

APPENDIX I

Checklist of Ten Issues for Legal Profession Representatives Whose FATF Mutual Evaluations Have Not Yet Occurred

This Appendix summarizes information discussed elsewhere in this Article. It is based in large part on the advice from the three “case study” jurisdictions and offers a checklist of issues for jurisdictions that have not yet undergone their FATF 4th Round Mutual Evaluation.

1. **Confirm Timing**: The FATF webpage contains a searchable calendar that indicates the timetable for each country's Mutual Evaluation Report.⁴³³ The FATF Procedures document explains the steps and timetable. Legal profession representatives should recognize the significant lead time involved and become familiar with the deadlines for the national risk assessment and the documents submitted before the on-site assessment visit.⁴³⁴

2. **Identify Relevant Government Authorities**: Jurisdictions differ with respect to the government body that takes the lead in interacting with FATF.⁴³⁵ If the legal profession representatives are able to locate the relevant government entity and establish a relationship with the government representatives in advance of the mutual evaluation, that should be helpful.⁴³⁶ Government representatives might welcome this kind of relationship because the legal profession representatives have knowledge that will make the

433. See FATF Global Assessment Calendar, *supra* note 102 and accompanying text.

434. See *FATF 4th Round Methodology*, *supra* note 95 (discussing the FATF 4th Round Methodology document, its Timeline appendix, and the fact that tasks that are performed two, four, and six months before the FATF on-site visit).

435. If legal profession representatives are not sure whom they should reach out to, one source that can provide a starting point is the International Bar Association's Anti-Money-Laundering Forum webpage. This webpage has listings for many countries in the world and these listings identify the relevant government bodies *Anti-Money-Laundering* Forum, INT'L B. ASS'N, <https://www.anti-moneylaundering.org/Default.aspx> [<https://perma.cc/7YAN-YT9P>].

436. Cf. 2017 *Canada Risk Assessment*, *supra* notes 196-97, which assigned a high vulnerability rating to Canada's legal profession and did not note professional regulation initiatives. At the time the Canadian government issued its threat assessment report, it had recently lost in the Supreme Court a fourteen-year legal fight with lawyer regulators regarding the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and regulations pertaining to the legal profession.

government representatives' jobs easier in completing the necessary paperwork.

3. **Recognize the Importance of the National Risk Assessment:**

A country's national risk assessment plays a key role in the FATF Mutual Evaluation. Some of these risk assessments have been prepared with little input from the legal profession in their countries. In order to maximize their chance of input, legal profession representatives should familiarize themselves with any prior risk assessments performed by their country and consider whether and how they can participate in the country's forthcoming risk assessment.⁴³⁷ Because countries have been criticized for "stale" or weak threat assessments, governments should welcome the participation of the legal profession.⁴³⁸ The participation, however, must be meaningful. FATF Reports have expressed criticism of countries that painted too optimistic a picture of the risks posed by legal professionals.⁴³⁹

437. There are three different reasons why legal professions might want to consider, in advance of the mutual evaluation, how they could contribute to the national risk assessment. First, legal professions that have ignored requests to participate have been criticized in their country's FATF mutual evaluation Report. *See supra* note 150 (noting that Serbia's MER criticized the legal profession for not responding to a questionnaire that solicited information for the National Threat Assessment). Second, legal professions might want to participate in the development of the risk assessment, rather than simply critiquing it later as unfounded, because the FATF Mutual Evaluation Reports give great deference to these national reports. *See, e.g., FATF 4th Round Methodology, supra* note 95, ¶ 7 ("Assessors should use the country's own assessment(s) of its risks as an initial basis for understanding the risks, but should not uncritically accept a country's risk assessment as correct, and need not follow all its conclusions."); *id.* at 8, ¶ 15 ("Assessors are not expected to conduct an independent risk assessment of their own when assessing Recommendation 1 and Immediate Outcome 1, but on the other hand should not necessarily accept a country's risk assessment as correct. In reviewing the country's risk assessment, assessors should consider the rigour of the processes and procedures employed; and the internal consistency of the assessment. . . .") A third reason to participate and help shape the findings is because FATF reports have been critical of legal professions that are unfamiliar with or disagree with the findings contained in their country's national risk assessments. *See, e.g., supra* note 153 (citing Andorra MER); *Portugal MER, supra* note 109, ¶ 300 ("[The regulator] could not provide an analysis of the conclusions of the [National Risk Assessment] that directly targeted their specific sector(s), nor clarify the source(s) of data.").

438. *See, e.g., Australia MER, supra* note 109, ¶ 2.8 ("The [National Threat Assessment's] conclusions reasonably reflect most of Australia's main risks (which likely still prevail), but the NTA is now three years old and assessors are not confident that it is current for all risks, including where subsequent assessments have superseded it in some areas . . .").

439. *See, e.g., supra* notes 151-52 and accompanying text.

4. Look Outside the Country for Ideas About Risk

Assessment: One of the recurring themes about lawyer AML issues is how little empirical data is available. Given the lack of data that legal profession representatives are likely to encounter, they may want to look outside their own country for ideas to consider in a risk assessment.

5. Become Familiar with FATF's Mutual Evaluation

Template Documents: It is important for legal profession representatives to realize that their own country likely will submit information to the FATF on-site assessment team using the FATF template found in the FATF 4th Round Methodology document.⁴⁴⁰ FATF's 4th Round Mutual Evaluation Report is also likely to follow the structure in the template. Legal profession representatives would be wise to familiarize themselves with these documents and strive to collect the requested data. They will also need to learn how to present the information they consider relevant using the terminology and framework that the FATF assessors consider relevant.

6. Document and Communicate Profession-Based AML

Requirements: Legal profession representatives should understand that the assessment team, and perhaps the profession's own government representatives, may not fully understand the nature and scope of professional regulation unless they are educated on that point. Moreover, the FATF assessment team is likely to assume that if a lawyer is not subject to the same AML regulations as all other DNFBPs, then the lawyer's AML obligations are deficient. Legal profession representatives need to be familiar not only with their own regulations, but with the AML regulations applicable to other kinds of DNFBPs so that they can explain where there is overlap and why aspects of the national AML scheme applicable to other DNFBPs may be duplicative and thus unnecessary for lawyers.⁴⁴¹

440. See *FATF 4th Round Methodology*, *supra* note 95.

441. See, e.g., Nicoll Email, *supra* note 174 (recommending additional education about the relationship of FATF to professional regulations). There may also be additional regulations with the forum, including regulatory requirements that overlay obligations for example of identification, verification in real estate transactions, foreign investment, company, trust formation, charities, and not for profit organizations that mimic or duplicate some or most of the

7. Develop, Document, and Communicate Professional Regulation Implementation Data: Legal profession representatives should be prepared to present documentation to support the jurisdiction's lawyer AML education efforts and regulatory enforcement, including education efforts and criminal and disciplinary cases.⁴⁴² The legal profession in one country, for example, was criticized for not providing the FATF on-site team with its educational materials.⁴⁴³ Legal profession representatives might want to use a forthcoming visit as an opportunity to educate or reeducate the jurisdiction's lawyers using existing or new tools. For example, the Ghana Bar, which is a member of the IBA, was criticized for not circulating the IBA/ABA/CCBE Typologies Guide.⁴⁴⁴

8. Identify Appropriate Legal Profession Representatives to Speak with the FATF On-Site Team: According to the FATF Procedures document, two months before the FATF assessment team's on-site visit, the country must provide the assessment team with the program for its visit, which will include the private sector bodies the team will meet with. Legal profession representatives should work with government authorities to ensure that the appropriate legal profession representatives are invited to meet the FATF on-site team.⁴⁴⁵ They should also make sure that the individuals tasked to meet with FATF representatives have all of the information that would be helpful.

AML/CTF regulatory requirements). *Id.* Many such regulatory obligations arise pursuant to state based legislative schemes. *Id.*

442. *See, e.g., supra* notes 230-31 and accompanying text (noting FATF interest in some of the information the US legal profession collected).

443. *See Iceland MER, supra* note 109, ¶ 315 (observing, in an arguably critical manner, that the Iceland Bar Association had not provided the FATF on-site assessors with a copy of the guidance it provided to its members).

444. *See Ghana MER, supra* note 148 (citing Ghana's Mutual Evaluation Report).

445. *See Wilson Email, supra* notes 193-95 and accompanying text (reporting on discussions within Canada about whether the legal profession representatives should be from British Columbia or from the Federation, which had broader representation). If government representatives do not reach out to the legal profession representatives, legal profession representatives may want to take the initiative because countries have been criticized for their failure to have legal profession representatives meet with the on-site assessment team. *See supra* notes 153-54 and accompanying text (noting countries whose legal profession had been criticized because it had not met with the FATF on-site inspectors or the representatives were unfamiliar with the country's risk assessment).

9. Consider Reaching Out for Advice to Legal Professions that Have Already Undergone Their Mutual Evaluations: Legal profession representatives who are planning for their country's mutual evaluation may find it useful to consult with individuals from other countries who have already gone through the process.⁴⁴⁶ Countries that have done so have found it useful.⁴⁴⁷ Among other points, legal profession representatives may want to speak with one another to learn how they can most effectively remind the FATF on-site assessors (and perhaps their own government) of the points made in the FATF Interpretive Note to Recommendation 23.⁴⁴⁸

10. Consider Cost-Benefit Arguments and Data: FATF has been criticized for not adequately taking into the account the costs imposed by its Recommendations. The costs may be tangible, such as the financial cost of administering an AML system.⁴⁴⁹ However, the costs may also be intangible, such as a loss of confidence in the rule of law that might result under certain circumstances if lawyers are required to act as agents of the government and report suspicious transactions. Additional costs might include the loss of opportunities in which a lawyer persuaded a client to avoid money laundering activities. While this undoubtedly would not work for all clients, there might be some clients for which it would work. If legal profession

446. See *supra* note 252 (recommending that countries that are looking for a venue in which to meet each other and have these kinds of conversations might consider using the webpage and resources of the International Conference of Legal Regulators ("ICLR") and the IBA Bar Issues Commission).

447. See *supra* notes 210-11 and accompanying text (describing Case Study #3 and US-Australian information-sharing).

448. See *supra* notes 91, 159-60 and accompanying text (describing the Interpretive Note to Recommendation 23 and the lack of discussion about this Note in the reports).

449. The Law Society of England and Wales is one of the few groups that has collected empirical data about the costs and benefits of lawyer AML efforts. See Law Soc., *The costs and benefits of anti-money laundering compliance for solicitors: Response by the Law Society of England and Wales to the call for evidence in the Review of the Money Laundering Regulations 2007* (Dec. 2009), <http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/documents/law-society-response-to-the-hm-treasury-money-laundering-review-2009/> [<https://perma.cc/8VZP-4NQW>] (noting that solicitors filed a number of SARs, but few required government follow-up action; also includes cost information). See also Terry, FATF Introduction, *supra* note 89, at 29-32 (summarizing the data the Law Society presented to its government).

representatives want to offer cost-benefit arguments, they should consider how best to develop and frame those points.

ARTICLE

THE RELEVANCE OF FATF'S RECOMMENDATIONS AND FOURTH ROUND OF MUTUAL EVALUATIONS TO THE LEGAL PROFESSION*

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ABSTRACT

More than two hundred countries in the world have agreed to abide by the anti-money laundering (“AML”) recommendations developed by the Financial Action Task Force (“FATF”), which is an intergovernmental organization. This Article focuses on the potential impact on the legal profession of FATF’s fourth round of mutual evaluations. During these mutual evaluations, which currently are underway, FATF-affiliated countries examine each other’s compliance with the FATF Recommendations and recommend follow-up action. This Article first presents the legal profession-related results from the completed Mutual Evaluation Reports. A number of these FATF Reports recommend changes that include requiring lawyers to report suspicious client transactions, greater enforcement of existing lawyer AML rules, and changing the entities that supervise lawyer AML

* This Article includes information that was current through July 25, 2018, which is shortly before the Article’s editorial process began, although much of it was written before December 2017 because it was circulated to the attendees at the Fordham University School of Law *Regulation of Legal and Judicial Services Conference*. Because FATF regularly updates its documents and the FATF Mutual Evaluation process is ongoing, the Authors recommend that readers check for updates. All URLs were accurate as of July 2018.

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efforts. The next Part of this Article examines the legal profession AML situation in the Authors' home countries of the United States and Peru, noting the current or potential impact in these countries of the FATF Recommendations, the FATF Mutual Evaluation process, and lawyer-related money laundering scandals. The final Part of this Article suggests an alternative, education-focused, peer-review approach to the legal profession portions of the FATF Mutual Evaluations that arguably would decrease lawyer facilitation of criminal money laundering activities while better protecting traditional lawyer values that are globally recognized as important components of administration of justice and rule of law systems. Because the regulatory impact of FATF's mutual evaluations may be much broader than anti-money laundering issues, everyone interested in the topic of lawyer regulation should be aware of the FATF Recommendations and the ongoing mutual evaluation process.

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I. INTRODUCTION

This Article focuses on international anti-money laundering (“AML”) standards and the “mutual evaluation” assessments that currently are underway to measure compliance with these standards. Viewed from one perspective, this Article focuses on a narrow topic that might seem of interest to a limited audience. The Authors submit, however, that this topic should be of interest to everyone interested in legal services regulation because AML regulations raise issues that address the core of what it means to be a lawyer. Moreover, the developments discussed in this Article have the potential to shape not only lawyers’ AML obligations, but lawyer regulation more broadly, including the nature of the lawyer-client relationship.

This Article proceeds in the following manner. After a brief introduction in Part I, Part II continues by explaining why governments care about money laundering issues and the ways in which lawyers previously have been involved in illegal money laundering. Part III provides an introduction to an international intergovernmental body called the Financial Action Task Force (“FATF”) and its AML recommendations. Part IV focuses on the mutual evaluation process that countries use to evaluate each other’s compliance with the FATF Recommendations. Section IV.A provides information about the FATF mutual evaluation process and Section IV.B analyzes the treatment of the legal profession in the completed reports. Section IV.C explains how the legal professions in three countries prepared for their mutual evaluations. Sections V.A and V.B examine the AML lawyer regulation situation in the United States and Peru, including scandals