International Regulation of the Legal Profession: An Impending Possibility?

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Revised anti-money laundering recommendations issued by the Financial Action Task Force (FATF) in June of 2003 have significant ethical implications for the legal profession. This article summarizes the FATF Recommendations and identifies possible ramifications for lawyers in the United States.

The FATF is an intergovernmental policy-making organization based in Paris. It is composed of 33 members (31 countries and two international organizations), including the United States, and 21 observers (five regional bodies and 16 international organizations). The FATF was formed in 1989 and focuses on the development and promotion of national and international policies to fight money laundering. Pursuant to this mission, the FATF issues and periodically revises its 40 Recommendations, billed as a complete set of anti-money laundering measures suitable for universal implementation. The Recommendations and a wealth of other information are available at *www.fatf-gafi.org*.

The Recommendations themselves have no domestic legal effect, although FATF member countries usually implement them. Before the latest revision, the United States was in full compliance with 17 Recommendations and in partial compliance with ten others. Although the Recommendations originally targeted financial institutions, in recent years, through what has become known as the "Gatekeeper Initiative," the international fight against money laundering has been expanded to include more direct regulation of lawyers and other professionals. Lawyers, accountants, auditors, and others who are viewed as being in a position, vis-à-vis the clients they serve, to detect potential money laundering transactions are now being enlisted into the global anti-money laundering initiative.

Due Diligence and Record-Keeping

What principal components of the FATF Recommendations would apply to lawyers? Among the provisions is an extension of the same customer due diligence and record-keeping requirements governing financial institutions to "lawyers, notaries, other independent legal professionals, and accountants when they prepare for or carry out transactions for their client" relating to certain specified activities. These activities are:

(1) Buying or selling real estate;
(2) Managing client money, securities, or other assets;
(3) Managing bank, savings, or securities accounts;
(4) Organizing contributions for the creation, operation, or management of companies; and
(5) Creating, operating, or managing legal persons or arrangements, and buying and selling business entities.

The due diligence provisions would require that lawyers verify identities of the parties and beneficial owners and the business purpose of the transaction. Continuing due diligence on the source of the subject funds may also be required. For high-risk transactions, such as those involving politically exposed persons, lawyers would be required to perform enhanced due diligence.

Lawyers would also be required to maintain "all necessary records" regarding the specified transactions, including information obtained through the due diligence, for at least five years after the client relationship ends. Where a "complex, unusual large transaction" lacks an apparent economic or visible lawful purpose, lawyers should investigate the background and purpose of the transaction and memorialize their findings, and make this writing available to authorities upon appropriate authorization and subject to any legal privilege that may apply. (It is not clear how the privilege carve-out is to be implemented in the due diligence written assessment, if that assessment is requested by government authorities.)

The ABA Task Force on Gatekeeper Regulation and the Profession, which includes representatives from the Section of International Law and Practice, expressed concerns to the FATF that imposing on lawyers requirements similar to those on financial institutions would be unreasonably and unnecessarily burdensome, especially for small firms and sole practitioners. In addition, the ABA has urged that any anti-money laundering requirement focus on lawyer activities that involve the actual transferring, holding, or moving of money for the client to avoid infringing on fundamental attributes of the attorney-client relationship.

Last year the ABA House of Delegates adopted Resolution 104, regarding the attorney-client relationship and confidentiality in the context of U.S. anti-money laundering enforcement objectives. This resolution opposes any law or regulation, implemented for anti-money laundering or terrorist financing purposes, that would compel lawyers to disclose client confidential information to law enforcement authorities through a suspicious transaction reporting requirement, or would otherwise compromise the independence of the bar or attorney-client relationship. At the same time, the resolution recognizes the legitimate interests of the government in preventing money laundering and terrorist financing, and acknowledged the importance of continued education of the profession regarding these crimes. Moreover, the resolution commits the bar to review the ethics rules regarding *permissive* disclosure of confidential information to determine if further modifications would be appropriate to address law enforcement concerns.

Suspicious Transaction Reporting (STR)

The more controversial and ethically problematic aspect of the Recommendations is the requirement that lawyers file reports, in certain circumstances, with government enforcement officials or SROs (self-regulatory organizations) concerning their clients. Under the Recommendations, lawyers, notaries, other independent legal professionals, and accountants must report "suspicious transactions" to government authorities or SROs, when the lawyer is engaging in a "financial transaction" on behalf of or for clients in any of the five areas described above in connection with due diligence requirements. However, it does not appear that contemplated financial transactions would trigger the STR requirements. Therefore, if an attorney declines to assist a client with a "financial transaction," the STR requirement may not apply.

Whether a transaction is "suspicious" would be judged on an objective standard, the pertinent assessment being whether a lawyer "suspects or has reasonable grounds to suspect" money laundering. A suspicious transaction is one that appears to involve the proceeds of criminal activity or be related to terrorist financing, or one that has no apparent economic or visible lawful purpose. The Financial Crimes Enforcement Network (FinCEN), an agency of the U.S. Treasury Department, has a definition of "suspicious transaction" in place that corresponds almost exactly with that of the Recommendations. *See* Financial Crimes Enforcement Network, *Money Laundering Prevention: A Money Services Business Guide*, at 15, *available at www.fincen.gov/msb_prevention_guide.pdf*. That guide also identifies a number of red flags that should trigger a reasonable suspicion.

The Recommendations contain an exception to the suspicious transaction reporting obligation if the information giving rise to the "suspicion" is "obtained in circumstances where [lawyers] are subject to professional secrecy or legal professional privilege." It is not clear whether the term "professional secrecy" corresponds to "confidential communications," and there is concern that the exemption may not fully protect the traditional sanctity of the attorney-client relationship and ethical rules requiring attorneys to maintain the confidentiality of client information. Most state ethical rules, as well as the ABA Model Rule 1.6, *permit* lawyers to disclose client confidential information only when the lawyer reasonably believes the client is engaged in specified illegal conduct. Mandatory disclosure of "suspicions" would represent a dramatic departure from existing ethical obligations of lawyers and tend to frustrate lawyer-client communications necessary to provide the legal advice and assistance to law-abiding clients.

An especially worrisome aspect of the Recommendations is the "no tipping off" rule, which would prevent a lawyer from informing a client that a suspicious transaction report has been filed. While an Interpretative Note to the Recommendations makes it clear that this rule does not encompass lawyers' efforts to "dissuade a client from engaging in illegal activity," the rule would seem to include circumstances in which the client is apparently not contemplating illegal activity but is nevertheless engaged in suspicious conduct. In addition, permitting dissuasion while forbidding tipping off creates an ethical line that could be difficult to navigate. Finally, there is no indication in the Recommendations as to how withdrawal from a representation, which may be ethically required, would be accommodated in the context of the "no tipping off" rule. Obviously, it would be inconsistent with well-established ethical rules (which lawyers are bound to observe or else face disciplinary proceedings) to prevent or inhibit lawyers from withdrawing from a representation through an aggressive interpretation of the "no tipping off" rule.

Under the Recommendations, lawyers would be protected from criminal and civil liability where the reporting requirement causes them to breach a contractual, legislative, regulatory, or administrative restriction regarding disclosure. It is unclear whether this "safe haven" extends to violations of ethical rules, so lawyers could be at risk if they withdraw from representing clients for whom they have filed an STR. Moreover, it is unclear whether the Recommendations, if implemented, would protect lawyers from malpractice, breach of contract, or consequential damages if a lawyer terminates a client relationship due to an STR concern.

One final note is that pursuant to the interpretive note to Recommendation 16, jurisdictions may institute a system whereby STRs would be submitted to a bar association or other legal SRO, as long as that organization cooperates with the country's financial intelligence unit ("FIU") overseeing anti-money laundering reporting. The interpretive note requires "appropriate forms of cooperation," but does not clarify what such cooperation would entail. Specifically, it does not indicate whether the self-regulatory organization would have to share the reports with the FIU or could exercise its own judgment as to what level of suspicion must be shared with government authorities. A broad interpretation of this interpretive note could help place SROs in a position to protect the traditional attorney-client relationship while still satisfying FATF requirements.

What Happens Now?

Several countries have already adopted Gatekeeper Initiative regimes that are applicable to lawyers practicing within those jurisdictions. The United Kingdom, Switzerland, the Netherlands, Germany, and other European countries have such regimes, some enacted quite recently. The Canadian government adopted a Gatekeeper Initiative regime for its lawyers, but it was challenged in the Canadian provincial courts. In early 2003, the Canadian government rescinded the Gatekeeper STR requirements as applied to lawyers. The U.S. government has not yet taken formal regulatory action on the Gatekeeper Initiative. However, pursuant to the USA PATRIOT Act, FinCEN has issued an Advance Notice of Proposed Rulemaking, asking for comment on how to apply certain anti-money laundering rules to persons involved in real estate closings and settlements, including lawyers. FinCEN received approximately 52 sets of comments, many expressing concern over the impact on the attorney-client privilege if these rules are applied to lawyers.

It is possible that FinCEN could allow its USA PATRIOT Act rulemaking to be subsumed in a joint effort, broader in scope, between the Treasury Department and the Justice Department to regulate Gatekeepers in accordance with the new 40 Recommendations. However, many questions remain regarding any possible effort to implement the Recommendations vis-à-vis lawyers. Will new legislation be required? Would the states play a role in any regulatory effort? Or will the Gatekeeper Initiative be the domain of the federal government; with whom would STR reports be filed? Are changes needed to existing ethical rules? Will rules be applied across the board to all lawyers and law firms regardless of their practice areas, size of firm, or client base? Will the rules applying to in-house counsel be covered?

The bar will continue to consult with U.S. government officials. The ABA Task Force on Gatekeeper Regulation and the Profession, as well as the Section's own Ad Hoc Task Force on Professional Responsibilities Regarding Money Laundering, have been engaged with U.S. officials examining the FATF Recommendations, and also have been active in educational efforts for ABA members. Clearly, in an effort to combat money laundering and terrorist financing, bedrock principles of the legal profession--the duty of confidentiality, duty of loyalty, and the independence of the bar--must be protected. Dialogue with U.S. officials during OR in the coming months will be critical to how the balance between law enforcement interests and the interests of clients in securing legal advice will be struck.

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