FINANCIAL SERVICES COMMISSION MEET THE REGULATOR FORUM

14th May, 2008

Pelican Centre, Long Bay Beach Resort

TOPIC: **Frequently Asked Questions in Relation to the New AML/CFT Regime of the British Virgin Islands**

QUESTION 1: **What is the status of the Anti-money Laundering and Terrorist Financing Code of Practice, 2008 ("Code of Practice")? (And also vis-à-vis the AML Guidance Notes, 1999?)**

The Anti-money Laundering Code of Practice, 2008 was enacted on 22nd February, 2008 and came into effect from that date. Made pursuant to the provisions of the Proceeds of Criminal Conduct Act, 1997 (as per the 2008 amendment), the Code of Practice is subsidiary legislation and therefore has the force of law. The Code of Practice revokes the AML Guidance Notes, 1999 which is now no longer law.

QUESTION 2: **Is the Anti-money Laundering Code of Practice, 1999 still in force?**

The Anti-money Laundering Regulations, 2008 (AMLR) was designed to replace the Anti-money Laundering Code of Practice, 1999. The AMLR was enacted on 20th February, 2008 and came into effect from that date. Like the Code of Practice, the AMLR is subsidiary legislation and therefore has the force of law.

QUESTION 3: **Who is caught by the Anti-money Laundering Regulations, 2008 (AMLR) and the Code of Practice?**

Any person who engages in a type of business that falls within the ambit of the definition of "relevant business" in regulation 2 of the AMLR is required to comply with the provisions of the AMLR and the Code of Practice. Although the Code of Practices uses the term "entity", this term is defined to cross reference to "relevant business" in the AMLR; thus an entity would be one that engages in a relevant business. The Code of Practice also applies to a professional who engages in a relevant business.

QUESTION 4: **What is the status of the Explanatory Notes contained in the Code of Practice?**

The status of the Explanatory Notes is clearly defined in section 2 (2) and (3) of the Code of Practice. The Explanatory Notes (formulated as Explanations in the Code of Practice) are not law; they are provided as guidelines to a better understanding of the provisions of the Code of Practice and how those provisions are expected to be complied with and enforced. However, while the Explanatory Notes are not law, the Code of Practice makes it clear that a judge, the Commission or the FIA may take them into account in dealing with any matter thereunder.

QUESTION 5: **Does the Code of Practice apply to charities and other associations not for profit?**

Yes, the Code of Practice applies to charities and other associations not for profit. This is clearly outlined in section 4 of the Code of Practice.

QUESTION 6: **Section 18 (2) of the Code of Practice provides that the requirement to report a suspicious activity or transaction includes the reporting of an attempted activity or transaction that has been turned away. However, paragraph (iii) of the Explanation provides an exception. Is this not a contradiction? What is there to report if the proposed business relationship/one-off transaction is declined?**

Section 18 (3) uses the language "where possible" a report must be made where an applicant for business or customer fails to provide adequate information or supporting evidence to verify his or her identity or, in the case of a legal person, the identity of any beneficial owner. Explanatory Note (iii) specifically provides that *"it is a question of judgment as to whether the relationship sought by the applicant for business merits suspicion for reporting purposes; but in any case where a suspicion is held, it must be reported to the Reporting Officer. Yet there are also situations where an applicant for business may turn away before any essential information is recorded of or from him or her; in such a case the obligation provided in section 18 (2) will not apply."* There is no contradiction. The requirement to report to the FIA under section 18 of the Code of Practice in circumstances where a Reporting Officer holds the view that a specific business transaction is not suspicious for purposes of reporting is restricted to reporting the fact of

the decision being made not to report. This will enable the FIA to make an assessment whether or not a Reporting Officer is in fact considering transactions for reporting purposes. If a business relationship/transaction is declined but it elicits a suspicion before or at the time it is declined, that suspicion must be reported.

QUESTION 7: **Does the Code of Practice apply retroactively/retrospectively to existing business prior to the coming into force of the Code of Practice? Or is it of prospective application?**

The Code of Practice has no retroactive or retrospective application; its provisions apply prospectively.

QUESTION 8: **If the Code of Practice does not have any retroactive/retrospective effect, how and to what extent do its provisions relate to existing businesses?**

Service providers are required to ensure full compliance with the new AML/CFT regime when they are updating customers' due diligence information pursuant to the requirements of section 21 of the Code of Practice.

QUESTION 9: **When is enhanced customer due diligence (ECDD) exercise applicable? Is it discretionary or imperative?**

It is required wherever in the AMLR and the Code of Practice it is specifically so stated, such as with PEPs, formation of non-face to face business relationships where identity is verified electronically or copies of documents are relied on, in order to manage the potential risk of identity fraud or where the applicant for business originates from a geographic risk region. In non-mandatory situations, it is left to the judgment of an entity or a professional, as the case may be, to determine whether the nature of a business relationship or one-off transaction is such as to warrant the application of ECDD measures. That judgment is expected to be applied objectively.

QUESTION 10: **The customer due diligence (CDD) measures outlined by the Code apply typically to banks and trust and company management type of business. Will specific guidance be provided to deal with mutual fund type businesses? Can a wire transfer method be utilized as a means of verification of identity?**

No guidance is envisaged at this time. The methods by which verification can be effected are outlined in the Explanatory Notes and are of general application. Where the CDD measures outlined are inapplicable in any particular case, the concerned entity or professional is required to satisfy itself or himself or herself that the information it or he or she has on the identity of a customer is sufficient and satisfactory. Nothing prohibits the industry from utilizing other available methods so long as they serve in effectively verifying identity. So yes, a wire transfer method that effectively verifies identity can be utilized. See Paragraph (iii) of the Explanation to section 23 of the Code of Practice: *"The [identification] of a person may take different formats"* … Then it goes on to outline example forms of identification.

QUECTION 11: **Sections 28 (2) and 29 (10) of the PCCA provide immunity for reporting a suspicious transaction. Section 18 (5) of the Code of Practice requires that where a Reporting Officer decides that available information does not substantiate a suspicion of money laundering/terrorist financing, the fact of such a decision must be reported to the FIA. Would such a disclosure be considered a defence under the PCCA?**

There is no disclosure requirement here. What the Code of Practice requires is the reporting of the decision not to report, the rationale being that when inspections are conducted such documented decision would be available for review and it would also enable the FIA to make an assessment whether a Reporting Officer is properly and effectively performing his or her duties under the Code of Practice.

QUESTION 12: **Am I required to update my client's due diligence information? If so, how often should I carry this out?**

Yes, every 3 years for low or normal risk business relationships and once each year for higher risk business relationships. Section 21 of the Code of Practice is quite explicit on this subject.

QUESTION 13: **Where I have lost contact with a client or the client has been struck off the register and for all intents and purposes there is no business relationship, am I still required to update the client's due information?**

Yes, so long as the relationship has not been formally and expressly terminated. Where there is termination, CDD

information must be updated as at the date of termination. See section 21 (3) of the Code of Practice.

QUESTION 14: **Where a person who may not be subject to the AMLR and the Code of Practice transfers business to me, who bears the responsibility for performing CDD in relation to the business? Similarly, where a business relationship with a client is terminated but the client's (or some of the client's) documents are held back, would I still be required to perform CDD in relation to that client?**

You can rely on the CDD information supplied at transfer if it fully complies with the Code and the AMLR requirements; otherwise the onus is on you to carry out the CDD requirements as you are effectively taking on new business.

So long as the business relationship with a client is not fully and effectively terminated, the CDD duties apply.

QUESTION 15: **Where I am unable to complete the verification of identity after establishing a business relationship, I am required to complete the verification process within a period of 21 days from the date of establishment of the business relationship (section 23 (2) (a)). What should I do if I am unable to complete the verification within the specified time frame?**

The law as it currently stands requires the verification process to be completed within a period of 21 days from the date of establishment of a business relationship. However, in genuine circumstances where an entity demonstrates tangible effort at completing the requisite verification process in respect of a business relationship but is hindered by matters beyond its control, it must, if it considers it reasonable to complete the verification, notify the FIA in writing before the expiry of the 21 day period advising on the difficulties it is encountering in completing the verification process and advising further on a specific period within which it expects to complete the verification. Where the difficulties encountered suggest some unwillingness of cooperation on the part of the applicant for business relationship, the entity must make an objective determination regarding the wisdom of continuing the business relationship.

QUESTION 16: **I receive a large number of applicants for business, am I required to carry out verification on all of the applicants?**

Where a business relationship entails a large number of applicants for business, it is sufficient to carry out verification on a limited group. Section 23 (4) of the Code of Practice provides this.

QUESTION 17: **In the case of introduced business, the introducer is domiciled in a jurisdiction whose laws prohibit the transmission of information save on a regulator-to-regulator (or other similar mechanism) basis, should I accept business from that jurisdiction? Is there inconsistency between section 31 (3) (c) of the Code of Practice and regulation 6 (1) (c) of the AMLR in relation to legal practitioners and accountants belonging to professional bodies – the parameters of application?**

The Code of Practice does not prohibit establishing a business relationship in such circumstances. What is required of the entity accepting the introduced business is to ensure that the introducer has in place the requirements outlined in section 31 of the Code of Practice. Essentially, the due diligence information relating to the introduced business must be appropriately recorded and must be available whenever required by the FIA or the Commission. It is for the entity accepting introduced business to ensure that the requirements of section 31 are fully complied with. In circumstances where the laws of a jurisdiction from which business is introduced prohibit direct transmission of recorded due diligence information, the FIA or the Commission, as the case may be, must be accordingly notified whenever such information is requested by them. The FIA or the Commission will utilize the mutual legal assistance regime in place to access the information through the relevant foreign regulator or other authority. An entity would be treated as failing in its legal obligation if the foreign regulator or other authority is unable to render assistance on account of the non-availability of the due diligence information.

There is no inconsistency between section 31 (3) (c) of the Code of Practice and regulation 6 (1) (c) of the AMLR. The rules are the same: the professional must belong to a professional body that espouses and applies AML/CFT measures to FATF standards and the professional must be subjected to supervision by such a body for AML/CFT compliance.

QUESTION 18: **Previously a listing of approved jurisdictions was provided. Would a similar regime be provided under the Code of**

Practice to enable reliance on introductions from those jurisdictions without the need for further verification?

The Code of Practice has moved away from the previous regime of jurisdiction listing for the simple reason that such listing was not truly founded on an objective test. Thus the Code of Practice now applies one test in relation to introduced business – the satisfaction of the requirements of section 31 thereof. However, consistent with the FATF Recommendations, the Commission is empowered under section 52 of the Code of Practice to issue a list of jurisdictions from which introduced business will be accepted should it in the future consider such a regime necessary.

QUESTION 19: **Are company formation entities and law firms required to comply with the new AML/CFT regime?**

Yes, so long as they perform any of the businesses falling under the definition of "relevant business" in section 2 of the AMLR.

QUESTION 20: **Which jurisdictions would the FSC consider as "high risk" and would a list be provided?**

No, the FSC will not be providing a list as the Code of Practice provides sufficient guidelines in identifying high risk jurisdictions for AML/CFT compliance. Examples are where international sanctions/embargos are in place, high incidences of corruption (taking the TI's annual Corruption Perception Index), civil strife on a large and consistent basis, etc.

QUESTION 21: **Does a non-face to face application for business require engaging ECDD measures?**

Non-face to face business relationships are identified by the FATF standards to pose serious challenges of money laundering and terrorist financing and recommend additional checks for verification purposes. Where identification is verified electronically or reliance is placed on copies of documents, additional verification is required (including taking ECDD measures) for the sole purpose of managing any potential risks of identity fraud (section 29 (4) of the Code of Practice).

QUESTION 22: **Is it in order for service providers to use a risk tracker or automated risk assessment systems in ensuring AML/CFT compliance?**

Yes, so long as the process ensures full AML/CFT compliance.

QUESTION 23: **Is it possible for the FSC to share intelligence with service providers to assist in compliance with the AML/CFT regime?**

The Code of Practice creates a new regime of public sector – private sector dialogue and information exchange. Through this and other media it may be possible to share certain intelligence for purposes of forestalling and preventing activities of money laundering, terrorist financing and other forms of financial crime. However, it should be noted that the Commission may in certain circumstances be obligated to maintain intelligence confidential, especially where such intelligence relates to law enforcement activities or emanate from foreign regulators or law enforcement agencies on mutual legal assistance requests or other basis.

QUESTION 24: **The AMLR and the Code of Practice purport to be subsidiary legislation. Which enactment prevails if there is a conflict or inconsistency between the two?**

The AMLR and the Code of Practice do not purport to be subsidiary legislation; they are subsidiary legislation made pursuant to the Proceeds of Criminal Conduct Act, 1997. Conflicts or inconsistencies in legislation are resolved either by the courts (through appropriate judicial process) or by amending or revising legislation. Both the AMLR and the Code of Practice were enacted the same day and have equal force.

QUESTION 25: **In relation to section 21 (2) of the Code of Practice, why has the requirement for updating CDD information been prescriptive instead of placing emphasis on the need for review of such information (without a prescribed period) that is not a legal requirement?**

The need for updating customer due diligence information as highlighted in section 21 of the Code of Practice is considered essential to ensuring compliance with the requirements of the Code and providing strength and meaning to the Territory's international cooperation regime. Through this formula, both the FIA and the Commission can ensure that customers' due diligence information are in fact being reviewed and updated periodically. This is consistent with the FATF Recommendations.

QUESTION 26: **With respect to section 31 (5) (a) of the Code of Practice, why is a one year period of updating customer information by an introducer a requirement instead of simply recognizing compliance with the introducer's AML/CFT laws as "the basis" for relying on an introduction?**

What section 31 (5) of the Code of Practice requires is for an entity relying on introduced business to satisfy itself that the introducer has in place a system of updating customer due diligence information on an annual basis. Merely relying on an introducer complying with his or her AML/CFT laws on the basis of "international comity" is not recognized by the FATF Recommendations. The applicable test is compliance to the established FATF standards. A jurisdiction may have its own AML/CFT laws which may not necessarily meet the established FATF standards. The rule established in section 31 (5) of the Code of Practice provides some assurance from an introducer with respect to introduced business.

QUESTION 27: **Would section 25 (4) of the Code of Practice be reviewed to provide clarity regarding the applicability and scope of the section? Paragraph (v) of the Explanatory Notes.**

The verification documents or information required in respect of companies apply only in relation to entities where such documents or information can be legally obtained. Where such mode of verification is not possible, the entity concerned need only satisfy itself that the information it has for verification purposes is sufficient. It is then required to so inform the FIA or FSC (for regulated entities) and record such fact for inspection purposes. The fundamental objective of the verification requirements is to buttress the KYC principle in establishing business relationships so that should the information be required at any future date it could be made available, in addition to preventing acts of money laundering, terrorist financing and other forms of financial crime. The Code of Practice (section 25 (4) and Explanation (v) thereof) are clear on the point.

QUESTION 28: **What constitutes "money broking"? as a relevant business pursuant to the AMLR?**

It is, in essence, the business of a person engaging as a broker in the wholesale of foreign exchange and other types of money market instruments. A money broker may also act as an

intermediary bringing persons (usually banks) together who are looking for deposits and to place money, whether for a short period or over a long period.

QUESTION 29: **Compliance manuals of procedure are required to be submitted to the FIA for approval (reg. 3 (3) of the AMLR). Would the "old manuals" suffice or do new ones have to be developed and sent to the FIA? Who will review the manuals and are the resources available in the FIA?**

Considering the extensive scope of the Code of Practice, new compliance (or internal control) manuals are required; any old manual would not suffice for full compliance purposes. The AMLR places the responsibility on the FIA to review and approve compliance manuals and the FIA is fully sensitized to this legal obligation and have undertaken to employ the necessary resources, in addition to the current resources, to effect the obligation.

QUESTION 30: **When will the AMLR and the Code of Practice be enforced?**

The AMLR and the Code of Practice are already in force and future AML/CFT inspections will be based on the new regime to establish level of compliance. This also means the engagement of the enforcement regime outlined in both enactments.