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Identification and Exchange of Information on Politically Exposed Persons in Central American Countries

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ABSTRACT

In the fight against money laundering, information on politically exposed persons (PEPs) is highly relevant for financial institutions as it is about customers deemed to be high-risk due to their public functions and the degree of influence they can exert. This document reviews the regulatory and operational frameworks to access and exchange of information on PEPs in Central American countries, as well as the enhanced due diligence measures under implementation in these countries. The main findings indicate that there are legal constraints in relation to the definition of PEPs and the obligation to declare beneficial owners. There are also operational constraints in terms of the measures implemented to identify PEPs and to ensure the integrity of information systems. Likewise, this document presents recommendations to address the barriers identified and analyzes best practices to help strengthen the detection and prevention mechanisms used by Central American governments and financial institutions for cases in which PEPs use the financial system to launder money obtained through corruption and related crimes.

JEL codes: D73, G28, N46

Keywords: anti-money laundering, beneficial owner, due diligence, exchange of information, FATF, financial institutions, financial transparency, politically exposed persons

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EXECUTIVE SUMMARY

Exchange of information is one of the fundamental pillars of an effective system for preventing money laundering and terrorist financing (ML/TF). Politically exposed persons (PEPs) can represent elevated risk of money laundering as they are considered public officials who are inherently more influential. For this reason, it is important to review the current regulatory and operational frameworks for exchange of information on PEPs.

The collection and exchange of information on PEPs is particularly complex as they require, first and foremost, information flows from the public sector to financial institutions (FIs), in particular to facilitate PEPs identification. On the other hand, it is essential to ensure exchange of information between FIs and their correspondent banks.

This technical note analyzes access to and exchange of information on PEPs in Central American countries. In particular, it examines the legal constraints faced by FIs in Central American countries in accessing the information needed to properly identify PEPs, their family members, and close collaborators and in sharing this information within the financial group and with the FIs' correspondent banks abroad.

The main findings indicate the presence of legal barriers related to the definition of PEPs, the obligation to declare beneficial owners, the publication of affidavits of assets and income, and the protection of personal data. In addition, in some cases, there are operational barriers to PEP identification measures and to technological capacity for data maintenance and information system integration.

Additionally, this document provides recommendations on overcoming the constraints identified, and defines best practices in working with Central American countries and their FIs in establishing measures to mitigate PEPs-related risks of corruption and money laundering activities.

ACRONYMS AND ABBREVIATIONS

ASBA: Association of Supervisors of Banks of the Americas (*Asociación de Supervisores de Bancos de las Américas*)

AML/CFT: Anti-Money Laundering/Combating the Financing of Terrorism (alternatively Counter-Terrorist Financing/CTF)

DNFBPs: Designated Non-Financial Businesses and Professions

CRI: Costa Rica

DOM: Dominican Republic

FATF: Financial Action Task Force

GTM: Guatemala

HON: Honduras

ML/TF: Money laundering/terrorist financing

NIC: Nicaragua

PAN: Panama

PEP: Politically exposed persons

SRB: Self-regulatory body

OECD: Organisation for Economic Co-operation and Development

SLV: El Salvador

FIU: Financial intelligence unit

GLOSSARY[1]

Designated Non-Financial Businesses and Professions: These refer to: (i) casinos; (ii) real estate agents; (iii) precious metal dealers; (iv) lawyers, notaries, other independent legal professionals, and accountants (professionals in sole proprietorships, in partnerships or hired by professional firms, and not "in-house" professionals who are employees of other types of companies nor professionals working for government agencies, who may already be subject to AML/CFT measures); and (v) trust and corporate service providers, which include all persons or activities not covered by the Recommendations, and who provide any of the following services to third parties as business activities: acting as an agent to establish legal entities; acting (or arranging for another person to act) as a director or attorney of a corporation, partner of a corporation or someone with a similar role at other types of legal entities; providing a registered domicile; providing a corporate domicile or physical space, postal or administrative address for a corporation or any other type of legal person or structure; acting (or arranging for another person to act) as trustee of an express trust or performing an equivalent role for another type of legal structure, and acting (or arranging for another person to act) as a nominee shareholder on behalf of another person.

Competent authorities: Public authorities with designated responsibilities related to the fight against money laundering and/or terrorist financing, which include: (i) the financial intelligence unit (FIU), in particular; (ii) the authorities that investigate and/or prosecute money laundering, terrorist financing, and associated predicate offenses, and freeze/seize and confiscate proceeds from crime; (iii) the authorities that receive reports on cross-border transportations of currency and bearer negotiable instruments, and (iv) the authorities that have supervisory or oversight responsibilities in the area of AML/CFT to monitor compliance by financial institutions and DNFBPs. Notably, self-regulatory bodies (SRBs) are not considered competent authorities.

Correspondent banking: This refers to the provision of banking services by one bank ("correspondent bank") to another bank ("respondent bank"). Large international banks often act as correspondents for thousands of other banks around the world. Through their correspondents, respondent banks can access a wide range of services, including cash management (e.g., multi-currency interest-bearing accounts), international transfers, check clearing, accounts payable, and currency services.

[1] The country codes of the International Organization for Standardization (ISO) are used to refer to the countries of Latin America.

Beneficial owner: The natural person(s) who ultimately own(s) or control(s) a customer and/or the natural person on whose behalf a transaction is made. Beneficial owners also include persons exercising the ultimate effective control over a legal person or another type of legal structure.

Funds: Assets of any kind, whether corporeal or incorporeal, tangible or intangible, movable or immovable, and legal documents or instruments in any form, electronic or digital, which provide evidence of ownership of or interest in such assets.

Financial group: A group consisting of a holding corporation or another type of legal person that exercises control and coordinates the functions of the rest of the group to supervise the group in accordance with its core principles, together with branches and/or subsidiaries subject to AML/CFT policies and procedures at the group level.

Financial institution (FI): A natural or legal person that carries out one or more of the following activities or operations for or on behalf of a customer as business activities: (i) taking deposits and other repayable funds from the public; (ii) issuing loans; (iii) providing financial leasing or leasing services; (iv) providing money or securities transfer services; (v) issuing and managing means of payment (credit and debit cards, checks, traveler's checks, money orders, bank transfers, electronic money, etc.); (vi) providing financial guarantees and obligations; (vii) benchmarking of: money market instruments (checks, bills of exchange, certificates of deposit, derivatives, etc.); foreign currency; tradable instruments, interest rates and indices; transferable securities; and commodity futures trading; (viii) participating in securities issuance and providing financial services related to such issuance; (ix) managing individual and collective portfolios; (x) providing custody service or managing cash or liquid securities on behalf of third parties; (xi) conducting other forms of investment, administration, or management of funds or money on behalf of third parties; (xii) underwriting and placing life insurance and other investment-related insurance; and (xiii) providing currency and currency exchange services.

Politically exposed person (PEP): PEPs can be foreign, domestic, or members of an international organization. Foreign PEPs are individuals who perform or have been entrusted with prominent public functions in another country, such as heads of state or government, high-level politicians, high-level government or court officials, high-ranking military officers, senior executives of state corporations, and officials of major political parties. National or domestic PEPs are individuals who perform or have been entrusted with prominent public functions domestically, such as heads of state or government, high-level politicians, high-level government or court officials, high-ranking military officers, senior executives of state-owned enterprises, and senior officials of political parties. PEPs who perform or have been entrusted with prominent functions by an international organization are members of its managerial bodies and of senior management, such as directors, deputy directors, and board members or equivalent functions. The definition of PEPs is not intended to cover middle- or lower-ranking individuals in the previous categories.

Legal person: entities that are not natural persons that can establish a permanent relationship as a customer of a financial institution or hold other types of properties. This may include corporations, corporate bodies, foundations, associations, and other similar, relevant entities.

1

INTRODUCTION

Corruption and abuse of public funds are increasingly significant issues for the international community and government transparency agendas. Research over the past decades reveals how politically exposed persons (PEPs) have illicitly accumulated vast amounts of wealth and how these funds are often laundered in foreign jurisdictions and hidden in trusts, private companies, foundations, or on behalf of family members or associates (FATF/GAFI, 2011). In most cases, these activities involve having bank accounts and using financial services.

In response, the international community has established standards to adequately define PEPs and encourage countries to put in place policies and mechanisms to identify and regulate PEPs to detect and prevent cases in which PEPs use national and international financial systems to launder money obtained from corruption and other crimes.

The Financial Action Task Force (FATF) issues international standards on combating money laundering and terrorist financing (ML/TF). The FATF Recommendations establish a framework of measures (40 recommendations in total) that countries should implement to combat ML/TF. The FATF assesses not only the regulatory adequacy of member countries in terms of compliance with the recommendations but also the effectiveness of their implementation.

Generally speaking, a PEP is an individual who exercises or who has been entrusted with a prominent public function. The position and influence of a PEP place him or her in a particularly visible situation prone to potential abuse of public funds. For this reason, FATF Recommendations 10 and 12[2] have set out requirements that financial institutions (FIs) must meet to prevent and detect misuse of financial systems by PEPs.

Effective compliance with PEPs due diligence standards requires a high level of public and private sector cooperation and information exchange. On one hand, in order to facilitate the identification process, public institutions should coordinate among themselves and provide FIs with the necessary information on the natural persons performing the designated public functions. On the other hand, public institutions should provide information on PEPs' family members and close collaborators, who enjoy higher levels of privacy than people holding public office. In turn, FIs should have the ability to share the information gathered through their due diligence processes regarding legal persons belonging to the same conglomerate and

[2] These recommendations also apply to designated non-financial businesses and professions (DNFBPs).

their correspondent banks, regardless of whether these institutions are located in the same jurisdiction or in another country.

However, access to and exchange of information may be constrained for legal and/or operational reasons. Legal constraints come from various sources: (i) the degree of detail in the PEPs definition; (ii) the obligation to declare the beneficial owner of legal persons in public registries; (iii) the extent of public accessibility to affidavits of property and income of public officials; (iv) the scope of personal data protection; and (v) the scope of financial privacy protection. The operational constraints refer to, on one hand, with measures that countries have at their disposal to facilitate PEPs identification, and, on the other hand, with the technological capacities of regulated entities and their procedures for integrating and preserving data from different systems.

The expectations of local and foreign regulators also play an important role in determining the possibility to effectively exchange information on PEPs. The diversity in regulatory frameworks, regulated entities, and scenarios that call for information sharing require formulating adequate guidelines to ensure consistency in the interpretation of different regulatory frameworks. Inconsistent interpretation may discourage the private sector from sharing information with peers or with the public sector due to ambiguity and uncertainty over the expectations of the authorities.

Overcoming these constraints is especially important in a business context and the risk management model that emerged in the financial sector since the 2008–09 financial crisis. In that context, many international FIs ended their correspondent banking relationships with FIs of developing countries in light of the difficulty of maintaining these relationships (and the costs associated) or the inability to adequately meet the expectations of the regulators due to limits on the exchange of information, particularly the information provided by local FIs (IMF, 2016).

In the specific case of Central America, PEPs are a highly relevant issue given the relatively high level of perceived corruption in all countries except Costa Rica: out of a total of 180 countries included in the Transparency International Corruption Perceptions Index in 2017, Costa Rica ranks 38th, Panama 96th, El Salvador 112nd, the Dominican Republic 135th, Honduras 135th, Guatemala 143rd, and Nicaragua 151st.[3] Similarly, due to the volume of financial activity in the region and their inherent characteristics, money remittances—mostly channeled through correspondent banks—are considered a high-risk segment for money laundering.

In addition, FATF mutual evaluations[4] of compliance with ML/TF standards highlight the vulnerabilities of Central American countries to illicit drug and human trafficking, merchandise smuggling, tax evasion, and the relationship between these crimes and public corruption. The reports also highlight criminal organizations' use of local FIs, in particular money transfer services, currency exchange facilities, third-party fund managers, corporate service providers, and corporate vehicles for money laundering purposes.

This Technical Note analyzes the challenges faced by seven Central American countries (Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Panama) in exchanging information on PEPs. The countries included in the study are democratic, constitutional, and independent states with continental (or "civil law") legal systems.

[3] https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

[4] FATF conducts mutual evaluations of each member country on an ongoing basis to assess the levels of implementation and effectiveness of its 40 Recommendations.

The study starts by examining the measures implemented and the constraints faced by FIs in accessing the information needed to adequately complete PEPs identification processes. It then reviews the restrictions on information exchange in correspondent banking, and briefly describes how local and international regulator expectations impact compliance with the standards examined in the previous sections. The study concludes by presenting the best practices and recommendations for overcoming the constraints identified.

2

OBTAINING INFORMATION ON POLITICALLY EXPOSED PERSONS

This section outlines the customer due diligence measures implemented in Central American countries and analyzes the challenges faced by the FIs of the region in terms of compliance with the identification processes of PEPs.

2.1. Customer Due Diligence and PEPs Identification

To determine whether a customer or the beneficial owner of a customer is a PEP, FIs must start with the due diligence measures set out in FATF Recommendation 10. Central American countries comply with most of these recommendations. Specifically:

1. All countries have adopted, at least formally, a risk-based approach[5] to customer due diligence measures.[6]
2. All countries explicitly prohibit parties from entering into business relationships anonymously or under false names.[7]
3. When starting a business relationship, all countries require their FIs to identify the customer and the beneficial owner,[8] be it a natural or legal person, regular or occasional customer. In addition, Guatemala specifically requires its FIs to set up a transaction profile for each customer:
   i. If the customer is a natural person, all countries require their FIs to request identification information (full name, full address, place and date of birth, and

[5] The general principle of a risk-based approach is that, where risks are higher, countries should require financial institutions and DNFBPs to take enhanced measures to manage and mitigate those risks; and that, correspondingly, where risks are lower, simplified measures may be permitted (FATF, 2012).

[6] GTM: Risk Management Guide. CRI: Law No. 8204, arts. 16, 18, and 30. SLV: Anti-Money Laundering Law, Art.19. HND: Special Anti-Money Laundering, Arts. 6 and 7; SV Resolution No. 1476/22-08-2011, Art. 11. DOM: Law 155–17, Art. 42. PAN: Law 23–2015, Art. 40. NIC: Regulation UAF-PLD/FT/FP, Annex 1.7; Circular 0303–2014.

[7] GTM: Anti-Money Laundering Law, Art. 20. CRI: Law No. 8204 (2017), Art. 16. DOM: Art. 61 of Law No.155–17 on anti-money laundering and terrorist financing of June 1, 2017. SLV: Special Rule 2 of FIU instructions for implementing the anti-money laundering law. HND: Special Anti-Money Laundering Law, Art. 7(9). PAN: Law 23–2015, Art. 26. NIC: UAF Resolution 0006–2016, Art. 10.

[8] GTM: Anti-Money Laundering Law, Arts. 21 and 22. CRI: 2017 amendment to Law No. 8204, Art. 16; Law No. 8204, Art. 10. SLV: technical standard on managing the risks of money laundering and terrorist financing, Art. 18; FIU Instruction on the application of the Anti-Money Laundering Law, Art. 6. HND: Resolution No. 869/29-29-10-2002, Art. 16. DOM: Anti-Money Laundering and Terrorist Financing Law of 2017, Art. 38; Circular 004–16, Art. 1. PAN: Law 23–2015, Arts. 26, 27, and 28. NIC: Resolution UAF 006–2016, Art. 11.

profession). Panama also requires information on the source of funds.

ii. If the customer is a legal person, all countries require their FIs to request information on the customer's corporate legal name, type of legal person, place of incorporation, and information on the identity of the legal representatives and main business activity. Additionally, Guatemala, El Salvador, and Panama request their regulated entities to identify partners and shareholders who own 10 percent or more of a company's stock. All countries require due diligence on the natural persons identified.

4. To verify customer identity, all countries require their FIs to validate the information collected in the identification process through independent and reliable means.
5. All countries require their regulated entities to take measures to establish the identity of the beneficial owner when there are reasons to believe that he or she is not the same as the customer.[9] In addition, Panama[10] requires its FIs to (i) take "reasonable measures to verify the information and documentation obtained from each of the natural persons identified as a beneficial owner"; (ii) "extend due diligence to identify the natural person who is the owner or controller" if the beneficial owner is a legal person; (iii) take "effective measures to ensure that they have identified the beneficial owner, and conduct transaction due diligence" in the specific case of legal persons with bearer share registers or certificates; and (iv) refrain from initiating or continuing the relationship when the regulated financial entity has failed to identify the beneficial owner.
6. All countries require their regulated entities to take "reasonable measures" to identify whether the customer or beneficial owner is a PEP.[11]

To facilitate compliance with this obligation, some countries provide their regulated entities with a list of public functions that must be considered when identifying PEPs. The Superintendence of Banks of Guatemala[12] publishes, for example, a non-exhaustive but sufficiently detailed list of the minimum prominent public functions that FIs must consider when classifying their customers or beneficial owners. Costa Rica,[13] El Salvador,[14] and the Dominican Republic[15] provide a less exhaustive list of prominent public functions to allow the regulated entities to decide whether to classify a certain customer as a PEP. On the other hand, in Honduras,[16]

[9] GTM: Anti-Money Laundering Law, Art. 12; SVD: Anti-Money Laundering Law. Art. 10 a); CRI: Law No. 8204, Art. 16; HON: Anti-Money Laundering Law, Art. 7; NIC: UAF Resolution 006–2016, Art. 14; DOM: Art. 38 of Law No. 155–17 against Money Maundering and Terrorist Financing of June 1, 2017. PAN: Law 23, Art. 27.4.

[10] Art. 27 of Law 23.

[11] GTM: Anti-Money Laundering Law, Arts. 19 and 20. CRI: Law No. 8204, Art. 15. SLV: Anti-Money Laundering Law, Art. 9; Technical Regulations for Managing the Risks of Money Laundering and Terrorist Financing, Art. 22. HND: Resolution 650/10-05-2010. DOM: Law No.155–17 of June 1, 2017 and Instructions on Due Diligence (Circular SIB: No. 004/16, June 29, 2016). PAN: Law 23–2015, Art. 34. NIC: Regulation of Law No. 793.

[12] http://www.sib.gob.gt/web/sib/lavado_activos/pep.

[13] An exhaustive list is provided in the General Regulations of Legislation on Anti-Drug Trafficking, Related Activities, Money Laundering, Terrorist Financing, and Organized Crime, Art. 22.

[14] Anti-Money Laundering Law, Art. 9–B.

[15] Art. 2, numeral 19 of Law No.155–17 on anti-money laundering and terrorist financing, enacted on June 1, 2017, and Instructions on Due Diligence, approved and adopted through Circular SIB: No. 004/16 on June 29, 2016.

[16] FIU Resolution 650/10-05-2010, Art. 2 defines PEPs as persons who "exercise public functions and carry out public activities with access to and/or decision-making power over public resources."

Nicaragua,[17] and Panama,[18] the authorities have not drawn up a list of public functions deemed prominent beyond the examples used in the FATF definition of foreign PEPs or public officials with access to public funds.

The regulated entities of countries that publish lists of prominent public functions are in a better position to identify PEPs than their peers in countries that do not, for the following reasons:

1. First, these lists allow FIs to approach their customers with precise questions. Many FIs in countries that provide lists of prominent public functions create account opening forms that contain the lists so that potential customers can report, in the beginning of a business relationship, if they perform any of the functions listed or if they are relatives or close collaborators of a person that does. In contrast, using generic language for functions—for example, "senior officials"—make this task difficult as it creates uncertainty in the private sector about tiers, differences between permanent and temporary staff, and the creation of "ad-hoc" positions, etc.
2. Second, these lists facilitate the subsequent verification process because the identity of natural persons exercising prominent public functions as previously defined can be verified against official gazettes that publish their appointments.[19]
3. Thirdly, these lists make it possible to define a standard or parameter for all the regulated entities in the market, avoiding that each regulated entity adopts its own definitions that are aligned more with its business segments than with the standard that the legislation seeks to promote.
4. Finally, it is reasonable for regulated entities to make efforts to assess the transaction risks of a PEP and not merely the identification process. In practice, most FIs acquire commercial databases built upon information on such risks. Therefore, the more homogeneous these databases are, the fewer divergences and interpretations there will be regarding a natural person's PEP status. To homogenize databases, these lists should disaggregate the public functions included as much as possible.

These reasons are even more compelling when the customers or beneficial owners are family members or close collaborators of a PEP, as they must be able to provide information on the nature of the relationship with their relatives or collaborators when establishing a relationship with a financial institution, so that the latter can classify the former appropriately and grant these persons similar treatment to that of PEPs.[20]

[17] Regulation of the Financial Analysis Unit, Art. 2(14): "persons who hold public office, including their close relatives and collaborators" http://legislacion.asamblea.gob.ni/normaweb.nsf/b92aaea87dac762406257265005d21f7/441de24164b3d0c706257b18006cf42b?OpenDocument.

[18] Law 23, Art. 4, section 18 and its regulation reiterate the FATF definition.

[19] All countries have Official Gazettes that publish information on government acts (GTM: http://www.dca.gob.gt/archivo/login.php; CRI: http://www.gaceta.go.cr/; SLV: http://www.diariooficial.gob.sv/diarios/; HND: http://www.lagaceta.hn/; DOM: http://www.consultoria.gov.do/consulta/; PAN: https://www.gacetaoficial.gob.pa/).

[20] FATF's Recommendation 12 requires that "(t)he requirements for all types of PEP should also apply to family members or close associates of such PEPs." To subject PEP's family members and close associates to the same enhanced diligence measures, the regulated entities must be in a position to identify them. While Central American countries differ in the scope of the definition of family relations and close associates, regulated entities need to have parameters for making decisions consistent with the objectives of the Recommendation. The definitions are as follows: GTM: family members and close associates should also be considered PEPs for professional, political and/or commercial or business purposes; CRI: spouse should be considered PEPs; SLV: PEP regulations also apply to family members and closely associated persons; HND: PEP requirements extend to spouse or cohabitant, children, parents, and close personal or business associates; DOM: regulated

2.2. Transparency and Identification of Beneficial owners of Legal Persons and Trusts

To enable regulated entities to identify beneficial owners of legal persons and trusts, FATF Recommendations 24 and 25 require countries to ensure that there is adequate, accurate, and timely information on the beneficial ownership and control of legal persons—especially if they comprise companies that issue bearer shares, as well as information on the parties to a trust agreement. The international standard requires that the competent authorities be able to access such information in a timely manner, and recommends that countries take the necessary measures to ensure that regulated entities can also do so to fulfill their due diligence obligations.

With the exception of Honduras, where notaries can still set up certain types of corporations without the obligation to register them,[21] all countries in Central America require the registration of legal persons in a Public Registry.[22]

Currently, no international standard requires registration of or making information on the beneficial owner available to the general public. The current international recommendation is limited to requiring information on beneficial owners be made available to the authorities by various means—through the public register held by the legal person or by a resident agent. For this reason, with the exception of Costa Rica, which began to require that beneficial owners be reported to the Central Bank in 2016,[23] no Central American country requires that information on beneficial owners be reported to a registry when shareholders or partners are legal persons.

On the other hand, with the exception of the Dominican Republic,[24] which has requirements for Limited Liability Companies, and Guatemala[25] for certain types of operations, no other Central American country requires periodic information updates to the Public Registry.[26] Worse still, some countries recognize share transfers with a simple blank endorsement.[27] In practice, this means that regulated entities cannot trust the information they obtain from the Public Registry of Commerce.

entities must apply a risk-based approach to due diligence and monitoring of PEPs' spouse or cohabitant, and persons to whom they are related by blood or affinity up to the second degree of Politically Exposed Persons, as well as close associates and persons who act on their behalf; PAN: close relatives and collaborators must also be considered PEPs; NIC: close relatives, associates, and collaborators of PEPs must also be considered PEPs.

[21] Art. 490 of the Code of Commerce.

[22] GTM: Art. 337 of the Code of Commerce. HON: Arts. 380 to 384 only establish the obligation to register and update information in the Public Registry of Commerce; consequently, there do not seem to exist mechanisms to determine, in a reliable manner, the beneficial owner of these legal persons. PAN: Article 36 of the Code of Commerce requires these companies to keep a "Shareholder Register" with the names of all persons who are shareholders of the company, their domiciles, number of shares, date of purchase and amount paid. However, no clause was found in Panama that requires companies to notify changes to the Public Registry.

[23] Law 9416, 2016. Available at: http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=83186&nValor3=106701&strTipM=TC.

[24] Article 12 of Law No. 3–02 of December 11, 2001 on the Commercial Register: "Every two (2) years since the date of initial registration, all natural or legal persons required to register in the Commercial Register must renew their registration at the corresponding Chamber of Commerce and Production."

[25] Decree 18–2017, October 3, 2017.

[26] Specifically, GAFILAT has pointed out this deficiency in the fourth-round mutual evaluation reports of Guatemala, Honduras, and Costa Rica (http://www.gafilat.org/index.php/es/).

[27] HND: Art. 490 of the Code of Commerce.

Regarding the obligation to identify and allow access to information on the parties to a trust, although all countries have laws in this regard,[28] access to such information varies from country to country. El Salvador,[29] Costa Rica,[30] and Nicaragua[31] require registration in the Public Registry. In addition to registration, the Dominican Republic requires notification on modifications within 30 calendar days.[32] In Panama, the newly passed Law 21-2017 not only requires trusts to notify any amendment or change to the articles of association to the Superintendence of Banks, which is the authority that must approve any merger, consolidation, spin-off, or transfer of shares,[33] but also explicitly authorizes this Superintendence to order the dissolution of trusts that fail to comply with transparency requirements.[34] Guatemala[35] and Honduras[36] require that the information on parties to the trusts remain in the hands of notaries or clerks who set up the trust. While the authorities may have access to this information, regulated entities may not access this information without the intervention of one of the parties.

The absence of an explicit international obligation to publicly declare the beneficial owner of legal persons when their partners or shareholders are also legal persons means that regulated entities have no choice but to accept the information provided by their customers, leaving these entities without an independent source of information.

2.3. Enhanced Diligence Measures for PEPs

In accordance with FATF Recommendation 12, if a customer and/or beneficial owner is found to be a PEP during the identification process, the regulated entities of all Central American countries are required to take the following enhanced diligence measures:

1. Obtain senior management approval for entering into or continuing the business relationship.[37]
2. Take measures to establish the PEP's source of wealth and funds.[38] Although all Central American countries have regulations related to this requirement, none allows remote public access (online access) to affidavits of

[28] GTM: Arts. 766 to 793 of the Code of Commerce, in accordance with the Anti-Money Laundering Law and IVE Notifications No. 624–2010 and 4471–2014. HND: Art. 925 of the Code of Commerce; Art. 17 of the Special Anti-Money Laundering Law. SLV: Art. 1233 of the Code of Commerce; Art. 13(9) of the Commercial Register Law. PAN: Arts. 1, 24, 40, and 43, Law No. 21–2017 (which amends Law No. 1 of 1984). CRI: Law No. 8204. DOM: General Regulation on the Fulfillment of Tax Duties and Obligations for Trusts.

[29] Art. 13(9), the Commercial Register Law which establishes the obligation of registration of deeds of incorporation, amendment, and dissolution of trusts, and of the deeds of issuance of trust certificates of participation.

[30] Art. 636, Code of Commerce.

[31] Art. 7, Trust Agreement Law (Law No. 741).

[32] Art.10, General Regulation No. 01–2015 on the fulfillment of tax duties and obligations for trusts of April 22, 2015.

[33] Arts. 43, 44, and 45, Law No. 21–2017.

[34] Art. 23, Law No. 21–2017.

[35] Art. 771, Code of Commerce.

[36] Art. 1050 (I), Code of Commerce.

[37] GTM: IVE Notification No. 1030 of Regulation 1034–2013. CRI: Law No. 8204, Art. 23. SLV: Technical Regulation on Managing the Risks of Money Laundering and Terrorist Financing, Art. 23. HND: Resolution 650/10-05-2010. DOM: Instruction on Due Diligence, approved and adopted through Circular SIB: No. 004/16 of June 29, 2016. PAN: Law 23–2015, Art. 34. NIC: Regulation on the Prevention of Money Laundering and Terrorist Financing Applicable to Financial Institutions, Art. 8(10).

[38] With the exception of Nicaragua, all Central American countries require regulated entities to take complementary due diligence measures to obtain information on a PEP's source of funds: GTM: IVE Notification No. 1030 of Regulation

assets made by public officials pursuant to the relevant laws on public ethics or integrity.[39] Disclosure of these affidavits—assuming that the information contained therein meets the minimum relevant international standards[40]—would facilitate compliance with this measure considerably, since it would allow regulated entities to have a source of reference on the financial status of their potential customers who are PEPs.

3. Ongoing monitoring of the business relationship: with the exception of Costa Rica, all Central American countries require their regulated entities to monitor business relations with PEPs on an ongoing basis.[41]

Given the shortcomings in identifying PEPs, be they natural persons or beneficial owners of a legal person, it is highly likely that enhanced screening measures will have little or no impact on the region, especially if a PEP wants to hide behind a legal person.

1034–2013. CRI: Law No. 8204, Arts. 8 and 9. SLV: Anti-Money Laundering Law, Art. 2. HND: Resolution 650/10-05-2010. DOM: Instruction on Due Diligence, approved and adopted through Circular SIB: No. 004/16 of June 29, 2016. PAN: Law No. 123–2015. Guatemala and Panama require their regulated entities to identify the source of wealth of PEPs.

[39] GTM, Law on the Integrity and Responsibility of Civil Servants and Public, Art. 21. DMC: Law on Affidavits of Property (Law 311–14), Art. 8, para. III. CRI: Regulation of the Law on Anti-Corruption and Unlawful Enrichment in Public Service, Art. 76. SVD: Law on Unlawful Enrichment of Civil Servants and Public Employees, Art. 6. HND: Organic Law of the Supreme Audit Court, Art. 64. NIC: Law No. 438, Law on the Integrity of Public Servants, Art. 22; Law 59.

[40] See the United Nations Convention against Corruption, Arts. 8.5 and 52.

[41] GTM: IVE Notification No. 244–2009 and IVE No. 245–2009, section 3.1; IVE Notification No. 303, Annex 1. SLV: Anti-Money Laundering Law, Art. 2. HND: Resolution 650/10-05-2010; Special Anti-Money Laundering Law, Art. 7. DOM: Instruction on Due Diligence, approved and adopted through Circular SIB: No. 004/16 of June 29, 2016. PAN: Law 23–2015, Art. 34. NIC: Regulation on the Prevention of Money Laundering and Terrorist Financing Applicable to Financial Institutions, Art. 13.

3

EXCHANGE OF INFORMATION ON POLITICALLY EXPOSED PERSONS BETWEEN FINANCIAL INSTITUTIONS

Assuming that local FIs can access information on PEPs, various types of transactions require that FIs share this information with their peers. This section looks at two situations in particular: exchange of information between entities belonging to the same financial group and in the context of correspondent banking.

3.1. Exchange of Information Between Entities of the Same Financial Group

FATF Recommendation 18 requires financial groups to implement group-wide programs against ML/TF, including policies and procedures for sharing information among entities belonging to the same group.

This means that at least the functions within the financial group with a role in the management and supervision of anti-ML/TF compliance program—compliance, auditing, sanctions, and legal functions—should be able to access information obtained from and managed by affiliates and subsidiaries. Internal procedures should ensure that the information shared is limited to what is necessary for managing the program properly and that it is used only for such purposes. Information exchange should also ensure confidentiality.[42]

The information that financial groups should be able to exchange includes both information on the customer and on the financial products and transactions (FATF/GAFI, 2017):

1. Customer information refers to data collected during the identification process.[43] Sharing this information with all the authorities responsible for the ML/TF prevention program allows for an assessment of the exposure of the financial group if the customer or beneficial owner has business relationships with different affiliates and subsidiaries of the same financial group.
2. Information about the financial products that the customer uses, including their purpose and the expected level of transaction is essential (i) for an adequate due diligence process; (ii) for monitoring the fit between the customer's profile and the level of transaction

[42] TATF, Interpretative Note to Recommendation 18, paragraph 4.

[43] Includes names, domiciles, documents, details of the beneficial owner, ownership and control structure in the case of legal persons, records of financial assets (investments and properties), and information on the source of wealth and origin of the funds, PEP status, and family members and close associates if applicable.

at the group level; and (iii) for following up on transaction alerts or patterns that do not fit the customer's profile.

3. Transaction information includes account records, credit and debit card statements, digital information—IP addresses and ATM usage—information on failed transactions and on termination of business relationships based on suspicions of ML/TF. Being able to share this information within the financial group—when necessary—makes it possible to take risk-based measures within the group that allow for consistent group monitoring.

Only in some Central American countries has the legislation made it possible to share information between subsidiaries and affiliates of the same financial group, as an exception to the principle of confidentiality of information provided by bank customers. In this regard, Honduras[44] and Nicaragua[45] explicitly allow sharing of information on local as well as foreign affiliates and subsidiaries, and without limitations on the type of information shared, while Panama's legislation only allows sharing information with entities of financial groups domiciled in the country.[46] In El Salvador, the Banking Law allows member companies of the same financial conglomerate to share customer databases as well as computer and communication systems,[47] but it prohibits the sharing of information subject to banking secrecy, which includes passive transactions (deposits and public deposits), which make up a significant portion of transactions.[48] Similarly, Costa Rica[49] allows for "sharing between [entities belonging to the same financial group] of information obtained in the know-your-customer process…," which would seem to exclude information on transactions and products.

The Guatemalan legislation is ambiguous in this regard: the Law on Banks and Financial Groups[50] contains two exceptions that could be interpreted either way: while it exempts from confidentiality "information exchanged between banks and financial institutions," it does not indicate the type of information or the purposes for which said information may be exchanged. The same rule exempts from confidentiality "obligations and duties established by regulations on money-laundering." However, such regulations do not establish either the obligation or the duty to share information between entities of the same financial group. Since the breach of confidentiality has

[44] Special Anti-Money Laundering Law (Legislative Decree No. 144–2014), Art. 16: "Supervised institutions that are part of an overseas group of affiliates and subsidiaries must take due diligence measures for shared customers of the group in a manner that includes policies and procedures for exchanging information on said customers." Available at: http://www.tsc.gob.hn/biblioteca/index.php/leyes/615-ley-especial-contra-el-lavado-de-activos.

[45] General Banking Act, Art. 113: "banks and other regulated institutions may not report passive transactions with their customers [...] Exemptions include Information requested by other banks as part of the normal administrative process for approving customer transactions."

[46] Law 23, Art. 43: "regulated financial institutions shall designate an appropriate person in each of the institutions that make up the financial, economic, or business group, so that institutions domiciled in Panama can exchange information among themselves. The terms and conditions under which information exchange may take place shall be defined in the regulations of this Law."

[47] Banking Law, Decree No. 697, Art. 133. Available at: https://www.ssf.gob.sv/descargas/Leyes/Leyes%20Financieras/Ley%20de%20Bancos.pdf.

[48] Banking Law, Decree No. 697, Art. 232. Available at https://www.ssf.gob.sv/descargas/Leyes/Leyes%20Financieras/Ley%20de%20Bancos.pdf.

[49] SUGEF Agreement 12–10 "Regulation on Compliance with Law 8204," article 7.

[50] Decree No. 19–2002, Law on Banks and Financial Institutions (*Ley de bancos y grupos financieros*), Art. 63. Available at: https://www.banguat.gob.gt/leyes/2013/ley_bancos_y_grupos_financieros.pdf.

civil and criminal consequences, it is highly likely the market will use restrictive interpretations of both exceptions.

The Dominican Republic[51] has not introduced any exceptions to the provisions on banking confidentiality. Banking secrecy and personal data protection laws protect against disclosure to a third party of the identity or transaction profile of bank customers. This implies that information can only be shared with the explicit authorization of its owner. In practice, some FIs include in individual contracts clauses whereby customers consent to the institutions sharing their identifying information with other FIs. However, since banking secrecy breaches are a criminal offense, FIs are unlikely to share transaction information.

While almost all Central American countries allow some form of information exchange between entities belonging to the same financial group, most could improve their regulatory frameworks by expanding the types of information allowed to be exchanged and removing jurisdictional restrictions. Section 5 includes examples of other jurisdictions that have recently amended their legislation in this direction.

3.2. Exchange of Information in the Context of Correspondent Banking

It is important to start this section by recalling, as various international organizations (FATF/GAFI, 2016)[52] and some domestic regulators (IMF, 2016) have recently done, that correspondent banks are not required to know "(their) customer's customer." The FATF recommendations do not require correspondent banks to adopt due diligence procedures for the customers of their respondent banks. Correspondent banks should monitor the transactions carried out by their respondent banks to determine any changes in their risk profile or in the implementation of risk mitigation measures, suspicious activities, or any deviation from the agreed terms of the correspondent relationship. When a transaction draws the attention of the correspondent bank as a result of such monitoring, it will request the respondent bank to provide information on the transaction(s), which may lead to additional requests for information on the customers involved. In this case, the respondent bank should be ready to share product identification information and even customer transaction information with the former.

Similarly, if the correspondent relationship includes "payable-through accounts," the respondent bank must be able to provide information relevant to the due diligence process when requested to do so by the correspondent bank.

There are difficulties as those discussed in Section 2 in obtaining information on PEPs and beneficial owners as well as those arising from personal data protection laws as identified in the previous section. These difficulties constitute serious obstacles for correspondent banks in other jurisdictions, hindering a positive assessment of FIs in Central America.

On one hand, correspondent banks must be content with the fact that respondent banks are able to identify PEPs, their family members and

[51] Monetary and Financial Law No. 183–02 of November 21, 2002. Available at: http://www.sice.oas.org/Investment/NatLeg/RDM/Co_MonetFin_s.pdf and Law No. 172–13 on comprehensive personal data protection of December 13, 2013.

[52] See also FATF Recommendation 13 on Correspondent Banking (https://www.cfatf-gafic.org/index.php/es/documentos/gafi40-recomendaciones/419-fatf-recomendacion-13-banca-corresponsal) and Recent Trends in Correspondent Banking Relationships: Further Considerations, IMF, March 2017 (http://www.imf.org/en/Publications/Policy-Papers/Issues/2017/04/21/recent-trends-in-correspondent-banking-relationships-further-considerations).

close associates. As Section 2 suggests, Central American countries could improve their regulatory frameworks and practices. On the other hand, the legislation in most countries—even those that allow information exchange with entities belonging to the same financial group—does not allow information exchange with institutions outside of the financial group. In fact, with the exception of Nicaragua, whose Banking Law exempts from secrecy any information requested by other banking institutions as part of the normal administrative process for approving customer transactions.[53] The legislation of Costa Rica,[54] Honduras,[55] El Salvador,[56] the Dominican Republic,[57] and Panama does not allow for any exception to the prohibition of information exchange with third parties without the authorization of the owner of the information.

To avoid losing their correspondent accounts, some FIs have amended customer contracts to request the client's consent to share information with other FIs when the legislation requires it for carrying out customer transactions. This solution, however, has not met with unanimous acceptance in the legal field. Some legal advisors believe that FIs should request customer consent whenever the FIs wish to share information. In light of these conflicting interpretations, having an explicit legal exception would minimize the costs and legal risks for FIs. As explained in Section 4, in light of evolving financial activity models, lack of clarity about regulatory expectations is a source of uncertainty that countries are in a position to minimize. Section 5 presents good practices from other countries in overcoming these collective action problems.

[53] Notably, although Article 18 allows for information exchange when requested by other banking institutions as part of the normal administrative process for approving customer transactions, it has not made clear whether the information that can be disclosed is exhaustive or whether a bank's active transactions and services for its customers are still subject to banking secrecy. This lack of clarity arises because Article 18 states towards the end that "banks' active customer transactions and services are subject to withholding and may only be made known to the authorities and institutions indicated in the previous numerals."

[54] Art. 14, Law on Compliance with Fiscal Transparency Standards (Law No. 17.677), in force since June 28, 2012. Available at:http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=73335&nValor3=89970&strTipM=TC.

[55] Art. 4, Law on Transparency and Access to Public, Legislative Decree No. 147-2006. Available at: http://www.tsc.gob.hn/biblioteca/index.php/leyes/17-ley-de-transparencia-y-acceso-a-la-informacion-publica.

[56] Banking Law, Decree No. 697, Arts. 113 and 232. Available at: https://www.ssf.gob.sv/descargas/Leyes/Leyes%20Financieras/Ley%20de%20Bancos.pdf.

[57] Monetary and Financial Code of the Dominican Republic. Available at: http://www.sice.oas.org/Investment/NatLeg/RDM/Co_MonetFin_s.pdf.

4

REGULATORY EXPECTATIONS IN THE CONTEXT OF DE-RISKING

The international financial crisis of 2008–09 had a major impact on the banking sector and, in particular on its assessment models for systemic, business, and regulatory risks. A notable reaction to this was the exponential increase in the termination of correspondent banking relationships.

This phenomenos, known as de-risking, is a business decision based on comparing the benefit of a business relationship against the cost of maintaining it. The decision may be motivated by two types of factors. The first type of factors has to do with business models that emerged after the financial crisis. The regulatory reforms adopted to mitigate the effects of the crisis led to higher capital and liquidity requirements for FIs, increasing the costs of capital. As a result, international banks changed their business models to reduce direct cross-border lending and increase local lending by their foreign subsidiaries. In addition, post-crisis macroeconomic conditions—with excess liquidity in a low-interest-rate environment have been squeezing the profit margins of global financial institutions, which responded by tightening each segment. In this context, correspondent banking has become more risk-averse (IMF, 2016).

The second type of factors has to do with changes in the regulatory environment. On one hand, the review of the FATF Recommendations in 2012 led to more stringent requirements for FIs in assessing the risks of channeling money of illicit origin into transactions and in taking appropriate measures to mitigate these risks. In many cases, the cost of mitigation exceeds the benefit of the business relationship. On the other hand, fiscal transparency initiatives—such as the U.S. Foreign Account Tax Compliance Act (FATCA) or the OECD-sponsored agreement on the automatic exchange of tax information—resulted in some local banks refraining from defraying FATCA compliance costs with payments in U.S. dollars. Third, the coordinated and effective implementation of trade sanction regimes forced FIs to increase the complexity of their due diligence processes for certain transactions, resulting in higher compliance costs.

A World Bank global survey with 2012–15 data from more than 80 banking regulators, major international banks, and more than 170 local banks based in more than 60 countries showed a significant reduction in correspondent banking relationships mostly driven by U.S. and UK-based FIs (World Bank, 2015b).

For its part, the Association of Supervisors of Banks of the Americas (ASBA) reported in 2016 that 56 percent of the countries in Latin America and the Caribbean suffered the effects of the termination of business relationships, with the Caribbean countries being the hardest hit (67 percent). Seventy-eight percent of

supervisors attributed these decisions to difficulties in complying with regulations aimed at preventing money laundering and terrorist financing, and 68 percent attributed it in particular to compliance with customer due diligence recommendations.

Remittance services and correspondent bank accounts appear to be the business areas most adversely affected by de-risking policies. At a global level, the International Monetary Fund reported a trend of closure of accounts used for money and security transfer services between 2010 and 2014 (IMF, 2016). In the Americas, 60 percent of supervisors considered remittances to be the most heavily affected segment in the region, followed by correspondent banking relationships (40 percent) (ASBA, 2017).

While the severance of correspondent banking relationships between banks is an individual decision of each financial institution, it is evident that, when considered in an aggregated manner, it can create negative externalities, especially for financial inclusion and development objectives. On the other hand, if the number of formal cross-border transfer and payment channels decreases, it is possible that these transactions may be channeled through informal or less regulated channels, increasing ML/TF risks.

For this reason, since 2015 or perhaps earlier, the international community has stepped up efforts to take action to minimize such externalities. One of the most important lines of action is adequate communication of the expectations of local regulators, as international standards are a minimum threshold or standard with which all acceding countries must comply, but each country is free to set higher standards.

At the same time, in the context of the risk-based approach to preventing ML/TF, local regulations also set minimum standards for due diligence for the private sector. The system assumes that regulated entities are in a better position than regulators to assess their own risks and risk appetites.

Thus, while international standards do not require FIs to know "(their) customer's customer" in the context of correspondent banking as indicated above, local regulators often leave it to each FI to assess how much information is needed on their respondent banks.[58]

In conclusion, in a segment with narrow profit margins, significant compliance costs, and high legal and reputational risks, countries should do more to facilitate FI compliance to positively influence the cost-benefit assessment of maintaining correspondent relationships.

[58] See, for example, "US Joint Fact Sheet on Foreign Corresponding Banking: Approach to BSA/AML and OFAC Sanctions Supervision and Enforcement" (Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, and U.S. Department of the Treasury).

5

BEST PRACTICES IN PEP IDENTIFICATION

As discussed in the previous sections, not all countries face the same legislative challenges, as several Central American countries have already taken positive steps to identify PEPs.

This section outlines best practices adopted in Central American countries and other regions that allow them to overcome obstacles to both identifying PEPs and sharing information with other FIs.

5.1. Best Practices in Determining if a Customer or Beneficial Owner is a PEP

To determine whether a customer or the beneficial owner of a customer is a PEP, or a relative or close associate of a PEP, countries should generate sufficient public information to enable FIs and DNFBPs to verify the information obtained directly from their customers.

The first step is to have information that identifies the persons performing prominent public functions. Normally, competent authorities in charge of ML/TF prevention—FIUs, central banks, superintendencies of banks, and financial institutions—are the ones who prepare, publish, and disseminate lists containing such information. A best practice to facilitate access to this information is disaggregating, as much as possible, the public functions deemed prominent in a publicly accessible list.[59] In practice, lists of prominent public functions work better than lists of names of persons performing such functions at the time of publication. The latter creates a the burden of updating information on the State, whenever there is a new appointment, resignation, and promotion, requiring constant updates. On the other hand, PEPs do not cease being PEPs as soon as they finish their terms,[60] which makes it even

[59] See, for example, the list published by the Superintendency of Banks of Guatemala (http://www.sib.gob.gt/web/sib/lavado_activos/pep). The list of functions established in Article 22 of the Regulations of Law No. 8204 of Costa Rica, although exhaustive, is less precise on the breakdown of functions. For example, references such as "appointed officials with the rank of Minister" would require the financial institutions to know exactly which positions are comparable to those mentioned above, thus increasing uncertainty.

[60] GTM: two years since leaving civil service (file:////C:/Users/Ricardo/Downloads/Noticias%2018-03-2009%2001.pdf). CRI: eight years since leaving civil service (http://www.icd.go.cr/portalicd/images/docs/normativa/Reglamento_contraNarcotrfico_36948.pdf, Art. 23). SLV: two years since leaving public service (Anti-Money Laundering Law, Art. 9). PAN: two years since leaving civil service (http://www.uaf.gob.pa/tmp/file/51/LEY%2023.pdf, Art. 34). DOM: three years since leaving public service,

more difficult to use lists that include names of persons. In fact, these lists become outdated fairly quickly.[61]

The second step is to determine who performs or has performed these functions at a given time. This step requires cross-checking information from official gazettes in which all countries publish their government acts—including appointments of persons to public office—against the lists mentioned in the previous section. FIs and DNFBPs often rely on commercial databases that provide this information in real time and keep it up to date.

When the customer is a legal person or a trust, Central American countries should, in compliance with FATF Recommendations 24 and 25, take measures to ensure that:

1. Those who incorporate legal persons or trusts are required to identify the beneficial owners when the partners, shareholders or parties to the contract are themselves legal persons. This requires an amendment to the laws on corporations and the special laws enabling the creation of other legal entities (associations, foundations, etc.) to establish this specific obligation and to impose dissuasive sanctions on non-compliance.
2. Legal persons are required to keep this information up to date.
3. Access to such information by FIs and DNFBPs is allowed as part of the customer due diligence process. The scope of this Recommendation depends on the types of companies and the levels of transparency of information established by each country. The Fourth European Union Directive on ML/TF, which entered into force in June 2017, requires member countries to create centralized registers for companies to provide information on beneficial owners. FIs, law firms, and "any person or organization demonstrating a legitimate interest" will have access to the registers. The registers will contain names, dates of birth, nationality, country of residence, and interest of the person in each transaction. The United Kingdom[62] has already put in place such a register, and most EU countries had set up their own registers before the end of 2017.
4. In some Central American countries, there seem to be no restrictions on access to this information through the Public Registry. In others, especially those with high levels of financial confidentiality or those that still recognize certain types of legal persons not publicly registrable or those that issue bearer shares[63] (Honduras) may prefer that this information be only accessible when the competent authorities require it. This decision prevents regulated entities from verifying the information provided by their customers by independent means. As a result, foreign counterparts of these entities may have a negative assessment

Art. 2, numeral. 19, Law No.155–17 of June 1, 2017, and Instruction on Due Diligence, (Circular SIB: No. 004/16 of June 29, 2016). (http://sb.gob.do/Circulares_Resoluciones_V2/Admin/Unpload/ci/20160629_Circular%20004_16_Instructivo%20Debida%20Diligencia.pdf).

[61] http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf, p.18.

[62] https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships.

[63] Panama ceased to recognize bearer shares in 2015, when it established an immobilization regime for such shares, under which all companies with bearer shares must turn them over to a custodian authorized by the authorities indicated by law, which must identify the beneficial owners of the company, among other obligations. See Law 47 of August 2013, Law 18 of April 2015, and SBP Agreement 4–2015 of May 2015.

> of the latter's ability to comply with due diligence standards, and therefore, prefer not to establish or maintain business relationships with institutions that have no access to information on the beneficial ownership of legal persons.[64]

The customer or beneficial owner of a customer is usually not a PEP but a family member or close collaborator of a PEP. In addition to the public information available through the internet, one of the most reliable ways to identify family members and close associates of PEPs is through their periodic affidavits of assets and income. Normally, the rules governing these affidavits require the affiants to include information on at least their closest family members—spouse and children—and on their interests, which makes it possible to identify at least some close collaborators. In addition to allowing identification, access to affidavits of asset and income would allow FIs to monitor consistency between transactions and the value of declared assets. Central American countries should consider allowing, at least for FIs, access to affidavits of assets and income. FIs should also require that all PEPs submit declarations, and that the declarations include information on PEPs' family members and close associates.

5.2. Best Practices in Information Exchange

Regarding the exchange of information, and in light of tensions generated by de-risking practices, many countries have amended their legislation to align the objectives of anti-ML/TF laws and regulations with those of personal privacy protection regulations. It is important that these amendments provide for the possibility of exchanging not only information relevant for the identification of the customer and beneficial owner—with the exception of personal data regulations—but also transaction information—with the exception of information subject to banking secrecy, which is similar to the possibility that already exists in all Central American countries to share information protected by banking secrecy with the financial information unit. The following are best practices in information sharing within the same financial group and in the context of correspondent banking.

5.2.1. *Information Exchange Within the Same Financial Group*

As discussed in previous sections, the legislation of some Central American countries creates constraints to entities belonging to the same financial group when it comes to information sharing. Some constraints are associated with the type of information (for example, El Salvador does not allow using certain transaction information, such as information on liability transactions) and others with jurisdiction (for example, Panama only allows for information exchange within its jurisdiction).

Contractual arrangements can help to overcome these constraints by obtaining customer consent at the beginning of the business relationship, or through a legal amendment that includes an explicit exception to allow for adequate due diligence and monitoring within the financial group.

In France, for example, Art. L. 561–20 of the French Monetary and Financial Code authorizes information exchange between entities belonging to the same group.[65] In the United States, a guide developed jointly by the Financial Crimes Enforcement Network (FinCEN) and federal banking agencies

[64] For an exhaustive analysis of compliance with these recommendations, please visit: http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf.

[65] Art. L. 561–20, Monetary and Financial Code, France. Amended by Order No. 2019–737 of July 1, 2012.

in 2010 authorized FIs to exchange not only identification information but also useful information contained in reports of suspicious transactions with their affiliates and subsidiaries.[66]

5.2.2. *Information Exchange in Correspondent Banking*

As pointed out in Section 3, Central American countries should amend their legislation to enable information exchange with correspondent banks without the need for customer authorization.

An important example for the region is Mexico, which amended its Law on Credit Institutions in 2016 and again in 2017 to enable information exchange between entities that are not part of the same financial group. Generally speaking, U.S. or European banks are required to monitor transactions when acting as intermediaries, and report suspicious transactions to the FIUs when appropriate. Thus, U.S. or European banks often send requests for information to their respondent banks in Mexico. Most of the time, these requests are intended to rule out alerts of electronic monitoring systems before reporting transactions. However, personal data protection and banking secrecy prevented Mexican FIs from providing this information. As a result, correspondent banks were required to report the transaction as suspicious, as failure to obtain information is generally considered an additional alert. In some cases, this can lead to the interruption of correspondent relationships.

Amendments to Mexico's Law on Credit Institutions,[67] as cited below, make it possible to meet the current regulatory requirements to which FIs are subject in the United States and many European countries:

1. Art. 62: Regulated entities may exchange information on customer and user transactions, for which purpose they must limit themselves solely and exclusively to cases whose purpose is to strengthen the measures to prevent and detect acts, omissions, or transactions that could change the assumptions in Articles 139 (quater) or 400 bis of the Federal Criminal Code [ML/TF] and Article 52 of the Law on Crime against Bank Customers or Banking Institutions.
2. Art. 62 bis: Regulated entities shall agree with foreign financial institutions on the confidential treatment of the information exchanged and the positions of the officials authorized by both parties to carry out the exchange of information. Likewise, regulated entities must present the aforementioned agreements to the Committee, using the official format established for this purpose by the authorities prior to the exchange of information
3. Art. 62 ter.: Regulated entities may exchange information on their customers and users, as well as on customer and user transactions with peer foreign financial institutions for the purposes referred to in the first paragraph of Article 62 of these Provisions.
4. Art. 115 bis: Credit institutions may exchange information on general provisions referred to in Article 115 of this Law, to strengthen measures to prevent and detect acts, omissions, or transactions that could facilitate, provide help, assistance, or cooperation of any kind for committing the crimes referred to in Articles 139 and 148 bis of the Federal Criminal Code, or crimes contemplated in the assumptions of Article 400 bis of this Code [ML/TF].

The adoption of these types of amendments usually requires a collective process. In the case of

[66] https://www.fincen.gov/sites/default/files/news_release/20101122.pdf.
[67] Law on Credit Institutions amended in 2017 (http://www.dof.gob.mx/nota_detalle.php?codigo=5472995&fecha=24/02/2017).

Mexico, for example, public and private sector representatives of Mexico and the United States jointly designed information exchange forms.

On the other hand, these amendments require the utmost care to ensure consistency with other standards, notably the one that prohibits reporting the content or the mere existence of suspicious transaction reports. The Mexican-American initiative cited above avoided such situation by designing specific forms that allow sharing transaction information without alerting the existence of a suspicious transaction report.

Other countries encourage various forms of cooperation between supervisory authorities, personal data protection authorities, regulatory authorities, FIUs, and financial sector representatives to address potential inconsistencies. In France and Canada,[68] for example, each ML/TF prevention guide should receive, prior to its approval, an opinion from the ML/TF Advisory Commission, whose members include the abovementioned authorities. In Spain, the Personal Data Protection Agency is part of the ML/TF Prevention Commission which prepares instructions and guides for FIs.[69]

[68] Public consultation on the draft "Guide to Information Exchange in the Private Sector" (p. 23).

[69] http://www.sepblac.es/espanol/legislacion/prevbcap/pdf/ley10_2010.pdf and http://www.prevencionblanqueo.com/wp-content/uploads/2014/02/Miguel-Ll%C3%A9venes_TFG_PBC.pdf.

6

RECOMMENDATIONS

This section summarizes recommendations for timely access to and sharing of information on PEPs.

The PEP identification process:

1. As a first step, it is recommended that local authorities help FIs identify PEPs by drawing up lists to identify the relevant public functions. This requires taking legal measures (establishing prominent public functions included in the PEP definition) and operational measures (by publishing lists that disaggregate such functions).
2. In the process of identifying the beneficial owners of legal persons, it is recommended that regulatory frameworks include the obligation for legal persons and trusts to provide information on beneficial owners to public registries or to the authorities responsible for registering beneficial owners in each country. It is also recommended that these records receive regular inputs and updates on each legal person and, most importantly, that these records be made accessible to FIs.
3. Countries could facilitate FIs' process of identifying PEPs' family members and close associates, who should be subject to the same enhanced due diligence standards as PEPs. Therefore, it is recommended to make affidavits of property and income of public officials publicly accessible. This entails, on one hand, ensuring that all PEPs are required to make these affidavits, and, on the other hand, allowing FIs to access them.

Information sharing process:

1. Countries should adapt and align their legal frameworks for personal data protection to allow FIs to share information collected in the process of determining the identity of bank customers or beneficial owners with other entities in the same financial group—domestic or foreign—and with their correspondent banks.
2. Countries should align their legal frameworks on financial confidentiality so as to allow FIs to share transaction information of customers or beneficial owners with entities within the same financial group, both domestic and foreign, and with their correspondent banks without having to obtain customer authorization every time.
3. It is recommended to use in-house databases and shared information within the financial group: some FIs and DNFBPs may choose to develop internal databases as a tool to assist in determining who is a PEP. The structure of this shared database is highly useful for international financial groups, as each entity of the group can provide the most complete information on PEPs in their own country. The ability to access information on foreign

PEPs is often one of the major difficulties in the due diligence processes for foreign PEP customers. Nevertheless, it bears clarifying that for entities of the same group to exchange information, national laws must allow it, and that not all information is subject to banking/ professional secrecy and the right to data privacy.

7

CONCLUSIONS

Information exchange is key to promoting transparency in governments. It is also one of the fundamental pillars of an effective system for preventing ML/TF. Proof of this is that information sharing is part of more than half of FATF's 40 Recommendations and its methodology for measuring the effectiveness of national systems.

Financial and non-financial institutions required to prevent ML/TF rely on information provided by their peers and by the State to adequately meet due diligence obligations established by laws and regulations enacted in compliance with international standards. Managing the levels of risk exposure, monitoring transaction flows, detecting behavioral patterns in certain markets, and providing useful information to public enforcement institutions all depend on adequate information flows. Similarly, local authorities rely on data provided by both regulated entities and their local and foreign counterparts to gather information for intelligence purposes and for conducting the analysis needed for preventing and combatting ML/TF.

Therefore, information exchange should be made possible at a multisectoral level. At the private sector level, there should be information exchange between FIs belonging to the same economic group as well as between FIs that maintain correspondent relationships. Additionally, the private sector must work in coordination with the public sector to provide information on customer profiles and transaction profiles.

Based on the previous sections, it is possible to conclude that access to and exchange of information on PEPs in Central America can be facilitated through the following measures: (i) publishing disaggregated lists of public functions included in the definition of PEPs; (ii) enabling independent means of verifying the information provided by customers on PEPs' family members and close associates and on the beneficial owners of legal persons; and (iii) aligning regulatory frameworks on personal data protection and banking confidentiality to facilitate the sharing of information on PEPs at the multisectoral level and among FIs at the international level.

TABLE 1. COUNTRY COMPARISON

Constraints and best practices	CRI	ELS	GTM	HON	NIC	DOM	PAN
Requires regulated entities to take a risk-based approach to customer due diligence measures	✓	✓	✓	✓	✓	✓	✓
Explicitly prohibits parties from entering into business relationships anonymously or under false names	✓	✓	✓	✓	✓	✓	✓
Requires regulated entities to identify the customer and beneficial owner at the beginning of a business relationship	✓	✓	(a)	✓	✓	✓	✓
Requires regulated entities to request identification information from natural persons	✓	✓	✓	✓	✓	✓	✓
Requires regulated entities to request identification information from legal persons	✓	(b)	(b)	✓	✓	✓	(b)
Requires regulated entities to verify the information provided by customers	✓	✓	✓	✓	✓	✓	✓
Requires regulated entities to determine the identity of the beneficial owner when there is evidence to suggest that it differs from the customer	✓	✓	✓	✓	✓	✓	(c)
Requires regulated entities to take "reasonable measures" to determine whether a customer or beneficial owner is a PEP	✓	✓	✓	✓	✓	✓	✓
Provides a list of public functions for regulated entities to consider when identifying PEPs	(d)	(d)	✓	X	X	(d)	X
Requires all legal persons to be registered in a Public Registry	✓	✓	✓	(e)	✓	✓	✓
Requires regulated entities to provide the Public Registry with information on beneficial owners when partners or shareholders are themselves legal persons	✓	X	X	X	X	X	X
Requires periodic updates to information provided to the Public Registry	X	X	(f)	X	X	(g)	X
Requires registration of the parties to a trust	✓	✓	X	X	✓	(h)	(i)
Enhanced diligence measures for PEPs							
Requires senior management approval for entering into or continuing a business relationship	✓	✓	✓	✓	✓	✓	✓
Requires regulated entities to establish measures to determine the source of funds	✓	✓	✓	✓	✓	✓	✓
Requires ongoing monitoring	X	✓	✓	✓	✓	✓	✓
Information exchange among entities within and between financial groups							
Allows exception to the principle of confidentiality of banking information for subsidiaries and affiliates of the same economic group	X	X	(j)	✓	✓	X	(k)
Allows exception to the principle of confidentiality of banking information for institutions outside the same economic group	X	X	X	X	(l)	X	X

Notes: (a) Yes. In addition, regulated entities are required to set up a transaction profile for each customer. (b) Yes. In addition, regulated entities are required to identify partners and shareholders with interests equal to or greater than 10 percent of the company's shares. (c) Yes. In addition, it envisages: (i) taking "reasonable measures to verify the information and documentation provided by each of the natural persons identified as a beneficial owner"; (ii) "extending due diligence to the natural person who is the owner or controller" when the beneficial owner is a legal person; (iii) taking "effective measures to ensure identification of the beneficial owner and apply transaction due diligence" for the specific case of legal persons with bearer shares or certificates of bearer shares, and (iv) refraining from entering into or continuing the relationship when the regulated financial entity has failed to identify the beneficial owner. (d) Not exhaustive. (e) No. Some notaries may set up certain types of companies without the obligation to register them. (f) Yes, but only for certain types of companies. (g) Yes, but only for limited liability companies. (h) Yes. In addition to registration, regulated entities must notify changes within 30 calendar days of their taking place. (i) Yes. In addition, the Supervisory Body is authorized to dissolve any trust that does not comply with the transparency regulations in force. (j) Yes, but the regulation is ambiguous. (k) Yes, but only with entities domiciled in Panama. (l) Yes, but only information requested by other banking institutions as part of the normal administrative process for approving customer transactions.

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