



2010

An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance

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Note: For more recent articles about FATF by Laurel Terry, see Laurel S. Terry, *U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing*, 59 N. Y. L. S. L. Rev. 487 (2015); Laurel S. Terry and José Carlos Llerena Robles, *The Relevance of FATF's Recommendations and 4th Round of Mutual Evaluations to the Legal Profession*, 41 Fordham J. Int'l L. ___ (2018). To access these articles and additional materials by Laurel Terry related to FATF and lawyer-AML issues, go to this website and select "Financial Action Task Force (FATF) & Gatekeeper - Money Laundering (AML) Issues" as the category in the Dropdown menu: http://works.bepress.com/laurel_terry/ 3

An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance

2010 Journal of the Professional Lawyer 3

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Abstract

The Financial Action Task Force (FATF) is a thirty-six member intergovernmental organization whose mission is to fight money laundering and terrorism financing; the U.S. is a founding member of the FATF. The FATF is best known for its 40+9 Recommendations, many of which are directed towards various kinds of "gatekeepers" who are in a position to facilitate or inhibit money laundering and terrorism financing. Lawyers are among those to whom the FATF's recommendations apply. This article provides the introduction for the Journal of the Professional Lawyer's Symposium about the application of the FATF recommendations to the legal profession. It explains what the FATF is, why its "soft law" recommendations are influential, and introduces the FATF 40+9 Recommendations and a 2008 FATF document called the "RBA Guidance for Legal Professionals." By synthesizing data collected by the International Bar Association and by providing a brief overview of the implementation in three English-speaking common law countries, this article documents how governmental implementation of the FATF recommendations has dramatically affected lawyer regulation around the world. (The FATF's reach is much broader than its thirty-six members because more than one hundred eighty jurisdictions or entities have endorsed its recommendations.) This article continues by providing an overview of bar association and regulatory responses to the FATF developments. The analysis section of this article: 1) explains how "soft law" developments such as these FATF developments can become influential and the importance of monitoring them; 2) highlights the importance of these particular developments and encourages the U.S. legal profession to follow them more closely; 3) explains why global collaboration is particularly important in this context; and 4) explains how these developments illustrate the validity of the "services providers" paradigm about which I have previously written and the implications that flow from that observation.

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The 2010 Annual Meeting Program of the Section on Professional Responsibility of the Association of American Law Schools (AALS) was entitled “*The Transformative Effect of International Initiatives on Lawyer Practice and Regulation: A Case Study Focusing on FATF and Its 2008 Lawyer Guidance*.”¹ The bulk of this issue of the *Journal of the Professional Lawyer* is based on that program and includes contributions by Kevin Shepherd, Colin Tyre, and Ronald MacDonald, all of whom negotiated with the Financial Action Task Force (FATF) on behalf of lawyers around the world.² Their contributions address the implementation in the U.S., the European Union (EU) and Canada of the FATF 40+9 Recommendations³ and the FATF 2008

1. See Association of American Law Schools, 2010 Annual Meeting Podcast, (remarks available in a podcast to AALS members), https://memberaccess.aals.org/eWeb/DynamicPage.aspx?Site=AALS&WebKey=b72abe85-7899-4d6d-8812-a122ede64152&RegPath=EventRegFees&REg_evt_key=e95fe6b3-00bd-4570-950c-d1bfa09e510c [hereinafter AALS 2010 Annual Meeting Podcast]. To view the presentation on which this article is based, see http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/Terry_FATF_AALS_%202010.pdf [hereinafter Terry AALS Slide Show]. My AALS presentation slides include pictures of the webpages of many of the entities and documents described in this article.

2. See Colin Tyre, *Anti-Money Laundering Legislation: Implementation of the FATF Forty Recommendations in the European Union*, 2010 J. PROF. LAW. 69 (2010) [hereinafter Tyre]; Kevin L. Shepherd, *The Gatekeeper Initiative And The Risk-Based Approach To Client Due Diligence: The Imperative For Voluntary Good Practices Guidance For U.S. Lawyers*, 2010 J. Prof. Law. 83 (2010) [hereinafter Shepherd]; Ronald J. MacDonald, *Money Laundering Regulation—What Can Be Learned From The Canadian Experience*, 2010 J. Prof. Law. 143 (2010). For more information about who was involved in the negotiations, see Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach For Transactional Lawyers*, 43 REAL PROP. TR. & EST. L.J. 607 (2009) [hereinafter Shepherd Gatekeepers].

3. See The Financial Action Task Force [FATF], *The Forty Recommendations*, <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF> [hereinafter “FATF, Forty Recommendations”]; Financial

RBA Guidance for Legal Professionals (hereinafter 2008 Lawyer Guidance).⁴ This Symposium issue also includes two papers written in response to the AALS' Call for Papers⁵ and the reflections of two academics who come from very different backgrounds and perspectives regarding the significance of these FATF developments.⁶

I am pleased to be able to set the stage for these articles by providing background information about the FATF 40+9 Recommendations and the 2008 Lawyer Guidance. Part 1 of this article answers the question "What is the FATF?" Part 2 introduces the FATF 40+9 Recommendations. Part 3 provides background information about the 2008 Lawyer Guidance.⁷ Part 4 summarizes governmental responses to the FATF recommendations. Part 5 sets forth some of the ways in which the legal profession has responded to these developments. Part 6 contains my observations and reflections about these FATF developments, including the likely importance of the FATF developments to U.S. domestic lawyer regulation and legal practice, the importance of monitoring "soft law" developments such as these, and the observation that these FATF developments illustrate the "service providers" paradigm I have previously written about, which has led to changes in *who* regulates lawyers and *how* lawyers are regulated. Part 6 argues that if the legal profession expects to be treated differently than other service providers (or designated nonfinancial businesses and professions (DNFBPs) in this case), it must be prepared to explain exactly how and why it is entitled to different treatment. This article includes in its three appendices the ABA's responses to the FATF developments, an excerpt from the International Bar Association's Anti-Money Laundering Forum webpage, and excerpts from the FATF 40+9 Recommendations.

1. What is the FATF?

The FATF is an intergovernmental organization that currently consists of thirty-three countries and two regional associations; FATF members span the globe and

Action Task Force, 9 Special Recommendations (SR) On Terrorist Financing (TF), <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf> (Oct. 22, 2004) [hereinafter FATF, 9 Special Recommendations]. These two sets of recommendations will be referred to hereinafter as the FATF 40+9 Recommendations.

4. See Financial Action Task Force, RBA Guidance for Legal Professionals (2008), <http://www.fatf-gafi.org/dataoecd/5/58/41584211.pdf> [hereinafter FATF 2008 Lawyer Guidance].

5. Paul Paton, *Cooperation, Co-option or Coercion? The FATF Lawyer Guidance and Regulation of the Legal Profession*, 2010 J. PROF. LAW. 165 (2010); Louise L. Hill, *The Financial Action Task Force Guidance for Legal Professionals: Missed Opportunities to Level the Playing Field*, 2010 J. PROF. LAW. 151 (2010).

6. James Thuo Gathii, *The Financial Action Task Force and Global Administrative Law*; 2010 J. PROF. LAW 197 (2010); Ellen S. Podgor, *Regulating Lawyers: Same Theme, New Context*, 2010 J. PROF. LAW 191 (2010).

7. This article summarizes some of the information found in Kevin Shepherd's excellent article about the history of the FATF and the negotiation history of the 2008 Lawyer Guidance. See Shepherd *Gatekeepers*, *supra* note 2. I highly recommend reading that article in conjunction with this journal issue.

include countries in Africa, Asia, Australia, Europe, North America and South America.⁸ The G-7 countries established the FATF in 1989 to combat money laundering.⁹ In October 2001 (shortly after the 9/11 terrorist attacks on the United States), the FATF expanded its mandate to include efforts to combat the financing of terrorism.¹⁰ Its current objectives include: 1) revising and clarifying the global standards for combating money laundering and terrorism financing; 2) promoting global implementation of its standards; 3) identifying and responding to new money laundering and terrorist financing threats; and 4) engaging with stakeholders and partners throughout the world.¹¹ The U.S. is a founding member of the FATF.¹²

The FATF primarily conducts its work through its plenary group, four working groups, and its Secretariat, which is located in Paris.¹³ Similar to many intergovernmental organizations, the FATF does not have legal authority with respect to its members. Its power derives from its ability to expel members who do not comply with its policies and recommendations.¹⁴ Thus its edicts and recommendations are

8. See, e.g., Financial Action Task Force [hereinafter FATF], Members and Observers, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236869_1_1_1_1_1,00.html [hereinafter FATF Members].

As of June 2010, the FATF members were: 1) Argentina; 2) Australia; 3) Austria; 4) Belgium; 5) Brazil; 6) Canada; 7) China; 8) Denmark; 9) Finland; 10) France; 11) Germany; 12) Greece; 13) Hong Kong, China; 14) Iceland; 15) India; 16) Ireland; 17) Italy; 18) Japan; 19) the Kingdom of the Netherlands (including the Netherlands, the Netherlands Antilles and Aruba); 20) Luxembourg; 21) Mexico; 22) New Zealand; 23) Norway; 24) Portugal; 25) Republic of Korea; 26) Russian Federation; 27) Singapore; 28) South Africa; 29) Spain; 30) Sweden; 31) Switzerland; 32) Turkey; 33) the United Kingdom; and 34) the United States. The Republic of Korea became a member in 2009. See FATF, General Information Republic of Korea, http://www.fatf-gafi.org/document/10/0,3343,en_32250379_32236869_43881354_1_1_1_1,00.html. India became a member in 2010. See FATF, General Information India, http://www.fatf-gafi.org/document/31/0,3343,en_32250379_32236869_45543391_1_1_1_1,00.html. In addition to India and Korea, the FATF has admitted six other members since 2000. See FATF, ANNUAL REPORT 2008- 2009 at 26 (2009), <http://www.fatf-gafi.org/dataoecd/11/58/43384540.pdf> [hereinafter FATF 2009 Annual Report].

The two regional members of the FATF are the European Commission and the Gulf Co-operation Council. (The Gulf Cooperation Council (GCC) is a full Member of the FATF, but the individual Member countries of the GCC (of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates) are not.) See FATF, Member Countries and Observers FAQ, http://www.fatf-gafi.org/document/5/0,3343,en_32250379_32236869_34310917_1_1_1_1,00.html#q3.

9. See FATF, Mission, available at http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236846_1_1_1_1_1,00.html.

10. *Id.*

11. See FATF 2009 Annual Report, *supra* note 8, at 6 (reporting the 2008 Ministerial adoption of these four objectives as the FATF's mandate).

12. See Shepherd *Gatekeepers*, *supra* note 2, at n 33.

13. See FATF 2009 Annual Report, *supra* note 8, at 8-9.

14. See, e.g., FATF 2009 Annual Report, *supra* note 8, at 24, para. 5:

Full and effective roll-out of the 40+9 Recommendations in all countries is one of the fundamental goals of the FATF. Members are assessed through the mutual evaluation process which is an essential and long standing core activity of the FATF. This peer review

“soft law,” rather than “hard law.”¹⁵ Using an agreed-upon methodology, the FATF regularly conducts a “mutual evaluation” of each member to assess its compliance with the FATF 40+9 recommendations.¹⁶ The FATF is nearing the completion of

process has now been extended through the FATF-Style Regional Body (FSRB) network to more than 170 countries, and is the critical mechanism for promoting timely and effective implementation of FATF Recommendations and for contributing to the creation of a level playing field throughout the membership and beyond. Countries that are not FSRB members will be encouraged to join the relevant regional body. The FATF will complete the third round of mutual evaluations of its membership (using the common assessment methodology) to determine the degree to which all members have implemented the 40+9 Recommendations. Also, the FATF will continue to undertake appropriate follow-up action from mutual evaluations to ensure that members correct, as quickly as possible, any deficiencies that are identified through the mutual evaluation process.

See also infra notes 133, 150, 156 and accompanying text (describing the “non-compliant” and “partially compliant” FATF ratings of Australia, Canada and the U.S.).

15. *See generally* Gathii, *supra* note 6, for an excellent discussion of the factors that have contributed to the “hardening” of the FATF soft law, especially for developing countries. For an additional explanation of “soft law,” *see, e.g.*, Andrew T. Guzman and Timothy Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT’L L. 515 (2009); Andrew T. Guzman and Timothy Meyer, *Explaining Soft Law* (2009), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1040&context=andrew_guzman; Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons From Congressional Practice*, 61 STAN. L. REV. 573 (2008). For an application of this concept to the FATF, *see* Shepherd, *supra* note 2, at n 29 and accompanying text (“FATF thus has no independent ability to enact laws but instead relies on its political muscle to achieve reforms in these areas”) and at n. 314:

Although the federal government’s best practices for U.S. based charities are styled as “voluntary,” some scholars believe that the practices are beginning to attain “quasi-legal status.” The concern is that the federal government may draw a negative inference if an organization does not comply completely with the best practices guidance (citation omitted).

16. *See* FATF, FATF Membership Policy (Feb. 29, 2008), available at <http://www.fatf-gafi.org/dataoecd/25/48/41112798.pdf>. Step 2(c) states:

The overall mutual evaluation needs to be regarded as satisfactory, and in particular the level of compliance for the Recommendations dealing with the money laundering and terrorist financing offences (R.1 & SR.II), freezing and confiscation (R.3 & SR.III), customer due diligence (R.5), record-keeping (R.10), suspicious transaction reporting (R.13 & SR.IV), financial sector supervision (R.23), and international co-operation (R.35, R.36, R.40, SR.I & SR.V) need to be acceptable.

The FATF mutual evaluations are conducted in accordance with the procedures set forth in a “methodology” document and a handbook. *See* FATF, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations (Feb. 24, 2004, Updated as of February 2009), available at <http://www.fatf-gafi.org/dataoecd/16/54/40339628.pdf> [hereinafter FATF Methodology]; FATF, AML/CFT Evaluations and Assessments: Handbook for Countries and Assessors (April 2009), available at <http://www.fatf-gafi.org/dataoecd/7/42/38896285.pdf> [hereinafter FATF Evaluation Handbook]. A typical assessment team consists of four experts who come from different countries. This team is comprised of a legal expert, two financial experts, and a law enforcement expert. Additional experts might be required for larger or more complex jurisdictions. *See* Handbook, *supra*, at para. 14. For additional discussions of the evaluation process, *see* FATF

its third round of evaluations and is contemplating the launch of its fourth round; the FATF's completed evaluations are publicly available on its webpage.¹⁷

In addition to its thirty-six members, the FATF includes five "associate members" that are FATF-like organizations in other regions,¹⁸ and a number of observers. India, which was previously an observer, became a full member in 2010¹⁹; the remaining observers include three "FATF Style Regional Bodies,"²⁰ and more than twenty other "observer organizations," including the World Bank, the International Monetary Fund, the United Nations, and the Egmont Group of Financial Intelligence Units.²¹ To become an observer, an organization must be intergovernmental, international or regional in nature.²² It must also send a letter to the FATF expressing its interest and indicate that it will "[c]learly endorse the FATF Forty Recommendations and Nine Special Recommendations and agree to support their implementation."²³ The FATF also works closely with FATF-Style Regional Bodies.²⁴ And it recently launched an online forum called the Private Sector Consultative Forum.²⁵

2009 Annual Report, *supra* note 8, at 12-16; Shepherd, *Gatekeepers*, *supra* note 2, at n. 72 and accompanying text. For information about the FATF evaluations of the U.S., *see infra* notes 52 and 157-160 and accompanying text.

17. *See* FATF 2009 Annual Report, *supra* note 8, at 5 (regarding the anticipated launch of the fourth round of evaluations); FATF, Mutual Evaluations, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236963_1_1_1_1_1,00.html (includes links to evaluation reports by country, guidance for conducting mutual evaluations, and other documents).

18. *See* FATF Members, *supra* note 8. The five "associate organizations" listed on the FATF include organizations from Africa, Asia, the Caribbean, the Middle East, and South America: 1) the Asia/Pacific Group on Money Laundering (APG); 2) Caribbean Financial Action Task Force (CFATF); 3) the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL)—formerly PC-R-EV; 4) the Financial Action Task Force on Money Laundering in South America (GAFISUD); 5) Middle East and North Africa Financial Action Task Force (MENAFATF). *Id.* *See also* Terry AALS Slide show, *supra* note 1 (includes the webpages of these organizations).

19. *See supra* note 8 (regarding India's current status and former observer status).

20. The three "FATF Style Regional Bodies" that are observers are: 1) Eurasian Group (EAG); 2) the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG); and 3) the Intergovernmental Action Group against Money-Laundering in Africa (GIABA). *Id.* When combined with the "associate organizations, there are eight regional FATF-style regional bodies. *See also* FATF 2009 Annual Report, *supra* note 8, at 6 ("The primary FATF partners are the eight FATF style regional bodies . . ."). *See also* Terry AALS Slide show, *supra* note 1 (includes the webpages of these organizations).

21. *See* FATF Members, *supra* note 8. *See also* Gathii, *supra* note 6, for a discussion of the ways in which some of these international organizations have endorsed the FATF recommendations, contributing to the "hardening" of the FATF's "soft law."

22. FATF, FATF Policy on Observers (June 20, 2008), <http://www.fatf-gafi.org/dataoecd/26/24/41112594.pdf>.

23. *Id.*

24. *See, e.g.*, FATF 2009 Annual Report, *supra* note 8, at 5, 21 (describing the "enhanced cooperation" during the past year and a ten year history of cooperation). Some countries are members of both the FATF and an FATF style regional body. *Id.* at 20.

25. *Id.* at 21.

In sum, when the legal profession considers the impact of the FATF's work on the legal profession, it needs to realize that the FATF's reach is global. Furthermore, because there are a number of regional FATF-type organizations that have endorsed the FATF's recommendations, the FATF's reach is much broader than its 36 members. Finally, although the FATF lacks the power to directly enact binding laws, its "soft law" influence is likely to be profound because a member that fails to comply with the FATF's recommendations risks expulsion and few members are likely to want that in the current political climate.

2. What are the FATF 40+9 Recommendations?

The FATF is most known for its 40+9 Recommendations. The Forty Recommendations address money laundering; they were adopted in 1990, revised in 1996, and revised again in 2003.²⁶ The "Nine Special Recommendations" address the effort to combat terrorism financing. FATF members adopted eight of these recommendations in 2001, shortly after the 9/11 terrorist attacks on the U.S.; they adopted the ninth special recommendation in 2004.²⁷ Together, these recommendations are known as the 40+9 Recommendations.²⁸ (They are also referred to as the FATF AML/CFT recommendations; this acronym stands for "anti-money laundering and combating the financing of terrorism."²⁹) The FATF recommendations have been endorsed by more than 180 jurisdictions, the World Bank and the International Monetary Fund.³⁰

The FATF 40+9 Recommendations include a number of "gatekeeper" recommendations. This means that instead of being directed against the primary perpetrators of money laundering or terrorism financing, these recommendations target the "gatekeepers" who arguably are in a position to facilitate—or prevent—these activities. The "gatekeepers" covered by the FATF 40+9 Recommendations include lawyers, accountants, real estate agents, dealers in precious metals, casinos,

26. See FATF, Forty Recommendations, *supra* note 3; FATF 2009 Annual Report, *supra* note 8, at 6.

27. See FATF, 9 Special Recommendations, *supra* note 3; see also FATF, *Press Release: FATF Targets Cross-Border Cash Movements by Terrorists and Criminals*, available at <http://www.fatf-gafi.org/dataoecd/8/5/34301987.pdf> (noting the adopting of Special Recommendation IX).

28. See, e.g., FATF Homepage, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html:

The Financial Action Task Force (FATF) is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The FATF is therefore a 'policy-making body' that works to generate the necessary political will to bring about legislative and regulatory reforms in these areas. The FATF has published 40 + 9 Recommendations in order to meet this objective.

Id.

29. See, e.g., *infra* notes 46 and 70 (citing documents that use the AML/CFT acronym).

30. See FATF 2009 Annual Report, *supra* note 8, at 6.

and others.³¹ These individuals and entities are referred to in the 40+9 Recommendations as “designated nonfinancial businesses and professions” or DNFBPs.³²

The FATF 40+9 Recommendations include, inter alia, requirements about customer due diligence, record-keeping, and the obligation to report suspicious transactions (without tipping off their customer).³³ The record-keeping requirements are designed to make it easier for government officials to investigate and prosecute violations.³⁴ As one might imagine, some of the 40+9 Recommendations have been extremely controversial, especially the suspicious transaction reporting (STR) obligation and the “no-tipping off” policy, which prohibits lawyers who file suspicious transaction reports from telling their clients they have done so.³⁵

If a country fully adopts the 40+9 Recommendations, those recommendations will apply to some, but not all, lawyers who practice in FATF countries. Provided a lawyer is in private practice and not an in-house counsel,³⁶ the Recommendations apply to lawyers when they prepare for or carry out transactions for their clients in five areas of activity:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organization of contributions for the creation, operation or management of companies;
- the creation, operation or management of legal persons or arrangements, and buying and selling of business entities.³⁷

31. See, e.g., FATF, Forty Recommendations, *supra* note 3, at para. 12 (specifying that the due diligence provisions apply to casinos, real estate agents, dealers in precious metals and dealers in precious stones, lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their clients concerning certain specific activities, and Trust and company service providers when they prepare for or carry out certain specified transactions).

32. *Id.* at para 12; Shepherd, *Gatekeepers*, *supra* note 2, at n. 15 and accompanying text.

33. See *supra* note 3 (citing the FATF 40+9 recommendations); see also Appendix C to this article for a list of the FATF 40+9 Recommendations.

34. See, e.g., FATF, Forty Recommendations, *supra* note 3, at para.10 (“Such records must be sufficient to permit reconstruction of individual transactions. . . so as to provide, if necessary, evidence for prosecution of criminal activity.”).

35. See, e.g., Shepherd, *Gatekeepers*, *supra* note 2, at 630 and nn. 161-164 and accompanying text (explaining the controversial nature of some of the FATF recommendations when applied to the legal profession).

36. See FATF, 40 Recommendations, *supra* note 3, at 12 (Glossary states that “Designated non-financial businesses and professions” refers to “Lawyers, notaries, other independent legal professionals and accountants—this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to ‘internal’ professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to measures that would combat money laundering.”).

37. This list comes directly from the FATF recommendations. See FATF, Forty Recommendations, *supra* note 3, at Rec. 11(d). One of the challenges for the legal profession is to determine exactly what each of these means when applied to a lawyer’s day-to-day law practice. Kevin Shepherd’s

The FATF 40+9 Recommendations and their interpretative notes are approximately twenty-five pages.³⁸ Appendix C to this article includes the key recommendations applicable to lawyers and selected interpretative notes. Although the FATF Recommendations do not contain a table of contents, the FATF webpage sorts the forty anti-money laundering recommendations into four categories: 1) Legal Systems; 2) Measures to be taken by Financial Institutions and Non-Financial Businesses and Professions to prevent Money Laundering and Terrorist Financing; 3) Institutional and other measures necessary in systems for combating Money Laundering and Terrorist Financing; and 4) International Co-operation.³⁹ Appendix C to this article reproduces the recommendations in category 2.

The FATF Nine Special Recommendations to combat terrorism financing are only two pages long.⁴⁰ Their titles convey their substance:

- I. Ratification and implementation of UN instruments
- II. Criminalising the financing of terrorism and associated money laundering

article, *supra* note 2, refers to the forthcoming “best practices” document, which will include “practice tips” on how to apply the FATF 40+9 Recommendations and the 2008 Lawyer Guidance.

38. See the FATF 40+9 Recommendations, *supra* note 3.

39. See FATF, The Forty Recommendations, http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236920_33658140_1_1_1_1,00.html [hereinafter FATF 40 Recommendations Webpage]. The webpage categorizes the recommendations as follows:

A. Legal Systems

- Scope of the criminal offence of money laundering (Recommendations 1-2)
- Provisional measures and confiscation (Recommendation 3)

B. Measures to be taken by Financial Institutions and Non-Financial Businesses and Professions to prevent Money Laundering and Terrorist Financing

- Customer due diligence and record-keeping (Recommendations 4-12)
- Reporting of suspicious transactions and compliance (Recommendations 13-16)
- Other measures to deter money laundering and terrorist financing (Recommendations 17-20)
- Measures to be taken with respect to countries that do not or insufficiently comply with the FATF Recommendations (Recommendations 21-22)
- Regulation and supervision (Recommendations 23-25)

C. Institutional and other measures necessary in systems for combating Money Laundering and Terrorist Financing

- Competent authorities, their powers and resources (Recommendations 26-32)
- Transparency of legal persons and arrangements (Recommendations 33-34)

D. International Co-operation

- Recommendation 35
- Mutual legal assistance and extradition (Recommendations 36-39)
- Other forms of co-operation (Recommendation 40)

Id.

40. See FATF, 9 Special Recommendations, *supra* note 3. The nine special recommendations are reproduced in Appendix C.

- III. Freezing and confiscating terrorist assets
- IV. Reporting suspicious transactions related to terrorism
- V. International co-operation
- VI. Alternative remittance
- VII. Wire transfers
- VIII. Non-profit organisations
- IX. Cash couriers⁴¹

Although the FATF 40+9 Recommendations clearly apply to lawyers, they include a reference to “legal privilege” that has created uncertainty about the proper scope and application of the FATF suspicious transaction reporting recommendation. Recommendation 16 states that legal professionals are not required to report their suspicions “if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.”⁴² As is explained in greater detail later in this article, some legal profession organizations have relied on Recommendation 16 when challenging a particular country’s implementation of the FATF recommendations.⁴³

One of the criticisms of these 40+9 Recommendations as applied to lawyers is that the costs outweigh the likely benefits. On the benefit side, commentators note that there has been no empirical showing that otherwise innocent lawyers have been involved to any significant degree in facilitating money laundering or counter terrorism.⁴⁴ On the cost side, they note that some of the FATF recommendations fundamentally disrupt the lawyer-client relationship and place pressures on the rule of law.⁴⁵ As one commentator stated:

The question that remains is whether the AML/CTF legislation, with all its complexities and extensive resource requirements, will minimise, if not eliminate, money laundering in Australia. This is a concern where the impact of the legislation, particularly as it may affect the legal profession could adversely affect the rights of parties traditionally protected by the principles of the rule of law. In my view, the adverse impact of the AML/CTF on the professions may outweigh its utility as presently drafted.

. . . .

In my view, the challenge for the AML/CTF legislation is to have a strong educational impact, to the extent that the present levels of

41. See FATF 40 Recommendations Webpage, *supra* note 39.

42. See FATF Forty Recommendations, *supra* note 3, at para. 16.

43. See, e.g., *infra* notes 143-145 and 194-195 and accompanying text (citing, among other things, the Canadian and French and Belgian cases that have challenged suspicious transaction reporting).

44. See, e.g., AALS 2010 Annual Meeting Podcast, *supra* note 1 (remarks of Colin Tyre and Kevin Shepherd).

45. See, e.g., *infra* notes 113 and accompanying text (describing responses).

ignorance and perhaps negligence that exist in the community, and particularly in the legal profession, can be addressed. . . . Only time will tell whether our efforts and the approach taken by AUSTRAC will result in greater protection of the public, or unacceptable damage to our culture as a pluralist democratic society.⁴⁶

As noted above, commentators have criticized the FATF for applying these recommendations to the legal profession without any significant empirical evidence that shows that there has *in fact* been a problem with otherwise innocent lawyers facilitating money laundering or terrorism financing. Until the development of the 2008 Lawyer Guidance, which is described in the next section, the FATF had not provided much guidance even *in theory* about the specific ways in which they thought lawyers might be facilitating this activity. Much of the guidance that is available to the legal profession has come from professional associations. For example, the Law Society of England and Wales has provided a list of things that might signal something wrong, including: secretive clients; unusual retainers; instructions in areas outside the firm's expertise, but in which the client claims to be an expert; instructions from clients located a long way from the lawyer's offices who do not appear to have a good reason for choosing a remotely-located lawyer; clients that change their instructions to the lawyer for no logical reason, including clients that tell a lawyer that funds are coming from one source and, at the last minute, the source changes or clients that unexpectedly ask a lawyer to send money received into the lawyer's account back to its source, to the client, or to a third party.⁴⁷ The Law Society also warns lawyers to be wary of disputes that are settled too easily, as this may indicate sham litigation; loss-making transactions where the loss is avoidable; settlements paid in cash, or paid directly between parties without adequate explanation because such activity may indicate that mortgage fraud or tax evasion is taking place; and unusual patterns of transactions that have no apparent economic purpose.⁴⁸ It has also attempted to highlight the rare cases in which lawyers, who are not themselves money launderers or terrorists, have been found guilty of facilitating these activities:

In 2006, Phillip Griffiths, a solicitor in the United Kingdom, was sentenced to six months imprisonment for a money laundering offence. Mr. Griffiths had acted for an estate agent whom he knew and trusted in the purchase of a house for less than its value. The property had been sold

46. Steve Mark, *Chapter 3: Implementing Anti-Money Laundering Legislation and the Professions* 9-10 in D. Chaikin *MONEY LAUNDERING, TAX EVASION & TAX HAVENS* (2008), available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Chapter_3_Implementing_Anti.pdf/\\$file/Chapter_3_Implementing_Anti.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Chapter_3_Implementing_Anti.pdf/$file/Chapter_3_Implementing_Anti.pdf) [hereinafter Mark].

47. See Law Society of England and Wales, *Anti-money laundering practice note—29 October 2009*, at Ch. 11.2, <http://www.lawsociety.org.uk/productsandservices/practicenotes/aml/4062.article#h11genwarn> [hereinafter Law Society Oct. 2009 Practice Note].

48. *Id.*

by drug traffickers. Mr. Griffiths was convicted of failing to disclose to authorities when he had reasonable grounds for knowing or suspecting that a transaction involved money laundering. What turned out to be a simple mistake, an oversight, according to Mr. Griffiths, led to a serious conviction and ultimately resulted in the loss of his practice. Upon receiving his sentence, Mr. Griffiths warned other money laundering reporting officers (MLROs) that ‘it only takes one error’ to find themselves in the same situation.⁴⁹

In sum, notwithstanding the legal profession’s objections that the costs of the FATF recommendations far outweigh the benefits, it is clear that the FATF recommendations apply to lawyers in private practice when they are engaged in the five activities identified in the FATF recommendations. The reference to “legal privilege” in the recommendations, however, has given the legal profession the foothold to use when arguing that some of the FATF recommendations must be interpreted differently when applied to the legal profession.

3. What is the October 2008 FATF Risk-Based Approach Guidance for Legal Professionals?

In addition to its 40+9 Recommendations, the FATF has produced a number of supplementary documents to help its members implement its policies. Some of the more influential items include:

- 1) a document entitled “Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations;”⁵⁰
- 2) a handbook for countries and assessors to use when conducting evaluations of a country’s compliance with the FATF 40+9 Recommendations;⁵¹
- 3) additional documents related to the periodic evaluations of each FATF member’s compliance with the 40+9 Recommendations;⁵²

49. Mark, *supra* note 46, at n. 22 and accompanying text.

50. See FATF, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations, *supra* note 16.

51. See FATF, Evaluation Handbook, *supra* note 16.

52. The third round of evaluations began in January 2005 and is scheduled to end in October 2010. See FATF, Annual Report 2009, *supra* note 8, at 13. In October 2009, the FATF issued guidelines about the procedures and processes that apply during the third round of evaluations. See FATF, Reference Document, Third Round of AML/CFT Mutual Evaluations Process and Procedures (October 2009), available at <http://www.fatf-gafi.org/dataoecd/20/14/41563294.pdf>.

There are two different ways to locate the completed evaluation reports. The simplest is to click on the “mutual evaluations” item on the left hand menu on the FATF homepage. See FATF, Mutual Evaluations, available at http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236963_1_1_1_1_1_1,00.html. That page includes a link to “reports by country,” which allow one to select a country from an alphabetical list. Alternatively, one can go to the FATF Members webpage, *supra* note 8, and click on a particular country’s name. These country webpages use a standard template that includes information about that country’s FATF membership status, its “Lead Ministry/Authority in FATF

- 4) a series of “Best Practices” documents;⁵³
- 5) a set of documents on “methods and trends,” including “typology” documents that provide illustrative cases showing how money laundering and terrorism financing have occurred in particular sectors.⁵⁴ (The FATF has not yet produced a “typology” document for the legal profession);
- 6) a set of documents called “Guidances;”⁵⁵ and
- 7) a series of “risk-based” assessments for different kinds of professions, including one for the legal profession.⁵⁶

With respect to category seven, in addition to the document for the legal profession, the FATF has produced guides on using a risk-based approach for the financial sector, real estate agents, accountants, dealers in precious metals and stones,

Delegation;” its “Other Ministries/Authorities;” and “other useful links.” At the top of each country page, next to the icon of the country’s flag, there is a link that says “Click here to access documents on [country].” If one clicks that link, there will be two categories. One is “documents” and one is “reports.” If one clicks on “reports,” one will see the FATF evaluations that have been conducted. *See, e.g.,* FATF, *Summary of the Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism, United States of America* at para. 3, 5 (June 23, 2006), <http://www.fatf-gafi.org/dataoecd/44/12/37101706.pdf> [hereinafter Third Mutual Evaluation of the U.S.].

53. *See* FATF, Publications & Documents: Best Practices, *available at* http://www.fatf-gafi.org/findDocument/0,3354,en_32250379_32236920_1_43383774_1_1_1,00.html. The papers on this webpage include, for example, Best Practices Paper: Confiscation (Recommendations 3 and 38); International Best Practices: Freezing of Terrorist Assets (Special Recommendation III); and Best Practices Paper on Trade Based Money Laundering.

54. *See* FATF, Publications & Documents: Reports, http://www.fatf-gafi.org/findDocument/0,3354,en_32250379_32237202_1_43383847_1_1_1,00.html. As of March 2010, the documents on this webpage include: Money Laundering and Terrorist Financing in the Securities Sector; Money Laundering through the Football Sector; Vulnerabilities of Casinos and Gaming Sector Report; Typologies Report on Proliferation Financing; Money Laundering & Terrorist Financing Vulnerabilities of Commercial Websites and Internet Payment Systems; and Money Laundering and Terrorist Financing Through the Real Estate Sector. *Id.* *See also* FATF, *Methods and Trends*, *available at* http://www.fatf-gafi.org/pages/0,3417,en_32250379_32237202_1_1_1_1_1,00.html (provides a different method to access the “typologies” documents.); FATF 2009 Annual Report, *supra* note 8, at 18 (describing the 2008 Monaco “Typologies” conference that brought together 170 representatives from more than 50 countries).

55. *See* FATF, Publications & Documents: FATF Guidance Documents, *available at* http://www.fatf-gafi.org/findDocument/0,3354,en_32250379_32236920_1_43383836_1_1_1,00.html. The papers on this webpage include the following: Guidance on the Implementation of the Financial Provisions of UN Security Council Resolution 1803; Guidance on Capacity Building for Mutual Evaluations and Implementation of the FATF Standards Within Low Capacity Countries; Guidance for Financial Institutions in Detecting Terrorist Financing; and Guidance on Implementing Financial Provisions of UNSC Resolutions to Counter Proliferation of Weapons of Mass Destruction.

56. *See* FATF, Risk-Based Approach Guidance, *available at* http://www.fatf-gafi.org/document/63/0,3343,en_32250379_32236920_44513535_1_1_1_1,00.html [hereinafter FATF, Risk-Based Approach Guidance].

casinos, services businesses, and the life insurance sector.⁵⁷ A risk-based approach (as opposed to a rule-based approach) is founded on the premise that there are finite resources available to combat money laundering and terrorism financing and that those limited resources should be used in the most efficient manner possible, which means that the greatest risks should receive the most attention.

The first FATF risk-based guidance was produced for financial institutions.⁵⁸ As described in detail in Kevin Shepherd's *Gatekeepers* article and in the remarks from Mr. Shepherd and Colin Tyre at the 2010 AALS Annual Meeting program,⁵⁹ the financial sector document established the framework that the FATF wanted to use for all other sectors, including the legal profession.⁶⁰ Thus, the global legal profession was unhappily put in the position of trying to explain why the financial sector document could not simply be applied "lock, stock, and barrel" to the legal profession.⁶¹ Mr. Shepherd's article sets forth in detail the behind-the-scenes negotiations that led to the FATF's 2008 Lawyer Guidance and the ways in which it differs from the risk-based approach for the financial sector.⁶²

The 2008 Lawyer Guidance, which is the risk-based approach for the legal profession, is a lengthy and complicated document.⁶³ Consistent with the 40+9 Recommendations themselves, the 2008 Lawyer Guidance only applies to lawyers who engage in one of the five designated activities (*e.g.*, those who help clients who buy or sell real estate; help create, manage or operate legal persons; or establish or manage trusts or hold client's money.)⁶⁴ The 2008 Lawyer Guidance contains risk-based guidelines about due diligence, recordkeeping and the implementation of training and systems to deter and detect AML/CFT activities.⁶⁵ Because it uses

57. *Id.* This webpage includes: RBA Guidance for the Financial Sector (June 2007); RBA Guidance for Real Estate Agents (June 2008); RBA Guidance for Accountants (June 2008); RBA Guidance for Trusts and Companies Service Providers (TCSPs) (June 2008); RBA Guidance for Dealers in Precious Metals and Stones (June 2008); RBA Guidance for Casinos (October 2008) RBA Guidance for Legal Professionals (October 2008); RBA Guidance for Money Services Businesses (June 2009); and RBA Guidance for the Life Insurance Sector (Oct. 2009).

58. *See id.* (listing dates of the RBA Guidances; the financial sector RBA was first in 2007). *See also* Shepherd, *Gatekeepers*, *supra* note 2, at n. 79; FATF, Guidance On The Risk-Based Approach To Combating Money Laundering And Terrorist Financing-High Level Principles And Procedures (June 2007), <http://www.fatf-gafi.org/dataoecd/43/46/38960576.pdf>.

59. *See supra* notes 1-2.

60. *See* Shepherd, *Gatekeepers*, *supra* note 2, at nn. 110-114 and accompanying text; AALS 2010 Annual Meeting podcast, *supra* note 1.

61. *See* AALS 2010 Annual Meeting Podcast, *supra* note 1; Tyre, *supra* note 2.

62. *See generally* Shepherd, *Gatekeepers*, *supra* note 2. It is beyond the scope of this article to review those negotiations and differences, but for those who are interested, I highly recommend Mr. Shepherd's article.

63. *See* FATF 2008 Lawyer Guidance, *supra* note 4.

64. *Id.* at para. 12.

65. *Id.* at para. 114-115 (due diligence); 116-199 (monitoring clients and their activities), 121-122 (educating, training and awareness), and 123-125 (internal controls).

a risk-based approach as opposed to a rule-based approach, the required due diligence depends on the risk factors that are present.⁶⁶

The 2008 Lawyer Guidance identifies three different kinds of risk factors: 1) country/geographic risk; 2) client risk; and 3) service risk.⁶⁷ For each of these factors, the 2008 Lawyer Guidance explains how a lawyer might evaluate the risks. For example, with respect to service risk, “high risk” services include services for “money services businesses” such as remittance houses, currency exchange houses, transfer agents and bank note traders or other businesses offering money transfer facilities.⁶⁸ With respect to country risk, it indicates that while there is “no universally agreed definition by either designated competent authorities, self regulatory organizations (SROs), or legal professionals that prescribes whether a particular country or geographic area . . . represents a higher risk,” there are high-risk indicators.⁶⁹ They include whether a country is subject to UN sanctions or has been identified by credible sources such as the International Monetary Fund, the World Bank, or the Egmont Group of Financial Intelligence Units as lacking appropriate AML/CFT laws or being a location from which funds are provided to terrorist organizations, or having a significant level of corruption.⁷⁰

For client risk, the 2008 Lawyer Guidance notes, *inter alia*, that higher risk is associated with certain categories of clients such as politically exposed persons; clients that are cash intensive businesses; clients that are requesting services in unconventional ways; clients whose structure makes it difficult to identify the beneficial owner; clients that are non-profits organizations not subject to monitoring by competent authorities; clients who change settlement instructions without appropriate explanation; clients who have multiple addresses without legitimate

66. *See id.* at para. 103-112.

67. *Id.* at para. 108-110.

68. *Id.* at para. 109. *See also* Shepherd, *Gatekeepers*, *supra* note 2, at nn. 157, 162 (noting specific ways in which these three types of risks might be assessed.) For example with respect to country risk, Mr. Shepherd observes that:

Transparency International, a global civil society organization formed to fight corruption, has developed a jurisdiction-specific corruption perceptions index that ranks countries based on the degree to which corruption is perceived to exist among public officials and politicians. *See* http://www.transparency.org/policy_research/surveys_indices/cpi/2007/faq#general1. At least one law society has pointed out the value of referring to this index when dealing with clients from other countries. *See* Anti-Money Laundering Practice Note, Law Society of England and Wales Sec. 11.2 (Feb. 22, 2008).

Id. at n.157.

69. *Id.* at para. 108.

70. *Id.*. One of the major menu items on the FATF webpage deals with the topic of country risk. *See* FATF, High-risk and non-cooperative jurisdictions, *available at* http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236992_1_1_1_1_1,00.html.

reasons; or clients that use financial institutions, financial intermediaries or legal professionals not subject to adequate AML/CFT laws.⁷¹

After explaining these three kinds of risk, the 2008 Lawyer Guidance sets forth variables that might cause a lawyer to adjust his or her risk assessment.⁷² It is important to realize that, according to the FATF, there is no such thing as a risk-free client because all clients present some level of risk;⁷³ this is one of the ways in which the 2008 Lawyer Guidance might differ from the risk assessments that lawyers and law firms currently use as part of their intake processes or malpractice analysis.

In addition to providing advice on assessing client risk, the 2008 Lawyer Guidance provides information about how lawyers might comply with the FATF recommendations regarding the due diligence “know your client” requirements, and bookkeeping and training. It includes several practical tips.⁷⁴ One noteworthy aspect of the 2008 Lawyer Guidance is its omission of a suspicious transaction requirement. Because the FATF recommendations *require* suspicious transaction

71. FATF 2008 Lawyer Guidance, *supra* note 4, at para. 109. Both the FATF 2008 Lawyer Guidance and the FATF Recommendations include a glossary with the following definition of politically exposed persons or PEPs:

PEPs are individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those of PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

FATF 2008 Lawyer Guidance, *supra* note 4, at 39; accord FATF Forty Recommendations, *supra* note 3, at Glossary.

72. *See* FATF 2008 Lawyer Guidance, *supra* note 4, at para. 111-112 (examples of variables include the duration of the relationship, the familiarity of the legal professional with the country involved, the extent to which developing technologies are used, the nature of the referral of the client to the lawyer, the structure of the client or transaction).

73. *See* Shepherd, *Gatekeepers*, *supra* note 2, at nn. 180 and 208 and the AALS 2010 Annual Meeting Podcast, *supra* note 1. For example, in his article, Mr. Shepherd refers to the SDN List, which is a comprehensive list of individuals and entities that the federal government has designated pursuant to both country-based and list-based OFAC administered programs. U.S. persons are prohibited from dealing with any of the parties included on the SDN List. Shepherd, *Gatekeepers*, *supra* note 2, at n. 328.

74. *See, e.g.*, FATF 2008 Lawyer Guidance, *supra* note 4, at para. 126. It recommends that:

Subject to the size and scope of the legal professional’s organisation, the framework of risk-based internal controls should:

- Have appropriate risk management systems to determine whether a client, potential client, or beneficial owner is a PEP.
- Provide increased focus on a legal professional’s operations (e.g. services, clients and geographic locations) that are more vulnerable to abuse by money launderers.
- Provide for periodic review of the risk assessment and management processes, taking into account the environment within which the legal professional operates and the activity in its marketplace.

reporting (STR) by gatekeepers, the risk-based approach for the financial sector and those for other sectors include a number of provisions related to STR. The STR recommendation has been very controversial when applied to the legal profession, however, because of its impact on lawyer confidentiality and professional privilege.⁷⁵ In light of this impact and the fact that the FATF 40+9 Recommendations themselves acknowledge the important role of lawyer-client privilege,⁷⁶ there have been disagreements about whether and how the STR recommendation should be applied to the legal profession. Because STR is not truly part of a risk-assessment process, the FATF and legal profession representatives agreed to save their disagreement on STR for a later date and omitted any STR requirements from the 2008 Lawyer Guidance.⁷⁷

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- Designate personnel at an appropriate level who are responsible for managing AML/CFT compliance.
 - Provide for an AML/CFT compliance function and review programme if appropriate given the scale of the organisation and the nature of the legal professional's practice.
 - Inform the principals of compliance initiatives, identified compliance deficiencies and corrective action taken.
 - Provide for programme continuity despite changes in management or employee composition or structure.
 - Focus on meeting all regulatory record keeping or other requirements, as well as promulgated measures for AML/CFT compliance and provide for timely updates in response to changes in regulations.
 - Implement risk-based CDD policies, procedures and processes.
 - Provide for adequate controls for higher risk clients and services as necessary, such as review with or approvals from others.
 - Provide for adequate supervision and support for staff activity that forms part of the organisation's AML/CFT programme.
 - Incorporate AML/CFT compliance into job descriptions and performance evaluations of relevant personnel.
 - Provide for appropriate training to be given to all relevant staff.
 - For groups, to the extent possible, provide a common control framework.

75. See, e.g., *infra* notes 167-207 and accompanying text (describing bar association resolutions opposing this aspect of the FATF recommendations).

76. See, e.g., FATF 2008 Lawyer Guidance, *supra* note 4, at para. 6 ("The provisions contained in this Guidance, when applied by each country, are subject to professional secrecy and legal professional privilege.") and para. 16 ("The provisions in this Guidance are subject to applicable professional secrecy, legal professional privilege or rules of professional conduct, which are determined by each country.") ("Recommendation 16, however, provides that legal professionals are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.") See generally Shepherd, *Gatekeepers*, *supra* note 2.

77. See FATF 2008 Lawyer Guidance, *supra* note 4, at para. 120 ("STRs are not part of risk assessment, but rather reflect a response mechanism—typically to an SRO or government enforcement authority—once a suspicion of money laundering has been identified."); Shepherd, *Gatekeepers*, *supra* note 2, at nn. 157-164 and accompanying text. During the 2010 AALS Annual Meeting, Kevin Shepherd expressed his appreciation to the CCBE and IBA for supporting this position, even though the EU directives take a contrary approach. See AALS 2010 Annual Meeting Podcast, *supra* note 1.

In sum, the 2008 Lawyer Guidance is a lengthy document that has been developed by FATF members in consultation with private sector representatives to provide a common understanding about how to comply with the FATF 40+9 Recommendations using a risk-based approach. Similar to the FATF recommendations themselves, the 2008 Lawyer Guidance does not create legally enforceable obligations. It is, however, likely to be extremely influential in FATF member and observer countries because it will become part of the backdrop that is used to measure compliance with the FATF recommendations. In other words, it is another example of international standards and “soft law” that are likely to be influential.

4. How Have Governments Implemented the FATF 40+9 Recommendations?

Governments around the world have implemented anti-money laundering and counter-terrorism financing legislation that is consistent with or modeled after many of the FATF recommendations. To locate this legislation, one can click on the country links found on that member’s page on the FATF webpage. The resulting webpage will display links to that country’s AML/CFT legislation.⁷⁸ This page will also include links to the FATF mutual evaluations for that country and any follow-up reports; these reports evaluate the degree to which that country’s legislation is in compliance with the FATF recommendations.⁷⁹

Those interested in reviewing how a particular country’s legislation affects the legal profession might also find it useful to consult the International Bar Association’s Anti-Money Laundering Forum website.⁸⁰ This webpage is the responsibility of the IBA Anti-Money Laundering Legislation Implementation Group (AMLLIG), which describes itself as a specialized Working Group that “tackles the practical difficulties for the legal profession presented by compliance with anti-money laundering legislation in Europe and the rest of the world.”⁸¹ Its goals include educating the legal profession and acting as a resource.⁸²

78. See, e.g., FATF, General Information United States, available at http://www.fatf-gafi.org/document/57/0,3343,en_32250379_32236869_36104505_1_1_1_1,00.html; FATF Members, *supra* note 8.

79. See, e.g., FATF, Third Mutual Evaluation of the U.S., *supra* note 52; FATF Evaluation Handbook, *supra* note 16.

80. See IBA Anti-Money Laundering Forum, <http://www.anti-moneylaundering.org/>.

The International Bar Association “influences the development of international law reform and shapes the future of the legal profession throughout the world.” It has a membership of more than 35,000 individual lawyers and 197 bar associations and law societies spanning all continents. International Bar Association, About the IBA, http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx.

81. See IBA Anti-Money Laundering Forum, About Us, <http://www.anti-moneylaundering.org/AboutAML.aspx#members>.

82. This group has the following objectives:

- Ensure appropriate awareness of the difficulties encountered in preventing and detecting money laundering among legal professionals and their clients throughout the world;

The IBA website contains a vast amount of content related to AML/CFT legislation that affects the legal profession. The easiest way to access this information is by clicking on the flag icon for a particular country⁸³ The IBA has prepared a “mock-up” webpage that includes room to insert the following country-specific information:

- Central Authority For Reporting
- Other Anti-Money Laundering Regulator(S)
- Are Lawyers Covered By Anti-Money Laundering Legislation?
- Has The Third EU Money Laundering Directive Been Implemented? If Not, When Is It Expected To Be Implemented? (This Box Is Only Applicable To EU Member Countries)
- List The Laws Regarding Anti-Money Laundering, Indicating Which Laws Are Applicable To Lawyers.
- Are Visiting Lawyers Subject To Local Laws Regarding Anti-Money Laundering, And, If So, To What Extent?
- List Any Money Laundering Guidance For Lawyers (For Example, Law Society Or Bar Association Guidelines) Currently In Place.
- Is The Law Society/Bar Association Involved In Supervising Or Enforcing Compliance With Anti-Money Laundering Regulations?
- Describe Client Due Diligence Requirements, Including When It Must Be Undertaken By Lawyers.
- Does Your Country Follow A Risk-Based Approach To Client Due Diligence By Lawyers?
- Are There Enhanced Due Diligence Measures For Certain Types Of Clients, For Example, Politically Exposed Persons?
- Are There Simplified Due Diligence Measures For Certain Types Of Clients, For Example, Listed Companies?
- Are Lawyers Permitted To Rely On Third Party Due Diligence? If Yes, Please Describe.
- When Is A Lawyer Under An Obligation To Report Suspicious Transactions?

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- Seek a dialogue with the Financial Action Task Force (FATF), the European Commission, local regulatory bodies, bar associations and others to share information and encourage more co-ordination;
 - Analyse the impact on international law firms and private practitioners of the implementation of the EU Money Laundering Directive and other international initiatives;
 - Monitor all legislative and regulatory anti-money laundering requirements affecting lawyers and their clients worldwide; and
 - Act as a resource for practitioners and academics to promote a better understanding of the practical implications of anti-money laundering regulations.

Id.

83. See, e.g., IBA Anti-Money Laundering Forum, Global Chart, <http://www.anti-moneylaundering.org/globalchart.aspx>.

- Does Attorney/Client Privilege And/Or Duties Of Confidentiality Provide A Defence Or Partial/Total Exception To The Requirement To Report Suspicious Transactions?
- Does Local Law Provide Any Criminal And/Or Civil Indemnity To A Lawyer Who Has Reported A Suspicious Transaction?
- Once A Suspicious Transaction Report Has Been Filed, Is A Lawyer Allowed To Proceed With The Legal Advice/Transaction, And, If So, Must Consent From Authorities Be Obtained First?
- Is There A Tipping-Off Prohibition? If Yes, Please Describe.
- Describe Any Restrictions On Accepting A New Client.
- Are There Ongoing Monitoring Requirements For Existing Clients? If Yes, Please Describe.
- Describe Any Other Ways In Which Lawyers Are Affected By Anti-Money Laundering Legislation.
- Have Lawyers In Your Jurisdiction Been Implicated In Money Laundering, Including Any Type Of Complaint, Arrest Or Prosecution?
- Has The Financial Action Task Force (FATF) Or A FATF-Style Regional Body Conducted A Mutual Evaluation Of This Country, And, If So, What Were The Findings Concerning Lawyers' Compliance With The FATF 40+9 Recommendations?⁸⁴

Although most country entries include most of the information listed above, there are variations that reflect the particular country's AML/CFT legislation.⁸⁵

Appendix B to this article contains the IBA Anti-Money Laundering Forum entry for the United States. There are several important points to note about the "date" listing in a country's summary report. First, the date listed at the top of a country's report reflects the date on which the country summary was prepared and not the date of the most recent news entry for that country. For example, as Appendix B illustrates, the U.S. entry states that it was "last updated 21/02/2007," but the U.S. page includes a link to a February 5, 2010 news item. The second important point is that while the summaries presumably were accurate as of the date listed, the information may have changed as a result of news events that occurred subsequent to the preparation of the summary. For example, the Kenya summary, which was prepared May 13, 2008, states that lawyers are not covered by anti-money laundering legislation.⁸⁶ The "news" section at the bottom of the IBA webpage,

84. *See, e.g.*, IBA Anti-Money Laundering Forum, Mock-up Page, <http://www.anti-moneylaundering.org/Document/Default.aspx?DocumentUId=D477100F-95A7-4A22-89EA-F5371C55D53B>.

85. *Compare, e.g.*, IBA Anti-Money Laundering Forum, United States of America, http://www.anti-moneylaundering.org/northamerica/United_States_of_America.aspx [hereinafter IBA Forum: USA] with IBA Anti-Money Laundering Forum, Denmark, <http://www.anti-moneylaundering.org/europe/denmark.aspx>.

86. IBA Anti-Money Laundering Forum, Kenya, <http://www.anti-moneylaundering.org/africa/Kenya.aspx>.

however, notes that Kenya has new AML legislation as of January 5, 2010.⁸⁷ When one clicks on that link, one learns that this new AML legislation applies to lawyers.⁸⁸ Thus, one would not have an accurate picture of the Kenyan situation unless one read both the summary and the news section. Accordingly, when reviewing the IBA's country webpages, one must be mindful of the IBA's cautionary note and must carefully read both the summary and the news items.⁸⁹

The second way in which the IBA Anti-Money Laundering Forum provides information is through a "news" section. Since September 2008, there have been more than one hundred news entries about the legal profession and money laundering.⁹⁰ To locate these news stories, one can select the "Reading Room" tab on the main menu, and then select the "news" tab, which lists the stories chronologically.⁹¹

There is a third way to access information about the different countries' AML/CFT legislation. The IBA website includes a global chart and eight regional charts that summarize the AML legislation in each country. Although the IBA has cautioned its website users that there may be inaccuracies in its charts and that users should consult the underlying data,⁹² these charts provide a very useful "snapshot"

87. *Id.* See also Gathii, *supra* note 6 (describing Kenya's AML/CFT legislation applicable to lawyers).

88. IBA Anti-Money Laundering Forum, 05/01/2010- Kenya Has New AML Legislation, http://www.anti-moneylaundering.org/News_2010.aspx#05012010. This news report states:

The Proceeds of Crime and Anti-Money Laundering Act includes lawyers in the list of "designated non-financial businesses or professions." Consequently, lawyers have a duty to report and monitor suspected money-laundering activities, verify clients' identity, keep records of all transactions undertaken on behalf of clients and establish internal reporting and compliance procedures.

89. The IBA's Global Chart (and each of its regional charts) includes a note that provides a caution regarding this date point, stating: "3. Dates in brackets show the last update of the template. Please be aware that specific news might be reported after this date and they will appear at the bottom of the country page under the "Relevant News" section." See, e.g., Global Chart, *infra* note 93.

90. See IBA Anti-Money Laundering Forum, List of Updates, http://www.anti-moneylaundering.org/List_of_updates.aspx (includes more than 113 news reports since October 2008 about the legal profession and money laundering; these are organized by country and date). These entries come from all continents (except Antarctica). This list includes two entries for the U.S.: Feb. 5, 2010 (A Report from the US Senate's Permanent Subcommittee on Investigations brings back the debate on lawyers and money laundering); Dec. 18, 2009 (Maryland lawyer convicted of money laundering). See http://www.anti-moneylaundering.org/List_of_updates.aspx.

91. See IBA Anti-Money Laundering Forum, Reading Room: News, <http://www.anti-moneylaundering.org/news.aspx>. Alternatively, one can access the "news" stories for a particular country by consulting the country summary described in the prior paragraph. See *supra* notes 85-89 and accompanying text for a discussion of the IBA's country summaries. See Appendix B for an example of a news story headline.

92. The notes to these IBA's charts urge the reader to independently verify the information they contain. These notes state:

This chart has been adapted from each national contributor's submission. The classifications followed in this chart may not correctly represent the status or application of the

of the state of global AML legislation applicable to lawyers. To illustrate what the IBA's charts look like, Table 1 includes the first IBA country listed on the global chart (Afghanistan) and the entry for the United States.⁹³

Table 2, prepared by the author, summarizes the information found in the IBA charts. Table 2 shows how many jurisdictions were listed as having AML legislation directly applicable to lawyers; the number that had legislation indirectly applicable to lawyers; the number that had no legislation; and the jurisdictions from which full information had not yet been obtained. As Table 2 illustrates, the IBA has concluded that more than 50% of the jurisdictions it surveyed have AML

Table 1: Excerpts From the Charts Found On the IBA Anti-Money Laundering Forum (As of May 24, 2010)

	AML Legislation Directly Applicable to Lawyers	AML Legislation Indirectly Applicable to Lawyers ^[1]	No or Limited AML Legislation in Place ^[2]	Full Country Information not Available yet
Afghanistan (27/02/2007)	•			
United States of America (21/02/2007)		•		

Table Notes:

1. This involves various scenarios, such as:
 1. Lawyers being subject to universal criminal liability;
 2. AML legislation applicable to specific lawyers' roles only, eg, when acting as notary public or as a financial or corporate broker;
 3. Lawyers being subject to AML disciplinary rules designed specifically for legal professionals and administered by regulatory bodies.
 2. This includes cases where there is AML legislation and general criminal law in place, but they are not directly or indirectly applicable to legal professionals.
- [Table 1 omits notes 3-5 found on the IBA global chart.]

AML legislation in each jurisdiction for which the IBA Anti-Money Laundering Legislation Implementation Group takes no responsibility. We advise you to consult each country's page directly and to verify the information through your own local research and counsel.

and

Dates in brackets show the last update of the template. Please be aware that specific news might be reported after this date and they will appear at the bottom of the country page under the "Relevant News" section.

See, e.g., IBA Anti-Money Laundering Forum, Global Chart, available at <http://www.anti-moneylaundering.org/globalchart.aspx>, at nn. 3-4 [hereinafter Global Chart]. See also the IBA regional charts, *infra* notes 95-104.

93. See IBA Anti-Money Laundering Forum, Global Chart, <http://www.anti-moneylaundering.org/globalchart.aspx>.

legislation that is directly applicable to lawyers. In addition to providing the overall totals, Table 2 presents the total numbers in each category for each of the eight regions listed on the IBA Anti-Money Laundering Forum.⁹⁴

Table 2: Terry Synthesis of The Data Found on The IBA Anti-Money Laundering Forum (As of May 24, 2010)

	AML Legislation Directly Applicable to Lawyers	AML Legislation Indirectly Applicable to Lawyers ^[1]	No or Limited AML Legislation in Place ^[2]	Full Country Information not Available yet
Global Total (205)⁹⁵	105	33	10	57
	TOTAL BY	REGION	TOTAL BY	REGION
Regional Total (of 207)⁹⁶	106	33	10	58
Africa (52) ⁹⁷	18	2	4	28

94. The IBA Anti-Money Laundering Forum includes a global chart, organized alphabetically by country, *see supra* note 93, and eight separate charts for different regions of the world. *See infra* notes 95-106. The total numbers of countries in the global chart and the regional charts are different because two countries (Afghanistan and Pakistan) are intentionally included in both the Asia and Middle East regional charts. Since Afghanistan has directly applicable AML laws and was counted twice in the regional charts, the regional total is one more than the global total. Since Pakistan was counted twice in the regional charts and did not have full country information yet, the “not available yet” column in the regional charts is larger by one than the total in the global chart.

Even if the IBA’s charts are not 100% accurate, they are extremely useful for obtaining an approximate “snapshot” of the global status and regional status of AML legislation applicable to lawyers.

95. *See* IBA Anti-Money Laundering Forum, Global Chart, available at <http://www.anti-money-laundering.org/globalchart.aspx>.

96. *See supra* note 94 (explaining that the regional charts have two more countries than the global chart because Afghanistan and Pakistan are included in both the Asia chart and the Middle East chart).

97. *See* IBA Anti-Money Laundering Forum, Africa, available at <http://www.anti-money-laundering.org/Africa.aspx>. The eighteen African countries that are listed as having **AML directly applicable to lawyers** are: 1) Algeria; 2) Benin; 3) Burkina Faso; 4) Cameroon; 5) Central African Republic; 6) Chad; 7) Gabon; 8) Guinea-Bissau; 9) Ivory Coast; 10) Malawi; 11) Mauritania; 12) Mauritius; 13) Nigeria; 14) Senegal; 15) Seychelles; 16) South Africa; 17) Tunisia; and 18) Zimbabwe. The two African countries that are listed as having **AML indirectly applicable to lawyers** are: 1) Mozambique; and 2) Togo. The four African countries that are listed as having **no or limited AML laws** in place are: 1) Angola; 2) Botswana; 3) Equatorial Guinea; and 4) Kenya. The twenty-eight African countries for which **full information is not yet available** include: 1) Burundi; 2) Cape Verde; 3) Comoros; 4) Congo, Democratic Republic; 5) Congo, Republic of; 6) Djibouti; 7) Eritrea; 8) Ethiopia; 9) Gambia; 10) Ghana; 11) Guinea; 12) Lesotho; 13) Liberia; 14) Libya; 15) Madagascar; 16) Mali; 17) Morocco; 18) Namibia; 19) Niger; 20) Rwanda; 21) Sao Tome &

	AML Legislation Directly Applicable to Lawyers	AML Legislation Indirectly Applicable to Lawyers ⁽¹⁾	No or Lim- ited AML Legislation in Place ⁽²⁾	Full Country Information not Available yet
Asia (29) ⁹⁸	12	6	3	8
Caribbean (19) ⁹⁹	11	3	0	5
Europe (52) ¹⁰⁰	49	1	1	1
Middle East (16) ¹⁰¹	10	2	1	3

Principe; 22) Sierra Leone; 23) Somalia; 24) St. Helena; 25) Swaziland; 26) Tanzania; 27) Uganda; and 28) Zambia. *Id.*

98. See IBA Anti-Money Laundering Forum, Asia, available at <http://www.anti-money-laundering.org/asiapacific/asia.aspx>. The twelve Asian countries that are listed as having AML **directly applicable** to lawyers are: 1) Afghanistan; 2) Brunei; 3) Burma/Myanmar; 4) Cambodia; 5) Hong Kong; 6) Japan; 7) Kazakhstan; 8) Macau; 9) Malaysia; 10) Singapore; 11) Sri Lanka; and 12) Vietnam. The six Asian countries that are listed as having AML **indirectly applicable** to lawyers are: 1) Bangladesh; 2) China; 3) Kyrgyz Republic; 4) Taiwan; 5) Thailand; and 6) Uzbekistan. The three Asian countries that are listed as **having no or limited AML laws** in place are: 1) India; 2) South Korea; and 3) Tajikistan. The eight Asian countries for which **full information is not yet available** include: 1) Azerbaijan; 2) Korea, Democratic People's Republic of; 3) Laos; 4) Mongolia; 5) Nepal; 6) Pakistan; 7) Philippines; and 8) Turkmenistan. *Id.* See also *supra* note 94 (Afghanistan and Pakistan are listed in both the Asia and Middle East regional charts).

99. See IBA Anti-Money Laundering Forum, Caribbean, available at <http://www.anti-money-laundering.org/Caribbean.aspx>. The eleven Caribbean countries that are listed as having AML **directly applicable** to lawyers are: 1) Anguilla; 2) Aruba; 3) Bahamas; 4) Barbados; 5) Bermuda; 6) British Virgin Islands; 7) Cayman Islands; 8) Grenada; 9) St. Lucia; 10) St. Vincent and the Grenadines; and 11) Trinidad and Tobago. The three Caribbean countries that are listed as having AML **indirectly applicable** to lawyers are: 1) Dominica; 2) Dominican Republic; and 3) Jamaica. The five Caribbean countries for which **full information is not yet available** include: 1) Antigua and Barbuda; 2) Cuba; 3) Haiti; 4) St. Kitts and Nevis; and 5) St. Maarten. *Id.*

100. See IBA Anti-Money Laundering Forum, Europe, available at <http://www.anti-money-laundering.org/europe/Europe.aspx>. The forty-nine European jurisdictions that are listed as having AML **directly applicable** to lawyers are: 1) Albania; 2) Andorra; 3) Armenia; 4) Austria; 5) Belarus; 6) Belgium; 7) Bosnia and Herzegovina; 8) Bulgaria; 9) Croatia; 10) Cyprus; 11) Czech Republic; 12) Denmark; 13) Estonia; 14) Finland; 15) France; 16) Germany; 17) Gibraltar; 18) Greece; 19) Guernsey; 20) Hungary; 21) Iceland ; 22) Ireland ; 23) Isle of Man; 24) Italy; 25) Jersey; 26) Kosovo; 27) Latvia; 28) Liechtenstein ; 29) Lithuania; 30) Luxembourg; 31) Macedonia; 32) Malta; 33) Moldova; 34) Monaco; 35) Montenegro; 36) Netherlands; 37) Norway; 38) Poland; 39) Portugal; 40) Romania; 41) Russia; 42) Serbia; 43) Slovakia; 44) Slovenia; 45) Spain; 46) Sweden; 47) Switzerland; 48) Turkey ; and 49) United Kingdom. The Ukraine is the only European country that is listed as having AML **indirectly applicable** to lawyers. The only European country that is listed as **no or limited AML legislation** in place is Georgia. San Marino is the only European jurisdiction for which **full information is not yet available**. *Id.*

101. See IBA Anti-Money Laundering Forum, Middle East, available at <http://www.anti-moneylaundering.org/middleeast/middleeast.aspx>. The ten Middle East jurisdictions that are listed as having AML **directly applicable** to lawyers are: 1) Afghanistan; 2) Bahrain; 3) Iran; 4) Israel; 5) Kuwait; 6) Oman; 7) Qatar; 8) Saudi Arabia; 9) Syria; and 10) United Arab Emirates. The

	AML Legislation Directly Applicable to Lawyers	AML Legislation Indirectly Applicable to Lawyers ^[1]	No or Limited AML Legislation in Place ^[2]	Full Country Information not Available yet
North & Central America (10) ¹⁰²	1	8	1	0
Oceania (17) ¹⁰³	5	0	0	12
South America (12) ¹⁰⁴	0	11	0	1

According to the data from the IBA's global chart,¹⁰⁵ as of May 24, 2010, out of two hundred five jurisdictions, more than 50% (105) had AML legislation directly applicable to lawyers, with an additional 16% (33) having legislation indirectly applicable to lawyers, for a total of more than two-thirds of total jurisdiction that had AML legislation that was directly or indirectly applicable to lawyers. If one excludes the jurisdictions for which full country information was not yet available, then more than 70% of reporting jurisdictions had AML legislation that was directly applicable to lawyers and more than 93% of reporting jurisdictions had AML jurisdiction that was directly or indirectly applicable to lawyers.¹⁰⁶

two Middle East jurisdictions that are listed as having AML **indirectly applicable** to lawyers are: 1) Egypt; and 2) the Republic of Yemen. Jordan is the only Middle East country that is listed as having **no or limited AML laws** in place. The chart indicates that the IBA has **not yet obtained full information** for 1) Iraq; 2) Lebanon; or 3) Pakistan. *Id.*

102. See IBA Anti-Money Laundering Forum, North & Central America, available at http://www.anti-moneylaundering.org/north_and_central_america.aspx. Costa Rica is the only North or Central American country that is listed as having AML **directly applicable** to lawyers. The eight countries listed as having AML legislation **indirectly applicable** to lawyers are: 1) Canada; 2) El Salvador; 3) Guatemala; 4) Honduras; 5) Mexico; 6) Nicaragua; 7) Panama; and 8) United States of America. Belize is listed as having **no or limited AML legislation** in place. *Id.*

103. See IBA Anti-Money Laundering Forum, Oceania, available at <http://www.anti-moneylaundering.org/asiapacific/oceania.aspx>. The five Oceania countries that are listed as having AML **directly applicable** to lawyers are: 1) Australia; 2) Cook Islands; 3) Fiji; 4) New Zealand; and 5) Vanuatu. The twelve Oceania countries for which **full information is not yet available** include: 1) Indonesia; 2) Kiribati; 3) Marshall Islands; 4) Micronesia; 5) Nauru; 6) Palau; 7) Papua New Guinea; 8) Samoa; 9) Solomon Islands; 10) Timor-Leste; 11) Tonga; and 12) Tuvalu. *Id.*

104. See IBA Anti-Money Laundering Forum, South America, available at <http://www.anti-moneylaundering.org/Southamerica.aspx>. The eleven South American countries that are listed as having AML **indirectly applicable** to lawyers are: 1) Argentina; 2) Bolivia; 3) Brazil; 4) Chile; 5) Colombia; 6) Ecuador; 7) Guyana; 8) Paraguay; 9) Peru; 10) Uruguay; and 11) Venezuela. The one South American country for which **full information is not yet available** is Suriname. *Id.*

105. Although the numbers in the global chart differ slightly from the regional chart numbers cited in this paragraph, the percentage figures cited are accurate for both the IBA regional charts and the IBA global chart. As noted *supra* note 94, there is a slight discrepancy in the total number of countries listed because two countries are listed twice on the regional charts.

106. See Global Chart, *supra* note 93.

It is beyond the scope of this article to examine the accuracy of the IBA's data or to provide a comprehensive look at the different ways in which AML/CFT legislation has affected lawyers around the world.¹⁰⁷ If the IBA data is even close to accurate, however, then it appears that globally, AML/CFT legislation has had a significant impact on lawyer regulation.¹⁰⁸ This is noteworthy given the relatively recent appearance of the FATF 40+9 Recommendations. In order to provide a sense of the FATF's impact, this article will briefly highlight governmental action in three common-law English-speaking countries and will compare those developments to the situation in the United States.¹⁰⁹

107. Although there already are a number of articles about the FATF and its recommendations, many of these articles are country-specific. The IBA's Anti-Money Laundering Forum includes a webpage that has links to a number of books and articles on this and related topics. See IBA Anti-Money Laundering Forum, AML Resources, <http://www.anti-moneylaundering.org/AMLResources.aspx>. As of March 1, 2010, this webpage featured three books, two websites, and sixteen articles that have been written since 2005.

Although this list includes some U.S. articles, there are relevant U.S. articles that are not on this IBA list. See, e.g., Danielle Jasmin Kirby, *The European Union's Gatekeeper Initiative: The European Union Enlists Lawyers In The Fight Against Money Laundering And Terrorist Financing*, 37 HOFSTRA L. REV. 261 (2008); Bruce Zagaris, *Gatekeepers Initiative: Lawyers and the Bar Ignore It at Their Peril*, 23 C. J. 28, 30 (2008); John W. Brooks & Roberta Vassallo, *Attorney Cathy's Continuing Quandary, or, Can the Gatekeeper Initiative Be Reconciled with the Multi-Jurisdictional Practice of Law?*, 41 I' L. 59, 59-60 (2007) (providing an overview of the Gatekeeper Initiative); Henry Christensen III, *Application to Lawyers of Current Anti-Money Laundering Rules Adopted by the Financial Action Task Force on Money Laundering (FATF) and the United States Government: Recommendations of Good Practices for ACTEC Fellows*, 31 ACTEC J. 302, 309 (2006); Aaron R. Hutman, Matthew J. Herrington, and Edward J. Krauland, *Money Laundering Enforcement and Policy*, 39 I' L. 649 (2005); Edward J. Krauland & Benjamin Coats, *International Regulation of the Legal Profession: An Impending Possibility?*, GPS M., Mar. 2005, at 38; Edward J. Krauland & Aaron R. Hutman, *Money Laundering Enforcement and Policy*, 38 INT'L LAW. 509, 518 (2003); Nicole M. Healy & Judith A. Lee, *Ad Hoc Task Force on Professional Responsibilities Regarding Money Laundering: PATRIOT Act and Gatekeeper Update*, 37 INT'L LAW. 631, 635 (2003); Patricia Shaughnessy, *The New EU Money-Laundering Directive: Lawyers as Gate-Keepers and Whistle-Blowers*, 34 LAW & POL'Y INT'L BU. 25, 26 (2002); Kevin L. Shepherd, *USA PATRIOT Act and the Gatekeeper Initiative: Surprising Implications for Transactional Lawyers*, P. & P., Sept.-Oct. 2002, at 26, 29.

For U.S. journal articles that don't focus on lawyers specifically, see Jennifer Lynn Bell, *Terrorist Abuse of Non-Profits and Charities: A Proactive Approach to Preventing Terrorist Financing*, 17 K. J.L. & P. P' 450, 456 (2008); Valsamis Mitsilegas & Bill Gilmore, *The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards*, 56 INT'L & COMP. L.Q. 119 (2007); Andrew de Lotbinière McDougall, *International Arbitration and Money Laundering*, 20 AM. U. INT'L L. REV. 1021, 1029-30 (2005) (discussing origins of FATF); George A. Lyden, *Note: The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift*, 8 FORDHAM J. CORP. & FIN. L. 201 (2003).

108. See *supra* note 92 setting forth the IBA's disclaimers about its data. Despite any possible inaccuracies or vagaries due to required judgment calls, the IBA's charts provide a useful "snapshot" of whether countries have adopted AML/CFL legislation applicable to lawyers.

109. The other articles in this Symposium provide additional detail. See *supra* notes 2, 5 and 6.

The United Kingdom (UK) has one of the most aggressive AML regimes in terms of what it requires from its lawyers. Its AML/CFT legislation implemented the EU's money laundering directives, which in turn were based in large part on the FATF recommendations.¹¹⁰ The broad reach of the UK legislation is apparent if one reviews the most recent note about money laundering prepared by the Law Society of England and Wales,¹¹¹ which received governmental approval in October 2009,¹¹² or the Law Society's December 2009 submission to the government in response to its call for evidence about the impact of the UK AML legislation.¹¹³ In 2009, solicitors were the sixth largest group of reporters, behind banks, building societies, money transmission providers, cheque cashiers and accountants.¹¹⁴ Solicitors had the second highest number of consent requests in 2009 (3,040) and the third highest number of reports (11) about suspected terrorist financing.¹¹⁵ The Law Society prepared a chart that provided a snapshot of the suspicious activity reports or SARS experience in the UK:¹¹⁶

110. See generally HM Treasury, Money Laundering Regulations 2007, http://www.hm-treasury.gov.uk/consult_moneylaundering_2007.htm; Tyre, *supra* note 2, at Part 2(I)(i) (describing the UK as having "been at the forefront in enacting anti-money laundering legislation" and having gone "further in the 2002 Act than it was required to do by the terms of the [EU] First and Second [anti money laundering] Directives. (This is colloquially known as "gold-plating" the Directives.)" For links to the UK legislation, see the Law Society of England and Wales, Legislation, <http://www.lawsociety.org.uk/newsandevents/topics/aml/legislation.page> But see Adrienne Margolis, *Follow the Money, Recovering Ill-Gotten Gains*, IBA NEWS 29 (Oct. 2009)(noting that a recent Transparency International report is a timely reminder of the difficulty facing the many UK agencies attempting to recover proceeds of crime).

111. See Law Society Oct. 2009 Practice Note, *supra* note 47.

112. See Law Society of England and Wales, *HM Treasury approves Law Society AML practice note*, <http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=423685>.

113. See, e.g., Law Society of England and Wales, *The Costs And Benefits Of Anti-Money Laundering Compliance For Solicitors: Response By The Law Society Of England And Wales To The Call For Evidence In The Review Of The Money Laundering Regulations 2007* (December 2009), available at <http://www.lawsociety.org.uk/new/documents/aml/treasuryreviewsdec09.pdf> (48 page document included lengthy analysis and recommended changes to the existing legislation)[hereinafter Dec. 2009 Consultation Response].

This document was in response to the government's call for evidence. See HM Treasury, Review of the Money Laundering Regulations 2007- March 11, 2010, http://www.hm-treasury.gov.uk/fin_crime_review.htm (page announces the review of the 2007 money laundering legislation and includes links to the October 2009 call for evidence and the responses the government received) [hereinafter UK Call for Evidence]; see also HM Treasury, 09 October 2009 Press Notice: HM Treasury announces call for evidence, to inform Review of Money Laundering Regulations 2007 http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/press_91_09.htm [UK Call for Evidence Press Release].

114. See also Law Society of England and Wales, *SARs filed by solicitors fall for a third year* (Dec. 15, 2009), available at <http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=424873>.

115. *Id.*

116. See Dec. 2009 Consultation Response, *supra* note 113, at 28 (footnotes omitted).

Year	Estimate of ML threat	No of SARs	No of SARs from Solicitors	Monies Restrained	Monies Forfeited	Monies confiscated	Monies recovered
02/03	N/A	99,933 ^B	3,718 ^B	N/A	N/A	N/A	N/A
03/04	N/A	142,638 ^B	9,576 ^B	N/A	N/A	N/A	£54m ^F
04/05	N/A	195,792 ^B	10,525 ^B	N/A	£22.4m ^B	£129m ^B	£84m ^F
05/06	N/A	213,202 ^B	7,296 ^B	N/A	£31.4m ^B	£127.7m ^B	£97m ^F
06/07	£15b ^A	220,484 ^C	11,300 ^C	N/A	N/A	N/A	£125m ^F
07/08	£15b ^A	210,524 ^C	6,460 ^C	N/A	N/A	N/A	£135m ^F
08/09	£15b ^A	228,834 ^D	4,772 ^D	£254m ^E	£7.2m ^E	N/A	N/A

(This chart was based on UK government reports about the number of SARs filed.¹¹⁷)

The Law Society's December 2009 response to the government's Call for Evidence included estimated costs to solicitors of the UK's AML/CFT legislation:

In 2009, a further survey was conducted with top 100 firms, seeking to establish more of the easily quantifiable costs. We selected this demographic as they are more likely to have a staff member dedicated to compliance generally, if not dedicated solely to antimoney laundering. We received 21 responses, from firms ranging in size from 25—50 partners, to over 300 partners. These firms were generally in a better position to provide clearer estimates. However, even within this group some could not provide clear estimates because the costs had been absorbed or were combined with other compliance costs. Key headline results for the 2009 survey:

- Staff dedicated to AML compliance
 - 4 [Full time equivalent staff] to 16 [full time equivalent staff]
 - The salary bill for these staff ranged from £1,000 to £800,000
- Costs for risk assessments and manuals
 - The firms took a mixture of approaches in terms of whether these were prepared in-house or purchased from external consultants
 - An internal risk assessment ranged in cost from £1,000 to £90,000, while paying a consultant for such a risk assessment ranged in cost from £3,000 to £10,000.

117. See, e.g., UK Serious Organized Crime Agency [hereinafter SOCA], The Suspicious Activity Reports Regime Annual Report 2009, available at http://www.soca.gov.uk/about-soca/library/doc_download/93-the-suspicious-activity-reports-regime-annual-report-2009.pdf. See generally SOCA, Library, available at <http://www.soca.gov.uk/about-soca/library>.

- The creation of a policy manual internally cost between £1,000 and £80,000, while paying a consultant to produce such a manual cost between £3,000 and £10,000.
- Costs to obtain CDD [client due diligence]
 - The number of e-verification products used to obtain CDD ranged from 0 to 7
 - Set up costs in the last 12 months ranged from £1,000 to £250,000. Some firms did not incur this cost as they already had e-verification providers in place prior to 2007.
 - Annual costs for those with e-verification products ranged from £1,000 to £150,000 with individual searches or reports costing up to £20,000 each.
- Training
 - Firms used a mixture of approaches between purchasing training and producing it in-house.
 - Annual costs for training ranged from £600 to £100,000
- Making disclosures
 - cost estimates for a year ranged from £4,000 to £300,000 in lost fee earner and MLRO chargeable time
- Total expenditure on easily quantifiable AML costs
 - for each of the firms this ranged from £26,800 to £1,035,000 per year
 - for all 21 firms it was almost £6.5 million.¹¹⁸

As this data shows, the UK's AML legislation has had a significant impact on solicitors. A UK Lexis/Nexis study reported that one in four firms had difficulties implementing the new regulations.¹¹⁹

The UK government has received significant pushback from some of the "gatekeepers" subject to its AML legislation. The responses to the call for evidence are voluminous and often critical of the existing legislation.¹²⁰ The Law Society of England and Wales' December 2009 response to the call for evidence illustrates the degree to which this legislation remains controversial. Among other things, the Law Society recommended twenty specific changes to the existing legislation.¹²¹ It suggested that the burden of the current requirements was not justified by the benefits, citing the data it had produced about the monies restrained, forfeited,

118. See Law Society Dec. 2009 Response, *supra* note 113, at 26-27.

119. See Mark, *supra* note 46, at n. 12 (citing LexisNexis, *Small Firms Struggle with Money Laundering Regulations Six Months After Implementation*, Lexis Nexis UK (18 June 2008)).

120. See UK Call for Evidence and UK Press Notice, *supra* note 114. The comments are organized alphabetically by commenter and divided into six parts (A-B, C-E, etc). There is no table of contents. Together, these six documents contained more than 180 MB of information.

121. See Dec. 2009 Consultation Response, *supra* note 113, at 44-46.

confiscated and recovered, and the number of “Suspicious Activity Reports (SARs).”¹²² Colin Tyre’s Symposium article provides additional information about the UK’s money laundering efforts.¹²³ As his article explains, the UK’s money laundering legislation implemented the EU’s money laundering directives, which in turn were based in large part on the FATF recommendations.¹²⁴

Although not all EU countries have implemented the EU money laundering directives as stringently as the UK, the EU directives have had a dramatic impact on lawyers throughout Europe. This fact is documented in Colin Tyre’s article, in other articles,¹²⁵ and in the European Commission’s own reports.¹²⁶ These EU directives have led bar associations to adopt a number of resolutions opposing implementation of certain aspects of the FATF recommendations.¹²⁷ During 2010, Deloitte will conduct a study for the European Commission, scheduled to be completed in October 2010, that will “undertake a specific examination of the impact of the [EU] AML Directive on the independent legal professions . . .”; this study

122. *Id.* at 28.

123. *See* Tyre, *supra* note 2.

124. *See* Tyre, *supra* note 2, at Part 2.

The FATF’s recommendations have had an impact beyond inspiring the EU’s money-laundering directives. They are indirectly responsible for the first veto by the European Parliament under the 2010 Lisbon Treaty. To briefly recap, on February 11, 2010, the European Parliament passed a resolution in which it withheld its consent to the interim agreement between the EU and the USA on bank data transfers via the SWIFT network. *See* European Parliament, SWIFT VOTE: European Parliament votes down agreement with the US, http://www.europarl.europa.eu/news/public/focus_page/008-68312-039-02-07-901-20100128FCS68186-08-02-2010-2010/default_p001c009_en.htm The “SWIFT network” is the acronym for the Society for Worldwide Interbank Financial Telecommunications (SWIFT) which transmits financial data. *See* Email from Sara Poli, Fulbright Scholar, to author (March 4, 2010). The FATF recommendations are part of the reason why the SWIFT agreement exists. *See* European Parliament, Resolution on SWIFT, the PNR agreement and the transatlantic dialogue on these issues, SEC (2006) 1793 (Dec. 19, 2006), O.J. C 287 E/350 (Nov. 29, 2007) at para. 19-21. Several years ago, the SWIFT agreement ran into difficulties because of differences between U.S. and EU data protection laws. The U.S. Treasury and the EU Council and Commission negotiated a new interim SWIFT agreement in 2009, but the European Parliament thought that the views it expressed in its 2006 resolution had not adequately been addressed in the interim agreement and exercised its veto power for the first time. Thus the EU Parliament’s first veto is directly related to the FATF.

125. *See, e.g.*, Kirby, *supra* note 107.

126. European Commission, *Commission Staff Working Document: The Application to the Legal Profession of Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering*, Parl. Eur. Doc. (SEC 1793) (Dec. 21, 2006), available at http://www.cbce.eu/fileadmin/user_upload/NTCdocument/commission_report_la1_1183722383.pdf.

127. In addition to the resolutions cited elsewhere in this article, after the EU issued a draft money laundering directive, the Union Internationale des Avocats adopted a resolution urging them to uphold the principles of professional confidentiality. *See* Union Internationale des Avocats, Resolution on Professional Secrecy in the European Union—Money Laundering (Sept. 30, 2000), available at <http://www.uianet.org/documents/quia/resolutions/Professional%20Confidentiality.pdf>.

is being done to fulfill the legislative goal of regular review of the impact of the directive.¹²⁸

Australia provides another example of an English-speaking common-law country faced with the issue of how to apply the FATF 40+9 Recommendations to the legal profession. In 2006, the Australian federal government adopted the Anti-Money Laundering and Counter-Terrorism Financing Act directed towards the financial sector, the gambling sector, and bullion dealers;¹²⁹ the Act was amended in 2007.¹³⁰ In 2007, the Australian government began working on stage two of the legislation, which includes the legal profession;¹³¹ the government circulated draft legislation in 2008, but it has not yet been adopted.¹³² The government wants its Stage 2 legislation to bring Australia into full compliance with FATF standards, which would require inclusion of the legal profession.¹³³

The Law Council of Australia has reported that the forthcoming legislation “may involve a risk-based approach to AML/CTF; initial client identification and ongoing client due diligence; record keeping; auditing; employee training programs; the nomination of an anti-money laundering compliance officer (AMLCO); and suspicious matter reporting.”¹³⁴ It concluded that “such a regime will place a significant compliance burden on legal practitioners.”¹³⁵ Some of the issues currently of concern to the Law Council include how any AML/CTF reporting obligations will impact client confidentiality and privilege and who will regulate AML/CTF obligations for legal practitioners.¹³⁶ The Legal Services Commissioner in

128. See Email from Peter McNamee, CCBE Senior Legal Advisor, to author (May 10, 2010) (on file with author); see also *Money Laundering*, 25 CCBE-Info 9 (June 2010), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/newsletter_25_enpdf1_1277278385.pdf.

129. See Law Council of Australia, *Anti-Money Laundering Guide for Legal Practitioners 5* (Dec. 2009), available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8FCE74BF-1E4F-17FA-D2A2-C549BD6656B4&siteName=lca [hereinafter Australian Dec. 2009 AML Guide for Legal Practitioners]; Law Council of Australia, *Tranche One Legislation and Rules*, available at http://www.lawcouncil.asn.au/programs/national-policy/aml/tranche_one.cfm [hereinafter *Tranche One*].

130. See the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2007* (Cth), which amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; Mark, *supra* note 46, at n. 4.

131. Australian Dec. 2009 AML Guide for Legal Practitioners, *supra* note 129, at 5 (“The aim of the reforms is **to bring Australia into compliance** with the standards published by the Financial Action Task Force (FATF), an international inter-governmental body that develops and monitors policies to combat money laundering and terrorist financing.”)(emphasis added); Law Council of Australia, *Tranche Two Reforms and Consultation*, available at http://www.lawcouncil.asn.au/programs/national-policy/aml/tranche_two.cfm [hereinafter *Tranche Two*]. See also FATF, *Summary of the Third Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism Australia* (Oct. 14, 2005), <http://www.fatf-gafi.org/dataoecd/22/38/35509034.pdf>.

132. See Mark, *supra* note 46, at n.5 and accompanying text.

133. Australian Dec. 2009 AML Guide for Legal Practitioners, *supra* note 129, at 5.

134. *Id.*

135. *Id.*

136. *Id.*

New South Wales has expressed concern about how the FATF recommendations can be reconciled with lawyers' duties of confidentiality.¹³⁷ He has also expressed concerns about whether the costs of the proposed legislation outweigh its benefits.¹³⁸

Canada is another English-speaking common law country that has extensive AML/CFT legislation. The Financial Transactions and Reports Analysis Centre of Canada or FINTRAC is the Canadian entity responsible for enforcing and monitoring the AML legislation.¹³⁹ Its webpage shows the substantial activity in Canada to enforce the "Proceeds of Crime" act.¹⁴⁰ FINTRAC, like similar organizations, publishes annual reports that include reporting statistics and has published, *inter alia*, "Advisories" and "Typologies and Trends Reports."¹⁴¹

The Canadian government, like the UK and Australian governments, has faced issues related to the application of money laundering legislation to lawyers. Unlike the UK and Australia, however, these issues already have led to extensive litigation in which the legal profession was largely successful. This litigation history is set forth in the articles by Paul Paton and Ronald MacDonald and in a "Chronology" that was jointly prepared by the Federation of Law Societies of Canada and the Canadian Bar Association.¹⁴²

As these resources explain, after the Canadian government enacted AML legislation directed towards lawyers that included suspicious transaction reporting, law societies across Canada challenged this legislation.¹⁴³ This litigation was settled in 2003 when the Canadian government agreed "to repeal controversial parts of regulations implementing the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, parts that would have seriously eroded the right of Canadians to independent counsel and to confidentiality when dealing with their lawyers."¹⁴⁴

137. See Mark, *supra* note 46, at n. 13-14 and accompanying text.

138. *Id.* at Ch. 3, pp. 9-10. See *supra* notes 46 and 49 for excerpts of his remarks.

139. See Financial Transactions and Reports Analysis Centre of Canada [FINTRAC], Home, available at <http://www.fintrac-canafe.gc.ca/intro-eng.asp>.

140. *Id.*

141. FINTRAC, Publications, available at <http://www.fintrac-canafe.gc.ca/publications/pub-eng.asp>.

142. See Federation of Law Societies of Canada and Canadian Bar Association, Money-Laundering Chronology of Events (April 2003), available at http://www.abanet.org/crimjust/taskforce/canada/money_laundering.pdf [hereinafter Canada Chronology]. The Federation of Law Societies of Canada (FLSC) is an umbrella organization for the "regulatory" bodies in Canada, which are the law societies. The Canadian Bar Association or CBA is the "representational" body for the legal profession.

143. See Canada Chronology, *supra* note 142.

144. *Id.* at 17. See also Canada Gazette Part II, EXTRA Vol. 137, No. 2, SOR/2003-102 (March 20, 2003), Regulations Amending Certain Regulations Made under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act:

As a result of the litigation with the Federation and the additional issues posed by the Lavallee decision, the Government has conducted a thorough review of the provisions of

The settlement further provided that lawyers would be exempt from the legislation and any new regulations, unless the parties agreed otherwise.¹⁴⁵

After this litigation was settled, the Canadian law societies took several steps to prevent lawyers from assisting in money laundering or terrorism financing, including drafting a “no cash” rule and a client verification rule.¹⁴⁶ Whether these steps have satisfied the Canadian government is not entirely clear. At the time the Canadian government repealed the Proceeds of Crime Act as it applied to lawyers, it stated that it believed it was important that Canada’s AML/CFT regime cover all entities that act as financial intermediaries, including lawyers.¹⁴⁷ Accordingly, the government expressed its intention “to put in place a new regime for legal counsel consistent with this principle and which better takes into account the nature of the duties of legal counsel.”¹⁴⁸ Although I am not aware of any new Canadian legislation applicable to the legal profession, I am also not aware of anything to suggest that the Canadian government has changed its position. Ronald MacDonald’s article notes that although the Canadian government remains bound by the injunction, it continues to insist that FATF implementation must be handled by legislation or government regulation and cannot be accomplished by relying on the rules of the self-regulating organizations. According to remarks made during the AALS session, Canadian government officials have been among the most the most insistent on strict adherence to the terms of the FATF 40+9 Recommendations.¹⁴⁹ In June 2007, in its Third Mutual Evaluation, Canada was rated “not compliant” with respect to its failure to apply to lawyers the FATF recommendations regarding politically exposed persons, due diligence, record keeping, and suspicious

the PCMLTFA as they apply to legal counsel and legal firms. The Government concluded from this review that it is preferable not to retain the current regime for legal counsel.

Accordingly, the Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act repeal the provisions that subject legal counsel and legal firms to the client identification, record-keeping, reporting and internal compliance requirements under Part I of the PCMLTFA. Legal counsel and legal firms are therefore no longer subject to these regulatory requirements. The amendments come into force upon registration of the regulations.

The Government nonetheless believes it is important that Canada’s anti-money laundering and anti-terrorist financing regime cover all entities that act as financial intermediaries, including legal counsel and legal firms, in order to be effective. The government therefore intends, following consultations, to put in place a new regime for legal counsel consistent with this principle and which better takes into account the nature of the duties of legal counsel.

Id.

145. See MacDonald, *supra* note 2, at n.4 and accompanying text.

146. See *infra* note 186 and accompanying text (describing the “no cash” model rule and the model rule on client verification).

147. See SOR/2003-102, *supra* note 144.

148. *Id.*

149. See AALS 2010 Annual Meeting Podcast, *supra* note 1 (remarks of Colin Tyre).

transaction reporting.¹⁵⁰ Thus, at present, it seems unlikely that Canada will completely abandon its interest in regulating lawyers' compliance with the FATF 40+9 Recommendations.

In sum, while the articles by Paul Paton and Ronald MacDonald in this Symposium address the Canadian situation in more detail,¹⁵¹ this brief description shows that the Canadian legal profession has had to respond to its government with respect to the impact of the FATF 40+9 Recommendations.

The United States' implementation of the FATF 40+9 Recommendations shares similarities and differences with the implementation found in other English speaking common law countries. As in the UK, Canada, and Australia, the U.S. government has taken seriously the obligation to implement the FATF 40+9 Recommendations. The U.S. implemented these recommendations by adopting the Bank Secrecy Act and the USA Patriot Act, which broadened the scope of the Bank Secrecy Act.¹⁵² The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) is the entity responsible for administering the Bank Secrecy Act and receiving reports;¹⁵³ in 2004, it received more than 600,000 suspicious activity reports.¹⁵⁴ The U.S.' FATF Mutual Evaluation identifies additional actions that have been undertaken to implement the FATF recommendations.¹⁵⁵

Although U.S. implementation of the FATF 40+9 Recommendations shares similarities with the implementation in other common law countries, there are some significant differences. Unlike Canada or the UK, the U.S. has not adopted federal legislation that would subject the legal profession to its AML/CFT legislation. The U.S. has, however, been criticized for this omission. The FATF's Third Mutual Evaluation of the U.S., which was issued in 2006, found the U.S. either partially compliant or non-compliant with respect to its implementation of some of the FATF 40+9 Recommendations, noting that:

- casinos are the only DNFBP subject to suspicious transaction reporting and that lawyers, among others, are not subject to the "no tipping off" requirement, are not required to implement adequate internal AML controls, and

150. See FATF, Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism, Canada (Feb. 29, 2008), <http://www.fatf-gafi.org/dataoecd/28/33/40196937.pdf>, at 15, 17, 19.

151. See Paton, *supra* note 5.

152. See, e.g., Third Mutual Evaluation of the U.S., *supra* note 52; see also U.S. Department of the Treasury, Terrorism and Financial Intelligence: Publications and Legislation, available at <http://treas.gov/offices/enforcement/publications/> (including links to relevant legislation); Appendix B, which contains the IBA Anti-Money Laundering Forum entry for the U.S.

153. See U.S. Dept. of the Treasury, The Financial Crimes Enforcement Network (FinCEN), <http://www.fincen.gov/>. See also 2007 National Money Laundering Strategy, <http://treas.gov/press/releases/docs/nmls.pdf>; FATF, Third Mutual Evaluation of the U.S., *supra* note 52, at para. 9.

154. See FATF, Third Mutual Evaluation of the U.S., *supra* note 52, at para. 9.

155. *Id.*

there is no specific obligation to give special attention to the country advisories that FINCEN issues, (para. 16);

- DNFPB regulation, supervision and monitoring was only “partially compliant” and that “[t]here is no regulatory oversight for AML/CFT compliance for accountants, lawyers, real estate agents or TCSPs.”(para. 24); and
- that “[a]ccountants, lawyers, other legal professionals, real estate agents, and trust company service providers . . . are not currently subject to AML/CFT requirements (other than the large cash transaction reporting requirements;” (para. 35).¹⁵⁶

Although the U.S. was technically required to take corrective action by 2009, I am not aware that these issues have been resolved, especially with regard to suspicious transaction reporting.

Despite the U.S.’ failure to implement the FATF recommendations to the FATF evaluators’ satisfaction,¹⁵⁷ there can be no doubt that the U.S. government believes that lawyers are subject to some, if not all, of the FATF recommendations. The FATF’s 2008 Risk-Based Guidance for Lawyers is one of a number of different risk-based guidances that appear on the U.S. Department of Treasury’s webpage.¹⁵⁸ Kevin Shepherd’s prior “Gatekeepers” article and his article in this Symposium detail the ABA’s efforts to work with the U.S. Department of Treasury to implement the FATF 40+9 Recommendations and Risk-Based Guidance for Lawyers.¹⁵⁹ The ABA’s two “gatekeeper” resolutions and Joint Statement, which are described in the next section and appear as Appendix A, also document federal government’s interest in the issue of whether the FATF recommendations should be applied to the legal profession.¹⁶⁰

156. See FATF Third Mutual Evaluation of the U.S., *supra* note 52, at para. 16, 24, and 35.

The U.S. has been required to file two follow-up reports. See FATF 2009 Annual Report, *supra* note 8, at 15 (noting that the U.S. has not yet received the “all clear” from its third evaluation, which would entitle it to simply file a biennial update. The U.S., unlike Belgium, Portugal, Singapore, Italy and Norway, is subject to a continued “report back” obligation because it has not yet demonstrated that substantial progress has been made in implementing all aspects of the FATF 40+9 Recommendations). I have not been able to locate publicly-available copies of these follow-up reports. See also Shepherd, *Gatekeepers*, *supra* note 2, at nn. 100-104 and accompanying text (citing pp. 13-14 of the Third Mutual Evaluation of the U.S., cited *supra* note 52).

157. See *supra* note 156.

158. See, e.g., U.S. Dept. Treasury, *U.S. Government & FATF*, http://treas.gov/offices/enforcement/usg_and_fatf.shtml; U.S. Dept. of Treasury, *Money Laundering Strategy*, http://treas.gov/offices/enforcement/money_laundersing.shtml (listing together on one page, inter alia, the FATF RBA Guidances for Accountants, Legal Professionals, and Casinos). See also Third Mutual Evaluation of the U.S., *supra* note 52, at para. 12 (noting that the U.S. has mostly used a risk-based approach when determining which sectors are subject to various AML requirements).

159. See Shepherd, *Gatekeepers*, *supra* note 2; Shepherd, *supra* note 2.

160. See, e.g., ABA Resolution 300 (2008) at p. 3 (“Federal legislation was proposed in May 2008 to require those who form unincorporated business entities, trusts, partnerships, and other organizational structures to document, verify, and make available to law enforcement authorities the

Recent events confirm the unsettled nature of these issues. In February 2010, a Senate subcommittee chaired by Senator Carl Levin issued a 300 page staff report recommending that the U.S.' AML legislation be strengthened, including its application to lawyers.¹⁶¹ This lengthy report focused on four case studies and includes the following "findings of fact" regarding lawyers:

- (1) Lawyers. Two U.S. lawyers helped Teodoro Obiang, son of the President of Equatorial Guinea, circumvent anti-money laundering and PEP controls at U.S. banks by allowing him to secretly use a series of attorney-client, law office, and shell company accounts to be used as conduits for his funds.¹⁶²

The report recommends, inter alia, that "Treasury should issue an AML rule requiring U.S. financial institutions to obtain a certification for each attorney-client and law office account that it will not be used to circumvent AML or [politically exposed persons (PEP)] controls, accept suspect funds involving PEPs, conceal PEP activity, or provide banking services for PEPs previously excluded from the bank; and requiring enhanced monitoring of such accounts to detect and report suspicious transactions."¹⁶³ It also recommends that professional organizations, including the American Bar Association, "issue guidance to their members prohibiting use of any financial account to accept suspect funds involving PEPs, conceal PEP activity, facilitate suspect transactions involving PEPs, or circumvent AML or PEP controls at U.S. financial institutions" and that the U.S. should work with the FATF to amend its existing 40+9 Recommendations to strengthen anti-corruption and PEP controls.¹⁶⁴

record and beneficial ownership of these business entities. This legislation would impose significant and difficult burdens on company formation agents (including lawyers in some circumstances), state authorities, and others to comply with this legislation. States, and not the federal government, should retain the authority to regulate those who form these business entities."); ABA Resolution 104 (stating that "FURTHER RESOLVED, That any efforts to establish and implement international and United States policies to combat domestic and international money laundering and terrorist financing should be consistent with the following principles: . . ."). See also *id.* at 3 ("The U.S. Government has not yet developed a position on the Gatekeeper Initiative. However, it is anticipated that the U.S. Government will begin to do so in the near future, given FATF's actions to date, as well as the activities of other governments around the world.") The text of both of these resolutions is reproduced in Appendix A to this article.

161. United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Keeping Foreign Corruption Out Of the United States: Four Case Histories, Majority and Minority Staff Report* (Feb. 4, 2010), <http://tinyurl.com/yglq55v>. See also Senate Bill 569: Incorporation Transparency and Law Enforcement Assistance Act, 111th Cong., 2009-2010 Session, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.00569>, (bill introduced by Senator Levin would have applied to lawyers, among others, and required them to establish anti-money laundering programs; would also have required a report to Congress about state requirements for the disclosure of beneficial owners).

162. Staff Report, *supra* note 161, at 5.

163. *Id.* at 6.

164. *Id.* at 7.

As this brief summary has shown, governments around the world, including the U.S., have taken notice of the FATF recommendations and are making efforts to ensure that their existing legislation is consistent with those recommendations. The U.S. government is interested in the 40+9 Recommendations but unlike the UK, Canada and Australia, differences exist with respect to the appropriate federal government application of these recommendations to the legal profession.¹⁶⁵

5. How Has the Legal Profession Responded to the FATF 40+9 Recommendations?

At the outset, it should be noted that legal professions around the world generally support the principle of AML/CFT and believe that there are many aspects with which lawyers can help.¹⁶⁶ Because the FATF 40+9 Recommendations have been controversial when applied to the legal profession, it should come as no surprise to learn that bar associations and lawyer regulators have resisted aspects of the recommendations and have been actively involved in negotiations with FATF representatives.

The ABA has been among the bar associations that have responded to the FATF developments. In 2003 and 2008, the ABA adopted its “gatekeeper” resolutions, which set the parameters for the ABA’s negotiations with the FATF and the U.S. government.¹⁶⁷ The resolutions are found in Appendix A to this article. The 2003 ABA resolution contained five paragraphs that urged reasonable international recommendations and continued U.S. state regulation of lawyers.¹⁶⁸ The

165. For additional discussion about the federal government’s willingness to step in with respect to federal regulation of lawyers, see Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 J. PROF. LAW. 189 (2008)[hereinafter Terry, *Service Providers*]; John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959 (2009); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005).

166. See generally the resolutions cited in Appendix A; December 2009 Consultation Response, *supra* note 112, at 3.

167. See ABA, Resolution #104 Regarding the FATF Gatekeeper Regulation (Feb. 2003), <http://www.abanet.org/leadership/recommendations03/104.pdf>; ABA Resolution #300 (August 2008), http://www.abavideo.org/ABA531/pdf/hod_resolutions/300.pdf; Shepherd, *supra* note 2 (describing the proposed ABA resolution that will be considered August 2010). See also ABA Task Force on Gatekeeper Regulation and the Profession [includes many useful links], <http://www.abanet.org/crimjust/taskforce/home.html>.

168. The full text of Resolution 104 is set forth in Appendix A. In essence, it provides that the ABA: 1) supports all reasonable and necessary efforts to combat money laundering and terrorist financing activity; 2) urges continued state regulation (with minimal federal regulation) of those involved in the formation of business entities; 3) urges Congress to refrain from enacting legislation to regulate lawyers and to defer to the states; 4) urges that the client due diligence requirements and beneficial ownership requirements be risk-based, and take into account the actual risks of AML/CFT and the burdens that any regulations might impose on state and territorial authorities, those involved in the formation of such entities, and the bona fide investment community, and not conflict with existing state ethical rules or state regulation; and 5) urges the U.S. legal profession to develop appropriate guidance on adopting voluntary risk-based approaches to client due diligence.

2008 ABA resolution had as its focus U.S. implementation of the FATF recommendations. Kevin Shepherd was one of the drafters of this resolution and he has explained its background and purpose as follows:

[Resolution 300] dealt with proposed legislation and international policy initiatives intended to impose obligations on company formation agents, including lawyers, to undertake extensive due diligence on clients, and to determine beneficial owners when assisting in the formation of non-publicly traded business entities and trusts. A driving force behind Resolution 300 was the introduction on May 1, 2008 of S. 2956, a bill by Senator Levin (D. Mich.), that would, among other things, create a new category of “financial institution” under the Bank Secrecy Act for persons involved in forming a corporation, limited liability company, partnership, trust, or other legal entity. S. 2956 would require the U.S. Treasury Department to require corporate formation agents to establish AML programs to ensure that they are not forming these entities for money launderers.¹⁶⁹ http://www.clipartguide.com/_pages/0008-0709-2522-3664.html

These resolutions were developed by the ABA Gatekeeper Task Force.¹⁷⁰ Although the Task Force’s webpage does not appear to be updated regularly, it contains many useful resources.¹⁷¹ The ABA Gatekeeper Task Force webpage and these resolutions are available as links from the ABA Center for Professional Responsibility webpage,¹⁷² but this Task Force was not “housed” within the Center, and the legal ethics community does not appear to have been integrally involved in the development of these resolutions or the subsequent U.S. implementation of the FATF recommendations.¹⁷³

In addition to its own 2003 and 2008 resolutions, the ABA joined bar associations from Canada, the European Union, Japan, Switzerland and the United States in signing the 2003 “Joint Statement by the International Legal Profession to the FATF.”¹⁷⁴ This Statement, which is included in Appendix A, shows that despite

169. See Shepherd, *Gatekeepers*, *supra* note 2, at n. 195.

170. See Resolution #104, *supra* note 167, at 1; Resolution #300, *supra* note 167, at 1 (showing the Task Force as a sponsoring entity).

171. See generally, ABA Section of Criminal Justice, ABA Task Force on Gatekeeper Regulation and the Profession, <http://www.abanet.org/crimjust/taskforce/home.html> [hereinafter ABA Gatekeeper Task Force webpage]. This webpage has not been kept up to date. For example, none of the links cites the FATF 2008 Lawyer Guidance.

172. See, e.g., ABA Center for Professional Responsibility, *Additional American Bar Association Ethics and Professional Responsibility Resources*, <http://www.abanet.org/cpr/links.html#Additional>.

173. See generally Shepherd *Gatekeepers*, *supra* note 2, Shepherd, *supra* note 2; ABA Task Force on Gatekeeper Regulation and the Profession, Members, <http://www.abanet.org/crimjust/taskforce/members.html>.

174. Joint Statement by the International Legal Profession to the FATF (April 2003), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/signed_statement_0301_1183723072.pdf [hereinafter Joint Statement]. This Joint Statement is included in Appendix A to this article.

country differences in lawyer regulation, legal profession representatives in North America, Europe, and Asia were concerned about the effect of the FATF recommendations on access to justice and the rule of law.¹⁷⁵ They urged the FATF to conduct research into the extent to which lawyers were being used to facilitate AML/CFT activities, urged consultation and due process in the rule-making exercise, and urged the FATF to consider the impact of the recommendations on the legal system.¹⁷⁶ They also asked the FATF to remove lawyers from the application of the 40+9 Recommendations until this had been accomplished.¹⁷⁷

The 2003 Joint Statement illustrates one of the ways in which bar associations around the world have responded collectively to the FATF developments. They have also responded individually, with many of them taking steps beyond simply adopting resolutions. The Law Society of England and Wales has been among the most active. For example, in October 2009, it issued a revised version of its prior “practice note;” this document is quite lengthy and contains a tremendous amount of information on lawyers’ AML obligations and what they need to do to comply with them.¹⁷⁸ This is the fourth anti-money laundering practice note it has issued.¹⁷⁹ The Law Society also has been active in responding to government consultations about AML/CFT legislation and lobbying for changes.¹⁸⁰ As noted earlier, its December 2009 consultation response requested “a number of changes to the regulations, including: a better empirical understanding of the risks posed and the cost-effectiveness of the measures used to combat money laundering; greater sharing of methodologies within the regulated sector; the risk-based approach to be fully applied to the requirements to identify beneficial owners and politically exposed persons (PEPs); a more pragmatic approach to be taken to reliance; and the removal of criminal sanctions from breaches of the regulations.”¹⁸¹ The Law Society concluded that “[a]fter 7 years and around 45,000 SARs, our members remain to be convinced that their involvement in the AML regime is actually

175. *Id.* at para. 2-5.

176. *Id.* at para. 7.

177. *Id.* at para. 8.

178. See Law Society Oct. 2009 Practice Note, *supra* note 47. Although the Law Society’s documents are tailored to the UK implementation of the FATF recommendations and EU directives, some of their information would be useful to lawyers located elsewhere in the world.

179. See Law Society Oct. 2009 Practice Note, *supra* note 47 (includes links to the Feb. 22, 2008, Dec. 15, 2007, and Sept. 3, 2007 practice notes).

180. See Law Society of England and Wales, *Consultation responses*, available at <http://www.lawsociety.org.uk/newsandevents/topics/aml/consultations.page> (includes links to eleven responses by the Law Society to government consultations)[hereinafter Law Society Consultations]. See also Law Society of England and Wales, Your voice on AML (Dec. 15, 2009), available at <http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=424875>.

181. See, e.g., Law Society of England and Wales, *Law Society response to HM Treasury review* (Dec. 19, 2009), available at <http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=424870>. See also Law Society of England and Wales, Press Release: Reconsider extension of draconian powers, says Law Society (Dec. 19, 2009).

making any difference. Given the costs of compliance it is hard for firms to be committed to the ethos of the UK regime.”¹⁸² This consultation is one in a long line of responses by the Law Society of England and Wales.¹⁸³

Canadian law societies have also responded actively to the FATF developments. This summary will be brief because the articles by Paul Paton and Ronald MacDonald address the Canadian developments in more detail.¹⁸⁴ As those articles show, there has been extensive involvement in FATF issues by both the Canadian representational bodies (e.g., the Canadian Bar Association [CBA]) and the Canadian regulatory bodies (e.g., the Federation of Law Societies of Canada [FLSC], which is the umbrella organization for the regulatory bodies). The “Money Laundering Chronology of Events” provides a useful summary of the Canadian developments through 2003: as that document shows, both the CBA and the FLSC met with government officials, adopted several resolutions, and ultimately instituted litigation that led to government compromise on the issue of suspicious transaction reporting.¹⁸⁵

Although the Canadian bar associations and law societies opposed the suspicious transaction reporting aspects of the FATF recommendations, they are on record as supporting the government’s efforts to combat money laundering and terrorism financing and have taken steps to implement other aspects of the FATF’s recommendations. The FLSC adopted a model “no cash” rule that prohibited lawyers from receiving more than \$7,500 in cash except in limited circumstances. This model rule has been implemented in all Canadian provinces and territories.¹⁸⁶ In March 2008, the Federation of Law Societies of Canada adopted a Model Client Verification Rule, which it amended in December 2008.¹⁸⁷ The FLSC’s explanation of this rule does not refer directly to the FATF, but it is clear that this new model rule responds to many of the FATF recommendations.¹⁸⁸

182. Dec. 2009 Consultation Response, *supra* note 112, at 28. These comments are consistent with the observations of Australia commentator Steve Mark, cited *supra* note 46.

183. See Law Society Consultations, *supra* note 180.

184. See Paton, *supra* note 5.

185. See Canada Chronology, *supra* note 142.

186. MacDonald, *supra* note 2, at 145.

187. Federation of Law Societies of Canada, Model Rule on Client Identification and Verification Requirements, Adopted by Council of the Federation of Law Societies of Canada March 20, 2008 and modified on December 12, 2008, http://www.flsc.ca/en/pdf/Federation_Model_Rule_081212.pdf.

188. Federation of Law Societies of Canada, What’s New: Federation fights money laundering with new “know-your-client” model rule (March 31, 2008), *available at* <http://www.flsc.ca/en/whatsnew/whatsnew.asp> [hereinafter FLSC, What’s New]. This webpage explains the purpose of the rule as follows:

The Federation of Law Societies of Canada has taken another step to ensure lawyers and Quebec notaries are at the forefront of the fight against money laundering by adopting a model rule on client identification, verification and record keeping. The new “know-your-client” rule outlines the steps lawyers and Quebec notaries must take, and the records

According to the FLSC, all Canadian law societies agreed to adopt local rules mirroring the substance of the model rule.¹⁸⁹ As this brief summary shows, and as is set forth in more detail in the articles by Paul Paton and Ronald MacDonald, Canadian bar associations and law societies have been actively responding to the FATF developments.

Similar to the FLSC, the Council of Bars and Law Societies of Europe (CCBE), which represents 700,000 lawyers in Europe,¹⁹⁰ has worked actively with the FATF as it develops its policy towards lawyers and has also worked to educate its members about the FATF recommendations. The CCBE's involvement in the FATF negotiations is set forth in Kevin Shepherd's articles.¹⁹¹ The webpage of the CCBE's Money Laundering Committee provides examples of its policy work and shows its efforts to educate its members.¹⁹² This webpage includes links to the 2003 Joint Statement by U.S., European and Asian bar associations and to a number of press releases that document the CCBE's involvement in this area.¹⁹³ Some of the other documents listed on this webpage include a 2006 European Commission staff report about the impact on the legal profession of the EU Second Money Laundering directive,¹⁹⁴ the Belgian and French decisions discussed in Colin Tyre's article, and seven different position papers, including the CCBE's submissions in response to the Commission's staff report, the EU's proposed third money laundering directive, the UK's consultation on the proceeds of crime law, and the FATF's consultation.¹⁹⁵ The documents listed on this webpage also include the CCBE's fifteen-page analysis of the issues on which EU Member States have discretion as they implement the money laundering directive¹⁹⁶ and a document that contains information about how the FATF recommendations have been implemented in CCBE Member States. The latter document includes the answers to four questions: 1) Has the Directive been implemented? 2) Is Tipping-off permitted?; 3) Is the Bar the Competent Reporting Authority?; and 4) Under what circumstances

they must keep, to verify a client's identity. These actions will help members of the legal profession determine whether a client is attempting to use them to improperly transfer funds. All Canadian law societies have undertaken to adopt local rules mirroring the substance of the model rule as soon as possible.

189. See FLSC, What's New, *supra* note 188.

190. See CCBE, Introduction, <http://www.ccbe.org/index.php?id=2>.

191. See Shepherd, *Gatekeepers*, *supra* note 2; Shepherd, *supra* note 2.

192. CCBE, Committees—Money Laundering—Documents, available at http://www.ccbe.eu/index.php?id=94&id_comite=20&L=0 [hereinafter CCBE Money Laundering Committee].

193. *Id.*

194. *Id.* Colin Tyre's article, *supra* note 2, discusses this directive in more detail. See also Kirby, *supra* note 107.

195. See CCBE Money Laundering Committee, *supra* note 192.

196. CCBE, Action Points for EU Bars and Law Societies on the Implementation of the Money Laundering Directive (Jan. 2002), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/action_points_2201021_1183972258.pdf.

is a lawyer under an obligation to report?¹⁹⁷ In sum, the CCBE, like the ABA and FLSC, has been heavily involved in FATF-related activities.

Although Australia's AML legislation does not yet apply to the legal profession, the Law Council of Australia also has a long history of involvement in FATF and AML issues. The Law Council of Australia has explained its role as follows:

From the outset of these reforms the Law Council has been proactively engage[d] in lobbying the Government to ensure that any obligations imposed on legal practitioners are consistent with existing professional obligations and not unduly onerous.

The Law Council has submitted that the reforms should be precisely targeted so that they only capture the provision of services which are preparatory to or give effect to transactions through which money may be laundered. The reforms should not target legal services in general, nor low risk services or customers.

The Law Council has also consistently submitted that legal practitioners must not be subject to a suspicious matter reporting obligation that would require them to inform on their clients to regulatory agencies. The Law Council has argued that a suspicious matter reporting obligation would infringe upon client confidentiality and damage the important relationship of trust between lawyer and client.¹⁹⁸

The Law Council of Australia's "Anti-Money Laundering" webpage includes links to its advocacy and informational material.¹⁹⁹ This webpage currently has three links at the bottom of the page that provide information and documents related to: 1) stage one of the legislation (which did not include lawyers); 2) stage two of the legislation (which likely will include lawyers once it is adopted); and 3) a third link to "Anti-Money Laundering: Information for the Profession."²⁰⁰ The "Stage One" webpage includes links to eight documents sent by the Law Council to various governmental entities; the Stage Two page includes links to two submissions to government entities; and the "information" webpage includes the FATF's Risk Based Guidance for Lawyers and three different versions of a guide the Law Council has prepared for lawyers.²⁰¹

The most recent Law Council guide is a twenty-two page document that was issued in December 2009 and includes, among other things, two pages of useful

197. CCBE Overview of the Implementation of the 2001 Money Laundering Directive (March 2004), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/mld_implementationp1_1183722950.pdf.

198. Law Council of Australia, Anti-Money Laundering, *available at* http://www.lawcouncil.asn.au/programs/national-policy/aml/aml_home.cfm.

199. *Id.*

200. *Id.*

201. *See* Tranche One, *supra* note 129; Tranche Two, *supra* note 131; Law Council of Australia Anti-Money Laundering: Information for the Profession, http://www.lawcouncil.asn.au/programs/national-policy/aml/aml_information.cfm.

“money laundering warning signs” and five pages of guidance about how lawyers could implement aspects of the 2008 Risk Based Guidance of Lawyers.²⁰² This document updates and supplements the Law Council’s earlier documents regarding AML/CFT reporting obligations²⁰³ and its lengthy 2006 analysis of the applicability of Australia’s AML legislation to lawyers.²⁰⁴

The Law Council of Australia is not the only Australian entity involved in efforts to educate the profession about the FATF and AML obligations. At the time this article was written, the Australian Institute of Criminology was conducting a survey of legal practices in four Australian states (the Australian Capital Territory, New South Wales, Queensland and Victoria) to collect data about the risks lawyers perceive, the risk management tools they currently use, and the application of AML legislation to their practices.²⁰⁵ The Legal Services Commissioner of New South Wales is among those who have written about the FATF’s impact on the Australian legal profession.²⁰⁶

As this discussion shows, bar associations have responded vigorously to issues related to the application of the FATF 40+9 Recommendations to the legal profession. While their engagement undoubtedly has had some effect, it is not clear how much these efforts have affected the overall process. As Colin Tyre remarked during the AALS program, the legal profession was relatively late to the negotiations and thus has had a limited opportunity to shape the structure of 2008 FATF risk-based guidance for lawyers.²⁰⁷

6. Observations and Reflections

This article provides numerous details about the FATF 40+9 Recommendations and its 2008 Lawyer Guidance. What does all of this mean for U.S. lawyers in general and U.S. legal ethics experts in particular?

202. Australian Dec. 2009 AML Guide for Legal Practitioners, *supra* note 129, at 15-16 and 17-20.

203. See Law Council of Australia, Legal Practitioners Reporting Obligations under the Anti-Money Laundering/Counter Terrorism Financing Act (Aug. 21, 2008), http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8FC574F9-1E4F-17FA-D2B8-F8C76A23CA8B&siteName=lca.

204. Law Council of Australia, Update on Anti-Money Laundering and Counter-Terrorism Financing Reforms for Legal Practitioners (Dec. 22, 2006), *available at* http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8FC4E02B-1E4F-17FA-D2D5-353B0A0C4F90&siteName=lca.

205. See Law Council of Australia, News Article: Anti-money Laundering Survey Underway (March 26, 2010), *available at* <http://www.lawcouncil.asn.au/media/news-article.cfm?article=97C360D6-1E4F-17FA-D291-33D0A6EF00A7>.

206. See Steve Mark, *supra* note 46.

207. See AALS 2010 Annual Meeting Podcast, *supra* note 1. An unofficial transcript of that session, which is on file with author, includes the following remarks by Colin Tyre:

[W]e, as lawyers, became involved in this negotiating process at a very late stage. By the time we became involved it was probably about 2006. By then, the FATF recommendations

As a starting point, I believe that a broader segment of the U.S. legal profession, including the legal ethics community, needs to become familiar with the FATF developments and their potential impact on U.S. lawyer regulation. In my view, the legal ethics community has been relatively uninvolved in the FATF developments. None of the committees housed in the ABA Center for Professional Responsibility co-sponsored the ABA's gatekeeper resolutions.²⁰⁸ The legal ethics community has not been particularly involved in the development of the "best practices" document that the ABA currently is drafting to implement the 2008 Lawyer Guidance.²⁰⁹ Most U.S. legal ethics academics I know are not particularly knowledgeable about these FATF developments. Indeed, even U.S. legal practitioners may not be as aware of the FATF developments as they perhaps they should be.²¹⁰

Why should one bother to learn about these FATF developments? Given the "non-compliant" or "partially compliant" rating that U.S. lawyer regulation received in the FATF mutual evaluation process,²¹¹ I think U.S. lawyers should ex-

had been issued; there had been a mandate to include lawyers, and the recommendations had been implemented in Europe by the European Directives, which then had to be implemented in the individual Member States. Not only that, but the FATF had also got around to finalizing guidance for financial institutions and banks. Within the FATF obviously somebody said, well we would like to apply this financial institution guidance to what Kevin just referred to as the DNFBP's, which is this disparate group of money-handling professions and bodies which includes lawyers. The FATF's initial desire would have been to take the existing guidance and to delete the word "bank and financial institution," wherever it has appeared and substitute the words "DNFBP," which would have applied the whole guidance simply as it stood to lawyers. They called a conference in Amsterdam to see whether this was a course which we would like to adopt. One of the benefits of this particular conference was that for the first time, it brought together all of the representatives of the legal profession from across the world. So it was actually of considerable value to us because we got together the day before. For the first time, we began to put together a global strategy on behalf of the legal profession, one aspect of which was to say that it is absolutely unacceptable to apply the RBA Guidance which applies to banks and financial institutions lock, stock and barrel to lawyers because it simply did not recognize the peculiarities of lawyers as opposed to financial institutions and lawyers as opposed to casinos and jewelers and all of the other disparate people with whom we would expected to be in bed. So that was a positive aspect of getting together.

Id.

208. See Appendix A, *infra*.

209. See Shepherd, *supra* note 1.

210. During the May 2008 international conference of the Association of Professional Responsibility Lawyers, a European lawyer working for the European office of a U.S. law firm stated—in essence—that many U.S. law firms in Europe were not as diligent as they probably should be with respect to the AML/CFT regulations because it was not part of the U.S. law firm culture. Although some commentators may disagree (and one did during the AALS annual meeting), I found this May 2008 comment to be eye-opening. If some practitioners believe that lawyers in U.S. law firms—in general—are not as aware of these FATF developments as their European law firm counterparts—and that they should be—that is enough to convince me that the knowledge needs to be more broadly disseminated.

211. See *supra* notes 155-156.

pect to see changes in those areas of U.S. legal practice covered by the FATF policies. Although it is not clear how dramatic those changes will be, elsewhere in the world, the FATF's policies have led to some very dramatic changes, as evidenced by the 4,772 "suspicious activity reports" that UK solicitors filed against their clients in 2009 (which they were forbidden to mention to their clients) and the dramatic changes in client due diligence practices and recordkeeping.²¹² The IBA's data shows that the UK and EU are not alone in applying the 40+9 Recommendations to lawyers. As the summary in Table 2 of this article shows, approximately 50% of jurisdictions have anti-money laundering legislation that is directly applicable to lawyers and additional 16% have anti-money laundering legislation that applies indirectly to lawyers; moreover, if one ignores the jurisdictions for which the IBA does not have full information, then more than seventy percent of reporting jurisdictions have AML/CFT legislation directly applicable to lawyers and more than ninety-three percent of reporting jurisdictions have AML/CFT legislation that is directly or indirectly applicable to lawyers.²¹³

This data shows that throughout the world, the FATF developments have led to fundamental changes in the lawyer-client relationship and the duties imposed on lawyers.²¹⁴ Although the legal professions in some countries have successfully resisted aspects of the FATF recommendations,²¹⁵ these FATF recommendations appear to have had a significant impact in all FATF Member States (or soon will).²¹⁶ The U.S. legal profession has not been subject to the same kind of legislation that has been imposed elsewhere in the world, but it is likely to be exposed to the ABA's Voluntary Good Practices statement soon. Moreover, the issue of federal legislation may not have been permanently tabled as the February 2010 Congressional hearings show.²¹⁷ Thus, I hope that one of the lessons of this article is the importance of the FATF developments, especially to those interested in lawyer regulation.

212. See *supra* notes 116-118 and accompanying text.

213. See *supra* note 94 (explaining why the regional total included two more countries than the global total) and Table 2, Terry Synthesis of IBA Data, *supra*. As Table 2 reveals, the IBA global chart showed that 105 (51%) of 205 jurisdictions had directly applicable AML; the regional chart showed that 106 (51%) of 207 jurisdictions had directly applicable AML. The global chart showed that 33 (16%) of 205 jurisdictions had AML that was indirectly applicable to lawyers; the regional chart showed that 33 (16%) of 207 jurisdictions had indirectly applicable AML. If one excludes the 57 jurisdictions listed on the global chart as not having full country information or the 58 jurisdictions listed on the regional charts, there is 71% (global) or 72% (regional charts) of jurisdictions have directly applicable AML/CFT legislation and 22% (for both global and regional) have indirectly applicable legislation.

214. See Tyre, *supra* note 2; Gathii, *supra* note 6.

215. The Canadian government ultimately was unsuccessful in its efforts to impose these changes, but it took years of litigation to reach this point and it is not clear whether the issues are permanently resolved. See MacDonald, *supra* note 2; Paton, *supra* note 5.

216. The Australian government is in the process of preparing changes to implement the FATF developments and currently plans to include the legal profession within its legislation. See Mark, *supra* note 46.

217. See *supra* note 161-165 and accompanying text; Shepherd, *supra* note 2.

The second message I hope the reader will draw from this article is the importance of monitoring international “soft law” developments. The FATF 40+9 Recommendations and its 2008 Lawyer Guidance are not binding law. The FATF has no enforcement power. Its only power is to expel those countries that do not comply with its “membership” requirements as determined through the mutual evaluation process. Thus, the U.S. and other FATF members could walk away from the FATF recommendations at any time.

Although the U.S. theoretically could walk away from its FATF obligations, so long as it believes that it has more to gain by remaining in the organization than by leaving it, it will choose to remain a member. Given the current political realities, it seems unlikely to me that the U.S. will want to be expelled from an organization that fights terrorism financing and money laundering. But membership creates obligations. If the U.S. wants to continue as an FATF member, it will need to “cure” the problems in its FATF mutual evaluation, which means that it will need to be viewed as “compliant” with FATF policies. Thus, going forward, I think U.S. lawyers should expect to see changes in U.S. legal practice, if not lawyer regulation, as a result of the FATF’s non-binding, soft-law policies. This FATF example thus illustrates the broader point that we live in a global world in which international standards and “soft-law” developments may profoundly influence U.S. domestic lawyer regulation. It is important to realize that there are a number of these kinds of soft-law developments,²¹⁸ many of which have the potential to affect U.S. domestic lawyer regulation and legal ethics. For these reasons, it is important to monitor these developments.

My third observation concerns the importance of global collaboration. Where there are global developments (such as the FATF), there may be multiple parties, including those outside the U.S., that need to be convinced of the validity of a particular approach. For example, as noted earlier, I predict that the U.S. federal government will want to receive a “fully compliant” or “largely compliant” rating from the FATF mutual evaluation process. Consequently, those who conduct the U.S.’ FATF mutual evaluation comprise the audience that must be convinced that the U.S. lawyer regulation is compliant with FATF policies. This is more likely to happen if the U.S. legal profession works collaboratively with global legal profession representatives to develop an understanding among FATF members regarding how the FATF policies can and should apply to the legal profession.

To date, the legal profession has been relatively successful in working collaboratively to develop a shared approach towards the FATF. For example, global legal profession representatives have worked together to convince FATF members

218. See, e.g., Testimony of Laurel S. Terry, Transcript of the ABA Commission on Ethics 20/20 Friday 154-155 (February 5, 2010), <http://www.abanet.org/ethics2020/transcript.pdf> (citing the APEC Draft Best Practices Principles as an example of an international “soft law” initiative that the ABA should monitor). See also Gathii, *supra* note 6.

that lawyers are not identical to banks and that it would be inappropriate to apply to the legal profession the identical risk-based principles that applied to banks.²¹⁹ They also have been able to convince the FATF that a suspicious transaction reporting requirement does not belong in the legal profession's risk-based guidance document.²²⁰ A number of controversial issues remain, however. Going forward, it will be important for global legal profession representatives to collaborate, as they have done in the past, if they believe that particular interpretation is appropriate. As the charts contained in this article show, the IBA serves a useful role in helping the legal profession to centralize information and monitor these developments and I commend it for making this portion of its webpage publicly available (and urge it to continue to do so). I also hope that in the future, a number of U.S. representatives will participate actively in the work of the IBA AMLLIG so that they can share U.S. perspectives with this group.²²¹ I also hope that in the future the U.S. legal ethics community will be more directly involved in the development of the U.S. position regarding the FATF. In my experience, one of the difficulties of dealing with "soft-law" developments such as the FATF policies is that the process is not very transparent or inclusive. Thus, as global legal profession representatives collaborate, they should consider ways in which they might be able to improve the transparency and inclusivity of these initiatives.

Finally, the recent FATF developments (along with other developments) reinforce my belief in the validity of the "service providers" paradigm.²²² In 2008, I wrote an article for the Canons Centennial issue of this journal in which I noted the emergence of a "service providers" paradigm in which the legal profession is not viewed as a separate, unique profession entitled to its own individual regulations, but is included in a broader group of "service providers," all of whom can be regulated together. I argued that the "services providers" paradigm represented a fundamental, seismic shift in the approach towards U.S. lawyer regulation, that it already had affected some aspects of U.S. and non-U.S. lawyer regulation, and that it was likely to have profound implications for the future.²²³ I urged lawyers to recognize that this shift has taken place—whether they like it or not—and to be

219. See, e.g., AALS 2010 Annual Meeting Podcast, *supra* note 1 (Remarks of Colin Tyre).

220. *Id.* See generally the articles cited *supra* note 2.

221. The IBA webpage does not list any U.S. lawyers or members of U.S. law firms as members of this group. See *supra* note 81. I have been advised, however, that this listing is not complete.

222. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. ___, 130 S.Ct. 1324 (2010); see also Laurel S. Terry, *The Supreme Court and the Law of Lawyering: Mere Coincidence or Something More?*, AALS Annual Meeting, New Orleans, Jan. 7, 2010, http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/Terry_AALS_2010_Hot_Topics.pdf. In my view, the U.S. Supreme Court's decision in *Milavetz* confirms its willingness to accept the *service providers* paradigm in at least some contexts. I would like to thank Professor Renee Knake for organizing the 2010 AALS panel on the lawyering cases pending before the Supreme Court and for her useful article. See Renee Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. Rev. __ (2010) (forthcoming).

223. See Terry, *Service Providers*, *supra* note 165.

better prepared than they were in the past if they plan to argue that lawyers should be regulated differently than other service providers.

In my view, the FATF developments illustrate the use of the *service providers* paradigm both outside and inside the U.S. As Colin Tyre noted in his AALS remarks, when the FATF began working on the 2008 Lawyer Guidance, it wanted to apply to the legal profession the same document that had been developed for the financial sector: it saw—in essence—no differences between a customer’s bank and his or her lawyer.²²⁴ Although the legal profession was able to wrest some concessions from the FATF,²²⁵ the FATF has not agreed that lawyers should not be subject to its “suspicious transaction reporting” recommendation and still believes that lawyers should be treated the same as other DNFBPs—“designated nonfinancial businesses and professions.”²²⁶ The FATF’s website provides a visual illustration of the *service providers* paradigm: the guidance for casinos is listed right above the guidance for legal professionals, which is right above the guidance for accountants, and so on.²²⁷ For better or worse, the FATF sees lawyers as simply one of several kinds of DNFBPs. The U.S. Treasury webpage is similar. Its “Money Laundering Strategy” webpage lists eleven items, including papers on money laundering through the football sector, vulnerabilities in the casino and gaming sectors, and the risk-based approach guidances for accountants, for casinos, and for legal professionals.²²⁸ Thus, as noted in my earlier article, the *services providers* paradigm affects *who* regulates lawyers and *how* lawyers are regulated. As I noted in that article, if the legal profession expects to be treated differently than other service providers (or DNFBPs in this case), it must be prepared to explain exactly how and why it is entitled to different treatment. To date, the global legal profession has been able to do that successfully with respect to some of the FATF’s policies, but not all of them. If lawyers want different treatment than other gatekeepers or DNFBPs, they must be prepared to make their case to a skeptical audience about why differing treatment is warranted.

In conclusion, only time will tell the degree to which these FATF “soft law” policies affect U.S. domestic lawyer regulation. I hope that as a result of the AALS 2010 Annual Meeting program and the articles in this Symposium, the U.S. legal ethics community is better prepared to monitor, shape, and implement these developments as they unfold.

224. See AALS 2010 Annual Meeting Podcast, *supra* note 1 (Remarks of Colin Tyre).

225. See generally Shepherd, *Gatekeepers*, *supra* note 2.

226. See *supra* notes 75-77 and accompanying text.

227. See, e.g., FATF, Risk-Based Approach Guidance, *supra* note 56.

228. See *supra* note 158.

Appendix A

ABA Policies Relevant to the FATF-The ABA's 2003 and 2008 Resolutions and the 2003 Joint Statement

American Bar Association Task Force on Gatekeeper Regulation and the Profession Section of Real Property, Probate and Trust Law Criminal Justice Section Section of Litigation Section of International Law and Practice Report to the House of Delegates Recommendation #104 (2003)

RESOLVED, That the American Bar Association supports the enactment of reasonable and balanced initiatives designed to detect and prevent domestic and international money laundering and terrorist financing.

FURTHER RESOLVED, That any efforts to establish and implement international and United States policies to combat domestic and international money laundering and terrorist financing should be consistent with the following principles:

- (1) lawyers play a critical and independent role in the administration of justice and in ensuring lawful compliance by persons and entities involved in commercial and financial activities;
- (2) the judiciary and the organized bar are responsible for establishing ethical rules governing the activities of lawyers and for ensuring that the profession adheres to the highest standards of professional and lawful conduct; and
- (3) there is a critical need for confidentiality in client communications with lawyers to ensure the independence of the bar, protect the lawyer-client relationship, and support the proper functioning of the legal system;

FURTHER RESOLVED, That the American Bar Association:

- (1) opposes any law or regulation that, while taking action to combat money laundering or terrorist financing, would compel lawyers to disclose confidential information to government officials or otherwise compromise the lawyer-client relationship or the independence of the bar; and
- (2) will continue to review the Model Rules of Professional Responsibility and evaluate whether the rules permitting, in appropriate circumstances, disclosure of confidential information should be modified to permit disclosure of information demonstrating the clear intent of a client to commit criminal acts such as money laundering; and
- (3) urges bar associations and law schools to undertake education efforts to ensure that lawyers are informed regarding the scope of money laundering laws and the anti-money laundering requirements that apply to lawyers to safeguard the profession from being used to facilitate money laundering or terrorist financing activity.

American Bar Association Task Force on Gatekeeper Regulation and The Profession Section of Real Property, Trust and Estate Law Report to the House of Delegates Recommendation #300 (Adopted Aug. 2008)

RESOLVED, That the American Bar Association supports all reasonable and necessary efforts of the United States government and the international community to combat money laundering and terrorist financing activity in the international financial system;

FURTHER RESOLVED, That the American Bar Association urges that the regulation of those involved in the formation of business entities within the states and territories of the United States should remain a matter of state and territorial law and state sovereign prerogative, with a minimum of federal governmental regulation;

FURTHER RESOLVED, That the American Bar Association urges Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and to defer to the states as they consider amendments to the Model Business Corporation Act, Uniform Partnership Act, Uniform Limited Partnership Act, Uniform Limited Liability Company Act, and Uniform Limited Cooperative Association Act (collectively, the "Entity Paradigm Laws") proposed by the American Bar Association, the National Conference of Commissioners on Uniform State Laws, and others;

FURTHER RESOLVED, That the American Bar Association urges that the manner in which lawyers conduct client due diligence for purposes of rendering legal services and the manner in which record or beneficial ownership of business entities is documented, verified, and made available to law enforcement authorities, not conflict with the ethical requirements and regulations imposed by state authorities on the legal profession, be risk-based, and take into account:

- (1) the actual risk of money laundering and terrorist financing in the formation of business entities; and
- (2) the burdens that such requirements or regulations might impose on state and territorial authorities, those involved in the formation of such entities, and the bona fide investment community; and

FURTHER RESOLVED, That the American Bar Association urges state and local bar associations, and other appropriate constituencies within the legal profession, with the assistance of the ABA Task Force on Gatekeeper Regulation & the Profession, to develop appropriate guidance on adopting voluntary risk-based approaches to client due diligence that will inform legal professionals of the risks of money laundering and terrorist financing, and assist them in taking appropriate steps for compliance with anti-money laundering and anti-terrorist financing legal requirements.

Joint Statement by the International Legal Profession to the FATF (April 2003)²²⁹

We, the undersigned, representing members of the legal professions of the United States, Europe, Japan and Canada, have agreed to the following statement in relation to the fight against money-laundering:

229. See Joint Statement, *supra* note 174.

- (1) We share the concerns of governments around the world to stamp out the serious crime of money-laundering.
- (2) Nevertheless, it is our duty to support the fundamental values of justice and freedom in all our societies, and to ensure that, in the welcome fight against the ill-effects of money-laundering, other important rights and duties are not lost.
- (3) Among the core attributes of all our legal professions are both the ability of clients to consult their lawyers with complete confidence, and the independence of the bar from the government. These attributes are recognised in all our legal systems, despite their many differences. The notions of legal professional privilege, professional secrecy, and confidentiality (all three will be collectively called 'professional confidentiality and trust' in this document) are at the core of the legal profession worldwide. Likewise, lawyers around the world have a duty of loyalty to the clients they serve, and play a role in society and the administration of justice independent of the state.
- (4) We believe that professional confidentiality and trust, as well as the independence of the bar, are at the root of a democratic and just society, essential to the rule of law, and a condition of access to law and justice in states where the rule of law prevails. Without these, the vital relationship of the citizen with the state cannot be properly balanced, and the necessary understanding (and observance) of law cannot be achieved. The importance of these attributes of the legal profession is recognised by the fact that in some of our countries they are protected in the constitution itself, while in others they are ensured by penalties against lawyers in legal and ethics codes.
- (5) We are seriously concerned that, in the effort to stamp out money-laundering, the values recognised in international and constitutional laws of professional confidentiality and trust and independence of the bar are not receiving adequate consideration. On behalf of our clients, we can accept neither inroads into professional confidentiality and our duty of loyalty to clients, nor obstacles in access to justice. We believe that efforts to undermine these values will be subject, in a number of countries, to successful constitutional challenge.
- (6) Given our support for the fight against money-laundering, we are pleased to assist FATF in its work. We welcome the two FATF consultations which have taken place to date with the professions. However, the FATF as an organization has yet to develop a mechanism for pursuing a sustained dialogue with the bars of member nations. We recognize that a dialogue involving 31 countries is difficult to organize, but we believe that it is feasible.
- (7) Overall, we believe that the following elements are necessary to be undertaken before decisions can be made in relation to lawyers and professional confidentiality and trust:
 - (a) properly-founded research into the extent to which lawyers are used by money-launderers, and the ways in which they are being used, so that future decisions can be based on documented facts and trends;
 - (b) proper and thorough due process in this rule-making exercise. In particular, consultation is required with the legal profession and other affected parties about how professional confidentiality and independence of the bar work to support a free and just society. We would propose to establish an expedited schedule for such a consultation, and this effort could include a broad-based

- dialogue to develop best practices that FATF could consider as part of the Recommendation process;
- (c) consideration of the legal issues arising from international and constitutional law challenges—such as taking place in Canada at the moment—of efforts by governments to breach professional confidentiality and trust in the effort to stamp out money-laundering.
- (8) We, therefore, request FATF to remove any reference to lawyers in the revision to the Forty Recommendations, until the elements mentioned in (7) above have been achieved.

Signatories

American Bar Association

American College of Trust and Estate Counsel

Federation of Law Societies of Canada

Conseil National des Barreaux

Council of the Bars and Law Societies of the European Union

Federation of European Bars

Fédération Suisse des Avocats

Japan Federation of Bar Associations

Self-regulatory organisation of Swiss lawyers and notaries

Appendix B

IBA Anti-Money Laundering Forum: The United States²³⁰

United States of America

Last updated: 21/02/2007²³¹

CENTRAL AUTHORITY FOR REPORTING

- U.S. Department of the Treasury's
 - Financial Crimes Enforcement Network. (FinCEN)
-

Are Lawyers Covered By Anti-Money Laundering Legislation?

Lawyers are not expressly covered by the USA PATRIOT Act or the Bank Secrecy Act (“BSA”).

The BSA and the USA PATRIOT Act cover “financial institutions” and require such entities to have anti-money laundering programs and customer identification programs.

The term financial institution is broadly defined to include traditional financial institutions (banks, securities brokers, insurance companies) and other non-traditional entities (money transmitters, travel agencies, automobile dealers). Title III of the PATRIOT Act, also known as the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, made a number of amendments to the anti-money laundering provisions of the BSA, which are codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to make it easier to prevent, detect, and prosecute international money laundering and the financing of terrorism.

It is possible that subsequent rulemakings by FinCEN could expand the coverage of the PATRIOT Act to include lawyers performing certain functions. Title III of the Act contains a provision requiring FinCEN to promulgate anti-money laundering requirements for “persons involved in real estate settlements and closings.” On April 10, 2003, FinCEN issued an Advance Notice of Proposed Rulemaking requesting comments from the public, real estate industry, and interested parties on this issue. However, the Notice stated that the application of Title III should not raise issues of, nor impose obligations inconsistent with, the attorney-client privilege. FinCEN also recognized the concerns that would be raised if it were to impose mandatory reporting requirements on attorneys. No formal rulemaking procedure has occurred since the Advance Notice was issued.

230. This is taken from the IBA Forum: USA, *supra* note 85.

231. This date reflects the date on which the main U.S. summary was prepared but it does not reflect the last date on which this entry was edited. *See supra* note 92 (explaining the IBA policy regarding dates).

Criminal laws prohibiting the laundering of money apply to all individuals including lawyers. Lawyers involved in money laundering or facilitating the laundering of money by their clients are subject to existing criminal laws regarding money laundering.

Although not covered by the major anti-money laundering laws, lawyers are subject to the prohibitions set forth in the regulations issued by the Office of Foreign Asset Control (OFAC). These regulations prohibit all US businesses from engaging in transactions with certain specified individuals (terrorists, drug traffickers and certain former foreign leaders) and countries (Cuba, Syria).

Laws Regarding Anti-Money Laundering Procedures

Bank Secrecy Act (as amended by the USA PATRIOT Act of 2001).

In Addition To These Laws, Is There Any Money Laundering Guidance for Lawyers Currently In Place?

There is currently no guidance in place since lawyers are not specifically covered by the USA PATRIOT Act and Bank Secrecy Act.

Under What Circumstances Is a Lawyer Under the Obligation to Report?

The anti-money laundering laws do not impose an obligation on lawyers to report client activities.

Under certain circumstances a lawyer or law firm (like every other business) may be required to report large payments of cash/currency made by clients.

Lawyer Responsibility/Liability

Not applicable.

Clients Identification and Verification

The anti-money laundering laws do not impose an obligation on lawyers to report client activities.

Lawyers are obligated under existing state ethical rules to counsel their clients to abide by the law. If a client refuses to do so, a lawyer is obliged to withdraw from the representation.

Some existing state rules permit (but do not mandate) a lawyer to disclose confidential information when a lawyer has reason to know that a client intends to engage in certain types of criminal activity.

Lawyers Prosecuted for Money Laundering Offences

Lawyers are subject to extensive state ethical requirements and enforcement of those requirements. Lawyers who engage in illegal or unethical conduct, including money laundering, or are wilfully blind to its occurrence, have been disbarred,

criminally prosecuted, or both. It is important to note that state bar disciplinary proceedings may be brought even where an attorney has not been criminally prosecuted. See, e.g., *In re Lee*, 75 A.2d 1034 (D.C. 2000); *In re Calhoun*, 492 S.E. 2d 514 (Ga. 1997); *In re Berman*, 769 P.2d 984 (Cal. 1989); *In re Belgrad*, 1999 Ill. Atty. Reg. Disc. LEXIS 96 (1999); *US v Flores*, 454F.3d149 (Ct.App. 3rd Cir, 2006).

Relevant News

- 05/02/2010- A Report from the US Senate's Permanent Subcommittee on Investigations brings back the debate on lawyers and money laundering to this jurisdiction;
- 18/12/2009—Maryland lawyer convicted of money laundering.

Appendix C

Excerpts From the FATF 40+9 Recommendations

Author's Note: Appendix C includes excerpts from the FATF Forty Recommendations and the entirety of the FATF's nine special recommendations. Appendix C begins with paragraphs 4-25 of the FATF Forty Recommendations. For those lawyers covered by the FATF Forty Recommendations,²³² these paragraphs specify the measures to be taken to prevent money laundering. It is important to know that the FATF 40+9 Recommendations state that recommendations marked with an asterisk (*) should be read in conjunction with their Interpretative Note.²³³ Appendix C includes those only interpretative notes that refer specifically to lawyers; if a particular interpretative note refers to lawyers, there will be a footnote following the asterisk. In addition to the interpretative notes, it is important to remember that the FATF 40+9 recommendations should be read in conjunction with the forty-page October 2008 Risk-Based Guidance for Legal Professionals which is not reproduced here.

The Forty Recommendations²³⁴

B. Measures to Be Taken by Financial Institutions and Nonfinancial Businesses and Professions to Prevent Money Laundering and Terrorist Financing

4. Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations.

Customer due diligence and record-keeping

5.*²³⁵ Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names.

Financial institutions should undertake customer due diligence measures, including identifying and verifying the identity of their customers, when:

232. See *supra* note 37 and accompanying text.

233. See FATF 40 Recommendations Webpage, *supra* note 39. The Interpretative Notes for the Forty Recommendations are seven pages long and are available at <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF>.

234. See FATF, Forty Recommendations, *supra* note 3.

235. The interpretative notes include the following:

Recommendations 5-16 and 21-22 state that financial institutions or designated non-financial businesses and professions should take certain actions. These references require countries to take measures that will oblige financial institutions or designated non-financial businesses and professions to comply with each Recommendation. The basic obligations under Recommendations 5, 10 and 13 should be set out in law or regulation, while

- establishing business relations;
- carrying out occasional transactions: (i) above the applicable designated threshold; or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Special Recommendation VII;
- there is a suspicion of money laundering or terrorist financing; or
- the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The customer due diligence (CDD) measures to be taken are as follows:

- a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information⁴.
- b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions taking reasonable measures to understand the ownership and control structure of the customer.
- c) Obtaining information on the purpose and intended nature of the business relationship.
- d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Financial institutions should apply each of the CDD measures under (a) to (d) above, but may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction. The measures that are taken should be consistent with any guidelines issued by competent authorities. For higher risk categories, financial institutions should perform enhanced due diligence. In certain circumstances, where there are low risks, countries may decide that financial institutions can apply reduced or simplified measures.

Financial institutions should verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering risks are effectively managed and where this is essential not to interrupt the normal conduct of business.

Where the financial institution is unable to comply with paragraphs (a) to (c) above, it should not open the account, commence business relations or perform the transaction; or should terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.

more detailed elements in those Recommendations, as well as obligations under other Recommendations, could be required either by law or regulation or by other enforceable means issued by a competent authority.

FATF, Forty Recommendations, *supra* note 3, at Interpretative Notes.

These requirements should apply to all new customers, though financial institutions should also apply this Recommendation to existing customers on the basis of materiality and risk, and should conduct due diligence on such existing relationships at appropriate times.

6.* Financial institutions should, in relation to politically exposed persons, in addition to performing normal due diligence measures:

- a) Have appropriate risk management systems to determine whether the customer is a politically exposed person.[The footnote states “Reliable, independent source documents, data or information will hereafter be referred to as ‘identification data’”.]
- b) Obtain senior management approval for establishing business relationships with such customers.
- c) Take reasonable measures to establish the source of wealth and source of funds.
- d) Conduct enhanced ongoing monitoring of the business relationship.

7. Financial institutions should, in relation to cross-border correspondent banking and other similar relationships, in addition to performing normal due diligence measures:

- a) Gather sufficient information about a respondent institution to understand fully the nature of the respondent’s business and to determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subject to a money laundering or terrorist financing investigation or regulatory action.
- b) Assess the respondent institution’s anti-money laundering and terrorist financing controls.
- c) Obtain approval from senior management before establishing new correspondent relationships.
- d) Document the respective responsibilities of each institution.
- e) With respect to “payable-through accounts”, be satisfied that the respondent bank has verified the identity of and performed on-going due diligence on the customers having direct access to accounts of the correspondent and that it is able to provide relevant customer identification data upon request to the correspondent bank.

8. Financial institutions should pay special attention to any money laundering threats that may arise from new or developing technologies that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes. In particular, financial institutions should have policies and procedures in place to address any specific risks associated with nonface to face business relationships or transactions.

9.* Countries may permit financial institutions to rely on intermediaries or other third parties to perform elements (a)—(c) of the CDD process or to introduce business, provided that the criteria set out below are met. Where such reliance is permitted, the ultimate responsibility for customer identification and verification remains with the financial institution relying on the third party.

The criteria that should be met are as follows:

- a) A financial institution relying upon a third party should immediately obtain the necessary information concerning elements (a)—(c) of the CDD process. Finan-

cial institutions should take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to the CDD requirements will be made available from the third party upon request without delay.

- b) The financial institution should satisfy itself that the third party is regulated and supervised for, and has measures in place to comply with CDD requirements in line with Recommendations 5 and 10.

It is left to each country to determine in which countries the third party that meets the conditions can be based, having regard to information available on countries that do not or do not adequately apply the FATF Recommendations.

10.* Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal activity.

Financial institutions should keep records on the identification data obtained through the customer due diligence process (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence for at least five years after the business relationship is ended.

The identification data and transaction records should be available to domestic competent authorities upon appropriate authority.

11.* Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities and auditors.

12.*²³⁶ The customer due diligence and record-keeping requirements set out in Recommendations 5, 6, and 8 to 11 apply to designated non-financial businesses and professions in the following situations:

- a) Casinos—when customers engage in financial transactions equal to or above the applicable designated threshold.
- b) Real estate agents—when they are involved in transactions for their client concerning the buying and selling of real estate.
- c) Dealers in precious metals and dealers in precious stones—when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.
- d) Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities:
 - buying and selling of real estate;
 - managing of client money, securities or other assets;

236. The interpretative note states: “To comply with Recommendations 12 and 16, countries do not need to issue laws or regulations that relate exclusively to lawyers, notaries, accountants and the other designated non-financial businesses and professions so long as these businesses or professions are included in laws or regulations covering the underlying activities.” *Id.*

- management of bank, savings or securities accounts;
 - organisation of contributions for the creation, operation or management of companies;
 - creation, operation or management of legal persons or arrangements, and buying and selling of business entities.
- e) Trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.

Reporting of suspicious transactions and compliance

13.* If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit (FIU).

14.*²³⁷ Financial institutions, their directors, officers and employees should be:

- a) Protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the FIU, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.
- b) Prohibited by law from disclosing the fact that a suspicious transaction report (STR) or related information is being reported to the FIU.

15.* Financial institutions should develop programmes against money laundering and terrorist financing. These programmes should include:

- a) The development of internal policies, procedures and controls, including appropriate compliance management arrangements, and adequate screening procedures to ensure high standards when hiring employees.
- b) An ongoing employee training programme.
- c) An audit function to test the system.

16.*²³⁸ The requirements set out in Recommendations 13 to 15, and 21 apply to all designated nonfinancial businesses and professions, subject to the following qualifications:

237. The interpretation note to Recommendation 14 states “Where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping off.” *Id.*

238. The interpretative notes for Recommendation 16 include the following:
To comply with Recommendations 12 and 16, countries do not need to issue laws or regulations that relate exclusively to lawyers, notaries, accountants and the other designated non-financial businesses and professions so long as these businesses or professions are included in laws or regulations covering the underlying activities.

1. It is for each jurisdiction to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of

- a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in Recommendation 12(d). Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants, including auditing.
- b) Dealers in precious metals and dealers in precious stones should be required to report suspicious transactions when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.
- c) Trust and company service providers should be required to report suspicious transactions for a client when, on behalf of or for a client, they engage in a transaction in relation to the activities referred to Recommendation 12(e).

Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

Other measures to deter money laundering and terrorist financing

17. Countries should ensure that effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, are available to deal with natural or legal persons covered by these Recommendations that fail to comply with anti-money laundering or terrorist financing requirements.

18. Countries should not approve the establishment or accept the continued operation of shell banks. Financial institutions should refuse to enter into, or continue, a correspondent banking relationship with shell banks. Financial institutions should also guard against establishing relations with respondent foreign financial institutions that permit their accounts to be used by shell banks.

19. Countries should consider the feasibility and utility of a system where banks and other financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount, to a national central agency with a computerised data base, available to competent authorities for use in money laundering or terrorist financing cases, subject to strict safeguards to ensure proper use of the information.

20. Countries should consider applying the FATF Recommendations to businesses and professions, other than designated non-financial businesses and professions, that pose a money laundering or terrorist financing risk.

their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings. Where accountants are subject to the same obligations of secrecy or privilege, then they are also not required to report suspicious transactions.

2. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR to their appropriate self-regulatory organisations, provided that there are appropriate forms of co-operation between these organisations and the FIU.

Id.

Countries should further encourage the development of modern and secure techniques of money management that are less vulnerable to money laundering.

Measures to be taken with respect to countries that do not or insufficiently comply with the FATF Recommendations

21. Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures.

22. Financial institutions should ensure that the principles applicable to financial institutions, which are mentioned above are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply the FATF Recommendations, to the extent that local applicable laws and regulations permit. When local applicable laws and regulations prohibit this implementation, competent authorities in the country of the parent institution should be informed by the financial institutions that they cannot apply the FATF Recommendations.

Regulation and supervision

23.* Countries should ensure that financial institutions are subject to adequate regulation and supervision and are effectively implementing the FATF Recommendations. Competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution.

For financial institutions subject to the Core Principles, the regulatory and supervisory measures that apply for prudential purposes and which are also relevant to money laundering, should apply in a similar manner for anti-money laundering and terrorist financing purposes.

Other financial institutions should be licensed or registered and appropriately regulated, and subject to supervision or oversight for anti-money laundering purposes, having regard to the risk of money laundering or terrorist financing in that sector. At a minimum, businesses providing a service of money or value transfer, or of money or currency changing should be licensed or registered, and subject to effective systems for monitoring and ensuring compliance with national requirements to combat money laundering and terrorist financing.

24. Designated non-financial businesses and professions should be subject to regulatory and supervisory measures as set out below.

- a) Casinos should be subject to a comprehensive regulatory and supervisory regime that ensures that they have effectively implemented the necessary anti-money laundering and terrorist-financing measures. At a minimum:
 - casinos should be licensed;
 - competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner

of a significant or controlling interest, holding a management function in, or being an operator of a casino

- competent authorities should ensure that casinos are effectively supervised for compliance with requirements to combat money laundering and terrorist financing.
- b) Countries should ensure that the other categories of designated non-financial businesses and professions are subject to effective systems for monitoring and ensuring their compliance with requirements to combat money laundering and terrorist financing. This should be performed on a risk-sensitive basis. This may be performed by a government authority or by an appropriate self-regulatory organisation, provided that such an organisation can ensure that its members comply with their obligations to combat money laundering and terrorist financing.

25. The competent authorities should establish guidelines, and provide feedback which will assist financial institutions and designated non-financial businesses and professions in applying national measures to combat money laundering and terrorist financing, and in particular, in detecting and reporting suspicious transactions.

Author's Note: Reproduced below are the FATF's nine special recommendations on terrorist financing. These were adopted in October 2001, shortly after the 9-11 terrorist attacks; they were revised in 2004. They supplement the FATF 40 Recommendations. These recommendations and the FATF Forty Recommendations are usually referred to jointly as the 40+9 Recommendations.

FATF IX Special Recommendations (22 October 2004 FATF Standards) FATF Special Recommendations on Terrorist Financing²³⁹

Recognising the vital importance of taking action to combat the financing of terrorism, the FATF has agreed these Recommendations, which, when combined with the FATF Forty Recommendations on money laundering, set out the basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts.

I. Ratification and Implementation of UN Instruments

Each country should take immediate steps to ratify and to implement fully the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism.

Countries should also immediately implement the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.

239. See FATF, 9 Special Recommendations, *supra* note 3.

II. Criminalising the Financing of Terrorism and Associated Money Laundering

Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offences are designated as money laundering predicate offences.

III. Freezing and Confiscating Terrorist Assets

Each country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.

Each country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.

IV. Reporting Suspicious Transactions Related to Terrorism

If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations, they should be required to report promptly their suspicions to the competent authorities.

V. International Co-Operation

Each country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organisations.

Countries should also take all possible measures to ensure that they do not provide safe havens for individuals charged with the financing of terrorism, terrorist acts or terrorist organisations, and should have procedures in place to extradite, where possible, such individuals.

VI. Alternative Remittance

Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

VII. Wire Transfers

Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account

number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain.

Countries should take measures to ensure that financial institutions, including money remitters, conduct enhanced scrutiny of and monitor for suspicious activity funds transfers which do not contain complete originator information (name, address and account number).

VIII. Non-profit Organisations

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

IX. Cash Couriers

Countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system or other disclosure obligation.

Countries should ensure that their competent authorities have the legal authority to stop or restrain currency or bearer negotiable instruments that are suspected to be related to terrorist financing or money laundering, or that are falsely declared or disclosed.

Countries should ensure that effective, proportionate and dissuasive sanctions are available to deal with persons who make false declaration(s) or disclosure(s). In cases where the currency or bearer negotiable instruments are related to terrorist financing or money laundering, countries should also adopt measures, including legislative ones consistent with Recommendation 3 and Special Recommendation III, which would enable the confiscation of such currency or instruments.

