

# Ad Hoc Task Force on Professional Responsibilities Regarding Money Laundering: PATRIOT Act and Gatekeeper Update

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## I. Introduction

Since the terrorist attacks of September 11, 2001, the United States and other governments have expanded their efforts to combat terrorism financing and criminal money laundering activity. In the United States, the year 2002 saw the implementation of various provisions of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the "USA PATRIOT Act"), which the President signed into law on October 26, 2001. In addition, governments and non-governmental organizations worldwide have stepped-up their consideration of the extent to which lawyers and other professionals should be required to aid law enforcement agencies in the fight against money laundering and terrorist financing.

This article reviews both the major developments in the implementation of the USA PATRIOT Act during the past year, and the developments relating to the so-called "Gatekeeper Initiatives" regarding the appropriate role of private lawyers in governmental efforts to combat money laundering.

## II. Implementation of the USA PATRIOT Act: 2002 Developments

### A. BACKGROUND

Title III of the USA PATRIOT Act substantially amended the anti-money laundering laws of the United States. Throughout 2002, the Department of the Treasury, and other

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affected agencies, published various interim and final rules designed to implement the USA PATRIOT Act's provisions.<sup>1</sup> A few of those rules are discussed herein.

## B. CORRESPONDENT ACCOUNTS FOR FOREIGN SHELL BANKS: SECTIONS 313 AND 319

Section 313(a) of the USA PATRIOT Act added subsection (j) to 31 U.S.C. § 5318, which prohibits "covered financial institutions"<sup>2</sup> in the United States from providing "correspondent accounts"<sup>3</sup> to foreign "shell banks."<sup>4</sup> Section 319(b) of the USA PATRIOT Act added subsection (k) to 31 U.S.C. § 5318, which requires covered financial institutions that provide correspondent accounts to foreign banks to maintain records of the foreign banks' owners<sup>5</sup> and to maintain the name and address of an agent for service of process concerning the correspondent account. Subsection (k) further authorizes the Secretary of the Treasury and the Attorney General to issue a summons or subpoena for records relating to the correspondent account—including records maintained outside the United States—to any foreign bank that maintains such correspondent account in the United States. If a foreign bank fails to respond to a summons or subpoena, upon notice from the Treasury Secretary or Attorney General, any covered U.S. financial institution must terminate the account.

On September 26, 2002, the U.S. Treasury Department published final rules implementing sections 313(a) and 319(b) of the USA PATRIOT Act.<sup>6</sup> These rules prohibit covered financial institutions from establishing, maintaining, administering, or managing correspondent accounts for foreign shell banks. The rules further require those covered financial institutions to take steps to prevent correspondent accounts with foreign banks

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1. To date, there have been very few cases in which the government has brought indictments or obtained guilty pleas under the money laundering provisions of the USA PATRIOT Act. Of the few cases to be publicly reported, one was apparently unrelated to terrorism. Earlier this year it was reported that the U.S. Attorney's Office for the District of New Hampshire, working with the Canadian authorities, invoked Title III of the USA PATRIOT Act to seize and forfeit \$4.5 million fraudulently obtained from elderly Americans by a ring of Canadian con artists. The victims of the telemarketing scam allegedly were informed that they had won various cash prizes, but were told that they had to pay Canadian taxes to collect their prizes. The funds had been sent to Jordanian and Israeli banks in Israel, and the USA PATRIOT Act permitted the seizure of substitute assets held in U.S. branches of those banks. See Gary Fields, *Agents Invoke USA PATRIOT Act in Case Unrelated to Terrorism*, WALL ST. J., Jan. 29, 2003, at B10.

2. The term "covered financial institution" is defined to include: an insured bank, a commercial bank or trust company, a private banker, a U.S. agency or branch of a foreign bank, a credit union, a thrift institution, a corporation operating under section 25A of the Federal Reserve Act, and a broker-dealer. The term "covered financial institution" does not include foreign branches of U.S. insured banks. 31 C.F.R. § 103.175(f) (2003).

3. A "correspondent account" is defined as "an account established by a covered financial institution for a foreign bank to receive deposits from, to make payments or other disbursements on behalf of a foreign bank, or to handle other financial transactions related to the foreign bank." 31 C.F.R. § 103.175(d)(ii) (2003).

4. "Foreign shell bank" is defined as "a foreign bank without a physical presence in any country." 31 C.F.R. § 103.175(i) (2003).

5. The term "owner" means "any person who, directly or indirectly: Owns, controls or has power to vote 25 percent or more of any class of voting securities or other voting interests of a foreign bank." 31 C.F.R. § 103.175(l)(1)(i) (2003). Persons who control the election of a foreign bank's directors are also considered "owners." See § 103.175(l)(ii). Interestingly, if directors are appointed rather than elected, those in control of such appointments would appear to be excluded from the definition of owner. The term owner is broadly defined to include members of the same, rather extended, family (including parents, children, first cousins, spouses, stepsiblings, aunts, uncles, parents-in-law, and their respective spouses). See § 103.175(l)(2)(ii).

6. See 67 Fed. Reg. 60,562-79 (final rule Sept. 26, 2002) (to be codified at 31 C.F.R. pt. 103).

from being used to provide services indirectly to foreign shell banks. Covered financial institutions are not restricted from providing correspondent accounts to their "regulated affiliates," that is, foreign shell banks that are at least 50 percent owned by the covered financial institution.<sup>7</sup> The rule further provides a safe harbor for covered financial institutions that obtain certifications (and periodic recertifications every three years) to verify the institution's compliance with the requirements of 31 U.S.C. §§ 5318(j), (k).<sup>8</sup> The final regulations became effective on October 28, 2002; however, covered financial institutions have until March 31, 2003 to obtain the information necessary to satisfy sections 313(a) and 319(b) of the USA PATRIOT Act.<sup>9</sup>

### C. INTERIM RULE CONCERNING CUSTOMER IDENTIFICATION FOR CERTAIN FINANCIAL INSTITUTIONS: SECTION 326

Pursuant to section 326 of the USA PATRIOT Act, which adds subsection (*l*) to 31 U.S.C. § 5318, the Treasury Department, Financial Crimes Enforcement Network, Office of the Comptroller of the Currency, Federal Reserve Board of Governors, Federal Insurance Deposit Corporation, Treasury's Office of Thrift Supervision, and the National Credit Union Administration jointly issued a proposed rule establishing regulations, which set minimum standards for covered financial institutions and their customers. The new subsection requires these financial institutions to: (1) verify the identity of a person seeking to open an account; (2) maintain records verifying the identities of account owners; and (3) consult government lists of known or suspected terrorists before opening such accounts. The proposed rules, issued on July 23, 2002, address customer identification programs for banks, savings associations, and credit unions;<sup>10</sup> broker-dealers;<sup>11</sup> futures commission merchants;<sup>12</sup> mutual funds;<sup>13</sup> and credit unions, banks and trust companies that do not have a functioning federal regulator.<sup>14</sup> Although the rules are substantially similar for each of these entities, there are differences between them, stemming from the different types of accounts maintained by each type of entity, as well as from the differences in the business operations of these institutions.

7. See 31 C.F.R. §§ 103.75(p), 103.177(a)(iii) (2003).

8. See 31 C.F.R. § 103.77(b) (2003). The regulation supplies model certifications. See 31 C.F.R. app. A, B.

9. See 67 Fed. Reg. 78,383-84 (final rule Dec. 24, 2002) (to be codified at 31 C.F.R. pt. 103). The Treasury Department revised the final implementation date based on comments submitted by covered financial institutions, particularly in the securities industry. The comments pointed out that the process of communicating the rule's requirements to foreign banks, the broad definition of correspondent accounts, and the overall increase in the regulatory burdens imposed on financial institutions, necessitated additional time to respond. See 67 Fed. Reg. at 78,383.

10. See 67 Fed. Reg. 48,290-99 (proposed July 23, 2002) (to be codified at 12 C.F.R. pt. 21, 208, 211, 326, 563, 748; 31 C.F.R. pt. 103).

11. See 67 Fed. Reg. 48,306-18 (proposed July 23, 2002) (to be codified at 31 C.F.R. pt. 103; 17 C.F.R. pt. 240).

12. See 67 Fed. Reg. 48,328-38 (joint notice of proposed rulemaking July 23, 2002) (to be codified at 17 C.F.R. pt. 1; 31 C.F.R. pt. 103).

13. See 67 Fed. Reg. 48,318-27 (proposed July 23, 2003) (to be codified at 31 C.F.R. pt. 103, 17 C.F.R. pt. 270).

14. See 67 Fed. Reg. 48,299-306 (proposed July 23, 2002) (to be codified at 31 C.F.R. pt. 103).

## D. SPECIAL DUE DILIGENCE PROGRAMS FOR CERTAIN FOREIGN ACCOUNTS: SECTION 312

On July 23, 2002, the Treasury Department published an interim final rule deferring the implementation of section 312 of the USA PATRIOT Act for certain financial institutions.<sup>15</sup> Section 312 requires covered financial institutions to undertake special due diligence procedures concerning certain foreign accounts as required by 31 U.S.C. § 5318(i).<sup>16</sup> Section 5318(i) requires covered financial institutions to establish “due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through [correspondent] accounts.”<sup>17</sup>

Based on the comments received in response to the proposed rule (described as “the furthest reaching proposed regulation issued under Title III of the Act thus far”), the Treasury Department deferred its implementation for certain financial institutions because of the significant burden on those entities, as well as concerns about the scope of the definitions, the complexity of the requirement for a rule governing so many different types of entities, and the lack of clear guidance to those non-bank institutions regarding their compliance obligations.<sup>18</sup> The entities for which the rule’s application is deferred include: casinos, money service businesses, mutual funds, credit card systems, and all other entities defined in the Bank Secrecy Act as financial institutions.<sup>19</sup> The application of the proposed rule is not deferred as to banks, securities brokers and dealers, futures commission merchants, and introducing brokers.<sup>20</sup> These entities are required to comply with the rules only with respect to private banking accounts, defined as accounts carrying balances of at least \$1 million.<sup>21</sup> However, the Treasury Department has taken a practical approach to due diligence, thus, banks are required to focus their efforts on high-risk foreign banks and accounts.<sup>22</sup>

## E. ADDITIONAL REQUIREMENTS

Among other things, financial services businesses, including unregistered investment companies (such as hedge funds and commodity pools),<sup>23</sup> insurance companies,<sup>24</sup> mutual

15. See 67 Fed. Reg. 48,348–52 (interim final rule July 23, 2002) (to be codified at 31 C.F.R. pt. 103).

16. See 31 U.S.C.A. § 5318(i) (West Supp. 2003).

17. See 31 U.S.C.A. § 5318(i)(1) (West Supp. 2003).

18. See 67 Fed. Reg. 48,349 (interim final rule July 23, 2002) (to be codified at 31 C.F.R. pt. 103).

19. See 67 Fed. Reg. 48,348 (interim final rule July 23, 2002) (to be codified at 31 C.F.R. pt. 103). Those “remaining financial institutions” include a mixed bag of financial service providers and other entities, such as: “dealers in precious metals, stones, or jewels; pawnbrokers; loan or finance companies; private bankers; trust companies; state chartered credit unions that are not federally regulated; insurance companies; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons engaged in real estate closings and settlements; investment companies; commodity pool operators; and commodity trading advisors.” 67 Fed. Reg. at 48,348, n.7.

20. For purposes of the interim rule, the term “bank” is defined to include “[a]n insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h))); a commercial bank; an agency or branch of a foreign bank in the United States; a federally insured credit union; a thrift institution; and a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*).” 67 Fed. Reg. at 48,349.

21. See 31 C.F.R. § 103.182 (2003). Private banking accounts maintained by or for senior foreign political officials, their family members or close associates must be subjected to additional diligence. See 67 Fed. Reg. 48,350 (July 23, 2002) (to be codified at 31 C.F.R. pt. 103).

22. See 67 Fed. Reg. at 48,350.

23. See 67 Fed. Reg. 60,617–24 (proposed Sept. 26, 2002) (to be codified at 31 C.F.R. pt. 103).

24. See 67 Fed. Reg. 60,625–30 (proposed Sept. 26, 2002) (to be codified at 31 C.F.R. pt. 103).

funds,<sup>25</sup> and others, are now required to develop anti-money laundering programs, report suspicious activities and transactions, and implement certain money laundering controls.

For many years the Bank Secrecy Act has required banks and other entities to file confidential reports of suspicious activities, known as Suspicious Activity Reports (SARs), with the Treasury Department's Financial Crimes Enforcement Network (FinCEN). The USA PATRIOT Act expands the SAR filing requirements to include other financial institutions. In 2002, the Treasury Department issued regulations offering guidance in filing SARs to insurance companies,<sup>26</sup> currency dealers and exchangers,<sup>27</sup> mutual funds, casinos and card clubs,<sup>28</sup> and broker-dealers.<sup>29</sup> Although the rules vary depending on the entities' differing businesses and risks, each of them is required to file reports of suspicious activities and to create, maintain, and periodically test anti-money laundering compliance programs, as well as educate their employees regarding the reporting requirements.<sup>30</sup>

25. See 67 Fed. Reg. 21,117-21 (interim final rule Apr. 29, 2002) (to be codified at 31 C.F.R. pt. 103).

26. See 67 Fed. Reg. 64,067-75 (proposed Oct. 17, 2002) (to be codified at 31 C.F.R. pt. 103). Insurance companies will be required to report suspicious activity involving transactions over \$5,000 in value. The Financial Crimes Enforcement Network (FinCEN) perceives that the money laundering risk is greatest with respect to life insurance products and annuities, and other stored value products that permit the transfer of funds from one person to another (rather than health or property insurance) because those products permit money launderers to "place large amounts of funds into the financial system and seamlessly transfer such funds to disguise their origin." 67 Fed. Reg. at 64,070. The final rule will become effective 180 days after it is published. See 31 C.F.R. § 103.16(g)(2003).

27. See 67 Fed. Reg. 64,075-80 (proposed Oct. 17, 2002) (to be codified at 31 C.F.R. pt. 103). Pursuant to the USA PATRIOT Act, the proposed rule will add currency dealers and exchangers to the list of "money services businesses" that are required to report suspicious activity involving transactions over or aggregating to \$2,000, or \$5,000 for certain clearing transactions. See 31 C.F.R. § 103.20(a)(1) (2003). Money services businesses subject to this requirement include: currency dealers or exchangers; check cashers; issuers or sellers/redemers of travelers' checks, money orders or stored value devices; money transmitters; and the U.S. Post Office (except with respect to the sale of philatelic products). See 67 Fed. Reg. at 64,076.

28. See 31 C.F.R. § 103.21 (2003). Certain casinos previously had been subject to Bank Secrecy Act (BSA) filing requirements; this rule makes the filing requirements applicable to all casinos with gross gaming revenues over \$1 million per year. See 31 C.F.R. § 103.11(11)(n)(8) (2003). Covered casinos and card clubs are required to report suspicious activity involving transactions over \$5,000 in value, as well as all violations of law, except for certain specified offenses. See 31 C.F.R. § 103.21 (2003) (defining which transactions are required to be reported). Additionally, casinos must periodically test their compliance programs. See 31 C.F.R. § 103.64 (2003). The Final Rule applies to transactions occurring after March 25, 2003. See 31 C.F.R. § 103.21(g) (2003).

29. See 31 C.F.R. § 103.19 (2003). Broker dealers are required to report suspicious transactions of over \$5,000 in value. The Final Rule applies to transactions occurring after December 30, 2002. See 31 C.F.R. § 103.19(h) (2003).

30. The language of the broker-dealer rule concerning which transactions are "suspicious" and must be reported is typical of the rules applied to other reporting entities. Transactions must be reported where (1) they meet the dollar threshold, and (2) the entity or person making the report:

... knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

- (ii) Is designed, whether through structuring or other means, to evade any requirements of this part or of any other regulations promulgated under the [BSA];
- (iii) Has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the broker-dealer knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or
- (iv) Involves use of the broker-dealer to facilitate criminal activity.

### III. Gatekeeper Developments

#### A. THE MULTILATERAL EFFORT TO COMBAT MONEY LAUNDERING

The Financial Action Task Force (FATF), an inter-governmental body consisting of twenty-nine countries and two international organizations, was established to develop and promote anti-money laundering policies at the national and international levels.<sup>31</sup> On May 30, 2002, the FATF issued a Consultation Paper outlining various options for strengthening national anti-money laundering measures and sought comments on those options.<sup>32</sup> Among the proposals in the Consultation Paper were new anti-money laundering initiatives for non-financial businesses and professionals.<sup>33</sup>

In the Gatekeeper Initiative, the FATF proposed that certain professionals, including lawyers,<sup>34</sup> serve as gatekeepers to the international financial and business markets. The Consultation Paper further proposed that certain anti-money laundering measures be extended to lawyers, including (1) increased regulation and supervision of the profession; (2) increased due diligence requirements regarding clients; (3) new internal compliance training and record-keeping, and, perhaps most significant; (4) new Suspicious Transaction Reporting (STR) requirements.<sup>35</sup> These new STR requirements would call for lawyers to report information, relating to a client activity, to a government enforcement agency or a Self-Regulatory Organization (SRO).<sup>36</sup> Furthermore, lawyers would be prohibited from informing their clients when an STR has been filed with the government. This “no-tipping-off” rule is incorporated into the existing FATF Recommendations and is already applied to financial institutions that have suspicious activity reporting requirements under existing law.<sup>37</sup> The Consultation Paper proposed that the STR requirement be enforced through criminal, administrative, or other sanctions.<sup>38</sup>

The Consultation Paper recognized that “[t]he particular role, history and status of the legal profession and the rules that attach to it means that very careful attention will need

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31 C.F.R. § 103.19(a)(1)-(2) (2003).

Even a cursory examination of the rules shows that, in determining which transactions to report, broker-dealers may not rely solely on dollar thresholds or other objective criteria, but instead, must exercise judgment and develop internal, transaction- and customer-sensitive criteria for deciding when to report transactions. Likewise, reporting entities may report suspicious transactions that do not meet the above criteria, but which the broker-dealer “believes is relevant to the possible violation of any law or regulation but whose reporting is not required by this section.” 31 C.F.R. § 103.19(a) (2003).

31. The FATF members are: the United States, the individual member nations of the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, and the United Kingdom), Argentina, Australia, Brazil, Canada, the European Commission, the Gulf Cooperation Council, Hong Kong, China, Iceland, Japan, Mexico, New Zealand, Norway, Singapore, Switzerland, and Turkey. See FATF, *Members and Observers*, at <http://www1.oecd.org/fatf/Members> (last visited Apr. 11, 2003).

32. See Financial Action Task Force on Money Laundering, *Review of the FATF Forty Recommendations: Consultation Paper* (May 30, 2002), at <http://www.fatf-gafi.org/>.

33. *Id.*

34. The FATF Consultation Paper covers “independent legal professionals” (i.e., outside as opposed to inside counsel), notaries, accountants, auditors, and company formation agents. *Id.* at 98.

35. *Id.*

36. See *id.*

37. See *id.*

38. *Id.* at 103.

to be given when considering the application of anti-money laundering obligations to such professionals.”<sup>39</sup> In this regard, it recognized that any STR requirement imposed on lawyers should be subject to the notion of the attorney-client privilege and the need for confidentiality in representing clients in litigation.

In response to a request for comments by the FATF, the ABA Task Force on Gatekeeper Regulation and the Profession, which was established in February 2002, developed and submitted comments on August 23, 2002. The ABA Board of Governors approved those comments for submission to the FATF as Task Force comments. In addition, the ABA House of Delegates, at its mid-year meeting, approved by a vote of approximately 95 percent affirmative, a resolution on the Gatekeeper Initiative opposing any measure that would compel lawyers to disclose confidential information to government officials or otherwise compromise the lawyer-client relationship or the independence of the bar.<sup>40</sup>

In 2003, the FATF is expected to develop new, or modified, recommendations, including a position on the Gatekeeper Initiative. While non-binding, the members of the FATF are expected to implement the Recommendations through national law, regulations, or administrative practice. The U.S. Government has not yet developed a position on the Gatekeeper Initiative, however, given the FATF's actions to date, as well as the activities of other governments around the world, it is anticipated that the U.S. Government will begin to do so in the near future.

## B. ACTIVITIES OF OTHER GOVERNMENTS

Other governments throughout the world have either undertaken certain Gatekeeper Initiative legislation and regulation, or are now considering such laws and regulations in light of the FATF effort.<sup>41</sup> Organized bar associations in various countries have expressed concerns regarding the potential impact of Gatekeeper Initiative-type laws, especially STR requirements, on the attorney-client relationship, the independence of the legal profession from the government, and the confidentiality of communications between lawyer and client.

Of particular concern is the European Union's (EU) Anti-Money Laundering Directive (Directive), as amended by the Commission in October of 2001.<sup>42</sup> The amendment to the Directive requires European governments to take action to impose Gatekeeper Initiative requirements, similar to those outlined in the FATF Consultation Paper, upon “independent legal professionals” and notaries.<sup>43</sup> These requirements include an STR obligation. Lawyers within the EU would be prohibited from informing their clients of any report that is filed with the government or a SRO, and there would be civil and criminal penalties available to enforce the STR and the no-tipping off requirement. Although the STR requirement may be subject to the attorney-client privilege, at least as it applies to litigation or the pre-litigation analysis of a client's potential liability or claim, serious concerns remain

39. *Id.* art. 5.4.

40. The full text of this resolution can be accessed at [www.abanet.org/leadership/recommendations03/104.pdf](http://www.abanet.org/leadership/recommendations03/104.pdf).

41. Some European countries, such as the United Kingdom and Switzerland, have already implemented certain Gatekeeper Initiative requirements, including the STR requirement. These laws are quite detailed; however, summaries are available at the ABA Task Force on Gatekeeper Regulation and the Profession's Web site—[www.abanet.org/crimjust/taskforce/home.html](http://www.abanet.org/crimjust/taskforce/home.html).

42. Council Directive 2001/97/EC, 2001 O.J. (L 344) 76.

43. *Id.*

among the various European bar associations regarding the effect that any Gatekeeper Initiative requirements will have on the legal profession. According to the Directive, European member countries are expected to implement the Gatekeeper Initiative requirements by June 2003.<sup>44</sup> It remains to be seen whether this timetable will be met, or whether litigation or other action will be undertaken to challenge the Directive's Gatekeeper Initiative requirements.

The Canadian government has also implemented certain Gatekeeper Initiative requirements, including an STR requirement for the Canadian legal profession.<sup>45</sup> However, the Canadian bar initiated litigation challenging the constitutionality of the STR requirement as applied to lawyers, even though the Canadian law contained an exception to the reporting requirement for privileged communications between the lawyer and client. On November 20, 2001, a justice of the British Columbia Supreme Court issued an injunction against implementation of the reporting requirement, noting that the law raised serious constitutional concerns and could compromise the bar's independence from the government.<sup>46</sup> The court stated:

The harm identified by the petitioners is serious. . . . It should be noted that, even without the obligations imposed by this legislation, lawyers are subject to codes of conduct and ethical obligations imposed by Law Societies and to the provisions of Part XII.2 of the Criminal Code. They cannot engage in money laundering schemes or be a party to any transactions with clients that conceal or convert property or proceeds that they believe to involve money laundering. . . . The proclamation of s.5 [the suspicious transaction reporting provision] of the Regulations authorizes an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised deserve careful consideration by the Court. The petitioners seek a temporary exemption from the legislation until the merits of their constitutional challenge can be determined. I conclude that the petitioners have satisfied the tripartite test for the exemption they seek. . . .<sup>47</sup>

Other provincial courts followed suit, enjoining the reporting requirement within their respective jurisdictions. The Canadian federal government agreed to suspend implementation of the reporting requirement until a final decision on the merits of the case was issued. A trial on the merits of the constitutional challenge is expected in early summer of 2003.

Expressing similar concerns, the bar of the Bahamas has also instituted legal proceedings against the Gatekeeper Initiative legislation passed by the Bahamian government, again citing constitutional concerns regarding the effect of any mandatory reporting obligation on the attorney-client relationship and independence of the bar.<sup>48</sup>

### C. THE UNITED STATES POSITION

The U.S. Government has not yet passed any legislation or regulation concerning the Gatekeeper Initiative. According to the National Money Laundering Strategy Report of

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44. *Id.*

45. Proceeds of Crime (Money Laundering) Act, S.C., ch. 17, (2000) (Can.).

46. *The Law Society of British Columbia v. Att'y. Gen. of Canada*, [2001] BCSC 1593.

47. *Id.* paras. 103, 104, 108.

48. *Lawyers File Constitutional Challenge to Anti-Money Laundering Laws*, OFFSHORE NEWS ONLINE, Dec. 17, 2001, available at <http://www.offshore.com/articles>.

2000,<sup>49</sup> issued jointly by the Department of Justice and the Department of the Treasury, the Justice Department was tasked with reviewing the professional responsibilities of lawyers and making recommendations to the Attorney General and the Secretary of the Treasury, "ranging from enhanced professional education, standards or rules, to legislation, as might be needed."<sup>50</sup> A similar approach was taken in the National Money Laundering Strategy Report for 2001. An interagency working group has been established, consisting of representatives from the Departments of Justice and the Treasury, the Securities and Exchange Commission, the Financial Crimes Enforcement Network, the U.S. Customs Service, and others. This working group is charged with developing U.S. policy on Gatekeeper Initiative requirements for the legal profession. Moreover, the working group was heavily involved in developing the Gatekeeper Initiative aspects of the FATF Consultation Paper of May 30, 2002.

Apart from the interagency working group effort and the FATF exercise, Title III of the USA PATRIOT Act contains a provision requiring the Treasury Department to promulgate anti-money laundering requirements for persons involved in certain real estate transactions. Regulations pertaining to the real estate industry have been delayed as the Treasury Department is continuing to consult with the industry and determine how best to implement this portion of the statute. It is not clear if the proposed regulations will explicitly address or impose STR requirements for lawyers or law firms involved in certain real estate transactions.

The Secretary of the Treasury can also designate any business as a financial institution for purposes of extending anti-money laundering requirements to that business, including suspicious activity reporting requirements.<sup>51</sup> It is questionable whether this provision of the law could be used by the Treasury Department to impose Gatekeeper Initiative requirements, including any STR or suspicious activity reporting requirements, on the legal profession as a whole. It is expected that the U.S. Government, simultaneously with the efforts of the FATF to develop its final recommendation, will be developing a position during the next six to twelve months regarding the Gatekeeper Initiative. Moreover, it is anticipated that the U.S. Government will need to seek legislative authority, or otherwise engage in a rule-making proceeding, before imposing any Gatekeeper Initiative requirements on the profession.

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49. Pursuant to the Money Laundering and Financial Crimes Strategy Act of 1998, the Justice Department and Treasury Department are directed to issue a national money laundering strategy every year, outlining a plan of action to enhance U.S. anti-money laundering efforts. Money Laundering & Financial Crimes Strategy Act, Pub. L. No. 105-310 (1998).

50. U.S. Department of Justice and U.S. Department of the Treasury, *The National Money Laundering Strategy for 2000*, issued March 8, 2000, p. 45.

51. Specifically, 31 U.S.C. § 5312(a)(2), provides that a "financial institution" includes:

any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

31 U.S.C.S. § 1532(a)(2) (Law. Co-op. Supp. 2003).

