Inside The New Anti-Money Laundering Guidance For Attys

By Kevin Shepherd  (June 28, 2019)

Over a decade ago at its plenary meeting in October 2008, the Paris-based Financial Action Task Force issued a guidance paper for the global legal profession on how to detect and prevent money laundering and terrorist financing. Titled “Risk Based Approach Guidance for Legal Professionals,” the 2008 guidance did not have the force of law, but instead was intended to assist lawyers to combat and detect money laundering and terrorist financing.

In the intervening 11 years, the FATF revised its "International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation." The revised standards, coupled with the experience gained by public authorities and the private sector over the years in applying the 2008 guidance, prompted the FATF to revise and update the 2008 guidance.

At its June 2019 plenary meeting, FATF adopted an updated "Guidance for a Risk-Based Approach — Legal Professionals." The 2019 guidance bears structural similarities to the 2008 guidance, but contains several significant changes. This article will provide an overview of the 2019 guidance and highlight several of these changes that may be of most interest to U.S. lawyers.

Overview

The 2019 guidance contains 233 separately numbered paragraphs, four sections and six annexes. By contrast, the 2008 guidance contained 126 separately numbered paragraphs (about half of those contained in the 2019 guidance), three sections and three annexes. The 2019 guidance, like its original predecessor, is a technical, jargon-laden document that few lawyers will likely read cover to cover.

Who and What Are Covered?

The 2019 guidance, as did the 2008 guidance, applies to lawyers engaged in preparing for or carrying out specified transactional matters, such as buying and selling real estate, creating, operating, or managing legal persons or arrangements, and buying and selling of business entities.[1] Litigation is thus not a specified activity, and a lawyer representing a client in litigation will not be subject to the FATF standards.[2]

In addition to identifying broadly the specified activities covered by the 2019 guidance, the 2019 guidance lists 15 areas that may — or may not — fall within the category of a specified activity.[3] For example, the 2019 guidance states that a lawyer may provide advice on the purchase, sale, leasing and financing of real property. That advice, however, appears to go beyond the specified activity of buying and selling real estate.[4] The 2019 guidance only points out that "[t]he specifics of the risk-based processes should accordingly be determined based on the activities undertaken by the legal professional, the ethical and existing supervisory structure for legal professionals and the susceptibility or vulnerability of activities of a legal professional to [money laundering/terrorist financing]."[5]
Guidance for Sole Practitioners and Small Firms

The 2019 guidance seeks to improve on the 2008 guidance by providing guidelines to sole practitioners and small law firms in designing and implementing a risk-based approach to anti-money laundering and counter the financing of terrorism compliance. To that end, the 2019 guidance suggests a “practical” approach to assessing the risk that a client presents that consists of identifying the client and its beneficial owners and the true “beneficiaries” of the transaction, adopting engagement letter policies that reflect the exact nature of the service the lawyer is providing and how that work could facilitate the movement or obscuring of criminally derived proceeds, understanding the commercial or personal rationale for the work, exercising vigilance in identifying “red flag” indicators, and then developing an action plan if any action needs to be taken in response to this client intake approach.[6]

The 2008 guidance lacked these practical guidelines for sole practitioners and small law firms, which comprise the majority of lawyers.

Risk Categories

The 2019 guidance provides an extensive explanation of the three basic risk categories that are evaluated in a risk based approach: (1) country or geographic risk; (2) client risk; and (3) risk associated with the particular service offered. Of particular interest are the provisions discussing client risk[7] and transaction/service risk.[8] The 2019 guidance builds on the client risk factors discussed in the 2008 guidance by adding a number of new risk factors, such as sudden activity from a previously dormant client without clear explanation[9] or a client starts or develops an enterprise with unexpected profile or abnormal business cycles or client entrant into new/emerging markets.[10]

The 2019 guidance includes several new risk factors for assessing the transaction/service risk, some of which reflect technological advancements since the 2008 guidance. For example, a new transaction/service risk factor are services that rely heavily on new technologies (e.g., in relation to initial coin offerings or virtual assets) that may have inherent vulnerabilities to exploitation by criminals, especially those not regulated for AML/CFT.[11]

Another new transaction/service risk factor are transfers of goods that are inherently difficult to value (e.g., jewels, precious stones, objects of art or antiques, or virtual assets), where this is not common for the type of client, transaction, or with the lawyer’s normal course of business, such as a transfer to a corporate entity, or generally without any appropriate explanation.[12] The addition of new — and more detailed — risk factors under the client risk and transaction/service risk categories are helpful in assisting lawyers in detecting whether their services are being used for money laundering or terrorist financing.

Once a lawyer has assessed the risk factors under the three broad risk categories, the lawyer should review certain variables that may affect the overall risk assessment. As the 2019 guidance notes, “[a] significant factor to consider is whether the client and proposed work would be unusual, risky or suspicious for the particular legal professional.”[13] The list of these variables generally tracks the list of variables under the 2008 guidance, but expands on certain of them. For example, one risk variable under both the 2008 guidance and the 2019 guidance is the complexity of a structure of the transaction. The 2019 guidance explains that lawyers should satisfy themselves of a reasonable need for such complex structures in the context of the transaction.[14]
Beneficial Ownership

The 2019 guidance devotes significant attention to a lawyer’s role in identifying and verifying beneficial ownership.[15] The issue of identifying and disclosing beneficial ownership information remains a controversial topic in the United States, and legislation is pending in Congress that seeks to address this issue. The 2019 guidance significantly expands on the beneficial ownership provisions contained in the 2008 guidance, underscoring the importance this topic has in the AML/CFT arena.

Legal Professional Privilege and Professional Secrecy

Unlike the 2008 guidance, the 2019 guidance devotes six paragraphs[16] to legal professional privilege and professional secrecy, and recognizes that these concepts present challenges in implementing a risk-based approach.[17] The FATF leaves to each jurisdiction the extent to which legal professional privilege and professional secrecy apply, and the scope of these concepts in relation to AML/CFT.[18] The analogous concept of legal professional privilege is known in the United States as the attorney-client privilege, and the 2019 guidance notes that the United States recognizes a “crime-fraud” exception to the attorney-client privilege.[19]

Jurisdiction Specific Guidance

Because the 2019 guidance is high-level, it encourages law societies and bar associations to produce jurisdiction-specific guidance based on the 2019 guidance. As an example, the 2019 guidance points to the "Voluntary Good Practices Guidance to Detect and Prevent Money Laundering" adopted by the American Bar Association in 2010.[20] Based on this encouragement, it is possible that the American Bar Association may seek to update its 2010 guidance in response to the 2019 guidance.

Supervision of Risk-Based Approach in the U.S.

Recommendation 28 of the FATF standards requires that legal professionals be subject to adequate AML/CFT regulation and supervision. Section IV of the 2019 guidance provides detailed guidance to supervisors, much of which is inapplicable to the U.S. given its "alternative supervisory system.” In recognition of this different system, the FATF included a text box in Annex 4 focused on the U.S., which the FATF recognizes as the country with the largest number of lawyers subject to such a system. The lengthy text box describes the fit and proper requirements in the U.S., including the entry and ongoing requirements for lawyer licensing.

Conclusion

The 2019 guidance represents an update of the 2008 guidance, with several enhancements designed to make it more relevant to sole practitioners and small firms. To increase its acceptance and use by the legal profession, it would be helpful for the FATF to prepare a user-friendly executive summary (in addition to the single page “executive summary” that prefaces the 2019 guidance) that would succinctly summarize, at a high level, the contents of the 2019 guidance. This summary could then be widely distributed to the global legal profession and, in doing so, educate and engage the legal profession to increase its efforts to detect and combat money laundering and terrorist financing. This would be a welcomed development.
Kevin L. Shepherd is a partner at Venable LLP. He is a past president of the American College of Real Estate Lawyers, a past chair of the American Bar Association Real Property, Trust and Estate Law Section and the ABA Task Force on Gatekeeper Regulation and the Profession, and is a member of the ABA Board of Governors.

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[10] ¶103.cc.
[12] ¶104.t.
[14] ¶108.m.
[15] ¶118 and accompanying Box 3; ¶¶212-225; Annex 1.
[17] ¶77 and accompanying Box 1.