APPENDIX 2

Comparative Review of the AML Regime Covering Attorneys-at-Law

The following is a brief summary of the legislative regime that is in place in the Bahamas, the Cayman Islands, Trinidad & Tobago and the UK, respectively, for the purpose of bringing lawyers within the ambit of the AML machinery in these jurisdictions.

Bahamas:
In the Bahamas, lawyers are covered under the AML regime by an expanded definition of "financial institution." Thus, section 3 (1) of the Financial Transactions Reporting Act ("FTRA") states as follows:

"Subject to any regulations made under this Act, the term "financial institution" means any of the following —
(k) a counsel and attorney, but only to the extent that the counsel and attorney receives funds in the course of that person's business otherwise than as part of services rendered pursuant to a financial and corporate service provider's licence:

(i) for the purposes of deposit or investment;
(ii) for the purpose of settling real estate transactions; or
(iii) to be held in a client account"

Essentially, the limited range of services covered in section 3(1)(k) of the FTRA are where a lawyer *receives funds* in the course of his business for the purposes of investing or depositing; holding these funds in his client account; or for settling a real estate transaction.

Where an attorney knows, suspects or has reasonable grounds to suspect that a transaction or proposed transaction involves the proceeds of criminal conduct, as soon as practicable after forming that suspicion, he must report that transaction or proposed transaction to the Financial Intelligence Unit.

For the purposes of this section, references to a counsel and attorney include a firm in which he or she is a partner or an associate or is held out to be a partner or an associate.

Failure to make the report is an offence, unless the information is subject to legal professional privilege.

In addition, attorneys-at-law have AML obligations in relation to:

- Customer verification/identification
- Record-keeping of client's transactions.
- Educating and training staff (money laundering activity awareness)

Cayman Islands:

Section 136 (1) of the Proceeds of Crime Law ("PCL") states that a person commits an offence if:

> (a) he knows of suspects or has reasonable grounds for knowing or suspecting that another person is engaged in criminal conduct;
> (b) the information or other matter on which his knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to him in the course of a **business in the regulated sector** or other trade, profession, business or employment;
> (c) he does not make the required disclosure to a nominated officer, or the Financial Reporting Authority, as soon as is practicable after the information or other matter mentioned in paragraph (b) comes to him.

However, he does not commit an offence under this section if -

> (a) he has a reasonable excuse for not making the required disclosure;
> (b) he is a professional legal adviser or other relevant professional adviser and the information or other matter came to him in privileged circumstances; and
> (c) he does not know or suspect that another person is engaged in money laundering and he has not been provided by his employer with such training as is specified in guidelines issued by the Monetary Authority and published in the Gazette for the purposes of this section.

For the purpose of this section, a person is deemed to carry on business in the regulated sector if he carries on **"relevant financial business"** as defined by the Money Laundering Regulations ("MLR").

The MLR lists certain "activities" as falling within the definition of "relevant financial business" under the PCL and MLR. In this regard, the MLR Second Schedule, paragraph 14 states the following:

"financial, estate agency and legal services provided in the course of business relating to the sale, purchase or mortgage of land or interests in land on behalf of clients or customers" are activities that constitute "relevant financial business."

This is the category within which attorneys would find themselves amenable to the relevant AML provisions.

Examples of activities that would fall **outside** the scope of relevant financial business include drafting wills, providing legal opinions and legal advice.

The MLR sets out four key requirements that should be in place to ensure compliance.

These are:

1. client identification and verification procedures;
2. record keeping procedures;

3. internal reporting procedures (eg designating a MLRO to whom suspicious reports are made and who will have ultimate responsibility to file an SAR if deemed necessary);
4. internal control procedures, which now include designating a person at managerial level to be a compliance officer with responsibility for ongoing monitoring of clients and ensuring internal compliance with the AML laws in the Cayman Islands (eg. performing internal audit, employee screening, training and awareness)

Trinidad & Tobago:

The Proceeds of Crime Act ("POCA") (as amended in 2009) expands the scope of the AML regime to cover attorneys-at-law. This is achieved by adding the term "listed business" to several provisions of the legislation.

In this regard, "listed business" means a business or profession listed in the First Schedule to the Act. Here, "listed business" is defined to cover attorneys in certain clearly defined circumstances.

Thus, an attorney is accountable when performing the following functions on behalf of a client:

(a) buying and selling of real estate;
(b) managing of client money, securities and other assets;
(c) management of banking, savings or organization of contributions for the creation, operation or management of companies, legal persons or arrangements;
(e) buying or selling of business entities.

Financial institutions and listed businesses have a duty to pay attention to all complex and unusual transactions and to report suspicious transactions to the FIU.

These entities must also have in place record-keeping procedures as well as a compliance programme that includes—

(a) a system of internal controls to ensure ongoing compliance;
(b) internal or external independent testing for compliance;
(c) training of personnel in the identification of suspicious transactions; and
(d) appointment of a staff member responsible for continual compliance with the Act and the Regulations.

United Kingdom:

The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007 amended the definition of regulated sector as set out in the Proceeds of Crime Act 2002 ("POCA").

As such, a business is in the regulated sector to the extent that it consists of the participation in financial or real property transactions concerning—

(i) the buying and selling of real property or business entities;

(ii) the managing of client money, securities or other assets;
(iii) the opening or management of bank, savings or securities accounts;
(iv) the organisation of contributions necessary for the creation, operation or management of companies; or
(v) the creation, operation or management of trusts, companies or similar structures,
by a firm or sole practitioner who by way of business provides legal or notarial services to other persons.

POCA places a duty on employees in a business in the regulated sector (including lawyers) to make reports where they "know or suspect" that another person is engaged in money laundering and where (even if they do not know or suspect) they "have reasonable grounds for knowing or suspecting" that a person is engaged in money laundering.

The Money Laundering Regulations 2007 ("MLR") apply to certain defined businesses and professionals. Accordingly, regulation 3(9) extends the application of the MLR to "independent legal professionals." This is defined to mean a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning—

(a) the buying and selling of real property or business entities;
(b) the managing of client money, securities or other assets;
(c) the opening or management of bank, savings or securities accounts
(d) the organisation of contributions necessary for the creation, operation or management of companies or;
(e) the creation, operation or management of trusts, companies or similar structures,

For for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.

Under the MLR, lawyers have duties in relation to client identification, record-keeping and other internal compliance programmes.

Jamaica:

Persons in the regulated sector have an obligation under section 94 POCA to pay attention to unusual and complex transactions and to report to the FID any knowledge or belief, on reasonable grounds, that a transaction involves the proceeds of crime. This reporting obligation would therefore apply to attorneys-at-law who fall within the ambit of the regulated sector. However, it should be noted that any information that falls within the ambit of “privileged circumstances” is exempt from this duty of disclosure.

In accordance with regulation 5 of the Proceeds of Crime (Money Laundering Prevention) Regulations ("POC(MLP)R"), attorneys who are within the regulated sector would have a duty to establish certain programmes, policies and procedures necessary for the prevention and detection of money laundering. These include the following:

(i) client identification and verification procedures
(ii) record-keeping procedures
(iii) internal reporting systems
(iv) ongoing training and audit programmes

It should be noted that under the POC(MLP)R the duty to file threshold reports lies **only** on **financial institutions** and not all persons in the regulated sector. This means that attorneys-at-law would not have an obligation to automatically file reports of cash transactions that attain the prescribed amount, as is the case for the various financial institutions. It is only if such transactions give rise to knowledge or reasonable grounds to believe that the cash in question represents the proceeds of crime that a disclosure would have to be made under section 94.

The examination of the other 4 jurisdictions shows that not all lawyers in those jurisdictions fall under the AML umbrella, but only those who provide certain clearly defined services. These are usually the types of services that have been identified by the FATF as creating the greatest money laundering risk in relation to legal professionals.

It is suggested that in designating attorneys as a category of designated non-financial institution ("DNFI") under POCA, such designation should be limited to the following areas of legal practise:

i. creation and management of trusts
ii. creation and management of companies
iii. management of client funds and other property
iv. sale and purchase of real property

An attorney who performs any of the above functions would be deemed to be a DNFI within the regulated sector and therefore subject to the reporting obligations under POCA, as well as the identification and other duties under the POC(MLP)R.

This would be consistent with the international standard and would also prevent all attorneys from being unduly burdened. For instance, an attorney who practises only in the area of family law, such as custody and maintenance matters, may fall outside the scope of the AML regime. Similarly, attorneys who do criminal defence cases exclusively would not be performing any of the functions that make them vulnerable to money laundering and should therefore not be subject to these obligations. From a law enforcement perspective, by confining the reporting duties to specific matters, it would minimise the risk of the phenomenon of "over-reporting" from occuring.

It is suggested that a useful model for defining the scope of DNFIs within the regulated sector is that utilised in Trinidad. In that jurisdiction the Schedule clearly delineates the profession/industry and the activities within it that would give rise to AML obligations. (Please see at the end of this paper an excerpt from the Trinidadian POCA). In making the order pursuant to the Fourth Schedule of POCA, the Minister could stipulate the DNFIs in a similar manner.

Exemptions under POCA:

All persons making a disclosure under POCA are expressly exempt from liability for breach of any duty of confidentiality. Information that falls within the scope of "privileged circumstances" is also expressly exempt from disclosure.

Section 137(2) POCA appears to confer a wider exemption from liability for financial institutions for any act or omission made in good faith in the course of complying with POCA. It is submitted that this section should be amended to cover all persons in the regulated sector and not just financial institutions, in order to explicitly protect such persons from actions such as breach of contract, breach of fiduciary obligations or defamation.

Under regulation 8 MLR, the *de minimis* exemption from customer identification obligations applies to transactions involving US250, or its equivalent, and applies to all persons in the regulated sector other than money transfer or remittance agents. This would also protect attorneys involved in small transactions.

Regulator/ Competent Authority:

In addition to the GLC, there could exist a "super-regulator" which has general oversight for all the DNFIs in Jamaica. Such an exclusive DNFI regulator exists in other jurisdictions including, for example, Nigeria which has similar resource considerations as Jamaica.

In Nigeria, there is the National Advisory Council of Designated Non-Financial Institutions. It comprises *inter alia* representatives from the Federal Ministry of Commerce and Industry (FMC&I), Economic and Financial Crimes Commission (EFCC), Nigerian Bar Association (NBA), Institute of Chartered Accountants of Nigeria (ICAN), Association of National Accountants of Nigeria (ANAN), National Association of Supermarkets Owners of Nigeria (NASON) and the Special Control Unit against Money Laundering (SCUML).

The Council is charged with the responsibility of regulating, monitoring and supervising the DNFIs against money laundering and countering financing of terrorism in Nigeria. It is expected to ensure constant information flow between concerned partners in order to raise the level of awareness within and outside the country with regard to money laundering and terrorism financing.

The Council is also required to submit quarterly reports to the Commerce Minister and the Economic and Financial Crimes Commission (EFCC), through the special control unit against money laundering, as a means of keeping government informed of its activities.

This type of unified approach is different from that which exists in the UK, which has a splintered supervisory regime to ensure compliance, in that each industry or profession is effectively monitored for its AML compliance by the relevant professional body or industry regulator.

It is submitted that if this consolidated regulatory regime is adopted in Jamaica, it could address some of the resource concerns presently affecting potential DNFIs. In order to create efficiency and uniformity in the AML regime implemented amongst DNFIs, this DNFI regulator could assume, for instance, monitoring powers to ensure compliance with the AML regime for all DNFIs. The GLC could retain responsibility for drafting Guidance Notes for the legal profession and this could be achieved by virtue of the representation of the GLC on the executive of the new "super-regulator".

Indeed, section 94(7) POCA contemplates that guidance should be issued by a supervisory authority or any other body that regulates a particular profession, as this is a factor that would be taken into account when determining if an offence for non-disclosure has been committed.

Although not exclusive to DNFIs, the Compliance Commission of the Bahamas has power under section 46 of the FTRA to issue codes of practice for financial institutions falling within its supervisory scope. In this regard, lawyers are deemed to be financial institutions when providing services in the circumstances specified in section 3(1)(k) FTRA and, consequently, they are subject to supervision for AML purposes by the Commission in relation to those services.

The Commission has issued revised codes of practice for the various industries and professions falling within its supervisory mandate. The codes incorporate, *inter alia*, a risk-based approach to customer verification requirements and know your employee requirements. To date, codes have been issued for Accountants, Lawyers, Real Estate Brokers / Developers and Financial & Corporate Service Providers. These industry-specific codes provide practical guidance on the implementation of provisions of the AML/CFT legislation, while providing examples of good business practices.

The following is an extract from the First Schedule of the POCA (Amendment) Act (2009) of Trinidad & Tobago.

Listed Business

Type of Business	**Interpretation**
An Accountant, an Attorney-at-Law or other Independent Legal Professional	Such a person is accountable when performing the following functions on behalf of a client: *(a)* buying and selling of real estate; *(b)* managing of client money, securities and other assets; *(c)* management of banking, savings or *(d)* organization of contributions for the creation, operation or management of companies, legal persons or arrangements; *(e)* buying or selling of business entities.
National Lotteries On-Line Betting Games	The business of lotteries operated in accordance with the National Lotteries Act.
Jewellery	A business licensed under the Precious Metals and Precious Stones Act.

Dr. Shazeeda Ali
April 17, 2012