Opinions on FATF Consultation Paper on Gatekeepers

JFBA's Opinions for Submission to FATF

I. Fundamental View of JFBA

1. Confidentiality Obligation of the Attorney is Fundamental to the Existence of the Profession

The legal profession is characterized not only by its high level of legal professionalism but also by its contribution to the protection of basic human rights and legal interest of clients from the standpoint of having a certain adversarial relationship to the state authorities. In order for such legal profession to function effectively, it is essential to have a confidential relationship with the client. The basis for the confidential relationship is the fact that the attorney has the right and duty to protect his client's secrets.

This right and duty of the attorney has been provided for in law in the Code of Civil Procedure (Article 197 Paragraph 2) and the Code of Criminal Procedure (Article 149) of Japan which grants the attorney the right to refuse to testify about secrets that they have come to know in the performance of their duties and the Criminal Code (Article 134 Paragraph 1) of Japan which criminalizes the attorney's divulgence of the client's secrets without "justifiable cause".

In addition, Article 23 of the Practicing Attorney Law of Japan states that "A practicing attorney or a person who was previously a practicing attorney shall have the right and duty to maintain the secrecy of any

facts which he came to know in the performance of his duties; provided, however, that this shall not apply when otherwise provided for by any law." This is because "A client usually discloses his secret information concerning his legal case when entrusting his legal affairs to his attorney. It is thus considered most important of an attorney's duties to maintain the secrecy of any facts that he has come to know in the performance of his duties. It can also be said that the existence of the legal profession is secured by compliance with this duty." (p.151, "Jokai Bengoshiho", Research Office, FJBA) However, if a legal system in which the attorney must disclose the client's secrets to the authorities under certain circumstances is created, the basis for the confidential relationship between an attorney and his client will be at risk.

2. The Risk that the Reporting Obligation May Destroy the Public's Confidence in the Attorney

We fear that the creation of the systematic framework, in which the client's secrets may be reported to the government authorities under certain circumstances despite his belief when he disclosed it to his attorney that the secret will be protected by the attorney, will undermine the basic principle of the legal profession that the attorney protects the client's human rights and legal interest in an adversarial relationship to the authorities, and overall the public (i.e. clients) will lack confidence in the attorney.

Our service as attorneys has always been to realize social justice through the protection of legitimate legal interest of the client. It is our belief that a legal system that puts attorneys under the obligation to betray the client's secrets to the authorities is against our fundamental professional ethics. When the attorney comes to view

the client in such a light in daily practice, the attorney, himself, renounces the basis for the profession as an independent professional occupation.

3. JFBA's Money Laundering Policy

The JFBA certainly understands that the prevention of money laundering is an important task. We certainly do not tolerate our attorneys participating in money laundering and believe that if an attorney knows that the subject of a transaction is proceeds of crime, he should direct his client to stop such transaction. In addition, the attorney who has failed to take appropriate measures while aware of such facts will be subject to disciplinary action for contravention of attorney ethics. In some cases, he may even be prosecuted as an accessory to the crime of receiving proceeds of crime. Therefore, if the client refuses to stop the relevant transaction despite his attorney's directions, the attorney should resign as his representative and should refuse to provide any further legal advice.

4. JFBA's Internal Money Laundering Policy

In order to come to grips with this issue, the JFBA held a symposium in October 2001, at which officials of the Ministry of Justice and the Financial Service Agency who are in charge of this matter attended, followed by as many as 15 study meetings on money laundering for member attorneys held by local bar associations. In addition, we have strived to promote education concerning the prevention of money laundering by providing all member attorneys with a specially-prepared pamphlet containing important documents and materials on this issue as well as providing information on this issue through "Nichibenren Shimbun" (The

Federation Newsletter) , the newsletter for JFBA members and “Jiyu to Seigi” (Liberty and Justice), the journal of the JFBA.

We promise the FATF to continue to take practical, effective measures against money laundering, including the promotion of education to prevent attorneys from participating in money laundering, preparation of a handbook of relevant legal systems and a practice manual for the prevention of money laundering, and addition of provisions intended to prevent attorneys from participating in money laundering to the Articles of the JFBA, as the voluntary policy of the bar associations.

5. JFBA Opposes the Obligation to Report Suspicious Transactions

The attorney’s duty to protect secrets that he has come to know in the performance of his duties is a basic principle of the legal profession that has been formed and whose importance and validity has been confirmed through the long process of history. The attorney’s confidential obligation is indispensable for the protection of legitimate rights of the client, and in order for the judicial system to work properly, such obligation must be respected as much as possible.

A system that puts the attorney under the obligation to report suspicious transactions of the client, which is the same obligation as that financial institutions are put under, is a major mistake in that it fails to understand the basic principle of the legal profession and the significance of such principle.

Although the prevention of money laundering is an important task which also deserves attention, if we compromise a basic judicial principle in order to cope with money laundering, it will be very difficult for us to restore such principle.

Under the system in which an attorney is put under a reporting obligation if his client’s activities are “suspicious”, many clients who have

actually nothing to do with money laundering will be embroiled in nuisance investigations, which may put the attorney, conducting his daily practice, in opposition to the interest of a legitimate client not participating in money laundering at all. In addition, the introduction of such a reporting system will make communication between the client and the attorney more difficult and will prevent the client from explaining all the facts honestly to the attorney, which in turn will make it difficult for the attorney to prevent money laundering through appropriate advice.

If cases in which a false report given by an attorney ruined a legitimate client become known to the public, the public-at-large's confidence in attorneys will drop significantly. Persons actually planning to money laundering will consult dubious dispenser of legal advice who are not under a reporting obligation instead of qualified attorneys. In this way, the aforementioned system will not actually be useful for the prevention of money laundering. While the system that puts attorneys under a reporting obligation will bring only a minor benefit to the prevention of money laundering, such system may cause public mistrust in the legal profession and may even hinder appropriate management of the judicial system. As the adverse effects of such system will be disproportionately great, such system should not be introduced.

II.JFBA's Opinions on FATF Consultation Paper

1. Introduction

On the basis of the aforementioned view, the JFBA strongly opposes legislation for putting attorneys under the obligation to report suspicious transactions. However, here we will elaborate on our

opinion as to which option is less unacceptable assuming that the aforementioned system is to be introduced in accordance with the FATF's Consultation Paper.

In this case, we can refer to the system employed in Switzerland in which only attorneys who are financial intermediaries are put under a reporting obligation, the standpoint of the amendments to the relevant EU directive made as a result of activities of the Conseil des Barreaux de la Communauté Européenne (CCBE), and the opinion of the ABA task force which is opposed to a reporting obligation in all aspects while accepting the strengthening of the obligation of record preservation and due diligence.

It is our opinion that attorneys who are put under, and activities that are subjected to, such reporting obligation should be limited to those who are financial intermediaries and engaged the activities involved in financial transactions, respectively. In addition, even in such case, not only information obtained through judicial proceedings or procedures for identification of a client's legal standing, which information is exempted from the reporting obligation in the EU directive, but also information concerning a client obtained through legal advice should be exempted from such reporting obligation in accordance with Paragraph 17 of the preamble of the EU directive.

2. Occupations Subjected to Reporting Obligation

1) Conclusion

   On the assumption that a reporting system is to be introduced, the JFBA agrees with OP2.

2) Reasons

   On the basis of the aforementioned view, the JFBA believes, on the assumption that the system for the prevention of money

laundering that puts attorneys under a reporting obligation is to be introduced, attorneys should be subjected to such obligation in the following case: “OP2: Only cases in which an attorney is a financial intermediary”. While OP1 which states “All” is out of the question, if “OP3: In cases in which an attorney is involved in the planning and execution of financial, asset management, corporate or trust business” is chosen in accordance with the EU directive, such option may actually include a significant proportion of cases in which an attorney is engaged in regular practice of giving legal advice, and we must say that this option is likely to destroy the basic principle of the client’s privilege of confidentiality and the attorney’s confidentiality obligation which are indispensable for the judicial system to work properly.

3. Identification of Clients

1) Conclusion

We agree with the proposal of putting attorneys who are financial intermediaries under the obligation to perform client identification and verification.

2) Reasons

The scope of the obligation to identify clients is linked to that of the profession subjected to a reporting obligation described in the preceding section. If we choose OP2 in the preceding section, it may be inevitable for us to accept that the attorney should be put under the obligation to perform client identification and verification when engaged in financial brokering, as a financial institution is put under the legal obligation to perform customer identification and verification

by the Law concerning Customer Identification and Verification by Financial Institutions. However, such obligation to perform client identification and verification should be limited to the obligation to perform a client identification check, and we oppose any proposal that would put attorneys under the legal obligation to conduct investigations of their clients to find out details of their business, credit standing and so on.

4. Reports of Suspicious Transactions and Further Obligations

1) Conclusion

Even if attorneys are to be put under a reporting obligation, it should be limited to the case of OP2, and a greater threshold of "suspicion", such as a "strong suspicion" or "suspicion on objective grounds", should be necessary.

2) Reasons

As the JFBA opposes the proposal of putting attorneys under the obligation to report suspicious transactions, we strongly oppose OP1. However, rejection of the possibility of putting the attorney who is a financial intermediary under such reporting obligation even in such limited cases as OP2 may invite to occurrence of cases in which money laundering is attempted by using an attorney. In addition, financial institutions are put under a reporting obligation. Therefore, some might say that it is inevitable to put an attorney under the reporting obligation.

However, at present if an attorney assists his client knowing that he/she intends to be engaged in money laundering, the attorney will be charged with failure to meet his legal duty. If a system that puts attorneys under a reporting obligation

in addition to such legal liability is introduced, an attorney will have to investigate his client and decide whether to report or not based on the “suspicion”. Even an attorney who is a financial intermediary may be asked a delicate question about limits of legitimacy of business as a legal professional. If an attorney is put under a reporting obligation if he has “doubt” as a result of investigations conducted because of such legal consultation, the confidential relationship between an attorney and his client will be inevitably damaged.

Although we accept that an attorney who is a financial intermediary should be put under the obligation of record preservation and client identification and verification, we are skeptical about putting an attorney any reporting obligation beyond such obligation.

Furthermore, if a reporting system is inevitable, in order to minimize possible damage due to false reports suffered by his client in criminal procedures or economically, an attorney should be put under a reporting obligation if and only if the degree of the attorney’s “suspicion” is great, such as a “strong suspicion” or “suspicion on objective grounds”. Needless to say, as mentioned in the note, our view premises that if a Japanese attorney is put under a professional confidentiality obligation as an attorney, he is exempted from such reporting obligation.

5. Internal Reports

1) Conclusion

If an attorney is put under a reporting obligation, he should be allowed to give an internal report to his client.

2) Reasons

We believe that giving an internal report should be basically approved, because otherwise attorneys may become the minions of investigation agencies. If cases of attorneys' betrayals against their clients become known to the public, the basis for public confidence in the legal profession will be inevitably be destroyed. From these reasons, we believe that it is appropriate to approve internal reports in accordance with OP1. However, even if giving an internal report is basically approved, considering the possible influence of such report on investigations on money laundering by the agency receiving a relevant official report, we believe that the introduction of a system in which giving an internal report is prohibited for one week to 10 days from the time when the relevant official report is given is worth consideration.

6. Regulations and Supervision

1) Conclusion

We agree with OP1, as Japanese attorneys are supposed to be regulated and supervised by the bar associations they belong to that are independent from the administrative agencies. The bar associations (SRO) should be in charge of training on the prevention of money laundering and maintenance of high ethical and moral standards. However, if a reporting system is to be introduced, the agency for the receipt of reports should be FIU, i.e. the Financial Service Agency in the case of Japan.

2) Reasons

In the case of Japan, as the Practicing Attorney Law gives the bar associations freedom from supervision by the administrative

authorities and the power to supervise their attorneys, the bar associations should naturally be in charge of education and training of attorneys, preparation of related manuals, establishment of a code of ethics and a code of conduct and other related activities.

However, if a reporting system is to be introduced, we believe that the Financial Service Agency is an appropriate agency for the receipt of reports in Japan.