December 13, 2011

VIA E-MAIL (fatf.consultation@fatf-gafi.org)

Mr. John Carlson  
Principal Administrator  
FATF Secretariat  
Annexe Franqueville 238  
2, rue André Pascal  
75016 Paris  
France

Re: Follow-Up Comments to FATF Consultative Meeting in Milan

Dear John:

The American Bar Association (“ABA”), which has almost 400,000 members, is pleased to offer these comments to the Financial Action Task Force (“FATF”) on the issues raised at the FATF Consultative Meeting in Milan, Italy on December 5-6, 2011. As Chair of the ABA Task Force on Gatekeeper Regulation and the Profession, I have been authorized to express the ABA’s views on these issues.

Based on the discussions at the Consultative Meeting in Milan, this letter will supplement the points we expressed in our January 7, 2011, June 17, 2011, and September 16, 2011 letters and will offer suggested changes to the text of certain of the Standards. These proposed changes are attached hereto as Exhibit A. The discussion below highlights the rationale for the non-stylistic changes contained in the attached changes. Because of the compressed time period between the end of the Milan meeting and the deadline for comments from the attendees at the meeting, we have purposely kept our comments to a minimum.

R. 5 (Client Due Diligence). We have reviewed the suggested changes to R. 5 submitted to the FATF by the International Bar Association (“IBA”) by letter dated December 13, 2011. The ABA is in agreement with these proposed changes.

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Copies of the ABA’s three previous comment letters to the FATF are available at the following links:  
http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_abaresponentofatfconsultationpaper.pdf,  
http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011jun17_gatekeepero_l.pdf, and  
R. 6 (Politically Exposed Persons). The ABA reiterates its opposition to the extension of the PEP framework to domestic PEPs. This extension appears to conflict with the original purpose of R. 6, which was to address the money laundering susceptibility of foreign PEPs. The extension of R. 6 to domestic PEPs distorts the purpose of R. 6 and will impose a costly and burdensome compliance burden on the legal profession. Allowing competent authorities to define the contours of who constitutes a domestic PEP will create uncertainty on the part of those private sector parties who engage in cross-border transactions. A domestic PEP may be defined in a certain manner in one jurisdiction and defined wholly differently in another jurisdiction. This type of variation will likely impose significant compliance burdens on the legal profession and will do little to advance clarity on compliance requirements. The apparent reluctance of the FATF to issue lists of PEPs—foreign or domestic—further exacerbates this concern.

As we discussed in Milan, it is inappropriate to include in revised R. 6 an explicit statement that “family members” and “close associates” of PEPs should be subject to the same requirements under R. 6 as PEPs. The Standards do not define these phrases nor does the FATF produce lists identifying those who fall within these broad categories. The absence of definitional clarity and FATF-produced lists of these individuals makes compliance difficult and, indeed, unlikely.

Assuming that the FATF determines to preserve the domestic PEP category, the changes contained in Exhibit A would add more clarity in this area. The changes in Exhibit A also make clear that the risk-based analysis is applicable to domestic PEPs (as currently written, that point is unclear) and offers suggested refinement to the “family member” and “close associate” categories.

R. 12 (DNFBPs). Pursuant to discussions with Richard Chalmers after the Tuesday session in Milan, the IBA has proposed a clarifying change to R. 12 in its December 13, 2011 letter to the FATF. The ABA is in agreement with this proposed change.

R. 16 (DNFBPs/Legal Professional Privilege). We have reviewed the suggested changes to the last paragraph of R. 16 submitted to the FATF by the IBA by letter dated December 13, 2011. The ABA is in agreement with these proposed changes.

R. 28 (Documents and Information). The new language in R. 28 needs to make clear that competent authorities should be able to use a wide range of investigative techniques suitable for the investigation of money laundering and terrorist financing consistent with lawful process. The concept of lawful process is contained in the penultimate sentence of R. 28, but it should also be referenced in the third sentence of R. 28.

INR5 (Risk Based Approach). We have reviewed the suggested changes to INR5 submitted to the FATF by the IBA by letter dated December 13, 2011. The ABA is in agreement with these proposed changes. We note that the deletion of the reference to “deed of trust” in paragraph 5.a) of INR5 is designed to avoid confusion with an American-style deed of trust, which is a form of real estate financing instrument widely used in the United States. If the intent is to refer to a
written trust document (sometimes referred to as a trust deed or trust agreement), perhaps it would be clearer to refer to that particular instrument rather than to a deed of trust.

**INR12 and INR16.** As the ABA observed at the Milan meeting, the language at the end of INR12 and INR16 should clarify that countries that seek to issue laws and regulations relating to DNFBPs focusing on their underlying activities but not relating exclusively to DNFBPs should be consistent with each country’s fundamental principles of domestic law. In the United States, for example, federal courts have held that Congress must expressly indicate an intent to regulate lawyers engaged in the practice of law before a statute establishing a broad new regulatory scheme will be deemed to cover such lawyers. The regulation of the practice of law in the U.S. is traditionally the province of the states, and “if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute,’” *American Bar Association v. Federal Trade Commission*, 430 F.3d 457, 471-472 (D.C. Cir. 2005) (quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989), and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). We recognize that the language at the end of INR12 and INR16 is being carried forward from the existing Standards, but this provision would be enhanced through the addition of the reference to fundamental principles of domestic law. Attached as Exhibit A is suggested language.

**INR33 (Beneficial Ownership).** Bill Clark discussed during the Milan meeting suggested refinements to INR33 that would clarify that Standard. Attached as Exhibit A are these proposed changes, all of which the ABA supports.

**INR34 (Legal Arrangement and Beneficial Ownership).** We have reviewed the suggested changes to the first paragraph of INR 34 submitted to the FATF by the Society of Estate and Trust Practitioners by letter dated December 12, 2011. The ABA is in agreement with these proposed changes.

**Glossary (Tax Crimes as Predicate Offenses).** At the Milan meeting, the ABA articulated the rationale for opposing the addition of tax crimes as a predicate offense for money laundering and terrorist financing. The ABA’s rationale is more fully contained in its letter to the FATF dated September 17, 2011. The FATF indicated at the Milan meeting that it was unlikely that it would delete tax crimes from the definition of predicate offenses. The ABA continues to oppose the addition of this new language and requests that it be deleted from the revised Standards.

In light of the proposed significant revisions, both substantively and stylistically, to the Standards, the ABA would be willing to review the Standards scrupulously before their final adoption by the FATF to ensure that the revisions do not contain any internal inconsistencies or stylistic errors. The purpose is not to re-visit the substantive issues we have been discussing with the FATF this year, but rather to ensure that a document that will be used globally will withstand careful scrutiny by the international community. We are confident that the other legal groups, such as ACTEC, IBA, CCBE, and STEP, would be willing to join in this important effort.
The ABA appreciates the opportunity to provide its comments to the FATF on the proposed revisions to the Standards. If we can address any of these comments in more detail or if we can be of further assistance, please feel free to contact me at (410) 244-7772 or klshepherd@venable.com.

Very truly yours,

Kevin L. Shepherd
cc: Mr. Richard Chalmers (via email)
    Stephen Revell, Esquire
    Ms. Emma Oettinger
    John Riches, Esquire
    Claudio Cocuzza, Esquire
    Members, ABA Task Force on Gatekeeper Regulation and the Profession
    Thomas M. Susman, Director, ABA Governmental Affairs Office
    Duncan E. Osborne, Esquire
    William H. Clark, Jr., Esquire
    Leigh Basha, Esquire
EXHIBIT A
PROPOSED CHANGES TO CERTAIN RECOMMENDATIONS

R. 6 (Politically Exposed Persons)

6. Financial institutions should, in relation to foreign politically exposed persons (whether as customer or beneficial owner), in addition to performing normal due diligence measures:

   a) Have appropriate risk management systems to determine whether the customer or the beneficial owner is a politically exposed person.
   b) Obtain senior management approval for establishing or continuing (if it is an existing customer) such business relationships.
   c) Take reasonable measures to establish the source of wealth and source of funds.
   d) Conduct enhanced ongoing monitoring of the business relationship.

Financial institutions should be required to take reasonable risk-based measures to determine whether a customer is a domestic politically exposed person or a person who is or has been entrusted with a prominent function by an international organisation. In cases of a higher risk business relationship with such persons, financial institutions should be required to apply the measures referred to in paragraphs b, c and d.

The requirements for all types of PEPs should also apply to immediate family members or known close business associates of such PEPs.

Glossary

| Politically Exposed Persons” (PEPs) | PEPs are individuals who are or have been entrusted with prominent public functions either domestically or by a foreign country, for example. Examples include Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important and senior political party officials. PEPs are also individuals who are or have been entrusted with prominent functions by an international organisation and are members of senior management, i.e. directors, deputy directors and members of the board or equivalent functions. Foreign PEPs are those individuals who are or have been entrusted with prominent public functions by a foreign country, while domestic PEPs are those who are or have been entrusted domestically with such a function. The definition of PEPs is not intended to cover middle ranking or more junior individuals in the foregoing categories. |
INR12 and INR16

The designated thresholds for transactions are as follows:

- Casinos, including internet casinos (under Recommendation 12) - USD/EUR 3000
- For dealers in precious metals and dealers in precious stones when engaged in any cash transaction (under Recommendations 12 and 16) - USD/EUR 15,000.

Financial transactions above a designated threshold include situations where the transaction is carried out in a single operation or in several operations that appear to be linked.

The Interpretative Notes that apply to financial institutions are also relevant to designated non-financial businesses and professions (DNFBPs), where applicable. To comply with Recommendations 12 and 16, but subject to each country’s fundamental principles of domestic law, countries do not need to issue laws or regulations that relate exclusively to lawyers, notaries, accountants and the other designated non-financial businesses and professions (DNFBPs) so long as these businesses or professions are included in laws or regulations covering the underlying activities.

INR33

1. Competent authorities should be able to obtain or have access in a timely fashion to adequate, accurate and current information on the beneficial ownership and control of companies and other legal persons (beneficial ownership information) that are created in the country. Countries may choose the mechanisms they rely on to achieve this objective, although they should also comply with the minimum requirements set out below. It is also very likely that countries will need to utilise a combination of mechanisms to achieve the objective.

2. As part of the process of ensuring that there is adequate transparency regarding legal persons, countries should have mechanisms that:

   a) Identify and describe the different types and forms and basic features of legal persons in the country.

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20 Beneficial ownership information for legal persons is the information referred to in INR.5, paragraph 5(b)(i). Controlling shareholders as referred to in INR5, paragraph 5(b)(i) may be based on a threshold, e.g. any persons owning more than a certain percentage of the company (e.g. 25%).

21 References to creating a legal person, include incorporation of companies or any other mechanism that is used.
b) Identify and describe the processes: (i) for the creation of those legal persons, and (ii) for the obtaining and recording of basic and beneficial ownership information.

c) Make the above information publicly available.

d) Assess the ML/TF risks associated with different types of legal persons created in the country.

A. Basic Information

3. In order to determine who the beneficial owners of a company are, competent authorities will require certain basic information about the company, which, at a minimum, would include information about the legal ownership and control structure of the company. This would include information about the status and powers of the company, its shareholders and its directors.22

4. All companies created in a country should be registered in a company registry.2223 Whichever combination of mechanisms are used to obtain and record beneficial ownership information (see section B), there is a set of basic information on a company that needs to be obtained and recorded by the company as a necessary prerequisite. The minimum basic information to be obtained and recorded by a company should be:

(a) company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers (e.g. memorandum & articles of association), a list of directors, and

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22 Paragraphs 1 through 16 apply to legal persons whose incorporation or formation requires a filing in a company registry. References to shareholders include members or other holders of ownership interests, and references to directors include managers, partners and other persons who exercise control over a legal person.

2223 “Company registry” refers to a register in the country of companies incorporated or licensed in that country and normally maintained by or for the incorporating authority. It does not refer to information held by or for the company itself.

2224 The information can be recorded by the company itself or by a third person under the company’s responsibility.
(b) a register of its shareholders or members, containing the names of the shareholders and members and number of shares held by each shareholder and categories of shares (including the nature of the associated voting rights).

5. The company registry should record all the basic information set out in paragraph 4(a) above.

6. The company should maintain the basic information set out in paragraph 4(b) within the country, either at its registered office or at another location notified to the company registry. However, if the company or company registry holds beneficial ownership information within the country, then the register of shareholders need not be in the country, provided the company can provide this information promptly on request.

B. Beneficial Ownership Information

7. Countries should ensure that either: (a) information on the beneficial ownership of a company is obtained by that company and available at a specified location in their country or (b) there are mechanisms described in paragraph 8(c) in place so that the beneficial ownership of a company can be determined in a timely manner by a competent authority.

8. In order to meet the requirements in paragraph 6, countries should use one or more of the following mechanisms:

   a) (i) Requiring companies or company registries to obtain and hold up-to-date information on the companies’ beneficial ownership;

   b) (ii) Requiring companies to take reasonable measures to obtain and hold up-to-date information on the companies’ beneficial ownership;

   c) (iii) Using existing information, including (i) information obtained by financial institutions and/or DNFBPs, in accordance with Recommendations 5 and 12; (ii) information held by other competent authorities on the legal and beneficial ownership

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24 This is applicable to the nominal owner of all registered shares.

25 Measures taken should be proportionate to the level of risk or complexity induced by the ownership structure of the company or the nature of the controlling shareholders.

26 Countries should be able to determine in a timely manner whether a company has an account with a financial institution within the country.
of companies, for example company registries, tax authorities or financial or other regulators, and (iii) information held by the company as required above in Section A.

9. Regardless of which of the above mechanisms are used, countries should ensure that companies cooperate with competent authorities to the fullest extent possible in determining the beneficial owner. This should include:

- Requiring that one or more natural persons resident in the country is authorised by the company\textsuperscript{27,28} and accountable to competent authorities, for providing all basic information and available beneficial ownership information, and giving further assistance to the authorities; and/or

- Requiring that a DNFBP in the country is authorised by the company and accountable to competent authorities, for providing all basic information and available beneficial ownership information, and giving further assistance to the authorities; and/or

- Other comparable measures specifically identified by the country which can effectively ensure cooperation.

10. All the persons, authorities and entities mentioned above, and the company itself (or its administrators, liquidators or other persons involved in the dissolution of the company), should maintain the information and records referred to for at least five years after the date on which the company is dissolved or otherwise ceases to exist, or five years after the date on which the company ceases to be a customer of the professional intermediary or the financial institution (for such intermediaries/institutions).

C. Timely access to current and accurate information

11. Countries should have mechanisms that ensure that basic information, including information provided to the company registry is accurate and updated on a timely basis. Countries should require that any available information referred to in paragraph 7 is accurate and is kept as current and up to date as possible, and the information should be updated within a reasonable period following any change.

12. Competent authorities, and in particular law enforcement authorities, should have all the powers necessary in order to be able to obtain timely access to the basic and beneficial ownership information held by the relevant parties.

\textsuperscript{27,28} Members of the company’s board or senior management may not require specific authorisation by the company.
13. Countries should require their company registry to facilitate timely access by financial institutions, DNFBPs and other countries’ competent authorities to the public information they hold, and at a minimum to the information referred to in paragraph 4(a) above. Countries should consider also facilitating timely access by FIs and DNFBPs to information referred to in paragraph 4(b) above.

14. Countries may exempt from the implementation of the requirements of Recommendation 33 a company that is listed on a recognized stock exchange and subject to disclosure requirements or that is subject to regulation that reduces its ML/TF risk.

D. Obstacles to Transparency

14.15. Countries should take measures to prevent the misuse of bearer shares and bearer share warrants, for example by applying one or more of the following mechanisms: (a) prohibiting them; (b) converting them to registered shares or share warrants (for example through dematerialisation); (c) immobilising them by requiring them to be held with a regulated financial institution or professional intermediary, or (d) requiring shareholders with a controlling interest to notify the company, and the company to record their identity.

15.16. Countries should take measures to prevent the misuse of nominee shareholders and nominee directors, for example by applying one or more of the following mechanisms: (a) require nominee shareholders and directors to disclose the identity of their nominator to the company and to any relevant registry, and for this information to be included in the relevant register, or (b) require nominee shareholders and directors to be licensed, for their nominee status to be recorded in company registries, and for them to maintain information identifying their nominator and make this information available to the competent authorities upon request.

E. Other Legal Persons

17. In relation to foundations, Anstalt, and limited liability partnerships, countries should take similar measures and impose similar requirements, as those required for companies, taking into account their different forms and structures.

18. As regards other types of legal persons, countries should take into account the different forms and structures of those other legal persons, and the levels of ML/TF risks associated with each type of legal person with a view to achieving appropriate levels of transparency. At a minimum, countries should ensure that similar types of basic information should be

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29 A nominee shareholder or nominee director is one that has been nominated for a purpose that includes obscuring the identity of the nominator.
recorded and kept accurate and current by such legal persons, and that such information is accessible in a timely way by competent authorities. Countries should review the ML/TF risks associated with such other legal persons, and based on the level of risk determine the measures that should be taken to ensure that competent authorities have timely access to adequate, accurate and current beneficial ownership information for such legal persons.

F. Liability and sanctions

19. There should be a clearly stated responsibility to comply with the requirements in this Interpretative Note, as well as liability and effective, proportionate and dissuasive sanctions as appropriate for any legal or natural person that fails to properly comply with the requirements.

G. International Cooperation

20. Countries should rapidly, constructively and effectively provide international cooperation in relation to basic and beneficial ownership information, on the basis set out in R.36 and R.40. This should include (a) facilitating access by foreign competent authorities to basic information held by company registries; (b) exchanging information on shareholders; and (c) using their powers, in accordance with their domestic law, to obtain beneficial ownership information on behalf of foreign counterparts. Countries should monitor the quality of assistance they receive from other countries in response to requests for basic and beneficial ownership information or requests for assistance in locating beneficial owners residing abroad.