



Financial Intelligence Unit

Government of the Cook Islands

Financial Transactions Reporting Act 2017 Practice Guideline for Lawyers, Notary Public and other independent legal persons

1. Introduction

The purpose of this document is to provide some guidance specifically for the legal professionals sector.

This document is designed to assist you with your Anti Money Laundering and Terrorist Financing (AML/CFT) obligations and should be read in conjunction with the Financial Transactions Reporting Act 2017 (FTRA), the Financial Transactions Reporting Regulations 2017 (Regulations) and the Practice Guidelines for the Financial Transactions Reporting Act 2017 (Guidelines).

In addition to the FTRA, the Regulations and the Guidelines it is recommended you refer to the following for further guidance:

-the Financial Action Taskforce (FATF) Report on Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals¹.

It should be noted these guidelines are not law and do not constitute legal advice. They should not be relied upon as evidence of you complying with your obligations under the FTRA and the Regulations. You should seek your own independent legal advice on the interpretation and requirements of the FTRA and the Regulations.

If you have any questions or require more information concerning these guidelines, the FTRA, the Regulations and the Guidelines please contact the Financial Intelligence Unit.

2. Who has obligations under the FTRA?

As a lawyer (or law firm or practice), notary public or independent legal profession you must establish and operate a compliance programme in accordance with the FTRA **if you are involved** in preparing or carrying out transactions for clients in the following circumstances:

- conveyancing transactions²; or

¹ <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf>

² Under the FTR Regulations **conveyancing transaction** means a transaction that facilitates the legal process of transferring ownership of land in the Cook Islands or in any other country whether or not the land is improved in any way and includes—

- (a) purchase;
- (b) a sale;
- (c) the grant of any lease or sublease;

- managing client money, securities or other assets other than by passive receipt and holding of funds in a solicitor's trust account as required by the Law Practitioner's Act 1994 (retainers); or
- managing bank, savings or securities accounts; or
- creating, operating or managing legal persons or legal arrangements; or
- buying and selling business entities

This does not apply to any person employed as an lawyer or legal professional in an "in-house" capacity, i.e their duties relate solely to the provision of legal services to his or her employer.

The FTRA is not intended to capture the statutory or customary processes relating to alienation, determination of interests and entitlements of native freehold land.

It should also be noted that managing assets of a client does not include where those assets only represent advance payment of professional fees for the reporting institution.

3. What are your obligations under the FTRA?

You must develop internal policies, procedures, controls and systems to ensure the following obligations are met:

- internal compliance programme and risk assessments under Part 2, including;
 - appointing a Money Laundering Reporting Officer (MRLO) to oversee your compliance programme;
 - training employees to be aware of the policies, procedures and audit systems adopted by your organisation to deter money laundering and the financing of terrorism;
 - screening directors and key employees before appointing them; and
 - establishing an internal review function to test the effectiveness of your compliance programme and its compliance with the FTRA.
- customer due diligence including identifying Politically Exposed Persons (PEPs) and record keeping under Part 3;
- reporting of cash transactions and suspicious activities under Part 4.

Please refer to the Guidelines for further information and assistance in relation to each of the obligations mentioned above.

4. What are some of the risks specific to the legal sector?

Guidance in relation to risk assessments is provided under the FTRA practice guidelines. This section aims to provide further guidance to the risks generally faced by the legal sector.

The services of the legal sector may be used by money launderers to provide an additional layer of legitimacy to the criminal's financial arrangements, especially where the sums involved may be of large amounts.

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- (d) the grant of any mortgage or other charge.

a. Trust Accounts

Trust accounts are often used by the legal sector in most jurisdictions including the Cook Islands. The use of these accounts has been identified by the FATF as a potential vulnerability, as it may enable criminals to either place money within the financial system and/or use the money as part of their layering activity, with fewer questions being asked by financial institutions (eg. banks) because of the perceived respectability and legitimacy added by the involvement of the legal professional.

While the use of a lawyer's trust account is part of many legitimate transactions undertaken by the legal sector, it can be attractive to criminals because it can:

- be used as part of the first step in converting the cash proceeds of crime into other less suspicious assets;
- permit access to the financial system when the criminal may be otherwise suspicious or undesirable to a financial institution as a customer;
- serve to help hide ownership of criminally derived funds or other assets; and/or
- be used as an essential link between different money laundering techniques, such as purchasing real estate, setting up shell companies and transferring proceeds of crime.

The following situations could give cause for concern:

- a client deposits funds in an lawyer's trust account, but then ends the transaction for no apparent reason;
- a client advises that funds are coming from one source and at the last minute the source changes for no proper reason;
- a client requests to use a client account but does not require any underlying legal services; and/or
- a client unexpectedly (and for no apparent reason) requests that money received into a firm's trust account be sent back to its source, to the client or a third party.

Where a trust account is being utilised on behalf of a client the rationale should be obtained and this should be monitored on an ongoing basis. A reporting institution should think carefully before disclosing their trust account details and circulation of such details should be kept to a minimum.

b. The use of trusts

The legal sector is often involved in the creation of trusts. Trusts are also at risk of being used as a money laundering or fraudulent vehicle. When setting up a trust, one must be aware of high risk indicators and ensure the nature/purpose of the business relationship is known to the firm.

Whether you act as a trustee yourself, or for trustees, the nature of the risk may already require information to be gathered which will help you in assessing risks, such as the location of assets and the identity of trustees, settlor or beneficiaries.

c. Property purchases

In many countries property purchases are one of the most frequently identified methods of money laundering. While the land tenure system in the Cook Islands may provide for a less attractive market for such activity there is still some risk, particularly around investment opportunities. The purchase of a restaurant, hotel or nightclub, for example offers particular advantages as it is often a cash-intensive business. Retail and rental businesses provide a good front for criminal funds where legitimate earnings can be used to disguise proceeds of crime.

d. Company and commercial work

The nature of company structures (or corporate vehicles) can make them attractive to criminals because it is possible to obscure the true ownership and protect assets with relatively little expense. Corporate vehicles can be used to disguise criminal proceeds as legitimate profits, for example through false invoicing for goods or services. More often than not, they are also used to mask the identity of the true beneficial owners and their criminally obtained assets. Case studies submitted to the FATF have indicated the following common elements in the misuse of corporate vehicles:

- Multi-jurisdictional and/or complex structures of corporate entities;
- Foreign payments without a clear connection to the actual activities of the corporate entity;
- Use of offshore bank accounts without clear economic necessity;
- Use of nominees and use of shell companies; and/or
- Tax, financial and legal advisers were generally involved in developing and establishing the structure, in some cases legal practitioners involved, specialised in providing specific legal services for clients to enable illicit activity.

5. High Risk Indicators

As with all types of risk assessment, a holistic approach should be taken and the indicators below should be taken into consideration along with the following factors:

- The client is overly secretive or evasive about:
 - their identity;
 - who the beneficial owner is (if applicable);
 - the source of funds; and / or;
 - the nature and intended purpose of the business relationship.
- The client:
 - is a foreign PEP;
 - does not seem to have an appropriate rationale for the services being sought;
 - is using complex structures without providing, or inadequately providing, appropriate rationale;
 - is using an agent or intermediary with no apparent legitimate reason;
 - delegates authority without appropriate rationale (for example power of attorney, mixed boards etc);
 - is actively avoiding personal contact with no apparent legitimate reason;
 - is reluctant to provide or refuses to provide information, data and documents usually required in order to enable the transaction's execution;
 - provides false or counterfeited documentation;
 - is a business entity which cannot be found on the internet and/or uses an email address with an unusual domain part such as Hotmail, Gmail, Yahoo etc. especially if the client is otherwise secretive or avoids direct contact;
 - is known to have convictions for acquisitive crime (meaning a crime that generates proceeds), known to be currently under investigation for an acquisitive crime or have known connections with criminals;
 - is conducting activities which are prohibited if carried on in certain countries, is engaged in higher risk trading activities, or engaged in a business which involves handling significant amounts of cash;
 - has connections to a higher risk country including those that the FATF has asked members to apply counter measures in relation to, those with ML/FT strategic deficient, those identified as major illicit drug producers, those that have strong links with terrorist financing, and sanctioned countries etc;

- is or is related to or is a known associate of a person known as being involved or suspected of involvement with ML/FT activities;
- is involved with the use of bearer shares;
- is involved in transactions which do not correspond to his or her normal professional or business activities;
- frequently changes legal structures and/or; managers of legal persons; and/or; asks for short-cuts or unexplained speed in completing a transaction.
- The parties:
 - the parties to the transaction are connected without an apparent business reason;
 - the ties between the parties of family, employment, corporate or any other nature generate doubts as to the real nature or reason for the transaction;
 - there are multiple appearances of the same parties in transactions over a short period of time;
 - the age of the executing parties is unusual for the transaction, especially if they are under legal age, or the executing parties are incapacitated, and there is no logical explanation for their involvement;
 - there are attempts to disguise the real owner or parties to the transaction;
 - the person actually directing the operation is not one of the formal parties to the transaction or their representative; and / or
 - the natural person acting as a director or representative does not appear to be a suitable representative.
- The source of funds:
 - the transaction involves a disproportional amount of private funding, bearer cheques or cash, especially if it is inconsistent with the socio-economic profile of the individual or the company's economic profile
 - the client or third party is contributing a significant sum in cash as collateral for funding provided by the borrower/debtor rather than simply using those funds directly, without logical explanation;
 - third party funding either for the transaction or for fees/taxes involved with no apparent connection or legitimate explanation;
 - the transaction is aborted for no legitimate reason after receipt of funds and there is a request to send the funds to a third party;
 - funds are received from or sent to a foreign country when there is no apparent connection between the country and the client;
 - funds received from or sent to high-risk countries; and / or; the client is using multiple bank accounts or foreign accounts without good reason.
- The choice of lawyer:
 - instruction of a legal professional without experience in a particular specialty or without experience in providing services in complicated or especially large transactions;
 - the client is prepared to pay substantially higher fees than usual, without legitimate reason;
 - the client has changed advisor a number of times in a short space of time or engaged multiple legal advisers without legitimate reason; and / or;
 - the required service was refused by another professional or the relationship with another legal professional was terminated.

The above list is not exhaustive. New methods for laundering money and financing terrorism are constantly being developed. Typologies reports produced by the FIU are available on the FSC's website and you should contact the FIU for the latest information where you are uncertain or have questions on any risk matter.

6. When should you conduct Customer Due Diligence?

Customer due diligence must be undertaken by you at any point a person wishes to undertake a specified activity as listed in paragraph (2) of this document, or if they are not an established client, a person that wishes to transact amounts of \$10,000 NZD or more through the firms account(s).

Other activity which requires customer due diligence to be undertaken in accordance with the FTRA include:

- a. Where a lawyer, notary public or other independent legal person acts (whether there is a financial element to the transaction or not) in the incorporation of a company or an incorporated society (though not an incorporation of landowners under the Land (Facilitation of Dealings) Act 1970, the lawyer has an obligation to identify and verify the initial directors and shareholders as well as any ultimate principals of the legal person to be incorporated and to hold that information on file. Where the company is foreign enterprise and you are satisfied that the BTIB has been given full disclosure of directors and shareholders and supporting documentation required in terms of its due diligence requirements – you may undertake simplified due diligence instead;
- b. In preparing any share transfer form or any change of directors of a company (regardless of whether the lawyer acts in any related financial transaction) you shall identify and verify any incoming shareholder and director, except in the case of foreign enterprises where that incoming shareholder or director has had his or her identity verified in due diligence undertaken by BTIB then simplified due diligence may be undertaken.
- c. That in the case of drafting of a partnership deed the provisions relating to companies, the above in para [b] apply with necessary changes.
- d. In the case of any trust deed drafted by a solicitor the settlor (if the settlor is the client or introduced by the client) shall be identified or and verified unless the settlor is acting on behalf of another person, then the client instructing the settlor must also be identified and verified.

Where a conveyancing transaction involves the sale of leasehold by a native landowner(s)³ you are not required to undertake customer due diligence on the landowner(s) in respect of that conveyancing transaction. If the land is assigned in the future by a person whose rights to the leasehold were obtained through a conveyancing transaction then you are required to undergo CDD on that person.

7. Record Keeping

All copies of customer due diligence information and transactional information must be kept for a minimum period of 6 years from the date of the transaction or the end of an ongoing business relationship.

8. What must be reported to the FIU?

Suspicious Activity

³ that is a person or persons with rights to the land on the basis of their familial or blood connection to that land as recognised by the Court or custom.

Any activity or requests by a client or intending client that appears to you to be unusual or suspicious in your experience with dealing with that client in particular, or with clients generally, must be reported to the FIU under section 47. The list in Part 5 above provides guidance as to the type and nature of transactions, events and circumstances that might give you reasonable cause to suspect an activity is suspicious.

Cash Transactions

The receipt of any funds on behalf of a client either paid in cash into the Lawyer's or the Lawyer's Firm's account equal to or greater than \$10,000 NZD must be reported to the FIU in the required form and manner.

9. FIU's Approach to Compliance Monitoring & Enforcement

The FIU has a responsibility to ensure that all reporting institutions are in compliance with all legislative requirements under the FTRA. To do this, the FIU is being empowered under the Financial Intelligence Act 2015 (FIU Act) to examine your compliance with the FTRA. It may request information from you, conduct on-site examinations and provide reports to you for this purpose

The FIU is empowered under section 31 of the FIU Act to enforce compliance on reporting institutions that have failed to comply in whole or in part with any of the obligations under the FTRA, or have failed to undertake directives issued by the FIU to take remedial actions.

10. Penalties for Non-Compliance

Failure to comply without reasonable excuse may cause the FIU to bring legal proceedings including prosecution of which a penalty of up to \$250,000 or a term of imprisonment of up to 5 years may be applied to an individual, or a penalty of up to \$1,000,000 to a body corporate.

11. FIU Contact

For further information about your obligations under the Act, or the FIU and its activities, contact the FIU Office on (682) 29182 or email: intel@cifu.gov.ck

12. Other resources

- FATF Report on Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals:

<http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf>

- United Kingdom Law Society

<http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/>

- A Lawyer's Guide to detecting and preventing money laundering – A collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe.

<http://www.lawsociety.org.uk/support-services/documents/iba-aml-typologies-report/>