Lawyers & AML/CFT Initiatives

Crisscrossing the Pond: Transatlantic Issues in Legal Ethics And Regulation

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Overview of Remarks

• Intro

• What’s happening in FATF
  – US & UK 4th Round Mutual Evaluation Reports
  – Overall Treatment of Lawyers in FATF MERs
    Significance of new FATF Legal Profession RBA?

• What’s happening in the US
  – Periodic legislation
  – ABA Gatekeeper TF (& other?) MRPC proposals
  – NY City Bar Opinion, New GA C’ee, ICLR
  – Implications of this topic for lawyer/firm advisors?

• Trends & my advice about lawyer responses
FATF Recommendations 22 & 23

DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS

22. DNFBPs: customer due diligence

The customer due diligence and record-keeping requirements set out in Recommendations 10, 11, 12, 15, and 17, apply to designated non-financial businesses and professions (DNFBPs) in the following situations:

1) Buying/selling real estate; 2) managing client $-assets; 3) managing bank-other accounts; 4-5) creation-operation-management of companies or legal persons

23. Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22. Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants, including auditing.

FATF Mutual Evaluation Reports

- Approximately 60 countries have their 4th Round reports
- FATF Recommendation #1 requires a risk assessment
- **US**: Dec. 2016 MER
- **UK**: FATF onsite visit in March 2018; MER coming soon

All Mutual Evaluation Reports (MERs) are available from FATF homepage.
Treatment of Lawyers in FATF 4th MERs

• Overall: Most FATF MERs criticize lawyers-lawyer reg

• Burden allocation: Some MERs say lawyers or their regulators haven’t proved their systems are effective

• Common Complaints about Lawyers in FATF Reports:
  – Insufficient AML/CFT regimes
  – Lawyers don’t understand their legal obligations (rule issues)
  – Lawyers aren’t implementing AML/CFT (application issues)
  – Regulators [supervisors] aren’t diligent enough

• Rule of Law concerns are rarely if ever cited

FATF 4th Round MER Results

DNFBP Ratings as of 7-2018*

← Note how few ‘C’ (green) ratings

← FATF’s table shows a country’s rating for FATF Recs. 22 & 23 for lawyers & other DNFBPs
R.23=suspicious transaction reporting & no tipping off

R.22 DNFBPs: Customer due diligence
R.23 DNFBPs: Other measures

Technical Compliance

*These ratings are regularly updated
Other FATF-Legal Services Activity

- The RBA (Risk-based Approach) document is being updated to reflect the revised 2012 FATF 40 Recommendations. Result????
- The IBA is taking a leading role. Others are also involved.

What’s Happening in the US?

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[Image of a question mark]
1. US 2016 MER Recommendation

D. Priority Actions

30. The prioritised recommended actions for the United States, based on these findings, are:

1. Take steps to ensure that adequate, accurate and current BO information of U.S. legal persons is available to competent authorities in a timely manner, by requiring that such information is obtained at the Federal level.

2. Implement BO requirements under the BSA (scheduled to come into force in 2018) and apply these to the sectors discussed in point 3 below.

3. Apply appropriate AML/CFT obligations as follows:
   a) To investment advisers. Even if some investment advisers are already indirectly covered through their association with banks, bank holding companies and security broker dealers, the direct application of AML/CFT rules to all investment advisers will address a vulnerability identified by the U.S. authorities themselves;
   
   b) On the basis of a specific vulnerability analysis, to lawyers, accountants, trust and company service providers (other than trust companies which are already covered); and
   
   c) After the outcomes of the recent GTO have been analyzed, take appropriate action to address the ML risks in relation to high-end real estate.

2. Federal Bills Are Regularly Introduced

Gatekeeper Regulation and the Legal Profession

ABA Opposes Anti-Money Laundering Legislation that Erodes the Attorney-Client Privilege and Imposes Burdensome Regulations on Small Businesses, their Lawyers, and States

The ABA opposes S. 1454, S. 1717, H.R. 3089, and other similar measures because:

- The legislation would undermine the attorney-client privilege, the confidential lawyer-client relationship, and traditional state court regulation of the legal profession.

- The bills would also impose burdensome, costly, and unworkable beneficial ownership reporting requirements on small businesses, their lawyers, and states.

- The burdensome and intrusive new reporting requirements in the legislation are unnecessary because the federal government, financial institutions, and the legal profession have developed other more effective tools.

My Preferences: **Decouple** lawyer regulation issues from beneficial ownership/corporate law issues
3. GTO Developments

How dirty is Miami real estate? Secret home deals dried up when feds started watching

- Study by a Federal Reserve Bank of NY E’ee & U. Miami prof
- Examined impact of Treasury “GTO” [geographic targeting order]
- The Miami Herald reported that:

  *In Miami-Dade, the first-of-its-kind study found a 95 percent drop in how much cash shell companies and other corporate entities spent on homes. The decline began immediately after the [GTO] rule took effect in March 2016.*


See also 60 Minutes: Anonymous Inc.

4. US Ethics Developments

- ABA Model Rule proposal(s) exist
  - Creates an **EXPLICIT** due diligence obligation
  - Meanwhile:
    - NY City Bar Formal Op. 2018-4: Duties When an Attorney Is Asked to Assist in a Suspicious Transaction
    - As of 10/18, there is a GA State Bar Subcommittee
    - US regulators discuss this at places such as ICLR & IBA
    - For resources, see https://tinyurl.com/ABA-Gatekeeper
Examples of US Discussions

ABA Needs A New Model Legal Ethics Rule

By Kevin Shepherd, Venable LLP April 6, 2017, 1:12 PM EDT

From my forthcoming Dec. 2018 article:

Regardless of the reason, there seems to be growing interest in the United States in creating (or making more explicit) lawyers’ due diligence obligations:

Although the phrase “due diligence” is not one that is used in the ABA Model Rules, the idea that a lawyer may have a duty to make a factual inquiry is a familiar one. For example, presumably few people would allow a lawyer to avoid the mandatory conflicts of interest provisions by simply failing to inquire about the identity of the opponent party.

Re Due Diligence: Consider Rules 1.1 (duty re facts); 1.2(d) (don’t assist), & 1.16(a) (duty to reject-withdraw)

Cf. Conflicts of interest

Resources to Help You Advise Attys-Firms

See resources list in Conference materials & FATF dropdown in https://works.bepress.com/laurel_terry/
Some Recent UK Developments

- **Supervision** issues are front & center
- UK Attys have a new AML supervisor [regulator]

Concluding Observations

For US Attendees:
- The APRL audience is VERY influential re ethics
- Think hard before opposing US atty *due diligence*
- It doesn’t have to lead to STR or NTO (maybe the opposite?)
- The UK experience shows that what’s at stake includes WHO regulates lawyers

For Everyone
- My Advice: Given FATF MERs, legal profession reps should consider how best to cooperate & educate others
To Read More About It …

- Dec. 2018 article about FATF MERs
- 2015 article about US atty AML response
PLUS resources in Conference materials ↓


Resource Slides (I don’t plan to show)
A Primer About FATF (GAFI)

- **Financial Action Task Force (FATF):** an IGO (intergovernmental organization) started in 1989
- **Goals:** Fight money laundering & terrorist financing [aka AML/CFT; activities increased after 9-11]
- **Members:** 35 Jurisdictions + 2 regional groups
- **Associate Members:** cover most of the globe
- **Focus:** 40 Recommendations (as revised 2012, 2017)
- **Methods:** education, Mutual Evaluations

FATF’s Reach
FATF’s 40 Recommendations

Translations of the FATF Recommendations

- Recommendations du GAFI - 2012

The following unofficial translations, are provided for your convenience.

- Arabic - translated by MENA FATF
- Armenian - translated by the Central Bank of Armenia
- Dari - translated by the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC)
- Estonian - translated by the Estonian Financial Supervisory Authority
- Pashto - translated by the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC)
- Portuguese - translated by the Portuguese Delegation
- Portuguese - translated by GAFISUD
- Russian - translated by the Russian Delegation
- Somali - translated by GAFISUD

Updated November 2017

FATF Recommendation 22

DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS

22. DNFBP: customer due diligence *

The customer due diligence and record-keeping requirements set out in Recommendations 10, 11, 12, 15, and 17, apply to designated non-financial businesses and professions (DNFBPs) in the following situations:

(d) Lawyers, notaries, other independent legal professionals and accountants – when they prepare for or carry out transactions for their client concerning the following activities:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.
FATF Recommendation 23

23. DNFBPs: Other measures *

The requirements set out in Recommendations 18 to 21 apply to all designated non-financial businesses and professions, subject to the following qualifications:

(a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22. Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants, including auditing.


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THE FATF RECOMMENDATIONS

D – PREVENTIVE MEASURES

9 Financial institution secrecy laws
10 Customer due diligence and record keeping
11 Customer due diligence *
12 Record keeping
13 Politically exposed persons *
14 Correspondent banking *
15 Money or value transfer services *
16 New technologies
17 Wire transfers *
18 Reliance, Controls and Financial Groups
19 Reliance on third parties *
20 Internal controls and foreign branches and subsidiaries *
21 Higher-risk countries *
22 Reporting of suspicious transactions *
23 Designated non-financial Businesses and Professions (DNFBPs)
FATF 40 Recommendations & DNFBPs

- FATF’s Recommendations apply to lawyers (DNFBPs)
- Virtually all countries have agreed to comply
- The FATF Recommendations are tools US & UK use

Summary of FATF 4th Round MERs*

Rec. 22 – DNFBP Customer Due Diligence:

- **9 Non Compliant** (Australia, Botswana, Canada, Fiji, Mongolia, Nicaragua, Sri Lanka, Thailand, US)
- **23 Partially Compliant** (Andorra, Austria, Bahamas, Cambodia, Costa Rica, Denmark, Guatemala, Hungary, Ireland, Jamaica, Macao China, Mexico, Norway, Portugal, Samoa, Serbia, Singapore, Switzerland, Tunisia, Uganda, Vanuatu, Zimbabwe)
- **17 Largely Compliant** (Armenia, Bangladesh, Barbados, Belgium, Cuba, Ethiopia, Ghana, Honduras, Isle of Man, Italy, Malaysia, Panama, Slovenia, Spain, Sweden, Trinidad & Tobago, Ukraine)
- **1 Fully Compliant** (Bhutan)

[* Data taken from FATF's 7-25-18 Table of Assessment Ratings]
Summary of FATF 4th Round MERs*

Rec. 23 –DNFBP Other Measures e.g., STR & NTO

6 Non Compliant (Australia, Canada, Mexico, Mongolia, Nicaragua, US)

24 Partially Compliant (Andorra, Bahamas, Barbados, Bhutan, Botswana, Costa Rica, Fiji, Guatemala, Honduras, Hungary, Iceland, Isle of Man, Jamaica, Macao China, Samoa, Serbia, Singapore, Sri Lanka, Switzerland, Thailand, Tunisia, Uganda, Vanuatu, Zimbabwe)

18 Largely Compliant (Austria, Bangladesh, Belgium, Cambodia, Cuba, Denmark, Ethiopia, Ghana, Ireland, Italy, Malaysia, Norway, Panama, Portugal, Slovenia, Sweden, Trinidad & Tobago, Ukraine)

2 Fully Compliant (Armenia & Spain)

➢ There has been significant litigation about R. 23

*Data taken from FATF’s 7-25-18 Table of Assessment Ratings

FATF’s Impact in the U.S.

• Conversations are underway re whether to add an ethics rule or comment that addresses FATF Rec. 22 re “due diligence”
  • It could be a stand-alone rule as in Canada
  • It could be a new Model Rule
  • It could be a new section in an existing rule
  • It could be a comment analogous to the “technology” comment in ABA MRPC 1.1 [8]
• I think a duty of inquiry implicitly exists (an atty couldn’t fail to inquire re conflicts, could they?) but duty should be explicit