RESPONSE OF THE GENERAL LEGAL COUNCIL

TO DRAFT DISCUSSION PAPER ON POCA/TPA DATED FEBRUARY 28, 2012

1. We refer to the BOJ draft discussion paper enclosed by letter dated February 28, 2012 from the BOJ's General Counsel on the FATF requirements for Attorneys-at-law. In the discussion paper, certain issues were identified for consideration in respect of the Proceeds of Crime Act (POCA). Our comments and/or suggestions in respect of each of them, in the order in which they appear in the paper, are as follows:

Impact of the POCA Regime on Legal Professional Privilege (LPP)

2. The inclusion of attorneys-at-law in the regulated sector gives rise to additional obligations (over and above any which currently apply) which impact on the general duties of confidentiality owed by attorneys to their clients and their duty to preserve the privilege of their clients not to disclose certain communications.

3. In particular, s. 94 obliges persons in the regulated sector to make reports (loosely called suspicious transaction reports ("STR's")) where they have knowledge or believe, on reasonable grounds, that another person is engaging in a money laundering transaction and the knowledge or belief came to them in the course of a business in the regulated sector. Section 94(5) exempts an attorney-at-law from making such a report where the information, etc. came to him in "privileged circumstances". The meaning of "privileged circumstances" is prescribed in s.94 (8) as follows:

   "(8) Information or other matter comes to an Attorney-at-law in privileged circumstances if it is communicated or given to him –

   (a) by, or by a representative of, a client of his in connection with the giving by the Attorney-at-Law of legal advice to the client;

   (b) by, or by a representative of, a person seeking legal advice from the Attorney-at-Law; or

(c) by a person in connection with legal proceedings or contemplated legal proceedings:

Provided that this subsection does not apply to information or other matter that is communicated or given with the intention of furthering a criminal purpose."

4. This exemption may not be the same in all respects as legal professional privilege ("LPP"). The UK Law Society in its Anti-Money Laundering Practice Note points out, in paragraph 6.6, certain differences between communications made in "privileged circumstances" and those to which LPP applies.

5. For example, the Law Society asserts that when advice is given or received in circumstances where litigation is neither contemplated nor reasonably in prospect, except in very limited circumstances, communications between the attorney and third parties will not be protected under the advice arm of LPP.

6. However, the "privileged circumstances" exemption would expressly exempt communications regarding advice to be provided to representatives. Accordingly, communications with a junior employee of a client or other professionals assisting in a transaction, such as surveyors or estate agents, may be exempt. In some respects the term "privileged circumstances" is therefore wider since it expressly covers exchanges with a representative of a client, unlike common law LPP.

7. It is important to correctly identify whether communications are protected by LPP or if they are merely covered by the privileged circumstances exemption. This is because the privileged circumstances exemption exempts you from certain POCA provisions, in particular the duty to file an STR. It does not provide any of the other LPP protections to those communications. Therefore, a communication which is only covered by privileged circumstances, not LPP, may ordinarily remain vulnerable to seizure or production under a court order or other such notice from law enforcement. However, s.108 (1) of POCA expressly exempts from a disclosure order, information that is subject to LPP and s.117 exempts from search and seizure, information that is covered by LPP.

8. Also, LPP is not expressly overridden by POCA so even if a particular communication does not fall squarely within the term "privileged circumstances", it may still be covered by LPP. Indeed, LPP

can only be overridden if this is expressly stated by statute and this is not likely to happen since it is now considered to be a component of due process under one's fundamental rights.

Impact of the POCA Regime on an Attorney's Duty of Confidentiality

9. The discussion paper correctly identifies the duty of confidentiality as arising from the fiduciary relationship between attorney and client. In addition, we would submit that it is an implied term of the contract of retainer between attorney and client and is therefore also contractual. The duty obliges the attorney not to disclose client information save with the consent of the client.

10. The filing of STRs under s.94 would ordinarily be a breach of the duty. However, these reports are exempt by virtue of s.100(1) - (3), since they are deemed to be protected disclosures. We have noted the suggestion that the consent of clients be obtained by the inclusion in retainer agreements of clients' permission to make the necessary disclosures.

11. We consider it to be desirable that there be express protection for the attorney, his partners and employees from criminal prosecution, disciplinary action and civil suit, where a disclosure is made in good faith in accordance with POCA. In this regard **s.137 (2) should be amended to cover all persons in the regulated sector, including attorneys and other DNFI's**.[1] This amendment is necessary to allow for broader exemption from civil liability, e.g. in relation to actions for breach of contract, defamation or breach of fiduciary duties.

12. We note the comments made on s.100 concerning protected and authorised disclosures. It is our understanding that currently, as a matter of practice, where the circumstances demand a quicker report and response than that facilitated by the statutory procedure of submission of the prescribed form, an oral disclosure may be made and oral response received. However, oral disclosures do not fall within the definition of authorised disclosures set out in the relevant sections of POCA including s.100 (4). Such authorised disclosures are necessary where a person is seeking consent to proceed with a transaction in order to secure a defence to a potential money laundering charge.

---

[1] This could be done by substituting the words "persons in the regulated sector" for the words "financial institution" in s.137 (2).

13. The circumstances which have given rise to the practice in relation to financial institutions giving oral disclosures will also arise in relation to attorneys-at-law, given the urgency that is sometimes attendant on dealings with clients and the delivery of legal services. Accordingly, we recommend that **s.100(4) be amended to accommodate oral disclosures**. Otherwise, accommodation for oral disclosures could be made in regulations dedicated to DNFI's.

14. We are also of the view that the form of disclosure presently prescribed for financial institutions is too detailed for non-financial institutions and **a simplified form of disclosure should be devised for attorneys**. We recommend for consideration the form used in the Bahamas, a copy of which is attached as Appendix 1.

15. We also recommend the **amendment of the Canons of Professional Ethics** in light of the changing environment in which attorneys operate, **to create some additional exceptions to the duty of confidentiality** e.g. where the attorney is permitted or compelled by law to disclose the information, or where non-consensual disclosure is necessary to prevent the commission of a serious offence, etc.

Regulatory Issues

16. **The GLC should be named as a supervisory authority in the Fourth Schedule to POCA.** The discussion paper observes that, under s.91(1)(g), the competent authority is charged with monitoring compliance by businesses in the regulated sector and with issuing guidelines to such businesses regarding AML measures. We are of the view that ideally the GLC should be the competent authority for attorneys-at-law as well as fulfilling the role of supervisory authority. There is some confusion as to the respective roles of these two creatures of POCA. The discussion paper states on page 10 that,

    "Competent authorities have statutory responsibility to monitor compliance. However, the supervisory authorities would have discretion to determine how compliance should be measured and the scope of such assessment exercises."

17. As the competent authority is the one with ultimate responsibility for monitoring compliance and

issuing guidelines then it seems desirable that we preserve the profession's traditional right to self-regulation by having the **GLC authorised by the Minister under s.91(1)(g) as the competent authority**.

18. These recommendations raise the issue of the availability and adequacy of resources for the GLC to effectively discharge all the functions of competent and/ or supervisory authority, particularly with regard to the functions of monitoring and auditing attorneys who will be brought into the regulated sector. One approach would be to permit the GLC to delegate any of its functions and, in particular, its monitoring/auditing function to another entity which has the institutional capacity to perform them. In this regard, we recommend that while the GLC should be identified as the competent authority, it should also **be given the power to delegate any of these functions.**

19. Breaches of POCA by attorneys could be reported to the GLC, and disciplinary action taken against the defaulting attorneys by the GLC. Otherwise, the resources of the GLC will have to be supplemented in a very significant way and, if this is the case, **a joint assessment should be undertaken by the GLC and the BOJ to determine the level of financial support required and, we suggest, needed to be provided by the BOJ/GOJ.**

20. **Alternatively, we recommend the establishment of a "super-regulator", on which the GLC is adequately represented, as the competent authority for all DNFI's including attorneys-at-law.** (See Appendix 2 attached which outlines approaches to this matter taken in some other jurisdictions including Nigeria.) This would be one way of ameliorating the resource problem associated with the functions of a competent authority. The Nigerians have taken this approach to their own situation and this may be a model which merits closer examination. The funding of such a super-regulator would of course be an issue but, at the very least, economies of scale and shared expenses may make it a more viable option than separate competent authorities for each DNFI.

20. If there is such a super-regulator and it is designated as the competent authority the GLC should still be named as the supervisory authority with the function mentioned in s.94(7)(a)(i) of POCA in relation to the issuance of guidance and the discretion to determine how compliance is measured, referred to in the discussion paper and set out in paragraph 16 above.

21. We note the suggestion in the discussion paper in respect of the use of the inspections carried out by audit firms on legal firms as happens in the Bahamas. We agree that this is a possible route but note that audit inspections are costly exercises. We therefore recommend that this not be a regulatory requirement but be left up to the discretion of individual firms or the competent authority.

Segregation of Attorneys Engaged in the Relevant Activities

22. We recognise that there will be some attorneys-at-law who do not engage in any of the activities which would bring them within the FATF recommendations. We recommend that **attorneys-at-law who are engaged in clearly defined activities, broadly as stipulated by FATF Recommendation 22(d), should be designated DNFI's under POCA.** (See Appendix 2)

23. However, some of the criteria set out in FATF Recommendation 22(d) require clarification and refinement for the avoidance of both uncertainty and too expansive an interpretation. In particular, **the meaning of the term "managing of client money" should be clarified so that the mere operation of a client's account does not itself come within that phrase**. Such clarification could be set out in new regulations covering DNFI's. In this regard, we commend for your consideration the language used to describe similar activity in paragraph 6.4.1 of the AML/ATF Handbook & Code of Practice for Lawyers published by the Compliance Commission of the Bahamas. The Commission uses the term "holding a client account" rather than "managing of client funds" but limits the activity which it seeks to capture as follows:

"(iii)holding a client account; in circumstances where the lawyer merely acts in relation to those funds as an agent, intermediary or conduit for the client, to facilitate the entry or placement, movement, or removal of such funds, into, within or out of the financial system."

24. We note your suggestion for the establishment of a register for attorneys who fall within the regulated sector. We recommend that **attorneys be required to file annual declarations with the GLC as to whether they are engaged in any activity which falls under FATF Recommendation 22(d)**. It is our proposal to make the filing of the declaration a condition precedent to the issue of the attorney's annual practising certificate. In the case of a firm, we propose that one annual declaration be given on the firm's behalf in similar fashion to the accounts

report currently required. A compilation of these annual reports would result in lists of attorneys engaged in the FATF activities on a yearly basis.

25. We recognise that while attorneys-at-law may only occasionally, or never, engage in the activities set out in FATF Recommendation 22(d), they are all nevertheless entitled to engage in the full range of legal service activities. Accordingly, we recommend that **regulations dedicated to attorneys-at-law (or alternatively to DNFI's) should be adopted which require all attorneys (not just attorneys who are DNFI's) to make this annual declaration**. We also propose **the amendment of the Legal Profession Act ("LPA") to give the GLC the express power to inspect all attorneys (not just attorneys who are DNFI's) to ensure the accuracy of statements in annual declarations and where relevant, questionnaires (referred to in para. 27) and compliance with POCA.** In this regard, non-compliant attorneys would be subject to the disciplinary regime prescribed by the LPA in addition to any other prescribed penalty.

26. We have chosen not to adopt the suggestion of the "one-off" perennial declaration of involvement in the relevant activities as we believe that focussed attention to the matter on a regular basis such as would be achieved under an annual declaration regime will serve as a reminder to attorneys of their statutory obligations under POCA and is, ultimately, in their interest. The review of the annual declarations is a separate monitoring function, i.e. under the LPA and not POCA.

Regulation which is risk-sensitive

27. We agree that a risk-sensitive approach to regulation and monitoring is required which does not compromise key FATF requirements as set out in the discussion paper. This would be reflected both in terms of the approach to monitoring compliance with POCA as well as the guidelines issued to attorneys concerning their approach in complying with POCA. In the case of the monitoring function, we would support an approach which sees heightened monitoring being applied, *inter alia*, to attorneys who engage in a significant way in high-risk activities or are otherwise considered to be at greater risk. In this regard, we propose that as part of the annual declaration referred to at paragraph 24 above, **attorneys who are DNFI's would be required to complete and file a questionnaire whose objective would be to discern whether, and to what extent, they are**

compliant with recommended AML procedures. Such heightened monitoring could include requests for "further and better particulars" in respect of any aspect of the questionnaire or, in serious cases of concern, on-site examination.

Nature of guidance which should be issued by the Supervisory Authority (and role of GLC)

28. We agree that the GLC should be the competent authority and should be designated as the supervisory authority since it is best positioned to issue appropriate guidelines to legal practitioners which take into account the exigencies of practice in our jurisdiction. We also agree that amendments are required to harmonise the requirements under POCA with the ethical rules that govern the legal profession.

29. We agree that the GLC has an interest in, and the relevant capacity to make, recommendations for amendment to POCA and regulations under it, both generally and in respect of its application to attorneys-at-law. In addition to amendments already suggested, we recommend the changes identified below.

Are the requirements in the Jamaican law in keeping with FATF?

30. We note and agree with the point made in the discussion paper that the supervisory regime should not impose requirements on attorneys which are more onerous than those prescribed by FATF.

Requirements for enforcement

31. We note the observation in the paper that breaches of POCA and the respective regulations constitute offences carrying criminal sanction but that such offences are not included as prescribed offences which constitute professional misconduct under the Legal Profession Act (Prescribed Offences) Rules. While we agree that offences created by POCA ought to be prescribed offences, we are also of the view that **most breaches of the regulations should not be criminalised but ought to be dealt with as acts of professional misconduct in respect of which the GLC should be empowered to take such action as it sees fit**. Examples of these breaches would be in relation to record-keeping, customer verification, employee training and audit requirements. FATF

Recommendation 35 in fact permits criminal, civil or administrative sanction.

32. We reiterate our recommendation that separate regulations be made to deal specifically with lawyers as this would facilitate the treatment of certain breaches as being of a disciplinary nature to be dealt with exclusively by the GLC.

33. In addition, attorney-specific regulations would allow the promulgation of mechanisms to identify and segregate the treatment of lawyers coming within the regulated sector from those who do not.

Costs

34. We acknowledge and agree with the observation that monitoring compliance and complying with AML measures are costly for both the regulator and the regulated and refer to our earlier comments on the resource needs of the GLC and how they may be met. (See paragraphs 18 and 19.)

General Recommendations

35. In addition to responding to the specific issues raised in the discussion paper on POCA, we wish to make some general observations and/or recommendations.

36. **Section 100(4)(a) of POCA should be amended** to make a disclosure "authorised" if, *inter alia,* it is a disclosure to an authorised officer or nominated officer that the person disclosing knows or has reasonable grounds to believe that the property is criminal property rather than that property is criminal property.

37. **Section 97 of POCA should be amended** to give express statutory effect to paragraph 4 of FATF Interpretative Note 23 and so permit a legal adviser to make disclosure to the client for the purpose of dissuading the client from engaging in illegal activity. The UK has already done this by amendment to s.333D(2) of their Proceeds of Crime Act.

38. **The Legal Profession (Prescribed Offences) Rules, 1998 should be amended** to include a reference to the money laundering offence as defined under POCA and to remove references to the Money Laundering Act.

39. **The consent regime in POCA should be re-examined** given the potential consequences of having to wait for the 7 days allowed for the Financial Investigations Division (FID) to give consent prior to undertaking the proposed transaction. This leaves reporting persons open to threats of physical violence and also to suit relative to losses incurred by delays. Accordingly **we propose that FID consent or refusal of consent should be given within 3 days and that the waiting period before proceeding with the transaction after refusal of consent should be 5 days**.

40. We also note that with the expansion of the regulated sector to include lawyers (and other DNFI's) the FID will need additional resources in order to perform their functions effectively. **The additional resource needs of the FID should be addressed.**

The Terrorism Prevention Act (TPA)

41. We note the intention to bring attorneys-at-law under the TPA and are of the view that **the approach to the regulation of the profession under the TPA should be similar to and consistent with that proposed in respect of POCA. In this regard, attorneys-at-law who are engaged in clearly defined activities, broadly as stipulated by FATF Recommendation 22(d), should be named under s. 15(2)(c) TPA as another entity falling within the ambit of that provision.**

42. We have also noted, however, the inconsistency in the language used in s.94 of POCA and s.16(3) of the TPA (as amended in 2011) in relation to the transactions to which one must pay attention and report. In addition, the Terrorism Prevention (Reporting Entities) Regulations 2010 have not been amended to reflect the 2011 amendment to s.16(3) of the TPA.

May 10, 2012