



## Report to the GAVI Alliance Board

16-17 November 2011

| Subject         | Proposed retirement of the GAVI Fund Affiliate from the IFFIm structure |
|-----------------|-------------------------------------------------------------------------|
| Report of:      | Debbie Adams, MD, Law and Governance                                    |
| Authored by:    | Anthony Brown, Senior Legal Counsel                                     |
| Agenda item:    | 07                                                                      |
| Category:       | For Guidance/Discussion                                                 |
| Strategic goal: | Alliance operations                                                     |

### Section A: Overview

#### 1. Purpose of the report

- 1.1 The purpose of this report is to update the Board on the analysis undertaken to review the role of GFA in the IFFIm structure (when referring to the IFFIm structure, we use “**IFFIm**”, when referring specifically to the UK charity, we will use the “**IFFIm Company**”).
- 1.2 The report summarises the original rationale for the GAVI Fund Affiliate’s (“**GFA**”) inclusion in IFFIm and why those reasons are no longer relevant and outlines GFA’s current role and proposes how a revised structure without GFA could work.

#### 2. Recommendations

- 2.1 As this paper is being presented for discussion only, there are no recommendations at this time.

#### 3. Executive summary

- 3.1 IFFIm was conceived in 2004 as a mechanism to increase funding for GAVI Alliance programmes (“**GAVI**”). At the outset of establishing the mechanism, it was understood that a charity would need to be created to issue bonds on the international capital markets. The final mechanism that was established in 2006, for reasons set out below, required the establishment of two additional charities: the IFFIm Company to issue bonds and the GFA to enter into grant agreements with sovereign donors.
- 3.2 At the end of 2010, GFA, GAVI and the IFFIm Company began a review of GFA’s historical and ongoing role within IFFIm to analyse the legal, governance, accounting and tax implications of amending the IFFIm

Transaction Documents to remove GFA from the structure and the impact this action would have on the remaining entities.<sup>1</sup>

3.3 The conclusions of the preliminary study indicate that:

- (a) the key drivers behind the inclusion of GFA in the structure are no longer a concern;
- (b) roles currently being performed by GFA could be allocated between GAVI and/ or IFFIm; and
- (c) the removal of GFA would reduce the operational costs of IFFIm in an amount up to approximately USD 1.4 million per annum.

## 4. Context

### *Reasons for GFA's Inclusion in IFFIm*

#### **A. EUROSTAT Ruling**

4.1 At the time of creating IFFIm, two key drivers in the design required:

- (a) IFFIm to be independent of the grantor governments, and that accordingly the borrowing of IFFIm should be considered as the borrowing of a non-government unit, and not as the borrowing or debt of donor countries;
- (b) grant payments to be expensed through the donor government budgets as they are paid as opposed to expensing the entire amount when the pledge is made.

4.2 EUROSTAT, the statistical office of the European communities, was approached to take a decision on the recording of government donations to IFFIm. The proposed structure made it clear that the donors would be making pledges to and contracting with a GAVI Alliance entity for the delivery of its immunisation programme. Under the proposed structure, the donors would be willing to give their approval for that entity to assign the pledges to a new entity (the IFFIm Company) for the purpose of frontloading the pledges to deliver immunisation programmes faster. In this way, there was a clear separation between the donors, GAVI and the IFFIm Company, with the latter representing an independent funding instrument of GAVI and not of the donors. For this to occur the donors required a legal entity other than the IFFIm Company with which they could contract. At the time, the GAVI Alliance was not a legal entity and hence in the proposal to EUROSTAT it was proposed that the donors would contract with the GAVI Fund (previously known as the Vaccine Fund and renamed the GAVI Fund in 2006), a US 501(c)3 public charity that served as one of the vehicles through which donors funded GAVI.

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<sup>1</sup> We likewise note that the 2011 evaluation of IFFIm also suggested looking at streamlining the overall IFFIm governance structure.

### **B. The Public Support Test**

- 4.3 After receipt of the EUROSTAT approval of the IFFIm structure, the GAVI Fund was evaluated to see if it could enter directly into grant agreements.
- 4.4 The GAVI Fund, however, after legal and tax analysis, was concerned that entering into grants with non-US governments could adversely impact its “public charity” status under certain rules of the Internal Revenue Code (“IRS”). U.S. public charities must meet annually a “public support” test, which is a calculation to demonstrate how much of a charity’s support comes from the general public. Loss of public charity status results in adverse tax consequences to an organisation. The charity would essentially be reclassified as a private foundation, requiring it to pay taxes on net income and eliminating some of the favourable tax advantages received by donors to public charities.
- (a) A large base of donors helps a charity’s public support analysis as do grants from US public institutions, such as the US government. Private foundations are not considered public support and large donations from private foundations can tip the balance below an unacceptable level. It has been unclear under IRS rules whether to count grants from governments other than the US as public or private.
  - (b) At the time, the US-based GAVI Fund had a small donor base with a large grant from a private foundation (the Bill & Melinda Gates Foundation), a few non-US government donors and USAID. Given the IRS rules around grant recording for non profit charities, entering into IFFIm grant agreements valued at more than US\$ 3 billion would have placed the GAVI Fund in jeopardy of losing its public charity status. Consequently, it was impossible for the GAVI Fund to serve as the entity to enter into the IFFIm grant agreements.

### **C. The GAVI Fund Affiliate**

- 4.5 With neither the IFFIm Company, the GAVI Alliance nor the GAVI Fund able to enter into grant agreements directly with IFFIm grantors, a new entity the GFA was created. By serving in this role, GFA addressed the need for government grantors to contract with a GAVI Alliance entity and ensured the independence of IFFIm. This carried none of the obstacles which prevented the GAVI Fund from entering into IFFIm grants under the ‘public support’ test.
- 4.6 Under the structure the GFA committed to assign the donor pledges directly to IFFIm in exchange for receiving the proceeds from IFFIm bond issuances over time. These funds were to be disbursed directly for the procurement of the desired immunisation programmes as directed by the GAVI Alliance.

### ***Why it is now possible to remove GFA from IFFIm***

#### **A. EUROSTAT Ruling**

- 4.7 While as noted in section 4.2, the proposed design had in mind that the IFFIm Company would be an independent unit, with a clear distinction between donors, GAVI and IFFIm, in the end, EUROSTAT took a different view of this issue without preventing the delivery of a favourable opinion overall. It noted that *“... GAVI, VF (the Vaccine Fund) and IFFIM are to be combined in a single institutional unit for the purpose of national accounts. It was decided also that this unit should be classified in the International Organisation sub-sector (S.22) and it would therefore be outside the national accounts of individual countries.”*
- 4.8 The removal of GFA from the structure would not undermine either (a) of the key drivers noted in section 4.1 in regards to the EUROSTAT ruling or (b) the ruling itself since the key elements of the final ruling as noted above in sections 4.7 and 4.8 is not based on the existence of GFA. Therefore, future grant agreements made by incoming grantors to the transaction can continue to be made to a separate entity (i.e. GAVI) and assigned to IFFIm.

#### **B. The Public Support Test**

- 4.9 The public support test is no longer a concern for GAVI. In 2006, the GAVI Alliance did not have legal personality and relied on the GAVI Fund for contracting. In 2008/9, it became a Swiss not for profit foundation. As part of the reorganisation, the GAVI Fund transferred the majority of its assets and liabilities and functions to GAVI, including its role within the IFFIm structure.
- 4.10 GAVI also applied for and received tax-exempt “public charity” status in the U.S. As a result, the same concerns apply to GAVI as applied to the GAVI Fund in relation to receiving support from governments other than the US and maintaining public charity status.
- 4.11 However the sources of support and number of foreign governments that support GAVI and its programmes have increased and become more diverse since 2005. The Secretariat has conducted “public support test” modeling for GAVI. This analysis was conducted for the years 2009-2015, and was performed with and without treating non-US government support as “public” for purposes of the public support test.
- 4.12 If non-US government support is treated as “public” and not subject to public support calculation limitations, then GAVI would appear to satisfy the higher threshold.
- 4.13 If non-US government support is not treated as “public” and subject to public support calculation limitations, then GAVI would not satisfy the higher threshold, but would satisfy the “facts and circumstances” test of the public support classification rules.
- 4.14 The analysis conducted indicates that GAVI could satisfy the public support test on a going forward basis and therefore could receive directly the pledges from the donor governments. (See Schedule 1)

## **C. The responsibilities and obligations of GFA could be reassigned**

4.15 The main responsibilities and obligations of GFA under the IFFIm Finance Framework Agreement and associated transaction documents are as follows:

- GFA enters into Grant Agreements with sovereign grantors and assigns these to IFFIm.
- GFA participates in the chain of approvals of programmes, by reviewing and approving programmes proposed by GAVI to ensure these are suitable for funding under the IFFIm structure and in accordance with GFA's charitable objects and memorandum and articles of association.
- GFA forwards approved programmes which it has received from GAVI to IFFIm for its approval and makes funding requests of IFFIm.
- In relation to approved programmes for which funding is then made available by IFFIm and deposited into GFA's trust account, GFA makes disbursement requests and remits funds to GAVI or directly to the recipient country.
- GFA provides a monitoring overview of use of funds by GAVI, including reviewing reports produced by GAVI for the GFA board.

4.16 In addition to these responsibilities under the IFFIm transaction documentation, GFA has historically also entered into certain (i) direct grant agreements to third parties (such as WHO and UNICEF) and (ii) other direct agreements (e.g. EU co-funding agreements), as well as building up some investment income of its own.

## **D. A revised IFFIm structure excluding GFA**

4.17 Set out below is a summary of GFA's role/ functions as described above, together with the approach that could be taken to re-allocate them within the structure, if a decision to remove GFA from IFFIm is taken.

- (a) These changes could be made by way of amendment and restatement to the key documents (including the IFFIm Finance Framework Agreement) in a manner similar to that undertaken in relation to the novation, amendment and restatement of these documents in December 2009 to take account of the removal of the GAVI Fund from the structure and its replacement by GAVI.
- (b) No changes would be made to existing Grant Agreements.

| GFA's Current Role                                                                    | Potential Change                                                                                                                                                                                                |
|---------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Original party to the existing Grant Agreements and additional transaction agreements | Existing donor grants could be assigned by GFA to IFFIm and IFFIm agree with GFA to perform GFA's (limited) obligations to the grantors in the Grant Agreements. No further action in this respect is proposed. |

| GFA's Current Role                                                                                         | Potential Change                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                                            | The Account Administration Agreement between GFA and the World Bank would be terminated and World Bank's tasks under that Agreement would be combined into the existing Treasury Management Agreement between the World Bank and IFFIm.                                                                                                                                                                                                                                                                   |
| Potentially the party to future Grant Agreements                                                           | Future Grant Agreements to be made by sovereign donors to GAVI and assigned to IFFIm. [Or to be made directly to IFFIm].                                                                                                                                                                                                                                                                                                                                                                                  |
| Financing approval and request for funding                                                                 | GAVI would request funding direct from IFFIm and IFFIm would review those requests. The process would move from the initial 2006 4-step process to the current 3-step process to a 2-step process.                                                                                                                                                                                                                                                                                                        |
| Making disbursement requests to IFFIm                                                                      | GAVI would interact directly with IFFIm.                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Provision of certain representations, warranties and covenants                                             | Representations, warranties and covenants which solely concern GFA would be removed or made by GAVI/IFFIm where appropriate.                                                                                                                                                                                                                                                                                                                                                                              |
| Monitoring overview of use of funds by GAVI                                                                | GAVI currently provides a monitoring report directly to GFA pursuant to the GFA Monitoring Policy and provides a similar report to IFFIm. The IFFIm Board would need to adopt a Monitoring Policy and a similar reporting approach would be required to GAVI.                                                                                                                                                                                                                                             |
| References to GFA in the documents                                                                         | These would be removed as part of the amendment and restatement of the documents or replaced with IFFIm/GAVI where appropriate.                                                                                                                                                                                                                                                                                                                                                                           |
| Party to certain other direct Grant Agreements and other direct agreements (e.g. EU co-funding agreements) | If GFA is removed from IFFIm the effective date of the retirement of GFA from the transaction structure is likely to be after these agreements have matured.                                                                                                                                                                                                                                                                                                                                              |
| GFA has built up some of its own investment income                                                         | On the removal of GFA from the structure any remaining funds/income would need to be allocated. Funds earmarked for GAVI programmes in accordance with the FFA would need to be transferred to GAVI. Interest income and other income which has accrued in the account could be paid to GAVI as the sole member of GFA and would be available for use in funding programmes in keeping with GFA's charitable purposes. GFA's Board of Directors will have ultimate say on the use of any remaining funds. |

### **5. Next steps**

- 5.1 The two charities, GAVI, the World Bank and the Grantor Governments have entered into a Finance Framework Agreement (“FFA”) which sets out the legal framework and defines the relationships and obligations between the parties to the documents. Removing GFA from IFFIm would require an amendment to the FFA and the agreement of all the parties to such amendment. GAVI, on behalf of GFA and IFFIM, and in collaboration with the World Bank would need to engage donors and other stakeholders to ascertain their view on any proposed restructuring. This work has started with presentations to the Boards of GFA and IFFIm and to the IFFIm donors.
- 5.2 We are conducting more in-depth analysis on the following:
- (a) Which entity should contract directly with future grantors and exploring, for example, if IFFIm is able to enter into the grant agreement directly with grantors;
  - (b) Modeling the GAVI’s public support for each scenario; and
  - (c) How will GFA’s current responsibilities be allocated to the remaining entities.
  - (d)
- 5.3 If it is ultimately decided by all parties to remove GFA from IFFIm, as a matter of UK Charity Law, the GFA Board would need to decide the future of GFA, for example, whether to wind-up the entity.

### **6. Conclusions**

- 6.1 Following the analysis done to date and for the reasons set out above, it is possible from a legal, tax and accounting perspective to restructure IFFIm and remove GFA should this be the ultimate decision of the parties to the FFA.

## **Section B: Implications**

### **7. Impact on countries**

- 7.1 There will be no direct impact on countries.

### **8. Impact on GAVI Stakeholders**

- 8.1 GAVI and/or IFFIm will take on some additional responsibilities as stated above in section 4.18.

### **9. Impact on the Business Plan / Budget / Programme Financing**

- 9.1 No direct impact on business plan, although costs savings of up to USD 1.4 million would be realised.

### **10. Risk implications and mitigations**

- 10.1 There is a risk that donors may not wish to change the structure.

### **11. Legal implications**

- 11.1 The report contains the legal comments and analysis.

### **12. Consultation**

- 12.1 The Boards of GFA, IFFIm and their legal advisors, KPMG and GAVI external counsel.

### **13. Gender implications / issues**

- 13.1 There are no direct gender implications.

### **14. Implications for the Secretariat**

- 14.1 Removing GFA from the IFFm structure would result in a reduction in the work load of the Secretariat in supporting IFFIm.