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Director General
Financial Systems Division
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Dear Ms. Pezzack,

The following is my submission concerning Canada's anti-money laundering and anti-terrorist financing ("AML") regime. I consent to the disclosure of these comments whether in whole or in part.

PART A: RECOMMENDATION SUMMARY

I recommend that the federal government move through three stages of improvements to its AML system:

Stage One – Client and Customer Declarations of Beneficial Ownership

Change required: enact legislation (i) requiring customers and clients of Reporting Entities and purchasers and sellers of real estate to provide disclosure of beneficial ownership by way of Declaration of Beneficial Ownership (defined in Part B below); (ii) attaching criminal sanctions to false statements in these declarations; and (iii) requiring Reporting Entities to collect and keep on file the Declarations of Beneficial Ownership (in the same manner they are presently required under the PCMLTFA regulations to handle other information gathered);

Objective*:* to improve data quality of beneficial ownership information in our financial, commercial and real estate markets; reduce risk burdens on Reporting Entities; and improve intelligence value of data to better enable law enforcement agencies to investigate and prosecute money launderers;

Suggested implementation date: within six to nine months.

Stage Two – FINTRAC receives beneficial ownership information for all real estate transactions

Change required: enact legislation to (i) make FINTRAC a repository for reports of beneficial ownership of real estate, and (ii) require buyers and sellers of real estate to file a report with FINTRAC that includes basic identification information and disclosure of beneficial ownership;

Objective*:* improve FINTRAC's metadata analysis and the intelligence value of data to better protect Canada's real estate markets;

Suggested implementation date: within a year.

Stage Three—a publicly-accessible central registry of beneficial ownership

Change required: obtain agreement with the provinces and territories to establish a publicly-accessible central registry of beneficial ownership of private corporations, business trusts and real estate, and then enact required legislation and establish requisite systems;

Objective: improve metadata analysis, specific-data quality, and intelligence value of data; lower costs and risks to financial institutions and other reporting entities; and help decrease corruption, money laundering and terrorist financing in Canada and around the world;

Suggested implementation date*:* within four years.

PART B: DISCUSSION OF RECOMMENDATIONS

Stage 1 Customers and clients must provide declarations of beneficial ownership

A principal cornerstone of all AML systems is the data quality of reported beneficial ownership. The poorer the quality, the weaker the system. Unfortunately, the quality of data under Canada's present system is often poor because of the key missing piece in our system of reporting: legal accountability of customers and clients providing disclosure of beneficial ownership.

Canada has adopted a "risk-based" AML system where our financial institutions and designated non-financial businesses and professions ("Reporting Entities") are, among other things, legally required to set up systems to detect and then report to FINTRAC suspicious transactions that may involve money laundering or terrorist financing. Such legal obligations are correctly placed on these entities because they not only have a vested interest in ensuring our markets remain free of money laundering and terrorist financing, but they also have a bird's eye view of the transactions conducted by their clients and customers and therefore are uniquely positioned to detect any criminal or suspicious activity.

In carrying out these obligations, Reporting Entities need accurate and reliable information of the underlying beneficial ownership of their customers and clients. But therein lies the problem. The primary source of beneficial-ownership information comes from the clients and customers themselves, yet there is either no legal obligation on these persons to be truthful when they provide that information, or there is no meaningful legal sanction attached to their false or misleading representations.

To gain an appreciation of the extent of that structural weakness, just think of how effective and judicious Canada's tax system would be if (i) there were no legal sanctions against taxpayers providing false information on their tax returns, and (ii) the tax preparer alone, and not the client, would suffer sanctions and reputational harm for the false statements made by the client.

That lack of legal accountability in our AML system not only weakens the quality of information received from customers and clients, but it also creates other large problems throughout the AML regime:

(i) it places our financial, commercial and real estate markets at greater risk of money laundering and terrorist financing;
(ii) it places much greater risk and cost burdens on Reporting Entities as they constantly search for other sources to verify the relatively unreliable beneficial-ownership information provided by their customers and clients; and
(iii) it weakens the ability of law enforcement agencies to investigate money laundering and terrorist financing.

This last point requires further explanation. Money laundering and terrorist financing, by their very nature, involve the transfer of funds through complex webs of private corporations and trusts in multiple jurisdictions, which makes investigation by law enforcement agencies so prohibitively expensive and time consuming (often many years) that it is almost impossible to obtain a conviction unless they first obtain indictable evidence of some other predicate crime (e.g., drug dealing, bribery) and use that as leverage to obtain evidence for a money laundering conviction. All of that would change if legal sanctions such as those for perjury were attached to false declarations made by beneficial owners and their agents (e.g., nominees, trustees, directors, and other person representing third parties). Law enforcement officials would only have to prove the declarant lied and then they could use the threat of prosecution as leverage to flip the person to obtain evidence of the money laundering scheme.

All of these problems—poor data quality, high risk and cost burdens on Reporting Entities, and roadblocks preventing investigations and prosecutions of AML crimes—can be significantly reduced by enacting legislation requiring that whenever a Reporting Entity is required under the PCMLTFA to obtain beneficial ownership information from a client or customer, the customer or client would be required to provide that information (typically made in account opening documents):

(i) by way of a Statutory Declaration under section 41 of the Canada Evidence Act (i.e., a declaration made before a notary or commissioner of oaths, etc.) or

(ii) by way of an unsworn Declaration Under Penalty of Perjury (i.e., a declaration, such as commonly used under US law, that acknowledges the statement is being made under penalty of perjury and pursuant to the laws of Canada but is not sworn before a notary or commission of oaths)[1].

Collectively, these declarations are referred to herein as a "Declaration of Beneficial Ownership."

That legislative change—requiring customers and clients to provide Declarations of Beneficial Ownership, with sanctions attached for false declarations—would not only be a strong incentive for customers and clients to carefully and accurately report beneficial ownership, but it would also make investigations and prosecutions of money laundering much easier because law enforcement agencies would simply have to prove the declarant lied and then they could use the threat of prosecution to obtain evidence of the money laundering scheme.

As an example of the effectiveness of such a change, I now set out in some detail how Declarations of Beneficial Ownership can be used in the real estate sector, an area that has been of relatively urgent AML concern since 2015 when the Supreme Court ruled in *Federation of Law Societies of Canada* that the PCMLTFA, as it pertains to lawyers, is unconstitutional.

More specifically, the federal government could enact legislation requiring that all real estate brokers obtain from their clients, as part of their account opening documents, a Declaration of Beneficial Ownership which,

(i) in the case of purchasers, discloses beneficial ownership and source of funds, and indicates whether they are or are not a politically-exposed person ("PEP"), Head of an International Organization ("HIO") or a family member or close associate of a PEP or HIO, or a sanctioned person; and

1 For instance, see US Federal LAW, 28 USC 1746. Similar legislation would be required to facilitate the use of unsworn Declarations Under Penalty of Perjury in Canada.

(ii) in the case of sellers, discloses beneficial ownership and source of funds (including disclosure of whether they are or are not a PEP or HIO etc.) at the time they first obtained title and all changes in beneficial ownership to the time of sale.

Where a person is a PEP or HIO, he would be required to also disclose the relationship that causes him to fall within the definition of those terms (e.g., Mayor of Karachi, Pakistan; or brother of the President of the International Olympic Committee).

Real estate brokers would also be required

(i) to keep such Declarations of Beneficial Ownership in their files, available for examination by any person authorised under section 45(2) of the PCMLTFA or as otherwise authorized by a court of law;
(ii) to disclose to FINTRAC, any purchase by a sanctioned person, PEP or HIO (including family members and close associates); and
(iii) to disclose to FINTRAC, any purchase or sale facilitated by the broker where the name on title is not that of a person for whom the broker has a Declaration of Beneficial Ownership (e.g., the client directed his lawyer to register title in a different name, or the purchaser is not represented by a realtor and he would not provide the seller's realtor with a Declaration of Beneficial Ownership).

Persons making false declarations would be subject to the same sanctions as a person committing perjury under section 131 of the Criminal Code. Consideration should also be given to increasing sanctions to include an order for the property to be subject to forfeiture where there is *mens rea* to make a false declaration in furtherance of another indictable offense (e.g., money laundering or tax evasion).

The legislation should also require that where a person purchases or sells real estate in Canada without representation by a broker, that person would be required to file a Declaration of Beneficial Ownership with FINTRAC.[2] Additionally, where "source of funds" discloses a non-institutional lender/mortgagee, a Declaration of Beneficial Ownership (including source of their funds) would be required from that lender/mortgagee.

Finally, if the government wished to simply target high-risk areas (such as Toronto and Vancouver) it could amend the PCMLTFA to allow **Geographic Targeting Orders** similar to those used in the US for specific real estate areas (e.g., NY, Miami, San Francisco) with higher risks of money laundering. Under such legislation, the government could require that all real estate brokers in the Greater Toronto Area and Vancouver obtain and keep in their files purchasers and sellers' Declarations of Beneficial Ownership, as described above.

Such a program could be augmented by enacting legislation similar to the UK's **Unexplained Wealth Orders** (UWOs) introduced on January 31, 2018 under the Criminal Finances Act 2017. This investigative power enables law enforcement authorities (such as the RCMP and CRA) to seize and dispose of any property suspected to be obtained using illicit wealth. UWOs extend the government's existing civil recovery scheme with no need for criminal proceedings to be initiated. If the Court issues a UWO, the individual concerned (the respondent) must provide a satisfactory response explaining how the property was lawfully obtained.

[2] While the obligation to file rests with the purchasers and sellers of real estate, in practise the filing would be facilitated by their legal counsel or other agent already registered as an F2R administrator with FINTRAC.

Stage 2 FINTRAC becomes a repository for real estate beneficial ownership information

The federal government could enact legislation

(i) enabling FINTRAC to set up an electronic repository system to receive an electronic copy of real estate purchasers' and sellers' Declarations of Beneficial Ownership along with basic identification information; and

(ii) requiring that all purchasers and sellers of real estate in Canada file with FINTRAC an electronic copy of their Declarations of Beneficial Ownership along with basic identification information).

Note: while the obligation to file rests with the purchasers and sellers of real estate, in practise the filing would be facilitated by their legal counsel or other agent already registered as an F2R administrator with FINTRAC, thereby eliminating the need for FINTRAC to implement new systems to receive information from the general public.

To maximize efficiency and to avoid causing delays to the completion of real estate transactions, the system would be automated to instantly issue to the filer an electronically generated confirmation receipt from FINTRAC. Further, to ensure that information being filed is complete, the electronic filing form would use drop-down fields to be completed for basic identification information and an upload field for filing the Declaration of Beneficial Ownership.

The distinct advantage of these reports being electronically filed with FINTRAC (as opposed to real estate brokers simply keeping the Declarations of Beneficial Ownership in their files, as discussed above) is twofold.

First, the data would be of higher quality. Mistakes made by real estate brokers in collecting data (e. g., failure to get passport numbers, dates of birth; accepting a trust or private corporation, instead of a natural person, as the beneficial owner) would be detected and corrected at the outset, and mistakes made by brokers in preserving data (e.g., the file was lost) would be of lesser consequence because FINTRAC would already have the relevant information.

Second, and most important, the data would have significantly increased intelligence value because FINTRAC would be able to conduct metadata searches relating to beneficial owners of real estate to better detect and identify money launderers, terrorist financers and tax evaders. For instance, searches that would raise red flags would include (i) a single buyer owning a large number of homes; (ii) university students buying mansions; (iii) private individuals who provide multiple mortgages (as disclosed in source of funds); (iv) foreign buyers owning multiple homes; (v) builders who use personal residence exemptions; and (vi) houses sold at suspiciously high or low prices. These metadata searches would not only provide better information about the groups of persons who are buying Canadian real estate, but it would also better enable law enforcement agencies and CRA to investigate and prosecute money launderers and tax evaders.

Stage 3 A publicly-accessible central registry of beneficial ownership

The federal government could commence discussions with the provinces and territories to find common agreement to develop and implement a publicly-accessible registry of beneficial ownership of real estate, private corporations and trusts. Such a registry would be years in the making, and so the government should begin the process as soon as possible, else we will continue to fall behind best AML practises.

There are several hurdles to establishing a central registry in Canada. The following is a brief discussion of the largest barrier: the constitutional problem.

The provinces and territories have the constitutional right to regulate companies incorporated in their jurisdictions and to deal with transfers of land (property rights), while the federal government has the constitutional right to deal with money laundering and tax evasion (criminal matters) and to regulate companies federally incorporated, which means the creation of a central registry would be a much more complex undertaking for Canada than for those countries (such as the UK) where property rights, company law and criminal matters all fall under the central government's sole jurisdiction.

That constitutional complexity suggests that the federal government should seek cooperation and agreement with the provinces and territories to establish the central registry. But that leads to further complications.

First, the 14 governments must find agreement on fundamental issues:

(i) that a registry of beneficial ownership is required;
(ii) what legal entities/sectors are covered by the legislation (e.g., private corporations, trusts, real estate—or only one or two of these areas);
(iii) what privacy concerns must be addressed and how they would be addressed;
(iv) what information must be filed (e.g., does it include source of funds, a Declaration of Beneficial Ownership, passport information, and PEP and HIO disclosures?);
(v) what information is to be available to the public and what is available only to government agencies;
(vi) which government agencies will have access to the non-public information (e.g., only federal agencies like FINTRAC and CRA or also each of the provinces and territories, which increases risks of leaks and violations of privacy);
(vii) whether law enforcement agencies will have unlimited access to the non-public information or only have access on a need-to-know basis);
(viii) how is "beneficial ownership" to be defined and what is the minimal threshold ownership within that definition (e.g., 25%, 10%);

Second, for a central registry of beneficial ownership to be effective, it must have good data quality that users can rely on. That suggests three things:

(i) the data collected must be much more extensive than that presently collected by provincial and territorial company registrars, none of whom presently collect information concerning beneficial ownership;
(ii) there must be sanctions for submitting false information (e.g., similar to the Declaration of Beneficial Ownership system discussed above); and
(iii) the registrar must have the power to vet[3] the information being submitted (e.g., he can check information submitted and ask for corrections where needed).

3 While the central registrar needs to have the power to vet, I recommend the system not be structured such that the vetting must be completed and approval given by the registrar before a filer can complete a business transaction, otherwise business transactions in Canada would become unacceptably burdened with long processing times and unpredictable closing dates. Instead, the registrar should immediately accept the information, provide a receipt confirming filing, and simply post the information as "pending" until vetting is completed. For persons who need their information posted and vetted quickly, the system could include a fast lane (like we do for Canadian passports) for a higher fee.

(iv) Such a system of increased data collection and vetting by registrars will create significant costs that will be difficult for the smaller provinces and territories to absorb. The federal government could overcome this problem by offering to subsidize all or part of the costs, but that would not overcome the inefficiency and data-quality problem of 14 different registrars vetting the information going in the system.

Conversely, the federal government could suggest that the provinces and territories do no vetting of beneficial ownership and simply create a link from their corporate-registry and land-registry databases that automatically sends the beneficial ownership information to the federal government's central registry for vetting there. Such a system would be more efficient, less expensive for the provinces and territories and would have better data quality because the vetting would be made by only one registrar.

The point of raising all of these issues is to emphasize that it will be both difficult and time consuming for the 14 governments to reach agreement. But that should not deter the federal government from proceeding, but rather emphasizes the need to begin these important discussions immediately.

In the interim, the Federal government can unilaterally implement the above Stage 1 (requiring customers and clients of reporting issuers and buyers and sellers of real estate to provide Declarations of Beneficial Ownership) and Stage 2 (making FINTRAC a repository for real estate beneficial-ownership information).

But the ultimate goal should be a publicly-accessible registry of beneficial ownership for private corporations, business trusts, and real estate. The details and benefits of a public registry have been explained in detail in other submissions to the Director General, such as that of Transparency International Canada, and instead of repeating those details, I simply state that I fully support TIC's submission.

Regards,

Kevin Comeau

Schedule A

Benefits derived from statutorily requiring Declarations of Beneficial Ownership

(i) improves the quality of data of beneficial ownership, the key ingredient to detecting, deterring, investigating and prosecuting money laundering and terrorist financing;
(ii) allows Canada to keep its commitment to G-20 to implement a stronger beneficial-ownership reporting system;
(iii) deters money launderers from "snow washing" proceeds of crime and terrorist financing through Canadian real estate;
(iv) reduces artificial inflation in Canadian real estate and thereby allows housing prices to self-correct to more affordable levels;
(v) just publicly announcing plans to enact the amending legislation will encourage money launderers who already own Canadian real estate to divest before the legislation is enacted, else they risk being discovered upon sale of their property;
(vi) reduces vacancies of homes purchased by foreign buyers;
(vii) makes criminal prosecution much easier and less expensive—you no longer have to follow the money down the rabbit hole of multiple jurisdictions; you only have to prove perjury;

(viii) deters dirty money from our financial markets, making Canada more attractive for legitimate investors;

(ix) provides financial institutions with more reliable information of beneficial ownership, thereby reducing their financial and reputational risk of money launderers using their business for criminal purposes;

(x) creates a balance between privacy rights of the individual and the government's need to fight money laundering, terrorist financing and tax evasion; and

(xi) increases CRA's ability to detect, investigate and prosecute tax evasion (including fraudulent claims to principal residence exemptions).