FATF SERIES

BY ECONOMIC LAWS PRACTICE (ELP)

Table of Contents

FATF – THE GLOBAL FISCAL REGULATOR 3

Introduction 4

Creation of the FATF 4

Constitution of the FATF 5

Role of the FATF 6

Membership to the FATF 7

Mutual Evaluations 8

Benefits for Nations on being a Member of the FATF 9

FATF: AN INDIA PERSPECTIVE 11

Joining The Asia Pacific Group (APG) 12

Prevention of Money Laundering Act, 2002 13

Financial Intelligence Unit – India (FIU – IND) 14

Enforcement and Regulatory Bodies under PMLA 15

Businesses Covered under PMLA 17

Mutual Evaluation of 2023 18

Conclusion 18

FATF: PREPARING FOR INDIA'S UPCOMING ASSESSMENT 19

India's Growth Story 20

Strengthening India's AML Regulations 21

Industry Specific Regulations 22

Bullion and Jewellery Industry 22

Real Estate Agents 23

Virtual Digital Assets 24

Casinos 26

Chartered Accountants, Cost Accountants and Company Secretaries 27

Conclusion 28

© Economic Laws Practice

FATF – THE GLOBAL FISCAL REGULATOR

INTRODUCTION

The world today is going through a significant political turmoil, which is re-aligning the entire trade and economic equilibrium between nations. Treaties and Conventions signed post the Second World War have drastically reduced the occurrence of physical wars between countries. However, financial crimes and acts of terrorism now pose a different challenge impacting the economies of nations, which can potentially wreak havoc that outgrows the effects of a physical war.

A crucial aspect of such fiscal challenges is the financial system of the country and its inter-linkage with the international financial system. There have been instances of financing of illegal activities in the jurisdiction of another nation which could be classified as an act of war. Further, the subtle manner in which these activities can be carried out would, without exposing nations, cause significant damage to nations that fall prey to such illegal acts. To trace and curb such transactions and activities, it was considered critical that a system, network, or a multi-governmental body be established and activated. The intent was to not just monitor but also recommend regulations to be legislated in various member countries that would facilitate exposing the conduct of such activities and assist in curbing such activities.

In and around 1987, the menace of drug crime and drug trafficking caused by certain nations was impacting not just the well-being but also the economy of various developed and developing nations. The proceeds of drug crimes were making their way into the financial systems of various countries which resulted in money laundering and later into terrorist financing. To curb this menace, it was decided to identify a mechanism that would go to the root of the cause and nip it in the bud. It was thus decided to create a system that would monitor financial transactions and consequently control the flow of funds that were directed towards the conduct of such illegitimate businesses. It was believed that with the development of such a monitoring mechanism, international financial transactions would be under check and the proceeds of the drug trade could not be routed through these financial systems in the case of cross- border flow of funds.

CREATION OF THE FATF

To overcome this insurmountable challenge faced by nations, especially in relation to the fight against drug trafficking and laundering of its proceeds, it was decided to convene a Financial Action Task Force (**FATF**) at the G7 Summit held in Paris during July 1989.

The FATF was established by the G7 Summit to examine and develop measures to combat money laundering, which was finding its way into funding illegal activities such as drug cartels and trade. The FATF originally included G7 countries, the European commission and eight other countries (viz. Australia, Austria, Belgium, Luxembourg, Netherlands, Spain, Sweden, and Switzerland). The FATF was given the responsibility to examine money laundering techniques and trends, review the action already taken at national or international levels, and to set out measures necessary to combat money laundering.

Over a period of time, the FATF has been a very effective watchdog in not only regulating and curbing drug related money laundering activities but also curbing laundering proceeds of other crimes, and terrorist funding. Since its formation in July 1989, FATF has progressively developed as a global regulator of financial systems and transactions and played its role as an international regulator of such financial systems. The various steps taken by the FATF since its inception in July 1989 are briefly given here:

- In April 1990, less than a year after its creation, the FATF issued a report containing a set of 40 recommendations in order to provide a comprehensive action plan to fight money laundering.
  - These recommendations included placing certain regulatory obligations not only on the conventional financial institutions, but also on certain sectors which are traditionally prone to money laundering activities

such as casinos, dealers in precious metals and stones, real estate agents, etc., who were included under 'designated non-financial businesses and professions' (DNFBPs);

- With evolving money laundering trends, various persons/sectors were covered within the ambit of DNFBPs, which now includes virtual assets and crypto assets as well as trust and company service providers (since 2019) and legal professionals (since 2022);
- In 2003, it was recommended that for 'politically exposed persons' (**PEPs**), enhanced due diligence (**EDD**) should be undertaken by financial institutions/DNFBPs;
- In 2022, the FATF further strengthened the global beneficial ownership rules in the FATF Standards to stop criminals from hiding their illicit activities and dirty money behind secret corporate structures.

- In October 2001, the FATF issued 8 special recommendations to disrupt cashflow of terrorist organisations.
  - This was an immediate action to develop clear standards to prevent terrorist financing in light of the terrorist attacks of 9/11 in the United States;
  - In October 2004, the FATF published the 9th Special Recommendation on terrorist financing in relation to cash couriers;
  - In February 2012, the FATF published revised Recommendations (refer to **Annexure 1**), to cover issues such as the financing of weapons of mass destruction.

Over the years, the FATF has continued to refine and strengthen its recommendations, in order to ensure that countries have stringent tools to tackle money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.

One of the examples of the effect of FATF's Recommendation is the establishment of Financial Intelligence Units (FIUs) in several countries (Recommendation 29), that serve as a national centre for receipt and analysis of information relevant to money laundering, associated predicate offences, and terrorist financing. These FIUs usually form a part of the Egmont Group, an international organisation for fostering cooperation amongst FIUs for improved communication and interaction. FIU- Ind, India's FIU is also a part of this Group.

Recognising the essential role and efforts of the FATF in setting global standards to combat money laundering and terrorist financing, the United Nations Security Council (**UNSC**) adopted a resolution – UNSCR 2462 in March 2019, which urges all countries to implement FATF Recommendations.

In order to ensure compliance of the Recommendations, FATF conducts Mutual Evaluations across countries to analyse the implementation and effectiveness of measures to combat Anti-Money Laundering/Combating Financing of Terrorism (**AML/CFT**).

CONSTITUTION OF THE FATF

- The FATF is headed by a President who convenes and chairs the meetings of the FATF Plenary, the Steering Group, oversees the FATF Secretariat and takes all decisions and actions necessary to achieve the objectives of the FATF. The President is the principal spokesperson for the FATF and represents the FATF worldwide.
- The current President of the FATF is Mr. T. Raja Kumar of Singapore who was appointed on 1 July 2022, with his tenure extending to 30 June 2024. The internal structure of the FATF consists of the following:
  - ***The Plenary:*** It is the decision-making body of the FATF and consists of the Member jurisdictions and organisations. Decisions are taken by consensus after conducting Mutual Evaluations on a country-to-country basis.

- *The Steering Group:* The FATF Steering Group is an advisory body chaired by the President. The composition of the Steering Group is decided keeping in mind the maximum effectiveness in taking forward the FATF's work as well as having a balanced representation of different geographic regions.
- *The Secretariat:* The FATF Secretariat supports the functions of the FATF, and the Executive Secretary. The Secretariat staff are responsible to and act in accordance with the instructions of the President.

FATF Styled Regional Bodies (FSRBs)

- In early years of its existence, FATF primarily focused on its member nations, which were developed countries. However, it was soon realised that to combat money laundering, which was taking an increasingly globalised form, there was a need to expand the network from developed countries to developing/non-member countries. FSRBs were hence set up. FSRBs are regional bodies comprising of a group of member nations of that region.
- The FSRBs are Associate Members designated by the FATF that participate in the work of the FATF. Till date, 9 FSRBs have been established and they commit to:
  - Endorse the FATF Recommendations, guidance and other policies as determined by the FATF for combating AML/CFT;
  - Promote effective implementation of the FATF standards in their member jurisdictions through the conduct of systematic Mutual Evaluations and follow-up processes; and
  - Participate in the development of the FATF standards, guidance and other policy for combating AML/CFT and other threats to the international financial system.

ROLE OF THE FATF

- The FATF is an international policy making body, which leads global action to tackle money laundering, terrorist and proliferation financing. The objectives of the FATF are to:
  - Protect financial systems and the broader economy from threats of money laundering, financing of terrorism and proliferation, thereby strengthening financial sector integrity and contributing to safety and security;
  - Work to generate the necessary political will to bring about national legislative and regulatory reforms in these areas to prevent illegal activities and the harm they cause to society.
  - Undertake research on emerging money laundering trends, and means of funding terrorism, promote global standards to mitigate such risks, and assess and monitor whether countries are taking effective action in this regard.
- In total, over 200 countries and jurisdictions have committed to implement the FATF's Standards as part of a co-ordinated global response to preventing organised crime, corruption, and terrorism. Countries and jurisdictions are assessed with the help of FSRBs and other global partners such as the IMF and World Bank.
- The FATF Plenary holds countries to account if they do not comply with the Standards. Certain instances of actions taken by the FATF Plenary are:
  - **Democratic People's Republic of Korea (DPRK)** has been placed in the Black List since FATF has serious concerns about the threat posed by DPRK's illicit activities related to proliferation of weapons of mass destruction (WMD) and its financing. FATF has called on its members to advise their financial institutions to give special attention to business relationships with DPRK through enhanced scrutiny.
  - **Iran** remains on the Black List for failing to fulfil compliance under its action plan, including failure to enact UN's Convention against Transnational Organised Crime and Protocols (Palermo Convention) and Terrorist

Financing Conventions in line with FATF's Standards. Counter measures on Iran were suspended, owing to Iran's commitment in June 2016 to address its strategic deficiencies. However, non-compliance with such commitments has resulted in FATF once again calling upon its members to apply counter measures against Iran in February 2020.

- FATF's 2020 report stated that the **UAE** had not demonstrated effective supervision of real estate agents and precious stones and metal dealers and was a safe haven for wealthy individuals facing Western sanctions. Therefore, UAE was added to the Grey-List.[1]
- **Democratic Republic of Congo (DRC), Mozambique and Tanzania** were added in the Grey-List in October 2022 for having strategic deficiencies in their AML/CFT regimes;
- **Russian Federation** has been suspended from membership of the FATF in February 2023 on account of the continuing and intensifying war of aggression against Ukraine which runs counter to the FATF's principles.

MEMBERSHIP TO THE FATF

- A country is required to be strategically important to become a member of the FATF. The key considerations for deeming a country to be strategically important are:
  - **Quantitative indicators** - such as the size of gross domestic product (GDP), the size of banking, insurance, etc.
  - **Qualitative indicators** - such as the impact of a country on the global financial system, level of commitment to combat money laundering and terrorist financing (AML/CFT), etc.
  - **Additional considerations** such as fulfilment of financial sector standards and participation in other relevant organisations.
- A country is granted membership of FATF if it satisfactorily fulfils the technical compliance of the essential FATF recommendations within 3 years. Based on the Plenary report, a country must fulfil its shortcomings, after which it can be allowed to participate as an Observer from the next Plenary meeting.
- Within 3 years, Mutual Evaluation of the country is to be conducted and membership is granted if the outcome of the Mutual Evaluation is satisfactory.
- If the Mutual Evaluation is not completely satisfactory, then the country should provide a clear commitment at political/Ministerial level to reach the expected results within a reasonable timeframe (i.e., a maximum of 4 years).
  - India became a member of the Asia Pacific Group (APG), an FSRB, in March 1998 and subsequently in 2006, it became an Observer at FATF.
  - As a part of its Membership, a joint FATF/APG Mutual Evaluation team visited India in 2009 for on-site assessment of India's compliance with the 40+9 Recommendations of FATF based on which the FATF Plenary adopted the Mutual Evaluation Report (MER) of India on 24th June 2010. On 25th June 2010, FATF admitted India as the 34th Country Member of FATF. *(India also became a part of the Eurasian Group (EAG), another FSRB, in December 2010).*
  - However, since India had not met all the FATF membership criteria, the Plenary also decided that India should report at each Plenary on the progress made in the implementation of the Action Plan. India

[1] https://timesofindia.indiatimes.com/business/india-business/explained-why-dubai-is-on-a-fatf-gray-List-and-what-it-means-for-india/articleshow/90068564.cms

continued to report back to the FATF periodically till February 2013 post which (in June 2013) it was recommended that India be removed from the regular follow-up process.

- India is now scheduled to be assessed in the fourth round of Mutual Evaluations which are to take place this year starting with a technical compliance review in the month of May 2023 up till an on-site assessment in November 2023.

MUTUAL EVALUATIONS

- FATF Mutual Evaluations are peer reviews, where members from different countries assess another country. An MER provides an in-depth description and analysis of a country's system for preventing criminal abuse of the financial system as well as focused recommendations to the country to further strengthen its system.
- A complete Mutual Evaluation may take up to **18 months** and is carried out as per strict guidelines outlined by the FATF in a comprehensive report outlining the procedure to be followed**.** It mainly comprises of two parts, effectiveness and technical compliance:
  - **Technical compliance**: the process starts 6 months prior to the scheduled visit of the assessment team for review. This is a desk-based review, conducted based on information provided by the assessee country on the laws, regulations and any other legal instruments it has in place to combat money laundering and the financing of terrorism and proliferation. Further, pre-existing information drawn from country's early MER, follow up reports and other credible or reliable source of information may be relied upon.
  - **Effectiveness:** this is the main component of the Mutual Evaluation and the focus during the on-site visit. During this visit, the assessment team will require evidence that **demonstrates that the assessed country's measures are working** and deliver the right results.

Prior to on-site visit

- An assessment team is formed at least 4 months prior to the scheduled onsite visit and comprises of 5-6 expert assessors (comprising of at least one (i)legal, (ii) financial and (iii) law enforcement experts), principally drawn from FATF members, and is supported by members of FATF Secretariat. In joint Evaluations, i.e., Evaluation by FATF as well as FSRBs, the assessment team will also include an assessor from the relevant FSRB.
- A preliminary draft Technical Compliance annex is shared with the assessee country 4 months prior to the onsite visit and provides for 11 Immediate Outcomes and underlying Core Issues, which will form the focus area during the on-site visit. The assessee country is provided an opportunity to comment on the draft Technical Compliance annex, and thereafter the revised draft Technical Compliance annex is shared with the country at least 2 weeks prior to the on-site visit.

On-site visit

- On-site visit, which is usually upto 2 weeks, is the best opportunity to clarify issues relating to the assessee country's AML/CFT system. The assessors review the 11 immediate outcomes relating to effectiveness of the system and clarify any outstanding technical compliance issues. Attention is paid to areas where high money laundering and terrorist financing risks are identified.
- Meetings with private sector or other non-governmental representatives are an important part of the visit. If the assessors have a concern that presence of government officials may inhibit openness of the discussion, the assessors may have to be granted an opportunity to meet with such bodies or persons in private.

Preparation of MER and plenary meetings

- Within 6 weeks of the on-site visit, the assessment team prepares and sends a draft MER to the assessee country for initial discussion of the findings in the report and its recommendations. Face to face meetings with the assessee country to discuss draft MER and Executive Summary (ES) are prepared 8 weeks prior to the plenary meeting, and thereafter the final draft MER and ES are placed before the Plenary. After the report is adopted and published, the country under review is expected to address any identified shortcomings and is subject to post-assessment monitoring. According to FATF, the completion of assessment and publishing of MER is merely 'a starting point for the country to continue strengthening its measures to tackle money laundering and terrorist financing'.

BENEFITS FOR NATIONS ON BEING A MEMBER OF THE FATF

- The FATF identifies jurisdictions with weak AML/CFT measures in two FATF public documents i.e., Black List and Grey List, that are issued 3 times a year. Countries categorized under the Black or Grey Lists may face certain economic sanctions with regards to their transactions with other jurisdictions, which can impact trade relations and economy of the countries placed under such Lists. According to a report of the IMF, the point estimate for the effect of Grey-Listing on total capital inflow of a country was measured to be −7.6, meaning that the country's capital inflow is expected to decline by 7.6 percent of GDP when the country is Grey-Listed.[2]
- Consequently, countries which are members of the FATF/ FSRB and/or are not designated either under the Grey or Black List can be considered as having gained a status to undertake global financial transactions without being subjected to larger scrutiny.

Recognising the significance of the FATF's identification of high-risk jurisdictions (Black List)/ Jurisdictions under increased monitoring (Grey List)

- Various member countries (especially developed nations) have issued governmental declarations that refer to the Black List/Grey List status denominated by the FATF on various nations, for directing higher level of scrutiny/EDD while dealing with such nations. A few illustrations of the same are set out hereunder:
  - **USA**: With respect to the FATF-identified jurisdictions under the Grey List, the U.S. FinCEN (regulator in relation to financial crimes in USA) requires financial institutions in the U.S. to comply with due diligence obligations for foreign financial institutions. Additionally, with respect to jurisdictions under the Black List (currently the DPRK, Iran and Myanmar), the FinCEN has the power to prohibit any correspondent account relationships.[3]
  - **European Union (EU)**: The 4th Money Laundering Directive of EU mandates that the European Commission should regularly update the List of high risk third country jurisdictions, which are countries with strategic deficiencies in their regimes on AML/CFT that pose significant threats to the financial system of the Union. Such identified high-risk third countries are subjected to EDD by financial institutions and other obligated entities of the countries forming part of EU. The said List takes into account information from the FATF.[4]
  - **The United Kingdom:** The UK provides similar regulations as EU for EDD of high-risk third countries and the Financial Conduct Authority (FCA) regulates and supervises different sectors on actions they can take to

---

[2] https://www.imf.org/en/Publications/WP/Issues/2021/05/27/The-Impact-of-Gray-Listing-on-Capital-Flows-An-Analysis-Using-Machine-Learning-50289

[3] https://www.fincen.gov/sites/default/files/shared/2016-27049.pdf, https://www.fincen.gov/sites/default/files/shared/2019-23697.pdf

[4] https://finance.ec.europa.eu/news/anti-money-laundering-commission-updates-its-List-high-risk-third-country-jurisdictions-strengthen-2022-12-20_en

© Economic Laws Practice

counter risks... The List of high risk third countries identified in terms of UK's Money Laundering Regulations mirrors both jurisdictions of FATF, i.e., Black List and Grey List. The FCA has, in the past imposed fines on certain financial institutions/intermediaries that have failed to undertake EDD in relation to transactions with countries identified as high risk third countries.[5]

- **Singapore**: The Monetary Authority of Singapore (MAS) is responsible for pursuing allegations involving money laundering within the country's financial institutions. In pursuance of this, the MAS requires Financial Institutions to consider DPRK, Iran and Myanmar as high-risk jurisdictions, pursuant to FATF's classification of the said countries as Black List countries and apply EDD measures to mitigate the risks these countries pose to the international financial system.[6]
- **Japan:** Countries and regions identified by FATF as having deficiencies of anti-money laundering policy, etc. are deemed to have high risk in Japan. Currently, the Black List countries have been identified as high-risk countries and strict client identity verification is required for transactions and transfer of assets to persons residing or located in such countries.[7]
- **India:** The Reserve Bank of India (RBI) prohibits entities from non-compliant FATF jurisdictions from acquiring 'significant influence' i.e., > 20% voting power in payment service operators. The Securities and Exchange Board of India (SEBI) requires securities market intermediaries to undertake EDD on clients from high-risk countries and prohibits foreign investments of more than 25% by high-risk countries in Alternative Investment Funds (AIFs). There are many other sanctions imposed by the Indian Authorities against high-risk countries identified by the FATF. Moreover, the Indian Banks' Association has prepared a guidance note providing an indicative List of high-risk customers, products, services, and geographies and advises banks to use such guidance.

Several of the above regulations were brought into effect based on India's last MER. Due to the COVID-19 pandemic, India could not be assessed in the fourth Mutual Evaluation of the FATF and is due for a Mutual Evaluation in November 2023. In the next segment of this series, we will be focussing on India, its membership in the FATF and its compliance with the FATF recommendations.

[5] https://www.legislation.gov.uk/uksi/2017/692/regulation/33
[6] https://www.mas.gov.sg/publications/fatf-statement/2023/february-2023-fatf-statement
[7] *https://www.amt-law.com/asset/res/news_2022_pdf/publication_0025005_ja_001.pdf*

© Economic Laws Practice

FATF: AN INDIA PERSPECTIVE

In the first part of this three article series, we discussed the essence and magnanimity of the Financial Action Task Force (FATF) as the global regulator of member countries for combating money laundering and terrorist financing. We also touched upon the constitution, role and responsibility of FATF and the benefits that member jurisdictions gain by being a part of FATF. Undoubtedly India is a prominent member of FATF and therefore abides by its regulations and also reaps the benefits deriving from the same.

However, it is crucial that we understand India's journey into being a full-fledged member of the FATF in light of its history, with a view to better envisage and project the future implications/repercussions for India.

JOINING THE ASIA PACIFIC GROUP (APG)

Like most other countries, India's journey into FATF also commenced by becoming a part of a FATF - styled body **(FSRB)**, APG, in March 1998. The political declaration adopted by the special sessions of the United Nations General Assembly held in June 1998 of which India was a member state, required all participating jurisdictions to adopt money laundering legislations and implement thorough procedures for administering the same. Being part of the FSRB and with a view to becoming a member of FATF, India was required to take various initiatives towards strengthening its internal legal eco-system to prevent money laundering. Thus, India promulgated the prevention of money laundering act 2002 PMLA which came into effect in 2005.

As a step towards enabling India to become member of FATF, the first mutual evaluation was conducted by the APG in 2005 and Mutual Evaluation Report **(MER)** for India was adopted by the APG plenary in 2006. Major recommendations of the MER of 2005 were:

- To make the Financial Intelligence Unit **(FIU)** operational in India.
- To set unified standards for customer due diligence **(CDD)** in the financial sector.
- To prescribe obligations for suspicious transactions reporting **(STR)** on relevant authorities in the financial sector.
- To include real estate agents, dealers in precious metals and precious stones **(DPMS)**, lawyers and accountants under the definition of Designated Non-financial Businesses and Professions **(DNFBPs)**.

However, not all suggested recommendations could be implemented by India as set out in the APG MER. Still, considering India's significance as a global economy, FATF gave India the status of an "observer". This marks the initiation of India becoming a full-fledged member of the FATF. This in turn devolved upon India the responsibility to adopt the 40+9 recommendations issued by the FATF.

In November – December 2009, with a view to confer upon India a full membership to the FATF, an onsite assessment of India's compliance with the 40+9 recommendations of FATF was carried out by a joint mutual evaluation team of the FATF / APG. A MER on India was published on June 24, 2010, which was discussed at the FATF plenary, and based on the same, India was admitted as the 34th member of the FATF on June 25, 2010. This clearly reflects a proud moment for India as emphasized by the Ministry of Finance which in its press release dated June 29, 2010 stated that, "*FATF membership is very important for India in its quest to become a major player in the international finance. It will help India to build the capacity to fight terrorism and trace terrorist money and to successfully investigate and prosecute money laundering and terrorist financing offences. India will benefit in securing a more transparent and stable financial system by ensuring that financial institutions are not vulnerable to infiltration or abuse by organized crime groups. The FATF process will also help us in co-ordination of AML/CFT efforts at the international level.*"[8]

[8] https://pib.gov.in/newsite/erelcontent.aspx?relid=62898

© Economic Laws Practice

In December 2010, India become a part of the Eurasian group **(EAG)** another FSRB, mainly comprising of developed European nations. This was aimed to enable India to learn from its member nations and further strengthening its own Anti-Money Laundering **(AML)** regime.

In view of the MER 2010, India undertook to strengthen its AML/Combating of Financing of Terrorism **(CFT)** regime and accordingly presented an action plan. Various initiatives were taken by India during the period 2010 to 2013, which were reported to the FATF plenary till June 2013. It is significant to note that based on such reporting, India was conferred a status that it had reached a satisfactory level of compliance with respect to all core and key recommendations.

In this article, we will discuss certain crucial initiatives adopted by India to achieve the relevant recommendations of MER 2010 and the benefits that were sought to be unearthed by implementing such regulatory measures.

PREVENTION OF MONEY LAUNDERING ACT, 2002

In pursuance of the aforementioned political declaration adopted by the Special Session of the United Nations General Assembly, in 2002, the Indian Parliament enacted the Prevention of Money Laundering Act, 2002 **(PMLA, 2002/ PMLA)** which came into effect on July 1, 2005. The objective for implementation of the PMLA, 2002 was to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

It is a comprehensive legislation *inter alia* aimed at:

- preventing money-laundering and connected activities;
- confiscation of proceeds of crime, setting up of agencies; and
- mechanisms for coordinating measures for combating money-laundering, etc

PMLA, 2002 initially prescribed a monetary threshold of INR 30,00,000/- for several offenses covered thereunder, which was criticised by the FATF in India's MER 2010. Accordingly, Recommendations 1 and 2 of the MER proposed doing away with a monetary threshold to bring the definition of money laundering in line with the Vienna and Palermo Conventions.

Recommendation 1 of the MER also suggested that the definition under Section 3 of the PMLA regarding offence of money laundering should be brought in line with the Vienna and Palermo Conventions so as to fully cover physical concealment as well as acquisition, possession and use of all relevant proceeds of crime. Further, Recommendation 3 of the MER suggested that confiscation of property laundered should be specifically covered under PMLA, and such confiscation should not be dependent on conviction of a person for a scheduled offence under the PMLA.

By an amendment in 2012, the aforementioned lacunae under Recommendations 1 and 2 were resolved. This amendment did away with the monetary threshold for offences under the PMLA and enlarged the definition of offence of money laundering in Section 3 of the PMLA to include therein the activities like concealment, acquisition, possession and use of proceeds of crime as criminal activities.

Similarly, as far as the requirement of conviction under a predicate offense for confiscation of property under the PMLA is concerned, the same was also addressed by the same amendment of 2012. Sections 5 and 8 of the PMLA were amended to ensure that the pre-requisite of conviction under a predicate offense for confiscation of property was done away with, and such confiscation is now dependent on registration of predicate offence investigation at a judicial level, either in India or in any other country.

The above amendments, along with widening of ambit of DNFBPs covered under PMLA, and undertaking of stringent monitoring and supervising of anti-money laundering laws by regulatory bodies in India, which is dealt with in detail

in the latter part of this article, various recommendations of the FATF provided in the MER, 2010 were considered to have been largely complied with.

The amendments undertaken pursuant to the FATF recommendations has enabled India to implement robust anti-money laundering laws in India. As per the latest available Government data, as on January 31, 2023, a total of 1142 prosecution complaints have been filed. The proceeds of crime of INR 15,623.68 Crores have been identified and confiscated the PMLA out of which substantial part of attached proceeds of crime are still under adjudication by the Adjudicating Authority. In addition to this, property having the value of INR 862.43 crore has already been confiscated to the Central Government under the orders of the competent court.[9]

FINANCIAL INTELLIGENCE UNIT – INDIA (FIU – IND)

For effective implementation of the PMLA 2002, a central Financial Intelligence Unit – India **(FIU-IND)** was established in 2004, which centralises and coordinates most of India's AML/CFT strategies.

The FIU-IND was set up by the Indian government vide O.M. dated November 18, 2004 as the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions. FIU-IND is also responsible for coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and financing of terrorism. The FIU-IND has been made a fully functional body in line with the recommendation of APG MER and FATF Recommendation 26.

FIU-IND is an independent body reporting directly to the Economic Intelligence Council **(EIC)** headed by the Finance Minister. Section 13 of the PMLA provides the FIU-IND with the statutory basis upon which to access financial, administrative and law enforcement information from various sources for analysis of STRs (Suspicious Transaction Reports) and processing of references received from other agencies. The main function of FIU-IND is to receive cash/suspicious transaction reports, analyse them and, as appropriate, disseminate valuable financial information to intelligence/enforcement agencies and regulatory authorities .

The functions of FIU-IND are:

- **Collection of information:** Act as the central reception point for receiving Cash Transaction reports **(CTRs)**, Non-Profit Organisation Transaction Report **(NTRs)**, Cross Border Wire Transfer Reports **(CBWTRs)**, Reports on Purchase or Sale of Immovable Property **(IPRs)** and Suspicious Transaction Reports **(STRs)** from various reporting entities;
- **Analysis of information:** Analyse received information in order to uncover patterns of transactions suggesting suspicion of money laundering and related crimes;
- **Sharing of information**: Share information with national intelligence/law enforcement agencies, national regulatory authorities and foreign Financial Intelligence Units;
- **Act as central repository**: Establish and maintain national data base on the basis of reports received from reporting entities;
- **Coordination**: Coordinate and strengthen collection and sharing of financial intelligence through an effective national, regional and global network to combat money laundering and related crimes;
- **Research and Analysis**: Monitor and identify strategic key areas on money laundering trends, typologies and developments.

[9] *https://enforcementdirectorate.gov.in/statistics-0 , last accessed on 9th June 2023*

The Section 66 of the PMLA allows dissemination of information by FIU-India to any officer, authority or body performing any function under any law relating to AML/CFT notified by the Central Government.

Further, the Strategic Analysis Lab of FIU-IND **(SAL)** conducts sample studies on various reports submitted by the reporting entities and identifies the compliance gaps in them. It also helps in identifying new money laundering patterns and modify/create new scalable statistical models and algorithms.

- With the help of SAL, in FY 21-22, an analysis of STRs pertaining to virtual assets or cryptocurrencies led to recognition of several fraudulent schemes using virtual currencies. Usage of international e-wallets or virtual prepaid cards was also observed which has helped in understanding regulatory issues in the virtual assets sector.

ENFORCEMENT AND REGULATORY BODIES UNDER PMLA

Enforcement Directorate (ED)

Under the PMLA, 2002, Enforcement Directorate has been appointed as the enforcement body and has been granted wide powers. It possesses powers to undertake survey, search, seizure as well as attachment of property, arrest and imposition of fines and penalties. It is also the adjudicating authority under PMLA. Accordingly, in relation to all scheduled offences under the PMLA, 2002, powers to take action are with the Enforcement Directorate.

Reserve Bank of India (RBI)

The RBI has taken the following steps in order to meet the objectives of the PMLA:

- The RBI issued KYC guidelines in 2013 setting AML/CFT standards and procedures for conducting CDD for banks, which refers to the Indian Banks' Association's **(IBA)** guidance note on KYC norms and AML standards which was published in July 2009. The guidance note provided an indicative list of high-risk customers, products, services, and geographies which must be kept in mind by banks for their own risk assessment.[10] Moreover, RBI advised banks to take into account risks arising from deficient/high risk jurisdictions identified by the FATF Plenary from time to time.
- The RBI vide its guidelines for investment in entities from FATF non-compliant jurisdictions dated June 14, 2021, prohibited investors from FATF non-compliant jurisdictions from acquiring 'significant influence' i.e., equal to or above 20% voting power, in payment service operators **(PSO)**.[11]
- The RBI, vide Notification dated September 13, 2021 empowered entities other than banking companies under Section 11A of the PMLA to carry out e-KYC/Aadhar authentication of the clients and invited applications for the same from NBFCs, Payment System Providers and Payment System Participants. Thereby, vide notification dated May 4, 2023, the RBI permitted 22 entities to carry out e-KYC/Aadhar authentication of their clients under the PMLA.

Securities and Exchange Board of India (SEBI)

The SEBI issued guidelines dated February 3, 2023, on AML/CFT obligations of securities market intermediaries under the PMLA and Rules, whereby it identifies clients from high-risk countries, Politically Exposed Persons **(PEPs)**, NPOs and companies having beneficial ownership as 'clients of special category' and required intermediaries to conduct enhanced due diligence **(EDD)** for such clients.[12]

---

[10] https://www.rbi.org.in/Scripts/BS_ViewMasCirculardetails.aspx?id=8127

[11] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12114&Mode=0

[12] https://www.sebi.gov.in/legal/master-circulars/feb-2023/guidelines-on-anti-money-laundering-aml-standards-and-combating-the-financing-of-terrorism-cft-obligations-of-securities-market-intermediaries-under-the-prevention-of-money-laundering-act-2002-a-_67833.html

The SEBI had also published a circular in December 2022 on foreign investment in alternative investment funds **(AIFs)** and thereby prohibited investors from high-risk countries as per the FATF from acquiring 25% or more in AIFs.[13]

The Central Board of Direct Taxes (CBDT)

CBDT, the Central body responsible for implementation of Direct taxes, is responsible for monitoring PEPs, very High Net-Worth Individuals **(VHNIs)** and High Net-Worth Individuals **(HNIs)** to reduce tax risks and deepen the tax base in such groups of taxpayers. The CBDT also exchanges information with the FIU-IND and other regulators in order to increase coordination. It also monitors matters related to the FATF and other bodies dealing with AML/CFT having effect on direct taxes.[14]

The Central Board of Indirect Taxes and Customs (CBIC)

The CBIC has been designated as the regulatory body for DPMS and the real estate sector, as these sectors are covered under the ambit of DNFBPs under the PMLA. In light of this, the CBIC has issued AML/CFT guidelines for both sectors. The AML/CFT guidelines for Real Estate sector dated May 4, 2023 prescribe for categorization of clients into high-risk and low-risk based on their location, nature of business, trading turnover, etc., and directs the reporting entities to conduct risk assessment of clients who are non-resident, HNI, trusts, charities, NGOs, etc.[15]

Guidelines for DPMS are also exhaustive in nature, and require various compliances to be undertaken by DPMS, where they undertake cash transactions exceeding Rs. 10,00,000/- with a customer, whether in one single transaction or multiple transactions which are connected.

Insurance Regulatory and Development Authority (IRDA)

The IRDA vide its Master Guidelines on AML/CFT dated August 1, 2022, required insurers to conduct EDD while taking insurance risk exposure to individuals/entities connected with high-risk countries identified by the FATF. Insurers were also directed to go beyond FATF statements and apply publicly available information when identifying high-risk countries.[16]

---

[13] https://www.sebi.gov.in/legal/circulars/dec-2022/foreign-investment-in-alternative-investment-funds-aifs-_66045.html
[14] https://incometaxindia.gov.in/pages/about-us/central-board-of-direct-taxation.aspx
[15] https://old.cbic.gov.in/resources//htdocs-cbec/aml-cft-guide-real-estate-agent-13042023.pdf
[16] https://www.lifeinscouncil.org/component/Master%20Guidelines%20on%20AMLCFT%202022.pdf

© Economic Laws Practice

BUSINESSES COVERED UNDER PMLA

Initially, the PMLA covered financial institutions and intermediaries (such as stockbrokers, share transfer agent, stock exchange) etc. Thereafter, casinos were included as a DNFBP vide amendment to the PMLA, 2002.

Widening of sectors covered under the DNFBP

The FATF, in its MER, 2010 specifically highlighted that apart from Casinos, the PMLA, 2002 did not apply to any of the DNFBP Sector. Accordingly, vide the PMLA Amendment Act, 2012, the ambit of PMLA Act, 2002 was expanded to real estate, agents/sub-registrars in charge of registering properties, DPMS and safe deposit keepers. Futures brokers were also specifically covered under the ambit of PMLA, 2002. The amendment also contains a provision to expand the ambit of the PMLA to other DNFBP sectors as and when required.

DNFBP ambit further widened in 2023

As per the risk assessment carried out by India during the follow up rounds with FATF post MER, 2010, India did not include lawyers and accountants under the DNFBPs since they posed a low risk on money laundering. However, recently, vide a Notification dated May 3, 2023, Chartered Accountants, Company Secretaries and Cost Work Accountants have been included as DNFBPs in case they undertake transactions specified therein, such as buying/selling immovable property, managing client money, securities, or other assets. Prior to this, vide Notification dated March 7, 2023, cryptocurrency exchanges have been included as DNFBPs.

Compliances for DNFBPs covered under PMLA

The DNFBPs notified under the PMLA, 2002 are required to undertake several compliances under the PMLA (Maintenance of Records) Rules, 2005 **[PMLA Rules]** such undertaking KYC compliances, reporting of suspicious transactions, furnishing cash transaction reports and counterfeit currency reports etc. to FIU-IND. Non-compliance under the said Rules is considered to be a separate violation, which may lead to imposition of fines not less than Rs. 10,000/- but which may extend to Rs. 1,00,000/- for each such failure.

The above provisions have been implemented to ensure that high-risk sectors such as casinos, real estate, DPMS etc., through which proceeds of crime can be laundered, are also effectively regulated, to enable the regulatory as well as enforcement authorities to identify suspicious transactions.

Recent amendments to PMLA Rules

Recently, the PMLA Rules were amended in 2023, whereby the Government made it mandatory for banks and financial institutions to record financial transactions of PEPs and to provide information about transactions with NPOs. Details of the NGO clients would have to be uploaded in the 'Darpan Portal' of the Niti Aayog and the record would be maintained for up to 5 years after the business relationship has ended. Such information will also have to be shared with the ED as and when sought.

Moreover, by way of the abovementioned amendment, PMLA Rules tighten the definition of beneficial owners under the AML laws i.e., define beneficial owner as an individual/group holding 10% ownership in a client's business, and require the reporting entities to undertake enhanced due diligence in such cases.

Thus, under the PMLA Act read with the PMLA Rules, several responsibilities have been placed not only on the financial institutions such as banks, stock exchanges etc., through which monetary transactions are usually undertaken, but also the DNFBPs which mainly includes sectors such as real estate, casino, DPMS etc., which are vulnerable to money laundering activities. Several responsibilities and compliances have therefore been imposed on

such sectors and ample powers have been provided to FIU-IND to ensure that such compliances are followed, including granting of powers to impose fines in case of breach of such compliances.

MUTUAL EVALUATION OF 2023

India now sits at the cusp of undergoing another mutual evaluation of the FATF scheduled during this year.

India's next mutual evaluation by the FATF is likely to take place in November 2023 and in that regard, according to reports, the process has already begun. The technical compliance submissions have been made on May 5, 2023, and thereafter the effective annex submissions are scheduled on the July 14, 2023. Post the on-site assessment, the FATF Plenary discussion is scheduled in June 2024.

During such evaluation various critical aspects are expected to be evaluated to determine India's position on various recommendations and further improvements to be carried out, including assessment of applicable legislations such as PMLA Act, PMLA Rules, Unlawful Activities (Prevention) Act, 1967 etc., and effective implementation of such laws. As per the trends observed in the MER published for countries that have undergone the 4th Mutual Evaluation round of FATF, it appears that the focus has been towards effective implementation of anti-money laundering provisions applicable to DNFBPs. This will also include evaluating measures taken by Government and regulatory bodies, as well as industry associations to create awareness amongst relevant DNFBPs to undertake effective compliances under the anti-money laundering provisions.

CONCLUSION

Having successfully implemented the recommendations of MER, 2010, and with robust AML/CFT eco-system in place, India is considered to be a part of the group of nations that are effectively fighting against the menace of money laundering and terrorist financing. Being a part of FATF grants legitimacy to India's political efforts, especially those related to countering of terrorist financing activities in its neighboring countries. This has been an impressive journey for India, where from being a brutal victim of money laundering and terrorist financing, it is now recognized as a nation with an effective and robust AML/CFT eco-system.

A positive rating in the upcoming FATF Mutual Evaluation will be a crucial next step for India, to establish itself as a strong member of the global AML/CFT watchdog. Therefore, the industry bodies, especially those covered under DNFBPs should be agile and proactive to ensure that the industry players are well aware as well as well-equipped to undertake all necessary compliances under the PMLA and its allied rules.

In the next article we will now dwell upon how the Government should give a final touch to ensure India's thorough compliance to the recommendations, how various industry bodies should undertake surveys and knowledge sharing sessions to ensure proper adoption of practices by member businesses and how businesses should structure their internal operations to ensure compliance with applicable regulatory requirements.

FATF: PREPARING FOR INDIA'S UPCOMING ASSESSMENT

This is the third and final segment of ELP's article series on Financial Action Task Force (FATF) and its significance against the backdrop of the upcoming Mutual Evaluation in India.

In the first segment of the series[17], we discussed the constitution of the FATF, its role, objectives as well as assessments under FATF in certain countries. FATF and FATF-styled bodies (FSRBs) conduct periodic Mutual Evaluations for every member country and based on Mutual Evaluation Reports (MERs), countries with deficiencies and low compliance with FATF's recommendations are classified under the grey list or blacklist. The MERs also prescribe ratings to countries under the categories of i) Non-Compliant ii) Partially Compliant iii) Largely Compliant and iv) Compliant based on the compliance level of the country against specific FATF recommendations. Effectively, better compliances result in higher rating for the country. Based on such MERs, countries where deficiencies are observed are directed to comply with recommendations and follow-up reports are published based on the changes implemented (if any).

In the second segment of the series[18], we discussed India's membership and Mutual Evaluation by the FATF. India became a member of the FATF in 2010 and submitted its final follow-up report in 2013 which was found to be satisfactory by the FATF. Simultaneously, in light of the MER and the FATF recommendations, India has continued making several regulatory changes in order to completely be in line with the FATF's objectives. Consequently, as compared to its 2010 MER, India's rating has strengthened over the past few years. Needless to add, there are considerable benefits of improved rankings from an economic and growth perspective.

This article deep dives into the existing regulations for anti-money laundering in India, especially for Designated Non-Financial Businesses and Professions (DNFBPs) such as bullion and jewellery industry, real estate agents, cryptocurrency exchanges etc., and also reflects on India's preparedness for its impending FATF on-site assessment in November 2023.

INDIA'S GROWTH STORY

India is one of the world's fastest-growing economies and has made significant strides in its economic growth in recent years. Despite factors such as demonetization, introduction of GST and the pandemic, India has experienced robust economic growth over the past few decades, averaging around 7% annually.[19] The Government has simultaneously implemented several structural reforms to improve business environment, attract foreign investment and stimulate economic growth. According to International Monetary Fund's (IMF) latest reports, India became the fifth-largest economy in the world. Further, according to the IMF, India will rise to fourth place in 2025 and into third place in 2027 as a USD 5.4 trillion economy.

While India has made remarkable progress in various socio-economic indicators, such as education, healthcare, and poverty alleviation, it is still considered a developing country by the United Nations. It falls under the category of "developing country" or "emerging market" due to factors such as its per capita income, infrastructure development, and social development indicators. There is also a perception of higher corruption levels. Now, given that an on-site

[17] https://www.mondaq.com/india/money-laundering/1323836/fatf-series--article-1--fatf--the-global-fiscal-regulator
[18] https://www.mondaq.com/india/money-laundering/1328958/fatf-an-india-perspective
[19] https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=IN

assessment of India is due, the country is currently under the radar to improve its FATF ratings and its MER of 2023, which will consequently strengthen the flow of investments into the country and aid in economic growth.

STRENGTHENING INDIA'S AML REGULATIONS

Pursuant to the FATF Mutual Evaluation of India in 2010, Government agencies have expedited their efforts to further strengthen the anti-money laundering and counter-terror financing (AML/CFT) framework. The Finance Minister via a tweet stated that, *"The Strategic Priorities for the FATF for 2022-24 are: Strengthen the FATF Global Network, FATF systems of Mutual Evaluations, Enhance International Beneficial Ownership Transparency, Increase Capabilities to more effectively recover Criminal assets, Leverage Digital Transformation, Ensure Sustainable Funding for FATF Strategic priorities".*

Over the last few years, since the current political party came into power, the government has taken several steps to comply with FATF recommendations. Some of the major initiatives include:

- Demonetization of Indian rupee notes with denominations of 500 and 1000 in November 2016 to (i) curtail the shadow economy (ii) increase cashless transactions and (iii) reduce the use of illicit and counterfeit cash to fund illegal activity and terrorism.
- Introduction of Digital India, a campaign to improve the country's digital infrastructure and offer more government services online.
- The DigiLocker platform serves as the foundation for a "one-stop solution" for data of individuals maintained by various government agencies, regulators, and regulated entities. This simplifies the KYC process, making it faster and more efficient for consumers, further driving the growth of the digital economy in India.
- The National Payments Corporation of India has developed an instant payment system called Unified Payments Interface (UPI) to facilitate inter-bank peer-to-peer and person-to-merchant transactions. As per the report titled "The Indian Payments Handbook – 2022-27"[20], UPI transactions are likely to reach one billion per day by FY 2026-27, accounting for 90 percent of the retail digital payments in the country. Moreover, UPI accounted for about 75 percent of the total transaction volume in the retail segment during 2022-23. This has significantly reduced cash transactions from the economy thereby enhancing accountability.
- The Reserve Bank of India, in 2023 has granted permission to NBFCs and payment service providers to apply for obtaining an Aadhaar e-KYC Authentication Licence which will further promote digitisation and check frauds.
- Expansion of definition of Designated Non-Financial Businesses and Professions (**DNFBPs**) i.e., inclusion of dealers in precious metals (**DPMS**), real estate agents, CA, CS and CWS, and virtual digital assets in the definition of DNFBPs under the Prevention of Money Laundering Act, 2002 (**PMLA**).
  - The regulatory authority for DPMS and real estate agents under the PMLA is carried out by the Central Board of Indirect Taxes and Customs (**CBIC**) which in turn gives powers to the Director General of Audit (**DGA**) to issue AML/CFT guidelines. The DGA has thereafter issued the AML & CFT Guidelines for Real Estate Agents, 2022 dated 30.12.2022 and the AML & CFT Guidelines for Dealers in Precious Metals and Precious Stones, 2023 on 17.02.2023.
  - The guidelines set out clear roles and responsibilities for real estate agents and DPMS which include conducting customer due diligence, maintenance of records, appointing reporting entities, reporting suspicious transactions, formation of client assessment and risk-based assessment policies, etc.

[20] https://www.pwc.in/assets/pdfs/the-indian-payments-handbook-2022-2027.pdf

© Economic Laws Practice

India no doubt has been making steady improvement in ensuring that its FATF's vision and mission is fulfilled, and the country gets a good risk assessment rating in the upcoming MER of 2023.

INDUSTRY SPECIFIC REGULATIONS

The Ministry of Finance (MoF) serves as the Treasury of India and has under its purview, taxation, fiscal legislations, financial institutions, capital markets, centre and state finances and the Union Budget. The Department of Revenue under the MoF exercises control in respect of matters relating to all Direct and Indirect Union Taxes through two statutory Boards which are, the Central Bord of Direct Taxes (CBDT) and the CBIC.

MoF is also the chief regulator for AML/CFT related laws in the country. Additionally, the Department of Revenue, MoF, established the Directorate of Enforcement (ED) in the year 1956 with its Headquarters in New Delhi which is responsible for enforcement of the Prevention of Money Laundering Act, 2002 (PMLA) and Foreign Exchange Management Act, 1999 (FEMA). The MoF, from time to time comes up with various notifications to grant powers to various industry-wise regulators in the country to publish and ensure enforcement of guidelines in the financial sector.

The various industrial sectors that have been brought within the purview of PMLA and their regulations are:

BULLION AND JEWELLERY INDUSTRY

As per the Notification No. G.S.R. 799 (E) dated December 28, 2020, the Ministry of Finance notified the inclusion of Dealers in Precious Metals and Precious Stones (DPMS) within the definition of DNFBPs in the PMLA if they engage in any cash transactions with a customer which is equal to or above INR ten lakhs, whether carried out in a single transaction or in several transactions that appear to be linked.

- Vide Notification No. G.S.R. 800 (E) dated December 28, 2020, the CBIC was appointed as the regulator for DPMS under PMLA.
- Further, the office memorandum dated November 22, 2021 was issued by the CBIC whereby the Directorate of Audit was appointed to work on behalf of the CBIC as regulator in respect of DPMS. Therefore, the DGA issued the AML & CFT Guidelines for Dealers in Precious Metals and Precious Stones, 2023 on 17.02.2023.
  - As per the Guidelines, DPMS' are required to establish policies and procedures under the PMLA and apply ML/TF risk assessment in their transactions. Internal mechanisms and furnishing of information is to be undertaken by every entity and persons working within the entity.
  - Cash transactions equal to or above INR ten lakhs are to be reported within a month and suspicious transactions are to be reported to the FIU-IND within 7 working days of its occurrence.
  - KYC is to be conducted for every cash transaction equal to or above INR Fifty thousand as per the Rule 9(1)(b)(i) of the PMLA Rules.
  - Enhanced Due Diligensssce (**EDD**) must be conducted apart from Client Due Diligence (CDD) for high-risk client, business relationships and transactions.

International Perspective

- These inclusions in the PMLA and efforts by the Government authorities will hopefully assist India in securing a good rating from the FATF in the upcoming Mutual Evaluation. For instance, in the UK where DPMS were

regulated by His Majesty's Revenue and Customs (HMRC), the financial activity in the sector was identified to have low risk. The Responsible Jewellery Council of the UK also published a Code of Practices Guidance for the Jewellery Sector.

- The USA also has a Jewellers Vigilance Committee which provides comprehensive guidance and checklists to be followed by the players in the sector.
- However, the DPMS sector should focus on suspicious transaction reporting (STR) since the FATF has observed shortcomings in STR in various other countries such as UAE, Germany and Japan in their recent MERs.
- Moreover, South Africa has been placed in the grey list of the FATF and one of the reasons is that the potentially high-risk sectors of DPMS and Company Service Providers (CSPs) are not AML/CFT regulated, except for a general reporting obligation.
- Apart from these basic compliance requirements, DPMS must also conduct training and awareness sessions for the players in the sector. The FATF observed shortcomings with the same in Qatar vide its recent MER.

Way forward for the Indian Industry

The industry must consider the shortcomings observed by the FATF in other countries and focus on mitigating risks such as buying and selling of loose diamonds against payment other than in banking terms, using fraudulent invoices to overstate the value of jewellery, diamonds, or precious metals., etc.

Moreover, there is a need for industry oriented practical guidelines to be issued for adoption and implementation by the bullion and jewellery industry. By considering industry dynamics, such guidelines must prescribe for reasonable restrictions without hindering the flow of trade in the industry.

REAL ESTATE AGENTS

The Ministry of Finance issued Notification No. G.S.R. 855 (E) dated 29.11.2022, whereby it notified that real estate agents (i) as defined under clause (zm) of section 2 of the Real Estate (Regulation and Development) Act, 2016 and as a person engaged in providing services in relation to sale or purchase of real estate (ii) having an annual turnover of INR twenty lakhs and above would be included in the definition of DNFBPs under the PMLA.

- Further, vide office memorandum dated November 22, 2021, the Directorate of Audit was appointed to work on behalf of the CBIC as regulator in respect of Real Estate Agents. Therefore, the DGA issued the AML & CFT Guidelines for Real Estate Agents, 2022 dated 30.12.2022.
- The Guidelines provide obligations for Real Estate Agents under the PMLA and Rules thereunder in line with the Risk Based Approach (RBA) adopted by the FATF for real estate agents and the recommendations made by it. These Guidelines are similar to the guidelines for DPMS as stated above.
- Other requirements are:
  - Furnishing information regarding cash transactions above INR t enlakhs and other instances mentioned above to the Director, FIU-IND by the 15th Day of the succeeding month and furnishing information regarding suspicious transactions within 7 working days of its occurrence.

- Evolving internal mechanisms in line with any guidelines issued by the CBIC or the Director, FIU-IND.
- Communication of group policies, client acceptance policies and CDD measures to combat ML/TF.

International Perspective

- Unlike India, U.S. real estate agents and other DNFBPs involved in real estate transactions are not subject to comprehensive AML/CFT measures. Due to this, US was rated non-compliant with FATF recommendations for real estate sector.
- In Canada's 2016 MER, FIs and DNFBPs were generally observed to be subject to appropriate risk-sensitive AML/CFT supervision, but supervision of the real estate and DPMS sectors was not entirely commensurate to the risks in those sectors.

Way forward for the Indian Industry

- In light of the above, India must actively focus on the supervision of the real estate sector to mitigate risks such as undertaking of benami transactions in the name of persons who are not expected to have large amounts of wealth, mixing of illicit funds with legitimate funds, etc.
- For instance, recently the state Real Estate Regulatory Authorities (RERAs) in India have issued circulars making it mandatory for real estate agents to obtain registration by undergoing professional training and passing state examinations based on specific modules provided by the government. To increase compliance with FATF recommendations, RERA should also provide AML/CFT training to real estate agents as per the FATF recommendations and include specific modules on AML/CFT in its exam syllabus.
- Moreover, to ensure free trade while safeguarding the industry from ML/TF risks, a real estate industry practical guide applicable to not just real estate agents, but all stakeholders within the industry should be issued by the industry association. This will also bring consistency in the manner and type of records maintained by Industry members from an AML/CFT perspective and guarantee unrestricted trade for honest stakeholders.

VIRTUAL DIGITAL ASSETS

The MoF issued Notification No. S.O. 1072(E) dated 07.03.2023, whereby it notified that DNFBPs would include activities when carried out for or on behalf of another natural or legal person in the course of business as an activity for the purposes of given sub sub-clause, namely:-

- exchange between virtual digital assets and fiat currencies;
- exchange between one or more forms of virtual digital assets;
- transfer of virtual digital assets;
- safekeeping or administration of virtual digital assets or instruments enabling control over virtual digital assets; and
- participation in and provision of financial services related to an issuer's offer and sale of a virtual digital asset.

Since there is no centralized market regulator for crypto agencies and Virtual Digital Assets (VDA), the FIU-IND has introduced Draft AML & CFT Guidelines for Reporting Entities Providing Services Related To Virtual Digital Assets. However, the same have not been implemented yet. Under the guidelines, VDAs are required to undertake the following compliances:

- VDAs are required to register as Reporting Entities with the FIU-IND. As part of registration, they must disclose their account details with Banks/FIs where they hold accounts for transactions as well as for holding of Client Money.
- Implement internal policies, procedures and controls, appoint designated directors and principal officers, conduct training, conduct internal control/audit, follow KYC norms, CDD, EDD, and report suspicious transactions etc. similar to the other guidelines for DPMS and real estate agents.

The Indian Government must aim to implement these guidelines soon since many other countries are already compliant with the FATF requirements for VDAs.

International Perspective

In the UK, the Financial Conduct Authority has acted as the AML/ CTF supervisor of UK businesses conducting or intending to conduct crypto asset activity. It also provides a general checklist for registration of crypto assets.

The FATF, in its 2022 MER of the Netherlands, observed that the understanding of ML risk for FIs and virtual asset service providers (VASPs) is generally good, and policies and procedures are in place and commensurate to risks.

Way forward for the Indian Industry

In India, many crypto exchanges are already (voluntarily) complying with certain baseline KYC norms and also reporting of suspicious transactions. A uniform standard for all market players, however, would be useful. Suspicious transactions such as cross-country benami i.e., converting cryptocurrency into cash in a foreign currency, purchases from 'dark web' marketplaces, etc. need to be regulated by the associations and regulatory bodies.

However, since there is no centralized market regulator for the crypto industry, the stakeholders are wary that investigative agencies (like the ED- Directorate of Enforcement) could become the primary watchdog for the crypto economy. Framing of certain common practical guidelines uniformly adopted by the industry would facilitate creation of a framework for compliance by players within the crypto industry.

CASINOS

The definition of DNFBPs was included vide PMLA amendment of 2009 where casinos were brought under the scope of reporting entities. Moreover, in terms of Rule 9 (7) of the PML Rules, the Goa Anti Money Laundering and Financing of Terrorism Guidelines (Goa AML Guidelines) were issued to regulate the casino sector and bring it in line with the FATF recommendations. The Government of Sikkim also issued AML/CFT guidelines for casinos operating in Sikkim in September 2011 under the Sikkim Casino Games (Control and Tax) Act, 2002.

Apart from the general AML/CFT guidelines issued by other sectors, the Goa AML Guidelines provide the following:

- Identification of high-risk customers, i.e., customers may become high spenders because of their cumulative spending over a period of time. Also, customers who gamble large amounts of money on limited occasions or even during a single visit are to be considered as high-risk customers. If the customers' spending patterns change dramatically and their play does not fit their playing profile or if they collect huge winnings back in cash instead of normal banking transactions, they may be considered as high-risk customers. Junket operators, customers with multiple casino player rating accounts and unknown customers are also to be considered as high-risk customers.
- Casinos are supposed to conder a wide range of variables such as size of premises, customer profile, speed and volume of business, types of payment, types of gambling offered, etc. while identifying risks.

In India, there is no central authority governing the casino industry as of now.

International Perspective

Unlike in India, the UK Gambling Commission has a wide checklist of considerations which ensure that the developments in the Gambling sector are compliant and will help to deliver the licensing objectives of the Gambling Act. Due to this, the FATF considered UK to have a good understanding of risks in the gambling sector.

Similarly in the USA, Casinos are subject to a robust AML/CFT regime, and in recent years, this sector has had an increased focus on preventive measures. The American Gaming Association also issues AML/CFT guidelines apart from compliance requirements under the Banking Secrecy Act.

Way forward for the Indian Industry

Indian Casinos should voluntarily devise internal guidelines for mitigating risks of money laundering, by setting up a SOP for identifying suspicious transactions, and various compliances to be followed by casinos under the AML regulations.

CHARTERED ACCOUNTANTS, COST ACCOUNTANTS AND COMPANY SECRETARIES

The Ministry of Finance issued Notification No S.O. 2036(E) dated 03.05.2023 whereby it notified that DNFBPs would include financial transactions carried out by a relevant person on behalf of his client, in the course of his or her profession, in relation to the following activities-

- buying and selling of any immovable property;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organization of contributions for the creation, operation or management of companies;
- creation, operation or management of companies, limited liability partnerships or trusts, and buying and selling of business entities

However, the Ministry has not yet issued any further notifications appointing a regulator in this regard and no guidelines have been issued for this sector of DNFBP yet.

International Perspective

The FATF in its August 2022 MER of Germany observed that there are no market entry checks for the trust and company service provider (TCSP) sector and noted that as a shortcoming for the sector. Even in South Africa Company Service Providers (CSPs) were not AML/CFT regulated apart from having general reporting obligations and the same was one of the many reasons why South Africa was put in the FATF grey list.

Way forward for the Indian Industry

Indian institutes for Chartered Accountants, Company Secretaries and Cost Accountants should endeavor to undertake training sessions for professionals to educate them with respect to compliances to be undertaken, specifically focusing on the industry dynamics and setting internal standards.

CONCLUSION

To comply with the FATF's recommendations and to get an overall good rating, all regulated entities, reporting entities and regulators must continue to share up-to-date risk assessments as widely as possible with relevant stakeholders, conduct training and awareness exercises for all governed industries and report STRs and CTRs.

Industry Associations and regulatory bodies of which various DNFBPs are members, need to take up the onus of issuing detailed guidelines while taking into consideration the industry specifics and practical issues being faced. Moreover, guidelines should be drafted in a manner which will not impede and dissuade businesses. Consistency of record keeping and correct compliance procedures ultimately leads to an effective reporting mechanism with a faster response time to enquiries by the AML regulators/ monitoring authority. Globally, this task of issuing implementable procedural guidelines has been taken up by industry associations and acknowledged by regulatory authorities. India has a considerable gap to fill to implement these practical approaches and the impending MER 2023 could be the perfect opportunity for industry associations to take up this onus.

To ensure that the FATF gives a favourable observation, the government needs to also ensure that technical and effective compliances of the regulations which counter anti-money laundering are in place. While adoption of new guidelines and risk assessments by Indian sectors demonstrate the clear impact of the FATF's assessment process in 2010, there are still some sectors where AML/CFT frameworks are in the initial stages of development.

In light of the upcoming on-site assessment, the regulatory sectors, reporting entities and designated entities in India are under high levels of scrutiny. Indian authorities must keep in mind the actions taken by the FATF against other countries that have already undergone assessment and rely on the practical guidelines provided to them in that regard to perform better in its upcoming on-site assessment.

We hope you have enjoyed reading this primer. For further information please write to us at **insights@elp-in.com** or connect with our authors:

Nishant Shah, Partner – Email – ***NishantShah@elp-in.com***

Virangana Wadhawan, Principal Associate – Email – ViranganaWadhawan@elp-in.com

Bhargavi Shukla, Associate – Email – ***BhargaviShukla@elp-in.com***

© Economic Laws Practice

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

MUMBAI

9th Floor, Mafatlal Centre
Vidhan Bhavan Marg Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

NEW DELHI

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400

AHMEDABAD

C-507/508, 5th Floor, Titanium Square
Thaltej Cross Roads, SG Highway,
Ahmedabad – 380054
T: +91 79460 04854

PUNE

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

GIFT CITY

Unit No. 605, Signature, 6th Floor
Block 13B, Zone - I
GIFT SEZ, Gandhinagar 382355
E: elplaw@elp-in.com

elplaw.in

insights@elp-in.com

/elplaw.in

/ELPIndia

/company/economic-law-practice

elppodcast.buzzsprout.com

DISCLAIMER:

The information contained in this document is intended for informational purposes only and does not constitute legal opinion or advice. This document is not intended to address the circumstances of any particular individual or corporate body. Readers should not act on the information provided herein without appropriate professional advice after a thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi judicial authorities may not take a position contrary to the views mentioned herein.

© Economic Laws Practice 2023