

September 16, 2011

Via email fatf.consultation@fatf-gafi.org

FATF Secretariat
2, rue André Pascal
75775 Paris Cedex 16
FRANCE

Re: Consultation Paper: Review of the Standards – Preparation for the 4th Round of Mutual Evaluations (Second Public Consultation)

Ladies and Gentlemen:

The Investment Company Institute (“ICI”)¹ appreciates the opportunity to comment on *Consultation Paper: The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations (Second Public Consultation)* (June 2011) (“Paper”) by the Financial Action Task Force (“FATF”). We previously provided comments regarding FATF’s October 2010 consultation paper concerning its work in this area.² The ICI and its members are committed to assisting the government of the United States and FATF in deterring and preventing money laundering and terrorist financing.

We provide comments below with respect to the following proposals in the Paper:

- Clarifications regarding policies and procedures for Recommendations 5, 33 and 34 and beneficial ownership information;
- Data protection and privacy;
- Group-wide compliance programs; and
- Expansion of category of persons considered politically exposed persons (“PEPs”).

¹ The Investment Company Institute is the national association of U.S. registered investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$12.9 trillion and serve over 90 million shareholders.

² Letter from the Investment Company Institute to the FATF Secretariat, January 7, 2011 (“January Letter”) available at <http://www.ici.org/pdf/24890.pdf>.

Beneficial Ownership Information

As discussed in our January Letter, US mutual funds are required to develop and implement an anti-money laundering (“AML”) program reasonably designed to prevent them from being used to launder money or finance terrorist activities. The legislative history of the US law requiring financial institutions to develop such programs acknowledges that the law is not a “one-size fits all” requirement. The AML program rule for mutual funds also reflects this approach.³ Similarly, the US customer identification program rule for mutual funds also specifies that mutual funds utilize risk-based procedures for verifying the identity of each customer that opens a new account.

In the Paper, FATF is proposing to specify in Recommendation 5 the types of measures that financial institutions would be required to undertake to identify and verify the identity of customers that are legal persons or legal arrangements and to understand the nature of their business and their ownership and control structure. FATF also proposes to specify the information that “would normally be needed in order to satisfactorily” accomplish those tasks. For Recommendation 33, FATF is seeking to clarify the steps countries should take regarding beneficial ownership information for legal persons, including specifying what would be considered adequate, accurate and timely beneficial ownership information. FATF proposes a similar approach for Recommendation 34 and legal arrangements. For both legal persons and legal arrangements, FATF is also considering specifying what is involved in an effective set of measures to prevent the misuse of legal persons and arrangements.

In our January Letter, we urged FATF to proceed cautiously in order to respect the different but complementary purposes of the FATF Standards and FATF guidance. For example, FATF’s Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing – High Level Principles and Procedures (June 2007) is described as supporting the development of a common understanding of what the risk-based approach (“RBA”) involves and providing insights into “good public and private sector practice” in the design and implementation of an effective RBA.⁴ In contrast, FATF Standards set forth minimum standards for jurisdictions to implement with detail according to their particular circumstances and constitutional frameworks.⁵ Accordingly, we believe that FATF efforts to provide more specification regarding Recommendations 5, 33 and 34 belong in guidance.

We appreciate that FATF is concerned with compliance; however, we believe that FATF could better foster compliance through guidance, a vehicle that is more flexible and can therefore address the varying circumstances and legal regimes around the world. We believe that problems of compliance of

³ See Department of Treasury, Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Mutual Funds, 67 FR 21117, 2119 (April 29, 2002).

⁴ RBA Guidance, paragraph 1.3.

⁵ FATF Standards, FATF 40 Recommendations (June 20, 2003, incorporating amendments of October 22, 2004), Introduction.

concern to FATF are indicative of bona fide challenges presented by obtaining beneficial ownership information rather than disregard of the recommendations.

Accordingly, we believe that guidance would better advance and serve FATF's goals. Industry and governments share the common goal of preventing and deterring money laundering and terrorist financing and we therefore urge FATF to maintain a dialogue with industry to develop approaches that can be effectively implemented by financial institutions. We have serious reservations regarding many of FATF's proposals on beneficial ownership information.

FATF's proposed changes to Recommendation 5 specify measures that are highly prescriptive. Consistent with our January Letter, we continue to believe that it is not necessary for FATF to propose such changes for the identification of customers. We also have concerns regarding the ability of firms to implement the proposed measures. Some of the required measures are vague and/or pose significant operational issues for effective implementation (*e.g.*, mere "names" are of limited use without more information, "senior management" is vague and may not correspond with any control or authority over a customer, what is "widely dispersed," what is "control through other means"). We also have serious concerns regarding the cost of implementing the measures, particularly in light of the limited reliability of the information and that it would only be current as of the time received by a financial institution.

We remain convinced that a robust risk-based approach best addresses this difficult area, allowing firms to effectively deploy resources and to also adapt to changing circumstances. One of the hallmark characteristics of the RBA and Recommendation 5 is the ability of a firm to design, change and implement an effective AML program, including a customer identification program, that takes account of the varying and changing risks associated with the different types of businesses, clients, accounts and transactions it may handle now and in the future. We urge FATF to not specify the information to be collected in this context.

With respect to verification, we asked FATF in our January Letter to further evaluate this issue in light of the inability of many financial institutions to reliably verify beneficial ownership information with relevant authorities. We urge FATF to incorporate this circumstance into its consideration of changes regarding the verification of beneficial owners. In addition, for Recommendations 33 and 34, FATF is proposing measures to require companies or trustees to hold the information and make it available to authorities. While such measures would be helpful, we are uncertain whether the legal authority to compel legal persons and legal arrangements to collect, hold and produce such information to authorities or financial institutions may be available in all jurisdictions. There may be legal prohibitions on obtaining or disclosing certain information. In the United States, there are no official listings of beneficial owners of corporations or limited liability companies formed under state laws despite recent interest in developing such listings. Also, the recent US efforts do not address the issue of beneficial ownership in the context of partnerships or trusts. In the United States, it remains unclear when, or if, such lists will be forthcoming. Accordingly, it is essentially impossible for financial

institutions (wherever located) to reliably verify beneficial ownership information for most US entities.⁶

Without a means for reliably verifying beneficial ownership information, we question whether such information is truly helpful to financial intelligence units or law enforcement, particularly considering the costs associated with obtaining the information. We therefore recommend that firms be allowed to continue to utilize risk-based procedures for identifying and verifying the identity of beneficial owners.

Lastly, we urge FATF to support the essential role that reliance upon third parties that themselves are subject to AML rules and effective supervision may play with respect to beneficial ownership information. We encourage FATF to support extending a jurisdiction's discretion regarding the types of entities that can be relied upon. We believe that FATF's support of an expansion of reliance with respect to firms that are subject to supervision and AML requirements in other FATF jurisdictions would be supportive of its efforts regarding beneficial ownership.

Data Protection and Privacy

We strongly support FATF's efforts to mitigate conflicts between data protection and privacy laws and laws regarding anti-money laundering and combating the financing of terrorism ("AML/CFT"), including for international groups and consolidated risk management programs seeking to use cross-border flows of information. We believe that it is essential for authorities to coordinate and cooperate on these issues.

Group-Wide Compliance Programs

We support FATF's efforts to facilitate group-wide compliance programs; however, as FATF recognizes, certain data protection or privacy laws limit these programs. In addition, AML/CFT laws may impact the operation of group-wide compliance programs. For example, whether a "group" operates cross-border or includes entities not subject to AML/CFT obligations may impact whether a group-wide compliance program is possible. In the United States, for example, there are limits on the ability of firms to share information related to suspicious activity reporting. A US mutual fund may only share a suspicious activity report ("SAR"), or any information that would reveal the existence of a SAR, with an affiliate that is itself subject to a SAR regulation issued by specified US regulators. In addition, the mutual fund affiliate that has received the SAR from the mutual fund is not permitted to share the SAR, or any information that would reveal the existence of the SAR, with its own affiliate, even if subject to SAR regulation. Accordingly, efforts to facilitate group-wide compliance programs

⁶ We understand that similar challenges exist in other jurisdictions. In addition, there also can be challenges accessing such information, if it exists, as there may be limits on its availability to the public.

are complicated by AML/CFT laws. We recommend that FATF take account of this issue in its efforts regarding group-wide compliance programs.

Politically Exposed Persons (PEPs) – Expansion

FATF is considering applying requirements for domestic and foreign PEPs equally to family members and close associates of a PEP. In addition, FATF is considering whether persons carrying out prominent functions for international organizations should be treated as domestic PEPs. FATF has not defined the terms “international organization” or “prominent functions,” which are broad and would be difficult to implement absent a clear description or definition.

In specified circumstances, US law requires enhanced due diligence of accounts with senior foreign political figures. The RBA also contemplates different procedures for customers identified as higher risk, which could include a domestic PEP in some circumstances. As we stated in our January Letter, we believe that the RBA is the most effective mechanism for the consideration of a customer’s risk or, as appropriate, their status as a PEP. Accordingly, we do not believe the proposed changes are necessary.

If you have questions or require additional information, you can reach me at (202) 326-5813.

Very truly yours,

/s/ Susan M. Olson

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