

## **Written evidence submitted by the British Banking Association (BBA) (CFB 05)**

To: Sir Alan Meale and Anne Main, Chairs of the Public Bill Scrutiny Committee;  
Cc: the Clerk of the Public Bill Scrutiny Committee

### **Detailed Evidence on the Criminal Finances Bill**

1. The BBA would like to thank the Committee for the opportunity to provide evidence to the Committee on the Criminal Finances Bill (CFB). During the session the BBA's CEO Anthony Browne also promised to provide further written evidence on the CFB which is set out below.
2. As way of context, the BBA is the leading trade association for the UK banking sector with 200 member banks headquartered in over 50 countries with operations in 180 jurisdictions worldwide. Eighty per cent of global systemically important banks are members of the BBA. As the representative of the world's largest international banking cluster the BBA is the voice of UK banking.
3. Our members are fully committed to and supportive of the need to improve the collective response of UK PLC to money laundering, financial crime, terrorist financing and tax evasion. As the Home Office acknowledges, there is already an estimated £5 billion compliance cost to banks alone in the UK. We believe however that the current framework and approach means that the investment across the public and private sector delivers less than the sum of its parts. The CFB provides a good opportunity to help increase the effectiveness of the collective approach to AML.
4. Our members also recognise the need to work together more effectively to tackle criminal finances. The ethos and approach of a public private partnership that underpins the CFB is the right one. The work undertaken by the Joint Money Laundering Taskforce (JMLIT) for example, has demonstrated the benefits of a public-private partnership approach to tackling money laundering. In that spirit, we have focussed our comments on how the CFB could be improved further.
5. The areas of the bill that are particularly important to our members are the powers on Intelligence Sharing where we believe reducing the threshold could make the powers more effective, the importance of ensuring that law enforcement has the tools and the powers they need, and the corporate offence of the failure to prevent tax evasion.
6. The CFB creates a new criminal offence, so it is important for all UK businesses that the scope of the offence, and the prevention procedures required, are clear and unambiguous, and HMRC publicly states its expectations. We hope that everyone can agree that ensuring clarity is not contentious. The banking sector fully supports efforts to tackle tax evasion. And believe that the BBA's investment in producing detailed guidance on the implementation of these measures demonstrates that we are committed to the delivering on the Government's ambitions, notwithstanding our reservations.
7. As noted during our oral evidence we are concerned that the legislation as drafted could have unintended consequences, given the unprecedented extraterritorial scope of the powers. We would encourage the committee to consider the potential precedent being set by these powers and the negative impact on the attractiveness of the UK as a financial centre.
8. For the benefit of the Committee's, we have enclosed examples of suggested changes to the draft legislation that could be made to the clauses on intelligence sharing in order to make them more effective. The Annex illustrates how a lower threshold (which was supported by the regulator) could work whilst still ensuring civil liberties are protected. It also seeks to

ensure that these powers are future proofed to be compatible with the forthcoming EU General Data Protection Regulation (GDPR).

9. We of course recognise that it is, quite correctly, for HMG and Parliament (with the support of the Office of Parliamentary Counsel) to propose changes to the drafting of legislation. The attached documents are only intended to be helpful illustrative examples of the type of changes that could be made that would be welcomed by the financial sector as a means of making the powers on intelligence sharing far more effective.
10. As well as further evidence on the CFB itself, we did want to expand on a further issue that was raised during the evidence session regarding a wider corporate offence of a failure to prevent economic crime. Members recognise that there is a clear and growing need for a more holistic approach to all types of financial crime and compliance so if MPs and HMG want to consider this offence then we and members would be happy to and be keen to be involved in discussions at an early point.
11. However, as noted during the evidence session we would caution about the need to think this through carefully and avoid introducing any offence in haste that could have unintended consequences, especially given the wider context of all the legislation and proposals under way. The landscape in this space is complicated, and as above there is a growing view that much of the compliance regimes are collectively delivering less than the sum of its parts across banks, law enforcement and regulators.
12. After all, the CFB is just one strand of delivering the AML Action Plan. Our members are already engaged in discussions with HMG on the SARs Reform Programme and changes to the Supervisory Regime. They are required to implement the 4<sup>th</sup> Anti Money Laundering Directive (4AMLD) by June or earlier next year and in due course will be further required to implement or pay heed to a wide range of new powers, including the Funds Transfer Regulation, the Payment Services Directive and the GDPR. They will need to implement this Bill and measures in the Immigration Act. There is also further work under way in HMG on tackling bribery and corruption, fraud and sanctions all of which is important and will need the involvement of members to implement.
13. Given all this it is difficult to see how a wider offence, that would be effective, could be introduced in the timescale of this Bill following proper consideration as to how all of the above issues and regimes fit together. Rather there is the risk of unintended consequences and further requirements that do not deliver meaningful outcomes. We would prefer a more strategic approach to this issue and to work with HMG to examine and discuss how all the different pieces align with each other as a more holistic approach could better tackle financial crime whilst also cutting red tape and supporting growth.
14. We would like to thank the Committee for their evident commitment to making this Bill as effective as can be achieved. Whilst we believe there are areas of the Bill that could be improved in order to make it more effective, the BBA and members strongly support the overall objectives of the CFB.
15. We are copying this evidence to the FCA and to the Law Society, given representatives attended the session alongside the BBA. We hope the evidence below is helpful, and the BBA stand ready to assist the Committee in anyway further that we can.

British Bankers Association  
18 November 2016

## **Measures to enhance the ability to investigate the proceeds of crime (Part 1 Chapter 1)**

### **(i) Unexplained Wealth Orders**

1. As to the principle of the power itself, there is support and recognition across the industry that Unexplained Wealth Orders (UWOs) could be a powerful tool in tackling money laundering and corruption. It should help ensure those funnelling the proceeds of corruption into the UK for example, will find it harder to hide the provenance of their wealth to law enforcement. We also recognise that as well as the operational impacts of this power, it may have value in having a powerful deterrent effect, stopping those with illicit assets looking to bank in the UK.
2. With regards to a threshold of £100,000 for use of UWOs, that would seem a sensible starting point. Over time, as this power is used there may be further evidence to suggest that there would be benefits in adjusting the threshold either upwards or downwards accordingly to ensure that it is delivering the most effective operational outcomes.
3. Whilst implementation is outside the direct inquiry of this Committee we feel it is important to note that the CFB will only be successful with effective implementation. Clear guidance from the regulators will have a key role to play in ensuring these measures are effective.
4. With that in mind we believe that regulators will need to be very clear in expectations over what are reasonable checks, especially with regard to information held overseas where it may be harder to check. For example, it may not be possible for banks to check the value of property in a country (such as the UAE) where there are no centrally held property registers.
5. There will also need to be acceptance that the level of proof a bank may be satisfied with cannot and should not be the same as the threshold required in a court of law. If such an obligation was placed on the industry it will be near impossible for firms to run a risk based approach (RBA) and could lead to large cohorts of genuine clients finding it hard to access banking services simply because of the concern of the possible risk of regulatory action.
6. That is why we welcome the recent FCA work on 'de-risking' and their work and commitment to improve perceptions of the Supervisory Regime. We will continue discussion on this issue, so as the intelligence picture improves, banks, law enforcement and regulators share a common understanding of risk and crucially what the appropriate response to manage this risk is.

### **(ii) Extension of Disclosure Orders to Money Laundering Investigations**

7. Extending the use of disclosure orders to cover money laundering investigations and simplifying the existing process to make it easier for law enforcement agencies to use are sensible steps. Banks agree financial investigation powers should be flexible and able to be used earlier. However, again there is a need to look beyond this Bill to issues of implementation.
8. After all, this power would be in addition to the impact of other high volume disclosure demands placed on banks - such as requests from the Department of Work and Pensions (DWP) which primarily relate to benefit fraud have reached over 40,000 individual requests for one bank alone. Members believe there is a growing need for HMG, law enforcement and banks to collectively consider and prioritise the totality of requests for information on banks.

### **(iii) Extension of investigatory powers**

9. The BBA and members believe the extension of these powers is a sensible step. It is in everyone's interest, including our members, that law enforcement have the powers they need to investigate money laundering.

## **Measures to strengthen the Suspicious Activity Report regime (Part 1 Chapter 2)**

### **(i) Changes to SARS - Extension of moratorium period**

10. As it is the NCA who carry the responsibility for notifying the customer if the NCA wishes to go beyond the 31 days moratorium there is support from members. If this provision was not in place, there would be significant concern as otherwise banks would carry the risk of 'tipping off'.
11. However, as noted in the BBA's oral evidence, this change is just one part of the wider reforms to the SARs regime needed. There is a long standing request from our members for there to be more engagement and intelligence from the NCA on SARs. Banks still wish to see further fundamental reform of the SARs regime outside of this Bill to support a rebalancing of approach; from a mainly reactive process of submitting over 380,000 SARs per annum, mostly unused, to a more strategic and targeted approach based on intelligence sharing and partnership working. We look forward to working with HMG on this issue.

### **(ii) Extending Information Sharing**

12. We strongly support the aim of the powers. It is in everyone's interests that banks support law enforcement to protect the integrity of the UK financial system. The public private partnership work, not least the Joint Money Laundering Taskforce (JMLIT) has identified the amount of data held in the private sector, and the benefits this could provide to law enforcement. The financial sector can help see the end to end system and support law enforcement in identifying and tackling money launderers and terrorist financiers.
13. However, members, including those involved in the JMLIT, have strong concerns that the powers do not go as far as necessary to achieve the desired step change in tackling money laundering.
14. Greater intelligence sharing powers would aid with the prevention and detection of all types of financial crime, including AML. One of the current barriers to tackling economic crime is the extent of siloed powers and compliance regimes. Helping remove these would create a far stronger intelligence picture to allow industry and law enforcement to protect the public from fraud, better disrupt terrorist financing and organised crime. After all one bank's fraud is another bank's money laundering
15. At present the powers enabling banks to share information with other banks are only triggered when the threshold of "suspicion" that would trigger the report of a SAR has already been met. We believe it would deliver far more benefit to law enforcement, banks and the public, if the powers could be used to help confirm or remove a suspicion for the purposes of reporting a SAR.
16. For example:

*We know money mule accounts or associates are often used to disguise money laundering including the proceeds of fraud or corruption. So Bank A may have a red flag on a payment into an account from Bank B, which seems unusual but after investigation remains a border line decision as to whether to report to the NCA. At present Bank A has to make a decision as to whether to report or not. Either way the NCA could either be getting a report it does not need, tying up resource to investigate, or it could miss out on a valuable intelligence lead.*

*If however Bank A could share information with Bank B it could give a clearer intelligence picture which could either help identify a money launderer committing fraud if this pattern is repeated, or conversely ensure that if there is a perfectly legitimate explanation known to Bank B, prevent an unnecessary report being made to the NCA.*

17. The BBA and members of course recognise that if the threshold is lowered, there is a strong need to ensure that the powers strike the right balance between intelligence sharing and civil liberties. We believe both these challenges can be addressed and have provided suggestions for one approach in the Annex.
18. In this example, the provisions for sharing intelligence have been more tightly focused around confirming the requirement to report under POCA s300 or 331 which more narrowly defines and places on the statute the circumstances when intelligence can be shared whilst still permitting more intelligence sharing within this more focused bandwidth. In short it arguably narrows but deepens this power.
19. The importance of protecting civil liberties could also be explicitly addressed on the face of the Bill by including more detail over what information can be shared and when. This would not only give greater protections but help future proof this legislation by better aligning it with the forthcoming GDPR.
20. There may also be benefits from having on the face of the Bill reference to statutory guidance for application of these powers. This is to ensure that there is a way to put in place appropriate privacy safeguards and governance, but with more flexibility than if these are included in the primary legislation. Either way, the presence of safeguards in this kind of statutory arrangement will be required under the GDPR, so this is important future proofing.
21. A good analogy is the HMG Code of Practice that exists for designated anti-fraud organisations. This could work in a similar way (and this would also permit the Home Office to have greater control, if it so desired, to impose greater controls on what standards organisations have to meet in order to be able to share intelligence).
22. If there are changes to the threshold there would also need to be a number of changes to the protections to ensure that the right balance between intelligence sharing and civil liberties are struck and to ensure that the protections will provide sufficient reassurance to firms. These include in particular:
  - Clarifying that there is a 'non-disclosure' exemption under the Data Protection Act
  - Clarifying that there is no breach of s. 333A of POCA (tipping off)
  - Preparing for new rules around processing data, especially criminal data, under the General Data Protection Regulation, by setting out that relevant disclosures are in the 'substantial public interest'.
23. Even if there are no changes to the threshold issue the current clauses do not, in the view of our members, offer the necessary expressed legal protections or a straightforward process to share information.

24. For example:

*On bank to bank intelligence sharing, protection is bestowed on one firm (A) in the regulated sector, only if another firm (B) has taken the necessary step to notify the NCA. On the process, requiring banks to submit a notification, which to all extent and purposes resembles a SAR before later submitting a SAR seems a cumbersome process, not least the need for a separate but linked reporting mechanism and the need for parties to track the deadline of a notification before converting into a SAR.*

25. We believe one possible solution would be to require the first notification to be a SAR, but allow banks to then update if and once they have further intelligence to warrant doing so. This could happen at present but the reason this capability is not widely used is purely down to the lack of protections in place. Widening these protections, as intended in the Bill, could allow this approach to be more widely used by those acting in good faith.

The clauses, whatever other changes are made, would benefit greatly from separating and breaking down how the powers would work for the three scenarios of intelligence sharing (a) JMLIT; (b) bank to bank sharing (c) sharing to the NCA at the request of the NCA.

26. This issue is very important to our members. We believe it is in everyone's interest that we do not introduce powers that will not be used or fall short in terms of the intended outcomes.

### **Measures to improve our capability to recover the proceeds of crime (Part 1 Chapter 3)**

27. The banking industry has a strong interest in supporting criminal forfeiture and financial investigation. As well as new powers, members believe it is important to ensure that existing powers are used successfully and that the right foundations are in place to support improved processes.

28. Over the past 15 years, banks have frozen thousands of accounts because of suspicions they are linked to criminality. In total it is estimated that these accounts currently hold between £30 and £50 million. Based on historical evidence, it is likely that the stock of suspended accounts would continue to grow by £2.5m per annum. This has a cost to the banks and to the economy.

29. The BBA and members strongly support the aim of these powers provided the right protections are in place and that implementation is carefully managed. It may again be outside the remit of this Committee but we believe there would be merit in reinvesting some of these proceeds into a more effective SARs database. This would better help the powers in the Bill be used more effectively.

### **Measures to combat the financing of terrorism (Part 2)**

30. Members strongly support the steps being taken to prevent terrorist financing and work closely with HMG and law enforcement on this issue, including through JMLIT.

## **Corporate Criminal offence for failure to prevent the facilitation of tax evasion**

1. Banks have been actively working with the Government for many years to deliver a safe and secure financial system and to increase transparency in international tax matters. There are already extensive controls in place to monitor for and prevent money laundering and financial crime including handling the proceeds of tax evasion. Those procedures are aimed at addressing risks associated with a customer using a bank's services to evade tax. **No bank wants to deal with the proceeds of financial crimes or with criminals, including customers who engage in tax evasion.**
2. However, we have two key concerns with the scope of the offences contained in clauses 37 and 38 of the Criminal Finances Bill 2016 as set out below on the following areas:
  - *Extraterritorial effect of section 38*
  - *Responsibility for third parties*
3. While the industry supports the aims the Government, in seeking to tackle tax evasion, there is broad concern across the industry that these measures could have unintended consequences, which could be negative for the UK economy.
4. None of our suggestions are intended to frustrate the policy aims of the Government in introducing these new offences, and is not intended to prevent UK banks taking responsibility for the actions of their employees. Where there is criminal wrong doing then banks, like anyone else should face the consequences. It is simply that that as the Bill will create a new criminal offence, it is **important for all UK businesses that the scope of the offence is appropriate, clear and unambiguous.**
5. Set out below is further detail on our concerns and proposed solutions which preserve the overarching aims of the Bill, whilst providing the certainty needed by UK businesses. It is hopefully clear that our proposed amendments are minor legislative changes targeted to specific concerns.

### ***Extraterritorial effect of section 38***

6. The draft clauses are described as intended to catch a UK based corporation which fails to prevent its employees or associated persons from criminally facilitating an overseas tax fraud.
7. However, the scope goes far further - the rules apply at a legal entity level. This means for example that the actions of US headquartered bank which failed to prevent the facilitation the evasion of US tax by a US person in its US operations could be subject to prosecution by HMRC, in addition to any prosecutions in the US, solely because there is a UK branch.
8. At its extreme, the actions of a Singapore branch of a US bank helping to evade Hong Kong tax, could be subject to prosecution by HMRC if the bank also has a UK branch.
9. This places a high burden on the inbound business to put in place additional rules to meet UK standards, on top of whatever the local requirements for preventing tax evasion are. Notably, the same would not apply if you were conducting business through a subsidiary in the UK which means the effect is disproportionate to banking and insurance businesses.
10. HMRC have indicated that such a situation may well fail the public interest test for prosecution, but that causes more uncertainty than it resolves. In our view, the offence should

be drafted in such a way that it only captures those offences where there would be a public interest in prosecuting.

11. Critically, the concern is not that a bank's overseas operations should be allowed to engage in tax evasion, we would reiterate that no bank wants to deal with tax evaders. But it recognises that prevention efforts are best co-ordinated locally, and efforts should be focused on complying with local law. Time and effort spent in the US or China or Japan to comply specifically with UK laws may have limited benefit to governments or banks in those countries, as they do not recognise the practicalities of ensuring local compliance.
12. We believe careful consideration should be given on whether it is appropriate for either foreign policy reasons or for effective use of resources for HMRC to have to consider if it will take action against a foreign bank operating overseas who may or may not have helped a foreign national evade tax in that country simply because that bank has a branch in the UK.
13. Not only is there the risk of this making the UK a less attractive environment for foreign banks, it will also require HMRC to devote some resource in considering whether to pursue action, even if they routinely chose not to do so. That is also notwithstanding the ramifications of HMRC choosing to take action against an overseas bank that has a branch in the UK, but where there is no other nexus of the crime to the UK. We believe it would be more appropriate for HMRC to pass on any intelligence it has to the relevant authorities in another country to allow them take their own action for tax evasion, providing any support a necessary.
14. There are also concerns that the breadth, combined with the depth on associated persons could result in 'de-risking' of SMEs in the regulated sector for certain types of activity. Given banks could face action against them if a third party they are connected to has helped a person evade tax evasion, even if the bank has no knowledge of that, then banks will have to choose very carefully which parts of the regulated sector they do business with in order to manage this risk.
15. We therefore propose that there should be some element of the offence which relates to the UK, even if it was just by a person who was under the oversight of the UK operations.
16. Adopting this approach would mean that:
  - the overseas branches of UK headquartered banks would continue to be in scope
  - the actions of UK branches of foreign banks would be in scope
  - if any of activities took place in the UK, the overseas operations of non-UK companies would be in scope
  - even where all activities are carried on outside of the UK, the overseas operations of non-UK companies would be in scope if the offence related to UK tax.
17. This is consistent with a policy which seeks to ensure that the UK cannot be used to facilitate tax evasion anywhere in the world, and UK operations cannot be indifferent to tax matters in other countries. This would be consistent with the broad approach taken to the Bribery Act requiring some UK nexus, although due to the differences in the legislation, the approach required may be different. However, it removes the wholly extraterritorial effect of the rules.

18. This would be a relatively simple amendment to Criminal Finances Bill where a more appropriate scope for the offence could be achieved by an amendment to section 37(2) (proposed changes in red):

*(2) The conditions are—*

*(a) that B is a body incorporated, or a partnership formed, under the law of any part of the United Kingdom;*

*(b) where B is not within paragraph (a)—*

*(i) B carries on a business or part of a business in the United Kingdom, and the relevant foreign tax evasion facilitation offence is committed by a person associated with that establishment when acting in that capacity, or*

*(ii) that any conduct constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom,*

*and in paragraph (b) “business” includes an undertaking.*

*(3) For the purposes of determining whether a person is associated with an establishment for the purposes of subsection (2)(b)(i), the establishment shall be regarded as a relevant body in its own right that is separate from B.*

We would note that subsection 37(3) follows the approach adopted by global tax transparency measures<sup>1</sup>, which treat a branch of a financial institution as an entity in its own right, distinct from the head office or other branches of the same legal entity.

19. If the extraterritorial effect remains the same then it makes the UK seem like a hostile environment for banks at a time when that impression must be avoided. Particularly for banks with small UK branches compared to substantial head offices, this may provide a strong incentive to base their branch elsewhere in the EU. We could also see equivalent actions by foreign governments which would impose additional burden on UK banks with little or no benefit in the fight against financial crime.

20. A rule which applies to banks, but not to lawyers, accountants, tax advisers, or other higher risk groups (including those who handle property or cash or otherwise provide infrastructure which could support tax evasion) seems to be counter-intuitive in the context of the aims of the Bill.

### ***Responsibility for independent third parties***

21. The offence follows the definitions used in the Bribery Act by applying not just to employees but also to associated persons – any third party who provides services “for or on behalf” of the bank. There is a necessary proximity between two parties where an associated person

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<sup>1</sup> FATCA, the OECD's Common Reporting Standard and the EU's Directive on Administrative Co-operation (Council Directive 2011/16/EU as amended by Council Directive 2014/107/EU) which have been implemented in the UK through the International Tax Compliance Regulations 2015

pays a bribe in order “to secure or retain business” for a company within the meaning of the Bribery Act – there is a limited subset of people who would be willing to incur an expense to benefit another business. There is no equivalent limit which applies for the tax offence – the tax evasion by a third party could be wholly incidental to the bank’s business.

22. We recognise the policy aim of including associated persons other than employees within the scope of the offence – and we agree that entities should not be able to outsource risk merely by using third parties to provide key services.
23. However, many associated persons are third parties who act on their own account, and are by definition independent of the bank who may work with them. Banks should not become de facto regulators for other industries, either in the UK or overseas, where those companies act independently of the bank and outside of their control.
24. Again, HMRC have the view that this would not be an issue provided reasonable procedures were in place demonstrating that a “...*corporation has done as much as it can reasonably be expected to do to address the risk that its associated person ignores its policies against being complicit in financial crime and seeks to circumvent its procedures, then the corporation will have a defence of having put in place reasonable procedures. Reasonable procedures need not be fool-proof and need not have actually stopped the financial crime from occurring.*”
25. That recognition is welcome, but we continue to believe that primary legislation should ensure that the scope of associated persons is well defined to avoid ambiguity, should reflect the commercial reality of those parties over whom a bank is able to exercise control, and should be consistent with the Bribery Act to ensure that there are not divergent standards or to make some firms in the regulated sector higher risk simply by virtue of their size or frequency by which banks deal with them.
26. We suggest that this concern can be addressed by introducing a filter, equivalent to the Bribery Act, by requiring the offence to be committed with a view to securing a benefit for the business. This could be achieved by an amendment to section 36(4) as follows (proposed changes in red):
  - (4) A person (P) acts in the capacity of a person associated with a relevant body (B) if P is—
    - (a) an employee of B who is acting in the capacity of an employee,
    - (b) an agent of B (other than an employee) who is acting in the capacity of an agent, or
    - (c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services in anticipation of securing a benefit to the company connected with performance of the relevant services that would not have been secured but for the commission of the facilitation offence.
27. This change would not change the responsibility that an organisation takes for its employees or its agents, who would be in scope regardless of whether there was a benefit where they

were acting in their capacity as an employee or agent. We recognise that HMRC believe that a benefit test in those cases would introduce an additional burden of proof which they do not wish to meet.

28. It would apply the test only when considering the criminal liability of a bank for the actions of an independent third party who they cannot directly control. This would provide a more definite scope to the offence, and would deliver consistency with the scope of the Bribery Act.

*November 2016*