THE NEW FATF STANDARDS

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INTRODUCTION

The Financial Action Task Force (the "FATF"), which was established by the G-7 Summit held in Paris in 1989,[1] is a 36-member inter-governmental body mandated to set international standards (the "FATF Standards" or "Standards") and to promote effective implementation of legal, regulatory, and operational measures for combating money laundering, the financing of terrorists and proliferation, and other related threats to the international financial system.[2] The Standards are comprised of the FATF's Recommendations in furtherance of that mandate, corresponding Interpretive Notes, and a Glossary.[3] In February 2012, following an intensive review process that extended over more than two

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[1] *History of the FATF*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/pages/aboutus/historyofthefatf/ (last visited Nov. 14, 2012). The G-7, or Group of 7, is an international group consisting of the finance ministers from the United States, Canada, Great Britain, France, Germany, Japan, and Italy. *See, e.g.*, Andrew de Lotbinière McDougall, *International Arbitration and Money Laundering*, 20 AM. U. INT'L L. REV. 1021, 1029, 1029 n.28 (2005).

[2] *Who We Are*, FIN. ACTION TASK FORCE , http://www.fatf-gafi.org/pages/aboutus/ (last visited Nov. 14, 2012) [hereinafter *Who We Are*].

[3] As a general matter, the Recommendations state high-level principles, while the Interpretive Notes explain more specifically how countries are to comply with the Recommendations. In certain cases, the Glossary definitions may also contain specific requirements. *See, e.g.*, Fin. Action Task Force [FATF], *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations*, at 8 (Feb. 15, 2012) [hereinafter *2012 Standards*], *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20(approved%20February%202012)%20reprint%20May%202012%20web%20version.pdf.

years,[4] the FATF announced its third revision (i.e., fourth version) of the FATF Standards.[5] The new Standards ("2012 Standards" or "Revised Standards"), which will be implemented during upcoming compliance assessments, are the topic of this article, which will examine specific changes the FATF made in revising the 2003 version of the Standards and consider private sector comments that were directed at some of those changes.

The FATF Standards are used as a basis for conducting peer reviews, called "Mutual Evaluations," of each member country's anti-money laundering/combating the financing of terrorism ("AML/CFT") regime.[6] Since 2004, all of the 34 FATF member jurisdictions[7] have undergone a Mutual Evaluation,[8] each of which resulted in a lengthy Mutual Evaluation report[9] that includes a detailed description of the specific country's AML/CFT regime and a rating for its degree of compliance with each of the

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[4] FATF, *FATF's Response to the Public Consultation on the Revision of the FATF Recommendations*, at 3 (Feb. 16, 2012) [hereinafter *FATF Response to Public*], *available at* http://www.fatf-gafi.org/media/fatf/documents/publicconsultation/FATF%20Response%20to%20the%20public%20consultation%20on%20the%20revision%20of%20the%20FA20Recommendations.pdf.

[5] *2012 Standards*, *supra* note 3.

[6] Each Mutual Evaluation involves a year-long process that includes an on-site visit by a team composed of several assessors from other member jurisdictions and headed by a representative of the FATF Secretariat. The assessment team prepares a draft Mutual Evaluation report that is discussed, frequently amended, and ultimately agreed by the Plenary. FATF, *Third Round of AML/CFT Mutual Evaluations: Processes and Procedures*, at 20–23 (Oct. 2009) [hereinafter *Third Round*], *available at* http://www.fatf-gafi.org/media/fatf/documents/process%20and%20procedures.pdf. The International Monetary Fund and World Bank also perform a limited number of FATF member assessments. *Id.* at 17–18. An assessment is based on the FATF Methodology. The Methodology used for the third round contains a detailed list of criteria corresponding to each Recommendation which forms the basis for assessing a country's compliance with such Recommendation. *See generally* FATF, *Methodology for Assessing Compliance with the FATF 40 Recommendations and 9 Special Recommendations* (Feb. 2009) [hereinafter *2004 Methodology*], *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/methodology.pdf (providing an overview, background, interpretation, and guidance on the methodology).

[7] The FATF membership also includes two regional organizations. *FATF Members and Observers*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/pages/aboutus/membersandobservers/ (last visited Nov. 14, 2012) (containing a list of members).

[8] *See generally Mutual Evaluations*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/topics/mutualevaluations/ (last visited Nov. 14, 2012) [hereinafter *Mutual Evaluations*] (listing the dates of the mutual evaluations).

[9] Mutual Evaluation reports are generally 200–300 pages and sometimes longer.

Recommendations.[10] Following each Mutual Evaluation, the FATF monitors each country in regard to specific Recommendations for which it received a low rating and requires the country to provide a series of periodic follow-up reports to the FATF detailing the country's progress until a satisfactory level of compliance with those Recommendations has been achieved.[11] In cases where progress isn't considered satisfactory, the Plenary takes a series of graduated steps, which may include a letter from the President to the country's appropriate government official stressing the importance of achieving a satisfactory level of compliance, a high-level mission from the FATF to the country to heighten its political awareness of the deficiencies, a public statement warning other members (and non-member countries) to consider the member's AML/CFT deficiencies, and ultimately, consideration by the FATF of whether a country's membership should be suspended.[12]

In addition to the FATF's procedures for addressing deficiencies of its own members, the FATF has historically taken a leading role in bringing international focus on jurisdictions around the world with weak AML/CFT regimes. Beginning in 1999 the FATF engaged in an initiative in which it identified jurisdictions globally with AML weaknesses; it identified a total of 23 such "Non-Compliant Countries or Territories," or "NCCTs," of which there were none remaining in this designation by October 2006.[13] This process was reinvigorated in 2009, following a call by the G-20 to assess countries' compliance with international AML/CFT standards and to publicly identify high-risk jurisdictions[14] and issue regular updates on

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[10] *See, e.g.*, FATF, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America* (June 23, 2006) [hereinafter *U.S. Mutual Evaluation*], *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf (containing the FATF's third mutual evaluation of the United States).

[11] *See, e.g.*, FATF, *Mutual Evaluation: 8th Follow Up Report: Anti-Money Laundering and Combating the Financing of Terrorism: China* (Feb. 17, 2012), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/mer/Follow%20Up%20MER%20China.pdf (providing an example of a follow up report on China's progress).

[12] *Third Round*, *supra* note 6, at 14.

[13] *See About the Non-Cooperative Countries and Territories (NCCT) Initiative*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/topics/high-riskandnon-cooperative jurisdictions/more/aboutthenon-cooperativecountriesandterritoriesncctinitiative.html (last visited Nov. 14, 2012).

[14] *See* Press Release, G-20 Leaders, Declaration on Strengthening the Financial System: London Summit, at 5–6 (Apr. 2, 2009,"), *available at* http://www.treasury.gov/resource-center/international/g7-g20/Documents/London%20April%202009%20Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf; Press Release, G-20 Leaders, Leaders' Statement: The Pittsburgh Summit, at 10 (Sept. 25, 2009), *available at* http://www.treasury.gov/resource-center/international/g7-g20/Documents/Pittsburgh_sum

jurisdictions with strategic deficiencies. Since June 2009, the FATF's International Cooperation Review Group ("ICRG") has been coordinating a worldwide review of all jurisdictions of a significant size with deficient AML/CFT regimes. Following each Plenary, the FATF issues two statements regarding these countries. One statement identifies "jurisdictions which have strategic AML/CFT deficiencies for which they have developed an action plan with the FATF," and calls on those countries to "complete the implementation of action plans expeditiously. . . ."[15] The other list, called FATF's "Public Statement," lists jurisdictions which have strategic AML/CFT deficiencies and which either have not committed to an action plan with the FATF, or have not made sufficient progress in addressing those deficiencies. These jurisdictions are either subject to a call by the FATF on its members to "consider the risks arising from the deficiencies associated with each jurisdiction," or in the most serious cases, a call "to apply counter-measures to protect the international financial system from the on-going and substantial money laundering and terrorist financing (ML/TF) risks emanating from the jurisdictions."[16] FATF members, as well as other jurisdictions, are expected to bring these FATF statements to the attention of their financial institutions.[17] Thus, although FATF membership and the Standards do not have the binding force of a treaty, the Mutual Evaluations, along with the follow-up and ICRG processes, generally provide significant incentives for all member countries, as well as other jurisdictions around the world, to improve their AML/CFT regimes.[18]

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[15] *See, e.g.*, *Improving Global AML/CFT Compliance: on-going process - 22 June 2012*, FIN. ACTION TASK FORCE http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/improvingglobalamlcftcomplianceon-goingprocess-22june2012.html (last visited Nov. 14, 2012).

[16] *See, e.g.*, *FATF Public Statement - 22 June 2012*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/improvingglobalamlcftcomplianceon-goingprocess-22june2012.html (last visited Nov. 14, 2012) [hereinafter *FATF Public Statement - 22 June 2012*].

[17] *See, e.g.*, Treas. Adv. FIN-2012-A008 (July 19, 2012), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2012-A008.pdf (showing the United States' response to FATF actions).

[18] It also bears noting that at this time "[a] large number of jurisdictions have not yet been reviewed by the FATF. The FATF continues to identify additional jurisdictions, on an on-going basis, that pose a risk to the international financial system." *FATF Public Statement - 22 June 2012*, *supra* note 16.

All of the FATF's formal decisions are made at the tri-annual meetings of the FATF Plenary,[19] but most of the underlying and preparatory work is performed by one of the FATF's specialized working groups, including: the Working Group on Evaluations and Implementation ("WGEI"), which, among other duties, reviews and proposes revisions to the FATF Standards and Methodology;[20] the International Co-operation Review Group ("ICRG"), which identifies and engages with countries that have serious AML/CFT deficiencies and prepares statements targeting deficient countries that are approved and published by each FATF Plenary after each meeting;[21] the Working Group on Typologies ("WGTP"), which identifies and analyses illicit finance threats including methods and trends,[22] the Working Group on Terrorist Financing and Money Laundering, which responds to new and emerging threats, such as proliferation financing, refines standards, and develops guidance;[23] and the Global Network Coordination Group, which strengthens the capacity and coordination of the FATF-Style Regional Bodies ("FSRBs") that form the global network.[24]

The FATF Standards are promoted outside of the 36 FATF members by a group of FSRBs, which have been established in different regions to disseminate the FATF standards around the world.[25] There are eight

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[19] *Who We Are*, *supra* note 2. In addition to the Plenary, the FATF is comprised of a small full-time Secretariat and a President selected from among its members who serve rotating one-year terms. *FATF Presidency*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/pages/aboutus/fatfpresidency/ (last visited Nov. 14, 2012); *FATF Secretariat*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/pages/aboutus/fatfsecretariat/ (last visited Nov. 14, 2012).

[20] FATF, *2008-2009 Fin. Action Task Force Annual Report*, at 8 (2009) [hereinafter *FATF 2008-2009 Annual Report*], *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/2008%202009%20ENG.pdf.

[21] *More About the International Co-Operation Review Group (ICRG)*, FIN. ACTION TASK FORCE *available at* http://www.fatf-gafi.org/topics/high-riskandnon-cooperative jurisdictions/more/moreabouttheinternationalco-operationreviewgroupicrg.html (last visited Nov. 14, 2012).

[22] *FATF 2008-2009 Annual Report*, *supra* note 20.

[23] *Id.*

[24] *See* FATF, *Annual Report 2011-2012*, at 34 (2012) *available at* http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF%20annual%20report%202011%202012%20website.pdf ("[The GNCG] provides a practical forum for exchanging experiences between the FSRB's and with the FATF and for developing high standards of work carried out by the various bodies and their secretariats." (alteration added)).

[25] *See Countries*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/countries/ (last visited Nov. 14, 2012) (showing a list of FSRBs, and which countries are members). *FATF 2008-2009 Annual Report*, *supra* note 20, at 7.

FSRBs, which, together with the actual FATF members, create a network of nearly 200 countries.[26]

The Revised Standards, which will be applied by the FATF in its fourth round of Mutual Evaluations,[27] as well as by the FSRBs, are intended to "provide authorities with a stronger framework to act against criminals and address new threats to the international financial system."[28] The timing of this most recent revision is consistent with the FATF's practice of reviewing the Standards following each round of Mutual Evaluations.[29] As seems appropriate for any standard-setting body, the FATF conducts such a periodic review to ensure that its Standards are up-to-date and relevant, as well as to benefit from what it has learned from implementation, evaluation, and practice since the previous revision. [30] The FATF's thorough review process included two public consultation papers,[31] in which the FATF asked the Private Sector Consultative Forum ("Consultative Forum") for input regarding standards that impact it directly.[32] These papers resulted in substantial written comments from the private sector, as well as two consultation sessions.[33]

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[26] *FATF Members and Observers*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/pages/aboutus/membersandobservers/ (last visited Nov. 14, 2012).

[27] The fourth round of Mutual Evaluations is scheduled to begin in late 2013. FATF, *The Review of Standards: Preparation for the 4th Round of Mutual Evaluations, Second Public Consultation*, at 4 (June, 2011) [hereinafter *Second Preparation for 4th Round*], *available at* http://www.fatf-gafi.org/media/fatf/documents/publicconsultation/Second%20public%20consultation%20document.pdf.

[28] *FATF Steps Up the Fight Against Money Laundering and Terrorist Financing*, FIN. ACTION TASK FORCE (Feb. 16, 2012), http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatfstepsupthefightagainstmoneylaunderingandterroristfinancing.html.

[29] Its third round of Mutual Evaluations was nearing its conclusion when the most recent process of reviewing the standards began in June 2009. *Second Preparation for 4th Round*, *supra* note 27.

[30] *See 2012 Standards*, *supra* note 3 at 7. (Previous revisions to the Standards were completed in 1996 and 2003. Those revisions focused on broadening the scope of the Standards and addressing emerging threats).

[31] FATF, *The Review of Standards: Preparation for the 4th Round of Mutual Evaluations*. (Oct. 2010) [hereinafter *First Preparation for 4th Round*], *available at* http://www.fatf-gafi.org/media/fatf/documents/publicconsultation/First%20public%20consultation%20document.pdf; *Second Preparation for the 4th Round*, *supra* note 27.

[32] The Private Sector Consultative Forum is comprised of a large number of associations representing the financial services industries and DNFBP sectors that have participated in the review process as well as previous outreach efforts by the FATF. *FATF Meets With the Private Sector*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/documents/documents/fatfmeetswiththeprivatesector.html (last visited on Nov. 14, 2012).

[33] *See generally Review of the FATF Standards*, FIN. ACTION TASK FORCE, http://www.fatfgafi.org/topics/fatfrecommendations/documents/reviewofthefatfstandards.ht

Key changes announced by the FATF in the 2012 Standards include the inclusion of the risk-based approach,[34] increased transparency and international cooperation, expansion of operational standards, consideration of new threats and priorities, and clarification of certain Standards.[35] Another notable element of the Revised Standards is the incorporation of the Nine Special Recommendations into the general Recommendations of the 2012 Standards, in recognition of the related nature of the threats posed by money laundering and terrorist financing and complementary tools needed to address these risks.[36] When the standards were revised, some of the requirements contained in the Special Recommendations were integrated into related Recommendations, while other Special Recommendation requirements have been retained in a section in the 2012 Standards that addresses terrorist financing and proliferation.[37] As a result, there no longer are "Special Recommendations" included in the Standards, although the requirements addressing terrorist financing have been retained.[38]

The 2012 Standards are grouped into the following seven categories: (1) Anti-Money Laundering and Combating the Financing of Terrorism ("AML/CFT") Policies and Coordination, (2) Money Laundering and Confiscation, (3) Terrorist Financing and Proliferation, (4) Preventive Measures, (5) Transparency and Beneficial Ownership of Legal Persons and Arrangements, (6) Powers and Responsibilities of Competent Authorities and other Institutional Measures, and (7) International Cooperation.[39] This article considers the Revised Standards in the order that they are listed.

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ml (last updated Aug. 10, 2012). The first paper was published in October 2010, one year after the FATF Plenary agreed on the list of issues to be considered, and was discussed with the private sector in January 2011. The second paper was published in June 2011 and was discussed at a consultation session in December 2011.

[34] The process through which a country or entity identifies and assesses its AML/CFT risks and applies commensurate measures to address those risks, as described in Recommendation 1. *See* discussion *infra* Recommendation 1.

[35] *See* FATF, *FATF Recommendations: Media Narrative*, at 1–2, [hereinafter *Media Narrative*] *available at* http://www.fatf-gafi.org/media/fatf/documents/Press%20handout%20FATF%20Recommendations%202012.pdf (last visited Nov. 14, 2012).

[36] *See History of the FATF*, FIN. ACTION TASK FORCE, http://www.fatfgafi.org/pages/aboutus/historyofthefatf/ (last visited Nov. 14, 2012). Eight of the nine Special Recommendations, which address terrorist financing, were adopted following the 9/11 attack. *Id.* These were integrated into the Standards when they were revised in 2003, and a ninth Special Recommendation was added in 2004. *Id.* This created what was sometimes referred to as the "FATF 40 + 9." *Id.*

[37] *See 2012 Standards*, *supra* note 3, at 8.

[38] *Id.*

[39] *See id.* at 4–5.

In this article, I closely examine the Revised Standards to pinpoint the substantive changes that have been made to the 2003 Standards,[40] and also explain why Recommendations that have been modified, may not be substantively different. In this regard, I will also consider the 2004 Methodology,[41] which was used to assess countries' compliance with the 2003 Standards. This article also discusses some of the comments received from the private sector during the public consultation period and examines their impact on the Revised Standards. This article does not attempt to discuss the Revised Standards in their entirety, but focuses on modifications from the 2003 Standards (as augmented by the 2004 Methodology).

ANALYSIS OF THE REVISED STANDARDS' MODIFIED RECOMMENDATIONS

A. *AML/CFT Policies and Coordination*

Recommendation 1. Assessing risk and applying a risk-based approach

Recommendation 1 of the 2012 Standards, "Assessing risk and applying a risk-based approach," is one of only two that have no parallel in the 2003 Standards.[42] In consultation with relevant private sector industries, during 2006 through 2008 the FATF developed and published several guidance documents outlining the high-level principles of the risk-based approach and discussing good private sector practices in utilizing the approach.[43] The official adoption of the risk-based approach in the Standards is a significant step and indicates the extent to which this approach is now widely accepted as the appropriate approach—to be utilized by all countries across all industries and all sizes of institutions—

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[40] FATF, *FATF Standards: FATF 40 Recommendations October 2003 (incorporating all subsequent amendments until October 2004)* (2010) [hereinafter *2003 Standards*], *available at* http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20%2040%20Recommendations%20rc.pdf.

[41] *See 2004 Methodology*, *supra* note 6. The detailed criteria contained in the 2004 Methodology are based primarily on the 2003 Standards, but also contain some additional requirements not always explicit in the Standards. Because these criteria were, in effect, requirements in assessments, this article considers such requirements to be part of the 2003 Standards, for purposes of discussing changes from those Standards.

[42] *Compare 2012 Standards*, *supra* note 3, *with 2003 Standards*, *supra* note 41.

[43] *See, e.g.*, FATF, *Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures*, (June 2007) [hereinafter *Guidance on RBA*], *available at* http://.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf.

for most effectively preventing and detecting money laundering and terrorist financing.

Recommendation 1 requires that FATF member countries "identify, assess, and understand the [Money Laundering and Terrorist Financing ("ML/TF")] risks for the country," and apply a risk-based approach to ensure that the measures taken are commensurate with the risks identified.[44] This analysis should be an "essential foundation to efficient allocation of resources" throughout the AML/CFT regime.[45] Per the Revised Standards, countries should also require their financial institutions and designated non-financial businesses and professions ("DNFBPs")[46] to perform a similar risk assessment in order to effectively mitigate their ML/TF risks.[47]

The Interpretive Note ("Note") to Recommendation 1 points out that countries need to consider the AML/CFT capacity and experience of particular sectors because the risk-based approach affords discretion to financial institutions and DNFBPs, and such discretion is more appropriately given to sectors with greater capacity and experience.[48] In addition, under the Note, countries must require enhanced measures for higher risk situations, and may permit simplified measures where risks are lower.[49]

The Note's subparts contain specific obligations and required decisions regarding risk assessment, management, and mitigation for countries, as well as financial institutions and DNFBPs. Each member country is obligated to "take appropriate steps" to identify and assess its ML/TF risks, to keep its assessments up-to-date, and to provide "appropriate information" to competent authorities, financial institutions, and DNFBPs regarding these risks and how they might be mitigated.[50] Although this might have been viewed as an implicit requirement under the 2003 Standards, its explicit inclusion in the Revised Standards could become a significant additional obligation, should it be interpreted in Mutual Evaluations as requiring more extensive documentation of a country's ML/TF risk analysis than was produced previously.[51] The Note

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[44] *2012 Standards*, *supra* note 3, at 11.

[45] *Id.*

[46] The DNFBPs include casinos, real estate agents, dealers in precious metals and stones, lawyers, accountants, and trust and company service providers. *See id.* at 112–13.

[47] *Id.* at 11.

[48] *Id.* at 31. In general financial institutions, including banks, securities firms and insurance companies, have greater AML/CFT capacity and experience than DNFBPs. *Id.*

[49] *2012 Standards*, *supra* note 3, at 31. *See also 2003 Standards*, *supra* note 41, at 5.

[50] *2012 Standards*, *supra* note 3, at 32.

[51] *See id.* This new requirement, like many others, will need to be applied in the context of Mutual Evaluations, at which time a determination will be made as to how it will

also includes provisions permitting a jurisdiction to exempt a financial institution or DNFBP from certain Recommendations, in limited circumstances, where there is a proven low risk of money laundering or where an activity is carried out on an occasional or very limited basis such that there is a low risk of money laundering or terrorist financing.[52]

Financial institutions and DNFBPs are also required to identify and assess their ML/TF risks, to document their assessments, and to keep them up-to-date.[53] The Note states, however, that individual risk assessments are not necessary in cases where competent authorities have determined that a financial institution or DNFBP has "clearly identified and understood" its risks.[54] Regardless, financial institutions and DNFBPs must always have policies, controls, and procedures in place to mitigate the risks that are identified either by the institution itself or by its country, to monitor the implementation of such controls, and to enhance the controls when necessary.[55] The Note contains relatively detailed requirements applicable to financial institutions and DNFBPs with regard to these expectations for risk assessments.[56]

The private sector comments were generally supportive of the universal application of the risk-based approach, both for regulated entities and for their supervisors. Some commenters noted that, in order to fully implement a risk-based system in which risks are assessed and resources prioritized, countries should be required (and not just permitted) to allow simplified measures for lower risk situations. Commenters also urged increased sharing of information by the public sector regarding potential risks.[57]

Recommendation 1, in conjunction with its Interpretive Note, not only sets out the expectation that all countries will apply the risk-based approach to AML/CFT, but also contains new requirements for member countries and the private sector with regard to performing and updating risk

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be interpreted. For example, assessors will have to determine whether a country's risk assessment must be set forth in one comprehensive document, or whether a country can demonstrate an adequate risk assessment based on a variety of sources.

[52] *Id.* at 32. These exemptions were effectively included in the 2003 standards, by virtue of their inclusion in the definition of "Financial Institution." *2003 Standards*, *supra* note 41, at 16–17.

[53] *2012 Standards*, *supra* note 3, at 33.

[54] *Id.*

[55] *Id.*

[56] *Id*.

[57] *See, e.g.*, Letter from International Banking Federation, to John Carlson, Principal Administrator, FATF Secretariat 3, (Jan. 12, 2011), http://www.ibfed.org/download/6546 [hereinafter *IBFed January Letter*].

assessments.[58] The impact of this new requirement on both countries and the private sector could be substantial, particularly in the cases of countries and industries that have not previously conducted or documented their risk assessments.[59]

Recommendation 2. National cooperation and coordination[60]

The first paragraph of Recommendation 2 of the 2012 Standards, "National cooperation and coordination," sets out a new requirement that countries promulgate regularly-reviewed national AML/CFT policies informed by specific risk circumstances and "designate an authority or have a coordination or other mechanism . . . responsible for such policies."[61] The second paragraph of Recommendation 2 requires countries to have mechanisms that enable competent authorities to cooperate and coordinate concerning the development of AML/CFT strategies, at both policy and operational levels.[62] The latter paragraph is substantially similar to Recommendation 31 of the 2003 Standards, with one significant modification; it now contains a new requirement that, in addition to money laundering and terrorist financing, AML/CFT policies and operations must also address efforts to combat the financing of proliferation of weapons of mass destruction.[63] This is a result of, and consistent with, the inclusion in the 2012 Standards of Recommendation 7, "Targeted financial sanctions related to proliferation."[64]

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[58] *2012 Standards*, *supra* note 3, at 11, 31–33.

[59] *See, e.g.*, DEP'T OF TREASURY, MONEY LAUNDERING THREAT ASSESSMENT WORKING GRP., U.S. MONEY LAUNDERING THREAT ASSESSMENT (Dec. 2005), *available at* http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/mlta.pdf (providing an example of a United States' risk assessment).

[60] 2012 Standards Recommendation 2 corresponds, in part, to Recommendation 31 of the 2003 Standards. *See 2012 Standards*, *supra* note 3, at 4 (showing the new recommendation numbers with the corresponding recommendations from 2003).

[61] *Id.* at 11.

[62] *Id.*

[63] *Id.*

[64] *See id.* at 13 (requiring countries to implement financial sanctions on persons or entities designated by the United Nations Security Council pursuant to resolutions that relate to preventing the financing of proliferation).

B. *Money Laundering and Confiscation*

Recommendation 3.Money laundering offence[65]

Revised Standards Recommendation 3, "Money laundering offence," combines two Recommendations previously published in the 2003 Standards: Recommendation 1, dealing with criminalization and predicate offenses; and Recommendation 2, concerning criminal intent and legal persons.[66] Although the text of 2012 Standards Recommendation 3 is considerably shorter than that of 2003 Recommendations 1 and 2, all of the requirements that were contained in the 2003 versions of Recommendations 1 and 2, as well as certain essential criteria from the 2004 Methodology, are included in Recommendation 3 or its Interpretive Note.[67] There is, however, still a significant change to the Recommendation 3 requirements when considered in light of the definition of "designated categories of offences" provided in the Revised Standards' Glossary.[68] In the 2012 Standards, the definition of "designated categories of offences" has been expanded to include "tax crimes (related to direct taxes or indirect taxes)."[69] Additional material published by the FATF explains that this expansion is meant to include "serious tax crimes," a category that the FATF does not define and the scope of which will be determined through the upcoming Mutual Evaluation process.[70] This means that, to be compliant with the Revised Standards, countries will now have to include serious tax crimes as predicate offenses to money laundering.

The Glossary definition of "smuggling" has been similarly expanded. The parenthetical "(including in relation to customs and excise duties and taxes)" has been added to the 2003 definition and appears in the Revised

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[65] 2012 Standard Recommendation 3 corresponds with Recommendations 1 and 2 of the 2003 Standards. *Id.* at 4.

[66] *2012 Standards*, *supra* note 3, at 12. *2003 Standards*, *supra* note 41, at 3–4.

[67] *2012 Standards*, *supra* note 3, at 12, 34–35. *2003 Standards*, *supra* note 41, at 3. *See also 2004 Methodology*, *supra note* 6 (describing the essential criteria of Recommendations 1 and 2 of the 2003 Standards).

[68] *2012 Standards*, *supra* note 3, at 111–12.

[69] *Id.* at 112. *Cf. 2003 Standards*, *supra* note 41, at 15 (not listing tax crimes as one of the designated categories of offences).

[70] *See* FATF, *FATF Recommendations: Media Narrative*, *supra* note 35, at 2, *available at* http://.fatf-gafi.org/media/fatf/documents/Press%20handout%20FATF%20Recommendations%202012.pdf (last visited Nov. 14, 2012) ("The list of predicate offences for money laundering has been expanded to include serious tax crimes."); *2012 Standards*, *supra* note 3, at 34. Paragraph 2 of the Interpretive Note states that " [c]ountries should apply the crime of money laundering to all serious offenses . . ."). *Id.* (ellipsis added).

Standards' Glossary.[71] The FATF explains that this modification is intended as a clarification "to contribute to better coordination between law enforcement, border and tax authorities, and remove potential obstacles to international cooperation regarding tax crimes."[72]

The inclusion of tax crimes as predicate offenses received a mixed response from the private sector. Some financial representative bodies supported it, while DNFBPs and others generally opposed it. The concerns expressed included: (1) the scope of tax crimes, with a strong preference for including only "serious tax crimes;" (2) the inherent difficulty for the private sector to detect and identify tax crimes for purposes of suspicious transaction reporting;[73] and (3) "the need for a level playing field," i.e., ensuring that different countries consider similar tax crimes as having the same degree of seriousness.[74] The private sector also noted that it is challenging to identify and isolate the proceeds specifically connected to a tax crime.[75] It remains to be seen how these concerns will be addressed going forward. Mutual Evaluation reports will have to make individual determinations as to whether countries have properly included "serious" tax crimes as money laundering predicates, so as to comply with the Revised Standards. These determinations, in turn, will ultimately determine the full significance of this change to the Standards.

Recommendation 4. Confiscation and provisional measures[76]

Recommendation 4, "Confiscation and provisional measures," has been revised, primarily as a result of the FATF's decision to eliminate confusion by transferring to it certain requirements previously included in Special Recommendation III of the 2003 Standards.[77] As a result,

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[71] *2012 Standards*, *supra* note 3, at 112.

[72] *Media Narrative*, *supra* note 35, at 2.

[73] *See, e.g.*, *IBFed January Letter*, *supra* note 57, at 4.

[74] *FATF Response to Public*, *supra* note 4, at 3.

[75] *See id.* (indicating that the private sector lacks expertise to identify and detect tax crimes).

[76] Recommendation 4 of the 2012 Standards corresponds with Recommendation 3 of the 2003 Standards. *2012 Standards*, *supra* note 3, at 4.

[77] *Id.* at 12; *see also* FATF, *FATF IX Special Recommendations* at 8 (Oct. 2001) [hereinafter *Special Recommendations*], *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf (describing the requirements of Special Recommendation III). The majority of the requirements set forth in Special Recommendation III of the 2003 Standards now appear in Recommendation 6 of the 2012 Standards. *2012 Standards*, *supra* note 3, at 13.

Recommendation 4 now addresses confiscation and provisional measures pertaining to criminal proceedings relating not only to money laundering and predicate offenses (as was covered in 2003's Recommendation 3), but also relating to the financing of terrorism, which was previously covered in Special Recommendation III of the 2003 Standards. This is accomplished by two changes in the first paragraph of Recommendation 4: (1) a requirement that countries adopt confiscation and provisional measures similar to those set forth in the Terrorist Financing Convention,[78] in addition to those required by the Vienna and Palermo Conventions,[79] and (2) the addition to the 2003 Standard's Recommendation 3 requirement that countries are able to confiscate property laundered, and proceeds from money laundering or predicate offenses, the requirement that "competent authorities" are also able to confiscate "property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations . . . ."[80] As mentioned above, this change was made in order to distinguish a country's authority to freeze and confiscate terrorist-related assets in a criminal investigation or prosecution (now covered in this Recommendation), from a country's authority to implement the United Nations Security Council Resolution ("UNSCR") "Targeted Financial Sanctions" requirement.[81] This change was made primarily to eliminate confusion with respect to Special Recommendation III caused by combining requirements relating to terrorist financing in the context of criminal authorities, with those requirements in the context of administering a targeted sanctions regime.[82] This change does not give rise to additional aggregate requirements.[83]

The second paragraph of Recommendation 4 requires that relevant confiscation and provisional measures provide enforcing parties with the

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[78] *Id.* at 12. The International Convention for the Suppression of the Financing of Terrorism, which was referred to in the Interpretive Note to Special Recommendation III, requires (Art. 8) that each State Party "shall take appropriate measures . . . for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing" terrorist financing offenses, as well as proceeds derived from such offenses. United Nations International Convention for the Suppression of the Financing of Terrorism, art. 8, Dec. 9, 1999, 2178 U.N.T.S. 197 (ellipsis added) [hereinafter *Terrorist Financing Convention*].

[79] *2012 Standards*, *supra* note 3, at 12.

[80] *Id.*

[81] *See* discussion *infra* Recommendation 6.

[82] *FATF Response to Public*, *supra* note 4, at 7–8.

[83] *2012 Standards*, *supra* note 3, at 12. The 2004 Methodology also included the requirement to be able to confiscate property that is indirect proceeds, income or profits from proceeds, or proceeds held by third parties. *2004 Methodology*, *supra* note 6, at 19. These are not included in the Revised Standards.

authority to "take steps that will prevent or void actions that prejudice the country's ability to freeze or seize," as well as to recover, property subject to confiscation.[84]

An Interpretive Note has also been added to Recommendation 4, which requires countries to implement mechanisms that will enable "authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized . . . both in the context of domestic proceedings, and pursuant to requests by foreign countries."[85]

C. *Terrorist Financing and Financing of Proliferation*

Recommendation 5. Terrorist financing offence[86]

Recommendation 5 of the Revised Standards, "Terrorist financing offence," is the same as Special Recommendation II of the 2003 Standards in substance, but differs from Special Recommendation II in form.[87] Recommendation 5 requires countries to criminalize terrorist financing on the basis of the Terrorist Financing Convention[88] and states that they "should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the

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[84] *Id.* This largely incorporates the 2003 Methodology (criteria 3.6), but adds a reference to the country's ability to "freeze or seize" property subject to confiscation. *Id.* In addition, countries are required to consider adopting measures that allow non-conviction based confiscation, or that require an offender to demonstrate the lawful origin of property allegedly liable to confiscation, to the extent consistent with domestic laws. *Id.* These were only suggested for possible consideration in the 2003 version of Recommendation 3. *See 2003 Standards*, *supra* note 41, at 4.

[85] *2012 Standards*, *supra* note 3, at 36. This Note also applies in relation to a similar new requirement in Recommendation 38 regarding freezing and confiscation of property pertaining to mutual legal assistance. *See id.* at 102.

[86] Recommendation 5 of the Revised Standards corresponds to Special Recommendation II of the 2003 Standards. *Id.* at 4.

[87] *Compare Special Recommendations*, *supra* note 77, at 2, *with 2012 Standards*, *supra* note 3, at 13.

[88] The United Nations Terrorist Financing Convention sets forth the acts that constitute the offense of the financing of terrorism and requires State Parties to criminalize such acts. *Terrorist Financing Convention*, *supra* note 78. The Interpretive Note to Special Recommendation II notes that "[a]lthough the [Terrorist Financing] Convention had not yet come into force at the time that SR II was originally issued in October 2001—and thus is not cited in the SR itself—the intent of the FATF has been from the issuance of SR II to reiterate and reinforce the criminalisation standard as set forth in the Convention (in particular, Article 2). The Convention came into force in April 2003." *Special Recommendations*, *supra* note 77, at 4 n.1 (alterations added).

absence of a link to a specific terrorist act or acts."[89] While both of these requirements were contained in the 2003 Standards, they were included in the Interpretive Note to Special Recommendation II, rather than in the text of the Special Recommendation itself.[90] The remaining parts of Special Recommendation II's Interpretive Note now appear in Recommendation 5's Interpretive Note or the Revised Standards' Glossary.[91]

> Recommendation 6. Targeted financial sanctions related to terrorist and terrorist financing[92]

Recommendation 6 of the 2012 Standards, "Targeted financial sanctions related to terrorism and terrorist financing," contains some substantive changes from its predecessor, Special Recommendation III of the 2003 Standards. Recommendation 6 is now uniquely focused on "targeted financial sanctions," a new term defined in the Glossary to mean "both asset freezing and prohibitions to prevent funds or other assets from being made available, directly or indirectly, for the benefit of designated persons and entities."[93] The Recommendation states that the sanctions are to comply with UNSCRs relating to the prevention and suppression of terrorism and terrorist financing, including UNSCR 1267 and its successor UNSCRs[94] and 1373.[95] As noted above, the second paragraph of Special

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[89] *2012 Standards*, *supra* note 3, at 13.

[90] *Special Recommendations*, *supra* note 77, at 4–5.

[91] *2012 Standards*, *supra* note 3, at 37, 117, 121. The "Objective" and "Characteristics of the terrorist financing offense" in the Interpretive Note to Recommendation 5 includes all of the corresponding requirements in the Interpretive Note to Special Recommendation II. The defined terms "funds," "terrorist," "terrorist act," "terrorist financing," and "terrorist organization" have been moved to the 2012 Standards' General Glossary from the Interpretive Note to Special Recommendation II without change in substance.

[92] Recommendation 6 of the Revised Standards corresponds to Special Recommendation III of the 2003 Standards. *Id.* at 4.

[93] *Id.* at 13, 113, 120. The definition of the term "designated persons or entities" has been expanded from the 2003 definition of "designated person" to include (a) for purposes of Recommendation 6, individuals, groups and undertakings designated by the 1267 Committee or the 1988 Committee, and natural or legal persons designated by jurisdictions pursuant to UNSCR 1373, and (b) for purposes of Recommendation 7, natural or legal persons designated by UNSCR 1718 or 1737 or their successors, or by the respective UN Sanctions Committee. *Id.* at 113–14.

[94] *Id.* at 13. *See generally* S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999), *available at* http://www.un.org/sc/committees/1267/ (stating that UNSCR 1267 required countries to freeze funds or other assets owned or controlled by Al-Qaida, the Taliban, Usama bin Laden, or associated persons). When issued, UNSCR 1267 had a time period of one year; however, successor UNSCRs extend or are otherwise directly related to it.

Recommendation III, which required measures to "enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts, or terrorist organizations[,]" now appears in the Revised Standards Recommendation 4.[96]

Recommendation 6's Interpretive Note is also somewhat different from that of Special Recommendation III. It has been reorganized and is generally aligned with the framework reflected in the FATF International Best Practices Paper, "Freezing of Terrorist Assets (October 2003)."[97] This framework requires that countries (1) establish procedures to identify and initiate designation proposals meeting the criteria of UNSCRs 1267 and its successor resolutions and UNSCR 1373, including a competent authority or court that deliberates on proposals for designations; (2) freeze and prohibit dealing in funds or other assets of designated persons and entities suspected of being associated with terrorists; and (3) implement due process measures, including delisting, unfreezing, and providing access to such frozen funds or assets.[98] In particular, the Interpretive Note expands upon the required identification and designation procedures, and the necessary authority for such procedures; these procedures were not explicit in the Interpretive Note to Special Recommendation III.[99] Among the other technical changes are a listing of UNSCR 1267's successor resolutions[100] and the move to the Glossary of the definitions contained in the Interpretive Note to Special Recommendation III.[101]

The private sector was generally supportive of the changes to Special Recommendation III. Most of the comments focused on using consistent terminology, which the FATF successfully accomplished in its revisions.[102]

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[95] *See* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001), *available at* http://www.un.org/News/Press/docs/2001/sc7158.doc.htm (stating that the Resolution requires countries to freeze the funds or other assets of persons who commit, attempt to commit, or participate in, terrorist acts, and of persons and entities acting on behalf of such persons). Each country must have the authority to designate such persons, and to examine and give effect to such actions of other jurisdictions.

[96] *2012 Standards*, *supra* note 3, at 12; *Special Recommendations*, *supra* note 7777, at 2 (alteration added).

[97] FATF, *International Best Practices: Freezing of Terrorist Assets*, at 3 (Oct. 3, 2003), *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/International%20BPP%20Freezing%20of%20Terrorist%20Assets%20SR%20III%20Cover%202012.pdf.

[98] *2012 Standards*, *supra* note 3, at 39–46.

[99] *Id.* at 40–42.

[100] *Id.* at 39.

[101] *Id.* at 109–23.

[102] *FATF Response to Public*, *supra* note 4, at 7.

In response to private sector concerns, Recommendation 6's Interpretive Note includes a reference stating, in effect, that when determining the limits of or fostering widespread support for a counter-terrorist financing ("CTF") regime, countries must respect human rights and the rule of law, in addition to rights of innocent third parties.[103] The Interpretive Note also requires that countries inform persons designated on the Al-Qaida Sanctions List of the availability of the United Nations Office of the Ombudsperson to accept de-listing petitions,[104] and requires that countries have mechanisms for communicating de-listings and un-freezings to the financial sector immediately upon taking such action and for providing adequate guidance on the financial sector's obligations with respect to these actions.[105]\

Recommendation 7. Targeted financial sanctions related to proliferation

The 2012 Standards' Recommendation 7 is entirely new. It requires countries "to implement targeted financial sanctions to comply with United Nations Security Council resolutions relating to the prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing."[106] The Revised Standards' Recommendation 7 is based upon, and largely tracks the language of, Recommendation 6, except that Recommendation 7 is directed at complying with UNSCRs that relate to preventing the proliferation and financing of weapons of mass destruction ("WMD"),[107] as opposed to terrorism and terrorist financing. [108]

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[103] *2012 Standards*, *supra* note 3, at 39.

[104] *Id.* at 44. This is required by UNSCR 1904. S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904(2009).

[105] *2012 Standards*, *supra* note 3, at 45.

[106] *Id.* at 13. (explaining that "[t]hese resolutions require countries to freeze without delay the funds or other assets of, and to ensure that no funds and other assets are made available, directly or indirectly, to or for the benefit of, any person or entity designated by, or under the authority of, the United Nations Security Council under Chapter VII of the Charter of the United Nations.")."

[107] *See generally id.*; S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1737(2006) (showing that UNSCR 1718 (2006) imposes a series of economic and commercial sanctions on the Democratic People's Republic of Korea (North Korea) in the aftermath of that nation's claimed nuclear test of October 9, 2006, and 1737 (2006), requires Iran to suspend certain "proliferation sensitive nuclear activities," places several prohibitions on all states with regards to Iran's nuclear activities, imposes a freeze on those assets supporting or associated with Iran's nuclear proliferation activities and establishes a committee to oversee their implementation).

The Interpretive Note to Recommendation 7 similarly tracks that of Recommendation 6, but with a few differences.[109] Recommendation 7's Interpretive Note focuses on the UNSCRs that contain designations, or the relevant UNSC Committee established for the purpose of making designations, while Recommendation 6's Interpretive Note focuses on the responsibilities of individual countries.[110] This difference arises because under Recommendation 7 (as well as under the relevant UNSCRs), unlike Recommendation 6, countries are under no specific obligation to implement procedures and mechanisms for proposing designations to the UN. Instead, countries could consider developing such capability. Accordingly, the Interpretive Note to Recommendation 7 recognizes that designations are originated by UN members and points to the 1718 and 1737 UN Committee guidelines, which call for member submissions and contain the criteria that would be needed for proposed designations (which must be made by the relevant UN Committee).[111] In addition, whereas the focus of Recommendation 6 on preventing terrorist financing is included in other areas of the Standards, including the criminalization of terrorist financing, suspicious transaction reporting, preventive measures, and international cooperation, requirements relevant to the prevention of WMD proliferation are limited to Recommendations 7 and 2.[112] Finally, Recommendation 7's Interpretive Note contains a specific requirement that countries adopt measures to monitor financial institutions' and DNFBPs' compliance with these obligations and that noncompliance should be subject to sanctions.[113] In contrast, sanctions for noncompliance with Recommendation 6 are covered by Recommendation 35, which is the general sanctions standard.[114]

Some private sector commenters opposed extending targeted financial sanctions to proliferation financing.[115] In response to private sector

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[108] It also bears noting in both cases that, while the relevant UNSCRs include a broad range of requirements, including travel bans and activity-based financial prohibitions, these Recommendations address only implementation of the asset freezing provisions and related prohibitions contained in the UNSCRs. *See generally 2012 Standards*, *supra* note 3, at 13.

[109] *Id.* at 47. The sections have identical titles except for the second, which is entitled "Designations" rather than "Identifying and Designating Persons and Entities Financing or Supporting Terrorist Activities." *Id.*

[110] *See generally id.* at 39–53.

[111] *Id.* at 48.

[112] *Id.* at 11, 13.

[113] *2012 Standards*, *supra* note 3, at 50.

[114] *Id.* at 26.

[115] One commenter noted that, for the great majority of transactions, financial institutions do not have sufficient information to distinguish between ordinary, innocent transactions, and those involving WMD, and urged that primary responsibility for

requests that the Standards be more explicit regarding human rights, Recommendation 7's Interpretive Note includes a requirement that de-listing procedures should be in accordance with the "Focal Point" mechanism established under UNSCR 1730,[116] as well as requirements for communicating de-listings and un-freezings to the financial sector and providing appropriate guidance.[117]

The addition of Recommendation 7, ensuring implementation of targeted financial sanctions called for by UNSCRs that are aimed at preventing the financing of the proliferation of WMD, represents a significant expansion by the FATF of its original mandate of preventing money laundering, as expanded in 2001 to include terrorist financing, and demonstrates the organization's ability to expand its scope in order to combat the financial aspects of other serious threats to world security.[118]

Recommendation 8. Non-profit organisations[119]

The text of Recommendation 8 in the 2012 Standards, "Non-profit organisations," is identical to that of Special Recommendation VIII in the 2003 Standards.[120] The Interpretive Note to Recommendation 8 is also substantively identical to the Interpretive Note to Special Recommendation VIII.[121] The only two technical changes made in converting Special Recommendation VIII to Recommendation 8 were (1) moving the definitions to the Glossary and (2) adding a "Resources for Supervision,

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preventing such transactions should rest with customs and export control officials. *See* Letter from International Banking Federation, to John Carlson, Principal Administrator, FATF Secretariat, 6–7 (Sept. 20, 2011), http://www.ibfed.org/download/7115.

[116] *2012 Standards*, *supra* note 3, at 50. *See also* S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006), *available at* http://www.un.org/ga/search/view_ doc.asp?symbol=S/RES/1730(2006) (requesting that the UN Secretary General establish a focal point to receive de-listing requests).

[117] *2012 Standards*, *supra* note 3, at 51.

[118] *Id.* The FATF mandate was initially expanded to refer to WMD proliferation financing in 2008. *See Ministers renew the mandate of the Financial Action Task Force until 2020*, FIN. ACTION TASK FORCE (Apr. 20, 2012), http://www.fatf-gafi.org/topics/fatfgeneral/documents/ministersrenewthemandateofthefinancialactiontaskforceuntil2020.html. The 2012 mandate further expands upon this.

[119] Recommendation 8 of the 2012 Standards corresponds with Special Recommendation VIII of the 2003 Standards. *2012 Standards*, *supra* note 3, at 4.

[120] *Compare id.* at 13, *with Special Recommendations*, *supra* note 77, at 3.

[121] *Compare 2012 Standards*, *supra* note 3, at 54–58, *with Special Recommendations*, *supra* note 77, at 20–24.

Monitoring, and Investigation" section, which was previously covered globally by Recommendation 30 in the 2003 Standards.[122]

D. *Preventive Measures*

Recommendation 9. Financial institution secrecy laws[123]

The Revised Standards' Recommendation 9, "Financial institution secrecy laws," is identical to the 2003 Standards' Recommendation 4.[124] It states that "[c]ountries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations."[125] Recommendation 9 has no corresponding Interpretive Note.

The FATF considered the impact of data protection and privacy requirements[126] on the implementation of the FATF standards, recognized that such requirements can in some cases limit—or conflict with—the implementation of AML/CFT requirements, and sought private sector input regarding this complex area.[127] In response, the private sector noted potential restrictions on the ability of financial institutions to (1) rely on third parties for certain CDD requirements (as permitted by Recommendation 17) and (2) implement financial group compliance programs (as required by Recommendation 18), that could arise as a result of data protection requirements.[128] Despite its efforts, the FATF was ultimately unable to identify and articulate a solution in the Revised Standards, but it has noted the need to work with other international bodies in order to endeavor to resolve these issues.[129] To the extent that an effective AML/CFT regime requires that government authorities have

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[122] *2012 Standards*, *supra* note 3, at 58. In the 2012 Standards each Recommendation (where appropriate) contains its own requirement for adequate resources (e.g., Recommendations 26, 28-30 and 32), rather than addressing resources globally through a separate recommendation. *Compare id.* at 23–25, with *2003 Standards*, *supra* note 40 at 11. This change was made in order that the adequacy of resources could be assessed in connection with each relevant standard.

[123] Recommendation 9 in the 2012 Standards corresponds with Recommendation 4 in the 2003 Standards. *Id.* at 4.

[124] *Compare id.* at 14, *with Special Recommendations*, *supra* note 77, at 4.

[125] *2012 Standards*, *supra* note 3, at 14.

[126] *See, e.g.*, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281/31).

[127] *FATF Response to Public*, *supra* note 74, at 9.

[128] *See, e.g.*, *IBFed January letter*, *supra* note 58, at 3–4; *FATF Response to Public*, *supra* note 4, at 9.

[129] *See FATF Response to Public*, *supra* note 4, at 9.

access to financial or other information regarding individuals, and to the extent that a data privacy regime may restrict or prohibit such access, these represent diametrically opposed interests, that it would seem may only be resolved either by extremely artful negotiations, or the willingness of either or both regimes to compromise (or both). Thus far this has not been achieved.

Recommendation 10. Customer due diligence[130]

The Revised Standards' Recommendation 10, "Customer due diligence," along with its Interpretive Note, was one of the Recommendations that received the greatest amount of attention during the FATF review and private sector consultations.[131] Although the text of Recommendation 10 was not significantly modified from its predecessor, the 2003 Standards' Recommendation 5, the Interpretive Note has substantial changes.[132]

The third paragraph of Recommendation 10 is new in form (but not substance). It states: "The principle that financial institutions should conduct [customer due diligence ("CDD")] should be set out in law. Each country may determine how it imposes specific CDD obligations, either through law or enforceable means."[133] This text is based upon, and replaces, the requirements contained in the 2004 Methodology's asterisked criteria that required certain CDD measures to be set out in "law or regulation."[134]

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[130] Recommendation 10 in the Revised Standards corresponds to Recommendation 5 in the 2003 Standards. *2012 Standards*, *supra* note 3, at 4.

[131] *Id.* at 14–15, 59–66. *See generally* FATF, *Consultation on Proposed Changes to the FATF Standards: Compilation of Responses from Designated Non-Financial Business and Professions (DNFBPs)* (2011) [hereinafter *First Compilation of Responses from DNFBPs*], *available at* http://www.fatf-gafi.org/media/fatf/documents/publicconsultation/First%20public%20consultation%20document%20responses%20dnfbp.pdf (providing some examples of comments relating to customer due diligence). 2003's Recommendation 5 was the longest Recommendation with the greatest number of requirements. *2003 Standards*, *supra* note 41, at 4–5, 18–21. In addition, the requirements pertaining to beneficial ownership identification have proven among the most challenging Standards for countries to implement. *See, e.g.*, *First Compilation of Responses from DNFBPs*, *supra* at 57 ("In practice, much of the beneficial ownership information that might be required is not available through independent channels.").

[132] *Compare 2012 Standards*, *supra* note 3, at 14–15, 59–66, *with 2003 Standards*, *supra* note 41 at 4–5, 18–19.

[133] *2012 Standards*, *supra* note 3, at 14 (alterations added).

[134] *See id.* at 14. *See also 2004 Methodology*, *supra* note 667, at 9. This requirement, which also applies to certain elements of Recommendations 11 and 20, is explained in an Interpretive Note entitled "Legal Basis of Requirements on Financial Institutions and

In the fourth paragraph of Recommendation 10, which addresses the CDD measures to be taken, subsection (c) was modified to read as follows: "(c) *Understanding and, as appropriate,* obtaining information on the purpose and intended nature of the business relationship."[135] By adding "Understanding and, as appropriate . . ." to this subsection, it appears that the financial institution is not necessarily required to obtain information about the purpose and intended nature of the business relationship, so long as it "understands" its purpose and intended nature, and (presumably) can demonstrate that it does.

The fifth paragraph of Recommendation 10 was edited by deleting more than three sentences that referred to considering risk, and replacing the edited text with the clause: "using a risk-based approach (RBA) in accordance with the Interpretive Notes to this Recommendation and to Recommendation 1."[136]

Finally, a parenthetical was added to the seventh paragraph of Recommendation 10, as follows: "Where the financial institution is unable to comply with the applicable requirements under paragraphs (a) to (d) above (subject to appropriate modification of the extent of the measures on a risk-based approach), it should be required not to open the account . . ."[137] The addition of the parenthetical reiterates that the extent of the four CDD measures is subject to adjustment based on an analysis of the relevant risks.

Unlike Recommendation 10 itself, the Interpretive Note to Recommendation 10 is substantively different from its 2003 counterpart, the Interpretive Note to Recommendation 5.[138] These changes and additions are discussed below in the order of their subheadings.

Subheading A, "Customer Due Diligence and Tipping-Off," contains no substantive changes, but subheading B, "CDD – Persons Acting on Behalf of a Customer," has one new element.[139] Subheading B extends to individual customers, the requirements in the 2003 Interpretive Note that financial institutions verify the identity of any person purporting to act on behalf of a legal person or arrangement and to confirm that such person is in fact properly authorized to do so.[140] The 2003 Interpretive Note to

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DNFBPs," placed at the end of the 2012 Standards' Interpretive Notes section and discussed at the end of this article.

[135] *2012 Standards*, *supra* note 3, at 14 (emphasis added).

[136] *Id.* at 15 (emphasis added). The reference to the RBA in the 2012 Standards made it possible to substantially shorten the text of the above paragraph.

[137] *Id.*

[138] *Compare id.* at 59–66, *with 2003 Standards*, *supra* note, at 18–21.

[139] *2012 Standards*, *supra* note 3, at 59.

[140] *Id.*

Recommendation 5 did not apply this requirement to individual customers.[141]

Subheading C, entitled "CDD for Legal Persons and Arrangements," contains new text.[142] The new text explains that the purpose of the CDD requirements is twofold: (1) "to prevent the unlawful use of legal persons and arrangements, by gaining a sufficient understanding of the customer," and (2) "to take appropriate steps to mitigate the risks" associated with the customer.[143] The specific requirements for customer identification and verification are similar to those articulated in the 2003 Interpretive Note, except that the 2012 Interpretive Note requires identification of "persons having a senior management position," while the 2003 Interpretive Note only required identification of directors.[144] The Interpretive Note to Recommendation 10 also requires "the address of the registered office, and, if different, a principal place of business," while 2003's Interpretive Note to Recommendation 5 simply required an address.[145]

The requirements for identifying and verifying the identity of the customer's beneficial owner have undergone more substantial revisions. While 2003's Interpretive Note to Recommendation 5 spoke generally about "identifying the natural persons with a controlling interest and . . . who comprise the mind and management of the legal person or arrangement,"[146] the 2012 Standards' Interpretive Note to Recommendation 10 now sets forth a new step-by-step process to satisfy the beneficial ownership identification requirement for legal persons: "(i.i) The identity of the natural persons . . . who ultimately have a controlling ownership interest in a legal person;" "(i.ii) to the extent there is doubt under (i.i)…the identity of the natural persons (if any) exercising control of the legal person . . . through other means; and . . . (i.iii) [w]here no natural person is identified under (i.i) or (i.ii) above . . . the relevant natural person who holds the position of senior managing official."[147]

For "legal arrangements" (i.e., trusts), the Interpretive Note to Recommendation 10 specifies obtaining "the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the

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[141] *2003 Standards*, *supra* note 41, at 18–21.

[142] *2012 Standards*, *supra* note 3, at 59–60.

[143] *Id.* at 60.

[144] *Compare id.* at 60, *with 2003 Standards*, *supra* note 41, at 19.

[145] *Compare 2012 Standards*, *supra* note 3, at 60, *with 2003 Standards*, *supra* note 41, at 19.

[146] *2003 Standards*, *supra* note 41, at 19.

[147] *2012 Standards*, *supra* note 3, at 60–61 (alterations added) (footnote omitted).

trust . . . ."[148] This is more prescriptive than the corresponding requirements contained in the 2003 Standard.

Certain other CDD requirements for legal persons and arrangements were unchanged, including taking reasonable measures to verify the identity of the beneficial owner, and an exemption from beneficial ownership requirements for publicly traded companies. [149]

In the 2012 Standards, Recommendation 10 also has a new subheading D, "CDD for Beneficiaries of Life Insurance Policies," and, in relation to life insurance, the Glossary has a new definition of "beneficiary."[150] The 2003 Interpretive Note to Recommendation 5 stated that identification and verification of the identity of the beneficiary under a life insurance policy "should occur at or before the time of payout or the time where the beneficiary intends to exercise vested rights under the policy."[151] The 2012 Standards' Interpretive Note to Recommendation 10 now states that financial institutions should identify the beneficiary by name or otherwise obtain sufficient information about the characteristics or class to be able to identify the beneficiary, as the case may be, then maintain this information in accordance with the requirements of Recommendation 11.[152] Financial Institutions must also verify the beneficiary's identity at the time of payout; include the beneficiary as a relevant risk factor in determining whether enhanced due diligence is required, and, if it is required, take reasonable measures to identify and verify the beneficial owner of a beneficiary who is a legal person or arrangement.[153] Finally, the Interpretive Note requires that a financial institution that is unable to comply with these requirements should consider filing a suspicious transaction report ("STR").[154] As a result of the public consultation, the Interpretive Note to Recommendation 10 also states that verification of beneficiaries need only occur "at the time of payout," and the reference in the 2003 Interpretive Note to verification "before the time the beneficiary intends to exercise vested rights" was deleted, in recognition that beneficiaries have no "vested rights" prior to payout.[155]

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[148] *Id.* at 61.

[149] *Id.* The Interpretive Note to Recommendation 10 extends this to majority-owned subsidiaries of publicly traded companies. *Id.*

[150] *Id.* at 61, 109–10.

[151] *2003 Standards*, *supra* note 41, at 20.

[152] *2012 Standards*, *supra* note 3, at 15, 61.

[153] *Id.* at 61.

[154] *Id.* at 62.

[155] *Id.* at 61.

The 2012 Standards' Recommendation 10's subheading E, "Reliance on Identification and Verification Already Performed," is unchanged from 2003's Interpretive Note to Recommendation 5, and subheading F, "Timing of Verification," was changed only by deleting a reference to life insurance beneficiaries (now covered in subheading D), and by deleting an outdated reference to the Basel CDD Paper of 2001.[156] Subheading G, "Existing Customers," was revised to be more specific than its corresponding provision in 2003's Interpretive Note to Recommendation 5, which referred to the Basel CDD Paper for guidance.[157] The new provision is based on the corresponding provision from the 2004 Methodology that requires the application of CDD measures to existing customers "on the basis of materiality and risk," with an additional requirement that CDD applied to existing customers should take "into account whether and when CDD measures have previously been undertaken and the adequacy of data obtained." [158]

The 2012 Standards added a new subheading H, entitled "Risk Based Approach," to Recommendation 10's Interpretive Note, which primarily lists numerous examples relevant to assessing and mitigating risk.[159] Subheading H contains seven subsections, and begins with the admonition that "[t]he examples . . . are not mandatory elements of the FATF Standards, and are included for guidance only."[160] The first, entitled "Higher Risks," expands substantially on corresponding information in 2003's Interpretive Note to Recommendation 5 and the 2004 Methodology.[161] It includes examples of types of customers, countries, and products or transactions that may carry higher ML/TF risk and, thereby, require enhanced CDD measures.[162] Some of the examples are based upon similar material in the FATF's Guidance on RBA.[163]

The next subsection in subheading H, entitled "Lower Risks," notes that there are circumstances where the risk of money laundering or terrorist financing may be lower and, thus, it "could be reasonable for a country to

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[156] *Compare id.* at 61–62, *with 2003 Standards*, *supra* note 41, at 20 & n.10 (citing BASEL COMM. ON BANKING SUPERVISION, CUSTOMER DUE DILIGENCE FOR BANKS (2001), *available at* http://www.bis.org/publ/bcbs85.pdf).

[157] *Compare 2012 Standards*, *supra* note 3, at 62, *with 2003 Standards*, *supra* note 41, at 20.

[158] *2012 Standards*, *supra* note 3, at 15, 62. *2004 Methodology*, *supra* note 6, at 15–19.

[159] *2012 Standards*, *supra* note 3, at 63.

[160] *Id.*

[161] *Compare id. with 2003 Standards*, *supra* note 41, at 19–21, *and 2004 Methodology*, *supra* note 6, at 17–19.

[162] *2012 Standards*, *supra* note 3, at 63–64.

[163] *Guidance on RBA*, *supra* note 433, at 23–25.

allow its financial institutions to apply simplified CCD measures."[164] This subsection also includes examples, taken largely from 2003's Interpretive Note to Recommendation 5 and the Guidance on RBA, of potential lower risk factors for the customer; product, service, transaction or delivery channel; or country.[165]

The third subheading H subsection, "Risk variables," is also based on the Guidance on RBA.[166] It explains that financial institutions should take certain variables into account—such as the purpose of an account, the level of assets in an account, or regularity of the business relationship—that may increase or decrease the potential risk of that account.[167]

The fourth subsection in subheading H, entitled "Enhanced CDD measures," contains examples of some of the enhanced measures financial institutions may take in higher risk situations and is based primarily on the 2003 Standards' Recommendation 11[168] and the measures previously required by Recommendation 6 of the 2003 Standards.[169]

The fifth subheading H subsection, entitled "Simplified CDD Measures," lists examples of possible measures financial institutions may take when risk is low.[170] The sixth subsection, entitled "Thresholds," notes that the maximum threshold for occasional transactions is $15,000 (USD/EUR), including transactions "carried out in a single operation or in several operations that appear to be linked."[171] This subsection states a requirement that was contained in the 2004 Methodology.[172]

The final subsection in subheading H, entitled "Ongoing due diligence," requires that financial institutions "ensure that documents, data or information collected under the CDD process is kept up-to-date and relevant by undertaking reviews of existing records . . . ."[173] This requirement is of particular importance with respect to higher-risk

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[164] *2012 Standards*, *supra* note 3, at 64.

[165] *2003 Standards*, *supra* note 41, at 21; *Guidance on RBA*, *supra* note 433, at 25-26.

[166] *Compare 2012 Standards*, *supra* note 3, at 65, *with Guidance on RBA*, *supra* note 433, at 24–25.

[167] *2012 Standards*, *supra* note 3, at 65.

[168] *Id.* (directed at "complex, unusual large transactions"), *with 2003 Standards*, *supra* note 41, at 7 (stating that R11 is directed at "complex, unusual large" transactions).

[169] *2003 Standards*, *supra* note, at 5–6.

[170] *2012 Standards*, *supra* note 3, at 66.

[171] *Id*.

[172] *2004 Methodology*, *supra* note 6, at 24 n.23.

[173] *2012 Standards*, *supra* note 3, at 66 (ellipsis added).

customers and is based on a nearly identical requirement in the 2004 Methodology.[174]

The private sector had substantial comments regarding this Standard, which focused on the general challenges of determining beneficial ownership, the cost and burden involved (particularly with a universal rather than risk-based requirement), and their strong preferences in favor of a risk-based requirement and, when applicable, for permitting it to be based on a minimum percentage for ownership. Private sector comments also suggested eliminating the "mind and management" standard as particularly difficult to define, and instead clarifying as much as possible which individuals need to be identified. Commenters also observed that the public sector authorities that create legal entities should be required to facilitate access to beneficial ownership information.[175]

Although Recommendation 10 has not changed substantially, its Interpretive Note has been substantively revised. The most significant modification is the method for determining the beneficial ownership of a financial institution's customer, which was included as a means of addressing many private sector comments, as well as what had been a very problematic requirement for most countries in the third round of assessments. Although the new Interpretive Note's revised formulation may well lead to further questions,[176] it appears to be of greater clarity and somewhat easier to apply than the old Interpretive Note to Recommendation 5's reference to "persons with a controlling interest" and who "comprise the mind and management . . . ."[177]

Also of note, Recommendation 10's Interpretive Note states that a threshold percentage for ownership may be appropriate. It will be interesting to observe in the course of the fourth round of Mutual Evaluations, the extent to which these changes in fact clarify the requirement in practice and result in increased compliance. In addition, the Interpretive Note has been lengthened substantially by the inclusion of numerous examples of the risk-based approach, although with the

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[174] *Compare id.*, *with 2004 Methodology*, *supra* note 6, at 17.

[175] *See FATF Response to Public*, *supra* note 4, at 3–5.

[176] *See, e.g.*, Letter from the American Bar Association, to John Carlson, Principal Administrator, FATF Secretariat, 4 (Sept. 16, 2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011sept16_gatekeep_l.authcheckdam.pdf [hereinafter *ABA Letter*] (asserting that phrases such as "controlling ownership interest in a legal person" and "natural persons exercising control through other means" will need further clarification).

[177] *See 2003 Standards*, *supra* note 41, at 19.

admonition that these are examples only and not to be viewed as requirements.[178]

Recommendation 11. Record-keeping[179]

The 2012 Standards' Recommendation 11, "Record-keeping," tracks the 2003 version of Recommendation 10 very closely.[180] The few changes include text, appearing in the second paragraph, that was taken from the 2003 version of Recommendation 11 and refers to retaining "the results of any analysis undertaken (e.g. inquiries to establish the background and purpose of complex, unusual large transactions),"[181] as well as a new paragraph stating that the requirement for financial institutions to maintain records of transactions and information obtained through the CDD measures must be codified in domestic law.[182] The 2012 Standards has no Interpretive Note for Recommendation 11.

Recommendation 12. Politically exposed persons[183]

Recommendation 12 of the 2012 Standards, "Politically exposed persons," includes some significant substantive additions from the requirements of its predecessor in the 2003 Standards, Recommendation 6.[184] While 2003's Recommendation 6 addressed only foreign politically-exposed persons ("Foreign PEPs"), the 2012 Standards' Recommendation 12 expands its requirements to include individuals who are, or have been, entrusted domestically with prominent public functions ("Domestic PEPs") and persons entrusted with a prominent function by an international organization ("IO PEPs").[185] The revised Recommendation requires

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[178] *See 2012 Standards*, *supra* note 3, at 8 ("These examples are not mandatory elements of the FATF Standards, and are included for guidance only.").

[179] The 2012 Standards' Recommendation 11 corresponds to the 2003 Standards' Recommendation 10. *Id.* at 4. Recordkeeping is important for many reasons, including for law enforcement investigations and prosecutions, as well as for financial institutions to monitor their customers' transactions and report those that may be suspicious.

[180] *Compare id.* at 15, *with 2003 Standards*, *supra* note 41, at 7.

[181] *2012 Standards*, *supra* note 3, at 15.

[182] *Id.* This requirement reflects a similar requirement contained in the 2004 Methodology that certain recordkeeping requirements had to be in "law or regulation." *2004 Methodology*, *supra* note 6, at 9. *See* discussion *infra* Part H.

[183] The Revised Standard's Recommendation 12 corresponds to the 2003 Standards' Recommendation 6. *2012 Standards*, *supra* note 3, at 4.

[184] *Compare id.* at 16, *with 2003 Standards*, *supra* note 41, at 5–6.

[185] *2012 Standards*, *supra* note 3, at 16.

financial institutions to take "reasonable measures" to determine whether a customer or beneficial owner is a Domestic PEP or an IO PEP.[186]

In cases of a higher-risk business relationship with Domestic or IO PEPs, the financial institutions should apply the measures referred to in paragraphs (b), (c), and (d) of Recommendation 12, which require them to obtain senior management approval, take reasonable measures to establish source of wealth and funds, and conduct enhanced monitoring.[187] Thus, once Domestic or IO PEPs have been identified in a "higher risk business relationship," a requirement that is risk-based in itself, the financial institution is required to take the same measures as it would for Foreign PEPs.[188] These changes are implemented by adding a second paragraph to new Recommendation 12 and expanding the PEP definition from a definition limited to Foreign PEPs in the 2003 Standards' Recommendation 6, to distinct definitions of Foreign PEP, Domestic PEP, and IO PEP in the Revised Standards' Glossary.[189]

The 2012 Standards' Interpretive Note to Recommendation 12 requires that financial institutions take "reasonable measures" to determine, no later than the time of payout, whether beneficiaries of life insurance policies and/or, where required, the beneficial owner of the beneficiary are PEPs.[190] Where there are higher risks identified,[191] in addition to normal CDD, the financial institution should inform senior management before the payout, conduct enhanced scrutiny of the "whole business relationship with the policyholder," and consider filing an STR.[192]

The addition of Domestic PEPs to this Recommendation was among the most controversial changes in terms of the private sector consultation.[193] Many private sector commenters objected to the extension on the basis that,

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[186] *Id.* This is distinguished from the 2003 requirement that financial institutions have "appropriate risk management systems" to identify Foreign PEPs, whether as customer or beneficial owner. *2003 Standards*, *supra* note 41, at 5–6.

[187] *2012 Standards*, *supra* note 3, at 16.

[188] *Id.*

[189] *Id.* at 118–19. In addition, the requirements to include family members and close associates of PEPs, and customers whose beneficial owners are PEPS, are set forth in the text of the Recommendation, rather than in the definition or the 2004 Methodology, as was the case in 2003's Recommendation 6. *Id.* at 16. These are changes in form rather than substance.

[190] *Id.* at 67.

[191] The FATF does not define "higher risks" in this context, but see discussion *supra* Recommendation 10 (discussing use of the term "risk-based" in Recommendation 10).

[192] *2012 Standards*, *supra* note 3, at 67. The 2003 Standards' Interpretive Note to Recommendation 6 encouraged countries to extend the requirements of 2003's Recommendation 6 to domestic PEPs. *2003 Standards*, *supra* note 41, at 22.

[193] *See generally First Compilation of Responses from DNFBPs*, *supra* note 131.

given limited resources, this would be an unwarranted additional time and cost burden, and that it is far more efficient (and appropriate) to leave it to each jurisdiction to best address the risk of domestic corruption.[194] Other commenters went further and suggested that the risk-based approach should be applied to foreign as well as domestic PEPs.[195] This alternative was rejected, on the bases that foreign PEPs continue to present a significant risk of corruption, and that implementation of the risk-based approach for foreign PEPs would represent an inappropriate weakening of the standards.[196] The private sector also suggested that the FATF define "family members" and "close associates," that national authorities should publish lists of PEPs, and that guidance is needed in identifying which family members and close associates should be considered PEPs.[197] The FATF rejected the suggestion that the terms be defined because the meaning of these terms could differ substantially with the culture and risks specific to each country and, therefore, flexibility is needed.[198] The suggestion that countries publish lists of PEPs was also rejected on several grounds: that such lists could reduce the amount of attention that financial institutions devote in identifying and assessing risks of potential corruption, such lists would be difficult to keep up to date, and the authorities would not necessarily be able to take into account all the information that financial institutions develop through their due diligence process.[199] The FATF has announced that it intends to issue guidance that will facilitate compliance with the new requirements of Recommendation 12 and include how to identify PEPs, their family members and close associates.[200]

Recommendation 13. Correspondent banking[201]

Recommendation 13 of the 2012 Standards, "Correspondent banking," adopted the 2003 Standards' Recommendation 7 without significant change.[202] Subparagraph (d) was modified slightly, and now requires financial institutions to "clearly understand," rather than to "document," the

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[194] *See, e.g.*, *IBFed January Letter*, *supra* note 57, at 6–7.

[195] *FATF Response to Public*, *supra* note 4, at 6.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *See id.* ("FATF is intending to develop further guidance on the issue, and this would include guidance on how to identify a PEP, his/her family members and close associates.").

[201] The Revised Standards' Recommendation 13 corresponds to the 2003 Standards' Recommendation 7. *2012 Standards*, *supra* note 3, at 4.

[202] *Compare id.* at 16, *with 2003 Standards*, *supra* note 41, at 6.

respective responsibilities of each institution.[203] In subparagraph (e), the previous requirement that the respondent bank verify "the identity of and perform[] ongoing due diligence on the customers" with direct access to payable-through accounts has been shortened to simply require that the respondent bank has "conducted CDD" on such customers, which has the same meaning.[204]

In addition, prohibitions on establishing or continuing correspondent banking relationships with shell banks and permitting their accounts to be used by shell banks, previously published as a part of the 2003 Standards' Recommendation 18, have been incorporated in this 2012 Standards Recommendation, thus (together with Recommendation 26) eliminating Recommendation 18 in its 2003 form as a stand-alone recommendation.[205]

The Interpretive Note to Recommendation 13 states that "similar relationships" to which the requirements should also apply include "those established for securities transactions or funds transfers, whether for the cross-border financial institution as principal or for its customer."[206] This text was taken from a footnote to the 2004 Methodology.[207] The 2012 Standards' Interpretive Note to Recommendation 13 also contains the definition of "payable-through account."[208]

Recommendation 14. Money or value transfer services[209]

Although the text of Recommendation 14 in the 2012 Standards, even with its Interpretive Note, is substantially shorter than the combined text of the 2003 provisions it is based on, Special Recommendation VI and the Interpretive Note to Special Recommendation VI, the three "core elements" (as listed in the Interpretive Note to Special Recommendation VI) have

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[203] *2012 Standards*, *supra* note 3, at 16

[204] *2003 Standards*, *supra* note 41, at 6. *2012 Standards*, *supra* note 3, at 16.

[205] *Compare 2012 Standards*, *supra note 3*, at 16, 23, *with 2003 Standards*, *supra* note 41, at 9.

[206] *2012 Standards*, *supra* note 3, at 68.

[207] *2004 Methodology*, *supra* note 6, at 20 n.14.

[208] *2012 Standards*, *supra* note 3, at 68. This was defined in the Glossary to the 2003 Standards. *2003 Standards*, *supra* note 41, at 17.

[209] The Revised Standards' Recommendation 14 corresponds to the 2003 Standards' Special Recommendation VI. *2012 Standards*, *supra* note 3, at 4. Because "money and value transfer services" fall within the definition of "financial institution," they are already subject to several other standards, and arguably this Recommendation is unnecessary. It was included in the 2003 standards in order to bring attention to the fact that many jurisdictions were not taking sufficient action to regulate remittance activity outside of the banking sector. Because the third round of assessments showed low levels of compliance, it was determined appropriate to retain this as a separate standard.

been retained.[210] The three core elements state that jurisdictions (1) "should require licensing or registration of persons providing money/value transfer services" ("MVTS"), (2) "should ensure that [MVTS] are subject to applicable [standards]," and (3) can "impose sanctions on [MVTS] . . . that operate without a license . . . and fail to comply with" the applicable standards.[211] For emphasis, Recommendation 14 explicitly requires that countries proactively reach out to identify MVTS without a license and apply appropriate sanctions.[212]

Special Recommendation VI contained several references to, and a discussion of, "informal systems" and "alternative remittance systems."[213] To avoid possible confusion, the FATF does not use these terms in the 2012 Standards' Recommendation 14 or its Interpretive Note, but such systems continue to be subject to the Recommendation.[214] The fact that agents must be individually licensed or registered, or alternatively, maintained on a list by their MVTS provider, was moved from the Interpretive Note to Special Recommendation VI to an explicit statement in Recommendation 14 and continues to apply.[215] Finally, the FATF changed the definition of "MVTS" in the Glossary by removing references to the banking system and, instead, including a reference to "new payment methods," reflecting this emerging potential AML/CFT risk.[216]

Recommendation 15. New technologies[217]

Recommendation 15 in the 2012 Standards, "New technologies," is based upon, and expands on, one of the two elements of the 2003 Standards' Recommendation 8, Risks relating to new technologies.[218] The new Recommendation 15 is more specific, in that it requires countries and financial institutions to identify and assess the risks relating to "(a) the development of new products and new business practices, including new

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[210] *Compare id.* at 13, *with Special Recommendations*, *supra* note 77, at 13.

[211] *Special Recommendations*, *supra* note 77, at 13.

[212] *2012 Standards*, *supra* note 3, at 17 ("Countries should take action to identify natural or legal persons that carry out MVTS without a license or registration, and to apply appropriate sanctions.").

[213] *Special Recommendations*, *supra* note 77, at 13–15.

[214] *See 2012 Standards*, *supra* note 3, at 17, 69.

[215] *Id.* at 17; *Special Recommendations*, *supra* note 77, at 14.

[216] *2012 Standards*, *supra* note 3, at 118; *2004 Methodology*, *supra* note 6, at 61, 68.

[217] The Revised Standards' Recommendation 15 corresponds to the 2003 Standards' Recommendation 8. *2012 Standards*, *supra* note 3, at 4.

[218] *Compare id.* at 17 (entitled "New Technologies"), *with 2003 Standards*, *supra* note 41, at 6 (discussing threats arising from "new or developing technologies").

delivery mechanisms, and (b) the use of new or developing technologies for both new and pre-existing products."[219] Recommendation 15 also requires financial institutions to assess relevant new products, practices, or technologies prior to launch and to take appropriate measures to manage and mitigate the associated risks.[220]

The requirements in Recommendation 15's 2003 predecessor, Recommendation 8, relating to non-face-to-face transactions have largely been incorporated into the Risk Based Approach section of the 2012 Standards' Interpretive Note to Recommendation 10.[221]

Recommendation 16. Wire transfers[222]

Recommendation 16 and its Interpretive Note contain some of the most significant revisions from the corresponding requirements as they appear in the 2003 Standards' Special Recommendation VII and the Interpretive Note to Special Recommendation VII. Among these changes are the required inclusion of beneficiary information in all wires, a definition for and inclusion in the Standard of "cover payments," the application of some requirements to wire transfers below the threshold amount, freezing requirements for intermediary financial institutions, and new requirements regarding MVTS providers and prepaid cards.[223]

While the 2003 Standards' Special Recommendation VII and its Interpretive Note required that cross-border wire transfers include the originator's basic information, the 2012 Standards' Recommendation 16 and its Interpretive Note contain a new requirement dictating that, for all "qualifying wire transfers," [224] "ordering" (i.e., originating) financial institutions must ensure that (1) all "required" originator information is "accurate" (i.e., verified),[225] and (2) all "required" beneficiary information

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[219] *2012 Standards*, *supra* note 3, at 17.

[220] *Id.*

[221] *Compare id.* at 59–66 (discussing the risk based approach), *with 2003 Standards*, *supra* note 41, at 6 ("[F]inancial institutions should . . . address any specific risks associated with non-face to face business relationships or transactions." (alterations added)).

[222] The 2012 Standards' Recommendation 16 corresponds to the 2003 Standards' Special Recommendation VII. *2012 Standards*, *supra* note 3, at 4.

[223] *Id.* at 17, 70–75.

[224] *Id.* at 71, 74 (describing qualifying wire transfers as all wire transfers above the applicable threshold of USD/EUR 1000).

[225] *Id.* at 70–72. Although the required originator information is unchanged from the 2003 Special Recommendation VII Interpretive Note, the verification requirement is new. *See generally Special Recommendations*, *supra* note 77, at 17.

is included. The "required" beneficiary information includes the name of the beneficiary, the account number (when an account is used to process the transaction), or in the absence of an account, a unique transaction reference number.[226] This change was adopted largely due to the abuses of "cover payments," a new term in the Standards that describes a payment made through one or more correspondent banks to settle, or "cover," a wire transfer message that simultaneously travels directly from the originator's bank to the beneficiary's bank.[227] Although cover payments can bring greater efficiency for banks that execute large numbers of wire transfers, they can expose intermediary banks to increased risk of unknowingly facilitating illicit activities, since they would be unaware of the message going directly from the originator's to the beneficiary's bank. The recognition of this risk also led the FATF to include an explicit statement that cover payments, as well as serial payments, are subject to the requirements of this Recommendation.[228]

Intermediary financial institutions are now required to (1) ensure that all beneficiary (as well as originator) information that accompanies a wire transfer is retained with the wire, and (2) "take reasonable measures to identify cross-border wire transfers that lack required originator [and beneficiary] information. [These] measures should be consistent with straight-through processing."[229] Because straight-through (i.e., automated) processing makes it impracticable to manually ensure at the time of processing that wires contain all required information, the automated system must be able to detect wire transfers lacking all required information. They must also "have effective risk-based policies and procedures for determining: (i) when to execute, reject, or suspend [a non-complying wire transfer] . . . and (ii) the appropriate follow-up action."[230] In addition, the text of Recommendation 16 contains the requirement "that, in the context of processing wire transfers, financial institutions take freezing

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[226] *2012 Standards*, *supra* note 3, at 71.

[227] The Interpretive Note to Recommendation 16 defines a "Cover payment" as "a wire transfer that combines a payment message sent directly by the ordering financial institution to the beneficiary financial institution with the routing of the funding instruction (the cover) from the ordering financial institution to the beneficiary financial institution through one or more intermediary financial institutions." *2012 Standards*, *supra* note 3, at 73.

[228] *2012 Standards*, *supra* note 3, at 70. For a thorough discussion of the risks presented by cover payments and common supervisory expectations to bring about greater transparency, see BASEL COMM. ON BANKING SUPERVISION, DUE DILIGENCE AND TRANSPARENCY REGARDING COVER PAYMENT MESSAGES RELATED TO CROSS-BORDER WIRE TRANSFERS (2009), *available at* http://www.occ.gov/news-issuances/ bulletins/2009/ bulletin-2009-36b.pdf.

[229] *2012 Standards*, *supra* note 3, at 72 (alterations added).

[230] *Id.* (alterations added).

action and should prohibit conducting transactions with designated persons and entities," as required by Recommendation 6 (targeted financial sanctions).[231] These are all new requirements for intermediary financial institutions.

Beneficiary financial institutions are required to take reasonable measures to identify cross-border wire transfers that lack required beneficiary (as well as originator) information, and to verify the identity of the beneficiary of qualifying wire transfers (if not previously verified) and maintain the information as required by the 2012 Standards' Recommendation 11. These requirements relating to beneficiary information are new to the Revised Standards. Beneficiary financial institutions (like intermediary financial institutions) also must have "effective risk-based policies and procedures for determining (i) when to execute, reject, or suspend [a non-complying wire transfer], and (ii) the appropriate follow-up action," also a new requirement. [232]

Under the 2012 Standards' Recommendation 16 and its Interpretive Note, cross-border wire transfers below the applicable threshold (USD/EUR 1000) also must now contain the originator and beneficiary's names, an account number (where an account is used) or unique transaction reference number that permits traceability of the transaction, and "the originator's address, or national identity number, or customer identification number, or date and place of birth."[233] It also requires that the originator's information be verified if there is a suspicion of money laundering or terrorist financing.[234] The 2003 version of Special Recommendation VII and the Interpretive Note to Special Recommendation VII did not require identification of either the originator or the beneficiary for such low-value non-qualifying wire transfers.[235] In addition, the ordering financial institution (1) must now ensure that the required information in all cross-border wire transfers, above or below the threshold, is included, and (2) should not be allowed to execute the transfer if it does not comply with these requirements.[236]

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[231] *Id.* at 17.

[232] *Id.* at 72. Beneficiary financial institutions were required to have effective risk-based procedures in place to identify wire transfers lacking complete originator information. *See Special Recommendations*, *supra* note 77, at 19.

[233] *Id.* 71 (footnote omitted).

[234] *Id.*

[235] *Special Recommendations*, *supra* note 77, at 17. Thus, the only difference now in the information required for qualifying and non-qualifying wire transfers is that qualifying wire transfers must include the originator's address, identity number, customer identification number or date and place of birth.

[236] *2012 Standards*, *supra* note 3, at 72.

The 2012 Standards' Interpretive Note to Recommendation 16 contains a new subsection requiring MVTS providers to comply with Recommendation 16 in all countries in which they operate, either directly or through an agent.[237] In cases where the provider controls both the ordering and beneficiary side of a wire transfer, it must also take into account all of the information on both sides of the order to determine whether an STR should be filed.[238] Then, if an STR is needed, the provider must file it in any country affected by the suspicious wire and must "make relevant transaction information available to the Financial Intelligence Unit" ("FIU") of that country.[239] These are new explicit requirements under the 2012 Standards.

In addition, the 2003 Standards' Special Recommendation VII and its Interpretive Note contained an exception for credit or debit card transactions, as long as the card numbers accompanied the transfers and the card is not used to pay for the money transfer itself.[240] The new Interpretive Note to Recommendation 16 treats prepaid cards the same as credit and debit cards, so when a prepaid card is used to create a person-to-person wire transfer, the transaction is covered by Recommendation 16, and the necessary information must be included in the message.[241]

Finally, a requirement in Interpretive Note to Special Recommendation VII that countries monitor compliance by financial institutions with applicable wire transfer regulations and subject those failing to comply to sanctions, is not included in new Recommendation 16. However, this omission does not indicate that this is no longer a requirement, but rather that it is covered by Recommendations 26 and 27.

The private sector raised several issues regarding the proposed changes to the requirements to this Standard. These include the need for the FATF to consider the value of the additional information to be obtained, in relationship to the cost to financial institutions to implement the changes, understanding better the current procedures used by financial institutions to screen wire transfers for sanctioned parties and to resolve potential false positives, how to address blank fields in a wire transfer, and what country's sanction program applies when a financial institution receives a wire transfer that originates in another country.[242]

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[237] *Id.* at 73.

[238] *Id.*

[239] *Id.*

[240] *Special Recommendations*, *supra* note 77, at 18.

[241] *2012 Standards*, *supra* note 3, at 70.

[242] *See, e.g.*, *IBFed January Letter*, *supra* note 57, at 11–12.

Recommendation 17. Reliance on third parties[243]

In the 2012 Standards, several changes were made when the 2003 version of Recommendation 9 was redefined as Recommendation 17, "Reliance on third parties." One change was made to clarify that financial institutions are permitted to rely on DNFBPs, as well as on other financial institutions, to identify and verify the identity of the customer and beneficial owner and obtain information about the purpose and nature of the account, so long as the certain criteria are satisfied.[244] The FATF made a more significant change to Recommendation 17 by adding a new paragraph with reduced requirements for a financial institution that wants to rely on a member of the same "financial group."[245] This new paragraph provides that when (1) the group applies CDD and record-keeping requirements consistent with the 2012 Standards' Recommendations 10, 11 and 12 and implements AML/CFT programs consistent with the Revised Standards' Recommendation 18; and (2) such implementation is supervised at the group level by a competent authority, then the relying financial institution is not required to satisfy criteria (b) and (c) of Recommendation 17.[246] In addition, regarding criteria (d), the relying institution need not consider the level of risk in the country where the relied-upon institution is based if any higher country risk is mitigated by group AML/CFT policies.

An Interpretive Note has also been added to Recommendation 17 that explains the difference between "third-party reliance" and "outsourcing" or "agency."[247] The Interpretive Note also clarifies that "relevant competent authorities" means both the home authority, which should understand group policies and controls, and host authorities, which should be involved for the branches and subsidiaries.[248] The Interpretive Note further explains that "third parties" may include both "financial institutions [and] DNFBPs that

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[243] The Revised Standards' Recommendation 17 corresponds to the 2003 Standards' Recommendation 9. *2012 Standards*, *supra* note 3, at 4.

[244] *Id.* at 18, 76. This was achieved by adding "or monitored" to criteria (c).

[245] *Id.* at 18. A corresponding definition of the new term "financial group" has been added to the Glossary. *Id.* at 115.

[246] *Id.* (requiring that copies of relevant CDD and other documentation will be made available upon request without delay, and that the third party being relied upon is regulated or supervised for, and complies with, Recommendations 10 and 11).

[247] *Id.* at 76. In third-party reliance pursuant to Recommendation 17, the third party is a regulated financial institution or DNFBP that typically has an existing independent business relationship with the customer and applies its own CDD procedures. *See id.* In an agency or outsourcing scenario, the agent or outsourced entity is typically not a regulated financial institution and applies the CDD procedures of the relying financial institution.

[248] *2012 Standards*, *supra* note 3, at 76.

are supervised or monitored and otherwise meet the requirements under Recommendation 17."[249]

All of the abovementioned changes and clarifications made to Recommendation 17 were requested by the private sector through the Consultative Forum.[250] Another modification that was urged by the private sector but was not accepted was to relieve the relying financial institution of liability in the event that the relied-upon third party failed to adequately perform any of Recommendation 10's CDD requirements in its elements (a) through (c).[251] Rather, Recommendation 17 continues to place "ultimate responsibility" on the relying financial institution, based on the FATF's belief that this is an essential component of an effective CDD process, as well as the practical reality that in the event of a failure by the third party to conduct adequate CDD, the supervisor of the relying institution would have no sanctioning authority over the third party.[252]

Recommendation 18. Internal controls and foreign branches and subsidiaries[253]

The Revised Standards' Recommendation 18, "Internal controls and foreign branches and subsidiaries," and its Interpretive Note include all the requirements applicable to financial institutions previously contained in 2003's Recommendation 15, as well as some new obligations applicable to financial groups.[254] In the Revised Standards, financial groups are required to "implement group-wide programmes against money laundering and terrorist financing, including policies and procedures for sharing information within the group for AML/CFT purposes."[255] The Interpretive Note to Recommendation 18 goes on to require that the group programs should: apply to all branches and majority-owned subsidiaries, cover the three required elements, be appropriate to the business of the branches and

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[249] *Id.* (alteration added).

[250] *See First Compilation of Responses from DNFBPs*, *supra* note 131, at 81 (indicating that the private sector noted that data protection requirements in some jurisdictions could limit reliance); *see also FATF Response to Public*, *supra* note 4 at 8.

[251] *See First Compilation of Responses from DNFBPs*, *supra* note 131, at 62–63 (describing some of the issues with reliance).

[252] *2012 Standards*, *supra* note 3, at 18.

[253] The Revised Standards' Recommendation 18 corresponds to the 2003 Standards' Recommendations 15 and 22. *Id.* at 4.

[254] *2003 Standards*, *supra* note 41, at 8; *2012 Standards*, *supra* note 3, at 18, 77.

[255] *2012 Standards*, *supra* note 3, at 18.

subsidiaries, and be implemented effectively at that level.[256] The programs should include policies and procedures for sharing information required for AML/CFT risk management.[257] Group-level compliance, audit, and/or AML/CFT functions should be provided with customer, account, and transaction information from branches and subsidiaries when necessary for AML/CFT purposes, and adequate safeguards on the confidentiality and use of information should be in place.[258] As noted above in relation to the 2012 Standards' Recommendation 9, the private sector has noted that data protection and privacy requirements may limit the extent for permissible cross-border group-wide sharing of customer information.[259]

Recommendation 18 and its Interpretive Note also include the requirements previously contained in the 2003 Standards' Recommendation 22.[260] Recommendation 18 now requires financial institutions to "ensure that their foreign branches and majority-owned subsidiaries apply AML/CFT measures consistent with the home country requirements implementing the FATF Recommendations through the financial groups' programmes against money laundering and terrorist financing."[261] 2003's Recommendation 22 contained substantially the same requirement, but without an explicit reference to group programs.[262] In cases where the host country doesn't permit implementation of the home country's higher measures, the Interpretive Note to Recommendation 18, like 2003's Recommendation 22, requires the financial institution to report this to its home country supervisor.[263] The Interpretive Note to Recommendation 18 now also requires that, in such a case, the financial institution must take "additional measures to manage the money laundering and terrorist financing risk," and if such measures are not sufficient, the home country supervisor "should consider additional supervisory actions, including placing additional controls on the financial group, including, as appropriate, requesting the financial group to close down its operations in the host country."[264] Thus, Recommendation 18 and its Interpretive Note have gone somewhat beyond the corresponding requirements in the 2003 Standards.

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[256] *Id.* at 77. The three required elements are: (1) internal policies, and procedures and controls; (2) training; and (3) audit. *Id.*

[257] *Id.*

[258] *Id.*

[259] *See* discussion *supra* Recommendation 9.

[260] *2003 Standards*, *supra* note 41, at 9; *2012 Standards*, *supra* note 3, at 18, 77.

[261] *2012 Standards*, *supra* note 3, at 18.

[262] *2003 Standards*, *supra* note 41, at 9.

[263] *2012 Standards*, *supra* note 3, at 77.

[264] *Id.*

Recommendation 19. Higher-risk countries[265]

The 2012 Standards' Recommendation 19 and its Interpretive Note contain several changes from the 2003 Standard they are based on, Recommendation 21, many of which involve more precise terminology.[266] While 2003's Recommendation 21 required financial institutions to give "special attention" to business relationships and transactions with persons, companies, and financial institutions from countries "which do not or insufficiently apply the FATF Recommendations,"[267] the new Recommendation 19 in the 2012 Standards requires that financial institutions "apply enhanced due diligence" to relations and transactions "from countries for which this is called for by the FATF," and goes on to require that "[t]he type of enhanced due diligence measures applied should be effective and proportionate to the risks."[268] The Interpretive Note to Recommendation 19 refers to the enhanced due diligence measures listed in paragraph 20 of the Interpretive Note to Recommendation 10 as possible measures that could be undertaken;[269] 2003's Recommendation 21 did not contain such a list.[270]

While 2003's Recommendation 21 required that countries be able to apply countermeasures "where . . . a country continues not to apply or insufficiently applies"[271] the FATF Standards, the revised Recommendation 19 requires, more specifically, that countries "are able to apply appropriate countermeasures when called upon to do so by FATF [as well as independent of such a call]," and that such countermeasures are effective and proportionate to the risks.[272] The Interpretive Note to Recommendation 19 contains a list of nine examples of possible countermeasures, whereas the 2004 Methodology included five.[273]

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[265] The Revised Standards' Recommendation 19 corresponds with the 2003 Standards' Recommendation 21. *Id.* at 4.

[266] *Compare 2003 Standards*, *supra* note 41, at 9 (providing details about when to apply countermeasures), *with 2012 Standards*, *supra* note 3, at 19, 78 (stating only that countries should be able to apply countermeasures).

[267] *2003 Standards*, *supra* note 41, at 9.

[268] *2012 Standards*, *supra* note 3, at 19 (alteration added).

[269] *Id.* at 78.

[270] *See 2003 Standards*, *supra* note 41, at 9.

[271] *Id.* (ellipsis added).

[272] *2012 Standards*, *supra* note 3, at 19 (alterations added).

[273] *2004 Methodology*, *supra* note 6, at 30; *2012 Standards*, *supra* note 3, at 78. Examples of new countermeasures include prohibiting financial institutions from relying on third parties located in the country concerned to conduct elements of CDD; requiring

Recommendation 20. Reporting of suspicious transactions[274]

Recommendation 20 in the 2012 Standards, "Reporting of suspicious transactions," corresponds to Recommendation 13 and Special Recommendation IV of the 2003 Standards. Recommendation 20 is nearly identical to 2003's Recommendation 13 combined with Special Recommendation IV.[275] The only difference is that in the 2012 Recommendation 20, the reporting requirement must be codified in the "law" of the country, whereas in 2003's Recommendation 13, the requirement had to be in "law or regulation."[276] The Interpretive Note to the new Recommendation 20 includes an explanation of the reference to "terrorist financing" in the Recommendation, in order that it also covers the requirements of Special Recommendation IV.[277] The Recommendation 20 Interpretive Note also incorporates a requirement, previously contained in the 2004 Methodology, that the reporting requirement should be a "direct mandatory obligation" and that so-called "indirect reporting" is not acceptable.[278] As a result of the inclusion of tax evasion in the list of predicate offenses, the Interpretive Note appropriately omits the element of 2003's Interpretive Note to Recommendation 13 that required suspicious transactions to be reported regardless of whether they are thought to involve tax matters.[279]

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financial institutions to review and amend, or terminate, correspondent relationships with financial institutions in the country concerned; requiring increased supervisory examination and/or external audit requirements for branches and subsidiaries of financial institutions based in the country concerned; and requiring increased external audit requirements for financial groups with respect to any of their branches and subsidiaries located in the country concerned. *2012 Standards*, *supra* note 3, at 78.

[274] The 2012 Standards' Recommendation 20 corresponds to the 2003 Standards' Recommendation 13 and Special Recommendation IV. *Id.* at 4.

[275] *Id.* at 19; *2003 Standards*, *supra* note 41, at 8; *Special Recommendations*, *supra* note 77, at 2.

[276] *See* discussion *infra* Part H.

[277] *See 2012 Standards*, *supra* note 3, at 81; *Special Recommendations*, *supra* note 77, at 2.

[278] *See 2012 Standards*, *supra* note 3, at 79; *2004 Methodology*, *supra* note 6, at 25.

[279] *2003 Standards*, *supra* note 41, at 22.

Recommendation 21. Tipping-off and confidentiality[280]

Recommendation 21 of the 2012 Standards is one of the few Recommendations that was literally unchanged from its 2003 version, Recommendation 14.[281]

The 2003 Interpretive Note to Recommendation 14 provided that "where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping off."[282] This text was appropriately moved to the Interpretive Note to the 2012 Standards' Recommendation 23, which addresses, among other subjects, STR obligations of DNFBPs.[283]

Recommendation 22. DNFBPs: Customer due diligence[284]

The 2012 Standards' Recommendation 22 is substantively unchanged from 2003's Recommendation 12. The Interpretive Note to the 2012 Standards' Recommendation 22 incorporates the requirements from the 2004 Methodology that real estate agents should comply with Recommendation 10 requirements with respect to both purchasers and sellers of the property, and that casinos "ensure that they are able to link [CDD] information for a particular customer to the transactions that the customer conducts in the casino."[285]

Recommendation 23. DNFBPs: Other measures[286]

The 2012 Standards' Recommendation 23, together with its Interpretive Note, is substantively unchanged from the 2003 Standards' requirements under Recommendation 16 and the Interpretive Note to Recommendation 16.[287] The Interpretive Note to Recommendations 22 and 23 includes a new statement added to clarify that, to comply with the two

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[280] The Revised Standards' Recommendation 21 corresponds to the 2003 Standards' Recommendation 14. *2012 Standards*, *supra* note 3, at 4.

[281] *See id.* at 19; *2003 Standards*, *supra* note 41, at 8.

[282] *2003 Standards*, *supra* note 41, at 22.

[283] *2012 Standards*, *supra* note 3, at 82.

[284] The Revised Standards' Recommendation 22 corresponds to the 2003 Standards' Recommendation 12. *Id.* at 4.

[285] *Id*. at 81 (alteration added); *2004 Methodology*, *supra* note 6, at 24, n.22 & 24.

[286] The Revised Standards' Recommendation 23 corresponds to the 2003 Standards' Recommendation 16. *2012 Standards*, *supra* note 3, at 4.

[287] *2003 Standards*, *supra* note 41, at 8; *2012 Standards*, *supra* note 3, at 20, 82.

Recommendations, countries need not issue laws or enforceable means that relate exclusively to the relevant DNFBPs, so long as long as they are subject to laws or enforceable means covering the relevant activities.[288]

E. *Transparency and Beneficial Ownership of Legal Persons and Arrangements*

Recommendation 24. Transparency and beneficial ownership of legal persons

The Revised Standards' Recommendation 24 is based on Recommendation 33 of the 2003 Standards.[289] The changes to the text of Recommendation 24 include an added reference to preventing misuse of legal entities for terrorist financing (as well as money laundering) and added references to "bearer share warrants"[290] and "nominee shareholders[291] and directors,"[292] in addition to "bearer shares,"[293] as matters for which jurisdictions need to take effective measures to prevent their misuse.[294]

More significantly, the Revised Standards include a detailed Interpretive Note to Recommendation 24, while the 2003 version of Recommendation 33 had no Interpretive Note.[295] The new Interpretive Note has its origin in the 2004 Methodology, which listed three "examples" for ensuring adequate transparency: (1) central registration (up-front disclosure), (2) requiring company formation agents to obtain the information, and (3) relying on investigative and other law enforcement

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[288] *2012 Standards*, *supra* note 3, at 80.

[289] *Id.* at 5.

[290] A certificate giving the bearer the right to buy securities at a stated price for a stated period or at any time in the future. *See* THOMAS P. FITCH, DICTIONARY OF BANKING TERMS 501 (6th ed. 2012).

[291] A registered owner of shares, if different from the beneficial owner, who acts as owner of record. *See id.* at 314.

[292] An individual appointed as director to sign documents for the company should the beneficial owner not want his or her name to be connected with it, and who typically will have no knowledge of the company's affairs or accounts, cannot control or influence it, and will not act unless instructed to by the beneficial owner. *See, e.g.*, *Abusive Offshore Tax Avoidance Schemes – Glossary of Offshore Terms*, INTERNAL REVENUE SERV. http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Abusive-Offshore-Tax-Avoidance-Schemes---Glossary-of-Offshore-Terms (last updated Aug. 1, 2012).

[293] "Bearer shares refers to negotiable instruments that accord ownership in a legal person to the person who possesses the bearer share certificate." *2012 Standards*, *supra* note 3, at 109.

[294] *Compare id.* at 22, *with 2003 Standards*, *supra* note 41, at 11.

[295] *2012 Standards*, *supra* note 3, at 83–87.

powers.[296] The 2004 Methodology further noted that these examples are complementary and that countries "may find it highly desirable and beneficial to use a combination of them."[297] This vague criterion resulted in considerable difficulty in achieving consistency in assessments, which were almost universally very low.[298]

The Interpretive Note to Recommendation 24 goes well beyond the examples listed in the 2004 Methodology. It contains detailed requirements that are summarized below.[299]

The first three subsections of the 2012 Standards' Interpretive Note to Recommendation 24 set out the primary requirements for basic and beneficial ownership.[300] As an initial matter, countries should have "mechanisms" that identify and describe the different types, forms and basic features of legal persons, the process for their creation, and the means of obtaining basic and beneficial ownership information.[301] The mechanisms should also make this information publicly available and assess the ML/TF risks associated with the different types of legal persons.[302]

The Interpretive Note divides information regarding a legal person into "Basic Information" and "Beneficial Ownership Information."[303] Basic Information includes (a) the name of legal person, proof of incorporation, legal form and status, address of registered office, basic regulating powers, and a list of directors (all of which should be recorded in a "company registry") [304]; and (b) a shareholder register containing names of shareholders and number and categories of shares held.[305] The company should maintain the shareholder register required in (b) within the country, unless the company or company registry holds Beneficial Ownership Information within the country, in which case the shareholder registry need not be in the country, but still must be available promptly upon request.[306]

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[296] *2004 Methodology*, *supra* note 6, at 39.

[297] *Id.*

[298] *See, e.g.*, *Mutual Evaluations*, *supra* note 8 (providing mutual evaluations which contain examples of the difficulties with compliance).

[299] *2012 Standards*, *supra* note 3, at 83–87.

[300] *Id.* at 83–85.

[301] *Id.* at 83.

[302] *Id.*

[303] *Id.* at 83–85.

[304] For example, the records maintained by the Secretary of a State in the United States.

[305] *Id.* at 83–84.

[306] *2012 Standards*, *supra* note 3, at 83–84.

Countries are required to ensure that Beneficial Ownership Information[307] is either (a) maintained by the company at a specified location in the country, or (b) can be determined in a timely manner by a competent authority by "mechanisms."[308] The Interpretive Note to Recommendation 24 lists three such "mechanisms" for meeting these requirements: (a) requiring companies or company registries to hold the information, (b) requiring companies to take "reasonable [(i.e., risk-based)] measures" to obtain and hold the information, and (c) using existing information, including that held by financial institutions or DNFBPs, competent authorities, the company, or stock exchanges.[309] The Interpretive Note further requires that countries oblige companies to cooperate with competent authorities in determining the beneficial owner, by such means as requiring an individual and/or a DNFBP in the country to be authorized to provide Basic Information and available Beneficial Ownership Information, and/or "[o]ther comparable measures, specifically identified by the country, which can ensure cooperation."[310] The information referred to must be maintained for at least five years after the company ceases to exist.[311]

Basic Information must be accurate and updated.[312] Beneficial Ownership Information must be accurate, kept as current as possible, and updated within a reasonable period following any change.[313] "Competent authorities . . . should have all powers necessary to obtain timely access to [both types of information] . . . ."[314] Company registries should facilitate timely access by financial institutions, DNFBPs, and foreign competent authorities to, at a minimum, the Basic Information.[315]

This Recommendation was one of the most heavily discussed in private sector comments and the Consultative Forum. Many private sector representatives pointed out the difficulty (as well as the considerable expense) of an "up-front" disclosure system, due to the challenges of defining "beneficial owner" in other than a conceptual manner, the reality that virtually all legal entity formation systems are based upon legal

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[307] *See id.* at 83 n.10 (defining Beneficial Ownership by reference to information referred to in the 2012 Standards' Interpretive Note to Recommendation 10).

[308] *Id.* at 84.

[309] *Id.* (alteration added) (footnote omitted).

[310] *Id.* at 85. (alteration added).

[311] *Id.*

[312] *2012 Standards*, *supra* note 3, at 85.

[313] *Id.*

[314] *Id.* (alterations added).

[315] *Id.*

(nominal) ownership, and that under many systems an entity lacks the legal authority, as well as the practical ability, to pierce through potentially many ownership layers to the ultimate individual owner.[316] As a result, the 2012 Standards' Interpretive Note to Recommendation 24 requires that legal entities obtain and record certain Basic Information, and provides two primary means for compliance with the beneficial ownership requirement: (1) identify the beneficial owner at formation and update the identification following any change, or (2) have mechanisms in place to obtain Beneficial Ownership Information when needed.[317] Based upon past assessments, although many countries presumably comply with the requirements for Basic Information, very few countries have implemented an up-front Beneficial Ownership Information system.[318] It remains to be seen how many will do so, as opposed to attempting to comply by having mechanisms to determine the beneficial owner when necessary.

The Interpretive Note to Recommendation 24 further provides that countries should take measures to prevent the misuse of bearer shares, bearer share warrants, nominee shares, and nominee directors.[319] Examples of possible mechanisms are listed.[320] Some private sector commenters asserted that there would be difficulties with the FATF's two proposed means of preventing nominee shares misuse: (1) requiring disclosure of the nominator to the company and any relevant registry (which would arguably defeat the purpose of using a nominee),[321] and (2) requiring nominee shareholders to be registered (which they asserted would be cumbersome).[322] The Interpretive Note also provides that countries should take similar measures and impose similar requirements with regard to foundations, Anstalt,[323] and limited liability partnerships—taking into

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[316] *See, e.g.*, *ABA Letter*, *supra* note 176 at 5–6; *First Compilation of Responses from DNFBPs*, *supra* note 131, at 49 (showing the Federation of European Accountants comment that "[i]t must be clear that a professional does not have the investigation powers of criminal authorities to identify the ultimate beneficial owner." (alteration added)).

[317] *2012 Standards*, *supra* note 3, at 84.

[318] *See, e.g.*, *Mutual Evaluations*, *supra* note 8 (providing examples of prior assessments).

[319] *2012 Standards*, *supra* note 3, at 85.

[320] *Id.* at 85–86.

[321] A private sector commenter noted three important objectives for the use of nominee shareholders: personal privacy, personal safety in high-risk jurisdictions, and the need for anonymity for certain business transactions. *See, e.g.*, *ABA Letter*, *supra* note 176, at 7–8.

[322] *See, e.g.*, *Second Preparation for the 4th Round*, *supra* note 27, at 6 (discussing the possibility of implementing these proposals).

[323] A type of corporate body found in certain civil law countries, including Liechtenstein. *See, e.g.*, I.R.S. Chief Couns. Mem. AM2009-012 (Oct. 16, 2009),

account their different forms and structures—and should take the same action for other types of legal persons—taking into consideration the level of money laundering or terrorist financing risk.[324] There must be clear responsibility to comply with the requirements and liability and sanctions for failure.[325] Finally, countries must provide effective international cooperation in relation to basic and beneficial ownership information and monitor the quality of assistance they receive from other countries to their requests.[326]

> Recommendation 25. Transparency and beneficial ownership of legal arrangements

The Revised Standards' Recommendation 25, "Transparency and beneficial ownership of legal arrangements," is based on the 2003 Standards' Recommendation 34.[327] The Revised Standards' changes to the text of Recommendation 25 are minimal.[328] The FATF's revisions include a new reference to preventing misuse for terrorist financing (as well as money laundering) and an additional requirement that countries consider facilitating access to beneficial ownership and control information by financial institutions and DNFBPs.[329]

As was the case with the Revised Standards' Recommendation 24, the most significant change made to Recommendation 25 is an added Interpretive Note. In the 2003 Standards, Recommendation 34 was similar to Recommendation 33 in that it had only a Methodology containing three examples of ways to increase transparency: (1) central registration, (2) reliance on trust service providers, and (3) reliance on investigative powers.[330] This vagueness made assessment very difficult and frequently resulted in "Not Applicable" ratings for civil law countries that do not recognize trusts,[331] while common law countries nearly universally received low ratings.[332]

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available at http://www.irs.gov/pub/irs-utl/am2009012.pdf (stating that Anstalts are a type of business entity under Treas. Reg. § 301.7701-2(a)).

[324] *2012 Standards*, *supra* note 3, at 86.

[325] *Id.*

[326] *Id.* at 86–87.

[327] *Id.* at 5.

[328] *Compare id.* at 22, *with 2003 Standards*, *supra* note 41, at 12.

[329] *2012 Standards*, *supra* note 3, at 22.

[330] *2004 Methodology*, *supra* note 6, at 40–41.

[331] *See, e.g.*, *First Compilation of Responses from DNFBPs*, *supra* note 131, at 90 (containing an observation from the Society of Trust and Estate Practitioners that "[r]ecommendation 34 was judged "not applicable" for Switzerland on the grounds that

The 2012 Standards' Interpretive Note to Recommendation 25 contains detailed requirements, as summarized below.[333] Countries must require trustees of express trusts governed under their laws to obtain and hold accurate and current beneficial ownership information regarding the trust, including information on the settlor, trustees, protector, beneficiaries, and any other natural persons exercising ultimate effective control over the trust.[334] Countries must also require trustees to disclose their status to financial institutions and DNFBPs when acting as trustee, and may not be prohibited "from providing competent authorities with any information relating to the trust; or from providing financial institutions or DNFBPs, upon request, with information on the beneficial ownership [or] assets of a trust to be held or managed . . . . ."[335] These requirements may be implemented either via legislative action or through common law.[336] Countries must ensure that "trustees are either legally liable for any failure to perform [these obligations]; or that there are effective, proportionate and dissuasive sanctions . . . for [any failure] to comply."[337] In addition, in an effort to address issues raised by certain civil law countries, the Interpretive Note states that countries are not required to give legal recognition to trusts.[338]

Countries are further encouraged to ensure that other authorities and entities hold information on trusts with which they have a relationship.[339] Examples of sources for such information include trust registries, tax authorities, and other agents and service providers to trusts.[340] Countries

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Swiss law does not recognise trusts." (alteration added)). FATF member countries fall generally into three categories as regards trusts: countries whose law provides for trusts and recognizes and enforces domestic and foreign trusts (common law countries such as the United States and U.K.); countries whose law does not provide for the creation of trusts but that, as parties to the 1985 Hague Convention on the Law Applicable to Trusts and their Recognition ("Hague Convention"), recognize trusts subject to foreign law (e.g., Italy and The Netherlands); and countries whose law neither permits trusts to be created nor recognizes foreign trusts (e.g., Norway and Sweden). Countries in this latter category generally received "Not Applicable" ratings, although financial institutions in such countries may maintain accounts for trusts. *See generally Mutual Evaluations*, *supra* note 8 (providing examples of prior assessments).

[332] *See, e.g.*, *U.S. Mutual Evaluation*, *supra* note 10 at 237–39.

[333] *2012 Standards*, *supra* note 3, at 88.

[334] *Id.*

[335] *Id.* (alterations added) (footnote omitted).

[336] *Id.* at 89.

[337] *Id.* (alterations added).

[338] *Id.*

[339] *2012 Standards*, *supra* note 3, at 88.

[340] *Id.*

should also consider facilitating access by financial institutions and DNFBPs to trust information held by these sources.[341]

Competent authorities must be able to obtain timely access to information held by trustees and other parties, including financial institutions and DNFBPs, on beneficial ownership, residence of the trustee, and trust assets the trustee holds or manages.[342] "Professional trustees"[343] must be required to maintain beneficial ownership information for five years after their relationship ceases, and countries are encouraged to require non-professional trustees to maintain the information for the same period.[344] Countries must have effective, proportionate, and dissuasive sanctions for failing to grant competent authorities access to the information on trusts referred to above.[345]

In the case of any legal arrangement with a similar structure or function, countries should take measures similar to those required for trusts in order to achieve similar levels of transparency.[346] Countries should provide rapid and effective international cooperation in relation to information on trusts and other legal arrangements.[347] Countries should ensure that there are clear responsibilities to comply with these requirements contained in the revised Recommendation 25's Interpretive Note and sanctions for failing to grant competent authorities access to information regarding the trust.[348]

Recommendation 25 also received a substantial number of comments from the private sector; nearly all from trust attorneys in common law countries seeking to explain relevant aspects of trust law and suggest how such elements should be reflected in the 2012 Standards.[349] Specifically, the comments urged that the 2012 Standards' obligations should focus on, and be consistent with, the existing legal obligations of trustees, and opposed any requirement of maintaining "trust registries."[350] Both of these

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[341] *Id.* at 89.

[342] *Id.* at 88.

[343] This term is not defined in the Standards. *See generally id.* at 109–23 (glossary).

[344] *Id.* at 88.

[345] *2012 Standards*, *supra* note 3, at 89.

[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] *See, e.g.*, *First Compilation of Responses from DNFBPs*, *supra* note 131, at 84–99 (providing examples of comments from The Society of Trust and Estate Practitioners and STEP Bermuda).

[350] *See, e.g.*, Letter from American College of Trust and Estate Counsel, to John Carlson, Principal Administrator, FATF Secretariat, (Aug. 8, 2011), http://www.actec.org/Documents/misc/ACTEC_FATF_Comments_08_08_2011.pdf.

suggestions were ultimately incorporated into the 2012 Standards' Interpretive Note.[351] Commenters further urged the FATF to explicitly shift the ultimate responsibility for compliance with the Recommendation from the country whose law governs a trust, to the country where the trust is managed, in recognition of the fact that the country whose law governs a trust would have no power over a trustee or trust in situations where the trustee resides, and the trust is managed, in another country.[352] This suggestion, however, was not included in Recommendation 25's Interpretive Note, as it could have upset the consensus that had been reached.[353] Hopefully its omission does not lead to confusion in upcoming Mutual Evaluations.

F. *Powers and Responsibilities of Competent Authorities, and Other Institutional Measures*

Recommendation 26. Regulation and supervision of financial institutions[354]

The 2012 Standards' Recommendation 26 contains several changes from its 2003 predecessor, Recommendation 23, none of which are clearly substantive. In the second paragraph, Recommendation 26 now explicitly requires that countries apply consolidated group supervision to financial institutions that are subject to the Core Principles: banks, securities firms, and insurance companies.[355] This would generally require that the supervisor of the head institution of the financial group implement

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[351] *See FATF Response to Public*, *supra* note 4, at 5; *2012 Standards*, *supra* note 3, at 88.

[352] *See, e.g.*, *Response from the Society of Trust and Estate Practitioners*, SOC'Y OF TRUST AND ESTATE PRACTITIONERS, 6–7 (Sept. 13, 2011), http://www.step.org/pdf/FATF%20Sep%2011Final%20response.pdf?link=contentMiddle; *First Compilation of Responses from DNFBPs*, *supra* note 131, at 97 (stating that STEP Bermuda believed that "[i]t would be preferable . . . for trustees' residence . . . to be the basis of regulatory responsibility for a trust." (alterations added)).

[353] *2012 Standards*, *supra* note 3, at 89.

[354] The 2012 Standards' Recommendation 26 corresponds to the 2003 Standards' Recommendation 23. *Id.* at 5.

[355] *Id.* at 23. This would have been an implicit requirement under the 2003 Standards, through its reference to the Core Principles, but now is explicit and will be specifically assessed in Mutual Evaluations. *2003 Standards*, *supra* note 40, at 9–10; *2004 Methodology*, *supra* note 6 at 31–32. In addition, the 2004 Methodology requires that directors and senior management of Core Principles institutions be subject to "fit and proper" tests; this is not explicit in the 2012 Standards. *2004 Methodology*, *supra* note 6 at 31.

procedures to supervise or monitor the group for AML/CFT purposes, including any group-wide program implemented pursuant to the requirements of Recommendation 18. In addition, in the first paragraph, the phrase "or financial supervisors" was added following "competent authorities" with reference to taking the necessary measures to prevent criminals from holding interests or management functions in financial institutions.[356] This change is not substantive, but was necessary as a result of changes in the definitions of these and related terms.[357] Similarly, in the third paragraph, the word "monitoring" has replaced the word "oversight," for consistency when addressing the required form of supervision of non-Core Principles financial institutions.[358] Finally, a sentence from 2003's Recommendation 18 prohibiting the establishment or continued operation of shell banks has been added to the end of the first paragraph.[359] This provision was transferred to the 2012 Recommendation 26 because the FATF felt that efforts to eliminate shell banks have been largely successful and there is no longer a need for a separate recommendation addressing that issue.

The Interpretive Note to Recommendation 26 has been expanded well beyond the 2003 Standards' Interpretive Note to Recommendation 23, which was limited to reviews of licensing of controlling interests in financial institutions for AML/CFT purposes.[360] The revised Interpretive Note to Recommendation 26 appropriately extends the risk-based approach to supervision and explains how this is to be properly implemented.[361] The expanded Interpretive Note, which is based, in part, on the Guidance on

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[356] *Id.*

[357] *See* discussion *infra* Recommendation 28. In the 2012 Standards, "competent authorities" continues to be the all-encompassing term for those government authorities with responsibilities for combating money laundering and terrorist financing, although the definition has been revised to include a list of several specific types of authorities, including supervisors. *2012 Standards*, *supra* note 3, at 110. The definition of "supervisor" has been expanded to include, in addition to the public authorities with responsibilities for ensuring compliance by financial institutions and DNFBPs with AML/CFT requirements, certain non-public bodies with the same responsibilities, so long as they are empowered by law to exercise these functions and supervised by a competent authority. *Id.* at 120. The primary reason for this addition was to include as "financial supervisors" certain regulators for the securities industry in particular countries (often referred to in those countries as "self-regulatory organizations" or "SROs") that satisfy these standards.

[358] *Id.* at 23. *See also, id.* at 17 (stating that MVTS are to be subject to "effective systems of monitoring . . . .") (ellipsis added).

[359] *Id.* at 23; *2003 Standards*, *supra* note 41, at 9.

[360] *2003 Standards*, *supra* note 41, at 23.

[361] *2012 Standards*, *supra* note 3, at 90–91.

RBA,[362] explains that the risk-based approach to supervision means the "process by which a supervisor, according to its understanding of the risks, allocates its resources to AML/CFT supervision; and . . . the specific process of supervising institutions that apply an AML/CFT risk-based approach."[363] It further clarifies that this approach allows supervisors to direct more resources to areas perceived to present higher risks, thereby utilizing their resources more effectively.[364] This approach requires the supervisor to have a thorough understanding of the money laundering and terrorist financing risks in the specific country, as well as on-site and off-site access to all relevant information on the domestic and foreign risks relevant to customers, and products and services of the supervised institutions.[365] In implementing their risk-based approach, supervisors need to take into account the degree of discretion allowed to the regulated institutions.[366]

The Interpretive Note to Recommendation 26 also requires that countries ensure their supervisors have adequate financial, human, and technical resources, sufficient operational independence to ensure freedom from undue influence, and processes to ensure high professional standards.[367] The 2003 Standards contained a separate Recommendation mandating this requirement.[368]

Recommendation 27. Powers of supervisors

The 2012 Standards' Recommendation 27 includes the contents of 2003's Recommendation 29 with only minor modifications.[369] In Recommendation 27, the FATF broadened its description of the function of supervisors by changing "monitor" to "supervise or monitor," to be

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[362] *See generally Guidance on RBA*, *supra* note 433, at 12–20 (describing what effective risk-based AML/CFT supervision requires).

[363] *2012 Standards*, *supra* note 3, at 90.

[364] *Id.*

[365] *Id.*

[366] *Id.*

[367] *Id.* at 90–91.

[368] *See 2003 Standards*, *supra* note 41, at 11 (showing that Recommendation 30 contained this requirement).

[369] *2012 Standards*, *supra* note 3, at 5. The 2004 Methodology included some specific requirements regarding inspections, as well as the power of supervisors to inspect without a court order, that are not explicitly included in the 2012 Standards. *2004 Methodology*, *supra* note 6 at 36.

consistent with Recommendation 26.[370] The 2012 Recommendation 27 also contains a new sentence regarding sanctions that was taken from 2003's Recommendation 17 and references the 2012 Standards' Recommendation 35 in connection with the authority to impose sanctions.[371]

> Recommendation 28. Regulation and supervision of DNFBPs[372]

The 2012 Standards' Recommendation 28, regarding regulation and supervision of DNFBPs, is an expanded version of 2003's Recommendation 24.[373] Part (a) of new Recommendation 28 is identical to its counterpart in 2003's Recommendation 24, and the first paragraph of part (b) was changed only to reflect changes to the 2012 Standards' terminology.[374] In addition, whereas the 2003 Standards' Recommendation 24 required a competent authority to take necessary measures to prevent criminals from holding or being the beneficial owner of, having a significant or controlling interest in, functioning as a manager of, or operating a casino.[375] The 2012 Standards' Recommendation 28 has broadened these requirements so that they apply to all DNFBPs, include taking measures to prevent criminals and their associates from being "professionally accredited" (referring to "fit and proper" tests as an example), and refer to enforcement by the supervisor or SRB.[376] The revised Recommendation 28 also includes a reference to imposing sanctions, in line with Recommendation 35, to deal with any failure to comply.[377] Finally, Recommendation 28 has an Interpretive Note

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[370] *Compare 2012 Standards*, *supra* note 3, at 23, *with 2003 Standards*, *supra* note 41, at 9.

[371] *2012 Standards*, *supra* note 3, at 23; *see also* discussion *infra* Recommendation 35.

[372] The Revised Standards' Recommendation 28 corresponds to the 2003 Standards' Recommendation 24. *2012 Standards*, *supra* note 3, at 5.

[373] *Compare id.* at 23–24, *with 2003 Standards*, *supra* note 41, at 10.

[374] Recommendation 28 substitutes the terms "supervisor" and "self-regulatory body" for "government authority" and "self-regulatory organization," respectively. *2012 Standards*, *supra* note 3, at 24. "Supervisor" is now the generic term for authorities responsible for ensuring compliance by DNFBPs (as well as financial institutions) with AML/CFT requirements. *Id.* at 120. The newly defined term "self-regulatory body," or "SRB," has replaced the term "self-regulatory organization" or "SRO" from the 2003 Standards. *Id.* at 24. Also, the definition of SRB is somewhat stricter than "SRO," inasmuch as an SRB must be authorized to "enforce rules to ensure that high ethical and moral standards are maintained by those practising the profession," in order to fit the SRB definition. *See id.* at 120.

[375] *2003 Standards*, *supra* note 41, at 10.

[376] *2012 Standards*, *supra* note 3, at 23–24.

[377] *Id.* at 24.

that sets forth certain principles applicable to the risk-based approach to supervision of DNFBPs, analogous to the Interpretive Note to Recommendation 26.[378]

Recommendation 29. Financial intelligence units ("FIU")[379]

The 2012 Standards' Recommendation 29, read together with its Interpretive Note, is a modified version of 2003's Recommendation 26.[380] The revised Recommendation 29 clarifies, broadens, and, in some respects, strengthens the core functions of an FIU. Recommendation 29 now clearly states that the FIU's functions are to (1) receive and analyze STRs, in addition to other information required by the jurisdiction relevant to money laundering, predicate offenses, and terrorist financing, and (2) disseminate the results of its analysis.[381] Recommendation 29's new reference to predicate offenses is important because it ensures consistency with the Revised Standards' requirements in Recommendations 30, 32 and 37.[382]

Recommendation 29's Interpretive Note has been expanded substantially from its counterpart in the 2003 Standards. It notes that there are different models for an FIU, and that the Recommendation applies to each of them.[383] It explicitly states that "[t]he FIU serves as the central agency for the receipt of disclosures filed by reporting entities," and that it should include other information required by national legislation, such as cash transaction and wire transfer reports.[384] The Interpretive Note to Recommendation 29 emphasizes the FIU's analysis function, and states that the "FIU analysis should add value to the information received" by it (a newly articulated requirement), and that FIUs should be encouraged to use analytical software, but that "such tools cannot fully replace the human judgment element of analysis."[385] It also describes two types of analysis: (1) operational analysis, which focuses on specific targets, and (2) strategic analysis, which identifies money laundering trends and patterns.[386] The

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[378] *Id.* at 90, 92.

[379] The Revised Standards' Recommendation 29 corresponds to the 2003 Standards' Recommendation 26. *Id.* at 5.

[380] *See id.* at 24, 93–95; *2003 Standards*, *supra* note 41, at 10–11.

[381] *2012 Standards*, *supra* note 3, at 24.

[382] *See* discussion *infra* Recommendations 30, 32, and 37.

[383] The FIU Models include law enforcement, administrative, judicial, or hybrid. *See, e,g., What is an FIU?*, THE EGMONT GRP. OF FIN. INTELLIGENCE UNITS, http://www.egmontgroup.org/about/what-is-an-fiu (last visited Nov. 14, 2012).

[384] *2012 Standards*, *supra* note 3, at 93.

[385] *Id.*; *see also 2003 Standards*, *supra* note 41, at 10–11 (listing no such requirement).

[386] *2012 Standards*, *supra* note 3, at 93.

strategic analysis function will be significant in terms of the new requirement for a national risk assessment that FATF sets out in the Revised Standards' Recommendation 1, as it should provide very useful information regarding a country's AML/CFT risks.

Recommendation 29's Interpretive Note further requires that the FIU be capable of two types of dissemination.[387] The first type of dissemination is spontaneous (i.e., proactive) dissemination of the information reported to the FIU, as well as the results of the FIU's analyses, "when there are grounds to suspect money laundering, predicate offences or terrorist financing."[388] The second type of dissemination is new and furthers the 2012 Standards' Recommendation 31.[389] It requires dissemination by the FIU upon request of competent authorities under Recommendation 31, although the FIU should retain ultimate discretion regarding analysis or dissemination.[390]

Both Recommendation 29 and its Interpretive Note mandate that the FIUs have the power "to obtain and use additional information from reporting entities, as needed to perform its analysis properly."[391] Previously, the 2003 Standards' Recommendation 26 limited this scope to information held by competent authorities.[392] In addition, the Note states that, in order to conduct their analysis function, "FIU's should have access to the widest possible range of financial, administrative, and law enforcement information," including public source information, information collected or maintained by other authorities, and also required to have access, when appropriate, to commercially held data.[393]

Recommendation 29's Interpretive Note further establishes information security and confidentiality requirements and mandates operational independence and autonomy.[394] It clarifies that, where an FIU is part of an existing authority, its "core functions should be distinct from those of the other authority."[395] It requires that the FIU have adequate financial, human, and technical resources,[396] that it "has regard to the Egmont Group Statement of Purpose and its Principles for Information

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[387] *Id.* at 94.

[388] *Id.*

[389] *Compare id.* at 94, *with 2003 Standards*, *supra* note 41, at 11.

[390] *2012 Standards*, *supra* note 3, at 94.

[391] *Id.* at 93–94.

[392] *2003 Standards*, *supra* note 41, at 10–11.

[393] *2012 Standards*, *supra* note 3, at 94.

[394] *Id.* at 94–95.

[395] *Id.* at 95.

[396] *Id.*; *see also 2003 Standards*, *supra* note 41, at 11.

Exchange Between [FIUs]," and that it applies for membership in the Egmont Group.[397] Finally, the requirement to "consider the feasibility and utility" of large transaction reporting, which was formerly contained in 2003's Recommendation 19, has been added to Recommendation 29's Interpretive Note, as it was not considered of sufficient importance to constitute a stand-alone Recommendation.[398]

> Recommendation 30. Responsibilities of law enforcement and investigative authorities[399]

The 2012 Standards' Recommendation 30, which was based on 2003's Recommendation 27, is closely related to the revised Recommendation 31.[400] Recommendation 30 addresses the responsibilities of law enforcement and investigative authorities, while Recommendation 31 addresses their powers.[401] Together, the two Recommendations clarify and strengthen these elements.

Recommendation 30 of the 2012 Standards adds that the existing requirement that law enforcement authorities have responsibility for money laundering and terrorist financing investigations, must be "within the framework of national AML/CFT policies," thus linking this law enforcement function with the "national cooperation and coordination" requirements of Recommendation 2. Recommendation 30 also requires that, "[a]t least in . . . cases related to major proceeds-generating offences . . . designated law enforcement authorities should develop a pro-active parallel financial investigation [defined in the Interpretive Note] when pursuing money laundering, associated predicate offences, and terrorist financing, include[ing] cases where the associated predicate offense occurs outside the jurisdictions."[402] Furthermore, countries now must designate a

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[397] *2012 Standards*, *supra* note 3, at 95 (alterations added); *cf. 2003 Standards*, *supra* note 41, at 23 (stating that formerly, an FIU was to "consider" this). The Egmont Group is an informal group of FIUs formed in 1995 that meet regularly to find ways to cooperate, particularly in the areas of information exchange, training, and sharing expertise. *See About*, THE EGMONT GRP. OF FIN. INTELLIGENCE UNITS, http://www.egmontgroup.org/about (last visited Nov. 14, 2012).

[398] *Compare 2012 Standards*, *supra* note 3, at 95 (incorporating the language into another recommendation), *with 2003 Standards*, *supra* note 41, at 9 (providing a separate recommendation).

[399] The Revised Standards' Recommendation 30 corresponds to the 2003 Standards' Recommendation 27. *2012 Standards*, *supra* note 3, at 5.

[400] *See* discussion *infra* Recommendation 31.

[401] *2012 Standards*, *supra* note 3, at 24–25.

[402] *Id.* at 24 (alterations added).

competent authority to expeditiously identify, trace, and initiate actions to freeze and seize property which may be subject to confiscation, and must[403] make use of permanent or temporary multi-disciplinary groups specialized in financial investigations and conduct cooperative or joint investigations when necessary with authorities in other countries.

The Interpretive Note to Recommendation 30 expands the role of financial investigators by stating that the Recommendation is applicable to "those competent authorities, which are not law enforcement authorities, per se, but which have the responsibility for pursuing financial investigations of predicate offences, to the extent [they] are exercising functions [described in] Recommendation 30."[404] The Interpretive Note to Recommendation 30 states that anti-corruption authorities may be designated to investigate money laundering and terrorist financing offenses relating to corruption offenses, in which authorities should also have sufficient powers, and now includes definitions of "financial investigation" and "parallel financial investigation."[405] Finally, the authorities must have adequate resources and maintain high professional standards.[406]

> Recommendation 31. Powers of law enforcement and investigative authorities[407]

In the 2012 Standards, Recommendation 31 is focused more generally on powers of law enforcement authorities.[408] Accordingly, Recommendation 31 includes the material from 2003's Recommendation 28 as well as some provisions from 2003's Recommendation 27.[409] Recommendation 31, in substance, tracks 2003's Recommendation 28 in terms of the power to obtain access to all necessary documents and information.[410] The revised Recommendation 31 also adds a reference to terrorist financing investigations, and refers explicitly to the taking of witness statements, which was in the 2004 Recommendation 28

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[403] *See id.* at 120 (indicating that the word "should" is equivalent to the word "must" in the 2012 Standards).

[404] *Id.* at 96 (alterations added).

[405] *Id.*

[406] *Id.*

[407] The 2012 Standards' Recommendation 31 corresponds to the 2003 Standards' Recommendations 27 and 28. *2012 Standards*, *supra* note 3, at 5.

[408] *Id.* at 25.

[409] *Id.*; *2003 Standards*, *supra* note 41, at 11.

[410] *Compare 2012 Standards*, *supra* note 3, at 25, *with 2003 Standards*, *supra* note 41, at 11.

Methodology.[411] In addition, Recommendation 31 requires that countries ensure the availability of a wide range of suitable investigative techniques, including "undercover operations, intercepting communications, accessing computer systems and controlled delivery."[412] Furthermore, Recommendation 31 requires that financial investigators have access to mechanisms to determine, in a timely manner, whether natural or legal persons own or control accounts and to identify assets without prior notification to the owner.[413] Finally, when conducting investigations, Recommendation 31 provides that authorities should be able to ask for all relevant information held by the FIU, rather than waiting to be provided with such information.[414] As noted above, under the 2012 Standards' Recommendation 29, the FIU will have discretion as to whether to provide any such information.[415]

Recommendation 32. Cash couriers[416]

The FATF adopted the 2012 Standards' Recommendation 32 from the 2003 Standards' Special Recommendation IX nearly verbatim.[417] The only difference between the old and new recommendations is that the 2012 Standards' Recommendation 32 has an added reference to currency or bearer negotiable instruments related to "predicate offenses," in addition to terrorist financing or money laundering.[418] Similarly, the Interpretive Note to Recommendation 32 is nearly identical to the Interpretive Note to Special Recommendation IX in substance.[419] The most significant change is the addition of a somewhat detailed description of the three types of declaration system,[420] which was taken from the FATF's "Best Practices" paper[421] and

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[411] *2012 Standards*, *supra* note 3, at 25; *2004 Methodology*, *supra* note 6, at 35–36.

[412] *2012 Standards*, *supra* note 3, at 25; *cf. 2003 Standards*, *supra* note 41, at 11 (showing Recommendation 27 which only "encouraged" countries to support and develop such techniques).

[413] *2012 Standards*, *supra* note 3, at 25.

[414] *Id.*

[415] *See supra* text accompanying note 390.

[416] The Revised Standards' Recommendation 32 corresponds to the 2003 Standards' Special Recommendation IX. *2012 Standards*, *supra* note 3, at 5.

[417] *Compare id.* at 25, *with Special Recommendations*, *supra* note 77, at 3.

[418] *2012 Standards*, *supra* note 3, at 25.

[419] *Compare id.* at 98–101, *with Special Recommendations*, *supra* note 77, at 25–27.

[420] These three systems are (1) where all travellers complete a written declaration, (2) where only travellers carrying amounts above a threshold complete a declaration, and (3) where travellers orally declare the amount they are carrying.

should provide greater clarity regarding the requirements of each. The Interpretive Note to Recommendation 32's "Sanction" section includes a new reference to "predicate offenses" and a "resources" paragraph.[422] The definitions, which have been placed at the end of the Interpretive Note, contain non-substantive changes in "false declaration" and "false disclosure."[423]

Recommendation 33. Statistics

The Revised Standards' Recommendation 33 is based on the 2003 Standards' Recommendation 32.[424] The first sentence of Recommendation 33 has been rewritten for greater simplicity and clarity, but the Recommendation contains no substantive change.[425]

Recommendation 34. Guidance and feedback[426]

The Revised Standards' Recommendation 34 is adapted from, and nearly identical to, 2003's Recommendation 25.[427] The only revision that was made, however, is one of substance. Whereas 2003's Recommendation 25 applied only to "competent authorities," the revised Recommendation 33 applies to "competent authorities, supervisors and SRBs."[428] As a result of this change, SRBs will now be subject to Recommendation 34.[429] In contrast, under 2003's Recommendation 25, it was optional for SROs (which roughly corresponded to SRBs under the Revised Standards) to establish guidelines for DNFBPs.[430] In addition, the 2003 Standards' Interpretive Note to Recommendation 25 stated that, when considering feedback, "countries should have regard to the FATF Best Practices

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[421] FATF, *International Best Practices: Detecting and Preventing the Cross-Border Transportation of Cash by Terrorists and Other Criminals*, at 4 (Feb. 12, 2005), *available at* http://www.fatfgafi.org/media/fatf/documents/recommendations/International%20BPP%20Detecting%20and%20Preventing%20illicit%20cross-border%20transportation%20SR%20IX%20%20COVER%202012.pdf.

[422] *2012 Standards*, *supra* note 3, at 100.

[423] *Id.* at 100–01

[424] *Id.* at 5.

[425] *Compare id.* at 26, *with 2003 Standards*, *supra* note 41, at 11.

[426] The 2012 Standards' Recommendation 34 corresponds to the 2003 Standards' Recommendation 25. *2012 Standards*, *supra* note 3, at 5.

[427] *Compare id.* at 26, *with 2003 Standards*, *supra* note 41, at 10.

[428] *2012 Standards*, *supra* note 3, at 26; *2003 Standards*, *supra* note 41, at 10.

[429] *2012 Standards*, *supra* note 3, at 26.

[430] *See 2004 Methodology*, *supra* note 6, at 33.

Guidelines on Providing Feedback to Reporting Financial Institutions and Other Persons."[431] The 2012 Standards' Recommendation 33 has no Interpretive Note, as the Best Practices document has become obsolete.

Recommendation 35. Sanctions

The Revised Standards' version of Recommendation 35 corresponds to 2003's Recommendation 17.[432] Recommendation 35, while similar in substance to the 2003 Recommendation 17, contains some changes. By its terms, the revised Recommendation 35 only applies to the "natural or legal persons covered by Recommendation 6, and 8 to 23," while the 2003 Standards' Recommendation 17 contained no similar limitation.[433] This reflects the fact that the FATF has chosen to apply this Recommendation to the specified Recommendations (primarily the "Preventive Measures"), while several other Recommendations contain their own sanctions requirement.[434] In addition, Recommendation 35 incorporates a requirement that "[s]anctions should be applicable not only to financial institutions and DNFBPs, but also to their directors and senior management," which previously appeared in the 2004 Methodology.[435]

G. *International Cooperation*

Recommendation 36. International instruments[436]

The Revised Standards' Recommendation 36, which is a revision of the 2003 Standards' Recommendation 35 and Special Recommendation I, adds the United Nations Convention against Corruption, 2003 to the list of international conventions that member countries are required to "become

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[431] *2003 Standards*, *supra* note 41, at 23.

[432] *2012 Standards*, *supra* note 3, at 5.

[433] *Id.* at 26; *2003 Standards*, *supra* note 41, at 9.

[434] Because Recommendation 35 requires sanctions for natural or legal persons who fail to comply with AML/CFT requirements, those Recommendations where AML/CFT requirements are not relevant (e.g., Recommendations 7, 24 and 25) are not included under Recommendation 35. In addition, certain other Recommendations (e.g., Recommendations 7, 24, 25, 27 and 28) contain a specific reference to sanctions authority in the Recommendation or in the Interpretive Note. *See 2012 Standards*, *supra* note 3, at 23–24, 50, 86, and 89.

[435] *Id.* at 26 (alteration added); *2004 Methodology*, *supra* note 6, at 28.

[436] The 2012 Standards' Recommendation 36 corresponds to the 2003 Standards' Recommendation 35 and Special Recommendation I. *2012 Standards*, *supra* note 3, at 5.

party to and implement fully."[437] This Convention was listed as an "Additional (i.e., optional) Element" in the 2004 Methodology (Recommendation 6);[438] its addition is a further example of the emphasis on anti-corruption measures in the Revised Standards. The Recommendation also adds to the list of examples of relevant regional conventions countries are "encouraged" to ratify and implement; the Council of Europe Convention on Cybercrime (2001) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005).[439]

Recommendation 37. Mutual legal assistance

The 2012 Standards' Recommendation 37, in effect, replaces 2003's Recommendation 36, Recommendation 37, and parts of Special Recommendation V.[440] The Revised Standards' Recommendation 37 also incorporates some new requirements. In a change parallel to that made in several other Recommendations in the 2012 Standards, including Recommendations 29 and 32, Recommendation 37 adds the explicit requirement that mutual legal assistance should be provided in relation to investigations, prosecutions and related proceedings of "associated predicate offenses" as well as of money laundering and terrorist financing.[441] Recommendation 37 also adds several new requirements to those that were previously included in 2003's Recommendations 36 and 37. These include that countries should: (1) "have an adequate legal basis for providing assistance and, where appropriate, should have in place treaties, arrangements or other mechanisms to enhance cooperation;"[442] (2) "use a central authority, or another established official mechanism, for effective transmission and execution of requests," and maintain a "case management system;" and (3) maintain the confidentiality of requests and the information in them, "subject to fundamental principles of domestic law, in

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[437] *Id.* at 27.

[438] *2004 Methodology*, *supra* note 6, at 19–20.

[439] *2012 Standards*, *supra* note 3, at 27. 2003's Recommendation 35 listed the predecessor Convention of 1990. *2003 Standards*, *supra* note 41, at 12.

[440] *2012 Standards*, *supra* note 3, at 5.

[441] *Id.* at 27.

[442] *Id.* The "adequate legal basis for providing assistance" requirement is completely new. *See 2003 Standards*, *supra* note 41, at 12. The reference to treaties, arrangements, or other mechanisms to enhance cooperation was applicable under Special Recommendation V with respect to proceedings regarding terrorist acts, financing, and organizations, and therefore is a new requirement with respect to proceedings regarding money laundering and associated predicate offenses. *See Special Recommendations*, *supra* note 77, at 2.

order to protect the integrity of the investigation or inquiry," and inform the requesting country promptly if unable to comply.[443]

The 2012 Recommendation 37 clarifies a 2004 Methodology requirement which stated simply that "the powers of competent authorities required under [Recommendation 28 (now Recommendation 31)] should also be available for use in response to requests for mutual legal assistance."[444] In part due to the expansion of the powers now to be available under Recommendation 31, 2012 Recommendation 37 now requires that, of the powers to be available under Recommendation 31, those relating to "the production, search and seizure of information, documents or evidence (including financial records) from financial institutions and other persons, and the taking of witness statements," as well as "a broad range of other powers and investigative techniques," should be available in response to requests for mutual legal assistance, as well as "in response to direct requests from foreign judicial or law enforcement authorities to domestic counterparts," if consistent with their domestic framework.[445] The 2012 Standards' Recommendation 37 now requires that a country seeking mutual legal assistance must "make best efforts to provide complete factual and legal information that will allow for timely and efficient execution of requests, including any need for urgency . . . send requests using expeditious means . . . [and] make best efforts to ascertain legal requirements and formalities" before sending the request.[446] Finally, the Recommendation requires countries to render mutual legal assistance in the absence of dual criminality, "if the assistance does not involve coercive actions."[447]

> Recommendation 38. Mutual legal assistance: freezing and confiscation

The 2012 Standards' Recommendation 38 is based on the 2003 Standards' Recommendation 38 and parts of Special Recommendation V.[448] The 2012 Standards' Recommendation 38 requires that countries have effective mechanisms for managing property or instrumentalities, or

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[443] *2012 Standards*, *supra* note 3, at 27.

[444] *Id.*; *2004 Methodology*, *supra* note 6, at 43 (alterations added).

[445] *2012 Standards*, *supra* note 3, at 28.

[446] *Id.* (alterations added).

[447] *Id.* at 27. 2003's Recommendation 37 required this "to the greatest extent possible." *2003 Standards*, *supra* note 41, at 12. This is a somewhat weaker standard, inasmuch as it is more difficult to assess in a Mutual Evaluation.

[448] *2012 Standards*, *supra* note 3, at 5.

property of corresponding value that has been frozen, seized, or confiscated in response to a foreign country's request.[449] In addition, the Recommendation now imposes new requirements in two situations. First, countries must have the authority to respond to requests made on the "basis of non-conviction-based confiscation[s] . . . and related provisional measures, unless [it] is inconsistent with fundamental principles of domestic law;" and, based on Recommendation 38's Interpretive Note, countries should have such power, "at a minimum in circumstances when a perpetrator is unavailable by reason of death, flight, absence, or [is] unknown."[450] Second, countries must be able to share confiscated property among or between other countries, particularly when confiscation results directly or indirectly from coordinated law enforcement action.[451]

Recommendation 39. Extradition

The Revised Recommendation 39 corresponds to 2003's Recommendation 39 and parts of Special Recommendation V.[452] The requirements for extradition in this Recommendation have been expanded and strengthened in certain respects. The Revised Standards' Recommendation 39 requires that countries have clear and "efficient processes for the timely execution of extradition requests, including prioritization when appropriate;" that they maintain a case management system to monitor progress; and that they "not place unreasonable or unduly restrictive conditions on the execution of requests" and " ensure they have an adequate legal framework for extradition (which was implied under the 2003 version of Recommendation 39)."[453]

Furthermore, the 2012 Standards' Recommendation 39 requires that, "[c]onsistent with fundamental principles of domestic law, countries . . . have simplified extradition mechanisms, such as[:] allowing direct transmission of requests for provisional arrests between appropriate authorities, extraditing persons based only on warrants of arrests or

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[449] *Id.* at 28.

[450] *Id.* at 28, 102 (alterations added). Any such authority in cases of requests based on non-conviction-based confiscation was "encouraged" by 2003's Recommendation 38. *2003 Standards*, *supra* note 41, at 13. There is some ambiguity in the Interpretive Note as to whether this requirement is to apply, even if "inconsistent with fundamental principles of domestic law." *See 2012 Standards*, *supra* note 3, at 102. This may be another issue that will be resolved in the context of Mutual Evaluations.

[451] *Id.* This was something countries were only required to consider in the 2003 Standards. *See 2003 Standards*, *supra* note 41, at 24.

[452] *2012 Standards*, *supra* note 3, at 5.

[453] *Id.* at 29.

judgments, or introducing a simplified extradition of consenting persons who waive formal extradition proceedings."[454] Previously, under 2003's Recommendation 39, countries were only required to "consider" such simplified extradition mechanisms.[455]

> Recommendation 40. Other forms of international cooperation[456]

The 2012 Standards' Recommendation 40 and its Interpretive Note, which correspond to Recommendation 40 and part of Special Recommendation V in the 2003 Standards and cover international cooperation through methods other than mutual legal assistance or extradition, have been expanded in several respects. The 2012 Recommendation 40 adds to the 2003 version the requirement that countries should have a "lawful basis for providing cooperation," and that, if needed, bilateral and multilateral agreements, such as Memorandums of Understandings ("MOUs"), "should be negotiated and signed in a timely [manner] with the widest range of foreign counterparts."[457] Recommendation 40 also contains a new requirement that there be "clear and efficient processes for the prioritization and timely execution of requests . . . ."[458]

The 2012 Standards' Interpretive Note to Recommendation 40 is substantially longer and more detailed than its 2003 counterpart.[459] It imposes new obligations on the requesting party: that it "provide complete factual and, as appropriate, legal information;" that it include any need for urgency; and that it identify the anticipated use of such information.[460] The Interpretive Note to Recommendation 40 further provides that a competent authority should not refuse a request on the grounds that "there is an inquiry, investigation or proceeding underway in the requested country,

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[454] *Id.* (alterations added).

[455] *See 2003 Standards*, *supra* note 41, at 13.

[456] The Revised Standards' Recommendation 40 corresponds to the 2003 Standards' Recommendation 40 and part of Special Recommendation V. *2012 Standards*, *supra* note 3, at 5; *2003 Standards*, *supra* note 40 at 13–14; and *Special Recommendations*, *supra* note 77, at 2.

[457] *2012 Standards*, *supra* note 3, at 29–30 (alteration added). *See also 2003 Standards*, *supra* note 41, at 13–14 (lacking this requirement in 2003).

[458] *Id.* at 30. *See also 2003 Standards*, *supra* note 41, at 13–14 (lacking this requirement in 2003).

[459] *Compare 2012 Standards*, *supra* note 3, at 103–106 (18 paragraphs), *with 2003 Standards*, *supra* note 41, at 24 (4 paragraphs).

[460] *2012 Standards*, *supra* note 3, at 103.

unless the assistance would impede that inquiry," or because "the nature or status . . . of the requesting counterpart authority is different from that of its foreign counterpart."[461]

Part B of the 2012 Standards' Interpretive Note to Recommendation 40, entitled "Principles Applicable to Specific Forms of International Cooperation," contains more specific provisions pertaining to cooperation among FIUs, among financial supervisors, and among law enforcement authorities, and expands some of the requirements under 2003's Recommendation 40. For example, an FIU would now be required to be able to exchange with its foreign counterparts information it can access or obtain; this would include information it must now be able to obtain from financial institutions pursuant to Recommendation 29.[462] Moreover, financial supervisors must be able to not only conduct inquiries on behalf of foreign counterparts, but also, "as appropriate, to authorize or facilitate the ability of foreign counterparts to conduct inquiries themselves in the country, in order to facilitate group supervision."[463]

Furthermore, law enforcement authorities must "be able to form joint investigative teams to conduct cooperative investigations and, when necessary . . . establish bilateral or multilateral arrangements to enable such joint investigations."[464] In addition, unlike the 2004 Methodology for Recommendation 40, which addressed exchanges of information with non-counterparts as optional,[465] the Revised Standards' Interpretive Note requires countries to permit exchanges of information indirectly with non-counterparts, *i.e.*, the requested information passes "from the requested authority through one or more domestic or foreign authorities before being received by the requesting authority."[466] The 2012 Interpretive Note to Recommendation 40 further "encourages" countries to permit the exchange of information with non-counterparts directly.[467]

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[461] *Id.* (ellipsis added).

[462] *Id.* at 104.

[463] *Id.* at 105.

[464] *Compare id.* at 104–06 (ellipsis added) (including these statements broadening the scope), *with 2003 Standards*, *supra* note 41, at 13–14, 24 (with a more narrow scope).

[465] *2004 Methodology*, *supra* note 6, at 46.

[466] *2012 Standards*, *supra* note 3, at 106.

[467] *Id.*

H. *Interpretive Note: Legal Basis of Requirements on Financial Institutions and DNFBPS*

This Interpretive Note, not associated with any particular Recommendation in the 2012 Standards but rather with all the Standards, defines two important terms and sets forth two important principles. The terms are (1) "law," which essentially means legislation enacted through a Parliamentary process,[468] and (2) "Enforceable means," which includes regulations as well as guidelines and other documents, so long as they are enforceable.[469]

All requirements in the Standards applicable to financial institutions and DNFBPs must be set forth in law or enforceable means.[470] This in effect carried forward a similar requirement in the 2003 standards, but which used the terms "law or regulation" and "other enforceable means."[471] The purpose of this requirement is to ensure that compliance by countries with the standards is based on laws, or other enforceable and sanctionable measures, and not on mere "guidance" or "best practices" which are not enforceable, and noncompliance which is not subject to sanction.[472] Because of the wide divergence of legal and regulatory systems used in FATF member countries, as well as methods for imposing requirements on financial institutions and DNFBPs, this requirement has led to very complicated discussions and distinctions within the FATF in assessing different countries' compliance with the Standards.

The second principle contained in this Interpretive Note is that certain requirements in the 2012 Standards' Recommendations 10, 11, and 20 must be contained in law.[473] This emphasizes and modifies a requirement, previously in the 2004 Methodology, that certain essential criteria had to be contained in "law or regulation," defined in the 2004 Methodology to include both legislation and implementing regulations.[474] Now, per the revised Recommendations 10, 11, and 20, the corresponding requirements must be satisfied solely through measures that meet the Glossary definition of "law."[475] The FATF's rationale for this is that certain requirements

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[468] *See id.* at 107 ("The notion of law also encompasses judicial decisions that impose relevant requirements, and which are binding and authoritative in all parts of the country").

[469] *Id.*

[470] *Id.*

[471] *2003 Standards*, *supra* note 41, at 18.

[472] *See 2012 Standards*, *supra* note 3, at 107 ("There must be sanctions for non-compliance . . . which should be effective, proportionate and dissuasive." (ellipsis added)).

[473] *Id.*

[474] *2004 Methodology*, *supra* note 6, at 9, 67.

[475] *2003 Standards*, *supra* note 41, at 14–15, 19, 107.

considered of paramount importance must be contained in legislation, in order for the country to show sufficient political will to impose and enforce such requirements in a manner that cannot be easily revoked or rescinded. This requirement could be disadvantageous for countries with a legislative system like the United States, where the legislative body traditionally places very general requirements in legislation and authorizes appropriate regulatory bodies to impose more specific requirements through implementing regulations.

CONCLUSION

As a result of its review process, the FATF has made some significant changes to its Standards, including the following: the incorporation of the risk-based approach into the Standards (Recommendations 1, 10 and 26); the extension of the Standards to encompass some new threats, including the addition of tax crimes as a predicate offense (Recommendation 3) and the extension of the Standards to the financial sanctions called for by UNSCRs aimed at preventing WMD proliferation (Recommendation 7); an increased emphasis on fighting corruption, by covering domestic as well as foreign PEPs (Recommendation 12) and requiring ratification and implementation of the UN Convention Against Corruption (Recommendation 36); requiring greater transparency in cross-border wire transfers (Recommendation 16); greater specificity in the requirements aimed at increased transparency of ownership of legal entities and arrangements (Recommendations 24 and 25); increased emphasis in AML/CFT requirements (including supervision) at the financial group level (Recommendations 18 and 26); enhanced responsibilities and powers for law enforcement (Recommendations 29, 30 and 31); and an expanded scope of international cooperation between authorities in different jurisdictions (Recommendations 36 through 40).

The FATF has announced that it is in the process of developing a revised Methodology that will be used in evaluating compliance with the 2012 Standards.[476] The FATF has also announced that the new Methodology will entail a much greater emphasis on effectiveness. Thus, the FATF is not only revising the 2004 Methodology to be technically consistent with the Revised Standards, in order to assess for technical compliance with them, but is also developing an effectiveness component to

[476] FATF, *Annual Report 2011-2012*, at 20 (Oct., 11 2012), *available at* http://www.fatf-gafi.org/media/fatf/documents/process%20and%20procedures.pdf ("The FATF is working closely with its delegations and other assessing bodies, including the IMF, the World Bank, and the FSRBs to develop the methodology for assessing the level of compliance with the new FATF Recommendations.").

the Methodology.[477] This will be a significant change from the 2004 Methodology, which was highly focused on technical compliance, and where effectiveness was considered only in more general terms.[478] This will mark a substantial additional challenge for the FATF, as well as its members. Presumably, all will agree that effectiveness in preventing, detecting, disrupting, and prosecuting money laundering and terrorist financing activity is ultimately what jurisdictions should be striving for; however, it is certainly much more difficult to objectively determine the effectiveness of an AML/CFT regime, than to measure the extent to which countries have enacted a particular set of laws and regulations. The degree to which the FATF can be successful in this endeavor will only become evident through the next round of assessments, scheduled to begin late this year.[479]

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[477] *See* Bjørn S. Aamo, President, Fin. Action Task Force, FATF President's Speech at the Asia Pacific Group (APG) on Money Laundering 15th Annual Meeting (July 17, 2012), *available at* http://www.fatf-gafi.org/documents/documents/fatfpresidentsspeechattheapgannualmeetingjuly2012.html ("This new round of mutual evaluations will place a much stronger emphasis on the assessment of effective implementation of the revised FATF Standards, and not only technical compliance.").

[478] *See 2004 Methodology, supra* note 6, at 9.

[479] *See Second Preparation for the Fourth Round*, *supra* note 27, at 4.