GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO

FINANCIAL INTELLIGENCE UNIT OF TRINIDAD AND TOBAGO

Ministry of Finance

AML/CFT/CPF GUIDANCE FOR ATTORNEYS-AT-LAW

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Purpose

This Guidance is intended to provide assistance to Attorneys-at-Law in Trinidad and Tobago with their AML/CFT/CPF obligations.

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1. INTRODUCTION

This Guidance is intended to provide assistance to attorneys-at-law (AALs) in possession of a valid practising certificate granted under Section 23 of the Legal Profession Act, Chapter 90:03, and conducting the activities, as described in the First Schedule of the POCA, in complying with their Anti-Money Laundering, Counter Financing of Terrorism and Counter Proliferation Financing ("AML/CFT/CPF") legal obligations.

In accordance with the Financial Intelligence Unit of Trinidad and Tobago Act, Chap. 72:01 ("FIUTTA") and the Proceeds of Crime Act, Chap. 11:27 ("POCA"), the FIUTT is the Supervisory Authority for all listed businesses. These listed businesses are itemised in the First Schedule of the POCA, within which AALs are included.

Every individual practising as an AAL and conducting the activities, as described in the First Schedule of the POCA, is required to register with the Financial Intelligence Unit of Trinidad and Tobago ("FIUTT") and honour his AML/CFT/CPF obligations set out in the following Acts and Regulations:

1. The Financial Intelligence Unit of Trinidad and Tobago Act, Chapter 72:01 ("FIUTTA")
2. The Financial Intelligence Unit of Trinidad and Tobago Regulations, 2011 ("FIUTT Regulations")
3. The Proceeds of Crime Act, Chapter 11:27 ("POCA")
4. The Financial Obligations Regulations, 2010 ("FORs")
5. The Anti-Terrorism Act, Chapter 12:07 ("ATA")
6. The Financial Obligations (Financing of Terrorism) Regulations, 2011 ("FOFTRs")
7. Economic Sanctions (Implementation of United Nations Resolutions on the Democratic People's Republic of Korea) Order, 2018 ("ESO")
8. Economic Sanctions (Implementation of United Nations Resolutions on the Islamic Republic of Iran) Order, 2023 ("ESO")

N.B. This Guidance is a general, informative document and is not intended to replace any of the above mentioned AML/CFT/CPF Acts and Regulations. This Guidance should not be construed as legal advice and should be read in conjunction with the said laws.

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2. WHY SUPERVISE AALS?

AALs are characterised as “gate keepers” to the financial system when they prepare for , or carry out certain activities for and on behalf of their clients. These activities make AALs more susceptible to being misused by unscrupulous clients to enable illicit funds to enter the financial system.

AALs are exposed to misuse by criminals involved in **money laundering** (“ML”) activities for the following main reasons:

1. The use of AALs by criminals in the conduct of certain transactions provide a veneer of respectability and the appearance of legitimacy to any activity. Criminals need their illegal activities to appear legitimate and, therefore, seek the involvement of a lawyer as a “stamp of approval” for certain activities;

2. Criminals, without properly understanding the concept of legal professional privilege, incorrectly believe it will delay, obstruct or even prevent an investigation or prosecution by authorities if they utilise the services of an AAL;

3. Certain services provided by AALs are more likely to be misused by criminals to facilitate criminal activity and ML. In fact, FATF Recommendation 22 has identified the following legal services as particularly susceptible to misuse by criminals in the context of money laundering and terrorist financing when facilitated through an AAL:
    - Buying and selling of real estate;
    - Managing of client money, securities or other assets;
    - Management of bank, savings or securities accounts;
    - Organisation of contributions for the creation, operation or management of companies; and
    - Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

    Criminals can misuse the abovementioned services offered by an AAL to successfully launder his illicitly obtained funds and/or property at any stage of the money laundering process, i.e. placement, layering or integration stages.

FATF also identified that the use of companies and charities as well as the sale of property can be used to facilitate **terrorist financing (“TF”)**. Therefore, similar methods and techniques could be used to facilitate either ML or TF and therefore the vulnerability of AALs to involvement in TF cannot be overlooked.

Please see the FATF's Report entitled "Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals", June 2013, to understand further *the process by which AALs may be misused* by criminals to commit ML/TF/PF.

3. DO THESE OBLIGATIONS APPLY TO YOU?

These obligations apply to you if you are an attorney at law practicing[1] in Trinidad and Tobago and you **prepare documents for the conduct of transactions, and/or conduct transactions**, of the following nature[2] for and on behalf of your clients :

(a) Buying and Selling of Real Estate;
(b) Managing of client money, securities and other assets;
(c) Management of banking, savings or securities accounts;
(d) Organisation of contributions for the creation, operation or management of companies; and
(e) Creation, operation or management of legal persons or arrangements, and buying and selling business entities.

If you are an employee of a sole practitioner, firm or partnership, these requirements are the responsibility of your employer. However, you, as an employee, will have internal reporting of suspicious transactions and terrorist property obligations in accordance with your employer's compliance programme.

(a) Buying and Selling of Real Estate:

This activity includes the preparation of Agreements for Sale, Deeds of Conveyance, Deeds of Mortgage and other such documents for an on behalf of clients who wish to purchase or sell real estate (residential or commercial), as well as the purchase, sale or assignment of leases and any other transaction which finance the purchase or sale of real estate or otherwise transfer or dispose of real property. There is no specified dollar amount or threshold and therefore, the phrase includes *all* activities of an AAL acting for or on behalf of a client in a real estate transaction, from the first contemplation of the conveyance to its conclusion, as well as *any other mode or method of disposal of real property*. It is immaterial whether or

[1] Please note Section 23 of the Legal Profession Act, Chapter 90:03 which requires an attorney to be the holder of a valid practicing Certificate in order to conduct legal services in Trinidad and Tobago.

[2] Pursuant to the S18 B of the FIUTTA and Regulation 28 of the FIUTT Regulations, listed businesses are required to register with the FIUTT to be supervised for their compliance with AML/CFT/CPF domestic laws. The First Schedule of POCA categorises an Attorney at Law who facilitates the following activities on behalf of clients as a listed business:
(a) Buying and Selling of Real Estate;
(b) Managing of client money, securities and other assets;
(c) Management of banking, savings or securities accounts;
(d) Organisation of contributions for the creation, operation or management of companies; and
(e) Creation, operation or management of legal persons or arrangements, and buying and selling business entities.

not the transaction is effected for monetary consideration and as such, it should be noted a conveyance by way of gift is included in this activity.

(b) Managing of Client Money, Securities or Other Assets:

This activity comprises all activities by an AAL when involved in the management or handling of a client's funds, securities or other assets. The handling of a client's funds includes situations where you, as the attorney-at-law, have control, use, application, or disposition of client's funds held in escrow for real property transactions, or if a client authorises you through any other means to conduct financial transactions on his/her behalf.

Please note that client's money refers to money held or received by the AAL to be used for a client. This includes money held by the AAL as an agent, stakeholder, donee of a power of attorney; or as liquidator, trustee in bankruptcy or court appointed receiver.

The negotiation and preparation of agreements or contracts to grant any right or interest to money, securities or other assets or to appoint an agent or grant power over any money, securities or other asset, is also included in this activity.

Considerations when operating your client accounts:

It should be noted that operating a client account does not automatically require you to comply with AML/CFT/CPF obligations. These obligations apply to you when the client accounts are used in conjunction with a specified activity listed above, i.e. Buying and Selling of Real Estate; Managing of client money, securities and other assets; Management of banking, savings or securities accounts; Organisation of contributions for the creation, operation or management of companies; and Creation, operation or management of legal persons or arrangements, and buying and selling business entities.

Best practice dictates that you do not permit your clients to make deposits into your client account without there being record of accompanying legal services to be provided or already provided. You should consider including a process to ensure that information about funds received and payments made are cross checked and documented.

CDD should be completed before taking money on account, including verifying source of funds.

The receipt and holding of funds for professional fees, disbursements, expenses or bail is not within the definition of these activities.

(c) **Management of banking, savings or securities accounts**:

This activity refers to the circumstances where the AAL is involved in the management of banking and security accounts belonging to and established by a client or the AAL, acting on the client's behalf. It encompasses where the AAL is appointed a signatory or agent or granted any interest, mandate or power in respect of any such account belonging to a client. The AAL may be authorised to conduct transactions involving the client's funds or securities are lodged with, managed, transferred or withdrawn from any financial institution.

This includes the negotiation and preparation of agreements for the creation or operation of any such account and to appoint any signatory or agent or grant any interest, mandate or power in respect of any such account.

However, the phrase does not include the opening and maintaining of an account for the payment of fees to the attorney, where the attorney's fees are not mixed with any other client money.

(d) **Organisation of contributions for the creation, operation or management of companies**:

All services provided by an attorney when any person or entity seeks funding or any other contribution in the course of the promotion, incorporation, operation, or management of any company incorporated in Trinidad and Tobago or elsewhere, are included within this specified activity. For example, where you prepare for, or carry out, a transaction where investors contribute capital to a legal entity and would conceivably cover financing and refinancing transactions.

The source of funding sought may be through allocation, transfer, sale, exchange, mortgaging or charging of any shares or assets of a company, the grant of debentures, mortgages, charges or other security over shares or assets of a company or the arranging, negotiating or promotion of any scheme having the effect or appearing to have the effect of altering the financial position or assets of a company.

This refers to the services of an AAL that involve organizing and managing client funds used to create and operate companies. Criminals may ask legal professionals to create/or to manage companies, to provide greater respectability and legitimacy to the entities and their activities. As a result, AALs should consider their exposure to this type of work, and the risks involved – especially where the AAL undertakes complex company work/transactions (e.g. company/group restructuring, merger & acquisition transactions etc.) for clients involving higher risk jurisdictions. This is particularly important where beneficial ownership or the nature of business can be obscured or anonymized, or the use of nominees or bearer shares is permitted.

(e) Creation, operation or management of legal persons or arrangements, and buying and selling business entities

This activity involves services provided by an attorney in the formation, promotion, incorporation, operation, and management of entities. It contemplates circumstances where an attorney-at-law sells, transfers, disposes of, purchases or acquires any interest in a business entity whether incorporated or unincorporated and includes, but is not limited to, the following:

i. providing the registered office, business address, administrative address or other relates services for a company or trust;
ii. acting or arranging for another person to act as a partner, manager or investment advisor of a partnership;
iii. acting or arranging for another person to act as a trustee, manager or advisor of a trust;

iv. acting or arranging for another person to act as a nominee shareholder, director, secretary or manager of a company; and
v. providing services during the liquidation or receivership of a legal entity.

This category of specified activities comprehends most of the routine work that is done by AALs involved in corporate and commercial law.

AALs should therefore pay close attention to the way in which company structures may be exploited by criminals who wish to retain control over criminally derived assets while frustrating the ability of law enforcement to trace the origin and ownership of assets. Note that shell companies are often formed to achieve this outcome. Shell companies are corporate entities that do not have any business activities or assets. They may be used for legitimate purposes such as serving as a temporary transaction vehicle (e.g. special purpose vehicle). However, they can also be an easy and inexpensive way to disguise beneficial ownership and the flow of illegitimate funds and are attractive to criminals engaged in money laundering.

As such, AALs should beware of creating companies on behalf of clients, where ownership may be concealed. AALs should also ensure that they understand the entities concerned when managing a client's company/companies, including (where relevant), the company's source of funds and wealth to minimize the risk of money laundering. Additionally, AALs should seek to understand the commercial rationale/reason for the matter structure in the creation, operation or management of companies (e.g. to reduce costs, tax implications etc.)

4. WHAT ARE YOUR AML/CFT/CPF LEGAL OBLIGATIONS?

The AML/CFT/CPF laws of Trinidad and Tobago impose the following obligations:

I. Registration with the FIUTT
II. Appoint a Compliance Officer and Alternate Compliance Officer
III. Assessing ML/FT/PF Risks
IV. Develop and implement a Compliance Programme
V. Conducting Customer Due Diligence
VI. Training
VII. Internal and External Audits
VIII. Submission of Reports to the FIUTT
IX. Keep Records

Please note that this is not an exhaustive list of obligations and each entity is required to consult the AML/CFT/CPF laws referred to at the Introduction of this Guidance to ensure compliance.

I. REGISTRATION WITH THE FIUTT

You **must** register with the FIUTT if you are an Attorney-at-Law conducting the activities specified in Section 3 herein. Your application for registration must be received within three months of commencing the specified activities or, incorporation as a company or registration as a firm or partnership under the laws of Trinidad and Tobago, *with the intention to conduct the specified activities*, whichever is the **earlier** date. *(See Section 18B of the FIUTTA and Regulation 28(1) of the FIUTT Regulations).*

To register with the FIUTT, you may visit the FIUTT's website to access the **FIUTT Registration of Supervised Entities Form** and **relevant instructions**.

Please note that pursuant to Regulation 28(2) of the FIUTT Regulations, failure to register with the FIUTT within the time stipulated is an offence for which you are liable on summary conviction to a fine of $50,000 and to a further fine of $5,000 for each day the offence continues.

- ### Change of address or change of Directors

You are required to notify the FIUTT where there is a change of Directors, Owners, Partners or Compliance Officer within thirty (30) days of such change.

You must also notify the FIUTT of a change of address of your registered office or principal place of business within thirty (30) days of such change. *(See Regulations 29(1) and 29A of the FIUTT Regulations)*

Submissions of such changes can be made manually or electronically.

To make a manual submission, visit the FIUTT at Level 25, Tower D, International Waterfront Complex, 1A Wrightson Road. Electronic submissions can be made via email to fiucompliance@gov.tt

Failure to notify the FIUTT of a change of address of your registered office or principal place of business within thirty (30) days is an offence and you are liable on summary conviction to a fine of twenty thousand dollars ($20,000).

Additionally, failure to notify the FIUTT of a change of Directors, Owners, Partners or Compliance Officer within thirty (30) days is an offence and you will be liable on summary conviction to a fine of twenty thousand dollars $20,000. (See Regulations 29(2) and 29A (2) of the FIUTT Regulations).

- De-registration

In the circumstances where you *no longer conduct or intend to conduct* the specified activities, in your function as an attorney at law, it is advised that an application for de-registration be made to the FIUTT *(See Section 18BA of the FIUTTA)*. In order to deregister with the FIUTT, you must first ensure that you, your company, firm or partnership, no longer conduct the activities on the FIUTT's **List of Supervised Sectors***.*

To deregister with the FIUTT, you must submit:

- ✓ a completed Deregistration Form to the FIUTT (click here to access the De-registration of Listed Business Form); and
- ✓ evidence that you, your firm or partnership are no longer performing the activities which required you to be registered with the FIUTT.

To evidence that you no longer conduct the activities which require you be registered as an Attorney at Law with the FIUTT, you must submit to the FIUTT a brief summary of the circumstances which have led to your change in operations. Please note that any other useful documentation may be submitted in addition.

To make a manual submission, visit the FIUTT at Level 25, Tower D, International Waterfront Complex, 1A Wrightson Road. Electronic submissions can be made via email to fiucompliance@gov.tt.

Once the FIUTT is satisfied that **you, your company, firm or your partnership no longer conducts the activities listed in Section 3 herein**, your application for deregistration will be accepted and you will be issued with a Notice of De-registration. In addition, your name and/or the name of your company, firm or partnership will be removed from the FIUTT's List of Registrants, inserted to the FIUTT's List of De-Registrants, and uploaded on our website. A notice will also be circulated to the Financial Institutions informing them of same. It should be noted that de- registration from the FIUTT will not affect any other form

of business activity but only financial transactions pertaining the specified activities which require FIUTT registration.

II. APPOINT A COMPLIANCE OFFICER AND ALTERNATE COMPLIANCE OFFICER

Regulation 3(5) of the FORs requires you to designate a Compliance Officer for the purpose of securing compliance with AML/CFT/CPF obligations. Regulation 3(8) of the FORs requires you to also appoint an alternate compliance officer who will be required to undertake the functions of the Compliance Officer should the Compliance Officer be absent from duty for both short and extended periods of time.

The Compliance Officer and Alternate Compliance Officer of the business shall be a senior employee of the business or such other competent professional.

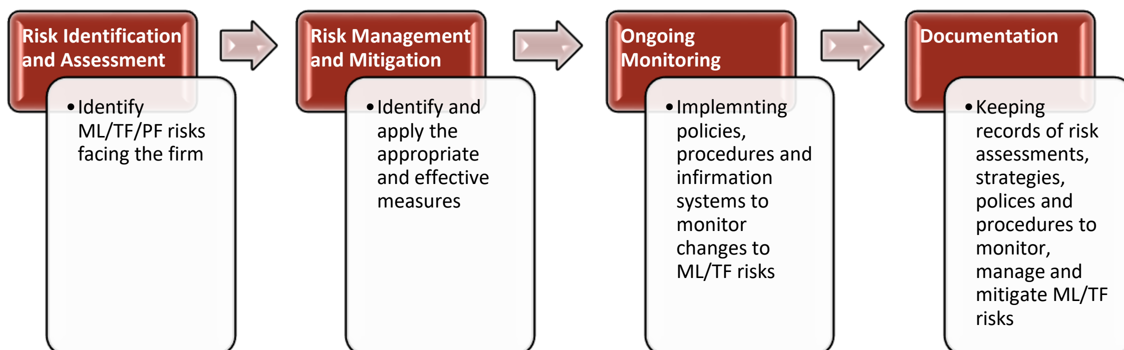
Please note that Regulations 3(8) and 3(10) of the FORS mandates that you seek the written approval of the FIUTT after designating persons as the business' Compliance Officer and Alternate Compliance Officer, respectively.

For guidance on designating a Compliance Officer and Alternate Compliance Officer, and receiving approval from the FIUTT, please click here.

III. ASSESSING ML/FT/PF RISK

Regulation 7 of the FORs requires you to adopt a risk-based approach ("RBA") to monitoring financial activities within your business.

Key elements of a RBA can be summarised as follows:



Essentially, you are required to first take steps to identify, assess, understand and document the ML/FT/PF risks of your business to determine those clients/transactions that are of low, medium or high risk.

Risk identification and assessment is an important component of adopting a risk–based approach. Your risk assessment ought to follow an approach that considers, amongst other things, the size of your business, the financial value of transactions involving your business and the nature of such transactions.

When identifying potential risks to your business, the primary risk categories may include:

1. **Country or Geographic risk** - this includes noting the country/jurisdiction where your clients, parties to the transactions and/or the property involved, are from or located. You must consider the effectiveness of that country's AML/CFT/CPF regime, identified deficiencies, whether the country is subject to sanctions by international organisations. This can be done through conducting checks on the FATF's list of High Risk Jurisdictions subject to a Call for Action and jurisdictions under increased monitoring. The FIUTT regularly publishes FATF public statements of jurisdictions who have been added to and removed from these lists **here.**

   Country or Geographic risk should also be considered when the funds to be used in the transaction have been generated from abroad and the transaction is conducted without face-to face contact.

2. **Client risk**- this includes considering the degree of ML/TF/PF risk posed by your client and the parties involved in the transaction including any beneficial owners.

   Higher risk circumstances for customers include, but are not limited to, whether the parties are from a higher risk jurisdiction, as identified above, whether they are listed on any list of targeted financial sanctions, whether they have any connection to industries associated with higher ML/TF/PF risks, use an unverifiable source of funds to conduct the transaction for which the AAL was engaged, and whether they may use foreign companies to conduct the transaction. Consideration of whether a client is Politically Exposed Person is also necessary.

   It may be necessary to pay closer attention to clients that are cash intensive business or where the business in not cash intensive but chooses to use cash or make payments by or delivery through third parties as well as those that may appear to engage in structuring.

3. **Transaction risk/Service risk**- This type of risk considers the legal services offered by the attorney at law. Examples of transaction or service risk include:

   a. Services where the attorney acts as a financial intermediary, handle receipts and transmission of funds the client accounts when facilitating a business transaction;

b. Services that are capable of concealing beneficial ownership from competent authorities;
c. Payments received from unknown/un-associated third parties;
d. The transfer of real estate between parties in a unusually short timeframe with no apparent reason;

Please see the FATF's Guidance "Guidance for a Risk-Based Approach - Legal Professionals" dated June 2019, for more information on adopting a risk based approach and the risk factors relative to Legal Professionals to be considered.

Upon completion of your risk assessment, you must determine and implement reasonable and proportionate measures and controls to mitigate such risks. Your compliance programme should be tailored to provide for the specific policies, procedures and controls to mitigate against the risks identified. These include documenting the appropriate Customer Due Diligence measures which ought to be applied when establishing a business relationship with your client, when conducting large transactions (TT$50,000.00 or higher) and in higher and lower risk circumstances.

Please also visit our website for further guidance on **adopting a risk based approach**.

IV. DEVELOP AND IMPLEMENT A COMPLIANCE PROGRAMME

Regulation 7 of the FORs requires you to develop a written Compliance Programme ("CP") to include specific policies, procedures and controls necessary for meeting the entity's AML/CFT/CPF obligations.

The CP is a written document which should include the risk assessment that you have conducted for your particular business, as well as your system of internal policies, procedures, and controls which are intended to mitigate the vulnerabilities and inherent risks identified in your risk assessment, which can be exploited by money launderers and terrorism financiers.

After development of your CP, you are required to ensure that it is effectively implemented and that the appropriate procedures are followed in a timely manner. AALs are also required to regularly review their AML/CFT/CPF measures and test them for effectiveness. As the AML/CFT/CPF Supervisory Authority, the FIUTT is empowered to examine the effectiveness of the implementation of the measures outlined in your Compliance Programme.

Please click here for the FIUTT's guidance on **Compliance Programme**.

V. CONDUCTING CUSTOMER DUE DILIGENCE

Your CP should contain policies and procedures for conducting Customer Due Diligence ("CDD") in the appropriate circumstances. This includes setting out the specific procedures which must be followed when conducting transactions with higher and lower risk customers.

AALs should aim to ensure they conduct business solely with customers (including local and foreign customers) they can reasonably confirm are engaging in legitimate business. In meeting such obligation, an attorney should implement adequate and reasonable measures to establish the identity of their customers and ensure the funds utilised to secure legal services are provided for by the Client and not by an unknown third party. Where the funds are being provided by a third party, CDD should be obtained and verified on that third party.

Part III of the FORs sets out the necessary approach to conducting CDD, which supervised entities must follow when entering into a business relationship with a client or when conducting transactions with clients.

The FIUTT has issued detailed guidance on measures, which should be taken when conducting CDD. This guidance can be found **here**.

Please note that in addition to the general ML/TF/PF risk factors contained in the CDD guidance, risk factors specific to the legal services provided by an attorney at law should be considered when risk rating clients for the purposes of CDD.

VI. TRAINING

Training is an essential component in combatting of money laundering, the financing of terrorism and financing of proliferation of weapons of mass destruction.

Regulation 6 of the FORS mandate that arrangements be made for training and ongoing training of the Directors and all members of staff to equip them to:

(a) perform their AML/CFT/CPF obligations;
(b) understand the techniques for identifying any suspicious transactions of suspicious activities; and
(c) Understand the money laundering threats posed by new and developing technologies.

It is the responsibility of the attorney-at-law to develop on-going training programmes for the Compliance Officer, alternate Compliance Officer, owners/Directors and members of staff at the appropriate levels of the business.

VII. INTERNAL AND EXTERNAL AUDIT

Regulation 10 of the FORs requires you to engage the services of internal and external auditors to review the CP for your business.

In reviewing the CP, the external auditor is required to evaluate your business' compliance with relevant AML/CFT/CPF legislation and guidelines; and submit reports generated and recommendations annually to the relevant Supervisory Authority. The internal auditor must ensure that your policies, procedures and systems comply with the FORs and that the level of transaction testing is in line with the risk profiles of your customers.

Further guidance on engaging auditors to conduct the internal and external AML/CFT/CPF audits can be found **here**.

VIII. SUBMISSION OF REPORTS TO THE FIUTT

As a supervised entity, you are required to submit three (3) types of reports to the FIUTT:

- **Suspicious Transactions Reports or Suspicious Activities Reports (STRs/SARs);**
- **Terrorist Funds Report (TFR); and**
- **Economic Sanctions Report (ESR)**

The relationship between reporting entities and the FIUTT is a key one given that the FIUTT can only perform its analytical function to produce financial intelligence if the various reporting entities report critical information they may have.

• Reporting Suspicious Transactions and Activities

You **MUST** submit a Suspicious Transaction Report or Suspicious Activity Report (STR/SAR) to the FIUTT where ***you know or have reasonable grounds to suspect that***:

i. funds being used for the purpose of a transaction are the proceeds of a criminal conduct *(See S55A of the POCA)*;

ii. a transaction or an attempted transaction is related to the commission or attempted commission of a Money Laundering offence

iii. an attempted transaction is related to a Terrorist Financing *(see Section 22C(2) of ATA*) or Proliferation offence *(see Clause 9 (2) of ESOs);* or

iv. funds within the entity are linked or related to, or to be used for terrorism, terrorist acts or by terrorist organisations or those who finance terrorism *(See S22C (3) of the ATA).*

The STR/SAR must be submitted to the FIUTT within fourteen (14) days of the date the transaction was **deemed** to be suspicious *(See S55A (3) of the POCA and S 22C (6) of the ATA).*

- Reporting Terrorist Property/Funds

A Reporting Entity is required to screen its customers/clients against the following lists:

(a) United Nations Security Council Resolution (UNSCR) 1267/1989/2253 Sanctions List and United Nations 1988 Sanctions Committee List (together referred to as the "List of Designated Entities" in accordance with section 2(1) of the ATA[3]); and

(b) Trinidad and Tobago Consolidated List of Court Orders;

Screening of your clients should occur at the following two (2) stages:

(a) At the on-boarding stage; **and**

(b) *Immediately and without delay* upon receipt of a notification from the FIUTT that the List of Designated Entities and/or Consolidated List of High Court Orders has been updated.

If you identify that your client's name appears on either of the above-mentioned lists, you are required to submit a TFR **immediately** to the FIUTT.

For Guidance on reporting Terrorist Property or Funds as it relates to the relevant form and procedure please click **here**.

[3] *Please note that both the ISIL (Da'esh) & Al-Qaida Sanctions Committee List - UNSCR 1267/1989/2253, and the UN Security Council Sanctions Committee Established Pursuant to Resolution 1988 (Taliban) List are contained in the* United Nations Security Council Consolidated List. *If you have consulted the United Nations Security Council Consolidated List, you would have consulted both the ISIL (Da'esh) & Al-Qaida Sanctions Committee List - UNSCR 1267/1989/2253, and the UN Security Council Sanctions Committee Established Pursuant to Resolution 1988 (Taliban) Lists, together with all other lists maintained by the UN Security Council.*

- Reporting Property/Funds for the Proliferation Financing of weapons of mass destruction.

You are required to immediately complete and submit an Economic Sanctions Report ("ESR") to the FIUTT if upon screening your client against the List of Entities subject to a freezing High Court Order under the ESOs which is circulated by the Attorney General, you have acquired knowledge or reasonable suspicion that the client's property/ funds is that of such listed entity. *(See Clause 9 of the ESOs)*

For Guidance on reporting Property or funds for Proliferation Financing as it relates to the relevant form and procedure please click **here**.

- *Defining Knowledge and Suspicion*

The first criterion above provides that, before you become obliged to report, you must **know** or **have reasonable grounds for suspecting,** that some other person is engaged in ML/FT/PF.

If you actually 'know' that your client is engaged in such a criminal activity, then your situation is quite straightforward – the first criterion is met.

Reasonable grounds to suspect

Having 'reasonable grounds to suspect' requires you to have more than mere suspicion, meaning that there is a possibility that a ML/TF/PF offence has occurred.

To have 'reasonable grounds to suspect', you are expected to have considered the facts, context and ML/TF/PF indicators related to a financial transaction and, having reviewed this information, you concluded that there are in fact reasonable grounds to suspect that the particular financial transaction is related to the commission of an ML/TF/PF offence. You need not verify the facts, context or ML/TF indicators that led to your suspicion.

You do not need to prove that an ML/TF/PF offence has actually occurred. Your suspicion however must be reasonable and not biased or prejudiced.

Attempted Transactions

If a client attempts to conduct a transaction, but for whatever reason that transaction is not completed, and you think that the attempted

transaction is suspicious, you must report it to the FIUTT, and you must discontinue the business transaction or relationship with the entity.

An attempt is only when concrete action has been taken to proceed with the transaction.

AALs are reminded that once a STR/SAR is submitted to the FIUTT, all efforts must be employed to avoid any attempts at tipping off a person that an investigation is about to commence or has commenced or that a report was made to the FIUTT.

- *How to identify a Suspicious Transaction or Activity*

Determining whether a transaction or activity is suspicious is based on your knowledge of the customer and of the industry. You and your employees, if any, are better positioned to identify transactions which lack justification or do not fall within the usual methods of legitimate business. While there may be general indicators of suspicious transactions, there are also indicators specific to the business of dealing in precious metals and stones which would help you and your employees to better identify suspicious transactions whether completed or attempted.

For examples of Suspicious Indicators or red flags as it relates to AALs, please read the FATF Report: "Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals", dated June 2013.

For further guidance on Reporting STRs/SARs as it relates to procedure and associated offences, **click here.**

IX. RECORD KEEPING

As a supervised entity you are required to retain records, including those related to transactions and client identification, for a period of six (6) years in electronic or written form. Retention of these records and the exercise of proper record keeping practices enable you to comply with lawful requests for information from auditors, other competent authorities and law enforcement authorities that request these records for the purposes of criminal investigations or prosecutions (*See Regulation 31 of the FORS).*

For further information on your record keeping obligations please see the FIUTT's Guidance to Supervised Entities on Record Keeping.

5. LEGAL PROFESSIONAL PRIVILEGE

The basic principle of Legal Professional Privilege (LPP) is that all communications between the lawyer and his client should be held to the highest standards of confidence. LPP confers rights exclusively upon the client and duties exclusively upon the attorney. A client may waive this privilege at any time and to extent but without a waiver, the attorney is duty bound to uphold such privilege.

LPP can be broken down into two segments, namely **Litigation privilege** and **Legal advice privilege.**

(a) **Litigation privilege** protects confidential communications, and evidence of those communications, between a lawyer and his client and a third party, or between a client and a third party, which were created for the sole or dominant purpose of obtaining information or advice in connection with the conduct of existing or reasonably contemplated litigation, including avoiding or settling, as well as defending or resisting, that litigation[4].

(b) **Legal advice privilege (LAP)** protects confidential communications, and evidence of those communications, between a lawyer and his client, but not communications with third parties, provided that the communications are for the dominant purpose of seeking and receiving legal advice in a relevant legal context[5]. The requirement that there be a relevant legal context to the communications/documents for LAP to apply serves as a method to separate and exclude communications of a purely business nature between attorney and client, such as where the client may use the attorney as a mere business agent e.g. for the collection of rents.

Legal advice privilege is likely to attach to documents contained in a client's file where the attorney is conducting the following supervised activities:

(a) Purchasing and selling real estate- this activity commonly involves AALs legally advising clients on title and other matters prior to the client's commitment to a contractual obligation
(b) Organsing contributions for the creation, operation or management of companies- legal advice may be given on risks of misstatement of prospectuses and any rights to be afforded to contributors (e.g. securities or shareholdings)
(c) Setting up and management of trusts or settlements- Advice may be given on the fiduciary duties of trustees, the drafting of beneficial clauses and the incidence of taxation
(d) Purchasing and selling of a business entity- complex legal advice may be given in relation to the transaction. This includes advice on representations, warranties and the terms of the contract of sale[6].

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[4] R v Derby Magistrates' Court, Ex p B [1996] AC 487, Parry-Jones v The Law Society and Ors [1968] 1 All ER 177
[5] R (Morgan Grenfell &Co Ltd) v Special Commissioner for Income Tax [2003] 1 AC 563
[6] The Attorney General and another (Appellants) v The Jamaican Bar Association (Respondent) (Jamaica) [2003] UKPC 6

Please note that the examples highlighted above do not reflect an exhaustive list but rather legal advice privilege can arise in any communication and documentation when conducting any of the specified activities, providing that it is within the relevant legal context. It is for the attorney in conduct of the specified activity to identify such communications and documents which attract legal professional privilege/legal advice privilege and safeguard same.

I. CONSIDERATION OF LPP/ DETERMINING LAP

LAP attaches to all communications made in confidence between attorneys and their clients for the purpose of giving or obtaining legal advice even at a stage when litigation is not yet in contemplation.

When determining whether particular documents or communications are covered by LAP, attorneys are advised to apply the *dominant purpose test*[7]. The dominant purpose test requires the attorney to satisfy the criteria of each of the following elements in order to claim the protection of LAP over specific documents and communications: **There must be-**

- **a. a communication (whether written of oral);**
- **b. between a client and an attorney;**
- **c. made in confidence;**
- **d. for the purpose giving or obtaining legal advice.**

<u>Key points to note when applying the dominant purpose test include:</u>

i. The mere involvement of a lawyer is not enough to justify a claim for privilege;

ii. Consideration of legal advice privilege has to be undertaken on the basis of particular documents, and not simply the brief or role of the relevant lawyer;

iii. Legal advice privilege does not apply to documents which are merely "raw materials" that were not created for the purpose of obtaining legal advice;

Documents which come into existence during the course of a transaction or event (for example created before legal advice is sought) and not created for the purpose of legal advice are not protected by legal advice privilege. Documents generated in the course of a transaction or event, are also not protected; but if a document comes into existence as part of a process in the communication with a lawyer with the purpose of obtaining legal advice, then it is protected.

iv. Additional information passed by the attorney or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required will be considered privileged information;

[7] The Civil Aviation Authority v Jet2.com Ltd, R. (on the Application of) [2020] EWCA Civ 35

For example, where a client sends a letter to his attorney with information and whether or not a request for advice is expressly made therein, it is usually implied that there is an overall expectation in the relationship that the solicitor would, at each stage, whether asked specifically or not, tender the appropriate advice.

v. Legal advice is not confined to telling the client the law. It includes advice as to what should prudently and sensibly be done on the relevant legal context;

vi. Emails sent to the attorney as well as other parties if the dominant purpose of the email is to seek advice from the lawyer and others are copied in for information only would be considered privileged information;

vii. Documents which contain both privileged and non-privileged information (intermingled) whereby the severance of non-privileged information is practically impossible would be considered to have the dominant purpose of seeking legal advice;

viii. Communication to an attorney may be privileged even if express legal advice is not sought since it is open to a client to keep his lawyer acquainted with the circumstances of a matter on the basis that the lawyer will provide legal advice as and when he considers it appropriate;

ix. The value of the public interest in a client being able to obtain legal advice in confidence over the general public interest; and

x. The burden of proving a claim to privilege is on the party asserting privilege.

II. LEGAL PROFESSIONAL PRIVILEGE AND AML/CFT/CPF OBLIGATIONS

In complying with AML/CFT/CPF obligations, there are two circumstances within which Legal Professional Privilege and the safeguarding of documents subject to same becomes pertinent. These two circumstances arise when (i) the FIUTT conducts a compliance examination and (ii) where an attorney is required to submit a SAR/STR to the FIUTT.

A. COMPLIANCE EXAMINATIONS

To secure compliance with the laws highlighted within the Introduction, the FIUTT is empowered to enter into the business premises of an attorney at law, during working hours and with consent of the owner or occupier of such premises, in order to inspect or take documents or make copies or extracts of information, inspect the premises and observe the manner in which certain functions are performed. The FIUTT may also require any person on the premises to provide an explanation on any such information. [See Section 18G of the FIUTTA and Section 55D of the POCA]

Before a compliance examination is conducted, the attorney at law is given notice by the FIUTT of its intention to conduct such an examination. As the guardian for the preservation of his clients'

privileged information, the attorney at law is required to properly identify any privileged material before the examination takes place and ensure that it is not disclosed/provided for inspection or copying.

The FIUTT, for the purpose of AML/CFT/CPF examinations, often request for, inter alia, copies of the attorney's AML/CFT/CPF Program, the process for filing SARs/STRs, processes for sanctions screening and evidence that the required CDD and record keeping measures ate undertaken. Information contained in these such documents were not created between the attorney and client for the purpose of obtaining legal advice, and therefore will not automatically be covered by LAP.

Please note that you are not required to 'claim privilege' or identify the privileged documentation to the FIUTT compliance Officer. You are required to simply remove the privileged material from the files that fall within the sample for examination.

In the case where privileged material is unwittingly or inadvertently disclosed to the FIUTT, the FIUTT will return said material and destroy any copies in its possession, if made.

B. SAR/STR REPORTING

Guidance on submitting's SARs/STRs to the FIUTT can be found at Section 8 above and in SAR/STR Guidance published on the FIUTT's website.

However, in relation to your client's right to LPP, please note that it is not an offence for an attorney to fail to disclose any information or other matter which has come to him in privileged circumstances (See Section 52(2) of the POCA and Regulation 9 of the FORs).

Any information or other matter comes to an attorney at law in privileged circumstances, if it is communicated to him, or given to him by or by a representative of, a client of his in connection with the giving, by the attorney, of legal advice to a client, by, or by a representative of, a person seeking legal advice from the attorney or by a person in contemplation of or in connection with legal proceedings and for the purpose of those proceedings (See Section 52(7) of the POCA).

It is the duty of the attorney at law to determine whether the information in his possession, and possibly the subject of a SAR/STR, is covered by LPP.

No information or other matter required to reported under Section 55A of the POCA shall be treated as coming to an attorney on privileged circumstances if it is communicated or given with a view to furthering any criminal purpose.

6. GENERAL OFFENCE FOR FAILURE TO COMPLY WITH THE REGULATIONS AND FORS

Non-compliance with your obligations under the AML/CFT/CPF laws and regulations may result in criminal and or administrative sanctions.

Contravention of the POCA

A FI or LB which does not comply with Sections 55, 55A and 55C or any regulations made under Section 56 of the POCA, commits an offence and is liable on summary conviction, to a fine of five hundred thousand dollars and to imprisonment for a term of two years and on conviction on indictment, to a fine of three million dollars and to imprisonment for a term of seven years. *(See Section 57 of the POCA)*

Contravention of the FORS

A FI or LB which does not comply with the FORs, commits an offence and is liable on summary conviction, to a fine of five hundred thousand dollars and to imprisonment for a term of two years and on conviction on indictment, to a fine of three million dollars and to imprisonment for a term of seven years. *(See Section 57 of the POCA and Regulation 42 of the FORs)*

Contravention of the FIUTT Regulations

Where a FI or LB commits an offence under the FIUTT Regulations where no penalty is specified, it shall be liable on summary conviction, to a fine of twenty-five hundred thousand dollars and to a further fine of twenty-five thousand dollars for each day that the offence continues; and on conviction on indictment, to a fine of one million dollars and to a further fine of fifty thousand dollars for each day that the offence continues. *(See Regulations 36 and 37 of the FIUTT Regulations)*

Contravention of the ATA

A FI or LB which fails to comply with Section 22AB or Section 22C (1), (2) or (3) of the ATA commits an offence and is liable on summary conviction to a fine of five hundred thousand dollars and to imprisonment of two years and on conviction on indictment, a fine of three million dollars and imprisonment for seven years*. (See Section 42(1) of the ATA)*

Where a company commits an offence under Section 22AB or Section 22C (1), (2) or (3) of the ATA, any officer director or agent of the company who directed, authorized, assented to, or acquiesced in the commission of the offence or to whom any omission is attributable, is a party to the offence and is liable in summary conviction or conviction on indictment in the same manner as the above paragraph. *(See Section 42(2) of the ATA).*

Contravention of the ATA Regulations

A FI or LB which does not comply with the ATA Regulations commits an offence and is liable on summary conviction to a fine of five hundred thousand dollars and to imprisonment of two years. *(See Section 42(1) of the ATA and Regulation 7 of the ATA Regulations).*

*** End of Document ***