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## Cleaning up the Beaches: The Caribbean Response to the FATF's Review to Identify Non-Cooperative Countries of Territories

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# **Cleaning up the Beaches: The Caribbean Response to the FATF's Review to Identify Non-cooperative Countries or Territories**

*Jason Ennis\**

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I. Introduction

On June 22, 2000, a bombshell was dropped on several Caribbean nations. The Financial Action Task Force (hereinafter FATF) in its *Review to Identify Non-cooperative Countries or Territories* (hereinafter Review 2000) identified "serious systemic problems" with the anti-money laundering laws in five Caribbean nations.<sup>1</sup> The FATF recommended that financial institutions in its member nations give "special attention" to transactions involving these five "non-cooperative countries."<sup>2</sup> One year later, the FATF issued a new list of non-cooperative countries (hereinafter Review 2001), with two of the five Caribbean nations no longer labeled as non-cooperative.<sup>3</sup>

The FATF's blacklist, and the responses of the Caribbean nations to their inclusion on the blacklist, illustrate that the international fight against money laundering is likely to result in a split among jurisdictions with the major financial centers of the Caribbean quickly adopting laws that conform with the demands of the international community in an effort to maintain their position within the financial community. The less significant financial centers among the Caribbean nations may move more slowly in response to

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1. Financial Action Task Force on Money Laundering (FATF), *Review to Identify Non-cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* 12, ¶ 64 (June 22, 2000), available at [http://www.fatf-gafi.org/pdf/NCCT2000\\_en.pdf](http://www.fatf-gafi.org/pdf/NCCT2000_en.pdf) [hereinafter FATF, Review 2000].

2. *Id.* at 12, ¶ 65.

3. FATF, *Review to Identify Non-cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* 3, ¶ 1 (June 22, 2001), available at [http://www.fatf-gafi.org/pdf/NCCT2001\\_en.pdf](http://www.fatf-gafi.org/pdf/NCCT2001_en.pdf) [hereinafter FATF, Review 2001].

international demands, as they may view the benefits of compliance as either minimal or even negative.

The first section of this comment will address the criminal need for money laundering, and the processes by which money is laundered. Section II will discuss the attractiveness of the financial centers of the Caribbean for a wide range of financial services including money laundering. The third section addresses the FATF, the major organization involved in the fight against money laundering worldwide. The fourth section will discuss the FATF's reviews of the five Caribbean jurisdictions, and their responses to the FATF's demands, with special emphasis placed on the responses of the Bahamas and the Cayman Islands, both of which won removal from the FATF's list of non-cooperative countries in 2001. I conclude with thoughts as to the problems of compliance with the FATF, and the likely direction the fight against money laundering is to take in the wake of the terrorist attacks on the United States, and the problems that offshore financial centers face.

## II. The Fruits of Crime and the Necessity of Money Laundering

The objective of many criminal acts is to create a profit for the individual criminal or criminal group that committed the illegal act.<sup>4</sup> The larger the profits generated, the greater the need for the criminal to find a way to control the funds without bringing notice to the manner in which they were earned.<sup>5</sup> Without money laundering operations to bestow an appearance of legitimacy upon ill-gotten profits, the profits generated would betray the fact that they were produced by crime.<sup>6</sup> As a result, "[m]oney laundering is the life blood of the drug syndicate and traditional organised crime."<sup>7</sup>

### A. WASHING UP: AN OVERVIEW OF THE PROCESS OF MONEY LAUNDERING

The money laundering process is commonly thought of as occurring in three phases: placement, layering, and integration.<sup>8</sup> In the placement phase, the money laundering process introduces the proceeds of criminal activity, usually large amounts of cash, into the financial system in a manner that seeks to prevent the monies from being identified as the proceeds of crime.<sup>9</sup> Placement can be accomplished by any number of methods;<sup>10</sup> however, the end result of the placement process is often a deposit at a financial institution.<sup>11</sup> Placement is followed by layering, which involves attempts to hide the paper trail

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4. FATF, *Policy Brief: Money Laundering 1* (July 1999), available at <http://www.fatfgafi.org/pdf/PB9906en.pdf> (last visited Aug. 13, 2002) [hereinafter *FATF, Policy Brief*].

5. See GUY STESSENS, *MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL* 8 (2000).

6. See *id.*

7. *Id.* (quoting former American Attorney-General Edwin A. Meese).

8. WILLIAM C. GILMORE, *DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTER-MEASURES* 29 (Council of Europe Publishing 2d ed. 1999).

9. Bruce Zagaris, *A Brave New World: Recent Developments in Anti-Money Laundering and Related Litigation Traps for the Unwary in International Trust Matters*, 32 VAND. J. TRANSNAT'L L. 1023, 1027 (1999).

10. See *FATF, Policy Brief*, *supra* note 4, at 2.

11. STESSENS, *supra* note 5, at 84.

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that can betray the criminal source or ownership of the funds by carrying out various transactions.<sup>12</sup> The final phase of the process integrates the money into the legitimate economy and gives it the appearance of legitimacy,<sup>13</sup> which allows it to be used for legal purposes without attracting the attention of law enforcement authorities.<sup>14</sup>

While the process of money laundering is conceptually broken into three stages, the methods by which money is laundered are varied and numerous.<sup>15</sup> Though numerous, all money laundering techniques share common features to satisfy the launderers' requirements.<sup>16</sup> The money launderers seek to conceal the ownership and source of their funds, maintain control of the funds, and change the form of the funds to enable their use elsewhere.<sup>17</sup>

## B. SEEKING TO STEM THE TIDE OF MONEY LAUNDERING

Considering the money launderers' requirements and the three-step process of laundering, authorities sought to determine the points in the system where the launderer would be most susceptible to detection.<sup>18</sup> As drug trafficking was the impetus behind the first international efforts to combat money laundering, and given that the proceeds drug traffickers seek to launder are usually in the form of large volumes of cash, it was natural that law enforcement authorities would first turn to the placement stage.<sup>19</sup>

Because of the need to convert cash into forms that are less susceptible to detection, the primary focus of anti-money laundering efforts has been on the procedures that deposit-taking institutions use.<sup>20</sup> "[I]t has become common practice to impose significant obligations on banks, building societies and other deposit-taking institutions in the fight against money laundering."<sup>21</sup> This has resulted in requirements for customer identification, record-keeping, and reporting suspicious transactions, to name just a few of the methods used in an attempt to create a paper trail for law enforcement authorities to follow. It has also increased the likelihood that authorities would be able to discover the criminal nature of the proceeds at the placement stage.<sup>22</sup> As a result of encountering

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12. *Id.*

13. *Id.*

14. Julie Fendo, *Attacking the Tools of Corruption: The Foreign Money Laundering Deterrence and Anti-Corruption Act of 1999*, 23 FORDHAM INT'L L.J. 1540, 1544 (2000).

15. GILMORE, *supra* note 8, at 30.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* Money launderers face an additional source of vulnerability before placement. Criminal proceeds held as cash rather than as an account in a financial institution are susceptible to the normal risks of cash, as well as being discoverable by authorities by less advanced means than those contemplated by the FATF. "Customs agents using money-sniffing dogs have begun regularly inspecting passengers and luggage" resulting in seizures of as much as \$1.1 million in cash in a single instance. Tod Robberson, *Investigators Hope Money Trail is Path to Stopping Drug Flow: Unlikely Helpers Aid Effort against Complex Global Transactions*, DALLAS MORNING NEWS, Oct. 21, 2001, at 1A.

20. GILMORE, *supra* note 8, at 31.

21. *Id.*

22. *Id.*

more stringent standards in general, launderers naturally sought out those jurisdictions where a lesser degree of regulation made placement of their illegal proceeds into the financial system easier.<sup>23</sup>

"Money laundering is not simply a problem faced by the banking community and other mainstream financial institutions."<sup>24</sup> Increasingly, money launderers are using non-financial businesses for their purposes.<sup>25</sup> While launderers often acquire and corrupt actual, on-going businesses to this purpose, they are also able to create fictitious businesses to accomplish their goals.<sup>26</sup> Offshore financial centers, which offer high levels of banking and commercial secrecy, relatively low tax rates, a large financial sector, modern telecommunication capabilities, and no currency controls on deposits of foreign currencies, are popular jurisdictions to establish these fictitious businesses for money laundering purposes.<sup>27</sup>

### III. The Particular Attractiveness of Caribbean Financial Centers

Law enforcement authorities and money laundering experts have long identified the countries of the Caribbean basin as areas of particular concern in the fight against money laundering.<sup>28</sup> The Caribbean nations have been popular destinations for drug dollars because of their "proximity to the United States, high levels of corruption, and . . . many financial centers with secrecy laws and lenient taxes."<sup>29</sup>

#### A. THE DEVELOPMENT OF THE OFFSHORE SECTOR IN THE CARIBBEAN

Many of the Caribbean nations began to develop as offshore financial secrecy and tax havens to promote their economic diversification in an attempt to address the problems of an inadequate natural resource base and declining agricultural viability.<sup>30</sup> A number of factors encouraged this drive for diversification: the remoteness and insularity of the Caribbean nations, small populations which lead to higher per person costs for governmental institutions, a reliance on external trade and foreign investment leaving them susceptible to external shocks, susceptibility to natural disasters, and a narrow resource base.<sup>31</sup>

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23. *Id.* at 32.

24. *Id.* at 36.

25. *Id.* at 36-37.

26. *Id.* at 37.

27. *Id.* at 37-38.

28. *Id.* at 185.

29. *Id.*

30. *Id.*

31. See World Bank, International Bank for Reconstruction and Development, *Small States: Meeting Challenges in the Global Economy* 5 (April 2000), available at [http://wbln0018.worldbank.org/html/smallstates.nsf/\(SmallStateslookup1\)/WorkProgramsWorkPrograms?OpenDocument](http://wbln0018.worldbank.org/html/smallstates.nsf/(SmallStateslookup1)/WorkProgramsWorkPrograms?OpenDocument) (last visited Aug. 13, 2002).

Establishing themselves as offshore financial centers allows the Caribbean nations to "attract funds, provide jobs and facilitate economic development."<sup>32</sup> The diversification into financial services has had remarkable results. The Cayman Islands in 1964 had two banks and no offshore businesses; today the Cayman Islands are the world's fifth most significant financial center.<sup>33</sup> The Bahamas, Aruba, and the Netherlands Antilles are also major financial centers.<sup>34</sup>

#### B. THE LEGITIMATE USES OF OFFSHORE FINANCIAL CENTERS

While the offshore financial centers have attracted a great deal of attention for their role in money laundering, they offer many important, legitimate uses as well. Indeed, in 1997 offshore centers made up one half of the world's twelve largest banking centers.<sup>35</sup>

An important element of many offshore centers is their secrecy laws. Banking secrecy has a long history and is an important consideration for both corporate and individual customers.<sup>36</sup> "Withholding financial information from competitors, suppliers, creditors and customers, is a right that business people assume from the outset. . . , confidentiality and the judicious use of information is generally assumed in business as a critical component of rules of the game in market-oriented economies."<sup>37</sup> This use of offshore financial and bank secrecy jurisdictions is part of a legitimate effort on the part of companies to maintain their privacy and a competitive edge in an increasingly competitive business environment "in which competitive intelligence has become almost mandatory."<sup>38</sup>

Private citizens also benefit from the personal banking confidentiality protected as a key right for citizens in liberal democracies through a wide range of civil and criminal laws.<sup>39</sup> Offshore centers can also offer trusts that provide the opportunity to avoid forced

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32. Jack A. Blum et al., *Financial Havens, Banking Secrecy and Money Laundering*, CRIME PREVENTION & CRIMINAL JUSTICE NEWSLETTER (United Nations Office for Drug Control and Crime Prevention)g (New York, NY, 1998), available at <http://www.imolin.org/finhaeng.htm> (last visited Mar. 10, 2002).

33. GILMORE, *supra* note 8, at 185.

34. *Id.* Indeed, the success of the offshore sector in the Caribbean has inspired a number of imitators. Not all offshore banks are literally "offshore." Legislators and executives in Colorado and Montana are in the process of establishing offshore banks that would be subject to less regulation than local banks, and to an annual fee on deposits that would go to the state treasuries. Banking secrecy that troubles U.S. officials abroad is a key feature of these efforts. Montana has instituted penalties of a \$10,000 fine and 10 years of imprisonment for knowingly disclosing financial information about a depositor in an "offshore" bank in the state. While not yet a race to the bottom in regulatory standards, the competitive pressures that affect Caribbean offshore centers are already evident in Colorado and Montana as they compete with one another by lowering the fees they charge on deposits. Paul Beckett & Russell Gold, *Switzerland in Rockies: Offshore Banking Arrives in U.S. with Some of its Baggage*, WALL ST. J., June 6, 2001, at C1, available at 2001 WL-WSJ 2865676.

35. ANTHONY GINSBERG, *INTERNATIONAL TAX HAVENS* 4 (2nd ed. 1997).

36. Blum et al., *supra* note 32.

37. *Id.* (quoting WALTER INGO SECRET MONEY 2 (Lexington, Massachusetts, D.C. Heath, 1985)).

38. *Id.*

39. *Id.*

heirship laws, more common in civil law jurisdictions that would dictate the distribution of assets from a parent's estate "regardless of the parents' wishes or better judgment."<sup>40</sup>

Offshore centers usually offer low or nonexistent tax rates that attract investors and company owners seeking to reduce their tax burdens, as well as ordinary citizens.<sup>41</sup> These centers attract deposits both from citizens who seek to avoid taxes through legitimate uses of loopholes, and those who evade taxes by concealing their wealth.<sup>42</sup>

Offshore centers offer important benefits to onshore financial centers as well. Onshore banks seek to establish operations in offshore centers to avoid Federal Reserve requirements that obligate banks to place a percentage of their deposits in reserve accounts nightly that earn no interest.<sup>43</sup> Through the creation of an overseas branch in an offshore center, onshore banks can create profit centers not available within their home jurisdiction.<sup>44</sup> Offshore centers can attract hedge funds by offering more flexible regulations that may allow more leverage or investment in one type of asset than would be allowed under American regulations.<sup>45</sup> Many Caribbean centers also provide for the creation of International Business Companies (IBCs), relatively informal organizations that have numerous legitimate uses, including the holding of patents, utilization of tax treaties, and foreign trade.<sup>46</sup> Despite the numerous legitimate uses of offshore financial centers, it is their susceptibility to use for money laundering that necessitates the attention paid to them by anti-money laundering authorities.

#### IV. The Financial Action Task Force

The single most important international body in the fight against money laundering is the Financial Action Task Force (FATF).<sup>47</sup> The G-7 Summit in Paris in 1989 established the FATF in response to growing concerns over the problem of money laundering.<sup>48</sup> The FATF is an intergovernmental body composed of 29 countries and two international organizations.<sup>49</sup> While housed within the Organization for Economic Cooperation and

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40. See GINSBERG, *supra* note 35, at 228.

41. Blum et al., *supra* note 32.

42. *Id.*

43. *Id.*

44. *Id.*

45. GINSBERG, *supra* note 35, at 78-79.

46. Blum et al., *supra* note 32.

47. GILMORE, *supra* note 8, at 79.

48. FATF, *Policy Brief*, *supra* note 4, at 1.

49. The twenty-nine member countries of the FATF are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, China, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The two member international organizations are the European Commission and the Gulf Cooperation Council. FATF, *The Forty Recommendations* 1, available at [http://www.fatf-gafi.org/pdf/40Rec\\_en.pdf](http://www.fatf-gafi.org/pdf/40Rec_en.pdf) (last visited Mar. 11, 2002) [hereinafter FATF, *Recommendations*].



Development, the FATF is not formally a part of any other international organization.<sup>50</sup> In fact, the FATF is neither a permanent international organization, nor a body charged with managing a legally binding convention; the FATF is an ad-hoc group with a singular agenda.<sup>51</sup> The sole purpose of the FATF is "the development and promotion of policies to combat money laundering."<sup>52</sup>

The FATF is a multi-disciplinary body "bringing together the policy-making power of legal, financial and law enforcement experts."<sup>53</sup> The three duties of the FATF in its campaign against money laundering are: to monitor its member nations' progress in putting into operation anti-money laundering measures; to follow "advancements" in money laundering techniques and suggest measures to combat them; and to promote "the adoption and implementation of FATF anti-money laundering standards globally."<sup>54</sup>

The FATF was certainly successful in its goal of seeking to develop a set of standards for combating money laundering. First drafted in 1990, and revised in 1996, the FATF developed "The Forty Recommendations" that set out a basic blueprint for anti-money laundering efforts.<sup>55</sup> The Recommendations serve as principles to be implemented with flexibility by countries according to the circumstances of their financial and legal systems.<sup>56</sup> The Forty Recommendations cover law enforcement and the criminal justice system, the financial system and its regulation, and standards for international cooperation.<sup>57</sup>

#### A. THE PROBLEM OF NON-COOPERATIVE NATIONS

In its fight against money laundering, it was apparent to the FATF that as its members strengthened their systems to combat money laundering in response to the Forty Recommendations, criminals would move their money laundering operations to other jurisdictions with less stringent regulations.<sup>58</sup> Indeed, the FATF felt that each success in bringing one nation into compliance with its standards would result in a "race to the bottom" between other jurisdictions, exacerbating competition between financial centers,

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50. GILMORE, *supra* note 8, at 82.

51. *Id.* While the unique make-up of the FATF raises questions about its de jure rights to prescribe international standards applicable to non-member countries and to impose sanctions for the breach of those standards, the de facto power of the FATF is real as evidenced by the efforts made by the Bahamas and the Cayman Islands as discussed in this comment to comply with the FATF's standards. For an interesting discussion of the questions of sovereignty in relation to the FATF and similar multilateral initiatives see Benjamin R. Hartman, *Coercing Cooperation from Offshore Financial Centers: Identity and Coincidence of International Obligations against Money Laundering and Harmful Tax Competition*, 24 B.C. INT'L & COMP. L. REV. 253 (2001).

52. See FATE, *Recommendations*, *supra* note 49, at 1.

53. *Id.*

54. FATE, *Policy Brief*, *supra* note 4, at 4.

55. See FATE, *Recommendations*, *supra* note 49, at 1.

56. See *id.*

57. *Id.*

58. FATE, *Review 2001*, *supra* note 3, at 5, ¶ 6.

and contributing to a worsening of existing practices.<sup>59</sup> As a result, the FATF has engaged in significant efforts "to identify key anti-money laundering weaknesses in jurisdictions both inside and outside its membership."<sup>60</sup> "The goal of the FATF's work in this area is to secure the adoption by all financial centres of international standards to prevent, detect and punish money laundering."<sup>61</sup>

## B. TWENTY-FIVE CRITERIA DEFINING A NON-COOPERATIVE NATION

As part of the FATF's goal to have all financial centers adopt its standards against money laundering, the FATF published a report on February 14, 2000 on the issue of non-cooperative countries and territories in the fight against money laundering.<sup>62</sup> This report set out twenty-five detrimental rules and practices that obstruct international cooperation against money laundering.<sup>63</sup> While separate from the Forty Recommendations, the twenty-five criteria are consistent with the Forty Recommendations.<sup>64</sup> These twenty-five detrimental rules and practices served as the guide for defining non-cooperative countries and territories in the FATF's annual reviews in 2000 and 2001.<sup>65</sup>

The twenty-five criteria are broken into four broad categories: loopholes in financial regulations, obstacles raised by other regulatory requirements, obstacles to international cooperation, and inadequate resources for preventing and detecting money laundering activities.<sup>66</sup>

### 1. Loopholes in Financial Regulations

The largest of the four basic categories (encompassing eleven of the twenty-five criteria)<sup>67</sup> addresses the loopholes in financial regulations. The identified loopholes in financial regulations include inadequate regulations and supervision of financial institutions, inadequate rules for licensing and creation of financial institutions including background checks on financial managers, inadequate know-your-customer requirements, excessive secrecy provisions, and the lack of efficient systems for reporting suspicious transactions.<sup>68</sup> Know-your-customer requirements for financial institutions are of obvious importance in the fight against money laundering when one considers the basic desire of criminal launderers to keep both their criminal identity and criminal nature of their funds hidden.<sup>69</sup>

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59. See FATE, *Report on Non-cooperative Countries and Territories* 1, ¶ 2 (Feb. 14, 2000), available at [http://www.fatf-gafi.org/pdf/NCCT\\_en.pdf](http://www.fatf-gafi.org/pdf/NCCT_en.pdf) (last visited Aug. 13, 2002) [hereinafter FATE, *Report on Non-cooperative Countries*].

60. FATE, *Review 2001*, *supra* note 3, at 5, ¶ 7.

61. *Id.* at 5, ¶ 9.

62. See FATE, *Report on Non-cooperative Countries*, *supra* note 59, at 1, ¶¶ 3-4.

63. *Id.* at 1, ¶ 7.

64. *Id.* at 1, ¶ 4.

65. See FATE, *Review 2000*, *supra* note 1, at 2, ¶ 9; See FATE, *Review 2001*, *supra* note 3, at 7, ¶ 18.

66. FATE, *Report on Non-cooperative Countries*, *supra* note 59, at 2, ¶ 8.

67. *Id.* at 2-4, ¶¶ 9-18.

68. *Id.*

69. See GILMORE, *supra* note 8, at 30.

## 2. Regulatory Obstacles

The second broad category concerns obstacles raised by other regulatory requirements, including: inadequate commercial law requirements for registering business and legal entities and lack of identification of beneficial owners.<sup>70</sup> These criteria again address the concerns about financial institutions not knowing their customers and the lack of know-your-customer requirements in non-cooperative countries.

## 3. Obstacles to International Cooperation

The category regarding obstacles to international co-operation addresses the inherent multilateral nature of the fight against money laundering. The criteria included here address both administrative and judicial obstacles to cooperation.<sup>71</sup> The administrative obstacles identified as criteria to define a country as non-cooperative include prohibitions or restrictions on the exchange of information between anti-money laundering authorities, and even an obvious unwillingness to cooperate.<sup>72</sup> Judicial obstacles include a failure to criminalize laundering the proceeds of serious crimes and the existence of laws that prohibit or unduly restrict the exchange of information between judicial authorities.<sup>73</sup>

## 4. Inadequate Resources Devoted to Fighting Money Laundering

The final category makes inadequate resources for preventing and detecting money laundering one of the criteria for defining a country as non-cooperative.<sup>74</sup> Poorly trained or corrupt staff among those responsible for anti-money laundering compliance is a criterion for non-cooperation. The twenty-fifth criterion is the lack of a centralized financial intelligence unit to collect, analyze, and disseminate relevant information concerning suspicious transactions to the proper authorities.<sup>75</sup>

### C. AFTER SEPTEMBER 11: A NEW ENVIRONMENT FOR INTERNATIONAL FINANCE

Like so much of the rest of the world, offshore financial centers changed on September 11, 2001. While there has been no formal change to the twenty-five detrimental rules and practices, the FATF has adopted new standards to incorporate the crackdown on terrorist financing.<sup>76</sup> The FATF has added eight new recommendations

70. FATF, *Report on Non-cooperative Countries*, *supra* note 59, at 4, ¶¶ 19–22.

71. *Id.* at 4–5, ¶¶ 23–31.

72. *Id.* at 4–5, ¶¶ 24–26.

73. *Id.* at 5, ¶¶ 28–29.

74. *Id.* at 5–6, ¶¶ 32–34.

75. *Id.* at 6, ¶ 34.

76. FATF, *FATF Cracks Down on Terrorist Financing* 3, Oct. 31, 2001, available at [http://www.fatf-gafi.org/pdf/PR-20011031\\_en.pdf](http://www.fatf-gafi.org/pdf/PR-20011031_en.pdf) (last visited Aug. 24, 2002) [hereinafter FATF, *Crack Down*]. Cracking down on money laundering in relation to terrorist activities is made more difficult by the differing needs of terrorist financing and drug-related money laundering. The amounts involved in financing the attacks of September 11, 2001 pale in comparison to the amount of money involved in drug trafficking; and the terrorists were able to succeed, in part, because authorities were focused on drug-related targets. Antonio Fins, *Terrorists' Cash Flows in Secret World*, S.FLA. SUN-SENTINEL, Sept. 30, 2001, at 1H, available at 2001 WL 22758419.

with regard to terrorist financing to The Forty Recommendations. The new recommendations are: 1) that immediate steps be taken to ratify and implement the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism; 2) each country should criminalize financing terrorism, terrorist acts, and terrorist organizations and ensure that those offenses constitute money laundering predicate offenses; 3) each country should adopt and implement measures to freeze and seize the assets of terrorists; 4) require reporting of funds that are suspected to be linked to terrorism; 5) each country should afford others the greatest cooperation in connection with inquiries relating to terrorism and its financing; 6) application of all FATF recommendations to informal money transfer systems; 7) enhanced scrutiny of the originators of wire transfers; and 8) countries should review the adequacy of regulations that relate to non-profit entities that may be abused for terrorist activities.<sup>77</sup>

Britain has said that "the FATF should 'name and shame' countries that do not implement measures to deprive terrorists of financing."<sup>78</sup> As part of the plan adopted by the FATF at the meeting on the financing of terrorism in October 2001, the FATF plans to initiate a process "to identify jurisdictions that lack appropriate measures to combat terrorist financing," much like the current review to identify non-cooperative countries.<sup>79</sup> A failure to adopt the new recommendations regarding terrorist financing is likely to assure a nation of being labeled non-cooperative. The urgency of the crackdown means that the repercussions of being labeled non-cooperative will increase, as the United States is likely to view any derogation from these standards as grounds for economic sanctions with the potential of inflicting serious harm on the financial sector of non-cooperative nations.

#### D. WHY WHEN THE FATF SPEAKS SOME NATIONS HAVE TO LISTEN

The FATF's list of non-cooperating countries is a "name and shame" list with a bite. The FATF's report that set out the twenty-five criteria for defining non-cooperative countries also set out certain actions designed "to put an end to the detrimental rules and practices"<sup>80</sup> of non-cooperative countries that FATF member countries should consider taking when dealing with non-cooperative countries "to protect their economies and financial systems against criminal money."<sup>81</sup>

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77. FATF, *Crack Down*, *supra* note 76, at 3-4. The call for the application of all FATF recommendations to informal money transfer systems is prompted by the use of "hawala" networks common in the Middle East which are an informal system used to transfer money based on an honor-code. Because "hawala operates under the radar of financial regulators" the efforts necessary to combat money laundering through these systems will be different than those previously advocated by the FATF. See Fins, *supra* note 76, at 1H.

78. Andrew Parker, *Attack on Afghanistan Diplomacy & Terrorist Finances*, FIN. TIMES, Oct. 29, 2001, available at 2001 WL 29306008.

79. FATF, *Crack Down*, *supra* note 76, at 2.

80. FATF, *Report on Non-cooperative Countries*, *supra* note 59, at 7.

81. *Id.* at 8.

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### 1. *Putting an End to Detrimental Practices*

The first step the FATF report discusses to put an end to detrimental rules and practices is a dialogue with the non-cooperative country that "should prompt them to amend their laws and change their practices."<sup>82</sup> The report then suggests that multilateral organizations could take specific actions to seek appropriate action on the part of the non-cooperative country.<sup>83</sup> The report also suggests that the World Bank and the International Monetary Fund in particular could view a failure to follow the recommendation of the FATF as a reason not to undertake activities within the jurisdiction.<sup>84</sup>

The report suggests the final action be the application of Recommendation 21 to countries unwilling to take constructive action.<sup>85</sup> Recommendation 21 of the FATF's "Forty Recommendations" provides that "[f]inancial institutions should give special attention to business relations and transactions" from countries which do not sufficiently apply the Forty Recommendations.<sup>86</sup> "Whenever these transactions have no apparent economic or visible lawful purpose" the background of the transactions should be investigated as best as possible and any finding should be kept in writing "to help supervisors, auditors and law enforcement agencies."<sup>87</sup> While "special attention" is not defined further, adding time and expense to every transaction emanating from a given country is an obvious incentive not to do business in that country.

### 2. *Protecting Economies from Money Laundering in Non-cooperative Nations*

Apart from actions designed to put an end to detrimental practices, the report also listed counter-measures that FATF members might take to protect their economies from money laundering in non-cooperative nations.<sup>88</sup> The report provides that individual FATF members are free to implement the counter-measures on an independent basis, but suggests that they "should be applied according to the gravity of the identified deficiencies" within the non-cooperative nation.<sup>89</sup> The first and second categories of counter-measures provide for strict know-your-customer requirements when financial institutions within FATF members do business for or with individuals or entities within non-cooperative jurisdictions, and for mandatory reporting of all transactions with non-cooperative jurisdictions.<sup>90</sup> The final suggested counter-measure provides that FATF members should consider "whether it is desirable and feasible to condition, restrict, target or even *prohibit* financial transactions" with non-cooperative countries.<sup>91</sup>

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82. *Id.* at 7, ¶ 46.

83. *Id.* at 7, ¶ 47.

84. *See id.* at 7, ¶ 47.

85. *Id.* at 8, ¶ 48.

86. FATF, *Recommendations*, *supra* note 49, at 5, ¶ 21.

87. *Id.*

88. FATF, *Report on Non-cooperative Countries*, *supra* note 59, at 8.

89. *Id.* at 8, ¶ 50.

90. *Id.* at 8, ¶¶ 51-53.

91. *Id.* at 8, ¶ 54 (emphasis added).

### 3. *The Costs of Non-cooperation*

Even absent the application of any specific counter-measures, being labeled as a non-cooperative nation can carry real costs. The *ECONOMIST* notes that in 1999, "Antigua suffered a financial drought after America and Britain issued an 'advisory' to their financial institutions, recommending 'enhanced scrutiny' for transactions there."<sup>92</sup> When Liechtenstein was put on the list of non-cooperative countries in 2000, Standard and Poor's changed the outlook for Liechtenstein's (admittedly not Caribbean) biggest bank from stable to negative, citing worries about the effect anti-money laundering counter-measures might have on the bank's business.<sup>93</sup> Before the release of the FATF's Review 2001, Standard and Poor's raised its outlook for the bank in anticipation that the principality would not be on the 2001 list.<sup>94</sup> Smaller nations with relatively large financial sectors, such as Liechtenstein and many Caribbean nations, are naturally both more dependent on their financial industry and less able to bear any costs of non-cooperation. Therefore, they must view the FATF's reviews with some trepidation.

#### E. THE CARIBBEAN FINANCIAL ACTION TASK FORCE

The FATF is not the only multilateral institution involved in combating money laundering in the Caribbean. Leaders from the countries of the Caribbean and Central America met in Aruba in June 1990 and established the Caribbean Financial Action Task Force (CFATF).<sup>95</sup> The members of the CFATF are determined to "defeat the evils of drug trafficking and money laundering."<sup>96</sup> As part of their efforts against money laundering, the CFATF "agreed to endorse and implement both the 40 FATF recommendations and 19 Aruba recommendations."<sup>97</sup> The nineteen Aruba recommendations created by the CFATF are intended to address specific money laundering issues that occur in the Caribbean.<sup>98</sup>

The CFATF is headed by a Council of Ministers (the Council)<sup>99</sup> that is the supreme authority within the CFATF.<sup>100</sup> The Memorandum of Understanding that governs the

92. *All Havens in a Storm*, *ECONOMIST*, July 1, 2001, available at 2000 WL 8142669.

93. *Fighting the Dirt*, *ECONOMIST*, June 23, 2001, available at 2001 WL 7319487.

94. *Id.*

95. GILMORE, *supra* note 8, at 186. The members of the CFATF include: Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Costa Rica, Dominican Republic, Dominica, Grenada, Jamaica, Montserrat, Netherland Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Turks and Caicos Islands, and Venezuela. Though the names would seem to indicate a relation, the CFATF is not a member of the FATF. See FATF, *Recommendations*, *supra* note 49, at 1.

96. CFATF, *Kingston Declaration on Money Laundering* 8, ¶ 20 (Nov. 5-6, 1992), available at <http://www.cfatf.org/eng/>.

97. *Id.* at 2, ¶ 5.

98. GILMORE, *supra* note 8, at 186.

99. CFATF, *Memorandum of Understanding Among Member Governments of the Caribbean Financial Action Task Force*, art. VI(i) (Oct. 10, 1996), available at <http://www.cfatf.org/eng/>.

100. *Id.* art. VII(1).

CFATF may be amended by a unanimous vote of the Council.<sup>101</sup> The Council's functions include the adoption of mutual evaluation reports on members,<sup>102</sup> adoption of revised Recommendations,<sup>103</sup> and the power to take appropriate actions with respect to members that fail to comply with the CFATF's standards.<sup>104</sup>

The members of the CFATF engage in both self-assessment exercises and mutual evaluations to monitor and encourage their progress in implementing policies against money laundering.<sup>105</sup> The mutual evaluation program is "a crucial aspect of the work of the CFATF" because it is one of the primary methods by which the CFATF ensures that its members comply with its standards.<sup>106</sup> The mutual evaluations are not a judgment by one nation, but "a constructive consultative dialogue between professionals, be they bank supervisors/regulators [or] legal officers."<sup>107</sup> The aim of the evaluation process is to assist a nation in improving its anti-money laundering law rather than just to castigate it for its failures.<sup>108</sup> Comparing the mutual evaluation by professionals from peer countries with a unilateral evaluation process draws out several distinct points of difference. The mutual evaluation procedure is a multilateral, private evaluation process that relies on cooperation among countries to promote progress, compared to the public "name and shame" nature of the FATF's list of non-cooperative nations that relies on punitive measures to coerce compliance.<sup>109</sup> Nevertheless, it is the FATF, not the CFATF, to which the industrialized nations belong. Thus, it is the FATF's methods that are given more effect.

## V. The Five Non-cooperative Caribbean Nations

The FATF's Review 2000 labeled five Caribbean jurisdictions as non-cooperative: Bahamas, Cayman Islands, Dominica, St. Kitts and Nevis, and St. Vincent and the Grenadines.<sup>110</sup> Of these countries only the Bahamas and the Cayman Islands made sufficient progress in addressing the deficiencies identified by the FATF in the following year to warrant removal from the list of non-cooperative countries in the FATF's Review 2001.<sup>111</sup> The steps taken by the Bahamas and the Cayman Islands to comply with the FATF's requirements are the main subjects of this section; the less successful efforts of the other three nations are discussed afterwards.

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101. *Id.* art. XIX.

102. *Id.* art. VII(4)(vii).

103. *Id.* art. VII(4)(viii).

104. *Id.* art. VII(4)(x).

105. *See id.* arts. XIV, XV; *see also* GILMORE, *supra* note 8, at 187.

106. Calvin Wilson, *The Mutual Evaluation Process of the Caribbean Financial Action Task Force*, 15 AM. U. INT'L L. REV. 759, 805 (2000).

107. *Id.*

108. *Id.*

109. *See* Victoria H. Figge, *Best Practices in Multilateral Implementation*, 15 AM. U. INT'L L. REV. 759, 808 (2000).

110. FATF, *Review 2000*, *supra* note 1, at 12 ¶ 64.

111. FATF, *Review 2001*, *supra* note 3, at 3 ¶ 1.

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### A. THE BAHAMAS

The Bahamas's status as an offshore center has had significant beneficial effects for the island's economy. Prime Minister Hubert Ingraham has stated that:

Our success in services over the past thirty or more years has permitted us to enjoy the third highest per capita income among independent states in the Western hemisphere, following only the United States and Canada. Today, we can boast of higher levels of employment, increased home ownership, rising personal and household income, the lowest business loan interest rates in thirty years and of increased entrepreneurial opportunities and small business growth. Together, these permit and support our infrastructural and social agenda.<sup>112</sup>

In spite of, or perhaps because of, their dependence on the financial sector, the Bahamas has been at the forefront of the battle against money laundering. When the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances first established money laundering as a criminal offense in 1988,<sup>113</sup> the Bahamas was the first country to ratify the convention.<sup>114</sup> Furthermore, before the FATF's Review 2000, the Bahamas already had its own anti-money laundering law in The Money Laundering (Proceeds of Crime) Act, 1995.

Nevertheless, though the FATF acknowledged that the Bahamas had "comprehensive anti-money laundering legislation," they still identified deficiencies within the Bahamas's system that merited the inclusion of the Bahamas on the list of non-cooperative countries in the Review 2000.<sup>115</sup> In the FATF's Review 2000, the Bahamas was deemed to be in compliance fully with ten of the twenty-five criteria set by the FATF, and partly in compliance with a further four of the criteria.<sup>116</sup> The FATF found fault with a lack of information about the beneficial ownership of trusts and IBCs, particularly the ability to issue bearer shares.<sup>117</sup> The Bahamas also allowed certain intermediaries (for example, attorneys) to invoke their professional codes to avoid revealing the identity of their clients.<sup>118</sup> The FATF further expressed frustration with the degree and nature of international cooperation with anti-money laundering authorities in the Bahamas. Long delays, restricted responses to requests for assistance, and no allowances for cooperation outside of judicial channels were hallmarks of the process of international cooperation in the Bahamas.<sup>119</sup>

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112. Jeremy Hetherington-Gore, *The Bahamas—Virtue Rewarded*, at <http://www.lowtax.net/html/jcaspec.html> (last visited Mar. 10, 2002).

113. Blum et al., *supra* note 32.

114. Peter D. Maynard, *The Law Against Corruption and Money Laundering in the Caribbean with Special Reference to the Bahamas*, 29 U. MIAMI INTER-AM L. REV. 627, 634 (1998).

115. FATF, *Review 2000*, *supra* note 1, at 2–3 ¶ 12. The FATF has not yet completed an assessment of its members against the 25 criteria used to define non-cooperative countries. FATF, *Annual Report 2001-2002*, at 20, ¶ 96 (June 22, 2002), available at [http://www.fatf-gafi.org/pdf/AR2002\\_en.pdf](http://www.fatf-gafi.org/pdf/AR2002_en.pdf) (last visited Aug. 13, 2002). For the sake of comparison, the United States is in full compliance with 17 of the FATF's Forty Recommendation, and is in partial compliance with a further 10 of the Forty Recommendations. *Id.* Annex C.

116. *Id.* at 3, ¶ 12.

117. *Id.* at 3, ¶ 12.

118. *Id.* at 3, ¶ 12.

119. *Id.*



Just twelve months later, in the FATF's Review 2001, the FATF removed the Bahamas from its list of non-cooperative countries.<sup>120</sup> The FATF observed that the Bahamas made progress in implementing its counter-money laundering regime by adopting laws that addressed "banking supervision, customer identification, information about ownership of IBCs and channels for providing international cooperation at the judicial level as well as the administrative level through the new FIU (financial intelligence unit)."<sup>121</sup> In the twelve-month span from June 22, 2000 to June 22, 2001, the Bahamas had enacted new laws that amounted to "a complete overhaul of most of the Bahamas' main financial services legislation."<sup>122</sup>

### 1. *Proceeds of Crime Act, 2000*

The Proceeds of Crime Act, 2000 expanded the definition of the offense of money laundering in the Bahamas compared to the Money Laundering (Proceeds of Crime) Act, 1995. The 1995 Act made money laundering an offense only if a person knew that the proceeds were criminal in nature.<sup>123</sup> The new act makes money laundering an offense for any person who knows, suspects, or has reasonable grounds to suspect the criminal nature of the proceeds.<sup>124</sup> A person is guilty of money laundering if they act with the intent to conceal or disguise the "nature, source, location, disposition, movement or ownership" of the proceeds of criminal conduct.<sup>125</sup>

Furthermore, the act creates a positive duty to disclose information gained during the course of employment that leads a person to know, suspect, or have reason to suspect that another person is engaged in money laundering.<sup>126</sup> Failure to disclose the required information can result in imprisonment for three to ten years, or fines from \$50,000 to an unlimited amount, or both fines and imprisonment.<sup>127</sup> The act maintains legal professional privileges,<sup>128</sup> but also shields any breach of these privileges in connection with disclosure of money laundering from criminal or civil liability.<sup>129</sup> However, information is not treated as privileged, and an attorney therefore has a duty to disclose any money laundering activities if the client gives the information to his attorney with a view to furthering criminal purposes, or if the information relates to criminal conduct.<sup>130</sup> Furthermore, the know-your-customer requirements are strengthened because at no time does the legal privilege "extend to information regarding the identity and address of the client or principal."<sup>131</sup> This would seem to create a broad duty of disclosure even within the attorney-client context because the duty of disclosure is created when the person giving the information to an attorney possesses a criminal motive and is not dependent upon either the attorney's knowledge or purpose for eliciting the information.

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120. FATF, *Review 2001*, *supra* note 3, at 3, ¶ 1.

121. *Id.* at 7-8, ¶ 20.

122. Hetherington-Gore, *supra* note 112.

123. See MONEY LAUNDERING (PROCEEDS OF CRIME) Act, 1995, §9(1).

124. See Proceeds of Crime Act, No. 44 of 2000 (2000), §40(2) (Bah.).

125. *Id.* §40(1)-(3).

126. *Id.* §43(2)(a)-(b).

127. *Id.* §45(2).

128. *Id.* §43(3).

129. *Id.* §43(1).

130. *Id.* §43(6).

131. *Id.* §7.

## 2. *International Business Companies Act, 2000*

Introduced on December 29, 2000, the International Business Companies Act (IBC Act) constituted "an essential step in strengthening the Know-Your-Customer regime in The Bahamas, and towards full compliance with FATF recommendations."<sup>132</sup> Recommendations 10 through 13 of the FATF's Forty Recommendations<sup>133</sup> and criteria 4, 5, 6, 7, 13, and 14 of the Criteria defining non-cooperative countries<sup>134</sup> all identified the customer identification problems raised by the existence of bearer shares and anonymous accounts as detrimental to the fight against money laundering.<sup>135</sup> The IBC Act prohibits the issuance of bearer shares,<sup>136</sup> requires that all bearer shares in issue be cancelled, and that registered shares be issued as replacements.<sup>137</sup> This Act directly addressed the concerns raised by the FATF in its 2000 Review regarding the ability of IBCs to issue bearer shares.<sup>138</sup> As a result, the FATF praised the Bahamas and cited the elimination of bearer shares when it removed the Bahamas from the list of non-cooperative in 2001.<sup>139</sup>

## 3. *Financial Transaction Reporting Act, 2000*

The Financial Transaction Reporting Act implements a full know-your-customer regime through the creation of three basic obligations on financial institutions in the Bahamas. The Act requires financial institutions to take reasonable steps<sup>140</sup> to verify the identity of their customers when conducting transactions.<sup>141</sup> This obligation addresses the complaint raised by the FATF in its Review 2000 about the ability of some intermediaries (for example, lawyers) to invoke professional codes of conduct to hide the identities of their clients.<sup>142</sup> The Act also obligates financial institutions to report suspicious transactions to the Bahamas' Financial Intelligence Unit.<sup>143</sup>

The third obligation created by the Act directly addressed the FATF's Recommendation 12 that financial institutions maintain transaction records for at least five years.<sup>144</sup> Financial institutions must now maintain records verifying the identity of their customers<sup>145</sup> for every transaction conducted through the financial institution<sup>146</sup> for at least five years.<sup>147</sup>

132. Hetherington-Gore, *supra* note 112.

133. FATF, *Recommendations*, *supra* note 49, at 3-4, ¶¶ 10-13.

134. FATF, *Report on Non-cooperative Countries*, *supra* note 59, at 10-11, ¶¶ 4-7 & 13-14.

135. See FATF, *Recommendations*, *supra* note 49, at 3-4, ¶¶ 10-13; FATF, *Report on Non-cooperative Countries*, *supra* note 59, at 3, ¶ 13.

136. International Business Companies Act, No. 45 of 2000 (2000), §10(a) (Bah.).

137. *Id.* §195(4).

138. FATF, *Review 2000*, *supra* note 1, at 3, ¶ 12.

139. FATF, *Review 2001*, *supra* note 3, at 8, ¶ 21.

140. Financial Transactions Reporting Act, No. 40 of 2000 (2000), §§11(1) & 13(1)(a) (Bah.).

141. See *id.* §§6-9.

142. FATF, *Review 2000*, *supra* note 1, at 3, ¶ 12. However, the act does not require the disclosure of any privileged attorney-client communication, just disclosure of the identity of the client. Financial Transactions Reporting Act, *supra* note 140, §17.

143. Financial Transactions Reporting Act, *supra* note 140, §14(1).

144. FATF, *Recommendations*, *supra* note 49, at 3-4, ¶ 12.

145. Financial Transactions Reporting Act, *supra* note 140, §24(1).

146. *Id.* §23(1).

147. *Id.* §§23(3) & 24(4)(a)-(c).

The first experiences with the act illustrate the worries the Bahamas faces as it adopts regulations to comply with the FATF.<sup>148</sup> The act calls for written reports on many types of financial transactions, and it has drawn complaints from the financial industry in the Bahamas.<sup>149</sup> Transactions that previously occurred electronically within seconds can now take days.<sup>150</sup> Wendy Warren, the CEO and Executive Director of the Bahamas Financial Services Board, has said that the act is "a nightmare, and it causes business to come to a halt."<sup>151</sup>

The Bahamas is seeking to change the impact of the new requirements by amending the act,<sup>152</sup> but must be careful that in doing so they do not risk again being labeled non-cooperative. Though the FATF's Review 2000 did not cite the Bahamas' lack of mandatory reporting requirements as a reason for being labeled non-cooperative,<sup>153</sup> the lack of mandatory reporting requirements was one of the reasons listed for finding the Cayman Islands to be non-cooperative,<sup>154</sup> and Bermuda was praised by the FATF for its "efficient mandatory system" for reporting suspicious transactions.<sup>155</sup> Any changes that appear to weaken the reporting requirement may be viewed as a non-cooperative act.

#### 4. Financial Intelligence Unit Act

The twenty-fifth, and final, criterion used by the FATF for defining a non-cooperative country is the "lack of [a] centralised unit (i.e., a financial intelligence unit) . . . for the collection, analysis and dissemination of suspicious transactions information to competent authorities."<sup>156</sup> The Financial Intelligence Unit Act directly addressed this requirement by creating a financial intelligence unit (FIU).<sup>157</sup> The FIU is to receive all disclosures of information required under the Proceeds of Crime Act and to disseminate information regarding the proceeds of offenses.<sup>158</sup> Furthermore, the FIU addresses the FATF's observation that long delays, restricted responses to requests for assistance, and no room for cooperation outside of judicial channels marked the process of international cooperation in the Bahamas.<sup>159</sup> Carl Bethel, the Minister of Justice, commented that he believed "that the Bahamas was blacklisted by the FATF mainly because of its reluctance to cooperate with international investigations."<sup>160</sup> As a result, the Financial Intelligence Unit Act specifically provides for cooperation between the FIU of the Bahamas and foreign FIUs.<sup>161</sup>

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148. Hetherington-Gore, *supra* note 112.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. See FATE, *Review 2000*, *supra* note 1, at 2-3, ¶¶ 12-13.

154. *Id.* at 4, ¶ 21.

155. *Id.* at 3, ¶ 15.

156. FATE, *Report on Non-cooperative Countries*, *supra* note 59, at 6, ¶ 34.

157. Financial Intelligence Unit Act, No. 39 of 2000 (2000), §3(1) (Bah.).

158. *Id.* §4(1).

159. FATE, *Review 2000*, *supra* note 1, at 3, ¶ 12.

160. Hetherington-Gore, *supra* note 112.

161. Financial Intelligence Unit Act, *supra* note 157, §4(2)(a), (c), (g)-(h).

The creation of the FIU further illustrates the danger the Bahamas and other off-shore centers face as they undertake efforts to comply with the demands of the FATF while at the same time they try to preserve their unique comparative advantages in financial services. The FIU Act was designed to meet the standards of practice in use in many jurisdictions.<sup>162</sup> Prime Minister Ingraham has said, "[w]e are not asking banking institutions in the Bahamas to operate under rules that they are unfamiliar with."<sup>163</sup> Instead, the Bahamas is asking banks "to conduct business in the Bahamas as they would in Zurich, or Toronto, or London, or New York."<sup>164</sup> The question that faces the Bahamas and its customers is: if business is conducted in the Bahamas as it is in Zurich, Toronto, London, or New York, what reason is there for the business to be conducted in the Bahamas rather than in any of these jurisdictions or in any of the other financial centers of the industrialized world?

#### 5. *Central Bank of the Bahamas Act*

The new central bank act further addresses the complaints by the FATF concerning the "long delays and restricted responses to requests for assistance."<sup>165</sup> The Act expands the powers of the Governor, provides for better supervision of financial institutions, and allows for better cooperation between the central bank and overseas authorities.<sup>166</sup> The act defines the functions of the Central Bank of the Bahamas to include "the power to assist and co-operate with overseas regulatory authorities."<sup>167</sup>

#### 6. *Bank and Trust Companies Regulation Act*

This new act further strengthens the role of the Central Bank Governor. It provides for greater supervisory powers of banks and trust companies.<sup>168</sup> Furthermore, the act provides for cross-border supervision of foreign banks with branches or subsidiaries incorporated within the Bahamas by foreign regulatory authorities.<sup>169</sup>

The Act maintains the general statutory duty of confidentiality for banks,<sup>170</sup> but contains more exceptions to this duty than the previous act. The new act prohibits the disclosure of information gained in the course of employment,<sup>171</sup> except in certain cases including disclosures to persons in connection with criminal proceedings,<sup>172</sup> or for the purpose of assisting the Governor of the Central Bank of the Bahamas in the performance of his duties.<sup>173</sup> The influence of the FATF's Review 2000 is evident when one considers that the previous version of the act contained neither of the two above exceptions to

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162. See Hetherington-Gore, *supra* note 112.

163. *Id.*

164. *Id.*

165. FATF, *Review 2000*, *supra* note 1, at 3, ¶ 12.

166. Hetherington-Gore, *supra* note 112.

167. Central Bank of the Bahamas Act, No. 37 of 2000 (2000), §5(2) (Bah.).

168. Hetherington-Gore, *supra* note 112.

169. Banks and Trust Companies Regulation Act, No. 38 of 2000 (2000), §10 (Bah.).

170. *Id.* §15(1).

171. See *id.* §15(1)(a)–(f).

172. *Id.* §15(1)(v)(a).

173. *Id.* §15(1)(iv).

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the statutory duty of confidentiality.<sup>174</sup> The Act also excepts the Inspector of Banks and Trust Companies established under the Act<sup>175</sup> from the duty of confidentiality "where he believes that a suspicious transaction was not reported as required under the Financial Transactions Reporting Act, 2000."<sup>176</sup>

The new Act also increases the licensing criteria for banks and trust companies. It provides that the Governor may grant a license after considering: the applicant's fitness to conduct business,<sup>177</sup> the sufficiency of the applicant's financial resources,<sup>178</sup> "the soundness and feasibility of the business plan",<sup>179</sup> the applicant's experience and business record,<sup>180</sup> the character and competence of those who will operate the company,<sup>181</sup> and "the best interests of the financial system in The Bahamas."<sup>182</sup> Considering that the previous version of the act did not mandate consideration of any specific factors when determining whether to issue a license and that it provided that a license could be issued so long as it was not against the public interest,<sup>183</sup> this is a much wider mandate for investigation into banks and trust companies that is concordant with the FATF's concern about the potential use of shell corporations by money launderers.<sup>184</sup>

#### 7. *Financial and Corporate Service Providers Act*

"Only banks and trust companies licenced under the Banks & Trust Companies Regulations Act, and financial and corporate service providers licenced under the Financial and Corporate Service Providers Act, may provide registration, management, administration, registered agent, registered office, nominee shareholders and officers and directors for IBCs."<sup>185</sup> As both the Banks & Trust Companies Regulations Act and the Financial and Corporate Service Providers Act require their licensees to comply with the Financial Transaction Reporting Act<sup>186</sup> and provide beneficial ownership information,<sup>187</sup> the effect is to require full application of the know-your-customer regime to IBCs.<sup>188</sup> Again, this shows an appreciation for the FATF's concerns about the abuse of shell corporations by money launderers and the changes the Bahamas are willing to make to their laws to be removed from the FATF's list of non-cooperating countries.

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174. *Id.*, §10(1)(e)(i)–(iii) (1965).

175. *Id.*, *supra* note 169, §9.

176. *Id.* §15(7)(c).

177. *Id.* §4(2)(a).

178. *Id.* §4(2)(b).

179. *Id.* §4(2)(c).

180. *Id.* §4(2)(d).

181. *Id.* §4(2)(e).

182. *Id.* §4(2)(f).

183. *Id.*, §4(1) (1965).

184. Recommendation 25. FATF, *Recommendations*, *supra* note 49, at 5 ¶ 25.

185. Hetherington-Gore, *supra* note 112. See also International Business Companies Act, *supra* note 136, §4.

186. See Banks and Trust Companies Regulation Act, *supra* note 169, §§9(2)(b), 15(7)(c); Financial and Corporate Service Providers Act, No. 41 of 2000 (2000), §12(3) (Bah.).

187. See Banks and Trust Companies Regulation Act, *supra* note 169, §15(5)–(6); Financial and Corporate Service Providers Act, *supra* note 186, §14(1)(3).

188. Hetherington-Gore, *supra* note 112.

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While the changes outlined above justified removing the Bahamas from the list of non-cooperative nations in 2001, the FATF listed areas within the Bahamas' financial system that it would continue to monitor. In particular, the FATF noted that it would monitor the amount of resources that the Bahamas devoted to the institutions created in the previous year, the application of the new customer identification requirements to accounts that pre-date the requirements, and the efforts made to ensure compliance by the Bahamian financial sector with the improved anti-money laundering regime.<sup>189</sup> Furthermore, in accord with their stated concerns about obstacles to administrative and judicial cooperation,<sup>190</sup> the FATF would continue in the following year to monitor "the ability of the Bahamian regulators to access [suspicious transaction reporting] information and cooperate with foreign counterparts, [and] the continued practice of cooperating with judicial authorities."<sup>191</sup>

While the strength of the government's response to the FATF's blacklist preempted an exodus of the island's bigger banks and strengthened the island's reputation as a financial center,<sup>192</sup> compliance with the demands of the FATF has not been without its costs. Banks that remain in the Bahamas are facing higher regulatory costs because some of the rules the Bahamas has adopted are stricter than international rules.<sup>193</sup> The new regulations create demands on the operations of banks in the Bahamas that cost the banks financial and staff resources.<sup>194</sup>

There have been few job losses, but some managed banks (with minimal physical presence in the Bahamas) have left because of the increased licensing requirements adopted in response to the FATF's blacklist,<sup>195</sup> and "the Bahamas is receiving fewer applications to do banking business in the country."<sup>196</sup> While the central bank governor comments that tightening the regulations in the Bahamas "was something we had to do," to others the "legislation appears to be much stronger than that enacted in any other affected jurisdiction."<sup>197</sup> As a result, countries like the British Virgin Islands and the Cayman Islands seem to be attracting clients that left the Bahamas.<sup>198</sup> A loss of clients to either of these two jurisdictions would perhaps indicate a real erosion of the competitiveness of the Bahamas' financial sector. It would also indicate that the Bahamas did go too far in responding to the FATF's demands because the British Virgin Islands were not in either of the FATF's reviews and, like the Bahamas, the Cayman Islands was able to win removal from the list of non-cooperative countries in the Review 2001. The Bahamas has faced the choice between maintaining sovereign authority over regulations and staying on the good side of the international financial community as represented by

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189. FATF, *Review 2001*, *supra* note 3, at 8, ¶ 22.

190. FATF, *Report on Non-cooperative Countries*, *supra* note 59, at 4-5, ¶¶ 23-31.

191. FATF, *Review 2001*, *supra* note 3, at 8, ¶ 22.

192. Richard Lapper, *Survey-Bahamas: Shock-proof Isles Must Face up to Change*, FIN. TIMES, Dec. 19, 2001, available at 2001 WL 31429998.

193. *Id.*

194. Canute James, *Survey-Bahamas: All Comes Clean with Laws on Laundering*, FIN. TIMES, Dec. 19, 2001, available at 2001 WL 31429995.

195. Lapper, *supra* note 192.

196. James, *supra* note 194.

197. *Id.*

198. *Id.*

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the FATF. It has chosen to escape the penalties of the FATF's blacklist by bowing to its coercive powers.

#### 8. *The Bahamian Response to September 11th*

Showing an understanding of the new state of affairs following the terrorist attacks of September 11th, the Bahamas was one of the first countries to respond in the wake of the terrorist attacks.<sup>199</sup> The Bahamas promulgated the International Obligations (Afghanistan) Order 2001 in late September before the FATF adopted its new standards.<sup>200</sup> The order prohibited "any person dealing with any property, and any financial institution licensed in The Bahamas, from transacting business with Osama bin Laden, the Al Qaeda organization, or any individuals associated with them."<sup>201</sup>

#### 9. *The Bahamas in 2002*

The Bahamas continued to make progress even following their removal from the FATF's list of non-cooperative countries in 2001. The FATF's *Review to Identify Non-cooperative Countries or Territories* issued June 21, 2002 (hereinafter Review 2002) cited the Central Bank of the Bahamas for implementing an ambitious inspection program, conducting 165 on-site examinations for the year up to March 31, 2002. It also cited the Securities Commission for conducting inspections of seventy-eight licensees and registrants since March 2001.<sup>202</sup> In response to the new requirement that banks maintain a physical presence in the Bahamas implemented to gain the acceptance of the FATF, ninety-nine bank licenses were revoked between 2001 and May 2002.<sup>203</sup> The Review 2002 indicated that the FATF would continue to monitor the Bahamas paying special attention to its cooperation with the requests of foreign regulators.<sup>204</sup>

### B. CAYMAN ISLANDS

The development of the Cayman Islands as an offshore financial center has met with great success, and today the islands are the world's fifth most significant financial center.<sup>205</sup> The Cayman Islands also rank behind only the United States, United Kingdom, Japan, and France in the volume of deposits placed through their banks.<sup>206</sup> In fact, the

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199. Statement by Wendy Warren, CEO and Executive Director of the Bahamas Financial Services Board, at [http://www.bfsb-bahamas.com/news\\_print.lasso?id=33100](http://www.bfsb-bahamas.com/news_print.lasso?id=33100) (last visited Mar. 10, 2002).

200. The FATF adopted its special recommendations on terrorist financing October 30, 2001 one month after the Bahamas adopted their law. FATF, *Crack Down*, *supra* note 76, at 1.

201. Statement by Wendy Warren, *supra* note 199.

202. FATF, *Review to Identify Non-cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* 18 ¶ 88 (June 21, 2002), available at [http://www.fatf-gafi.org/pdf/NCCT2002\\_en.pdf](http://www.fatf-gafi.org/pdf/NCCT2002_en.pdf) [hereinafter FATF, Review 2002].

203. *Id.* ¶ 89.

204. *Id.* ¶ 90.

205. GILMORE, *supra* note 8, at 185.

206. GINSBERG, *supra* note 35, at 222.

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Cayman Islands' per capita income of \$30,120 "makes the Caymans richer than Saudi Arabia during the peak of the petroleum boom in the early 1980s."<sup>207</sup>

In the FATF's Review 2000, the FATF acknowledged that "the Cayman Islands has been a leader in developing anti-money laundering programmes throughout the Caribbean."<sup>208</sup> The Cayman Islands previously served as president of the Caribbean Financial Action Task Force (CFATF), provided assistance to the other states of the Caribbean in anti-money laundering, closed financial institutions based on worries about money laundering, and cooperated with other authorities in criminal law enforcement matters.<sup>209</sup> Moreover, the Cayman Islands "uncovered several serious cases of fraud and money laundering otherwise unknown to authorities in FATF member states."<sup>210</sup>

Despite the Cayman Islands obvious commitment to combating money laundering, the FATF nevertheless still identified deficiencies within the Cayman Islands that warranted their inclusion in the list of non-cooperative countries. The Cayman Islands met fully thirteen of the twenty-five criteria, and partially satisfied a further four of the twenty-five criteria.<sup>211</sup> However, the Islands allowed funds to flow in and out of the country with no restriction and had some of the strictest confidentiality laws in the world.<sup>212</sup>

The FATF found fault with the lack of legal requirements for customer identification and record keeping, and the inability of supervisory authorities to gain access to information regarding the identity of customers.<sup>213</sup> A large class of management companies was unregulated, and the Cayman Islands did not have "a mandatory regime for the reporting of suspicious transactions."<sup>214</sup>

In the following year, the Cayman Islands made significant progress in implementing its new anti-money laundering framework.<sup>215</sup> The FATF praised the Cayman Islands for increasing appreciably the resources allocated to financial supervision and to its FIU.<sup>216</sup> The Cayman Islands enacted laws addressing customer identification and record keeping for financial services and laws creating sanctions for a failure to report suspicious transactions.<sup>217</sup> The FATF also praised the Cayman Islands for embarking upon an "ambitious financial inspection programme," for requiring the identification of all pre-existing accounts, and for requiring all banks licensed in the Cayman Islands to establish a physical presence in the islands.<sup>218</sup> Additionally, many of the rules that previously existed only as guidelines within a code of practice are now legal requirements.<sup>219</sup>

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207. Tod Robberson, *Offshore, Many a Tax Haven*, DALLAS MORNING NEWS, Mar. 3, 2002, at 33A.

208. FATF, *Review 2000*, *supra* note 1, at 4, ¶ 22.

209. *Id.* at 4, ¶ 22.

210. *Id.*

211. *Id.* at 4, ¶ 20.

212. GINSBERG, *supra* note 35, at 220.

213. FATF, *Review 2000*, *supra* note 1, at 4, ¶ 20.

214. *Id.* ¶ 21.

215. FATF, *Review 2001*, *supra* note 3, at 8, ¶ 25.

216. *Id.*

217. *Id.* at 8, ¶ 24.

218. *Id.* at 8, ¶ 25.

219. *Cayman Islands: Working Paper Prepared by the Secretariat*, U.N. GAOR, 56th Sess., at 7, U.N. Doc. A/AC.109/2001/15 (2001).



Much like the rules adopted by the Bahamas, those adopted by the Cayman Islands evidence the direct effect of the FATF's Forty Recommendations and twenty-five criteria for defining non-cooperative nations. The Cayman Islands acknowledged as much by stating that it "has framed its regulatory system around international standards of supervision and cooperation with overseas regulatory authorities in the fight against financial crime."<sup>220</sup>

A money laundering offense in the Cayman Islands occurs when a person assists a second person in retaining or controlling the proceeds of criminal conduct if the person knows or suspects that the second person has engaged in or benefited from criminal conduct.<sup>221</sup> The new laws addressed the FATF's concern about the lack of "a mandatory regime for the reporting of suspicious transactions,"<sup>222</sup> by making the failure to disclose known or suspected money laundering a money laundering offense itself.<sup>223</sup>

The requirement to report knowledge or suspicion about money laundering activities extends to the attorney-client relationship. The requirement to make a disclosure about known or suspected money laundering includes knowledge or suspicion that comes to a person "in the course of his trade, profession, business or employment."<sup>224</sup> The duty to make a disclosure is not relieved by normal client confidentiality standards because "a report of a suspicious activity . . . does not give rise to any civil liability to the client or others and does not constitute, under Cayman Islands law, a breach of the duty of confidentiality."<sup>225</sup>

Tipping off the target of a money laundering investigation about an actual or proposed investigation into possible money laundering offenses is itself an offense.<sup>226</sup> While tipping off carries a maximum penalty of five years in prison and an unlimited fine, all other money laundering offenses couple the possibility of an unlimited fine with a maximum of fourteen years imprisonment.<sup>227</sup>

There are only two defenses to a money laundering charge. The first defense requires the defendant to prove a lack of knowledge or suspicion that the transaction "related to the proceeds of criminal conduct or that it facilitated the retention or control of the proceeds by the criminal."<sup>228</sup> The second defense to a money laundering charge is to report the suspicious transaction.<sup>229</sup> If a report is made about a suspicion concerning the source of the funds involved, it is not an offense to proceed to carry out the transaction.<sup>230</sup> The report must be made before or as soon as reasonably possible after carrying

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220. Cayman Islands Monetary Authority, *Guidance Notes on the Prevention and Detection of Money Laundering in the Cayman Islands 1* (June 1, 2001), available at <http://www.cimoney.com.ky/pages/policy/KYMLGN01062001.pdf>.

221. *Id.* at 10.

222. FATF, *Review 2000*, *supra* note 1, at 4, ¶ 21.

223. Cayman Islands Monetary Authority, *supra* note 220, at 10.

224. *Id.*

225. *Id.* at 12.

226. *Id.* at 10.

227. *Id.* at 11.

228. *Id.*

229. *Id.*

230. *Id.*

out the suspicious transaction.<sup>231</sup> If the report is made before the transaction, there is no risk of prosecution in proceeding with the suspicious transaction before receiving the consent of the authorities.<sup>232</sup>

The Cayman Islands also adopted regulations that seek to meet the know-your-customer requirements reflected in the Forty Recommendations and twenty-five criteria. Persons in the Cayman Islands should not form business relationships without establishing the identity of the person for whom they are conducting a transaction.<sup>233</sup> The regulations comply with the record keeping requirements of the twenty-five criteria by mandating that records of a customer's identity and transactions be kept for a period of at least five years.<sup>234</sup>

Yet, as they adopted regulations more compliant with the FATF's requirements, the Cayman Islands acknowledged the difficulty of their task. The laws and regulations that they adopt to help them avoid the condemnation of the FATF must also allow the Islands "to maintain their position as a premier jurisdiction, while at the same time ensuring that its institutions can operate in a competitive manner."<sup>235</sup>

As with the Bahamas, while removing the Cayman Islands from the list of non-cooperative jurisdictions in its Review 2001, the FATF promised to continue to monitor the Islands' progress "in applying customer identification requirements to pre-existing accounts, and further efforts to enhance compliance by the financial sector with the new anti-money laundering requirements."<sup>236</sup> Also of importance for the following year would be the continued ability of the Caymanian authorities to cooperate with their counterparts in money laundering investigations.<sup>237</sup>

The FATF's Review 2002 brought a special gift for the Cayman Islands from the FATF. The FATF announced that the Cayman Islands had adequately addressed the identified deficiencies within their financial system and consequently would no longer require monitoring by the FATF.<sup>238</sup> However, the FATF said that the Cayman Islands should continue to participate in the CFATF and its monitoring procedures.<sup>239</sup>

### C. DOMINICA

In the FATF's Review 2000, Dominica was deemed to meet fourteen of the twenty-five criteria defining a non-cooperative nation.<sup>240</sup> In labeling Dominica non-cooperative, the FATF observed that some of Dominica's legislation was outdated, and that the

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231. *Id.*

232. *Id.* at 11-12.

233. *Id.* at 13, Appendix C, §§7, 9 (The Proceeds of Criminal Conduct Law (2000 Revision) The Money Laundering Regulations, 2000).

234. *Id.* at §12.

235. Cayman Islands Monetary Authority, *supra* note 220, at 1.

236. FATF, *Review 2001*, *supra* note 3, at 9, ¶ 26.

237. *Id.*

238. FATF, *Review 2002*, *supra* note 202, at 18, ¶ 92.

239. *Id.*

240. FATF, *Review 2000*, *supra* note 1, at 5, ¶ 26.

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offshore sector was largely unregulated.<sup>241</sup> The report particularly cited obstacles to the identification of owners of accounts.<sup>242</sup>

Dominica was able to make some progress over the following year, but was not able to match that of the Bahamas or the Cayman Islands and remained on the list of non-cooperative jurisdictions.<sup>243</sup> Dominica addressed some of the FATF's recommendations by enacting laws that criminalized money laundering, established a financial intelligence unit, and created some record keeping and suspicious transaction reporting requirements.<sup>244</sup> Dominica, however, still needed to address issues of customer identification, retention of records for the FATF-mandated five years, and the ability of supervisory authorities to access necessary information.<sup>245</sup>

In the Review 2002, Dominica was again deemed a non-cooperative nation.<sup>246</sup> Regardless, Dominica gained plaudits from the FATF for amendments to the Offshore Banking Act that require offshore banks to establish a physical presence in the jurisdiction, and for amendments to the International Business Companies Act that create a mechanism to register bearer shares.<sup>247</sup> The ability for Dominica to aid foreign regulatory authorities was enhanced as of January 31, 2002, by the Exchange of Information Act.<sup>248</sup> Dominica also amended its International Exempt Trust Act to grant government access to the financial documents of licensees under the Act.<sup>249</sup> Although Dominica made significant legislative and regulatory progress, the FATF continued to be concerned about Dominica's ability to cooperate timely to requests for international mutual legal assistance and the fact that there was no clear mechanism to direct cooperation with regulators from foreign banks.<sup>250</sup>

#### D. ST. KITTS AND NEVIS

Though St. Kitts and Nevis met twenty of the FATF's criteria, the FATF judged them to be non-cooperative in its 2000 review of non-cooperative countries.<sup>251</sup> The FATF identified numerous faults within the offshore sector of Nevis, the financial center of the federation.<sup>252</sup> Money laundering was a crime only in the context of drug trafficking and not when it involved the proceeds of other criminal acts.<sup>253</sup> The offshore sector in Nevis was largely unsupervised with no procedures to combat money laundering.<sup>254</sup> There were numerous obstacles to customer identification and to international cooperation.<sup>255</sup>

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241. *Id.*

242. *Id.*

243. FATF, *Review 2001*, *supra* note 3, at 18, ¶ 88.

244. *Id.* at 10, ¶ 38.

245. *Id.*

246. See FATF, *Review 2002*, *supra* note 202, at 10, ¶ 41.

247. *Id.* at 10, ¶ 40.

248. *Id.*

249. *Id.*

250. *Id.* at 10, ¶ 41.

251. FATF, *Review 2000*, *supra* note 1, at 10, ¶ 57.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

St. Kitts and Nevis did not make enough progress in the following year to warrant their removal from the list of non-cooperative nations.<sup>256</sup> Though several laws were enacted which established customer identification procedures, required maintaining records, and required reporting suspicious transactions, there were still issues that needed to be addressed before St. Kitts and Nevis could be deemed cooperative.<sup>257</sup> Chief among the remaining issues were the identification of the beneficial owners of accounts and the ability of the authorities within St. Kitts and Nevis to cooperate internationally.<sup>258</sup>

In 2002, St. Kitts and Nevis won removal from the FATF's list of non-cooperative countries.<sup>259</sup> The one change cited by the FATF for the removal of St. Kitts and Nevis was the creation of a mechanism for the registration of bearer shares that includes identifying the beneficial owners of accounts.<sup>260</sup> This change certainly appears to be a direct response to the FATF's blacklisting of St. Kitts and Nevis one year earlier. It directly addressed one of the main issues cited by the FATF in 2001 for the inclusion of St. Kitts and Nevis on its list of non-cooperative countries.<sup>261</sup> Though the FATF did remove St. Kitts and Nevis from its blacklist, it will continue to monitor the jurisdiction and pay special attention both to cooperation between St. Kitts and Nevis and international regulatory authorities. The FATF will also pay special attention to the development of and resources devoted to the newly created FIU and other anti-money laundering entities.<sup>262</sup>

#### E. ST. VINCENT AND THE GRENADINES

St. Vincent and the Grenadines were fully in compliance with sixteen of the FATF's twenty-five criteria and partially in compliance with one more in the FATF's Review 2000.<sup>263</sup> The review provided a veritable laundry list of problems with the anti-money laundering framework of the islands. First, there was a complete absence of anti-money laundering regulations with respect to offshore institutions.<sup>264</sup> No know-your-customer or record keeping requirements existed, nor was there any positive obligation to report suspicious transactions.<sup>265</sup> The resources devoted to supervision were inadequate, and the authorities were prohibited from cooperating with international jurisdictions in many cases.<sup>266</sup>

St. Vincent and the Grenadines made the least amount of progress of the five Caribbean jurisdictions identified as non-cooperative in the FATF's Review 2000.<sup>267</sup> They did enact some laws creating authorization and registration requirements for banks in

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256. FATF, *Review 2001*, *supra* note 3, at 18, ¶ 88.

257. *Id.* at 12, ¶ 46.

258. *Id.*

259. FATF, *Review 2002*, *supra* note 202, at 1, ¶ 1.

260. *Id.* at 9, ¶ 33.

261. FATF, *Review 2001*, *supra* note 3, at 12, ¶ 46.

262. FATF, *Review 2002*, *supra* note 202, at 9, ¶ 34.

263. FATF, *Review 2000*, *supra* note 1, at 10, ¶ 59.

264. *Id.*

265. *Id.*

266. *Id.*

267. See FATF, *Review 2001*, *supra* note 3, at 12, ¶ 48.

the offshore sector and allowed some access to otherwise confidential information.<sup>268</sup> The FATF did observe, however, that as of June 2001 there had been no progress in addressing the identified deficiencies since February 2001.<sup>269</sup> Clearly, the FATF intended the process to be ongoing and did not envision a four-month respite in the fight against money laundering.

Between the FATF's Review 2001 and Review 2002, St. Vincent and the Grenadines enacted legislation to address the deficiencies in their anti-money laundering framework. In December of 2001 and January of 2002, laws were enacted that criminalized laundering the proceeds of any criminal conduct, required the reporting of suspicious transactions, and mandated requirements for record-keeping.<sup>270</sup> Nevertheless, St. Vincent and the Grenadines remain on the FATF's list of non-cooperative nations.<sup>271</sup> There are still broad exemptions from requirements for customer identification, and the FATF remains concerned about the ability of authorities to cooperate with regulators from foreign banks. It "strongly encourages" St. Vincent and the Grenadines to address the issue.<sup>272</sup>

## VI. Conclusion

The kind of encouragement by coercion represented by the FATF's list of non-cooperative nations illustrates the choice that the nations of the Caribbean face. At the beginning of September 2000, the likely course for the imposition of international financial standards through the FATF was progress in fits and starts with the United States supporting the resistance of offshore jurisdictions to some of the proposed standards. The Bush Administration seemed skeptical about the value of multilateral institutions such as the FATF.<sup>273</sup> The traditional support of the United States for tax competition was also likely to blunt any attempt by European nations to regulate the tax evading aspects of the offshore financial centers found in the Bahamas, the Cayman Islands, Dominica, St. Kitts and Nevis, and St. Vincent and the Grenadines.<sup>274</sup>

In the wake of the terrorist attacks on the World Trade Center Towers and the Pentagon, the likely course of the fight against money laundering in the Caribbean is both easier to chart and more perilous for offshore centers. The pressures placed on the regulatory systems of the Caribbean nations to comply with international norms represented by the FATF will increase. Where previous American support for the FATF was nominal, the Bush Administration today fully supports the efforts of the FATF in the fight against money laundering.<sup>275</sup>

The new urgency of the fight against money laundering provided by the September attacks, coupled with the collapse of Enron, is providing an opportunity for some

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268. *Id.*

269. *Id.*

270. FATE, *Review 2002*, *supra* note 202, at 15, ¶ 65.

271. *Id.* at 2, ¶ 3.

272. *Id.* at 15, ¶ 67.

273. *Through the Wringer: The Challenge of Money Laundering—Banks Are Doing More Than Ever Before to Clamp Down on Money Laundering, But Is It Enough?*, *ECONOMIST*, April 12, 2001, available at 2001 WL 7318519.

274. See Hetherington-Gore, *supra* note 112.

275. Michael M. Phillips, *Money-Laundering Task Force to Tighten Controls*, *WALL ST. J.*, June 22, 2001, at A3, available at 2001 WL-WSJ 2867376.

politicians to conflate the low (or no) tax aspects of offshore centers with the issue of the money laundering aspects of offshore centers and place greater burdens on their continued operation. The U.S. press has pointed out that "Congress is considering measures to pressure [offshore financial centers] . . . arguing that they provide hassle-free havens for drug traffickers, money launderers, terrorists and others who want to hide their activities from U.S. authorities."<sup>276</sup> Sen. John Kerry of Massachusetts, one of several legislators pressing for a clamp-down on offshore centers, argues that a "growing number of unscrupulous corporations and individuals are utilizing tax havens in the Caribbean and elsewhere to avoid . . . paying taxes."<sup>277</sup> For Sen. Kerry, "[t]he spread of tax havens punishes those who play by the rules. The end result is higher taxes on . . . those who comply with the law."<sup>278</sup> Before the attacks of September 11th, it would have been easy to envision another senator, from say Texas, taking exception to a suggestion from a Massachusetts politician that low taxes were a problem. Today, there is likely to be less support for offshore centers from any American legislators because the low tax aspects of offshore centers are now coupled with the concerns about money laundering in the minds of many.

Questions about the niceties of sovereignty will likely be brushed aside or ignored by the industrialized nations as they demand compliance in return for not ostracizing the offshore financial havens from the mainstreams of global finance. The new reality will require a delicate balancing act on the part of all financial centers wishing to combat terrorist financing and maintain their status as financial havens. While the Bahamas remains "wedded to the belief that law-abiding persons and entities have a right to privacy and confidentiality with respect to conduct of their affairs," a view probably shared by other offshore financial centers in the Caribbean, authorities in Europe and especially the United States may feel differently when the alternative provides an effective weapon against terrorist organizations.<sup>279</sup>

While nations must respond to the very real danger represented by the FATF blacklist, they must walk a fine line. Nations dependent on their financial services sectors must satisfy the FATF while not being viewed as merely placating the institution and at the same time serve the customers who chose the jurisdiction for its favorable regulatory environment. In complying, the offshore centers will have to work to maintain their comparative advantage in the provision of financial services while at the same time adopting many of the same regulations found in the industrialized nations. The Central Bank Governor of the Bahamas, Julian Francis, observed that the impact of the sensitivity and mobility of financial services means "any significant development which disturbs the ease of major institutions doing business from [a] jurisdiction . . . could result in the rapid relocation of business to other jurisdictions willing to accommodate them."<sup>280</sup> The goal of the financial centers will be to enact compliant regulations without losing business to other, less regulated jurisdictions that might be willing to risk international pariah status.

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276. Robberson, *supra* note 207, at 1A.

277. *Id.*

278. *Id.* at 33A.

279. Statement by Wendy C. Warren, *supra* note 199.

280. Hetherington-Gore, *supra* note 112.

