Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms

Kathleen A. Lacey
Barbara Crutchfield George

Follow this and additional works at: http://scholarlycommons.law.northwestern.edu/njilb
Part of the Banking and Finance Commons, Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation
Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms

Kathleen A. Lacey*
Barbara Crutchfield George**

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 265
II. BACKGROUND ................................................................. 267
    A. Definition of Money Laundering.............................. 267
    B. Negative Consequences of Money Laundering .......... 268
    C. Brief Review of Existing Money Laundering Initiatives 269
    D. Link to Business......................................................... 271
    E. Link to Tax Issues..................................................... 274

* Associate Professor, Department of Finance, Real Estate & Law, College of Business Administration, California State University, Long Beach, M.B.A., J.D., University of Southern California.
** Professor, Department of Finance, Real Estate & Law, College of Business Administration, California State University, Long Beach, J.D., University of Iowa.
III. COMMON CHALLENGES TO THE ERADICATION OF MONEY LAUNDERING

A. Bank Secrecy and Tax Havens .......................................................... 277
B. Privacy Protection as an Impediment ............................................ 278
C. Lack of Diligence by Financial Institutions .................................... 280
D. Insufficient "Gatekeeping" by Attorneys and Accountants ............ 281
E. Unregulated Financial Services ...................................................... 282
F. Correspondent Banks ...................................................................... 283
G. Shell Banks ................................................................................. 285
H. Private Banks ............................................................................... 285
I. Other ............................................................................................. 287

IV. CHART SUMMARIZING THE EXTENT TO WHICH THE MAJOR INITIATIVES RESOLVE THE CHALLENGES TO THE ERADICATION OF MONEY LAUNDERING ................................................................. 288

V. U.S. INITIATIVES TO CURB MONEY LAUNDERING ..................... 290

A. Overview of the Legislative Framework 1986-2001 ...................... 290
B. Shortcomings in the Legislative Framework and the U.S. Congressional Response to Shortcomings through Adoption of the PATRIOT Act, Title III, the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ................. 302
C. Remaining Loopholes .................................................................... 312
D. Current Status ............................................................................... 313

VI. EUROPEAN INITIATIVES TO REGULATE MONEY LAUNDERING ...... 314

A. European Union Initiatives ............................................................. 316
B. The Council of Europe ................................................................... 324

VII. INITIATIVES OF MULTILATERAL ORGANIZATIONS .................. 329

A. Organization for Economic Cooperation and Development ............ 329
B. United Nations ............................................................................... 332
C. Organization of American States .................................................... 335

VIII. OTHER ANTI-MONEY LAUNDERING EFFORTS ....................... 338

A. Transparency International .............................................................. 338
C. Financial Stability Forum ............................................................... 345

IX. RECOMMENDATIONS ................................................................ 345

A. Recommendations to Address Concerns Regarding Secrecy of Tax Havens ................................................................. 346
B. Recommendations to Address Ongoing Privacy Protection Concerns ................................................................................ 346
C. Recommendations to Address Concerns Regarding Lack of Bank Diligence & Cooperation ...................................................... 347
D. Recommendations to Address Loophole of Attorneys and Accountants as Facilitators of Money Laundering ......................... 348
E. Recommendations to Address Remaining Statutory Loopholes in Various Jurisdictions and in the International Multilateral Framework through Adoption of a Comprehensive Multilateral Treaty .......................................................... 349

X. CONCLUSIONS ............................................................... 350

I. INTRODUCTION

In the last decade, there has been increased global, domestic, and media focus on the economic, political, and social costs associated with corruption, such as the prevalent business practice of bribing foreign public officials in order to obtain lucrative contracts, with the resulting need of the bribe recipient to launder the illicit proceeds.¹ This increased focus on corruption can be attributed to factors such as the end of the Cold War, the further integration of Europe, the increase in international business mergers, the borderless global market and a greater recognition of the economic costs of corruption.²

One of the most significant economic costs of corruption results from money laundering. Money laundering occurs when secret deposits of illicit funds move through a series of deceptive transactions designed to disguise the source of the funds and make them reappear in the market in a legitimate form, without a trace of their origin. As an integral part of numerous forms of business corruption, drug trafficking, arms smuggling, terrorism, and other illegal activities, the consequences of money laundering have a notable economic impact. With one estimate³ as to the annual global amount of money laundered calculated in a range between $500 billion and $1 trillion⁴ and an estimate that such laundered funds are equal to approximately two percent to five percent of the world's gross domestic product,⁵ it is obvious that decisive action needs to be taken to halt this flow of illegal

² George et al., supra note 1, at 4.
³ There are multiple figures and wide ranges available as estimates on the extent of funds involved in the laundering process.
This is a uniquely opportune time for anti-money laundering initiatives and policy reform to occur. Since the terrorist attacks in the United States in September, 2001, security agencies throughout the world have rushed to follow leads that may prove that Osama bin Laden financed the attack with massive amounts of laundered money. Greater awareness of the harmful effects of money laundering, and public and governmental concerns regarding reverse-money laundering by terrorists, has resulted in a surge of attention directed toward anti-money laundering efforts. Consequently, financial institutions are under increasing pressure to comply with existing anti-money laundering regulations by implementing internal anti-money laundering guidelines. Governments also are experiencing significant public pressure to enhance and expand the anti-money laundering legislative framework.

To determine the future direction for effective anti-money laundering initiatives, it is important to first examine the multiple challenges faced by government and other organizations and institutions trying to eradicate money laundering. These challenges include, inter alia, private banks, correspondent banks, unregulated financial services, and various banking practices traditionally shrouded in secrecy. In order to assess these challenges it is necessary to evaluate the existing money laundering initiatives to determine if they sufficiently resolve the challenges relevant to the eradication of money laundering. The initiatives evaluated by the authors include those from the United States, European Union, Council of Europe ("COE"), the Organization for Economic Cooperation and Development ("OECD"), United Nations, the Organization of American States ("OAS"), Transparency International ("TI"), the Financial Action Task Force ("FATF"), and the Financial Stability Forum ("FSF").

In this paper, the authors will: 1) delineate the insidious role of money laundering in business corruption, 2) identify the challenges to the eradication of money laundering, 3) summarize the adopted and proposed initiatives taken by the United States, European Union COE, and a number of multilateral and non-governmental entities, 4) analyze the feasibility and effectiveness of the current adopted and proposed domestic, European, and multilateral initiatives in addressing those challenges identified, and 5) make recommendations regarding future money laundering policies.

Lisa Hoffman, Bin Laden Money Ignored, PRESS-TELEGRAM (Long Beach, CA), Sept. 19, 2001, at A9. The subtitle states: "Until attacks, the United States did not follow alleged terrorist's winding financial trail." The article comments that difficulties in derailing bin Laden's financial operations are compounded by the "reluctance of other countries to open their banking systems to investigators." See also Warren Vieth, Money Trail a Long and Winding Road, L.A.TIMES, Sept. 20, 2001, at A22.
II. BACKGROUND

Money laundering is difficult to discover, investigate and prosecute, thus allowing vast sums of ill-gotten gains to move through the international financial system without fear of retribution by the wrongdoers.\(^7\) The laundering process is traditionally thought of as taking place after funds have been received in some corrupt or criminal transaction. However, in the case of al Qaeda and other terrorist organizations, the money laundering occurs before the illegal act. In reverse order, "clean money" is laundered in order to hide the sources of the money ultimately used to accomplish an illegal or destructive purpose.\(^8\) The series of deceptive laundering techniques prevent law enforcement officers from tracing the funds and determining the perpetrators and masterminds behind the vicious acts. In this article, the authors recognize that it is this latter type of money laundering that has driven the speedy passage of legislation in the fall of 2001. However, reference in the article will usually be made to money laundering in its more traditional form because illegal profits from corrupt business transactions follow the more familiar "dirty money passed to clean hands" sequence.

A. Definition of Money Laundering

One definition of money laundering is that it is the process by which one conceals the existence, illegal source, or illegal application of income and then disguises that income to make it appear legitimate in the open economic market.\(^9\) Money laundering is a three-stage process:

1. Placement,
2. Layering, and
3. Integration\(^10\)

The placement stage entails the actual physical deposit of cash into a domestic or international bank or other type of financial institution.\(^11\) The

---


\(^8\) Gibeaut, supra note 5, at 47.


placement of the funds may appear to be a fairly simple part of the laundering process because currency is anonymous, but cash is "difficult to handle, hard to hide, takes time to move, and attracts attention."\(^{1}\) Enforcement officials target this stage as the point at which preventive action would be most effective. However, identification of money laundering activity at this stage requires a high degree of motivation and vigilance on the part of the banking institutions.

The layering occurs when there is a movement of funds from one financial institution to a series of others, through a sequence of complex transactions intended to separate illicit proceeds from their source and disguise the audit trail.\(^{13}\) "Shell" companies, usually registered in offshore havens, are often used in this phase. The beneficial owners of the shell companies are hidden beneath layers of bank secrecy laws and the exercise of the attorney-client privilege.\(^{14}\)

The last step is to make the wealth derived from the illicit proceeds acquire the cloak of legitimacy through the integration of the funds into a lawful flow of personal or commercial transactions. One example is the use of illegal funds deposited in foreign financial institutions as security for domestic loans.\(^{15}\) The goal of the launderers is ultimately to have access to the money.

B. Negative Consequences of Money Laundering

The underlying harmful nature of money laundering is the corruption associated with it. Less apparent is a multiplicity of other negative consequences, which result from the money laundering process. There is an insidious core affecting society and the global economic welfare. The core tends to be largely ignored because the concentration is on the criminal activity in the initial stages, e.g., the bribe, and apprehending the wrongdoer on the other end, e.g., the punishment. Meanwhile, irreparable damage is done during the interim process of deviously legitimizing the fruits of corrupt activity by shifting the funds through a series of complex financial transactions.\(^{16}\) Some of these negative consequences are:

\(^{12}\) Mulligan, supra note 10, at 2331-33.
\(^{13}\) Money Laundering Strategy 2000, supra note 7, at 6.
\(^{14}\) Scott, supra note 11.
\(^{15}\) Id.
\(^{16}\) Money Laundering Strategy 2000, supra note 7 at 33-34; PATRIOT Act, supra note 5, at § 302.
1. Undermining public trust in the integrity of financial institutions
2. Posing a challenge to the legitimate authority of national governments
3. Corrupting officials and professionals
4. Facilitating the looting of national treasuries, and the International Monetary Fund ("IMF") and World Bank funds of capital-poor developing countries
5. Creating an inherent danger to the financial and economic stability of nations
6. Diminishing the efficiency of global interest rate markets
7. Causing a routine violation of legal norms, property rights, and human rights
8. Facilitating other crimes such as drug trafficking, tax evasion, bribery, and terrorism\(^7\)

An example of the effect on society and national economies can be found in two of the world's notoriously corrupt dictators of capital-poor developing countries, Ferdinand Marcos of the Philippines and Mobutu Sese Seko of Zaire, who funneled millions of dollars looted from their national treasuries into Swiss bank accounts.\(^8\) The solution to this is to stop money laundering at its source by reducing the corruption and limiting the wrongdoers' access to an enabling financial network.

C. Brief Review of Existing Money Laundering Initiatives

The United States and the European Union have undertaken various initiatives in order to resolve the multiple problems resulting from money laundering. The United States has developed a legislative framework that includes statutes targeting money laundering, tax evasion, and other financial crimes. These statutes regulate corrupt conduct through the two distinct mechanisms of (1) criminalizing the act of money laundering\(^9\) and (2) discouraging money launderers from depositing illicit funds in U.S. financial institutions by mandating statutory reporting requirements for those institutions.\(^10\) In 2000 and 2001, the Department of Justice ("DOJ") and

---

\(^7\) Money Laundering Strategy 2000, supra note 7 at 5.
Department of the Treasury ("Treasury") submitted two major bills to Congress21 "to address gaps and shortcomings" in U.S. money laundering laws.22 Following the September 11 attacks, the Bush administration placed the highest priority on passage of legislation that would allow law enforcement agencies to follow the money trail of al Qaeda and other such renegade organizations which resulted in the enactment of the USA PATRIOT Act ("PATRIOT Act").23

The European Union joined the fight against money laundering in 1991 with the adoption of the Directive on the "Prevention of the Use of the Financial System for the Purpose of Money Laundering,"24 which the European Parliament and Council have recently amended to address perceived shortcomings.25 The COE, a separate multilateral organization, has also adopted an initiative targeting money laundering26 and is the umbrella organization for Groupe d'Etats contre la corruption ("GRECO")27 that will engage in the assessment and evaluation of anti-money laundering efforts. Recently, multilateral organizations such as the OECD,28 the United Nations,29 and the OAS,30 have shifted some of their efforts from directly at-

D. Link to Business

Money laundering is most often associated with obviously illegal conduct, such as drug trafficking, arms smuggling, prostitution, terrorism and organized crime. However, by definition it encompasses a much larger base, including business corruption. Money laundering has many facets, but much of it occurs in a business context.

There are various high profile examples of corrupt government officials receiving bribes from businesses in exchange for government contracts or private individuals engaged in unlawful activities that deposit the illicit funds in highly respected banking institutions using sham corporations and legitimate transfer methods to make deposits.

A scenario involving a corrupt government official receiving bribes from a multinational corporation\footnote{The funds laundered by President Bongo were derived from bribes he had received to grant a lucrative government contract to a French oil company. See Jeff Gerth, Hearings Offer View into Private Banking; Secret Accounts Under Scrutiny as Foreign Wealth Moves Abroad, N.Y. TIMES, Nov. 8, 1999, at A6 (interviewing Mr. Raymond Baker, guest scholar at Brookings Institute).} occurred when President Omar Bongo of Gabon laundered $50 million of the illicit funds through France’s Citibank Private Bank. Citibank’s documents show that bank officials were aware of news reports that Mr. Bongo was under investigation for possibly accepting bribes from French oil executives, but they claimed that they were "reluc-
tant" to raise those reports with the President of Gabon or with regulators.\footnote{Id.}

A different type of money laundering linked to business transactions is a case in which large amounts of money from Russia were laundered through the Bank of New York (BNY). This case provides a significant insight into many facets of the process of money laundering. The facts leading up to the 1999 court decision occurred in 1995 and 1996 when the BNY became the center of an immense money laundering operation, involving several high-level managers at the BNY.\footnote{It came as a surprise to the American public, so long accustomed to thinking of offshore financial havens as places like the Cayman Islands, Antigua, or the Bahamas, to find that New York City was the offshore bank of choice for several businessmen in Russia who were stashing billions of dollars of their illegally obtained monies in the BNY.} A summary of the case follows with references to the existing challenges to the eradication of money laundering that allowed such an egregious example of money laundering to occur. The authors also refer back to the BNY case during the course of their later discussion of the challenges and shortcomings in the laws and initiatives up to 2001, some of which have recently been resolved and some of which remain.


In late 1995 Lucy Edwards, vice president of the Eastern European division of the BNY in London, was involved with her husband, Peter Berlin, a businessman, in a massive money laundering scheme to channel approximately $10 billion into the United States.\footnote{Lisa I. Fried, \textit{Money Laundering: BONY Inquiry has Banks Checking Procedures: Money Laundering}, N.Y. L. J., Sept. 16, 1999, at 5. This is an example of the challenge faced in eliminating money laundering when there is lack of diligence by the financial institution. This lack of diligence allows insiders to compromise the system by knowingly facilitating the schemes.} Lucy Edwards was formerly Lyudmila Pritzker, and both she and her husband were naturalized U.S. citizens born in Russia. They were involved in a complex scheme with corporations set up by Mr. Berlin with accounts at the BNY and some banks in Russia. Access was gained to electronic banking software, which enabled Russian banking agents to make approximately 160,000 wire transfers on their own.\footnote{Bruce Zagaris, \textit{Former BONY Officer & Spouse Plead as Former BONY Executive Sues BONY in Russia}, 16 NO. 4 INT’L ENFORCEMENT L. REP. 682 (2000). This is an example of the challenge encountered in eliminating money laundering when illicit funds are moved easily through the system with wire transfers.}

Also involved in the scheme was Natasha Gurfinkel Kagalovsky, a
naturalized U.S. citizen born in Russia who was Senior Vice President of BNY in New York, supervising the bank's business in its Eastern European Division. Her husband, Konstantin Kagalovsky, was Russia's representative to the IMF from 1992-1995. Reportedly, this was the connection to the possibility that some IMF proceeds were part of the laundered funds.\textsuperscript{41}

The illicit money was deposited in U.S. correspondent banks in Russia and then transferred from Russia into the United States.\textsuperscript{42} At the same time or later, "front" or "sham" corporations were established through which the identity of the owners was suppressed.\textsuperscript{43} Press reports indicate that during a five-month period more than $4.2 billion in 10,000 transactions passed through one BNY account.\textsuperscript{44} The BNY was involved with about seventy correspondent banks in Russia and other former Soviet republics.

The charges filed against Edwards alleged that she used her position to move funds around the world to parties who received the laundered money and to make funds available to help hundreds of Russian nationals enter the United States illegally.\textsuperscript{45} They were indicted on September 6, 1999. In February 2000, Edwards and her husband pled guilty to charges that they conspired to launder money, visa fraud, wire fraud and bribery of bank officials.\textsuperscript{46}

The original indictment against Lucy Edwards and Peter Berlin fell short of federal money laundering because the prosecutors could not prove that money the couple transmitted derived from one of the illegal activities listed in the specific underlying acts ("SUAs") in the U.S. Code.\textsuperscript{47}

Eight million dollars was seized from the accounts of Edwards and Berlin and forfeiture was imposed. One of the difficulties encountered in


\textsuperscript{42} At this point there is the initial "placement" of the illegal funds in the stream of commerce. Also, this is illustrative of the challenge posed by the complete reliance of primary banks in the United States on correspondent banks in foreign countries to vouch for the legitimacy of their deposits. See Thomas Crampton, How Money Launderers Weave a Chaotic Web of Global Transfer, INT'L HERALD TRIB., Feb. 18, 2003.

\textsuperscript{43} Id. The "layering" process in money laundering is accomplished in a variety of ways, including the creation of shell companies, so that the money trail cannot be followed. Attorneys and accountants help in suggesting and setting up legal mechanisms to aid in the deception.

\textsuperscript{44} Zagaris, supra note 40. This exemplifies the challenge in eradicating money laundering raised by the financial institution's lack of diligence in failing to take note of unusual activity or to have systems in place to signal unusual activity.

\textsuperscript{45} U.S. v. Berlin, supra note 38.

\textsuperscript{46} Id. See also Ann Davis & Michael Allen, Bank of New York Defendants Ready to Implicate Others, WALL ST. J., Feb. 17, 2000, at A4.

\textsuperscript{47} A shortcoming in the legislation in effect at the time of this case was that the laws did not cover the specific act of money laundering in which the defendants engaged because the list of predicate offenses was not inclusive enough.
the case against Lucy Edwards was her contention that New York did not have jurisdiction since her alleged wrongful acts occurred in the United Kingdom.

The Federal Security Service, Russia's intelligence agency, refused United States requests to provide bank statements and other documents related to the BNY investigation.\(^{48}\)

No money laundering charges were filed against the BNY, because there was no specific underlying wrongful act under which it could be charged in the provisions of banking legislation existing at that time. The BNY was sanctioned by the Federal Reserve and New York State Banking Department for deficiencies in its supervision of overseas accounts.\(^{49}\)

The BNY allegedly earned at times up to $240 million a month in fees from the Russian money laundering operation.\(^{50}\) An underlying challenge in trying to eradicate money laundering is the amount of profits earned by the banks. This profit motive in some cases prevents the banks from participating in a concentrated effort to stop the flow of illicit funds.

E. Link to Tax Issues

Offshore banks\(^{51}\) are viewed as desirable tax havens because they are frequently located in countries that impose no taxes and do not generally

\(^{48}\) As exemplified in this case, enforcement of laws may be impeded by jurisdictional problems, including cross-jurisdictional difficulties in obtaining evidence when dealing with foreign financial records.

\(^{49}\) Fried, supra note 39.


\(^{51}\) B. Chad Bungard, Offshore Banking in the British Dependencies, 9 TOURO INT’L L. REV. 141 (2001). Citizens from other countries are increasingly utilizing Western financial institutions to launder money from illicit activity. Banking havens, such as the Cayman Islands, a crown colony of Great Britain, present a good example of the intertwining of tax evasion and the banks’ secrecy laws protecting depositors of illicit funds. The Caymans’ special tax status is said to have originated as a result of some local residents saving ten English ships that ran aground on the reef near Grand Cayman in a violent storm in the late 1700s. Gratitude for the bravery of the residents was shown by the issuance of a royal decree that no subject of the crown in the Caymans would ever be forced to pay taxes. Thus, the existing situation is that the Caymans, with approximately 500 banks, are able to guarantee an attractive tax-free environment for bank depositors. Other offshore havens also offer 50 and 100 years of freedom from taxes. Through the Mutual Legal Assistance Treaties, many of these offshore havens have been able to assure their bank customers that no foreign tax rules are enforceable through their courts against earnings from the accounts. The host countries earn millions of dollars from annual licensing fees to the banks and businesses registered in their jurisdiction. Combined with the guarantee of the anonymity of the depositors, the offshore banks have become the financial institutions of choice for those who seek to hide money or avoid taxes. See also Peter D. Maynard, The Law Against Corruption and Money Laundering in the Caribbean with Special Reference to the Bahamas, 29 U. MIAMI INT’L L. REV. 627 (1998).
cooperate with the tax authorities of the depositor's home country to track down the incomes.\textsuperscript{52} Difficulties emerge in the attempts to halt money laundering that involve financial institutions in offshore tax havens because they provide shelter for legitimate and illegitimate transactions. Foreign depositors regularly choose from a multitude of offshore banks\textsuperscript{53} to legitimately shelter vast amounts of wealth for the purpose of avoiding income, gift, and inheritance taxes because those financial havens provide secrecy and do not impose taxes.\textsuperscript{54} Foreign investors also use the secrecy provided by offshore banks to hide their ill-gotten profits, subsequently moving the money to other financial institutions or using the account to pay for legitimate products.\textsuperscript{55} Both tax evaders and money launderers choose the offshore banks for the same reasons: the banks provide a veil of secrecy along with tax advantages. The fact that offshore or out-of-jurisdiction banks are ultimately used to shield the source of money launderers' funds places those illegitimate transactions in an identical category with transactions that involve using those same banks as part of a legitimate tax-sheltering plan.

These tax havens have been a direct subject of attack by the OECD,\textsuperscript{56} the European Union,\textsuperscript{57} and the FATF.\textsuperscript{58} One effect of the out-of-jurisdiction


\textsuperscript{53} It has been reported that there may be as many as 4,000 such offshore banks. \textit{See} Kathleen Day, \textit{Report Faults U.S. Banks on Money-Laundering Safeguards}, \textsc{Wash. Post}, Feb. 5, 2001, at A2. Forty-seven of the world's largest banks are reportedly licensed to operate in offshore locations where secrecy is the order of the day. \textit{See} Jim Hoagland, \textit{Bush's War Should Target the Money Launderers}, \textsc{Int'l Herald Trib.}, Oct. 2, 2001, at 7.

\textsuperscript{54} Aenlle, \textit{supra} note 52, at 18. The author discusses in detail the legitimate way in which companies can be formed that are "wrapped in a trust," with directors or trustees employed to disburse assets that are deposited in one of the tax haven countries. One of the experts interviewed by the author opines that "[s]uch companies, if correctly formed, will not be liable to tax in any of the jurisdictions." \textit{See} Barbara Wall, \textit{For Tax Havens, Writing's on the Wall: 'The Future is Transparent}, \textsc{Int'l Herald Trib.}, Oct. 7, 2000, at 19.

\textsuperscript{55} A Bell helicopter was purchased from a Texas-based manufacturer by a Colombian businessman who allegedly used laundered drug smuggling money through payments to Bell's New York bank account by thirty-one separate wire transfers from unrelated third parties. The Department of Justice froze the account and demanded that the money be forfeited and the U.S. Customs Department seized the helicopter. \textit{See} Karen DeYoung, \textit{U.S. Colombia to Confront Lucrative "Peso Exchange,"} \textsc{Wash. Post}, Aug. 29, 2000, at A1.

\textsuperscript{56} Peter Yu, \textit{The OECD and Harmful Tax Competition}, at \url{http://www.hk-lawyer.com/2001-5/May01-tax.htm} (last visited July 13, 2001).

\textsuperscript{57} Tom Buerkle, \textit{E.U. Resolves Dispute Over Tax Evasion}, \textsc{Int'l Herald Trib.}, Nov. 28, 2000, at 1. The article states that "[t]he agreement aims to prevent investors from avoiding taxes by stashing their savings abroad." \textit{Id.} The agreement gives E.U. Member States a choice between imposing a withholding tax on interest income earned by foreign investors (which is an approach bitterly opposed by the United Kingdom) or to provide information about foreign investors' interest income to their home country. \textit{See E.U. Vows Laundering Action}, \textsc{Int'l Herald Trib.}, Oct. 18, 2000, at 17.

\textsuperscript{58} Financial Action Task Force on Money Laundering, \textit{More About the FATF and Its
activities is that the home countries lose enormous amounts of money in tax revenue, whether the depositors are engaged in legal tax maneuvers or illegal money laundering. In a globalized society operating with the advantages of modern technology, it is now much easier, and thus more prevalent, for tax evaders and money launderers alike to use the offshore accounts. Thus, the situation requires a broad multilateral solution.

The unexpected downside of the dual emphasis on tax evasion and money laundering was the negative momentum created in the United States prior to the terrorist events in the fall of 2001. The U.S. Congress and the Bush Administration alleged that Paris-based bureaucrats in the OECD were trying to create "a global network of tax police" that would erode the sovereignty of nations and undermine the privacy of citizens. The U.S. market-oriented approach, which favors the protection of legitimate tax shelter schemes, stands in direct contrast with the OECD guidelines, which would arguably stifle these legitimate schemes in its attempt to control the illegitimate funds. The attitude of the Bush Administration swiftly changed after the September 11th attacks, because detractors realized that the secrecy and anonymity provided by the tax havens had been a part of the money laundering maze of those who sought the destruction of the free world.

---

59 Barry James, In Surprise, E.U. Reaches Shaky Deal on Tax Data, INT'L HERALD TRIB., June 21, 2000, at 1. The article noted that the European Union would continue to work on an overall tax package to prevent "predatory tax breaks that allow one country to poach jobs and investment from another." Id.

60 One private estimate places the amount lost each year by the U.S. Treasury at $70 billion in personal tax revenue. Wall, supra note 52.


62 David Ignatius, Tax Cheats Have Unlikely Friends, INT'L HERALD TRIB., Apr. 20, 2001, at 8. The reference to "global police" was attributed to Congressman Dick Armey (R-Tex.).

63 Id. See also Daniel J. Mitchell, International Bureaucrats Seek Control of U.S. Tax Law, HUMAN EVENTS ONLINE (Mar. 12, 2001), at http://www.humaneventsonline.com/articles/03-12-01/mitchell.htm. (N.D). Mitchell stated: "To prevent this disastrous outcome, the conservative movement needs to mobilize against the OECD. A number of key lawmakers, including House Majority Leader Dick Armey (R-Tex.) and the Senate Majority Whip Don Nickles (R-Okla.), already have jumped into the battle. They have sent strongly worded letters to the Treasury Department condemning the OECD's assault against tax competition, financial privacy, and fiscal sovereignty. Similar letters have been sent by Sen. Jesse Helms (R-N.C.), Sen. Judd Gregg (R-N.H.), Rep. Sam Johnson (R-Tex.) and Rep. Tom Reynolds (R-N.Y.)." Id.
III. COMMON CHALLENGES TO THE ERADICATION OF MONEY LAUNDERING

The following challenges impede the successful eradication of money laundering. Legislative and other anti-money laundering initiatives are currently in different stages of development in various jurisdictions, but the challenges listed below comprise the common, global impediments.

A. Bank Secrecy and Tax Havens

Historically, the system of bank secrecy began when Huguenots were fleeing religious persecution in France to a safe haven in Switzerland in the 1600s. A banking system steeped in secrecy sprang up in order to protect the Huguenot assets. Today, the term "bank secrecy" is closely associated with Switzerland, a nation that has a reputation for its system allowing nameless "numbered" bank accounts. Switzerland sought to establish a flourishing economy by creating a superb banking system. In building a competitive banking system, the individual right to financial privacy became one of the basic principles on which it built its reputation. Through the years Switzerland has been both praised and scorned for its bank secrecy laws.

For example, in the 1930’s and 1940’s, these laws helped European Jews safeguard financial assets threatened by the Nazi regime. On the darker side, the bank secrecy laws of Switzerland have enabled dictators and others involved in laundering massive amounts of ill-gotten money to effectively safeguard the proceeds from their corrupt business transactions.

In addition to countries like Switzerland and Liechtenstein, money-laundering has been facilitated by the secrecy provided by the offshore banking havens. Offshore financial centers constitute a weak link in curbing business corruption and hinder broader efforts to raise standards of accountability and transparency in the global financial system. All tax havens provide secrecy and many of the tax havens provide the additional benefit of anonymity. If there is to be an honest attempt to eradicate money laundering, anonymity must be eliminated. Increased legislative restrictions on

---

64 Rubin, supra note 18, at 300.
65 Certainly in recent years there has been much negative attention directed toward Swiss banks because of their wartime role in handling Nazi money looted from Jews and their refusal to turn over money deposited in the banks to families of Holocaust victims. See Mortimer Zuckerman, Switzerland's Secret Shame: the land of fondues and yodeling must be made to pay for its hypocrisy, U.S. NEWS & WORLD REP., June 22, 1998.
66 Id.
67 Id. See also Holberton, supra note 18.
68 Examples of offshore banking havens include the Cayman Islands, Bahamas, Nauru, and Dominica.
money laundering through these offshore financial havens are a necessary component to a global anti-corruption campaign, and are necessary to enhance confidence in the global financial marketplace.

B. Privacy Protection as an Impediment

As world leaders have discussed methods of combating money laundering through the elimination of bank secrecy and the adoption of a more transparent system, the specter of violation of depositor's privacy has arisen. Financial institutions have the difficult task of determining where the depositor's right to privacy ends and the institution's duty to disclose suspicious financial activity begins. It becomes a delicate balancing act.

With the renewed interest in protecting privacy precipitated by the extraterritorial application of the 1995 E.U. Data Privacy Directive, the U.S. Congress included a privacy component in its comprehensive financial reform legislation passed in 1999, which increased the responsibility of financial institutions to ensure depositors' privacy.

There have been accusations that transparency forces banks to spy on their customers. In the United States there has been legislation to prevent such "spying". The Right to Financial Privacy Act of 1982 protected bank customers against the federal government by restricting the government's access to records that are related to a legitimate law enforcement inquiry and required that a subpoena be served on a customer before or concurrently with service on the bank. Also, in 1999, Congress dropped the controversial "know your customer" ("KYC") proposal, which was an important guideline to be used by banks in dealing with customers, because of the criticism that rights of privacy would be violated. Support for the KYC rule has been revived as a result of the problems in following the money trail in the September 11th attacks. There is no doubt that KYC invades privacy because it necessitates establishing identity and background and, in some instances, family background. However, there is a point where, on balance, this invasion of privacy becomes necessary to prevent money laundering.

---


72 Gibeaut, supra note 5, at 48.

73 As an example of family connections in the money laundering process, the son of the late dictator of Nigeria, General Sani Abacha, deposited millions of dollars plundered from government funds in banks in several countries. Tom Mastland & Jeffrey Bartholet, The Lost Billions, NEWSWEEK INT’L, Mar. 13, 2000, at 28. See also Eric Pfanner, Tightening the System, INT’L HERALD TRIB., Oct. 31, 2001, at 18.
the misuse of the system by those who seek its protection for illegal purposes.

In the summer of 2001, some members of the U.S. Congress and agencies within the U.S. government used protection of privacy as one of the main arguments against OECD attempts to impose restrictions on the way in which the offshore tax havens handle their accounts.\textsuperscript{74} This was particularly interesting in view of the fact that the United States is one of the few nations in the world that has not adopted a comprehensive federal data privacy law. Unlike western European countries, the United States has not given protection of privacy a high priority. A primary difference between the European and U.S. approaches to privacy is illustrated by their enforcement frameworks. Unlike the constitutions or statutes in many European nations,\textsuperscript{75} there is no specific language about privacy in the U.S. Constitution, although the courts have found a fundamental right to privacy in limited circumstances.\textsuperscript{76}

Subsequent to the September 11th attacks privacy issues in the United States were even less likely to be raised, and even if raised, less likely to be heeded. The newly passed PATRIOT Act legislation permits many kinds of intrusive government surveillance, which would have heretofore been unheard of.\textsuperscript{77} A post-September 11th Harris poll that was reported in Business Week magazine showed that 81% of those responding favored "closer monitoring of banking and credit-card transactions to trace funding sources."\textsuperscript{78} With the emphasis on finding and freezing the assets of the terrorist organizations, accounts in financial institutions will be the subject of increased scrutiny.

Financial institutions should not use the excuse of protection of privacy when there are obvious signs of unusual or illegal financial transactions. Notions of privacy and protection of legitimate tax evasion schemes cannot take precedence over the ability to ferret out illegal money laundering. Where reasonable cause exists for believing that money being deposited is


\textsuperscript{75} For example, privacy as a fundamental human right also is evident in E.U. Member State legislation. Article 8 of the United Kingdom's Human Rights Act of 1998 addresses the "right to respect" for one's private life as a human right. This right cannot be abridged except by law and as necessary for national security, public safety, the country's economic well-being, crime prevention, or to protect the rights and freedoms of others. Human Rights Act, 1998, c. 42, § 1(1), ¶ 1, art. 8. (Eng.).

\textsuperscript{76} See Roe v. Wade, 410 U.S. 113 (1973) (a woman's right to privacy in her decision to terminate a pregnancy is constitutionally protected under the Fourteenth Amendment's concept of personal liberty); Griswold v. Connecticut, 381 U.S. 479 (1965) (Connecticut law prohibiting use of contraceptives by married couples violates constitutional right "of privacy and repose").

\textsuperscript{77} Tit. II §§201-225.

\textsuperscript{78} Mike France et al., \textit{Privacy in an Age of Terror}, \textit{Bus. Wk.}, Nov. 5, 2001, at 86.
illegal, the financial institution (depending on the jurisdiction) may have a legal duty to disclose that information. There is a legal duty in the United States to report, as an example, transactions over $10,000, and to report suspicious activity. There is no legal duty, however, in those countries that have established themselves as havens of financial secrecy. It is in these kinds of situations that OECD, FATF, U.N., E.U., and TI intervention is needed to halt business corruption by pressuring financial institutions in all jurisdictions to lift the veil of secrecy and engage in an exchange of information with the home countries of foreign investors. With the globalization of the markets in the last decade, the intergovernmental and non-governmental organizations have intervened in an attempt to harmonize the tax laws. The extent and scope of intervention by these institutions bears watching, but their intervention should certainly not be quashed to protect depositors' privacy in cases where there is clearly illegal activity.

C. Lack of Diligence by Financial Institutions

It is often found that there are insiders within a financial institution who compromise the system by knowingly facilitating money laundering schemes or who are themselves involved in the schemes. A good example of this can be found in the Bank of New York case, previously discussed, in which several employees were involved in a massive laundering operation. Although large international banks have literally hundreds of thousands of transactions daily, systems should be developed to signal unusual activity of this type.

Although the legal system in many countries provides a strict non-secret external structure in which the financial institutions must operate, those institutions continue as both witting and unwitting participants in illegal laundering activities. Management within the financial institutions sometimes ignores obvious indications of the possible illegal source of de-

80 Mastland & Barthalet, supra note 73, at 28.
81 The Bank of New York (BNY) appears to be the last major banking institution to discover that its employees were engaged in a money-laundering scheme. Investigation into the suspicious transactions started, in part, because British authorities alerted the FBI that the money being laundered through BNY was being used to pay contract killers and drug barons. Also, a Suspicious Activity Report (SAR) was filed with the Treasury Department by Republic National Bank of New York when Republic noticed that Russian corporations were transferring unusually large amounts of money through their bank to BNY. When Republic could not track down one of the recipients of the funds, it filed the SAR with the Treasury Department. See European Investigations of Russian Payments Calls Attention to Alleged Bribes and Money Laundering, 15:10 INT'L ENFORCEMENT L. REP. (Oct. 1999). BNY was sanctioned by the Federal Reserve and New York State Banking Department for deficiencies in its supervision of overseas accounts. Fried, supra note 39.
posits of huge sums of money from their customers\(^8\) in order to successfully compete and to improve their profit margins.\(^3\) It is within the financial institutions themselves, where the actual placement and layering of the illegal monies occur, that the legal and ethical issues of illegal money laundering must be addressed.

It is only within the confines of the financial institutions, where there is personal contact with the participants in the placement and layering, that an evaluation of the transactions can be made. The personal exchange connected with the transaction may have certain elements that create a suspicion on the part of a bank employee so that questions can be raised with regard to where such large sums of money are originating.

Banks should employ competent employees at all levels where money laundering may be detected. For example, wire transfers are notorious for their lack of oversight and are usually handled by relatively low level employees who may not notice any suspicious patterns. It is through the diligence of an employee in the financial organization that unusual activity is discovered and reported to investigating authorities.

D. Insufficient "Gatekeeping" by Attorneys and Accountants

Money launderers continue to receive the assistance of professional facilitators who assist in a range of ways to mask the origin and ownership of tainted funds.\(^4\) Lawyers and accountants are routinely used in layering transactions through helping with the formation of "sham" and "front" corporations, and other deceptive devices,\(^5\) needed to hide the illicit origin of the funds.

The reason that the European Union chose "Gatekeeper Initiative" as the title to designate its money laundering legislation\(^6\) is because lawyers

---

\(^8\) Press reports indicated that during a five-month period, more than $4.2 billion in 10,000 transactions passed through one BNY account in a money-laundering scheme. Former BNY Officer & Spouse Plead as Former BONY Executive Sues BONY in Russia, 16:4 INT'L ENFORCEMENT L. REP. (Apr. 2000).

\(^3\) The BNY case also illustrates the profit motive because BNY allegedly earned $720 million in profits from the Russian money laundering operation within the first three months of 1995. Guart, supra note 50.


\(^5\) In the BNY case appearing earlier in this article, the defendants used these kinds of corporations to aid in the subterfuge necessary to carry out their money laundering operations. Fried, supra note 39.

\(^6\) 2001 Amended Directive, supra note 25, See also Bruce Zagaris, Lining Up Help
and accountants "serve as entryways to the legitimate business world through complex corporate structuring designing trusts that disguise the true beneficiaries and performing a host of other transactions." Accountants are well positioned to help in uncovering money-laundering activities because of their access to client records and operations. An example of the role that accountants can play occurred when Price Waterhouse reported the money laundering and other illegal activities of Bank of Credit and Commerce International ("BCCI") to securities regulators. It has been noted that lawyers and accountants are in the same category. They are "especially attractive to money launderers because their professional conduct rules force them to keep clients' secrets."

Initially, there was substantial resistance, based on privacy and privilege issues, to the provision in the E.U. directive that included a reporting requirement for lawyers and accountants; subsequently, action has been taken by the European Union to govern the conduct of lawyers and accountants, for without the aid of their intermediary services the layering and final integration of the illegal funds cannot occur.

E. Unregulated Financial Services

There are many ways of moving money swiftly and efficiently without using the traditional financial system and to evade banking regulations. Along with lawyers and accountants, there are many other facilitators of money laundering like real estate agents, casinos, currency exchange bureaus, investment advisers, and check cashers. All of these unregulated loopholes in the financial system grant money launderers the freedom to move funds at will throughout the world.

One informal method popular in many of the Middle Eastern countries is *hawala*, based on personal trust, which allows money to be moved...
Crackdown on Money Laundering

around without leaving a tell-tale paper trail.\textsuperscript{91} As early as the 1994 anti-money laundering statute passed by the U.S. Congress,\textsuperscript{92} 
\textit{hawala} money brokers were required to register with the government and report large and suspicious transfers of cash. The proposed implementing rules were not written until 1997, however, with the regulations only taking effect in 2002.\textsuperscript{93} There was no urgency in implementing the legislation until the events of September 11, 2001, which involved a cadre of Middle Easterners who came from countries where the \textit{hawala} practice is most prevalent.

Brokerage firms have become increasingly vulnerable to laundering schemes because they allow money launderers to invest with minimal scrutiny. Despite this vulnerability, dealers were not required to report suspicious activities or to develop anti-laundering policies.\textsuperscript{94}

\section*{F. Correspondent Banks}

A concern for regulators is the system in which banks in one country handle payments for "correspondent banks" elsewhere.\textsuperscript{95} "In correspondent bank arrangements, a U.S. bank agrees to open an account for a foreign bank, which will be used to process transactions for the foreign bank's customers."\textsuperscript{96} This arrangement results in the attachment of the credibility and reputation of the U.S. bank to the transaction. Nevertheless, the U.S. bank must rely on the foreign bankers to vouch for the legitimacy of their deposits even though many offshore foreign banks are less regulated and may be precluded by their laws from giving information about their customers.\textsuperscript{97}

Many of these banks are located in foreign countries with a very lax approach to money laundering, either externally through legislation or internally through relaxed attitudes. Some banks are no more than a storefront and, in essence, are merely a "shell" operation. This makes it easy for

\begin{footnotes}
\item Pfanner, \textit{supra} note 73, at 18. \textit{Hawala}, the name given the informal system, originated in the Hindi language where it means "in trust." This network of brokers, who handle the transfers, has operated for generations in Asia and the Middle East. Funds in national currency are deposited with a "broker" in one country who then deals with a broker in another country for the payment of the funds in the applicable currency to the intended recipient. In larger cities, including some in the United States, brokers may operate from the back of a store. Nevertheless, the result is that there is no trail for law enforcement to follow. \textit{See} Adam Cohen, \textit{How bin Laden Funds His Network}, \textit{TIME}, Oct. 1, 2001, at 63.
\item John Willman, \textit{Cleaning Up: The Global Economy has made money laundering easier and less detectable. But following last week's terrorist attack, US financial regulations are set to clamp down}, FIN. TIMES, Sept. 21, 2001, at 22.
\item \textit{Id.}
\end{footnotes}
a money launderer to initiate the placement of the illegal funds in a correspondent bank and then have the funds transferred to a U.S. bank without questions being asked of the correspondent bank about the original source of the funds.98 Technology increases the prevalence of money laundering in modern society. For example, wire payments have become a popular method to shift illicit funds in the international market.99 Payment orders on wire transfers seldom identify the originating customer because of space limitations on the system.100 This method is attractive because information regarding the wire transfer becomes more difficult to track when the transfer passes through several banks.101 The wire transfer transactions are typically monitored by junior-level employees who focus on the names and accounts of the senders and recipients, not the purposes of the transactions.

If a small foreign bank is not directly connected to a wire system, a correspondent bank may be used, which adds yet another step in the transfer process to make it harder for the enforcement agents to trace the illegal funds.102 Scrutiny is difficult when a wire transfer order comes into a U.S. bank acting as a correspondent bank for a foreign bank.103 Still more difficult for investigators to follow is the on-line wire transfer which was referred to in the Bank of New York case described earlier in this article.104

Another technique which frustrates government’s enforcement of the money laundering laws is the use of the "payable-through account" (PTA). A payable-through account is one established in a U.S. bank, usually by a foreign bank, through which the foreign bank’s customers conduct banking transactions, just as if they were the U.S. bank’s own customers. This kind of account is meant for the convenience of foreign customers in facilitating lawful transfers. The customers of the foreign bank can generally transfer funds by writing checks at their own bank that are payable through the U.S. bank. The customers' funds are wired to the U.S. bank. The client of the

98 For example, the placement of approximately $100 million of illegally obtained funds occurred when Raul Salinas de Gottari, brother of former Mexican President Carlos Salinas, had his wife carry cashier's checks from five Mexican banks to Citibank Mexico City, which sent the money by wire to Citibank New York. S.C. Gwynne & Adam Zagorin, Just Hide Me the Money, TIME SOUTH PACIFIC, Dec. 14, 1998.

99 Fendo, supra note 9, at 1547.


101 Id.

102 Hughes, supra note 100, at 295-96. See also Alford, supra note 9; Mulligan, supra note 10.

103 Alford, supra note 9.

104 Former BONY Officer & Spouse Plead as Former BONY Executive Sues BONY in Russia, supra note 82, at 682.
foreign bank can, therefore, carry on most banking activities in the same way as a direct customer of the U.S. bank, but PTAs leave the U.S. bank with no control over the transactions and no information about the customers.  

G. Shell Banks

Another major part of the correspondent bank system is the relationship between U.S. financial institutions and so-called "shell" banks in foreign countries. Shell banks have long sheltered the money trail for money launderers from the eyes of investigators who sought to expose them. These banks are, as the name implies, banks that have no physical offices anywhere, but simply exist to move money from one place to another in secrecy. These shell banks are often in offshore centers and have a correspondent relationship with a legitimate onshore bank through which money can be laundered.

When legislation governing business with shell banks was being considered in the fall of 2001, lobbyists for Citigroup allegedly urged lawmakers to make an exception for shell banks affiliated with financial services companies. Ultimately the legislation that was passed ignored this request for an exception and banned U.S. financial institutions from having a correspondent relationship with shell banks.

H. Private Banks

Private banks are a thriving industry comprising the upper tier of international banks' wealth management businesses. The activities of private banks should be more closely monitored because they are vulnerable to money laundering, as they offer privacy to customers who have at least a $1 million deposit. Wealthy clients of the banks demand secrecy, providing a "cover" for those involved in money laundering.

---


107 Pfanner, supra note 73.

108 Lavelle, supra note 106.

109 The amount of money deposited in the world's private banks, some of which is involved in the "laundering process", has steadily increased over the past decade with estimates of: 1986 - $4.3 trillion; 1997- $10 trillion; 2000 - $13.6 trillion. Gwynne & Zagorin, supra note 98.

110 Pfanner, supra note 73.

111 Levin Says U.S. Private Banks Profit Off Foreign Corruption, Minority-led Subcommittee Investigation Highlights Four Cases which Illustrate Weaknesses in Private Banking
Private banks operate inside and outside the jurisdiction of the United States. These banks offer their private banking clients the utmost secrecy and a wide array of services, often including facilitating secret trusts, offshore accounts, secret name accounts, and shell companies. Clients are assured of the assignment of a one-on-one private banker to manage his or her assets. Since U.S. banks cannot have secret accounts and protect anonymity, they sometimes help their clients by setting up the accounts offshore.

A specialist in money laundering and financial crime commented recently that traditionally the private banking industry has not been strong in investment in automated systems. Managers deal closely with their customers and do not rely on automated detection techniques, as is the case with retail banks. The lack of formal client-relationship-management systems has meant that the individual manager has knowledge about the client but the institution does not have that same information.

An excellent example of the way that private banks function in the money laundering process is the way in which Raul Salinas, brother of former President Carlos Salinas of Mexico, used the system. While earning an annual civil service salary of the equivalent of $190,000 in Mexico, Mr. Salinas' wife transferred approximately $100 million over a relatively short period of time from at least five Mexican banks to accounts in Citibank Mexico City handled by an employee, Amy Elliott. The $100 million was wired to Citibank New York using an alias for Mr. Salinas known only to Elliott. Once in New York, the funds were dumped into an anonymous Citibank "concentration" account where no link to Salinas appeared. From New York the money entered a stream that zigzagged around the world to the Cayman Islands and then to London and Zurich. Elliott had set up an offshore trust company based in London and Zurich. The trust company was owned by several Cayman Islands shell corporations, and was managed by a Swiss subsidiary of Citicorp. Meanwhile, according to the GAO Report, Citibank did not try to learn the source of the wealth of Salinas.

It is evident that whether the private banks operate within the geo-
graphical boundaries of the United States or in foreign countries, extensive money laundering operations are frequently occurring. The driving motive behind the protection given by the private banks to these money-laundering operations is the tremendous profitability for the banks. They reportedly earn up to 25% in returns from private bank accounts. More importantly, it is necessary for the private banks to maintain their clientele because they need more than $5 billion in assets to remain viable.\footnote{119}{Thomas Crampton, \textit{As Rich Lose Wealth, Banks Shift Priorities}, \textit{Int'l Herald Trib.}, Oct. 31, 2001, at 18.}

\section{I. Other}

There are additional challenges to overcome in the struggle against money laundering that are incorporated in subsequent sections of this article. Among the challenges are: 1) jurisdictional problems in the enforcement of laws,\footnote{120}{As described in the BNY case, one of the difficulties encountered in the case against the defendant, Lucy Edwards, was the contention that New York did not have jurisdiction since her alleged wrongful acts occurred in Great Britain. \textit{U.S. v. Berlin}, No. 99 Cr. 914 (S.D.N.Y., 2000).} 2) implementation of measures to facilitate confiscation of defendants' assets, and other stringent penalties,\footnote{121}{A $10 million civil penalty was imposed against U.S. Trust Corp., a private bank owned by Charles Schwab Corp. (the largest discount and online brokerage in the United States), for failing to report "suspicious or unusual activity" as required by the U.S. Bank Secrecy Act. This represents only 2 percent of the yearly profits for the company. Approximately sixty of its wealthy customers were engaged in "smurfing" - circumventing reporting requirements by deposits slightly less ($9,999.00) than the U.S. banking laws' mandatory reporting limit of $10,000.00. \textit{See} Liz Pulliam Weston, \textit{U.S. Trust Will Pay $10-Million Penalty}, \textit{L.A. Times}, July 14, 2001, at C1.} and 3) inadequate coverage of existing legislation.\footnote{122}{In the BNY case, the original indictment against the defendants, Edwards and Berlin, fell short of federal money laundering because their acts fell outside the realm of 18 U.S.C. §§ 1956 & 1957. Also, no money laundering charges were filed against BNY because there was no specific underlying wrongful act under which it could be charged in the provisions of banking legislation existing at that time. \textit{Berlin}, No. 99 Cr. 914 (S.D.N.Y., 2000).}
IV. CHART SUMMARIZING THE EXTENT TO WHICH THE MAJOR INITIATIVES RESOLVE THE CHALLENGES TO THE ERADICATION OF MONEY LAUNDERING

With multiple challenges to the eradication of money laundering, multilateral organizations, governments and non-governmental organizations have attempted to combat money laundering through passage of various initiatives that are discussed in greater detail in subsequent sections of the paper. The following chart summarizes the authors' analysis of the extent to which the major anti-money laundering initiatives resolved the challenges by designating the status of each initiative as: Fully Resolved, Partially Resolved, or Not Resolved.
### Chart Summarizing the Extent to Which the Major Initiatives Are Resolving the Challenges to the Eradication of Money Laundering

<table>
<thead>
<tr>
<th>Initiative</th>
<th>A. Bank Secrecy &amp; Tax Havens</th>
<th>B. Privacy Concerns</th>
<th>C. Lack of Diligence</th>
<th>D. Insufficient &quot;Gatekeeping&quot;</th>
<th>E. Unregulated Fin. Services</th>
<th>F. Correspondent Banks</th>
<th>G. Shell Banks</th>
<th>H. Private Banks</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. U.S.</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Money Laundering Control Act of 1986 (not applicable)</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>2. Bank Secrecy Act (1994)</td>
<td>NR</td>
<td>PR</td>
<td>PR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
</tr>
<tr>
<td><strong>B. European Union (EU)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>C. Council of Europe</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Conversion on Laundering, Search, Seizure and Confiscation of the Proceeds of Crimes</td>
<td>FR</td>
<td>PR</td>
<td>PR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
</tr>
<tr>
<td><strong>D. Organization for Economic Cooperation and Development (OECD) Guidelines</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>E. United Nations (UN)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Global Programme Against Money Laundering</td>
<td>NR</td>
<td>NR</td>
<td>PR</td>
<td>NR</td>
<td>PR</td>
<td>PR</td>
<td>PR</td>
<td>PR</td>
</tr>
<tr>
<td>2. Political Declaration and Action Plan against Money Laundering</td>
<td>PR</td>
<td>NR</td>
<td>PR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
</tr>
<tr>
<td>3. Convention Against Transnational Crime</td>
<td>PR</td>
<td>NR</td>
<td>FR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
</tr>
<tr>
<td><strong>F. Organization of American States (OAS)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. OAS Inter-American Convention Against Corruption (1996)</td>
<td>FR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
</tr>
<tr>
<td>2. Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses (Oct. 1998)</td>
<td>FR</td>
<td>NR</td>
<td>PR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
</tr>
<tr>
<td><strong>G. Transparency International</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wolfsberg AML Guidelines for Private Banking</td>
<td>FR</td>
<td>PR</td>
<td>FR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>FR</td>
</tr>
<tr>
<td><strong>H. Financial Action Task Force (which operates as an &quot;arm&quot; of the OECD)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. The Forty Recommendations</td>
<td>NR</td>
<td>NR</td>
<td>FR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
</tr>
<tr>
<td>2. &quot;Naming and Shaming&quot;</td>
<td>PR</td>
<td>NA</td>
<td>PR</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
</tbody>
</table>

FR = Challenges fully resolved  PR = Partially resolved  NR = Not resolved  NA = Not applicable

These refer to resolution of the challenges in the relevant country or region.
V. U.S. INITIATIVES TO CURB MONEY LAUNDERING

A. Overview of the Legislative Framework 1986-2001

Legislative measures in the United States have been drafted to target money laundering through mechanisms, aimed to a great extent, at detection during the initial phase of money laundering, known as the placement phase, where the launderer must physically dispose of the illicit funds. Detection of the money laundering process is most likely to occur in this stage, because the illicit funds are closer to the original source, and can therefore be traced more readily. Since the current legislative framework has been predominantly structured to combat money laundering through domestic financial institutions, the U.S. Department of Justice has been advocating for a broader statutory program to incorporate prohibitions against international money laundering, and to increase the number of international crimes that are predicate offenses to money laundering, listed in the statute as specified unlawful activities.

The authors will discuss the major statutes enacted by the U.S. Congress that combat money laundering. The authors also summarize important additional statutes, considered by Congress but not enacted, including the Foreign Money Laundering Deterrence and Anti-Corruption Act ("FMLDA"), the Money Laundering Control Act of 2000, and the International Counter-Money Laundering Act in both 1999 and 2000. These statutes were not enacted due to resistance by the financial community regarding the disclosure and notification provisions included in the

---

123 Scott, supra note 11. Placement may be accomplished by depositing the funds in a domestic bank or financial institution or by shipping them across borders to deposit in a foreign financial institution. The remaining two stages of money laundering, as noted previously, are layering, which separates the illegal proceeds from their source through a number of financial transactions, and integration, which disguises the illicit funds so that they appear legitimate.
124 Id.
126 Money Laundering Strategy 2000, supra note 7 at 115 and Money Laundering Control Act §1956(c)(7) (listing specified unlawful activities). Currently, the limited number of foreign offenses included in the Act are any scheme to defraud by or against a foreign bank, narcotics trafficking, kidnapping, robbery, extortion, destruction of property by using explosives, and murder.
bills. Additionally, Congress rejected the legislation due to concerns regarding civil liberties, such as privacy.

With the change in environment following the September 11th attacks, Congress has now enacted the PATRIOT Act. In addition to authorizing additional government power to enhance domestic security against terrorism and “enhance enforcement investigatory tools,” the statute includes the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001. Congress made a dramatic bipartisan effort to pass this legislation despite opposition lobbying by the banking interests. “Critics of the lobbying efforts portrayed them almost as unpatriotic acts by a group whose concerns for profits far outweighed that for the nation.” A more detailed analysis of the individual statutes is below.

1. Money Laundering Control Act of 1986 (MLCA)

In 1986 Congress adopted the Money Laundering Control Act which targets money laundering by criminalizing the conduct of transforming illicit funds into legitimate financial instruments. The provisions of the MLCA are codified at 18 U.S.C. §§ 1956 and 1957, and are punishable by fines and prison sentences up to 20 years. The legislative history of this statute reveals the following intent:

... to create a Federal law against money laundering; to authorize forfeiture of the profits earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide Federal law enforcement agencies with additional tools to investigate money laundering; and to enhance the penalties under existing law to further deter the growth of money laundering.

This legislative intent outlines the policy considerations of the statute and of the relevant law enforcement agencies, particularly the Department of Justice and Department of Treasury, over the subsequent years. The statute, the first of its kind, establishes a structure where money laundering is linked as an adjunct to underlying crimes.

130 Mulligan, supra note 10, at 2326.  
132 PATRIOT Act, supra note 5, § 302(a)(1).  
133 Id. at §§ 351-357.  
135 Couture, supra note 131.  
136 Id.  
138 Id.  
140 18 U.S.C. § 1956(c)(7) (listing specified unlawful activities)..
(a) Elements of the Crime of Money Laundering

Under sections 1956 and 1957 of Title 18 of the U.S. Code, two elements must be proven by the government prosecutor in order to obtain a conviction for the crime of money laundering. The government must prove: 1) that illicit funds were derived from one of the SUAs in the statute; and 2) that the defendant engaged in the SUA, then laundered the illicit proceeds.

Section 1956(a)(1)(A)(1) of the statute focuses on conduct where a defendant knowingly engages in a financial transaction, in one of four described circumstances: to promote an SUA, violate tax laws, conceal criminal proceeds or avoid reporting requirements with the proceeds of an SUA.

(b) Specified Unlawful Activities (SUA)

Prior to 2001, the statutory list of SUAs incorporated primarily domestic offenses, including such business crimes as concealment of assets, receiving gifts or commissions for procuring loans, fraudulent bank entries and other forms of financial fraud, and a plethora of other non-business activities, such as racketeering violations under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The limited number of foreign offenses included in the Act are any scheme to defraud by or against a foreign bank, narcotics trafficking, kidnapping, robbery, extortion, destruction of property by using explosives, and murder.

The bribery of a foreign public official in an international business transaction was not included in the statute initially. The Money Laundering Control Act was amended in 1992 to include a felony violation of the Foreign Corrupt Practices Act as a predicate offense for the purpose of a money laundering prosecution. This amendment was a significant recognition of the close link between bribery and the bribe recipient's need to launder the illegal funds paid, and provided law enforcement with an additional enforcement tool.

---

See id. §§ 1956-1957.
See id. § 1956(a)(1)(A)(1).
See id. § 1956(c)(7)(1994) (listing specified unlawful activities).
See id. § 1956(c)(7)(D).
See id. § 1956(c)(7)(B)(i).
See id. § 1956(c)(7)(ii).
See id.
See id.
See id.
See id.
See id. § 1956(c)(7)(D).
(c) International Movement of Illegal Proceeds

Section 1956 (a)(2) of the statute is directed at the international movement of illegal proceeds, into, out of, or through the United States where the criminal knows that the proceeds derive from unlawful activity, and knows the transfer’s purpose is to conceal the origin of the proceeds.

(d) Knowingly Engaging in a Monetary Transaction in Criminally Derived Property

Section 1957 criminalizes conduct where the defendant "knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000." This language is distinct from Section 1956 and incorporates important differences. First, there is a $10,000 threshold. Second, Section 1957 targets a broader range of conduct because it only requires that a transaction occur with proceeds known to be of criminal origin. The transaction need not occur with the intent to engage in a SUA or to conceal the origin of the funds. Finally, a Section 1957 violation must be conducted through a financial institution (by definition a monetary transaction means the deposit, withdrawal, transfer, or exchange of funds or a monetary instrument through or to a financial institution).

The MLCA makes it unlawful for anyone to intentionally promote avoidance of the $10,000 reporting requirements of the Bank Secrecy Act, known as currency transaction reports (CTR) or to promote the concealment of criminal profits. Criminal penalties for evading the reporting requirements include fines and imprisonment for up to five years.

---

153 See id. § 1956(a)(2).
154 See id. §1956(a)(3).
156 See id.
157 See id.
158 See id. § 1957(f)(2).
159 See id. § 1957(f)(1).
160 See id. § 1957(a)(3). This practice is often called "smurfing"; it occurs when a depositor, to circumvent the CTR reporting requirements, divides large sums of cash into a number of deposits in an amount slightly less than $10,000. See also 31 U.S.C. § 5324 (1986) (requiring criminal penalties for structuring of transactions in order to avoid the CTR reporting requirement).
2. Bank Secrecy Act (1994)

(a) History of the Statute

Law enforcement officials found it increasingly difficult in the late 1960’s to trace suspicious large sums of money deposited in the U.S. banking system. The key regulatory agencies arguing that they were thwarted in their attempts to track these funds were the Treasury, the Securities and Exchange Commission ("SEC") and the DOJ. These agencies sought relief through the issuance of legislation by Congress that would impose bank record keeping requirements. The statute currently referred to as the Bank Secrecy Act ("BSA") was originally passed in 1970 under the name Currency and Foreign Transactions Reporting Act. The Treasury has noted, in discussing the BSA, that "the title of the Act is misleading, as the BSA’s main purpose is to limit, rather than enhance, secrecy regarding certain financial transactions".

Much of the attitude of the U.S. banking industry regarding the mandatory reporting of transactions in order to detect money laundering can be captured in the legislative history of the statute. The banking industry debated the wisdom of such regulation, expressing concerns over the specter of invasion of clients' financial privacy and the extreme burden placed on them through the record keeping requirements. Rep. Wright Patman responded that banks should bear costs imposed by the legislation as part of their civic duty to combat crime and the law was ultimately passed.

With the tremendous amount of emphasis concentrated on the elimination of corruption in the last decade, money laundering again was targeted in the 1990’s as one of the primary ways to reduce corruption, and has resulted in the passage of the amended Bank Secrecy Act, as well as a spate of pending legislation aimed at eliminating money laundering. The Bank Secrecy Act is based on the assumption that it is easiest for law enforcement to detect and prosecute money laundering during the placement phase of the process, since the money is closest to its origin at that point in time, and the financial institutions used for placement can be regulated through

---

168 H.R. REP. No. 975-91, at 11; see Mulligan, supra note 10, at 2339.
mandatory reporting requirements. This has been labeled “splash detection,” as it is aimed at detecting the illicit funds before they “splash” into the legitimate financial system. It becomes much more difficult to detect money laundering after the funds have already entered the financial cycle. The U.S. Congress, therefore, adopted the BSA to target money laundering at the placement phase. The BSA authorizes the Secretary of the Treasury as the administrative agency to issue rules mandating financial institution reporting requirements and to implement anti-money laundering programs. Rules promulgated by the Secretary mandate that financial institutions must file various types of reports, including currency transaction reports, suspicious activity reports (SARs), reports of cross-border currency transportation, and reports relating to foreign bank and securities accounts.

(b) Currency Transaction Reports (CTRs)

The BSA includes provisions mandating that U.S. banking institutions file CTRs whenever $10,000 or more is withdrawn from or deposited into one account during a single day.

Specifically the regulation requires: “Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or

---

171 Id.
172 The BSA is the common reference to the statute that was originally adopted in 1970. The BSA has had various amendments since that time. The discussion in this paper focuses on the current status of the BSA. Lawrence L.C. Lee, Combating Illicit Narcotics Traffic in Taiwan: The Proposed Money Laundering Control Act, 4 TUL. J. INT’L & COMP. L. 189, 210 (1996).
173 The Secretary of the Treasury has the authority to define the term “financial institution” very broadly under the BSA. 31 U.S.C. § 5318(a)(2). Presently, Treasury rules restrict the meaning of this term to mean each agent, agency, branch or office within the United States of any person doing business as a bank, broker, or dealer in securities, a money services business, to include a check-cashing business, currency exchange, issuer or seller, or redeemer of traveler’s checks, money orders, a money transmitter and the U.S. Postal Service. 31 C.F.R. § 103.11 (n)(1)-(7), (uu)(3),(4),(5),(6).
175 See 31 C.F.R. § 103.22 (1992) (describing currency transaction reporting form, also known as IRS Form 4789).
176 See id. § 103.21 (1992); Alford, supra note 9; Mulligan, supra note 10.
178 See id. § 5314.
180 31 U.S.C. § 5313 (statutory provision mandating report); see 31 C.F.R. § 103.22 (1992) (regulation describing currency transaction reporting form, also known as IRS Form 4789).
to such financial institution which involves a transaction in currency of more than $10,000..."  

In addition, the CTR must disclose the identity of the customer who has the account and the customer's source of funds. The statute then prohibits U.S. banks from notifying any person involved in the suspicious transaction that the transaction has been reported to the government. This provision allows law enforcement to investigate alleged money laundering, without the suspect being aware of the initial investigation, but may raise the possibility of suspects filing civil lawsuits regarding invasion of privacy.

(c) Suspicious Activity Reports (SAR)

The BSA requires U.S. banks to disclose suspicious activity within customer accounts on SAR forms. Banks must file, under 31 CFR 103.21, reports of suspicious transaction activity on the SAR reporting form where the suspicious transaction involves at least $5,000. According to the Treasury rules, banks or money service businesses are required to file SARs regarding known, or suspected cases of money laundering, illegally derived funds, transactions where there is no apparent business or lawful purpose, and BSA violations. These rules also prohibit the bank from notifying the customer that a SAR has been filed, and provide a safe harbor for them from potential tort liability for any disclosures contained in a SAR.

A new SAR system was implemented in 1996 by the supervisory agencies overseeing the reporting. All reporting institutions submit the same form to one location. Currently, the Treasury Department is the database manager for the SAR system.

181 31 C.F.R. § 103.22(a)(1).  
184 Mulligan, supra note 10.  
185 31 C.F.R. § 103.18(a)(1).  
186 See id. § 103.18, 103.21.  
187 See id. § 103.21.  
188 See id. § 103.18(a)(1).  
189 See id. § 103.20(a).  
190 31 C.F.R. § 103.18(2).  
191 See id. §§ 103.18(e), 103.20(d), 103.21.  
192 See id. §§ 103.18(e), 103.20(d), 103.21.  
194 Id.
(d) Reports of Cross-border Currency Transportation

All persons physically transporting currency or other monetary instruments in excess of $10,000 across the U.S. border, and all persons receiving a cross-border shipment of currency, must file currency or monetary instrument report (also known as a “CMIR form”). The failure to file the mandated report can lead to seizure of the funds in question.

(e) Reports Relating to Foreign Bank and Securities Accounts

According to 31 C.F.R. 103.24, a foreign bank account report (FBAR) must be filed by U.S. citizens, residents, and persons doing business or visiting within the U.S., when such persons maintain accounts with foreign banks, securities brokers or dealers.

(f) Civil and Criminal Penalties

Willful violations of the provisions of the BSA have both civil and criminal consequences. Criminal penalties for BSA violations that occur while violating another law of the United States, or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, include fines up to $500,000, or imprisonment up to 10 years, or both. Civil penalties include fines of the greater of the amount involved in the transaction (not to exceed $100,000) or $25,000.

(g) Amended by: Money Laundering Suppression Act (1994) (MLSA)

Congress amended the Bank Secrecy Act in 1994, through the MLSA, to address concerns from the banking industry as to the excessive paperwork and expense of the reporting requirements and to enhance the requirements of the BSA. Also, the statute attempted to rectify the banking industry’s concerns regarding inconsistencies between the reporting requirements of the BSA and the protections provided by the MLCA, which could leave them vulnerable to possible defamation lawsuits under tort theory.

---

196 31 C.F.R. § 103.23.
197 See id. § 103.23.
198 See id. § 103.24.
200 See id. § 5322(b).
201 See id. § 5321.
204 See Barbot, supra note 170.

There were three underlying purposes for the adoption of the MLCA in 1998 by Congress. First, Congress desired to recognize that money laundering is frequently the adjunct to an underlying crime, such as drugs or bribery. A second reason that combating money laundering is important, and evidence of the close connection perceived by Congress between money laundering and bribery, is that money laundering helps foreign corrupt officials disguise misappropriated public assets. These assets have often been part of U.S. aid meant to “improve the lives of their countries’ citizens.” Third, anti-money laundering policy and legislation is intended to protect the integrity of our financial system and institutions.


The National Money Laundering Strategy for 2000 (“2000 Strategy”) is the consequence of both a Presidential Directive and a Congressional mandate. The 2000 Strategy outlines the Administration’s intention to address loopholes and shortcomings in the current anti-money laundering statutory framework through seeking enactment of two additional statutes - one to enhance domestic enforcement of the anti-money laundering laws, and a second statute to combat international money laundering. In the federal government, countering money laundering involves the coordination and cooperation of a number of federal agencies responsible for implementing the MLCA and the BSA. The DOJ and the Treasury are the

---

207 Id.
208 Id. at 5.
209 Id.
leading agencies involved in the enforcement efforts, while a number of federal financial regulatory agencies, such as the Federal Reserve Board, examine the financial institutions under their respective jurisdictions to determine if those institutions have effective systems in place to detect money laundering.\textsuperscript{216}

Four other options, outlined in the 2000 Strategy, are in the process of implementation.\textsuperscript{217} The Financial Crime-Free Communities (C-FIC) Grant Program would provide capital for state and local counter-money laundering enforcement efforts.\textsuperscript{218} The first High Intensity Money Laundering and Related Financial Crime Areas (HIFCA) were announced in the 2000 Strategy.\textsuperscript{219} New York, Los Angeles, San Juan, Puerto Rico, and the cross-border smuggling movement between Mexico and Texas/Arizona are the first four HIFCA designations made.\textsuperscript{220} This designation will provide resources for law enforcement to intensify their efforts to curb money laundering in those high-risk areas.\textsuperscript{221}

Funding additional prosecution efforts, creating money laundering investigation units, and funding research studies into the domestic movement of laundered funds through money service businesses and money transmitters\textsuperscript{222} are other recommendations in the 2000 Strategy on how to more effectively deter domestic money laundering.\textsuperscript{223}

The 2000 Strategy has specific goals in regard to addressing the problems posed by international aspects of money laundering.\textsuperscript{224} The proposed International Counter-Money Laundering Act, supported the Treasury Department, would provide the Secretary of the Treasury with authority to “crack down on foreign jurisdictions, institutions, or classes of transactions” that pose a significant money laundering risk.\textsuperscript{225} The 2000 Strategy outlines the U.S. policy to work with the FATF to name and shame those nations.

\textsuperscript{216} Money Laundering Strategy for 2000, supra note 7, at 7-8. Other federal financial supervisory agencies are the Office of the Comptroller of the Currency, The Federal Deposit Insurance Corporation, the Office of Supervision, the National Credit Union Administration, and the SEC.

\textsuperscript{217} Id.

\textsuperscript{218} Id. Congress has already appropriated $2.3 million for grant award recipients such as the San Bernardino (CA) Sheriff’s Department and the New York State Police.

\textsuperscript{219} Id. at 9.

\textsuperscript{220} Id. at 10-14.

\textsuperscript{221} See id.

\textsuperscript{222} The Treasury Department has issued regulations requiring these entities to also file suspicious activity reports. See Eizenstat Statement, supra note 105. “There is a strong potential for abuse by foreign money launderers who want to clean their dirty money through our institutions.”

\textsuperscript{223} Summers Remarks, supra note 22.

\textsuperscript{224} Money Laundering Strategy for 2000, supra note 7, at 1-2.

\textsuperscript{225} Id.
that are the worst money-laundering offenders. The 2000 Strategy Act is a pivotal policy document to facilitate U.S. government efforts to battle money laundering.

Another pivotal U.S. policy document, the International Crime Control Strategy, as developed by the Departments of Justice, State and Treasury, has been described as “an innovative action plan that will serve as a road-map for a coordinated, effective, long-term attack on international crime.” The strategy outlines eight primary goals. One of the stated goals of the strategy is to combat the laundering of money by international criminals through U.S. banks. The International Crime Control Strategy provides an additional important policy document to assist the United States in developing strategies and necessary legislation to combat money laundering.

Based, in part, on the recommendations for additional anti-money laundering legislation in the 2000 Strategy and in the International Crime Control Strategy, the U.S. government drafted, but did not ultimately adopt, a number of anti-money laundering statutes in 1998, 1999 and 2000. These proposed statutes are discussed below.


As a consequence of the shortcomings and loopholes in the anti-money laundering legislation, Congress made a number of attempts to adopt statutes aimed at redressing the shortcomings after 1998. These statutes were merely proposed, but never enacted. Although none of the statutes discussed in this section were ultimately adopted, many of their provisions were included in the PATRIOT Act.

In 1998 an anti-money laundering bill was first introduced to Congress as part of President Clinton’s International Crime Control Strategy. Presidential Decision Directive 42, dated October 21, 1995, ordered the State Department, the DOJ, and the Treasury to devise a comprehensive strategy to counter international financial crimes, including money laundering. Both the 1998 proposed bill and the FMLDA were designed to

---

226 Id. at 61.
228 Id.
229 Id.
230 Id.
232 Press Release, supra note 213.
233 Id.

300
curb international money laundering. The Money Laundering Act of 1998 was never adopted because of the concern raised by some members of Congress regarding the civil forfeiture provisions.

When the FMLDA was introduced to the House of Representatives on September 21, 1999, the legislators’ intent was to combat money laundering by international crime groups and corrupt government officials. Regulation of offshore financial centers, defined as “nations, regions, zones, and cities that in many instances have virtually impenetrable financial secrecy laws and weak financial regulatory and reporting regimes, which are tailored to violate or circumvent the laws of other nations,” was a primary purpose of the FMLDA.

New provisions of the FMLDA included prohibitions stating that unidentified foreign owners cannot open or maintain accounts (a proposed extension of the KYC principles that currently apply to domestic bank customers) and correspondent accounts or correspondent bank relationships with foreign banks in virtually unregulated jurisdictions are prohibited. One of the stumbling blocks to Congress enacting the FMLDA was vehement opposition by the financial community regarding the “Know Your Customer” disclosure and notification requirements.

The Administration, through the Departments of Treasury and Justice, and as recommended in the National Money Laundering Strategy of...
2000, has been seeking to persuade Congress to adopt proposed amendments since November 10, 1999. Other bills have subsequently been introduced to Congress with many provisions that are similar to the FMLDA. These include the Money Laundering Control Act of 2000 and the International Counter Money Laundering Act (March 2000) and International Counter-Money Laundering and Anti-Corruption Act of 2001 (March 2001). Although these bills were never adopted, many of their significant provisions have been included in the recently adopted anti-money laundering legislation discussed below.

B. Shortcomings in the Legislative Framework and the U.S. Congressional Response to Shortcomings through Adoption of the PATRIOT Act, Title III, the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001

1. Shortcomings in the Legislative Framework Prior to 2001

(a) Shortcomings of the MLCA

(1) Criticism by the U.S. government: illicit funds derived from a crime that is not an SUA

The U.S. government experiences difficulties when prosecuting violations under the MLCA, either when the illicit funds arise from a crime not listed as a SUA, or when it is difficult to prove that the defendant committed the SUA. An example of this problem (as discussed earlier) is the well-publicized scandal regarding Omar Bongo, the President of Gabon, who deposited more than $50 million in a secret account at Citibank Private Bank. One of the shortcomings in any U.S. attempt to bring money laundering charges against Mr. Bongo is that the funds, even if illicit, and although laundered through the United States, did not arise from a crime listed in the MLCA as a SUA.

Some suggestions to remedy this shortcoming in the MLCA were originally suggested in the International Crime Control Strategy. The
PATRIOT Act, adopted in October 2001, addresses some of these shortcomings in Section 315, by incorporating foreign corruption offenses as money laundering crimes, such as bribery of a public official, and misappropriation, theft or embezzlement of public funds by or for the benefit of a public official and illegal arms sales.²⁵³ Certain violent crimes, such as destruction of property by means of a crime of violence, have also been included in the PATRIOT Act.²⁵⁴ These additional SUA's grant federal prosecutor's authority to charge criminals who commit these enumerated crimes in other countries and launder the proceeds through U.S. financial institutions, and should potentially address this much noted shortcoming.²⁵⁵

(2) Criticism by the U.S. government: existing legislative framework does not cover smuggling and/or transporting cash and currency

Both Congress and the U.S. government agencies involved in the anti-money laundering efforts have stated that the transportation and smuggling of cash in bulk form may now be the most common form of money laundering.²⁵⁶ Typically, movement of large sums of illicit cash is an indication of drug trafficking, terrorism, racketeering, tax evasion, and of course, money laundering.²⁵⁷ Congress has stated that the arrest and prosecution of bulk cash smugglers is a critical component in deterring laundering of criminal proceeds, and that therefore, confiscation or forfeiture of the smuggled amounts is a critical necessity to effective enforcement.²⁵⁸

The PATRIOT Act creates a new criminal felony offense for smuggling bulk cash in amounts greater than $10,000, with appropriate criminal sanctions.²⁵⁹ It also creates a criminal offense for a currency courier to transport more than $10,000 in currency in interstate commerce, with intent to evade specified currency reporting requirements.²⁶⁰ This part of the statute authorizes forfeiture of any of the cash smuggled, and actually makes it mandatory for a court to order, as part of a criminal sentence, forfeiture of all property involved in certain currency reporting offenses.²⁶¹

Congress believes that forfeiture of the smuggled funds will be a significantly more effective deterrent to laundering of criminal proceeds than the current penalties for statutory reporting violations.²⁶² The current penal-
ties often result only in the prosecution of low-level employees in the smuggling organization, who can be easily replaced.

(b) Shortcomings of the Bank Secrecy Act

(1) Criticism by the banks: expensive compliance related to record-keeping

Since the initial adoption of the BSA, financial institutions have consistently complained that compliance with the reporting requirements of the BSA is expensive and administratively burdensome. It was primarily due to vigorous opposition lobbying by the banking industry, based on compliance and expense concerns, that prior drafts of amended anti-money laundering legislation were not adopted in 1998, 1999, and 2000. After the September 11th attacks, however, opposition to the PATRIOT Act was characterized as unpatriotic, so the response of the banking community has been considerably muted.

In light of current events the banking industry has found itself under a "civic duty" to support and comply with the current legislation. As noted by John Byrne, Senior Counsel to the American Bankers Association (the banking industry's primary lobbyist), "the legislation simply puts into statute what happens daily in a financial institution."

(2) Criticism by banks: violates customer privacy rights

A second criticism of the statute frequently raised is that the disclosure requirements potentially violate the customer's right to privacy, and leave financial institutions vulnerable to civil lawsuits by those customers for invasion of privacy. During legislative debates ratifying the BSA, many members of Congress initially expressed concerns that the BSA would violate bank customer privacy, and these concerns had been raised vociferously with recent attempts to amend the Bank Secrecy Act reporting requirements. Privacy is a general concern in anti-money laundering efforts, and until the terrorist attacks and the subsequent global interest in determining the sources of terrorist funding, financial data privacy concerns had been of critical importance.

263 Mulligan, supra note 10.
264 Couture, supra note 131.
265 Id.
266 Id.
267 Id.
268 Gibeaut, supra note 5.
There is no specific statutory remedy regarding privacy concerns. Ironically, less than a year after privacy requirements went into effect for banks and financial service providers,270 the PATRIOT Act authorized sharing of information on suspected terrorists and money launderers.271 Finally, the PATRIOT Act also amends the Right to Financial Privacy Act to allow the transfer of financial records to other financial institutions upon certification that the records are relevant to intelligence activities related to international terrorism.272

An often stated potential ramification of disclosure and notification requirements is that the financial institution reporting may have civil liability relative to the disclosure. For that reason, the BSA provides civil liability immunity for disclosures.273 The PATRIOT Act has revised that section and includes that the institution cannot be sued for failure to notify the person who is the subject of the disclosure.274

(3) Criticism by the U.S. government: current recordkeeping and disclosure of customer identity insufficient to detect money laundering

The Department of Treasury275 has reported to Congress for some time that the KYC provisions within the statutory framework need to be enhanced and that the current recordkeeping requirements are insufficient to detect various forms of money laundering. These undetected money-laundering opportunities include those involving financial institutions operating outside the United States, those involving correspondent accounts, and those accounts that are funding terrorist activity against the United States.276 It also includes accounts handled by securities brokers277 and commodity traders. A recent report prepared by the General Accounting Office ("GAO") divulged that brokers/dealers are vulnerable to money laundering activities, and because they have not previously had reporting requirements under the BSA, they are a weak link in the anti-money laundering framework.278 The report indicates that the securities industry is vulnerable to money laundering because it has as many as three billion transactions

272 See id.
278 Id.
through the primary exchanges in a day.\textsuperscript{279}

The PATRIOT Act "Know Your Customer" provisions have been expanded to include not only customer identity, but also account activity and determination of the source of funds.\textsuperscript{280} Banks are now required to verify the identities of new accountholders and to compare them to lists of known or suspected terrorists.\textsuperscript{281} The statute directs the Secretary of the Treasury to issue regulations with minimum standards for financial institutions, to be utilized when opening accounts.\textsuperscript{282}

Section 356 of the PATRIOT ACT targets brokerage firms, securities brokers, and dealers as entities that must file reports of suspicious financial transactions.\textsuperscript{283} Increased due diligence in opening new accounts, and development of anti-money laundering policies are two other provisions pertinent to both the securities and commodities firms.\textsuperscript{284} The Secretary of the Treasury has a legislative mandate to publish proposed regulations regarding the requirements by July 2002.\textsuperscript{285}

Additionally, the statute subjects credit unions, futures commission merchants, commodity trading advisers, and pool operators to reporting requirements.\textsuperscript{286} Mandatory reports on monetary instruments transactions by any licensed sender of money or any other person who engages as a business in the transmission of funds, including, quite interestingly, informal transfer networks, such as hawalas,\textsuperscript{287} of people facilitating the transfer of money domestically or internationally, outside of the conventional financial institutions system.\textsuperscript{288} The addition of these provisions to the legislative framework should enhance detection of the significant funds that are laundered through the system by one of these methods.

(c) Other Shortcomings in the Legislative Framework Relevant to International Money Laundering

In the past, the U.S. government has had very limited tools available to assist in tackling the corrosive problems posed by international money laundering.\textsuperscript{289} Many of the predicate offenses are foreign crimes not previ-
Crackdown on Money Laundering

ously covered in the U.S. legislative framework. Prior to the PATRIOT Act
the U.S. government had only two options. At one end of the spectrum, the
Secretary could issue financial advisories.290 Sweeping economic sanctions
authorized by the President were the only option that was more severe, and
could only be utilized primarily when there was a national security threat.291
The Departments of Treasury and Justice have been supporting the intro-
duction and adoption of legislation to “enhance the government’s ability to
protect U.S. institutions and the U.S. financial system from international
money laundering, and to resolve the statutory loopholes that have made it
difficult for the U.S. government to investigate and prosecute international
money laundering.”292 One of the primary purposes of the PATRIOT Act is
to address the gaps.293

(1) Criticism: inability to obtain relevant evidence in a foreign juris-
diction

When a SUA occurs on foreign soil, or the relevant financial records
are in a foreign jurisdiction,294 DOJ and U.S. law-enforcement frequently
experience obstacles in obtaining the necessary evidence from the foreign
institutions due to jurisdictional constraints. Cooperation between nations
is a critical component to successfully counter money laundering, and be-
cause government officials from corrupt nations are sometimes involved in
illicit activities themselves, the U.S. government experiences great diffi-
culty in obtaining the relevant evidence and documents from those na-
tions.295

The Patriot Act has resolved some of these difficulties by establishing
statutory federal jurisdiction over foreign money launderers, and their U.S.
assets, and over money that is laundered through a foreign bank.296 The
statute additionally mandates cooperation among financial institutions in ef-
forts to deter money laundering,297 and authorizes the Treasury to adopt
regulations with the purpose of establishing information sharing proce-
dures.298 Another effective solution to facilitate cooperation between coun-

290 Id. at ¶ 432.
291 Id.
292 H.R. 3886, § 5318 (2000); see also Money Laundering Strategy 2000, supra note 7, at
58 (Goal 4: strengthening international cooperation to disrupt the flow of illicit money; “Ob-
jective 1: Action Item 4.1.1: The Administration will seek enactment of the International
Counter-Money Laundering Act of 2000”).
293 § 315, 115 Stat. 272. As noted earlier, section 315 expanded the definition of finan-
cial institutions to include insurance companies and securities firms.
294 See id.
297 See id. § 314(b).
298 See id. § 314(a)(2).
tries is through the negotiation of “mutual legal assistance treaties” (MLAT). These bilateral treaties require the signatories to assist each other with the investigation and prosecution of criminal matters. A mechanism utilized increasingly to enhance cooperation between nations in criminal matters is the inclusion of provisions in multilateral treaties, such as the OECD Convention, that require all countries that ratify the convention to provide mutual legal assistance to each other in investigating legal matters covered by the treaty.

(2) Criticism: jurisdictional limitations

A significant, and much discussed, limitation in the U.S. legislative framework was the inability of U.S. law enforcement and federal courts under the statutes existing prior to the PATRIOT Act to investigate, prosecute and adjudicate international money laundering violations due to jurisdictional limitations.

The PATRIOT Act authorizes U.S. district courts to have civil jurisdiction over foreign banks that violate U.S. money laundering laws, if the bank maintains an account in the United States, and makes it illegal to launder illicit, criminally derived proceeds, through foreign banks.

2. Response to Shortcomings through Adoption of the PATRIOT Act

Many of the provisions of the PATRIOT Act have already been discussed as remedies to the shortcomings of prior legislation. There are now some significant additional provisions in the PATRIOT Act that merit further discussion.

(a) Expanded Department of Treasury authority

One of the more potent, controversial, and unpredictable provisions in the PATRIOT Act provides the Treasury Secretary with expanded powers to mandate special measures by designating certain countries, foreign financial institutions, and types of international financial transactions, as being of primary money laundering concern. This provision allows the Secretary to impose special measures on domestic banks that conduct busi-

---

299 Money Laundering Strategy 2000, supra note 7, at 76.
301 § 302(a), 115 Stat. 272. The Findings and Purpose of the PATRIOT Act provides documentation as to the extent of the global money laundering problem, and the Congressional purpose and goals in resolving those issues by adoption of the statute.
303 § 311(a)(1), 115 Stat. 272. See also Gibeaut, supra note 5, at 48.
ness with those foreign designated banks in the form of correspondent or other accounts. Some of the special measures that the Secretary can mandate include increased recordkeeping requirements, and determination of information relating to beneficial ownership and payable-through-accounts.

(b) Enhanced due diligence with regard to private and correspondent banking

A second significant provision requires an enhanced due diligence by domestic institutions to detect and report money laundering transactions through private banking and correspondent accounts involving foreign persons. Historically, the often incomplete and insufficient customer identification requirements for these accounts have left them vulnerable to money laundering opportunities. The Findings and Purpose section of the PATRIOT Act notes that correspondent banking is susceptible to manipulation by foreign banks to permit laundering of funds by shielding the identity of the actual parties engaged in the financial transaction.

(c) Ascertaining foreign beneficial owners of accounts

A continuing loophole in anti-money laundering reporting requirements has been the use of concentration accounts to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. Section 325 of the PATRIOT Act authorizes the Treasury to establish regulations requiring U.S. financial institutions to ascertain the foreign beneficial owners of concentration accounts in the United States. In addition to identification of individual accountholders, the regulations should include, at a minimum, a requirement for financial institutions to develop written procedures governing the documentation of all transactions in concentration accounts.

(d) Shell banks

The new statute bans U.S. banks from engaging in transactions with foreign shell banks, banks that have no physical offices anywhere but exist merely as a mechanism to move money from one place to another in se-
crecy.\textsuperscript{310} The American Bankers Association is in agreement with this provision, and many U.S. banks have already developed policies to avoid relationships with shell banks.\textsuperscript{311} Lobbyists for Citigroup had urged Congress to make an exception for shell banks associated with financial services companies.\textsuperscript{312} Since it is relatively easy to establish an unregulated financial services firm, supporters of the statute were concerned that such a broad exception could leave the provision moot.\textsuperscript{313} A statutory exception was ultimately included to exempt foreign shell banks that are "an affiliate of a depository institution, credit union, or foreign bank that maintains a physical presence in the United States or a foreign country."\textsuperscript{314} The Treasury Department should monitor how many exceptions fall under this provision, and therefore, how many transactions with shell banks continue to occur and to what extent they pose an ongoing money laundering opportunity.

3. Financial and Banking Industry Response to the PATRIOT Act

Although there was definite lobbying by the banking and financial service industries prior to and during the adoption of the PATRIOT Act, public reaction by those industries after the passage of the statute was quite muted.\textsuperscript{315} One reason for such a low-key response is that the statute's anti-terrorism measures conveyed the idea that opposition to the law could be viewed by the public as unpatriotic.\textsuperscript{316} In fact, the American Bankers Association issued a letter praising the legislation.\textsuperscript{317} Many bank media-relations departments either declined all comments, or seized the opportunity to tout their existing anti-money laundering procedures.\textsuperscript{318} John Byrne, the senior counsel of the American Bankers Association, indicated that it will be business as usual for the banking industry because "the practical effect will be fairly minimal because the bank regulators are already very aggressive..."\textsuperscript{319}

A factor that may have eased banking industry concerns regarding the statute is that they were successful in having Congress include a requirement in the bill that mandates that the Treasury Department issue regula-

\textsuperscript{310} § 313, 115 Stat. 272. See Lavelle, supra note 106, at 48.
\textsuperscript{311} Lavelle, supra note 106, at 48.
\textsuperscript{312} Id.
\textsuperscript{313} Id.
\textsuperscript{314} § 313(j)(3)(A), 115 Stat. 272.
\textsuperscript{315} Couture, supra note 131, at 21.
\textsuperscript{316} Id.
\textsuperscript{317} Lavelle, supra note 106, at 48.
\textsuperscript{318} Couture, supra note 131, at 21.
\textsuperscript{319} Id.
Crackdown on Money Laundering

This rather lengthy process could not only delay application of some of the statute's provisions, but may well allow the banking industry significant input to the implementing rules. Industry input to the rule-making process may also be less publicly noticed than the opposition lobbying efforts during the legislative process. The banking industry asserts that it wants only reasonable adjustments to the statutory provisions.\(^{321}\)

There are continued banking industry complaints regarding ambiguous language in the statute.\(^{322}\) For example, the due diligence requirements\(^{323}\) require banks to ascertain both the identity of the beneficial owners and the source of funds. Banks are concerned as to what information they need to acquire in order to meet that statutory requirement.\(^{324}\) The Treasury regulations, and perhaps later, court interpretation of the statute may be necessary to clarify some of these ambiguities.

The compliance burden on smaller banks and financial institutions is an ongoing concern to those institutions. Since the law requires both large and small institutions to establish anti-money laundering programs and procedures that include employee training and independent audits, the cost of such extensive compliance plans can be a significant burden to the smaller businesses. The industry wants to be sure that the Treasury regulations do not adopt a "one-size-fits-all approach" due to the pressure for them to issue the regulations quickly.\(^{325}\)

The issue of greatest concern to the financial community is the authority granted to the Treasury Department for establishing sanctions against countries, financial institutions and certain specific transactions that it determines to be major money laundering risks.\(^{326}\) This is a powerful and somewhat unpredictable power which would allow the Secretary of the Treasury to impose special measures on domestic banks engaged in international business, such as enhanced due diligence to identify participants in specific transactions.\(^{327}\) The banking industry is concerned that these provisions will require more extensive recordkeeping.\(^{328}\) This provision could potentially cause banking institutions to lose lucrative business transactions to foreign banks not subject to the same restrictions if they cannot determine with whom they are dealing, or if those individuals do not want to do

\(^{320}\) PATRIOT Act, supra note 5, §§ 325, 356.
\(^{321}\) Lavelle, supra note 106, at 48.
\(^{322}\) Couture, supra note 131, at 21.
\(^{323}\) PATRIOT Act, supra note 5, § 312.
\(^{324}\) Couture, supra note 131, at 21.
\(^{325}\) Gibeaut, supra note 5, at 50.
\(^{326}\) Lavelle, supra note 106, 48.
\(^{327}\) Id.
\(^{328}\) Gibeaut, supra note 5, at 50.
business with a bank where they are required to reveal their identity.

C. Remaining Loopholes

Despite the recent legislative changes in the U.S. statutory framework, there are a number of remaining loopholes in the anti-money laundering regime.

1. Embezzlement of IMF funds

Often, the source of illicit funds embezzled by corrupt government officials are derived from IMF funding and loans to the capital-poor nations; potentially, therefore, this continues to be a loophole in the legislative framework. The current U.S. and international concerns regarding bribery of foreign government officials in international business transactions are not fully resolved by the inclusion of bribery violations of the Foreign Corrupt Practices as a predicate offense, or by the current revisions incorporating embezzlement of public funds or acceptance of bribes by a foreign government official as specified unlawful activities. Unfortunately, the statute does not specifically identify misuse of IMF funds as a predicate offense, which had been considered under previously proposed legislation.

331 Fendo, supra note 9, at 1573 (noting that more than $100 billion is laundered out of poorer countries every year).
332 Foreign Money Laundering Deterrence and Anticorruption Act, H.R. 2896, 106th Cong. § 4(b) (2000). This could be accomplished by having the Secretary of the Treasury order the U.S. executive directors of the relevant financial institutions to oppose any loan or disbursement, other than to address basic humanitarian needs, for any country that the Secretary determines has a high level of corruption, is not implementing anti-corruption measures, or is not taking meaningful steps to facilitate good governance and reduce corruption.
333 H.R. 2896, § 4(b).
2. Casinos and credit card gambling

Another notable omission from the current statute’s provisions is regulation of casinos and credit card gambling, which have been described as “potentially bottomless pits of money laundering.” In contrast, the E.U. 2001 Amended Directive on the prevention of money laundering would incorporate casinos in the definition of financial institutions. The U.S. banking industry lobbied vigorously against an initial provision that would have outlawed offshore credit card gambling because it is quite profitable, and they were successful in having that provision scuttled.

3. Attorneys and other professionals facilitating money laundering

Perhaps one of the most controversial anti-money laundering proposals, both in the European Union and the United States, is one that would require attorneys, accountants, real estate brokers, tax advisers and other professionals to meet identification and notification requirements regarding suspicious transactions. Attorneys and other professionals can serve as attractive and legal entrances to the legitimate business arena by structuring corporations and trusts that disguise the identities of the true owners or beneficiaries. In the United States such a provision has not yet been raised by the Treasury, while in the European Union the amended Directive incorporating provisions covering these professionals has been adopted as of December 4, 2001. The American Bar Association believes that the DOJ is not ready to ask Congress for that type of statutory mandate, but wants to discuss self-regulation with the Treasury and the DOJ, where the idea has been raised but not specifically implemented. Comprehensive and voluntary disclosure requirements, where the attorney believes the client is engaging in financial crime, may forestall federal government action if included in the American Bar Association Model Rules of Professional Conduct.

D. Current Status

While the U.S. legislation is much more comprehensive in its anti-money laundering prohibitions and financial institution reporting requirements than it was prior to the adoption of the PATRIOT Act, its ultimate ef-
fectiveness will only be evident as time passes and an assessment can be made as to whether it does indeed reduce the amount of money laundered through U.S. institutions.

VI. EUROPEAN INITIATIVES TO REGULATE MONEY LAUNDERING

Efforts within Europe to combat money laundering and corruption are spearheaded by two primary multinational institutions, the European Union and the COE.342 It is helpful for an evaluation of the European initiatives to clarify and explain the structure and legislative framework of these two separate entities.

The COE is a multilateral organization and intergovernmental body established in 1949, which aims to protect human rights, democracy and the rule of law, and to seek solutions to problems facing European society.343 It was the first step after World War Two to a closer association of the countries within Western Europe before the more integrative body of the European Coal and Steel Community was created in 1951.344 The European Convention of Human Rights,345 "a social and political treaty designed to protect human rights and promote the ideals of democracy," was the first treaty ratified by the COE.346 Gradually, the COE has assumed the role it has today of an international organization dedicated to the protection of human rights and freedom and increased cooperation between European countries.347 The COE currently has 43 Member States, fifteen of which are also members of the European Union.348 Unlike the European Union, conventions adopted by the COE have only an international law status; therefore, the applicability of convention provisions depends on domestic legal

---

342 The European Council, part of the institutional structure of the European Union, has a confusingly similar name to the Council of Europe. They are actually totally separate and distinct entities.


344 Id.


346 MARK-ANTHONY JORDAN, DOING THE RIGHTS THING 1.16 (2001).


348 The COE’s Member States are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Herzegovina, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. See Council of Europe, Council of Europe’s Member States, at http://www.conventions.coe.int (last visited July 8, 2003).
recognition by signatory members.\textsuperscript{349} Meanwhile, the European Union developed into an economic, political and social alliance of nations organized as a supranational institution, initially established by the Treaty of Rome establishing the European Economic Community (1957),\textsuperscript{350} followed by the Single European Act (1986),\textsuperscript{351} the Treaty on European Union (1992),\textsuperscript{352} and an amendment of prior treaties in the Treaty of Amsterdam (1997), often referred to as the Maastricht Treaty.\textsuperscript{353} Its current membership of fifteen nation-states is bound by the jurisprudence of the E.U. legal system as a condition of membership in the European Union.\textsuperscript{354} In what has developed into a fully functioning and pervasive legal system, the provisions of the enabling treaties legally bind the Member States to follow the provisions of the treaties governing the European Union.\textsuperscript{355} A necessary condition of a nation's membership in the E.U. is that all Member States must give full legal effect to E.U. convention and directive provisions within their national legal system.\textsuperscript{356}

The European Commission ("Commission"), charged with the day-to-day management of the European Union, has considerable legal powers, which include recommending legislation to the European Council ("Council"). The Council, along with the European Parliament ("EP"), issue directives that must be implemented through adoption into the domestic legal systems of the Member States (a doctrine known as direct effect), unless existing legislation covers the area.\textsuperscript{357} The power of the European Union to issue directives emanates from Article 10 in which Member States have an obligation to "take all appropriate measures...to ensure fulfillment of the

\textsuperscript{349} JORDAN, supra note 347, at 1.15, 1.16 & 3.10.
\textsuperscript{350} TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter "EEC Treaty"]. The EEC Treaty, also known as the Treaty of Rome, has been amended several times including various acts of accession admitting new Member States to the European Union.
\textsuperscript{352} TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1, 31 I.L.M. 247 (1992). This treaty established the European Union and is commonly referred to as the "TEU" or the Treaty of Maastricht. The TEU changed the name from the Treaty Establishing the European Economic Community to the European Community Treaty (EC Treaty).
\textsuperscript{354} JORDAN, supra note 347. The fifteen Member States of the E.U. are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom, see http://europa.eu.int/abc-en.htm.
\textsuperscript{355} JORDAN, supra note 347.
\textsuperscript{356} Id. at 1.15. See EEC TREATY art. 189.
\textsuperscript{357} JORDAN, supra note 347, at 1.15.
obligations arising out of this Treaty or resulting from actions taken by the institutions of the Community.”

A. European Union Initiatives


Article 2 prohibits the money laundering of criminal proceeds, as defined in the 1991 Directive. This provision differs from the U.S. Money Laundering Control Act, which actually criminalizes money laundering. The predicate offense for money laundering in the Directive is criminal activity specified in Article 3 of the Vienna Convention, primarily drug-trafficking. This is a significant difference from the U.S. statutory framework, which has a number of predicate offenses to money laundering. The preamble to the 1991 Directive provides that the Member States should extend application of the money laundering prohibition to more than illicit funds generated by drug-related criminal activity. The 1991 Directive suggests extension of the money laundering prohibition to "the proceeds of other criminal activities (such as organized crime and terrorism)," but

See Consolidated EC Treaty art. 10 (former-EC Treaty art. 5).
Id. at preamble.
Id. art. 2. According to the 1991 Directive, money laundering means the “conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property...” Id. art. 1.
Id.
does not require such extension.

Similar to the U.S. Bank Secrecy Act, the 1991 Directive also mandates certain reporting requirements by financial institutions, credit institutions and insurance companies. These institutions must require identification of their customers (similar to U.S. KYC policies) by means of supporting evidence. This identification requirement "shall apply for any transactions...involving a sum amounting to ECU 15000 or more, whether the transaction is carried out in a single operation or in several operations which seem to be linked." Additionally, financial institutions and other covered institutions are required to identify the customer where the institution is suspicious that the transaction involves a money laundering scheme, even if the amount falls below the ECU 15000 level. Finally, to facilitate money-laundering investigations, institutions must maintain these identification records for a five-year period. Institutions making these required disclosures of information are protected from liability, in order to enhance their willingness and comfort in complying with the 1991 Directive.


368 Id. art. 1.
369 Id. art. 3(1), 3(2).
370 Id. art. 3(6).
372 Id. art. 9.

317
need to broaden and strengthen the 1991 Directive through the adoption of an amended Directive.\(^{376}\)

Since 1991, the Commission has compiled two reports on the implementation of the amended Directive, which were submitted to the European Parliament and the Council.\(^{377}\) A significant success of the 1991 Directive, as noted in the reports, is that all Member States have adopted legislation that prohibits money laundering as a punishable offense.\(^{378}\) Based on the limited data available so far, however, there have been few convictions for money laundering.\(^{379}\) One possible explanation for this fact is that, as banks comply with the reporting requirements, money launderers have sought alternative mechanisms and institutions to disguise the illicit origin of their funds.\(^{380}\) The new payment technologies, such as electronic fund transfers and the increasing spectrum of financial instruments available, often create new opportunities for money laundering that are difficult to detect.\(^{381}\)

Both the EP and the Council have adopted reports and conclusions, based on the Commission Reports,\(^{382}\) which called for renewed efforts by the Commission to combat money laundering through revision of the 1991 Directive.\(^{383}\) The discussion below illustrates the primary shortcomings of the 1991 Directive and the specific remedies included in the 2001 Directive that address those shortcomings.

(a) Criticism: limited predicate offences

One weakness of the 1991 Directive was that drug trafficking was the only predicate offense to money laundering that was identified, with the option left to the individual Member States as to whether additional predicate offences should also be identified.\(^{384}\) As expected, the Member States' lists of predicate offences do indeed differ, leading to a critical lack of uniform-

---


\(^{377}\) See Explanatory Memorandum, supra note 375 (discussing the 1995 and 1998 Commission Reports).


\(^{379}\) Id.

\(^{380}\) Id.


\(^{382}\) Commission Reports, COM(95) 54 & COM(98) 401.

\(^{383}\) Id.

Also, the Directive did not require Member States to criminalize money laundering, but just to prohibit it. This provision differs dramatically from U.S. law, where money laundering, when combined with certain predicate offenses, is itself a criminal act. This particular criticism of the 1991 Directive is moot, however, since all of the Member States have in fact made money laundering a criminal offense.

In the 2001 Directive, the Parliament and Council note that there has been a trend in recent years to a much broader definition of money laundering, based on a more extensive list of predicate offenses, as reflected in the Forty Recommendations of the FATF. Therefore, the list of predicate offenses listed in the amended Directive is extended to include proceeds from participation in activities connected with organized crime, fraud, as defined in the Convention on the protection of the European Communities' financial interests, and corruption. Finally, the 2001 Directive includes as a predicate offense, "an offense which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State." Neither bribery, embezzlement of IMF funds, or international crimes are included in the list of predicate offenses, leaving those issues unresolved.

(b) Criticism: potential lack of uniformity

Since E.U. law allows Member States to comply with directives by implementing only the requirements of the directive into domestic law, rather than requiring them to incorporate the directive's exact wording, there is a potential lack of uniformity among Member States' implementing legislation. For example, the 1991 Directive allows the Member States to establish their own penalties for the offence of money laundering. A consequence of this provision is the potential lack of uniformity in punishment for money laundering offences that could exist in Member States, thus weakening the effectiveness of the Directive. Another significant provision lacking in consistency among Member States is the one discussed above regarding the predicate offences to money laundering.

A lack of uniformity continues to exist under the amended Directive, and is the consequence of the overarching structure and treaties of the European Union allowing adoption of only the requirements of E.U. legisla-
tion. As the Member States adopt the amended Directive into their individual domestic laws, an assessment of the lack of uniformity can be better made.

(c) Criticism: attorneys and other professionals facilitate money laundering

Another alleged drawback of the 1991 Directive, and one that has significant ramifications for anti-money laundering efforts generally, was the lack of imposed reporting requirements for legitimate professionals, such as lawyers and accountants, who are sometimes involved in establishing the apparatus of money laundering. The EP and Council reports indicated the need for a specific mandate to include within the amended Directive’s scope those “occupations and enterprises which can be considered to be involved, or likely to be involved, directly or indirectly, in money laundering.” The amended Directive complies with this mandate in a number of pivotal, but controversial, amendments.

One of the obligations imposed by the amended Directive includes non-financial activities and professions, such as external accountants, auditors, real estate agents, dealers in precious metals and casino operators, owners and managers in the reporting requirements. Additionally, reporting requirements would be imposed on notaries and other legal professionals in respect to specific financial activities where the risk of money laundering is high; such as the buying or selling of real estate; handling of client money, securities or assets; opening or managing bank savings, or securities accounts; creation, operation or management of companies, trusts, or similar structures; and the execution of any other financial transactions. These professions would have a safe harbor, as do the financial institutions, to shield them from legal liability for disclosing the required identification and other information. Due to the confidentiality between client and attorney, certain special provisions have been drafted to allay concerns regarding the erosion of that privilege. E.U. members have the option of allowing lawyers to communicate their suspi-
cions regarding money laundering to the bar association or equivalent professional bodies.\textsuperscript{406}

The inclusion of attorneys in the reporting requirements has been a thorny issue in the negotiations over the amended provisions, with certain E.U. members, such as Sweden, arguing strongly for their inclusion, since it has been confirmed that money launderers utilize the professions as part of the process of legitimizing their illicit proceeds; other members, such as Germany, have expressed resistance to inclusion of the legal professions on the basis that the provisions are vague, and would make it difficult for lawyers to do their jobs.\textsuperscript{407} In order to ameliorate the concerns raised in regard to the imposition of reporting requirements on legal professionals, and to ensure compatibility with the European Human Rights Convention,\textsuperscript{408} a compromise in the Council was negotiated which permits derogation from the reporting requirements "with regard to information they receive from a client in the course of ascertaining the legal position for their client, or performing their task of defending or representing their client in or concerning judicial proceedings.\textsuperscript{409}

The European Union calls its initiative the "Gatekeeper Initiative" because lawyers and professionals are frequently the gate through which illicit funds are transferred by utilizing complex corporate structuring and trusts to transform them into legitimate funds.\textsuperscript{410} The Gatekeeper Initiative is quite controversial, and has been strongly resisted by the legal profession, which cherishes its traditional attorney-client privilege. The Member States have eighteen months to adopt gatekeeper statutes within their domestic legislative systems.\textsuperscript{411} The amended Directive requires the Commission to examine and report within three years on the implementation of the Gatekeeper Initiative and other provisions, which should provide insight into the success or difficulties encountered by the legal professionals in meeting the reporting requirements.\textsuperscript{412}

(d) Criticism: ambiguous definition of financial institutions leaves many institutions not covered by the Directive

In its report and resolution of June 2000,\textsuperscript{413} the European Parliament expressed its support for a more accurate definition of financial and credit
institutions to be incorporated in the amended Directive. The report indicated that money laundering was occurring regularly through institutions handling large amounts of cash, but not covered in the reporting requirements, such as currency exchange operations, money remittance offices and investment firms.

The amended Directive defines credit institutions and imposes reporting obligations on bureaus of change, money remittance offices, investment firms and insurance companies to remedy and address this shortcoming.

(e) Criticism: transactions that are non-face-to-face are not covered

The 1991 Directive failed to include specific measures for reporting institutions in non-face-to-face transactions. Since the bank personnel do not observe the customer and review physical supporting in non-face-to-face transactions, the opportunity for money laundering is increased.

The amended Directive does require reporting institutions to take specific measures when entering into a transaction with a customer in a non-face-to-face transaction. Such measures shall clearly establish customer identity, and would include requiring additional documentary evidence to verify the documents supplied.

In an Annex to the amended Directive, a Code of Conduct is established for reporting requirements in non-face-to-face operations, such as those conducted by telephone, computer, mail or fax. Identification of customers by credit and financial institutions is required. A potential weakness in the amended Directive is the fact that non-face-to-face transactions can occur in the context of professional and client interactions, and yet professionals and others are not specifically covered in the Annex.

(f) Criticism: remaining loopholes

As is also true of the U.S. legislative framework, the European Union amended Directive does not specifically address the laundering of illicit funds embezzled by corrupt government officials from either bribes paid by corporations, or from IMF loans made to their nations. When U.K. banks or the IMF, which lends money in part derived from U.K. taxpayers and the

415 Id. art. 1(B).
416 Id.
417 Id. art. 1(B)(2).
418 Id. art. 3(11).
419 2001 Amended Directive, supra note 25, at art. 3 (11)
420 Id. at Annex.
421 Id.
taxpayers of other industrialized countries, lends money to underdeveloped nations where the corruption allows for misuse of such funds, as noted previously, it sabotages efforts by the industrialized nations to help those nations.\footnote{\text{\textsuperscript{422}}} It has been asserted that money launderers may use the exemption regarding identification requirements for bank-to-bank transactions as a way to circumvent the reporting requirements.\footnote{\text{\textsuperscript{423}}} Bank-to-bank transactions are also the mechanism by which money-laundering opportunities arise through the relationship of a domestic bank with offshore financial institutions and shell banks by means of correspondent accounts. One member of the EP has criticized the amended Directive for this continuing shortcoming.\footnote{\text{\textsuperscript{424}}} Reverse money laundering, where legally acquired funds are disguised to finance crimes (such as terrorism), is not covered in the amended Directive.\footnote{\text{\textsuperscript{425}}} Remaining loopholes also include the lack of restrictions on correspondent banks and shell banks, a significant money laundering opportunity, and the need to require registration of E.U. bank accounts and offshore financial institutions on the Channel Islands.

(g) Current status

On June 13, 2001, the Commission issued an opinion in which it rejected the fifteen amendments approved by the European Parliament on its second reading.\footnote{\text{\textsuperscript{426}}} The amendments rejected include a provision that would incorporate market supervisory authorities in the definition of financial institutions and a provision that would include customs and tax officials in the category of financial institutions, among others.\footnote{\text{\textsuperscript{427}}} The European Parliament and Council finally approved the amended Directive on December 4, 2001.\footnote{\text{\textsuperscript{428}}} Member States have until June 15, 2003 to adopt domestic legislation that complies with the amended Directive and communicate them to the Commission.\footnote{\text{\textsuperscript{429}}} As noted previously, the Commission must report in three years on the gatekeeper initiative, the provision regarding identifica-

\footnote{\text{\textsuperscript{422}}} Fendo, \textit{supra} note 9, at 1552 (noting that more than $100 billion is laundered out of underdeveloped countries every year).
\footnote{\text{\textsuperscript{423}}} Proposal, \textit{supra} note 374, at art. 3(7).
\footnote{\text{\textsuperscript{425}}} \textit{Id.}
\footnote{\text{\textsuperscript{427}}} \textit{Id.}
\footnote{\text{\textsuperscript{428}}} 2001 Amended Directive, \textit{supra} note 25.
\footnote{\text{\textsuperscript{429}}} \textit{Id.} art. 3.
tion of clients in non-face-to-face transactions, and possible implications for electronic commerce. The amended Directive has made significant modifications to the 1991 Directive, such as enhancing the list of predicate offences, broadening the definition of financial institutions, and including professionals in the reporting requirements. These changes should resolve most of the shortcomings that were a concern to the European Parliament and Council, and to European efforts to combat money laundering generally.

A critical aspect of the amended Directive is that it has binding force within the Member States. The European Union can enforce compliance with present Member States, and require compliance by those nations, like Turkey, that are hoping to secure E.U. membership. The Commission, for example, brought suit against Austria in the European Court of Justice, to force its compliance with those provisions in the 1991 Council Directive that apply to certain forms of savings accounts. This ability of the European Union to secure compliance with the money laundering prohibitions is significant because the amended E.U. Directive will have broad impact throughout most of Western Europe and an increasing number of the nations in Central Europe.

An additional indication of the E.U. commitment to counter money laundering is also evidenced by statements from the E.U. Finance Ministers, who have threatened to impose penalties on countries that fail to comply with international anti-money laundering standards. The European Union can also sustain the momentum in the campaign against money laundering through compliance with the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, discussed below.

B. The Council of Europe

As discussed earlier, the COE is an international organization whose primary purpose is to strengthen democracy, human rights and the rule of law among Member States. The COE has identified the destructive effects of corruption on those goals. Corruption, organized crime, and the laundering of the proceeds of crime have specifically been pinpointed as threats to these goals. The COE has devised a three-part strategy to combat these activities: laying down standards, monitoring the effectiveness of domestic

---

430 Id. art. 2.
431 JORDAN, supra note 347.
432 Id.
433 Id.
434 Id.
435 E.U. Vows Laundering Action, supra note 57.
implementing legislation, and assisting its new members’ efforts. The COE has implemented this strategy and addressed the overarching issue of corruption through a number of mechanisms, including several Conventions, which are discussed below.


The Council adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("Convention on Laundering") in November 1990 in order to devise a common criminal policy for depriving criminals of the proceeds from crime. Signatories to the Convention on Laundering agree to adopt national legislation allowing them to confiscate instrumentalities and proceeds from crime. Signatories can limit the scope of predicate offences to certain categories. Nonetheless, the Convention on Laundering has potential application to a far broader category of predicate offences than drug trafficking.

The Convention on Laundering includes provisions that criminalize the knowing: (1) conversion and transfer of the proceeds of crime, (2) concealment of the nature, source, location, movement, or ownership of such property, (3) acquisition, possession, or use of illicitly-gained proceeds, and (4) participation in, facilitation of, counseling of, or conspiracy to commit or attempt to commit the above offences.

Article 4 of the Convention on Laundering mandates that each party adopt legislative measures to empower its courts to order that bank, financial or commercial records be made available or be seized. Significantly, the Article further states that a Party cannot refuse to implement the provision on the grounds of bank secrecy. Out of respect for the sovereignty of the States, the Parties agreed to an agreement on the application of the Convention in a subsequent instrument, which they hoped would ensure the Convention's effective application. The States agreed to this principle in a subsequent instrument, which they hoped would ensure the Convention's effective application.

Council of Europe, How was the GRECO set up?, at http://www.greco.int/info/HistE.htm (last visited July 10, 2003).


Id. art. 2(1).

Id. art. 2(2).

Id. art. 6(1)(a).

Id. art. 6(1)(b).

Id. art. 6(1)(c).

Id. art. 6(1)(d).

Id. art. 4.
of the individual signatories who may have domestic laws regarding bank
secrecy, there is a provision that allows a Party to require that the lifting of
bank secrecy be authorized by its judicial authority.\footnote{Id. art. 18(7).}
Effective enforce-
ment of implementing legislation would be seriously hindered if bank se-
crecy laws could block access to the critical financial records that provide
the key evidence of money laundering.

A primary purpose of the Convention on Laundering is to require in-
ternational cooperation in investigative assistance, search, seizure and con-
fiscation of the proceeds of crime.\footnote{Id. art. 18(1)(b).} Despite the detailed international co-
operation provisions included in the Convention on Laundering, a Party can
postpone or refuse to cooperate if the request would prejudice sovereignty
or security,\footnote{Id. art. 18(1)(a).} or the action would be contrary to the principles of the legal
system of the Requested Party.\footnote{Id. art. 18(1)(b).}

2. Criminal Law Convention on Corruption; Civil Law Convention on
Corruption (1999)

In January 1999, COE opened the Criminal Law Convention on Cor-
rup-
public officials and private parties, as well as a wide range of other criminal
offenses connected with corruption.\footnote{COE Criminal Convention, supra note 452.} The COE Criminal Convention
tackles the issue of corruption very broadly, and from both the supply and
demand sides of corrupt transactions.\footnote{Id.}

The COE, as is true with other multilateral institutions, recognizes the
significant connection between corruption and money laundering.\footnote{Lucinda Low & Michael Burton, The OECD, OAS, and Council of Europe Antibribery Conventions: New International Standards and Their Implications, in THIRD ANNUAL INTERNATIONAL SYMPOSIUM, supra note 84, at 29, 30.} In or-
der to strengthen the legal connection between the two, the COE Criminal
Convention requires signatories to enact legislation defining the predicate
offenses for criminal violations of their money laundering laws, specifically
including bribery and other offenses listed in Articles 2-12, a provision
similar to the U.S. statutes. The provision is limited to the "extent that the Party has not made a reservation or a declaration with respect to these offences or does not consider such offences as serious ones for the purpose of their money laundering legislation." The COE Criminal Convention establishes asset forfeiture provisions that require signatories to facilitate the identification, tracing, freezing and seizing of the proceeds of corruption, and provides that bank secrecy should not be an obstacle. These provisions integrate well with the 1990 Convention and potentially enhance efforts within Europe to halt the laundering of the illicit proceeds generated by corruption.

Additionally, the Council has completed its work on a Civil Convention on Corruption, which would allow parties allegedly injured by acts of corruption to sue for damages to compensate them for their injury. The Council of Europe's Committee adopted the Civil Law Convention on November 4, 1999.

3. Mechanisms to Monitor Effectiveness and Implementation of COE Conventions

The COE has created the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures to monitor implementation of its conventions, and to utilize a mutual evaluation and peer pressure system to review the laws of those COE Member States that are not members of the Financial Action Task Force. The Committee also provides all Member States with specific recommendations regarding actions they can take to better curb money laundering through compliance with the pertinent international anti-money laundering standards, such as the Forty Recommendations of the FATF and the 1991 EC Directive.

\[\text{327}\]
4. GRECO (Groupe d'Etats contre la corruption)

The COE embarked in 1999\textsuperscript{464} on an assessment system to evaluate the compliance of countries in meeting specific guidelines for anti-corruption and anti-money laundering efforts through the creation of GRECO, which is translated as "Group of States against corruption."\textsuperscript{465} GRECO was conceived as an organization that would follow up on compliance, through a process of mutual evaluation and peer pressure, with the observance of the Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the Programme of Action against Corruption.\textsuperscript{466} Member nations are measured and evaluated in their compliance to specific anti-corruption principles, an important long-term part of maintaining the pressure on countries to meet basic anti-corruption standards.

5. Current Status

The COE has become a leader in international efforts to fight corruption, and provides valuable assistance in diminishing corruption in its region by assessing the necessary changes at the regional, national and local levels, and monitoring the implementation and enforcement of its Conventions.\textsuperscript{467} The necessity to balance the sovereignty concerns of the COE members in regard to this Convention, as with other COE measures, against the need to incorporate the Convention's legitimate purpose through effective enforcement provisions that may conflict with the domestic laws of some Member States is a delicate compromise.

Since the COE Convention has an international law status, it does not

\textsuperscript{464} The history of GRECO is as follows. On May 5, 1998, the Committee of Ministers of the COE adopted Resolution (98) 7 authorizing the establishment of the "Group of States against Corruption - GRECO" in the form of a partial and enlarged agreement. In this latter Resolution, the Committee of Ministers invited Member States of the COE, and non-member states having participated in the preparation of the agreement, to notify the Secretary General of their intention to participate in the adoption of the agreement establishing GRECO, on the understanding that it would be considered as having been adopted after the Secretary General received the fourteenth notification from a Member State of its wish to participate. Following receipt of this fourteenth notification, GRECO was set up on May 1\textsuperscript{st}, 1999 by Resolution (99) 5 adopted by the following States: Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain and Sweden. Shortly afterwards, Poland, Hungary, Georgia and the United Kingdom also joined. On February 24\textsuperscript{th}, 2000, Bosnia-Herzegovina was the first non-member state of the COE to become a member of GRECO. See Group of States against Corruption (GRECO), at http://www.greco.coe.int/ (last visited July 15, 2003).


\textsuperscript{466} What's the GRECO?, at http://www.greco.coe.int/ (last visited July 15, 2003).

\textsuperscript{467} Council of Europe, Group of States against corruption, at http://www.greco.coe.int/contentse.htm (last visited July 15, 2003).
automatically take legal effect in COE Member States. Signatories to the COE Convention choose whether to adopt the Convention’s provisions within their own domestic legal systems. The E.U. anti-money laundering legislation, on the other hand, has a more significant consequence since it must be incorporated in the national legal systems of the Member States.

VII. INITIATIVES OF MULTILATERAL ORGANIZATIONS

A. Organization for Economic Cooperation and Development

The OECD is one of the most important multilateral organizations in the world. It is a Paris-based organization founded in 1960. Its membership consists of thirty countries, which together produce two-thirds of the world's goods and services, and comprises the home countries of almost all large multinational enterprises. The OECD employs a staff of 1,850 and operates with two official languages—English and French.

The OECD is often referred to as "the club" because it is composed of a close-knit group of like-minded countries that share a commitment to a market economy and a pluralistic democracy. It provides governments with a setting in which to discuss, develop and perfect economic and social policy.

I. Activity Aimed at Combating Money Laundering

The OECD has traditionally devoted a lot of attention to curbing global bribery and corruption, but recently has begun to concentrate its efforts on addressing the difficulties posed by tax havens that provide secrecy and protection both to those who are seeking to launder the illicit funds resulting from corrupt activities and those who are seeking to legitimately evade the payment of taxes. One of the OECD's efforts to stem the tide of corruption, its 1997 Convention Combating Bribery of Foreign Public Officials in International Business Transactions (which took effect in February 1999), was mainly concerned with prohibition of acts on the supply side of bribery.

---

468 See OECD, About: OECD, at (last visited July 17, 2003).
469 Id.
470 Id. The thirty members are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. OECD, Membership, at http://www.oecd.org/oecd/pages/homes/displaygeneral/0,3380,EN-countrylist-0-nodirectorate-no-no-159-0,00.html (last visited July 15, 2003).
472 See About: OECD, supra note 469.
473 Id.
in business transactions. However, one section in the Convention was devoted to money laundering because it is so intricately interwoven with bribery as a result of the recipient's need to legitimize illicit funds. The relevant section of the Convention provides that if the law of the countries in which active or passive bribery of its own public officials constitutes a predicate offense for the application of its money laundering legislation, those countries shall also make the bribery of foreign public officials a predicate offense without regard to the place where the bribery occurred.

In 1998, the primary OECD initiative affecting money laundering was the issuance of a report entitled Harmful Tax Competition: An Emerging Global Issue. The Report created a Forum on Harmful Tax Competition, set forth guidelines for dealing with harmful preferential regimes in Member Countries, and adopted a series of recommendations for combating harmful tax practices. The OECD's main focus was to determine measures that could be taken to protect the tax bases eroded when financial havens attract investment or savings outside their country of origin and, concurrently, to eliminate the bank secrecy that protects the illegal activity of money launderers.

The next step was not taken until June 2000 when the OECD's Committee on Fiscal Affairs presented its report, Towards Global Tax Cooperation. This report:

- Identified potentially harmful preferential regimes (e.g., insurance, fund managers, banking) existing within Member countries in accordance with the factors set out in the 1998 report;
- Identified more than thirty jurisdictions meeting the criteria for being tax havens in accordance with the factors set out in the 1998 report;
- Contained an update on work with non-member countries and proposals for taking its work forward.

---

474 OECD Convention, supra note 301.
475 Id.
476 Id.
477 This Report was prepared by the Committee on Fiscal Affairs of the OECD chaired by Jeffrey Owens of the United Kingdom. See Charles M. Bruce, OECD Report on Tax Havens and Preferential Tax Regimes, INT'L ENFORCEMENT L. REP., Aug. 2000; See Yu, supra note 56.
478 OECD Delays and Strengthens Implementation of Tax Initiatives While Target Countries React, 15:11 INT'L ENFORCEMENT L. REP. 885, Nov. 1999. The OECD delayed the implementation of this harmful tax competition initiative while strengthening cooperation in an atmosphere of both acceptance and criticism.
479 Bruce, supra note 478.
480 See Yu, supra note 56; see Barry James, Tax Havens Face OECD Threat of Sanctions, INT'L HERALD TRIB., June 14, 2000, News at 1.
Crackdown on Money Laundering

On November 24, 2000, the OECD released the Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices which used a step deadline for certain goals, with the aim of full cooperation by the end of 2005. The thrust of the OECD’s effort is:

1) for the tax havens to have more transparency about their tax and banking practice;
2) better informational exchange and cooperation with law enforcement officers;
3) termination of the special tax breaks given to foreign investors.

2. Objections to OECD Intervention

OECD opponent’s primary objections concerns tax issues. If the financial institutions disclose information about their depositors, depositors merely seeking tax shelters lose their cloak of secrecy, along with money launderers. With an estimated amount of money laundered each year of $500 billion to $1 trillion, this problem is a front-and-center topic and should not be derailed by the tax issues. Nonetheless, opponents to OECD actions never mention money laundering.

Some concerns were expressed about the way in which the OECD has gone about its work. The Heritage Foundation and the Center for Freedom and Prosperity, conservative U.S. organizations, have led the fight against OECD intervention. They have argued that committees in the OECD were in effect "corralling" U.S. tax policy without the knowledge and participation of the U.S. Congress or the affected business community; that the U.S. Treasury Department was being too complacent about the important actions being taken; and that the actions of the OECD were not transparent because they were taken "behind closed doors" without notice or consultation.

Further, detractors of the OECD initiative argued that the inefficient, high-tax jurisdictions should be confronted with competition provided by the tax havens. A continual irritant to those who object to OECD intervention is that countries serving as tax havens for foreign investment are being penalized because the home countries must impose high taxes in or-


Ignatius, supra note 62.


Bruce, supra note 478.

Id.
der to maintain their "welfare state."  

Many offshore jurisdictions were angered by the industrialized nations' threat of punitive action unless they changed their tax policies and improved the management of their offshore business to contain international financial crimes such as money laundering. They were particularly angered by the OECD's Memorandum of Understanding that outlined steps to be taken by stated deadlines.  

The Clinton administration embraced the concept of the OECD's declination of harmful tax practices, and in its final budget request, proposed money for implementing the tax haven provisions. However, it is clear that under President Bush, the United States was reversing this policy until the September 11th attacks. Treasury Secretary Paul O'Neill had argued before the attack that "The United States does not support efforts to dictate to any country what its own tax rates or tax system should be and will not participate in any initiative to harmonize world tax systems." The entire OECD initiative was jeopardized until the reversal of U.S. policies in the fall of 2001 due to the terrorist attacks.

B. United Nations

The United Nations has not concentrated its attention on negative tax implications with regard to foreign investors depositing funds in offshore financial institutions. Although the United Nations has been intensely involved in anti-corruption and anti-bribery activities, its efforts to eliminate money laundering have been connected more narrowly to its fight against international organized crime through its Office of Drug Control and Crime Protection ("ODCCP"). There is an obvious link between drugs and money laundering because drug traffickers legitimize their illegal funds through the money laundering process. Since the U.N. money laundering initiatives do not incorporate a tax approach, they have proceeded without arousing the ire of the opponents to tax regulation. The United Nations' international money laundering initiatives started with the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention), which called on signatories to criminalize money laundering to assure that bank secrecy is not a barrier to

487 Id.
489 Milbank, supra note 74, at 1.
490 Id.

332
criminal investigation. This convention came into force on November 13, 1990. It required U.N. members to make money laundering illegal, to adopt measures to enable the tracing, freezing, seizing and confiscation of the proceeds, to cooperate with other countries in identifying, tracing, freezing and seizing those assets and to provide for bank, financial or commercial records to be made available to investigators, notwithstanding bank secrecy. However, ten years after the Vienna Convention, it was estimated that only approximately thirty of the 145 countries that were convention signatories had implemented anti-money laundering measures substantially compliant with the Vienna Convention.

1. **Global Programme Against Money Laundering (GMPL)**

The GMPL is carried out in cooperation with other international, regional and national organizations, including, *inter alia*, Interpol, FATF, the COE and OAS. It is a research and assistance project within the ODCCP. This program provides training to business, law enforcement and judicial professionals, assists in building stronger legal and institutional frameworks, and fosters awareness of international anti-money laundering efforts. Its goal is to increase the effectiveness of international action against money laundering by offering comprehensive technical expertise to requesting Member States.

The GMPL provides valuable services through the publication of periodic working papers on the complexities of money laundering issues. In 1998, GPML published the study, *Financial Havens, Banking Secrecy and Money Laundering*. It also coordinates the International Money Laundering Information Network (ImoLIN) with other agencies.


The Political Declaration and Action Plan against Money Laundering (Action Plan) was adopted in New York at the Twentieth Special Session of the United Nations General Assembly on June 10, 1998. The Special

---


493 Fazey, supra note 393.

494 GPML is housed in the U.N. ODCCP which comprises the United Nations Drug Control Program (UNDCP) and the Centre for International Crime Prevention (CICP), which are located in the Vienna International Centre in Austria. See United Nations Office On Drugs and Crimes, at http://www.unodc.org/odccp/about.html?id=20 (last visited Feb. 19, 2003).


496 Id.

497 United Nations Global Programme against Money Laundering, *A Closer Look*, Politi-
Session was devoted to countering the world drug problem. Representatives from 185 nations were present and unanimously adopted a political declaration and six action plans, including one countering money laundering. The key provisions of the Action Plan against Money Laundering recommended:

1. Adoption of national legislation and programs to counter money laundering by 2003;
2. Compliance with the anti-money laundering and related provisions of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
3. Greater international and judicial cooperation in cases involving money laundering;
4. Inclusion of money laundering as a crime in mutual legal assistance agreements;
5. Establishment of an effective financial and regulatory regime to deny criminals and their illicit funds access to the global financial system;
6. Creation of customer identification and verification requirements applying the "know your customer" concept;
7. Removal of bank secrecy impediments preventing the investigation and punishment of money laundering;
8. Continued assistance by GPML to institutions, organizations and bodies committed to countering money laundering by providing training, advice and technical assistance to states upon request and where appropriate.


More recently, on November 15, 2000, the United Nations adopted a Convention Against Transnational Organized Crime, which will enter into force after forty countries have ratified it. The Convention provi-
sions caused the representative from Pakistan, Shaukat Umer, to comment at the Palermo Signing Conference in December 2000 that "never before has a multilaterally negotiated global instrument included a stringent provision against money laundering -- the 'locomotive and conveyor-belt' of crime." 503

The Convention would require members to establish four criminal offenses in their domestic laws to combat organized crime. One of the listed crimes is money laundering. 504 The Convention requires that nations:

1. Set up machinery to regulate financial institutions as well as to license and examine them;
2. Lift bank secrecy to prevent and investigate money laundering;
3. Outlaw anonymous bank accounts or accounts in false names;
4. Set up financial intelligence units to collect, analyze and disseminate information about potential money laundering and other financial crimes.

To further the goal of thwarting the criminal’s ability to launder illicit funds, the Convention obliges signatories to agree "to separate organized criminal groups from their ill-gotten funds by confiscating the proceeds of crime or property of the same value and by identifying, freezing and seizing assets." 506 Additionally, the countries "commit themselves to empower courts or other authorities to order that bank financial or commercial records or property are made available or seized." 507

A Conference of the Parties to the Convention have agreed to meet not later than one year after the treaty has gone into force to agree on measures that will facilitate the Convention and continue the pressure on money laundering operations. 508

C. Organization of American States

The OAS is a multinational organization composed of thirty-four nations in the Western Hemisphere. 509 The OAS has adopted two pivotal

---

503 Id.
504 Id.
506 Id.
507 Id.
508 Id.
509 OAS members include: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Suriname, St. Kitts and Nevis, Trinidad and Tobago, United States, Uruguay, and Venezuela. See Organization of American States, at http://www.oas.org (last visited July 16,
conventions that combat corruption, which is a significant achievement for the developing nations in North, Central and South America.  

1. Inter-American Convention Against Corruption

The OAS Inter-American Convention Against Corruption (OAS Convention) was adopted in 1996, as the first multilateral convention to require signatories to criminalize bribery through the adoption and implementation of domestic legislation. It has now been ratified by twenty-six nations. The OAS Convention prohibitions are directed at both the supply-side (multinational corporations) and the demand-side (public officials) of bribery transaction, a broader application than other multilateral anti-bribery instruments.

Article VI(d) of the OAS Convention criminalizes "the fraudulent use or concealment of property derived from any of the acts of corruption" set forth in the Article, which, although the term itself is never used, includes money laundering. The OAS Convention also authorizes asset seizure and forfeiture, and includes a clause to ensure that domestic bank secrecy laws are not utilized to avoid cooperation between state parties in an investigation regarding corruption. These provisions dovetail well with the subsequently adopted Model Regulations Concerning Laundering Offenses.


512 Those nations that have ratified the OAS Convention include: Argentina, the Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, , Trinidad and Tobago, United States, Uruguay, and Venezuela. The United States did not ratify the OAS Convention at first due to (1) its initial failure to incorporate a monitoring mechanism to assess the effectiveness of implementation of Member States, and (2) constitutional concerns that the prohibition of illicit enrichment from an unexplainable increase in assets during a term of public service would violate the Fifth Amendment constitutional right to a presumption of innocence. The United States finally ratified the OAS Convention in September 2000. The monitoring issue was remedied in June 2001 in the Declaration of the State Parties to the Inter-American Convention Against Corruption. Id.

513 Id.

514 Id. art. VI(d).

515 Zeldin & di Florio, supra note 438, at 33.

516 OAS Convention, supra note 511, at art. XV(1).

517 Id. art. XVI(1).
2. Model Regulations Concerning Laundering Offenses Connected To Illicit Drug Trafficking and Other Serious Offenses (October 1998)

The Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses (Model Regulations)\(^{518}\) were adopted by the Inter-American Drug Abuse Control Commission and the Organization of American States in May 8, 1992. As with other multilateral institutions such as the FATF and Council of Europe, the Model Regulations are not legally binding, but are implemented by national legislation adopted by Member States.\(^{519}\) The provisions of the Model Regulations are very similar to the U.N. Convention\(^{520}\) in regard to the following points: (1) the relevant predicate offence was initially limited to drug trafficking,\(^{521}\) (2) the regulations encourage Member States to criminalize the laundering of proceeds from drug trafficking,\(^{522}\) and (3) the provisions define the criminal activity as whenever anyone transfers, converts, acquires, possesses, uses, and conceals or disguises the nature, source, location, disposition, movement, rights or ownership of property that he/she knows or should have known are the proceeds of an illicit drug offence.\(^{523}\) Also, the Model Regulations include asset forfeiture and seizure provisions to foster effective enforcement of the criminal violations,\(^{524}\) and require “know your customer” policies,\(^{525}\) maintenance of identity records for five years,\(^{526}\) and provide that bank secrecy laws cannot prohibit local banks from the reporting requirements.\(^{527}\)

Due to perceived weaknesses in the original Model Regulations, and the desire to be “dynamic, timely, and relevant,” the Inter-American Drug Abuse Control Commission and the OAS adopted amendments to the Model Regulations in 1999 and 2002.\(^{528}\) One significant change is the addition of the language, “and other serious offenses” to illicit drug trafficking.\(^{529}\) The other serious offenses are to be determined by the legislation of each Member State. The Model Regulations define serious criminal activ-

\(^{518}\) Amended Regulations, supra note 30.
\(^{519}\) Id.
\(^{520}\) Vienna Convention, supra note 366.
\(^{521}\) Amended Regulations, supra note 30, at art. 1.
\(^{522}\) Id. art. 2.
\(^{523}\) Id.
\(^{524}\) Id. art. 7.
\(^{525}\) Id. art. 10.
\(^{526}\) Amended Regulations, supra note 30, at art. 11.
\(^{527}\) Id. art. 12(9).
\(^{528}\) Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses, AG/RES 1656, Organization of American States, XXIX-O/99 (Dec. 2002), at http://www.cicad.oas.org/Lavado_Activos/eng/MODEL_REGULATIONS.htm [hereinafter “Model Regulations”].
\(^{529}\) Id. art. 1(9).
ity to include illicit traffic of firearms, illicit traffic of human beings (such as illegal immigrants), human organ trafficking, prostitution, pornography, kidnapping, extortion, corruption, fraud and activities related to terrorism and the financing of terrorism, terrorist acts and terrorist organizations.\footnote{Id. art. 1.}

Since the Model Regulations have no binding legal effect, but rather serve as a model for OAS members to potentially adopt in their domestic legal systems, the efficacy of the Regulations are limited. This represents a significant difference from the U.S. statutory framework and the E.U. Directive, which do have binding legal effect.

VIII. OTHER ANTI-MONEY LAUNDERING EFFORTS

A. Transparency International


One recent achievement of TI is the establishment of the Wolfsberg Anti-Money Laundering Guidelines for Private Banking (“Wolfsberg AML Principles”), developed with the participation of a group of the world’s largest banks.\footnote{See AML Guidelines, supra note 31. Banks that participated include ABN AMRO Bank N.V.; Barclays Bank; Banco Santander Central Hispano, S.A.; Chase Manhattan; Citibank, N.A.; Credit Suisse Group; Deutsche Bank AG; HSBC; J.P. Morgan, Inc.; Societe Generale; and UBS AG. See id.} TI served as the catalyst for the project, and collaborated with the banks and two international experts in money laundering.\footnote{The experts are Professor Mark Pieth, Chairman of the OECD Working Group on Bribery and Corruption, and Stanley E. Morris, head of FinCEN and a member of the Financial Action Task Force on Money Laundering. See id.} The banks stated the purpose of the guidelines as follows: “Bank policy will be to prevent the use of its worldwide operations for criminal purposes. The bank will endeavor to accept only those clients whose source of wealth and funds can be reasonably established to be legitimate.”\footnote{Id. art. 1.1.} The Wolfsberg AML principles include such diverse provisions as requirements for banks...
to identify suspicious activities and "know your customer" policies for high net worth banking clients.\textsuperscript{536}

An important aspect of client and beneficial owner identification is a due diligence mandate that details the essential information banks should be recording, such as the purpose for opening the account, the source of wealth, estimated net worth and sources of funds. This is a significant change in policy for those financial institutions that have historically provided a high level of confidentiality in regard to banking clients. As noted by the media:

The world of private banking is highly secretive and competitive, so it is no small feat for Transparency International to get two major Swiss banks, J.P. Morgan, Citigroup and others to agree to common procedures. As other banks sign on, the hope is that one of the incentives for tolerating lax oversight will diminish - the fear that competitors will take the tainted money that vigilant banks turn down.\textsuperscript{537}

According to the guidelines, banks are to apply heightened scrutiny to high risk countries,\textsuperscript{538} offshore jurisdictions,\textsuperscript{539} high-risk activities,\textsuperscript{540} and interestingly, public officials.\textsuperscript{541} In regard to suspicious activities, banks must develop a written policy for identification and follow-up. Examples of suspicious activities listed are cash transactions over a certain amount, pass-through/in-and-out-transactions, and transactions that are inconsistent with the due diligence information.\textsuperscript{542} Finally, banks that adhere to the guidelines must establish an independent internal control policy for money laundering,\textsuperscript{543} reporting and training systems,\textsuperscript{544} and a five-year record retention system.\textsuperscript{545}

The adoption of the Wolfsberg AML Guidelines is a critically important development in global efforts to combat money laundering. Multilateral conventions, initiatives, directives, and domestic legislation designed to counter money laundering are not sufficient, in and of themselves, to dimin-

\textsuperscript{538} AML Guidelines, supra note 31, at art. 2.2.
\textsuperscript{539} Id. art. 2.3.
\textsuperscript{540} Id. art. 2.4.
\textsuperscript{541} Id. art. 2.6.
\textsuperscript{542} Id. art. 4.1.
\textsuperscript{543} AML Guidelines, supra note 31, at art. 6.
\textsuperscript{544} Id. art. 7,8.
\textsuperscript{545} Id. art. 9.
ish the opportunities for money laundering, since they can never be fully effective without the compliance of the financial institutions that are utilized in the money laundering process. Additionally, the Wolfsberg AML Guidelines provide a necessary consistency in policy for financial institutions dealing with clients in a global financial marketplace.

B. The Financial Action Task Force

The Financial Action Task Force on Money Laundering (FATF or Task Force) is an inter-governmental body comprised of twenty-nine members and two regional organizations.\(^546\) Although it is not a part of the Organization for Economic Cooperation and Development (OECD), its Secretariat is housed in the offices of the OECD in Paris.\(^547\) The location of its offices and the prevalence of some of the prominent banking havens in the region contribute to the FATF’s active role in Europe recently.

The FATF has been described as "a policy making body which works to generate the necessary political will to bring about national legislative and regulatory reforms to combat money laundering."\(^548\) It was established in 1989 at the Economic Summit of the G-7 when the major industrialized countries that are members of that organization recognized that money laundering posed a threat to the global banking systems and to financial institutions.\(^549\) The charge to the FATF was to "examine money laundering techniques and trends, review the action which had already been taken at a national or international level, and set out the measures that still needed to be taken to combat money laundering."\(^550\) Initially the Task Force was comprised of the members of the G-7 group, the European Commission and eight other countries. It was later expanded in 1991 and 1992 to include an additional twelve members.\(^551\)

The FATF meets regularly several times a year with the position of President rotating annually among the FATF members.\(^552\) The official languages are English and French.\(^553\) Decisions are made on the basis of pres-

---

\(^{546}\) The members are Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, China, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, European Commission, and Gulf Cooperation Council. Financial Action Task Force on Money Laundering, Members and Observers, at http://wwwl.oecd.org/fatf/Members-en.htm (last modified May 30, 2002).

\(^{547}\) Id.

\(^{548}\) Id.

\(^{549}\) Id.

\(^{550}\) Id.

\(^{551}\) Id.

\(^{552}\) Id.

\(^{553}\) Id.

340
entations and recommendations from the Secretariat or based on written or oral reports from delegations. The decision making process within the FATF is based on consensus. 554

1. The Forty Recommendations

The most significant action by the FATF, as it has set about its anti-money laundering efforts, has been the adoption and implementation of the Forty Recommendations ("Recommendations") that set forth "a generic framework" for combating money laundering. 555 The Recommendations were first introduced in 1990 and were most recently revised in 1996. 556 In the interim periods between revisions, the FATF has issued Interpretative Notes, which clarify the application of specific Recommendations. 557

The Recommendations are implemented and monitored by the FATF, by engaging in an evaluation of the extent of implementation of the Forty Recommendations by Signatories, which requires:

- Annual Self-Assessment 558
- On-Site Country (mutual) Evaluation 559
- Global Out-Reach Programs to non-members and to high-risk areas by creating complementary region-specific organizations:
  - Council of Europe's Select Committee of Experts on the Evaluation of Anti-Money-Laundering
  - Asia/Pacific Group on Money Laundering
  - Caribbean Financial Action Task Force
  - Eastern and Southern Africa Anti-Money Laundering

557 See Interpretative Notes, supra note 32.
558 Canada and the FATF, supra note 556 (Each country must "complete detailed surveys and questionnaires on the status of their legal, financial, and regulatory laws in order to assess how closely they are aligned with The Forty Recommendations."). See also Financial Action Task Force on Money Laundering, supra note 58.
559 Canada and the FATF, supra note 556 ("FATF experts . . . visit the country to meet with key officials from the government, law enforcement, and the private sector to assess the effectiveness of that country’s anti-money laundering regime.").
560 Id.
Group

- Intergovernmental Task Force against Money Laundering in Africa
- Financial Action Task Force on Money Laundering in South America
- Non-Cooperating Countries and Territories Initiative
- Annual report detailing money laundering trends and typologies provisions.

The Recommendations are designed to operate as "soft law" that is not binding but provides a framework for countries to implement according to their particular circumstances. The Recommendations are principles for action and provide a comprehensive set of anti-money laundering measures which incorporate "the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation."

The basic obligations contained in the Recommendations have been described at the FATF Internet site as:

a) The criminalization of the laundering of the proceeds of serious crimes (Recommendation 4) and the enactment of laws to seize and confiscate the proceeds of crime (Recommendation 7).

b) Obligations for financial institutions to identify all clients, including any beneficial owners of property, and to keep appropriate records (Recommendations 10-12).

c) A requirement for financial institutions to report suspicious transactions to the competent national authorities (Recommendation 15) and to implement a comprehensive range of internal control measures (Recommendation 19).

d) Adequate systems for the control and supervision of financial institutions (Recommendations 26-29).

e) The need to enter into international treaties or agreements and to pass national legislation which will allow countries to provide prompt and effective international co-operation at all levels (Recommendations 32-40).

---

563 Id.  
564 Id.
2. Recent Application: "Naming and Shaming" Through a Listing of Non-Cooperative Countries

In February 2000, FATF issued a report describing a process for identifying non-cooperative jurisdictions. During the prior year twenty-five criteria had been designed "to identify detrimental rules and practices that impede international co-operation in the fight against money laundering."\(^{565}\) The issues addressed in the criteria were:

a. Loopholes in financial regulations that allowed either no supervision or inadequate supervision of the financial sector, along with weak licensing or weak customer identification requirements, excessive financial secrecy provisions, or lack of reporting systems for suspicious transactions.\(^{566}\)

b. Weaknesses in commercial requirements, including lack of identification of beneficial ownership and inadequate records to allow the appropriate identification of business entities and the relevant information pertaining to them.\(^{567}\)

c. Obstacles to international cooperation, regarding both administrative and judicial levels.\(^{568}\)

d. Inadequate resources for preventing, detecting and repressing money laundering activities.\(^{569}\)

On June 22, 2000, FATF applied these criteria to countries both inside and outside FATF membership "whose detrimental practices seriously and unjustifiably hamper the fight against money laundering,"\(^{570}\) and published its first review of the rules and practices of twenty-nine countries. The report listed fifteen jurisdictions as non-cooperative countries,\(^{571}\) including some of the well known offshore bank havens for deposit of illicit funds and for tax evasion, such as Liechtenstein, Russia, Israel, Lebanon, the Cook Islands, the Philippines, the Marshall Islands, Nauru, Niue, Panama, Dominica, St. Kitts and Nevis, the Bahamas, the Cayman Islands, and St.

---


\(^{566}\) FATF Report, supra note 566.

\(^{567}\) Id.

\(^{568}\) Id.

\(^{569}\) Id.


Vincent and the Grenadines.572

A second list was published in June of 2001 in which Russia was spotlighted and Liechtenstein, the Bahamas, Caymans, and Panama were removed from the list.573 Six new countries were targeted for scrutiny: Burma, Egypt, Guatemala, Hungary, Indonesia and Nigeria.574

There has been some prominent media coverage connected with the disclosure of the final list - first heralding the imminent event and making predictions as to the countries that would be included on the list,575 and later the publication of the list.576 The list was further emphasized because of the interrelationship between the OECD577 and the E.U.578 initiatives against tax evasion that were directed against the offshore banks. The list has been lauded by the G-7579 and the United States580 for its bold approach in identifying the countries with the most egregious banking practices.

The next important phase will involve the steps taken to encourage the listed non-cooperative countries to engage in constructive anti-money laundering action. A number of measures to be taken were set forth in the FATF Report, including:

a. Customer identification obligations for financial institutions in FATF members with respect to financial transactions carried out with

---

572 See also Michael Allen, Laundering Crackdown Intensifies with List of Offending Countries, WALL ST. J., June 22, 2000, at A8.
574 Id.
575 Id.
576 See James, supra note 556; see also Allen, supra note 573.
577 See James, supra note 556.
578 The E.U. explored the possibility of the host banking country instituting a system of tax withholding on nonresident investment. This was vehemently opposed. The alternative approach agreed upon was that twelve of the fifteen E.U. countries would exchange information so that residents could be taxed in their home countries and the remaining three countries - Luxembourg, Austria and Belgium - would impose a withholding tax on nonresidents. See James, supra note 556; see also Buerkle, supra note 57.
579 See Report from G7 Finance Ministers to the Heads of State and Government, supra note 572. The G7 Finance Ministers called on the FATF "to continue its work on identification of NCCTs and to revise its list on a regular basis to take into account changes made in these jurisdictions identified and in the situations elsewhere." They also urged the non-cooperative countries and territories (NCCTs) "to improve expeditiously their anti-money laundering regime and to remedy the deficiencies identified" and promised to "review the situation for the 2001 Summit." Id.
580 The U.S. supported the list despite the fact that it included its close ally Israel. The list was supported by the then Treasury Secretary Summers and additional credibility was achieved when the inclusion of Israel was also supported by the deputy who had negotiated compensation for families of Holocaust victims whose assets were kept after World War II by Swiss banks. See David Ignatius, Getting Serious about Money Laundering in Sundry Havens, INT’L HERALD TRIB., Dec. 4, 2000, at 8.

344
or by individuals of legal entities whose account is in a "non-cooperative jurisdiction."\textsuperscript{581}

b. Specific requirements for financial institutions in FATF members to pay special attention to or to report financial transactions conducted with individuals or legal entities having their account at a financial institution established in a "non-cooperative jurisdiction."\textsuperscript{582}

C. Financial Stability Forum

The Financial Stability Forum (FSF) was convened in April 1999 by the Group of Twenty (G-20), to promote international financial stability through information exchange and international cooperation in financial supervision and surveillance.\textsuperscript{583} The FSF was concerned about the ripple effect of fraud, which could negatively affect the financial centers. The FSF listed twenty-six offshore banking jurisdictions which were generally considered as "having a low quality of supervision and/or being non-cooperative with onshore supervisors, and with little or no attempt to adhere to international standards."\textsuperscript{584} The FSF has representatives from all the Basel-based regulatory groups, including the International Monetary Fund and the World Bank, along with twenty-one representatives of the G-7.\textsuperscript{585} The FSF's work was "the culmination of the process of creating a regime for international financial regulation."\textsuperscript{586}

IX. RECOMMENDATIONS

Most of the challenges reviewed by the authors earlier in this article, which have been encountered in efforts to eradicate money laundering, have been to a large extent resolved within the United States through the adoption of the PATRIOT Act. These challenges include bank secrecy, unregulated financial services, correspondent banks, shell banks, private banks, jurisdictional problems in the enforcement of laws and inadequate coverage of existing legislation. The world can now observe whether the amended U.S. money-laundering legislation is effective in reducing the amount of funds laundered through the American financial system. Of course, many of these challenges continue to remain on a global level and have not yet been sufficiently resolved, or have only been addressed by a few jurisdictions. Their resolution will require further concerted multilateral action,

\textsuperscript{581} Zagaris, supra note 566.
\textsuperscript{582} Id.
\textsuperscript{583} See James, supra note 556, at 1.
\textsuperscript{584} James, supra note 481, at 1.
\textsuperscript{586} Id.
domestic implementing legislation and the commitment of the financial institutions involved. These challenges warrant further discussion.

A. Recommendations to Address Concerns Regarding Secrecy of Tax Havens

The most successful method to date for reducing the use of tax havens to secretly hide illicit funds can be found in the FATF "name and shame" program. Strong global support from governmental and non-governmental organizations is recommended for the method employed in the "name and shame" list issued by the FATF. The publication of the list of non-conforming countries that provide safe havens for illegal money laundering has substantial deterrent value.\(^5\)\(^8\) Just as the publicity surrounding Transparency International's issuance of its annual Corruption Perception Index has done,\(^5\)\(^8\)\(^7\) the FATF list has the effect of focusing national attention on the negative aspects of money laundering and encouraging elimination of the structures that support it. Although it is the countries that provide safe havens for the illegal money laundering that are named, rather than specific financial institutions, the list creates tremendous pressure on the institutions within the country to handle suspicious transactions with greater care. The countries seek to be removed from the list by passing legislation with reporting requirements. There is a strong deterrent inherent in the negative publicity of being named as a country that will not cooperate in anti-money laundering efforts.

B. Recommendations to Address Ongoing Privacy Protection Concerns

The KYC rules and the attack on the secrecy of the tax havens raise questions covering invasion of privacy in the financial arena. There is a complex struggle between those who believe that home countries must be protected from tax evaders and those who raise the specter of privacy and individual freedom to resist regulation efforts. There is no doubt that in the new environment of fear and suspicion, the public will more willingly accept questions and prying into accounts by financial institutions. As a sign of the times, Robert Pitofsky, the former Federal Trade Commissioner and an outspoken advocate of privacy, recently said, "Terrorists swim in a society in which their privacy is protected. If some invasions of privacy are necessary to bring them out into the open, most people are going to say,\(^5\)\(^8\)\(^7\)

\(^5\)\(^8\)\(^7\) In the article it was noted that in the past year the Bahamas, Cayman Islands, Liechtenstein and Panama have been dropped from the blacklist after they introduced legislation to curb money laundering. See Barry James, Philippines Linked to Criminal Cash, INT'L HERALD TRIB., Sept. 8-9, 2001, at 9.

okay, go ahead."\textsuperscript{589}

The key to resolution is to reach some balance between the need for financial institutions to know more about the customers and the source of their funds, and the need for customers to be assured that there is not an invasion of privacy when they are engaged in legitimate activities. A compromise position could be reached on the protection of privacy by having financial institutions establish the practice that all prospective customers should receive notice of the kind of information required under the KYC rules in order to process a transaction and understand that if a transaction appears to be "suspicious" that further information will be required. Also, customers should receive written notice that suspicious transactions will be reported, along with a definition and examples of "suspicious" transactions.

The problem of the secrecy provided by tax havens has been addressed in the prior section with a recommendation that global support should be given to the FATF "name and shame" list of offending tax haven countries. The naming of the countries has had the effect of providing an impetus for legislation to be passed regulating the activities of the banking institutions in order for the country to be removed from the list.

C. Recommendations to Address Concerns Regarding Lack of Bank Diligence & Cooperation

One of the most effective solutions to the money-laundering problem is for financial institutions to assume a primary position in battling the illegal money launderers. One incentive to encourage the industry towards improved performance is that statutes should include the approach used in the Foreign Corrupt Practices Act that makes the directors and officers liable for the illegal acts of agents. Management concerns over liability, debilitating penalties and media exposure would inhibit the drive for profit.

The Wolfsberg AML Principles are an important component in global efforts to combat money laundering because the Principles secure the commitment of private banks that are "on the front line," confronting the money launderers’ attempts to create slush funds and launder illicit proceeds through their institutions. In order to effectively eradicate money laundering, the entire financial institution must join the private banks in a cooperative effort to effect a change in the way they do business.

One idea advanced by former U.S. Deputy Assistant of Secretary of State of International Law Enforcement, Jonathan Winer, to encourage adherence to anti-money laundering standards combines and enhances two existing initiatives.\textsuperscript{590} He suggests going beyond the self-regulation of the

\textsuperscript{589} Mike France et al., \textit{Privacy in an Age of Terror}, BUS. WK., Nov. 5, 2001, at 86.

\textsuperscript{590} Another money laundering concern is the recurring scandals involving embezzlement of IMF funds by public officials. A recommendation to directly diminish those money-
Wolfsberg AML Principles and beyond the FATF’s “name and shame” black list by using the power of the vast amount of funds available for development assistance by the international development institutions - the IMF, World Bank, and United Nations. The international financial institutions control billions of dollars for lending. Currently anti-money laundering compliance is not required in the selection of private-sector banks for deposit of these funds. Mr. Winer recommends creating a “white list” of private-sector financial institutions that would include a roster of those institutions that meet the requirements for compliance with anti-money laundering standards and agree to periodic assessment of compliance (such as is done under GRECO). The financial institutions could, on a preferential basis, make large and profitable deposits of development funds in the participating banks that are on the “white list.” This preferential treatment would establish a reward system that would provide a strong incentive for increased adherence to anti-money laundering guidelines.

Other recommendations for encouraging increased diligence by financial institutions to safeguard against becoming a part of the money laundering operations include:

- Banks should implement anti-money laundering systems with designated compliance officers, training programs, and audit procedures.
- Client-relationship-management systems should be universally adopted. The lack of formal systems of this kind has meant that the individual manager has knowledge about the client but the institution does not have that same information.
- Employees should be properly screened and trained to function efficiently and ethically. The responsibility is on the institution itself to not become a party to the money laundering process.

D. Recommendations to Address Loophole of Attorneys and Accountants as Facilitators of Money Laundering

One controversial shortcoming that remains as a loophole in most anti-money laundering initiatives is the lack of regulation of attorneys and accountants who play a strong supporting role in the laundering of funds for

---

591 See Clark, supra note 113.
their clients by establishing sham corporations, secret trusts and a multiplicity of other inventive organizational devices, often in offshore havens, to avoid detection. These professions are not within the inner circle of the financial industry and fall outside of the regulations that govern financial institutions.

There has been considerable objection to regulation of attorneys and accountants, mainly in the area of concerns that requirements mandating notification of suspicious money laundering transactions might erode the privacy required in the professional relationship, e.g., the attorney/client privilege.

The European Union and Canada have already passed legislation that requires reporting of suspicious financial transactions, and attorneys in the United States are apprehensive that legislators here will follow the lead of these other jurisdictions. An intermediate measure to impose self-regulation has been suggested by the professional licensing bodies. First, an ethical standard could be added to emphasize the need for diligence in dealing with clients where there is substantial evidence that they are involved in suspicious monetary transactions. A second step could involve disciplinary action by the licensing agency in cases where it is proven that the licensed member failed to report a suspicious transaction when he or she "knew or should have known" the transaction involved illicit money laundering.

E. Recommendations to Address Remaining Statutory Loopholes in Various Jurisdictions and in the International Multilateral Framework through Adoption of a Comprehensive Multilateral Treaty

Existing legislation and initiatives, especially those enacted prior to 2001, are generally ineffective. While the United States adopted the PATRIOT Act in October 2001 to redress many of the currently existing statutory shortcomings, and the European Union has an amended Directive passed in December 2001 to expand its legislation, many nations have either no anti-money laundering legislative framework, or one with significant shortcomings.

One potential resolution to the current lack of uniformity and cooperation in anti-money laundering legislation across nations would be for a multilateral organization (such as the United Nations or OECD) to draft a

596 See Gibeaut, supra note 5, at 49.
597 Also, as mentioned earlier in the article, voluntary disclosure requirements could be included in the American Bar Association Model Rules of Professional Conduct.
comprehensive anti-money laundering convention, and then have signatory nations to the convention adopt implementing domestic legislation. The success of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted on December 17, 1997, and now adopted by twenty-eight countries, can serve as a model for the anti-money laundering treaty. A convention such as this could incorporate basic anti-money laundering tenets such as criminalizing the act of money laundering and establishing financial institution reporting requirements. Additionally, the convention could standardize the SUAs that constitute predicate offenses, expand the definition of financial institutions to include casinos and entities that allow credit card gambling, diminish enforcement difficulties and facilitate cooperation between nations in enforcement by including provisions for domestic governments to obtain the necessary evidence to investigate and prosecute cases where the evidence is in a foreign jurisdiction. Formal monitoring procedures to track the compliance of signatories in adopting the necessary implementing legislation are a necessary component to the effectiveness of a multilateral treaty. GRECO could potentially be responsible for the rigorous review of the signatory states implementing legislation since the organization has experience in reviewing anti-money laundering initiatives.

X. CONCLUSIONS

Money laundering challenges government authority, corrupts public officials, endangers the financial and economic stability of countries, and erodes the integrity of financial institutions. The sheer magnitude of the estimates of the annual amount of money laundered, between $500 billion and $1 trillion, indicates that this form of financial abuse cannot be ignored.

Globalization has increased the scope and extent of money laundering. With lightning speed, money can be wired from Yemen to terrorists in Florida for the destruction of buildings in New York and Washington D.C. Business corruption, drug trafficking, arms smuggling, and terrorism are

599 While the authors believe that transnational agreements, such as the one recommended in this paper play a pivotal role in altering corrupt attitudes and conduct, other commentators question whether accords like the OECD Convention are elitist and an example of the moral imperialism of the Western industrialized nations. See Steven R. Salbu, Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform, 38 HArV. J. ON LEGIS. 1 (2001).

600 See OECD Convention, supra note 301.


sustained by the loopholes in the financial structure that allow illegal funds to slip through the system undetected.

A convergence of multilateral and domestic anti-money laundering initiatives that incorporate rigorous compliance monitoring systems is necessary to combat money laundering. Legislation and conventions alone are insufficient. A comprehensive multilateral convention by an organization, such as the OECD, committed to reducing corruption would be a significant step towards diminishing money laundering. Such a convention must be combined with co-operative anti-laundering intervention by the financial institutions themselves, similar to the one employed by the private banks in the Wolfsberg AML Principles, with the addition of an assessment mechanism. Success in the eradication of money laundering requires an effective, comprehensive and aggressive global action by multilateral organizations, governments and the financial institutions that can be implemented to diminish the destructive impact of money laundering.