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THE FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING: THE WORLD STRIKES BACK ON TERRORIST FINANCING

Amy Walters*

MONEY laundering is “the process by which one conceals the existence, illegal source, or illegal application of income and then disguises that income to make it appear legitimate.”¹ In order to convict on a money laundering charge, prosecutors must show that the defendant engaged in financial transactions or international transfers of money involving funds from a “specified unlawful activity.”² Such activities include “bribery, counterfeiting, drug trafficking, espionage, extortion, fraud, murder, kidnapping, racketeering, and certain banking practices.”³

Money laundering is not a new phenomenon, although it was not defined as a specific crime until 1986.⁴ The criminal term “money laundering” was first used in the United States to describe the Mafia’s blending of illegal income with legitimate business revenue.⁵ Today it is also associated with the terrorist financial network. In the wake of the September 11 terrorist attacks on America, money laundering has taken on a new priority as it now appears that terrorists are funded through money laundering processes.

On September 20, 2001, President George Bush addressed a joint session of Congress, and vowed that the United States “will direct every resource at our command. . . to the disruption and defeat of the global terror network.”⁶ During the same address, President Bush issued the

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1. William R. Schroeder, *Money Laundering: A Global Threat and the International Community’s Response*, 70 FBI LAW ENFORCEMENT BULLETIN NO. 5 (May 2001), available at www.fbi.gov/publications/leb/2001/leb01.htm [hereinafter *Schroeder*].
2. Paul Bauer and Rhonda Ullman, Federal Reserve Bank of Cleveland, *Understanding the Wash Cycle*, available at <http://www.clev.frb.org/Research/com2000/0915.htm> (last visited Mar. 5, 2003) [hereinafter Bauer and Ullman].
3. *Id.*
4. Madelyn J. Daley, *Effectiveness of United States and International Efforts to Combat International Money Laundering*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L. J. 175, 179 (2000).
5. *Id.*
6. Gerald P. O’Driscoll, Jr. et al., *Stopping Terrorism: Following the Money*, THE HERITAGE FOUNDATION BACKGROUNDER NO. 1479 (Sept. 25, 2001), available at

unforgettable ultimatum to the rest of the world, "Either you are with us, or you are with the terrorists."⁷ Under President Bush, the United States has waged an all out war against terrorism and, perhaps more importantly, their financiers. This paper examines the post-September 11 efforts to stop terrorist financing by the United States and the rest of the world.

I. THE FINANCIAL ACTION TASK FORCE: BACKGROUND

In 1989, the threat of money laundering in the international banking system prompted the leaders of the Group of Seven (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States) to convene the Financial Action Task Force (FATF).⁸ The FATF was to be responsible for "examining the money laundering trends and techniques, reviewing international and national action and determining additional anti-money laundering strategies."⁹

FATF membership currently consists of two regional organizations, the European Commission and the Gulf Cooperation Council, and twenty-nine countries and territories.¹⁰

The Financial Action Task Force was first formed at the Group of Seven Paris Summit in 1989.¹¹ More generally stated, the FATF's primary purpose is to "monitor and to coordinate international enforcement of anti-money-laundering laws."¹² In February 1990, at its first meeting, the FATF issued a series of recommendations to combat money laundering based on UN Convention principles.¹³ The "Forty Recommendations" were amended in 1996 to reflect changes in money laundering trends as well as potential threats in the future.¹⁴ The "Forty Recommen-

<http://www.heritage.org/Research/NationalSecurity/BG1479.cfm> (Citing to President George W. Bush, *Address to a Joint Session of Congress and the American People*, September 20, 2001, available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html.)

7. *Id.*
8. United States State Department, *The Financial Action Task Force on Money Laundering, ECONOMIC PERSPECTIVES*, (May 2001), available at <http://usinfo.state.gov/journals/ites/0501/ijec/fatffacts.htm>.
9. *Id.*
10. *Id.*; The FATF current members include the European Commission and the Gulf Cooperation Council, as well as Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.
11. Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 174 (1995).
12. *Id.*
13. *Id.*
14. David Lyman, *Money Laundering*, in ICC Standing Committee on Extortion and Bribery, *CORPORATE PRACTICES MANUAL ON EXTORTION AND BRIBERY* (1999). Other international bodies have issued or adopted similar guidelines, in whole or in part: the United Nations and several of its specialized agencies, the International Organization of Securities Commissions, the European Union (EU), the Council of Europe, Gulf Cooperation Council, Organization of American States

dations” require member countries to assist each other in money laundering investigations, avoid enacting secrecy laws that hamper such investigations, criminalize money laundering, and report suspicious transactions.¹⁵ The “Forty Recommendations” are the most comprehensive set of anti-money laundering directives yet created for governments, legislatures, law enforcement, financial institutions and businesses,¹⁶ and have become the accepted international standard for anti-money-laundering regimes.¹⁷

A. EFFECTIVENESS OF THE FATF TO DATE

The Financial Action Task Force on Money Laundering published its twelfth annual report on June 22, 2001, outlining the main achievements of the FATF in 2000-2001 under the presidency of Spain, including the significant progress in work on non-cooperative countries and territories (NCCTs).¹⁸ To encourage non-member countries with deficient anti-money-laundering legislation to implement new laws, the FATF introduced a major project in 1999 known as the Non-Cooperative Countries and Territories (NCCTs) Initiative.¹⁹ The Initiative’s first report in June 2000 identified fifteen jurisdictions with “serious, systemic money laundering problems.”²⁰

The 2000 Report urged the fifteen NCCTs to improve their rules and

(OAS), Caribbean Financial Action Task Force (CFATF), South Pacific Forum, Asia/Pacific Group on Money Laundering, Council for Security Cooperation in the Asia-Pacific (CSCAP), INTERPOL, ASEANPOL, World Customs Organization (WCO), Southern and Eastern Africa Financial Action Task Force (SEAFATF), Bank for International Settlements (BIS), Basel Committee on Banking Supervision, International Banking Security Association, Banking Federation of the European Union, Organization for Economic Cooperation and Development (OECD), among others.

15. Barbot, *supra* note 11, at 175

16. Lyman, *supra* note 14, at 2.

17. A summary of the recommendations’ basic obligations that countries need to implement include: Criminalizing the laundering of the proceeds of serious crimes (Recommendation 4) and enacting measures to seize and confiscate the proceeds of crime (Recommendation 7); Requiring financial institutions to identify all clients, including any beneficial owners of property, and to keep appropriate records (Recommendations 10 to 12); Requiring financial institutions to report suspicious transactions to the competent national authorities (Recommendation 15) and to implement a comprehensive range of internal control measures (Recommendation 19); Ensuring adequate systems for the control and supervision of financial institutions (Recommendations 26 to 29); Establishing international treaties or agreements and to pass national legislation that will allow countries to provide prompt and effective international cooperation at all levels (Recommendations 32 to 40); Schroeder, *supra* note 1, at 5.

18. News Release, Organisation for Economic Cooperation and Development, Financial Action Task Force on Money Laundering 2000-2001 Report Released, (Jun. 22, 2001), available at <http://www.oecd.org/EN/document/0,,EN-document-590-17-no-12-3827-590,00.html>.

19. *Id.*

20. *Id.* at 3. The fifteen countries placed on the FATF 2000 NCCT list were: the Bahamas, the Cayman Islands, the Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, the Marshall Islands, Nauru, Niue, Panama, the Philippines, Russia, St. Kitts and Nevis, and St. Vincent and the Grenadines.

practices and adopt legislation as quickly as possible.²¹ The FATF reported that it would continue communication with the NCCTs and provide technical assistance to help the NCCTs design and implement anti-money laundering systems.²² The FATF has updated the list of non-cooperative countries and territories, removing the Bahamas, the Cayman Islands, Liechtenstein and Panama from the list, but will monitor future developments in those countries.²³

Most recently, the FATF has identified serious deficiencies in Egypt, Guatemala, Hungary, Indonesia, Myanmar and Nigeria.²⁴ The FATF calls on its members to request their financial institutions to give special attention to businesses and transactions with persons, companies and financial institutions in these countries and territories.²⁵

II. CURRENT CONCERNS OF THE FATF IN THE WAKE OF THE SEPTEMBER 11 ATTACKS: TERRORIST FINANCING

A. OSAMA BIN LADEN'S AL-QAEDA

Investigation into the September 11, 2001 terrorist attacks has led to evidence that the operation was highly sophisticated and involved extensive planning, intelligence, and training.²⁶ The group that makes the most extensive use of private funding is Osama bin Laden's al-Qaeda, or "the Base".²⁷

Osama bin Laden is regarded as the wealthiest financier of terrorism currently active. Bin Laden's wealth is not publicly known,²⁸ but he is said to have inherited \$300 million from his family that he uses to finance al-Qaeda.²⁹

Al-Qaeda was established by Osama bin Laden in the late 1980s in order to bring together Arabs who fought against the Soviet invasion in Afghanistan.³⁰ During the Soviet invasion, al-Qaeda helped finance, recruit and train Sunni Islamic extremists for the Afghan resistance.³¹ The current goal of al-Qaeda is to establish a "pan-Islamic Caliphate" throughout the world using allied Islamic extremists to overthrow re-

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1. The updated list of NCCTs is as follows: Cook Islands, Dominica, Egypt, Guatemala, Hungary, Indonesia, Israel, Lebanon, Marshall Islands, Myanmar, Nauru, Nigeria, Niue, Philippines, Russia, St. Kitts and Nevis, and St. Vincent and the Grenadines.

26. O'Driscoll, *supra* note 6, at 2.

27. *Id.*

28. Reuven Paz, ICT Academic Director, *Targeting Terrorist Financing in the Middle East*, Paper Presented at the International Conference on Countering Terrorism through Enhanced International Cooperation (October 23, 2000).

29. Terrorism files.org, *Terrorist Organisations-al Qaeda*, available at www.terrorismfiles.org/organisations/al_qaida.html (last visited 02/04/03).

30. *Id.*

31. *Id.*

gimes deemed “non-Islamic” and to eliminate Westerners and non-Muslims from Muslim countries.³²

Al-Qaeda has military, political and fundraising branches.³³ It has solicited funds in many countries for years on the pretext of supporting hospitals, schools and other charitable organizations.³⁴ Although al-Qaeda does support such institutions, it also provides money to terrorist organizations,³⁵ functioning as the “merchant bank for terrorism.”³⁶

B. THE HAWALA SYSTEM

Al-Qaeda has historically been attracted to operating in un-regulated jurisdictions, those places with limited bank supervision, no anti-money laundering laws, ineffective law enforcement, and a culture of no-questions-asked bank secrecy.³⁷ Some of these places included the regional banking centers of the Middle East such as Dubai, Kuwait, Bahrain and Lebanon, as well as such familiar havens as Liechtenstein and the Bahamas.³⁸

Al-Qaeda also abuses the Islamic banking system, an entirely legitimate system based on *sharia*, or Islamic law, which prohibits the earning or payment of interest.³⁹ Islamic banks are known to operate under loose regulatory oversight, partly because they are based in jurisdictions without proper controls, but also because they are allowed a greater degree of autonomy due to their religious nature.⁴⁰ Islamic banks regularly commingle funds from depositors with group investments by fund managers, which creates easy opportunities for anonymous money transfers.⁴¹

Al-Qaeda also takes advantage of the ancient *hawala* (Hindi for “in trust”) underground banking system, an informal financial network used in Pakistan and India to avoid paying bribes or taxes when transferring money across borders.⁴² The *hawala* system can be used to transfer money without actual money movement or any wire transfer. It is a cash business that leaves behind few, if any, written or electronic records, also called “money trails.”⁴³

The *hawala* system is quite simple. It requires a network of *hawaladars*, primarily these are members of families which have been in

32. *Id.*

33. Brookings Study, *Americas Response to Terrorism—FAQs*, available at www.brook.edu/dybdocroot/fp/projects/terrorism/faqs.htm (last visited 02/04/03).

34. *Id.*

35. *Id.*

36. O’Driscoll, *supra* note 6, at 2.

37. Maurice R. Greenberg, William F. Wechsler and Lee S. Wolosky, *Terrorist Financing, Report of an Independent Task Force Sponsored by the Council on Foreign Relations*, available at www.securitymanagement.com/library/terrorist_news0103.pdf (last visited 02/02/03) [hereinafter *Task Force*].

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. O’Driscoll, *supra* note 6, at 2.

43. *Id.*

this business for generations, as well as trust, and access to telephone lines.⁴⁴ The anonymous customer will physically hand over to their local hawalader some amount of money. That hawalader then contacts his counterpart across the world by phone, and that individual then distributes money out of his own resources to the intended recipient.⁴⁵ The entire transaction takes place without any money ever crossing borders. The trust between hawaladers allows them to carry each other's debts for long periods before finding ways to settle them.⁴⁶

III. POST-SEPTEMBER 11, 2001 EFFORTS TO FIGHT TERRORIST FINANCING

A. FATF ISSUES EIGHT SPECIAL RECOMMENDATIONS TO FIGHT TERRORIST FINANCING

According to the Organization for Economic Co-Operation and Development (OECD) at the extraordinary Plenary on the Financing of Terrorism on October 30, 2001, the FATF expanded its mission beyond money laundering and will now direct its energy and expertise on the worldwide effort to stop terrorist financing.⁴⁷

The FATF issued a set of Eight Special Recommendations on Terrorist Financing which commit members to take immediate steps to ratify and implement the relevant United Nations instruments.⁴⁸ The Eight Special Recommendations from the FATF first require member countries to ratify and implement the 1999 UN Convention for the Suppression of the Financing of Terrorism,⁴⁹ as well as UN Security Council Resolution

44. Task Force, *supra* note 37.

45. *Id.*

46. *Id.*

47. Organisation for Economic Cooperation and Development, *FATF Cracks Down on Terrorist Financing*, (Nov. 4, 2001), available at <http://webnet1.oecd.org>. [hereinafter *FATF Cracks Down*].

48. *Id.*

49. The Eight Recommendations of the FATF on fighting terrorist financing are: 1) countries must ratify and implement the 1999 UN Convention to Suppress the Financing of Terrorism; 2) They must make it a criminal offense to finance terrorism and terrorist acts; 3) They must take steps to rapidly freeze and confiscate terrorist assets; 4) Financial institutions and others must report suspicious transactions linked to terrorism; 5) Countries must extend to one another maximum international cooperation in detecting and punishing terrorist financing and seize the assets; 6) There must be licensing and regulation of the so-called alternative remittance system; 7) Inter-bank wire transfers must bear the full and accurate information on the originating parties; and 8) National laws should adequately deal with non-profit organizations such as charities to prevent their abuse for terrorist financing; Timothy Lemay, UN ODCCP, Speaking Notes at the Bishek International Conference on Enhancing Security and Stability in Central Asia: *Strengthening Comprehensive Efforts to Counter Terrorism*, Session 3, (Dec. 14 2001) [hereinafter Lemay Speaking Notes]; see United Nations, International Convention to Suppress the Financing of Terrorism, available at <http://untreaty.un.org/English/Terrorism/Conv12.pdf> (last visited Mar. 13, 2003); see Financial Action Task Force on Money Laundering, *Special Recommendations on Terrorist Financing*, available at http://www1.oecd.org/fatf/SrecsTF_en.htm (last visited Mar. 13, 2003).

1373.⁵⁰ Secondly, they must make it a criminal offense to finance terrorism and terrorist acts.⁵¹ Third, they must take steps to rapidly freeze and confiscate terrorist assets.⁵² Fourth, financial institutions and others must report suspicious transactions linked to terrorism.⁵³ Fifth, countries must extend one another the maximum international cooperation in detecting and punishing terrorist finance and seizing the assets.⁵⁴ Sixth, there must also be licensing and regulation of the alternative remittance systems.⁵⁵ Seventh, inter-bank wiring will bear full and accurate information on the originating parties.⁵⁶ Eighth, national laws should deal adequately with non-profit organizations to prevent abuse by terrorist financiers.⁵⁷

1. *Expectations of FATF Members and Other Countries*

FATF members have agreed to a comprehensive plan of action to implement the new standards set by the FATF.⁵⁸ The plan recommends that by December 31, 2001, all FATF members must have completed a self-assessment of compliance with the Special Recommendations, including a commitment to come into compliance with the Special Recommendations by June 2002 as well as to create action plans addressing the implementation of recommendations not already in place.⁵⁹

All countries around the world will be invited to participate on the same terms as FATF members.⁶⁰ By February 2002, additional guidance for financial institutions on the techniques and mechanisms used in the financing of terrorism should have been developed.⁶¹ Additionally, by June 2002, the FATF expected the initiation of a process to identify jurisdictions lacking appropriate measures to combat terrorist financing and discussion of further steps, including the possibility of counter-measures, for jurisdictions that do not counter terrorist financing.⁶²

The FATF also mandates that members regularly publish the amount of suspected terrorist assets frozen, in accordance with the appropriate United Nations Security Council resolutions.⁶³ FATF members are also required to give technical assistance to non-members, as necessary, to help them comply with the Special Recommendations.⁶⁴

50. Financial Action Task Force on Money Laundering, *Special Recommendations on Terrorist Financing*, available at http://www1.oecd.org/fatf/SrecaTF_en.htm (last visited Mar. 13, 2003).

51. Lemay Speaking Notes, *supra* note 49.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *FATF Cracks Down*, *supra* note 47.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

2. *The Self-Assessment Questionnaire on Terrorist Financing*

The Eight Special Recommendations on terrorist financing were adopted by the FATF in October 2001.⁶⁵ Immediately following their adoption, the FATF employed a self-assessment exercise in order to determine the level of implementation of the Special Recommendations. A self-assessment questionnaire on terrorist financing (SAQTF) with a series of questions regarding each Special Recommendation was designed in order to elicit details that would assist in determining whether a particular jurisdiction had actually implemented each Special Recommendation.⁶⁶

Upon completion of the initial phase of this exercise by FATF members, the FATF decided that additional guidance would be drafted and published to assist non-FATF members in understanding some of the concepts contained in the Special Recommendations and to clarify certain parts of the SAQTF.

3. *October 9-11, 2002: FATF Holds Second Plenary Meeting on Terrorist Financing*

The FATF, under the presidency of Jochen Sanio, met again in plenary session from October 9-11, 2002 in Paris.⁶⁷ As a result of the implementation of significant reforms, Russia was removed from the FATF's list of non-cooperative countries and territories (NCCTs),⁶⁸ as well as Dominica, Niue and the Marshall Islands.⁶⁹ The FATF has also taken a serious step of recommending that its members impose counter-measures against Nigeria and Ukraine.⁷⁰ These counter-measures include the possibility of enhanced surveillance and reporting of financial transactions.⁷¹ The counter-measures would apply as of December 15, 2002 to Nigeria unless it enacts legislation that significantly expands the scope of its current laws, and to Ukraine unless it enacts comprehensive legislation that meets international standards.⁷²

More than 120 countries have participated in the self-assessment exercise on terrorist financing.⁷³ This exercise has helped FATF identify countries for priority technical assistance by the IMF, World Bank, and United Nations to improve their anti-terrorist financing systems.⁷⁴ After

65. Organisation for Economic Cooperation and Development, *Guidance Notes For the Special Recommendations on Terrorist Financing and the Self-Assessment Questionnaire*, available at <http://www.oecd.org> (last visited Mar. 13, 2003).

66. *Id.*

67. Organisation for Economic Cooperation and Development, *Financial Action Task Force Plenary to Meet Oct. 9-11, 2002*, available at <http://www.oecd.org> (last visited Mar. 13, 2003).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

having endorsed the FATF Forty and Eight Recommendations, the IMF, World Bank, and the FATF have developed a common methodology to assess the countries in compliance with the FATF Recommendations.⁷⁵

The FATF also held an international forum with representatives from the private sector to discuss a range of issues being considered as FATF reviews its Forty Recommendations.⁷⁶ This review is expected to be completed during the first half of 2003. At the conclusion of the review, FATF will issue updated Recommendations.⁷⁷

IV. THE U.S. ATTACK ON TERRORIST FINANCING

A. EXECUTIVE ORDER 13224

In a press release issued on December 4, 2001, President Bush announced action to block the assets of three entities that provide financial and material support to the terrorist organization Hamas.⁷⁸ Hamas is a terrorist organization advocating extremist Islamic fundamentalist ideology and pursuing a combined program of violence and terror.⁷⁹ Hamas is a militant offshoot of the Muslim Brotherhood and its platform states that “there is no solution for the Palestinian question except through *ji-had* [holy war].”⁸⁰ Since October 1, 2000, Hamas has claimed responsibility for at least twenty bombings, two shootings, one kidnapping and one mortar attack.⁸¹ Hamas is clearly a terrorist organization of global reach.⁸²

The three Hamas controlled organizations that finance terrorism include the United States based Holy Land Foundation for Relief and Development, Beit el-Mal Holdings, an investment company controlled by Hamas, and Al-Aqsa Islamic Bank, a financial arm of Hamas substantially owned by Beit el-Mal.⁸³

The Holy Land Foundation operates under the guise of a charity while its primary purpose is to fund Hamas.⁸⁴ Last year Holy Land raised \$13 million in the United States.⁸⁵ On December 4, 2001, federal agents locked down the Holy Land Foundation’s headquarters in Richardson, Texas, as well as its three other offices in Illinois, New Jersey and

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Jewish Virtual Library, *Hamas*, available at www.us-israel.org/jsource/Terrorism/hamas.html (last visited Feb. 3, 2003).

81. Press Release, United States Department of Treasury, Remarks by John B. Taylor, Under Secretary of the Treasury on the Financial Fight Against Terror (Dec. 4, 2001), available at <http://www.ustreas.gov/press/releases/po840.htm> [hereinafter Taylor Press Release].

82. *Id.*

83. Press Release, United States Department of Treasury, Shutting Down the Terrorist Financial Network (Dec. 4, 2001), available at <http://www.ustreas.gov/press/releases/po841.htm>. [hereinafter Treasury Dep’t Press Release].

84. Taylor Press Release, *supra* note 81.

85. *Id.*

California.⁸⁶

Beit el-Mal Bank, a public holding company that funnels money to and for Hamas, ostensibly engages in investments and finance and has assets estimated at \$25 million.⁸⁷ The company's chairman is a major financial player in Hamas and a majority of the shares in the company are held by members of Hamas.⁸⁸

Al-Aqsa Islamic Bank is a financial arm of Hamas. Al-Aqsa is 20 percent owned by Beit el-Mal. The two share senior officers and directors, and a majority of its shareholders and senior officials have ties to Hamas.⁸⁹ Individuals associated with the bank have been previously arrested and charged with Hamas activities in the Middle East.⁹⁰

In a press release issued December 20, 2001, President Bush announced the blocking of assets of Umma Tameer-e-Nau (UTN), a non-governmental organization founded by Pakistani nuclear scientists that has provided information to Osama bin Laden and the Taliban about chemical and biological weapons.⁹¹ Bush also announced the blocking of assets of Lashkar-e-Tayyiba (LET), a Kashmiri terrorist organization that has conducted a number of operations against Indian troops and civilian targets in Kashmir since 1993.⁹² These actions were taken pursuant to Executive Order 13224,⁹³ signed by the President on September 23, 2001, authorizing aggressive actions against the bankers of international terrorism.⁹⁴ As of December 20, 2001, the United States has designated 158 individuals and organizations pursuant to Executive Order 13224.⁹⁵ It seems that this will be a long fight. As former Treasury Secretary Paul O'Neill put it, "day by day and week by week we are building a wall between global terrorists and the world financial system they rely on."⁹⁶

B. THE USA PATRIOT ACT

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act or the Act) of 2001⁹⁷ was signed into law by President Bush on Octo-

86. Treasury Dep't Press Release, *supra* note 83.

87. Taylor Press Release, *supra* note 81.

88. *Id.*

89. Treasury Dep't Press Release, *supra* note 83.

90. *Id.*

91. Press Release, United States Department of Treasury, Terrorist Financing Fact Sheet (Dec. 20, 2001) available at <http://www.ustreas.gov/press/releases/po886.htm> [hereinafter Terrorist Fact Sheet].

92. *Id.*

93. Exec. Order No. 13,224, 31 C.F.R. 595-97 (2001).

94. *Id.*

95. Terrorist Fact Sheet, *supra* note 91.

96. Press Release, United States Department of Treasury, Treasury Secretary Paul O'Neill Remarks on New Terrorist Financing Designations (Dec. 20, 2001), available at <http://www.ustreas.gov/press/releases/po885.htm>

97. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56 (2001).

ber 26, 2001, a little over a month after the issuance of Executive Order 13224.⁹⁸ The Act consists of ten titles which give federal law enforcement and intelligence officers' greater authority to gather and share evidence particularly with respect to wire and electronic communications.⁹⁹ The Act amends federal money laundering laws involving overseas financial activities.¹⁰⁰ It also creates new federal crimes, increases the penalties for existing federal crimes, and adjusts existing federal criminal procedure on acts of terrorism.¹⁰¹ The Act modifies immigration law, increasing the ability of federal authorities to prevent foreign terrorists from entering the United States, to detain foreign terrorist suspects, to deport foreign terrorists, and to mitigate the adverse immigration consequences for the foreign victims of September 11.¹⁰² The Act also authorizes appropriations to enhance the capacity of immigration, law enforcement, and intelligence agencies to respond more effectively to the threats of terrorism.¹⁰³

Title III of the USA PATRIOT Act focuses on strengthening the current U.S. money laundering defenses and changes those laws to help deal with terrorism.¹⁰⁴ It allows the Secretary of the Treasury to require increased record keeping and reporting by financial institutions with regard to transactions involving jurisdictions outside the United States, financial institutions outside the United States, and classes of transactions involving jurisdictions outside of the United States that are considered to be a primary money laundering concern.¹⁰⁵ Title III also requires the Secretary of Treasury to adopt regulations to encourage cooperation among financial institutions, their regulatory authorities and law enforcement authorities to share information regarding individuals, entities and orga-

98. Abdres Rueda, *The Implications of Strong Encryption Technology on Money Laundering*, 12 ALB. L.J. SCI. & TECH. 1, 14 (2001). The legislation expands the definition of a "financial institution" within the meaning of the money laundering laws and is able to encompass hundreds of businesses that were traditionally out of reach, including banks, securities dealers, insurance companies, investment bankers, money transmitters, casinos, check cashers, credit card companies, real estate agents and pawnbrokers. The Act requires these "financial institutions" to establish anti-money laundering programs. In particular, these businesses must develop internal policies, procedures and controls, designate a compliance officer, conduct ongoing employee training programs and perform audit functions to test programs.

99. Charles Doyle, *CRS Report for Congress, Terrorism: Section by Section Analysis of the USA PATRIOT Act* (December 10, 2001), available at <http://ftp.state.gov/documents/organization/7952.pdf>. The new law also contains a due diligence requirement that appropriate, specific, and where necessary enhanced, due diligence policies, procedures and controls to detect and report money laundering for private banking accounts established, managed, maintained, administered or managed for a non-U.S. person, including a foreign individual visiting the United States, or a representative of a non-U.S. person.

100. *Id.* at 15.

101. *Id.*

102. *Id.*

103. *Id.*

104. International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56 (2001), available at <http://www.ofi.state.la.us/patriotact.pdf> (last visited Mar. 13, 2003).

105. *Id.*

nizations engaged in terrorist acts or money laundering activities.¹⁰⁶ It increases the maximum criminal and money penalties for money laundering from \$100,000 to \$1,000,000.¹⁰⁷ Title III makes the act of smuggling bulk cash in or out of the United States a criminal offense and authorizes the forfeiture of any cash or instruments of the smuggling offense.¹⁰⁸

V. CONCLUSION

A. INFILTRATION OF HAWALA MONEY TRANSFER NETWORKS IS CRUCIAL

Victory in the war against terrorist financing will require more vigilance of the global financial system on the part of all financial industries. The FATF and other regulatory mechanisms must infiltrate informal transfer networks and distinguish legitimate from illegitimate businesses.¹⁰⁹

According to a progress report given by Kenneth W. Dam, the Deputy Secretary of the Treasury, in May 2002, the United Arab Emirates hosted an international conference where several countries agreed to improve the regulation of hawalas by, among other things, implementing the FATF Recommendations against hawalas and appointing a supervising authority to ensure enforcement.¹¹⁰ Dam testified to the Financial Services Committee of the United States House of Representatives that al-Qaeda and other terrorist organizations have suffered financially as a result of these efforts.¹¹¹

Some say that bin Laden succeeded in avoiding detection because anti-money laundering efforts were focused on other areas, such as the South American cocaine trade, internet gambling, and stock and bond frauds.¹¹² Requiring banks to verify client identities was thought to be the most effective policy, but it was aimed at drug lords and tax cheats, not terrorists who followed a subtle game plan that did not raise any red flags.¹¹³

In fact, an examination of the financial connections among September 11 hijackers showed that most of the individual transactions were small sums far below the reporting threshold and in most cases consisted only of wire transfers.¹¹⁴ The individuals appeared to be foreign students re-

106. *Id.*

107. *Id.*

108. *Id.*

109. Antonio Fins, *Terrorist Cash Flows in Secret World*, SOUTH FLORIDA SUN-SENTINEL, Sep. 30, 2001, available at www.sunsentinel.com/business/local/sfl-sbmoney/30sep30.story.

110. Kenneth W. Dam, Deputy Secretary of Department of the Treasury, Testimony to the Financial Services Committee, United States House of Representatives, *Terrorist Financing: A Progress Report on Implementation of the USA PATRIOT Act*, September 19, 2002 available at www.ustreas.gov/press/releases/po3439.htm.

111. *Id.*

112. *Id.*

113. *Id.*

114. Financial Action Task Force, Organisation for Economic Cooperation and Development, *Guidelines for Financial Institutions in Detecting Terrorist Financing*,

ceiving money from their parents or grants for their studies.¹¹⁵

Present and former government officials admit that since the mid-1990s they did not fully utilize the legal tools they had to wage such a fight.¹¹⁶ Richard Palmer, who served as the Central Intelligence Agency's station chief in Moscow during the 1990s said that "We could have starved the organization if we put our minds to it. The government has had the ability to track these accounts for some time."¹¹⁷

Congress is now reviving a proposal killed last year by Texas Republican Senator Phil Gramm, then chairman of the Senate Banking Committee, which would give the Treasury Secretary broad power to bar foreign countries and banks from access to the American financial market unless they cooperate with money-laundering investigations.¹¹⁸ The bill, introduced by the Clinton administration, was strongly opposed by the banking industry and Mr. Gramm.¹¹⁹ Mr. Gramm believes that "the way to deal with terrorists is to hunt them down and kill them."¹²⁰ Perhaps he has a point, but until the terrorists are found and eliminated, the U.S. Treasury Department should have the authority to regulate which countries and banks will have access to the American financial market.

B. FATF NEEDS MORE POWER TO EFFECTIVELY COMBAT TERRORIST FINANCING

Terrorist incidents are simply acts of large-scale criminality.¹²¹ In the context of the recent attacks against the United States, these offenses include murder, hi-jacking, theft, fraud, and various offenses dealing with the destruction of property.¹²² The efforts since September 11 of the FATF in its Eight Recommendations and the United Nations in its Resolution 1373 recommend that the member states take certain actions to combat the financing of terrorists. But these organizations are not given the power to criminalize the non-compliance of their members. However, if these organizations were to provide their member states with model legislation resembling the USA PATRIOT Act, the provisions might be implemented more swiftly. If the FATF is to be the body through which the international community succeeds in ridding the global financial network of terrorist funding, it must be given the power to sanc-

available at http://www1.oecd.org/fatf/pdf/GuidFITF01_en.pdf. (last visited Mar. 5, 2003).

115. *Id.*

116. Tim Weiner, David Cay Johnson, *Roadblocks Cited in Efforts to Trace bin Laden's Money*, N.Y. TIMES, Sep. 20, 2001, available at <http://www.econ.umn.edu/~cswan/F01/Class/Sep20/money.html>

117. *Id.*

118. Weiner and Johnson, *supra* note 116.

119. *Id.*

120. *Id.*

121. See Lemay Speaking Notes, *supra* note 49.

122. *Id.*

tion non-complying countries.¹²³

The FATF has produced countless reports and guidelines regarding “best practices” in the fight to curb money laundering, condemning money laundering and calling for its member countries to “step up” current practices.¹²⁴ These well-intended efforts on the part of the FATF constitute a confusing and overlapping array of requirements.¹²⁵ The FATF is only able to list countries; it has no power to sanction non-complying countries.¹²⁶ The bewildering set of requirements issued by the FATF thus far, paired with the inability to enforce them cannot possibly allow for the FATF to effectively eliminate terrorist financing. The FATF must also be given the power to sanction non-complying countries.

“The biggest warning to Americans and the rest of the world is that they should not expect a quick feel-good victory, won with a new crop of laws or a few well-launched missiles,” says Antonio Fins, business writer for the Sun-Sentinel.¹²⁷ “It took better than 30 years from the time the United States identified the Mafia as a major threat to our country for us to eliminate it as significant,” said Patrick O’Brien, former U.S. Customs Special Agent, “We can win, but this war will take time. That is not pessimism, it is reality.”¹²⁸

123. Anita Ramasastry, *Follow the Money and Follow it Fast: The Need for an International Fiscal Coalition to Fight Money Laundering*, FindLaw’s Legal Commentary, available at http://writ.news.findlaw.com/commentary/20011015_ramasastry.html (last visited Mar. 5, 2003).

124. *Id.*

125. *Id.*

126. *Id.*

127. Fins, *supra* note 109.

128. *Id.*