

Mr. David Lewis  
Executive Secretary  
Financial Action Taskforce (FATF)  
2 rue André Pascal  
75116 Paris  
France

5 April 2018

**Dear Mr. Lewis:**

**Re: FATF Draft paper on “Vulnerabilities linked to the concealment of beneficial ownership”**

The IBFed appreciates the opportunity to comment upon the FATF Draft paper on “Vulnerabilities linked to the concealment of beneficial ownership”.

As you know, the International Banking Federation (IBFed<sup>1</sup>) is the representative body for national and international banking federations from leading financial nations around the world. This worldwide reach enables the IBFed to function as the key international forum for considering legislative, regulatory and other issues of interest to the banking industry and its customers. We also have a keen interest in the efficiency of the global tax system

The FATF draft paper is a most interesting document with numerous case studies on how certain structures can be abused to conceal the beneficial owners. These examples are very vivid for financial intermediaries and can help compliance officers and the front in daily business to better understand and control certain structures.

However, the case studies show professionals either deliberately acting alongside their clients or showing great carelessness or total disinterest in knowing who their clients were. In many cases the

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<sup>1</sup> The International Banking Federation (IBFed) was formed in 2004 to represent the combined views of our national banking associations. The IBFed collectively represents more than 18,000 banks, including more than two thirds of the largest 1,000 banks in the world. IBFed member banks play a crucial role in supporting and promoting economic growth by managing worldwide assets of over 75 trillion Euros, by extending consumer and business credit of over 40 trillion Euros across the globe, and by collectively employing over 6 million people. The IBFed represents every major financial centre and its members’ activities take place globally. With its worldwide reach the IBFed is a key representative of the global banking industry, actively exchanging with international standard setters and global supervisory bodies on subjects with an international dimension or with an important impact on its members.

experts mentioned could even fall under the penal code. If not, this is due to an incorrect application of anti-money laundering standards or their inapplicability to certain professions.

Therefore we believe that the work of the FATF already largely covers the causes of the problems and the measures to be taken (extension of standards to certain professions, better control).

It also evidences the widening gap between the obligations applicable to financial intermediaries and those applicable to other professions. Similarly it confirms that the quality of the beneficial owner information is unlikely to be formally guaranteed in all cases, as it will always be possible to rely on third parties, straw men and lies.

While it is important to understand the ownership of any legal entity and who controls the legal entity, we believe the form should not be given greater importance than the function. The form of ownership can help understand the activity, but the activity taking place is where the main focus should be. One reason such a small percentage of actual money laundering or terrorist financing is caught is that too much attention is given to what could happen, potentially detracting resources from focusing on actual abuses and actual suspicious activity. Therefore, the white paper needs to clearly emphasize that understanding beneficial ownership is a means to an end and not an end in itself.

As noted in the paper, there are challenges to requiring gatekeepers, particularly attorneys, to report information. In the United States for example, the legal profession is subject to strict codes of ethics that require attorneys to maintain the confidentiality of information provided by clients. There are a few very narrow exceptions to the restricted confidentiality but the goal is to ensure clients receive the best legal advice. Violation of that confidentiality is taken seriously and can lead to an attorney losing his or her license to practice law. Therefore, reliance on attorneys in the United States as a source of information is not viable. The role of the attorney as gatekeeper must be kept in context with their role in society, not limited to their role as gatekeepers in the AML/CFT context.

So overall we believe it should be avoided to reach the financial intermediaries with new requirements and recommendations, with the risk of adding a layer of due diligence and reporting obligations rather than adopting a more purposive approach. In particular, the desired exchange of information between the FIUs, the regulators and the financial institutions must be assessed although the need is understandable from the point of view of the FIU and the regulator.

Please find below our input on the 4 questions raised by the FATF.

**Question 1: “Are there any additional vulnerabilities associated with the concealment of beneficial ownership?”**

There may be instances when it is inappropriate to disclose the beneficial owners of a legal entity to the public at large. Sometimes confidentiality is needed to ensure that a specific, legal project can proceed. Therefore, to balance the competing needs of transparency and confidentiality, something is needed to ensure that the disclosure of beneficial ownership information is limited to appropriate individuals in relation to specific AML concerns.

What needs to be addressed as well is whether the focus on collecting beneficial ownership information could have a negative impact on small business formation. If the costs for registration

and compliance undermine the economic rationale of small business formation, that would increase the barrier to small business development. Since small business development is important for financial inclusion, this concern needs to be considered.

We also believe that some vulnerabilities could be seen as assets in order to reduce risks mentioned. For example, a level playing field should be ensured among the various professionals assisting clients, whether they are financial institutions or Designated Non Financial Businesses and Professions (DNFBP). The principle «same risk, same rules, same requirements» should be applied, where and as far as applicable to the heterogeneous group of obliged entities, as the draft paper clearly shows that the actual asymmetry may lead to distortions and vulnerabilities. Countries should oblige financial institutions, companies and professions outside the financial sector (DNFBP) to reduce their risks of money laundering and terrorist financing and to evaluate and implement efficient measures for them to implement containment.

To adequately assess the beneficial ownership it is key to have a clear definition of the various professions (DNFBPs) involved, their role, their duties, their responsibilities. This would allow drafting rules and requirements that would better mitigate the risk linked to the various professions.

Obtaining information on beneficial ownership is a legislative requirement in a number of countries' terms. However the verification of the information in the absence of independent sources cannot be accurately done. Financial Institutions have to rely heavily on information provided by customers themselves as there is no independent source that verifies the information. This has potential to be abused, as a customer who wants to hide the beneficial ownership merely has to provide inaccurate information. Therefore lack of central registers and legal authority to support this initiative is a vulnerability.

The cost of compliance in identifying beneficial ownership in complex structures should also be factored as the de-risking like hood increases.

There is no mention of crypto or digital currencies which we think should warrant at least as much attention as trade in terms of the vulnerability of moving money outside the banking system.

**Question 2: "What other indicators are available to identify schemes designed to conceal beneficial ownership?"**

Paragraph 73 of the paper should be expanded. If a discretionary trust owns the shares in the corporate, the legal owner is the trustee. The reality is that the information of relevance will be the settlor, the beneficiaries and any accompanying letter of wishes. If the trust is administered in the country, this could be obtained. However, where it is a foreign trust, the information could be more difficult to obtain as well as more time consuming. So the issue that needs to be brought to the fore is that where there is a trust, the corporate should be required to identify and verify the person with an underlying potential interest in the shares and the settlor for the trust in addition to the legal owner.

Multiple nesting of commercial entities where a beneficial owner is owned or controlled by another legal entity - and yet another and another - can be indicative of a potential problem. While there may be legitimate reasons for structuring a business arrangement through multiple layers, the more

layers there are, the more suspicious the structure becomes and the more intense scrutiny that should be expected. Some indicators of the need for further inquiry might include:

- When a legal entity is structured using multiple jurisdictions that have no apparent rationale or connection to the business of the entity, particularly when some of the structures are chartered in high risk jurisdictions.
- When a legal entity moves locations or changes officials or board members frequently without an apparent rationale.
- When a customer is reluctant or obstinate with providing relevant and appropriate requested information, it suggests the customer might have something to hide.

The ability to create a digital wallet and move money without using a bank or having to reveal the identity of the owner of the wallet would seem to open up all kind of possibilities for abuse. The entity itself would be invisible and only the entry and exit points from the crypto world would be visible to the banking community.

**Question 3: “What additional methods and tools are available to prove beneficial ownership?”**

In a globalised and digitised world, initiatives regarding e-ID, e-signature, etc. should be fostered, with worldwide aligned regulations.

As beneficial ownership is an economical concept as much as it might be a legal one, it should be acknowledged that it will rather be a plausibility check at financial intermediaries' and DNFBPs' level. This should be taken into account when designing due diligence requirements in the regulation and enforcement. The addition of formal requirements, performed through forms, registers, etc. may not be appropriate, as beneficial ownership being of economical nature, its purposes may not be adequately identified by means of forms, registers, etc.

We are convinced that the most efficient and effective means to identify and verify beneficial ownership is through the government agency that authorizes the creation of the entity. Therefore, emphasis on the role of government in the beneficial ownership process should be brought to the forefront, since there is a tendency in some jurisdictions to expect the private sector to fulfil a role that more properly belongs to the government. The governments of all countries should establish “national registries” for beneficial ownership information that the private sector can rely upon. While some have argued that access to this information should be limited to competent authorities, it would seem reasonable that banks and other reporting entities with “legitimate interests” in this information should also have ready access, as appropriate for AML purposes.

In this respect we would like to point out that the way central beneficial ownership registers have been established so far – particularly in the EU, based on the AMLD4 and the upcoming AMLD 5 – is suboptimal. There is a lack of harmonization in concepts (the definition of business ownership varies from one country to another and is not in line with the tax concept of Controlling Person under the Common Reporting Standard) and methodologies. The Registers have been designed as additional administrative requirements for obliged entities and not as a tool to help obliged entities comply with their due diligence requirements and to improve the efficiency of the fight against money laundering.

An alternative source for demonstrating beneficial ownership would be through tax returns filed with revenue authorities. While additional legislation might be needed to require the submission of beneficial ownership information or to permit that information to be disclosed to law enforcement agencies or others, since annual returns are required and must often be certified, they could provide another source of beneficial ownership information.

**Question 4: “How do you think the FATF and Egmont Group could best distribute this report to maximise its utility to key stakeholders?”**

We assume the usual channels would be used e.g. internet, country authorities, FIU of each jurisdiction, trade associations etc.

We recommend that the FATF would distribute this report not only in English, but also in other languages such as German, French, Italian, Spanish, Russian and Chinese.

The countries should be required not only to post on their website but also to ensure that supervisors for a sector distil the report and make recommendations to their sector.

Financial trade associations in each jurisdiction should be invited to make the report available to their members.

The various case examples analyzed in the report provide useful guidance to private sectors. In sharing the report the following points should be stressed:

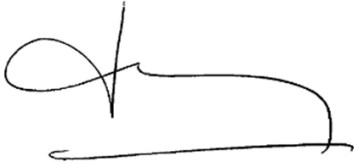
- As pointed out, the report does not cover all vulnerabilities associated with vehicles, techniques and professional intermediaries;
- Vehicles, techniques and professional intermediaries cited in the report are in most cases used in a legitimate manner, support the stability and efficiency of the financial system, and enable provision of sophisticated financial services. Therefore, it is important that their vulnerabilities are analyzed and determined on a case-by-case basis, in consideration of the case studies in the report;
- To do so, each business operator should work to gather the cases in which vulnerabilities of vehicles, etc. have materialized and improve their risk management competency. In addition, the information should be shared with the authority of each country and kept up-to-date

We also recommend cooperation with professional organisations of DNFBPs in order to define the professions, their role, their duties, their responsibilities in a positive way, as a broad recognition would also be an asset for the said professions. Also cooperation with professional organisations of representatives of risk functions (e.g. auditors, compliance and risk officers), national associations for banks, insurances, asset managers, brokers, lawyers, Trust and Company Service providers, registration bodies (e.g. company offices, High Courts etc.), DNFBPs and last but not least national supervisory authorities in the financial sector.

Apart from the 4 questions raised you will find attached some comments on specific paragraphs of the report.

We hope that our contribution is useful and would like to thank you for taking our input into consideration.

Yours sincerely,

A handwritten signature in black ink, consisting of a large loop on the left, a vertical stroke, and a long horizontal stroke extending to the right.

Mrs Hedwige Nuyens  
Managing Director  
International Banking Federation

Remarks on specific paragraphs of the report:

- N.229: *“Further to the need of FIUs and competent authorities...the direct sharing of information in real time between competent authorities and private sector....”* It has to be carefully observed how such an information exchange should be implemented and what obligation will be introduced to the banks. Banks are still private sector and not the extended arm of the regulator or FIU. They also claim that two-way information sharing between public and private sector has to be enhanced, which allows the independent access.
- N.231: *“centralized registers of beneficial ownership”*: This is only useful if applicable for offshore jurisdictions and Delaware as well.
- N.233: *“Governments to maintain a publicly accessible risk assessment”*. This will have to be maintained by financial institutions and professional service providers. So the bank would have to provide and feed the risk assessment.
- Par. 34 *« Misuse of Legal persons »*. Reference to Legal persons only refers to company laws. It is proposed that the reference be amended to widen the scope of legislation which could create a legal person.
- Par 35 *« Misuse of Legal persons »*. We propose that a foot note be included to elaborate on direct and indirect control
- Par 58 *« Shell and Shelf companies »*. We believe shelf and shell companies should not be included within the same scope. The misuse of shell companies is broader than shelf companies
- Paragraph 69 *« Splitting company incorporation and asset administration over different countries »*. We propose the inclusion of country of operations (i.e. Splitting company of incorporation, countries of operations and asset administration over different countries)
- Paragraph 112 and 161 *« Legal professionals and intermediaries »* Proposed estate agents are included as a commonly exploited intermediary (although substantively covered in paragraph 164)
- Paragraph 210 *« Vulnerable business practices »*. We suggest clarification that business practice could include products.