December 3, 2021

Dr. Marcus Pleyer
President
Financial Action Task Force (FATF)
2 Rue André Pascal 75116
Paris, France

RE: Revisions to Recommendation 24 and its Interpretive Note - Public Consultation

Dear Dr. Pleyer:

The Institute of International Finance ("IIF") is grateful for the opportunity to comment on the Financial Action Task Force ("FATF") consultation on revisions to Recommendation 24 ("R.24") on the transparency and beneficial ownership ("BO") of legal persons and its interpretive note ("INR.24" and collectively, the "Consultation")[1]. As we have stated previously, the focus on beneficial ownership information reporting is critical. Identifying the true beneficial owner or individual exercising control in a business relationship is vital for both the public and the private sector in the fight against financial crime and entree by competent authorities and financial institutions to reliable, verified, and accessible beneficial ownership information remains a global priority.

We greatly appreciate the iterative approach the FATF has taken regarding outreach to interested stakeholders in this important area and we are pleased to see that elements of the comments we offered to the previous consultation on this matter are reflected in the draft amendments.[2] We emphasize again that the FATF has a significant opportunity to enhance the effectiveness of jurisdictional beneficial ownership registries by setting high standards for implementation internationally through R.24 and its interpretative note. The amendments as drafted help in many ways to strengthen this regime.

As such, we reflect herein on the Consultation and the questions raised by the FATF. Overall, ensuring the public sector stands by the contextual reference data they provide in a beneficial ownership registry, making it is a source upon which financial institutions can rely both practically and legally, and clarifying that financial institutions should not be expected to ensure the quality of information maintained in a beneficial ownership registry are all crucial tenants of a more effective and transparent regime.

[1] FATF, *Revisions to Recommendation 24 and its Interpretive Note - Public Consultation*, October 2021

[2] IIF, Comments on FATF Beneficial Ownership Consultation, August 2021

We very much welcome further engagement with the FATF and its member jurisdictions on these matters. If you have any questions, please do not hesitate to contact me or Matthew Ekberg at mekberg@iif.com.

Very truly yours,

Andrés Portilla
Managing Director, Regulatory Affairs
Institute of International Finance (IIF)

Revisions to Recommendation 24 and its Interpretive Note

1. *Multipronged approach to collection of Beneficial Ownership information*

The approach set out in paragraph 7 of INR.24 which includes compulsory beneficial ownership information collection and a requirement for a public authority or body to hold beneficial ownership information is, we believe, generally sufficient in terms of the standards applied to the establishment of beneficial ownership registries or a similar mechanism.

In particular, we agree with paragraph 7(a) that countries should require companies to obtain and hold adequate, accurate and up-to-date information on the company's own beneficial ownership; to cooperate with competent authorities to the fullest extent possible in determining the beneficial owner, including making the information available to competent authorities in a timely manner; and to ensure financial institutions have access to adequate, accurate and up-to-date information on a company's beneficial ownership information. Furthermore, the information should be actively policed and backed by the government as a trustworthy source of due diligence material on which financial institutions can rely and this should be emphasized through paragraph 7(b) of INR.24.

However, flexibility embedded in the amendments to this section of INR.24 does risk sacrificing consistency between countries/authorities and the type of register that is established. As we have previously emphasized, there should be further work to examine the role of interoperability and international cooperation with and across domestic and regional registries to identify where complex international corporate structures may be shielding criminal activity. This will require coherence in standards applied across jurisdictions, which could be emphasized in more detail in amendments to paragraph 19 of INR.24 relating to international cooperation.

In addition, paragraph 7(c) of INR.24 would also benefit from further clarity concerning supplementary measures for determining the beneficial ownership of a company. It should be clear that financial institutions should be able to obtain beneficial ownership information from registries maintained by public authorities. Financial institutions should, however, not be viewed as a source of such information. As noted, the public sector should stand by the contextual reference data they provide, ensuring it is a source upon which the regulated sector can rely both practically and legally if the integrity of the verification information is appropriate for effective risk management. [3]

Lastly, under paragraph 4(a) of INR.24, we suggest that minimum information to be obtained include not only company name, but if that name includes any aliases such as a "doing business as" or "trade name". This would help, for example, in jurisdictions where the legal name of a corporation is a number, however, it conducts business under a trade name. Information on aliases would have substantial value to law enforcement and other stakeholders when searching the registry. Streamlining basic reporting information such as this would also help obviate inconsistencies in how registries are implemented across jurisdictions.

2. *Risk-Based Approach*

[3] It is important to note that there are examples under current frameworks for beneficial ownership reporting which do not always take this matter of reliance into account, and this can negatively impact the efficacy of such regimes. For example, the current framework in the EU and, as transposed in certain member states, requires financial institutions to obtain a proof of registration or an excerpt of the register when onboarding but, may not rely on it and must report discrepancies (see, for instance, German AML-law, §§ 11,12, 23 and the EU AML Directive §§ 14, 30).

As noted in our submission on the original FATF consultation concerning amendments to R.24, we do not believe verification of information in registries can be risk-based, as the information must be correct and verified by the authorities of the register in order for it to be relied upon. The usefulness of the registry is severely diminished if users do not know whether the information in it has been verified. A risk-based approach would also neglect the fact that legal persons who are assessed low risk could be used for ("ML") and terrorist financing ("TF") and the risk-based approach could be inconsistently applied across countries, leading to potential exploitation of a register – which is something the FATF should carefully monitor.

In addition, the assessment and mitigation of ML and TF risks associated with foreign-created legal persons is important, however, assessment should be connected to the assurance that this information is available in verified and accessible registries in the country of the foreign-created legal person. Again, international connectivity and interoperability of registries held to similar standards is needed, as set out in FATF Recommendations 37 and 40 and raised in the draft amendments to paragraph 19 of INR.24.

In this regard, further clarity is needed in terms of paragraph 1 of INR.24. As drafted, competent authorities are expected to be able to obtain, or have access in a timely fashion to, adequate, accurate and current information on the beneficial ownership and control of companies and other legal persons that are created in the country, "*as well as those that present ML/TF risks and have sufficient links with their country (if they are not created in the country).*" Footnote 3 concerning "sufficient links" goes on to state that countries may determine what is considered a "*sufficient link*" on the basis of risk. Examples of a sufficiency test may include, but are not limited to, when a company, on a non-occasional basis, owns a bank account, employs staff, owns real estate, invests in the stock market, owns a commercial/business insurance, or is a tax resident in the country.

We believe that the examples in footnote 3 are particularly broad and could be interpreted by national authorities as all being indications of "sufficient links". There may be unintended consequences of such links, including, for example, investments in the stock market, as there would likely be a great number of companies that own foreign stock. For each to have to register themselves in each foreign market would be onerous with limited benefit derived. We believe further clarity in scope would improve the ultimate drafting and obviate issues of misinterpretation.

3. Access to Information

We are grateful that section C of INR.24 emphasizes the need for timely access to adequate, accurate and up-to-date beneficial ownership information. This a core pillar of a more effective regime for transparency in the ultimate control of legal entities. We note, however, that footnote 12 of INR.24 which outlines examples of information aimed at identifying the natural person(s) who are the beneficial owner(s) may become viewed as Customer Due Diligence ("CDD") requirements overall. This could raise issues per jurisdiction, depending on the construct of laws concerning information exchange. The collection of "nationality" as an identifier may raise issues under human rights legislation prohibiting the gathering of such information. The same may be true for place of birth. INR.24 would benefit from greater recognition of these limitations to obviate an expectation that these examples become binding CDD requirements.

In addition, we note that in paragraph 11 of INR.24, it states that countries should consider complementary measures as necessary to support the accuracy of beneficial ownership information, "*e.g., discrepancy reporting".* Financial institutions may still compare the beneficial

ownership registry information with other information that they may hold concerning legal entities on the registry and suspicious discrepancies could be reported via Suspicious Activity Reports ("SAR") which are then shared with registries for investigation. However, we stress that jurisdictional authorities should not rely on financial institutions to verify the information in registries, act as gatekeepers, or to depend on discrepancy reporting as a means of validation.

The emphasis in R.24 and INR.24 should be on requiring the legal entities reporting their beneficial ownership information to be more forthcoming in a verifiable way. Otherwise, the benefits of a registry will be limited and its role in the wider disruption of illicit activity will be diminished.

Lastly, paragraph 13 of INR.24 clarifies that countries should also consider facilitating timely access by financial institutions and DNFBPs to beneficial ownership information held in registries or other mechanisms, "*as well as public access to this information*." Transparency in registries can improve their accuracy, however, access to beneficial ownership information should first and foremost be available to those who have a legitimate purpose for needing this information, such as FIUs, regulatory bodies, law enforcement and financial institutions.

Data is expected to be published in accordance with local privacy and data protection legislation, and governments should mitigate any risks that may arise from publication – including, *inter alia*, any potential for misuse of publicly available information - through controlling varying levels of access to beneficial ownership information in the registry among stakeholders – such as tiered access based on legitimate interest to other stakeholders beyond competent authorities and financial institutions. Greater clarity in INR.24 more generally in this regard – and further cross-border discussion on accessing registries in accordance with common data protection principles - would be valuable to the efficacy of registries going forward.

4. Bearer Shares and Nominee Arrangements

We agree that bearer shares and bearer share warrants without any traceability should be subject to additional controls as set out in amendments to paragraph 14 of INR.24. Material ownership or control through bearer shares should have those shares immobilized or converted, although exceptions may be warranted, as increased transparency is critical in the fight against financial crime, in particular tax evasion and sanctions circumvention. However, with the information now available from the FATF Mutual Evaluation Reports, the FATF could provide a valuable service by maintaining a table with the national rules surrounding bearer shares. Allowing the private sector to use such resources in their risk-based measures often leads to more efficient results than outright prohibitions.

5. Other Issues for Consideration

In addition to our comments on amendments to R.24 and INR.24, we also outline a few areas for the FATF to consider which may not be fully reflected in the Consultation.

First, there should be some clarity on the documentary evidence that is needed to verify beneficial ownership. For example, locally created legal persons could submit attestations concerning the beneficial owners, whereas foreign legal persons who own or create local legal persons, could provide (in the absence of electronic and digital access to the competent authorities) a degree of evidence – without being excessively burdensome - concerning their beneficial ownership, though fix provisions and guidelines should be avoided.

Second, while the suggested amendments to R.24 and INR. 24 discuss in detail the importance of making information on the beneficial owners available in a timely way, consideration should be given to including clarity that any updates, changes, or amendments on the beneficial ownership must be submitted to the competent authorities / financial institutions before being asked to do so (proactive from the legal person versus reactive based on the request from a competent authority).

Third, despite clarifications on beneficial ownership through the amendments to R.24 and INR.24, the use of attorney/client privilege continues to be a prevalent method of hiding true beneficial ownership. The FATF should consider whether there is sufficient legal basis to allow attorney/client privilege to exempt beneficial ownership from legal disclosure and how the legal obligation for attorneys to protect information is any different than that imposed on financial institutions. This will aid in closing gaps in reporting which may shield the ultimate beneficial ownership information and reduce the efficacy of financial crime mitigation and prevention.

Fourth, it would be helpful if beneficial ownership registries are able to maintain as a matter of practice a historical timeline of information on legal entities incorporated in their jurisdictions, including, *inter alia*, changes in directorships, shareholders, entity names, shareholding structure, issued shares, and capital re-construction schemes. This information is in many instances important for understanding the history of a legal entity and will provide more useful intelligence for financial crime risk management. Furthermore, efforts should be made by the public sector to identify legal entities which have been registered but, by all indication, are not operational. This should assist in identifying red flags concerning shell companies.