONS**

- (a) Introduce mandatory suspicious activity reporting  
(*Proceeds of Criminal Conduct (Amendment) Act, 2006*)
- (b) Specifically provide for the forfeiture of the instrumentalities of drug trafficking  
(*Drugs (Prevention of Misuse) (Amendment) Bill, 2007*)

#### 4. EMERGING DEVELOPMENTS

- (a) FATF Working Group on Evaluations and Implementation – Law, Regulation and Other Enforcement means
- (b) FATF Working Group on Evaluations and Implementation – AML/CFT Implementation in Low Capacity Countries
- (c) Guidance on CFT
- (d) AML/CFT assessment processes of private banking, with emphasis on Politically Exposed Persons (PEPs)
- (e) Other developments in the revised FATF Recommendations
- (f) Where to with the FATF emerging initiatives?
- (g) Civil forfeiture

##### 4 (a) – *Law, Regulation and Other Enforceable Means*

- (i) Issue of definition of terms – “law or regulation” & “other enforceable means”
- (ii) Origin of ‘the problem’ - General Interpretative Note 2 to the FATF 40 Recommendations states:

“Recommendations 5-16 and 21-22 state that financial institutions or designated non-financial businesses and professions should take certain actions. These references require countries to take measures that will oblige financial institutions or designated non-financial businesses and professions to comply with each recommendation. The basic obligations under Recommendations 5, 10 and 13 should be set out in law or regulation, while more detailed elements in those Recommendations, as well as obligations under other Recommendations, could be required either by law or regulation or by other enforceable means issued by a competent authority.” (*Emphasis added*)

- (iii) Definitions:

“law or regulation” refers to primary and secondary legislation, such as laws, decrees, implementing regulations or other similar requirements, issued or authorized by a legislative body, and which impose mandatory requirements with sanctions for non-compliance. The sanctions for non-compliance should be effective, proportionate and dissuasive”;

“other enforceable means” refers to guidelines, instructions or other documents or mechanisms that set out enforceable requirements with sanctions for non-compliance, and which are issued by a competent authority (e.g. a financial supervisory authority) or an SRO. The sanctions for non-compliance should be effective, proportionate and dissuasive.”

- (iv) Net effect of definitions: For both defined terms, it is expected that they should be capable of requiring/imposing a legal obligation which should be legally enforceable by criminal, civil or administrative sanctions; in addition, the sanctions must be such that they fit the compliance requirement that is breached: they must be effective, proportionate and dissuasive.
- (v) Unacceptable measures:
  - Self-regulatory codes of conduct issued by private sector associations
  - Non-binding guidance/codes of conduct and/practice formulated and issued by regulatory authorities (for example, the BVI AML Guidance Notes)
  - Internal policies formulated and issued by private sector entities
- (vi) Instructions to Assessors: Application of all of the above requirements and criteria, including an assessment of the application of effective and dissuasive sanctions in practice.

#### 4 (b) - *AML/CFT Implementation in Low Capacity Countries*

- (i) What is a “low capacity country” (LCC)?
  - The FATF for now refuses to attempt a definition (to avoid “definitional discussions” which may distract discussions on the real and substantive issues)
  - World Bank:  
  
A definition of LCC is important;  
Suggests definition could be used by the FSRBs’ assessors in their assessment of countries (in the pre and post evaluation stage);  
Thus an LCC qualifies as such if it has any of the following constraints:
    - Highly under-resourced government apparatus

- Severe lack of skilled labour
- Dominant informal sector
- Predominantly cash-based economy
- Weak information and communication infrastructure

To the above may be added extreme poverty and a small financial sector

- (ii) Aim: The ultimate aim is to assist ‘lagging’ countries in their full and effective implementation of the 40 + 9 Recommendations
- (iii) Calibrating AML/CFT systems: Carry out an assessment of particular jurisdictional risks by implementing priority Recommendations that pose the immediate risks to a country and the international community.

#### 4 (c) – *Guidance on CFT*

- (i) Developing guidance on the implementation of the law on CFT.
- (ii) Proactive intelligence gathering by conducting financial investigations.
- (iii) Developing operational interagency task forces that ensures an expedited low threshold exchange of information among investigative agencies.
- (iv) Utilising specialized services for purposes of analyzing and data mining of financial intelligence.
- (v) Lowering the threshold for exchange of information with foreign countries?
- (vi) Investing seriously in training programmes geared towards enhancing the regime of financial investigations.
- (vii) Identifying measures to establish red flag indicators for public and private sector entities.
- (viii) Developing a regime of mutual trust and a mechanism for the exchange of information between the public and the private sectors.
- (ix) Raising employee awareness of misuse of financial systems for terrorism purposes and keeping attuned to published lists – UN, EU, intelligence gathering websites, etc.

- (x) Adopting an intelligence-led and risk-based approach that places emphasis on how government agencies, financial supervisors and financial sector can work together cohesively.

4 (d) - ***AML/CFT assessment processes of private banking, with emphasis on Politically Exposed Persons (PEPs)***

- (i) Definition: According to the Third EU Money Laundering Directive, PEPs are defined as “natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons”.
- (ii) Risk indicators: Where a customer has an affinity or consanguine relation in government, fails to disclose the nature of his/her business, including beneficial owners, principals and/or partners, uses questionable (and sometimes very complex) structures to obscure ownership links, often without any credible explanation and absence of expertise in the country or industry with which he/she is connected.
- (iii) Processes and procedures: It is important that all financial institutions put in place processes and procedures for identifying and screening PEPs to prevent abuse of the financial system.
- (iv) Site checks: Financial institutions must utilize available websites that identify and expose PEPs, such as Worldcheck, Lexis-Nexis, Complicheck and Factiva.

4 (e) ***Other developments in the revised FATF Recommendations***

The FATF is now going beyond financial institutions!!! It is reaching out to designated financial services businesses and professions (refer to [www.fatf-gafi.org](http://www.fatf-gafi.org)). These are:

- (i) Real estate agents: when concerned in business dealings for a client involving the buying and selling of real estate.
- (ii) Lawyers, notaries and other independent legal professionals, and accountants: when they are concerned in transactions for clients involving the buying and selling of real estate, managing client monies, securities or other assets, managing banks, savings or securities accounts, contributions for establishment, operation or management of companies, and buying and selling of business entities, including establishing, operating or managing legal persons or arrangements.

- (iii) Dealers in precious metals and stones: when they engage in cash transactions with customers beyond an established threshold.
- (iv) Trust and company service providers: when engaged in transactions for clients by acting as formation agents of legal persons, acting as director or secretary of a company, partner or partnership, providing registered office/business service, acting as (or arranging for another to act as) trustee of an express trust or as a nominee shareholder for another person.
- (v) Casinos: when they engage in financial transactions with customers beyond an established threshold.

4 (f) ***Whereto with the FATF emerging initiatives?***

October Meeting of the WGEI may discuss and recommend possible initiatives: guidance document, best practice paper, additional Recommendations, a naming and shaming initiative directed at small offshore jurisdictions.

4 (g) **Civil forfeiture**

Not an assessment requirement criteria, but ought we not move in the direction of what the future is likely to hold up to a standard benchmarking tool?

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