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The Impact of September 11th on Anti-Money Laundering Efforts, and the European Union and Commonwealth Gatekeeper Initiatives

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I. Background

Since the September 11, 2001 terrorist attacks on the United States and the subsequent revelations concerning the al Qaeda network's extensive money laundering network, anti-money laundering authorities have focused their attention on detecting and deterring money laundering systems used to finance international terrorism. Anti-money laundering authorities in the United States and abroad have also worked to develop sufficient legal bases to prosecute those who provide the financial fuel for terrorist groups. September 11th tragically illustrated the significant challenges law enforcement authorities face—not only do more mundane criminals employ the mechanisms of the modern transnational finance system, but so do terrorists and their financiers. The financiers of international terrorism use offshore banks, Internet shell banks, correspondent and private banking, as well as less formal, often ancient mechanisms like *hawala*, the black market peso exchange, bulk cash smuggling, and illegal money remitting businesses, to transfer money from place to place, as well as to conceal the path, source, and ownership of the laundered funds.

In the United States, lawmakers have responded to the challenges of combating both the formal and informal financial systems used by money launderers by amending existing statutes and enacting new anti-money laundering laws and regulations. On October 26, 2001, as part of a larger package of reforms, Congress passed the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.¹ The new legislation amends existing federal law by, among other things, requiring greater due diligence by banks in forming relationships and conducting transactions with customers and other banks,

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1. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, tit. III, Pub. L. 107-56, 115 Stat. 272 (2001).

expanding the list of entities required to file currency transaction reports, broadening federal authority to obtain foreign bank records, granting federal authorities the power to seize the assets of terrorists and the proceeds of terrorist activities, and otherwise expanding federal laws prohibiting money laundering and forfeiting its proceeds.²

The 2001 amendments are relatively sweeping, however, as with all legislative enactments, it is likely that, in practice, deficiencies in the amended money laundering and forfeiture laws will be discovered and addressed in later legislation. Whether the 2001 amendments are sufficient to address the threat posed to the international financial system, and the safety and security of the United States and other nations, remains to be seen. Despite the scope of these latest amendments, law enforcement authorities may discover that they still lack the necessary resources to address informal methods of transferring and/or laundering funds. Such resources might include: expanded statutory and regulatory authority, improved intelligence gathering and analysis capabilities, or enhanced mechanisms for obtaining cooperation in particular areas from foreign authorities.

Moreover, in some areas the amendments may impose additional obligations that frustrate Congress's objectives. For example, the burdens expanded currency reporting requirements impose on both the reporting entities and the receiving agencies may outweigh any expected benefits. Thus, the 2001 amendments to U.S. anti-money laundering law may go too far, and yet not far enough.

Almost certainly Congress and the legislatures of other nations allied in the fight against terrorism will attempt to further strengthen the laws governing informal money transfer systems; al Qaeda, and presumably other terror groups, have reportedly funded their activities through virtually untraceable *hawala* money transfers, as well as through the use of more sophisticated mechanisms.³ While informal, private means of transferring funds may be difficult to detect and prevent, the implementation of a broad array of approaches may help to shut off the flow of funds to terrorists and other criminals through both formal and informal mechanisms. Future anti-money laundering initiatives may include: (1) educating immigrant communities in developed nations about their access to the banking system; (2) publicizing the restrictions on the illicit transfer of funds and the reporting requirements for currency and monetary instruments; (3) implementing legitimate money transfer systems that would facilitate expatriates' transfers of funds to their home countries; (4) imposing strict penalties on those who provide unlicensed banking, lending or check cashing services, who fail to file required currency and other reports, or who fail to declare income from their money transfer or lending services; and (5) using the resources of governments, multilateral organizations and international financial institutions to research and develop methodologies to deter the use of informal money transfer systems, and to replace these mechanisms with legitimate banking opportunities.

In addition to the changes made to U.S. law, multilateral anti-money laundering organizations have quickly moved to address the issues raised by the events of September 11, 2001. Significantly, although terrorism had been an area of concern previously, the Financial Action Task Force (FATF) has turned its attention more directly to encouraging Member States to take specific action against money laundering used to finance or aid international terrorism. To that end, the FATF issued eight Special Recommendations on Terrorist Fi-

2. *Id.*

3. See Frantz, *infra* note 36.

nancing that are designed to respond to the growing concerns over the means used to finance the spread of terrorism.

Finally, unrelated to the recent terrorist threat, the European Union (EU), the United Kingdom, Canada, and certain Caribbean nations, have taken action to strengthen national anti-money laundering regimes and enforcement efforts. Of particular note are the so-called "gatekeeper initiatives," intended to combat international money laundering by enlisting the assistance of financial and legal professionals involved in cross-border business transactions. The gatekeeper initiatives, as currently manifested in those jurisdictions, require lawyers (as well as other financial service professionals) to maintain information concerning their clients, and report their clients' suspicious activities to national authorities, under certain circumstances. The effects of these directives on U.S. lawyers practicing or doing business in EU or Commonwealth nations will bear watching, because these gatekeeper initiatives may conflict with U.S. lawyers' ethical obligations of confidentiality regarding privileged communications.

II. Developments in U.S. Anti-Money Laundering Law and Strategy

A. AMENDMENTS TO U.S. ANTI-MONEY LAUNDERING LAWS

Prior to the September 11th attacks, the U.S. Congress had been considering various amendments to the federal money laundering laws. After the attacks Congress quickly moved to implement a range of aggressive anti-money laundering initiatives by modifying existing law. Specifically, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)⁴ to combat terrorism, by, among other things, enhancing existing money laundering and forfeiture laws.

In enacting Title III of the USA PATRIOT Act, known as the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (2001 Money Laundering Act), Congress recognized the need to develop additional strategies for combating domestic and international money laundering, and expanding the ability of law enforcement authorities to forfeit the proceeds and instrumentalities of criminal activity. In its findings, Congress noted that the International Monetary Fund (IMF) has estimated that money laundering amounts to approximately two percent to five percent of global gross domestic product annually, or about \$600 billion each year, which "provides the financial fuel that permits transnational criminal enterprises to conduct and expand their operations to the detriment of the safety and security of American citizens."⁵ Moreover, Congress stated that "money laundering, and the defects in financial transparency on which money launderers rely, are critical to financing global terrorism and providing funds for terrorist attacks."⁶ Congress was particularly concerned that foreign jurisdictions with weak supervisory and enforcement regimes, which permit the use of anonymous offshore banking facilities, make possible the illicit movement of funds that are either the proceeds of, or used to commit, offenses including narcotics trafficking, terrorism, arms smuggling, trafficking in human

4. Pub. L. 107-56, 115 Stat. 272 (2001).

5. *Id.* § 302(a)(1).

6. *Id.* § 302(a)(2).

beings, and financial fraud.⁷ Congress also expressed concern over the potential misuse of private and correspondent banking services to facilitate these offenses.⁸

In response to these concerns, Congress expanded the reach of U.S. anti-money laundering laws. The 2001 Money Laundering Act enhances existing U.S. anti-money laundering and forfeiture laws, by concentrating on three areas. First, the Act enacted substantive changes to the criminal laws, including by expanding the list of “specified unlawful activities” (SUA). For example, the Act enlarged the list of crimes that may serve as predicate offenses for money laundering crimes, and expanded the government’s powers to seize and forfeit tainted funds and property, including the property of terrorists, terrorist organizations and the proceeds of terrorist acts. Second, the Act focused attention on U.S. financial institutions. For instance, financial institutions are required to take “special measures” when dealing with foreign institutions and jurisdictions found to be of “primary money laundering concern,” and otherwise to regulate more strictly the relationships between U.S. financial institutions and foreign banks and persons.⁹ Third, the Act grants additional procedural tools to federal courts, law enforcement, and regulatory authorities. In all, the 2001 Money Laundering Act substantially amends U.S. law.

B. SIGNIFICANT CHANGES TO FEDERAL LAW

1. *Substantive Amendments to U.S. Anti-Money Laundering Laws – Expanded SUAs and Forfeiture Authority*

As with prior amendments to federal law, the 2001 Money Laundering Act has enlarged the catalog of SUAs that may give rise to money laundering offenses. The Act expands the list of money laundering predicate offenses to include: additional Racketeer Influenced and Corrupt Organizations Act (RICO) predicate offenses;¹⁰ foreign crimes, including all crimes of violence, foreign public corruption, and offenses for which the United States would be required to extradite or prosecute the offender;¹¹ operation of an illegal money remission business, either with the knowledge that the funds being transmitted were derived from a criminal offense or that they were intended to be used for an unlawful purpose;¹² and bulk cash smuggling of amounts greater than \$10,000 into or out of the United States.¹³

The 2001 Money Laundering Act also expands the federal government’s forfeiture authority. In a new provision, enacted as part of Title 18, Section 981, Congress provided for the civil forfeiture of the assets of any person, entity or organization engaged in terrorism. In addition, Congress authorized the forfeiture of any property “affording any person a source of influence over such entity or organization” where the assets or property were “acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing” an act of domestic or international terrorism against U.S. persons or property, or which were “derived from, involved in, or used or intended

7. *Id.* § 302(a)(4).

8. *Id.* §§ 302(a)(6), (7).

9. See John Gibault, *Show Them the Money: The Anti-Terrorism Laws Target Money Laundering, Forcing Banks to be More Vigilant and Compliance Officers to Take on More Tasks*, ABA Journal, Jan. 2002, at 47–48.

10. 18 U.S.C. § 2332b(g)(5)(B) (West 2001).

11. 18 U.S.C. § 1956(c)(7)(B) (West 2001).

12. 18 U.S.C. § 1960 (West 2001).

13. 31 U.S.C. § 5332 (West 2001).

to be used" to commit such acts.¹⁴ The property of a person convicted of an international terrorism offense may also be forfeited criminally pursuant to 28 U.S.C. § 2461(c). Additionally, the amendments permit the government to seek forfeiture of proceeds or instrumentalities, or in some instances, property used to facilitate the predicate money laundering offenses. These include domestic or international terrorism directed at U.S. persons and property,¹⁵ the expanded list of racketeering predicates,¹⁶ foreign crimes,¹⁷ currency reporting offenses and conspiracy to commit reporting offenses,¹⁸ and bulk cash smuggling.¹⁹

2. *Stricter Regulation of U.S. Financial Institutions' Relationships with Foreign Banks and Persons*

Money laundering through financial institutions is of special concern to Congress. The 2001 amendments increase the civil and criminal penalties for money laundering that may be imposed on financial institutions—up to twice the amount of the transaction or up to one million dollars.²⁰ The Secretary of the Treasury may require U.S. financial institutions to take certain "special measures" with respect to foreign institutions or jurisdictions where reasonable grounds exist to believe that they are of "primary money laundering concern."²¹ The 2001 Money Laundering Act further requires banks to conduct enhanced due diligence for private banking and correspondent accounts,²² and prohibits U.S. banks from maintaining correspondent accounts with foreign "shell banks."²³ In addition, the Act enhances the operational capabilities of the Financial Crimes Enforcement Network (FinCEN).²⁴ The Treasury Department has issued interim guidelines and proposed regulations implementing the provisions dealing with correspondent banking and reporting by broker/dealers.²⁵

3. *Expanded Procedural Authority*

Finally, the Act provides the government with certain additional law enforcement tools. The Attorney General or the Secretary of the Treasury may issue a summons or subpoena to obtain foreign bank records, even those maintained overseas, by serving the financial institution's designated representative in the United States.²⁶ The government may also seek to forfeit funds deposited in a foreign bank by filing a civil action against the equivalent amount deposited in a corresponding U.S. bank account. The government is not required to trace the funds, nor does the foreign bank have standing to challenge the forfeiture action

14. 18 U.S.C. § 981(a)(1)(G) (West 2001).

15. 18 U.S.C. § 981(a)(1)(G) (West 2001).

16. 31 U.S.C. § 5332(c) (West 2001).

17. 18 U.S.C. § 981(a)(1)(B) (West 2001).

18. 31 U.S.C. §§ 5317(c), 5324, 5331 (West 2001).

19. 31 U.S.C. § 5332 (West 2001).

20. See 31 U.S.C. §§ 5321, 5322 (West 2001).

21. 31 U.S.C. § 5318A (West 2001).

22. 31 U.S.C. § 5318(i) (West 2001).

23. Shell banks are a phenomenon of the Internet age; they are banks that have no physical presence anywhere, and are not subject to regulation by any country. See 31 U.S.C. § 5318(j) (West 2001).

24. See USA PATRIOT Act, §§ 310, 362, 115 Stat. 332.

25. A link to the proposed guidelines and the interim rules is available at <http://www.treas.gov/press/releases/po887.htm>. The proposed rule concerning financial institutions is reprinted at 31 C.F.R. pt. 104 (2001). The proposed rule concerning reporting requirements for broker/dealers is reprinted at 31 C.F.R. pt. 103 (2001).

26. See 31 U.S.C. § 5318(k) (West 2001).

27. See 18 U.S.C. § 981(k) (West 2001).

by asserting an "innocent owner" defense.²⁷ Further, the "fugitive disentitlement doctrine" has been expanded to prohibit corporations from recovering forfeited funds where a majority shareholder, or any other person filing a claim on the company's behalf, is personally disqualified from recovering such funds.²⁸

Congress also expanded the money laundering venue provisions. Following the Supreme Court's suggestion²⁹ that money laundering may be a continuing offense where the SUA took place in one judicial district, but the financial transaction occurred in another, Congress amended Title 18 to permit prosecutors to bring cases in any district where the defendant participated in moving the funds.³⁰

The judiciary has also been granted expanded powers. Federal courts may exercise long arm personal jurisdiction over foreign nationals who violate 18 U.S.C. § 1956(a). Jurisdiction may be found where the financial transaction occurred in whole or in part within the United States, where a U.S. court had issued an order of forfeiture and the foreign person converted the funds to his or her own use, or where the foreign person is a financial institution that maintains a bank account in the United States.³¹ Courts are now explicitly permitted to order a criminal defendant to repatriate forfeitable assets to the United States,³² and they may enforce foreign forfeiture orders either before trial or post-conviction.³³ Additionally, a court may also appoint a receiver to take control of the defendant's assets in order to satisfy a judgment, including an order of restitution to a victim of an SUA.³⁴

B. POTENTIAL GAPS IN U.S. ANTI-MONEY LAUNDERING LAW

Although wide-ranging, the changes to U.S. law may not go far enough. In particular, the 2001 Money Laundering Act may not fully address informal financial transactions.³⁵ Since September 11th the role of informal transactions in funding terrorism has received significant attention.³⁶ Because the *bawala*³⁷ system in use through much of the Middle East, Asia (in China, it is known as "*fei qian*" or flying money), and elsewhere may have been used to finance operations of al Qaeda and other terrorist groups, it is likely that, to the

28. 28 U.S.C. § 2466 (West 2001).

29. See *United States v. Cabrales*, 524 U.S. 1, 8 (1998) ("money laundering . . . arguably might rank as a 'continuing offense,' triable in more than one place, if the launderer acquired the funds in one district and transported them into another.").

30. See 18 U.S.C. § 1956(i) (West 2001).

31. See 18 U.S.C. § 1956(b)(2) (West 2001).

32. 21 U.S.C. § 853(e)(4) (West 2001).

33. 28 U.S.C. § 2467 (West 2001). By enacting this provision, Congress appears to be signaling that it hopes that foreign jurisdictions will do likewise, and enforce U.S. forfeiture orders.

34. 18 U.S.C. § 1956(b)(4) (West 2001).

35. See, e.g., 18 U.S.C. § 1960 (West 2001) (illicit transmission of funds).

36. See, e.g., Douglas Frantz, *A Nation Challenged: Ancient Secret System Moves Money Globally*, N.Y. TIMES, Oct. 3, 2001, at B5; Meenakshi Ganguly, *A Banking System Built for Terrorism*, TIME, Oct. 5, 2001, available at <http://www.time.com>; Michelle Cottle, *Hawala v. The War on Terrorism*, THE NEW REPUBLIC, Oct. 15, 2001, available at <http://www.thenewrepublic.com/101501/cottle101510.html>; Kurt Eichenwald, *A Nation Challenged: Terror Money Hard to Block*, N.Y. TIMES, Dec. 10, 2001, at A1.

37. As in a letter of credit transaction, in a *bawala* transaction, the funds that are being transferred do not physically move. Instead, for a fee, the sender contracts, often orally, with an intermediary who advises a counterpart located near the recipient to pay the recipient a sum of money. Because these transactions may involve multiple intermediaries, tend to occur between people who have developed familial or other bonds of trust, and the parties may avoid written communications—perhaps to escape local authorities in states where *bawala* is illegal—they may be very difficult to control.

extent that such informal systems are susceptible to regulation, the United States will further amend its law to regulate and control these mechanisms, much as it has done with check cashing and money-wiring institutions. Moreover, it is likely that the United States will encourage jurisdictions that regularly permit such transactions, whether officially or otherwise, to take additional steps to control these informal money transfer systems.³⁸ In addition, the 2001 Money Laundering Act may not fully address emerging money laundering typologies including Internet and electronic banking, or jurisdictional issues relating to the cross-border investigation and prosecution of money laundering offenses. The U.S. government will need to continue monitoring the development of new money laundering techniques and issues, and develop appropriate legislative responses.

C. THE 2001 U.S. NATIONAL MONEY LAUNDERING STRATEGY

Even before the events of September 11th, the U.S. government had planned to address perceived gaps in U.S. anti-money laundering enforcement. In September 2001, the Attorney General and the Secretary of the Treasury issued the 2001 U.S. National Money Laundering Strategy (2001 Strategy).³⁹ Because the 2001 Strategy was prepared in substantial part before the September 11, 2001 terrorist attacks, and before the USA PATRIOT Act was adopted, it focused less on combating terrorism and more on traditional law enforcement and regulatory concerns. However, many of the issues raised by the government have made their way into the 2001 Money Laundering Act.

The strategy contains five goals, each of which is sub-divided into one or more objectives, which are further subdivided into priorities. For example, as its first goal the United States intends to focus its law enforcement efforts on the prosecution of major money laundering organizations and systems. The objectives identified in connection with achieving that goal include: developing, organizing, and coordinating "High Intensity Money Laundering and Related Financial Crime Area (HIFCA) Task Forces;" enhancing the use of federal criminal and civil asset forfeiture laws through the HIFCAs and other mechanisms, enhancing intra- and inter-agency coordination of money laundering investigations; expanding efforts to dismantle the black market peso exchange;⁴⁰ and enacting legislation to address deficiencies in current U.S. law. The 2001 Money Laundering Act implements many of these legislative goals; the others presumably will be addressed through inter- and intra-agency coordination of law enforcement efforts.

The second goal requires the government to develop methods of measuring the effectiveness of anti-money laundering efforts, with the objective of developing and implementing systems to institutionalize such measurement methodologies. The third goal is to prevent money laundering through public-private efforts and regulatory measures. The objectives supporting this goal include examining the efficacy of existing reporting require-

38. The FATF has reported that the *hawala* system remains favored in much of the world because it is reliable, convenient, cheaper than moving funds through the banking system, and almost untraceable. See FATF, REPORT OF MONEY LAUNDERING TYPOLOGIES 1999-2000, FATF-XI, at 6, ¶ 24, Feb. 3, 2000, available at http://www.oecd.org/fatf/pdf/TY2000_en.pdf (last visited Jan. 2, 2002) [hereinafter FATF XI].

39. See U.S. DEP'T OF TREASURY & U.S. DEP'T OF JUSTICE, THE 2001 NATIONAL MONEY LAUNDERING STRATEGY, available at www.ustreas.gov (last visited Nov. 15, 2001) [hereinafter 2001 Strategy].

40. The black market peso exchange (BMPE) is another informal money laundering method, similar to the *hawala* system. See 2001 Strategy, *supra* note 39, at 13; FATF XI, *supra* note 38, at 5 (discussing the BMPE and noting its use both by expatriate workers and narcotics traffickers).

ments, expanding the types of financial institutions subject to the Bank Secrecy Act's requirements, increasing the usefulness of information already reported to law enforcement agencies and the financial industry, and minimizing the threat of money laundering by foreign correspondent banks to U.S. financial institutions. The 2001 Money Laundering Act substantially addresses the law enforcement aspects of this goal, particularly through the provisions granting expanded powers to the Justice and Treasury Departments in obtaining access to foreign bank records, expanded the list of entities subject to currency reporting requirements, and adding restrictions placed on private banking and offshore shell banks.⁴¹ The objective of re-focusing the reporting requirements—making them both less burdensome for reporting entities and more useful for law enforcement—has been given additional prominence by the revelations concerning al Qaeda's funding of the September 11th terrorists, and will require additional analysis and review.

The fourth goal concerns the coordination of federal, state and local law enforcement efforts. The 2001 Strategy's objectives in this area include: providing seed capital for state and local anti-money laundering efforts; improving inter-agency coordination; and enhancing the effectiveness of state and local agency's access to and use of Bank Secrecy Act data. The government's fifth goal is strengthening international anti-money laundering cooperation. Its objectives include: enhancing cooperation and effectiveness between law enforcement agencies; continuing the United States' role in FATF and similar organizations; providing technical assistance to foreign jurisdictions working to combat money laundering; cooperating with the international financial institutions to enhance anti-money laundering efforts; and taking necessary coordinated action against money laundering threats.

As discussed above, many of the 2001 Strategy's goals and objectives—at least those that can be met through legislative action—have found their way into the 2001 Money Laundering Act. The Act's measures addressing money laundering through foreign banks,⁴² its expansion of the types of enterprises subject to currency reporting requirements,⁴³ and its grant to the judiciary of explicit authority over enforcing foreign forfeiture orders,⁴⁴ are consistent with and implement a number of the 2001 Strategy's goals. Whether the remaining goals are implemented, or whether the strategy is substantially re-focused towards addressing the funding of international terrorism, remains to be seen.

III. The Financial Action Task Force's Response to the September 11th Terrorist Attacks, and Its Ongoing Anti-Money Laundering Activities

The Financial Action Task Force (FATF)⁴⁵ responded quickly to the September 11th terrorist attacks by developing an initiative aimed at preventing the laundering of funds

41. See, e.g., 31 U.S.C. § 5318(k) (West 2001) (foreign banks required to appoint agent for service of process in the U.S.); 31 U.S.C. § 5331(c) (West 2001) (currency reporting requirements); 31 U.S.C. § 5318(i) (West 2001) (enhanced due diligence for private and correspondent banking accounts); 31 U.S.C. § 5318(j) (West 2001) (U.S. banks prohibited from maintaining correspondent accounts with foreign shell banks).

42. See, e.g., 18 U.S.C. § 981(k) (West 2001) (forfeiture of property in interbank accounts); 31 U.S.C. § 5318 (West 2001) (subpoenas and summons on foreign banks).

43. See 31 U.S.C. §§ 5331, 5332 (West 2001).

44. See 28 U.S.C. § 2467 (West 2001).

45. The FATF is an independent international body, whose Secretariat is housed at the OECD. It was formed by the G-7 Economic Summit Group in July 1989 to "examine measures to combat money laundering." In 1990, FATF issued its "Forty Recommendations" on combating money laundering. See FATF, ANNUAL

used to finance terrorism.⁴⁶ On October 30, 2001, at an emergency meeting, FATF President Clarie Lo announced that “[o]ur mission is to strangle and cut the supply of money and assets that is the lifeblood of terrorists.”⁴⁷ Treasury Secretary Paul O’Neill likewise said: “FATF is uniquely positioned to take up the challenges of terrorist financing. Our goal must be nothing less than the disruption and elimination of the financial frameworks that support terrorism and its abhorrent acts.”⁴⁸ Secretary O’Neill further recommended that “the FATF adopt special recommendations that will set the international standard for combating terrorist financing, that all countries swiftly comply with these standards, and that there be regular public reports on the state of play in identifying and take action against terrorist financing.”⁴⁹

Thereafter, on October 31, 2001, the FATF announced that it was expanding its mission beyond traditional money laundering to focus its energy and expertise on the worldwide effort to combat terrorist financing. To that end, FATF issued eight Special Recommendations on Terrorist Financing.⁵⁰ The Special Recommendations⁵¹ require Member States to:

- Take immediate steps to ratify and implement the relevant United Nations instruments.
- Criminalize the financing of terrorism, terrorist acts and terrorist organizations.
- Freeze and confiscate terrorist assets.
- Report suspicious transactions linked to terrorism.
- Provide the widest possible range of assistance to other countries’ law enforcement and regulatory authorities for terrorist financing investigations.
- Impose anti-money laundering requirements on alternative remittance systems.
- Strengthen customer identification measures in international and domestic wire transfers.
- Ensure that entities, in particular non-profit organizations, cannot be misused to finance terrorism.

FATF members further agreed to a comprehensive Plan of Action, with a six-month timetable starting in December 2001, that requires them to conduct self-assessments concerning their implementation of the Special Recommendations; develop additional guidance for financial institutions and educate them regarding mechanisms by which terrorists finance their activities; identify non-compliant jurisdictions and take steps to bring them into compliance by implementing possible, undefined “counter-measures;” publish reports

REPORT, FATF XII, at 3, June 22, 2001, *available at* http://www1.oecd.org/fatf/FATDocs_en.htm#Annual (last visited Nov. 18, 2001) [hereinafter FATF XII].

The thirty member countries and governments of the FATF are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, China, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. Two international organizations are also members of the FATF—the European Commission and the Gulf Co-operation Council. *See* FATF XII, *supra*, at 3. More information on the FATF can be found on its Web site at <http://www.fatf-gafi.org>.

46. The FATF publishes a report annually discussing its Member States’ progress over the prior year in combating money laundering. FATF issued its annual 2000–2001 report on June 22, 2001. *See* FATF XII, *supra* note 45.

47. *See* <http://www.oecd.org/oecd/pages/home/> (last visited Dec. 28, 2001).

48. *See id.*

49. *See id.*

50. The full text of the FATF Special Recommendations on Terrorist Financing is available at <http://www.oecd.org/oecd/pages/home/>.

51. *See* FATF, SPECIAL RECOMMENDATIONS, *available at* <http://www.oecd.org/oecd/pages/home/> (last visited Dec. 28, 2001).

concerning the amount of terrorists' funds that have been frozen, and provide technical assistance to non-Member States to assist them in complying with the Special Recommendations.⁵² The FATF further resolved to coordinate its actions with other organizations and bodies, including the United Nations, the Egmont Group,⁵³ the G-20, and the International Financial Institutions. FATF also agreed to take into account the Special Recommendations as its members revise the FATF's Forty Recommendations on Money Laundering⁵⁴ and to "intensify its work with respect to corporate vehicles, correspondent banking, identification of beneficial owners of accounts, and regulation of non-bank financial institutions."⁵⁵

Prior to the events of September 11th and continuing in tandem with its anti-terrorism objectives, during 2000–2001 the FATF's activities had focused on three main areas: spreading the anti-money laundering message, improving its members' implementation of the Forty Recommendations, and strengthening the review of money laundering methods and counter-measures.⁵⁶ The FATF published an update to its list of non-cooperative countries and territories (NCCT), worked to develop and enhance the functioning of additional FATF-style regional bodies,⁵⁷ enhanced its cooperation with the International Financial Institutions, and launched a review of the Forty Recommendations.⁵⁸ The FATF considers its work in reviewing, and publishing its list of NCCTs to be of great significance; the counterpart to the FATF's model of self-analysis by Member States and peer evaluation and review is the public disclosure of those countries that are non-compliant with the FATF's anti-money laundering objectives.⁵⁹

Also in 2000–2001, the FATF continued its typologies exercise, identifying those methods of laundering money that are of growing and continuing concern. The FATF reiterated concerns over the anonymity afforded to money launderers by the Internet, the use of trusts and other corporate entities for complex and large-scale money laundering schemes, developing a gatekeeper initiative similar to that established by the EU that would require

52. *See id.*

53. The "Egmont Group" (named for the location of the first meeting in the Egmont-Arenberg Palace in Brussels), launched in approximately 1995, is an informal organization of government agencies specializing in anti-money laundering functions. Forty countries have created anti-money laundering units under the Egmont Group's auspices, known as "financial intelligence units" or FIUs, to address the problem of money laundering. The Egmont Group's goal "is to provide a forum for FIUs to improve support to their respective national anti-money laundering programmes. This support includes expanding and systematizing the exchange of financial intelligence, improving expertise and capabilities of the personnel of such organizations, and fostering better communication among FIUs through the application of new technologies." *See* The Egmont Group of Financial Intelligence Units, available at http://www1.oecd.org/fatf/Ctry-orgpages/org-egmont_en.htm (last visited Nov. 18, 2001).

54. The Forty Recommendations are available at <http://www.oecd.org/fatf>.

55. *Id.*

56. *See* FATF XII, *supra* note 45, at 1.

57. These include the Caribbean Financial Action Task Force (CFATF), the oldest regional body, founded in 1990–92, with twenty-five current Member States; the Asia/Pacific Group on Money Laundering (APG), established in 1997, and having twenty-two Member States at present; the Council of Europe's Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (PC-R-Ev), established in 1997, by the Committee of Ministers; the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), a fourteen-member body founded in 1999; and the *Grupo de Acción Financiera de Sudamérica Contra el lavado de Activos* (GAFISUD), a group of nine South American countries founded in 2000. *See* FATF XII, *supra* note 45, at 5–7.

58. *See id.* at 1, 3.

59. *See id.* at 10–11.

lawyers and notaries to report suspicious client transactions, the cross-border movement of large quantities of cash and the laundering of cash in certain luxury industries (citing the cash purchase of thoroughbred race horses as one example), and the laundering of funds by and for terrorists.⁶⁰ The FATF noted that anti-money laundering regimes differ with respect to whether countries are able to restrain otherwise clean funds that might be used to fund terrorism (essentially, what would be called under U.S. law "promotion" money laundering).⁶¹ In the United States, this issue has recently arisen in the context of the government's crackdown on the promotion of terrorism through donations to charitable organizations. While charitably minded persons who make donations to organizations that they understand to be engaged in legitimate activities should not be prosecuted, those organizations raising funds, under whatever pretext, in order to finance terrorism, may be prosecuted and their assets seized.⁶² The FATF may encourage other Member States to develop similar laws.

IV. Gatekeeper Initiatives: European Union and Commonwealth Countries

A. EUROPEAN UNION

On October 31, 2001 the European Parliament amended "Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering."⁶³ The EU Directive is noteworthy for its "gatekeeper" requirement, by which lawyers and notaries (who perform quasi-legal functions in many civil law jurisdictions) will be required to supply information concerning suspicious transactions to national authorities (including, perhaps, specially constituted bar association units).⁶⁴ Lawyers and notaries will be "subject to the provisions of the EU Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity" and thus required to report their clients' suspicious activities, with certain exceptions.⁶⁵ The EU Directive aims at preventing clients from using the services of lawyers and notaries to launder the proceeds of criminal activities, or otherwise concealing or disguising the source of funds or other property, in connection with criminal activity.⁶⁶

Lawyers and notaries are not required to report suspicious activity where they are ascertaining a client's legal position or in connection with judicial proceedings.⁶⁷ "Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counselor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows the client is seeking legal advice for money laundering purposes."⁶⁸ By contrast, the United States has no such reporting requirements. Instead, in

60. See *id.* at 15-17.

61. See *id.* at 16, ¶ 82.

62. See 18 U.S.C. § 981(a)(1)(G) (West 2001).

63. See European Parliament Directive PE-CONS 3654/01, 10/31/01, amending Council Directive 91/308/EEC [hereinafter EU Directive].

64. See, e.g., *id.* art. 6(3); Preamble, para. 16.

65. *Id.*

66. See *id.* art. 1(C), (D).

67. See *id.* art. 6(3).

68. *Id.* at Preamble, para. 17.

some circumstances, the government may forfeit legal fees paid to defense counsel, where they were derived from illicit activity.⁶⁹ Attorneys practicing in the United States have no privilege to violate the law; they are required to supply truthful information to banks in connection with the filing of currency reports,⁷⁰ and can be prosecuted for participating in a money laundering scheme.⁷¹ Moreover, attorneys are ethically prohibited from continuing to represent a client where the attorney is aware that the client intends to break the law, and communications made to an attorney for the purpose of furthering the client's criminal activity are not privileged.⁷² With a few exceptions, however, state bar ethics rules prohibit attorneys from disclosing confidential information obtained from their clients.⁷³ Thus, proposals to impose gatekeeper requirements on U.S. lawyers may run afoul of state bar ethics rules.⁷⁴

In addition to implementing the "gatekeeper" provisions, the amended EU Directive expands the range of money laundering predicate offenses from narcotics offenses alone, to include all "criminal activity," involving "the commission of a serious crime." The enlarged list of predicate offenses includes those defined in Article 3(1)(a) of the Vienna Convention, as well as "activities of criminal organizations," serious fraud, corruption, and any offense that "may generate substantial proceeds and which is punishable by a severe sentence of imprisonment."⁷⁵

69. See, e.g., *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (The Sixth Amendment does not prohibit government from forfeiting proceeds of criminal activity that might otherwise have been used to pay defendant's legal fees); *In re Moffitt, Zwierling & Kemler, P.C.*, 846 F. Supp. 463 (1994) (fee paid to criminal defense attorneys forfeited because it was proceeds of client's drug trafficking).

70. See *United States v. Belcher*, 927 F.2d 1182 (11th Cir. 1991) (holding that indictment was proper where attorney was alleged to have provided false information to bank, thereby causing it to file false CTR).

71. See *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001) (affirming attorneys' money laundering convictions).

72. See, e.g., CAL. EVID. CODE § 956 (2001) ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud."); FED. R. EVID. 501 (2001) (importing state law privileges and exceptions into the federal rules).

73. The duty to protect client confidences is of paramount importance. For example, in *People ex rel. Dept. of Corporations v. SpecDee Oil Change Systems, Inc.*, 20 Cal.4th 1135 (1999), the California Supreme Court stated: "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system . . . To this end, a basic obligation of every attorney is '[t]o maintain inviolate the confidence, and every peril to himself or herself to preserve the secrets, of his or her client.'" (Citations omitted). The court added, "A related but distinct fundamental value of our legal system is the attorney's obligation of loyalty. Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process." *Id.* at 1145 (citations omitted). Only in certain extreme circumstances may lawyers disclose otherwise privileged communications. See, e.g., CAL. EVID. CODE § 956.5 (2001) ("There is no privilege under this article if the lawyer reasonably believes that the disclosure of any confidential client communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.").

74. For example, the Sarbanes-Oxley Act of 2002 requires the Securities and Exchange Commission to issue rules requiring attorneys practicing before the Commission to "report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by [an issuer] or any agent thereof to the chief legal counsel or the chief executive officer . . ." and if those individuals do not take effective action, to report the alleged wrongdoing to the audit committee or another committee of the board comprised of outside directors, or to the entire board. *Id.* § 307. Although the Sarbanes-Oxley Act does not require attorneys to report information outside the company in the first instance, it makes no provision for the preservation of the attorney-client privilege in connection with the required disclosures.

75. See Vienna Convention art. 1(E).

The EU Directive is a guideline; Member States must develop implementing regulations concerning such elements as “substantial proceeds” and “severe sentence of imprisonment.”⁷⁶ Member states will also need to address issues such as when a lawyer is presumed to “know” the purpose for which a client is seeking legal advice or assistance with a transaction. Lawyers who assist their clients with real estate transactions, acquiring or disposing of property or assets of any kind, incorporating and operating companies, and other business activities, will be subject to the EU Directive.⁷⁷ Lawyers who handle what in most circumstances are routine transactions may be unprepared to determine which transactions and clients require additional scrutiny, and may lack the administrative and other systems necessary to identify and report suspicious transactions. Thus, in cooperation with EU Member States, the legal profession will need to develop educational programs for attorneys practicing in those states, as well as for those who may on occasion become involved in European transactions.

The EU Directive permits Member States that have professional associations regulating the activities of lawyers and notaries to designate a special body to receive suspicious activity reports.⁷⁸ Those entities will need to develop systems for obtaining and transmitting suspicious activity reports to the relevant national authorities, as well as, perhaps, an ethics hotline or other mechanism for assisting professionals in complying with their obligations to their clients while also satisfying the EU Directive. Through such associations, lawyers and notaries may seek to develop national laws that would provide them with immunity from either criminal or civil liability, where applicable, for disclosing otherwise confidential information.

For U.S. lawyers and firms with cross-border practices representing European clients, compliance with the EU Directive could violate U.S. rules governing the confidentiality of attorney-client communications. Attorneys, bar associations, courts, and perhaps insurers, will have to confront the potential conflicts between the EU Directive and the obligations of confidentiality imposed on U.S. lawyers.⁷⁹ In the meantime, U.S. lawyers who represent European clients proactively should take steps to comply with both U.S. and European law; they may want to ask their clients to enter into written waiver agreements by which clients agree to permit attorneys to disclose information concerning suspicious transactions to the appropriate authorities, as required by any applicable law or regulation.

B. THE COMMONWEALTH COUNTRIES – UNITED KINGDOM, CANADA, AND THE BAHAMAS

Certain of the Commonwealth countries, including the United Kingdom, Canada, and the Bahamas have also enacted gatekeeper initiatives. Each statutory scheme is different, but all impose reporting requirements on persons, including lawyers, who may have reason to know or suspect that a client or other person may be engaged in money laundering. As discussed below, the United Kingdom and Canada exempt privileged communications from

76. EU Directive, *supra* note 63.

77. *See id.* art. 2a(5).

78. *See id.* at Preamble, para. 20, and art. 6(3).

79. The USA PATRIOT Act amends 31 U.S.C. § 5318(g)(3) to provide civil immunity under both federal and state law for financial institutions and their directors, officers and employees, who disclose suspected violations of law or regulations. Similar legislation addressing the potential liability of lawyers and law firms who are subject to the EU Directive ultimately may need to be implemented.

the disclosure requirements, however, those exemptions are relatively narrowly drawn. The Bahamian reporting system does not provide for any such exemptions.

1. *The United Kingdom*

For some time the United Kingdom has required persons and entities with knowledge of money laundering activities to report information concerning those activities to the appropriate law enforcement authorities. The failure to do so may be a criminal offense under the Drug Trafficking Act (DTA) 1994; and the Prevention of Terrorism (Temporary Provision) Act (POTA) 1989, as amended by the Criminal Justice Act 1993.⁸⁰ Each of these statutes contains an exemption for privileged information. For example, section 52(2) of the DTA provides, "Subsection (1) above [imposing the disclosure obligation] does not make it an offence for a professional legal adviser to fail to disclose any information or other matter which has come to him in privileged circumstances."⁸¹ Privileged circumstances are defined as follows:

- (8) For purposes of this section, any information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him—
 - (a) By, or by a representative of, a client of his in connection with the giving by the adviser of legal advice to the client; or
 - (b) By, or by a representative of, a person seeking legal advice from the adviser; or
 - (c) By any person—
 - (i) In contemplation of, or in connection with, legal proceedings; and
 - (ii) For the purpose of those proceedings.⁸²

It is also an offense, under the DTA, the POTA, and the Criminal Justice Act (CJA) 1993 for any person to "tip off" the subject of a money laundering investigation about the existence of that investigation, where the information is likely to prejudice the investigation.⁸³ Again, these statutes each exempt "professional legal advisers" from the obligation to disclose otherwise reportable information or other matters regarding money laundering activity where that information is obtained in "privileged circumstances."⁸⁴

80. For example, Section 52(1) of the Drug Trafficking Act (DTA) provides that:

- (1) A person is guilty of an offence if—
 - (a) he knows or suspects that another person is engaged in drug money laundering,
 - (b) the information, or other matter, on which that knowledge is based came to his attention in the course of his trade, profession or business, and
 - (c) he does not disclose the information or other matters to a constable as soon as is reasonably practical.

Drug Trafficking Act, 1994, c. 37, § 52(1) (Eng.) [hereinafter DTA]. See also Prevention of Terrorism Act, 1989, c. 4, § 18A(1) (Eng.) [hereinafter POTA].

81. See also POTA, *supra* note 80, § 18A(9).

82. DTA, *supra* note 80, § 52(8); see also POTA, *supra* note 80, § 17(2C).

83. See POTA, *supra* note 80, § 17, DTA, *supra* note 80, § 53, and Criminal Justice Act, 1993, c. 36, § 93D (Eng.) [hereinafter CJA]. The restrictions imposed by these statutes are essentially identical. Section 17(2) of the POTA provides that a person is liable if he or she either discloses to any other person information or "any other matter" that might "prejudice" an investigation if the disclosing party knows that a terrorism investigation is being, or is about to be conducted. Sections 17(2A) and 17(2B) prohibit the disclosure to any person of information concerning prior disclosures about suspicious activities made to law enforcement authorities.

84. See DTA, *supra* note 80, §§ 52(2); POTA, *supra* note 80, §§ 17(2C); and CJA, *supra* note 83, § 93D(4). For example, Section 17(2C) of the POTA states that:

In addition, Supervisory Authorities, which are defined to include banking and financial services organizations, are also required to provide law enforcement authorities with information concerning actual or suspected money laundering activities.⁸⁵ In particular, where a supervisory authority "(a) obtains any information; and (b) is of the opinion that that information indicates that any person has or may have been engaged in money laundering, the authority shall, as soon as is reasonably practical, disclose that information to a constable."⁸⁶ The Regulations also contain strict client-identification and record-keeping requirements.⁸⁷ Further, the Anti-Terrorism Act, Crime and Security, 2001, amends the Terrorism Act 2000, making it an offense for a person in the "regulated sector"⁸⁸ to fail to disclose promptly to a U.K. law enforcement officer that he "knows or suspects or has reasonable grounds for knowing or suspecting that another person has committed an offence under any of sections 15 to 18 (relating to funding terrorism and laundering terrorist funds), and the information came to him in the course of a business in the regulated sector."⁸⁹ A failure to disclose such information is excused if the person "is a professional legal adviser and the information or other matter came to him in privileged circumstances."⁹⁰

2. Canada

Canada's Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations⁹¹ similarly impose reporting obligations on persons and entities involved in financial transactions including accountants, money remitters, insurance agents, and real estate brokers, among others.⁹² Legal counsel are subject to the reporting requirements where they receive or pay funds (except funds relating to fees for professional services), purchase or sell securities, or transfer funds or securities "by any means."⁹³ Persons subject to the reporting requirements must supply certain statutorily required information⁹⁴ to a

(2C) Nothing in subsections (2) to (2B) [relating to liability for "tipping off" any person] above makes it an offence for a professional legal adviser to disclose any other matter—

- (a) to, or to a representative of, a client of his in connection with the giving by the adviser of legal advice to the client; or
- (b) to any person—
 - (i) in contemplation of, or in connection with, legal proceedings; and
 - (ii) for the purpose of those proceedings.

Section 93D(4) of the CJA similarly exempts the rendering of legal advice from the prohibitions on tipping off any person about the existence or proposed existence of a money laundering investigation, or about any disclosures regarding suspicious activities, where the information is likely to prejudice that investigation. See CJA, *supra* note 83, § 93D(1)–(3). Section 53 of the DTA is virtually identical to the CJA and POTA sections on "tipping off."

85. See Money Laundering Regulations 1993, S.I. No. 1993, § 15 (Eng.).

86. *Id.* § 16(1).

87. See *id.* §§ 7–13.

88. The regulated sector includes persons and entities: "(a) dealing in investments as principal or as agent; (b) arranging deals in investments; (c) managing investments; (d) safeguarding and administering investments; (e) sending dematerialised instructions; (f) establishing (and taking other steps in relation to) collective investment schemes; and (g) advising on investments." See Anti-Terrorism Act, Crime and Security, 2001, Schedule 3A, Part 1(1) (Eng.).

89. See *id.* §§ 21A(1)–(4).

90. *Id.* § 21A(5)(b).

91. Proceeds of Crime (Money Laundering) Act, P.C. 2001-1500 (2001) (Can.).

92. See *id.* § 1, "Interpretation."

93. See *id.* § 5 (Application of Part 1 of the Act).

94. Section 12 provides that reports must contain information including the names, addresses, account numbers and other identifying data concerning the transaction in question.

governmental agency authorized to accept such reports "concerning a financial transaction in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence."⁹⁵ Canada's Suspicious Transactions Reporting Regulations exempt legal counsel from disclosing information covered by the solicitor-client privilege.⁹⁶ Note, however, that the category of "privileged" communications between a solicitor and her client may be substantially narrower than the range of otherwise confidential, but unprivileged, client information known to legal counsel. Thus, under Canadian law, lawyers could be required to provide non-privileged, yet confidential information concerning their clients' financial activities to governmental authorities. Because the regulations are newly enacted and became effective only on November 8, 2001 their impact on the relationship between legal counsel and their clients may take some time to become known.

3. *The Bahamas*

The Bahamas has also enacted a gatekeeper initiative as part of its Financial and Corporate Service Providers Act, 2000.⁹⁷ The Act requires financial service providers to obtain licenses and subjects them to regulation and inspection.⁹⁸ The term "financial and corporate services" encompasses services routinely provided by lawyers including "the registration or management and administration of international business companies."⁹⁹ Among other things, the appointed inspector is authorized to determine whether a potential licensee is qualified to obtain a license based on criteria including "whether the applicant is a fit and proper person" and the "professional reputation and experience of the applicant;"¹⁰⁰ conduct periodic inspections of licensees;¹⁰¹ and provide information obtained during the course of an inspection to foreign authorities.¹⁰² Before providing financial or corporate services to a client licensees are required to verify the client's identity,¹⁰³ obtain identifying information and two references from the client,¹⁰⁴ and maintain records concerning the client.¹⁰⁵ The inspector may suspend or revoke the licenses of those found to have violated the statute.¹⁰⁶ Licensees may also be subject to substantial fines if they are found to have violated the Act.¹⁰⁷ Non-Bahamian lawyers who do business in the Bahamas will need to take these regulations into account in structuring business and financial arrangements on behalf of their clients.

95. *Id.* § 9(1).

96. *See* Part 1, § 5.

97. The statute, entitled "An Act to Provide for the Licensing and Regulation of Financial and Corporate Service Providers and for Connected Purposes," was initially enacted on Dec. 29, 2000, and amended on Aug. 31, 2001. No. 41 of 2001 (Bah.)

98. *See id.* § 3.

99. *Id.* § 2.

100. *Id.* § 4.1(3).

101. *Id.* § 12.4.

102. *Id.* §§ 12A(3)-(7), (9).

103. *Id.* § 14(1).

104. *Id.* § 14(2).

105. *Id.* § 14(3), 15.

106. *See id.* §§ 16, 17.

107. *See id.* § 18.

V. Conclusion

Since September 11, 2001 international attention has been intensely focused on the practice of laundering funds used to finance terrorism. Anti-money laundering authorities in the United States and elsewhere have addressed some of these issues through enacting legislation, promulgating implementing regulations, and drafting recommendations, along with undertaking efforts to enhance and expand coordination. However, it is likely that anti-money authorities will need to further focus their efforts on combating money laundering conducted through informal methods outside the financial system, as well as through emerging typologies such as Internet banking.

