THE GATEKEEPERS INITIATIVE:
AN EMERGING CHALLENGE FOR PROFESSIONAL ADVISORS OF INTERNATIONAL BUSINESS AND TAX MATTERS

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International Business and Tax Matters

by Bruce Zagaris

I. INTRODUCTION

Since 1999, there has been an international initiative to develop measures to facilitate better cooperation in counter-money laundering by so-called gatekeepers. Professionals, such as lawyers, notaries, real estate agents and dealers in high value goods, independent professionals, trust and company service providers, investment advisers, and accountants, who advise on and help with transactions involving the movement of money, are deemed to have a special role in identifying, preventing, and reporting money laundering.[1] Some countries, such as the U.K. and the Cayman Islands, already impose due diligence requirements on gatekeepers similar to financial institutions (e.g., " know their client," "identify and report suspicious transactions" and not "tip off" the persons engaging in suspicious transactions that a suspicious activity report has been filed).

Two critical milestones in the international gatekeeper regulation have been the issuance by the European Union of its revised anti-money laundering directive, containing gatekeeper regulation provisions in the fall of 2001 and the issuance of the Financial Action Task Force's Review of the Forty Recommendations Consultation Paper on May 30, 2002. The latter would extend anti-money laundering requirements to gatekeepers worldwide.

A related trend has been for law enforcement and regulatory authorities to combine international tax and counter-money laundering enforcement by: (1) ensuring that obligations to report transactions relating to suspected criminal offenses apply even where such transactions are believed to involve tax offenses; and (2) permitting money laundering authorities to forward information to their tax authorities to support the investigation of tax related crimes, and communicating such information to other jurisdictions so that it can be used by their tax authorities.[2]

Money laundering legislation arose in 1986 as a result of efforts in the U.S. to combat international narcotics trafficking and deprive criminals of the proceeds of their crime and the instrumentalities by which they commit crime. In the normal course of creating anti-money-laundering norms, the tendency has been to agree initially on narrow sets of legal principles and

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1 See FATF, *Review of the FATF Forty Recommendations Consultation Paper*, Sec. 5 (Non-Financial Businesses and Professionals) (May 30, 2002).

2 *See, e.g., the FATF 1998-99 Survey of Trends and Techniques*.

policies and then to broaden them. For instance, one of the initial intergovernmental agreements on anti-money-laundering, the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, was limited in many ways because it was an initial effort and because the participating governments were so diverse. Nevertheless, subsequent efforts draw from the Vienna Drug Convention and utilize wherever possible the same terminology and systematic approach of that convention, unless changes are believed necessary for improvements.

Much of the emphasis of the politics of international anti-money laundering is to try to deprive criminals, especially transnational criminals and organized crime, of the fruits of the crimes and the means of their committing more crimes. Another goal is to allocate the seized proceeds to governments and law enforcement. Hence, the economics and politics of anti-money laundering are to redistribute theeconomics and power of crime. To help with the fight, governments and international organizations have solicited the collaboration of the private sector to prevent money laundering through know-your-customer and identifying and reporting to law enforcement suspicious transactions.

The implications for international business planning are that financial institutions and their employees, and increasingly professionals, are on the front-line and responsible for increased due diligence, (e.g., to know their clients, identify and report suspicious transactions). Some of the confidentiality that client's have come to expect is greatly eroded by know your customer requirements to identify and report suspicious transactions and far reaching enforcement cooperation agreements (i.e. Mutual Assistance in Criminal Matters Treaties and tax information exchange provisions).

This article will examine the emergence of the gatekeepers initiative and its potential for impacting the ways in which attorneys, accountants, and other professionals advise clients in international transactions. In addition, the article also discusses the ways in which international anti-money laundering and international tax enforcement are increasingly interacting.

I. ORIGIN OF GATEKEEPERS' INITIATIVE

The origin of the gatekeepers' initiative was the G-8 conference held in Moscow between 19-20 October 1999, at which the subject of transnational organized crime was discussed. At the end of the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime during the Moscow Summit, the final communique stated that:

> We have agreed to bring our anti-money laundering regimes into closer alignment and to consider putting certain responsibilities, as appropriate, on those professionals, such as lawyers, accountants, company formation agents, auditors and other financial intermediaries who can either block or facilitate the entry of organized crime money into the financial system.

A continuing difficulty is that increasingly international groups consisting of law enforcement officials and financial regulatory officials are making policy without any or with only very limited opportunity for the private sector and civil society groups to participate. For instance, the G-8's announcement of the gatekeeper initiative was without any notice or any opportunity whatsoever for the private sector to participate in the decision-making.

II. EUROPEAN UNION

A. The Revised Money Laundering Directive of 2001

The principal impetus for the gatekeepers' initiative comes from the European Union. For the last two years or so, the EU had tried to revise its 1991 Anti-Money Laundering Directive. An important aspect of the EU Directive is that it had some extraterritorial effect. For instance, Article 1 of the 1991 Directive defined "financial institution" and "credit institution" to include branches located in the Community of financial and credit institutions respectively whose head offices were outside the Community. The recital also explained the need for the directive to focus on the interaction of national prevention and enforcement with international cooperation. The Directive, in addition to requiring EU Member States to criminalize money laundering, required EU Member States to undertake a broad measure of preventive steps, such as internal control procedures, "Know Your Customer" procedures, training employees, identification and reporting of suspicious activities, and auditing due diligence programs.[3]

On December 4, 2001, the European Parliament and the Council of the European Union adopted a revised directive against money laundering.[4]

Recitals 15 to 20 discuss the application of the revised directive to the gatekeepers as follows:

> (15) The obligations of the Directive concerning customer identification, record keeping and the reporting of suspicious transactions should be extended to a limited number of activities and professionals which have been shown to be vulnerable to money laundering.

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3 For background see William Gilmore, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTER-MEASURES 160-88 (1995).

4 Directive 2001/97/EC of the European Parliament and of the Council of 4 December 20001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ C L 344/76 (Dec. 28, 2001).

(16) Notaries and independent legal professionals, as defined by the Member States, should be made subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity.

(17) However, where independent members of professions providing legal advice which are legally recognized and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.

(18) Directly comparable services need to be treated in the same manner when practiced by any of the professionals covered by the Directive. In order to preserve the rights laid down in the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) and the Treaty of the European Union, the case of auditors, external accountants and tax advisors who, in some Member States, may defend or represent a client in the context of judicial proceedings or ascertain a client's legal position, the information they obtain in the performance of these tasks should not be subject to the reporting obligations in accordance with the Directive.

(19) The Directive makes reference to 'the authorities responsible for combating money laundering' to which reports of suspicious operations must be made on the one hand, and to authorities empowered by law or regulation to supervise the activity of any of the institutions or persons subject to this Directive ('competent authorities') on the other hand. It is understood that the Directive does not oblige Member States to create such 'competent authorities' where they do not exist, and that bar associations and other self-regulatory bodies of independent professionals do not fall under the term 'competent

authorities'.

(20) In the case of notaries and independent legal professionals, Member States should be allowed, in order to take proper account of these professionals' duty of discretion owed to their clients, to nominate the bar association or other self-regulatory bodies for independent professionals as the body to which reports on possible money laundering cases may be addressed by these professionals. The rules governing the treatment of such reports and their possible onward transmission to the 'authorities responsible for combating money laundering' and in general the appropriate forms of cooperation between the bar associations or professional bodies and these authorities should be determined by the Member States."

Article 2a requires that "Member States...ensure that the obligations laid down in this Directive are imposed on the following...legal or natural persons acting in the exercise of their professional activities:"

1. auditors, external accountants and tax advisors;

2. real estate agents;

3. notaries and other independent legal professionals, when they participate, whether:

(a) by assisting in the planning and execution of transactions for their client concerning the:
(i) buying and selling of real property or business entities;
(ii) managing of client money, securities or other assets;
(iii) opening or management of bank, savings or securities accounts;
(iv) organization of contributions necessary for the creation, operation or management of companies;
(v) creation, operation or management of trusts, companies or similar structures;
(vi) or by acting on behalf of and for their client in any financial or real estate transaction;

4. dealers in high-value goods, such as precious stones or metals, or works of art, auctioneers, whenever payment is made in cash, and in an amount of EUR 15,000 or more;

5. casinos."

Article 6 requires EU Members to ensure that the institutions and persons subject to the

Directive and their directors and employees cooperate fully with the authorities responsible for combating money laundering.

Article 6(3) provides that, in the case of notaries and independent legal professionals, EU Members may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed of the facts of a suspicious transaction and in such case will establish the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering.

EU Members are not required to apply the suspicious transactions reporting obligations to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position of their client or performing their task of defendant or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

EU Members must implement the directive by June 3, 2003 at the latest. Already, the U.K. had legislation in place implementing the directive. Since the adoption of the initiative, Denmark, Germany and the Netherlands have enacted legislation to implement the directive.

Before the Revised Directive of 2002, the EU Anti-Money Laundering Directive has applied only to credit and financial institutions.

As a result of the proposed Directive, when they advise clients on investment matters managing financial accounts, creating companies or trusts or executing financial transactions, lawyers, auditors, external accountants and tax advisers will be subject to the same requirements to "Know Your Customer" and "Identify and Report Suspicious Transactions" as banks and other credit institutions. In particular, attorneys, accountants, auditors, real estate agents, and other independent legal professionals are covered when they participate, whether in planning or undertaking, on behalf of their clients, real estate investments, the management of investment activities, opening and operating accounts, organization of contributions for organizations, managing and operating the same, the creation and operation of trusts, companies or similar structures, and advising or acting on behalf of a client in any financing of real estate.

EU Members will be able to decide whether to permit EU-authorized exemptions in national law. For instance, states will be able to nominate a bar association or accounting association "or other self-regulatory bodies for independent professionals." The states must determine how those bodies will cooperate with regulatory authorities.

The inclusion of professional advisers will mean that professional advisers in non-EU countries, which are not otherwise covered by the Directive's extraterritorial application provisions, will have an advantage in practicing, since they will not be bound by the rules. The "balloon effect" of anti-money laundering will mean that investors and clients that do not want their advisers bound by such rules, either for legitimate or illegitimate reasons, are likely to utilize professionals in non-EU countries. The anti-money laundering politics will exert pressure on non-EU countries to enact similar legislation. The success of the proposed new directive will depend partly on the implementation by professional bodies of the due diligence, the cooperation between professional bodies and regulatory authorities, as well as the education of professionals and self-compliance efforts by professional bodies.[5]

B. Action by European Non-Governmental Organizations

The action to revise the 1991 Anti-Money Laundering Directive has sparked debate by professional organizations representing attorneys, accountants, auditors, and other affected professionals.

On July 27, 1999, in Brussels, Belgium, the Council of the Bars and Law Societies of the European Community, the Conference of Notaries of the European Union, the European Federation of Accountants and Auditors for Small and Medium-Sized Enterprise (EFAA) and the Federation of European Accountants signed a Charter on combating organized crime.[6]

The Charter contains the ethical principles to which the professions must submit themselves. They include to check the identity of their clients, and refrain from the receipt of bribes or the contribution to illegal activities. The Charter provides for each of the professionals to prepare or improve mechanisms to assist their members, supervisory mechanisms and disciplinary sanctions. In addition, the professionals will undertake awareness-raising actions that the EC is considering supporting.

According to a representative of the Council of the Bars and Law Societies, "the Charter does not mark the beginning of our commitment to the fight against money-laundering, but makes it more visible." While the Charter sets forth the major principles, the different signatory professionals must take steps, in their own codes of conduct, for instance, to implement the principles.

The European Commission initially articulated the basic idea of the Charter and the U.N. Office for Drug Control and Crime Prevention has endorsed the efforts.[7]

In addition to the Charter, the European Federation of Accounting Society is working on

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5 For background on the bill passed by the European Parliament, *see European Parliament Imposes Money Laundering Due Diligence on Professionals*, 17 INT'L ENFORCEMENT L. REP. 191 (May 2001).

6 *European Lawyers Sign a Charter to Combat Organized Crime*, 3 UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION (UN ODCCP) 4 (Sept. 1999).

7 *Id.*

revising its rules as a result of anti-money laundering initiatives.[8]

Other groups, such as national law societies and the Conseil Consultative Europeén de Barreau (CCBE) became involved in the legislation quite late in the process. Many of them did not believe they had ample time to present their views and that the deliberative bodies did not even start to grasp, let alone resolve the manifold implications of the initiative. Because of the different structures of the bar in the common and civil law countries, the bar associations did not work well together. Just as importantly, they did not coordinate effectively with the non-legal groups.

The CCBE's Task Force on Anti-Crime has established various Action Points to draw attention to those areas where especial vigilance must be taken so that Bars and law Societies will be able to lobby national governments to exercise the discretions in a coordinated way across the EU. Hence, the Task Force would encourage each Bar and Law Society to:

(a) inform the CCBE Secretariat (mcnamee@ccbe.org) of any developments on the implementation process in their Member State;

(b) notify the CCBE Secretariat of any guidelines that national Bars may have developed for their members; and

(c) convey to their governments the importance of adopting a harmonized and sensible approach in implementing the Directive in accordance with the following Action Points.

Action Point I – Reporting Obligations

The CCBE focuses on the discretion reserved to EU Members in Article 6.3 (second paragraph) to exempt certain gatekeepers when "they receive information from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings". The CCBE urges its members to ensure their national governments exercise the discretion in a way that practitioners will be exempted from the obligation to report suspicious transactions on the provisions contained in Art. 6.3

Action Point II – "Ascertaining the Legal Position"

(a) Legal Advice – Considering the provisions in Recital 17 and notwithstanding that the wording of Article 6.3 does not specifically refer to legal advice, the CCBE urges its members to maintain consistency throughout the EU by having EU Members' implementing legislation clarifying that legal advice is so included, subject to the conditions referred to in recital (17) of the agreed text.

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8 For additional background on the role the Conference of Notaries of the European Union, the European Federation of Accountants and Auditors for Small and Medium-Sized Enterprise (EFAA) and the Federation of European Accountants, *see European Professional Associations Agree on Due Diligence Against Organized Crime and U.S. Starts Gatekeepers Initiatives*, 16 INT'L ENFORCEMENT L. REP. 719 (May 2000).

(*b*) *Knowledge* – The CCBE advises that the qualifications to legal advice are reflected in the definition of "Money Laundering" at Article I(c) where the expression "knowing that such property is derived from criminal activity" is used. The definition states that "Knowledge, intent or purpose required as an element of the above mentioned activities may be inferred from objective factual circumstances." This test differs from the one outlined in recital (17). The CCBE emphasizes that knowledge in the context of the definition of "Money Laundering" in Article 1(C) should not be confused with knowledge that the client is seeking legal advice for money laundering activities (recital 17). Any effort to further qualify actual knowledge by reference to the provision in the definition of money laundering should be strongly resisted.

Action Point III – Information for Other Purposes

One provision in the draft Article 6 of the EU Money Laundering Directive of 2001 was a paragraph that precluded law enforcement authorities from using information received for purposes other than combating money laundering. However, EU Members could provide that such information may also be used for other purposes (e.g., other criminal or regulatory purposes). The CCBE advises National Bars to ensure that EU Members do not reintroduce this provision when implementing the 2001 Directive into national law. This would ensure that different rules do not apply across the EU on information obtained for the purpose of combating money laundering and also to ensure that clients and lawyers are clear that the same rules apply in each EU Member.

An increasing phenomena is that law enforcement authorities are accessing the information collected for anti-money laundering purposes on a world wide basis. Under the Egmont group Financial Investigative Units (FIUs) are exchanging suspicious activity reports. Some FIUs also assist other law enforcement and regulatory authorities. SAR and anti-money laundering information have been used to check immigration applications, acceptance of accounts by brokers and financial service providers, financing transactions and other matters. The appearance of a person's name in a law enforcement or regulatory computer will prejudice the persons's ability to conduct business, travel, open accounts, and borrow money without the person's having any knowledge that their name may have been placed in a computer and without having ever been determined by an impartial tribunal to have committed any crime whatsoever.

Action Point IV Non-disclosure to Client (Tipping Off)

The provision against tipping off clients when a suspicious transaction report is made is in Article 8 of the 1991 Directive. The 2001 Directive in Article 8(2) gives EU Members the option of not applying the "tipping off" obligation to the professions. Accordingly, the CCBE urges national Bars to ensure that Article 8 is not applied to lawyers in their jurisdiction, so that there will be a consistent application of the Directive concerning the issue of non-disclosure (or the prohibition against "tipping off") to clients in each EU Member.

Action Point V – Independent Legal Professionals

The Directive does not clarify whether the wording "independent legal professionals" includes only members of the regulated legal professionals within the European Union, or whether it is to include all persons who are entitled to practice law, including lawyers from jurisdictions other than the European Union who are physically present in the EU. To maintain a "level playing field," the CCBE believes the legislation should not discriminate between various classes of lawyers, and so should cover all legal practitioners within a particular jurisdiction, including foreign lawyers.

Action Point VI – Definition of "Criminal Activity"

The definition of money laundering in Article I(C) of the EU Revised 2001 Directive refers to the conversion or transfer of property knowing that such property is derived from "criminal activity." Criminal activity is broadly defined in sub-paragraph (E) as meaning any kind of criminal involvement in the commission of a serious crime. EU Members may designate "any other offense as a criminal activity for the purposes of this Directive." The CCBE believes that a discretion of this nature is wrong since it exceeds the scope and purpose of the anti-money laundering goals. It urges National Bars and Law Societies to be especially vigilant in relation to this point in order to ensure EU Members to not exercise this discretion.

Action Point VII – Role of Bar and Law Societies

Recital (2) and Article 6(3) concerning reporting suspicious transactions allows EU Members to adopt rules that require notaries and independent legal professionals to make SARs to the self-regulatory organizations (e.g, bar association). The CCBE tells National Bars to consider whether they may want to avail of this option. If so, they must inform their national government accordingly.

Action Point VIII – Review Within Three Years

The CCBE reminds Bar and Law Societies that according to Article 2 of the 2001 Directive, the EU Commission must carry out a particular examination relating to the implementation of the Directive.

Increasingly international organizations are developing partnerships between governments and the private sector to combat transnational crime.

IV. FINANCIAL ACTION TASK FORCE CONSULTATION PAPER AND SELECTED RESPONSES FROM BAR ASSOCIATIONS

A. The Consultation Paper

On May 30, 2002, the Financial Action Task Force on Anti-Money Laundering (FATF) issued a Consultation Paper proposing major revisions and extensions of the forty recommendations. In an effort to develop more democratic and transparent processes, FATF has requested the views of all interested parties, including non-FATF members, the private sector, or any other interested persons. Comments are requested by August 31, 2002 (if possible electronically and preferably in English or French).[9]

The FATF has undertaken the review because of changes in money laundering methods and technologies and new international legal standards, including the U.N. Convention on Transnational Organized Crime, the amendments in Directive 2001/97 EC of the European Parliament and Council amending the 1991 directive on money laundering, and the creation of the FATF Special Recommendations on Terrorist Financing. To prepare the paper, the FATF established three working groups: one to consider suspicious transaction reporting and high risk products, a second on the misuse of corporate vehicles, and a third on the role of non-financial businesses and professionals.

Three options are given to cover *lawyers and notaries*. With respect to lawyers, Option 1 is to cover lawyers and independent legal professionals in all their activities. Option 2 is to cover lawyers and independent legal professionals, but only where they are acting as financial intermediaries on behalf of or for the benefit of the client. Option 3 is to cover lawyers and independent legal professionals where they are involved in the planning or execution of financial, property, corporate, or fiduciary business for the client.

The paper lists three options for covering notaries: Option 1 is to cover notaries or notaries public in all countries; Option 2 is to cover notaries or notaries public only where they are acting as financial intermediaries on behalf of or for the benefit of the client; and Option 3 is to cover notaries or notaries public where they are involved in the planning or execution of financial, property, corporate, or fiduciary business for the client.

In the application of suspicious transaction reporting and increased diligence to lawyers and notaries, they would have to comply with Recommendations 14-19, especially the reporting of suspicious transactions. However, several options would be available concerning when the reporting obligation would apply: Option 1 would impose a general obligation in respect of all their activities; Option 2 would impose an obligation limited to their involvement in certain listed vulnerable activities e.g., where they act as a financial intermediary; Option 3 would apply Option 1 or 2, but permit countries to decide where SAR are to be sent directly to the FIU or to the appropriate SRO (where one exists) for that professional. Each jurisdiction could determine the details of how that SRO would then cooperate with the FIU and other competent authorities.

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9 Financial Action Task Force on Anti-Money Laundering, *Review of the FATF Forty Recommendations: Consultation Paper* (May 30, 2002) (www.fatf-gafi.org).

Under all the options, no obligation to report suspicious transactions would exist if the relevant information came to the lawyer or notary in circumstances in which the lawyer or notary is subject to professional secrecy or legal professional privilege. Such issues of secrecy or privilege would not be relevant in countries where the notary exercises a more limited function that excludes the giving of legal advice. Under Option 1 Recommendation 17 would not apply to lawyers and notaries, who would be allowed to tip-off their clients that they had made a report. Under Option tipping-off would not be permitted. The FATF may also consider as to whether it would be tipping-off if lawyers are required to dissuade their clients from being involved in any illegal activity. For oversight and supervision, the FATF paper provides 3 options: Option 1, self-regulatory oversight by an SRO; Option 2, self-regulatory oversight by an SRO which could itself by subject to supervision itself by a government body on compliance with AML obligations; and Option 3, oversight or supervision by one or more designated government authorities. The system should allow for sanctions for failing to comply with the relevant obligations.

AML measures must be applied to *accounting professionals*. In options for coverage of accountants and auditors, parts 1 and 4 refer to "accountants" or "external accountants" and include auditors, while parts 2 and 3 differentiate between the obligations that could be applied to accountants and those that could apply to auditors. Option 1 would apply AML measures to all external accountants, including where the accountant is an auditor performing a statutory audit function. Option 2 would apply AML measures to all external accountants, but only where they are acting as financial intermediaries. This would include giving advice on matters where they are acting as financial intermediaries.

With respect to ST reporting and increased diligence, all external accountants would be required to comply with FATF Recommendations 14-19, especially the ST reporting. As with lawyers, it might have to be extended beyond "transactions." Two options are provided as to whether or when the reporting obligation would apply to external auditors. Option 1 would apply an obligation on external auditors to report suspicious transactions in respect of all their activities. Option 2 would require them to report but only insofar as they are involved in certain listed vulnerable activities, e.g., where they act as financial intermediaries. The FATF paper gives options allowing "tipping-off" and not allowing "tipping-off." In terms of regulation and supervision, as with legal professionals, the FATF paper gives 3 options: self-regulatory oversight by an SRO; self-regulatory oversight by an SRO which could be subject to supervision itself by a government body on compliance with AML obligations; and oversight or supervision by one or more designated governmental agencies.

The FATF paper will subject to AML measures *investment advisors*, that is, persons who provide financial advice or planning services to the public. These services often involve the investment advisor examining a client's financial needs and recommending financial products and services to meet those needs. In some countries, advisors provide advice on certain types of investments, such as pensions, life insurance, or unit trusts. These must be authorized and must abide by rules to protect customers and investors. Depending on the country, financial planning or advice may be offered not only by specific authorized investment advisors, but also by lawyers, accountants, or other types of professionals. The advisor may also offer other types of advice, such as tax planning, purchasing foreign real estate, etc. The FATF paper takes the position that due to the important role of investment advisors as financial intermediaries and their knowledge of client's affairs, consideration should be given as to whether they should be subject to AML obligations, even where they do not handle the client's funds.

A significant challenge for the FATF will be its ability to digest, deliberate, and incorporate some of the comments it has requested. A weakness of the 29-member FATF until now has been a very limited outreach with non-FATF members and the private sector. However, the FATF seems to be genuinely trying to become more democratic. Indeed its initiative against non-cooperative countries demands increased transparency and accountability. The FATF will need to find more ways to involve interested parties (e.g., the private sector and non-governmental organizations) at the earliest possible time in its policy making.

B. Bar Groups Comment on FATF Consultative Paper

The Financial Action Task Force, which for the first time invited comments from interested parties before making new policy, has received some of the early comments. It appears that many groups will make comments. Two groups issuing comments are the American Bar Association and the American College of Trust and Estate Counsel.

1. American Bar Association

The American Bar Association advised that, to the extent that the FATF Recommendations apply to lawyers, they should be carefully tailored and focused primarily on attorneys who receive and transfer funds on behalf of clients. The ABA Task Force supported in principle recommendations that would require attorneys, when acting as financial intermediaries, to verify the identities of clients, maintain records on domestic and international transactions, and develop training programs that would help attorneys identify potential money-laundering schemes or other situations in which the domestic or international monetary system could be used for criminal purposes.

The Task Force opposed proposals that would require attorneys to identify and report Suspicious Transaction Reports to authorities and the related proposal that would prevent attorneys from notifying a client that such information has been so reported (e.g., the prohibition against "tipping off").

The ABA comments explain that any evaluation of the proposals to extend FATF Recommendations 10-12 and 14-19 to attorneys must occur in the context of the critical role played by attorneys in the system of justice in the U.S., which preserves and protects civil liberties and individual rights and depends upon lawyers to advise clients regarding the scope, meaning, and application of the law to business transactions. In particular, the comments focus on the attorney-client relationship, the ABA Model Rules of Professional Conduct and the ethical rules adopted by the states and other jurisdictions to govern lawyers' professional conduct. The ABA comments underscore that, although attorneys may serve as gatekeepers to the domestic and international monetary system, they also serve as gatekeepers to the system of justice and administration of law for citizens of the U.S. and other countries. In particular, the ABA paper discusses the duty of confidentiality as part of the attorney-client relationship. Model Rule 1.6(a) prohibits an attorney from revealing "information relating to the representation of a client unless the client gives informed consent" subject to certain limited exceptions set forth in the rule.

The ABA comments support the requirement that attorneys functioning as financial intermediaries can reasonably be expected to obtain proof of their *client's identity*. Additional investigation should be unnecessary in the absence of certain objective criteria that would put an attorney on notice that an issue concerning the client's true identity or intentions was present. The ABA cautions that the requirement to identify a client should not be implemented in a way that requires the attorney to perform any due diligence on the non-client members in a business enterprise created by the attorney and the client. Any implementation should establish a bright line for determining that the attorney has satisfied this requirement. Additionally, the ABA comments recommend that government regulators considering client due diligence rules or procedures should consult and collaborate with the organized bars to address these questions and to tailor such regulations and procedures to the nature of the client and matter, the resources of the attorney or law firm, the particular industry in which the client is engaged, and the scope of the services to be rendered to the client.

The ABA supports the application of *record keeping* to lawyers: they should keep records on customer identification, account files, and business correspondence for at least five years after the account is closed. The ABA paper anticipates that "law enforcement authorities would be required to resort to traditional law enforcement processes, such as judicial subpoenas and statutory investigative demands, to obtain the records." The reality is that Financial Investigative Units are starting to share certain information for preventive as well as investigative and law enforcement reasons.

The ABA strongly supports internal controls and training so that attorneys serving as financial intermediaries can identify money laundering or other uses of the legal system to further criminal purposes. Such training would include participation by the ABA, state and local bar associations, and other continuing legal education programs, as well as the development of law school curricula in criminal law, professional responsibility, banking, and other courses.

The ABA opposes subjecting attorneys to FATF recommendations 14-18, which would require attorneys to submit STRs to government authorities based on a mere suspicion that the funds involved in a client's transaction came from some type of illicit activity and would prevent attorneys from informing their clients that they had done so. The ABA paper states that subjecting attorneys to STRs would be "so fundamentally at odds with the confidentiality underlying the attorney-client relationship and the attorney's role as a compliance counselor to the client" could harm clients, the economy, and efforts to foster compliance with the law. In addition, the STR and "no tipping off" recommendations would have a chilling effect on the attorney-client relationship.

2. American College of Trust and Estate Counsel

The ACTEC is a professional association of lawyers, teachers, and judges with a current membership of more than 2,600 Fellows throughout the U.S. who have been elected to membership by their peers on the basis of their professional reputation and their demonstrated exceptional skill and ability in probate, trust and estate, and transfer tax law, and who have made substantial contributions to these fields through lecturing, writing, teaching and bar activities. ACTEC explained that its comments were based in part on the attention to trusts in FATF's Report of February 1, 2001. In particular, the FATF February 1, 2001 Report suggests three avenues for further inquiry regarding the use of trusts: (1) establish regulation and licensing of professionals involved in trust formation (this would mean requiring those professionals to apply the same anti-money laundering preventive measures as are applied to financial institutions); (2) regulate the form of trusts (this would mean some standardization of the form of trusts that would be allowed in international commerce, the prohibition on the use of some proscribed types of trusts, and the prohibition on the use of some proscribed types of provisions in trusts, such as flee clauses; (3) impose a registration requirement for trusts (this would require the establishment of some form of international registry of trusts, containing their creation, the identify of interest parties such as settlor, trustee, or beneficiary, and their assets).

The ACTEC agrees that professionals serving for compensation as trustees should be subject to most of the FATF recommendations. However, the ACTEC opposes any special licensure of trustee because there are over one million practicing lawyers in every state of the U.S. and many serve as trustees for compensation. The ACTEC opposes strenuously any effort to regulate the form of trusts. Trusts necessarily are infinitely flexible and should not be restricted to use in "standard" forms. For privacy reasons, the ACTEC opposes any international registry of trusts, but agrees that trustees should be required to have complete information on file for review by law enforcement authorities.

The ACTEC expresses that tax offenses are not and should not be understood to be the type of criminal acts that can be held to produce the ""proceeds of crime" for purposes of "money laundering." ACTEC disagrees that international transactions that lead to underpayment or non-payment of taxes should be criminalized and made part of the reporting structure of the Forty Recommendations. ACTEC explains that attitudes toward the reporting of income and payment of taxes vary widely from country to country. Additionally, trust companies and professionals in one country are not knowledgeable as to the tax laws of other countries, and are not likely to be able to determine if their clients or customers are acting in full compliance with the tax laws of their home countries and any other affected countries. The ACTEC paper makes many detailed and useful comments on the FATF Consultative paper.

3. Japanese Federation of Bar Association (JFBA)

The JFBA's comments oppose the obligation to report suspicious transactions. The attorney's confidential obligation is indispensable for the protection of the legitimate rights of the client. For the judicial system to operate properly, such obligation must be respected as much as possible. Requiring the attorney to make suspicious activity reports (SARs) would undermine the basic attorney-client trust. Making SARs will also unnecessarily embroil many clients who actually have nothing to do with money laundering and will deter communication between the client and the attorney. If an attorney is required to report, he should be allowed to give an internal report to his client. Most countries require the person reporting not to "tip off" the person about whom the reporting person has a suspicion.

The JFBA, like the ABA, believes that only attorneys serving as financial intermediaries should be subject to anti-money laundering due diligence. The JFBA agrees with the proposal of subjecting attorneys when they serve as financial intermediaries to client identification and verification.

C. Problems in Democracy, Transparency, and Governability in the Legislative Process

A major problem in the FATF consultative process and in the gatekeeper initiative is its need for improved democracy. Initially, the undertaking for the gatekeeper initiative was made by the G-8 ministers in 1999 in Moscow. The FATF has also decided to undertake the initiative. However, the FATF is not even an organization with legal personality or proper democratic and governable procedures. Only 29 countries participate in the FATF process. Other countries participate only in the regional FATFs. Even if the FATF were an international organization, the governments of the world have not conferred upon FATF the right of sovereigns to make laws and regulatory measures that impinge on fundamental rights.

A limitation of the FATF is that it is composed almost entirely of law enforcement and financial regulatory officials. Unlike parliaments of the world, the FATF does not have a properly elected group of legislators that have a clear mandate to legislate. The lack of mandate is exacerbated by the absence of a careful legislative process that provides the bases for decisions on the important issues.

In addition, the FATF has not devised an effective way for civil society and all the persons interested in its initiative to participate. The decision of FATF to allow comments, while a useful departure from its procedure, does not afford enough opportunity for the private sector to participate from the start of its initiative and to have meaningful and effective opportunity to debate the need for the initiative, let alone the monumental decisions that will impact all the countries of the world and international commerce and international human rights.

An important limitation of the FATF legislative process is the absence of transparency. Other than the FATF written reports, lawyers and civil society and even governments outside the

29 FATF members do not have access to the deliberations on which the FATF makes its policies that the world is expected to implement.

Most private sector groups welcome the decision by the FATF to allow interested persons to make comments and attend the Forum in October. However, many of the bases on which the recommendations put forth in the Consultation Paper were determined without the opportunity of the non-FATF members or even lawyers to participate. The limited opportunity for interested parties to participate in response to the FATF Consultation Paper and to make comments within ninety days will not provide enough due process to enable the FATF to properly have the input that the private sector can and should provide. Indeed, the FATF deferred the prior February 2002 deadline ninety days to allow for more internal deliberations within the FATF after FATF members had already spent many months working on the gatekeeper initiative.

The Recommendation on the regulation of gatekeepers is silent on measuring the costs of the proposed options. Perhaps the lack of substantial private sector input and the fact that the FATF's members are law enforcement and financial regulators who will not bear any of the costs of the regulations explain the lack of measurement of such costs. Similarly, the Consultation Paper does not measure or assess the likely adverse macroeconomic impact of the proposed gatekeeper regulations.

Civil society and bar groups may want to recommend that, to ensure legitimacy and broad popular support for anti-money laundering recommendations, the legislative and decision-making processes be improved. In particular, the private sector and lawyers should have the ability to regularly dialogue with the FATF.

V. **UNITED STATES EMBRACES AND IMPLEMENTS THE INITIATIVE**

As a result of the G-8 Summit in Moscow and other initiatives to prevent and combat transnational crime, the U.S. Treasury and Justice Departments in the National Money Laundering Strategy for 2000 offered an initiative to develop a partnership with associations of legal and financial professionals to ensure that money launderers are denied access to the financial system. In particular, lawyers, accountants and auditors serve as the "gatekeepers" to the domestic and international financial system and hence are uniquely in a position either to facilitate money laundering or, on the other hand, to deter and detect the crime. The initiative is designed to ensure that such gatekeepers are not unwitting facilitators of money laundering schemes. Two action items are in play under the implementation of the Strategy. The first is that a study group has been established consisting of the Departments of the Treasury and Justice, FinCEN, the SEC, and the federal bank regulators to examine how best to utilize accountants and auditors in the detection and deterrence of money laundering. A second is that the Chief of the Asset Forfeiture and Money Laundering Section of the Department of Justice is reviewing the professional responsibilities of lawyers and accountants with regard to money laundering and will make recommendations ranging from enhanced professional education, standards or rules, to legislation as might be needed.[10]

With respect to the review of professional responsibilities of gatekeepers, the Strategy requires an interagency working group to propose preliminary recommendations to the Money Laundering Steering Committee by the end of June. There seem to be three options: (1) increased education; (2) application of new rules with respect to professional responsibility; and (3) application of SARs on the federal and/or state levels to gatekeepers.[11]

To explore these options, an interagency task force has held initial meetings with members of the American Bar Association (ABA). These meetings have been exploratory in nature, whereby the task force has set forth the conceptual nature of the initiative, the options, and solicited help and support of the ABA groups. Officials in the Inter-Agency Task Force have reported that their efforts are somewhat in arrears because of the press of work on the Financial Action Task Force (FATF) on Anti-Money Laundering's report on non-cooperative countries. In other words, the Task Force has prioritized compliance by other countries over that in the U.S.

A priority in the U.S. National Money Laundering Strategy Report 2002 is to work with FATF countries to complete the revisions of the Forty Recommendations. In this regard, the U.S. will start drafting the revised FATF Recommendations during fall 2002 with an anticipated completion date of spring 2003.[12]

In particular, many U.S. lawyers involved in business and estate planning do not believe they should be covered. Tax shelter laws in the U.S. already impose on lawyers reporting requirements with respect to this activity. For instance Section 6111 of the Internal Revenue Code of 1986, as amended, already requires a tax shelter organizer to register the shelter with the Secretary, no later than the day on which the shelter is first offered for sale, by filing a Form 8264 ("Application for Registration of a Tax Shelter"). In addition, Section 6112 of the Code requires a person who organizes a potentially abusive tax shelter or sells an interest therein to maintain for a period of seven years a list identifying each person who was sold an interest in any tax shelter with respect to which registration was required under Section 6111 or which the Secretary determines has a potential for tax avoidance. Treasury Regulations issued under Section 6112 require detailed information about the shelter. On international transactions, lawyers and clients must already comply with the Qualified Intermediary Regulations, Section 6038 regulations for foreign persons with ownership of U.S. corporations, foreign trust reporting, correspondent bank regulations under the USA Patriot Act, the Customs and Monetary

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10 U.S. Department of the Treasury and Department of Justice, THE NATIONAL MONEY LAUNDERING STRATEGY FOR 2000 44-46 (Mar. 2000).

11 For background *see European Professional Associations Agree on Due Diligence Against Organized Crime and U.S. Starts Gatekeepers Initiatives*, 16 INT'L ENFORCEMENT L. REP. 719, 720.

12 U.S. Department of the Treasury, NATIONAL MONEY LAUNDERING STRATEGY (July 2002) (www.treas.gov).

Instruments Report for cross-border payments, IRS Form 8300 under I.R.C. Sec. 5060I for cash payments received in a business, and a host of other laws and regulations. In addition, U.S. lawyers already operate under a complex mix of regulations, especially with respect to international transactions. Many of these laws apply uniquely in the U.S. and mean that additional (e.g., anti-money laundering reporting) laws would be duplicative.

VI. BUSINESS AND PRACTICE IMPLICATIONS OF THE INITIATIVE

The pressure for the U.S. and other G-7 countries to enact legislation to subject professionals to anti-money laundering due diligence has come from the EU. The enactment of strong gatekeeper provisions in the revised anti-money laundering directive of 2001 means that the EU will increasingly insist that the U.S. act to ensure a level playing field. Similarly, other jurisdictions, such as the U.K. and Switzerland, and others that are already the target of economic sanctions or threatened sanctions already subject professionals to anti-money laundering due diligence (e.g., the Bahamas, the Cayman Islands, and Bermuda). They not surprisingly believe that the country most active in the anti-money laundering rhetoric – the U.S. – should match its words with actions.

For example, in the Bahamas a Compliance Commission has been established as the anti-money laundering supervisory body for the non-traditional group of financial institutions. They include persons who "provide financial services that are susceptible to abuse by criminal elements seeking to launder proceeds of criminal conduct." The use of non-traditional financial services to lander criminal proceeds has increased in recent years as countries have required traditional financial institutions, such as banks and trust companies, tightened anti-money laundering laws.[13]

The Commission refers to FATF typologies that have identified lawyers/notaries, accountants, and other professionals who offer financial services and financial advice as having become common elements to complete money laundering schemes and has resulted in the gatekeepers' initiative. In response, internationally the standard has been to move toward including certain non-traditional financial professionals within the framework of anti-money laundering laws and regulations, particularly on customer identification, record keeping and suspicious transaction reporting.

The Commission has two functions for ensuring compliance with the anti-money laundering provisions of the Bahamian anti-money laundering: maintaining a general review of financial institutions in relation to the conduct of financial transactions and for this purpose conducting annual on-site examinations; and conducting an on-site examination when it deems such to be necessary. The Commission's purposes are to ensure the adherence to "know your customer" requirements, record keeping and internal procedures and policies prescribed by anti-money laws. In this connection, the Commission has authority to do all things necessary for the

[13] For more background *see About Us*, http://www.bahamas.gov.bs/compliancecommission.

performance of its functions; require production of records and the supply of information or explanation; and issues Codes of Practice to provide guidance as to the duties, requirements and standards to be complied with and the procedures (e.g., verification, record-keeping, reporting of suspicious transactions or otherwise) and best practices to be observed.[14]

Another key country for the U.S. will be Canada. On November 20, 2001, British Columbia Supreme Court Justice Marion Allan granted a temporary injunction on the application of certain obligations under the regulations of Bill C-22, Canada's revised Proceeds of Crime (Money Laundering) Act, S.C., c. 17.[15]

The Law Society of British Columbia and the Federation of Law Societies of Canada brought the petition against the Attorney General of Canada, seeking to exempt lawyers from the enforcement of the Proceeds of Crime (Money Laundering Act. The Canadian Bar Association was given leave to intervene in support of the petition. The petitioners challenged the constitutional validity of the legislation and sought a declaration that certain sections of the law, especially sections 5(i) and (j) of the Regulations are inconsistent with the Constitution of Canada. In particular, the petitioners sought and received a temporary exemption from the requirement for lawyers to identify and report "suspicious transactions" under Sec. 5 of the Regulations. This Regulation makes it a crime for every lawyer to fail to obtain and secretly report to a government agency, any information that should cause suspicion in a lawyer's relationship with his or her client. According to the petition, the subjectivity of the requirement threatens the independence of the bar and solicitor-client confidentiality, and creates a conflict between lawyers' duties to their clients and their obligation to report confidential information to the government.

Sec. 5 of the Regulations provides:

> Every legal counsel is subject to Part I of the Act when they engage in any of the following activities on behalf of any person or entity, including the giving instructions on behalf of any person or entity in respect of those activities:
>
> (a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail;
>
> (b) purchasing or selling securities, real property or business assets or entities; and
>
> (c) transferring funds or securities by any means.

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14 For background on the Bahamian anti-money laundering laws, *see* Bruce Zagaris *International Initiatives Result in Strengthened Anti-Money Laundering in the Caribbean*, 18 INT'L ENFORCEMENT L. REP. ___ (Apr. 2002).

15 *The Law Society of British Columbia v. Attorney General of Canada, Supr. Ct. of British Columbia*, 2001 BCSC 1593,

Sec. 7 of the Act requires :

> Every person or entity shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offense.[16]

The Attorney General opposed the petition, arguing the petitioners are not entitled to interlocutory relief for several procedural grounds.

Judge Allan concluded that the provisions of Sec. 5 of the Regulations authorize an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised merited the Court's careful consideration. The petitioners met the tripartite test for a temporary injunction: (1) a serious constitutional issue exists, namely the independence of the bar and the confidentiality of the lawyer-client relationship comprise fundamental principles of justice that cannot be infringed by legislation or by governmental action; (2) the petitioners, as well as lawyers and clients, and the administration of justice may suffer irreparable harm unless lawyers are exempted from reporting suspicious transactions pending a determination of the constitutional issues; and (3) the balance of convenience favors the granting of interlocutory relief, which simply postpones some of the Regulations to the legal profession.[17]

Meanwhile, Harry J. Wruck, Q.C., who represented the Attorney General of Canada, was quoted as stating the law "has nothing to do with solicitor-client privilege and nothing to do with the independence of the bar..." Wrung observed that Sec. 11 of the law "completely exempts and protects solicitor-general privilege" by stating "(n)othing in this Part requires a legal counsel to disclose any communication that is subject to solicitor-client privilege."[18]

The Lawyers Professional Indemnity Co. (LPIC) in Toronto has warned members that the regulations will require firms to appoint compliance officers, keep detailed records of personal and financial data on important client transactions, to report extensive information on "suspicious" clients to FinTRAC. The LPIC has warned lawyers it will not insure lawyers against the heavy fines, except in cases in which former clients make claims alleging damages based on the firm's compliance with the new regulations.[19]

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16 The Centre refers to the Financial Transactions and Reports Analysis Centre of Canada, which was recently created.

17 Judge Allan observed that the legislation would remain application to all other persons and entities mentioned in the law, including banks, credit unions, trust companies, loan companies, securities dealers, investment counsellors, foreign exchange brokers, life insurance brokers, money service businesses, accountants, and real estate brokers.

18 Cohen, *supra.*

19 *Id.* For additional information, see the LPIC's website (www.lpic.ca).

Policy-makers, legal professionals, and persons interested in anti-money laundering and financial regulatory matters will be monitoring the Canadian case for its potential impact on the gatekeepers' initiative in other countries. Although the constitutions vary from country to country, the issues of the independence of the bar, the confidentiality of the lawyer-client relationship, and the administration of justice have similar policy considerations worldwide. In some international enforcement initiatives, such as the UN Vienna Convention Prohibiting the Illegal Trafficking of Narcotic and Psychotropic Substances and the UN Convention against Transnational Organized Crime, the obligations of signatories are minimized by exempting signatories to act, insofar as action may contravene their constitution or fundamental principles.

If the U.S. does not enact similar legislation, then clients and professionals will take advantage of globalization to meet or obtain advice from the professionals who are in the jurisdiction in which such advice can most easily be given and with the least risk of liability or restricted advice. For instance, a sophisticated client whose business situation may give rise to enhanced risk that the professional sitting in London or an EU country, once the revised directive is in place, will not be able to properly advise a client on international business, estate planning, and/or tax and/or investment matters. Such client will likely seek out other professionals, especially in a world where there are no shortage of qualified advisors and where it is easy for the client and/or advisor to have consultation in a given vicinity. The ability of the client and advisor to change the place of consultation may also depend on the need for supplemental and/or implementation of the advice. However, such supplemental work may only affect subsequent work.

The ability of a client and/or advisor to switch places and means to provide advice on international business, estate, tax, and investment depends in part on the applicable legal and ethical considerations and their extraterritorial reach in some cases. In some cases, an advisor who provides advice on a problem with multiple persons and entities impacted and multiple jurisdictions has a series of legal and ethical considerations which are beyond the scope of this short discussion.

VII. DUE DILIGENCE IMPLICATIONS FOR U.S. PROFESSIONALS

Many implications may flow from subjecting attorneys, accountants, auditors, and other independent professionals to anti-money laundering due diligence, such as the requirements to know your customer and identify and report suspicious transactions.

In the other lines of business to which anti-money laundering due diligence applies (e.g., banks, money-service businesses, savings & loans, credit institutions, and broker-dealers), the business must hire a compliance officer and develop mechanisms to prepare a due diligence plan help implement it. This includes the development of training, as well as internal and external audit procedures. It is no excuse that the business is small and cannot afford such mechanisms. A distinction between banks and financial institutions and law firms is that, unlike banks and financial institutions, some law firms are very small.

Clearly the implications raised in this section do not apply yet to lawyers because no state has proactively applied the gatekeepers initiative. For instance, although the United Kingdom has a law requiring professionals to make suspicious transactions reports and occasionally issues reports, citing the low incidence of the reports and warning enforcement actions against lawyers who do not obey the law, such actions have been rare.[20] This section assumes that the U.S., if it adopts its anti-money laundering laws to professionals, will continue to proactively implement and enforce them.[21]

Some issues that are likely to arise include the proper steps a lawyer/law firm should take after it must report a suspicious transaction. Currently anti-money laundering law would preclude them from disclosing the report to their client, since this would be "tipping off"a criminal offense. The more difficult issues include what does a law firm do vis-a-vis an existing client after it files a suspicious activity (transaction) report (SAR). Banks and financial institutions must grapple with this same problem. Sometimes they obtain guidance from regulatory or law enforcement authorities. However, in the bulk of cases they are not able to obtain initially any reliable information. Continuing to do business with a client against whom a law firm has filed a SAR is precarious. Terminating a relationship is sensitive, especially if the report does not result in a prosecution or even a criminal investigation. Terminating a relationship in the middle of an assignment may lead to liability due to breach of contract, malpractice, breach of ethical obligations (e.g., obligation of confidentiality, obligation to zealously represent the client) or commercial losses to the law firm (e.g., due to loss of work and overall loss of clients).

Another issue is whether filing a SAR would lead to criminal liability on the part of the law firm. For instance, the filing of a SAR may trigger investigation into prior conduct between the law firm and the client and lead the regulatory and/or law enforcement authority to believe that the law firm should have known and acted earlier or that the law firm was a co-conspirator, aider, or abetter in some related activity. In addition to the SAR violating the right to client confidentiality, the law firm may violate the client's right to attorney-client privilege and right against self-incrimination. In addition, in the event law enforcement authorities prosecute the law firm, the lawyer would have waived his or her own right against self-incrimination.

In the international context, SAR information has gained increased significance because some countries are exchanging SAR information. The EU has a policy on exchanging SARs.[22]

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20 However, recently the British Fraud Office has charged two senior solicitors and are investigating four others with respect to alleged major money laundering activities. *See* Robert Verkaik, *City Lawyers Face Charges Over Money Laundering Charges*, THE INDEPENDENT (London), Mar. 12, 2001, website.

21 For a discussion of defending money laundering charges against attorneys, among others, see Bruce Zagaris and Ben Hinceman, *Defending Money Laundering Charges*, 1 INTERNATIONAL WEALTH TRANSFER PRACTICE 23-26 (International Bar Assoc., Mar. 12-14, 2001).

22 Bruce Zagaris, *EU Council Initiates Arrangements for Exchange of Information Between FIUs*, 17 INT'L ENFORCEMENT L. REP. 3 (Jan. 2001), discussing *Council Decision of Oct. 17, 2000 Concerning Arrangements for Cooperation Between Financial Intelligence Units of the Member States in Respect of Exchanging Information* (2000.642.JHA), OFF. J. EUR. COMM., Oct. 24, 2000 (L 2714).

The U.S. is trying as a matter of policy to exchange SAR information. One fundamental obstacle is that, whereas the U.S. treats SAR as intelligence information that can be kept indefinitely, the EU policy is that, unless used for prosecution purposes, such intelligence information must be destroyed after a period of years. Just as importantly, the U.S. and many other countries prefer informal cooperation, whereby there are no formal rules. The problem with informal cooperation is that the rights of private individuals and entities, whether they are the targets or just third party stakeholders, are not protected. Recent mutual assistance treaties in criminal matters (MLATs) that grant the government compulsory process rights, as delimited by the respective treaties, expressly state that the treaties do not create a right for a "private person" to obtain evidence. In such MLATs, the U.S. has insisted on a provision that states as follows:

> This Treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not create any right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.[23]

The purpose is to prevent MLATs from being used to suppress or exclude evidence or to impede criminal investigations. Hence, if adversely affected persons want to prevent the execution of requests that they believe were made in violation of the treaty, their only recourse under the treaty is to the executive authority of the requested country, not its courts. Similarly, if they want to contest that the requested country violated the terms of the treaty in executing a request, they can complain only to the executive authorities of the respective countries.[24] Hence, the CCBE has urged that Bars and Law Societies throughout the EU work with national governments to maintain consistency in implementing legislation with respect to the expression "ascertaining the legal position" and its interaction with the knowledge requirement for money laundering.

A major issue that will be impacted by anti-money laundering due diligence and the gatekeepers' initiative is the attorney-client privilege. One of the problems is that the privilege varies considerably among countries and among professionals (attorney-client vs. accountant-client). In a global world a client, whether intending to conduct legitimate or illegitimate activities, will be able to spot and take advantage of the gaps in the law.

To reduce risks and potential liabilities from any actions from potentially disgruntled clients, law firms are likely to follow the lead of banks and financial institutions: they will insert into professional service agreements broad clauses, warning potential clients of their obligations as part of the anti-money laundering due diligence and seeking a waiver in such cases of their ethical obligations, such as privacy, obligation to zealously represent the client, and so forth.

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23 *See* Art. 1(3) of the Treaty between the U.S. and the U.K. Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, signed July 3, 1986, entered into force, March 19, 1990.

24 For additional discussion of the preclusion of private persons from using MLATs, *see* Bruce Zagaris, *U.S. Extends Its Reach for Evidence*, 15 CRIM. JUST. 8, 56 (Winter 2001).

The ability to send SARs to bar associations rather than the regulatory agency does not appear to be a satisfactory answer if you are an attorney or a client. Ultimately, the bar association is faced with the same requirements as the regulatory agency. Decisions must be made on whether to quickly undertake further investigations of a criminal nature or whether to defer action. The decision may result not from the quality of the SAR, but from the prioritization of resources in the context of the number of ongoing leads from other sources. Nevertheless, the above-mentioned concerns about privacy, liability, and so forth are not eliminated by investing the bar as a middleman. Further, reliance on the bar raises many sensitive issues about the capabilities of bar associations to act as a financial intelligence unit and the nature of the relationship between the bar association, attorneys, and clients once the bar association assumes the role of intermediary for the regulatory agencies.

VIII. **FINAL THOUGHTS**

Many of the European attorneys with whom this author has spoken have lamented the inability to follow and participate in the EU's effort to enact the gatekeepers' initiative. They believe the policymakers in some cases have failed to even identify many of the issues, let alone resolve them. The moral of the story is for professionals potentially impacted to become involved at the start and not before it is too late. In this connection, each of four or five times I have mentioned the gatekeepers' initiatives in my talks, two common reactions are horror and shock, on the one hand, and utter disbelief, on the other. Professionals think I am talking about the year 2100 when they will be retired. They believe it can never happen in the U.S. even though the U.S. Treasury has mentioned the gatekeepers initiative in both of its Money Laundering Strategy Control Reports. The G-8 provided a press release of the initiative and news of the EU revised directive has continued to instruct observers of money laundering and compliance policy.[25]

For professionals who want to defer enactment of legislation applying anti-money laundering laws to them, the best prophylactic is better self-regulation. Education will be a start. In addition to educating their own members, professionals should start educating their clients and constituents about the gatekeepers' initiative and alternative choices within the initiative and involving them in the policymaking.

Professionals will also want to consider and discuss their rules of ethics. The discussion should occur within their own societies/associations and with other affected professionals, even though they compete in the context of a Multidisciplinary Practice environment.

Clearly, the gatekeepers' initiative presents some fundamental transformations of law and culture for professionals and their clients. Indeed international anti-money laundering law has already produced some transformations of law and culture for other industries. Hence, lawyers,

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[25] *See, e.g., EU Council and Parliament Agree on Revised Anti-Money Laundering Directive*, 17 INT'L ENFORCEMENT L. REP. 135 (April 2001).

accountants, auditors, real estate brokers, and other independent professionals may be hard pressed to completely exempt themselves from the new frontier of anti-money laundering enforcement.

For tax planning the gatekeepers initiative has another wrinkle. Increasingly, international organizations are calling for broadening the anti-money laundering enforcement regime to include fiscal offenses, including foreign fiscal offenses. The United Kingdom has already enacted such laws, much to the dismay of British tax practitioners.[26] Already, while the U.S. anti-money laundering law does not specifically criminalize foreign fiscal crimes, de facto it has done so. For instance, the Bank of New York conviction of Lucy Edwards and Peter Berlin was for wire fraud, namely helping Russian nationals evade Russian income tax. The U.S. courts have enforced money laundering laws to prosecute persons trying to evade Canadian excise tax on alcohol and cigarettes.[27] Once the anti-money laundering enforcement authorities (the Financial Intelligence Units) add tax crimes, the ability to swap intelligence on anti-money laundering crimes in the way of SARs enable law enforcement to jump the hurdles of tax secrecy that have restricted tax police. The new millennium brings tax and investment advisors into the new frontier of the widening net of the international financial enforcement regime, of which the sub-regimes of tax and anti-money laundering loom large.

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26 *See, e.g.*, John Rhodes, *The Impact of UK Money-Laundering Legislation on Fiscal Crime*, 2000 WORLD TAX CONFERENCE REPORT 33:1 (Canadian Tax Foundation).

27 *See* Bruce Zagaris, *Coordinated Information-Sharing and Money-Laundering Initiatives*, 2000 WORLD TAX CONFERENCE REPORT 32:1, 13 (Canadian Tax Foundation), citing *U.S. v Trapilo* (Dec. 5, 1997), docket no. 97-1011 (2d Cir. 1997) [unreported]; *U.S. Appellate Court Upholds Application of Wire Fraud Laws to Foreign Tax Fraud*, 13 INT'L ENFORCEMENT L REP. 47-48 (Feb. 1998); and *U.S. v. Boots*, 80 F.3d 580 (1st Cir. 1996), *cert. denied,* 117 S. Ct. 263 (1996).