Trends in International Money Laundering from a U.S. Perspective

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I. Introduction

During the last year or so, international organizations and governments have focused increasingly on extending anti-money laundering legislation to cover additional persons, products, and situations, while developing strategies and mechanisms to implement and enforce anti-money laundering laws and conventions. As politicians struggle to explain the inability to effectively control the growth of transnational crime and organized crime groups, the rhetoric and efforts to develop an international money movement enforcement regime have increased.

In 1999 and 2000, governments and international organizations continued their active efforts to increase regulatory and criminal enforcement of various laws to stem the tide of transnational crime. These efforts were reflected in the criminalization of various business and financial transactions (as reflected in the signing by at least 124 countries during the week of December 12-15, 2000 of the Convention against Transnational Organized Crime¹), the imposition of new due diligence measures on the private sector and the concomitant weakening of privacy and confidentiality laws, strengthened penalties for non-compliance with regulatory efforts against the private sector and governments, and new law enforcement techniques (e.g., undercover sting operations, wiretapping, expanded powers to search homes and businesses, and controlled deliveries).

In particular, a major development in 2000 was the almost simultaneous issuance of blacklists against non-compliant organizations. Within a one-month period, the Organization of Economic Cooperation and Development (OECD) issued its harmful tax competition initiative with a list of tax havens that did not agree to make a public commitment to bring their practices into compliance; the Financial Stability Forum (FSF) issued its report on offshore financial centers (OFC), classifying OFCs into three levels of compliance

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with international standards; and the Financial Action Task Force on Anti-Money Laundering (FATF) issued its list of fifteen non-complying countries.

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

The implications for international business planning are that financial institutions and their employees, and increasingly professionals, are on the front-line and responsible for increased due diligence (e.g., to know their clients, and to identify and report suspicious transactions). Some of the confidentiality that clients have come to expect is greatly eroded by the know-your-customer requirements to identify and report suspicious transactions and far-reaching enforcement cooperation agreements (i.e., Mutual Assistance in Criminal Matters Treaties and tax information exchange provisions). The implications for national governments and international organizations include the establishment of a new enforcement regime with new substantive and procedural laws and new institutions, such as the Financial Investigative Unit (FIU).

This article addresses trends in international anti-money laundering developments during the last couple of years.

II. Developments of International Organizations

Multilateral organizations have set the framework for anti-money laundering standards, mechanisms, and institutions. The U.N. pioneered the 1988 Vienna Convention against the Trafficking in Illegal Narcotic and Psychotropic Substances, which contains the requirements to criminalize money laundering and immobilize the assets of persons involved in illegal narcotics trafficking.

In 1989, the G-7 Economic Summit Group established the FATF, which operates out of the OECD headquarters in Paris. The FATF has issued a set of Forty Recommendations that concern legal requirements, financial and banking controls, and external affairs. It operates through regional groups in the Caribbean and more recently has established a similar group in Asia. The FATF and its regional counterparts issue an annual report that provides an overview of progress and problems in international anti-money laundering and an additional report on topologies and trends in laundering prevention and enforcement techniques. In addition, the G-10 Basle Group of Central Banks has actively provided guidelines for central bank supervisors and regulatory controls.


With respect to regional developments of international organizations, the Council of Europe's 1991 Convention on Laundering, Search, Seizure and Confiscation of Assets has become the major international convention that obligates signatory governments to cooperate against anti-money laundering from all serious crimes. The European Union, as a signatory to the Convention, and due to its own actions to combat financial crimes against the Communities, issued the 1991 Anti-Money Laundering Directive that likely will be revised and extended during mid-2001.

The Inter-American Drug Abuse Control Commission (CICAD) has provided its own recommendations. At its meeting on November 4-7, 1997, CICAD anti-money laundering experts recommended an ongoing assessment of compliance with standards and the creation of national FIUs. National governments and international organizations are striving to create mechanisms to regularly monitor compliance with international standards.

Increasingly, international organizations have cooperated and helped one another in formulating and implementing anti-money laundering strategy as well as developing an overall strategy vis-à-vis offshore financial centers. Because the recent FATF annual reports and topologies provide cutting edge discussions of the status of money laundering trends, they are discussed next.

International organizations issued three reports within three months of each other that cumulatively exerted significant pressure on many offshore financial centers. On April 5, 2000, the Financial Stability Forum (FSF) published a list ranking twenty-five leading OFCs according to their levels of compliance with international standards of supervision and transparency. On June 22, 2000, the FATF issued a review identifying non-cooperative jurisdictions on anti-money laundering. And on June 26, 2000, the Committee on Fiscal Affairs (CFA) of the OECD issued a report listing thirty-five jurisdictions that have been determined to be "tax havens" and have not made a commitment to bring their practices into compliance with the recommendations of the CFA.

A. Financial Action Task Force

On February 14, 2000, the FATF issued a report establishing a process to sanction non-cooperative jurisdictions.

1. Background

The FATF explains that in recent years there has been a sharp increase in the number of jurisdictions offering financial services without appropriate control or regulation and

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protected by strict bank secrecy. The proliferation of these new jurisdictions and products, along with the high mobility of funds and the rapid development of new payment technologies, has provided new means for laundering proceeds of serious crimes. The report explains that, to ensure the stability of the international financial system and effective prevention of money laundering, all financial centers must have comprehensive control, regulation, and supervision systems. All financial intermediaries or agents must be subject to strict obligations, especially as regards the prevention, detection, and punishment of money laundering.

FATF members will first identify the detrimental rules and practices that impair the effectiveness of their money laundering prevention and detection systems, as well as the results of their judicial inquiries in order to determine criteria for defining the non-cooperative countries or territories. The FATF prepared a list of countries and territories that meet the criteria, which are contained in both Part I and the Annex of the report. FATF members have agreed on a process for identifying the non-cooperative jurisdictions and on the necessary international action to encourage compliance by the identified non-cooperative jurisdictions. FATF members agreed on countermeasures to protect their economies against money from unlawful sources.

On June 22, 2000, the FATF released a review identifying non-cooperative jurisdictions on anti-money laundering. The fifteen jurisdictions that were found non-cooperative are: 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. Countries or jurisdictions investigated and found to adhere to the majority of the twenty-five stated FATF criteria are: Antigua and Barbuda, Belize, the British Virgin Islands, Cyprus, Gibraltar, Guernsey, the Isle of Man, Jersey, Malta, Mauritius, Monaco, Samoa, and St. Lucia.

The review also revealed a number of issues that arose in several jurisdictions and raised questions of interpretation. The following is a summary of the issues:

1. The practice in some jurisdictions of an "indirect obligation" to report suspicious transactions related to some criminal offenses, whereby reporting provides a defense against a charge of money laundering, rather than requiring a direct obligation to report;
2. The practice in some jurisdictions of permitting intermediaries to introduce businesses to banks and financial institutions where the obligation to verify customer identity was an obligation for the introducer rather than of the bank;
3. Difficulties in establishing the beneficial ownership of some legal entities, including companies issuing bearer shares or being owned by trusts;
4. The existence and development of IBCs, which can be formed by intermediaries and be subject to less verification and disclosure requirements rather than applied to the company sector as a whole; and
5. The lack of a strict regime to apply the new rules of customer identification for accounts open prior to their entry into force.

Because the FATF believes these five general issues require further clarification, it will start dialogue with concerned jurisdictions to discuss their implications, including the possibility

11. See Review to Identify Non-Cooperative Countries or Territories, supra note 8.
12. Id.
13. Id.
of changing their laws and practices. Hence, the FATF's review may result in some revisions in the substance of international money laundering standards.

In the future, if the fifteen listed jurisdictions maintain their detrimental rules and practices despite the encouragement to make certain reforms, FATF members will need to consider the adoption of countermeasures (e.g., economic sanctions). The FATF will place on the agenda of each plenary meeting the issue of non-cooperative jurisdictions, to monitor any progress that may occur, and to revise its findings, including removal of jurisdictions' names from the list. The FATF will continue to monitor weaknesses in the global financial system that could be exploited for money laundering purposes. This will lead to more jurisdictions being examined and future reports updating the FATF findings in relation to these matters.

Austria escaped the list because of its progress on legislation abolishing anonymous savings passbook accounts although other countries on the list (e.g., the Bahamas) had initiated legislation to correct the offending deficiencies. The FATF review was thought courageous by some observers because of its criticism and listing of larger countries, such as Israel and Russia. Russia has figured in many major laundering cases.

The way in which FATF countries implement the warning of national financial institutions to give special attention to business relations and transactions with persons in non-cooperative jurisdictions will be very important regarding the immediate and short-term impact as well as the success of the warnings in stimulating action in the so-called non-cooperative jurisdictions.

On June 15, 2000, the FATF issued a press release welcoming the "clear political commitment" by the Austrian government to abolish anonymous passbooks in accordance with a decision earlier this year by the FATF plenary meeting. It welcomed the introduction of a bill into Austria's Parliament to amend the Banking Act and its adoption by the First Chamber of the Austrian Parliament on June 7, 2000.

On February 1, 2001, during a presentation of its annual report, the FATF announced it was "not yet satisfied" that any of the fifteen jurisdictions cited for non-cooperation in the June 2000 FATF report had sufficiently rectified the gaps to be taken off the list.

According to the FATF, seven jurisdictions on the list—the Bahamas, the Cayman Islands, the Cook Islands, Israel, Liechtenstein, the Marshall Islands, and Panama—"have enacted most, if not all legislation needed to remedy the deficiencies identified in June 2000." The FATF said four jurisdictions—Dominica, Niue, St. Kitts and Nevis, and St. Vincent and the Grenadines—"have taken concrete steps to enact legislation and regulations" even though "a number of deficiencies still remain."

The FATF gave less positive grades to Lebanon and the Philippines, which the FATF characterizes as having started "processes to change laws and regulations" and Russia,
which is preparing legislation for introduction to the Duma. According to the FATF, only Nauru, a South Pacific island, has not yet communicated with the FATF on how it intends to address its alleged deficiencies.\(^{22}\)

During its annual plenary meeting in June 2001, the FATF will consider the results of the continuing dialogue with the non-cooperative countries, at which time it will reach a decision on what, if any, measures should be taken against jurisdictions still considered non-cooperation. Also at this time, the FATF will provide details on a second set of evaluations now occurring on other jurisdictions not named on the initial non-cooperative list. The FATF will also discuss emerging money laundering trends, as well as the proposed countermeasures law enforcement agencies should consider.\(^{23}\)

On June 22, 2000, the FATF issued its 1999-2000 annual report, which summarized its many initiatives, especially in three main areas: (1) extending the anti-money laundering work to all continents and regions of the world; (2) improving its members' implementation of the Forty Recommendations; and (3) improving the review of money laundering methods and countermeasures.\(^{24}\)

Among an important accomplishment during the year was the admission of Argentina, Brazil, and Mexico as full members of the FATF, the establishment of FATF-style regional bodies, and the improvement of the anti-money laundering systems in FATF members, especially Austria, whose suspension the FATF threatened over its lack of compliance.

Since September 1999, the three new Latin American members, Argentina, Brazil, and Mexico, have participated in the work of the FATF as observers. Their entry into the FATF is part of its expansion of its membership to a limited number of strategically important countries that could play a major role in their regions in the process of combating money laundering. The minimum criteria for admission to FATF are:

1. full commitment at the political level through implementation of the Forty Recommendations, released in 1996 in revised form, within a reasonable time frame (three years) and to undergo annual self-assessment exercises and two rounds of mutual evaluations;
2. full and active membership in the relevant FATF-style regional body, or preparation to work with the FATF or leadership in the establishment of a regional style body where none exists;
3. status as a strategically important country;
4. criminalization of laundering of the proceeds of drug and other serious crimes; and
5. laws that require financial institutions to identify their customers and to report unusual or suspicious transactions.

To indicate the application of some of the criteria, the report summarizes the first mutual evaluations of the three new members from the Americas.

In its 1999-2000 Survey of Money Laundering Trends and Techniques, the FATF reviewed the problems arising from increasing offers of financial services over the Internet, both by the growing number of existing mainstream financial institutions and a few pure Internet banks. The number of Internet transactions increases money-laundering risks due to the difficulty for banks offering such services to positively establish the identity of a particular transactor or even determine the location from which the transaction is made.

\(^{22}\) Id.

\(^{23}\) Id.

Alternative remittance systems such as the Black Market Peso Exchange, hawala/hundi, and the Chinese/East Asian systems also present difficulties since they are informal ways for cultural, ethnic, and linguistic groups to move money without the usual audit trail.

The survey reviews the role of company formation agents in money laundering and the ease with which they are able to take advantage of lax registration procedures and banking or corporate secrecy of certain jurisdictions to create layers of structures between illegal procedures. The FATF has proposed potential responses, such as a minimum standard in company formation procedures and measures against entities on the company register that do not comply with necessary procedures.

A trend is to use trade activity as both a cover for money laundering and as an actual money laundering mechanism.

While narcotic trafficking continues to provide the single largest source of criminal proceeds throughout the world, the proceeds from various types of fraudulent activity compose an increasing portion of illegal funds. Certain professions, such as solicitors, notaries, and accountants in connection with company formation agents, are often participants in laundering schemes, which have led a number of countries to adopt countermeasures.

To strengthen international cooperation, the FATF is preparing a guide for each FATF jurisdiction that sets forth the key features of each country's privacy and secrecy laws, its ability to share information and the conditions under which such information might be exchanged, and the position of each country on mutual legal assistance. The guide would have a list of contacts for financial regulators, law enforcement agencies, and relevant ministries, departments, or administrative authorities.

B. OECD

The OECD has twenty-nine members, including all of the EU Member States. In May 1996, the OECD Council of Ministers requested the OECD Committee on Fiscal Affairs "to develop measures for countering harmful tax competition on investment and financing decisions and the consequences for national tax bases." The OECD Committee on Fiscal Affairs established a task force known as the Special Sessions on Tax Competition to implement the request. At a meeting convened on April 8, 1998, the Council of Ministers adopted the report and a series of recommendations to its members. Luxembourg and Switzerland abstained and released statements, explaining their opposition to the report.

The OECD has delayed slightly the implementation of the OECD harmful tax competition (HTC) while strengthening cooperation with international organizations and informal groups friendly to the proposal as target jurisdictions such as Jersey and The Bahamas have issued a statement strongly critical of the initiative.

On January 8-9, 2001, the high level consultations on the OECD's HTC initiative resulted in progress for all sides. The targeted countries and the Commonwealth Secretariat

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27. For additional background on the report and its impact on offshore jurisdictions, see Bruce Zagaris, The Assault on Low Tax Jurisdictions: A Call for Balance and Debate, 8 TAX MGMT. INT'L J. 473, 474-500 (1999); see also Bruce Zagaris, Offshore Jurisdictions Tack as Gusting Winds Buffet Their Boats and Shores, 20 TAXES INT'L 823-28 (Feb. 21, 2000).
achieved the withdrawal of the OECD Framework for Collective Memorandum of Understanding (OECD Collective MOU)\(^2\) and other promises from the OECD, such as a more open and inclusive process. The OECD achieved an agreement to proceed with the initiative on the basic principles that have formed the essence of the HTC initiative. The OECD has surrendered time and a revised process in exchange for a process that will guarantee better implementation and enforcement.

The meeting also produced many interesting papers and discussions on the making and implementation of international tax policy, the respective roles of national governments and international organizations in legislating, implementing, and enforcing policies.

The meeting agreed to establish a task force. The task force will consist of Australia, Barbados, the United Kingdom, France, Ireland, Cook Islands, the British Virgin Islands, Malaysia, Malta, Japan, and Vanuatu. The task force has two main responsibilities: (1) to find a mutually acceptable political process to turn the three principles into commitments that, if successful, would replace the OECD’s process in the context of its Framework for a Collective MOU; and (2) to examine how the parties could continue the existing dialogue. It would examine how the recently created Global Forum on Taxation could evolve into a forum, that would promote global cooperation on tax matters, thereby responding to the Commonwealth Secretariat’s call for “truly inclusive Global Forum.”\(^2\) Work on the first task would start immediately with a meeting in January in London at the Commonwealth Secretariat in order to use the momentum for the Tokyo meeting on February 15-16, 2001.\(^3\)

C. UNITED NATIONS

During the week of December 12-15, 2000, 124 countries signed the United Nations Convention on Transnational Organized Crime\(^1\) during a four-day high-level signing conference in Palermo, Italy. An additional eighty countries are close to signing.\(^2\) At a ceremony on December 12, 2000, the Convention against Transnational Organized Crime (TOCC) issued and opened two protocols for signature, one to prevent, suppress, and punish trafficking in persons, especially women and children, and the other against the smuggling of migrants by land, sea, and air.

The Convention seeks to strengthen the power of governments in combating serious crimes. The new Convention will provide the basis for stronger common action against money laundering, greater ease of extradition, and measures on the protection of witnesses and enhanced judicial cooperation. It will also create a funding mechanism to assist coun-

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\(^{30}\) For additional discussion, see Bruce Zagaris, *Consultations in Barbados on OECD Harmful Tax Competition Initiative Yield Progress*, 17 INT'L ENFORCEMENT L. REP. 50-54 (Feb. 2001).

\(^{31}\) See Convention Against Transnational Organized Crime, supra note 1.

tries in implementing the Convention. The Convention aims to help countries synchronize their national laws so that no uncertainty will exist as to whether a crime in one country is also a crime in another.\textsuperscript{33}

Signatory countries undertake the following commitments in the TOCC: (1) to criminalize offenses committed by organized crime groups, including corruption and corporate or company offenses; (2) to combat money laundering and the proceeds of crime; (3) to accelerate and extend the scope of extradition; (4) to protect witnesses testifying against criminal groups; (5) to strengthen cooperation to locate and prosecute suspects; (6) to enhance prevention of organized crime at the national and international levels; and (7) to develop a series of protocols containing measures to combat specific acts of transnational organized crime.\textsuperscript{34}

III. Substantive and Institutional Issues

A. Establishment and Evolution of FIUs

A structural development of the international money movement enforcement subregime has been the establishment of a new law enforcement agency or group in each country that has primary responsibility for implementing anti-money laundering legislation and receiving and sending requests internationally. The FATF has recommended the establishment of such agencies, also known as FIUs. Although they have various names and acronyms (e.g., Financial Crimes Center or FinCEN in the United States, the National Crimes Intelligence Center or NCIC in England, and Austrac in Australia), they have similar responsibilities and structures, and are increasingly networking with one another.

B. Gatekeepers Initiative and Other Due Diligence

An international initiative has been to develop measures to facilitate better cooperation in counter-money laundering by gatekeepers. Professionals, such as lawyers and accountants, who advise on and help with transactions involving the movement of money, are deemed to have a special role in identifying, preventing, and reporting money laundering. Some countries, such as the United Kingdom and Cayman, already impose due diligence requirements on gatekeepers similar to financial institutions (e.g., know your client,\textsuperscript{35} "identify and report suspicious transactions,"\textsuperscript{36} and the exercise of care to not tip off persons engaging in suspicious transactions).

C. Tax Crimes and Money Laundering

A trend has been for law enforcement and regulatory authorities to combine international tax and counter-money laundering enforcement by: (1) ensuring that obligations to report

\textsuperscript{33} Id.


transactions relating to suspected criminal offenses apply even where such transactions are believed to involve tax offenses; and (2) permitting money laundering authorities to forward information to their tax authorities to support the investigation of tax-related crimes, and communicating such information to other jurisdictions so that it can be used by their tax authorities.17

IV. U.S. Developments

A. FinCEN Anti-Money Laundering Strategic Plan

On September 30, 2000, the Financial Crimes Enforcement Network of the U.S. Department of Treasury issued its Strategic Plan 2000-2005, which calls for enhanced efforts to combat international money laundering.38

FinCEN cooperates closely with other agencies and parts of the U.S. government and other governments to combat transnational crime and its impact on financial institutions and governments. FinCEN provides this help by supporting its FIU counterparts and facilitating the exchange of information among these institutions in support of anti-money laundering investigations. In addition, FinCEN, in coordination with other U.S. government agencies, helps foreign governments and institutions to combat transnational crime by assessing and evaluating money laundering controls in specific countries and by providing training and technical assistance.

FinCEN will help the U.S. Department of Treasury initiatives mentioned in the National Money Laundering Strategy for 2000,39 which include: providing training and assistance to countries implementing counter-money laundering measures; supporting expanded FIU membership in the Egmont Group; and providing country-specific expertise for policy development. FinCEN will increase its efforts to increase the international jurisdictions that represent a money laundering threat to the United States, and expand its expertise and analysis related to correspondent banking and offshore financial services.

During 1999, FinCEN has experienced three times the increase in the international cooperation it has provided to support U.S. law enforcement. It also helps foreign law enforcement agencies in their investigations.40

FinCEN has also listed its strategies for the five-year period. Among the international aspects, it will promote increased cooperation with and among foreign law enforcement authorities to exchange information about investigations and significant money laundering systems. With this connection, it will promote the networking FIUs through the Egmont Secure Web to increase the timely sharing of investigative information. By using its extensive knowledge base, FinCEN also plans to provide evaluations of countries' efforts to combat money laundering. FinCEN will provide training and technical assistance to cooperating countries in the development and operation of FIUs and the formulation and implementation of counter-money laundering strategies. FinCEN will support the Trea-

40. Id. at 17.
sury's efforts to highlight the importance of global counter-money laundering efforts bi-
laterally, multilaterally, and within intergovernmental bodies and multilateral organizations,
and to promote the adoption of international anti-money laundering standards, such as the
Forty Recommendations of the FATF.

FinCEN plans to measure progress in its strategies by reviewing key international work-
load measures that indicate the response to FinCEN's efforts to support FIU development,
and promote policies and the exchange of investigative information internationally to com-
bating money laundering in the United States and abroad.41

B. PROPOSED ANTI-MONEY LAUNDERING LEGISLATION

In the last session of Congress, many international money laundering bills were intro-
duced. They focused, inter alia, on extending the predicate offenses to U.S. money lan-
derers to include foreign crimes, specifically corruption of public officials, and requiring
the executive branch to impose reporting and/or restrictions against transactions from for-
eign jurisdictions that lack sufficient anti-money laundering laws and regulations.

C. FOREIGN NARCOTICS KINGPIN DESIGNATION ACT

1. The Law

On December 3, 1999, President Bill Clinton signed the Foreign Narcotics Kingpin
Designation Act (FNKDA),42 legislation that prohibits U.S. companies from doing business
with foreign firms that have links to drug “kingpins” throughout the world.43 The new law
provides a budget for intelligence operations to monitor activities of narcotics traffickers
and their related organizations. In a written statement accompanying the bill's signing,
President Clinton pledged to work with other countries in implementing the law in a way
to combat the national security threat posed to the United States by international drug
trafficking.

The provisions of the act are contained in Title VIII (International Narcotics Trafficking)
sections 801-11. Section 802 makes findings, namely that Presidential Decision Directive
42,44 issued on October 21, 1995 ordering U.S. agencies to increase the priority and re-
sources devoted to the threat international crime presents to national security, work more
closely with other governments to develop a global response to the threat, and use aggres-
sively and creatively all legal means available to combat international crime. Executive Or-
der Number 1297845 provides for the use of the authorities in the International Emergency
Economic Powers Act (IEEPA)46 to target and apply sanctions to four international nar-
cotics traffickers and their organizations that operate from Colombia (e.g., the Cali cartel).
Section 802(a)(3) finds that IEEPA was applied successfully to international narcotics traf-

41. Id. at 18.
43. The White House Office of Communications, Statement by President on Intelligence Authorization
Act, Dec. 3, 1999, available at 1999 WL 1102909; for background on the signing, see also Corbett B. Daly,
Clinton Signs Sanctions Measure Barring Business with Firms Tied to Drug Kingpins, DAILY REP. FOR EXEC. (BNA),
fickers in Colombia and based on that successful case study Congress believes similar authorities should be applied globally. Section 802(a)(4) finds the existence of a "national emergency resulting from the activities of international narcotics traffickers and their organizations that threatens the national security, foreign policy, and economy of the United States."47 U.S. policy will be to apply economic and other financial sanctions to significant foreign narcotics traffickers and their organizations worldwide to protect the national security, foreign policy, and economy of the United States.48

The goal of the new law is to provide authority to identify and apply sanctions globally to significant foreign narcotics traffickers, their organizations, and the foreign persons who provide support to those significant foreign narcotics traffickers and their organizations, whose activities threaten the national security, foreign policy, and economy of the United States.49

Under the law, the president must transmit to the various congressional committees50 a list in June of each year (starting June 1, 2000) that would name suspected drug traffickers and their U.S. connections. The director of the Central Intelligence Agency (CIA) and Cabinet members from the departments of Defense, Justice, State, and Treasury would make recommendations to the president on the individuals and organizations to include on the list. An unclassified version of the report will be available to the public.51 The reports must not disclose the identity of any person, if the director of the CIA determines such disclosure could compromise an intelligence operation, activity, source, or method of the United States or if the attorney general determines that such disclosure could reasonably be expected to compromise the identity of a confidential source or jeopardize the integrity or success of an ongoing criminal investigation or prosecution.52

The Act immediately blocks all assets and property of the foreign drug kingpins and associates (e.g., persons materially assisting in, providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a significant foreign narcotics trafficker; foreign persons the Treasury designates as owned, controlled, or directed by, or acting for or on behalf of, a significant foreign narcotics trafficker the president designates; and any foreign person the Treasury designates as playing a significant role in international narcotics trafficking).53 The law also prohibits U.S. persons from engaging in any transaction or dealing in property or interests in property of any significant foreign narcotics trafficker and any transaction or dealing by a U.S. person or within the United States that evades or avoids, or has the effect of evading or avoiding, and any attempt or conspiracy to violate any of the prohibitions of the Act.54

The secretary of the Treasury is empowered to issue regulations, instructions, licenses, or otherwise investigate, regulate, or prohibit any transactions in foreign exchange, cur-

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47. Foreign Narcotics Kingpin Designation Act, § 802(a)(4).
48. Id. § 802.
49. Id. § 803.
50. The Congressional Committees are the Permanent Select Committee on Intelligence, and the Committees on the Judiciary, International Relations, Armed Services, and Ways and Means of the House of Representatives; and the Select Committee on Intelligence, and the Committees on the Judiciary, Foreign Relations, Armed Services, and the Finance of the Senate.
51. Foreign Narcotics Kingpin Designation Act, § 804.
52. See id. § 804(e).
53. Id. § 805(b).
54. Id. § 805(c).
rency, or securities as well as transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interests of any foreign country or a national thereof. The Treasury can also investigate, block, and take a range of actions over transactions or any property in which any foreign country or national thereof has any interest, by any person or with respect to any property, subject to U.S. jurisdiction. The Treasury may require record keeping, reporting, and production of documents to carry out the purposes of the Act.

The Act states that no person can "be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to, and in reliance on this title, or any instruction, or direction" under the title. While this provision seems novel in the context of the IEEPA, very few U.S. persons can withstand the disabilities that attend an administrative or court enforcement action under IEEPA. The Act gives broad rulemaking authority to the Treasury.

Penalties under the law include fines of up to $10 million for entities and ten years imprisonment for willful neglect or refusal to comply with orders. An officer, director, or agent of any entity who knowingly participates in a violation is subject to imprisonment of not more than thirty years and a fine of not more than $5 million. A person who violates any license, order, rule, or regulation is subject to a civil penalty not to exceed $1 million. A person can seek judicial review of a civil penalty only to the extent allowed in 5 U.S.C. § 702.

The law requires the Immigration and Nationality Service (INS) to exclude entry into the United States by any alien who the INS knows or has reason to believe is or has been an illicit trafficker of any controlled substance or in any listed chemical, or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in such activity; or the spouse, son, or daughter of an alien who is inadmissible due to the aforementioned international narcotics activity if such spouse, son, or daughter has within the previous five years obtained any financial or other benefit from the illicit activity of the alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity.

The Act establishes a Judicial Review Commission on Foreign Asset Control. Its five members will be appointed by the congressional intelligence committees and must have an appropriate security clearance. The duties of the Commission are to conduct both a review of the current judicial, regulatory, and administrative authorities relating to the blocking of assets of foreign persons by the United States and a detailed examination and evaluation of the remedies available to U.S. persons affected by the blocking of assets of foreign persons by the United States. The Commission is authorized to hold hearings, take testimony, and receive evidence. Additionally, the Commission may secure directly from any executive agency information, suggestions, and statistics. The Commission must handle and protect

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55. Id. § 806(a).
56. Id. § 806(b).
57. Id. § 806(c).
58. Id. § 806(d).
59. Id. § 807(a)(1).
60. Id. § 807(a)(2).
61. Id. § 807(b).
62. Id. § 807(c).
63. Id. § 809.

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all classified information provided to it in accordance with applicable statutes and regulations. The law was signed and took effect on December 3, 1999.

When President Clinton signed the bill into law, he stated that the United States looks forward to "working with appropriate host government authorities to pursue additional measures against those designated." At present, the weakness of the Act is its unilateral extraterritorial nature. President Clinton stated his concern about several parts of the Act as well as segments of the accompanying joint explanatory statement. Early on, the Zedillo administration has opposed economic sanctions for drug kingpins. Another controversial aspect of the new Act is its apparent designation of foreign entities as connected with, owned by, or associated with foreign drug kingpins and the associated blocking, immigration exclusion, and other disabilities, without an opportunity for the entities to participate in any way in the designation process. The Act indicates the continued and even extended reliance by the United States on unilateral economic sanctions in areas of enforcement, such as counter-drug policy.

2. The First List of Kingpins

On June 1, 2000, President Clinton identified twelve foreign persons as significant foreign narcotics traffickers pursuant to the FNKDA. The list contained no surprises. Each of the persons named are already under indictment and have been cited for many years as drug lords.

The persons named on the list include some of the major Mexican drug kingpins: José and Luis Amezcua-Contreras, brothers and amphetamine traffickers who also are imprisoned; Ramon Arellano-Felix, also known as El Comadante, a member of the FBI's Top 10 list and a leader of Mexico's violent Tijuana Cartel and his brother Benjamin Arellano-Felix; Rafael Caro-Quintero, who operated out of the Sonora area and is imprisoned for the murder of Drug Enforcement Administration agent Enrique Camarena in 1985; and Vicente Carrillo Fuentes, head of the Juarez Cartel. Also on the list are Chi Fu Chang, a Burmese national and warlord also known as Khun Sa; Chinese national Wei Hsueh-Kang; two persons who have resided and caused controversy in St. Kitts, Noel Timothy Heath and Glenroy Vingrove Matthews; and two Nigerians, Abeni O. and Oluwole A. Ogungbuyi, husband and wife.

On the OFAC list, the names of the twelve persons have been put into the various versions of OFAC's listing of Specially Designated Nationals and Blocked Persons with the identifier SDNTK to distinguish them from the SDNT designation.

64. Id. § 810.
65. Id. § 811.
68. For the list and a discussion of it, see Letter from the President to Select Committee Chairmen (June 2, 2000), at http://ofcn.org/cyber.serv/teledem/pb/2000/jun/msg00012.html.
Soon hundreds of businesses and individuals associated with the named kingpins will be designed as Tier 2 entities under the Act, which will also bar them from doing business with U.S. firms. The Tier 2 names will be even more important because many of them may be engaging in legitimate and thriving business. Numerous companies designated as Tier 2 entities in Colombia have gone out of business.\footnote{Vernon Loeb, U.S. Lists 12 Foreigners as Drug Kingpins, Wash. Post, June 3, 2000, at A5.}

The White House must submit the list to certain congressional committees by June 1 each year, and to follow it by July 1 with a confidential outline of sanctions the White House intends to impose on individuals or businesses allegedly associated with drug lords.\footnote{President Moves to Seize U.S. Assets of a Dozen Alleged Drug Lords, at http://www.cnn.com/2000/US/06/02/druglords/index.html.} The president need not obtain congressional permission before imposing sanctions.\footnote{See id.} The persons named or affected can appeal to the Treasury Department or use the counts to challenge the sanctions against them.\footnote{See id.}

3. The Regulations

On July 5, 2000, the Office of Foreign Assets Control of the U.S. Department of Treasury issued the Foreign Narcotics Kingpin Sanctions Regulations. The Regulations were issued pursuant to the FNKDA.\footnote{Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901-1908, 8 U.S.C. § 1182 (1994).}

The Act authorizes sanctions against significant foreign narcotics traffickers and their organizations. Section 805(b) of the Act blocks all property and interests in property within the United States or within the possession or control of any U.S. person that are owned or controlled by significant foreign narcotics traffickers, as identified by the president, or foreign persons designated by the secretary of the Treasury, in consultation with the attorney general, the director of the Central Intelligence Agency, the director of the Federal Bureau of Investigation, the administrator of the Drug Enforcement Administration, the secretary of Defense, and the secretary of state.\footnote{21 U.S.C. § 1904.} Persons are designated if they are found to be:

1. materially helping in or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a significant foreign narcotics trafficker or foreign persons designated by the secretary of the Treasury pursuant to Section 805(b) of the act;
2. owned, controlled, or directed by, or acting for or on behalf of, a significant foreign narcotics trafficker or foreign persons designated by the secretary of the Treasury pursuant to Section 805(b) of the act; or
3. playing a significant role in international narcotics trafficking.\footnote{Id.}

Persons coming within any of the above three categories are referred to as specially designated narcotics traffickers.

The regulations are found in Section 31 of the Code of Federal Regulations, part 598. The regulations are separate from, and independent of, the Narcotics Trafficking Sanctions,\footnote{Narcotics Trafficking Sanctions, 31 C.F.R. § 536 (2000).} which implement the national emergency declared in Executive Order 12978 of
October 21, 1995, with respect to significant foreign narcotics traffickers based in Colombia.79 The Colombia foreign narcotics regulations are not affected by the new regulations.

Subpart B of the regulations, which implements Section 805(a) of the Act, provides that specially designated narcotics traffickers are subject to any and all sanctions authorized by the Act until revoked or waived.80

Section 598.202 implements Section 805(b) of the Act by providing that property and interests in property owned or controlled by specially designated narcotics traffickers and within the United States or within the possession of control of a U.S. person are blocked.81

Section 598.203 of the regulations implements Section 805(c)(1) of the Act by prohibiting transactions and dealings by U.S. persons or within the United States in property or interests in property of specially designated narcotics traffickers.82

Section 598.204 implements Section 805(c)(2) of the Act by prohibiting transactions that have the effect of evading or avoiding, and attempts or conspiracies to violate, the prohibitions contained in this part.83

Sections 598.205 and 598.206 of the regulations set forth the effect of transfers of blocked property in violation of the regulations and the required holding of blocked property in interest-bearing accounts.84

Pursuant to Section 808 of the Act, subpart C of the regulations defines key terms used in the regulations. Subpart D of the regulations provides interpretive sections concerning the general prohibitions of subpart B. For instance, Section 598.407 clarifies that the prohibitions in Section 598.203 containing prohibitions of dealing with blocked accounts apply to offshore transactions, that is, transactions with any U.S. person in a location outside the United States with respect to property in which the U.S. person knows, or has reason to know, that a specially designated narcotics trafficker has or has had an interest since the effective date. The “has reason to know” standard is a difficult one for U.S. persons, especially since they can suffer criminal and administrative penal sanctions if they do not meet the standards. Section 598.408 of the regulations provide for continuation of the sanctions when there occurs an alleged change in ownership or control of an entity designated as a specially designated narcotics trafficker.85

Section 598.406 prohibits the provision of services performed by U.S. persons, wherever located, on behalf of or for the benefit of a specially designated narcotics trafficker, or with respect to property interests of a specially designated narcotics trafficker.86 For instance, without a license, a U.S. person may not, except as authorized by or pursuant to this part, provide legal, accounting, financial, brokering, freight forwarding, transportation, public relations, or other services to a specially designated narcotics trafficker. Section 598.507 authorizes the provision of certain legal services, provided that all receipt of payment for such services is specifically licensed.87 If transactions are prohibited but are found to be consistent with U.S. policy, subpart E may authorize them by a general license or by a

80. See id. § 598.201.
81. See id. § 598.202.
82. See id. § 598.203.
83. See id. § 598.204.
84. See id. §§ 598.205-.206.
85. See id. § 598.408.
86. See id. § 598.406.
87. See id. § 598.507.
specific license issued pursuant to the procedures contained in subpart D of part 401 of chapter V. The general licenses contained in subpart E include an authorization for U.S. financial institutions to debit blocked accounts for normal service charges.  

In Section 598.507, the provision of certain legal services is authorized, provided that the service providers obtain a specific license for the receipt of payment for such services.  

Subpart F of the regulations implements Sections 806(a)-(b) of the Act by referring to the Reporting and Procedures Regulations in subpart C of 31 C.F.R. part 501.  

In subpart G, Section 807 of the Act is implemented. Civil and criminal penalties applicable to violations of the regulations are detailed. Section 598.701 provides the civil and criminal penalties prescribed in Sections 807(a)-(b) of the Act. Section 598.706 implements Section 80(c) of the Act by providing that civil penalties are subject to judicial review only to the extent provided in 5 U.S.C. § 702.  

Subpart H contains certain administrative procedures applicable to this part and implements others by reference to the Reporting and Procedures Regulations in subpart D of 31 C.F.R. part 501, which have provisions on administrative procedures. Section 598.802 implements Section 805(e)(3) of the Act by clarifying that records or information obtained or created in the implementation of the regulations are not subject to disclosure under Section 552(a)(3) of the Freedom of Information Act.  

The exemptions of records or information obtained or created in implementing the regulations are of critical importance because a basic criticism of the regulations is the lack of procedural due process for persons defined as specially designated narcotics traffickers, and the harsh criminal and/or administrative penal sanctions that persons can suffer if they violate the law and regulations. The exemption of all records or information obtained or created in the implementation further exacerbates the fairness problem. This Achilles heel of the Act and regulations will likely encounter legal and constitutional challenges. The lack of procedural due process is complicated by the proviso that "(d)iffering foreign policy and national security contexts may result in differing interpretations of similar language among the parts of this chapter." In other words, to the extent an aggrieved person or other interested person tries to invoke the rule of law, the administrators can base differing and discriminatory treatment on divergent foreign policy and national security contexts.  

Section 598.803 delegates to the Office of Foreign Assets Control those actions that the secretary of the Treasury is authorized to take pursuant to the Act. Pursuant to Section 805(e)(3) of the Act, Section 501.805(a) is amended to clarify the inapplicability of Section 552(a)(3) of the FOIA.  

In implementing the regulations, OFAC will seek to consult with foreign governments where appropriate. Indeed, from the start, President Clinton's concept behind imposing sanctions against designated narcotics traffickers and their associates was to stimulate a multilateral sanction program. However, as of now, even with the passage of five years since the announcement of the sanction program, no governments have joined the U.S. narcotics sanctions.  

The extension of Part 536 Narcotics Trafficking Sanctions Regulations to Foreign Narcotics Kingpin Sanctions Regulations shows the mission creep of the application of economic economic
sanctions to diverse issues, for example, first Colombian organized crime traffickers, and now foreign narcotics kingpins and their families and associates.


On December 4, 2000, the Judicial Review Commission on Foreign Asset Control issued a report to Congress pursuant to the FNKDA\textsuperscript{92} recommending greater openness and responsiveness by the Office of Foreign Asset Control and greater formal administrative review of final OFAC actions. The Commission found that the provision of the Act restricting judicial review of designations by the secretary of the Treasury, while not unconstitutional, is both unnecessary and inconsistent with the accountability of government actions inherent in sanctions programs established pursuant to the IEEPA\textsuperscript{93} and in numerous other regulatory schemes.

D. Regulatory Developments

1. FinCEN Advisories Against Non-Cooperative Countries

Within a couple of days of the FATF report on non-cooperative countries, FinCEN issued advisories against each of the fifteen non-cooperative jurisdictions. In Category 1 involving the Bahamas, the Cayman Islands, Israel, and the Philippines, financial institutions dealing with transactions originating in or routed to or through these jurisdictions or transactions involving entities organized or domiciled, or persons maintaining accounts, in the identified jurisdiction, are requested to consider carefully how the deficiencies in the particular jurisdiction's counter-money laundering controls could effect the possibility that the transactions are being used for illegal purposes. Financial institutions are asked to provide enhanced scrutiny to transactions or banking relationships that do not involve established and adequately identified and understood, commercial companies or investment companies, for example, IBCs, as opposed to well-known operating businesses and investment companies.

Category 2 applies to Panama and Russia. In addition to the provisos in Category 1, the advisories also ask financial institutions to pay special attention to specific types of transactions that have been identified as being associated with money laundering in these jurisdictions. For Panama, the advisory advises scrutiny for large transactions involving cash, third-party checks and wire transfers, and to transactions originating in or routed to or through, and entities organized or domiciled in, the Colon Free Trade Zone. Careful scrutiny should be given to large transactions involving cash and wire transfers with Russia.

Category 3 applies to the Cook Islands, Dominica, Lebanon, Liechtenstein, the Marshall Islands, Nauru, Niue, St. Kitts and Nevis, and St. Vincent and the Grenadines. Financial institutions in the United States are asked to give increased attention to any transaction originating in or routed to or through the identified jurisdictions or involving entities organized or domiciled, or persons maintaining accounts, in the identified jurisdiction. In contrast to the first two categories of advisories, financial institutions are not requested to consider the particular jurisdiction's specific anti-money laundering deficiencies or to focus on operating businesses and investment companies that are not well known.

\textsuperscript{92} See Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901-08.

In all of the advisories, FinCEN directs financial institutions subject to suspicious activity reporting requirements to examine carefully transactions of $5,000 or more of the types covered by the advisory to determine if the filing of a Suspicious Activity Report (SAR) is required.  

2. SAR Report

In October 2000, the Bank Secrecy Act Advisory Group, a joint government-private sector group, published for the first time the Suspicious Activities Report (SAR) Review: Trends Tips & Issues. Significantly, the report reflects a number of important trends with respect to international money laundering enforcement in the United States.

The report is the result of a continuing collaboration among U.S. financial institutions, federal law enforcement, and regulatory agencies to provide meaningful information about the preparation, use, and utility of SARs filed by financial institutions. The publication reflects the recognition of both the relevant government agencies and the country’s financial institutions of the desirability of a continuing public exchange of information about the SAR system and its results.

The Bank Secrecy Act Advisory Group will publish the SAR Activity Review semiannually in October and April, beginning in October 2000. In addition, analytic reports, issue papers, and other publications related to or resulting from information contained in the Review may be published separately.

a. National Trends and Analyses

One section of the SAR Activity Review indicates examples and patterns of suspicious activity reported in the national database.

(i) Shell Company Activity. During the first half of 2000, the SARs filed revealed several instances of activity involving suspicious wire transfer patterns. Many of these suspicious wire transfer patterns involve shell companies, that is, corporations that engage in no apparent business activity and that only serve as a conduit for funds or securities. The activities often also involve foreign transactions located in jurisdictions considered non-compliant or problematic, as reported in FinCEN advisories.

Several types of suspicious wire transfer transactions have been identified, each involving geographically complicated wire transfer routing (originator, beneficiary, or transit/intermediary bans) and/or geographically complex originator and beneficiary activity. More than $500 million in suspicious wire transfers have been reported in relation to this type of activity.

Common patterns of underlying suspicious activity have been observed as follows: a lack of evidence of legitimate business activity, or any business operations at all, undertaken by many of the companies; unusually large numbers of wire transfers (several thousand wires totaling more than $500 million); transactions conducted in bursts of activities within a short period of time; beneficiaries maintaining accounts at foreign banks that have been the subject of previous SAR reporting due to suspicious wire transfer activity; and reappearing


beneficiary banks located in offshore jurisdictions, the account of at least one of which has been closed by the reporting financial institution due to overall suspect activity.

(ii) Possible Reflections of Russian Criminal Activity. Law enforcement information shows a steady increase in Russian organized criminal activity in the United States since the early 1990s. Senior law enforcement officials requested assistance in comprehending the scope of financial activity that may be connected to Russian organized crime groups in the United States. An analysis of Bank Secrecy Act (BSA) data shows that SARs filed by U.S. financial institutions for suspected structuring/money laundering activity involving Russian transactors, owners, or citizenship averages approximately $200 million annually.

(iii) Increased SAR Reporting Involving Mexico. SARs show a shift in suspected money laundering activity involving Mexico. Instead of transiting through Mexico en route to Colombia or other Central and South American destinations, a shift has occurred toward using techniques and schemes in which drug proceeds are cycled through Mexico directly back into the United States. SARs show patterns of large wire transactions ($1.5 million or more per transaction) moving funds to U.S. payees from Mexican money exchange houses and other financial institutions, which may in part, be attributable to changes in the laundering cycle. In general, such changes in patterns are believed to come from the heightened profile of Mexico-based criminal groups in drug trafficking in the United States, which create a corresponding increase in the threat of money laundering activity linked to Mexico.

(iv) Non-Compliant Countries. In July 2000, FinCEN issued fifteen advisories with respect to deficiencies in the anti-money laundering controls of the following countries: The Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russian Federation, St. Kitts and Nevis, and St. Vincent and the Grenadines. Financial institutions were instructed to consider such deficiencies in determining whether transactions involving each of the fifteen countries required the filing of a SAR.

FinCEN is now analyzing SAR filings for each of the designated countries to determine if the overall volume of SARs and the nature of the suspicious activities have changed as a result of the advisory process. Feedback on the results of the post-advisory analysis will be furnished at a subsequent date once sufficient data has been accumulated to permit a meaningful comparison with the pre-advisory baseline information for each of the affected countries.

b. Law Enforcement Cases

The SAR Activity Review has a section providing law enforcement agencies the opportunity to summarize investigative activity in which SARs and other BSA information played an important role in a successful investigation and/or prosecution of criminal financial activity.

In Florida, a SAR filing resulted in the identification of additional fraud committed by a subject already under investigation by special agents within the U.S. Secret Service's (USSS) Tampa Field Office. From December 1996 through May 1997, investigators identified an individual who deposited counterfeit commercial checks into various bank accounts opened under aliases, and then immediately wired the funds from the accounts opened under aliases to accounts in Nigeria. Because these checks were drawn against true bank accounts, several

days would elapse before the counterfeit checks were detected. Sometimes, the counterfeit checks actually cleared the bank that the checks were drawn upon. In total, the subject had deposited and collected on $400,000 in counterfeit commercial checks.

In June 1997, a financial institution filed a SAR form stating that the subject (using an alias) had opened an account at the bank using a small account of money. A few days later, $85,000 in commercial checks was deposited into the account. A short time later, the subject tried to wire a large portion of the $85,000 to Nigeria through a bank in New York City. Personnel within the original bank inquired about the sporadic account activity and the wire transfer. As a result, they did not wire the funds and identified the commercial checks as counterfeit. This information was included on the SAR form filed by the financial institution. The USSS investigators then learned that the subject used the name identified by the bank as an alias. Due to this SAR filing, investigators were able to make the required link and attributed additional fraud losses to the defendant. The defendant was arrested, convicted, and sentenced to forty-eight months in prison.

The U.S. Customs Service in Chicago investigated a Russian and Lithuanian organized crime group that was heavily involved in the smuggling of stolen luxury vehicles out of the United States into Europe. Independent analysis of a SAR filing indicated suspicious behavior relating to the Russian organized crime network that was under investigation. The SAR filing was subsequently disclosed to the Customs case agent who used the filing to identify additional associates and bank accounts. The information contained in the SAR filing contributed to the successful prosecution of the suspects and the seizure and forfeiture of assets.

A U.S. Customs Service investigation in Houston of a criminal organization engaged in the repackaging and exportation of stolen commercial baby formula was helped by an analysis of SAR filings and CTRs. The criminal network, which operated in several states, laundered their illicit profits through financial institutions to the Middle East. An analysis of CTRs monitored the movement of these funds. Thereafter, SAR filings were discovered that underscored the suspected transactions. An analysis of the SAR filings and CTRs, together with a combination of various investigative techniques, resulted in multiple indictments on various federal offenses, including money laundering, and the identification and seizure of several bank accounts.

E. Public Figures

On January 16, 2001, the U.S. Department of Treasury, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the Department of State announced the issuance of new guidance to help U.S. financial institutions avoid transactions that may involve the proceeds of foreign official corruption. The guidance, which was issued to support Action Item 2.1.1 of the U.S. National Money Laundering Strategy for 2000, encourages U.S. financial institutions to apply enhanced scrutiny to their private banking and similar high

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98. See Money Laundering Strategy, supra note 39.
dollar accounts and transactions where such accounts or transactions may involve the proceeds of corruption by senior foreign political figures, their immediate family or close associates. The guidance provides a set of suggested account establishment and maintenance procedures designed to help institutions obtain appropriate information on accounts held by such persons, as well as a list of potentially suspicious transactions that will often warrant enhanced scrutiny.

Financial institutions are encouraged to develop and maintain enhanced scrutiny practices and procedures designed to detect and deter transactions that may involve the proceeds of official corruption by senior foreign political figures, their immediate family, or their close associates. These practices and procedures are part of institutions' due diligence anti-money laundering policies and procedures and should ensure that institutions report such activity as suspicious in accordance with applicable suspicious activity reporting requirements. Financial institutions should review their practices in this area as part of their overall internal and external audit.

A financial institution can elect to apply the advice in the guidance depending on the extent of the risk determined to exist by each institution as a general matter, given its normal business operations, and in each case as it is presented. Each financial institution must exercise reasonable judgment in designing and implementing policies and procedures concerning senior foreign political figures, their immediate family and their close associates, and for determining any necessary actions to be undertaken by the institution regarding their transactions.

In undertaking the reasonable steps and reasonable efforts suggested in the guidance, a financial institution should not rely solely on information obtained from the covered person or his or her associates. Instead, it should try to obtain additional information from its organization and from independent sources.

A “covered person” is defined as a person identified in the course of normal account opening, maintenance, or compliance procedures to be a “senior foreign political figure,” any member of a senior foreign political figure’s “immediate family,” and any “close associate” of a senior foreign political figure.

A “senior foreign political figure” is a senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not), a senior official of a major foreign political party, or a senior executive of a foreign government-owned corporation. In addition, a “senior foreign political figure” includes any corporation, business or other entity that has been formed by, or for the benefit of, a senior foreign political figure.

The “immediate family” of a senior foreign political figure typically includes the figure’s parents, siblings, spouse, children, and in-laws.

A “close associate” of a senior foreign political figure is a person who is widely and publicly known to maintain an unusually close relationship with the senior foreign political figure, and includes a person who is in a position to conduct substantial domestic and international financial transactions on behalf of the senior foreign political figure.

In conjunction with financial institutions’ policies, practices, and procedures financial institutions are encouraged to employ the practices set forth in the guidance when establishing and maintaining a business relationship with a covered person.

1. Ascertain the Identity of the Account Holder and the Account’s Beneficial Owner

If, during the normal account opening, maintenance or compliance procedures with regard to private banking or other applicable accounts, a financial institution ascertains in-
formation indicating that the beneficial owner of the account may be a covered person, the institution should undertake reasonable efforts to determine whether, in fact, a covered person holds or will hold a beneficial interest in the account. If, after making a reasonable effort to make this determination, substantial doubt remains as to whether a covered person holds a beneficial interest in the account, the financial institution may refuse to open the account if the institution is not able to determine the capacity in which, and on whose behalf the proposed account holder is acting.

If a financial institution is requested to open an account for a covered person who comes from a "secrecy jurisdiction," the financial institution should require the covered person to provide the information that the institution typically collects to identify the client and his/her source of funds or wealth at the outset of the relationship, and to waive any secrecy protections provided by local law so that the institution is able to obtain the information that the institution typically collects when opening an account for a U.S. resident. A secrecy jurisdiction is considered a country or territory that, among other things, does not participate in international counter-money laundering information sharing arrangements or, either by law or practice, allows account holders to forbid financial institutions from cooperating with international efforts to obtain account information as part of an official investigation.

2. Obtain Adequate Documentation on the Covered Person
   When establishing a business relationship with a covered person, the financial institution should obtain from the person (or others working on his or her behalf) documentation adequate to identify the covered person, and take reasonable steps to assess the covered person’s business reputation.

3. Understand the Covered Person’s Anticipated Account Activity
   When establishing an account for a covered person, the financial institution should document the purpose for opening the account and the anticipated account activity, and take reasonable steps to determine whether the covered person has any legitimate business or investment activity in the United States that would make having an account in the United States a natural occurrence.

4. Determine the Covered Person’s Source of Wealth and Funds
   Each financial institution requested to establish an account for a covered person should undertake reasonable efforts to determine the source of the covered person’s wealth, including the economic activities that generated the covered person’s wealth, and the course of particular funds involved in establishing the relationship. The institution should take reasonable steps to determine the official salary and compensation of the covered persons as well as the individual’s known legitimate sources of wealth apart from his or her official position.

5. Apply Additional Oversight to the Covered Person’s Account
   The decision to accept or reject establishing an account for a covered person should directly involve a more senior level of management than is typically involved in decisions regarding account opening. The institution should record all material decisions taken in the course of establishing an account for the covered person. An institution with such an account for a covered person should review annually, or more frequently as events dictate, each such covered person’s account to determine whether to continue doing busi-
ness with the covered person, including consideration of pertinent account activity and
documentation.

When a financial institution conducts transactions for or on behalf of covered persons,
it should be alert to features of transactions that are indicative of transactions that may
involve the proceeds of foreign official corruption. The guidance sets forth a non-exhaustive
list of potentially questionable or suspicious activities to illustrate the sort of transactions
involving covered persons that often will warrant enhanced scrutiny that do not replace,
supersede, or supplant financial institutions' legal obligations regarding potentially suspi-
cious transactions generally.

In addition to a financial institution's existing information sources, fourteen sources of
information are given that may assist financial institutions in determining whether to con-
duct business with an individual who may be a covered person, and in determining whether
such a person may be engaging in transactions that may involve proceeds derived from
official corruption (e.g., the annual U.S. National Money Laundering Strategy, FinCEN
advisories and publications, the evaluations of the annual International Narcotics Control
Strategy Report, and annual Corruption Perceptions Index of Transparency International).

The guidance provides sophisticated means to ascertain and deal with investments by
senior political figures, their families, and their agents. It will help combat the laundering
of proceeds by corrupt political figures. It will also complicate due diligence for financial
institutions. One of the initial responses is likely to be the "balloon effect," whereby covered
political figures will move their money to financial intermediaries in the United States or
elsewhere that are not covered by the guidance. This in turn will lead the international
community to campaign against those financial intermediaries and/or countries not covered,
especially the smaller jurisdictions that do not have membership in the international or-
ganizations or entities (e.g., FATF) making decisions.

F. Case Law: Extraterritorial Application of Anti-Money Laundering Laws

On November 30, 1999, the U.S. District Court for the Southern District of New York
applied U.S. money laundering laws extraterritorially, marking the second reported decision
applying such laws extraterritorially in United States v. Approximately $24,829,681.80 in
Funds (Plus Interest). In upholding the money laundering conviction for a wire fraud pred-
cipate, the court ruled that the U.S. money laundering laws need not involve actual physical
activity within the United States and a person may act from abroad within the United States
"electronically or otherwise." In this case, the defendant started a transfer of funds from
New Orleans to London while he was in the United Kingdom.

V. Summary and Conclusion

At the start of the new millennium most jurisdictions have enacted anti-money laundering
regimes. However, the substance, procedure, and resources of the regimes vary widely, and
large gaps enable transnational criminals to launder money by taking advantage of the

Dist. LEXIS 18499 (Nov. 29, 1999).
100. Id.
101. See id. at 4.
differences in the laws and gaps in international cooperation. Indeed, many sophisticated criminals conduct their criminal activities, including the movement of their money, in an increasingly borderless world. Whether they are producing and distributing drugs, smuggling arms, aliens, endangered species, or perpetrating different frauds, they need not leave their house or town, especially if they use modern technologies. They can employ their own intelligence to learn of the latest anti-money laundering laws and techniques, use multiple types of communication, encryption to safeguard the privacy of their communications, and use a pyramid of employees based on a franchise system to minimize their capital expenditures and business and criminal risks.

Criminals utilize alternative banking systems, such as offshore financial centers, the Colombian black market peso exchange system, the non-bank financial sector, cyber-methods, free trade zones, secrecy, and intermediary vehicles to conceal, segregate, impose multiple entities, and deter identification and investigation of their money movement methods. Criminals continue to increase the smuggling of criminal cash from countries for placement into financial systems abroad, often taking advantage of many European and Western Hemisphere jurisdictions that have no cross-border records tracking the movement of cash. Money launderers increasingly use non-financial businesses or professionals related to banking institutions. They obtain the assistance of professionals, such as accountants, notaries, lawyers, real estate agents, and agents for the purchase and sale of luxury items, precious metals, and consumer durables, textiles and other products involved in the import-export trade.

The use of private banking facilities and public figure accounts in banks and fiduciary entities enable criminals and their agents to enter the international financial system without subjecting themselves to the normal know-your-customer, suspicious transactions reporting, and other due diligence that may impede the laundering of crime proceeds.

The emphasis at the start of the millennium on the strengthening of the emerging international money movement enforcement regime is increasingly on implementation and enforcement. On universal, regional, and subregional levels, international organizations focus on multilateral evaluations and even imposing sanctions on jurisdictions not complying with the anti-money laundering standards.

A major focus of anti-money laundering enforcement will be against non-complying countries, especially official financial centers (OFC). Indeed, the United Nations, the OECD, the FATF, the Basle Group, the multilateral development banks, and the regional organizations, such as the EU and OAS, all have programs to combat the pernicious aspects of improperly regulated financial products and service providers from OFCs. In the Western Hemisphere, the emphasis to exert pressure on OFCs is starting to bear fruit. The advisories issued by the United States and Britain against Antigua and Barbuda have resulted in amendments to the Antiguan anti-money laundering laws, enforcement actions against some of the offending financial institutions and their owners, and increased resources to anti-money laundering and financial supervisory initiatives. Similarly, the hiring of new staff in St. Vincent and the Grenadines indicates that the anti-money movement enforcement initiatives have gotten the latter’s attention. While several Caribbean governments have opposed some of the initiatives, none of them have taken meaningful legal action. The Antiguan government’s threat to initiate action in the U.N. or World Trade Organization is the first threatened action.

The private sector will be challenged to extend their due diligence programs, anticipate and respond promptly to prevent the use of their entities for diverse global money laun-
dering, and to undertake new anti-money laundering due diligence requirements so as to avoid criminal and regulatory problems, yet maintain and adjust their business practices to stay competitive. Increasingly, partnerships between the private sector and governments and international organizations are the order of the day. The response of the private sector to the new measures of international organizations will determine the impact on and reaction by targeted jurisdictions. For instance, on August 5, 2000, Stanley "Stalky" John, a St. Vincent attorney who does offshore work, stated that New York banks are requesting Vincentian individuals and corporations holding accounts to travel to New York in order for the banks to verify their ownership in the accounts. Mr. John explained that the verification procedure resulted from the fact that the U.S. government has issued financial advisories against St. Vincent.\textsuperscript{102} Such additional due diligence by banks and financial institutions in OECD or even G-7 countries is likely to trigger a response in the offshore financial centers.

Professionals advising clients will have to advise them on the significantly changed environment of financial confidentiality and the ability and routine of governments to cooperate on criminal enforcement over a wide range of matters. Increasingly, governments and international organizations are prioritizing tax administration, including collection, good governance, and transparency in the regulation of financial services, including financial institutions and service providers.

The increasing use of black lists by international organizations (e.g., OECD Harmful Tax Competition and the FATF) and governments (e.g., Clinton budget proposal on identifying tax havens) will require professional advisers and their clients to become more selective in the jurisdictions in which they base their entities, their residency, and their transactions. Professional advisers in countries such as Britain must be ever more diligent on issues of whether their clients have fulfilled their tax obligations.

Governments with large offshore jurisdictions must also choose. Mature and diversified financial sectors, such as the Cayman Islands, can emphasize their sophisticated and institutionalized business at the expense of servicing individuals who require strict confidentiality. Some of the newer jurisdictions do not have the luxury of making the trade-off. Other jurisdictions may decide that the cost of all the new compliance may not be worth emphasizing financial services or at least certain products (e.g., see the mention by Secretary Summers of economic nationality programs\textsuperscript{\textsuperscript{103}}). To the extent international organizations and governments influence offshore jurisdictions to eliminate certain products, the choice of professional advisors and their clients becomes more restricted and the cost of certain mechanisms increases. In fact, one of the increased risks for offshore trust advising is the potential risk for enforcement difficulties due to the enormous amount of new laws, regulations, enforcement actions, and attention devoted to certain products, transactions, and jurisdictions. To be sure, professional advisers, their clients, policymakers, and other interested persons live in interesting times.

The simultaneous implementation of initiatives by the OECD, the FATF, and the FSF clearly reflects the rise of international governmental organizations and related groups.\textsuperscript{104}


\textsuperscript{103} Available at http://www.j-bradford-delong.net/Politics/Summers_SGE.html.

\textsuperscript{104} This ending appears at the conclusion of an article by this author, entitled The OECD Report Identifying Harmful Tax Practices and Tax Havens Solidifies the Momentum of the Harmful Tax Competition Initiative, 29 Tax Mgmt Int'l J. 521-530 (July 28, 2000).
Globalization will continue to underscore the prioritization of the new international financial architecture (NIFA) and corporate governance. As world markets converge and multinational firms continue to cross-invest into other financial and service sectors, the world will increasingly need better institutional decision-making, better transparency, better sequencing in the liberalization process, and a more secure legal foundation. The crosscurrents and especially the strong and fluid international initiatives are resulting in a new international financial architecture.105 The early stages of the emergence of the NIFA have brought a web of interlinked "quasi-legal, global standards"106 that international governmental organizations are developing to minimize the bumps in globalization brought by the contagion from the Asian and other regional crises. Until the soft law standards become hard law, taxpayers, nation-states, multinational corporations, and other interested persons necessarily must conduct their affairs in increasingly gray areas. The new risks brought by the fluidity of the soft law standards implemented with increasing countermeasures will require more planning and attention to diverse legal and regulatory standards. Welcome to the new millennium!

106. Id.