

Money Laundering Enforcement and Policy

EDWARD J. KRAULAND AND AARON R. HUTMAN*

I. Introduction

More than a full year removed from the terrorist attacks of September 11, 2001, calendar year 2003 saw the United States and the international community continue efforts to combat money laundering and terrorist financing. The U.S. government continued to expand its regulatory anti-money laundering regime under the mandate of the USA PATRIOT Act¹ and to vigorously pursue enforcement of anti-money laundering statutes and regulations. In June 2003, the multilateral efforts of nations in the Financial Action Task Force (FATF)² produced an updated collection of the organization's Forty Recommendations, which are the international standard for anti-money laundering policy. Of particular interest to the legal profession is the role of lawyers as "gatekeepers" in financial transactions, and the resulting regulation of lawyers under anti-money laundering regimes in jurisdictions around the world.

This article summarizes various enforcement efforts under the U.S. anti-money laundering regime and U.S. regulatory developments under the USA PATRIOT Act, the new FATF Recommendations, and international developments relating to the regulation of lawyers as "gatekeepers" under anti-money laundering regimes.

*Edward J. Krauland is a partner at Steptoe & Johnson LLP. in Washington, D.C. He is a co-chair of the ABA Section of International Law & Practice, Ad Hoc Task Force on Professional Responsibilities Regarding Money Laundering, and Chairman of the ABA Task Force on Gatekeeper Regulation and the Profession.

Aaron R. Hutman is an attorney at Steptoe & Johnson LLP. in Washington, DC. His practice focuses on international trade law, anti-money laundering law and policy, Foreign Corrupt Practices Act compliance counseling, and export controls.

1. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, known as the "USA PATRIOT Act," was signed into law on October 26, 2001.

2. The FATF is an inter-governmental body whose purpose is to develop and promote policies, both at the national and international levels, to combat money laundering and terrorist financing. The FATF membership is currently made up of thirty-one countries and territories, and two regional organizations. See generally Financial Action Task Force's website, at <http://www.fatf-gafi.org> (last visited May 19, 2004).

II. U.S. Anti-Money Laundering Developments

In November 2003, the U.S. Department of the Treasury and the U.S. Department of Justice released the joint report, 2003 National Money Laundering Strategy.³ The three overarching goals of the report are to: (1) safeguard the international financial system from money laundering and terrorist financing; (2) enhance the U.S. government's ability to identify, investigate, and prosecute major money laundering organizations and systems; and (3) ensure effective regulation.⁴ During 2003, the United States vigorously pursued each of these goals.

A. SAFEGUARDING THE INTERNATIONAL FINANCIAL SYSTEM

During 2003, the United States worked with the FATF, the Edgemont Group, and various other international organizations and countries to combat money laundering and terrorist financing.⁵ The United States also utilized Section 311 of the USA PATRIOT Act, which allows the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), to designate a foreign jurisdiction, institution, class of transactions, or type of account as a "primary money laundering concern" and to impose certain "special measures" on those jurisdictions and institutions that pose money laundering concerns.⁶ This statutory provision offers a means for the United States, in coordination with other FATF countries, to apply pressure on non-cooperating countries or institutions, and thus combat money laundering and terrorist financing channels outside of this country. In 2003, under Section 311, FinCEN considered special measures against Nauru, Ukraine, Burma, and two Burmese financial institutions.

Section 311 was invoked for the first time in December 2002, when FinCEN designated Nauru and Ukraine as primary money laundering concerns in response to the FATF's call for countermeasures on Ukraine and the significant money laundering risks posed by Nauru.⁷ On April 17, 2003, FinCEN issued a notice of proposed rulemaking to ban correspondent account relationships with Nauru-licensed banks by any U.S. financial institution or foreign bank branch operating in the United States.⁸ Nauru has since implemented legislation that it claims will eliminate shell banks within six months, but the island remains on the FATF's list of Non-Cooperating Countries and Territories. Ukraine passed significant legislative reforms that led to a decision by the FATF on February 14, 2003, to with-

3. United States Department of the Treasury and United States Department of Justice, *2003 National Money Laundering Strategy*, (Nov. 2003), available at <http://www.treas.gov/press/releases/reports/js10102.pdf>[hereinafter *2003 National Money Laundering Strategy*].

4. *Id.* at 4.

5. *Id.* at 5-18.

6. The special measures that may be imposed on a target under Section 311 include requiring any domestic financial institution or agency to undertake specific recordkeeping and reporting requirements with regard to the target; maintaining information on beneficial ownership of the institution or agency's accounts; maintaining information on correspondent or pay-through accounts; and/or prohibiting or placing conditions upon correspondent or pay-through accounts. See 31 U.S.C.S. § 5318A(b) (Supp. 2002).

7. See *Departmental Offices Designation of Nauru and Ukraine as Primary Money Laundering Concerns*, 67 Fed. Reg. 78,859 (Dec. 26, 2002). Nauru maintained its practice of licensing a significant number of shell banks and failing to provide regulatory oversight for those banks despite the U.S. designation.

8. See Financial Crimes Enforcement Network, *Imposition of Special Measures Against the Country of Nauru*, 68 Fed. Reg. 18,917 (Apr. 17, 2003).

draw its call for countermeasures.⁹ FinCEN responded by revoking the designation of Ukraine as a primary money laundering concern on April 17, 2003.¹⁰

On November 25, 2003, FinCEN designated the country of Burma (Myanmar) and two individual financial institutions, Myanmar Mayflower Bank and Asia Wealth Bank, as “primary money laundering concern[s].”¹¹ On that same date, FinCEN published a notice of proposed rulemaking proposing a prohibition on opening or maintaining correspondent accounts for, or on behalf of, a Burmese financial institution in any covered financial institution in the United States, including any correspondent accounts of other foreign banks used to service Burmese financial institutions.¹² This prohibition would not apply to any account not prohibited under the U.S.-Burmese OFAC sanctions regime pursuant to Executive Order 13310.¹³ On November 25, 2003, FinCEN also published a notice of proposed rule-making recommending similar prohibitions apply to Myanmar Mayflower Bank and Asia Wealth Bank.

B. ENHANCING THE UNITED STATES GOVERNMENT’S ABILITY TO IDENTIFY, INVESTIGATE, AND PROSECUTE MONEY LAUNDERING

The 2003 National Money Laundering Strategy identified efforts of inter-agency coordination within the U.S. government to improve anti-money laundering enforcement and indicated a desire to focus resources on high-impact targets and illicit funds passing through the financial system.¹⁴ In support of these goals, FinCEN utilized Sections 314(a) and 319 of the USA PATRIOT Act, and engaged in a variety of enforcement efforts under U.S. law.

Under Section 314(a) of the USA PATRIOT Act, FinCEN established a system to enable law enforcement officials investigating terrorist financing and money laundering cases to relay requests for information regarding targets of investigation to financial institutions.¹⁵ According to FinCEN’s *Suspicious Activity Reports: Trends, Tips & Issues* (Issue 6), from February through October 20, 2003, FinCEN submitted 167 Section 314(a) requests to financial institutions on behalf of eleven individual federal law enforcement agencies and received 6,397 positive responses, which were forwarded to the requesting law enforcement agencies by FinCEN.¹⁶

9. See *FATF Withdraws Countermeasures with Respect to Ukraine and Decides on Date for Countermeasures to Philippines*, available at http://www.fatf-gafi.org/pdf/PR-20030214_en.pdf (Feb. 14, 2003).

10. See *Revocation of Designation of Ukraine as Primary Money Laundering Concern*, 68 Fed. Reg. 19,071 (Apr. 17, 2003).

11. See *Designation of Burma as a Jurisdiction of Primary Money Laundering Concern; Designation of Myanmar Mayflower Bank and Asia Wealth Bank as Financial Institutions of Primary Money Laundering Concern*, 68 Fed. Reg. 66,298 (Nov. 25, 2003). The FATF had called upon its members to impose additional countermeasures on Burma by November 3, 2003, given the lack of money laundering controls and barriers to cooperation in enforcement.

12. See *id.*

13. Note that while the OFAC regime would prohibit U.S. financial institutions from dealing with financial institutions in Burma, the prohibition on correspondent banking also applies to branches of Burmese financial institutions outside of Burma.

14. See 2003 *National Money Laundering Strategy*, *supra* note 3, at 19–22.

15. See *Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity*, 67 Fed. Reg. 60,579 (Sept. 26, 2002) (Final Rule); 67 Fed. Reg. 9874 (Mar. 4, 2002) (Interim Rule and Proposed Rule).

16. See *SAR Activity Review: Trends, Tips & Issues*, available at <http://www.fincen.gov/sarreviewissue6.pdf> (Nov. 2003). This procedure was interrupted under a brief moratorium from November 2002 to January 2003, which suspended all Section 314(a) activity, but the system resumed operation in February 2003.

In 2003, Congress used another weapon in anti-money laundering enforcement: Section 319 of the USA PATRIOT Act, which permits U.S. authorities to seize a foreign bank's "inter-bank" account to reach tainted money on deposit in the foreign bank outside of the United States. Section 319 provides a significant new scope for U.S. law enforcement, which in the past has been limited when attempting to reach funds in foreign banks where the United States did not have a proper treaty to reach such funds or where the foreign country was otherwise uncooperative. U.S. authorities are not required to show that the funds in any inter-bank account are related to the tainted funds at issue in order to utilize Section 319. Thus far, the United States has used Section 319 on more than a dozen occasions, reaching funds from the inter-bank accounts of financial institutions from countries including Belize, India, Israel, Oman, and Taiwan.¹⁷ For example, in May of 2003, federal authorities seized \$310,000 from foreign correspondent accounts at Citibank, Standard Chartered Bank, Deutsche Bank, and HSBC Bank U.S.A. as part of charges against Ahmed Abdu, a Sudanese citizen residing in Brooklyn who pled guilty to operating an unlicensed money transmitting business.¹⁸ Although a powerful tool for U.S. law enforcement, Section 319 has raised diplomatic controversy with countries whose banks have been affected by the provision.¹⁹

FinCEN and other federal authorities continued enforcement efforts against criminals and non-compliant financial institutions, including those businesses recently included as financial institutions under the USA PATRIOT Act. In January of 2003, the Justice Department agreed to a "deferred prosecution agreement" with Banco Popular of Puerto Rico under which the bank agreed to pay a fine of \$21.6 million for failing to report suspicious activities to the government.²⁰ The numerous violations by Banco Popular between 1995 and 2000 included the bank allowing one person to deposit over \$20 million in cash, including deposits in cash-filled paper bags or gym bags.²¹ In another enforcement action, on March 7, 2003, FinCEN imposed a \$3 million penalty on Western Union, a money services business, for widespread failures to follow currency transaction and suspicious activity reporting requirements.²² In addition to banks and money services businesses, U.S. enforcement actions also targeted other, less traditional "financial institutions." For example, in June 2003, agents for the Department of Homeland Security charged eleven New York City jewelers at seven different retail and wholesale locations with money laundering.²³ The jewelers had allegedly accepted cash in exchange for gold items when they had knowledge that the gold was subsequently smuggled to Colombia.²⁴

17. See Eric Lichtblau, *Threats and Responses: Law Enforcement; U.S. Cautiously Begins to Seize Millions in Foreign Banks*, NEW YORK TIMES, May 30, 2003 (Late Edition), at A16.

18. *Id.*

19. *Id.* ("State Department officials worry 'that this might be seen by other countries as arbitrary or trying to extra-territorially impose our laws' under the guise of fighting terrorism . . .").

20. See 2003 *National Money Laundering Strategy*, *supra* note 3, at 46; Gregg Fields, *Bank Fails to Report Shaky Activity*, THE MIAMI HERALD, Jan. 17, 2003, available at <http://www.moneylaundering.com/NewsArticles/MiamiHerald19.htm>.

21. Fields, *supra* note 20.

22. See Financial Crimes Enforcement Network, *In the Matter of Western Union Financial Services, Inc.*, available at http://www.fincen.gov/western_union_assessment.pdf (last visited Mar. 3, 2004).

23. See 2003 *National Money Laundering Strategy*, *supra* note 3, at 46-47.

24. *Id.*

C. ENSURING EFFECTIVE REGULATION: CONTINUED REGULATORY DEVELOPMENTS UNDER THE USA PATRIOT ACT

During 2003, FinCEN continued to implement the USA PATRIOT Act's mandate to require anti-money laundering programs for all companies falling under the expanded definition of "financial institutions" and to require suspicious activity reports where indicated or authorized by statute.²⁵ FinCEN, at times in conjunction with other financial or commodity regulatory agencies:

- Issued final rules requiring currency dealers and exchangers to file SARs and defining "futures commission merchants" and "introducing brokers in commodities" as financial institutions required to file SARs.²⁶
- Issued final rules applying customer identification requirements to "banks, saving associations, credit unions and certain non-federally regulated banks;" brokers and dealers; mutual funds; "futures commission merchants" and "introducing brokers;" and proposed rules applying customer identification requirements to "certain banks lacking a federal functional regulator."²⁷
- Issued proposed rules to require that mutual funds file SARs and to require anti-money laundering programs for "dealers in precious metals, stones, or jewels," commodity trading advisors, and investment advisors.²⁸
- Issued advanced notices of proposed rulemaking on the potentially complicated or controversial application of anti-money laundering programs to vehicle sales, travel agencies, and persons involved in real estate closings.²⁹

The advanced notice of proposed rulemaking regarding persons involved in real estate closings garnered particular interest from the U.S. legal profession, as the notice discussed the role of lawyers in real estate closings and sought comment on how best to apply any

25. See 31 U.S.C.S. § 5318(g), (h) (1996 & Supp. 2002).

26. See *Financial Crime Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Requirement that Currency Dealers and Exchangers Report Suspicious Transactions*, 68 Fed. Reg. 6613 (Feb. 10, 2003); *Amendment to the Bank Secrecy Act Regulations; Definition of Futures Commission Merchants and Introducing Brokers in Commodities as Financial Institutions; Requirement that Futures Commission Merchants and Introducing Brokers in Commodities Report Suspicious Transactions*, 68 Fed. Reg. 65,392 (Nov. 20, 2003).

27. See *Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks*, 68 Fed. Reg. 25,090 (May 9, 2003); *Customer Identification Programs for Broker-Dealers*, 68 Fed. Reg. 25,113 (May 9, 2003); *Customer Identification Programs for Mutual Funds*, 68 Fed. Reg. 25,131 (May 9, 2003); *Customer Identification Programs for Futures Commission Merchants and Introducing Brokers*, 68 Fed. Reg. 25,149 (May 9, 2003); *Customer Identification Programs for Certain Banks Lacking a Federal Functional Regulator*, 68 Fed. Reg. 25,163 (May 9, 2003) (Proposed Rule); *Customer Identification Programs for Financial Institutions*, 68 Fed. Reg. 55,335 (Sept. 25, 2003).

28. See *Amendment to the Bank Secrecy Act Regulations—Requirement that Mutual Funds Report Suspicious Transactions*, 68 Fed. Reg. 2716 (Jan. 21, 2003) (Proposed Rule); *Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels*, 68 Fed. Reg. 8480 (Feb. 21, 2003) (Proposed Rule); *Anti-Money Laundering Programs for Commodity Trading Advisors*, 68 Fed. Reg. 23,640 (May 5, 2003) (Proposed Rule); *Anti-Money Laundering Programs for Investment Advisers*, 68 Fed. Reg. 23, 646 (May 5, 2003) (Proposed Rule).

29. See *Anti-Money Laundering Programs for Businesses Engaged in Vehicle Sales*, 68 Fed. Reg. 8,568 (Feb. 24, 2003) (Advanced Notice of Proposed Rulemaking); *Anti-Money Laundering Programs for Travel Agencies*, 68 Fed. Reg. 8571 (Feb. 24, 2003) (Advanced Notice of Proposed Rulemaking); *Anti-Money Laundering Programs for "Persons Involved in Real Estate Closings and Settlements"*, 68 Fed. Reg. 17,569 (Apr. 10, 2003) (Advanced Notice of Proposed Rulemaking).

anti-money laundering requirements to lawyers. This notice and its implications for U.S. lawyers is discussed below in the Gatekeeper section.

III. Financial Action Task Force—Revised Forty Recommendations

In June 2003, the FATF formally adopted its revised “Forty Recommendations,” updating the set of prescriptions which serve as the international standard for anti-money laundering policies. These revised recommendations updated the prior Forty Recommendations introduced in 1996, and were designed to adapt enforcement and prevention policies to current and developing money laundering tactics, as well as further bolster international cooperation in anti-money laundering efforts.³⁰ Some of the more noteworthy changes in the Forty Recommendations follow.³¹

Recommendation One proposes an expansion of the scope of the coverage of anti-money laundering laws by urging countries to define money laundering to include transactions relating to money derived from the “widest range of predicate offenses.”³² The FATF recommends that these predicate offenses include violations of foreign law relating to conduct occurring in another country which would also constitute an offense in the country prosecuting a money laundering offense. Recommendation Two addresses the knowledge requirement for money laundering, providing that scienter should include a mental state that “may be inferred from objective factual circumstances.” This would provide for implied knowledge and “willful blindness,” already included in U.S. anti-money laundering statutes.³³

Second, the revised recommendations focus extensively on customer due diligence and identification. Recommendation Five elaborates on the measures which financial institutions must take to verify the identity of customers or beneficial owners and to conduct due diligence, providing more detailed standards than the prior recommendations. Recommendations Six and Seven provide for enhanced due diligence requirements for “politically exposed persons” (certain prominent public officials)³⁴ and foreign correspondent banking

30. The first Forty Recommendations were adopted by the FATF in 1990. These were subsequently revised in 1996. In May 2002, the FATF issued a public consultation document examining potential changes to the Forty Recommendations, beginning a year-long process of garnering suggestions and feedback from member countries, representatives of the banking, securities and insurance industries, and various other interested parties. The revised Forty Recommendations were officially adopted in the FATF June 2003 plenary in Berlin.

31. To compare the 1996 and 2003 versions of the Forty Recommendations, see the FATF website at http://www.fatf-gafi.org/40Recs_en.htm and http://www.fatf-gafi.org/40Recs-1996_en.htm.

32. Under Recommendation One, countries should include as predicate acts a range of crimes within each designated category of offenses. These categories include: organized crime and racketeering, terrorism and terrorist financing, trafficking in human beings and migrant smuggling, sexual exploitation (including offenses against children), trafficking in narcotics, trafficking in arms, trafficking in stolen or illegal goods, corruption and bribery, fraud, counterfeiting currency, product counterfeiting and piracy, environmental crimes, murder or grievous bodily injury, kidnapping or hostage-taking, robbery or theft, smuggling, extortion, forgery, piracy, and insider trading and market manipulation. See Recommendation 1 at http://www.fatf-gafi.org/40Recs_en.htm#Scope (last updated Feb. 2, 2004).

33. It is well established that U.S. courts, where necessary, may apply a conscious avoidance or willful blindness standard to the knowledge element under the U.S. criminal anti-money laundering statutes at 18 U.S.C. §§ 1956 and 1957. See, e.g., *United States v. Bornfield*, 145 F.3d 1123, 1123–32 (10th Cir. 1998) (affirming money laundering conviction where evidence showed that defendant accountant “consciously avoided actual knowledge” of illegal source of funds).

accounts. In addition, Recommendations Thirty-three and Thirty-four provide that countries should prevent the unlawful use of "legal persons"³⁵ and trusts or similar legal arrangements for money laundering, and encourage countries to consider applying the standards of Recommendation Five to these legal persons and trusts to ensure access to information on their beneficial ownership.

Third, the revised recommendations extend to additional industries and professionals the due diligence and reporting requirements applicable to traditional financial institutions. Recommendation Twelve provides that due diligence and customer identification requirements should apply to casinos,³⁶ real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals and accountants, and trust company service providers. Recommendation Sixteen provides that the aforementioned groups, with a few noted exceptions,³⁷ should also be required to report suspicious activities, be protected legally when making such reports, develop internal anti-money laundering and terrorist financing programs, and exercise care in dealing with parties from jurisdictions not compliant with the Forty Recommendations. Recommendation Twenty-three elaborates on the need to fully regulate money service businesses. Recommendation Twenty generally encourages countries to apply due diligence, customer identification and reporting recommendations to any other businesses or professionals who may pose money laundering or terrorist financing risks. The FATF has thus delivered a message that money laundering tactics extend beyond the traditional use of banks and will continue to evolve to encompass new industries; effective enforcement efforts will need to take account of and adapt to these changing tactics.

Finally, the revised recommendations address several topics relating to international banking practices and cooperation in enforcement. Recommendation Eighteen provides for a ban on shell banks,³⁸ and indicates banks should refuse to have correspondent relationships with such banks and guard against dealing with foreign banks that permit their accounts to be used by shell banks. Recommendation Twenty-one provides that countries should be able to apply counter-measures to countries not compliant with FATF recommendations (the use of such countermeasures by the United States under Section 311 of the PATRIOT

34. The Glossary to the Forty Recommendations defined "politically exposed persons" (PEP) as "individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories." See Glossary at http://www.fatf-gafi.org/40Recs_en.htm.

35. Recommendation Thirty-three places particular emphasis on regulating legal persons who issue bearer instruments. See Recommendation 33 at http://www.fatf-gafi.org/40Recs_en.htm#Transparency.

36. See also Recommendation 24(a) (outlining a "comprehensive regulatory and supervisory regime" recommended for casinos) at http://www.fatf-gafi.org/40Recs_en.htm#Regulation.

37. Lawyers, notaries, other legal professionals and accountants are only subjected to these anti-money laundering compliance requirements to the extent they engage in certain transactions. Moreover, the reporting requirement is made subject to professional secrecy or legal privilege requirements. Dealers in precious stones and metals should be required to report suspicious transactions when they engage in cash transactions of over \$15,000. Trust companies should be required to report suspicious activities only when engaging in certain transactions for or on behalf of a client.

38. Section 313(a) of the USA PATRIOT Act already prohibits covered financial institutions from providing "correspondent accounts" to shell banks. See 31 U.S.C.S. § 5318(j) (Supp. 2002).

Act was discussed above). Recommendation Twenty-six requires countries to designate Financial Intelligence Units (FIU), agencies in each country which will serve as a national center for receiving, assessing and making available for enforcement purposes suspicious activity reports and other information relating to money laundering and terrorist financing.³⁹ According to Recommendation Twenty-eight, these FIUs or other competent authorities should have the capacity to access records from financial institutions and other persons for enforcement purposes. Recommendation Forty details requirements for cooperation among countries in enforcing money laundering laws and discourages refusal of requests for assistance or invocation of secrecy or confidentiality rules to block the flow of information needed for enforcement.

IV. Gatekeeper Provisions

Over the past several years, one of the more controversial topics in money laundering enforcement has been the question of how countries should treat professionals such as lawyers, accountants, and financial advisors who facilitate transactions and otherwise act as “gatekeepers” to the financial and business systems within nations and throughout the global economy. These professionals are believed to be in a unique position to observe transactions and possibly identify potential suspicious activities that may indicate money laundering, terrorist financing, or other unlawful conduct. However, these gatekeeper professionals are often subject to confidentiality commitments or legal privileges which underlie the professional relationships that allow them to perform these necessary gatekeeping roles.

Prior to September 11, 2001, countries such as the United Kingdom and Switzerland had adopted laws imposing gatekeeper requirements on lawyers in their jurisdictions.⁴⁰ In October 2001, the Proceeds of Crime (Money Laundering) Act⁴¹ went into effect in Canada, imposing gatekeeper requirements on the legal profession in that country. On December 4, 2001, the European Parliament and the Council of the European Union issued a directive (the EU Directive) requiring EU members to apply gatekeeper initiatives on “independent legal professionals” by June of 2003.

During 2003, bar associations and legal professionals continued to express concerns with gatekeeper provisions which they believe threaten legal privilege, confidentiality, and the traditional role of the lawyer. These efforts appear to have had an impact in moderating the gatekeeper language in the revised FATF Forty Recommendations, halting implementation of controversial gatekeeper legislation in Canada, and giving rise to protests against the EU Directive. Thus far, the United States has not adopted any gatekeeper requirements for the legal profession.⁴² This is in part due to the sensitive and difficult questions raised

39. FinCEN, for example, serves as the FIU for the United States. FIUs from several countries currently participate in the Edgemont Group to coordinate enforcement efforts and provide mutual assistance.

40. Laws relating to gatekeeper initiatives for the Bahamas, Canada, Jersey, Switzerland and the United Kingdom are available on the ABA's website, at <http://www.abanet.org/crimjust/taskforce/laws.html> (last visited May 19, 2004).

41. S.C., ch. 17 (2000) (Can.).

42. The ABA Section of International Law and Practice, Ad Hoc Task Force on Professional Responsibilities Regarding Money Laundering, and the ABA Task Force on Gatekeeper Regulation and the Profession have been established to monitor this issue on behalf of the Section and the wider ABA. See generally ABA Gatekeeper Task Force, at <http://www.abanet.org/crimjust/taskforce/home.html>.

by such provisions, the extensive state ethics rules that apply to the profession and govern confidentiality obligations, and the critical role of the attorney-client privilege and duty of confidentiality in ensuring clients obtain accurate and complete legal advice and assistance.⁴³

A. GATEKEEPER PROVISIONS IN FATF FORTY RECOMMENDATIONS

The revised Forty Recommendations provided for a gatekeeping role for lawyers when engaged in certain transactions, but included language protecting legal privilege and confidentiality. Recommendation twelve requests that countries apply due diligence and record-keeping requirements to lawyers when they “prepare for or carry out transactions” in the areas of:

- buying and selling real-estate;
- managing client money, securities or other assets;
- managing bank savings or securities accounts;
- organizing contributions for the creation, operation or management of companies; and
- creating, operating, or managing legal persons or arrangements and buying and selling business entities.

Recommendation Sixteen further provides that lawyers in these specified transactional roles should be subject to suspicious transaction reporting requirements when they engage in “financial transactions,” further narrowing the scope of the reporting requirement. Such lawyers would not be required to report suspicious transactions where the “information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.” The interpretive note to Recommendation Sixteen indicates that each jurisdiction has discretion in setting the standards for professional secrecy and privilege.⁴⁴ Further, the interpretive note indicates a country would be allowed to institute a system whereby suspicious transaction reports would be submitted to a bar association or other legal self-regulatory organization (providing that organization cooperates with the country’s FIU).⁴⁵ Finally, the interpretive note to Recommendation Fourteen provides that counsel-

43. In February 2003, the American Bar Association adopted a resolution opposing mandatory reporting requirements on lawyers that would compromise the attorney-client relationship, as well as the privilege and duty of confidentiality. See http://www.abanet.org/crimjust/taskforce/gatekeeperresolution_v1.doc. The ABA report accompanying the resolution raised serious concerns regarding the effectiveness and potential unintended consequences of such gatekeeper requirements on legal compliance. See http://www.abanet.org/crimjust/taskforce/gatekeeperreport-clean_v1.doc. However, the U.S. legal community has also examined circumstances in which reporting wrongful activities by clients may be appropriate. In August of 2003, the ABA House of Delegates approved a resolution that amended Rule 1.6(b) of the ABA Model Rules of Professional Conduct and its accompanying comments to permit a lawyer to reveal information relating to the representation of a client (a) where it is “necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud . . . that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer’s services” or (b) where a lawyer finds out after the fact that his/her services have been used to further a crime or fraud so as to “enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses.” See MODEL RULES OF PROF’L CONDUCT, R. 1.6(b)(2), (3), cmts. 7, 8.

44. According to the interpretive note, the FATF envisions professional secrecy and privilege to apply to information a lawyer obtains: “(a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings.” See Interpretative Note to Recommendation 16, at http://www.fatf-gafi.org/Interpnotes_en.htm#16.

45. The interpretive note requires “appropriate forms of cooperation,” but does not clarify what such cooperation would entail. Specifically, it does not indicate whether the self-regulatory organization would have

ing a client to “dissuade” the client from engaging in unlawful activity does not constitute “tipping off,” which is otherwise generally prohibited when a party files a suspicious transaction report. Overall, the revised Forty Recommendations are less intrusive than some legal professionals feared when the FATF Consultations Paper was circulated.⁴⁶

B. U.S. REGULATIONS CONSIDERING GATEKEEPER REGULATION OF LAWYERS INVOLVED IN REAL ESTATE TRANSACTIONS

In the United States, no gatekeeper initiatives have been instituted to date. In 2003, however, the legal profession encountered the first potential gatekeeper requirements in FinCEN’s preparations to regulate “persons involved in real estate closings and settlements.” On April 10, 2003, FinCEN issued an “advance notice of proposed rulemaking,” soliciting information to help develop a future proposed rule, but also indicating that lawyers involved in real estate transactions could be subject to the rule.⁴⁷ Section 352(a) of the USA PATRIOT Act requires all financial institutions, including persons involved in real estate closings and settlements,⁴⁸ to maintain money laundering compliance programs. FinCEN explained that in crafting its rule, “attorneys often play a key role in real estate closings and settlements” and merit consideration for regulation. With regard to attorneys, FinCEN notes that Section 352(a) does not prescribe any reporting requirements, and thus does not raise issues of attorney-client privilege. However, the notice also states that, as required by the Bank Secrecy Act, persons involved in real estate transactions must report receipt of cash or cash equivalents over \$10,000 in conducting the transaction.

Several legal professional organizations have already expressed their concerns in response to FinCEN’s notice regarding the effect of any future rule imposed on attorneys.⁴⁹ The timing for further action by FinCEN is not clear, and as of the time of this writing, no formal action has been taken on the comments submitted pursuant to the notice of advance rulemaking.

C. SUCCESSFUL CANADIAN OPPOSITION TO GATEKEEPER STATUTES

The Government of Canada responded to opposition by members of the Canadian legal profession to suspicious transactions reporting requirements contained in the Proceeds of Crime (Money Laundering) Act, and announced in March 2003 that it was rescinding controversial regulations implementing these requirements. The statute at issue was passed in 2000 over the objections of the legal profession and went into effect in October 2001, followed by implementing regulations in November 2001.⁵⁰ Between 2001 and 2002 the

to share the reports with the FIU or could exercise its own judgment as to what level of suspicion must be shared with government authorities. *See id.*

46. *See, e.g.*, ABA Gatekeeper Task Force website at <http://www.abanet.org/crimjust/taskforce/actions.html> (providing links to correspondence with the FATF and U.S. officials encouraging a narrow scope for gatekeeper requirements and respect for confidentiality and legal privilege in the FATF revised Forty Recommendations).

47. *See* 68 Fed. Reg. 17,569 (Apr. 10, 2003).

48. *See* 31 U.S.C.S. § 5312(a)(2)(U) (1996 & Supp. 2002).

49. Several letters to FinCEN filed in response to the notice regarding persons involved in real estate settlements and closings are available at <http://www.abanet.org/crimjust/taskforce/actions.html>.

50. *The Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations*, SOR/2001-317, came into force on November 8, 2001.

Canadian legal profession, represented by the Law Society of British Columbia, the Canadian Bar Association, and the Chambre Des Notaires du Quebec and Barreau du Quebec, sued for exemptions from the law for lawyers in several provincial courts, receiving favorable rulings in each case. The petitioners and interveners argued that the federal regulations requiring suspicious activity reporting were inconsistent with the Constitution and the attorney-client relationship, despite the fact that the law contained an exemption for privileged communications. A hearing on the merits of the challenge to the regulations was scheduled for the summer of 2003 but Canada agreed to repeal the controversial portions of the statute in March 2003. The Chief Justice of the British Columbia Supreme Court issued an order on April 15, 2003, adjourning the merits hearing until November 2004, and memorializing Canada's decision to rescind the regulations subject to further consultations between Canada, petitioner, and interveners.⁵¹

D. OPPOSITION TO THE EU DIRECTIVE

The EU Directive, passed in December 2001, requires compliance by EU member states by June 15, 2003. Compliance with the EU Directive would include member states requiring independent legal professionals, when engaged in a transactional role, to report "any fact which might be an indication of money laundering" and furnish government authorities "with all necessary information" in accordance with the procedures of the implementing statute.⁵² However, the EU Directive allows member states to permit a legal professional to report any suspicious facts to a legal self-regulatory body that would determine "appropriate forms of cooperation" with government authorities.⁵³ In addition, member states are not obliged to report suspicious facts that the lawyer receives "in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings."⁵⁴

On June 9, 2003, representatives of the legal profession in France addressed a letter to the European Parliament requesting that they amend the language applying to lawyers in the EU Directive.⁵⁵ The letter emphasizes the importance of confidentiality in the attorney-client relationship and the danger that reporting requirements would turn lawyers into an agent of the state. However, while the letter notes that the reporting requirements should not apply to lawyers advising or representing a client, it allows that such reporting requirements could apply to "lawyers acting as a financial intermediary." Despite the June 2003 deadline for compliance with the EU Directive, several member states are still in the process of implementing gatekeeper requirements. Further activity is anticipated throughout calendar year 2004, and with the expansion of the EU, these gatekeeper requirements are likely to continue to be controversial.

51. Order, Supreme Court of British Columbia, No. L013116 Vancouver Registry (entered April 15, 2003), Vol. S/109, Folio 77.

52. EU Directive 2001/97/EC, arts. 6(1)(a), (b), 2001 O.J. L344/76 [hereinafter EU Directive].

53. *Id.* at art. 6(3). Compare *supra* note 45 and accompanying text.

54. EU Directive, *supra* note 52.

55. Letter to European Parliament from Paul-Albert Iweins of the Batonnier du Barreau de Paris, Michel Benichou of the Conseil National des Barreaux and Bernard Chambel of the Conference des Batonniers (June 9, 2003).

