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Opinions on the Draft Revision of the 40 Recommendations

General Introduction

The Japan Federation of Bar Associations (JFBA) has already submitted to the FATF and announced officially its strong opposition to putting lawyers under the obligation to report suspicious transactions as a countermeasure against money laundering.

The JFBA has not changed its position.

We are watching the on-going constitutional challenge regarding this system instituted in Canada and new legislation proposals by the Canadian government.

In the event the aforementioned system is also introduced in Japan, the JFBA will maintain its right to publicly oppose said system through legal and political means in response to specific legislation proposals on all fronts.

Therefore, we want to make it understood that while our approach is still premised on the aforementioned official position, our view on the draft recommendations mentioned below represents a way of thinking that is "less unacceptable" from the standpoint of the JFBA.

Recommendation 9

It should be clearly stipulated that Recommendation 9 shall not infringe the right to refuse seizure of evidence within the scope of the lawyer's duty of confidentiality.

Reason:

The Code of Criminal Procedure of Japan grants lawyers the right to refuse seizure of evidence such as documents in their possession if such document is within the scope of duty of confidentiality. It is necessary to confirm that the Recommendation is not intended to override such right of refusal that lawyers of each country have under the laws of their county.

Recommendation 13e)

We choose Alternative 2.

However, the term "financial transactions" should be more clearly defined and be limited to transactions similar to banking business such as transmission of money and funds.

Reason:

We choose Alternative 2 because the reasoning and the extent of the provisions are clearer and it is more limited in scope than Alternative 1, so that the prejudice to the role to be played by lawyers in the rule of law and access to justice and their independence from the government would be minimized.

Recommendation 14

We choose Alternative 2.

However, the term "financial transactions" should be more clearly defined and be limited to transactions similar to banking business such as transmission of money and funds.

Reason:

The same as Recommendation 13.

Recommendation 14 Last Paragraph

We choose "transactions", not "activity".

Reason:

The term "activity" is too vague and broad.

Interpretative Notes (Recommendation 14 & 15)

It should be clearly stipulated in the 3rd Paragraph that information obtained in the course of providing legal advice should be also excluded by adding "(c) in the course of providing legal advice to their client" to the second sentence.

Reason:

As the areas of lawyers' activities and laws for their powers and duties differ in each country, we agree with the idea that the scope of professional secrecy should be stipulated by the laws of each country. However, many countries including Japan have legislation that information of a client that was obtained in the course of it seeking legal advice from a lawyer shall be subject to professional secrecy and legal professional privilege even in areas not directly relevant to judicial proceedings. And in view of important roles of such legal advice for the rule of law and access to justice, the above wording should be added to the Interpretive Notes.

The 4th Paragraph

The portion referring to the power of SROs (self-regulatory organizations) to examine the STR should be incorporated into the body text by removing the bracket therefor.

Reason:

It is the SROs that can most precisely determine what matter falls under professional secrecy or legal profession privilege, and if SROs do not have such power of examination of STR, the system of reporting to SROs instead of the FIU itself would become meaningless.

Recommendation 15

1) We strongly oppose such recommendation.

Reason:

The JFBA has strongly opposed imposing the reporting obligation just on the basis of suspicion. The reasons therefor were described in the Opinion submitted to the FATF last August and also stated at the FATF forum for private organizations in Paris last October. In short, we do not agree with the above idea because such system will prejudice the independence of lawyers from government authorities, erode the public-at-large's confidence in lawyers, and make it difficult for lawyers to play the role of protecting the legitimate right of their client, resulting in preventing the realization of the rule of law and public access to justice. We firmly maintain this stance.

2) We oppose the addition of restrictions on terrorist financing to this recommendation.

Reason:

Addition of restrictions on terrorist financing is suggested not only in Recommendation 15 but also in Recommendations 18, 21, 24, 26, 28, 30, 31, 35, 36 and 45, and we oppose all of them. As opposed to money laundering in which the source of funding is a problem, the use of funds is the matter in case of terrorist financing, so the purpose and method of the restrictions is different. This issue has not been fully discussed yet nor been taken up in the Consultation Paper, which would raise a procedural problem. Therefore, we oppose the sudden addition of such sweeping restrictions.

<u>Recommendation 17</u>

We oppose the rule to prohibit tipping-off.

Reason:

Recommendation 17 ignores the realities of legal practice based on the confidential relationship with clients and would pose a risk of making lawyers minions of investigative organizations. Therefore, we oppose the imposition of such obligation on lawyers.

The Interpretive Note to Recommendation 17 provides that lawyers should be entitled to seek to dissuade a client from engaging in illegal activity. In view of the professional responsibilities to be carried out by lawyers for the rule of law, it is natural to allow such dissuasion and this should be maintained. However, to prohibit tipping-off while allowing lawyers to dissuade a client from engaging in a possibly illegal activity by showing the legal basis should be considered as a restriction of doubtful effectiveness. In brief, lawyers should not be prohibited from tipping off.

<u>Recommendation 18</u>

We oppose the application of Recommendation 18 to lawyers as it stands.

Reason:

The scale of the overwhelming majority of law offices in Japan is small ranging from sole practitioners to just a few lawyers. To obligate such small offices to develop the same programs as banks including, as a minimum, the designation of compliance officers, adequate screening procedures to ensure high standards when hiring employees, employee training programs or audit functions to test the system would impose an excessive burden and would be substantially impossible. In fact, it is difficult to

implement such programs in most cases. Therefore, it is impractical to apply Recommendation 18, as it stands, directly to lawyers.

Recommendation 21

1) We ask for clarification that the administrative sanctions set forth in Recommendation 21 shall include disciplinary action against lawyers by bar associations.

Reason:

In Japan, bar associations and the Japan Federation of Bar Associations exclusively implement the supervisory and disciplinary power regarding any illegal or unethical acts of lawyers. Therefore, in Japan, the sanctions in case of any lawyer's failure to comply with restrictions as gatekeeper for prevention of money laundering should be those imposed by the relevant bar association, and we think these are more effective and reasonable sanctions.

2) In the last sentence in the bracket, cases subject to criminal punishment should be limited to those cases when it does not report with the knowledge of money laundering committed.

Reason:

The draft recommendation sets forth that intentional failure to comply as a whole is subject to criminal punishment, but intentional failure includes *de minimis* and gross violations. For example, it is possible that lack of a proper compliance system may be subject to criminal punishment if it is recognized as intentional.

Making all such breaches subject to criminal punishment exceeds the criminal law power of the state. We think the imposition of disciplinary punishment by bar associations is enough in most cases. The scope of criminal sanctions in the draft recommendation is too broad, and cases subject to criminal punishment should be limited to those cases when it does not report with the knowledge of money laundering committed.

Recommendation 27

b) We agree with the idea that the power of supervision over implementation of anti-money laundering measures for lawyers may be also granted to SROs. However, it should be provided that the supervision by SROs shall be within the scope of supervision under the due authority of SROs in each country.

Reason:

In Japan, only bar associations and the Japan Federation of Bar Associations have the right to supervise and discipline lawyers under the Practicing Lawyers Law. As the government does not have the right to supervise lawyers in Japan, an option of supervision by SROs must be granted. However, it is neither necessary or proper to grant a special right of supervision to SROs only in the case of anti-money laundering measures that is different from the ordinary right of supervision, thus it should be concluded that the ordinary right of supervision is sufficient.

Recommendation 28

It should be clearly stipulated that the term "competent authorities" includes any SRO exercising the power of supervision in accordance with Recommendation 27.

Reason:

The right to establish guidelines for anti-money laundering measures including, but not limited to, detecting suspicious patterns of behavior should be granted to a SRO if such SRO has supervisory power in accordance with Recommendation 27. The SRO in touch with the reality of legal practice can establish the most appropriate guidelines. Moreover, if only government authorities have the power to establish guidelines while granting the SRO the supervisory power under Recommendation 27, such SRO will be merely the agent exercising the supervisory power on behalf of the government authorities, and consequently would prejudice the SRO's independence and be in contradiction of that SRO's autonomy. Especially in Japan, only bar associations and the Japan Federation of Bar Associations are entitled to exercise the supervisory power for lawyers, so the right to establish guidelines in the case that a SRO has supervisory power should be granted.

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