



Columns

A lawyer's role in countering money laundering and terrorism financing

Rather than awaiting the introduction of formal rules, lawyers and law firms in India should voluntarily take up the cause of countering money laundering.



money laundering

Ashish Kabra

Published on : 22 Feb, 2022, 10:32 am . 4 min read

Money laundering and the financing of terrorism can damage national financial systems. Illegitimate financial holdings, assets, and enterprises are unreliable sources of investment capital for sustainable economic development.

Among other effects, money laundering destabilizes national economies by increasing the demand for cash, increasing the volatility of interest and exchange rates, and even contributing to higher inflation. Therefore, countries have a public policy interest ensuring that their Anti-Money Laundering/Counter-Terrorism Financing (AML/CTF)



regime is comprehensive.

Traditionally, financial service providers such as banks were entrusted with the responsibility of detecting and preventing money laundering. However, over the years, the role of lawyers has also come to be recognized.

The Financial Action Task Force (FATF), established in 1989, is an inter-governmental policymaking body that publishes a set of [40 recommendations](#) that constitute international standards for combatting money laundering and the financing of terrorism. The 2012 FATF Recommendations cover Designated Non-Financial Businesses and Professions (DNFBPs), [which include lawyers](#). Lawyers are required to fulfil the customer due diligence (CDD) and record-keeping requirements set out in Recommendations 10, 11, 12, 15, and 17. They fall under this obligation if they prepare or carry out any of the following transactions for their clients:

(i) Buying and selling of real estate;

(ii) Managing of client money, securities, or other assets;

(iii) Management of bank, savings or securities accounts;

(iv) Organisation of contributions for the creation, operation or management of companies; and

(v) Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

The FATF's 2008 Guidance for the Legal Profession, [updated in 2019](#), provides factors lawyers should consider when developing a risk-based system to help avoid money laundering and terrorism financing risks, including client due diligence.

Although lawyers and bar associations worldwide are keen to see lawyers play an appropriate role in the fight against these practices, concerns usually arise on the impact of AML/CFT obligations on attorney-client privilege, a lawyer's independence and role in society. However, the basic intent behind the lawyers' obligations under the FATF Recommendations is consistent with the general professional and ethical standards applicable to lawyers across jurisdictions i.e. lawyers should not facilitate or be involved in criminal activity.

Several jurisdictions have recognized the need to bring lawyers within the fold of their AML/CTF regime, considering the FATF Recommendations. For instance, in the United Kingdom, the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* cover legal professionals. In Singapore, the *Legal Profession (Prevention of Money Laundering and Financing of Terrorism) Rules, 2015* prescribe various legal requirements for lawyers such as customer due diligence and suspicious transaction reporting. In the USA, *FATF's Mutual Evaluation Report of US* (2016) found that most DNFBP sectors are not subject to comprehensive AML/CTF measures. Consequently, the American Bar Association (ABA) is currently considering the introduction of *rules of professional conduct* concerning lawyers' client due diligence obligations. Meanwhile, the ethics committee of the ABA has opined that the *existing professional conduct rules* require lawyers who have knowledge of facts that create a high probability that their services are sought to further a criminal activity are under a duty to inquire further to avoid assisting in the criminal conduct. In New Zealand, since July 2018, lawyers have been obligated to establish an AML/CFT compliance programme setting out how they intend to detect and manage the risks in accordance with the *AML/CFT Act*. In the European Union, the Commission's third directive introduced AML/CFT requirements for lawyers.

Currently, in India, *lawyers are not included* in the list of DNFBPs under the *Prevention of Money Laundering Act, 2002*. As per Section 2(1)(sa) of the PMLA, a 'person carrying on a designated business or profession' includes a person carrying on activities for playing games of chance for cash or kind, and includes such activities associated with casino; Inspector-General of Registration; real estate agent; dealer in precious metals; person engaged in safekeeping and administration of cash and liquid securities on behalf of other persons and; person carrying on such other activities as the Central government may, by notification, so designate, from time to time.

As seen in the FATF's Mutual Evaluation *Report of India* (2010), Indian authorities had stated that the possible inclusion of designated professions (lawyers, accountants, etc) would depend on resolving issues relating to professional privilege. However, there are no proposed AML/CFT guidelines for lawyers in India.

The next round of the FATF mutual evaluation of India's AML/CFT regime *is scheduled to begin in September 2022*. The previous mutual evaluation reports of India and other countries do suggest that this round of evaluation would bring to the fore the need for implementation of express AML /CFT guidelines for lawyers in India. Thus, it

need for implementation of express AML/CFT guidelines for lawyers in India. Thus, it may be prudent for the Bar Council of India to undertake a thorough study of this

space and issue appropriate guidance for lawyers in India, as has been done by parallel bodies in other jurisdictions.

The global regime in this space is clearly fast evolving. We suggest that rather than awaiting the introduction of formal rules, lawyers and law firms in India should voluntarily take up the cause of countering money laundering.



Ashish Kabra

Ashish Kabra is the Head of the Singapore office of Nishith Desai Associates. The firm recently voluntarily adopted an AML/CFT policy for its lawyers.

money laundering

PMLA

Terrorism Funding

FATF