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Money Laundering and Its Current Status in Switzerland: New Disincentives for Financial Tourism

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Money Laundering and Its Current Status In Switzerland: New Disincentives For Financial Tourism

*Rebecca G. Peters**

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I. INTRODUCTION

As a national source of tourism, the Swiss Alps are, at least in one sense, overshadowed by the banks and finance companies of Switzerland. Because of the relatively strict Swiss banking secrecy laws, the stability of the Swiss franc and the long-standing expertise of Swiss banks in currency trading, financial tourists in the past have relied with alarming consistency on Switzerland's financial system to "launder," i.e., introduce into the normal flow of legitimate capital, funds or assets stemming from illegal activities.¹ Proof of Switzerland's status as a capital for financial tourism lies in the oft-observed coincidence that the trails of world-wide drug syndicates, dictators, stock market manipulators and tax evaders invariably - if only initially - lead through Switzerland.²

Until recently, participation in the laundering of assets known to have stemmed from a crime was not, other than under certain rare circumstances, subject to criminal sanctions in Switzerland. In the absence of applicable legislation, and in response to pressure from Swiss bank regulators to address suspected misuses of Swiss banking services, certain voluntary measures were taken by Swiss banks in 1977 in the form of a private agreement between the Swiss Bankers' Association (SBA) and member banks of the SBA. The agreement (the "Agreement of Due Care" or "Agreement") entered into in the immediate aftermath of the so-called "Chiasso affair,"³ established among other things, a duty of due

¹ *Täglich eine Million Dollar gewaschen*, Tages-Anzeiger, Nov. 11, 1988, No. 264 at 31. A joint study of the Swiss National Bank and the Swiss cantonal public prosecutors' offices, for example, determined that 26 different kidnapping investigations alone during the years 1970 and 1978 involved ransom money laundered through Swiss banks. *Massnahmen gegen "Geldsäuberung,"* Neue Zürcher Zeitung (NZZ), May 9/10, 1981, No. 106 at 9; B. Messerli, *Die Geldwäscherei de lege lata et ferenda*, 105 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT (ZStrR) 418, 421 n. 8 (1988).

² See, e.g., N. SCHMID, *BANKEN ZWISCHEN LEGALITÄT UND KRIMINALITÄT* 189-191 (1986) (King Faisal of Iraq, King Faruk of Egypt, Algerian Liberation Front, Ex-Shah of Iran Pahlavi, and Presidents of Argentina, Kongo-Katanga, Nicaragua); *Internationale Rechtshilfe - Gefahr für das Bankgeheimnis*, NZZ, Aug. 30, 1989, No. 200 at 21 (Marcos, Irangate, drug mafia); *The Lifestyle of Rich the Infamous*, FORTUNE, Dec. 2, 1988, at 38 (tax fugitive Marc Rich). Cf. *Nationalrat will schärferen Geldwäscher-Artikel*, Tages-Anzeiger, Nov. 28, 1989, No. 277 at 9 (statement of member of Swiss House of Representatives) ("no country can point to as many illegal banking transactions as Switzerland").

³ See AGREEMENT ON THE OBSERVANCE OF CARE BY THE BANKS IN THE ACCEPTANCE OF FUNDS AND ON THE PRACTICE OF BANKING SECRECY (Vereinbarung über die Sorgfaltspflicht bei der Entgegennahme von Geldern und die Handhabung des Bankgeheimnisses) (VSB 1977). The Chiasso affair involved revelations that the director of the Chiasso, Tessin branch of a major Swiss bank had systematically abused his position to accept and reinvest, through a Liechtenstein finance company, over 2.2 billion Swiss francs stemming from Italy in violation of Italian currency restric-

care for signatory banks in the identification of would-be account holders and depositors.

The Agreement has been described as a "certificate of morality" for Swiss banks.⁴ Nonetheless, the Agreement and its duty of identification - now in force for more than a decade⁵ - arguably represented a less than adequate means of hindering the laundering of funds through Swiss banks and other financial vehicles.⁶ In the wake of several recently uncovered scandals - including the so-called "Pizza Connection"⁷ and the more recent "Lebanon Connection"⁸ - the lack of criminal sanctions applicable to money laundering has become the major focus of attention of the Swiss media, the Swiss public, and, ultimately, the Swiss legislature. The Lebanon Connection assumed an important political dimension not only because of the magnitude and the character of the affair,⁹ but also because investigation of the matter indirectly resulted in the resignation and criminal investigation of, ironically enough, the very Swiss Federal Council member responsible at the time with supervising the drafting of legislation to criminalize money laundering.¹⁰

tions. W. MAURER, ZUM STREIT UM DAS BANKGEHEIMNIS DER SCHWEIZ: ZWEI VORSCHLÄGE ZU SEINER ENTSCHÄRFUNG 19 (1981).

⁴ I. WALTER, SECRET MONEY: THE WORLD OF INTERNATIONAL FINANCIAL SECRECY 106 (1985).

⁵ Since its adoption in 1977, the Agreement has been renewed twice. See AGREEMENT ON THE OBSERVANCE OF CARE BY THE BANKS IN THE ACCEPTANCE OF FUNDS AND ON THE PRACTICE OF BANKING SECRECY OF 1ST JULY 1982 (official English version) (ACB 1982) and AGREEMENT ON THE SWISS BANKS' CODE OF CONDUCT WITH REGARD TO THE EXERCISE OF DUE DILIGENCE, JULY 1, 1987 (official English version).

⁶ See, e.g., U. Zulauf, *Die Eidgenössische Bankenkommission und Geldwäscherei*, 7 RECHT 79, 84-85 (1989) (identification duty inadequate to discourage money laundering); *Emmentaler: Banken-Sorgfalt nach wie vor mit grossen Löcher*, SHZ, Mar. 26, 1987, No. 13 at 3 (Agreement's usefulness in combating money laundering outnumbered by numerous "loopholes" in Agreement); M. Schwaibold, *Bericht über die Diskussionen*, 39 WIRTSCHAFT UND RECHT (WuR) 237 (1987) (loopholes in Agreement's identification duty).

⁷ The Pizza Connection was uncovered in the spring of 1984, with charges that profits from the sale of \$1.6 billion worth of heroin had been laundered through various Swiss banks and finance companies over a five-year period. Zulauf, *supra* note 6, at 80.

⁸ The Lebanon Connection entailed November 1988 allegations that several of Switzerland's top banks, among others, had assisted a Lebanese-Turkish drug ring over a two-year period in the laundering of proceeds - at least partly stemming from illegal drug trade - totalling over 1.5 billion Swiss francs, or nearly one billion dollars. *Täglich eine Million Dollar gewaschen*, *supra* note 1; C. GRABER, *GELDWÄSCHEREI* 42 (1990).

⁹ See *Wichtiger als Geldwäscher bestrafen ist die Verbrecherorganisation treffen*, Tages-Anzeiger, Nov. 12, 1988, No. 265 at 33 (Lebanon Connection largest Swiss money laundering scandal to date). The Lebanon Connection presented a classical, now nearly archaic form of money laundering. See, *Geldwäscherei: Dampf aufgesetzt*, Schweizerische Handelszeitung (SHZ), Nov. 10, 1988, No. 45 at 17 (illegal drug profits entered Switzerland on daily basis via couriers carrying briefcases filled with dollar bills in small denominations).

¹⁰ See *Bundesanwalt erhebt Anklage gegen Alt-Bundesrätin Kopp*, Tages-Anzeiger, Sept. 22, 1989, No. 220 at 1 (charges of violation of official secrecy laws against former member of Swiss

Like the 1977 Chiasso affair, the Lebanon Connection, too, left its mark on the Swiss banking environment:¹¹ immediately subsequent thereto, the Swiss Federal Council (*Bundesrat*) accelerated the usual turtle-like pace of Swiss legislative reform with respect to efforts which were already underway to criminalize money laundering,¹² and the new legislation was approved by the Swiss Parliament to take effect August 1, 1990¹³.

The purpose of this Article is to examine and assess approaches taken in the past and under the new legislation in addressing the misuse of Swiss banks, attorneys, notaries, trustees and other Swiss professionals as conduits for money laundering transactions.¹⁴ Part II briefly presents certain preliminary considerations relevant to the question of money laundering in Switzerland, while Part III outlines and assesses those provisions of the Agreement of Due Care relating to the identification by banks of beneficial owners' assets. Next, Part IV describes the status of money laundering under both the new legislation specifically applicable to money laundering and other Swiss criminal laws with limited application in this area. Finally, Part V explores the effectiveness of the new legislation and the feasibility of certain additional measures to address the problem of money laundering in Switzerland.

II. PRELIMINARY CONSIDERATIONS

Any attempt to establish a due care standard or legal norm in Switzerland applicable to members of the banking profession and other professions susceptible to misuse for purposes of money laundering must, as

Federal Council (*Bundesrat*); latter allegedly warned husband of impending federal investigation into finance company upon whose board of directors husband was serving); *Freispruch für Kopp*, Tages-Anzeiger, Feb. 24, 1990, No. 98 at 1 (former Federal Council member exculpated of violating official secrecy laws).

¹¹ The Lebanon Connection has had an impact outside Switzerland as well. See *Neue Sorgfaltspflichtvereinbarung Liechtensteins*, NZZ, Oct. 11, 1989, No. 236 at 33 (recent adoption of revised Agreement of Due Care by Liechtenstein banks and drafting of federal legislation to criminalize money laundering tracking that enacted in Switzerland).

¹² *Geldwäscherei: Dampf aufgesetzt*, *supra* note 9.

¹³ AS 1990I 1077 f. See *Strafnormen gegen Geldwäscherei ab 1. August in Kraft*, NZZ, July 4, 1990, No. 152 at 23. Drafting of the legislation, which received final legislative approval in March 1990, commenced in June 1986. P. Bernasconi, *Grenzueberschreitende Wirtschaftskriminalität*, 83 SCHWEIZERISCHE JURISTISCHE ZEITUNG (SJZ) 73, 82 n. 24 (1987). Cf. P. FORSTMOSER & A. MEIER/HAYOZ, *EINFÜHRUNG IN DAS SCHWEIZERISCHE AKTIENRECHT* 329 (4th ed. 1989) (continuing efforts, begun over twenty years ago, to partially revise the Swiss Company Code).

¹⁴ Thus, separate but related questions relating to the misuse of Swiss banks for the perpetration of acts constituting crimes under the tax and currency laws of foreign countries, but not under those of Switzerland, will be left aside.

a preliminary matter, take into consideration the various legal and practical interests thereby implicated.

Money laundering is a follow-up deed essential to the successful completion of certain types of crimes.¹⁵ Because the conspicuously large cash sums or other assets earned through organized crime often leave behind clearer, more condemning tracks than the very acts themselves, such assets must be lent the appearance of earned income stemming from legal activities through laundering transaction.¹⁶ Drug traffickers in particular require money laundering services since illegal drugs are, of necessity, paid for in cash, usually with banknotes of small denominations.¹⁷ An obvious public interest thus exists in making it difficult for organized crime syndicates or other lawbreakers to avail themselves of legitimate banking and other financial services to successfully wipe clean an otherwise condemning criminal trail.¹⁸

By virtue of their central position with respect to currency transactions, asset management and, in particular, global payment transactions, banking institutions play an important - albeit normally unwitting - role in effecting the required laundering of tainted assets.¹⁹ Banks have a natural interest in ensuring that their services are not misused to render untraceable proceeds stemming from criminal activities. Through adverse publicity pointing to the bank's knowing or negligent participation in a money laundering scheme, a bank's reputation could be irreparably damaged and deposit balances correspondingly diminished. On the other hand, however, banks also have an interest in making sure that banking transactions are entered into and executed in the most rational and accommodating manner possible without the waste of time, and the arousing of customer resentment and mistrust entailed by detailed inquiry into

¹⁵ Bernasconi, *supra* note 13, at 81. A typical wash cycle might involve, e.g., first, an exchange of tainted funds for banknotes of large denominations in various currencies; second, the exchange of such banknotes for bearer checks, bearer credit, bearer certificates of deposit or other movable valuable assets, such as precious metals and securities; and finally, the transfer of such "goods" into another country. See *Geldwäscherei: Nach der Art der Indianer*, SHZ, Feb. 26, 1987, No. 9 at 3 (quoting P. Bernasconi, former chief prosecuting attorney of Canton Tessin).

¹⁶ See P. BERNASCONI, FINANZUNTERWELT: GEGEN WIRTSCHAFTSKRIMINALITÄT UND ORGANISIERTES VERBRECHEN 27-28 (1988) (dependency on money laundering so-called "Achilles heel" of organized crime).

¹⁷ *Das Geld kommt täglich kofferweise*, Tages-Anzeiger, Nov. 4, 1988, No. 149 at 33.

¹⁸ Cf. *US-Grosseinsatz gegen die Geldwäscherei*, NZZ, Nov. 25/26, 1989, No. 275 at 33 (statement of U.S. Senate Banking Committee member) (easier to catch key drug mafia members through financial transactions than through illegal drug trade).

¹⁹ Zulauf, *supra* note 6, at 79. A significant securities or tax fraud which does not at some point require the services of a bank for its perpetration is scarcely imaginable. C. MEIER, WIRTSCHAFTS-DELIKTE IM BANKENGEWERBE 111 (1986) (citing R. MUELLER & H.B. WABNITZ, WIRTSCHAFTS-KRIMINALITÄT 117 (1982)).

each and every transaction.²⁰ Such interest is heightened by the pragmatic observation that even the most probing of bank inquiries cannot, in every instance, determine the criminal or non-criminal origin of customer assets.²¹

In Switzerland, questions involving the knowing or negligent participation of Swiss bankers and other professionals in money laundering schemes are further complicated through certain privacy interests recognized as components of the general right to individual privacy protected under the Swiss Civil Code²² and effectuated in Swiss banking and criminal laws²³. Members of certain Swiss professions, for example, including attorneys and notaries,²⁴ are forbidden under professional confidentiality provisions of the Swiss Penal Code from disclosing to third parties information concerning a client in the absence of client consent or other extenuating factors²⁵. Thus, Swiss attorneys appointed to open bank accounts or carry out other bank transactions with client assets are generally not permitted, and generally may not be compelled, to disclose to enforcement authorities or relevant bank officials the identity of relevant clients.²⁶

²⁰ C. MEIER, *id.* at 88. See Judgment of the Second Public Law Division of June 25, 1982, Decisions of the Swiss Federal Tribunal (Entscheidungen des Schweizerischen Bundesgerichts) (BGE) 108 Ib 186, 191 (bank inquiry into economic background of each small, commonplace or unimportant banking transaction would incur large administrative expenses and create customer misunderstandings).

²¹ Cf. W. MAURER, *supra* note 3, at 35. Cf. D. Zuberbühler, *Das Verhältnis zwischen der Bankenaufsicht, insbesondere der Ueberwachung der einwandfreien Geschäftstätigkeit, und der neuen Sorgfaltspflichtvereinbarung der Banken*, 39 WuR 167, 175 (1987) (due to tremendous volume and hectic nature of modern business transactions, even the most cautious of banks are unable to avoid being misused for illegal or dubious transactions).

²² Swiss Civil Code (Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907 (SR 210) [ZGB]), Arts. 27 & 28.

²³ See U. EMCH & H. RENZ, *DAS SCHWEIZERISCHE BANKGESCHÄFT: DAS PRAKTISCHE LEHRBUCH UND NACHSCHLAGBUCH FÜR BANKEN UND BANKKUNDEN* 138 (3rd ed. 1984).

²⁴ In Switzerland, as in many other European countries, notaries are appointed government officials primarily responsible for the official recording of documents.

²⁵ Swiss Penal Code (Schweizerisches Strafgesetzbuch vom 21. Dezember 1937 (SR 311.0) (StGB)), Art. 321 Sect. I (applies to clergymen, doctors, pharmacists, dentists, lawyers, notaries, public notaries, auditors, and assistants of all preceding). Violations are subject to up to 3 years in prison and/or fines of up to 40,000 Swiss francs. Arts. 36, 48 Sect. I para. 1, 106 I & 321 Sect. 1 para. 1, StGB. No limits exists, however, on the amount of fines which may be imposed in the case of violations committed out of profit-seeking motives. Art. 48 Sect. I para. 1, StGB.

²⁶ Circumstances justifying such a disclosure are limited to client consent (Art. 321 line 2, StGB), the existence of a duty to testify or provide information under federal or cantonal law expressly made applicable to persons bound by professional confidentiality (Art. 321 line 3, StGB) or the voluntary solicitation and procurement by such persons of written permission to testify or provide information from applicable supervisory authorities. G. STRATENWERTH, *SCHWEIZERISCHES STRAFRECHT, BESONDERER TEIL I: STRAFTATEN GEGEN INDIVIDUALINTERESSEN* Sect. 7, N. 22 (3rd rev. ed. 1983) [hereinafter STRATENWERTH BTU] (citing authorities). Cf. Zuberbühler, *supra*

Similarly, Swiss banks, for their part, are forbidden under the Federal Act Concerning Banks and Savings Banks (the "Swiss Bank Act" or "Bank Act") from revealing the identity of account holders and other bank customers to third parties, including regulatory and enforcement authorities, absent customer consent or other extenuating circumstances.²⁷ Moreover, Swiss law in general does not allow private persons or entities to be placed under a duty to report possibly criminal activities to governmental authorities other than in very limited instances.²⁸ Thus, the creation of a bank reporting duty applicable to customers who engage in certain types of monetary transactions - a solution adopted in various other jurisdictions²⁹ - does not represent a viable option in Switzerland.³⁰

III. THE AGREEMENT OF DUE CARE

A. Purpose and Scope of Agreement

The Agreement of Due Care represents the first attempt within Switzerland to hinder the misuse of Swiss banking services for effectuating illegal or dubious transactions, such as the laundering of illegally-obtained assets. In proposing the new legislation and establishing a legal duty of due care for individuals professionally engaged in financial transactions, the Swiss Federal Council indicated that the Agreement - applicable to banks - might serve as an important basis in the future for determining the duty of due care.³¹ Nonetheless, it remains unclear

note 21, at 191 n. 53 (under various cantonal notary supervisory laws, Swiss notaries are subject to disclosure duties with respect to the opening of accounts with funds entrusted to them by clients).

²⁷ See Federal Act Concerning Banks and Savings Banks (Bundesgesetz über die Banken und Sparkassen vom 8. Nov. 1934 (SR 952.0) (BankG)), Art. 47 Sects. I & II (up to six months imprisonment and/or fines of up to 50,000 Swiss francs for persons intentionally disclosing, or attempting to incite the disclosure of, a banking secret in the absence of customer consent; fines of up to 30,000 Swiss francs for negligent disclosure). Circumstances nonetheless justifying a disclosure are limited to the existence of a legally-recognized "crisis situation," Art. 34, StGB, or of a duty under federal or cantonal law or regulations to testify or provide information to governmental authorities. Art. 47 Sec. IV, BankG.

²⁸ Bernasconi, *supra* note 13, at 85.

²⁹ Cf., e.g., *US-Grosseinsatz gegen die Geldwäscherei*, *supra* note 18 (under Currency and Foreign Transactions Reporting Act of 1970, U.S. banks required to report cash transactions exceeding \$10,000 or, in some cases, \$3,000, to U.S. Treasury Department; additional duty under Money Laundering Act to notify criminal authorities as to suspicious account movements); *EG-Richtlinie gegen Geldwäscherei*, NZZ, Feb. 15, 1990, foreign ed. no. 37 at 13 (European Commission directive to impose duty on banks and other financial institutions to report questionable transactions possibly involving drug trade, terrorism or other criminal acts).

³⁰ Cf. Zulauf, *supra* note 6, at 81 n. 21 (no legal duty for banks to notify Banking Commission as to illegal acts on parts of employees; authority of Commission under BankG to create such duty as yet unexercised).

³¹ Specifically, the Federal Council stated that professional groups in non-banking areas could

whether proof that an individual employee has complied with Agreement provisions will be sufficient alone to satisfy the legal duty of due care.³² The present version of the Agreement remains - at least technically - in force until September 30, 1992.

The Agreement of Due Care applies to all signatory SBA banks and their branches located in Switzerland, as well as to certain finance companies of a banking nature which are SBA members.³³ Although foreign branches, representative offices, and subsidiary offices of signatory banks are expressly excluded from the scope of the Agreement,³⁴ signatory banks may rely on customer references from their foreign branches or offices to satisfy the Agreement's duty of identification to the extent that the latter have been instructed to identify contracting partners in accordance with Agreement provisions³⁵.

The original purpose of the Agreement of Due Care, when entered into in 1977, was "to ensure the careful clarification of the identity of bank customers and to prevent that transactions contrary to the Agreement are made possible or facilitated through an abuse of the right to banking secrecy."³⁶ In light of such a purpose, a signatory bank was required under the 1977 Agreement to refrain from entering into a transaction where the bank knew or through the exercise of the required due care should have known that the customer funds were being entrusted to it for transactions contrary to the Agreement, including where it was "recognizable" to the signatory bank that the entrusted funds stemmed from an act constituting a crime or an extraditable offense under Swiss law.³⁷ The 1977 Agreement further required a signatory bank to sever banking relations with a customer in the event the bank had reason to

develop detailed rules similar to those in the Agreement as a guideline for satisfying the due care duty within those professions. BOTSCHAFT UND GESETZESENTWURF VOM 12. JUNI 1989 ÜBER DIE ÄNDERUNG DES SCHWEIZERISCHEN STRAFGESETZBUCHES (Gesetzgebung über die Geldwäscherei und mangelnde Sorgfalt bei Geldgeschäften), BB II 1061ff, 1090 [hereinafter, "BOTSCHAFT"].

³² Recently, for example, the Swiss Federal Banking Commission warned that a Swiss bank would be well advised not to continue certain practices explicitly provided for under the Agreement. *Eine Massnahme der Bankenkommision*, NZZ, July 7/8, 1990, No. 155 at 33. See *infra* notes 80 & 81 and accompanying text.

³³ Note 1, CDB 1987. Of all banks located in Switzerland, only a few agricultural credit cooperatives (Raiffeisenkassen) have not pledged to abide by the Agreement provisions. Zulauf, *supra* note 6, at 84 n. 62. Finance companies of a banking nature which are members of the SBA were first made subject to the Agreement in 1987. A. Stöckli, *Sorgfaltspflichtvereinbarung der Banken: Stellung und Auftrag der bankengesetzlichen Revisionsstelle*, 62 DER SCHWEIZER TREUHANDLER [STr] 446,447 (1988). Unless otherwise indicated, the term "signatory bank" as used hereinafter will include both banks as well as finance companies of a banking nature which are SBA members.

³⁴ Note 1, CDB 1987.

³⁵ *Id.* at note 9.

³⁶ Art. 1, VSB 1977.

³⁷ *Id.* at Art. 2 para. b & Art. 4.

suspect that the customer's funds stemmed from criminal activities.³⁸

During the course of revisions in 1982, however, the objectives of the Agreement of Due Care were reduced to the more modest goal "of confirming, defining and laying down in a binding way the established rules of good conduct in bank management"³⁹ and, at the same time, provisions of the 1977 Agreement prohibiting, at least in theory, the assistance by Swiss banks in the effecting of money laundering transactions were deleted, allegedly at the insistence of those who incorrectly contended that a bank's lending of assistance in typical money laundering transactions was already punishable at that time under the Swiss Penal Code⁴⁰. Consequently, the only provisions pertinent to the question of money laundering under the present Agreement of Due Care are those which establish a standard of due care for Swiss banks with respect to the verification of the identity of a contracting partner, a standard which may be used, at least in part, as a basis for interpreting the newly adopted legal duty of due care for individuals in financial transactions.⁴¹

B. Duty of Identification

1. Identification of Contracting Partners

The duty of identification set forth in the current Agreement of Due Care first entails a duty on the part of signatory banks to establish the identity of a potential contracting partner prior to the commencement of certain banking relations. Banking regulations encompassed by this duty are: the opening of an account, passbook or securities account, the entering into of a fiduciary transaction, the renting of a safety-deposit box and the execution of a cash transaction involving an amount exceeding 100,000 Swiss francs.⁴² Such duty of identification applies regardless of whether the contemplated transaction is to be internally referenced under

³⁸ *Id.* at Art. 12. See Zulauf, *supra* note 6, at 87, 87 n. 96 (failure of VSB 1977 money laundering prohibition to attain practical significance; banks charged, on two occasions, with violating such clause exonerated due to lack of concrete grounds indicating criminal origin of funds) (citing P. Klauser, *Drei Jahre Vereinbarung über die Sorgfaltspflichten der Banken*, 32 WuR 285, 294 f. (1980), and L. Meyer, *Weitere drei Jahre Vereinbarung über die Sorgfaltspflicht der Banken*, 36 WuR 157, 167 f. (1984)).

³⁹ Art. 1, Preamble, ACB 1982. *Cf.* Art. 1 Preamble, CDB 1987 ("... a view to preserving the good name of the Swiss banking community, nationally and internationally" and "establishing rules ensuring, in the area of banking secrecy and when accepting funds, business conduct that is beyond reproach").

⁴⁰ See Zuberbühler, *supra* note 21, at 181; *Drückten Banken Beiden Augen zu?*, Tages-Anzeiger, Nov. 22, 1988, No. 273 at 31.

⁴¹ See *supra* note 31 and accompanying text. The remaining undertakings in the Agreement prohibit Swiss banks both from providing active assistance with respect to capital transfers in violation of a foreign country's currency laws (Art. 1 para. b & Art. 7, CDB 1987).

⁴² Art. 2, CDB 1987. "Cash transactions" are defined to include all transactions carried out at a

a code or number rather under the client's name, or involves a bearer savings book, the legal rights to which may eventually be transferred to a holder unknown to the bank.⁴³

A signatory bank is required under the Agreement to maintain written records listing each contracting partner's full name and address and describing the exact type of identification used to verify such partner's identity.⁴⁴ Adequate methods to verify a contracting partner's identity are elaborated in explanatory notes to the Agreement.⁴⁵ In cases of personal negotiations between a signatory bank and an individual as contracting partner, the bank is generally required to demand that the relevant individual display an official identification document, such as a passport, identity card or driver's license.⁴⁶ The required proofing of identification is stricter in the case of business relations with an individual entered into through correspondence.⁴⁷ With respect to banking relations commenced with legal entities and companies, a signatory bank is required to ascertain identity through listings in certain official commercial registers or by obtaining a certificate of incorporation.⁴⁸

In the case of banking relations commenced through personal negotiations, the duty of signatory banks to examine official identification documents does not, according to published precedent of the oversight board appointed to enforce the Agreement ("Oversight Board" or "Board"), entail a further duty, for example, to refuse to enter into banking relations, to conduct an investigation or to take similar action with respect to potential contracting partners who present irregular or even facially invalid identification documents.⁴⁹ Not surprisingly, then, it has

bank's teller window, such as the changing of money, the purchase and sale of precious metals, cash subscriptions to bank "cash bonds" and debenture loans, and the cashing of checks. *Id.* at Note 6.

⁴³ *Id.* at Notes 4 & 5.

⁴⁴ *Id.* at Notes 16 & 17 (with respect to individuals, the address of domicile; for legal entities, the business address).

⁴⁵ See *id.* at Notes 7-17. The explanatory notes are relied upon for their interpretive value by the oversight board appointed to adjudicate breaches of the Agreement. Meyer, *supra* note 38, at 169 (Proceeding IV).

⁴⁶ CDB 1987, *id.* at Note 7. Swiss residents personally known to the bank, however, are not required to submit any identification while individuals not domiciled in Switzerland may, on an exceptional basis, identify themselves by means of the recommendation of certain banks or of a "trustworthy customer" personally known to the bank. *Id.* at Note 8.

⁴⁷ *Id.* at Notes 10 & 11 (confirmation of domicile and, if domicile other than Switzerland, authentication of contracting partner's signature by authorized bank or trustworthy customer personally known to bank).

⁴⁸ *Id.* at Notes 12 - 14 (listing in Official Swiss Commerce Gazette or annual directory to Swiss Commercial Register, extract from Swiss Commercial Register, copy of charter or equivalent document).

⁴⁹ See G. Friedli & L. Meyer, *Die Vereinbarung über die Sorgfaltspflicht der Banken in den Jahren 1984 bis 1987*, 40 WuR 163, 172 - 73 (1988) (Proceeding III) (fact that displayed identifica-

been pointed out that the greatest possible anonymity for customers of Swiss banks subject to the Agreement may be achieved through the use of forged identification documents.⁵⁰ Published precedent of the Oversight Board has also held that the Agreement neither expressly nor implicitly requires bank officials to include in relevant customer records a photocopy of the official identification as verification that the required identification proofing has in fact occurred.⁵¹

2. *Identification of Beneficial Owners.*

In certain instances, a signatory bank's duty under the Agreement of Due Care to identify potential contracting partners requires a further duty to obtain from such partners a declaration on Form A (attached to the Agreement) identifying actual beneficial ownership as to the relevant assets.⁵² The declaration of Form A is required to be obtained whenever serious doubt exists - prior to the opening of an account, a passbook or a securities account, or prior to the carrying out a fiduciary transaction - as to whether the contracting partner is himself the beneficial owner.⁵³ The Agreement silently assumes the existence of such doubt and requires a Form A declaration of beneficial ownership in each case where banking relations are established with a "domiciliary company," defined to include Swiss or foreign "institutions, corporations, foundations, trusts, etc. that do not conduct a commercial or manufacturing business or other form of commercial operation in the country where its registered office is located."⁵⁴ In such cases, a Form A declaration must be submitted by the domiciliary company's authorized officers and must indicate

tion card was forged not relevant to whether bank had fulfilled duty of identification); *id.* at 177 (Proceeding V) (duty fulfilled through examination of official identification document alone; irrelevant if examined passport had expired validity date).

⁵⁰ *Komplizierter Kampf um Anonymität*, Tages-Anzeiger, Dec. 9 1988, No. 288 at 35. See *Höhere Effizienz im Kampf gegen das organisierte Verbrechen*, NZZ, Feb. 25/26, 1989, No. 47 at 25 (because of anonymous nature of modern mass banking transactions, banks were fully protected from deceptive maneuvers, such as use of forged identification documents); *Der Professor, der Staatsanwalt, der Politiker*, Tages-Anzeiger, Nov. 27, 1989, No. 276 at 2 (statement of Swiss federal prosecutor) (duty of identification circumventable through use of forged passport).

⁵¹ See Friedli & Meyer, *supra* note 49, at 173 (Proceeding III) (failure of signatory bank to photocopy forged identification card displayed to bank prior to opening of account not violation of Agreement).

⁵² *Id.* at Art. 3 & Note 22.

⁵³ *Id.* at Art. 3 & Note 21. Thus, a Form A declaration is presumably not required to be obtained under such circumstances prior to the opening of a safe deposit box or the execution of a cash transaction exceeding 100,000 Swiss francs.

⁵⁴ *Id.* at Art. 4 para. 2. Automatically deemed "domiciliary companies" under the Agreement are entities lacking their own business premises, exclusive staff, or exclusive staff which engages in more than solely administrative tasks. *Id.* at Note 25. An exception to such duty exists where a bank knows that the domiciliary company belongs to a specific group of enterprises, or is familiar

the persons and/or entities in whom control of more than half of such company's capital stock or voting power is vested, directly or indirectly, or who otherwise recognizably exercises a decisive influence over the company.⁵⁵

In all other cases, only where "unusual circumstance" exist casting doubt on the presumption that the bank's contracting partner is her or himself the beneficial owner must a signatory bank obtain a Form A declaration from its contracting partner which either confirms such partner's status as a beneficial owner or, alternatively, identifies each third party beneficial owner of the assets in question.⁵⁶ According to an explanatory note to the Agreement, such "unusual circumstances" may exist where (i) a power of attorney is granted in favor of someone lacking recognizably close ties to the contracting partner, (ii) the assets submitted or to be submitted appear disproportionate to the contracting partner's known financial means or (iii) the opening of an account or execution of a fiduciary transaction is requested through correspondence by a person domiciled abroad not personally known to the bank.⁵⁷

The full name, address and country of domicile of each third party identified as a beneficial owner to a signatory bank by the bank's contracting partner on a Form A or otherwise made known to the bank through the course of business relations with the contracting partner must be kept on file by the bank.⁵⁸ Should serious doubt as to the accuracy of a contracting partner's Form A declaration exist, and such doubt is not dispelled through further clarification, the bank is then required to refuse to proceed with the requested account opening or fiduciary transaction.⁵⁹ Similarly, should a bank commence banking relations with a

with both the distribution of the company's capital stock and the identity of the individuals holding controlling interests. *Id.* at Art. 4 para. 3.

⁵⁵ *Id.* at Art. 4 para. 1 subpara. b & Note 27. See *Die Sorgfaltspflicht auf dem Prüfstand*, NZZ, Mar. 17, 1990, foreign ed. no. 63 at 33 (newly adopted legal duty of due care in identification makes no differentiation between domiciliary companies and others; future applicability of Art. 4 of Agreement questioned).

⁵⁶ *Id.* at Art. 3 & Note 18.

⁵⁷ *Id.* Such listing of specific "unusual circumstances" is not, however, intended to be exhaustive.

⁵⁸ *Id.* at Notes 19, 30 & 44. While not affecting the actual scope of banking secrecy provided under the BankG, the Agreement has arguably increased the quality of the information which Swiss banks are able to provide to law enforcement authorities in the event an exception to the banking secrecy duty is available. E. CHAMPOST, *DIE BANKGEHEIMNISSE DEN LÄNDERN IN DER WELT* 51 (1982). But cf. *infra* note 50 and accompanying text.

⁵⁹ Note 20, CDB 1987. Neither the text of the Agreement nor the explanatory notes thereto list specific circumstances possibly justifying serious doubt as to the accuracy of a declaration of beneficial ownership or explain what steps should be taken for the purpose of further clarification. See *Erste Fazit der neuen Sorgfaltspflicht Vereinbarung*, NZZ, Sept. 27, 1990, no. 224 at 33. 34 (in recent cases, Oversight Board left open question whether bank had duty to inquire into economic purpose

contracting partner and subsequently discover that originally-submitted information as to the beneficial owner was inaccurate or, alternatively, if the transactions carried out at the contracting partner's request suggest a deception as to the contracting partner's identity, the bank is then under a duty to sever banking relations as quickly as possible.⁶⁰

The Form A declaration has been criticized as being inadequate to achieve its intended purpose, i.e., that of reliably identifying actual beneficial ownership. First, the Agreement fails to provide concrete guidelines as to when "serious doubts" as to the accuracy of a Form A declaration might be deemed to exist.⁶¹ Indeed, although signatory banks were held in violation of the Agreement in two published proceedings for failing to obtain Form A declarations, in neither proceeding was it suggested that the mere obtaining of the Form A would not have *per se* fulfilled the Agreement's duty of identification.⁶² The declaration of beneficial ownership itself, however, merely calls for the confirming signature of the contracting partner that she/he or someone else is the actual beneficial owner. No verifying documentation, e.g., bank statement or confirmation of wire fund transfer, is required to be submitted in support of such claim, nor is the contracting partner required in the declaration to clarify the unusual circumstances giving rise, as an initial matter, to the doubt as to the contracting partner's beneficial owner status. As a legal matter, signatory banks may often be prevented from checking the truth of a claim that a person resident outside Switzerland is actually the beneficial owner.⁶³ Allegedly, as a practical matter, signatory banks do not normally even attempt to verify the accuracy of Form A declarations naming a third party as beneficial owner, with the result that a con-

of transaction where client opened eleven savings accounts in her own name, each in the amount of 1,000 Swiss francs.

⁶⁰ *Id.* at Art 9 para. 2 & Note 55. Such duty to sever relations applies only to the extent no criminal investigation has been commenced. *Id.* at Art. 9 para. 3. This caveat was added in response to criticism that the VSB 1977's requirement that banking relations be severed whenever client funds were suspected to stem from illegal activities was inadvertently tailored to permit suspected criminals to collect their funds and vanish. See Zulauf, *supra* note 6, at 85.

⁶¹ *Cf.* CDB 1987, Note 18 (providing examples of circumstances giving rise to doubt triggering initial duty to obtain Form A declaration). Further, apparently no duty whatsoever to obtain a Form A exists with respect to individual cash transactions, such as money changing transactions, regardless of the amount of the transaction. *Cf. supra* note 53.

⁶² See, e.g., Klauser, *supra* note 38, at 289-91 (Proceeding II) (bank should have demanded declarations of beneficial ownership from 25-year old foreigners, each wishing to deposit \$300,000 in \$100 bills into personal accounts); Meyers, *supra* note 38, at 165 (Proceeding II) (bank should have obtained Form A declaration from individual purporting to be director of foreign company and wishing to deposit \$30 million into personal account).

⁶³ See, e.g. Schwaibold, *supra* note 6, at 237 (naming French citizen by Mafia member as beneficial owner not capable of being proofed by bank in light of relevant French banking regulations); A. Meili, *Keine Unterstützung der Formular B1*, 117 *Der Schweizer Anwalt* 21, 22-23 (1988) (same).

tracting partner may successfully frustrate the purpose of such declaration by naming a random, real or fictitious foreigner as beneficial owner.⁶⁴

3. Declarations of Members of Certain Professions

The hitherto most important and controversial exception to the Agreement's duty of identification applies in the case of banking relations commenced by certain Swiss professions acting on behalf of clients desiring to remain anonymous vis-a-vis the bank.⁶⁵ In such cases, the Agreement allows Swiss attorneys and notaries, member firms of the Swiss Union of Fiduciary and Auditing Firms, and individual members of the Swiss Association of Certified Public Accountants, Trustees and Tax Consultants to commence banking relations on behalf of third party bank customers without revealing their client's identities to signatory banks.⁶⁶ As a substitute for disclosing the true customer's identity, the Swiss professional is merely required under the Agreement to submit to the relevant bank a declaration on Form B (attached to the Agreement) to the effect that:

- The actual beneficial owner of the relevant funds or other property is known to the professional;
- Having displayed due diligence, the professional is not aware of any fact suggesting an abuse of the right to banking secrecy by the true beneficial owner or, in particular, indicating that the assets concerned are the fruits of any criminal activity;⁶⁷

Further, under revisions to Form B in effect since March 31, 1989, members of professions entitled to use Form B are also required to declare on the Form that:

- The professional's appointment is not merely provisional in nature and is not primarily aimed at keeping the beneficial owner's name secret from the bank; and
- The professional will supervise the transactions made in the relevant account and immediately inform the bank upon either the

⁶⁴ See *Die Sorgfaltspflicht auf dem Prüfstand*, *supra* note 55 (as matter of practice, Swiss banks have merely satisfied themselves with the Form A declarations).

⁶⁵ For other exceptions to the duty to identify customers, see *supra* notes 46 & 53. See also Art. 5 para. 3 & Note 42, CDB 1987 (no declaration of beneficial ownership required with respect to accounts, securities accounts and fiduciary transactions commenced by Swiss banks, foreign banks and finance companies of a banking nature which are SBA members).

⁶⁶ Art. 5 para. 1, Notes 33 & 34, CDB 1987. Only attorneys, notaries, accountants or asset administrators domiciled or with registered offices in Switzerland are eligible for such exception.

⁶⁷ *Id.* at Art. 5 para. 2, Forms B1 & B2.

revocation or such person's appointment as such or a change in the conditions upon which such declarations are based.⁶⁸

The 1989 revisions to Form B additionally required Swiss attorneys and notaries, on the one hand, to declare separately that:

- They are acting as legal counsel in accordance with their respective appointments as such;
- The account or securities account to be opened is directly related to such appointment; and
- The purpose of the appointment as attorney or notary is not, either directly nor indirectly, primarily that of managing assets.⁶⁹

Trustees and asset managers, for their part, also became required to separately declare that:

- The relevant account is to be managed in accordance with a power of attorney conferred by the beneficial owner or such owner's representative; and
- The banking services in question "do not play an overriding role in this regard."⁷⁰

Should doubts arise subsequent to the commencement of banking relations through a member of a privileged profession as to the accuracy of such member's Form B declarations, a signatory bank is then required under the Agreement of Due Care to demand a declaration of beneficial ownership on Form A for the hitherto anonymous customer which identifies the actual beneficial owner of the relevant account.⁷¹ If the thus-obtained Form A declaration gives rise to doubt as to its correctness which is not dispelled through further inquiry, the bank is then - presumably - required to sever existing banking relations with the customer.⁷²

⁶⁸ *Id.* at Art. 5 para. 2, Note 37, Forms B1 & B2.

⁶⁹ Form B1, CDB 1987 (setting forth complete text of declaration of notaries and attorneys). "Asset management" in this context has been described as the preservation and accumulation of assets through technical and economic supervision. F. Thomann, *Die Stellung des Anwaltes unter der neuen Konvention und Ueberwachung seiner Funktion*, 39 WuR 198, 206 (1987). *Cf.* Decision of the Second Public Law Division of December 29, 1986, BGE 112 Ib 606, 608-9 (duty of professional confidentiality of lawyers extends only to activities specific to legal profession; duty not applicable to asset management or investment of client funds not bound up with normal legal mandate, such as estate administration).

⁷⁰ Form B2, CDB 1987 (setting forth complete text of declarations of trustees and asset managers). Banking services might be thus deemed to play an "overriding role" where a trustee or asset manager were dependent on banking services for the fulfillment of an asset management contract, for example, because the trustee lacks an independent infrastructure, correspondence contacts or a securities trading license. Zuberbühler, *supra* note 22, at 191.

⁷¹ Art. 9 para. 1, CDB 1987.

⁷² Such duty does not expressly exist under the Agreement. *But cf. id.* at Note 20 (requiring

Evidence that a Swiss professional has abused his or her special status in the opening of an account or arrangement of a fiduciary transaction may be reported to competent disciplinary authorities by signatory banks if such an act independently constitutes a breach of professional ethics.⁷³

The declarations required to be made by trustees and asset managers under the 1989 revisions to Form B were initially objected to by members of these professions as, in effect, rendering impermissible certain fiduciary relationships otherwise recognized under Swiss civil and tax laws.⁷⁴ Swiss attorneys and attorney organizations, for their part, objected, among other things, to the fact that the expanded declarations required of attorneys and notaries were much broader than the Form B representations required to be made by Swiss trustees and asset managers.⁷⁵ This anomaly has been justified with the argument that Swiss attorneys, unlike Swiss asset managers and trustees, are under a duty in most cases to deny testimony in civil and criminal investigations,⁷⁶ thus rendering attorney representation especially attractive to potential money launderers, not only as a means of avoiding otherwise applicable bank identification requirements, but also as a method of gaining an additional layer of legally protected anonymity in the case of subsequent civil or criminal proceedings.⁷⁷ Nonetheless, as recently as last year, the influential Swiss Bar

bank to refuse to *commence* banking relations with bank customer should doubt as to accuracy of customer's declaration of beneficial ownership not be dispelled through further inquiry).

⁷³ See *id.* at Art. 12 para. 9 & Forms B1, B2 (member of privileged profession must acknowledge possibility that evidence of breach of professional ethics will be reported to competent regulatory authority by signatory banks, the SBA or supervisory agency set up under the Agreement). But see *infra* notes 104-108 and accompanying text.

⁷⁴ V. Mueller, *Die Stellung des Treuhänders unter der Konvention und die Ueberwachung seiner Funktion*, 39 WuR 210, 215 (1987). See R.A. Schürmann, *Zum zehnjährigen Bestehen der Sorgfaltspflichtvereinbarung*, 61 STr 378, 379 (1987) (infringement on asset manager's constitutional freedom to engage in trade and commerce, and on constitutional right to privacy of asset manager's clients).

⁷⁵ See, e.g., A. Meili, *supra* note 63, at 22; *Zwist im Anwaltsverband*, NZZ, June 6, 1989, No. 128 at 35 (per Swiss Bar Association (Schweizer Anwaltsverband), Form B1 declarations unclear, unjustified and contrary to duty of attorney confidentiality). Swiss notaries did not register similar protests, perhaps because the latter are already subject to various disclosure duties under Swiss cantonal supervisory laws. See *supra* note 26.

⁷⁶ The duty of professional confidentiality of attorneys - described as "super secrecy" - is subject to fewer exceptions and, therefore, is less penetrable, than even banking secrecy; nearly all cantonal and federal criminal laws, and even certain cantonal civil laws, for example, restrict the right to refuse testimony in criminal proceedings to persons bound to professional confidentiality under Art. 321, StGB, and thus withhold such right from persons bound only by banking secrecy. D. BODMER, B. KLEINER & B. LUTZ, KOMMENTAR ZUM BUNDESGESETZ ÜBER DIE BANKEN UND SPARKASSEN Art. 47, N. 40 (3rd rev. ed. 1986) (hereinafter D. BODMER).

⁷⁷ *Seilziehen um die Sorgfaltspflichtvereinbarung*, NZZ, Dec. 14, 1988, No. 292 at 35; Zuberbühler, *supra* note 22, at 190. See *Sorgfaltspflichtvereinbarung: Auf die Barrikaden*, SHZ, Jan. 1, 1987, No. 3 at 2 (accusations as to quasi-sales by attorneys of their professional confidentiality duty because less subject to exceptions than banking secrecy.)

Association and several cantonal bar associations issued recommendations that their members use a narrower, alternative version of Form B proposed by the Swiss Bar Association.⁷⁸

However, in the light of the new legal duty of due care in financial transactions, the continued permissibility of the use of Form B is subject to substantial doubt. Long suspicious as to the existence of Form B abuse by "black sheep" within the attorney and trustee professions,⁷⁹ the Swiss Banking Commission has announced its view that Form B is not under certain circumstances consistent with the new legal duty of due care because Form B allows bank customers to shield their identity behind an attorney or trustee⁸⁰. Accordingly, the Swiss Banking Commission recently informed the SBA and various trustee and attorney organizations that if they fail to voluntarily abandon the Form B usage then the Banking Commission will formally urge banks to do so by means of a circular letter, and, if that fails, will issue a decree forbidding banks from accepting Form B.⁸¹

C. Enforcement of Agreement

A signatory bank's compliance with the provisions of the Agreement of Due Care is controlled in the first instance by the independent certified accountants appointed in accordance with the Bank Act,⁸² who are required to conduct Agreement compliance "spot checks" during the regular auditing of accounts and to report findings as to actual and suspected Agreement violations to both the Swiss Federal Banking Commission⁸³ and a special oversight board created under the Agreement (the "Oversight Board" or "Board")⁸⁴. Each signatory bank's internal auditing department is also responsible for verifying bank compliance with

⁷⁸ *Zwist im Anwaltsverband*, *supra* note 75. *But cf. id.* (objections to stance of Swiss Bar Association by certain cantonal bar associations; former's opposition to Form B1 alleged to merely serve interests of a handful of attorneys).

⁷⁹ *See Meili*, *supra* note 63, at 23 (claims of Swiss Banking Commission regarding attorney misuse of Form B).

⁸⁰ *Das Verbot anonymer Bankkonten*, NZZ, Sept. 6, 1990, No. 206 at 39. The new legal duty of due care does not currently apply to banks as such but, rather, applies to individuals professionally engaged in financial transactions. *See infra* note 156.

⁸¹ *Id.*

⁸² *See* Arts. 18-22, BankG (Swiss banks required to appoint independent accountants certified by the Swiss Federal Banking Commission to examine annual financial statements).

⁸³ The Banking Commission must, in turn, consider whether the particular Agreement violation also constitutes a violation of Art. 3 Sect. 2 subsect. c of the Bank Act. *See infra* notes 113-115 and accompanying text.

⁸⁴ Art. 10 para. 1 & Art. 12 para. 1, CDB 1987. The Oversight Board is composed of five independent experts who are appointed by the SBA for five-year terms. *Id.* at Art. 12 paras. 1 & 3.

the Agreement.⁸⁵

Upon receiving notice as to possible violation of the Agreement from a signatory bank's internal or independent auditors, a special investigator appointed by the SBA is required to investigate the alleged violation and recommend to the Board whether the commencement of a proceeding and imposition of an equitable sanction would be appropriate.⁸⁶ The SBA investigator is also authorized to investigate and recommend the commencement of proceedings based on information independently derived from other sources, such as newspaper reports or tips from bank customers.⁸⁷

The Oversight Board is authorized to impose a fine of up to 10 million Swiss francs with respect to violations of the Agreement by signatory banks.⁸⁸ In determining the amount of such sanctions, the Board is required to take due account of the degree of culpability of the delinquent bank, the bank's financial situation and the gravity of the Agreement violation.⁸⁹ A bank's failure to participate in an investigation under the Agreement may in and of itself subject the uncooperative bank to a fine.⁹⁰ Should a signatory bank refuse to pay the sanction imposed upon it by the Oversight Board within the prescribed period of time, an arbitration tribunal based in Basle may be charged with final adjudication as to the matter in dispute if the SBA files a complaint.⁹¹

The Oversight Board, the SBA investigators and the arbitration tribunal in Basle, as "authorized bank officers" within the banking secrecy provisions of the Swiss Bank Act, are each strictly bound to treat as confidential all facts made known to them during the course of Agreement enforcement inquiries or proceedings.⁹² Even when a bank is found in violation of the Agreement and required to pay a fine, the Board may not impart such a fact to either signatory banks or the public at large.⁹³ The

⁸⁵ Such duty is implied under Note 16, CDB 1987, requiring a bank to ensure that both its independent and internal auditors are in a position to verify bank compliance with required identification procedures. Stöckli, *supra* note 37, at 447.

⁸⁶ Art. 12 para. 2, CDB 1987. The SBA may appoint one or more such investigators. *Id.*

⁸⁷ See P. Nobel, *Die neuen Standesregeln zur Sorgfaltspflicht der Banken*, 39 WuR 149, 163 (1987).

⁸⁸ Art. 11 para. 1 & Art. 12 para. 4, CDB 1987. With respect to minor Agreement violations, the Board is authorized to issue a reprimand in the place of monetary sanctions.

⁸⁹ *Id.* at Art. 11 para. 1. Fines collected from delinquent banks are to be allocated to a useful public purpose and are, as a matter of Board practice, donated to the International Red Cross Committee. *Id.*; G. Friedli & L. Meyer, *supra* note 44, at 164.

⁹⁰ Art. 12 para. 7, CDB 1987 (maximum fine of 10 million Swiss francs!).

⁹¹ *Id.* at Art. 13 para. 1.

⁹² *Id.* at Art. 12 para. 8 & Art. 13 para. 9. Thus, signatory banks may not invoke banking secrecy vis-à-vis such parties. *Id.*

⁹³ M. AUBERT, J.P. KERNEN & H. SCHOENLE, *DAS SCHWEIZERISCHE BANKGEHEIMNIS* 176

Board is nonetheless required to inform the Swiss Banking Commission as to its decisions⁹⁴ and to periodically inform signatory banks as to the general nature of its findings to the extent permitted by the rules of banking and business secrecy⁹⁵. Accordingly, at regular three-year intervals the Board has, without naming the banks or other parties involved, published summaries of selected decisions under the Agreement.⁹⁶

The internal and external auditor compliance reviews contemplated under the Agreement as a primary means of patrolling compliance with the duty of identification demonstrates several inadequacies. First, an Agreement compliance review is merely required to be made as a "spot check," and is made only in connection with a bank's annual auditing review, with the broad range of other auditing tasks confronting bank auditors under the Bank Act substantially reducing the amount of time available for and, hence, the effectiveness of such Agreement spot checks.⁹⁷ Further, certain aspects of the duty of identification laid out in the Agreement are triggered by subjective, ill-defined elements, such as the duty to obtain a Form A declaration or to break off banking relations, which hinges upon the existence of "unusual circumstances" giving rise to "serious doubt" undispelled by "further clarification".⁹⁸ Application of such concepts by bank auditors requires both a thorough knowledge of individual case circumstances, which may not necessarily be obtainable from relevant customer files,⁹⁹ together with a willingness to confront bank management with perceived wrongdoings not capable of objective assessment¹⁰⁰.

(1978). See N. SCHMID, *supra* note 2, at 248 (according to Swiss Federal Council, no publication by Board of names of delinquent banks necessary; Board's notice to Swiss Banking Commission sufficient to protect public interest).

⁹⁴ Art. 12 para. 9, CDB 1987.

⁹⁵ Note 57, CDB 1987. The business secrecy provisions are set forth in Art. 167, StGB. See P. HONEGGER, AMERIKANISCHE OFFENLEGUNGSPFLICHTEN IM KONFLIKT MIT SCHWEIZERISCHEN GEHEIMHALTUNGSPFLICHTEN 151 f. (1986).

⁹⁶ See generally Klausner, *supra* note 38; Meyer, *supra* note 38; Friedli & Meyer, *supra* note 44. To date, 18 of the total 62 proceedings opened by the Board during 1977 and the end of 1987 have been published. Friedli & Meyer, *id.* at 164. Cf. *id.* (of the 62 proceedings opened, 37 discontinued and 24 resulted in imposition of fines).

⁹⁷ Zuberbühler, *supra* note 21, at 176. Cf. Stöckli, *supra* note 33, at 446 (time expenditure for spot checks should be in appropriate proportion to time allotted for other auditing tasks). Further, the duty of identification represents only one of the three major Agreement duties required to be reviewed as to bank compliance. Cf. *supra* note 41.

⁹⁸ See *supra* notes 56 & 59 and accompanying text.

⁹⁹ Cf. Stöckli, *supra* note 33, at 447 (formal Agreement violations easier to detect within scope of regular bank auditing activities than substantive violations).

¹⁰⁰ See Zuberbühler, *supra* note 21, at 176 (bank auditors likely to shy away from perceived meddling or from playing a pioneer role with respect to complex questions of a legal or moral nature).

Not surprisingly, disciplinary proceedings against signatory banks have generally, in the first instance, been opened on the basis of reports surfacing in local newspapers rather than in response to information provided by bank auditors.¹⁰¹ Moreover, the few violations of the Agreement's duty of identification actually uncovered by bank auditors to date have been mainly limited to technical violations of the duty in areas governed by clear and explicit rules.¹⁰²

The Agreement's investigation and enforcement mechanisms themselves have no direct application with respect to the various Swiss professionals, who are, in certain cases, alone responsible for vouching as to the required identification of contracting partners. While the Agreement provides that the Board may inform appropriate disciplinary authorities as to any Agreement breaches determined to have been committed by members of privileged professions, when independently constituting a breach of professional ethics,¹⁰³ the actual likelihood that evidence as to Form B misuses may be discovered via normal Agreement investigate channels is minimal. As an initial matter, Swiss professional may avail themselves of certain precautionary tactics, such as dispersing client assets among a large number of bank accounts, to prevent arousing suspicion that their Form B declarations may be false.¹⁰⁴ Swiss attorneys, who are not pledged to abide by Agreement provisions,¹⁰⁵ have allegedly refused in the past, on grounds of attorney confidentiality, to identify clients in whose banks accounts funds of dubious or criminal origin were

¹⁰¹ See *infra* note 120 and accompanying text. Cf. *Verpflichtung zur Information nötig*, Tages-Anzeiger, Nov. 12, 1988, No.265 at 33 (investigation into laundering of over one million Swiss francs through Swiss banks commenced by SBA investigator solely in response to newspaper reports; neither Banking Commission nor Board informed of incident by responsible bank auditors). Cf., e.g., Klauser, *supra* note 38, at 290 (Proceeding II) (Board alerted to "unusual circumstances" giving rise to "serious doubt" through criminal prosecution against bank customers); Meyer, *supra* note 38, at 164 (Proceeding II) (Board alerted to "unusual circumstances" through bank's filing of fraud charges against individual involved).

¹⁰² Stöckli, *supra* note 33, at 447 (Agreement violations hitherto uncovered by bank auditors predominantly technical in nature).

¹⁰³ Art. 12 para. 9, CDB 1987. Cf. M. Frey, *Verfahrensordnung und Sanktionen unter der "VSB 1987"*, 63 STr 115, 121 (1989) (incorrect Form B representations may violate prohibition of Swiss Penal Code on use of forged or falsified documents).

¹⁰⁴ Cf., e.g., Zuberbühler, *supra* note 21, at 192 (doubts as to the accuracy of Form B1 declarations are justified where an attorney represents an unusually high number of clients, each possessing inordinately large amounts of assets); accord W. MAURER, *supra* note 3, at 35 (customer's ability to open accounts by numerous banks poses major hindrance to bank efforts to detect funds constituting "dirty money").

¹⁰⁵ Neither independent Swiss trustees and asset managers, nor Swiss attorney organizations, such as the Swiss Bar Association, have voluntarily undertaken to adhere to the Agreement. Zulauf, *supra* note 6, at 84.

suspected to have been deposited¹⁰⁶. However, not even those professionals pledged to abide by Agreement provisions by virtue of membership in a pledging organization, such as many assets managers and trustees,¹⁰⁷ are required to submit themselves to either auditor "spot checks" or compliance reviews by the SBA, the Board or professional disciplinary authorities aimed at uncovering instances of Form B misuses¹⁰⁸.

The consequences suffered by banks adjudged to have violated the Agreement are, under current practice of the Oversight Board, arguably insufficient from both an economic and symbolic standpoint to deter Agreement violations in the future. Although the Board is theoretically authorized to impose equitable sanctions of up to 10 million Swiss francs on signatory banks adjudged to have violated the Agreement, the monetary sanctions imposed under Board decisions published to date have - excepting one fine of 500,00 Swiss francs imposed during early enforcement efforts - amounted to an average of only 45,000 Swiss francs even though extensive bank profits were reaped in some cases through the transactions which violated the Agreement.¹⁰⁹ The fines imposed by the Board are not directed at individual bank officials, but solely at the banks as such.¹¹⁰ At the same time, the veil of anonymity surrounding Board proceedings¹¹¹ protects signatory banks for the most part from adverse publicity stemming from an Agreement violation.

¹⁰⁶ *Höhere Effizienz im Kampf gegen das organisierte Verbrechen*, *supra* note 50. See also P. BERNASCONI, *supra* note 16, at 36.

¹⁰⁷ Certain Swiss Trustee and Asset Management Professional Associations Have Voluntarily Pledged to Abide by Agreement Provisions. See Zulauf, *supra* note 6, at 84 n. 5. See also 1986 RULES OF THE PROFESSIONAL COMMISSION, SWISS UNION OF FIDUCIARY AND AUDITING FIRMS (1986 Reglement über die Standeskommission, Schweizerische Treuhands- und Revisionskammer), Art. 28 paras. 3 & 6 (authorizing issuance of warning or reprimand, imposition of fines of up to one million Swiss francs and/or exclusion from membership for Agreement violators).

¹⁰⁸ Not surprisingly, according to officers of the Swiss Union of Fiduciary and Auditing Firms, the latter association has yet to receive notice of member violations of the Agreement from either the Board, SBA investigators or any other party. Cf. Thomann, *supra* note 69, at 219 (reporting of Agreement violations to Swiss Union of Fiduciary and Auditing Firms possible since 1982).

¹⁰⁹ See generally Klauser, *supra* note 38; Meyer, *supra* note 38; Friedli & Meyer, *supra* note 44. Cf. Meyer, *supra* note 38 at 166-67 (Proceeding III) (fine of 60,000 Swiss francs imposed on bank found guilty of repeated violations of Agreement involving sums totalling 10 - 20 million Swiss francs). The mildness of the imposed fines may be attributed to the fact that Board precedent has required the amount of fines to be imposed on delinquent banks to be calculated *without* reference to the existence and/or amount of actual profits realized by signatory banks in connection with Agreement violations. See Friedli & Meyer, *supra* note 44 at 179 (Proceeding VII).

¹¹⁰ C. GRABER, *supra* note 8, at 161.

¹¹¹ See, e.g., *supra* notes 92-96 and accompanying text.

IV. MONEY LAUNDERING AND DUTY OF DUE CARE UNDER CURRENT SWISS LAW

A. Prior to New Legislation

Even prior to the passage of new legislation specifically criminalizing money laundering within Switzerland, both the lending of assistance in laundering of illegally-obtained funds and the failure to exercise due care in identifying bank customers were - at least in theory - punishable in certain rare instances under provisions of already-existing Swiss legislation.

1. *Swiss Bank Act.*

First, the Swiss Bank Act provision requires, as a prerequisite for obtaining and holding a banking license, that the character and qualifications of both bank management and its board of directors be sufficient to ensure bank conduct beyond reproach.¹¹² This provision has been held to create a duty of due care for Swiss banks under the Bank Act - independent of the existence of a similar due care duty under the Agreement - to clarify to the Swiss Banking Commission the economic background of proposed banking transactions which are complicated, unusual or significant in scope, or which appear immoral or illegal.¹¹³ Sanctions available to the Banking Commission for violations of the Bank Act due care duty include the issuance of an order declaring a bank in violation of such duty and/or requiring the transfer or replacement of an executive employee¹¹⁴ or, in the case of a reckless violation, revocation of the delinquent bank's banking license¹¹⁵.

Both the Swiss Federal Tribunal and the Swiss Banking Commis-

¹¹² Art. 3 Sect. II subsect. c, BankG ("...Gewähr für eine einwandfrei Geschäftstätigkeit").

¹¹³ See, e.g., Judgment of the Second Public Law Division of June 27, 1985, BGE 111 Ib 126, 127 (bank required to produce documentation clarifying economic background of certain transactions; transactions must be terminated if they appear to be illegal or immoral); Judgment of the Second Public Law Division of June 25, 1982, BGE 108 Ib 186, 191-193 (whether transactions "significant" largely matter of discretion for Swiss Banking Commission); Judgment of the Second Public Law Division of July 11, 1980, BGE 106 Ib 145, 148 (main aim of transactions as to which bank was required to provide clarification may have been to increase layers of anonymity shielding actual beneficial owner).

¹¹⁴ Zuberbühler, *supra* note 21, at 178.

¹¹⁵ Art. 23 *quinquies* Sect. I, BankG. A banking license, however, may be revoked by the Banking Commission only as an *ultimo ratio*. Judgment of the Second Public Law Division of June 25, 1982, *supra* note 114, at 191. See N. SCHMID, *supra* note 38, at 63; D. BODMER, *supra* note 76, at Art. 23 *quinquies* N. 8. The Commission has yet to impose such a penalty in response to a bank's violation of its due care duty under the BankG. Letter of the Acting Director of the Federal Banking Commission dated Nov. 14, 1989. See K. Hauri, *Möglichkeiten und Grenzen der Bankenaufsicht in der Schweiz*, 83 SJZ 321, 328 (1987) (banking permits revoked, on various other grounds, total of 17 times).

sion have stressed that compliance with the Agreement's duty of due care in identification should merely be viewed as a necessary minimum for compliance with Bank Act's broader due care duty.¹¹⁶ Realistically, however, the Banking Commissions' staff - totalling around thirty persons and, as a rule, fully occupied with routine administrative matters - is ill-equipped for the assumption of an active investigatory role under the Bank Act.¹¹⁷ An active investigatory role is, indeed, not foreseen under the Bank Act, which basically makes the Banking Commission's investigation and enforcement activities dependent upon information as to possible Bank Act violations relayed to the Commission by relevant bank's independent certified accountants.¹¹⁸ Thus, until now the Banking Commission has not had at its disposal adequate legal or practical means for detecting and punishing a violation of the Bank Act's duty of due care which is not first brought to its attention by bank accountants, SBA investigators or the Oversight Board.¹¹⁹ As a factual matter, however, only a minute percentage of the suspected Agreement violations thus far investigated by the Board and/or SBA investigators has been based on information stemming from independent or internal bank auditors.¹²⁰

A further limitation on the Bank Act duty of due care is that its scope is limited to (i) actions taken by members of executive management, within (ii) banks and finance companies of a banking nature subject to the permit requirements of the Bank Act. The former limitation in particular undercuts the meaningfulness of the Bank Act due care duty, because most Agreement violations are committed by the low-ranking bank employees in customer service or asset management who - unlike their respective superiors - come into contact with bank customers

¹¹⁶ See, e.g., Judgment of the Second Public Law Division of June 27, 1985, *supra* note 114, at 128; Judgment of the Second Public Law Division of June 3, 1983, BGE 109 Ib 146, 153; Annual Report of the Swiss Banking Commission 1988 (Jahresbericht der Eidgenössischen Bankenkommission 1988), at 24. See also Zuberbühler, *supra* note 21, at 180.

¹¹⁷ *Drückten Banken Beide Augen Zu?*, *supra* note 40. See Hauri, *supra* note 115, at 324.

¹¹⁸ Zuberbühler, *supra* note 21, at 176. An exception is set forth in Article 21 of the Regulations of the Swiss Federal Council Concerning the Bank Act (Verordnung des Bundesrats zum Bundesgesetz über die Banken und Sparkassen, vom 17. Mai. 1972) (SR 952.02) (BankV), which requires banks to report directly to the Banking Commission with respect to customer lendings in excess of certain percentages of bank equity. See Zuberbühler, *id.* at 177 (development of Banking Commission precedent under BankG duty of due care is due exclusively to the direct reporting clump risks by banks).

¹¹⁹ The Banking Commission announced its intent to abolish the use of Form B, for example, only after the existence of such abuses had been alleged in newspaper reports and by various legal commentators for numerous years. Cf., e.g., *supra* notes 77 & 104 and accompanying text.

¹²⁰ Zuberbühler, *supra* note 21, at 176; Zulauf, *supra* note 6, at 84; Nobel, *supra* note 88, at 163. See *Höhere Effizienz im Kampf gegen das organisierte Verbrechen*, *supra* note 50 (Banking Commission first informed of Bank Act violations after their concealment from public at large no longer possible). See also *supra* note 101.

on a daily basis.¹²¹ In the overwhelming majority of instances in the past where a signatory bank was held to have violated the Agreement, the Swiss Banking Commission did not commence an independent, more far-reaching investigation into Bank Act due care issues largely because of the failure of involved bank personnel to occupy executive management positions.¹²²

Despite its insistence that a Swiss bank's acceptance of funds recognizably stemming from criminal activities could constitute a violation of the Bank Act's duty of due care,¹²³ the Swiss Banking Commission has yet to hold a bank in violation of such duty based on a failure to exercise due care to prevent the laundering of suspect funds¹²⁴. An opportunity to do so in the recent Lebanon Connection was denied the Banking Commission - at least as an initial matter - because responsible bank employees in that case were not members of executive management.¹²⁵

2. *Swiss Narcotics Act of 1951.*

One provision of Swiss criminal law which has hitherto had only limited relevance with regard to money laundering activities in Switzerland is the prohibition under the Swiss Narcotics Act of 1951 of the financing of, and the procurement of financing for, illegal drug trade.¹²⁶ Above and beyond its facial limitation to assets stemming from illegal drug trade, this prohibition has been limited by judicial precedence to instances where it could be proven that laundered drug proceeds had been *reinvested* in the illegal drug operation and, further, that the parties effecting a particular money laundering transaction knew or must have known that the proceeds were to be reinvested in this manner.¹²⁷ Be-

¹²¹ Zuberbühler, *supra* note 21, at 173. With respect to actions of lower-ranking bank personnel, the Swiss Banking Commission's review under Art. 3 Sect. 2 subsect. c of the Bank Act is limited to the question of whether top level bank management has exercised due care through its selection, instruction and control of such personnel.

¹²² Zuberbühler, *supra* note at 21, at 185.

¹²³ Zulauf, *supra* note 6, at 85.

¹²⁴ The Banking Commission's pronouncements as to the content of the Bank Act duty of due care have, in fact, often been criticized for their lack of specificity. See, e.g., D. BODMER, *supra* note 76, at Art. 3 - 3 *ter*, N. 36; Zuberbühler, *supra* note 21, at 175 (citing critics).

¹²⁵ See *Keine bankengesetzlichen Massnahmen in der Geldwäscherei-Affäre*, NZZ, Apr. 12, 1989, No. 84 at 33 (no violation of BankG; business relations between Lebanon Connection money launderers and bank's currency trading and precious metals departments maintained at hierarchically-low level). The Banking Commission has recently demanded that a bank's executive management be required to make a decision on the basis of clear guidelines as to the continuance of business relations should "questionable circumstances" arise. *Dubiose Gelder im 'Hort der Gnomen'?*, NZZ, Dec. 9/10, 1989, No. 287 at 33.

¹²⁶ Bundesgesetz vom 3. Oktober 1951 über die Betäubungsmittel (SR 812.121) (BetmG), Art. 19 Part 1 Sect. VII.

¹²⁷ C. GRABER, *supra* note 8, at 91 (citing decisions). Contingent criminal intent, or *dolus even-*

cause of the difficulties associated with obtaining such proof, the Narcotics Act's financing prohibition has not, until now, assumed a significant role in hindering the laundering of illegal drug proceeds in Switzerland.

In connection with recent criminal prosecution arising out of the Lebanon Connection¹²⁸, however, the scope of the Narcotic Act's application to money laundering operations has been significantly expanded to include, under certain circumstances, the laundering of money directly stemming from illegal drug trade (so-called "first-degree" money laundering), independent of proof that the laundered funds were then reinvested in the purchase of illegal drugs¹²⁹. Specifically, the Federal Tribunal ruled that the prohibition of the Narcotics Act may be applied to first-degree money launderers who know or assume the risk that their actions will directly or indirectly contribute to trafficking in illegal drugs and who have a close enough connection to the illegal drug operations to be viewed as accomplices or accessories to the drug trade.¹³⁰ On the other hand, it need not be proven that such persons knew details concerning either the illegal drug trade operations or the specific persons involved therewith.¹³¹ The Federal Tribunal left undecided whether or not the Narcotic Act's financing prohibition would be violated by the reinvestment in normal business transactions of already-laundered funds stemming from illegal drug trade (i.e., "second degree" money laundering).¹³² Subsequent to the Federal Tribunal's decision, two prominent figures in the Lebanon Connection drama - Lebanese money traders - were each sentenced to four-and-a-half years in prison for violating the Act's financing prohibition. The Jury Court of Bellinzona held that the brothers had engaged in the laundering of proceeds which they knew stemmed from illegal drug trade, and thereby could have indirectly con-

tualis, which equates to something more than reckless knowledge, has been held to be a necessary element of the Narcotics Act's prohibition on financing drug trade. Judgment of the Court of Appeals of Jan. 11, 1985, BGE 111 IV 28, 30. See P. NOLL & S. TRECHSEL, SCHWEIZERISCHES STRAFRECHT ALLGEMEINER TEIL I: ALLGEMEINE VORAUSSETZUNGEN DER STRAFBARKEIT 87 (1986) (contingent criminal intent exists where misdoer knew or assumed the concrete facts constituting the objective crime and, further, desired or at least accepted the fact that the crime would be completed).

¹²⁸ See *Brüder Magharian Anklage erhoben*, Tages-Anzeiger, Dec. 6 1989, No. 284 at 9 (charges of violating Narcotics Act financing prohibition brought against persons involved in Lebanon Connection by Bellinzona public prosecutor).

¹²⁹ Judgment of the Court of Cassations of October 27, 1989, Praxis des Bundesgerichtes 79-39, 153 ff., at 155. The Federal Tribunal's ruling was based in part on the Swiss Federal Council's pronouncements in connections with Switzerland's 1968 ratification of the Uno Convention Against Drug Abuse.

¹³⁰ *Id.* at 156-58.

¹³¹ *Id.* at 158.

¹³² *Id.* at 157.

tributed to the introduction into trade of additional cocaine.¹³³

3. *Receiving Stolen Goods.*

Another provision of Swiss criminal law tangentially applicable to the laundering of illegally-obtained assets is the Swiss Penal Code's prohibition of the receiving of stolen goods, i.e., the acquisition, acceptance as a gift or security deposit, or selling of an object acquired through a criminal act by a person who was or must have been aware of the criminal origin of the object.¹³⁴ It is generally accepted that a necessary element of this crime is that the "received goods" be acquired through a crime against property (*Vermögensdelikt*),¹³⁵ such as theft, robbery, fraud and blackmail¹³⁶. This limitation, however, excludes those crimes lacking a direct victim, such as illegal drug or weapons trade, prostitution and gambling, which constitute by far the most widespread "branches" of professional money laundering.¹³⁷ It is also generally accepted that the crime of receiving stolen goods does not encompass the receiving of surrogate stolen goods, i.e., goods stemming only indirectly from a property crime.¹³⁸ Thus, it is open to question, where the booty from a property crime is in the form of cash, as to whether the receiving of such cash is prohibited in instances where the funds' original form has already been altered, such as through a money changing transaction.¹³⁹

¹³³ *Je viereinhalb Jahre Zuchthaus für die Geldhändler Magharians*, Tages-Anzeiger, Sept. 14, 1990, No. 213 at 1 (decision as-yet-unpublished; reasons for judgment delivered orally).

¹³⁴ Art. 144 Sect. I, StGB (Hehlerei). Contingent criminal intent (*dolus eventualis*) is also a prerequisite for this crime. H. Walder, *Die Hehlerei gemäss StGB Art. 144 - Kasuistik und Lehren*, 103 ZStrR 233, 266 (1986).

¹³⁵ See, e.g., Judgment of the Court of Appeals of October 3, 1975, BGE 101 IV 402, 405; STRATENWERTH BTI, *supra* note 26, at Sect. 15, N. 6; Messerli, *supra* note 1, at 427; P. BERNASCONI, *supra* note 16, at 38; Walder, *supra* note 130, at 249; C. GRABER, *supra* note 8, at 74.

¹³⁶ The exact crimes qualifying as "property crimes" appears to be a matter of some dispute. Cf., e.g., Judgment of the Criminal Assizes Court of Lugano of November 1, 1980 (Corte delle Assise Criminali in Lugano), cited in P. BERNASCONI, *supra* note 16 at 32 n. 6 (kidnapping constitutes property crime within meaning of Art. 144, StGB); accord P. BRAILLARD, *DER FINANZPLATZ SCHWEIZ: REGIERUNGSPOLITIK UND INTERNATIONAL KONKURRENZFÄHIGKEIT* 98 (1987) (kidnapping ransoms paid to terrorists not proceeds of property crime). See *Vorgeschlagener Geldwäscher-Artikel ist zu schwach*, Tages-Anzeiger, Aug. 26, 1989, No. 197 at 9 (misappropriation constitutes property crime; murder and bribery do not).

¹³⁷ C. GRABER, *supra* note 8, at 77. Cf. G. Arzt, *Das schweizerische Geldwäschereiverbot im Lichte amerikanischer Erfahrung*, 106 ZStrR 160, 161 (1989) (majority of laundered money stems from illegal drug trade).

¹³⁸ See, e.g., C. GRABER, *supra* note 8, at 79; Walder, *supra* note 135, at 246-47.

¹³⁹ See C. GRABER, *supra* note 8, at 80; P. BERNASCONI, *supra* note 16, at 38 (terrorist who physically lays hold to robbery proceeds punishable; accomplice who receives bank deposit certificate purchased with robbery proceeds not punishable).

4. *Acting As Accessory After the Fact.*

Further, Article 305 of the Swiss Penal Code punishes persons acting as an "accessory after the fact," i.e., persons who act to either shield someone from criminal prosecution, criminal enforcement measures or mandatory institutionalization, or to prevent, through the "hushing-up" of a crime, the commencement of a criminal investigation.¹⁴⁰ The applicability of this crime to money laundering, however, is hindered by the fact that actions may not be punishable if merely aimed at preventing the confiscation or seizure of crime proceeds or goods - as are most laundering transactions - rather than protecting a person from criminal prosecution.¹⁴¹ Moreover, the scope of the crime of acting as an accessory after the fact has been judicially limited to actions taken to frustrate the enforcement and prosecution efforts of Swiss legal officials, but not those of non-Swiss legal officers.¹⁴² The overwhelming majority of laundering transactions effected in Switzerland, however, involve dirty money stemming from crimes committed and subject to prosecution outside Switzerland.¹⁴³ The crime of acting as an accessory after the fact does not, therefore, have much practical significance with respect to the majority of money laundering transactions effected in Switzerland.

5. *Confiscation of Crime Proceeds.*

An effective struggle against international crime depends, in large part, on the ability of legal officials to confiscate the proceeds which stem from a crime.¹⁴⁴ Swiss law, however, currently requires concrete proof linking the particular proceeds to be confiscated to the individual crimi-

¹⁴⁰ Art. 305 Sect. I, StGB (Begünstigung). See Judgment of the Court of Appeals of May 13, 1977, BGE 103 IV 98, 100; Judgment of the Court of Appeals of December 21, 1973, BGE 99 IV 266, 277; G. STRATENWERTH, SCHWEIZERISCHES STRAFRECHT, BESONDERER TEIL II: STRAFTATEN GEGEN GEMEININTERESSEN 320 (1984) (hereinafter STRATENWERTH BTII).

¹⁴¹ Cf. C. GRABER, *supra* note 8, at 83 (not punishable unless also intended to shield the perpetrator from criminal prosecution); accord Messerli, *supra* note 1, at 427 (Art. 305 StGB also prohibits actions aimed primarily at rendering difficult the seizure or confiscation of crime proceeds and intended only indirectly, if at all, to shield criminal actor from prosecution).

¹⁴² Judgment of the Court of Appeals of October 13, 1978, BGE 104 IV 238, 240-243 (Swiss crime of accessory after fact not applicable to concealment in Switzerland of murderer sought in West Germany; crime only intended to protect efforts of Swiss justice administration). See R. HAUSER & J. REHBERG, STRAFRECHT IV: DELIKTE GEGEN DIE ALLGEMEINHEIT 310 (1989). An exception is expressly foreseen in the case of certain especially serious underlying crimes committed outside Switzerland, such as mass murder or war crimes. Art. 305 Sect. I *bis*, StGB.

¹⁴³ *Geldwäscherei: Nach Art der Indianer*, *supra* note 15 (quoting P. Bernasconi). See *Geldwäscherei als Rechtspflegedelikt?*, NZZ, Nov. 22, 1989, No. 272 at 23 (issue of money laundering involves, in first instance, proceeds from crimes committed outside Switzerland).

¹⁴⁴ See C. GRABER, *supra* note 8, at 94.

nal act or acts.¹⁴⁵ In the context of illegal drug trade, this in effect requires proof linking each sum of money to be confiscated to a concrete drug transaction.¹⁴⁶ Further, certain features unique to American criminal law, in particular the permissibility of plea bargaining, may tend to create proof-related obstacles to the ability of Swiss courts to recognize, on the basis of the American judgment, the relationship between the particular sum of money to be confiscated and the particular drug transaction.¹⁴⁷

B. Under New Legislation

1. Background.

Draft legislative proposals to render money laundering transactions criminally punishable in Switzerland, through supplements to the Swiss Penal Code's prohibition against acting as an accessory after the fact, were first presented to the Swiss Federal Council in spring 1987 by appointed expert Paulo Bernasconi, former chief prosecuting attorney in the Canton of Tessin, within the scope of ongoing efforts to revise the Swiss Criminal Act concerning Property (*Vermögensstrafrecht*).¹⁴⁸ Subsequent to the November 1988 allegations about the key role several major Swiss banks held in the Lebanon Connection money laundering scandal and the indirectly-induced resignation of a Swiss Federal Council member, the Federal Council determined to subject the money laundering legislation to an accelerated enactment process, independent of the more slow-moving revisions to the Criminal Act Concerning Property.¹⁴⁹ Subsequently, preliminary money laundering proposals were adopted by

¹⁴⁵ *Id.* at 95.

¹⁴⁶ *Id.* One Zürich district court attorney summarized the current Swiss proof rules as requiring, for example, that: "...on November 27, 1989, . . .the American drug dealer M. accepted a certain amount of cocaine from his Columbian supplier in Tampa, Florida, which he gave to certain fellow Americans on the same day, who in turn sold the cocaine in St. Louis, Atlanta and New Orleans, and turned the proceeds over to M., who then ran immediately to the bank in Tampa and had exactly the same amount of proceeds transferred to his bank account in Switzerland, where receipt of such amount was credited to the account." *Id.* at 96, n. 208 (citing P. Gasser, *Weltwoche*, Aug. 24, 1989).

¹⁴⁷ C. GRABER, *supra* note 8, at 95-6 (doubt whether judgment entered as result of plea bargaining would satisfy current proof of guilt requirements of Swiss law).

¹⁴⁸ P. BERNASCONI, *DIE GELDWÄSCHEREI IM SCHWEIZERISCHEN STRAFRECHT, BERICHT MIT VORSCHLÄGEN ZU EINEM NEUEN ARTIKEL 305 BIS STGB (1986)*, reprinted in Messerli, *supra* note 1, at 420 (hereinafter *BERICHT*).

¹⁴⁹ *Bundesrat schlägt Doppellösung gegen die Geldwäscherei vor*, *Tages-Anzeiger*, May 11, 1989, No. 97 at 1. See *supra* notes 11-13 and accompanying text. To further this goal, the Federal Council also decided to appoint an expert commission to study and improve the Bernasconi proposals prior to their consideration by the Federal Council. *Id.*

the Swiss Federal Council in June 1989,¹⁵⁰ ratified without change five months later by a majority of the Swiss House of Representatives (*Nationalrat*),¹⁵¹ and ratified unanimously without change by the Swiss Senate (*Ständerat*) in March 1990¹⁵². The new legislation went in effect on August 1, 1990.¹⁵³

2. Text of New Legislation.

The new legislation, part of the Swiss Penal Code, makes it a crime, subject to up to three years in prison (*Gefängnis*)¹⁵⁴ and/or a fine,¹⁵⁵ for any person¹⁵⁶ to execute a transaction which could frustrate the determination of origin, discovery or forfeiture of assets where such person "knew or must have assumed" that the assets in question stemmed from a crime, including a crime committed outside Switzerland¹⁵⁷. Whether or not an act committed outside Switzerland constitutes a "crime" is to be judged under Swiss law.¹⁵⁸ The phrasing "knew or must have assumed" requires *dolus eventualis*, or contingent criminal intent.¹⁵⁹ In cases where the person convicted of the crime acted out of profit-seeking

¹⁵⁰ See *supra* note 31.

¹⁵¹ *Nationalrat ratifiziert Geldwäschereiartikel*, NZZ, Nov. 29, 1989, No. 278 at 21.

¹⁵² *Ständerat verabschiedet Strafrechtsnormen gegen die Geldwäscherei*, NZZ, Mar. 21, 1990, foreign ed. no. 66 at 25.

¹⁵³ AS 1990 I 1077ff, 1078.

¹⁵⁴ Under the Penal Code, unless specified otherwise, one may be confined in prison from one day to three months, *cf.* Art. 39 Para. 1 (Haft), from three days to three years, *cf.* Art. 36, StGB (*Gefängnis*), or from one to twenty years, *cf.* Art. 35, StGB (*Zuchthaus*). See G. STRATENWERTH, SCHWEIZERISCHES STRAFRECHT, ALLGEMEINER TEIL II: STRAFEN UND MASSNAHMEN, Sect. 3, N. 4-5 (1989) (hereinafter STRATENWERTH ATII) (informally and formally as well, punishment of *Zuchthaus* leaves stronger taint than any other criminal sanction).

¹⁵⁵ Where the text of the Penal Code sets forth a fine and a type of imprisonment penalty in the alternative, as the original text does here, the Swiss judge is allowed to impose both a fine and imprisonment penalty. Art. 50 Sect. II, StGB. See STRATENWERTH ATII, *supra* note 154, at 175.

¹⁵⁶ It is a basic principle of Swiss criminal law that only natural persons (and not legal entities) can commit a crime. P. NOLL, SCHWEIZERISCHES STRAFRECHT ALLGEMEINER TEIL I 124 (1981). Legal entities may be subjected to criminal law (in the sense of a fine) only if the application of the penalties to legal entities is expressly provided for. *Id.*

¹⁵⁷ Art. 305 *bis* Sect. I, StGB. The provision is triggered only where the laundered assets stem from a crime which may be punished with a term of imprisonment (*Verbrechen*), as opposed to a mere fine. STRATENWERTH ATII, *supra* note 154, at Sect. 4, N. 8.

¹⁵⁸ BOTSCHAFT, *supra* note 31, at 1082, 1087. See C. GRABER, *supra* note 8, at 164 n. 286.

¹⁵⁹ Art. 18 Sect. I, StGB. See *supra* note 127. The majority of the expert commissioners appointed to propose draft money laundering legislation had proposed the punishment of persons effecting money laundering transactions with reckless, rather than actual, knowledge as to the criminal origin of the laundered funds. C. GRABER *supra* note 8, at 101. This proposal was heatedly criticized by the SBA and SBA members. See, e.g., *Geldwäscherei: Nichts gelernt*, SHZ, Oct. 8, 1987, No. 41 at 1 (letter of SBA submitted to Swiss Federal Council member in protest of reckless money laundering provision); *Die Geldwäscherei wirksam bekämpfen - aber wie?*, SHZ, June 1, 1989, No. 22 at 7.

motives - as is presumably the case with respect to most money launderers - there is no ceiling on the amount of fine a Swiss judge may impose; in most other cases, the maximum imposable fine is 40,000 Swiss francs.¹⁶⁰ Increased penalties - up to five years in prison together with fine of up to 1 million Swiss francs - are foreseen in instances where the person convicted of the crime (i) acted as a member of a criminal organization, (ii) acted as a member of a band formed to systematically engage in money laundering activities, or (iii) achieved a large turnover or considerable profits through the laundering of money on a professional basis.¹⁶¹

In a separate section applicable only to persons professionally engaged in the acceptance, safeguarding, investment or transfer of third party assets, the new legislation authorizes the imposition of up to one year in prison and/or a fine¹⁶² for failure to exercise the due care necessary, under the circumstances, to establish beneficial ownership with respect to such assets¹⁶³. This legal duty of due care applies regardless of whether the handled assets stem from a crime. In contrast to the Agreement of Due Care, the due care duty does not apply to banks as such but, rather, extends to all individual members of Switzerland's financial community, e.g., business attorneys, finance managers, investment advisers, trustees and employees at banks, finance companies, *bureaux de change* and other popular non-bank vehicles for routing suspect money into established Swiss financial channels.¹⁶⁴

V. EFFECTIVENESS OF NEW LEGISLATION

Although the new money laundering legislation was enacted with unprecedented swiftness, Swiss legislators at the same time recognized that such legislation did not represent the most effective means possible for hindering money laundering in Switzerland but, rather, represented a politically-feasible and immediate solution.¹⁶⁵

¹⁶⁰ Art. 48 clause Sect. I - II, StGB (where text of legislation does not expressly provide otherwise, maximum fine of 40,000 Swiss francs; unlimited fine where perpetrator acted out of profit-seeking motives).

¹⁶¹ Art. 305 *bis* Sect. II, StGB. Theoretically, where a person convicted of money laundering acts out of profit-seeking motives but does not fulfill any of the conditions triggering increased penalties, the judge is actually free to impose a higher fine than the maximum fine of one million Swiss francs foreseen for aggravated instances of money laundering. *Cf. supra* note 160 and accompanying text.

¹⁶² As is the case under new Article 305 *bis* Sect. I, StGB, the maximum imposable fine is 40,000 Swiss francs unless the perpetrator acted out of profit-seeking motives.

¹⁶³ Art. 305 *ter*, StGB.

¹⁶⁴ See BOTSCHAFT, *supra* note 31, at 1088.

¹⁶⁵ See, e.g., *Ständeratskommission für Geldwäschereiartikel*, NZZ, Feb. 28, 1990, foreign ed. no. 48 at 29 (Senate Commission advised Senate to adopt legislation; "preferable to have the second best

Money laundering as such is prohibited under the new Swiss legislation only to the extent that the person or persons involved acted with the knowledge or under the assumption that the laundered assets stemmed from a crime.¹⁶⁶ This criminal intent limitation was imposed in deference to the fact that the Swiss Penal Code does not, as a rule, punish acts of mere negligence or recklessness.¹⁶⁷ Legislators and commentators alike pointed out that, among other things, it would be illogical and unfair to punish recklessness in connection with the laundering of money stemming from a crime where commission of the underlying crime itself required a higher standard of criminal intent.¹⁶⁸ Moreover, they noted that a standard of recklessness in the context of money laundering would be conceptually difficult for courts to apply, would lead to arbitrary verdicts because of the standard's necessarily case-by-case application and, ultimately, would cause massive legal uncertainty in the handling of third party assets.¹⁶⁹ Moreover, because charges of prohibited money laundering would be dependent, in each case, on conclusive proof - presumably through a final determination of guilt - that the assets in question stemmed from a crime, it was first argued that a criminal judge's determination of recklessness would be unduly guided by his after-the-fact knowledge that such assets were indeed "tainted"¹⁷⁰ and, second, that final judicial determinations of guilt with respect to crimes committed in foreign countries would not always be available, thus resulting in arbitrary verdicts¹⁷¹.

now rather than the best later or never" ("lieber das Zweitbest jetzt als das Beste später oder nie")); *Ständerat verabschiedet Strafrechtsnormen gegen die Geldwäscherei*, *supra* note 152 (per Federal Council President Koller, new legislation not final solution). Cf. *Nötiger aber nicht hinreichender Schritt*, NZZ, Mar. 22, 1990, foreign ed. no. 67 at 15 (under original plan, legislation would have been enacted effective 1997, at the earliest).

¹⁶⁶ This approach, contrary to the recommendations made by the expert commission appointed to study the issue, whereunder recklessness knowledge would also have been punished, was heralded with obvious relief by the SBA and its members. *Geldwäscherei: die Banken atmen auf*, Tages-Anzeiger, May 11, 1989, No. 97 at 33.

¹⁶⁷ See Art. 18 para.1, StGB (unless expressly provided otherwise, prohibited acts only punishable if perpetrator possessed criminal intent). See also P. NOLL & S. TRECHSEL, *supra* note 127, at 80 (only especially valuable legal rights, such as life, health and community property rights, protected against acts of negligence); *Bundesrat schlägt Doppellösung gegen die Geldwäscherei vor*, *supra* note 149 (punishment of recklessness thought to be contrary to Penal Code's principle of certainty).

¹⁶⁸ See, e.g., *Bundesrat schlägt Doppellösung gegen die Geldwäscherei vor*, *supra* note 149; *Grobfahrlässige Geldwäscherei - ein bankrechtliches Kuckucksei im Nest des Strafrechts?*, NZZ, April 29/30, 1989, No. 99 at 33; C. GRABER, *supra* note 8, at 103.

¹⁶⁹ *Grobfahrlässige Geldwäscherei - ein bankrechtliches Kuckucksei im Nest des Strafrechts?*, *supra* note 168. See also *Der Professor, der Staatsanwalt, der Politiker - alle uneins*, *supra* note 50 (opinion of criminal law professor G. Stratenwerth).

¹⁷⁰ *Grobfahrlässige Geldwäscherei - ein bankrechtliches Kuckucksei im Nest des Strafrechts?*, *supra* note 168.

¹⁷¹ *Geldwäscherei als Rechtspflegedelikt?*, *supra* note 143 (no "final determination of guilt" avail-

However, proving criminal intent in connection with money laundering transactions can be a difficult if not impossible task.¹⁷² In recognition of this, Swiss legislators enacted a legal duty of due care in the identification of beneficial ownership, applicable to all persons who professionally handle third party assets, pursuant to which instances of negligence are punishable regardless of whether or not the handled assets stem from a crime. Originally, it was thought that such a duty would be easier for courts to apply and would result in less arbitrary verdicts than would a prohibition on reckless money laundering, primarily because of the concrete rules already established under the Agreement of Due Care and precedence of the Oversight Board.¹⁷³ The Banking Commission, however, recently indicated that, in its view, the legal duty of due care on the part of employees at Swiss banks would not be satisfied through the acceptance by such employees of Form B from attorneys, trustees and asset managers in lieu of the names and addresses of the actual beneficial owners, as permitted under the Agreement of Due Care.¹⁷⁴

It is, therefore, likely that the duty of due care specified in the Agreement will not constitute, in every instance, a safe harbor for compliance with the new legal duty of due care. This may have both positive and negative consequences. On the positive side, it is doubtful whether the Agreement's rules go far enough and are precise enough to facilitate the detection of money laundering transactions.¹⁷⁵ A close examination of the Agreement and Board precedence reveals that the rules established thereunder are, in certain key areas, vague and open to interpretation,¹⁷⁶ and that these areas have yet to be adequately interpreted by the Over-

able, e.g., in American cases concluded through plea bargaining; verdict as to reckless money laundering would resemble high-stakes roulette game). It should be noted that this objection applies equally in cases where intentional money laundering is alleged.

¹⁷² As has been repeatedly pointed out by various Swiss white collar crime experts, persons involved in effecting financial transactions often purposefully refrain from posing questions as to the origin of the funds in question. See *Der Professor, der Staatsanwalt, der Politiker - alle uneins*, *supra* note 50 (criminal prosecutor Corboz); *Geldwäscherei: Nach der Art der Indianer*, *supra* note 15 (former Tessin chief prosecuting attorney Bernasconi).

¹⁷³ See, e.g., *Die Geldwäscherei wirksam bekämpfen - aber wie?*, *supra* note 159 (likely that boundaries of legal duty of due care no greater than those set under Agreement; Swiss banks would fight against requirements going beyond current Agreement requirements).

¹⁷⁴ *Das Verbot anonymen Bankkonten*, *supra* note 80. See also C. GRABER, *supra* note 8, at 200-01 (questioning whether legal duty of identification should apply only in the case of cash transactions in excess of a certain sum, as under the Agreement).

¹⁷⁵ Cf. *Nationalrat ratifiziert Geldwäscherartikel*, *supra* note 151 (remark by House of Representatives member that Lebanon Connection was neither detected nor avoided, despite compliance with Agreement by relevant Swiss banks.)

¹⁷⁶ See, e.g., *supra* note 98 and accompanying text.

sight Board¹⁷⁷. Moreover, even in certain areas where the Agreement's rules are concrete and detailed, they are at the same time subject to loopholes allowing their ready circumvention by sophisticated and business-savvy representatives of organized crime.¹⁷⁸

On the other hand, while the existence of a legal duty of due care with undefined boundaries would, arguably, have the undeniably desirable effect of spurring Swiss businessmen into inquiring as to the source of suspicious funds whose origins might otherwise be discretely ignored,¹⁷⁹ it could result in exactly the type of legal uncertainty and arbitrary verdicts which Swiss legislators had sought to avoid when seeking an alternative to punishing reckless money laundering.

According to some, the exact scope and meaning of most crimes in Switzerland, whether requiring actual knowledge or recklessness,¹⁸⁰ is first determined in any event through the practice of criminal prosecution authorities and by means of judicial interpretation.¹⁸¹ In the present case, however, it is questionable whether adequate enforcement means are available to ensure that the new prohibition against intentional money laundering and its companion duty of due care in identification do not end up becoming mere "dead-letter" legislation. As in the recent past with respect to legislation criminalizing insider trading,¹⁸² the Swiss Parliament appears once more to have enacted legislation - this time with respect to money laundering - without giving due consideration to practical enforcement concerns. Despite the fact that the legal duty of due care in financial transactions, for example, applies to persons active in

¹⁷⁷ The important Agreement concept of "serious doubt under the circumstances," for example, has yet to be clarified by the Oversight Board. *Die Sorgfaltspflicht auf dem Prüfstand*, *supra* note 55.

¹⁷⁸ Cf., e.g., *supra* notes 49 -51 & 64 and accompanying text.

¹⁷⁹ See also Zulauf, *supra* note 6, at 89 (lack of detailed due care "checklist" would avoid real danger of fossilization of minimum due care standard into maximum due care standard).

¹⁸⁰ For example, criminal penalties are foreseen for acts of recklessness or negligence in four different instances under the Bank Act, including with respect to violations of the Bank Act's banking secrecy provisions. See *Geldwäscherei-Artikel: Zwischen Kochgang und Schongang*, SHZ, Jan. 1, 1989, No. 1 at 5.

¹⁸¹ *Wäscht jetzt das Recht die Schweiz rein?*, Tages-Anzeiger, Nov. 27, 1989, No. 276 at 2. This conclusion is not obvious within a country with a codified legal system, such as Switzerland.

¹⁸² Insider trading, analogous from an enforcement standpoint to money laundering, was declared a criminal act as of July 1, 1988, without the simultaneous creation of either a federal or cantonal agency to supervise Swiss securities markets and detect possible cases of insider trading. See A. Baumgartner, *Insider Trading Ahndung in der Schweiz*, 63 STr 428 (1989). The Zurich Cantonal Department for White Collar Crime has expressed the view that the insider trading legislation was prematurely enacted insofar as structures enabling a quick and economical investigative process were not yet at hand. *Teileinstellung eines Zürcher Insiderverfahrens*, NZZ, Mar. 31, 1990, foreign ed. no. 75 at 21. See also *Falsche Dollars und Verkauf von Leasing-Autos*, NZZ, Spet. 12, 1990, No. 211 at 23 (according to head of Zurich white collar crime department, insider trading investigations demand disproportionately large time expenditures).

both bank and non-bank finance intermediaries, Swiss legislators have neglected to subject non-bank finance intermediaries to the supervisory control of an agency or other authority comparable to the Swiss Banking Commission or the Oversight Board.¹⁸³ Further, unlike requirements currently in force in the United States,¹⁸⁴ Japan¹⁸⁵ and being introduced in European Community member states,¹⁸⁶ the new money laundering measures adopted in Switzerland do not require Swiss banks and other handlers of third party assets to report certain types of financial transactions, such as those exceeding a stipulated cash threshold or which appear to be connected with criminal acts, to the local criminal authorities.

Such a reporting duty would, of course, conflict with the jealously-guarded Swiss banking secrecy and professional confidentiality provisions of the Swiss Bank Act and Penal Code. However, even if such a reporting duty did exist, it is unclear whether Switzerland's presently understaffed police and other law enforcement agencies would be able to cope with the resulting added administrative burden.¹⁸⁷

According to one commentator, money launderers can seldom be tracked down by justice officials in the country where the laundering transactions are effected without an "initial spark" from the country in which the principal crime has been committed.¹⁸⁸ A important side effect of the legislation will be to provide foreign legal officers with a basis for breaking down Swiss banking secrecy barriers when seeking judicial assistance in connection with cross-border money laundering operations. Under Swiss federal law and the various treaties entered into by Switzerland concerning mutual assistance in criminal matters, Swiss authorities may grant judicial assistance to a requesting country only with respect to acts which constitute a crime not only under the laws of the requesting

¹⁸³ Cf. *Höhere Effizienz im Kampf gegen die Geldwäscherei*, *supra* note 50 (demand by Banking Commission that its supervisory authority be extended to include finance companies, trustees and asset managers).

¹⁸⁴ Cf. *supra* note 29.

¹⁸⁵ Cf. *Drug Money Is Laundered Through Tokyo*, *Wall St. J.*, Sept. 7-8, 1990, col. 3 at 14 (effective Oct. 1, 1990, Japanese financial institutions required to disclose cash transactions of more than 30 million Yen (\$210,000)).

¹⁸⁶ Cf. *EG-Richtlinie gegen Geldwäscherei?*, *NZZ*, Feb. 15, 1990, No. 37 at 13 (European Community directive being drafted to require all entities engaging in finance and credit transactions to report each transaction which, in their opinion, is connected with drug trade, terrorism or other non-tax related crime).

¹⁸⁷ Cf. *US-Grosseinsatz gegen die Geldwäscherei*, *supra* note 18 (over 11 million financial transactions reported to responsible U.S. agency within past two years); accord C. GRABER, *supra* note 8, at 63 n. 68 (Switzerland described as 10 to 15 years behind neighboring countries in combat against illegal drug trade; currently, 22 employees within Federal Central Department for Combating Drug Trade).

¹⁸⁸ C. GRABER, *supra* note 8, at 62.

country, but also under the laws of Switzerland.¹⁸⁹ Because money laundering was until recently punishable only in certain rare instances, the newly-enacted legislation criminalizing money laundering may thus be expected to improve the ability of foreign legal officers to track down and prosecute internationally active professional money launderers with the help of requests for judicial assistance. Further, perhaps more importantly, the new legislation will provide Swiss legal officers an opportunity to open an investigation or criminal proceeding on their "own initiative", i.e., through an informal orientation by foreign legal officers rather than on the basis of a formal request for judicial assistance.¹⁹⁰

VI. CONCLUSION.

It is open to question whether the steps taken to date within Switzerland will, in and of themselves, prove effective in perceptibly reducing Switzerland's function as a global magnet for dirty money. Swiss legislators have announced their intent, however, to enact certain supplemental criminal and administrative measures to increase the arsenal of weapons available to combat organized crime in Switzerland.¹⁹¹ Additional measures contemplated by the Swiss Federal Council and currently being drafted by an expert commission appointed by the Federal Justice and Police Department include new Penal Code provisions to punish membership in a crime organization,¹⁹² to extend the new money laundering legislation to legal entities as well as natural persons and to provide for prompter confiscation procedures vis-à-vis assets suspected to have stemmed from a crime¹⁹³. It is hoped, further, that Swiss legislators will authorize funds for the creation of a specialized police unit or agency to patrol compliance with the new money laundering legislation.

In the final analysis, the new initiative in Switzerland to combat money laundering and organized crime - including the Federal Tribu-

¹⁸⁹ *Id.* at 62, 63.

¹⁹⁰ *Id.* at 63. The latter approach offers certain advantages, because Swiss law and treaties allow affected parties and even so-called "unaffected" third parties to delay the granting of judicial assistance through lengthy appeal proceedings. *Id.* at 70.

¹⁹¹ *Nationalrat ratifiziert Geldwäscherartikel*, *supra* note 151.

¹⁹² The concept of "organized crime" does not exist under current Swiss criminal or civil law, although the term is used and defined by the Treaty of May 25, 1973 between Switzerland and the United States concerning Mutual Assistance in Criminal Matters. C. GRABER, *supra* note 8, at 148-49.

¹⁹³ *Nationalrat ratifiziert Geldwäscherartikel*, *supra* note 147. Among the most oft-repeated proposals in this regard is that the burden of proving the non-criminal origin of the funds awaiting confiscation be shifted, under certain circumstances, to the defendant. C. GRABER, *supra* note 8, at 96. An expert commission is expected to submit proposed revisions to the Penal Code's confiscation provisions in late 1990. *Id.* at 97.

nal's expanded interpretation of the Narcotics Act - may be expected, as an initial matter, to deter representatives of organized crime from routing dirty money through Swiss financial channels. Further, the "pioneer" measures enacted in Switzerland will inevitably be held up, in the future, as a role model for other popular havens of financial tourism. In this respect alone, the new Swiss money laundering legislation represents an important step forward in efforts to build a global, coordinated front against organized crime.