Earlier this month, for the first time in 10 years, an intergovernmental organization called the Financial Action Task Force graded the United States on its efforts to combat money laundering and terrorist financing. The group, which includes government representatives from more than 30 countries, gave the U.S. the lowest possible score in five of the 51 categories it uses to judge countries' efforts.

The five categories had one thing in common. They each singled out the activities of American lawyers.

This isn't surprising. Going back to 2002, when Congress floated new rules to identify money laundering in the wake of the Sept. 11 attacks, the American Bar Association has staunchly opposed any federal legislation that would require lawyers to help identify money laundering or terrorist financing. Banks and other financial institutions must comply with the Bank Secrecy Act, which imposes stringent "know your customer" rules and requires that suspicious transaction be reported to federal authorities.

U.S. lawyers are exempt from these rules, which puts the country at odds with the United Kingdom and the European Union, where lawyers have been required to adhere to anti-money laundering rules for more than a decade.

The task force report concluded that the failure of lawyers to follow accepted anti-money laundering rules is a "significant gap" in the U.S. regulatory framework for identifying money laundering and terrorist financing. Moreover, there's no evidence that U.S. lawyers "have an adequate understanding of [money laundering and terrorist financing] vulnerabilities and the need to implement appropriate controls to mitigate them," the report concluded.
"The U.S. has always been lagging behind in this area," said Kristine Safos, a manager in HBR Consulting's law firm advisory group who has reviewed law firms' anti-money laundering practices. She noted that lawyers in the U.K. and EU haven't been hindered by complying with anti-money laundering rules. "It's become old hat," she said. "There's really no difficulty getting them to comply."

"The report underscored what we've been saying for years," said Mark Hays, a senior policy adviser at Global Witness, a nonprofit that investigates global corruption and human rights abuses. "The two big chinks in the U.S. [anti-money laundering] armor are the lack of real comprehensive disclosure of beneficial ownership [of companies] and the need for greater oversight of financial intermediaries like lawyers and accountants and the role they facilitate in financial activity."

**Taking the Bait?**

Last year Global Witness vividly demonstrated what those chinks can mean in practice. The group worked with "60 Minutes" on a segment that ran last January showing how a group of lawyers reacted when a would-be client asked for help with some suspicious transactions. Global Witness secretly filmed footage of 16 lawyers meeting with an investigator who posed as the representative of a government official from a poor African country. The official wanted to move millions of dollars in potentially illicit funds into the U.S. to buy a townhouse, a jet and a yacht while concealing his identity.

All but one of the lawyers appeared receptive, including James Silkenat, a partner at Sullivan & Worcester who was the ABA's president from 2013 to 2014. Sullivan & Worcester and the ABA maintained that Silkenat did nothing wrong by meeting with this man without following through on the engagement.

Most of the lawyers shown in the "60 Minutes" segment were solo practitioners or from small firms. But the biggest firms can also be linked to money laundering activities, according to a series of civil asset forfeiture suits that the Department of Justice filed in July. The complaints allege that five major U.S. law firms, including Shearman & Sterling and DLA Piper, assisted in transactions in which $1.3 billion in stolen Malaysian government funds were illegally laundered in the U.S. through purchases of luxury real estate and other transactions.

In some cases, the firms agreed to hold hundreds of millions of allegedly stolen money in their IOLTA accounts. The government has not accused the firms of any wrongdoing, and they all deny they did anything wrong. The cases are pending.

Banking authorities and anti-money laundering experts have been concerned for some time that law firm IOLTA accounts may be used for money laundering activities because they can mask the movement of funds from federal authorities. These accounts are held in the name of the law firm, do not trigger federal bank reporting requirements on a client's behalf, and are intended for pooling small amounts of funds related to the legal matters of multiple clients. In the cases filed in July, the government says at least $585 million passed through IOLTA accounts.
Pushing Back

In a statement, ABA President Linda Klein said the group will continue to draw the line against any reporting obligations that encroach on confidentiality or involve federal supervision of lawyers. But the ABA may take some steps to clarify how lawyers should handle potential money laundering situations, she said.

"The ABA continues to support all reasonable efforts by federal and international law enforcement agencies and the states to fight money laundering in ways that preserve the attorney-client privilege, the confidential lawyer-client relationship and traditional state court regulation of the legal profession," said Klein, who is the senior managing shareholder at Baker Donelson Bearman Caldwell & Berkowitz. "The ABA is currently exploring the possibility of developing a new Model Rule of Professional Conduct that, if adopted by a state's highest court, would directly address the obligations of lawyers in that state with respect to these issues."

Earlier this year, the ABA pushed back when the U.S. Congressional Task Force to Investigate Terrorism made another attempt to bring lawyers within the ambit of the Bank Secrecy Act to help identify suspicious transactions. In a May 24 letter, then-ABA President Paulette Brown argued that such a move would undermine the attorney-client privilege and the confidential lawyer-client relationship.

Richard Gordon, the director of the Financial Integrity Institute at Case Western Reserve University School of Law, doesn't believe that subjecting lawyers to anti-money laundering rules will make much of a difference. "The idea that a criminal could not do his or her dirty work without a lawyer, or who couldn't find a lawyer who would fail to implement her or his client due diligence requirements, is simply ludicrous," he said. If lawyers are subject to these rules, he said, "It won't result in catching any bad guys, and will raise costs to honest lawyers."

The ABA maintains that it has taken adequate steps to help lawyers identify suspicious transactions, while still honoring client confidentiality. In 2002 it formed the Task Force on Gatekeeper Regulation and the Profession to study money laundering issues. Eight years later it issued detailed "voluntary good practices guidance" to help lawyers identify potentially suspicious transactions. The ABA encouraged state and local bar associations to "embrace" these practices and to educate lawyers about them.

The ABA provided a list of more than 35 educational programs or talks related to the Gatekeeper Task Force that were held from 2012 to 2014. A similar number has been held since then, it said.

In her statement, Klein said these efforts have been "extremely beneficial in raising awareness and enhancing compliance regarding lawyers' obligations to detect and combat money laundering." She added, "Most lawyers who are familiar with the guidance make every effort to follow it closely. … We believe lawyers are committed to conducting client due diligence based on the circumstances of each case and make an effort to follow the guidance. When these are followed, it does not make the news. It's only when something falls through the cracks that a spotlight gets shone on it."

The FATF report said the ABA's best practices are good, but it's not clear how many lawyers follow them. "I don't think a lot of people are aware of them," consultant Safos said. "Many national firms
have not reviewed and applied these standards to their internal practices." She added: "If law firms are not subject to a regulatory or ethical requirement to comply, then there is no impetus to take action. Something does need to change in the industry, especially given the [December FATF report]."

Hays of Global Witness said he's not expecting the ABA to change its stance soon, and suggested that others in the legal community weigh in. "They are not the only voice in the legal community," he said about the ABA. "Whether the entire legal community feels the way ABA does, I don't know."

It appears that many lawyers, especially those in smaller firms, aren't even aware how clients might use them to launder money. Karen Giffen, a founder of the 12-lawyer Cleveland firm Giffen & Kaminsky, recalled how she became concerned about clients wanting to use her firm's IOLTA account. About five years ago, her firm represented another law firm that had been scammed when a new client said it wanted to deposit a seven-figure sum into its IOLTA account in exchange for a promise to give the firm work. Neither the seven-figure sum nor the work came through. Soon after, one of her firm's clients wanted to put money into the firm's IOLTA account. "I thought we should have some procedures in place," she said.

Now, Giffen must approve any deposit of $50,000 or more into her firm's IOLTA account. The lawyer in charge of the client must complete a form explaining why the money is being put there and how long it's expected to stay.

Giffen said she believes few firms have such safeguards in place. "My sense is no," she said. "Anecdotally, I know smaller firms that don't do this." She added: "People need to understand there's a lot of responsibility with IOLTA accounts. I think the ABA and state and local bar associations could educate people better."

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