



**EASTERN AND SOUTHERN  
AFRICA ANTI-MONEY  
LAUNDERING GROUP**

## Mutual Evaluation Report

Anti-Money Laundering and  
Combating the Financing of Terrorism

DECEMBER 2008

THE REPUBLIC OF MALAWI

The Republic of Malawi is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). This evaluation was conducted by the World Bank and was then discussed by the Task Force of Senior Officials of the ESAAMLG on 20 August 2008 and adopted by the Council of Ministers of the ESAAMLG as a 1<sup>st</sup> mutual evaluation on 22 August 2008.

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## ACRONYMS

ACB	ANTI-CORRUPTION BUREAU
AML/CFT	ANTI-MONEY LAUNDERING/COMBATING THE FINANCING OF TERRORISM
CBO	COMMUNITY BENEFIT ORGANIZATION
CDD	CUSTOMER DUE DILIGENCE
CEA	CUSTOMS AND EXCISE ACT
CFT	COMBATING THE FINANCING OF TERRORISM
CID	CRIMINAL INVESTIGATIONS DEPARTMENT
CPA	CORRUPT PRACTICES ACT
CPEC	CRIMINAL PROCEDURE & EVIDENCE CODE
CTR	CASH THRESHOLD REPORT
DDD	DANGEROUS DRUG DEPARTMENT
DNFBPs	DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS
ESAAMLG	EASTERN AND SOUTHERN AFRICAN ANTI MONEY LAUNDERING GROUP
FATF	FINANCIAL ACTION TASK FORCE
FFU	FISCAL AND FRAUD UNIT
FI's	FINANCIAL INSTITUTIONS
FIU	FINANCIAL INTELLIGENCE UNIT
FSAP	FINANCIAL SECTOR ASSESSMENT PROGRAM
FT	FINANCING OF TERRORISM
INPO	INTERNATIONAL NON-PROFIT ORGANIZATION
KYC	KNOW YOUR CUSTOMER
LEA	LAW ENFORCEMENT AGENCY
MAMCA	MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT
MERIDA CONVENTION	UNITED NATIONS CONVENTION AGAINST CORRUPTION (2003)
ML	MONEY LAUNDERING
MLA	MUTUAL LEGAL ASSISTANCE
ML & TF ACT	THE MONEY LAUNDERING, PROCEEDS OF SERIOUS CRIME AND TERRORIST FINANCING ACT, 2006
MoF	MINISTRY OF FINANCE
MoJ	MINISTRY OF JUSTICE
MOU	MEMORANDUM OF UNDERSTANDING
MPS	MALAWI POLICE SERVICE
MRA	MALAWI REVENUE AUTHORITY
MVT	MONEY OR VALUE TRANSFER
NBFI	NON-BANK FINANCIAL INSTITUTION
NBI	NEGOTIABLE BEARER INSTRUMENT
NIS	NATIONAL INTELLIGENCE SERVICE
NNPO	NATIONAL NON-PROFIT ORGANIZATION
NPO	NON-PROFIT ORGANIZATION
DPP	DIRECTOR OF PUBLIC PROSECUTIONS
PALERMO CONVENTION	UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (2000)
PC	PENAL CODE
PEPs	POLITICALLY EXPOSED PERSONS
RBM	RESERVE BANK OF MALAWI
ROSC	REPORT ON OBSERVANCE OF STANDARDS AND CODES
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
SRO	SELF-REGULATORY ORGANIZATION
ST	SUSPICIOUS TRANSACTION

STR	SUSPICIOUS TRANSACTION REPORT
UN	UNITED NATIONS
UNSCR	UNITED NATIONS SECURITY COUNCIL RESOLUTION
VIENNA CONVENTION	UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (1988)
XBR	CROSS BORDER REPORT

## **A. PREFACE**

1. An assessment of the anti-money laundering (AML) and combating the financing of terrorism (CFT) regime of Malawi was conducted based on the Forty Recommendations 2003 and the Nine Special Recommendations on Terrorist Financing 2001 of the Financial Action Task Force (FATF), and prepared using the AML/CFT Methodology 2004. The assessment considered the laws, regulations and other materials supplied by the authorities, and information obtained by the assessment team during its on-site mission from February 25 to March 11, 2008, as well as information supplied by the government of Malawi and verified by the assessors through May 11, 2008. During the on-site mission, the assessment team met with officials and representatives of all relevant government agencies and the private sector. A list of the government agencies and private sector entities that the assessors met during the on-site mission is set out in Annex 1 to the detailed assessment report.

2. The assessment was conducted by a team of assessors comprising World Bank staff and consultants. The assessment team consisted of: Stuart Yikona (Team Leader), Allan Schott and Ursula M'crystal (Consultants). The assessors reviewed the institutional framework, the relevant AML/CFT laws, regulations, guidelines, practices and other measures and systems in place to deter money laundering (ML) and the financing of terrorism (FT). In terms of institutions, the team covered both the financial institutions and designated non-financial businesses and professions (DNFBPs). The team also assessed the capacity, the implementation and the effectiveness of all measures and systems relating to AML and CFT in Malawi.

3. This Report provides a detailed assessment of the AML/CFT measures in place in Malawi as of May 11, 2008, two months after completion of the on-site mission. It describes, analyses and makes an assessment of the measures and systems in place as of that date, and provides recommendations on how certain aspects of the system could be strengthened (see Table 3). It also sets out Malawi's levels of compliance with the FATF 40+9 Recommendations (see Table 2). The report was produced by the World Bank as part of the Financial Sector Assessment Program (FSAP) of the Republic of Malawi. It was also presented to the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) and endorsed by this organization at its plenary meeting of August 18-22, 2008.

4. The assessors would like to express their gratitude to the Financial Intelligence Unit, the Reserve Bank of Malawi, the Ministry of Finance and other authorities for their support and kind assistance throughout the assessment mission.

## **B. EXECUTIVE SUMMARY**

### **Introduction**

5. This Report provides a detailed assessment of the level of compliance with the FATF 40+9, and provides recommendations to improve compliance with the prevailing context of Malawi. The views expressed in this document are those of the assessment team and do not necessarily reflect the views of the Government of Malawi or the Boards of the International Monetary Fund (IMF) and the World Bank.

### **Information and methodology used for the assessment**

6. In preparing the detailed assessment, World Bank staff reviewed the institutional framework, the laws, regulations, guidelines and other requirements, and the regulatory and other systems in place as of May 11, 2008, to deter money laundering (ML) and the financing of terrorism (TF) through financial institutions and designated non-financial businesses and professions (DNFBPs), as well as examined the capacity, the implementation and the effectiveness of all these systems.

### **Main findings**

7. The government of Malawi has demonstrated a high level of commitment to establishing a strong AML/CFT framework. This commitment is reflected by the enactment of the Money Laundering Proceeds of Serious Crime and Terrorist Financing Act in August 2006 (ML & TF Act) and the beginnings of an implementation program. This Act addresses key fundamental requirements by imposing AML/CFT obligations on all financial institutions and designated non-financial businesses and professions covered by international standards, except for life insurance companies. DNFBPs are included within the definition of financial institution under the ML & TF Act.

8. The criminalization of ML and TF broadly meets international standards, the legal framework for the financial intelligence unit is comprehensive, preventative measures for financial and non-financial sectors is extensive and the framework for international cooperation is such that Malawi can provide the widest possible assistance to other jurisdictions. Beginning in July 2007, the authorities set up an operational financial intelligence unit (FIU) as the main driver of the implementation process, created a National AML/CFT Committee to enhance domestic cooperation and adopted a phased approach to implementing the ML & TF Act beginning with the banking sector.

9. However, despite these efforts, there is concern with respect to the cash transaction reporting, due to the volume being received as a result of an objective standard with a low threshold and which has generated a large volume of reports and threatens to undermine the FIU's core function of receiving, analyzing and disseminating suspicious transaction reports. The authorities should re-consider the utility of such a system at this time and should concentrate on efforts to build an effective and efficient suspicious transaction reporting regime.

10. Furthermore, with respect to implementation in the financial sector, banks are already complying with many of the preventative measures of the ML & TF Act; however, they are the only financial institutions to have begun any efforts to satisfy the requirements of the statute. Moreover, life insurance companies are not covered at all under the statute. The basis for much of the compliance has been the 2005 Customer Due Diligence (CDD) Directive of the Reserve Bank of Malawi (RBM). The foreign banks are also complying with their home country/head office requirements. In addition, the FIU has met with the banks to inform them of the requirements of the new law.

11. Foreign exchange bureaus are another matter of particular concern. Due to an injunction regarding the licensing and registration of forex bureaus, non-bank affiliated bureaus have not had their licenses renewed and their supervision is virtually nonexistent. The authorities are of the view that the matter under the Exchange Control Act, will not be resolved until final determination by the courts. In any event, the FIU has communicated with forex bureaus informing them of their coverage under the ML & TF Act.

12. While the authorities have criminalized TF, there is neither a regulatory nor an administrative framework for implementing the United Nations Security Council Resolutions 1267 and 1373. Malawi should expedite the setting up of appropriate regulatory or administrative processes to implement the resolutions.



13. In the short term, the priority for the authorities should be to strengthen the capacity of the National AML/CFT Committee to enable its decisions to have a binding effect on all parties/stakeholders as well as the ability to formulate AML/CFT policy. An aggressive awareness raising campaign in the non-banking private sector and the general public should be immediately pursued. The FIU should develop a clear action plan with realizable benchmarks for the next 12-18 months. Finally, in order to ensure the effective implementation of the ML & TF framework, building the technical AML capacity/knowledge of law enforcement agencies, the public prosecutors and the judiciary will be critical.

### **General Situation of Money Laundering and Financing of Terrorism**

14. The biggest crime challenge facing Malawi at present is the production and trade in Cannabis Sativa (Indian Hemp). Cannabis Sativa is extensively cultivated in the remotest parts of the country and its production is steadily increasing. It is reported that the trade is worth millions of dollars. It's unlikely the situation can be reversed in the short term.<sup>1</sup> Anecdotal evidence indicates that Malawi is a transshipment point for other forms of narcotics trafficking, due to its porous borders. Very little is known about the proceeds generated or laundered from the trade in Cannabis sativa.

15. Law enforcement agencies have paid a great deal of attention to human trafficking. Malawi was recently commended on its efforts in this regard in a report published by the United States Department of State. Billboards along streets and highways of towns in Malawi were evidence of these efforts.

### **Overview of the Financial Sector and Designated Non-Financial Businesses and Professions (DNFBPs)**

16. The financial sector consists of nine commercial banks, 23 foreign exchange bureaus, two money transmitters, three life insurance companies, eight general insurance companies, one investment company, one investment trust, eight fund/portfolio managers, three securities firms/brokers and one leasing company (which is part of a commercial bank). Each type of financial institution is licensed pursuant to its respective acts. Each of these statutes is under review for updating. The insurance law, for example, is from 1957. All of the financial sector entities are supervised by the RBM. The foreign exchange bureaus are a matter of particular concern due to a court injunction that brings into question the authority of the RBM to license foreign exchange bureaus and to require that each becomes attached to a commercial bank. Thus, as stated in paragraph 11 above, their licenses have not been renewed and there are virtually unsupervised.

17. The DNFBP sector includes accountants, lawyers, real estate agents, casinos, and dealers in precious metals and stones. Each of the international "Big Four" accounting firms operate in Malawi, together with two regional firms and seven purely local firms, many of which are sole practitioners. Under the Society of Accountants, only about 40 individuals are authorized to sign financial statements out of a total of approximately 400 individuals registered with the society. With respect to lawyers, these are mainly sole practitioners. Lawyers are sometimes involved in arranging the purchase and sale of real estate. They are also involved in the incorporation of companies.

18. There are two casinos, one of is situated in Blantyre and the other in Lilongwe. Each is licensed, according to certain terms and conditions, by the Malawi Gaming Board under the Gaming Act. One of these casinos has been given permission by the Gaming Board to operate an internet casino.

19. With respect to dealers in precious metals and stones, the Minerals and Mines Act stipulates that no person may hold, store or trade in gemstones without a license. Such licenses are issued by the Department of Mines, under the Ministry of Energy and Mines.

20. There is no regulation or oversight of the real estate sector.

### **Legal System and Related Institutional Measures**

21. **The Money laundering Proceeds of Serious Crime and Terrorist Financing Act, 2006 (ML & TF Act) enacted in August 2006 criminalizes money laundering in Malawi consistent with the Vienna and Palermo Conventions, which Malawi has ratified.** All serious crimes – i.e. punishable by

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<sup>1</sup> Government of Malawi, *"Results of a cannabis survey in Malawi"*, Ministry of Home Affairs and Internal Security Inter-Ministerial Committee on Drug Control, p. 3 (2004).

imprisonment of not less than one year - are predicate offences for money laundering. The list of predicate offences includes all the designated offences itemized in the FATF Recommendations. Although the legislation was consented to on 25 August 2006, the notice making the law effective was only issued on 17 July 2007. Despite the short period since the ML & TF Act has come into operation, there are currently 7 cases under investigation that may lead to prosecution under the ML & TF Act.<sup>2</sup>

22. **Malawi has criminalized TF and ratified the United Nations Convention on the Suppression of the Financing of Terrorism.** Furthermore, Malawi does not have a legislative or regulatory framework to implement United Nations Security Council Resolutions (UNSCR) 1267 and 1373. Additionally, the authorities are not disseminating the UNSCR 1267 lists to financial institutions. However, there are a few provisions under the ML & TF Act that can be utilized to freeze terrorist assets although this would require a longer judicial process to effect. This is not consistent with the UNSCR requirement to freeze the assets without delay. The authorities should establish an appropriate legislative or regulatory framework for the freezing of terrorist assets.

23. **The ML & TF Act, the Criminal Procedure and Evidence Code (CPEC) and the Police Act adequately provide a framework for Malawi's confiscation regime.** Confiscation is conviction-based, with freezing, seizing and restraining orders being provided for under these Acts. Adequate powers are available to identify and trace property. The Malawi Police Service and the Anti-Corruption Bureau have previously utilized existing legislation to confiscate property used in the commission of an offence.

24. **Malawi has designated the Financial Intelligence Unit as the national central agency for the receiving, analyzing and disseminating of suspicious transaction reports.** The FIU has issued guidance and reporting forms to the banking sector. The FIU has adequate powers to request information in order to properly undertake its core functions. However, the authorities should review the implementation of the cash transaction reporting requirement at this time, which has elicited a large volume of reports and threatens to undermine the FIU's core function of receiving, analyzing and disseminating suspicious transaction reports.

25. **There has been no law enforcement agency specifically designated as having primary responsibility for ensuring that ML and TF offences are properly investigated.** However, the ACB and the MPS have already begun to consider aspects of ML as part of their day to day investigations. Moreover, the FIU can disseminate reports to any law enforcement agency, and the MPS has identified a liaison officer to facilitate this.

26. **Although the legislative framework for monitoring the cross-border physical transportation of currency is adequate, Malawi has not established a system to implement the provisions of the ML & TF Act to do so.** Currently monitoring of cross border movement of currency is applied in an ad hoc fashion, and only covers exchange control requirements. The FIU has drafted MOUs and reporting forms that will be sent to the MRA and the police/immigration to facilitate implementation of section 38 of the ML & TF Act. In addition, the FIU has secured funding from the US Treasury (under the millennium challenge account) in order to procure software that will facilitate the electronic submission of reports from the borders and the creation of a database of cross border reports.

#### **Preventive Measures – Financial Institutions**

27. **Banks are the only financial institutions complying with any of the ML&TF Act's provisions.** As a result of a phased-in approach, no other financial institutions are satisfying the requirements of the ML & TF Act. The non-bank financial institutions state that they are waiting for some government entity, probably the FIU, to inform them of their compliance obligations. Banks already comply with many of the statute's requirements due to the RBM's CDD Directive, which addresses many of the international standards.

28. **Insurance companies are not covered by the ML&TF Act.** While the legislators dutifully copied the definition of financial institution in the FATF 40 into the definition of financial institution in the statute, the "underwriting and placement of life insurance and other investment related insurance" was omitted. Thus, the statute does not cover all of the types of financial institutions that should be covered. In order to comply with international standards, insurance companies should be covered.

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<sup>2</sup> The Anti-Corruption Bureau and the Malawi Police Service are investigating 4 and 3 cases respectively.

29. **Certain anonymous accounts permitted to be offered to customers.** The Companies Act prohibits the issuance of bearer shares. The ML&TF Act prohibits anonymous accounts to be established or maintained at financial institutions. Despite this prohibition in the ML&TF Act, at least one bank offered bearer certificates of deposit at the time of the on-site mission. To remedy this anomaly, the RBM issued a draft Directive to all banks that would prohibit the issuance of bearer certificates after May 31, 2008, and would require that customer identification and verification be conducted on such existing certificates by the same date. Since the on-site mission, the RBM stated that it has issued a new Directive effective April 9, 2008, prohibiting such bearer certificates and that the bank involved has no such bearer certificates outstanding. Without challenging the veracity of such statements, such information could not be verified by the assessors by the May 11, 2008 cut-off date. Furthermore, the RBM stated that it had not verified the assertions of the bank involved by such cut-off date.

30. **Banking secrecy is not an impediment to the fight against money laundering.** Information is accessible to relevant authorities and financial institutions can exchange information in so far as it relates to financial crime such as fraud or money laundering.

31. **The requirement for suspicious transactions reporting (STR) is laid out in the ML & TF Act.** To date, only banks have been reporting, and the number of STRs is relatively low, given the size and diversity of the financial sector. Other private sector entities have not yet begun to make reports even though there are required to do so under the ML & TF Act.

32. **Adequate provisions that forbid tipping-off and that protect the reporting agents and entities against civil and criminal proceedings are provided for in the ML & TF Act.**

33. **There is no general feed-back (beyond acknowledgement of the receipt of the report) on STRs.** Specific feedback on progress of what has been done with the STRs needs to be provided to reporting entities.

34. **There is no statutory or regulatory framework dealing with shell banks.** While the current licensing approach does not authorize shell banks, such licensing is discretionary. The authorities should consider specifically prohibiting the establishment of shell banks.

#### **Preventive Measures – Designated Non-Financial Businesses and Professions (DNFBPs)**

35. **All categories of DNFBPs are covered under the ML & TF Act.** They are categorized as financial institutions and subjected to all the same requirements as other financial institutions. However, none of the requirements under the ML & TF Act are being implemented by any of the DNFBPs.

#### **Legal Persons and Arrangements and Non-Profit Organizations**

36. **Companies are registered under the Companies Act in Malawi. In order to register, companies must provide information on their directors and shareholdings.** However, this information is not updated and records cannot be considered adequate, accurate and current, as they are maintained manually. Additionally, no information on beneficial ownership is required or collected. It should however, be noted that the Registrar General's office is undergoing a computerization program to computerize its database.

37. **There are two types of trusts that can be created in Malawi.** Public trusts utilized by charities and other related non-profit organizations are created under the Trustee Incorporation Act. Private trusts are created under Common Law, by either a trust deed or a will. Public trusts are required to be registered, similar to a company under the Companies Act, but there is no registration requirement for private trusts. No information is collected on beneficial owners of such private trusts.

38. **There is no mandated legal structure for non-profit organizations. Most of these organizations are set up as associations, charities, churches, clubs, cooperatives, societies and unions.** They are required to be registered with either the Ministry of Women, or Ministry of Justice depending on whether they are an international or national organization. This registration entails collection of information on office bearers of the NPO, although this does not amount to a fit and proper test. There are no requirements regarding the transparency of financial resources or funding activities of NPOs. Malawi has not undertaken a review of its NPO sector to assess its vulnerability to abuse for the financing of terrorism.

## National and International Cooperation

39. **National coordination of AML/CFT matters is spearheaded by the AML/CFT committee. Inter-agency cooperation appears to be fairly robust in Malawi and it is expected that this will extend to areas in relation to AML/CFT issues.** However, national coordination could be strengthened at the policy level by enabling the AML/CFT Committee's decisions to have a binding effect on all parties/stakeholders as well as the ability to formulate AML/CFT policy. It is further recommended that this Committee consider developing a comprehensive AML/CFT strategy of Malawi.

40. **Malawi has a strong legislative framework for the provision of mutual legal assistance and extradition that is not unduly restrictive.** It has ratified the international Conventions relevant to money laundering and terrorism. However, none of this legislative framework is being used in practice, and cooperation occurs in an ad hoc and informal manner. It is recommended that Malawi establish processes and procedures to regularize international cooperation, including recording statistics in relation thereto.

### Other Issues

41. All relevant government agencies expressed concern about the general lack of human resources, funding, vehicles, and technical resources to meet their requirements.

42. The delayed implementation of a national identification system has posed a continued challenge in respect of Malawi's ability to monitor the movement of people, enable financial institutions to conduct CDD requirements and effectively facilitate international cooperation. However, the banking sector has been innovative in adopting mechanisms to identify and verify their clients, for example, the use of reference letters from traditional chiefs as well as using biometrics technology.

### Priorities for recommended plan of action

43. In the short term, the priority for the authorities should be to –

- Strengthen the capacity of the National AML/CFT Committee to enable its decisions to have a binding effect on all parties/stakeholders as well as the ability to formulate AML/CFT policy;
- Conduct an aggressive awareness raising campaign in the non-banking private sector and the general public;
- Develop a clear Action Plan by the FIU with realizable benchmarks for the next 12-18 months and communicated to all stakeholders; and
- Build the technical AML capacity/knowledge of law enforcement agencies, the public prosecutors and the judiciary.

## C. GENERAL

### **General Information on Malawi**

44. Malawi is a land-locked country. It is bordered by Zambia to the north-west, Tanzania to the north and Mozambique, which surrounds it on the east, south and west. Malawi is divided into three regions (the Northern, Central and Southern regions), which are further divided into twenty-eight districts. The capital city of the country is Lilongwe, while Blantyre is the Commercial capital. Official estimates in 2007 indicated population of 13.2 million (the 1998 census registered figure was 9.9 million). About a half of population reside in the Southern region of the country.

45. In 2006, Malawi's economy posted a 7.9% real Gross Domestic Product (GDP) growth. This was a build-up on the 2005 growth rate of 2.3% and the estimated growth for 2007 is 7.4%. This growth was driven by positive growth in the agricultural (7.3%), building and construction (14.9%), transport & communication (11.9%), financial & professional services (6.5%) and manufacturing (9.1%) sectors. The growth has been coupled with reduced interest rates and low inflation. It is expected that the implementation of the Malawi Growth Development Strategy (MGDS) will enhance development efforts to accelerate economic growth so as to create jobs and broad-based wealth. As a result, the Government is aligning public expenditures with the MGDS objectives and policies.

### **System of Government**

46. Malawi is a republic and got its independence from Britain on July 6, 1964. Malawi is a unitary state headed by a republican President who is elected by universal suffrage for a term of five years. Malawi's political system is a multi-party democracy. The three arms of Government operate independently comprising the Executive, the Legislature and the Judiciary. The Executive is made up of the President, Vice-President and cabinet members. Appointments to cabinet are at the sole discretion of the President. Ministers can be appointed from members of the National Assembly or non-members.

### **Legal System**

47. The Legislature is made up of the National Assembly comprised of 193 members of parliament elected by universal suffrage, each of whom serves for a five-year term. The President does not have statutory powers to nominate any Member of Parliament. The next elections are scheduled for May, 2009.

48. The Judiciary is headed by the Chief Justice. It comprises the Supreme Court, High Court, and Resident Magistrate Courts run by professional magistrates who are qualified lawyers. The other types of courts are the first, second and third grade Magistrate Courts, which are run by magistrates who have had basic training in law. Under the High Court, there is an Industrial Relations Court, a Constitutional Court and a Commercial Court. Judges of the Supreme Court and High Court are appointed by the President upon the recommendation of the Judicial Service Commission. The magistrates are appointed by the Judicial Service Commission. There is a Judicial Complaints Authority that receives and investigates complaints against the judiciary and the administration of justice.

49. Malawi has a legal system based on English common law and customary law.

50. The Constitution enacted in 1994 guarantees the independence of judiciary.<sup>3</sup> The judiciary has maintained its independence without interference and all its judgments on cases of corruption have been upheld, although money laundering cases have not been tested.

### **Transparency, good governance, ethics and measures against corruption**

51. In the area of anti-corruption, the Anti-Corruption Bureau (ACB) was established under the Corrupt Practices Act and became operational in 1998. The ACB has fully functional operational corruption prevention, public education, investigations and prosecutions sections. It investigates cases and educates the public to reduce corruption. Furthermore, the ACB was instrumental in having a US\$31m government contract cancelled on grounds that it was tainted with suspected corruption. Moreover, Malawi has ratified the United Nations Convention against Corruption.

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<sup>3</sup> Section 103.

52. In Malawi, the party in opposition is currently in the majority in parliament. Senior government positions in key agencies must be confirmed by parliament following nomination by the President. Discussions with both private and public sector officials indicated a high degree of confidence in the work of the judiciary. These are all good indicators of good governance and fair levels of transparency.

### **General Situation of Money Laundering and Financing of Terrorism**

53. The biggest crime challenge facing Malawi at present is the production and trade in Cannabis Sativa (Indian Hemp). Cannabis Sativa is extensively cultivated in the remotest parts of the country and its production is steadily increasing. It is reported that the trade is worth millions of dollars. It's unlikely the situation can be reversed in the short term.<sup>4</sup> Anecdotal evidence indicates that Malawi is a transshipment point for other forms of narcotics trafficking, due to its porous borders. Very little is known about the proceeds generated or laundered from the trade in Cannabis sativa.

54. Law enforcement agencies have paid a great deal of attention to human trafficking. Malawi was recently commended on its efforts in this regard in a report published by the United States Department of State. Billboards along streets and highways of towns in Malawi were evidence of these efforts.

55. Aside from drug trafficking, the highest levels of cases under investigation are for armed robbery of vehicles, fraud and corruption.

56. Although Malawi has not experienced a terrorist attack, the porous borders pose a threat to Malawi. Discussions with the authorities revealed that in 2003 individuals allegedly linked to Al-Qaeda were located in Malawi and deported. The authorities did provide valuable assistance to the United States government in a terrorism related case. It involved five al Qaeda suspects, all foreign nationals who were arrested in Blantyre in a joint operation between the governments of America and Malawi. They were suspected of financing terrorism through a charitable organization. The suspects were extradited into the hands of the American authorities. This does in some way indicate the kind of effort the authorities in Malawi could provide in implementing the terrorism financing provisions of the ML & TF Act.

### **Overview of the Financial Sector and Designated Non-Financial Businesses and Professions (DNFBPs)**

57. **Financial Sector: Malawi's financial system is small, bank-dominated but with a variety of institutions and markets.** The Malawian financial system consists of nine banks, two discount houses, one leasing company, eight insurance companies, four development finance institutions (DFIs), a young, but growing microfinance industry and a nascent capital markets sector. Two thirds of the country's financial assets are in the banking system, with the remainder in insurance companies and securities firms. Private pension funds, managed by life insurance companies, constitute a significant component, with 300 million USD in assets. The Malawi Stock Exchange (MSE) has currently 11 domestic listed companies, with two additional companies expected to list in 2007<sup>5</sup>. Market capitalization is 600 million USD equivalent to 27% of GDP, while trading in 2006 amounted to only 14.3 million USD or 0.7% of GDP, reflecting the small proportion of shares actually traded on the exchange.

58. Approximately 90% of the population is unbanked and a large proportion is regarded as unbankable by commercial bankers. With a GDP per capita of less than 170 USD, Malawi is one of the poorest countries in the world; 52% of the population (6.4 million people) lives below the poverty line and 22 % (2.7 million people) still live in ultra-poverty. There are only an estimated 892,056 bank customers, with another 250,000 using the services of non-bank financial institutions, including micro-finance institutions. Only 150,000 active formal sector workers are covered by private pension funds and 125,000 active government employees and 30,000 beneficiaries are covered by the public pension scheme.

59. At the date of the on-site mission, the Reserve Bank of Malawi was the overall supervisory authority of commercial banks, bureaux de change, discount houses, insurance companies, leasing and financing companies and the securities market.

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<sup>4</sup> Government of Malawi, *"Results of a cannabis survey in Malawi"*, Ministry of Home Affairs and Internal Security Inter-Ministerial Committee on Drug Control, p. 3 (2004).

<sup>5</sup> These numbers do not include one UK listed company (Old Mutual Plc), which is listed at MSE to facilitate the trading of its locally held shares. Its market capitalization is twenty times the market capitalization of the 11 domestic listed firms.

60. **Banking:** The banking system is predominantly privately-owned, with a high share of foreign-owned banks. Except for the medium sized Malawi Savings Bank, which is still 100% owned by the government, all banks are privately owned. Five banks are foreign-owned, constituting 29% of the banking market, which is less than the average of 47% for Sub-Saharan Africa. Four banks are listed on the stock exchange, on which only a small fraction of their equity is traded. Three new entrants have recently either requested or received bank licenses. Of these new entrants, one is to be affiliated with a discount house and one foreign bank that has applied to take-over a small poorly performing bank.

61. There are 23 bureaux de change in Malawi, which are licensed and supervised by the Reserve Bank of Malawi under the current law. As noted previously, the licensing of foreign exchange dealers is the subject of an injunction by the courts. As a consequence, the licensing and supervision of these dealers is virtually non-existent and is awaiting resolution by the courts.

62. **Pension and Insurance:** About 150,000 employees in the formal Malawian economy are covered by 632 private pension funds (according to the MRA), funded by contributions of both employers and employees, 90% of which are managed by two insurance companies. The Government runs a pay-as-you-go pension scheme for its employees.

63. Malawi's life insurance sector is small and highly concentrated, inefficient and with limited product and investment diversification. There are three life insurance companies. Gross insurance premiums for these three companies for 2007 was K4.1 billion, or slightly more than \$29 million USD. Given the small market size, the high degree of concentration is not surprising.

**Structure of financial sector, 2007**

	<b>Number of institutions</b>	<b>Total assets (US\$ million)</b>	<b>Authorized/ Registered and supervised by:</b>
<b>Commercial banks</b>	10	908.4	RBM/ Bank supervision
<b>Mortgage banks</b>	x	X	
<b>Investment Trust</b>	1	15.8	RBM/ Supervision of Non Bank Financial Institutions (SNBFI)
<b>Collective investment associations</b>			
<b>Life insurance companies and occupational pension funds</b>	3	267.4	RBM/ SNBFI
<b>General insurance companies</b>	8		RBM/ SNBFI
<b>Company pension funds</b>			MRA
<b>Insurance brokers</b>	10		RBM/ SNBFI
<b>Insurance Agents</b>	22		RBM/ SNBFI
<b>Loss Assessors/Adjusters</b>	21		RBM/ SNBFI
<b>Microfinance Institutions</b>	20		RBM/ SNBFI
<b>Financial Cooperatives</b>	70		RBM/ SNBFI
<b>E-money</b>	x	X	X
<b>Savings institutions</b>	x	X	X
<b>Foreign exchange</b>	23		Exchange Control and Debt Management/RBM
<b>Money transmitters</b>	3	Not available	RBM
<b>Leasing* and factoring</b>	1	X	X
<b>Credit cards etc.</b>	X	X	X

Source: Reserve Bank of Malawi. These are as at December 31, 2007.

\*The leasing company is a subsidiary of one of the commercial banks.

64. The following table sets out the types of financial institutions that can engage in the financial activities that are within the definition of "financial institutions" in the FATF 40+9.

<b>FINANCIAL ACTIVITY BY TYPE OF FINANCIAL INSTITUTION</b>		
<b>Type of financial activity (See the Glossary of the 40 Recommendations)</b>	<b>Type of financial institution that performs this activity</b>	<b>AML/CFT regulator &amp; supervisor</b>
1. Acceptance of deposits and other repayable funds from the public (including private banking)	Banks	Bank Supervision - Reserve Bank of Malawi
2. Lending (including consumer credit; mortgage credit; factoring, with or without recourse; and finance of commercial transactions (including forfeiting))	Banks	Bank Supervision - Reserve Bank of Malawi
3. Financial leasing (other than financial leasing arrangements in relation to consumer products)	Leasing	Bank Supervision - Reserve Bank of Malawi
4. The transfer of money or value (including financial activity in both the formal or informal sector (e.g. alternative remittance activity), but not including any natural or legal person that provides financial institutions solely with message or other support systems for transmitting funds)	Banks/Money Transmitters	Bank Supervision/Exchange Control and Debt Management - Reserve Bank of Malawi
5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money)	Banks	Bank Supervision - Reserve Bank of Malawi
6. Financial guarantees and commitments	Banks	Bank Supervision - Reserve Bank of Malawi
7. Trading in: (a) money market instruments (cheques, bills, CDs, derivatives etc.); (b) foreign exchange; (c) exchange, interest rate and index instruments; (d) transferable securities; (e) commodity futures trading	Stockbrokers  Forex Bureaus  Banks/Discount Houses	Supervision of Non Bank Financial Institutions (SNBFI) - Reserve Bank of Malawi  Bank Supervision - Reserve Bank of Malawi
8. Participation in securities issues and the provision of financial services related to such issues	Stockbrokers, Transfer secretaries, Stock Exchange, Underwriters	(SNBFI) - Reserve Bank of Malawi
9. Individual and collective portfolio management	Asset managers, mutual funds, investment trust, unit trust	(SNBFI) - Reserve Bank of Malawi
10. Safekeeping and administration of cash or liquid securities on behalf of other persons	Custodial service institutions	Bank Supervision - Reserve Bank of Malawi
11. Otherwise investing, administering or managing funds or money on behalf of other persons	Portfolio/asset/fund managers	(SNBFI) - Reserve Bank of Malawi
12. Underwriting and placement of life insurance and other investment related insurance (including insurance undertakings and to insurance intermediaries (agents and brokers))	Insurance Companies	(SNBFI) - Reserve Bank of Malawi
13. Money and currency changing	Forex Bureaus	Exchange Control and Debt Management - Reserve Bank of Malawi



## Overview of Designated Non-Financial Businesses and Professions (DNFBPs)

65. **Lawyers, notaries, and other independent legal professionals:** Lawyers in Malawi are required to be admitted as legal practitioners in accordance with the Legal Practitioners and Legal Education Act. Legal practitioners include attorneys and notaries, where notaries are attorneys with specific qualifications.

66. The Malawi Law Society is established under the Legal Practitioners and Legal Education Act. It administers the qualification of lawyers and recommends to the Chief Justice of Malawi to admit a lawyer to be listed on the roll of legal practitioners. It also establishes the code of conduct and after a hearing of the disciplinary committee, it can recommend to the High Court to strike a practitioner from the roll. There are currently 195 legal practitioners within Malawi, with the majority of them being associated with small law firms of an average of 2 lawyers per legal firm with the biggest having 10 lawyers.

67. **Accountants:** The accounting industry in Malawi is comprised of a total of 13 accounting firms. Each of the international "Big Four" accounting firms operate in Malawi; in addition, there are two regional firms and seven purely local firms, many of which are sole practitioners. Under the practice rules of the Society of Accountants, only about 40 individuals are authorized to sign financial statements out of a total of approximately 400 individuals registered with the society.

68. **Casinos:** The Casino industry is governed by the Gaming Act, 1996 as amended in 1998. This statute established the Malawi Gaming Board as a statutory body with powers to issue licenses, inquire into complaints against licensees, and regulate its own procedures. There are two operators that have been granted casino licenses: one operates in Blantyre and the other operates in Lilongwe. In addition, one gaming license has been granted to one of the operators, which has 13 sites for gaming machines classified as site operations. One of the casino operators has just been given permission from the Board to operate an internet casino.

69. **Dealers in Precious metals and stones:** Malawi mostly mines gemstones. The most abundant gemstone mined is aqua and, to a lesser extent, rubies and emeralds. Neither gold nor diamonds are mined in Malawi. Malawi is considered to be a transshipment point for the movement of precious metals and stones as opposed to a producer. Malawi has discovered uranium deposits and one Australian mining company is set to begin mining soon. The Malawi authorities are receiving assistance from the International Atomic Energy Agency to track and trace the sale of this uranium by instituting a process that is similar to the Kimberly diamond process.

70. **Real Estate agents:** The real estate sector in Malawi is unregulated.

## Overview of commercial laws and mechanisms governing legal persons and arrangements

71. The types of legal persons and legal arrangements that exist in Malawi include companies, partnerships and trusts.

72. **Companies:** These companies are established under the Companies Act, 1984. There are two types of limited companies, those that are limited by shares and those limited by guarantee. To create a limited company of any kind, certain information in the form of a standardized document need to be presented: a memorandum and articles of association, list of directors, list of shareholders, the capitalization of the company and its registered office. As at February 2008, there were 8822 companies registered in Malawi.

73. Bearer shares are explicitly prohibited under the Companies Act, 1986 and as a practical matter the authorities do not and have not permitted such shares to be issued in Malawi.

74. **Partnerships:** These are registered under the Business Names Registration Act. For a partnership, the Registrar General will need to see the Partnership Agreement.

75. **Trusts:** There are two types of trusts that can be created in Malawi. One is a Trust under the Trustee Incorporation Act, which is a public trust utilized by charities and other related non-profit organizations. The other is a private trust under Common Law, which can be created either by a trust deed or a will. Public trusts are required to be registered, similar to a company under the Companies Act, but there is no registration requirement for private trusts.

76. Since inception, 4,219 public trust applications have been received by the Registrar General's office. The Registrar General has no accurate figures available on the exact number of public trusts operating in Malawi as these are approved by the Minister of Justice. As noted earlier, the Registrar General's office is undergoing a computerization program to computerize its database.

## **Overview of strategy to prevent money laundering and terrorist financing**

### **a. AML/CFT Strategies and Priorities**

77. The authorities were not able to provide a written AML/CFT strategy or set of priorities. From the interviews it was evident that the FIU is the main driver behind the implementation of the AML/CFT regime in Malawi. Many stakeholders view the FIU as the unit that will deal with ML and TF matters in Malawi. The FIU has determined to roll out application of the ML & TF Act first to banks and then other financial institutions as designated under that Act.

### **b. The institutional framework for combating money laundering and terrorist financing**

78. **National Anti-Money Laundering and Combating the Financing of Terrorism Committee:** The Committee started meeting in September 2007 and is chaired by the Ministry of Finance. Its current membership comprises: the Financial Intelligence Unit, the Reserve Bank of Malawi, the Malawi Police Service (represented by the Fiscal and Fraud Unit), the Anti-Corruption Bureau, the Director of Public Prosecutions, the Malawi Revenue Authority, the Ministry of Foreign Affairs, the National Intelligence Service and the Ministry of Justice. Its current role is to coordinate the efforts of its members in the development of Malawi's AML/CFT framework.

79. **National Counter Terrorism Committee:** The committee was set up soon after September 2001 and is chaired by the Chief Secretary of Cabinet and the Office of the President. Its role is to oversee implementation of the United Nations requirements under the international terrorism related instruments. Its current membership comprises: the Ministries of Defence, Home Affairs, Finance, Transport, Information, Foreign Affairs and Justice, the Reserve Bank of Malawi and the National Intelligence Service.

80. **Ministry of Finance:** In addition to chairing the National AML/CFT Committee, the Ministry of Finance has current oversight of the activities of the Financial Intelligence Unit. Moreover, when it comes to developing AML policy, the Secretary to the Treasury in the Ministry is the liaison to the Cabinet for making decisions on AML/CFT matters since the National AML/CFT Committee does not currently have the authority to make binding decisions, although a proposal for increased authority has been sent to the Cabinet for approval.

81. **Director of Public Prosecutions (DPP):** Pursuant to Section 99 of the Constitution and Section 79 of the CPEC, the Director of Public Prosecutions (DPP) is responsible for the prosecution of all crimes against the laws of Malawi. The DPP can also delegate this role to other law enforcement agencies. In this respect, the ACB, MRA and the MPS can also prosecute corruption, tax and misdemeanor offences respectively.

82. **Anti-Corruption Bureau (ACB):** The Corrupt Practices Act establishes the Anti-Corruption Bureau. The Act mandates the ACB to conduct corruption prevention exercises, public education activities and conduct investigations and prosecution of offenders. The ACB became operational in 1998. The ACB has fully functional operational corruption prevention, public education investigations and prosecutions sections. The Bureau has an authorized establishment of 111 officers. Currently the staff strength is 91 staff members.

83. **Malawi Police Service (MPS):** The MPS is deployed nationally for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of property and the due enforcement of all laws and regulations with which they are generally charged under the Police Act.

84. **The Fiscal and Fraud Unit (FFU):** This is a special branch of the MPS and is responsible for the investigation of all fraud matters and any other financial crimes such as exchange control contraventions and theft by public officials. The FFU has a staff of 38 with some of them deployed at 16 of the 18 border posts to assist in cases of exchange control contraventions where they act as agents of the RBM. The FFU has appointed a desk officer who serves as the liaison officer and deals with all matters referred by the FIU.

85. **Malawi Revenue Authority (MRA):** The MRA is comprised of the Taxation and Customs Divisions. The Customs Division is tasked with monitoring the movement of goods into and out of Malawi. They are deployed at all 18 border posts, 2 of which are the national airports in Blantyre and Lilongwe. The Customs Division has 490 employees including support staff.

86. **Reserve Bank of Malawi:** The RBM is established in accordance with the Reserve Bank of Malawi Act and is currently responsible for the supervision of banks, bureaux de change, pensions, insurance, stock exchange and money service transmitters. The RBM employs a total of 613 staff. Of the total staff, the Banking supervision department employs 15 persons, Non-Banking financial institutions supervision department employs 13, and Exchange Control department employs 25, all of which will be responsible for AML/CFT matters on behalf of the RBM.

87. **National Intelligence Service (NIS):** Created pursuant to a Warrant of Establishment under the Office of the President and Cabinet, the NIS is divided into internal and foreign security sections and has as its primary focus is the national security of Malawi. There are 379 established positions in the NIS, of which 200 positions are filled. The NIS intends to have a desk officer who would be responsible for any matters that relate to ML or FT.

**c. Approach concerning risk**

88. Malawi has adopted a single uniform approach to dealing with AML/CFT. There is no risk based approach specified in the legislation nor are certain categories of institutions, product, service or geography identified as requiring enhanced scrutiny, except for domestic and foreign politically exposed persons, which is required under the international standards.

**d. Progress since the last WB/IMF assessment or mutual evaluation**

89. Malawi underwent a mutual evaluation conducted by the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) in June 2004. However, the authorities were unable to produce the mutual evaluation report as they had not received the report from ESAAMLG. Consequently, the assessors were not able to determine what deficiencies were identified in 2004.

90. Suffice it to say at the time of that evaluation, Malawi did not have a legislative and institutional framework to address ML & TF. Since that time, the Money Laundering Proceeds of Serious Crime and Terrorist Financing Act, 2006 was enacted and an operational FIU has been established.

## D. DETAILED ASSESSMENT

**Table 1: Detailed Assessment**

### 2. Legal System and Related Institutional Measures

<b>2.1 Criminalization of Money Laundering (R.1 &amp; 2)</b>	
Description and analysis	
91.	<p><b>Legal Framework:</b> The Money Laundering Proceeds of Serious Crime and Terrorist Financing Act, 2006 (ML &amp; TF Act) and the Penal Code (PC). Money Laundering is criminalized in Section 35 of ML &amp; TF Act; ancillary offences are provided for in Sections 21-23; and liability of legal persons is provided for in Section 24 of the PC, respectively.</p>
92.	<p><b>Criminalization of Money Laundering (c. 1.1 - Physical and Material Elements of the Offence):</b> There are four elements to the money laundering (ML) offence as provided for under the ML &amp; TF Act. Section 35(a) provides for the act of converting or transferring property with the aim of concealing or disguising the illicit origin of such property; Section 35(b) provides for the act of concealing or disguising the true nature, origin, location, disposition, movement or ownership of such property; Section 35 (c) provides for the act of acquiring, possessing or using such property that is from proceeds of crime; and Section 35(d) provides for the act of participating in, associating with or conspiring to commit, or attempting to commit or aiding, abetting and facilitating the commission of the three acts in Subsections 35(a), (b) and (c).</p>
93.	<p>The offences, as established in Section 35, are consistent with the Vienna and Palermo conventions.</p>
94.	<p><b>The Laundered Property (c. 1.2):</b> The definitions of property and the proceeds of crime, as provided for in the ML &amp; TF Act, are very broad. The definition of property covers any asset of every kind, whether corporeal or incorporeal, moveable or immovable, whether situated in Malawi or elsewhere and whether tangible or intangible and includes any legal or equitable interest in any such property. Under Section 2, proceeds of crime covers any property derived directly or indirectly from a serious crime and includes any property that has later been converted, transformed or intermingled, as well as income, capital or other economic gains derived from such property at any time from the commission of the serious crime. Considering these two provisions, it is clear that the offence of ML extends to all types of property.</p>
95.	<p><b>Proving Property is the Proceeds of Crime (c. 1.2.1):</b> Pursuant to Section 35 (2) of the ML &amp; TF Act, it appears that is not necessary to prove the predicate offence in order to prove that property is the proceeds of crime.</p>
96.	<p>In determining whether property is the proceeds of crime, it was asserted that the prosecution would rely on all the facts, chain of events and transactions, general profile of the accused over a period of time as well as the accused person’s associates. However, there is no case authority to support this assertion. Indeed, from the discussions with the DPP, the assessors were left with the impression, despite the language of Section 35 (2), that proof of a predicate offence would more likely be required than not.</p>
97.	<p><b>The Scope of the Predicate Offences (c. 1.3):</b> The predicate crimes for money laundering cover offences under the ML &amp; TF Act, the Penal Code and other laws criminalizing various offences. Covered offences include all the designated offences itemized in the FATF Recommendations except for two offences: (1) counterfeiting and piracy of products, and (2) insider trading and market manipulation.</p>
<p><b>Table: Designated Category of Offences</b></p>	
Designated Category of Offences	Relevant Law and Specific sections
Participation in an organized criminal group	S. 65, 66 and 71 of PC
Terrorism, including terrorism financing	S. 36 and 76 of ML & TF Act
Trafficking in human beings and migrant trafficking	S. 257, 259 and 267 of PC
Sexual exploitation (including of children)	S. 132, 135-138, 265 of PC
Illicit trafficking in narcotic drugs	S. 7-9 of Dangerous Drugs Act

Illicit Arms Trafficking	S. 4-5 of Firearms Act
Corruption and bribery	S. 90 of PC; S. 24-25 of Corrupt Practices Act
Illicit trafficking in stolen and other goods	S. 331 of PC
Fraud	S. 120, 332-336 of PC
Counterfeiting currency	S. 371-377 of PC
Counterfeiting and piracy of products	S. 47-48 of the Copy Right Act; S. 9-10 of the Trade Marks Act
Environmental crime	S. 197-198 of PC; S. 61-67 of Environmental Management Act
Murder, grievous bodily injury	S.209, 238-239 of PC
Kidnapping, illegal restraint and hostage taking	S. 257-269 of PC
Robbery or theft	S. 270-290, 300-302 of PC
Smuggling	S. 89 of PC
Extortion	S. 91, 304-307 of PC
Forgery	S. 351-354, 355-359 of PC
Piracy	S. 63 of PC
Insider trading and market manipulation	S. 36-41, 42 and 57 of the Capital Market Development Act

98. **Threshold Approach for Predicate Offences (c. 1.4):** Malawi takes a threshold approach; this means that all crimes, which are punishable by a maximum penalty of more than 12 months or punishable by life imprisonment or death, are predicate crimes for ML purposes.

99. **Extraterritorially Committed Predicate Offences (c. 1.5):** The ML offence applies whether the property in question is the proceeds of crime that occurred in Malawi or conduct that constituted a crime elsewhere and would also have constituted a crime in Malawi had it occurred there (Section 2 of the ML & TF Act defining serious crime).

100. **Laundering One's Own Illicit Funds (c. 1.6):** There is no provision in the ML & TF Act providing for the prosecution of an accused person for both the predicate offence and money laundering. But according to the authorities, the money laundering offence can be committed by a person who also committed the predicate offence. It was argued by the DPP that under Malawi's criminal justice system, the PC remains the main piece of legislation in all criminal cases. As such, all other criminal laws, including the ML & TF Act or CPA, are complementary to the PC. Moreover, in order to illustrate this point, ongoing cases before the Malawi courts were cited, namely, R. v. William Phiri (2008); R. v. Mwawa (2008); and R. v. Milton Kutengule (2008); all cases involve allegations of corruption under the CPA as well as other alleged offences under the PC. Notwithstanding these citations, it was still not clear whether a person can be charged with laundering one's own proceeds or if the reasons for not doing so is on the grounds that this would violate the principle against double jeopardy. The assessors were, therefore, not persuaded that prosecution for laundering one's own funds is possible under Malawian law.

101. **Ancillary Offences (c. 1.7):** Ancillary offences to the offence of money laundering are found in Section 35(d) of the ML & TF Act. It is also provided for under Sections 21-23 of the PC.

102. **Additional Element - Could an act committed overseas, which does not constitute an offence overseas but which would be a predicate offence if committed domestically, constitute an offence of ML (c. 1.8):** There is no provision permitting the prosecution for money laundering for a predicate offence, which if it was committed in a country that did not criminalize the act but which would have constituted an offence had it occurred in Malawi.

103. **Liability of Natural and Legal Persons (c. 2.1 & c. 2.3):** The offence of money laundering applies to both natural and legal persons. The term person when used in the ML & TF Act has the meaning given to it in the General Interpretation Act as applying to a natural or legal entity. Moreover, under Section 24 of the PC, corporations, associations or a body of persons can be prosecuted for any offence existing in the laws of Malawi.

104. **The Mental Element of the ML Offence (c. 2.2):** The intentional element of the ML offence is established like any other offence under the PC or other Malawian law. Proof can be satisfied either by adducing direct evidence linking the accused to the crime or inference being

made from evidence of objective factual circumstances. According to the authorities, in assessing whether a suspect may have intended to commit the offence of ML, “all the circumstances of the case are looked at and a reasonable conclusion can be inferred from the same that there was intention to commit the offence.” The basis for this principle is the common law and general criminal law practice. This assertion is supported by sections 169 & 171(f) of the Criminal Procedure and Evidence Code.

**105. Liability of Legal Persons should not preclude possible parallel criminal, civil or administrative proceedings (c. 2.4):** While as a general rule, prosecution of legal persons does not preclude parallel criminal, civil or administrative proceedings, there has to be a reason for doing so independent of the proceedings already underway. It is a practice established under Malawi’s criminal justice system. For example, in the case of Finance Bank Limited, which went into liquidation on the intervention of the RBM, parallel criminal proceedings were commenced by the ACB against one of the directors who later jumped bail, while the administrative action was still proceeding.

**106. Sanctions for ML (c. 2.5):** Under Section 35(3) of the ML & TF Act, a person who contravenes this section is liable, in the case of a natural person, for imprisonment for 10 years and a fine of US\$14,600, and, in the case of a legal person, a fine of US\$73,000 and loss of business authority. As this is a new law, there have been no ML cases that have been prosecuted although there are a couple of cases under active investigations, which the authorities believe will likely lead to a prosecution. Nonetheless, the sanctions are proportionate and dissuasive both within the context of Malawi and the Southern African region.

**107. Analysis of Effectiveness:** The Malawian criminalization of ML framework is in line with international standards and the material elements are consistent with the Vienna and Palermo Conventions. Eighteen of the designated predicate offences under the FATF Recommendations are covered. As it is a new law, it is not possible at this time to assess the effective implementation and systematic enforcement of the ML & TF Act. Indeed, as noted in paragraph 22, while the legislation was consented to on 25 August 2006, the notice making the law effective was only issued on 17 July 2007.

**108. Statistics (applying recommendation 32):** There is no systematic mechanism for the collection of statistics on investigations, prosecution and conviction of any cases. However, immediately following the assessment mission, an official from the National Statistics office was seconded to the DPP’s chambers to establish a system for keeping records.

**Recommendations and comments**

The authorities should consider –

- Criminalizing the laundering of one’s own illicit funds.
- Maintaining in a systematic manner statistics of ML investigations, prosecutions and convictions as this will enable the authorities to be better able to assess the effectiveness of the anti-money laundering regime.
- Providing clarity from a practical perspective on whether it is not necessary to prove the predicate offence in order to prove that property is the proceeds of crime.

**Compliance with FATF Recommendations 1 & 2**

<b>Rating</b>	<b>Summary of Factors underlying rating</b>
<b>R.1</b>	LC <ul style="list-style-type: none"> <li>• Laundering of ones own illicit funds not provided for</li> <li>• Too early to make an assessment of effective implementation</li> </ul>
<b>R.2</b>	LC <ul style="list-style-type: none"> <li>• Too early to make an assessment of effective implementation</li> </ul>

**2.2 Criminalization of terrorist financing (SR.II)**

**Description and analysis**

**109. Legal Framework:** Sections 36, 76 and 77 of the ML & TF Act.

**110. Criminalization of Financing of Terrorism (c. II.1):** The ML & TF Act contains two provisions in Sections 36 and 76 that criminalize financing of terrorism as required under the UN Suppression of the Financing of Terrorism Convention (TF Convention).

**111.** Section 76 criminalizes “the solicitation, reception, provision or possession of money or other property; entering into or becoming concerned in an arrangement as a result of which money or other property is made or is to be made available for the purposes of terrorism, or a terrorist or a

proscribed organization.” The terrorist financing offences apply to providing or collection of money or property for ‘terrorism’. An act of terrorism under Section 2 of the ML & TF Act includes acts within the scope of all the counter terrorism conventions ratified by Malawi (see discussion under International Cooperation), the use or threat of action in or outside Malawi which involves serious bodily harm to a person, serious damage to property, endangering a person’s life, creating serious risk to health or safety of the public or a section of the public, seriously interfering with communication systems or seriously prejudicing national security. Furthermore, TF is defined in Section 2 of the ML & TF Act as directly or indirectly providing or accumulating funds or other goods, or attempting to do so with intent that the funds be used or knowledge that the funds will be used in whole or in part to commit acts of terrorism as envisaged in the TF Convention and the twelve counter terrorism conventions in its Annex. Thus, it is evident from Section 2 that the TF offence covers use of funds to finance terrorist activities as discussed below in paragraphs 112-114.

112. Complementing the provision as outlined above, Section 36 of the ML & TF Act makes it an offence for any person by whatever means to engage in terrorist financing activities. It extends to a person who organizes or directs others, attempts or conspires to commit a terrorist financing activity, or is an accomplice to a terrorist financing activity.

113. Moreover, pursuant to Section 77 of the ML & TF of the Act, entering into an arrangement which facilitates the retention or control of terrorist property, including the concealment, removal from the jurisdiction or transfer to another person. Terrorist property covers money or other property likely to be used in a terrorist act or by a terrorist group. Furthermore, the term ‘terrorist group’ is defined as an entity that has one of its activities and purposes to commit a terrorist act or a group proscribed by the Minister as such.

114. Consequently, it is not necessary that the offence of terrorism be actually committed or that there is an attempt to commit terrorism, or that the funding be linked to a specific terrorist act, it is sufficient that the money or property is there and is intended to finance terrorist activities.

115. Currently, the Minister has not proscribed any organization as a terrorist group.

116. **Predicate Offence for Money Laundering (c. II.2):** Offences relating to terrorist financing are predicate offences for money laundering by virtue of the fact that the ML offences under the ML & TF Act apply to serious crimes of which terrorist financing is one.

117. **Jurisdiction for Terrorist Financing Offence (c. II.3):** Section 2 of the ML & TF Act includes acts of terrorism committed outside Malawi – providing as follows “an act or omission, whether committed in or outside Malawi.”

118. **The Mental Element of the TF Offence (applying c. 2.2 in R.2):** See earlier discussion on ML offences.

119. **Liability of Legal Persons (applying c. 2.3 & c. 2.4 in R.2):** See earlier discussion on ML offences.

120. **Sanctions for FT (applying c. 2.5 in R.2):** Under section 36(3) of the ML & TF Act a person who commits a terrorist financing offence is liable in the case of a natural person to imprisonment for 15 years and a fine of K3,000,000 (US\$22,000), and in the case of a legal person a fine of K15,000,000 (US\$110,000) and loss of business authority. As regards a person who solicits for money under section 76 of the ML & TF Act, the person is liable to imprisonment for 15 years and a fine of US\$110,000.

121. On the other hand, under section 77 of the ML & TF Act, a person who enters into an arrangement to facilitate retention or control of terrorist property is liable to only 2 years imprisonment and a fine of K100,000 (US\$710). It is not clear why there is a large disparity in the penalties that are imposed in the other two sections for a similar offence namely terrorist financing.

122. The sanctions as provided for in Sections 36 and 76 of that Act are proportionate and dissuasive. However, the penalty under Section 77 is not. It is not consistent with the 15 year terms imposed for carrying out the terrorist acts or fund raising.

123. **Analysis of Effectiveness:** Although generally consistent with the requirements under the SFT Convention, the provisions related to the offence of terrorist financing have not been tested. In

addition, the penalty for ‘entering into an arrangement to facilitate terrorist financing activities’ is not consistent with those imposed for similar offences under the ML & TF Act. Nevertheless, it has to be appreciated that in 2003 the authorities did provide valuable assistance to the United States government in a terrorism related case. It involved five al Qaeda suspects, all foreign nationals who were arrested in Blantyre in a joint operation between the governments of America and Malawi. They were suspected of financing terrorism through a charitable organization. The suspects were extradited into the hands of the American authorities. This does in some way indicate the kind of effort the authorities in Malawi could potentially provide in implementing the terrorism financing provisions of the ML & TF Act.

**Recommendations and comments**

The authorities should consider –  
 - Proscribing terrorist organizations such as those on the United Nations list.  
 - Strengthening the penalty for entering into an arrangement to facilitate terrorist financing activities.

**Compliance with FATF Recommendations II**

	<b>Rating</b>	<b>Summary of Factors underlying rating</b>
<b>SR.II</b>	PC	<ul style="list-style-type: none"> <li>• Strengthening the penalty for entering into an arrangement to facilitate terrorist financing activities</li> <li>• The provisions related to the offence of terrorist financing have not been tested</li> </ul>

**2.3 Confiscation, freezing and seizing of proceeds of crime (R.3)**

**Description and analysis**

124. **Legal Framework:** Sections 48-101 of ML & TF Act (confiscation, freezing, seizing, searching, production orders and monitoring orders); Sections 23-23A of the CPA (freezing and seizing); Sections 16 and 20 of the Police Act (search powers); Section 17 of Dangerous Drugs Act (search, seizure and confiscation); and Section 149 of the Criminal Procedure and Evidence Code (CPEC).

125. Historically, Malawi’s forfeiture regime was governed by the provisions under the Penal Code. The forfeiture laws were abused in that there were used to illegally confiscate property that belonged to any person that opposed the state government in the 1970’s and 80’s. As a result of this, when Malawi became a democracy in the early 1990s, all forfeiture laws were repealed. When the ML &TF Act was being debated in Parliament, there were fears that the provisions on confiscation in the Bill would end up being abused by any government that might be in power at any given time. This led to the change of *forfeiture* to *confiscation in the Act*, and it was decided as a compromise that the confiscation would not be civil, but conviction based. On the other hand, the authorities did indicate in discussions with the assessor team that there are limited circumstances when the Police, under the Police Act and in the exercise of their general powers, are able to seize proceeds of crime. For example, this was done in the seizure of Indian Hemp (a form of marijuana which is widely grown in many parts of Malawi). Consequently, Malawi’s confiscation regime should be viewed in the above historical context.

126. Malawi’s ML & TF Act provides for the confiscation of laundered property which represents proceeds from, instrumentalities used in and instrumentalities intended for use in the commission of ML, TF or other predicate offences and property of corresponding value.

127. **Confiscation of Property related to ML, TF or other predicate offences including property of corresponding value (c. 3.1):** The primary legislation that addresses the confiscation of property related to ML, TF or other predicate offences is the ML & TF Act.

**ML & TF Act**

128. Confiscation is available where a defendant has been convicted of a serious crime. Section 48 of the ML & TF Act provides that where a person is convicted of a serious crime, the Director of Public Prosecutions (DPP) may, not later than twelve months after conviction, apply to court for an order against property that is tainted property in respect of the serious crime or a pecuniary penalty order against the person in respect of any benefits derived from the commission of a serious crime. ‘Tainted property,’ as defined in Section 2, is property intended for use in, or used in or in connection with the commission of a serious crime or proceeds of crime. This clearly covers instrumentalities even if the term itself is not used.



129. Moreover, under Section 53 of the ML & TF Act, the court may, in determining whether property is tainted property, infer that- unless there is evidence to the contrary - (a) the property was used in, or used in connection with the commission of a serious crime if it was in possession of the convicted person at the time of or immediately after the commission of the serious crime for which the person was convicted; or (b) the property was derived, obtained or realized as a result of the commission of the serious crime if it was acquired by the convicted person during or within a reasonable time after the period of the commission of the serious crime and the court is satisfied that the income of the convicted person is from sources that cannot reasonably be accounted for.

130. As for a pecuniary order, under section 61, the defendant is ordered to pay a pecuniary penalty of an amount equal to the benefit derived from the offence. It provides for a defendant to pay to the government a penalty of an amount equal to the government's own assessment of the value of the proceeds of the serious crime, received by the defendant or from which he has benefited.

131. With respect to TF, the confiscation provisions, as discussed above, apply to terrorist property.

#### ***Dangerous Drugs Act (DDA)***

132. If a person is found guilty of an offence under the DDA, section 17 provides that dangerous drugs seized shall be forfeited by order of the court.

#### ***Corrupt Practices Act (CPA)***

133. If a person is found guilty of a corruption offence under the CPA, Section 3 of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations (issued under Section 54 of the CPA), provides that recovered, seized or frozen property shall by order of the court be forfeited to the State.

134. **Confiscation of Property Derived from Proceeds of Crime (c. 3.1.1 applying c. 3.1):** As stated when discussing the Criminalization of ML, property is broadly defined to cover every description of property. In this regard, any proceeds of crime can be confiscated. Indeed, this is supported by Section 62 of the ML & TF Act, which permits a presumption to be made by the court in determining whether a person has benefited from the commission of a serious crime. Under this provision, (a) all property, appearing to the court to be held by a person on the day on which an application for a confiscation order is made, is to be considered property that came into possession by reason of the commission of a serious crime for which that person has been convicted; and (b) any property received or presumed to have been received as a result of the commission of a serious crime for which the person has been convicted is to be considered property that came into possession by reason of the commission of a serious crime. Moreover, under Section 79(1) of the ML & TF Act proceeds of crime include property that may be held by a third party.

135. It is as a consequence of Section 62 that the authorities advised the assessor team that in making an application for a confiscation order a connection has to be made between the proceeds of crime and the commission of a serious crime. On the other hand, as will be indicated below, there is a Supreme Court case which offers a different view albeit in relation to use of provisional measures in a corruption case. It refers to all property of the defendant whether legal or illegal.

136. Furthermore, under Section 149(4) of the CPEC, a court, when making a confiscation order following conviction of an accused person, order the confiscation of property "not only such property as has been originally in the possession or under the control of any person but also any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise."

137. **Provisional Measures to Prevent Dealing in Property subject to Confiscation (c. 3.2):** Restraining orders under the ML & TF Act can be obtained under Sections 79 and 80 of that Act. The orders are against realizable property (defined in Section 2 of the ML & TF Act as any property held by a defendant or any property possessed by a person to whom a defendant has directly or indirectly made a gift) held by a defendant. The application under Section 79(2) is made *ex parte* by the DPP stating –

- where a person has been convicted of a serious crime, the date of conviction; or

- has been charged or is about to be charged with a serious crime, grounds for believing that a defendant committed a serious crime; or
- a description of the property in respect of a which the restraining order is sought; or
- the name and address of the person who is believed to be in possession of the property sought; or
- the grounds for the belief that the property is tainted property in relation to the serious crime; or
- the grounds for the belief that a defendant derived a benefit from the commission of a serious crime; or
- if in the hands of a third party, the grounds for the belief that the property is tainted property and is subject to the effective control of the defendant; or
- that a confiscation order will be made as discussed above pursuant to section 48 of the ML & TF Act.

138. In discussing the seizure and freezing procedures as they exist in Malawi, the Supreme Court of Malawi has held in the case of *the Republic vs Greselder Jeffery*, *MSCA Civil Appeal No 12 of 2002*, that a seizure or freezing order (including restraint orders) applies to “*all property held by the defendant and whether legitimately acquired or not.*” The reason the Supreme Court argued, citing a United Kingdom authority, that “*when applying for a restraint order, the prosecutor probably has somewhat limited information as to the defendant’s assets, yet an immediate application may be necessary in order to prevent dissipation.*”

139. In addition to the DPP making an application for a restraint order, the Director of the Anti-Corruption Bureau (ACB) can, under section 23A of the CPA and upon application to court, seek an order to seize or freeze any document, or other records or evidence or any asset, account, money or other pecuniary resource, wealth, property or business or other interest.

140. **Ex Parte Application for Provisional Measures (c. 3.3):** Applications by the DPP for freezing and seizure of property subject to confiscation under the ML & TF Act are made *ex parte* before the court. Additionally, the same equally applies when applications for provisional measures are made by the ACB and the Police.

141. **Identification and Tracing of Property subject to Confiscation (c. 3.4):** The ML & TF Act and the Police Act provides a wide range of powers to allow the authorities to identify and trace property, including production orders, tracking and monitoring orders, search and seizure including orders to financial institutions to produce any records in their custody (sections 41, 42, 69, 70, 71, 94, 98, 99, 101-102 of the ML & TF Act; sections 16 & 20 of the Police Act; section 36 of the CPA).

142. *Search warrants:* Section 41 of the ML & TF Act gives the FIU the ability to apply to court for a search warrant to enter a financial institutions in connection with ML or TF.

143. Sections 69 and 70 of the ML & TF Act provide the DPP with authority to apply for a search warrant in respect of tainted property. In practice the DPP acts on behalf of the law enforcement agencies such as the Police in making such an application. Furthermore, under section 71 of the ML & TF Act, an application can be made for searches in emergency situations without the authority of a search warrant or order of a court. However, there is no provision for a retrospective ratification of such an action. This raises a potential for abuse in the absence of a check on the actions of the DPP by judicial authority.

144. Sections 16 and 20 of the Police Act provide the authority to the police to conduct searches including in emergency situations. However unlike under the ML & TF Act, where the police make a search without a court order, under the Police Act they are required to have such an action retrospectively authorized by a magistrate.

145. Section 36 of the CPA provides the ACB or the Police with power to search a person pursuant to a warrant issued by a magistrate in relation to suspected corruption activities.

146. *Production orders:* Section 94 of the ML & TF Act provides for production orders to be issued against any person who has possession of a document relevant to identifying, locating or quantifying property suspected of belonging to a person charged with or convicted of a serious crime. Such documents when produced can be inspected, copies made in respect of the documents or retention of the documents for as long as there are required for the duration of the investigation

or trial.

147. Moreover under Section 98 of the ML & TF a search warrant can be issued to search for any document that is the subject of the production order.

148. Under Section 94(5) of that Act, a person is not excused from producing or making available a document when ordered to do so on the grounds that producing it or making it available might tend to incriminate him or make him liable to a penalty. However, the document shall not be admissible in evidence against the person producing it or making it available in any criminal proceedings except in respect of an offence under Section 96, which is the offence of failing to comply with the production order.

149. *Monitoring orders:* Section 101 of the ML & TF Act gives the competent authority the ability to apply to court for a monitoring order. The order directs a financial institution to disclose information in respect of an affected account regarding all transactions conducted through such an account. However, pursuant to Section 102 of that Act, the monitoring order cannot have retrospective effect or be in effect for more than a period of three months from the date of the order. Further, a financial institution that is the subject of such an order is prohibited from disclosing the existence or operation of the order.

150. **Protection of Bona Fide Third Parties (c. 3.5):** Third parties have the right before a confiscation order is made to apply to the court to make a declaration as to the nature, extent and value of the interest of the affected third party in respect of property which is the subject of the confiscation order (Section 56 of the ML & TF Act). Furthermore, where property has been seized on grounds that it is suspected to be tainted property under Section 73 of the ML & TF Act, a person who has an interest in the property may apply to the court for an order that the property be returned to that person under Section 73(1) of that Act. But the court will only grant the order returning the property where it is satisfied that the person is entitled to possession of the property, that the property is not tainted property and that the person in respect of the conviction has no interest in the property.

151. **Power to Void Actions (c. 3.6):** Under Section 55 of the ML & TF Act, the court has the authority to prevent or void actions whether contractual or otherwise affecting tainted property subject to confiscation.

152. **Additional Elements (R. 3) – Provision for a) Confiscation of assets from organizations principally criminal in nature; b) Civil forfeiture; and, c) Confiscation of Property which Reverses Burden of Proof (c. 3.7):** There is no provision for confiscation of the property from organizations principally criminal in nature and Malawi does not have a civil forfeiture framework.

153. **Statistics on freezing, seizure and confiscation:** There is no mechanism for maintaining statistics in a systematic manner with respect to seized, frozen or confiscated assets. On the other hand, pursuant to the CPA, the ACB does keep some records of assets that are seized, frozen and confiscated in relation to corruption cases, such as the Kambalame case; seizure of 92 trucks from GDC Haulage Company and in return collected MK8.6 million (US\$61,200) of the evaded tax; seizure of trucks from Gelseder Jeffrey worth MK60 million (US\$427,000); and property belonging to a senior public official in a Ministry of Education scam. In addition, in all these cases, the accused person's bank accounts were frozen in commercial banks. Moreover, the ACB seized 13 minibuses of a businessman who was corruptly and illegally operating a minibus business in Malawi. Furthermore, the ACB seized one Mercedes Benz motor vehicle from an accused person who used to be a CEO in one of the state-owned institutions during an investigation on corrupt practices.

154. **Analysis of Effectiveness:** The confiscation powers, as provided for under the ML & TF Act and other laws of Malawi, are adequate. But, as that Act is still new, its efficacy cannot be determined at this juncture. On the other hand, the ACB has exercised its powers under the CPA, which has resulted in the seizure and ultimate confiscation of tainted property. The Police have also used the powers under the Police Act to search and seize property that is related to other crimes unrelated to ML. However, in the absence of systematic and comprehensive maintenance of statistics, even the general seizure and confiscation actions taken by the law enforcement agencies cannot be fairly assessed for their effectiveness.

155. The present challenge for the DPP is to begin to test the efficacy of the ML & TF Act at the earliest opportunity.		
<b>Recommendations and comments</b>		
The authorities should consider maintaining in a systematic manner statistics on seized, frozen and confiscated assets		
<b>Compliance with FATF Recommendations 3</b>		
<b>R.3</b>	LC	<ul style="list-style-type: none"> <li>No implementation of the ML &amp; TF Act with respect to provisional measures</li> <li>No statistics are maintained on seized, frozen or confiscated assets</li> </ul>
<b>2.4 Freezing of funds used for terrorist financing (SR.III)</b>		
<b>Description and analysis</b>		
<p>156. <b>Legal Framework:</b> There is no regulatory or administrative mechanism or processes to implement United Nations Security Council Resolutions 1267 and 1373. Moreover, discussions with the authorities indicated that while the authorities do receive the United Nations List, this is not transmitted to the relevant stakeholders as required by the Resolutions. There have been no country designated lists that have been submitted to the Malawian authorities under UNSCR 1373.</p> <p>157. The ML &amp; TF Act provides in section 78 (1), that a supervisory authority which has reason to believe or suspect that a financial institution holds an account or property on behalf of terrorist shall issue a written directive to the institution requiring that they freeze or restrain any account or property held by the financial institution on behalf of the suspected terrorist. Though the law state that the order shall be in effect for three months, a competent authority can apply for the court to extend the order, Section 78 (2) and (3), ML Act. It is the view however of the assessors that this provision while giving the competent authority the ability to freeze terrorist related property does not meet the requirements envisaged under the Security Council Resolutions which calls for an immediate freezing. Indeed, when one compares this to what many jurisdictions have instituted, the provision in the ML &amp; TF Act falls far short of the international standard.</p> <p>158. Consequently, none of the requirements under Special Recommendation III are in place in Malawi.</p> <p>159. Notwithstanding the absence of a mechanism to implement the UN Resolutions, Malawi has set up a National Counter Terrorism Committee (CTC) in the Office of the President and Cabinet as the Chair with membership from the Ministries of Defence, Home Affairs and Internal Security, Finance, Transport, Information and Civic Education, Justice and Foreign Affairs and the National Intelligence Service (NIS) and the RBM. The Committee meets quarterly and is currently responsible for reviewing legislation related to terrorism and the UN Resolutions with a view to incorporating provisions of international instruments on terrorism into Malawi's anti-terrorism framework.</p>		
<b>Recommendations and comments</b>		
The authorities should consider -		
<ul style="list-style-type: none"> <li>- Setting up a framework for the freezing of funds used for terrorists financing, in accordance with the requirements of UNSCR 1267 and 1373, specifically:</li> <li>- Procedures and processes on de-listing and unfreezing of funds for persons wrongly listed</li> <li>- Procedures and processes on circulating the UN list to public and private sector players and not just financial institutions</li> <li>- Procedures for unfreezing of funds belonging to persons or entities that are not designated persons</li> <li>- Provide a mechanism through which a person or entity can challenge a freezing action</li> <li>- Providing a procedure and process by which persons subject to a freezing order is able to access funds or assets for basic expenses.</li> </ul>		
<b>Compliance with FATF Recommendations III</b>		
<b>SR.III</b>	NC	<ul style="list-style-type: none"> <li>Absence of a framework to implement the requirements on the freezing of funds used for terrorists financing</li> </ul>
<b>2.5 The Financial Intelligence Unit (FIU) and its functions (R.26, 30 &amp; 32)</b>		
<b>Description and analysis</b>		

**Legal Framework:** ML & TF Act (All Sections referred to hereunder are in relation to this Act)

160. The Financial Intelligence Unit (FIU) is the main driver behind the implementation of the AML/CFT regime in Malawi and many see the FIU as being an all-encompassing Unit that will deal with all money laundering matters in Malawi. The FIU is an administrative FIU and Section 11(2) (i) of the Act indicates that the FIU shall not conduct any investigation into ML or TF other than for the purpose of ensuring compliance by a financial institution with the provisions of this Act. However, the Act further provides that the FIU may perform such other acts as may be necessary to fulfill the objectives of the FIU. In many instances there is referral made to the investigative functions of the FIU, such as in Section 11(2)(e). The FIU authorities conceded that this may be interpreted as ambiguous, but felt that they would need as many powers as possible in order to be effective and to meet their objectives in the and operation of the FIU.

161. **Establishment of FIU as National Centre (c. 26.1):** The FIU is based in Lilongwe in the Reserve Bank of Malawi (RBM) building. It is the national central agency for analyzing, receiving and disseminating disclosures. Reports are sent to the FIU by hand delivery or courier (in the case of suspicious transaction reports), or email (in the case of weekly currency transaction reports). When setting up the FIU, the location was carefully considered and debated. It was decided that the FIU will be based in Lilongwe. Some of the positive spin offs of this location will be to:

- Separate from the Bank Supervision Department – which is based in Blantyre. This will help to alleviate the perceptions that the FIU is part of the RBM and reassert the independence of the FIU.
- Encourage electronic reporting by institutions.

162. **Guidelines to Financial Institutions on Reporting STR (c. 26.2):** Although Section 43(3) of the Act provides that a Supervisory Authority (SA) that supervises specific financial institutions shall continue to supervise such institutions with regard to compliance with the Act, this does not dictate that guidance shall be issued by them. It is understood that SAs will continue to monitor compliance with the legislation and issue such directives in relation to other regulatory matters. The FIU indicated that it expects to be the only authority who will issue rules and guidance in relation to the AML / CFT matters, but expects this to be in consultation with the relevant SA where such SA exists.

163. In November 2007, the FIU held a workshop with the banking sector to discuss draft guidelines for reporting large cash transaction and suspicious transactions, and reporting forms to be used by the banks. Thereafter, the FIU issued the “Guidelines for the Suspicious Transaction Reporting under Section 28 and 29 of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act No 11 of 2006”. The front page indicates that it is “Effective October 2007”. These guidelines were accompanied by a template reporting form entitled “Suspicious Transaction Report for Deposit taking Financial Institutions”

164. The Guidelines indicate that they are for the use of those financial institutions involved in:

- Acceptance of deposits and other repayable funds from the public
- Lending and financing of commercial transactions
- Foreign Exchange Bureaus
- Portfolio Management and advice
- Casinos and Lotteries
- Estate agents
- Legal practitioners and accountants carrying out transactions for their clients

165. The guidelines relate to the reporting of suspicious transactions and include a list of indicators. It is intended to be read in conjunction with the Suspicious Transaction Reporting (STR) form.

166. According to section 28 of the ML & TF Act, the information to be reported to the FIU, within three working days of forming a suspicion must include:

- Information in relation to the purpose of the transaction (as far as reasonable measures taken by the financial institution are able to ascertain this information);
- Information in relation to the origin of the transaction (as far as reasonable measures taken by the financial institution are able to ascertain this information);
- Information in relation to the ultimate destination of the transaction (as far as reasonable measures taken by the financial institution are able to ascertain this information);

- The identity and address of any ultimate beneficiary (as far as reasonable measures taken by the financial institution are able to ascertain this information);
- The purpose and nature of the business relationship with the client;
- In the case of a natural person: the name, address and occupation of a person, information relating to the national identity card or passport or other official identifying document of the person, source of wealth and property (as far as reasonable measures taken by the financial institution are able to ascertain this information);
- In the case of a legal entity: the name, legal form, address and directors of the entity, the principle owners and beneficiaries and control structure of the entity, provisions regulating the power to bind the entity, and any person purporting to act on behalf of the entity;
- In the case of a public official – all of the above AND, approval of senior management to conduct business with the customer; and
- A statement of grounds on which the financial institution holds the suspicion.

In addition, the report must be signed or otherwise authenticated by the financial institution.

167. Although the reporting form is intended for use in relation to suspicious transaction reporting under Sections 28 and 29 of the Act, the legislation does not dictate the information required to be reported in terms of Section 29 of this Act.

168. This reporting form is currently being utilized by FIs. Although the reporting form has been designed to kick-start reporting in Malawi, the manner in which the reporting requirement has been drafted in the legislation, with a cross-reference to customer identification requirements, has resulted in the form not being entirely consistent with the legislative requirements stipulated in Section 28 of the Act.

169. The FIU has decided to take a phased approach in the implementation of the legislation and banks are already utilizing the STR reporting form, the Large Currency Transaction report and the Large Currency Transaction weekly report to make reports to the FIU. The next phase of implementation is in relation to the DNFBCs. The FIU has drafted a reporting form for non-banking financial institutions and has been distributed it. FIU Feedback has been received from a number of institutions.

**Comment [atgp1]:** This sentence not too clear, especially the last part.

170. The FIU has also drafted a declaration form to be used for cross border currency reporting as required by Section 38 of the Act, to facilitate consultation with the relevant authorities in anticipation of the implementation of this reporting requirement.

171. **Access to Information on Timely Basis by FIU (c. 26.3):** The FIU has wide ranging powers to access information. Under Section 11 (2) (k), the FIU shall have the authority to request information from any financial institution, any SA and any law enforcement agency for the purposes of this Act.

172. Under Section 11(2)(q) of the ML & TF Act, the FIU may, pursuant to a memorandum of understanding (MOU), enter into any agreements or arrangements with any government institution or agency regarding the exchange of information. There are currently no MOUs or agreements in place that govern the exchange of information. The FIU has indicated that although they consider it a legal requirement for them to sign such MOUs and agreements in order to formalize the reciprocal sharing of information, they have in the interim established good working relationships with the relevant authorities and have been receiving the information requested, in particular from the MRA.

173. The FIU has not received any requests for information from any Law Enforcement Agency (LEA) so far. The FIU has not requested any information from the Malawi Police at this stage, but anticipates that requests for information will be granted, although there may be slight delays in receiving the information on a timely basis as the police database is not electronic. The FIU has access to information from the following databases:

- Their own database
- The Registrar of Companies (not electronic)
- A Credit Bureau (electronic)
- Law Enforcement Agencies (not electronic)

174. Law enforcement agencies interviewed showed a general willingness to work

with the FIU and provide information to them upon request.

175. **Additional Information from Reporting Parties (c. 26.4):** The FIU is able to request, and has received, additional information from reporting parties.

176. Currently, the FIU receives reports, some with the supporting documentation and some without it, as is the case with Currency Transaction Reports (CTRs). The FIU has successfully requested supporting documentation from the reporters and has received the requested information in a timely fashion (a few days). Banks interviewed confirmed that some documentation had been requested by the FIU and they had provided the information to the FIU as quickly as possible.

177. The Guidelines issued by the FIU require that reporters “list available documents that would be required in order for one to verify how suspicious activity was transacted” and the accompanying reporting form requires reporters to “list all documents that could serve as evidence of the suspicious transaction being reported.” Although this is to be used as an indication of the information utilized by the reporter to form the suspicion, the FIU can request any information from any institution, at any time, utilizing Section 11(2)(e) of the Act, where it may instruct any financial institution to take such steps as may be appropriate to facilitate any investigation anticipated by the FIU.

178. In addition to the powers to request any information under Section 11 (2)(k), Section 34 of the ML & TF Act requires every financial institution to pay special attention to certain transactions and verify the background and purpose of the transactions or business relations and record these in writing. This information is to be made available upon request to the FIU or the SA upon request.

179. Under Section 28(3) of the ML & TF Act, a financial institution that has reported a suspicious transaction, shall provide further information if requested to do so by the FIU. Additionally, under Section 43 of the ML & TF Act, the FIU also has the power to apply to the court to compel a financial institution to comply with sections of the legislation including reporting under Section 28 of that Act.

180. **Dissemination of Information (c. 26.5):** In terms of Section 11(2) (a) of the ML & TF Act, the FIU is able to receive, analyze and assess reports of suspicious transactions received from reporting institutions. Reports received pursuant to Section 11(2) (a) can be disseminated in terms of Section 11(2)(b). This section further stipulates that in addition to a requirement to send reports, where an element of money laundering or terrorism or financing of terrorism has been determined, to the appropriate law enforcement authorities, that the FIU is also required to provide this report to the relevant SA. The inclusion of the SAs in this requirement may have been intended to relate only to matters of non-compliance, but as currently drafted, requires that reports are dually referred to LEA and SAs. In practice, the FIU does not anticipate that reports will be dually referred to both the LEAs and SAs except in instances of non-compliance.

181. The provision created for the FIU to receive, analyze and assess reports only extends to STR and CTR reports that are made under section 28. The legislation does not make reference to other financial information held by the FIU, but in practice the FIU is receiving and analyzing all information received by it.

182. Whilst Section 11(2) (b) creates the obligation for the FIU to send any reports received under section 11(2)(a) to the relevant LEAs and SAs, there is no extension of this requirement to disseminate information from all other reports received, e.g., Cross Border Reports (XBRs) to authorities for investigation. In practice, the FIU intends to send any information that it holds, should it detect any element of money laundering or terrorist financing, to LEAs or SAs.

183. Section 11 (2) (d) of the Act stipulates that where the FIU has of its own accord entered the premises of a FI to inspect clients records, and that if there are grounds for the FIU to suspect that there are transactions that involve proceeds of serious crime or terrorist financing, the FIU will give any information derived from the inspection to a LEA as appropriate.

184. At the time of the onsite visit to Malawi, the FIU had disseminated its first report to the ACB. Previously, there had been one suspicious transaction reported to the RBM before the inception of the FIU that was investigated by an investigation task force, which was comprised of representatives from the MRA, ACB, Fiscal and Fraud Unit (FFU) of the Malawi Police Service, the RBM, and the office of the Director of Public Prosecutions (DPP). The task force was put in

place to investigate this matter, mostly as a means of demonstrating to the various agencies the need to work together in the investigation and prosecution of ML and TF matters. When the Act came into force before the investigations were completed, the FIU sent out reports to the FFU on what had been done on the case, so that they could investigate further. The DPP has indicated that the case has merit in respect of certain identified predicate crimes, but further investigation is required.

185. **Operational Independence (c. 26.6):** The FIU is set up by legislation as an independent unit with its own budget, which is provided by the Government of Malawi. In the process of being set up independently, the FIU is making use of the support of the RBM to establish itself. The FIU is currently housed within the RBM building and is utilizing the network infrastructure and other technical resources of the RBM to receive STR reports. Once the reports are received, the analysis is done from a stand-alone database that is managed and controlled using the computers that belong to the FIU.

186. Under Section 13(1) and (2) of the ML & TF Act, the Director of the FIU is to be appointed by the President but, his appointment has to be confirmed by the Public Appointments Committee (PAC), which is a committee comprised of members of parliament. The Director is appointed for a five year renewable term, and removal from office is also to be approved by the PAC, grounds for the removal can only be incapacity or incompetence. The Act stipulates that the Director of the FIU shall not be a person who is a Member of Parliament, or a director, officer or servant or has controlling interest in any financial institution. Prior to the time of the mission, a candidate had been nominated for the position of the Director, but the appointment was not confirmed by the PAC. In the interim, the Deputy Director has been seconded to the FIU from the RBM for a three- year period and he is fulfilling the functions and duties of, and exercising the powers of, the Director.

187. The Director has full discretion regarding the employment of staff and the terms of such employment, with the stipulation that the people employed should be suitably qualified. and the Minister may approve the terms and conditions of the employment (Section 14 (1)).

188. The FIU is currently drafting a FIU procedures manual which includes matters such as employment policy, administrative and financial routines, human resource matters and a code of conduct.

189. All final decisions under the powers afforded to the FIU, including the signing of domestic and international MOUs, are taken by the Director.

190. **Protection of Information Held by FIU (c. 26.7):** Members of staff of the FIU are expected to take an oath of confidentiality before they start working at the FIU. Whilst working at the FIU and after, they are to maintain confidentiality on any matter relating to the performance of their duties. The Director, officer or employee of the FIU shall not disclose any information obtained in the performance of their duties, except where it is sanctioned by the court, to aid in the detection, investigation or prosecution of an unlawful activity, ML offence or FT offence (Section 16). Should a member of the FIU improperly disclose any information, the person would be liable to a two-year imprisonment term and a fine of K100, 000 (US\$714.00).

191. Furthermore, the Director, an officer or employee of the FIU shall not disclose any information that would directly or indirectly identify the individual who provided a report to the FIU, or information on an individual or legal entity about whom a report was provided under the Act (Section 17 of the ML & TF Act).

192. Apart from each staff member of the FIU maintaining confidentiality, each person working for the Auditor General who audits the FIU has a duty not to disclose any information relating to the work of the FIU that may have obtained in the course of an audit (Section 20(2)).

193. The employees that are currently working at the FIU have all signed the oath of confidentiality.

194. Currently, the FIU makes use of the IT infrastructure offered by the RBM, including email facilities, but its own database is used to capture and store reports is a standalone system to which only the FIU staff have electronic access. At the time of the mission, the office space of the FIU was being segregated from the rest of the building by implementing access control mechanisms. These mechanisms include a separate electronic id-card entry point, complete walled severance



from the Reserve Bank space, and above-ceiling partitioning.

195. In order to protect confidentiality of the FIU information, but also to protect the identity of the analyst, the FIU has ruled that no dissemination will bear the name of the analyst. A further safeguard currently in place is that staff members can work after official hours only by notifying the Deputy Director in writing of the period of time he/she is expected to be within the office and the reason. The Deputy Director informs the Security Guards of this. Staff members who have not been properly authorized shall not remain within the premises after working hours.

196. Currently, all STRs remain sealed upon receipt and are forwarded to the Deputy Director of the FIU. He then issues instructions regarding the handling and analysis of the STRs. As the FIU grows, it is envisaged that different levels of access to certain databases will be implemented, restricted to specific staff handling the relevant issues.

197. In an interview with one of the FIs, it stated that it had delivered reports to the mailing department of the RBM in Blantyre marked for the attention of the Deputy Director of the FIU and that these reports were to be sent by the RBM to the FIU in Lilongwe. This institution claims that it had delivered such a report containing in excess of 10,000 cash threshold transactions to the RBM in Blantyre. The FIU disputes the institution's assertions. Such report is not reflected in the FIU's statistics. Subsequent to the assessment mission and delivery to the authorities of the draft report, the FIU established that some banks have not been using the hand delivery or courier method of delivering reports as requested, and the FIU is in the process of resolving this process.

198. The investigative functions attributed to the FIU in the legislation and the interplay between the information gathered under production orders and other actions required by the FIU, may in the future impact on management of information as "intelligence only", and will require consideration of operational safeguards to protect this information. This will need to be addressed as implementation of the legislation progresses.

199. **Publication of Annual Reports (c. 26.8):** The FIU may compile statistics and records, disseminate information within Malawi or elsewhere and make recommendations arising from information received. The FIU may also conduct research into trends and developments in the area of AML / CFT (Section 11(2)(f)).

200. The Act requires the FIU to prepare and submit an annual report, which reviews the work of the FIU, to the Minister on or before the 31<sup>st</sup> of December of each year (Section 21(1)(b)). This report shall be laid before Parliament (Section 21(2)). As the FIU has just been established, there have been no annual reports submitted so far, as the first report is due to be submitted any day between 1<sup>st</sup> July and 31<sup>st</sup> December, 2008. Similarly, no trend analysis has been undertaken and, therefore, no reports drafted in this regard.

201. The FIU is also expected to advise the Minister from time to time on the work of the FIU and, in particular, on matters that could affect public policy or the priorities to be set by the FIU (Section 21(1)(a)). Since its inception the FIU has submitted one report to the Minister, and this report generally covered the operations of the FIU and plans of the FIU. These periodic reports should generally outline the work of the FIU without giving the specifics of the cases the FIU has handled in the past year.

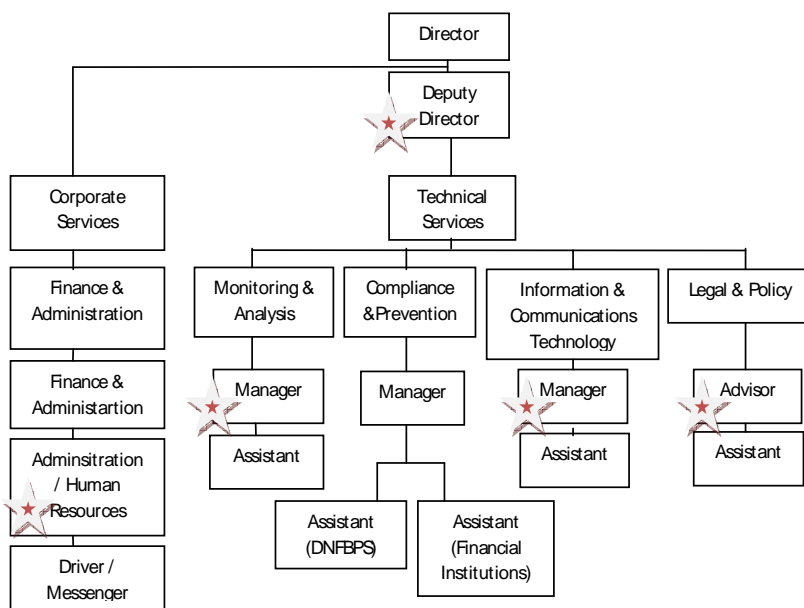
202. **Membership of Egmont Group (c. 26.9):** The FIU intends to apply for Egmont membership. So far, discussions have been held with the Financial Intelligence Centre of South Africa and the Mauritius FIU for them to act as sponsors, both of whom have informally agreed to do so. Malawi should begin its application process in October 2008, and hopefully be admitted into Egmont by June 2009.

203. **Egmont Principles of Exchange of Information Among FIUs (c. 26.10):** The FIU has the power to extend assistance to foreign jurisdictions with respect to property tracking, monitoring and confiscation orders (Section 11(2)(j)); to exchange information with foreign FIUs on terms and conditions as set out in an agreement between the parties (Section 11(2)(p)); and, where no such agreement exists, on terms and conditions agreed upon by them (Section 12). As stipulated in Section 12 (a) and (b), the information shall be used for intelligence purposes only, and shall be treated in a confidential manner and shall not be disclosed without the express consent of the FIU.

204. **Adequacy of Resources to FIU (c. 30.1):** According to the structure of the FIU, it has five

departments, namely the Information Technology Department (ICT), Legal and Policy Department (LAP), Monitoring and Analysis Department (MnA), Compliance and Prevention Department (CAP) and Corporate Services Department. Currently, all departments have representative staff members except the CAP. As the recruitment of staff progresses, all departments are to be headed by managers, except the Corporate Services Department, which is headed by the Director, and the Compliance and Prevention Department which is headed by the Deputy Director who will also generally head all technical services of the FIU. This means that the managers of MnA, ICT and LAP will report to the Deputy Director.

205. The organization chart of the FIU is depicted below. The stars indicate the positions that are currently filled. The Deputy Director and ICT Manager are on a three- year secondment from the RBM. The terms of the secondment are that the FIU reimburses the RBM all expenses it incurs with regard to employee salaries on a quarterly basis.



206. The Director of the FIU is responsible for appointing other members of staff. Section 14 stipulates that such officers and employees of the FIU must be suitably qualified and experienced persons. Furthermore, Section 14(2) states that at least one of the members of the FIU should be a legal practitioner, and one other person should have a sound financial, economic or accounting training or experience. This requirement has already been met by the FIU with the appointment of the Manager for MnA and the Advisor in LAP. The MnA manager, who has local and international accounting and auditing experience in the financial sector is currently conducting analysis of reports received by the FIU.

207. Due to the low threshold informally set by the FIU for CTRs initially, and the lack of any formal categorization or exclusion of certain transactions (such as exclusion of commercial transactions), there is the potential for large volumes of CTRs to be reported to the FIU by the FIs. One institution indicated that it reports approximately 50 cash threshold reports per week, except in December, when a larger number of transactions were reported due to the festive season. Some FIs have expressed their reservations as to whether the FIU has the adequate resources to manage this volume of reporting. One institution said that the FIU did not acknowledge receipt of reports and no reference numbers were allocated to reports. However, the FIU demonstrated that it has a robust reference system for logging reports, which includes: the nature of the institution, the specific number of the bank, the branch and other relevant information.

208. Since the mission, the FIU reports that it has met with the Bankers Association to discuss the CTR threshold and it was agreed to revise the threshold to a higher amount. A recommendation will be submitted to the Minister of Finance in this regard. The FIU further reports that it has secured funding for the procurement of software that will facilitate submission, analysis and storage of larger volumes of data. The FIU believes that this software will assist them in managing the volumes of reports received.

209. The FIU plans to recruit an additional two members of staff by the end of May, 2008, they will include a compliance officer and an IT officer. The FIU also plans to recruit two analysts when the new budget is allocated on July 1, 2008.

210. Funds for the operations of the FIU come from the Government's annual budget, any grants by other governments and any other money legally acquired by the FIU, provided that the Director has to approve any donations before these are made to the FIU. The financial year of the FIU begins on the first of July of one year and ends on the 30th of June of the next year. Before Government can apportion funds to the FIU, the FIU must submit an annual budget three months before the beginning of the next financial year. The FIU prepares for each new annual financial year its own annual budget of revenue and expenditure in accordance with Section 19 of the Act. Funds are provided by the Government of Malawi. The Director of the FIU decides how the budget will be applied. The FIU is subject to Audit examination by the Auditor-General, under strict confidentiality.

211. Since its date of inception, the FIU has been given K70, 000,000 from Government for its setup and operations. This amount is not given in one lump sum, but is received in monthly disbursements after submitting a monthly budget report to the Secretary of the Treasury.

212. Technically, the FIU has obtained technical equipment, with funding provided by the Millennium Challenge Cooperation through the US Department of the Treasury- Office of Technical Assistance. The equipment provided includes hardware such as computers, printers, scanners, servers, and software. The FIU is utilizing the equipment, as well as developing a web site for the FIU and setting up a local area network.

213. The FIU offices are currently housed in the Reserve Bank of Malawi (RBM) and the arrangement is that the FIU will be renting office space from RBM until such a time as the FIU is ready to move into its own secure office space. The FIU estimates that this should happen within the next three years.

214. **Integrity of Competent Authorities (c. 30.2):** The draft Policy and Procedure Manual of the FIU stipulates that when considering employing new members of staff, the prospective employee is expected to have an interview and submit documentation in relation to personal information and educational qualifications. Before the applicant can be employed, it is expected that a thorough background check will be performed for the FIU by the Police, and the National Intelligence Service.

215. In addition to authenticating the information in the documentation provided by the applicant, this background check should will consider matters such as whether the prospective employee or a member of his or her family has a criminal record, and whether the person is connected to a politically exposed person. The FIU will also be obtaining references from past employers. All this must be completed before an offer of employment is made.

216. Each member of the current staff of the FIU has not undergone this rigorous screening process but appears to be well qualified with many years of experience in their respective fields.

217. Each current and future employee is expected to complete a declaration of assets form, which outlines the assets owned, as well as those owned by immediate family members.

218. **Training for Competent Authorities (c. 30.3):** Members of the FIU have made study tours to the Financial Intelligence Centre in South Africa and the FIU in Mauritius. The FIU endeavors to participate in all training offered by the World Bank, IMF, and other bodies. So far, members of the FIU have participated in the following training sessions:

- Risk based approach to AML/CFT supervision in financial institutions conducted by MEMFI/IMF-East Africa, December 2007
- Rolling out an FIU conducted by the World Bank, February 2008
- AML/CFT Workshop on measures for FIU officials conducted by the IMF and the African Development Bank, October 2007

219. As the FIU establishes itself there will be on-the-job training and interaction amongst the staff members. There appears to be a general willingness to use the combined skills of all the staff

members to learn from each other and leverage off each other's strengths.

220. The FIU has done some initial training and awareness for members of the AML / CFT Task Team and other stakeholders in preparation for the World Bank FSAP. The FIU plans to conduct more detailed training for the Malawi Police at the end of March 2008.

221. **Statistics (applying R.32):** The FIU has established a database that will record the number and nature of reports received, sender of the report, district from which report was sent, and any other internationally recommended statistics.

222. Currently the FIU has statistics of the STRs, CTRs and XBRs received. The number of reports received from November 2007 to 31 January 2008 are:

#### STRs

Number received	of STRs	Source of reports
5		Banks
1		Law enforcement
<b>6</b>		<b>Total</b>

#### CTRs

Number received	of CTRs	Source of reports
<b>4873</b>		Banks

223. There may be a discrepancy in this statistic due to one institution's claim that it had sent the FIU a report that contained in excess of 10,000 transactions. The FIU disputes this claim and therefore the report is not reflected in these statistics.

#### XBRs

Number received	of XTRs	Source of reports
<b>1</b>		Law enforcement

224. It should be noted that the STR report noted as received from a law enforcement agency and the single XBR received is the same report but calculated in both statistics. The banks have also indicated that should a suspicious transaction be over the cash threshold limit, that they will report both a STR **and** a CTR.

225. There have been no requests for information made to the FIU by LEAs.

226. There has been one spontaneous referral of information by the FIU to the MRA. This does not include the joint investigation, as this STR was received by the RBM prior to the inception of the FIU.

227. The FIU has not received any monthly reports on the status of seized property required under Section 72(2).

228. The FIU aspires to have access to all AML/CFT statistics and is considering whether it should become the central authority for all AML /CFT statistics. It is envisaged that this will be discussed when negotiating MOUs with the relevant stakeholders.

229. Whilst interviewing financial institutions, some provided unsubstantiated statistics of STRs

and CTRs that were not consistent with the information provided by the FIU. Besides the report mentioned above containing in excess of 10,000 transactions, the margin of error was small. The variance could be attributed to the reporting requirement in section 28 of the Act mentioned above which could create ambiguity regarding when to report STRs and when to report CTRs.

230. **Analysis of Effectiveness:** The legislation has been in effect for almost 8 months and the FIU has been receiving reports for about 3 months at the time of the mission. The FIU has been a strong driver of the entire AML/CFT regime in Malawi and is very clearly seen as the focal point of the ML legislation and the successful implementation of the regime by all stakeholders that the team met with. Substantive action has been taken in the establishment of the FIU, its policies and procedures, stakeholder relationships, the reporting regime, training, IT and other operational areas of the FIU.

231. The FIU has started receiving reports, analyzing them and, in addition to the report already disseminated, expects to be disseminating more reports for further investigation in the near future. The FIU has created awareness surrounding the legislation and the reporting requirements, especially in relation to banks, and has utilized the evaluation as a springboard to educate all stakeholders. Even though there has been some delay in the publishing of Regulations, the FIU seems to enjoy the support of the stakeholders in terms of rapid implementation, albeit informal, on the basis of joint discussions and agreements without them. The FIU has started the process of negotiating MOUs and agreements in order to fully implement all aspects of the legislation eg receiving XBRs and the exchange of information. The FIU has a strong underlying legal framework and the general support of both the government and all relevant stakeholders. It has done well to implement basic requirements in such a short space of time.

**Recommendations and comments**

The authorities should consider –

- Issuing regulations to complete the framework for the FIU.
- Reviewing the current reporting form used for reporting transactions under Section 28 and 29 of the Act and amend it where necessary in order to meet the legislative requirements and make it more user friendly for SAs and auditors to report. The authorities could consider a separate reporting form for the SAs and auditors.
- Conducting awareness seminars and consultations beyond the banking sector and include the general public.
- Endeavoring to manage some of the expectations of stakeholders in relation to its role particularly in respect of investigations and feedback.
- Reviewing how it receives, captures, and manages reports and statistics to accurately reflect numbers received.
- Ensuring that overlaps and ambiguities are practically dealt with by issuing guidance notes.
- Reviewing the impact of the CTR reporting requirements, the threshold set and the resource impact on the emerging FIU against what benefits that may be derived from this method of reporting in a cash based economy.
- Expediting the FIU’s independence from the RBM and ensuring its information and office space is autonomous and secure.

**Compliance with FATF Recommendations 26, 30 & 32**

<b>R.26</b>	PC	<ul style="list-style-type: none"> <li>• There are shortcomings in the application of the legislation in relation to guidance notes and in the application of the reporting forms.</li> <li>• MOUs are not in place to legislatively share information with competent authorities domestically.</li> <li>• Due to the fact that the FIU has not been in operation for a year yet, it has not publicly released any reports in relation to its activities.</li> <li>• At the time of the mission, the FIU was still in the process of establishing control over its offices and IT systems in order to adequately protect its information.</li> <li>• The legislation has not been fully implemented due to short time</li> </ul>
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		that the FIU has been established and effectiveness in some areas could not be established.
<b>R.30</b>	NC	<ul style="list-style-type: none"> <li>The FIU Director is not appointed in accordance with the legislation.</li> <li>The FIU has not completely established a database nor does it have enough analysts to manage volumes of reporting to the FIU.</li> <li>FIU staff have not been subjected to the rigorous screening process as required by their own Policy and Procedure Manual.</li> <li>The rating in this box is an aggregate rating of R.30 across the various parts of the report.</li> </ul>
<b>R.32</b>	NC	<ul style="list-style-type: none"> <li>Some discrepancies may have been created in the statistics due to ambiguous reporting requirements</li> <li>The rating in this box is an aggregate rating of R.32 across the various parts of the report.</li> </ul>
<b>2.6 Law enforcement, prosecution and other competent authorities—the framework for the investigation and prosecution of offences, and for confiscation and freezing (R.27, 28, 30 &amp; 32)</b>		
Description and analysis		
<p>232. <b>Legal Framework:</b> The ML &amp; TF Act; Police Act; Criminal Procedure &amp; Evidence Code (CPEC); Corrupt Practice Act (CPA); Penal Code.</p> <p>233. The powers to investigate, conduct searches and seizures, detain persons, and compel witness statements are extensively provided for in the various pieces of legislation.</p> <p>234. <b>Designation of Authorities ML/FT Investigations (c. 27.1):</b></p> <p><i>Money Laundering</i></p> <p>235. There has been no specific law enforcement agency designated as having primary responsibility for ensuring that ML and FT offences are properly investigated, but the Malawi Police Service (MPS) is expected to conduct these investigations using its normal police powers as they are mandated to detect and bring criminal offenders to justice. The ML &amp; TF Act stipulated that the FIU shall not conduct ML and FT investigations but shall send any report to the appropriate law enforcement authorities. At this stage, it is envisaged that reports will be sent to the Fraud and Fiscal Unit of the MPS, the Customs and Tax Units of the MRA, the Department of Immigration and the ACB.</p> <p>236. <b>Office of the Director of Public Prosecutions:</b> Pursuant to Section 99 of the Constitution and Section 79 of the CPEC, the Director of Public Prosecutions (DPP) is responsible for the prosecution of all crimes against the laws of Malawi. The DPP can also delegate this role to other law enforcement agencies. In this respect, the ACB, MRA and the MPS can also prosecute offences related to corruption, tax and those that are not of a serious nature respectively. However, in so far as prosecuting ML and TF offences is concerned under Section 2 of the ML &amp; TF Act, the DPP will be responsible for prosecuting such offences and does not intend to delegate this role.</p> <p>237. To date, the DPP has not been involved in the prosecution of any ML or TF case.</p> <p>238. <b>Malawi Police Service (MPS):</b> The MPS is established under Section 3 of the Police Act. It has in excess of 800 members nationally and has specialized divisions such as the Fiscal and Fraud Unit, the Criminal Investigations Department (CID), the Dangerous Drugs Department (DDD), Fingerprint Bureau, Dog Section, General Duties, and Murder Squad. Its duties are set out in section 4 of that Act to include, among others, the prevention and detection of crime and the due enforcement of all laws and regulations for which it has enforcement responsibility.</p> <p>239. The DDD handles matters of drug production and trafficking, however, it is faced with a number of challenges such as inadequate human and financial resources, transport, lack of sniffer dogs, patrol boats, surveillance equipment to name a few. A forensic Laboratory is to be established to assist investigation as tests are currently carried out at an agricultural research laboratory. The</p>		

DDD works very closely with the UNODC.

240. The FFU a special branch of the MPS and is responsible for the investigation of all fraud matters and any other financial offence for example exchange control contraventions, theft by public officials etc. The FFU has a staff of 38 officers, some of which are deployed at 16 of the 18 border posts to assist in cases of exchange control contraventions where they act as agents of the RBM. The FFU has appointed a desk officer who will serve as the liaison officer and deal with all matters referred by the FIU.

241. **Anti-Corruption Bureau (ACB):** The Corrupt Practices Act establishes the Anti-Corruption Bureau. The Act mandates the ACB to conduct corruption prevention exercises, public education activities and conduct investigations and prosecution of offenders. The ACB became operational in 1998. The ACB has fully functional operational corruption prevention, public education investigations and prosecutions sections. The Bureau has an authorized staff of 111 officers. Currently the staff strength is at 91, of which 30 are investigators and 7 are prosecutors.

242. In discussions with the authorities, they indicated that they intended to use the ML & TF Act to broaden their investigations in corruption cases by including the laundering of the proceeds of corruption. It is expected that this will be done in accordance with section 10 of the CPA which authorizes the ACB to: “investigate any offence under any written law disclosed in the course of investigating any alleged or suspected corrupt practice or offence under this Act.”

243. Indeed, the ACB and the FFU have indicated that they are currently conducting investigations where there are money laundering elements that have been detected. At this stage they expect that all investigators will be looking at money laundering aspects of their ongoing cases.

244. **Malawi Revenue Authority (MRA):** The MRA is comprised of the Taxation and Customs Divisions. The Customs Division is tasked with monitoring the movement of goods into and out of Malawi. Staff are deployed at all 18 border posts, two of which are the national airports in Blantyre and Lilongwe. The MRA has 490 staff in the Customs Division.

245. All terrorism matters are to be referred to the NIS. The NIS has indicated that it intends to have a dedicated capacity in the future to look at ML and FT matters, but does not have this capacity at present.

246. **Ability to Postpone / Waive Arrest of Suspects or Seizure of Property (c. 27.2):** No statute could be identified that related to postponing or waiving arrest of suspected persons or the seizure of money for the purpose of identifying persons involved in money laundering activities or for gathering evidence. Authorities indicated that these techniques are used informally to conduct other investigations, but no formal or informal procedures could be identified in this regard. Only the ACB indicated that it has the authority to waive or postpone arrests in order complete its investigations, but this has not been done in relation to a money laundering investigation and there was no specific legal provision that dealt with this. Authorities expect that they will be considering these measures when they conduct money laundering investigations in future, now that the legislation is being implemented.

247. **Additional Element - Ability to Use Special Investigative Techniques (c. 27.3):** Although authorities indicated that they conduct undercover investigations. There is no legal framework that could be identified in relation to this. No special techniques have been used in relation to ML or FT investigations. Law enforcement agencies interviewed indicated that they do conduct undercover operations by infiltrating organizations and by using informers. No special permission or process is used for this practice and the persons involved are not prosecuted by the DPP.

248. **Additional Element - Specialized Investigation Groups & Conducting Multi-National Cooperative Investigations (c. 27.5):** There is no special permanent or temporary group that is specialized in the investigating of proceeds of crime, the seizure, freezing and confiscation of the proceeds of crime. Before the establishment of the FIU one investigation was carried out by an investigation task force, which was comprised of representatives from the MRA, ACB, Fiscal and Fraud Unit (FFU) of the Malawi Police Services, the Reserve Bank of Malawi, and the office of the Director of Public Prosecutions. The taskforce was led by an US Department of the Treasury Advisor who was giving technical assistance to Malawi on how to set up an FIU. The task force

was put in place to investigate this matter, mostly as a means of introducing to the various agencies to the need to work together in the investigation and prosecution of ML and TF matters. The matter is currently with the FFU for further investigation.

**249. Additional Elements - Review of ML & FT Trends by Law Enforcement Authorities**

**(c. 27.6):** As the implementation of the legislation is still extensively new, the FIU intends on conducting awareness with the law enforcement agencies. No review of methods, trends or techniques has been undertaken yet.

**250. Ability to Compel Production of and Searches for Documents and Information (c. 28.1):**

The powers to compel production of, search, seize and obtain financial records pursuant to the ML & TF Act are covered in Section 2.3 of this Report.

251. Section 113 of the CPEC authorizes search warrants to be issued by a judicial officer to any police officer to enter any place to seize any article that is reasonably suspected of being evidence of the commission of an offence. The search warrant is used “where it is proved on oath to a court that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building or place.” This is the provision that the police or other agencies working with the police have used in financial crime related investigations. It is expected that this authority will be utilized by the police to search premises and to obtain any record that would assist in any ML or TF investigations.

252. Furthermore, the ACB has the power through a search warrant to access all records necessary for an investigation. Section 11 of the CPA gives the ACB authority to “access all books, records, returns, reports and other documents relating to the work of the government or any public or private body.” In addition, under Section 12 of that Act, “the Director may, by order in writing supported by a warrant...authorize any officer of the ACB to investigate any bank account, share account, purchase account, expense account or any other account or any safe box in any bank.” Such an order is sufficient for the disclosure or production of all or any information, accounts, documents or articles as may be required by the ACB.

253. **Power to Take Witnesses’ Statement (c. 28.2):** The Malawi Police have the powers under the police act to take witness statements under the Criminal Procedure and Evidence Code using Judges Rules. The ACB can obtain sworn statements under Section 12A of the Corrupt Practices Act.

**254. Adequacy of Resources to Law Enforcement and Other AML/CFT Investigative or**

**Prosecutorial Agencies (c. 30.1):** At present, the DPP has a current authorization for 60 staff members, 33 of which positions being filled, including 13 paralegals. The two main offices are in Lilongwe (which has 20 prosecutors, including 9 paralegals) and in Blantyre (which has 13 prosecutors, including four paralegals). A third office was recently opened in Mzuzu and is serviced by one paralegal. The current caseload exceeds the capacity of the present staffing levels of the DPP.

255. All other law enforcement agencies discussed above complained of a general lack of human resources, funding, cars, and technical resources to meet their requirements. Access to vehicles was a particular problem.

256. **Integrity of Competent Authorities (c. 30.2):** Members of the FFU are recruited from within the CID Division. There is a minimum standard of education and some accounting knowledge is an advantage. The CPA specifies the required qualifications, training and integrity for the Officer in Charge.

257. **Training for Competent Authorities (c. 30.3):** The training of law enforcement and prosecution authorities in combating ML and FT has begun. Some training has been provided with assistance from the World Bank, International Monetary Fund, the United Nations Office Against Drugs and Crime, largely through the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).

258. The Directorate of Public Prosecution intends to build capacity in terms of prosecution of money laundering offences and financing of terrorism. With the assistance of the Millennium Challenge Corporation, a technical adviser on money laundering and prosecution has been assigned



to the Directorate to assist with internal training of prosecutors.

259. Several training sessions for both police and public prosecutors have taken place under the Millennium Challenge Corporation program, through the US Department of the Treasury. Under this program, about 100 investigators, prosecutors, judges and magistrates have been trained on how to detect, investigate and prosecute money laundering offences, and preside over financially related crime. In August 2007, Malawi hosted a workshop organized with the assistance and expertise from the Commonwealth Secretariat and the UN Office against Drugs and Crime. The workshop included topics such as the fight against terrorism, money laundering and financing of terrorism. The FIU intends to conduct further training for the LEAs in the near future.

260. **Additional Element (R. 30) - Special Training for Judges (c. 30.4):** Training was held from March 31 through April 5, 2008, for 35 investigators and prosecutors and on the last day of the training, a moot court was held where actual judges participated as if presiding over a real case.

261. **Statistics (applying R.32):** The MPS reported that it is currently investigating three cases where there are elements of money laundering involved. There have been no ML prosecutions. The ACB reported that it is currently investigating 4 high profile cases where there are elements of money laundering involved. There have been no money laundering prosecutions. There are currently no investigations being conducted for FT offences.

262. There have been no assets frozen, seized or confiscated in relation to ML related criminal proceeds or pursuant to UN Resolutions.

263. Although the authorities have indicated that they do receive requests for information from other law enforcement authorities, such as Interpol, this is dealt with in an informal manner and they do not keep statistics.

264. **Analysis of Effectiveness:** Adequate legislative powers have been created to conduct investigations and compel the production of information. The law enforcement authorities have indicated that, since the legislation has just been passed, they are still determining what is required in terms of implementing it. The ACB and the FFU seem to have had some exposure to complex financial investigations in terms of their existing work and are considering applying the new legislation to a few of their current cases.

265. The main concern for all the law enforcement agencies and the prosecution authorities is the lack of adequate human, financial and technological resources to undertake investigation and prosecution of complex financial crime related cases.

#### Recommendations and comments

The authorities should consider –

- Having the FIU conduct train the trainer exercises with law enforcement agencies so that they can give training and awareness exercises internally to create greater awareness and understanding of the ML & TF Act.
- Ensuring that law enforcement agencies should maintain in a systematic manner statistics in relation to money laundering investigations, prosecutions and seizure of proceeds of crime.

#### Compliance with FATF Recommendations

<b>R.27</b>	PC	<ul style="list-style-type: none"> <li>• Inadequate implementation of the ML &amp; TF Act by law enforcement agencies.</li> <li>• There is no evidence of measures taken by authorities to waive or postpone arrests of suspected persons or the seizure of money for the purpose of identifying persons involved in money laundering activities or for gathering evidence.</li> </ul>
<b>R.28</b>	C	
<b>R.30</b>	NC	<ul style="list-style-type: none"> <li>• Agencies are overall not adequately resourced to conduct complex financial investigations in addition to predicate offence investigations.</li> <li>• Insufficient training or exposure exists to AML/CFT matters.</li> <li>• The rating in this box is an aggregate rating of R.30 across the various parts of the report.</li> </ul>
<b>R.32</b>	NC	<ul style="list-style-type: none"> <li>• The rating in this box is an aggregate rating of R.32 across the various parts of the report.</li> </ul>

## 2.7 Cash couriers (SR.IX)

### Description and analysis

266. **Legal Framework:** Exchange Control Act; Customs and Excise Act; the ML & TF Act.

267. The Exchange Control Act and its accompanying Regulations have provisions regarding: the taking out or sending of Malawi currency, foreign currency, securities or bullion out of Malawi (section 3, Regulation 19); Possession of foreign currency (Regulation 25); Making declaration in relation to currency, foreign currency, securities or bullion (Regulation 27); Search for and seizure of currency (Regulation 27); False statements (Regulation 33); and Forfeiture (R36).

268. The Customs and Excise Act: Declaration (Section 29); Request information (Section 13); Search (Sections 13, 14, 15, 16); Arrest (section 19); Seizure (Section 146); Forfeiture (Sections 147, 148). Since liberalization of foreign currency, the importation of currency is not restricted. Therefore, these sections are not strictly adhered to as far as currency or negotiable bearer instruments are concerned.

269. The ML & TF Act: Declaration (Section 38); Search (Section 38); Seize Sections 38, 39); Detention and release of currency or negotiable instruments (Section 40).

270. "Goods" includes all wares, articles, merchandise, CURRENCY, baggage, stores, conveyances, animals, matter or things or any description – (Customs and Excise Act); "currency" includes coins, currency notes, drafts, travelers cheques, letters of credit, bills of exchange and promissory notes (Exchange Control Act); "negotiable bearer instrument" (NBI) means a document representing ownership of debts or obligations, including bills of exchange, promissory notes or certificates of deposit, whether made payable to the bearer or not

271. **Mechanisms to Monitor Cross-border Physical Transportation of Currency (c. IX.1):** The ML & TF Act requires a declaration to be made to an authorized officer. Currently members of the MPS are operating in 16 of the 18 border points including the two airports as agents of the Malawi government to deal with matters relating to the Exchange Control Regulations. The MPS can use its powers to request declarations, search and seize for any currency over the prescribed threshold of K3000 (approximately US\$21) when a person is leaving the country. Should money be seized, it is sent to the RBM for further inquiry or action. Although the provisions of the ML & TF Act have not yet been enforced, the FIU has drafted MOUs and reporting forms that will be sent to the MRA and the police/immigration to facilitate implementation of section 38 of the ML & TF Act. Additionally, the FIU has secured funding from the US Treasury in order to procure software that will facilitate the electronic submission of reports from the borders and the creation of a database for cross-border currency reports.

272. **Request Information on Origin and Use of Currency (c. IX.2):** Although the authority to request information is provided in the Customs and Excise Act and the Police Act, this authority is not exercised by the Customs Division because customs officers are not required at present. to request a declaration of currency. Apparently, the MPS does exercise this power when false declarations or disclosures are detected when travelers leaving the country are questioned from time to time.

273. There are no statistics available for the last few years that reflect any cases of contravention of the Exchange Control Regulations.

274. **Restraint of Currency (c. IX.3):** The ML & TF Act stipulates that where an authorized officer has reasonable ground to believe that currency or negotiable bearer instruments (NBIs) found in the course of an examination or search may afford evidence of the commission of an offence under the ML Act, a serious crime, a money laundering offence or an offence of financing of terrorism, the officer may seize the currency or NBIs. The authorized officer can also seize the currency or NBIs on reasonable grounds for suspecting that it is intended by any person for use in the commission of a serious crime, a money laundering offence or an offence of financing of terrorism. This is not the current practice as this aspect of the ML & TF Act has not been implemented, although as stated earlier, the authorities are discussing this matter and plan on taking action to implement this regime.

275. **Retention of Information of Currency and Identification Data by Authorities when appropriate (c. IX.4):** The declaration requirements under the Exchange Control Act and Customs

Acts indicate that declarations can be either verbal or written. The FIU has designed a draft report form that can be used to capture all relevant information and store such information. At this stage, there is no information available relating to declarations, nor are there statistics for cases where currency was seized by either the Customs or Exchange Control department.

**276. Access of Information to FIU (c. IX.5):** Section 38 of the ML & TF Act requires a report to be made to an authorized officer and that the authorized officer shall send a copy of the report without delay to the FIU. The legislation is silent on the information required to be in the report and Regulations have not been drafted yet. A draft form has been compiled by the FIU which sets out information to be collected for further discussion in this regard but has not been implemented yet.

**277. Domestic Cooperation between Customs, Immigration and Related Authorities (c. IX.6):** The MPS and the Customs officers work hand-in-hand at the border posts together with immigration officials although, from discussions with the authorities, it is understood that the MPS and not the Customs officers are responsible for any foreign exchange threshold contraventions.

**278. International Cooperation between Competent Authorities relating to Cross-border Physical Transportation of Currency (c. IX.7):** No information in relation to international cooperation relating to cross-border physical transportation of currency or the sharing of such information between authorities was provided.

**279. Sanctions for Making False Declarations / Disclosures (applying c. 17.1-17.4 in R.17, c. IX.8):** A person who contravenes Section 38 of the ML & TF Act is subject, under the statute, to a fine of K50 000 (approximately USD350) or imprisonment of 6 months and, in the case of a corporation, a fine of K100 000 (approximately USD710).

**280. Sanctions for Cross-border Physical Transportation of Currency for Purposes of ML or TF (applying c. 17.1-17.4 in R.17, c. IX.9):** Besides the seizure of currency or bearer negotiable instruments, no provision for any specific sanctions in relation to the physical cross-border transportation of currency or bearer negotiable instruments that are related to terrorist financing or money laundering could be identified in the ML & TF Act. However, the authorities have indicated that when an authorized officer asks the traveler to declare any currency in his or her possession, his or her baggage is subsequently searched, and currency in excess of the exchange control requirements is found, the officer may seize the currency, and request the person to explain where the currency came from and the purpose. If the traveler has made a false declaration to the officer, the individual is charged for making a false statement, in addition to illegal possession of currency.

**281. Confiscation of Currency Related to ML/FT (applying c. 3.1-3.6 in R.3, c. IX.10):** Section 40 of the ML & TF Act creates provision for the detention and release of currency or NBIs seized. That section provides that such currency or NBIs cannot be detained for longer than 7 days without a court order, or for more than 3 months from date of seizure until court has heard from parties. The court can extend detention but not for a period of more than 2 years from date of the order. Furthermore, it states that the currency or bearer negotiable instrument seized cannot be released if other proceedings are pending until the case has been concluded.

**282. Confiscation of Currency Pursuant to UNSCRs (applying c. III.1-III.10 in SR III, c. IX.11):** According to Section 38(4) of the ML & TF Act, should an authorized officer have reasonable grounds to believe that currency or a bearer negotiable instrument found in the course of an examination or search, may afford evidence as to an offence of financing of terrorism, the officer may seize the currency or bearer negotiable instrument. There have been no seizures of this nature and no processes or procedures are currently in place to implement this authority.

**283. Notification of Foreign Agency of Unusual Movement of Precious Metal and Stones (c. IX.12):** The Department of Mines has been conducting training with the MPS in the detection of gems and minerals at the borders, but no further information or statistics could be provided in relation to any seizures in this regard.

**284. Safeguards for Proper Use of Information (c. IX.13):** The reports made to the FIU will be subject to the FIU safeguards in respect of all reports. As no reports are currently collected it is unknown how these will be dealt with by relevant authorities.

**285. Additional Element – Implementation of SR.IX Best Practices (c. IX.15):** Malawi has adopted a declaration system under Section 38 of the ML & TF Act. Although a draft reporting

form and MOU have been drafted to facilitate discussion in this regard, there has been no active implementation of the declaration requirement yet.

**286. Additional Element – Computerization of Database and Accessible to Competent Authorities (c. IX.15):** Although there is currently no database (computerized or otherwise) of XBRs, as discussed earlier, the FIU has procured funding to facilitate the submission of XBRs to the FIU.

**287. Analysis of Effectiveness:** Although there is adequate legislation in place to deal with the requirements of this FATF recommendation, it has not been implemented. The ML & TF Act is relatively new and will take some time to become implemented. In the interim, due to the confusion expressed by the authorities in relation to the liberalization of foreign currency and its impact on control of cross border currency, it would appear that there is currently no effective declaration system in place.

**288.** Customs and FFU have indicated that the ML & TF Act is new and that they need time to consider it; they have had discussions regarding the way forward. The FIU has indicated that although it has designed a draft form to facilitate implementation of the reporting requirement, it has no timetable for the implementation of this requirement as it is largely dependent on the MRA and Police.

**289.** It is envisaged that the implementation of this reporting requirement will only be accomplished when the FIU has concluded the relevant consultations with the relevant stakeholders and a MOU is signed in this regard.

**Recommendations and comments**

The authorities should consider:  
 - Conducting a joint workshop to assign areas of responsibility in relation to implementing the requirements of this recommendation.  
 - Constructing a roll out plan for implementation, including conducting awareness raising and training.

**Compliance with FATF Recommendations**

<b>SR.IX</b>	PC	<ul style="list-style-type: none"> <li>• Although a legislative basis exists, there is limited implementation of either a declaration or disclosure system and this is currently applied only in relation to foreign exchange violations in Malawi when travelers are leaving the country. The provisions of the ML&amp;TF Act have not been implemented.</li> <li>• Only one report has been made to the FIU</li> <li>• The penalties are not dissuasive or effective</li> <li>• No information or data is recorded by authorities</li> </ul>
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**3. Preventive Measures–Financial Institutions**

**3.1 Risk of money laundering or terrorist financing**

**Description and analysis**

There is no risk-based approach to money laundering (ML) or terrorist financing (TL) in Malawi with regard to any part of the financial sector. This is based in large part on the fact that the newly passed ML & TF Act was still being implemented at the time of the assessment; the Reserve Bank of Malawi (RBM) was field testing a risk based approach to banking supervision in general.

**3.2 Customer due diligence, including enhanced or reduced measures (R.5 to 8)**

**Description and analysis**

**290. Legal Framework:** The customer due diligence (CDD) provisions applicable to financial institutions in Malawi are contained in Part III of the “Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Act, 2006 (ML & TF Act),” which technically came into effect on August 25, 2006 (although the notice making the law effective was issued in July of 2007, making the law retroactive). More specifically, the provisions relating to customer due diligence for financial institutions are found in Sections 24 through 26, inclusive, of the ML & TF Act. No implementing regulations or Directives, which have the force of law, have been issued to

implement the ML & TF Act.

291. It should be noted that the definition of the term financial institution used in the ML & TF Act is the same as the definition of that term provided in the Glossary to the FATF 40 Recommendations on Money Laundering (FATF 40), except that it does not include insurance company functions. In addition, the definition of financial institution used in the ML & TF Act includes designated non-financial businesses and professions (DNFBPs), as described in the Glossary to the FATF 40. Thus, for purposes of the all compliance requirements under the ML & TF Act in Malawi, there is no distinction between financial institutions and DNFBPs; both are covered by the same requirements that are applicable to financial institution, except that insurance companies are not at all by the statute.

292. In addition, RBM Directive NO.DO1-2005/CDD (CDD Directive), issued in 2005, provides for CDD requirements that are applicable to banks and financial institutions under the supervision of the RBM. RBM directives have the force and effect of law. Under this CDD Directive, which is still in effect, a financial institution is defined to include those entities whose regular business involves lending money with borrowed funds (but not deposits from the public), and includes pension funds, insurance companies, and investment funds and investment companies.

293. Foreign exchange bureaux pose a particular problem due to an injunction issued by the Courts. This has caused uncertainty as to their status and supervision by the RBM.

294. **Prohibition of Anonymous Accounts (c. 5.1):** Subsections 26(1) and (2), respectively, of the ML & TF Act provides that a financial institution “that maintains accounts shall maintain them in the true name of the account holder,” and shall not open, operate or maintain any anonymous account or any account that is in a fictitious, false or incorrect name.”

295. In addition, paragraph 4 of section 2 of Part IV of the CDD Directive provides that a bank or financial institution should never open an account, which is defined as accepting a deposit or allowing a withdrawal, with a customer that insists on anonymity or bearer status.

296. While the statute and the CDD Directive, by their literal terms, prohibit anonymous accounts, the RBM discovered, during an on-site examination, that at least one bank has offered, and has outstanding, bearer certificates of deposit, which is in clear contravention of these prohibitions. No enforcement action has been taken. Rather, to remedy this situation, on February 14, 2008, the RBM issued guidance prohibiting the issuance of bearer certificates of deposits, effective June 1, 2008, and is proceeding to make such a prohibition the subject of a future Directive. The guidance stated that such bearer certificates of deposit have been a permissible activity, despite what otherwise appears to be a clear violation of the statute and CDD Directive. Since the on-site mission, the RBM stated that it has issued a new Directive effective April 9, 2008, prohibiting such bearer certificates and that the bank involved has no such bearer certificates outstanding. Without challenging the veracity of such statements, such information could not be verified by the assessors by the May 11, 2008 cut-off date. Furthermore, the RBM stated that it had not verified the assertions of the bank involved by such cut-off date. This matter raises a significant issue about enforcement capability of the RBM and a lack of effectiveness of existing compliance requirements.

*When CDD is required*

297. **Requirement to Undertake CDD Measures (c. 5.2):** Section 24 (1) (a) of the ML & TF Act provides that every financial institution is to ascertain the identity of the customer or beneficial owner when it (a) enters into a continuing business relationship or conducts any transaction; (b) carries out and electronic funds transfer; (c) there is a suspicion of a money laundering offence or the financing of terrorism; or (d) there are doubts of the veracity of previous CDD or documentation. Banks explained that they do not carry out any transaction on behalf of a customer until the proper identification has been ascertained.

298. Section 24 (7) of the ML & TF Act provides that the above CDD requirements do not apply to occasional transactions below a threshold prescribed by the Minister of Finance and as published in the Gazette. This section also provides an exception for “such other persons as the Minister may prescribe by notice in the Gazette.” To date, no such threshold has been prescribed nor have any persons been exempted. Thus, all occasional transactions and all persons are covered

by the CDD requirements.

299. The statutory requirements for CDD generally satisfy the FATF Recommendation 5 requirements, but there is a significant issue with the phrasing of ascertaining the identity of the “customer or beneficial owner.” In this regard, FATF CDD provisions require the identification of the owner *and* beneficial owner of an account. As discussed below, there is a difference in the identification of natural persons and legal persons. A literal reading of the statute (sections 24(1) (a) and (2) (b)) requires the identification of the customer *or* beneficial owner for natural persons, while the identity of beneficial ownership is required for legal persons under section 24 (2) (c). Thus, under the language of the statute, the identification of beneficial ownership is required for legal persons, but not for natural persons. Furthermore, implementation for non-bank financial institutions is a significant problem. In this regard, banks carry out reasonable CDD requirements under the existing CDD Directive. Insurance companies and securities firms do some identification procedures, but to a lesser extent pursuant to business practices. As noted above, no regulations have been issued to implement the CDD requirements of the ML & TF Act. Other covered financial institutions do not observe such requirements.

#### *Required CDD Measures*

300. **Identification of Customers (c. 5.3):** For purposes of establishing a business relationship for natural persons, section 24 (2) of the ML & TF Act requires financial institutions to undertake appropriate customer identification procedures with regard to the customer or beneficial owner, including the requirement to adequately identify the name, address and occupation of the individual and verify such identity; the purpose and nature of the business relationship; and source of wealth and property.

301. For purposes of establishing identity, section 24 (2) requires the use of a national identity card, passport or other official identifying document of the person. Currently, there is no national identity card and most people do have drivers’ licenses. In addition, the statute requires “or other official identifying document.” With respect to this aspect of compliance, one bank uses a system of a photographs and fingerprints, which the bank does itself. Other banks use two photographs and a letter of identification from the District Commissioner or Traditional Authority (village chief). These procedures have been accepted by the RBM as an acceptable means of customer identification for banks under the existing CDD Directive.

302. **Identification of Legal Persons or Other Arrangements (c. 5.4):** Section 24 (2) (c) (iii) requires financial institutions to identify a legal person’s legal existence and structure, including information relating to: name, legal form, address, and directors of the entity; the principal owners and beneficiaries and control structure of the entity; provisions regulating the power to bind the entity; and verification that individuals purporting to act on behalf of the entity are authorized to do so, and identification of such individuals.

303. These requirements are entirely consistent with the FATF Recommendation 5 and essentially the same as those that currently exist under the CDD Directive. There appears, however, to be a wide degree of differences in the way banks and other financial institutions currently observe such requirements. In general, foreign owned banks are more likely to require more extensive information than domestic banks.

304. **Identification of Beneficial Owners (c. 5.5; 5.5.1 & 5.5.2):** As noted above, Section 24 (1) requires financial institutions to ascertain the identity of a customer *or* beneficial owner; while Section 24 (2) (c) (ii) requires financial institutions to identify principal owners and beneficiaries, as well as control structures of legal entities. There is no definition of “principal owner” or “control structure.” The CDD Directive, Part IV, Section 2, paragraph 6, directs banks to identify when customers are acting on behalf of another person only as “trustee, nominee or professional intermediary.” Otherwise, there is no more specific direction as to what is expected. In addition, there are no regulations or other guidance with respect to compliance with this requirement. Thus, there is need to specify that the natural person who ultimately owns or controls the customer is identified.

305. Only one bank that was interviewed sought an affirmative declaration or other statement by the customer with regard to whether the customer is acting as agent or acting on behalf of another individual or entity. Again, foreign banks have more comprehensive procedures in this area than do

domestic banks.

306. **Information on Purpose and Nature of Business Relationship (c. 5.6):** Under Section 24 (2) (a) of the ML & TF Act, financial institutions are specifically required to “obtain information on the purpose and nature of the [customer’s] business relation.” There is no similar provision in the CDD Directive, although it does require monitoring of accounts for unusual activity, which presupposes some understanding of the nature and purpose of the customer’ account.

307. Based on interviews with banks, there appears to be very little compliance with this provision by most of the banks.

308. **Ongoing Due Diligence on Business Relationship (c. 5.7; 5.7.1 & 5.7.2):** The ML & TF Act does not contain a requirement to conduct ongoing due diligence with regard to its business relationships with its customers. Banks do not as a general matter conduct such ongoing due diligence. However, in practice, some banks, especially foreign banks do conduct such ongoing due diligence.

*Risk –*

309. **Enhanced Due Diligence for Higher Risk Customers (c. 5.8):** Except for enhanced monitoring (as opposed to enhanced due diligence) of accounts by public officials, which is discussed below under paragraph 323 with respect to FATF Recommendation 6, there is no requirement in the ML & TF Act or the CDD Directive for enhanced due diligence for high risk customers. Nonetheless, certain banks have internal policies that establish higher risk categories of customers for which they conduct enhanced due diligence.

310. **Application of Simplified/Reduced CDD Measures when appropriate (c. 5.9):** Neither the ML & TF Act nor the CDD Directive provide for simplified or reduced CDD measures.

311. **Simplification / Reduction of CDD Measures relating to overseas residents (c. 5.10):** Section 24 (8) of the ML & TF Act provides that the Minister of Finance may prescribe the threshold or circumstances in which provisions of Section 24 of the statute shall apply to any particular customer or class of customer. No such regulations have been prescribed. Therefore, there are currently no provisions for a simplification or reduction of CDD measures and normal CDD measures apply in all cases.

312. **Simplified/Reduced CDD Measures Not to Apply when Suspicions of ML or TF exist (c. 5.11):** See paragraph 310 above.

313. **Risk Based Application of CDD to be Consistent with Guidelines (c. 5.12):** Financial institutions have not been authorized to conduct CDD on a risk sensitive basis because no guidelines have been issued. Also see paragraph 311 above.

*Timing of Verification –*

314. **Timing of Verification of Identity (c. 5.13):** Under Section 24 (1) of the ML & TF Act, a financial institution is required to verify a customer’s identification or beneficial owner on the basis of reliable and independent source documents “before entering a business relationship.” In this regard, a business relation is defined to include an occasional transaction. This requirement is enforced through Section 25 (1) of the ML & TF Act, which specifically prohibits a financial institution from proceeding with any transaction in the absence of satisfactory identification, unless directed to do so by the FIU. Failure to abide by this prohibition of Section 25 (1) subjects an individual violator to two years imprisonment and K100, 000 fine; and a corporate violator to a K500,000 fine and loss of business license.

315. Similarly Section 24 (1), Part IV, S

316. Section 2, paragraph of 1 of the CDD Directive provides that a financial institution “should never enter into a business relationship until identity of such customer has been satisfactorily established.”

317. The banks universally stated that they observed this requirement to the fullest extent even though no person or entity has been prosecuted for violating the ML & TF Act. Compliance

appears to be based upon the requirements of the CDD Directive.

**318. Circumstances when Verification of Identity Can Taken Place After Establishment of Business Relationship (c.5.14 & 5.14.1):** There is no provision in the ML & TF Act or the CDD Directive for identity verification to take place after establishment of the business relationship.

*Failure to Complete CDD –*

**319. Response by Financial Institutions when Unable to Verify Identity Failure (c. 5.15):** Section 25 of the ML & TF Act specifically provides that a financial institution “shall not proceed any further with the transaction” if satisfactory evidence of customer identity is not produced by the customer or financial institution and requires that the attempted transaction should be reported to the FIU.

**320.** As noted above, banks simply do not establish the business relationship in the absence of satisfactory customer identification. Because of this approach, banks do not generally consider reporting attempted transactions to the FIU.

**321. Termination of Business Relationship (c. 5.16):** The ML & TF Act does not contain a provision requiring financial institutions to terminate business relationships in the event that satisfactory customer identification information is not obtained by the financial institution. Banks simply do not establish the business relationship in the absence of satisfactory customer identification. Moreover, given the significant penalties for failure to obtain satisfactory customer identification prior to establishing a business relationship, terminating the relationship seems to be an unnecessary measure to assure that proper customer identification is obtained by a financial institution.

*Existing Customers –*

**322. CDD Requirements for Existing Customers (c. 5.17):** Under Section 24 (9) of the ML & TF Act, financial institutions are required to verify the identity of their existing customers within such period as the Minister of Finance may prescribe by notice published in the Gazette. The Minister has not prescribed any such period. Nonetheless, the bankers association has undertaken a commitment from its members to comply with this provision by September 1, 2008.

**323. CDD Requirements for Existing Anonymous Customers (c. 5.18):** The only types of anonymous accounts that currently exist at financial institutions in Malawi are bearer certificates of deposits. See earlier discussion in paragraphs 29 and 296.

*Foreign Politically Exposed Persons*

**324. Requirement to Identify Foreign Politically Exposed Persons (c. 6.1):** Under Section 24 (2) (d) (i) of the ML & TF Act, financial institutions, in addition to the statute’s standard CDD provisions, are required to have risk management systems in place to determine whether the customer is a public official. The definition of “public official” is broadly defined in the statute and includes individuals considered to be politically exposed persons (PEPs), as described in the Glossary to the FATF 40. While PEPs under the definition of the term in the FATF recommendation, includes only foreign individuals, the term “public official” in the ML & TF Act also includes domestic individuals, and thus, is broader in scope than the FATF 40 definition of the term PEP. There is no similar provision in the CDD Directive. Moreover, in contrast FATF Recommendation 6, which requires that financial institutions have a system in place to determine whether the customer or beneficial owner is a PEP, section 24 (2) (d) (i) only requires a determination with respect to the immediate customer and not any beneficial owner. Thus, the statutory requirement in Malawi only partially fulfills the international standard. In any event, the majority of the banks interviewed do not comply with this requirement.

**325. Risk Management of Foreign Politically Exposed Persons (c. 6.2; 6.2.1):** Section 24 (2) (d) (ii) provides that a financial institution shall obtain its senior management approval before establishing a business relationship with a public official. This is completely consistent with the FATF Recommendation 6 requirement, although as mentioned above, there is little compliance with this FATF recommendation. In addition, there is no statutory, regulatory or directive requirement for senior management approval if it is determined that a customer or beneficial owner is a PEP after the account has been established. However, there are significant penalties, under



Section 25 of the ML & TF Act, for establishing an account without meeting all of the CDD and prior approval requirements of Section 24. Furthermore, Section 25 provides that an account should not be established without first satisfying the CDD requirements of section 24. Nonetheless, the statute is silent on what an institution should do in the event such an account is established without senior management approval either before or after the account has been established.

**326. Requirement to Determine Source of Wealth and Funds of Foreign Politically Exposed Persons (c. 6.3):** Section 24 (2) (b) of the ML & TF Act requires financial institutions to “take reasonable measures to establish the source of wealth and source of property of all natural person customers. Thus, this provision would apply equally to a PEP or public official as that term is used in the ML & TF Act.

**327. Ongoing Monitoring of Foreign Politically Exposed Persons (c. 6.4):** Under Section 24 (2) (d) (iii), financial institutions shall “conduct regular enhanced monitoring of the business of any PEP or public official, as that term is used in the ML & TF Act”.

**328. Additional Element - Domestic Politically Exposed Persons (c. 6.5):** As described in paragraph 323 above, the definition of “public official” in the ML & TF Act specifically includes domestic PEPs.

**329. Additional Element - Ratification of the Merida Convention (c. 6.6):** Malawi ratified the Merida Convention on December 4, 2007.

*Cross Border Correspondent Accounts and Similar Relationships -*

**330. Requirement to Obtain Information on Respondent Institution (c. 7.1):** Section 24 (4) (a) and (b) provide that a financial institution shall adequately identify and verify respondent institutions with which it conducts business and gather sufficient information about the nature of the business of the correspondent institution. Section 24 (4)(c) imposes a requirement for a financial institution to determine, from publicly available information, the reputation and quality of supervision of the correspondent institution. Banks state that they do observe these statutory requirements based primarily upon their need to satisfy the requirements of their correspondent banks to satisfy international standards in order to maintain such relationships.

**331. Assessment of AML/CFT Controls in Respondent Institution (c. 7.2):** Under section 24 (4) (d) of the ML & TF Act, a financial institution is required to assess the anti-money laundering and terrorist financing controls of the correspondent institution. Again, most banks state that they observe this requirement; several stated that they utilize a questionnaire to facilitate the process.

**332. Approval of Establishing Correspondent Relationships (c. 7.3):** Section 24 (4) (e) provides that financial institutions should obtain the approval of senior management before establishing new correspondent relationships. This requirement was observed in the banks interviewed.

**333. Documentation of AML/CFT Responsibilities for Each Institution (c. 7.4):** Under Section 24 (4) (e) financial institutions are required to document the responsibilities of the institution and the correspondent bank. This provision is observed based primarily upon the requirements of international correspondent banks.

**334. Payable-Through Accounts (c. 7.5):** Section 24 (5) of the ML & TF Act requires that payable-through accounts must be done in accordance with the standards established by FATF Recommendation 7, however, the banks state that they do not utilize payable-through account in connection with their correspondence accounts.

**335. Misuse of New Technology for ML/FT (c. 8.1):** There is no statutory or regulatory requirement for financial institutions to have policies in place regarding misuse of new technologies.

**336. Risk of Non-Face to Face Business Relationships (c. 8.2 & 8.2.1):** There is no statutory or regulatory requirement for financial institutions to have policies and procedures in place that address non-face-to face business relationships. Banks and other financial institutions do not, however, establish business relationships, or offer or provide products or services on a non-face-to-

face basis.

337. **Analysis of Effectiveness:** The CDD and the preventive measures discussed above that are contained in the ML & TF Act are reasonably comprehensive and largely satisfy the requirements of the FATF 40. As noted, certain criteria do not have statutory or regulatory requirements. Banks have a significant advantage in complying with the customer identification requirements because of the CDD Directive issued in 2005. That directive was issued to help banks, in particular, comply with international standards of both FATF and the Basle Committee on Bank Supervision. Banks in Malawi have been trying to operate under the international standards largely in order to maintain correspondent relationships with international banks and, thereby, facilitate their international transactions.

338. No financial institutions other than banks have begun compliance efforts. This raises significant concerns about the effectiveness of the supervision and enforcement process for all financial institutions.

339. Foreign exchange bureaus are a matter of particular concern. Due to a court injunction regarding the licensing and registration of forex bureaus, they are not currently licensed and their supervision is virtually nonexistent.

340. Insurance companies are literally not covered by the ML & TF Act. While this needs to be remedied, there is relatively low risk with regard to life insurance due to the fact that contracts must be in existence for at least two years before there is any payout, except, of course, in the event of the death of the insured.

#### Recommendations and comments

The authorities should ensure that –

- All financial institutions are subject to compliance requirements and enforcement sanctions if needed. This needs to begin with a significant awareness raising process for all covered financial institutions, which includes DNFBPs due to their inclusion within the definition of the term financial institution, covered.

- The current unsettled status of foreign exchange bureaus is resolved. Regulatory or supervisory solutions should be examined to determine if they could succeed, otherwise, a legislative solution would be necessary if the courts ultimately rule against the powers of the RBM in this area.

- Insurance companies are brought within the scope of coverage of the ML & TF Act's compliance requirements.

- The issue of beneficial ownership, including for PEPs, should be clarified so as to satisfy the criteria in the Methodology, including establishing the identity of the customer AND beneficial owner and an affirmative determination of whether an account is being opened for a beneficial owner.

- The requirement to conduct ongoing due diligence of customers is made part of the CDD measures.

- The requirement to conduct enhanced CDD for higher risk customers is made part of the CDD measures.

- With regard to PEPs or public officials, there should be a requirement for determining the source of wealth in opening the account and for senior management approval in the event the account is opened without such prior approval.

- With respect to correspondent banking, financial institutions should be required to determine if the respondent institution has been subject to a ML or TF investigation or regulatory action, as well as ascertain whether controls at respondent institution are adequate and effective.

There should be a requirement for financial institutions to pay special attention to money laundering threats from new technologies and non face-to-face transactions.

<b>R.5</b>	PC	<ul style="list-style-type: none"> <li>Only banks comply with most of this requirement</li> </ul>
<b>R.6</b>	PC	<ul style="list-style-type: none"> <li>The determination of beneficial ownership and source of wealth are significant deficiencies</li> <li>Only banks comply with this requirement</li> </ul>
<b>R.7</b>	LC	<ul style="list-style-type: none"> <li>Financial institutions are not required to determine if an institution has been subject to a ML or TF investigation or regulatory action or ascertain whether controls at respondent institution are adequate and effective..</li> </ul>
<b>R.8</b>	NC	<ul style="list-style-type: none"> <li>There is no statutory or regulatory requirement</li> </ul>
<b>3.3 Third parties and introduced business (R.9)</b>		
Description and analysis		
<p>341. <b>Legal Framework:</b> Section 24 (6) of the ML &amp; TF Act provides a reasonably comprehensive set of requirements for introduced business.</p> <p>342. <b>Requirement to Immediately Obtain Certain CDD elements from Third Parties (c. 9.1):</b> Under section 24 (6) (a), a financial institution relying on a third party is required to “immediately obtain the information and documents required by” the CDD obligations.</p> <p>343. <b>Availability of Identification Data from Third Parties (c. 9.2):</b> Section 24 (6) (b) requires that financial institutions ensure that copies of information and relevant documentation available upon request and without delay.</p> <p>344. <b>Regulation and Supervision of Third Party (applying R. 23, 24 &amp; 29, c. 9.3):</b> The statute, in Section 24 (6) (c), requires the financial institution to satisfy itself that the third party or intermediary is regulated and complies with CDD measures in accordance with the ML &amp; TF Act.</p> <p>345. <b>Adequacy of Application of FATF Recommendations (c. 9.4):</b> Section 24 (6) (c) requires that financial institutions utilizing intermediary CDD services must satisfy themselves that the intermediary has measures in place that satisfy the requirements of Section 25, 26, and 27 of the ML &amp; TF Act, which address identity provisions of Section 24, maintaining no anonymous accounts, and record keeping requirements. There is no requirement that the financial institution satisfy itself on the question of whether the country of the intermediary adequately observes all of FATF recommendations.</p> <p>346. <b>Ultimate Responsibility for CDD (c. 9.5):</b> Nothing in the statute indicates that a financial institution is not ultimately responsible for customer identification and verification.</p> <p>347. <b>Analysis of Effectiveness:</b> The statute satisfies most of the FATF criteria in that financial institutions must satisfy themselves that intermediaries observe some FATF recommendations. The banks have indicated, however, that they do not rely on intermediaries and that they conduct their own customer identification and verification. Only banks have indicated compliance with this provision in that they do not utilize it; there have been no compliance efforts on the part of other financial institutions.</p>		
Recommendations and comments		
<p>The authorities should consider amending the statute to comply fully with international standards by adding provisions specifying:</p> <ul style="list-style-type: none"> <li>- What financial institutions should do to ensure that they only utilize third-party CDD from countries that observe FATF standards; and</li> <li>- That the financial institution is ultimately responsible for CDD.</li> </ul>		
Compliance with FATF Recommendation 9		
<b>R.9</b>	PC	<ul style="list-style-type: none"> <li>Only banks comply with this requirement.</li> </ul>
<b>3.4 Financial institution secrecy or confidentiality (R.4)</b>		
Description and analysis		
<p>348. <b>Legal Framework:</b> Under the ML &amp; TF Act, mandatory suspicious transaction reporting and providing information to authorities is not subject to any secrecy or other confidentiality privilege.</p> <p>349. <b>Inhibition of Implementation of FATF Recommendations (c. 4.1):</b> Under Sections 44</p>		

& 45 of the ML & TF Act, the statute provides clear authorization to provide all information to implement the FATF recommendations. Under the CPA, the Police Act and the CPEC, law enforcement authorities have access to financial records kept by financial institutions. Indeed, specific examples of cases shared with the assessors indicate that the authorities have used this power in carrying out financial investigations. Moreover, banks and other private sector players interviewed confirmed this practice. Furthermore, under the Reserve Bank Act, the RBM has broad powers to gain access to all records and information maintained by financial institutions under its jurisdiction.

350. **Analysis of Effectiveness:** The statute is clear and its authority to permit reporting of suspicious transactions and other information in response to requests by the FIU has been confirmed by legal authorities in Malawi. Only banks have submitted STRs and LCT reports and provided additional information upon request from the FIU; no other private sector entities (the Malawi Revenue Authority being the governmental exception) have submitted any STRs.

351. Furthermore, discussions with financial institutions indicated that they do share information among themselves particularly in relation to fraud matters or where a reference is requested on behalf of a potential customer.

Recommendations and comments

Compliance with FATF Recommendation 4

<b>R.4</b>	C	The criteria are fully met.
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**3.5 Record keeping and wire transfer rules (R.10 & SR.VII)**

Description and analysis

352. **Legal Framework:** Recording keeping requirements are specified in Section 27 and wire transfer information is covered by section 33 of the ML & TF Act, respectively.

353. **Record-Keeping & Reconstruction of Transaction Records (c. 10.1 & 10.1.1):** Section 27 (1) (b) of the ML & TF Act provides that records shall be maintained regarding “all transactions and correspondence...necessary to enable the transaction to be reconstructed at any time.” The records are to be kept for a minimum of seven years after the account is closed under section 27 (3) of the ML & TF Act. The seven year retention period is two years longer than the FATF recommendation. In addition, section 27 (4) of the statute gives the Minister additional authority to require records to be kept and maintained. Furthermore, the assessors are confident, based upon representations made by the banks that records would be kept longer if requested to do so, even in the absence of official action taken by the Minister under his/her additional grant of authority in this area.

354. **Record-Keeping for Identification Data (c. 10.2):** Under Section 27 (1) (a), identification data is to be retained under the same conditions as above.

355. **Availability of Records to Competent Authorities (c. 10.3):** Section 27 (5) of the ML & TF Act specifically provides that retained records “shall be made available upon request to the FIU, and other competent authority for purposes of ensuring compliance with this Act and for purposes of an investigation and prosecution of an offense.”

356. **Obtain Originator Information for Wire Transfers (applying c. 5.2 & 5.3 in R.5, c.VII.1):** Section 33 (1) requires financial institutions to include accurate originator information and related messages that is to remain with the transfer for all electronic transfers of funds. There is, however, no definition of what constitutes “originator information,” as specified in SR VII. In addition, there have been no implementing regulations specifying what should be included as originator information.

357. **Inclusion of Originator Information in Cross-Border Wire Transfers (c. VII.2):** Originator information is required to be included in all wire transfers. See paragraph immediately above.

358. **Inclusion of Originator Information in Domestic Wire Transfers (c. VII.3):** See paragraph 355.

359. **Originator information through Payment Chain (c.VII.4 & VII 4.1):** See paragraph 355.

360. **Risk-Based Procedures for Wire Transfers that Do Not Contain Originator Information (c. VII.5):** There is no statutory or regulatory requirement that beneficiary financial institutions adopt risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information. There is, however, a statutory requirement in Section 34 (1) (c) that financial institutions must pay special attention to wire transfers that do not contain complete originator information.

361. **Monitoring of compliance with SR VII (c. VII.6):** The RBM has developed an examination manual for purposes of examining its banks and financial institutions under its jurisdiction and has conducted at least one AML/CFT examination, according to authorities.

362. **Sanctions (c. VII.7):** Section 33 (3) provides for specific sanctions for violations of the wire transfer requirements.

363. **Incoming cross border wire transfers (c. VII.8):** There is no statutory or regulatory requirement that all incoming wire transfers must contain full and accurate originator information. There is, however, a statutory requirement in Section 34 (1) (c) that financial institutions must pay special attention to wire transfers that do not contain complete originator information.

364. **Outgoing Wire Transfers of Less than EUR/USD 1,000 (c. VII.9):** As noted above, originator information is required to be included in all wire transfers.

365. **Analysis of Effectiveness:** The Act addresses most of the criteria. Banks state that they observe these requirements. This is a new requirement; there have been no enforcement actions as of the assessment date. Thus, there is little to help determine whether its sanctions are effective, proportionate and dissuasive. There has been one examination by the RBM for compliance with AML/CFT and the RBM has a new examination manual that, among other things, specifically addresses wire transfers and international standards.

**Recommendations and comments**

The authorities should consider –

- Implementing the record keeping requirement with respect to all financial institutions.
- Providing a definition of what constitutes originator information that is consistent with the provisions of SR VII;
- Assuring compliance with this recommendation through examinations and enforcement actions where appropriate; and
- Bringing the wire transfer rules into complete compliance with international standards by addressing the deficiency that banks adopt risk-based procedures for handling wire transfers that do not contain complete originator information.

**Compliance with FATF Recommendations**

<b>R.10</b>	LC	<ul style="list-style-type: none"> <li>• The record keeping requirements, while complete in terms of satisfying the criteria, do not apply to insurance companies and there has been no implementation with respect to covered entities other than banks.</li> </ul>
<b>SR.VII</b>	LC	<ul style="list-style-type: none"> <li>• The statute addresses most but not all of the FATF requirements; there is no definition of what constitutes originator information and no provision for handling wire transfers that do not contain complete originator information.</li> </ul>

**3.6 Monitoring of transactions and relationships (R.11 & 21)**

Description and analysis

**Legal Framework:** Section 34 of the ML &TF Ac

366. **Special Attention to Complex, Unusual Large Transactions (c. 11.1):** Section 34 (1) (a) of the ML &TF Act requires financial institutions to pay special attention to “any complex, unusual or large transactions that have no apparent or visible economic or lawful purpose.” This requirement is entirely consistent with international standards. However, banks are the only financial institutions currently complying with AML measures. This requirement is also the same as is contained in Section 3 (3) of the CDD Directive.

367. **Examination of Complex & Unusual Transactions (c. 11.2):** Section 34 (2) (a) of the ML & TF Act specifically requires financial institutions to “verify the background and purpose of the transactions or business relations and record its findings in writing.” A similar requirement is contained in Section 3 (3) of the CDD Directive. The statutory provision is somewhat stronger than FATF Recommendation 11 in that the statute mandates that the financial institution “verify,” whereas FATF requires a financial institution “to examine as far as possible,” the background and purpose of the transaction. In addition, the statute also goes further than FATF Recommendation 11 in that it requires such verification for electronic funds transfers that do not contain complete originator information.

368. **Record-Keeping of Findings of Examination (c. 11.3):** Section 34 (2) (b) of the ML & TF Act requires that financial institutions make their written findings available to the FIU or supervisory authority upon request. There is, however, no specific requirement to retain such written findings for five years. In this regard, the seven-year record keeping requirements of section 27 (2) do not literally apply to these findings because this provision applies only to the records required to be maintained pursuant to Section 27 (1). The government disputes this reading of the statute. In this regard, due to the relative newness of the requirement, its effectiveness cannot be assessed. In addition, although there is a provision in Section 27 (4) that provides “any record required to be kept under this Act...shall be kept in a manner as the Minister may prescribe by regulation,” no such regulations have been issued.

369. **Special Attention to Countries Not Sufficiently Applying FATF Recommendations (c. 21.1 & 21.1.1):** Under Section 34 (1) (b) of the statute, financial institutions are required to pay special attention to “business relationships and transactions with persons in jurisdictions that do not have adequate systems in place to prevent or deter money laundering or terrorist financing.” This is consistent with part of the international standard set forth in FATF Recommendation 21. There is, however, no mechanism currently in place to advise financial institutions in Malawi of weaknesses in AML/CFT systems in other countries.

370. **Examinations of Transactions with no Apparent Economic or Visible Lawful Purpose from Countries Not Sufficiently Applying FATF Recommendations (c. 21.2):** Section 34 (2) requires that any transaction or business relationship with a person from a country with AML/ CFT system weaknesses must be verified and the written finding be made available to the FIU or supervisory authority.

371. **Ability to Apply Counter Measures with Regard to Countries Not Sufficiently Applying FATF Recommendations (c. 21.3):** There is currently nothing in place to address applying countermeasures to countries that do not apply sufficiently the FATF Recommendations.

372. **Analysis of Effectiveness:** With respect to Recommendation 11, banks state that they are complying with this requirement. As noted previously, only banks are complying in this area and what they are doing is based mainly on the CDD Directive with regard to large, complex and unusual transactions. The recordkeeping requirements with respect to large, complex and unusual transactions are unclear and, in any event, their effectiveness cannot be assessed due to the relative newness of the requirement. With respect to Recommendation 21, because it is a new requirement, its effectiveness also could not be assessed.

Recommendations and comments

The authorities should consider:

- Implementing the statute with respect to all financial institutions.
- Imposing the record keeping requirement consistent with the provisions under Recommendation 11.
- Establishing a notification mechanism for informing financial institutions about what countries they should be concerned with because of AML/CFT weaknesses.
- Implementing countermeasures for business relations and transactions from countries that do not fully observe FATF Recommendations.

Compliance with FATF Recommendations 11 & 21

<b>R.11</b>	PC	<ul style="list-style-type: none"> <li>• Only banks observe any part of this recommendation.</li> </ul>
<b>R.21</b>	PC	<ul style="list-style-type: none"> <li>• Only banks observe any part of this recommendation.</li> <li>• There are no measures to inform financial institution about specific country concerns and no countermeasure efforts in place to address such concerns.</li> </ul>

**3.7 Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV)**

Description and analysis

**Legal Framework:** Section 28 of the ML & TF Act.

373. **Requirement to Make STRs on ML and TF to FIU (c. 13.1 & IV.1):** Section 28(1) of the statute provides that “whenever a financial institution processes a transaction exceeding such amount of currency or its equivalent in foreign currency... [as prescribed by the Minister], or suspects or has reasonable grounds to suspect that any transaction is related to the commission of a money laundering offence or terrorist financing, it shall as soon as possible but not later than three working days after forming that suspicion report in writing to the FIU. Thus, this provision provides for two different types of reporting: large cash transaction and suspicious transaction reporting. In addition, section 29 of the ML&TF Act provides that whenever a supervisory authority or auditor suspects or has reasonable grounds to believe that information it has related to any transaction or attempted transaction that may involve a money laundering offense, the financing of terrorism, or may be of assistance in the enforcement of the ML & TF Act, shall report such transaction or attempted transaction to the FIU.

374. **STRs Related to Terrorism and its Financing (c. 13.2):** Suspicious transaction reporting for terrorist financing is specifically covered by Section 28 (1), as described immediately above.

375. **No Reporting Threshold for STRs (c. 13.3):** All suspicious transactions are required to be reported; the statute does not contain any language establishing a reporting threshold for STRs. The threshold that could be established by the Minister of Finance is for large cash transaction reporting, not suspicious transaction reporting. At the same time, it is unclear whether attempted suspicious transactions are required to be reported because the statute is silent on the issue of an attempted transaction that is deemed to be suspicious by a financial institution. This lack of clarity in Section 28 is reinforced by the specific reference to attempted transactions contained in Section 29 and discussed above.

376. **Making of ML and TF STRs Regardless of Possible Involvement of Tax Matters (c. 13.4, c. IV.2):** The statute makes it clear that all suspicious transactions are to be reported, regardless of the potential predicate crime involved.

377. **Additional Element–t - Reporting of All Criminal Acts (c. 13.5):** Section 35 states that the crime of money laundering involves, “any property in whole or in part directly or indirectly [that] represents any person’s proceeds of crime.” Thus, all crimes are covered under the statute for suspicious transaction reporting.

378. **Protection for Making STRs (c. 14.1):** Under Section 45 of the statute, financial institutions and their officers, employees, agents and auditors are protected from any “civil, criminal, administrative or disciplinary proceedings from filing a STR in good faith.” Although the scope of the language in the statute is very broad and includes agents of a financial institution, the

statute does not include directors. This is a significant shortcoming.

379. **Prohibition Against Tipping-Off (c. 14.2):** Section 30 provides that no person or institution shall disclose to any person that a suspicion has been formed or that a STR has been filed. The language is very broad and encompasses informing any person, even if a suspicion has been formed, in addition to the filing of a STR.

380. **Additional Element – Confidentiality of Reporting Staff (c. 14.3):** Section 31 specifically requires that “a person shall not disclose any information that will or is likely to identify...” any person (1) who has handled a transaction that is the subject of a STR, (2) any person who filed a STR; (3) any person who made a STR, or (4) any information contained in a STR, except in connection with an investigation or prosecution.

381. **Consideration of Reporting of Currency Transactions Above a Threshold (c. 19.1):** Section 28 of the ML & TF Act provides for the reporting of cash transaction above a threshold established by the Minister of Finance. Malawi has considered the question and addressed the matter in its legislation. No threshold has been established by the Minister, but it has been agreed, at least with respect to banks, that the threshold should be K1, 000,000. Banks have been reporting such transactions. There have, however, been significant discrepancies between what the banks have reported and what the FIU has acknowledged receiving.

382. **Additional Element - Computerized Database for Currency Transactions Above a Threshold and Access by Competent Authorities (c. 19.2):** The FIU is in the process of establishing its database for all reporting requirements, but has not completed the process.

383. **Additional Element - Proper Use of Reports of Currency Transactions Above a Threshold (c. 19.3):** The FIU has established a secure information technology system using the facilities of the RBM. It contemplated that a completely separate system will be utilized in the future.

384. **Establishment of Guidelines for Financial Institutions (c. 25.1):** The FIU has issued some guidelines to financial institutions, which include institutions other than banks. Such guidelines are, however, limited to filing STRs. Implementation of any of the ML & TF Act’s requirements at this point is limited to banks. The FIU is in the process of becoming fully operational and implementing the statute with respect to all types of financial institutions and DNFBPs.

385. **Feedback to Financial Institutions (c. 25.2):** There has been very little, if any, feedback to most banks, which are the only institutions currently, reporting to the FIU in the private sector.

386. **Analysis of Effectiveness:** The statutory provisions regarding suspicious transaction reporting, “tipping off” and protection for financial institutions, read literally, are entirely consistent with international standards, with the potential exception of whether attempted transactions need to be reported. Because the statute is so new and has not been fully implemented, there has not been sufficient time to assess the effectiveness of these provisions.

387. The inclusion of both large cash transaction and suspicious transaction reporting requirements together in the same provision in the legislation can create ambiguity for reporters as to whether they are required to file two reports if a transaction is both over a threshold and suspicious. In practice, banks are reporting suspicious and large cash transactions (in some instances the same report twice) to the FIU since this is the literal reading of the statute. In this regard, there is nothing inconsistent with a dual reporting requirement because the two requirements serve different purposes. Nonetheless, it is the view of the FIU that the reporting institutions are not required to file two reports.

388. The large cash transaction reporting requirement has generated many reports, not all of which have been acknowledged by the FIU. As discussed below, this reporting requirement may be serving as a distraction to the FIU accomplishing its core duties of receiving, analyzing and disseminating STRs and related financial information.

Recommendations and comments



The authorities should consider:

- Clarifying that attempted suspicious transactions should be reported.
- Reviewing the large cash transaction reporting requirement so that the FIU may concentrate on its core functions at least at this stage of its development.
- Issuing guidance clarifying the reporting requirement to eliminate duplicate reports if that is the desired result even though there is nothing inconsistent with a dual reporting requirement.
- Establishing compliance implementation measures for all financial institutions.
- Providing more and better feedback for reporting institutions and putting systems in place for feedback for other entities that should be reporting as the statute is fully implemented.
- Including directors within the scope of those protected from possible liability for STRs.

Compliance with FATF Recommendations 13, 14, 19 and 25 (c 25.2) and SR IV

<b>R.13</b>	PC	<ul style="list-style-type: none"> <li>• Only banks are filing STRs.</li> <li>• It is unclear whether attempted suspicious transactions are required to be reported.</li> </ul>
<b>R.14</b>	LC	<ul style="list-style-type: none"> <li>• No protection for Directors from possible liability for STRs.</li> </ul>
<b>R.19</b>	C	
<b>R.25</b>	NC	<ul style="list-style-type: none"> <li>• Only limited guidelines have been issued and there has been no meaningful feedback to the banks that have filed STRs.</li> </ul>
<b>SR.IV</b>	LC	<ul style="list-style-type: none"> <li>• Only banks are filing STRs.</li> <li>• It is unclear whether attempted suspicious transactions are required to be reported.</li> </ul>

**3.8 Internal controls, compliance, audit and foreign branches (R.15 & 22)**

Description and analysis

389. **Legal Framework:** The internal controls requirement is covered by Section 32 of the ML&TF Act, but the issue of foreign branches is not covered by the statute, regulations or the Directive.

390. **Establish and Maintain Internal Controls to Prevent ML and TF (c. 15.1, 15.1.1 & 15.1.2):** Section 32 (1) (b) requires each financial institution to establish procedures and systems that address customer identification, record keeping, detection of suspicious transactions and the reporting of such transaction, and make the institutions officers and employees aware of laws and regulations concerning ML and TF as well as the institution’s own policies and procedures regarding these requirements. Section 32 (1) (a) and 32 (2) require the appointment of a compliance officer to be “a senior officer” and specifies the duties of such an officer, including responsibility for developing a compliance manual for the institution. The requirement of the appointment of a compliance officer does not apply to institutions with five or less employees.

391. **Independent Audit of Internal Controls to Prevent ML and TF (c. 15.2):** Under Section 32 (1) (d), each financial institution is required to “establish an audit function to test its anti-money laundering and financing of terrorism procedures and systems.” The requirement for an internal audit function does not apply to institutions with five or less employees.

392. **Ongoing Employee Training on AML/CFT Matters (c. 15.3):** Section 32 (1) (c) requires the training of officers employees and agents of a financial institution.

393. **Employee Screening Procedures (c. 15.4):** Under section 32 (1) (b) (vi), a financial institution is required to have procedures in place to “screen persons before hiring them as employees.”

394. **Additional Element – Independence of Compliance Officer (c. 15.5):** The statute does not specify the independence level of the compliance officer other than Section 32 (2) (a), which provides that the compliance officer “shall be a senior officer.”

395. **Application of AML/CFT Measures to Foreign Branches & Subsidiaries (c. 22.1, 22.1.1 & 22.1.2):** There is no statutory or regulatory provision requiring application of AML/CFT requirements to foreign branches and subsidiaries.

396. **Requirement to Inform Home Country Supervisor if Foreign Branches & Subsidiaries are Unable Implement AML/CFT Measures (c. 22.2):** There is no statutory or

regulatory provision requiring notification of home country supervisor if foreign branches and subsidiaries are unable to implement Malawi's AML/CFT requirements. However, they were no foreign branches of a Malawi bank at the time of the assessment.

397. **Additional Element – Consistency of CDD Measures at Group Level (c. 22.3):** There is no indication from discussions with banks that CDD measures are applied universally at the group level. Nonetheless, several of the banks in Malawi are owned by foreign banks and subscribe to the parent's overall AML/CFT regime.

398. **Analysis of Effectiveness:** Banks are the only financial institutions that are implementing AML measures. Banks have compliance officers and internal procedures that are generally consistent with international standards. When reviewing the existing compliance manuals of several banks, however, all were written before enactment of the ML&TF Act. Thus, the existing manuals do not necessarily take into account all of the requirements of the new statute. One foreign bank has a branch in Malawi. It is unclear whether that branch observes, or is prohibited by the host country from observing, Malawi's AML/CFT requirements. The RBM has not undertaken an inquiry into this question, nor has it conducted an examination of the branch in question for AML purposes.

**Recommendations and comments**

The authorities should consider:

- Initiating efforts to bring all financial institutions under compliance requirements.
- Specifically subjecting foreign branches and subsidiaries to Malawi's AML/CFT requirements.
- Determining whether if this could be done by regulation for banks.

**Compliance with FATF Recommendations 15 & 22**

<b>R.15</b>	PC	<ul style="list-style-type: none"> <li>• The statute is consistent with international standards, but banks are the only financial institutions that complying with the ML &amp; TF Act's requirements and they are doing so based upon the CDD Directive.</li> </ul>
<b>R.22</b>	N/A	<ul style="list-style-type: none"> <li>• They are no Malawian banks with foreign branches or subsidiaries.</li> </ul>

**3.9 Shell banks (R.18)**

**Description and analysis**

399. **Legal Framework:** There is no statutory or regulatory framework dealing with shell banks.

400. **Prohibition of Establishment Shell Banks (c. 18.1):** The ML & TF Act does not address the establishment of shell banks and there is no regulation or directive that addresses this issue. Under its licensing provisions, the RBM has not chartered any shell banks. In addition, there are no shell banks currently operating in Malawi.

401. **Prohibition of Correspondent Banking with Shell Banks (c. 18.2):** The ML & TF Act does not address correspondent banking relationships with shell banks and there is no regulation or directive that addresses this issue.

402. **Requirement to Satisfy Respondent Financial Institutions Prohibit of Use of Accounts by Shell Banks (c. 18.3):** The ML & TF Act does not address the use of respondent banks by shell banks and there is no regulation or directive that addresses this issue.

403. **Analysis of Effectiveness:** The RBM has not chartered any shell banks and there are no shell banks currently operating in Malawi. There is, however, no statutory or regulatory provision dealing with shell banks or prohibiting their use as correspondent banks, although section 24 (4) of the ML & TF Act does have a requirement for correspondent banking relationships that is consistent with international standards. In addition, banks are not required to satisfy themselves that their respondent institutions do not permit their accounts to be used by shell banks.

**Recommendations and comments**

The authorities should consider specifically:

- Prohibiting the establishment of shell banks
- Prohibiting their use as correspondent banks, and requiring that banks satisfy themselves that their respondent institutions in foreign countries do not permit their accounts to be used by shell banks.

Compliance with FATF Recommendation 18		
<b>R.18</b>	PC	<ul style="list-style-type: none"> <li>While the RBM does not charter shell banks and none operate in Malawi, there is no statutory or regulatory prohibition against the use of shell banks as correspondent banks or against correspondent banks using shell banks.</li> </ul>
<b>3.10 The supervisory and oversight system—competent authorities and SROs: Role, functions, duties and powers (including sanctions) (R.17, 23, 25 &amp; 29)</b>		
Description and analysis		
<p>404. <b>Legal Framework:</b> Various sections of the ML &amp; TF Act contain specific sanctions applicable to natural and legal persons.</p> <p>405. <b>Availability of Effective, Proportionate &amp; Dissuasive Sanctions (c. 17.1):</b> Every requirement of the ML &amp; TF Act contains a specific prison term and fine. For example, the record keeping requirements of Section 27 provide that any person who contravenes such requirements “shall be liable—(a) in the case of a natural person, to imprisonment for two years and a fine of K100,000 (US\$710); and (b) in the case of a corporation, to a fine of K500,000 (US\$3570) and loss of business authority.” The violation of each requirement is addressed specifically in the section of the ML &amp; TF Act that imposes the requirement. There is no range of penalties; each sanction is specific and there is no discretion in applying the sanction. For individuals, most sanctions, while differing depending upon the individual requirement, mandates imprisonment for at least one year and a fine of at least K100,000 (US\$710). For corporations, most sanctions are a fine of K500, 000 (US\$3570) and loss of business authority.</p> <p>406. <b>Designation of Authority to Impose Sanctions (c. 17.2):</b> The statute is unclear on the appropriate prosecutorial authority for the various requirements. There have been no enforcement actions that have imposed fines or imprisonment under the ML &amp; TF Act. Thus, there have been no court determinations in this area. Because most of the sanctions involve imprisonment and fines, it appears that the DPP would be the designated authority to prosecute and impose those sanctions. The fines are not separate from the prison term, but part of the sanction. Certain violations involve only a fine. Here, it is unclear what authority would impose the fine. With regard to such fines, there is no discretion; the amount of the fine is set by statute.</p> <p>407. <b>Ability to Sanction Directors &amp; Senior Management of Financial Institutions (c. 17.3):</b> Sanctions are applicable to any “person,” including specific reference to a “natural person.” Thus, the ability to sanction officers and directors of financial institutions are specifically covered by the statute’s sanctions.</p> <p>408. <b>Range of Sanctions – Broad and Proportionate (c. 17.4):</b> The range of sanctions is not very broad; nor are they necessarily proportionate. For example, and as noted above, the failure of a financial institution to maintain records according to the ML &amp; TF Act’s requirements would mandate the imposition of a fine and loss of that institution’s authority to do business. There is no discretion in applying the sanctions; each requirement carries a specific and mandated sanction for failure to comply.</p> <p>409. <b>Regulation and Supervision of Financial Institutions (c. 23.1):</b> The ML &amp; TF Act provides rather comprehensive coverage of international standards preventive measures. The statute is only in the beginning stages of being implemented. Banks are the only financial institutions that are making efforts to satisfy its requirements. The country is “rolling out” its compliance efforts trying to bring other types of financial institutions into compliance over time. See paragraph immediately below.</p> <p>410. <b>Designation of Competent Authority (c. 23.2):</b> Section 43 (3) of the ML &amp; TF Act makes clear that the primary supervisor of a financial institution has overall authority to implement the requirements of the statute and enforce compliance with the statute, with the FIU taking such authority for other financial institutions. Thus, the RBM is the primary authority for banks, securities firms and insurance companies (even though life insurance companies are not covered under the statute) and others regulated by the central bank; the Malawi Gaming Board is responsible for casinos; the Law Society is responsible for attorneys; The Society of Accountants in Malawi is responsible for accountants. For others without a designated primary supervisor, such as dealers in precious stones and metals, the FIU will serve as the primary regulator. Based on the literal language of Section 43 (1), it appears they may be some technical inconsistency in the</p>		

application of enforcement, since this section states that the FIU “may” apply to the court to enforce the penalties in the ML & TF Act.

**411. Prevention of Criminals from Controlling Institutions (c. 23.3 & 23.3.1):** In order to obtain a banking (and other financial institution under the Banking Act) license, an applicant must submit information regarding the reputation, competence and expertise of executive officers pursuant to section 6 of the Banking Act (1989). Section 25 of that Act and RBM Directive on New Directors, Audit Committee Members and Senior Management Officials requires that a bank or financial institution shall obtain prior written approval of the RBM on the appointment of all directors and senior management of a bank or financial institution. Hence the directors and senior management officials are subject to a “fit and proper” test, including expertise and integrity. Section 60F of the Insurance Act (1959) has an integrity requirement for insurers and agents in order to obtain a license. Similarly, section 27 of the Capital Market Development Act authorizes the RBM to establish a fitness requirement for securities firms and brokers, which it has done under its licensing requirements

**412. Application of Prudential Regulations to AML/CFT (c. 23.4):** Malawi’s definition of financial institution for purposes of its ML & TF Act is much broader than the definition of financial institution that is used in FATF definition, since Malawi’s includes DNFBPs as financial institutions. Malawi’s banks, insurance companies (even though not included as financial institutions under the ML & TF Act) and securities firms are subject to Core Principles.

**413. Licensing or Registration of Value Transfer Services (c. 23.5):** Money transfer service firms (Western Union and Moneygram) are required to be licensed in Malawi, as are foreign exchange bureaus. There is, however, a significant foreign exchange sector that operates outside of the regulated arena. It is estimated by the central bank and the foreign exchange industry that two to four times the regulated industry exists in the unregulated arena. In addition, a court injunction has raised serious concerns about the RBM’s authority to license and supervise foreign exchange bureaus; they are currently virtually unsupervised.

**414. Monitoring and Supervision of Value Transfer Services (c. 23.6):** As noted above, the supervisory authority of the RBM over foreign exchange bureaus is currently under review by the Courts in Malawi and subject to an injunction. Thus, this is a major point of concern with regard to the RBM’s jurisdiction and supervisory authority. At this point, there is virtually no supervision of them. Also, non-licensed foreign exchange bureaus are not effectively supervised, since there has not been a prosecution of unlicensed foreign exchange bureau. Also as noted above, money transfer businesses have not begun to abide by the ML & TF Act’s requirements; they comply with their internal requirements, which are dictated by head office and not because of any the requirements of the ML & TF Act’s requirements.

**415. Licensing and AML/CFT Supervision of Other Financial Institutions (c. 23.7):** As noted previously, banks are the only financial institutions in Malawi complying with any of the ML & TF Act’s requirements. While other financial institutions may be licensed and supervised, they are not currently supervised for AML/CFT purposes.

**416. Guidelines for Financial Institutions (applying c. 25.1):** The FIU has established some guidance for banks to report large cash transactions and suspicious transactions. This is largely consistent with the guidance provided in the CDD Directive, except that large cash transactions were not subject to that directive. No guidance has been provided to other financial institutions covered by the reporting requirement, since there has been no effort to bring such institutions into compliance with the reporting requirements.

**417. Feedback on Reporting (c. 25.2) :** The FIU has not provided any feedback to reporting institutions, other than acknowledgement of the receipt of reports. This is still a very new process for banks in Malawi. Others have not even begun to make suspicious transaction reports. Some banks have received acknowledgements of their submissions, while others have not received any acknowledgements.

**418. Power for Supervisors to Monitor AML/CFT Requirement (c. 29.1):** Under the Reserve Bank Act, the RBM has adequate powers to monitor AML/CFT compliance for banks, insurance companies and agents, securities firms and brokers, and other financial institutions under its supervisory authority. This is reinforced by Section 11 of the ML & TF Act, which provides ample authority to the FIU to make inspections for compliance purposes and request information

from any entity covered by the statute. Such FIU authority can be delegated to other supervisory authorities, although the authority of some of the SROs is questionable with regard the AML/CFT issues.

419. **Authority to conduct AML/CFT Inspections by Supervisors (c. 29.2):** Subsections 11 (2) (c) and (k) of the ML & TF Act give the FIU specific authority to enter the premises of any financial institution to inspect any record, to ask any question, to take copies of any record and to request any information from any financial institution. In addition, Section 11 (2) (i) gives the FIU authority to conduct investigations of financial institutions for purposes of determining compliance by a financial institution with the statute's requirements.

420. **Power for Supervisors to Compel Production of Records (c. 29.3 & 29.3.1):** There is ample authority to compel the production of records. See paragraph immediately above for the sources of such authority. In this regard, there is no need to obtain a court order to produce records; the statute provides specific authority to the FIU.

421. **Powers of Enforcement & Sanction (c. 29.4):** As noted previously, each of the AM & TF Act's preventive measure requirements has a specific sanction for failure to comply.

422. **Adequacy of Resources for Competent Authorities (c. 30.1):** The FIU is still in the process of becoming fully functional. It is in the process of obtaining a Director to head operations as well as add to its staff. The FIU does have its own budget that is established annually by Parliament. The RBM has resources that could be used to implement and enforce AML/CFT requirements. At the time of the assessment, The RBM, through outside assistance, had developed an AML examination manual and was field testing a risk-based approach to bank supervision generally. There is still a need for more training and assistance to make the FIU and RBM fully capable of supervising financial institutions for AML/CFT. The Gaming Board and law and accounting SROs have not begun to implement or enforce the new statute and there appears to be a great need for training before any of them could provide adequate supervision.

423. **Integrity of Competent Authorities (c. 30.2):** Section 14 of the statute requires the officers and staff of the FIU to be qualified and experienced to carry out the proper functioning of the office and specifies certain experience that individuals must have. For example, there must be at least one legal practitioner and one with financial, economic or accounting training and experience. Sections 16 and 17 of the statute mandate a confidentiality oath of all FIU staff as well as require confidential treatment of all information held by the FIU, except when disclosure is appropriate in performing FIU duties. In addition, there is a significant penalty of K100, 000 and two years imprisonment for violations of the confidentiality provisions.

424. **Training for Competent Authorities (c. 30.3):** The FIU is in the process of becoming fully operational. The RBM has an examination manual and has conducted one examination for purposes of determining compliance with the new statute. See also discussion at criteria 30.1 (two paragraphs above).

425. **Analysis of Effectiveness:** The ML & TF Act provides specific penalties for failure to comply with each of the statute's requirements. There have been no prosecutions for compliance failures to date since the country is trying to bring the statute into effective operation. The range of sanctions is not broad for any given violation. Rather, severe violations and minor ones receive the same penalty that is mandated by the statute. Because insurance companies are not covered entities under the ML & TF Act, the penalties do not apply to them.

426. Banks are the only financial institutions that are complying with the new statute. Due to a court injunction, there is a significant question about the RBM's authority to license and supervise foreign exchange bureaus. The licensing requirement for foreign exchange bureaus is not enforced effectively, since the unlicensed sector is larger than the licensed sector. In this regard, there has not been a prosecution of an unlicensed foreign exchange operator.

427. At the time of the on-site mission, the authorities had only tried to obtain compliance by the banking sector, which has received some guidance from the FIU. There is little meaningful feedback in terms of suspicious transaction reporting or large cash transaction reporting. In fact, there are discrepancies in the volume of large cash transaction reports that have been filed versus those that have been received.

428. While not all financial institutions have been complying with the statute, the authority in the statute is clear with respect to inspections and document production. The FIU has requested information and the banks have provided the requested information without delay.

429. The FIU, although functional, is not yet fully operational, but is making significant progress in becoming so.

**Recommendations and comments**

The authorities should consider:

- Revising the sanctions to permit more discretion and a broader range of sanctions for compliance failures, especially for minor violations that could be handled by administrative order. Otherwise, all banks could lose their licenses to do business and the DPP would need to be expanded to prosecute so many violations.
- Implementing more fully the requirements of the statute by bring all financial institutions under coverage.
- Establishing a working relationship between the FIU and other supervisors that specifies the AML/CFT responsibilities of each supervisor.
- Clarifying the authority of the RBM with regard to foreign exchange bureaus.
- Prosecuting unlicensed foreign exchange bureaus.
- Providing reporting institutions with meaningful guidance on future reporting and feedback on the reports that have been filed.
- Providing training for the FIU and other supervisors that will be responsible for AML/CFT compliance supervision and enforcement.
- Appointing the Director of the FIU.

**Compliance with FATF Recommendations 17, 23 (c 23.2, 23.4, 23.6-23.7), 25 (c. 25.1), 29 & 30**

<b>R.17</b>	PC	<ul style="list-style-type: none"> <li>• The sanctions are not likely to be effective, if imposed, because there is no discretion and loss of business authority is mandated in almost every case for corporations.</li> </ul>
<b>R.23</b>	PC	<ul style="list-style-type: none"> <li>• Banks are the only financial institutions implementing the statute's requirements.</li> <li>• Many foreign exchange bureaus are unlicensed.</li> </ul>
<b>R.25</b>	NC	<ul style="list-style-type: none"> <li>• There has been little, if any, feedback to most banks, which are the only entities complying with the statute.</li> </ul>
<b>R.29</b>	PC	<ul style="list-style-type: none"> <li>• The authority to inspect and compel production of records is satisfactory, but there is virtually no supervision in the foreign exchange area of those that are (were) licensed, and absolutely no supervision of unlicensed ones.</li> </ul>
<b>R.30</b>	NC	<ul style="list-style-type: none"> <li>• The FIU is becoming fully operational.</li> <li>• There is a need for more training for all of the supervisory authorities, especially the DNFPB supervisors.</li> <li>• The rating in this box is an aggregate rating of R. 30 across the various parts of this report.</li> </ul>

**3.11 Money or value transfer services (SR.VI)**

**Description and analysis**

430. **Legal Framework:** The Banking Act; Exchange Control Act; the ML & TF Act. Money value transmitters that handle foreign currency are licensed under the Exchange Control Act as foreign exchange dealers. Every financial institution licensed under the Banking Act requires a separate license under the Exchange Control Act for it to be dealing in foreign currency.

431. The ML & TF Act designates any person who conducts business performing money transmission services as a financial institution. Therefore, any such person is subject to the requirements of this Act. In Malawi, there are three entities that offer MVTs: Moneygram, Western Union and the Postal Services. Their business operations are governed by the Exchange Control Act and its regulations.

432. Anecdotal information obtained during the assessment mission indicates that there may be informal operators conducting money transmission services that are not registered, but this could not be confirmed.

**Comment [atgp2]:** This last part is not clear.

433. **Designation of Registration or Licensing Authority (c. VI.1):** Section 3 of the Banking Act requires that any financial institution be licensed by the RBM. Western Union and Moneygram

operate as licensed money transmission service providers and are associated with banks. Fastcash is the domestic arm of the Postal Service providing money orders on a domestic basis, but that could potentially be used internationally. MVTs are required to be licensed and inspected by the RBM in accordance with the Exchange Control Act.

434. **Application of FATF Recommendations (applying R.4-11, 13-15 & 21-23, & SRI-IX)(c. VI.2):** Nothing has yet been done to subject these entities to the requirements of the new statute. The compliance mechanisms currently used are mandated by the head offices of the companies, not by the new statute or directives of the RBM or regulations of the FIU.

435. The local MVTs are required to identify and verify their customers, not to hold anonymous accounts, keep records for seven years, report suspicious and threshold transactions, appoint a compliance officer, train their staff, screen persons before hiring them, create internal rules and establish and audit function.. The CDD requirement may only have to be done in the event of occasional transactions above a threshold set by the Government. This threshold has not been set yet and the Regulations are still being drafted. The MVTs are only allowed to conduct transactions under the limit of USD 100 per day, per person, per week),

436. **Monitoring of Value Transfer Service Operators (c. VI.3):** Nothing has yet been done to subject these entities to the requirements of the new statute or to monitor their compliance with the statute. The FIU is “rolling out” its compliance efforts to try to bring covered entities within its compliance umbrella over a reasonable time.

437. The licensed MVTs are attached to banks and are subject to quarterly inspection by the RBM, although agencies interviewed indicate that this only happens annually. Inspection of MVTs is done by the Exchange Control Department of the RBM. This department visits all banks and foreign exchange bureaus, which are licensed to conduct foreign exchange transactions. However, where it considers necessary to do so and as it has in the past, Bank Supervision Department has conducted joint inspections with the Exchange Control Department to complement each other.

438. **List of Agents of Value Transfer Service Operators (c. VI.4):** The RBM, as part of its licensing requirements, is aware of each of the offices of the money transmission service providers.

439. **Sanctions (applying c. 17.1-17.4 in R.17)(c. VI.5):** Under the ML & TF Act, the same sanctions that are applicable to all covered financial institutions are applicable to money transmission service providers in Malawi.

440. Since it is a requirement for MVTs to be licensed and be compliant with the Exchange Control Act, the RBM has the relevant powers to implement sanctions.

441. **Additional Element – Applying Best Practices Paper for SR VI (c. VI.6):** Nothing has yet been done to implement the new statute with respect to money transmission service providers, including applying Best Practices recommendations.

442. It would appear that MVTs are not enjoying any special or individualized attention from the authorities and that they are operating either under the postal services, under a bank license or illegally. The inclusion of MVTs in the ML & TF Act does begin to address some of the issues in the FATF best practice note, but these have not been implemented yet.

443. **Analysis of Effectiveness:** The new statute is not effective with respect to money transmission service providers because the statute’s requirements have not been implemented in this sector.

444. Although there are some elements of a rudimentary system in place in relation to licensing, and some of the provisions required are in the new legislation, the agencies are not applying any AML / CFT requirements and are completely dependent on their head office to manage and block persons on sanctions lists, as well as to identify and detect suspicious transactions. The only system currently being applied is a system to ensure that exchange control thresholds are adhered to. The MVTsVs appear to have no idea what is required of them in relation to AML / CFT.

Recommendations and comments

The authorities should consider implementing the ML & TF Act's requirements with respect to all money service transmitters.		
Compliance with FATF Recommendation SR VI		
<b>SR.VI</b>	NC	<ul style="list-style-type: none"> <li>There has been no implementation effort with respect to money transmission service providers.</li> </ul>

#### 4. Preventive Measures–Designated Non-Financial Businesses and Professions

<b>4.1</b>	<b>Customer due diligence and record-keeping (R.12) (applying R. 5, 6, and 8 to 11)</b>
Description and analysis	
<p>445. <b>Legal Framework:</b> All categories of DNFBPs as defined in the FATF Recommendations are covered as “financial institutions” under the ML &amp; TF Act. Consequently, the AML/CFT obligations apply to DNFBPs in the same manner as to financial institutions.</p> <p>446. Lawyers are governed under the Legal Education and Legal Practitioners Act; the Accountants under the Public Accountants and Auditors Act; dealers in Precious metals and stones under the Mines and Minerals Act. There is no legal framework for real estate agents. To the extent that any trust and company service activities are conducted in Malawi these are done by lawyers.</p> <p>447. Casinos are governed by the Gaming Act.</p> <p>448. Section 2 of the ML &amp; TF Act provides, with respect to the lawyers and accountants, the AML and CFT obligations are applicable when buying and selling real estate, managing client money or other assets, managing of bank, savings and securities accounts, in the creation of companies, and in corporate acquisitions.</p> <p>449. For real estate agents, AML and CFT obligations apply when the person is dealing in transactions for a client in buying and selling real estate, while for precious metals and stone dealers, AML and CFT obligations apply when engaging in a cash transaction above a designated threshold. At the time of the assessment mission, such a threshold had not been prescribed by the Minister.</p> <p>450. Additionally, in discussions with the private sector, almost all the legal, accounting and real estate firms are 1-2 person run businesses. Therefore, the expectation is that the CDD measures will not be applied in the same way as to the banking and securities sectors for example.</p> <p>451. <b>CDD Measures for DNFBPs in set circumstances (applying c. 5.1-5.18 in R. 5, R. 6-11)(c. 12.1):</b> The CDD measures as provided for in section 24 of the ML &amp; TF Act (on customer identification and verification), section 25 (on not conducting business with a person if no satisfactory evidence of the identity has been produced), section 26 (on not maintaining anonymous accounts) and section 27 (on maintaining customer records) are applicable. For details on what these CDD measures entail, see the discussions under section 3 on Preventive Measures for Financial Institutions.</p> <p>452. <b>Analysis of Effectiveness:</b> The CDD measures under the ML &amp; TF Act are not being implemented by any of the DNFBPs. On the other hand, the assessors do recognize that one of the reasons for not issuing any guidance to the DNFBPs because the authorities have sought to introduce the requirements in the ML &amp; TF Act in a phased manner starting with the banking sector.</p>	
Recommendations and comments	
The authorities should consider providing appropriate regulatory or guidance with the necessary exemptions in order to make the application of CDD measures practicable and implementable.	



Compliance with FATF Recommendations																		
<b>R.12</b>	NC	<ul style="list-style-type: none"> <li>AML/CFT preventive measures under the ML &amp; TF Act are not being implemented by any of the DNFBPs as required under FATF Recommendations 5-11</li> </ul>																
<b>4.2 Suspicious transaction reporting (R.16) (applying R.13 – 15, 21 and SR IV)</b>																		
Description and analysis																		
<p>453. <b>Legal Framework:</b> See introductory discussion above under Recommendation 12 applicable to DNFBPs.</p> <p>454. <b>Requirement to Make STRs on ML and TF to FIU (applying R. 13):</b> As discussed in paragraph 373 (STR section), under Section 28 of the ML &amp; TF Act, financial institutions are required to report suspicious transactions. DNFBPs are covered under the definition of financial institutions and, therefore, are obligated to report suspicious transactions to the FIU. No suspicious transactions have been made by any of the DNFBPs.</p> <p>455. <b>Protection for Making STRs (applying R. 14):</b> DNFBPs are protected from both criminal and civil liability for breach of any confidentiality obligation if they file reports of their suspicions in good faith to the FIU. Further, there are prohibited from tipping off any person regarding the filing of a report or suspicion and are be criminally liable for doing so.</p> <p>456. <b>Establish and Maintain Internal Controls to Prevent ML and TF (applying R. 15):</b> In the absence of regulatory guidance as to how the DNFBPs are to implement the internal control obligations under the ML &amp; TF Act, the requirements are applicable without any exception.</p> <p>457. <b>Special Attention to Countries Not Sufficiently Applying FATF Recommendations (R. 21):</b> The ML &amp; TF Act makes DNFBPs' obligations, with respect to transactions and business relations from countries that do not sufficiently apply FATF recommendations, the same as are required for financial institutions.</p> <p>458. <b>Analysis of Effectiveness:</b> With the exception of the obligation to report suspicious transactions, the scope of the application of how internal control requirements are to be applied could be narrowed. This will enable the DNFBPs to apply these requirements in a manner that will ensure that they are cost effective considering the size of many of these entities.</p>																		
Recommendations and comments																		
The authorities should consider introducing suspicious transaction reporting and internal control obligations for the various professions within DNFBPs in a sequenced manner with due regard to the ML/TF risk which each of these businesses and professions present.																		
Compliance with FATF Recommendation 16																		
<b>R.16</b>	NC	<ul style="list-style-type: none"> <li>No implementation of the reporting obligation.</li> <li>No implementation of the internal controls obligation.</li> </ul>																
<b>4.3 Regulation, supervision and monitoring (R. 24-25)</b>																		
Description and analysis																		
<p>459. <b>Legal Framework:</b> Gaming Act; Legal Education and Legal Practitioners Act; Public Accountants and Auditors Act; Mines and Minerals Act.</p> <p><i>Overview of DNFBP supervisors</i></p> <table border="1"> <thead> <tr> <th>DNFBP</th> <th>Supervised for AML/CFT</th> <th>Supervisor</th> <th>SRO</th> </tr> </thead> <tbody> <tr> <td>Lawyers</td> <td>No</td> <td>X</td> <td>Malawi Law Society</td> </tr> <tr> <td>Accountants</td> <td>No</td> <td>X</td> <td>Society of Accountants in Malawi</td> </tr> <tr> <td>Real Estate Agents</td> <td>No</td> <td>X</td> <td>None</td> </tr> </tbody> </table>			DNFBP	Supervised for AML/CFT	Supervisor	SRO	Lawyers	No	X	Malawi Law Society	Accountants	No	X	Society of Accountants in Malawi	Real Estate Agents	No	X	None
DNFBP	Supervised for AML/CFT	Supervisor	SRO															
Lawyers	No	X	Malawi Law Society															
Accountants	No	X	Society of Accountants in Malawi															
Real Estate Agents	No	X	None															

<b>Dealers in precious metals</b>	<b>No</b>	<b>X</b>	<b>None</b>
<b>Casinos</b>	<b>No</b>	<b>Gaming Board</b>	<b>X</b>

460. **Regulation and Supervision of Casinos (c. 24.1, 24.1.1, 24.1.2 & 24.1.3):** The Malawi Gaming Board is responsible for the supervision of the casino industry. The Gaming Board has the powers to issue and revoke licenses if there has been a contravention of the Gaming Act. The Act is silent regarding money laundering contraventions.

461. The Casino industry is governed by the Gaming Act, 1996, as amended in 1998. This statute established the Malawi Gaming Board as a statutory body with powers to issue licenses, inquire into complaints against licensees, and regulate its own procedures. There are two operators that have been granted casino licenses, one operating in Blantyre and the other operating in Lilongwe. In addition, one gaming license has been granted to one operator, which has 13 sites for gaming machines classified as site operations. One of the casino operators has just been given permission from the Board to operate an internet casino.

462. A number of illegal casinos have been shut down by the Gaming Board with the assistance of the MPS. The Gaming Act makes provision for a rigorous licensing process and the Gaming Board makes use of its counterparts in other countries to verify information in the event of a holding company being in another jurisdiction. Casinos under the Gaming Act are required to report changes in key personnel to the Board and, in some instances, casinos have been fined when the inspectors have discovered violations of this requirement. Inspections occur monthly. Although due diligence of beneficial ownership is undertaken, this is done in a very superficial manner and would probably not uncover the true beneficial owner(s).

463. The ML & TF Act defines gambling houses, casinos and lotteries as financial institutions and, therefore, subject to CDD requirements. Section 24(7) (b) of the Act waives these requirements for occasional transactions not exceeding a certain amount prescribed in notice by the Minister of Finance, except when the institution has reason to suspect that the transaction is suspicious or unusual. No such threshold has been prescribed by the Minister. In addition, such institutions are required: not to hold anonymous accounts, keep records for 7 years; report suspicious and threshold transactions; appoint a compliance officer; train their staffs, screen persons before hiring them; create internal controls and establish an audit function. None of the requirements of the ML & TF Act have been implemented.

**Monitoring (c. 24.2 & 24.2.1):**

464. **Accountants:** The accounting industry in Malawi is comprised of a total of 13 accounting firms. Each of the international “Big Four” accounting firms operate in Malawi; in addition, there are two regional firms and seven purely local firms, many of which are sole practitioners.

465. The Society of Accountants is a supervisory body in accordance with the meaning of that term under the ML & TF Act. It is a self regulatory body that establishes the qualifications for, and the terms and conditions applicable to, operating as an accountant in Malawi. It has oversight over the conduct of all accountants and auditors in the country. Under the practice rules of the Society of Accountants, only about 40 individuals are authorized to sign financial statements out of a total of approximately 400 individuals registered with the society. The Society has yet to implement any rules or procedures for purposes of enforcing the requirements of the ML & TF Act, which defines accountants as financial institutions and, thereby, subjects them to all of the requirements of the statute.

466. **Lawyers:** Attorneys are regulated under the Legal Education and Legal Practitioners Act (hereafter the Legal Practitioners Act). Further, legal practitioners also include notaries, where notaries are attorneys with specific qualifications to be a notary public. The Malawi Law Society is established under the Legal Practitioners Act. It administers the qualification of lawyers and recommends to the Chief Justice of Malawi of Malawi to admit a lawyer to be listed on the roll of legal practitioners. It also establishes the code of conduct and, after a hearing of the disciplinary committee, it can recommend to the High Court to strike a practitioner from the roll, censure or suspend a legal practitioner. To

be admitted to practice as a lawyer, a person has to be a citizen of Malawi, have appropriate legal academic qualifications and should have passed the Malawi law examination (section 9 of Legal Practitioners Act).

467. The Malawi Law Society is a supervisory body in accordance with the ML & TF Act. As a self-regulatory body, it has oversight over the conduct of all lawyers in Malawi. In this regard, the Society has issued a Code of Ethics, 2006 (the Code) that is comprised of rules of professional conduct for legal practitioners. The Code is issued by the Ministry of Justice as rules of the Society pursuant to section 36 of the Legal Practitioners Act.

468. Under chapter 11, rule 20(iii) & (iv) of the Code, a lawyer must not counsel or participate in either “the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value” or “the concealment of property having potential evidentiary value in a criminal proceeding.” Moreover as an exception to principle of confidentiality/privilege, under chapter 8 rule 8(i) & (ii) of the Code, “a lawyer must disclose confidential information when required to do so by law”, or “a lawyer must disclose confidential information when necessary to prevent a crime likely to result in death or bodily harm and may disclose confidential information when necessary to prevent any other crime.”

469. In discussion with the Society, it was conceded that the obligations imposed on lawyers under the ML & TF Act would fit squarely within the exceptions outlined above. It will not, therefore, be an issue for members of the Society to comply with the requirements of the ML & TF Act. However, at the present time, no monitoring for ML or TF compliance purposes is being undertaken by the Society.

470. In terms of sanctions for breaches of the Code, the Society, after due process of law, can impose the following penalties: admonishment; suspension from practice and striking off the Roll as provided for in Section 21 of the Legal Practitioners Act; or expulsion of a member from the Society in accordance with Section 36(2) of the Legal Practitioners Act. In this regard, in 2007, the Society received 22 complaints. Of the 22, nine were heard by the Disciplinary Committee of the Society, of which four were sent to the Attorney General to move the High Court to discipline the lawyers affected (misappropriation of client funds was the violation). The Society has not had a case involving money laundering or terrorist financing.

471. In addition to the sanctions imposed by the Society, where there is criminality involved, a lawyer can also be prosecuted by the competent authorities.

***Dealers in precious metals and stones:***

472. The Minerals and Mines Act stipulates that no person may hold, store or trade in gemstones without a license. The supervisory authority that governs the issue of licenses in Malawi is the Department of Mines. They issue 3 types of licenses: (i) non-exclusive, which are granted for one year for small scale mining; (ii) reconnaissance and exclusive prospecting for medium and large scale mining; and (iii) mining license. The Department of mines uses a due diligence process when issuing licenses and the MPS assists with some of the inquiries. This process is not considered rigorous enough to determine beneficial ownership of the license operator. The Department monitors the environment for illegal operations and has criminally charged, and even deported, someone for operating without a license with the assistance of the MPS.

473. The ML & TF Act includes within the definition of financial institution, any person who is dealing in precious metals, stones, when the person is engaging in a cash transaction with a customer equal to or above the applicable designated threshold prescribed by the Minister. This threshold has not been prescribed and none of the provisions of the legislation have been implemented. Insofar as jewelers are concerned, besides being licensed to hold, store and trade in gemstones, they are not actively supervised.

474. **Guidelines for DNFBPs (applying c. 25.1):** No guidelines have been issued.

475. **Analysis of Effectiveness:** The only monitoring that is happening in relation to the gambling industry is in relation to monitoring and action against unlicensed operations and

<p>the collecting of revenues. It is a concern that a casino keeps funds for safe-keeping for patrons and receives foreign exchange (without limit) without applying any particular CDD or other requirements. It is a further concern that the Gaming Board has given a casino permission to operate an internet casino without issuing a license or following any other procedures in relation thereto.</p>		
<p>Recommendations and comments</p>		
<p>The authorities should consider –</p> <ul style="list-style-type: none"> <li>- Implementing a licensing process for internet casinos.</li> <li>- Conducting awareness and training for its gambling operators and staff on the ML &amp; TF. Act and the implementation thereof.</li> <li>- Issuing guidelines to the gambling industry in relation to the application of the ML &amp; TF Act, including examples of how money can be laundered through a casino.</li> <li>- Adopting measures to determine beneficial ownership when licensing casinos.</li> <li>- Applying AML requirements with respect to occasional transactions in casinos.</li> <li>- monitoring and supervising gaming licensees in relation to the requirements of the ML &amp; TF Act.</li> <li>- Having casinos cooperate with the RBM supervision department regarding the banking transactions undertaken by them.</li> <li>- Developing guidelines for each of the businesses and professions to aid in the implementation of the AML/CFT measures.</li> </ul>		
<p>Compliance with FATF Recommendations 24 &amp; 25 (c 25.1, DNFBP)</p>		
<b>R.24</b>	NC	<ul style="list-style-type: none"> <li>• No implementation of AML/CFT requirements across all DNFBPs</li> </ul>
<b>R.25</b>	NC	<ul style="list-style-type: none"> <li>• No guidelines have been issued</li> </ul>
<p><b>4.4 Other non-financial businesses and professions—Modern secure transaction techniques (R.20)</b></p>		
<p>Description and analysis</p>		
<p>476. <b>Other Vulnerable DNFBPs’ (applying R. 5, 6, 8-11, 13-15, 17 &amp; 21, c. 20.1):</b> At the time of the on-site mission, no assessment had been conducted by competent authorities to determine the ML/TF risk presented by other non-banking financial businesses and professions. Even on an anecdotal basis, the assessors could not identify other DNFBPs’ that could potentially be vulnerable to ML or TF.</p> <p>477. <b>Modernization of Conduct of Financial Transactions (c. 20.2):</b> The RBM has made efforts to encourage the use of modern techniques for conducting financial transactions particularly in promoting the use of Automatic Teller Machines and other secure payment systems, such as credit cards. Some banks have also introduced electronic banking for their customers.</p>		
<p>Recommendations and comments</p>		
<p>The authorities should consider conducting an assessment of the risks that other non-banking financial business and professions are likely to be misused for ML or TF.</p>		
<p>Compliance with FATF Recommendation 20</p>		
<b>R.20</b>	LC	<ul style="list-style-type: none"> <li>• No assessment on whether other DNFBPs’ are vulnerable to ML &amp; TF</li> </ul>

## 5. Legal Persons and Arrangements & Nonprofit Organizations

<p><b>5.1 Legal Persons—Access to beneficial ownership and control information (R.33)</b></p>		
<p>Description and analysis</p>		
<p>478. <b>Legal Framework:</b> The Companies Act, 1984; The Business Names Registration Act, 1968 (BNA) as amended, regulate the incorporation and registration of legal entities in Malawi.</p> <p>479. All limited companies and sole proprietorships in Malawi are registered by the Registrar</p>		

General's department, which falls under the Ministry of Justice. The main role of this office is to incorporate limited companies; keep a record of company information submitted under the Companies Act; and make the information available to the public and law enforcement agencies. As at February 2008, there were 8,822 companies registered in Malawi.

The following types of legal persons maybe created –

480. *Limited Companies* – These companies are established under the Companies Act, 1984. There are two types of limited companies: those that are limited by shares and those limited by guarantee, which are usually created by companies that have a charitable character. To create a limited company of any kind, the documents that need to be presented are a memorandum and articles of association for the company to be formed; this is a standard document that outlines who the directors are, their shareholdings, the capital of the company and its registered office. The documents are presented, together with a registration fee, which is a percentage of the company's registered capital. A certificate of registration will be issued, and the company will be recorded as registered.

481. *Partnerships, Sole Proprietorships* - These are registered under the Business Names Registration Act. For a partnership, the Registrar General needs the Partnership Agreement. For a sole proprietorship, a person who wants to own a business just needs to present him or herself at the Registrar General's office, fill in some forms indicating that the owner of the business is resident in Malawi, and specify the registered place of business. Upon submission of the foregoing information, the business will be registered accordingly.

482. It should be noted that for all these entities, particularly foreign companies, it is important that the directors are resident in Malawi. However, "resident" is not defined and, as such, a person just needs to give his or her residential address even if the person is in Malawi on a temporary basis.

483. **Measures to Prevent Unlawful Use of Legal Persons (c. 33.1):** There is a national registry where information on the ownership and control of all companies is maintained. This information is readily available to the public on payment of a search fee. However, the accuracy and timeliness of the information is doubtful.

484. On the other hand, each company is required to keep updated records of all information required by the Companies Act at its registered office and make this record available to the public (sections 128 & 129 of the Act).

485. Section 142 of the Companies Act prohibits the appointment of a legal person as a director of a company.

486. **Access to Information on Beneficial Owners of Legal Persons (c. 33.2):** All information of the legal entities that are created or just registered by the Registrar General is kept manually, and is open to the public for examination at anytime during working hours at a fee of K100 (US\$0.70c) per search. Law enforcement agencies are exempt from paying the search fee. A search certificate will be issued following the search, but, as the records are kept manually, it is a tedious exercise to carry out a search. This manual register includes relevant information on companies and undertakings: legal status, date of establishment, company capital, and powers of representation, etc.). It also includes details about changes in the status of the company such as board membership and address of registered office. The Malawi authorities informed the assessors that the main clients of the Registrar General are the Police and the ACB, both of which utilize the company registry in their investigative work.

487. It should also be noted that, in creating a legal person, it is not necessary to know if the directors of the company or person registering a business name has a resident permit, or a working permit. The legislation that regulates the work of the Registrar General does not require it to ask for these documents.

488. Each entity is expected to keep all documents of ownership and any changes in ownership that may take place. Also, each is expected to maintain accounting records. In particular, companies are expected to submit annual returns, even this does not happen in practice. Although the Registrar General has the power under the Companies Act to compel the submission of annual returns, this power has only been exercised once in 2003 when companies were ordered to update

their records. The success of this exercise was mixed.

489. Through a World Bank supported project, the Malawi authorities are considering the computerization of the company registration system. The advantage of this is that it will enable the public to search for information on companies, not only by the company name, but by individual name.

490. **Prevention of Misuse of Bearer Shares (c. 33.3):** Section 45 of the Companies Act prohibits companies from issuing share warrants in bearer form. Moreover, the authorities in Malawi do not as a matter of practice accept the issuing of bearer shares by any company.

491. **Additional Element - Access to Information on Beneficial Owners of Legal Persons by Financial Institutions)(c. 33.4):** Banks do require corporate entities seeking to open accounts to provide information on who the directors and shareholders are.

492. **Analysis of Effectiveness:** The Malawi system for access to beneficial ownership and control information of legal persons relies upon the availability of such information to the public, generally, and law enforcement agencies, in particular. However, because of the inadequacy of updated information at the company registry, the utility of the information that is maintained is doubtful. Indeed, while there is a requirement to provide annual returns on director and shareholder information to the Registrar General and to keep it updated, this information is not verified and consequently is not reliable.

493. It was evident from the authorities that two important law enforcement agencies involved in combating financial crime have searched for information from the company registry in the course of their investigations. This does indicate that there is indeed a role that the Registrar General's department can play in ensuring that information is kept accurate and in an updated manner.

#### Recommendations and comments

The authorities should consider –

- Enhancing the mechanism for keeping the information accurate and in an updated manner.
- Enhancing the capacity of the Registrar General's officer to verify the company information provided to the office, including that of beneficial owners.
- Strengthen the enforcement mechanism under the Companies Act to compel submission of annual returns.

#### Compliance with FATF Recommendation 33

<b>R.33</b>	PC	<ul style="list-style-type: none"><li>• Information is not kept in an updated manner.</li><li>• There is no beneficial ownership information</li></ul>
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#### 5.2 Legal Arrangements–Access to beneficial ownership and control information (R.34)

##### Description and analysis

494. **Legal Framework:** Trustees Incorporation Act (TIA), Trustee Act and Common Law. There are two types of trusts that can be created in Malawi: one is a Public Trust under the TIA, and the other is a private trust under Common Law, which can be created either by a trust deed or a will. A public trusts is registered similar to a company under the Companies Act, but there is no registration requirement for private ones.

495. As at February 2008, there were 4,219 trust applications received by the Registrar General's office. The reason for using the figure for trust applications is that it is the Minister of Justice that approves the applications. Consequently, the Registrar General's department was not in a position to confirm the exact number of approved trusts in Malawi.

496. Trustees in Malawi, like other common law jurisdictions, hold trust property for the benefit of other parties, called beneficiaries (section 18 of the Trustee Act).

497. *Trusts, Associations, Charities (Public Trusts):* These are registered under the Trustee Incorporation Act (TIA). Section 3 of the TIA provides that trustees of any charity for religious, educational, literary, artistic, scientific or public purposes, or of any association of persons of any religious, educational or other charitable purpose, can apply to the Minister of Justice for a certificate of incorporation of the trustees as a corporate body.

498. The following documentation/information is required to be submitted to the Registrar General's office: a constitution of the entity, names and signatures of the directors of the entity,

copies of the common seal of the entity, an oath of the directors to carry out the activities of the entity, and a designation of the registered office of business. After a review of this documentation to ensure that they satisfy the requirements of the TIA, the application is transmitted to the Ministry of Justice for final approval. Upon approval, a certificate of incorporation is issued by the Minister of Justice and returned to the Registrar General for forwarding to the applicants. According to the authorities, the rationale for such a process is to ensure that such entities are not involved in anything that would be subversive to the Government.

499. *Private Trusts (Settlement Trusts)*: These are privately created and the Registrar General's department is not involved in their creation. The only role the Registrar General's office plays is to have a Trust Deed stamped for authentication purposes.

500. **Measures to Prevent Unlawful Use of Legal Arrangements (c. 34.1)**: Similar to the discussion under Recommendation 33, neither the Registrar General's department nor the Minister of Justice is under any obligation to verify the integrity of the trustees.

501. **Access to Information on Beneficial Owners of Legal Arrangements (c. 34.2)**: Information related to public trusts is kept in a register and available for inspection by the public under section 14 of the TIA and section 12 of the Trustees Incorporation Rules. However, there is no central filing requirement for private trusts and no register of such trusts is maintained by any institution. Competent authorities have access to such information.

502. There are no requirements to obtain, verify or retain information on the beneficial ownership or control of trusts.

503. **Additional Element - Access to Information on Beneficial Owners of Legal Arrangements by Financial Institutions(c. 34.3)**: Banks only identify the trustee and not the beneficiary. The practice is to require the trustee to submit a certificate of incorporation.

504. **Analysis of Effectiveness**: The mechanism for accessing beneficial ownership information and control of trusts is not available. Certainly in the case of private trusts where there is no filing requirement, identification of ownership and beneficial ownership is problematic. There is potential to improve the registration system by building on the existing mechanism of registering public trusts under the TIA.

#### Recommendations and comments

The authorities should consider –

- Adopting a mechanism to register the private trusts, including beneficial ownership information, and make this available to the public
- Ensuring that the information on public trusts is kept in an updated manner

#### Compliance with FATF Recommendations

<b>R.34</b>	PC	<ul style="list-style-type: none"> <li>• Information not kept in an updated manner on public trusts</li> <li>• No ownership or beneficial ownership information on private trusts</li> </ul>
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#### 5.3 Nonprofit organizations (SR.VIII)

##### Description and analysis

505. **Legal Framework**: The legislative regime for the establishment, registration and monitoring of non-governmental organizations is governed by the Non-Governmental Organization Act, 2000 (NGO Act). It provides that NPOs opting to register their organization should do so with the Council for NPOs, known as the Council for Non-Governmental Organizations in Malawi (CONGOMA), established under Section 24 of the NGO Act as well as the Ministries of Women and Child Development and Justice. The primary function of the CONGOMA is to exercise oversight with respect to the NPO sector in Malawi, including promotion of cooperation between the NPO community and the government of Malawi.

506. **Overview of the Sector**: Within the Malawian economic and social environment, Malawi has a sizeable and diverse non-profit sector. As of January 2008, the sector comprised of NPOs was estimated to be more than 500. These are divided into International NPOs (INPOs) and National NPOs (NNPOs), of which 75 are INPOs and about 500 are NNPOs. The reason for having an estimate rather than an exact number is due to the lack of an appropriate database mechanism to record all NPOs in Malawi. Moreover, registration of NPOs is not mandatory, due to constitutional

protection of freedom of association. Furthermore, there is no mechanism to ensure that NPOs are registered with the CONGOMA and, as such, it is difficult to know with precision the number of NPOs that currently exists in Malawi.

507. The NPOs in Malawi include associations, charities, churches, clubs, cooperatives, societies and unions. The great majority of these NPOs are involved in activities dealing with orphan care, Health and HIV Aids awareness, agriculture, environmental, governance, human rights, water sector and economics.

508. **Registration:** In Malawi, there are two main types of NPO structures: formal and informal. The formal ones are registered either under the Trustees Incorporation Act or the Companies Act. Informal ones are registered with the District Commissioner and are commonly known as Community Based Organizations (CBOs).

509. For the formal ones, the Trustees Incorporation Act requires under section 3 that any NPO seeking to engage in charitable activities in Malawi apply to the Minister of Welfare Development and Women for a certificate of incorporation. An application to register an NPO is required to be accompanied by two copies of the constitution or governing instrument of the NPO. Additionally, for operational purposes (which does not impact the legality of an NPO), an NPO can elect to register with CONGOMA. For international NPOs, section 20 of the NGO Act requires that an INPO have a minimum of two of its directors or trustees be citizens of Malawi.

510. Furthermore, submission of names of the Trustees and directors is required. However, no background check is done on either the trustees or directors.

511. In practice, registration is first made with the Ministry of Women for INPOs and for NNPOs with the Ministry of Justice. Following this action, the NPO is then required to register with CONGOMA. The register at CONGOMA is publicly available and soon the information will also be made available on its website. Competent authorities have access to this information as well.

512. With respect to the CBOs, they are exempted from the application of the NPO Act under section 5 and are only required to submit a simple list of names of what are referred to as Committees to the District Commissioner.

513. It should be noted, however, that registration is becoming more common now that many organizations, which fund NPOs, particularly those that are based in the European Union, will not fund any NPO that has not registered with the Ministries or CONGOMA.

514. **Review of Adequacy of Laws & Regulations of NPOs (c. VIII.1):** Malawi has not reviewed the adequacy of the laws and regulations relating to NPOs as respects the prevention of abuse of NPOs for terrorist financing purposes. In discussions with the authorities, they advised that this is not a priority for them.

515. **Preventative Measures Against Illegitimate NPOs (c. VIII.2):** There has been no outreach to the NPO sector to raise awareness on understanding what financing of terrorism entails or how the sector can be abused for terrorist financing purposes. Neither the authorities nor CONGOMA has conducted any outreach to the sector to raise awareness on the anti-money laundering legislation and how the sector fits into the overall anti-money laundering and terrorist financing framework in Malawi.

516. On the other hand, CONGOMA has reached out to their members in promoting transparency and good governance in the management of NPOs. It has done this by developing a basic bookkeeping manual as well as by encouraging NPOs to have boards and national assemblies that have oversight on their NPO activities. Moreover, a NPO is required, under Section 22 of the NPO Act, to submit (on an annual basis) an audited financial statement, an annual report outlining the activities undertaken by the NPO, an annual return of its trustees, directors, office bearers, auditors and its sources of funding.

517. Notwithstanding the efforts made by CONGOMA and the obligations under the NPO Act, CONGOMA has not exercised its oversight responsibilities to ensure that the provisions of the Act are implemented by the NPOs. Indeed, the authorities advised the assessor team that NPOs do not submit audited accounts as required under the Act. This makes it impossible to appreciate where



the financing of several NPOs comes from or how the money is spent.

518. **Diversion of Funds for Terrorists Purposes (c. VIII.3):** There are no rules applicable to NPOs in Malawi as to how they can raise their funds to finance their activities. Funds can be raised from any source without efforts being made to account for how the money is spent or carrying out the necessary due diligence on the organizations or individuals providing the funds. But as a practical matter, one of the NPOs interviewed did indicate that, to the best of its knowledge, the NPOs in Malawi do have a knowledge of potential donors. Indeed, it was argued that the financial support this NPOs has received has been from donors it knows and that it has adequate information on who they are.

519. **Powers to investigate and sanction (c. VIII.4):** CONGOMA does possess some power to sanction wrongdoing or mismanagement of a NPO. The power relates to the suspension or cancellation of registration. There are no other sanctions available such as warnings, fines, removal of the trustees, directors or management.

520. With respect to investigative powers, CONGOMA does not have the requisite tools to conduct investigations of NPOs such as compelling production of information by a NPO.

521. **Domestic and international cooperation (VIII.5):** There is no mechanism that exists to facilitate domestic cooperation on the part of CONGOMA and law enforcement agencies.

522. With regard to international cooperation, CONGOMA is a member at the Southern African Development Conference (SADC) Council of NPOs. Malawi is the current Chair of this SADC Council. The main emphasis of this regional body is engaging the government and ensuring that NPOs across member states have a cooperative relationship with the respective government.

523. No effort or attempt to set up a mechanism for exchange of information has been made.

524. **Analysis of Effectiveness:** The current legislative framework for the NPO sector in Malawi is not effective. As the authorities acknowledged in discussions with the assessors, they do not monitor the activities of the NPO sector including the manner in which NPOs raise their funds. As one the interviewed NPOs stated, “there is no effort to check whether the names of trustees and directors submitted to the authorities are actually the ones that take up positions in controlling and managing an NPO.” Furthermore, the minimal enforcement powers provided for under the NPO Act have never been used, nor are they adequate or proportionate. The only available sanction is cancellation or suspension of a NPO’s registration.

**Recommendations and comments**

The authorities should consider –

- Reviewing the adequacy of the NPO Act with respect to combating terrorist financing
- At a minimum, conducting background checks of trustees and directors
- Strengthening the sanctioning regime for NPOs
- Conducting awareness raising seminars to sensitizing the NPO sector on ML & TF issues

**Compliance with FATF Recommendations**

<b>SR.VIII</b>	NC	<ul style="list-style-type: none"> <li>• No implementation of AML/CFT requirements in the NPO Sector</li> <li>• No review of adequacy of NPO Act has been undertaken</li> <li>• No monitoring of NPO sector for AML/CFT purposes</li> </ul>
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**6. National and International Cooperation**

<b>6.1 National cooperation and coordination (R.31)</b>
Description and analysis
<p>525. <b>Mechanisms for Domestic Cooperation and Coordination in AML/CFT (c. 31.1):</b> Considering that Malawi has only recently begun to implement its AML/CFT infrastructure, domestic cooperation and coordination has been fairly robust between the policy makers, the FIU, the RBM, the ACB, MPS and other relevant public sector competent authorities. Operationally, the evidence of efforts that have been made so far indicates that the authorities are moving in the right direction. The driver for enhancing domestic cooperation has been the newly created Financial</p>

Intelligence Unit.

526. The mechanism for domestic cooperation among the competent authorities is achieved through the National Anti-Money Laundering and Combating the Financing of Terrorism Committee which began meeting in September 2007, under the chairmanship of the Ministry of Finance. The committee is an administrative mechanism established on the initiative of the Financial Intelligence Unit and the Ministry of Finance. As a demonstration of the commitment of the government in supporting the work of the committee, financial support has been provided in the July 2008 budget.

527. Membership of the National Anti-Money Laundering and Combating the Financing of Terrorism Committee is drawn from all the relevant stakeholders – Ministries of Finance, Justice and Foreign Affairs, the FIU, RBM, ACB, NIS, MPS and MRA. Representation from the private sector will be invited on an ad hoc basis when the need arises.

528. Development of policy on AML/CFT measures is referred to the Secretary to the Treasury at Ministry of Finance or the Secretary of the Ministry of Justice, who decides whether to develop a cabinet paper for consideration by the government.

529. At the operational level, the competent authorities involved in combating ML and FT have all previously worked together in various matters such as criminal justice, economic crimes, and financial supervision. This cooperation and coordination has involved law enforcement agencies such as the MPS, the MRA, and the Immigration Department among others. The DPP and the ACB work together in terms of operations, including joint prosecution of cases. Financial institutions, such as banks, have traditionally shared information with Fiscal Police, the DPP as well as the ACB on suspected criminal conduct. Indeed, a Task Force in 2007, chaired by the RBM, was created to look into a suspected case of money laundering as reported to the RBM before the setting up of the FIU by one of the commercial banks. Members of the Task Force came from the RBM, the DPP, MRA, ACB and Fiscal Police.

530. On countering the financing of terrorism, as discussed earlier, there is a Counter Terrorism Committee (CTC) chaired by the Office of the President. The CTC comprises the Ministries of Defence, Home Affairs, Finance, Transport, Information, Justice and Foreign Affairs, the NIS and the RBM. Its work is related to developing and facilitating the implementation of measures to combat terrorism and its financing. Indeed, in 2003, the NIS worked closely with the MPS to monitor, subsequently arrest suspected Al Qaeda terrorists and extradite the suspects into the custody of the United States authorities.

531. **Additional Element - Mechanisms for Consultation between Competent Authorities and Regulated Institutions (c. 31.2):** Apart from the intention of the Committee to invite the private sector to participate in the meetings on an ad hoc basis, no mechanism is in place for consultation between competent authorities, the financial sector and DNFBPs that are subject to the obligations of the ML & TF Act. Discussions with the private sector institutions, with the exception of banking institutions, indicate that there is a low level of awareness on their obligations under the ML & TF Act.

532. **Analysis of Effectiveness:** It's too early to make any assessment of the effectiveness of the work of the Committee. First, its decisions are not binding on the government as it is no regulatory or administrative authority. Second, it lacks the ability to formulate Malawi's AML/CFT policy. Nonetheless, the efforts that the authorities have made are to be commended as they are a step in the right direction and bodes well for the future development of Malawi's AML/CFT infrastructure and the provision of support for the nascent FIU.

#### Recommendations and comments

The authorities should consider –

- Giving the necessary authority to the Committee to make binding decisions and formulating Malawi's AML/CFT policy.
- Aggressively undertaking awareness raising campaigns in segments of the private sector with respect to their obligations under the ML & TF Act.

#### Compliance with FATF Recommendation 31

<b>R.31</b>	LC	• Too early to assess effectiveness
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## 6.2 The Conventions and UN Special Resolutions (R.35 & SR.I)

### Description and analysis

533. **Legal Framework:** The implementation of many of the provisions of the Vienna and Palermo Conventions are found in the ML & TF Act, the PC, the CPA, the DDA, Mutual Assistance in Criminal Matters Act (MACMA) and the Extradition Act. A discussion on the manner in which the provisions dealing with international cooperation has been implemented follows under section 6.3 and 6.4 of this report. In so far as TF is concerned, some of the provisions of the SFT Convention have been implemented in the ML & TF Act. The process of ratification in Malawi is by Cabinet and the signing of the instrument of ratification by the President of the Republic. Parliament is only notified of the ratification decision.

534. **Ratification of AML Related UN Conventions (c. 35.1):** Malawi acceded to the Vienna Convention on October 12, 1995. It signed the Palermo Convention on December 13, 2000, and ratified it on March 17, 2005.

535. **Ratification of CFT Related UN Conventions (c. I.1):** Malawi acceded to the SFT Convention on August 11, 2003. However, it has only ratified 7 out of the 13 terrorist related conventions that are annexes to the SFT Convention.

536. **Implementation of Vienna Convention (Articles 3-11, 15, 17 & 19, c. 35.1):** Malawi has adopted legislative provisions to implement the provisions in Article 3 (on offences and sanctions related to narcotics and psychotropic substances); Article 4 (on establishing jurisdiction over offences related to narcotics and psychotropic substances); Article 5 (on confiscation of instrumentalities); Articles 6 and 7 (on extradition and mutual legal assistance); Articles 8-11 (on transfer of proceedings, other forms of cooperation and training, international cooperation and controlled delivery); and Articles 15 and 19 (on commercial carriers and the use of the mails). The articles are implemented pursuant to the ML & TF Act, the DDA, the MACMA and the Extradition Act.

537. **Implementation of SFT Convention (Articles 2-18, c. 35.1 & c. I.1):** Malawi has adopted legislative provisions to implement the provisions in Article 2 (creating terrorist related acts as offences); Article 4 (offences in Article 2 of Convention); Article 5 (legal and natural persons can be liable); Article 6 (terrorist related offences are not justifiable for political or other reasons); Article 7 (Malawi has jurisdiction over terrorist acts in Malawi); Article 8 (identification and confiscation terrorist related assets); Articles 9-10 (investigating terrorist activities in Malawi); Article 11 (terrorist financing offence is an extraditable offence); Article 12 (providing assistance to other States); Article 13-14 (sole ground of fiscal and political offences); Article 15-16 (extradition of accused or suspect); Article 17 (fair treatment) and Article 18 (preventive measures for financial institutions). The articles are implemented in the ML & TF Act, MACMA, CDD Directive and Extradition Act.

538. **Implementation of Palermo Convention (Articles 5-7, 10-16, 18-20, 24-27, 29-31 & 34, c. 35.1):** Malawi has adopted legislative provisions to implement the provision in Articles 5, 6, 7, 10, 11, 12-16, 18 (on criminalization of participation in an organized criminal group, on criminalization of the laundering of proceeds of crime; on establishing the FIU and introducing measures to detect and monitor the movement of cash across borders, liability of legal persons; prosecution, adjudication and sanctions for ML; confiscation and seizure of instrumentalities of crime; providing international cooperation for purposes of confiscation; establishing jurisdiction over ML offences; and extradition and mutual legal assistance). In addition, Malawi has adopted legislation to implement Articles 26, 27, 29, 30, 31, and 34 (on law enforcement and prevention of organized crime). The articles are implemented in the ML & TF Act, the PC, the MACMA and Extradition Act.

539. As regards Article 20 with respect to the use of special investigative techniques or controlled delivery, Malawi has not provided for this under the existing laws and criminal procedures. There is also no implementation of the asset sharing provision.

540. **Implementation of UN SCRs relating to Prevention and Suppression of FT (c. I.2):** As discussed in Section 2.4 (Freezing of funds used for terrorist), Malawi has not implemented the UNSCRs.

541. **Additional Element - Ratification or Implementation of Other relevant international**

**conventions (c. 35.2):** Regionally, Malawi ratified the SADC Protocol against corruption in 2002, and the African Union Convention on Prevention and Combating of Corruption in December 2007.

542. **Analysis of Effectiveness:** As mentioned earlier, and in the discussion to follow under mutual legal assistance, the efficacy of the implementation of these conventions at least in the area of international cooperation, is at best doubtful for lack of concrete evidence demonstrating how Malawi has implemented the international requirements. The absence of statistics is a glaring gap in enabling the assessors to make a good faith assessment of whether and how Malawi has implemented the provisions of the international conventions.

**Recommendations and comments**

Malawi has implemented a significant number of requirements in the Vienna, Palermo and SFT Conventions. However, aspects related to UN Security Council Resolutions have not been implemented.

The authorities should consider –

- introducing legislation on the use of special investigation techniques
- establishing asset sharing arrangements with foreign States
- implementing the UN Security Council Resolutions
- ratifying the remaining 6 terrorism related conventions

**Compliance with FATF Recommendation 35 and SR I**

<b>R.35</b>	LC	<ul style="list-style-type: none"> <li>• No provision for special investigation techniques.</li> <li>• No asset sharing arrangements.</li> </ul>
<b>SR.I</b>	PC	<ul style="list-style-type: none"> <li>• No implementation of UN Security Council Resolutions</li> </ul>

**6.3 Mutual Legal Assistance (R.32, 36-38, SR.V)**

**Description and analysis**

543. **Legal Framework:** The ML & TF Act and the MACMA. As a general observation, while the two pieces of legislation provide a strong framework for mutual legal assistance (MLA), there are no clear processes for providing such assistance. Further, it is not clear which entity is the central authority that is responsible for facilitating MLA in Malawi, although the authorities advised that it is the Attorney General. Indeed, discussions from all the agencies that directly or indirectly affect international cooperation generally did not know what the processes are. Examples provided by the authorities only served to confirm this fact. Moreover, there are no MLA related statistics that are maintained by the authorities.

544. The unintended consequence of such a decentralized MLA framework is that provision of such assistance is fairly liberal to the point of taking on a sense of ‘informality.’ Therefore, even in citing provisions in the enabling statutes, it should be borne in mind that the authorities have not strictly followed the MACMA, even if they have provided assistance envisaged in the MACMA.

545. The MACMA only references MLA between Malawi and Commonwealth member countries (that is, former British colonies). There is no provision whatsoever to provide assistance to non-Commonwealth countries. Indeed, the ML & TF Act in providing for a MLA framework, refers to the MACMA in stating that “where a request is made by a foreign state in the investigation or prosecution of a serious offence, a ML or TF offence in that country...the Minister may *in accordance with the MACMA* provide such assistance...”. Although the assessors sought an elaboration on what happens to a request from a non-Commonwealth country, the response was that assistance would still be provided as a matter of international comity and on the basis of reciprocity.

546. **Widest Possible Range of Mutual Assistance (c. 36.1):** Pursuant to the MACMA, Malawi can render legal assistance to Commonwealth Countries in the following areas:

- obtaining evidence or information relevant to any criminal matter including the production, search and seizure of such evidence or information (section 19);
- locating or identifying suspects believed to be in Malawi (section 20);
- arranging attendance of a person to give evidence relevant to any criminal matter (section 22);
- obtaining an article or a thing by search or seizure in Malawi for the purposes of, or in connection with, any criminal matter (section 21, including financial records);
- transferring a prisoner to give or provide evidence or assistance relevant to any criminal matter (section 23);

- serving documents (section 24);
- tracing property, which is suspected to be in Malawi, that was derived or obtained from the commission of a specified serious offence (section 25); and
- identifying, freezing, seizing or confiscating: assets laundered or intended to be laundered, and proceeds of ML and assets used for TF, as well as instrumentalities of such offences and assets of corresponding value (section 104 of the ML & TF Act).

547. **Provision of Assistance in Timely, Constructive and Effective Manner (c. 36.1.1):** In discussions with the authorities, it was indicated that provision of MLA takes a period of 6 months (cases cited involved motor vehicle theft and the tracing of a person suspected of being involved in the Rwandan genocide). This sentiment was echoed by all law enforcement agencies met during the mission and there is every indication that the provision of assistance to requesting countries is timely, constructive and effective.

548. **No Unreasonable or Unduly Restrictive Conditions on Mutual Assistance (c. 36.2):** MLA is not prohibited or subject to unreasonable, disproportionate or unduly restrictive conditions. As the authorities put it, “*no restrictions unless it is a complex case. Otherwise anything straight forward is easily facilitated.*” The grounds for declining a request are contained in section 18 of the MACMA. The grounds include:

- offences of a political character;
- offences purely involving persecution or prejudice;
- offences that would not constitute an offence in Malawi;
- situations where granting assistance would prejudice security of Malawi; violate the Constitution; prejudice international relations, substantial interests of Malawi or other essential public policy of Malawi; or
- requests relating to a conduct by person in Malawi for which he has already been acquitted or convicted.

549. **Efficiency of Processes (c. 36.3):** Notwithstanding the absence of clear MLA processes as mentioned in the introductory paragraphs above, there was no evidence indicating that the efficiency of the processes has been effected.

550. **Provision of Assistance Regardless of Possible Involvement of Fiscal Matters (c. 36.4):** In Malawi, serious offences related to fiscal matters are covered under the MACMA (section 2) and the ML & TF Act (section 2). Consequently, assistance cannot be refused on the sole ground that the offence involves fiscal matters.

551. **Provision of Assistance Regardless of Existence of Secrecy and Confidentiality Laws (c. 36.5):** Secrecy or confidentiality is not an impediment to providing MLA (see Section 2.4 of this report – Financial Institution Secrecy or Confidentiality).

552. **Availability of Powers of Competent Authorities (applying R.28, c. 36.6):** Competent authorities have the power when authorized under section 21 of the MACMA to search and seize documents obtained through the CDD process. As discussed earlier under section 2.6 of this report on compelling production and search of documents, these powers are also available for MLA purposes.

553. **Avoiding Conflicts of Jurisdiction (c. 36.7):** It is not clear what, in practice, the authorities would do where there are conflicts of jurisdiction. The authorities indicate that if such a scenario was to arise, the first step would be to identify those countries claiming the right to prosecute. Where the requested assistance relates to information or documents, the appropriate authority would, where practically possible, render the requested assistance and leave the matter of prosecution to the countries with competing jurisdiction. Where, however, the assistance involves the location of a suspect or seizure of property, recourse would be to international law regarding issues of the hierarchy of jurisdiction. The authorities have not considered devising or applying any such mechanisms to determine the more appropriate venue in situations of conflicts of jurisdiction.

554. **Additional Element – Availability of Powers of Competent Authorities Required under R28 (c. 36.8):** All requests have to be channeled through the DPP and, as noted when discussing production of financial records in section 2.6 of this report, these powers are available to requesting competent authorities.

555. **International Cooperation under SR V (applying c. 36.1-36.6 in R. 36, c. V.1):** The MACMA and the ML & TF Act do not distinguish between a ML or TF offence. The operative definition is whether or not an offence is a serious offence as defined in the two pieces of legislation. Accordingly, providing assistance in TF matters is not inhibited.
556. **Additional Element under SR V (applying c. 36.7 & 36.8 in R.36, c. V.6):** The same rules apply as discussed above.
557. **Dual Criminality and Mutual Assistance (c. 37.1 & 37.2):** As indicated above under criterion 36.2, dual criminality can be a basis for refusing MLA. Technical differences between Malawi's legal or criminal system and that of countries that have requested assistance have not been an impediment to rendering MLA. Consequently, dual criminality has not been an impediment whether for coercive or non-coercive measures.
558. **Timeliness to Requests for Provisional Measures including Confiscation (c. 38.1):** Requests for enforcement of foreign orders are treated as if there were orders made by a court in Malawi under the ML & TF Act. The provisions under the MACMA and the ML & TF Act apply. Consequently, it would be possible to obtain the enforcement of foreign confiscation orders, restraining orders, production orders, monitoring orders, search warrants, orders to identify and seize property. Since there was no evidence provided to the assessors, however, it is not possible to make an assessment of whether Malawi is effectively implementing its obligation with regard to these provisional measures. Nor is it possible to make an assessment of effectiveness based on what has been done so far or what could be done in the future.
559. **Property of Corresponding Value (c. 38.2):** Malawi is able to give effect to requests in respect of foreign orders dealing with property of corresponding value, under section 104 of the ML & TF Act and section 26(1)(a) of the MACMA.
560. **Coordination of Seizure and Confiscation Actions (c. 38.3):** With assistance from the DPP's office, the MPS has conducted joint seizure and confiscation operations with a few neighboring countries, primarily in cases involving stolen motor vehicles. The DPP's office is involved in case any legal challenges arise to the actions by the MPS.
561. **Asset Forfeiture Fund (c. 38.4):** The authorities indicated that they do not have an asset forfeiture fund or any other dedicated fund for the deposit of funds related to confiscated property. They did indicate that there have been instances where forfeited vehicles have been given to law enforcement agencies to use in exercising their duties.
562. **Sharing of Confiscated Assets (c. 38.5):** Malawi has not considered the sharing of confiscated assets with another jurisdiction.
563. **Additional Element (R 38) – Recognition of Foreign Orders for a) Confiscation of assets from organizations principally criminal in nature; b) Civil forfeiture; and, c) Confiscation of Property which Reverses Burden of Proof (applying c. 3.7 in R.3, c. 38.6):** As discussed above, under the MACMA and the ML & TF Act, Malawi is able to enforce foreign confiscation order whether obtained as a result of a criminal or civil process.
564. **Statistics (applying R.32):** There are no statistics on MLA requests whether to or from Malawi.
565. **Analysis of Effectiveness:** Malawi's framework for providing MLA and facilitating international cooperation is strong. This is particularly so with the enactment of the ML & TF Act, which makes all applications for provisional measures under that Act applicable to foreign orders. However, notwithstanding assertions by the authorities as discussed above, the lack of a central authority, as well as the absence of proper procedures to implement the existing framework, has the potential to impede the efficacy of Malawi's system. This would be the case where a requesting country is seeking Malawi's cooperation in a ML or TF matter. Not knowing who the point of contact is, how the process works and what the requirements are may delay the speedy execution of requests.
566. While the authorities advised the assessors that they have provided assistance to countries within the region, without any production of statistics as to how many incoming and outgoing requests were received, the nature of such requests, how long the entire process took and other

related matters, there is no basis to conclude that Malawi's system is efficient.		
<b>Recommendations and comments</b>		
The authorities should consider –		
<ul style="list-style-type: none"> <li>- Designating a central authority to facilitate execution of MLA requests.</li> <li>- Creating appropriate and clear processes for executing MLA requests.</li> <li>- Entering into agreements for coordination of asset sharing.</li> <li>- Establishing a database on MLA requests.</li> <li>- Establishing mechanism for sharing of confiscated assets.</li> </ul>		
<b>Compliance with FATF Recommendation 32, 36-38 and SR V</b>		
<b>R.36</b>	LC	<ul style="list-style-type: none"> <li>• No clear and efficient processes for executing requests.</li> <li>• Insufficient implementation of MLA requests related to ML cases.</li> </ul>
<b>R.37</b>	C	
<b>R.38</b>	LC	<ul style="list-style-type: none"> <li>• Insufficient implementation of the provisions relating to ML cases.</li> <li>• No consideration for asset sharing.</li> </ul>
<b>SR.V</b>	PC	<ul style="list-style-type: none"> <li>• No clear and efficient processes for executing requests.</li> <li>• Insufficient implementation of the provisions relating to TF cases.</li> <li>• No consideration for asset sharing.</li> </ul>
<b>6.4 Extradition (R.32, 37 &amp; 39, &amp; SR.V)</b>		
<b>Description and analysis</b>		
<p>567. <b>Legal Framework:</b> The Extradition Act and the ML &amp; TF Act. As in the case with MLA, it is not clear which entity is the central authority for dealing with extradition cases, although the Attorney General is key in facilitating extraditions.</p> <p>568. Unlike the MLA framework, there is a requirement that a jurisdiction enter into arrangements with Malawi in order for Malawi to extradite a person to that jurisdiction (section 3 of Extradition Act). Upon entering into such an arrangement, Malawi would designate such a jurisdiction as a country to which the Extradition Act would apply.</p> <p>569. Section 7 of the Extradition Act requires that a requesting country support its extradition application by producing a warrant for the person's arrest: and, in the case of a person already convicted, a certificate of conviction, a statement of the amount, if any, of the sentence already served, and a statement setting out the conduct constituting the offence.</p> <p>570. <b>Dual Criminality and Mutual Assistance (c. 37.1 &amp; 37.2):</b> Sections 4 and 5 of the Extradition Act provide for a foreign national to be extradited to a requesting country. Extradition is granted when the offence forming the basis of the request is also punishable under Malawian law. Dual criminality is a requirement for extradition purposes. Other restrictions upon which a fugitive cannot be surrendered to another jurisdiction include situations where the offence is of a political character; punishment based upon race, religion, nationality or political opinion; or there is abuse of due process.</p> <p>571. <b>Money Laundering or Terrorist Financing as Extraditable Offence (c. 39.1):</b> ML &amp; TF are extraditable offences under section 103 of the ML &amp; TF Act.</p> <p>572. <b>Extradition of Nationals (c. 39.2):</b> Malawi does not extradite its own nationals. Although this is not provided for in the Extradition Act, the authorities argued that it is understood that a national cannot be extradited.</p> <p>573. <b>Cooperation for Prosecution of Nationals (applying c. 39.2(b), c. 39.3):</b> The Extradition Act does not contain any provision requiring the prosecution of a Malawi national in lieu of extradition. A provision making it clear that such nationals will be prosecuted in lieu of extradition should be provided for under the laws of Malawi.</p> <p>574. <b>Efficiency of Extradition Process (c. 39.4):</b> In discussions with the authorities, they advised that the extradition process takes long, although no specific timeframe was indicated. The estimate made was over a year. However, such a length of time is not unique to Malawi. In</p>		

addition, as in the case of MLA requests, Malawi does not have any clear procedures on the manner in which extradition cases would be dealt.

**575. Additional Element (R.39) – Existence of Simplified Procedures relating to Extradition (c. 39.5):** There is no provision for adopting simplified procedures relating to extradition.

**576. Statistics (applying R.32):** There are no statistics on extradition.

**577. Analysis of Effectiveness:** Malawi has not had a case involving ML or TF since the ML & TF Act became effective. However, the authorities have in the past extradited fugitives accused of genocide in Rwanda. Additionally, as mentioned earlier, in 2003 the authorities did extradite suspected Al Qaeda terrorists. While there are the foregoing examples, the system has not been tested for extradition of persons suspected of involvement in ML or TF cases.

**Recommendations and comments**

The authorities should consider –

- Adopting an explicit provision prohibiting the extradition of Malawi nationals.
- Providing for prosecution of Malawi nationals in lieu of extradition.
- Providing for clear processes for dealing with extradition cases.

**Compliance with FATF Recommendations**

<b>R.37</b>	C	
<b>R.39</b>	PC	<ul style="list-style-type: none"> <li>• No explicit provision prohibiting the extradition of Malawi nationals.</li> <li>• No prosecution of Malawi nationals in lieu of extradition.</li> <li>• No clear processes for dealing with extradition cases.</li> </ul>
<b>SR.V</b>	PC	<ul style="list-style-type: none"> <li>• No explicit provision prohibiting the extradition of Malawi nationals.</li> <li>• No prosecution of Malawi nationals in lieu of extradition.</li> <li>• No clear processes for dealing with extradition cases.</li> </ul>

**6.5 Other Forms of International Cooperation (R.32 & 40, & SR.V)**

**Description and analysis**

**578. Widest Range of International Cooperation (c. 40.1):** Malawi has engaged in informal cooperative dealings on an agency-to-agency basis that covers the gambit of international cooperation. For example, the mechanisms permit law enforcement authorities to cooperate broadly with their foreign counterparts. This includes responding to specific enquiries and conducting joint operations.

**579. Office of Director of Public Prosecutions:** The DPP engages in bilateral cooperation with their counterparts in Mozambique, South Africa, Tanzania and Zambia. As indicated earlier, the DPP does provide assistance to the MPS whenever they are involved in joint cross-border operations with neighboring police force counterparts. The bilateral relations are informal and not predicated on any formal agreement with the aforementioned countries.

**580. Malawi Police Service:** There is very little use of formal channels of information exchange, use of information in court proceedings and seizure of instrumentalities and police officers in the region make extensive use of the Southern African Regional Police Chiefs Cooperation Organization (SARPPCO) framework as a springboard for informal assistance to one another. Evidence of this was illustrated in a media article in The Daily Times Newspaper on 6 March 2008, where it was reported that the MPS had traced and recovered a vehicle that had been stolen at gunpoint on 27 January 2008 in Zambia. The Zambian police brought the vehicle back to Malawi.

**581. Reserve Bank of Malawi:** The RBM uses informal channels of communication to provide international cooperation. It also has statutory authority to participate internationally in representing Malawi. An example of the informal channel was provided during the on-site mission in the case of Botswana and discussions in relation to a Malawi bank seeking to open a subsidiary in Botswana. The RBM stated that it provided information and assistance to the authorities from the central bank in Botswana. This assistance was provided in the context of the Malawi bank establishing the



branch and included an invitation to the Botswana authorities to visit Malawi and have a first-hand look at the location and proposed operations of the branch.

582. **Financial Intelligence Unit:** There is no FIU to FIU cooperation at the present time as the authorities are concentrating their efforts on building up domestic cooperation before looking outwards. The ACB has previously successfully made informal requests to foreign FIUs to assist with tracing assets.

583. **Provision of Assistance in Timely, Constructive and Effective Manner (c. 40.1.1):** While there are no statistics to indicate the timeliness of the provision of assistance between the competent authorities and their foreign counterparts, the assistance provided in an informal manner has been timely, constructive and effective as exemplified by the example cited above involving recovery and return of a stolen Malawian vehicle.

584. **Clear and Effective Gateways for Exchange of Information (c. 40.2):** The FIU has the power to extend assistance to foreign jurisdictions with respect to property tracking, monitoring and confiscation orders, as well as exchanging information with foreign FIUs on terms and conditions as set out in an agreement between the parties, and, where no such agreement exists, on terms and conditions agreed upon by them. However, it is stipulated in Section 12 (a) and (b) of the ML & TF Act that the information should be used for intelligence purposes only and be treated in a confidential manner and shall not be disclosed without the express consent of the FIU. The RBM has statutory authority to provide international cooperation and, as noted above, has provided such assistance to Botswana on an informal basis as an example.

585. No clear gateways or processes could be identified for international information exchange, but it would appear that information is being informally exchanged between law enforcement agencies. For example, the ACB has received and granted requests for information from law enforcement agencies in Australia, Botswana and the United Kingdom. Furthermore, the authorities indicated that information is exchanged within the Interpol relationship. However, no statistics could be provided on the number of requests received, nor those granted or refused.

586. **Spontaneous Exchange of Information (c. 40.3):** It is clear that requests for information are entertained by the local authorities, although this seems to be done on a sporadic and ad-hoc basis and no clear indication could be given as to the processes or timelines required to meet these requests. In general, authorities indicated that they deal with requests in a speedy manner, but this could not be verified.

587. **Making Inquiries on Behalf of Foreign Counterparts (c. 40.4):** The authorities indicated that they are able to gather information and make enquiries on behalf of their foreign counterparts in an informal manner and they do this on a regular basis. No specific requests were identified that related to money laundering and only the 2003 TF case mentioned above was identified in relation to TF requests.

588. **FIU Authorized to Make Inquiries on Behalf of Foreign Counterparts (c. 40.4.1):** As mentioned above, the FIU may assist international counterparts by providing them with information. The FIU has wide-ranging powers to gather information and request information from various sources including law enforcement authorities. These avenues of information gathering and international sharing have not been tested by the FIU so far.

589. **Conducting of Investigations on Behalf of Foreign Counterparts (c. 40.5):** The ACB and MPS indicated that it is able to obtain production orders in order to obtain bank and other information to assist foreign counterparts with investigations.

590. **No Unreasonable or Unduly Restrictive Conditions on Exchange of Information (c. 40.6):** Exchange of information between competent authorities internationally or domestically is seemingly unrestricted.

591. **Provision of Assistance Regardless of Possible Involvement of Fiscal Matters (c. 40.7):** It would appear that information is readily exchanged by the authorities with their counterparts. This has also been the case in fiscal matters.

592. **Provision of Assistance Regardless of Existence of Secrecy and Confidentiality Laws (c. 40.8):** The issue of secrecy or confidentiality laws has been considered by the authorities and is

not, nor has not been, an impediment to providing assistance.

593. **Safeguards in Use of Exchanged Information (c. 40.9):** There is no clear framework that governs the handling of information. Information received in the context of investigations is governed by the standard internal procedures of the respective agencies; these procedures appear, however, to be undocumented.

594. **Additional Element -Exchange of Information with Non-Counterparts (c. 40.10 & c. 40.10.1):** Information is shared among non-counterparts in an informal manner. In the absence of formal mechanisms for prompt and constructive exchange of information, it would appear that this information is exchanged in an indirect manner. No formal statistics are kept and there does not appear to be any formal procedures or safeguards in place for sharing of information, except in the case of the FIU (which is discussed under section 2.5 of this report above). The assessors were unable to determine whether the requesting authorities disclosed the purpose of the request or on whose behalf the request was made when making the request.

595. **Additional Element –Provision of Information to FIU by Other Competent Authorities pursuant to request from Foreign FIU (c. 40.11):** The FIU has the relevant powers (as per discussion under section 2.5 of this report above) to request information in relation to its functions, however, no framework has been considered or implemented by the FIU in relation to what is required to respond to international requests for information.

596. **Statistics (applying R.32):** No statistics are available in relation to international cooperation or exchange of information.

597. **Analysis of Effectiveness:** Although there is a provision in the ML & TF Act for the exchange on information in relation to exchange of information in respect of the FIU, the FIU is still in the early stages of being established. Therefore, procedures and effectiveness in relation to information exchange cannot be measured at this time. Insofar as the other authorities are concerned, there is obviously an active informal exchange of information where there is reciprocal sharing of information, but there are no formal mechanisms that set out these processes. Nor are there any processes that track and regulate these requests; this could create opportunities for abuse. Due to the newness of the statute, effectiveness in this area could not be assessed.

**Recommendations and comments**

The authorities should consider –

- Establishing guidelines and processes on the handling of information received from international counterparts.
- Maintaining statistics in relation to international requests (made and received).

**Compliance with FATF Recommendations**

<b>R.32</b>	NC	<ul style="list-style-type: none"> <li>• No statistics are maintained in relation to international cooperation.</li> <li>• The rating here is an aggregate of R. 32 in this report.</li> </ul>
<b>R.40</b>	PC	<ul style="list-style-type: none"> <li>• The cooperation in the case of the police, DPP and Supervisor is informal.</li> <li>• No FIU to FIU cooperation as yet.</li> <li>• No records, procedures or processes available in order to test effectiveness.</li> <li>• Hard copy records may impede prompt provision of information.</li> </ul>
<b>SR.V</b>	PC	<ul style="list-style-type: none"> <li>• No clear and efficient processes for executing requests.</li> <li>• Insufficient implementation of the provisions relating to TF cases.</li> </ul>

**7. OTHER ISSUES**

## 7.1 Resources and statistics

598. The authorities have recognized that in order to effectively implement the ML & TF Act, resources – both human and financial – need to be deployed across all relevant agencies involved in the implementation of the anti-money laundering and combating the financing of terrorism framework.

599. There is no systematic mechanism that has been devised or planned to collect statistical data related to ML & TF.

	Rating	Summary of factors relevant to Recommendations 30 and 32 and underlying overall rating
<b>R.30</b>	NC	<ul style="list-style-type: none"> <li>• Insufficient resources for law enforcement and prosecution agencies.</li> <li>• Insufficient training in investigation of ML &amp; TF cases for law enforcement and prosecution agencies.</li> <li>• Outside the banking regulator, insufficient training has been provided to other government regulatory agencies in AML/CFT.</li> </ul>
<b>R.32</b>	NC	<ul style="list-style-type: none"> <li>• There is no systematic collection of detailed statistics in respect of :               <ol style="list-style-type: none"> <li>a. Investigation, prosecution and conviction of ML cases,</li> <li>b. Freezing, seizure and confiscation of proceeds of crime,</li> <li>c. Mutual Legal Assistance Requests,</li> <li>d. Extradition requests,</li> <li>e. Other forms of international cooperation,</li> <li>f. No detailed review has been conducted on the effectiveness of the AML/CFT regime in Malawi,</li> <li>g. Discrepancies in FIU statistics,</li> <li>h. RBM inspections performed,</li> <li>i. Sanctions for non-compliance,</li> <li>j. Training of supervisors, or</li> <li>k. MOUs in place and requests/exchange of information.</li> </ol> </li> </ul>

**TABLE 2: RATINGS OF COMPLIANCE WITH FATF RECOMMENDATIONS**

The rating of compliance vis-à-vis the FATF Recommendations should be made according to the four levels of compliance mentioned in the 2004 Methodology (Compliant (C), Largely Compliant (LC), Partially Compliant (PC), Non-Compliant (NC), or could, in exceptional cases, be marked as not applicable (N/A).

Forty Recommendations	Rating	Summary of factors underlying rating
<b>Legal systems</b>		
1. ML offence	LC	<ul style="list-style-type: none"> <li>• No provision for laundering of ones own illicit funds.</li> <li>• Too early to make an assessment of effective implementation.</li> </ul>
2. ML offence–mental element and corporate liability	LC	<ul style="list-style-type: none"> <li>• Too early to make an assessment of effective implementation.</li> </ul>
3. Confiscation and provisional measures	LC	<ul style="list-style-type: none"> <li>• No implementation of the ML &amp; TF Act.</li> <li>• No statistics are maintained.</li> </ul>
<b>Preventive measures</b>		
4. Secrecy laws consistent with the Recommendations	C	The criteria are fully met.
5. Customer due diligence	PC	<ul style="list-style-type: none"> <li>• Only banks comply with most of this requirement.</li> </ul>
6. Politically exposed persons	PC	<ul style="list-style-type: none"> <li>• The determination of beneficial ownership and source of wealth are significant deficiencies.</li> <li>• Only banks comply with this requirement.</li> </ul>
7. Correspondent banking	LC	<ul style="list-style-type: none"> <li>• Financial institutions are not required to</li> </ul>

		determine if an institution has been subject to a ML or TF investigation or regulatory action or ascertain whether controls at respondent institution are adequate and effective.
8. New technologies & non face-to-face business	NC	<ul style="list-style-type: none"> <li>• There is no statutory or regulatory requirement.</li> </ul>
9. Third parties and introducers	PC	<ul style="list-style-type: none"> <li>• Only banks comply with this requirement.</li> </ul>
10. Record keeping	LC	<ul style="list-style-type: none"> <li>• The record keeping requirements, while complete in terms of satisfying the criteria, do not apply to insurance companies and there has been no implementation with respect to covered entities other than banks.</li> </ul>
11. Unusual transactions	PC	<ul style="list-style-type: none"> <li>• Only banks observe any part of this recommendation.</li> </ul>
12. DNFBP–R.5, 6, 8-11	NC	<ul style="list-style-type: none"> <li>• AML/CFT preventive measures under the ML &amp; TF Act are not being implemented by any of the DNFBPs as required under FATF Recommendations 5-11.</li> </ul>
13. Suspicious transaction reporting	PC	<ul style="list-style-type: none"> <li>• Only banks are filing STRs.</li> <li>• It is unclear whether attempted suspicious transactions are required to be reported.</li> </ul>
14. Protection & no tipping-off	LC	<ul style="list-style-type: none"> <li>• No protection for Directors from possible liability for STRs.</li> </ul>
15. Internal controls, compliance & audit	PC	<ul style="list-style-type: none"> <li>• The statute is generally consistent with international standards, but banks are the only financial institutions that are complying with the ML &amp; TF Act's requirements and they are doing so based upon the CDD Directive.</li> </ul>
16. DNFBP–R.13-15 & 21	NC	<ul style="list-style-type: none"> <li>• No implementation of the reporting requirement.</li> <li>• No implementation of the internal controls obligation.</li> </ul>
17. Sanctions	PC	<ul style="list-style-type: none"> <li>• The sanctions are not likely to be effective, if imposed, because there is no discretion and loss of business authority is mandated in almost every case for corporations.</li> </ul>
18. Shell banks	PC	<ul style="list-style-type: none"> <li>• While the RBM does not charter shell banks and none operate in Malawi, there is no statutory or regulatory prohibition against the use of shell banks as correspondent banks or against correspondent banks using shell banks.</li> </ul>
19. Other forms of reporting	C	
20. Other NFBP & secure transaction techniques	LC	<ul style="list-style-type: none"> <li>• No assessment on whether other DNFBPs' are vulnerable to ML &amp; TF.</li> </ul>
21. Special attention for higher risk countries	PC	<ul style="list-style-type: none"> <li>• Only banks observe any part of this recommendation.</li> <li>• There are no measures to inform financial institutions about specific country concerns and no countermeasure efforts in place to address such concerns.</li> </ul>
22. Foreign branches & subsidiaries	N/A	<ul style="list-style-type: none"> <li>• There are no Malawian local banks with foreign branches and subsidiaries.</li> </ul>
23. Regulation, supervision and monitoring	PC	<ul style="list-style-type: none"> <li>• Banks are the only financial institutions implementing the statute's requirements.</li> <li>• Many foreign exchange bureaus are unlicensed.</li> </ul>
24. DNFBP - regulation, supervision and monitoring	NC	<ul style="list-style-type: none"> <li>• No implementation of AML/CFT requirements across all DNFBPs</li> </ul>
25. Guidelines & Feedback	NC	<ul style="list-style-type: none"> <li>• Only limited guidelines have been issued and there has been no meaningful feedback to the banks that have filed STRs.</li> </ul>

Institutional and other measures		
26. The FIU	PC	<ul style="list-style-type: none"> <li>• There are shortcomings in the application of the legislation in relation to guidance notes and in the application of the reporting forms.</li> <li>• MOUs are not in place to share information with competent authorities domestically.</li> <li>• Due to the fact that the FIU has not been in operation for a year yet, it has not publicly released any reports in relation to its activities.</li> <li>• At the time of the mission, the FIU was still in the process of establishing control over its offices and IT systems in order to adequately protect its information.</li> <li>• The legislation has not been fully implemented due to short time that the FIU has been established and effectiveness in some areas could not be established.</li> </ul>
27. Law enforcement authorities	PC	<ul style="list-style-type: none"> <li>• Lack of implementation of the legislation.</li> <li>• No evidence found of measures taken by authorities to waive or postpone arrests of suspected persons or the seizure of money for the purpose of identifying persons involved in money laundering activities or for gathering evidence.</li> </ul>
28. Powers of competent authorities	C	
29. Supervisors	PC	<ul style="list-style-type: none"> <li>• The authority to inspect and compel production of records is satisfactory, but there is virtually no supervision in the foreign exchange area of those that are (were) licensed, and absolutely no supervision of unlicensed ones.</li> </ul>
30. Resources, integrity and training	NC	<ul style="list-style-type: none"> <li>• Insufficient resources for law enforcement and prosecution agencies.</li> <li>• Insufficient training in investigation of ML &amp; TF cases for law enforcement and prosecution agencies.</li> <li>• Outside the banking regulator, insufficient training has been provided to other government regulatory agencies in AML/CFT.</li> </ul>
31. National co-operation	LC	<ul style="list-style-type: none"> <li>• Too early to assess effectiveness.</li> </ul>
32. Statistics	NC	<ul style="list-style-type: none"> <li>• There is no systematic collection of detailed statistics with respect to : <ul style="list-style-type: none"> <li>a. Investigation, prosecution and conviction of ML cases,</li> <li>b. Freezing, seizure and confiscation of proceeds of crime,</li> <li>c. Mutual Legal Assistance Requests,</li> <li>d. Extradition requests,</li> <li>e. Other forms of international cooperation,</li> <li>f. No detailed review has been conducted on the effectiveness of the AML/CFT regime in Malawi,</li> <li>g. Discrepancies in FIU statistics,</li> <li>h. RBM inspections performed,</li> <li>i. Sanctions for non-compliance,</li> </ul> </li> </ul>

		<ul style="list-style-type: none"> <li>j. Training of supervisors, or</li> <li>k. MOUs in place and requests/exchange of information,</li> </ul>
33. Legal persons–beneficial owners	PC	<ul style="list-style-type: none"> <li>• Information is not kept in an updated manner</li> <li>• No beneficial ownership information.</li> </ul>
34. Legal arrangements – beneficial owners	PC	<ul style="list-style-type: none"> <li>• Information not kept in an updated manner on public trusts.</li> <li>• No beneficial ownership information on private trusts.</li> </ul>
<b>International Cooperation</b>		
35. Conventions	LC	<ul style="list-style-type: none"> <li>• No provision for special investigation techniques.</li> <li>• No asset sharing arrangements.</li> </ul>
36. Mutual legal assistance (MLA)	LC	<ul style="list-style-type: none"> <li>• No clear and efficient processes for executing requests.</li> <li>• Insufficient implementation of MLA requests related to ML cases.</li> </ul>
37. Dual criminality	C	
38. MLA on confiscation and freezing	LC	<ul style="list-style-type: none"> <li>• Insufficient implementation of the provisions relating to ML cases.</li> <li>• No consideration for asset sharing.</li> </ul>
39. Extradition	PC	<ul style="list-style-type: none"> <li>• No explicit provision prohibiting the extradition of Malawi nationals.</li> <li>• No prosecution of Malawi nationals in lieu of extradition.</li> <li>• No clear processes for dealing with extradition cases.</li> </ul>
40. Other forms of co-operation	PC	<ul style="list-style-type: none"> <li>• The cooperation in the case of the police, DPP and Supervisor is informal.</li> <li>• No FIU to FIU cooperation as yet.</li> <li>• No records, procedures or processes available in order to test effectiveness.</li> <li>• Hard copy records may impede prompt provision of information.</li> </ul>
<b>Nine Special Recommendations</b>	<b>Rating</b>	<b>Summary of factors underlying rating</b>
SR.I Implement UN instruments	PC	<ul style="list-style-type: none"> <li>• No implementation of UN Security Council Resolutions.</li> </ul>
SR.II Criminalize terrorist financing	PC	<ul style="list-style-type: none"> <li>• Need to strengthen the penalty for entering into an arrangement to facilitate terrorist financing activities.</li> <li>• The provisions related to the offence of terrorist financing have not been tested.</li> </ul>
SR.III Freeze and confiscate terrorist assets	NC	<ul style="list-style-type: none"> <li>• Absence of a framework to implement the requirements on the freezing of funds used for terrorists financing.</li> </ul>
SR.IV Suspicious transaction reporting	LC	<ul style="list-style-type: none"> <li>• Only banks are filing STRs.</li> <li>• It is unclear whether attempted suspicious transactions are required to be reported.</li> </ul>
SR.V International cooperation	PC	<ul style="list-style-type: none"> <li>• No clear and efficient processes for executing requests.</li> <li>• Insufficient implementation of the provisions relating to TF cases.</li> <li>• No consideration for asset sharing.</li> </ul>
SR.VI AML requirements for money/value transfer services	NC	<ul style="list-style-type: none"> <li>• There has been no implementations effort with respect to money transmission service providers.</li> </ul>
SR.VII Wire transfer rules	LC	<ul style="list-style-type: none"> <li>• The statute addresses most but not all of the FATF requirements; there is no definition of what constitutes originator information and no</li> </ul>

		provision for handling wire transfers that do not contain complete originator information.
SR.VIII Nonprofit organizations	NC	<ul style="list-style-type: none"> <li>• No implementation of AML/CFT requirements in the NPO Sector.</li> <li>• No review of adequacy of NPO Act has been undertaken.</li> <li>• No monitoring of NPO sector for AML/CFT purposes.</li> </ul>
SR.IX Cross Border Declaration & Disclosure	PC	<ul style="list-style-type: none"> <li>• Although the legislative basis exists, there is limited implementation of either a declaration or disclosure system and, as currently applied, only in relation to foreign exchange violations in Malawi when travelers are leaving the country. The provisions of the ML&amp;TF Act have not been implemented.</li> <li>• Only one report has been made to the FIU.</li> <li>• The penalties are not dissuasive or effective.</li> <li>• No information or data is recorded by authorities.</li> </ul>

**TABLE 3: RECOMMENDED ACTION PLAN TO IMPROVE THE AML/CFT SYSTEM**

<b>AML/CFT System</b> <b>1. General</b> <b>2. Legal System and Related Institutional Measures</b>	<b>Recommended Action (listed in order of priority)</b>
Criminalization of Money Laundering (R.1, 2 & 32)	The authorities should consider – <ul style="list-style-type: none"> <li>- Maintaining in a systematic manner statistics of ML investigations, prosecutions and convictions as this will enable the authorities to be better able to assess the effectiveness of the anti-money laundering regime.</li> <li>- Providing clarity from a practical perspective on whether it is not necessary to prove the predicate offence in order to prove that property is the proceeds of crime.</li> <li>- Criminalizing the laundering of one’s own illicit funds.</li> </ul>
Criminalization of Terrorist Financing (SR.II, R.32)	The authorities should consider – <ul style="list-style-type: none"> <li>- Proscribing terrorist organizations such as those on the United Nations list.</li> <li>- Strengthening the penalty for entering into an arrangement to facilitate terrorist financing activities.</li> </ul>
Confiscation, freezing and seizing of proceeds of crime (R.3, R.32) Freezing of funds used for terrorist financing (SR.III, R.32)	<ul style="list-style-type: none"> <li>- The authorities should consider maintaining in a systematic manner statistics on seized, frozen and confiscated assets.</li> </ul> The authorities should consider setting up a framework for the freezing of funds used for terrorists financing, in accordance with the requirements of UNSCR 1267 and 1373, specifically: <ul style="list-style-type: none"> <li>- Procedures and processes on de-listing and unfreezing of funds for persons wrongly listed</li> <li>- Procedures and processes on circulating the UN list to public and private sector players and not just financial institutions</li> <li>- Procedures for unfreezing of funds belonging to persons or entities that are not designated persons</li> <li>- Provide a mechanism through which a person or entity can challenge a freezing action</li> <li>- Providing a procedure and process by which persons subject to a freezing order is able to access funds or assets for basic expenses.</li> </ul>
The Financial Intelligence Unit and its functions (R.26, 30 & 32)	The authorities should consider – <ul style="list-style-type: none"> <li>- Issuing regulations to complete the framework for the FIU.</li> <li>- Conducting awareness seminars and consultations beyond the banking sector and include the general public.</li> <li>- Endeavoring to manage some of the expectations of stakeholders in relation to theirs roles particularly in respect of investigations and feedback</li> <li>- Reviewing how the government agencies receive, capture, and manage reports and statistics to accurately reflect types and numbers received</li> <li>- Ensuring that overlaps and ambiguities are practically dealt with by issuing guidance notes</li> <li>- Reviewing the impact of the CTR reporting requirements, the threshold set and the resource impact on the emerging FIU against the benefits that may be derived from this method of reporting in a cash-based economy.</li> <li>- Reviewing the current reporting form used for reporting transactions under Section 28 and 29 of the Act and amending it where necessary to meet the legislative requirements and</li> </ul>



- make it more user friendly for SAs and auditors to report.
- Devising a separate reporting form for the SAs and auditors.
- Expediting the FIU's independence from the RBM and ensuring the FIU's information and office space is autonomous and secure.

Law enforcement, prosecution and other competent authorities (R.27, 28, 30 & 32)

- The authorities should consider –
- Having the FIU conduct 'train-the-trainer' exercises with law enforcement agencies so that they can give training and awareness exercises internally to create greater awareness and understanding of the ML & TF Act
  - Ensuring that law enforcement agencies should maintain in a systematic manner statistics in relation to money laundering investigations, prosecutions and seizure of proceeds of crime

### 3. Preventive Measures – Financial Institutions

Risk of money laundering or terrorist financing

The authorities should conduct a study of the risks and threats that money laundering and terrorist financing pose in Malawi. This would help the government better utilize resources in the fight against money laundering and the financing of terrorism. The authorities should ensure that –

Customer due diligence, including enhanced or reduced measures (R.5 to 8)

- All financial institutions are subject to compliance requirements and enforcement sanctions if needed. This needs to begin with a significant awareness raising process for all financial institutions, which includes DNFBPs due to their inclusion within the definition of the term financial institution, covered.
- The current unsettled status of foreign exchange bureaus is resolved. Regulatory or supervisory solutions should be examined to determine if they could succeed, otherwise, a legislative solution would be necessary if the courts ultimately rule against the powers of the RBM in this area.
- Insurance companies are brought within the scope of coverage of the ML & TF Act's compliance requirements.
- The issue of beneficial ownership, including for PEPs, should be clarified so as to satisfy the criteria in the Methodology, including establishing the identity of the customer AND beneficial owner and an affirmative determination of whether an account is being opened for a beneficial owner.
- The requirement to conduct ongoing due diligence of customers is made part of the CDD measures.
- The requirement to conduct enhanced CDD for higher risk customers is made part of the CDD measures.
- With regard to PEPs or public officials, there should be a requirement for determining the source of wealth in opening the account and for senior management approval in the event the account is opened without such prior approval.
- With respect to correspondent banking, financial institutions should be required to determine if the respondent institution has been subject to a ML or TF investigation or regulatory action, as well as ascertain whether controls at respondent institution are adequate and effective.
- There should be a requirement for financial institutions to pay

Third parties and introduced business (R.9)	<p>special attention to money laundering threats from new technologies and non face-to-face transactions.</p> <p>The authorities should consider amending the statute to comply fully with international standards by adding provisions specifying:</p> <ul style="list-style-type: none"> <li>- What financial institutions should do to ensure that they only utilize third-party CDD from countries that observe FATF standards; and</li> <li>- That the financial institution is ultimately responsible for CDD.</li> </ul>
Financial institution secrecy or confidentiality (R.4) Record keeping and wire transfer rules (R.10 & SR.VII)	<p>None</p> <p>The authorities should consider –</p> <ul style="list-style-type: none"> <li>- Implementing the record keeping requirement with respect to all financial institutions.</li> <li>- Providing a definition of what constitutes originator information that is consistent with the provisions of SR VII;</li> <li>- Assuring compliance with this recommendation through examinations and enforcement actions where appropriate; and</li> <li>- Bringing the wire transfer rules into complete compliance with international standards by addressing the deficiency that banks adopt risk-based procedures for handling wire transfers that do not contain complete originator information.</li> </ul>
Monitoring of transactions and relationships (R.11 & 21)	<p>The authorities should consider:</p> <ul style="list-style-type: none"> <li>- Implementing the statute with respect to all financial institutions.</li> <li>- Imposing the record keeping requirement under Recommendation 11.</li> <li>- Establishing a notification mechanism for informing financial institutions about what countries they should be concerned with because of AML/CFT weaknesses.</li> </ul>
Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV)	<p>The authorities should consider:</p> <ul style="list-style-type: none"> <li>- Clarifying that attempted suspicious transactions should be reported.</li> <li>- Reviewing the large cash transaction reporting requirement so that the FIU may concentrate on its core functions at least at this stage of its development.</li> <li>- Issuing guidance clarifying the reporting requirement to eliminate duplicate reports if that is the desired result even though there is nothing inconsistent with a dual reporting requirement.</li> <li>- Establishing compliance implementation measures for all financial institutions.</li> <li>- Providing more and better feedback for reporting institutions and putting systems in place for feedback for other entities that should be reporting as the statute is fully implemented.</li> <li>- Including directors within the scope of those protected from possible liability for STRs.</li> </ul>

Cross Border declaration or disclosure (SR.IX)	The authorities should consider: - Conducting a joint workshop to assign areas of responsibility in relation to implementing the requirements of this recommendation. - Constructing a roll out plan for implementation, including conducting awareness raising and training.
Internal controls, compliance, audit and foreign branches (R.15 & 22)	The authorities should consider: - Initiating efforts to bring all financial institutions under compliance requirements. - Specifically subjecting foreign branches and subsidiaries to Malawi's AML/CFT requirements. - Determining if this could be done by regulation for banks.
Shell banks (R.18)	The authorities should consider specifically: - Prohibiting the establishment of shell banks - Prohibiting their use as correspondent banks, and requiring that banks satisfy themselves that their respondent institutions in foreign countries do not permit their accounts to be used by shell banks.
The supervisory and oversight system - competent authorities and SROs Role, functions, duties and powers (including sanctions) (R.23, 30, 29, 17, 32 & 25)	The authorities should consider: - Revising the sanctions to permit more discretion and a broader range of sanctions for compliance failures, especially for minor violations that could be handled by administrative order. Otherwise, all banks could all lose their licenses to do business and the DPP would need to be expanded to prosecute so many violations. - Implementing more fully the requirements of the statute by bring all financial institutions under coverage. - Establishing a working relationship between the FIU and other supervisors that specifies the AML/CFT responsibilities of each supervisor. - Clarifying the authority of the RBM with regard to foreign exchange bureaus. - Prosecuting unlicensed foreign exchange bureaus. - Providing reporting institutions with meaningful guidance on future reporting and feedback on the reports that have been filed. - Providing training for the FIU and other supervisors that will be responsible for AML/CFT compliance supervision and enforcement. -Appointing the Director of the FIU.
Money value transfer services (SR.VI)	The authorities should consider implementing the ML & TF Act's requirements with respect to all money service transmitters.

#### **4. Preventive Measures –Non-Financial Businesses and Professions**

Customer due diligence and record-keeping (R.12)	The authorities should consider providing appropriate regulations or guidance with the necessary exemptions in order to make the application of CDD measures practicable and implementable.
Monitoring of transactions and relationships (R.12 & 16)	The authorities should consider introducing monitoring of transaction and relationships, suspicious transaction reporting, and internal control obligations for the various professions within DNFBPs in a sequenced manner with due regard to the ML/TF risk which each of these businesses and professions present.
Suspicious transaction reporting (R.16)	See recommendation immediately above.
Internal controls, compliance & audit (R.16)	See recommendation immediately above.
Regulation, supervision and monitoring (R.24-25)	The authorities should consider – - Implementing a licensing process for internet casinos. - Conducting awareness and training for its gambling operators

and internally for its staff on the ML & TF Act and the implementation thereof.

- Issuing guidelines to the gambling industry in relation to the application of the ML & TF Act including examples of methods on how money can be laundered in through a casino.
- Adopting measures to determine beneficial ownership when licensing casinos.
- Applying AML requirements in respect of occasional transactions in casinos.
- Supervisors monitoring and supervising its gaming licensees in relation to the requirements of the ML & TF Act.
- Having casinos to cooperate with the RBM supervision department regarding the banking transactions undertaken by them.
- Developing guidelines for each of the businesses and professions to aid the implementation of the AML/CFT measures.
- The authorities should consider conducting an assessment of the risks that other non-banking financial business and professions are likely to be misused for ML or TF.

Other designated non-financial businesses and professions (R.20)

## 5. Legal Persons and Arrangements & Non-Profit Organizations

Legal Persons – Access to beneficial ownership and control information (R.33)

- The authorities should consider –
- Enhancing the mechanism for keeping the information accurate and in an updated manner.
  - Enhancing the capacity of the Registrar General’s officers to verify the company information provided to the office, including that of beneficial owners.
  - Strengthen the enforcement mechanism under the Companies Act to compel submission of annual returns.

Legal Arrangements – Access to beneficial ownership and control information (R.34)

- The authorities should consider –
- Adopting a mechanism to register the private trusts including beneficial ownership information and make this available to the public
  - Ensuring that the information on public trusts is kept in an updated manner

Non-Profit Organisations (SR.VIII)

- The authorities should consider –
- Reviewing the adequacy of the NPO Act with respect to combating terrorist financing.
  - At a minimum, conducting background checks of trustees and directors.
  - Strengthening the sanctioning regime for NPOs.
  - Conducting awareness raising seminars to sensitizing the NPO sector on ML & TF issues.

## 6. National and International Co-operation

National co-operation and coordination (R.31 & 32)

- The authorities should consider –
- Giving the necessary authority to the Committee to make binding decisions and formulating Malawi’s AML/CFT policy.
  - Aggressively undertaking awareness raising campaigns in segments of the private sector with respect to their obligations under the ML & TF Act.

The Conventions and UN Special Resolutions (R.35 & SR.I)

- The authorities should consider –
- Introducing legislative provision on the use of special investigation techniques.
  - Asset sharing arrangements with foreign States
  - Implementation of UN Security Council Resolutions
  - Ratifying the remaining six terrorism related conventions

Mutual Legal Assistance (R.36-38, SR.V, and R.32)

- The authorities should consider –
- Designating a central authority to facilitate execution of MLA requests.

- Creating appropriate and clear processes for executing MLA requests
- Entering into agreements for coordination of asset sharing.
- Establishing a database on MLA requests.
- Establishing mechanism for sharing of confiscated assets

Extradition (R.39, 37, SR.V & R.32)

- The authorities should consider –
- Adopting an explicit provision prohibiting the extradition of Malawi nationals.
  - Providing for prosecution of Malawi nationals in lieu of extradition.
  - Providing for clear processes for dealing with extradition cases.

Other Forms of Co-operation (R.40, SR.V & R.32)

- The authorities should consider –
- Establishing guidelines and processes on the handling of information received from international counterparts.
  - Maintaining statistics in relation to international requests (made and received).

## 7. Other Issues

Other relevant AML/CFT measures or issues

General framework – structural issues

**AUTHORITIES' RESPONSE TO THE ASSESSMENT**

**Annex 1 : Details of all bodies met on the on-site mission - Ministries, other government authorities  
or bodies, private sector institutions**

Public Sector

Secretary to the Treasury, Ministry of Finance  
Principal Secretary, Ministry of Home Affairs & Internal Security  
Ministry of Foreign Affairs  
Ministry of Women & Child Development  
Director, Department of Mines (Ministry of Energy & Mines)

National Anti-Money Laundering Committee  
National Counter-Terrorism Committee

Deputy Governor, Reserve Bank of Malawi  
General Manager, Reserve Bank of Malawi  
Banking and Non-Banking Supervision Departments, Reserve Bank of Malawi  
Exchange Control & Debt Management Department, Reserve Bank of Malawi

Attorney General  
Director of Public Prosecution

Anti-Corruption Bureau  
Financial Intelligence Unit  
Malawi Police Service  
Malawi Revenue Authority  
National Intelligence Service

Malawi Gaming Board  
Registrar of General

Private sector

Bankers Association of Malawi  
Council for Non-Governmental Organizations in Malawi  
Malawi Law Society  
Society of Accountants in Malawi

Ching'onga Estates  
Colony Club Casino  
Knight & Frank (real estate agents)  
MSB Forex Bureau  
National Bank of Malawi  
Nico Life Insurance Co. Ltd.  
Opportunity International Bank of Malawi  
Racane Associates (law firm)  
Real Insurance Co. Ltd.  
Stanbic Bank of Malawi  
Victoria Forex Bureau

**ANNEX 2 : LIST OF LAWS, REGULATIONS AND OTHER MATERIAL RECEIVED**

Laws

<b>Laws</b>	
1.	Banking Act
2.	Business Licensing Act
3.	Business Names Registration Act
4.	Capital Market Development Act
5.	Companies Act
6.	Cooperative Societies Act
7.	Corrupt Practices Act
8.	Criminal Procedure and Evidence Act
9.	Customs and Excise Act
10.	Dangerous Drugs Act
11.	Drug Abuse Bill
12.	Exchange Control Act
13.	Extradition Act
14.	Firearms Act
15.	Gaming Act
16.	Hijacking Act
17.	Immigration Act
18.	Insurance Act
19.	Legal Education and Legal Practitioners Act
20.	Legal Education and Legal Practitioners Act (Amendment)
21.	Lotteries Act
22.	Mines and Minerals Act
23.	Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act
24.	Mutual Assistance in Criminal Matters Act
25.	Non-Governmental Organizations Act
26.	Penal Code
27.	Police Act
28.	Reserve Bank of Malawi Act
29.	Trustee Act
30.	Trustee Incorporation Act

Subsidiary regulations, circulars, directives and instructions

<b>Regulations</b>	
1.	Collective Investment Scheme Regulations
2.	Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations
3.	Corrupt Practices (Prohibition of Abuse of Information Obtained in Official Capacity) Regulations
4.	Corrupt Practices (Disclosure by Public Officers of Interest in Contracts and Proposed Contracts) Regulations
5.	Corrupt Practices (Oath of Secrecy) Regulations
6.	Exchange Control Regulations
7.	Exchange Control (Forex Bureau & Forex Fixing Sessions) Regulations
8.	Reserve Bank of Malawi Directive 2005
9.	Trustees Incorporation Rules

Miscellaneous reports

<b>Other Documents</b>		
	<b>Subject</b>	<b>Description</b>
1.	Malawi Law Society – Code of Ethics	Code of ethics



2.	Mines and Minerals Policy of Malawi	Policy document
3.	Mineral Potential of Malawi	Informative document
4.	Anti Corruption Bureau Strategic Plan 2005 - 2009	Strategic Plan
5.	MCA Civil Appeal Bo 12 of 2002	Case file
6.	AML / CFT related statistics on serious crimes	Statistics
7.	AML/ CFT National Committee meeting 30 November 2007	Minutes of meeting
8.	Drug Control Policy	Policy document
9.	Law Society of Malawi Code of ethics	Booklet
10.	The Constitution of the Republic of Malawi	Legislation
11.	National Drug Control Master Plan for Malawi	Strategy document
12.	Results of a cannabis survey in Malawi	Survey
13.	Drug Abuse and HIV / AIDs in Malawi	Survey
14.	Brief on Illicit Drug Control Activities in Malawi	Information paper
15.	Establishment of a National AML / CFT Committee	Letter
16.	Malawi DEQ Version 3	DAQ
17.	Lawyers, notaries, accountants and money laundering	Internet article
18.	AML / CFT statistics	Statistics
19.	Additional information	Statistics and other additional information requested
20.	FFU statistics	Statistics
21.	Overview of MI and TF risk and vulnerability	Information paper from Fiscal & Fraud Unit
22.	Acts used by Fiscal and Fraud Police Officers	Information paper from Fiscal & Fraud Unit
23.	General powers and duties of Police Officers	Information paper from Malawi Police Service
24.	Agenda for meeting with Ministry of Home Affairs and Internal Security	Agenda
25.	Schedule of meetings	
26.	Notice iro the Money Laundering, Proceeds of Serious Crime and terrorist Financing Act	Gazette Notice
27.	Draft strategic plan for the Malawi FIU	Strategic Plan
28.	Draft Policy and Procedures for the FIU	Policy paper
29.	FIU organogram	Organogram
30.	FIU Oath of confidentiality	Confidentiality
31.	Presentation by the Director-General of NIS on terrorism issues	Information paper from NIS
32.	RBM letter iro sale of foreign exchange cash / notes above the prescribed limit of USD 1000	Letter
33.	Exchange Control circular No 3/2007 regarding foreigners working in embassies and other international organizations in Malawi	Circular
34.	ACB Case statistics	Statistics
35.	Newspaper article on vehicle recovered in Zambia	Newspaper article

