The International Financial Regulation and Enforcement Regime: Implications for Financial Intermediaries

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I. INTRODUCTION

Increasingly professionals in the United States and throughout the world involved in wealth management and planning are faced with a growing web of laws and ethics rules, regulating their conduct. In some cases running afoul of U.S. and foreign laws can result in prosecution and/or subject lawyers and professionals to forfeiture and loss of reputation.

This paper discusses selected international financial regulatory, enforcement and ethical issues in international trust and estate planning. As we are two weeks into the Trump Administration and still without a confirmed Secretary of Treasury, this paper makes limited statements and analyses of the likely policies of the Trump Administration.

Section II discusses the application of due diligence and “Know-Your-Client” principles for lawyers involved in wealth planning and management.

In Section III the anti-tax haven initiatives are updated. In particular, the actions of international organizations, such as the OECD and the EU, as well as informal groups, such as the FATF, G-20, and G7 are discussed.

Section IV considers developments in the limits on bank secrecy. Here, we have witnessed a convergence of dynamic developments. Whistleblowers have interacted and cooperated first with Wikileaks and more recently with the International Consortium of Investigative Journalists, and various civil society organizations, such as Global Witness, to further erode what limited confidentiality previously existed.

In Section V the practical lessons of dealing in the increasingly complex tax and regulatory regimes are discussed. In this regard practitioners must grapple with the rules of professional conduct and Circular 230, the increasing penalization of the conduct of enablers, and the convergence of various issues, such as tax, migration, transparency, and other issues.

Section VI provides a summary and conclusion for the paper.

II. APPLICATION OF DUE DILIGENCE AND “KNOW-YOUR-CLIENT” PRINCIPLES FOR LAWYERS INVOLVED IN WEALTH PLANNING AND MANAGEMENT

This section discusses the American Bar Association’s (ABA) risk-based anti-money laundering good practices guidance, to which lawyers and bar associations should pay special attention. The section also reviews a number of important regulatory developments and announcements by the Obama Administration on May 6, 2016. After four years FinCEN has issued customer due diligence regulations. Treasury has also issued regulations concerning the need for single-member Limited Liability Companies to obtain an Employer Identification Number (EIN). Also on May 6, 2016, President Obama called on Congress to provide additional tools to combat illicit financial activity and tax evasion and announced proposed legislation on transnational corruption. Both President Obama and Treasury Secretary Lew called on the Senate to ratify pending tax treaties. President Obama also called for proposed legislation to enable the U.S. to reciprocate under FATCA IGAs.
A. ABA Voluntary Risk-Based AML Good Practices Guidance

Increasingly obligations under international anti-money laundering ("AML") and counter-terrorism financing ("CFT") enforcement, tax transparency, and beneficial ownership regimes impose on lawyers, gatekeepers, and other wealth management professionals enhanced duties with respect to their client intake and monitoring. Concomitantly, these obligations have a potential to encroach on attorney-client privilege, the duty of client confidentiality, and the duty to zealously represent ones clients.

An international program known as the Gatekeepers Initiative, established in 1999, continues to gain momentum and have an increasing impact on professionals such as lawyers and accountants who deal with transactions involving the movement of money and the structuring of entities that may be involved in handling money. The Gatekeepers Initiative originated nearly a decade ago at the G-8 Countries’ Moscow Ministerial Conference entitled “Combating Transnational Organized Crime.”

The initiative simultaneously threatens professionals with criminal penalties for failing to adhere to emerging standards of anti-money laundering (AML) due diligence while at the same time providing opportunities for lawyers to expand the practice area of due diligence. This convergence of emerging threats and opportunities poses challenges for U.S. bar associations.

American lawyers are caught between two competing interests: adhering to the AML and counter-terrorist financing (CFT) laws of foreign – especially European – governments that impose criminal penalties on lawyers for not identifying and reporting suspicious activity concerning their clients, and adhering to their state professional ethics rules that require client confidentiality and zealous client representation. In addition, depending on the jurisdiction in which legal professionals are employed, clients are finding they can secure a higher level of confidentiality, and that the law and ethics standards require different conduct from legal professionals. As a result, both legal professionals and their clients find increasingly that the laws and ethics that apply to a wide range of services are falling into a gray area.

Almost daily, lawyers throughout the United States are asked to help send money abroad, or to provide advice on transnational securities or real estate transactions, or to establish or advise a nonprofit organization whose purposes may include helping foreign affiliates. U.S. lawyers and businesses routinely are asked to offer advice on transactions that may violate the prohibition of dealing with persons on the U.S. Department of the Treasury’s Special Designated National List of the Office of Foreign Asset Control (OFAC). The OFAC regulations prohibit all U.S. businesses, including lawyers and legal professionals, from engaging in transactions with certain specified persons (individuals and entities) that include individuals such as terrorists, drug traffickers, and nuclear proliferators, and countries such as Cuba and Syria. But individuals may have foreign names with multiple spellings, and countries often have myriad branches and affiliates, and depending on the precise name and location of their headquarters or place of business, the U.S. lawyers may have enforcement problems of their own. Indeed, the esoteric and complicated areas of anti-money laundering and counter-terrorism financial regulatory and enforcement laws are increasingly overlapping and converging.
The emergence of these two areas of the law – AML and CFT – present a double-edged sword for lawyers, especially ones who advise on regulatory and white collar criminal law. If they do not keep fully up-to-date with this dynamic area of practice, they will themselves have enforcement and even criminal problems. Lawyers that master these cutting-edge legal developments not only keep themselves out of harm’s way, they may also develop new areas of practice: advising lawyers and their clients on AML and CFT due diligence, sometimes on one-off transactions or on prevention and due diligence programs.

Lawyers and law firms are often caught in a bind. If they follow the ethics requirements of their states in international matters – adhering to client confidentiality and zealous client representation – it may be difficult to determine which jurisdiction’s ethical rules apply. Even worse, lawyers may realize that the requirements of their state’s ethical rules may violate foreign AML and CFT laws, thereby subjecting them to criminal sanctions. The AML and CFT due diligence requirements overlap and often conflict with foreign laws, thereby making counseling in the AML/CFT and ethics area a trap for the unwary.

U.S. gatekeepers must also follow international sanctions, such as those issued by the United Nations and the European Union. The United States clearly has the most extensive regulations and very aggressively enforces them, including enforcement against gatekeepers. The OFAC rules have brought a convergence of AML and counter-terrorist financial enforcement (CFTE) laws. However, because the AML and OFAC/CFTE laws are each enormously broad and complex, few U.S. lawyers are knowledgeable about both regimes. Most U.S. financial institutions have separate compliance officials and software for each legal area.2

The ABA House of Delegations has adopted Resolution 300, urging U.S. lawyers to develop voluntary risk-based guidance for client due diligence and directed the ABA to develop this guidance and to engage with the federal government and other interested parties.

Pursuant to Resolution 116, the ABA adopted as its official policy the voluntary good practice guidance.3

Under the ABA Good Practices Guidance, once a U.S. attorney has identified and verified the identity of his or her client and checked the same against OFAC’s SDN List, the attorney should then evaluate the new client based on the three major risk categories (i.e., country/geographic risk, client risk, and service risk) and the risk variables set forth in the Lawyer Guidance to determine whether the client is higher risk and, if so, perform enhanced Customer Due Diligence (CDD).4

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As mentioned below, the Financial Action Task Force’s 40 Recommendations, adopted on February 15, 2012, represent the international standards for AML and CFT. Recommendations 9 through 25, 26, and 28 set forth the measures financial institutions and designated non-financial businesses and professionals (“DNFBPs”), which includes lawyers, should take to prevent money laundering and terrorist financing. The recommendations address customer due diligence and record-keeping.

On December 1, 2016, the Financial Action Task Force (FATF) released its mutual evaluation of the United States’ level of compliance with the international money laundering standards based on the FATF 40 Recommendations, the level of effectiveness of its AML/CFT system, and makes recommendations on how the system could be strengthened.\(^5\)

The report underscores that the regulatory framework has some significant gaps, including minimal coverage of certain institutions and businesses: investment advisers (IAs), lawyers, accountants, real estate agents, and trust and company service providers (other than trust companies). Minimal measures are imposed on designated non-financial businesses and professions (DNFBPs), other than casinos and dealers in precious metals and stones, and consist of the general obligation applying to all trades and businesses to report transactions (or a series of transactions) involving more than US $10,000, and targeted financial sanctions (TFS) requirements. Other comprehensive AML/CFT obligations do not apply to these sectors. In the U.S. context the vulnerability of these minimally covered DNFBP sectors is significant, considering the many examples identified by the national risk assessment process.

**B. FinCEN Customer Due Diligence Rules**

On May 6, 2016, the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) announced it is making public a final rule requiring financial institutions to know and verify the identities of the natural persons (also known as beneficial owners) who own, control, and profit from companies when those companies open accounts.\(^6\)

This rule also amends existing regulations under the Bank Secrecy Act (BSA) to enhance transparency and protect the integrity of the financial system by clarifying and strengthening the customer due diligence obligations of financial institutions. The CDD Final Rule advances the implementation of the BSA by helping to make available to law enforcement valuable information needed to disrupt illicit finance networks. This will in turn increase financial transparency and augment the ability of financial institutions and law enforcement to identify the assets and accounts of criminals.


and national security threats. This will also facilitate compliance with sanctions programs and other measures that cut off financial flows to these actors.\textsuperscript{7}

The CDD Final Rule adds a new requirement that financial institutions – including banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities – collect and verify the personal information of the real people (also known as beneficial owners) who own, control, and profit from companies when those companies open accounts. The Final Rule also amends existing Bank Secrecy Act (BSA) regulations to clarify and strengthen the obligations of these entities.

The CDD Final Rule harmonizes BSA regulations and makes explicit several components of customer due diligence that have long been expected under existing regulations, as well as incorporating a new requirement for covered financial institutions to collect beneficial ownership information. Specifically, the rule contains three core requirements: (1) identifying and verifying the identity of the beneficial owners of companies opening accounts; (2) understanding the nature and purpose of customer relationships to develop customer risk profiles; and (3) conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. With respect to the new requirement to obtain beneficial ownership information, financial institutions will have to identify and verify the identity of any individual who owns 25 percent or more of a legal entity, and an individual who controls the legal entity. Based upon comments received in response to the proposed rule that was published in August 2014, the final rule extends the proposed implementation period from one year to two years, expands the list of exemptions, and makes use of a standardized beneficial ownership form optional as long as a financial institution collects the required information.

The CDD Final Rule advances the BSA by making available to law enforcement valuable information needed to disrupt illicit finance networks. This will in turn increase financial transparency and augment the ability of financial institutions and law enforcement to identify the assets and accounts of criminals and national security threats. This will also facilitate compliance with sanctions programs and other measures that cut off financial flows to these actors.\textsuperscript{8}

Some civil society organizations have criticized the final rule. Mark Hays of Global Witness, criticized provisions in the proposed regulations dealing with escrow accounts established by lawyers for their client because it excludes accounts set up in escrow by lawyers from being covered. He referred to an investigation his organization carried out last year into the role played by U.S. lawyers in money laundering, which was carried by 60 Minutes. He noted that one lawyer suggested using escrow

\textsuperscript{7} Id.

accounts as a way to avoid money laundering checks.\(^9\) Meanwhile, the bar associations have fought to exclude escrow accounts from the final rule.

Another criticism of one civil society organization is the ability of owners to dilute holdings below the 25 percent threshold to avoid disclosure.\(^{10}\)

C. **Requiring Foreign-Owned Single-Member LLCs to Obtain an EIN**

The Treasury Department and Internal Revenue Service (IRS) are issuing proposed regulations closing a loophole in U.S. laws that has allowed foreigners to hide assets or financial activity behind anonymous entities established in the U.S. The rule will require foreign-owned entities that are “disregarded entities” for tax purposes, including foreign-owned single-member limited liability companies (LLCs), to obtain an employer identification number (EIN) with the IRS. These entities represent a narrow class of foreign-owned U.S. entities that have previously had no obligation to report information to the IRS or to get a tax identification number, and thus can be used to shield the foreign owners of non-U.S. assets or non-U.S. bank accounts. The proposed rule will strengthen the IRS’s ability to prevent the use of these entities for tax avoidance purposes, and will build on the success of other efforts to curb the use of foreign entities and accounts to evade U.S. tax.\(^{11}\)

Treasury also announced proposed regulations to require foreign-owned “disregarded entities,” including foreign-owned single-member limited liability companies (LLCs), to obtain an employer identification number (EIN) with the IRS.

These requirements allow the IRS to determine whether there is any federal tax liability and if so, how much, and to share information with other tax authorities as appropriate. However, there is a narrow class of foreign-owned U.S. entities – typically single member LLCs– that have no obligation to report information to the IRS or to get a tax identification number. These “disregarded entities” can be used to shield the foreign owners of non-U.S. assets or non-U.S. bank accounts.\(^{12}\)

D. **Calling on Congress to Provide Additional Tools to Combat Illicit Financial Activity and Tax Evasion**

In addition to the administrative steps taken, the Administration renewed the call for Congress to act to strengthen the authorities and close the gaps in U.S. laws that can be abused by bad actors and keep the United States at the forefront of international efforts to combat financial crimes. In particular, the Administration called for new legislation to require reporting of the “beneficial ownership” of corporations, helping law enforcement prevent and investigate financial crimes. In this regard, the White House and Treasury are sending to Congress draft legislation requiring legal entities to know and

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\(^{10}\) *Id.*, quoting Heather Lowe, legal counsel and director of government affairs at Global Financial Integrity.

\(^{11}\) Finet and William Hoke, *supra*.

\(^{12}\) U.S. Department of Treasury, *supra*.
report information on beneficial ownership. Increasing law enforcement access to “beneficial ownership” information – information about the people who are really behind a corporation or other business entity – will help in preventing and investigating financial crimes.\(^\text{13}\)

The Administration said it is committed to working with Congress to pass meaningful legislation that would require companies to know and report adequate and accurate beneficial ownership information at the time of a company’s creation, so that the information can be made available to law enforcement. The legislation would authorize the Treasury Department to require that legal entities formed or qualified to do business within the United States file this information with the Treasury Department, and face penalties for failure to comply. The misuse of companies to hide beneficial ownership is a significant weakness in the transparency of entities formed in the United States that can only be resolved by Congressional action.\(^\text{14}\)

Also on May 5, 2016, Treasury announced it is sending beneficial ownership legislation to Congress. The Administration is committed to working with Congress to pass meaningful legislation that would require companies to know and report adequate and accurate beneficial ownership information at the time of a company’s creation, so that the information can be made available to law enforcement. As part of the proposed legislation, companies formed within the U.S. would be required to file beneficial ownership information with the Treasury Department, and face penalties for failure to comply. The misuse of companies to hide beneficial ownership is a significant weakness in the U.S. anti-money laundering/counter financing of terrorism regime that can only be resolved by Congressional action. The new draft legislation is an amended version of an Administration Budget proposal, reflecting discussions with Congress, law enforcement entities, and others.

The proposed legislation also contains technical amendments to the current Geographic Targeting Order (GTO) authority which would clarify FinCEN’s ability to collect information under GTOs, such as bank wire transfer information. The most recent GTOs temporarily require certain U.S. title insurance companies to record and report the beneficial ownership information of legal entities making “all-cash” purchases of high-value residential real estate. All-cash purchases may be conducted by individuals attempting to hide their assets and identity by purchasing residential properties so these GTOs assist the U.S. government in better understanding potential illicit finance vulnerabilities in the real estate sector. This January, FinCEN issued GTOs focused on the Borough of Manhattan in New York City, New York, and Miami-Dade County, Florida. FinCEN intends to evaluate the information it gains from these GTOs and determine what next steps would best protect the U.S. financial system from criminal abuse. Options could include broadening the GTOs to other areas, or using the information to inform a more comprehensive rulemaking.\(^\text{15}\)


\(^{14}\) White House, supra.

\(^{15}\) U.S. Department of Treasury, supra.
E. Proposed Legislation against Transnational Corruption

President Obama announced new legislation to strengthen the ability of the U.S. to fight transnational corruption. The Department of Justice is sending to Congress draft legislation to enhance and strengthen efforts to combat transnational corruption. This legislation would enhance law enforcement’s ability to prevent bad actors from concealing and laundering illegal proceeds of transnational corruption. It would also allow U.S. prosecutors to more effectively pursue kleptocracy cases and prosecute money laundering as part of foreign corruption, and reinforce the role of the U.S. in the international community as a model for others in anti-corruption matters. The proposals would assist investigators and prosecutors in gathering evidence which can be used in prosecuting those who seek to hide and move illegal funds.

F. Ratification of Pending Tax Treaties

President Obama called for long-overdue Senate action on tax treaties including eight tax treaties with other countries have been awaiting Senate approval for several years – including amendments to U.S. existing treaties with Switzerland and Luxembourg that would enable U.S. law enforcement in the United States to obtain information about financial accounts in those countries. The inability to obtain this information has impeded investigations and enforcement relating to offshore tax evasion – including evasion involving secret Swiss bank accounts. In a letter from Secretary Lew, the Administration called on Congress to finally act upon the treaties so that they can be implemented without further delay.

G. Proposed Legislation to Enable the U.S. to Reciprocate under FATCA IGAs

President Obama called for “Reciprocal FATCA” legislation to strengthen the ability of the U.S. to work with other countries to fight tax evasion. Congress also must act to strengthen the United States’ hand in pressing other countries to improve transparency by living up to its end of the bargain. The President has proposed providing full “reciprocity” under the Foreign Account Tax Compliance Act (FATCA) in the last three budgets he has submitted to Congress. Secretary Lew’s letter reiterates that Congress should act on the Administration’s legislative proposal as soon as possible to ensure that the United States meets international standards. The principal reason for the initiatives is that the U.S. understands that its ability to mobilize the international community and sustain the commitment of other nations to the global financial architecture requires the perception that the U.S. is taking a lead in adopting the financial regulatory reforms that the U.S., international organizations, such as the OECD and IMF, and informal groups, such as FATF, the G-7, and G-20, are trying to impose on other countries. Recently U.S. Treasury Secretary Jacob Lew admitted that sustaining U.S. leadership in the global economic system starts at home and that the U.S. must lead by example. In particular, the U.S. seeks to expand efforts to combat terrorist financing, corruption, money laundering, and other financial crimes. The U.S. is working through FATF to improve AML/CFT enforcement globally. In particular, the U.S. relies on the international community to pass resolutions to bolster the international effort to combat terrorist financing, specifically against the Islamic State. Simultaneously, Treasury is trying to

achieve progress in combating money laundering and terrorist financing and the implementation of tax policies with emerging-market partners. 17

H. Analysis of Recent U.S. Financial Regulatory Initiatives and Prospects for the Trump Administration

Notwithstanding the regulatory actions taken (e.g., CDD regulations and the proposed regulations on reporting by single-member LLCs), other initiatives require Congressional action. It will be difficult in a lame duck session of Congress, especially when the Republicans control Congress, to achieve passage of these proposals. Congress will not sit for long during this election year. Hence, the initiative and the difficulty of achieving them in a lame duck session opens the door for criticism due to the hypocrisy of the professed U.S. leadership on these issues and the lack of concrete action.

The principal reason for the initiatives is that the U.S. understands that its ability to mobilize the international community and sustain the commitment of other nations to the global financial architecture requires the perception that the U.S. is taking a lead in adopting the financial regulatory reforms that the U.S., international organizations, such as the OECD and IMF, and informal groups, such as FATF, the G-7, and G-20, are trying to impose on other countries. Recently U.S. Treasury Secretary Jacob Lew has admitted that sustaining U.S. leadership in the global economic system starts at home and that the U.S. must lead by example. 18 In particular, the U.S. seeks to expand efforts to combat terrorist financing, corruption, money laundering, and other financial crimes. The U.S. is working through FATF to improve AML/CFT enforcement globally. In particular, the U.S. relies on the international community to pass resolutions to bolster the international efforts to combat terrorist financing, specifically against the Islamic State. Simultaneously, the Treasury Department is trying to achieve progress in combating money laundering and terrorist financing and the implementation of tax policies with emerging-market partners. 19 As critics show the gaps between U.S. rhetoric and its own actions, it erodes the ability of the U.S. to assert its leadership.

The Trump Administration may well pause further work on tax transparency given Mr. Trump’s promise to cut regulations by 75%. 20 In addition, the Trump Administration has said it will audit multilateral treaties, so it remains to be seen whether the U.S. will ever ratify the OECD Convention MAATM in a Trump administration. Given the results of the 2016 Presidential and Congressional election, it is unlikely the U.S. Congress will provide additional tools to combat illicit financial activities and tax evasion, let alone proposed legislation to enable the U.S. to reciprocate under FATA IGAs or against transnational corruption.

17 Id. at 66-67.
16 Id. at 56, 61.
19 Id. at 66-67.
III. UPDATE ON ANTI-TAX HAVEN INITIATIVES

In this section anti-tax haven initiatives are brought up-to-date. The theme is that many of the international organizations and informal groups are reinforcing themes of corporate and tax transparency, tax enforcement cooperation, and anti-corruption. Increasingly, a convergence of these themes is occurring. Some of the tension among jurisdictions is reflected in WTO cases, such as the one brought by Panama against Argentina as a result of the latter putting Panama on its black-list.

A. Organization of Economic Cooperation and Development (OECD)

Since 1998, when the OECD started its harmful tax practices initiative emphasizing the goal of stopping the use of tax havens, it has been the predominant source of most anti-tax haven initiatives. However, it now calls the program the Transparency and Exchange of Information for Tax Purposes operated by the Global Forum. The Global Forum now has 135 members on equal footing and is the premier international body for ensuring the implementation of internationally agreed standards of transparency and exchange of information in the tax area. Through its peer review process, the Global Forum monitors whether its members fully implement the standard of transparency and exchange of information that they have committed to implement. It also works to establish a level playing field, even among countries that have not joined the Global Forum. Countries that do not meet the standards can be subject to blacklisting and countermeasures.

In recent years the Global Forum has worked with the Financial Action Task Force, the World Bank, the G-20, and the G7 in formulating and implementing many of its initiatives, such as the automatic exchange of information.

On April 14, 2016, the OECD recommended that the G-20 have the international community call time on all remaining holdouts who have yet to implement internationally agreed tax transparency standards. The OECD report says further progress is needed on the implementation of beneficial ownership identification rules. The OECD calls on the international community to have the Oslo Dialogue – an inter-government effort to fight tax crime and illicit financial flows – devise new recommendations to strengthen the effectiveness of inter-agency and cross-border co-operation.

B. Financial Action Task Force (FATF)

The Financial Action Task Force (FATF), also known by its French name, Groupe d’action financière (GAFI), is an intergovernmental organization established by the 1989 G-7 World Economic Summit held in Paris. As a testament to its significance, FATF has increased in size from its 16 original members—the G-7, the European Commission, and eight other countries—to 36 members.

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21 For background on the Global Forum, see http://www.oecd.org/tax/transparency.

22 OECD, Concrete actions needed to advance global tax transparency. OECD says, Apr. 14, 2016.

This organization was initially tasked with combatting money laundering worldwide. In October of 2001, shortly after the 9/11 terrorist attacks in the U.S., its mandate was expanded to include fighting the financing of terrorism. Seven years later, in October of 2008, FATF’s mandate was again expanded to address the financing and proliferation of weapons of mass destruction. Each of these areas of responsibility, anti-money laundering (AML), countering the financing of terrorism (CFT), and weapons proliferation, are considered “serious threats to global security and the integrity of the financial system.”

In pursuing these goals, FATF carries out several different functions as a global administrative institution. First, the organization serves as an information network. In collaboration with other international stakeholders, FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse.

The second function fulfilled by the organization is that of a harmonization network that allows “nations to standardize their laws and regulations in areas where they have determined that it will advance their common interests.” After reviewing techniques used in financing terrorism and laundering money, as well as the measures used to combat them, FATF attempts to establish standards for entities involved in financial transactions. These standards are meant to be global measures designed for universal application. It is through this function that FATF has promulgated its Forty Recommendations, which “set out a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as financing the proliferation of weapons of mass destruction.”

The last function fulfilled by the organization is that of an enforcement network. FATF monitors its members to ensure that they have implemented standards that have been adopted. Jurisdictions that fail to comply with these standards are placed on a list in an attempt to “name-and-shame” them into compliance. This list has the effect of signaling to the global arena that a particular state is a haven for illicit activities. Lacking its own independent enforcement mechanism, additional enforcement strategies rely on FATF’s ability to recommend retaliatory measures against non-compliant states by members that are already in compliance. Chief among these is the requirement that cooperating jurisdiction perform increased due diligence, with all the red tape associated with it, for relationships and transactions involving these “higher-risk countries.”

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26 Id. at 291.


28 Recommendation 19, THE FATF RECOMMENDATIONS.
As the international financial system is only as strong as its weakest link, the FATF seeks to identify the jurisdictions that present a particularly high risk due to crucial deficiencies in their AML/CFT regimes or due to a simple unwillingness to cooperate. Once these jurisdictions are identified, FATF has the ability to coordinate an array of responses to the threat they pose.

The responsibility for identifying jurisdictions with strategic deficiencies falls on the FATF’s International Cooperation Review Group (ICRG), which, as of June 2013, has reviewed over 70 countries. The initial referral of these countries to the ICRG is made based on available information arising from the jurisdiction. Examples of such information that demonstrates risk to the financial system include unfavorable results from a mutual evaluation process, non-participation in any FATF-Style Regional Bodies (FSRBs), or the lack of a stated commitment to implementing the FATF Standards.

Once these jurisdictions are referred to the ICRG, a preliminary review is conducted by one of the four regional review subgroups that cover, respectively, Africa and the Middle East, the Americas, Asia and the Pacific, and Europe and the Eurasian regions. This preliminary report is submitted to the FATF, which then decides whether a more targeted and in-depth review of the jurisdiction is required. If so decided, the jurisdiction to be reviewed is granted an opportunity to discuss the preliminary report face to face with the regional review group and to participate in developing an action plan to address the deficiencies that have been identified. High-level political commitment to the implementation of these action plans is specifically requested by the FATF.

Once the ICRG conducts its full review, the FATF decides whether or not the jurisdiction should be publicly identified. Of the 70 countries reviewed by the ICRG as of June 2013, 50 of them have been publicly identified. After each of the three yearly meetings of the Plenary, the organization issues statements that indicate the strategic risks emanating from each of the investigated countries. These Public Statements identify two types of countries:

- Jurisdictions for which the FATF calls on its members and non-members to apply counter-measures
- Jurisdictions for which the FATF calls on its members to consider the risks that have been identified and to apply enhanced due diligence when transacting with them

Under the first type of statement made of high-risk jurisdictions, the FATF’s June 2013 Public Statement called for the imposition of counter-measures against Iran and North Korea. Iran had been subject to calls for enhanced scrutiny by the FATF since February 2009. The country’s failure to adequately address the continuing threat of terrorist financing arising from the country has resulted in the imposition of additional safeguards on transactions with entities affiliated with Iran. The public

29 FATF ANNUAL REPORT, supra, at 26.
30 Id. at 27.
31 Id.
statement continues to call on Iran to address its AML/CFT deficiencies by criminalizing terrorist financing and implementing suspicious transaction reporting requirements.  

North Korea has been subject to the special scrutiny advisory since February 2011. The country has since engaged directly with the FATF and with the APG regional body, but the country’s AML/CFT deficiencies are still deemed critical. Enhancing their engagement with the FATF and APG is urged, and other jurisdictions are called on to apply counter-measures to protect their financial sectors from the threats emanating from North Korea.

Under the second type of statement made of high-risk jurisdictions, the June 2013 Public Statement listed twelve countries who posed risks that should be strongly considered by other jurisdictions. The number and names of the countries continue to change. Countries that have been identified as having strategic AML/CFT deficiencies but have shown a commitment to improving their AML/CFT regimes and have worked with the FATF to implement an agreed-upon action plan are able to avoid being listed in the Public Statement. Countries in this purgatory must show sufficient progress in addressing the identified risks within the timelines agreed to or else the FATF may decide to list the country in its Public Statement. Before making this decision, the FATF first issues a warning indicating the country’s unsatisfactory progress and urging more expeditious implementation of the action plan. History has demonstrated that these warnings indeed have the desired effect of accelerating a country’s compliance with its action plan.

A country may be removed from the ICRG investigation or “de-listed” from the Public Statement if it has been deemed to have addressed all or nearly all of the deficiencies identified in its action plan. Once this consideration is made, there is an on-site examination of the reform implementation efforts and of the political commitment to these reforms. If satisfied, the country is released from its unfavorable status.

On October 23, 2015, at the FATF plenary meeting in Korea, in order to protect the international financial system from money laundering and financing of terrorism (ML/FT) risks and to encourage greater compliance with the AML/CFT standards, the FATF identified jurisdictions that have strategic deficiencies and worked with them to address those deficiencies that pose a risk to the international financial system. The FATF identified Iran, North Korea and Myanmar as the jurisdictions with such deficiencies.

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33 Id.

34 FATF ANNUAL REPORT, supra, at 28.

35 Id.
The FATF continues to identify additional jurisdictions, on an on-going basis, that pose a risk to the international financial system.

The FATF and the FATF-style regional bodies (FSRBs) will continue to work with the jurisdictions noted below and report on the progress made in addressing the identified deficiencies. The FATF calls on these jurisdictions to complete the implementation of action plans expeditiously and within the proposed timeframes. The FATF will closely monitor the implementation of these action plans and encourages its members to consider the information presented with respect to each of the following jurisdictions: Afghanistan; Algeria; Angola; Bosnia and Herzegovina; Iraq; Guyana; Panama; Papua New Guinea; Syria; Uganda; and Yemen. The GATFG named Lao PDR as not making sufficient progress. The FATF commented on the deficiencies identified for each of the countries mentioned.36

C. G-20

The G-20 (Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies. It was founded in 1999 with the aim of studying, reviewing, and promoting high-level discussion of policy issues pertaining to the promotion of international financial stability. It seeks to address issues that go beyond the responsibilities of any one organization. The G-20 heads of government or heads of state have periodically conferred at summits since their initial meeting in 2008, and the group also hosts separate meetings of finance ministers and central bank governors. It has dealt from the start with tax and corporate transparency, anti-corruption, anti-money laundering and terrorist financing, and strengthening financial regulatory controls to prevent the type of financial contagion that has exacerbated world financial crises.

1. Communiqué of G-20 Finance Ministers & Central Bank Governors

On April 15, 2016, the meeting of the Finance Ministers and Central bank Governors of the G-20 issued a Communiqué, requiring the OECD by July 2016 to publish objective criteria to identify non-cooperative jurisdictions with respect to tax transparency.37

The G-20 Communiqué strongly reaffirmed the importance of effective and widespread implementation of the internationally agreed standards on transparency. It called on all relevant countries including all financial centers and jurisdictions, which have not committed to implement the standard on automatic exchange of information by 2017 or 2018 to do so without delay and to sign the Multilateral Convention. According to the Communiqué, by the 2017 G-20 Summit all countries and jurisdictions are expected to upgrade their Global Forum rating to a satisfactory level.

The Communiqué mandated the OECD working with G-20 countries to establish objective criteria by the July meeting to identify non-cooperative jurisdictions with respect to tax transparency.

36 For additional background see Bruce Zagaris, FATF Plenary Addresses Issues of Foreign Terrorist Fighters and Financing and De-risking, 31 INT’L ENFORCEMENT L. REP. 428, 430-31 (Nov. 2015).

Defensive measures will be considered by G-20 members against non-cooperative jurisdictions if progress as assessed by the Global Forum is not made.\(^{38}\)

The Communiqué stated that it looked forward to the Global Forum report on transparency and information exchange for tax purposes before the end of the year. It welcomed the collective and continuous efforts by countries and international organizations to build capacity on tax matters for developing economies. It encouraged G-20 members to consider committing to the principles of the Addis Tax Initiative.\(^{39}\)

The Communiqué reiterated that it is essential that all countries and jurisdictions fully implement the FATF standards on transparency and beneficial ownership of legal persons and legal arrangements. It particularly stressed the importance of countries and jurisdictions improving the availability of beneficial ownership information to, and its international exchange between, competent authorities for the purposes of tackling tax evasion, terrorist financing and money laundering. The FATF and the Global Forum on Transparency and Exchange of Information for Tax Purposes was asked to make initial proposals by the October meeting on ways to improve the implementation of the international standards on transparency, including on the availability of beneficial ownership information, and its international exchange.\(^{40}\)

The Communiqué reaffirmed the G-20’s resolve to combat decisively and tackle all sources, techniques and channels of terrorist financing. All countries and jurisdictions were called upon to join in these efforts, including through swift and effective implementation of FATF standards, the new Consolidated Strategy on Combating Terrorist Financing, and provisions of the UN Security Council Resolution 2253. The G-20 asked FATF, working with the relevant IOs, to strengthen its work on identifying and tackling loopholes and deficiencies that remain in the financial system and ensure that the FATF standards are effective and comprehensive, and fully implemented. The FATF-style regional bodies were called to be vigorous partners. The Communiqué called on IMF, OECD, FSB, and the World Bank Group to support FATF in addressing the evolving challenges by bringing in their own analysis, within their respective areas of expertise, of the sources, techniques and channels of illicit financial flows.\(^{41}\)

One of the problems as a result of increased sanctions on banks has been de-risking: closing correspondent bank relationships with indigenous banks and jurisdictions that are perceived as risks. The Communiqué supports the work by the FSB, FATF, World Bank Group, OECD and IMF to assess and address, as appropriate, the decline in correspondent banking services including under the FSB-coordinated action plan, and asked for a report on progress to be sent to the Summit. The work of the

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\(^{38}\) International Monetary Fund, *Communiqué*, supra.

\(^{39}\) *Id.*, parag. 7.

\(^{40}\) *Id.*, parag. 8.

\(^{41}\) *Id.*, parag. 9.
GPFI on enhancing SME financing, promoting digital financial inclusion and improving data collection and indicators was reaffirmed by G-20.42

2. G-20 Agrees to Act on Anti-Corruption, Corporate Transparency, Tax Enforcement Cooperation43

On November 15-16, 2015, the G-20 Leaders’ Communique at Antalya, Turkey, included support for anti-corruption and corporate transparency and tax enforcement cooperation.44

3. Anti-Corruption and Corporate Transparency

The Communiqué stated a commitment to developing a global culture of intolerance towards corruption through effectively implementing the 2015-2016 G-20 Anti-Corruption Action Plan. It endorsed the G-20 High-Level Principles of Integrity and Transparency in the Private Sector which will assist businesses comply with global standards on ethics and anti-corruption.

The Communiqué focused on the importance of ensuring the integrity and transparency of public sectors. In this connection, the G-20 endorsed the G-20 Anti-Corruption Open Data Principles and the G-20 Principles for Promoting Integrity in Public Procurement. It also welcomed the ongoing work on asset disclosure frameworks.

The Communiqué pledged to continue to work to increase international cooperation, including where appropriate and consistent with domestic legal systems, on civil and administrative procedures, as an important mechanism to effectively combat bribery and to support asset recovery and the denial of safe haven to corrupt officials and persons who corrupt them. It welcomed the publication of its Implementation Plans on beneficial ownership transparency and will continue its efforts in this regard.45

The G-20/OECD Principles of Corporate Governance represent a shared understanding with respect to corporate governance standards and practices in areas such as transparency, disclosure, accountability, board oversight, shareholder rights and role of key stakeholders.46 Developed by the OECD in 1999, the Principles are the international corporate governance benchmark for policy makers, investors, corporations and other stakeholders worldwide. They also have been adopted as one of the Financial Stability Board’s (FSB) key standards for sound financial systems.

In 2013, the OECD started a proactive and inclusive review of the Principles, with all G-20 countries invited to participate on an equal level. The review took advantage of extensive public

42 Id., parag. 6.
43 This section is based on the article by Bruce Zagaris, G20 Agrees to Act on Cybercrime, Anti-Corruption, Corporate Transparency, Tax Enforcement Cooperation, and the Refugee Crisis, 31 INT’L ENFORCEMENT L. REP. 11 (Nov. 2015).
44 G20, G20 Leaders’ Communiqué Antalya Summit, Nov. 15-16, 2015.
45 Id.
46 For the G20/OECD Principles of Corporate Governance, see http://www.oecd.org/corporate/principles-corporate-governance.htm
consultations and the participation of key international institutions – notably the Basel Committee, the Financial Services Board, and the World Bank, leading to the G-20 agreement in Antalya.\textsuperscript{47}

Transparency International (TI) has criticized the G-20 governments, including the U.S. and China, for failing to deliver on their promise to combat corruption by adopting laws to end the secrecy that facilitates corrupt individuals to hide their identity and shift money across international boundaries. According to TI, some countries have fallen behind on the most basic aspects of ensuring entity transparency. For instance, Brazil and South Africa have not adopted a legal definition of beneficial ownership, the technical term used to describe the real person or persons ultimately in control.\textsuperscript{48}

Coincident with the G-20 meeting, the U.K. issued a document, showing its implementation of the corporate transparency principles.\textsuperscript{49}

4. Tax Enforcement Cooperation

The Communiqué stated that the G-20 and world community are progressing towards strengthening the transparency of each country’s tax systems. The G-20 reaffirmed its prior commitments to information exchange on-request as well as to automatic exchange of information by 2017 or the end of 2018. The G-20 supports the efforts to strengthen developing economies’ engagement in the international tax agenda.

The Communiqué endorsed the measures developed under the G-20/OECD Base Erosion and Profit Shifting (BEPS) project. The G-20 stated that “\textit{(w)}idespread and consistent implementation will be critical in the effectiveness of the project, especially with respect to the exchange of information on cross-border tax rulings.” The Communiqué called on the OECD to develop an inclusive framework by early 2016 with the involvement of interested non G-20 countries and jurisdictions which commit to implement the BEPS project, including developing countries, on an equal basis. The G-20 welcomed the efforts by the IMF, OECD, UN, and World Bank Group to provide appropriate technical assistance to interested developing economies in tackling the domestic resource mobilization challenges, including from BEPS. The G-20 acknowledged that interested non G-20 developing countries’ timing of implementation may differ from other countries and expects the OECD and other international organizations to ensure that their circumstances are appropriately addressed in the framework.\textsuperscript{50}

\textsuperscript{47} OECD, G20 Leaders endorse G20/OECD Principles of Corporate Governance, Nov. 16, 2015.


\textsuperscript{50} G20, G20 Leaders’ Communiqué Antalya Summit, supra.
D. G-7

The Group of 7 (G-7) is a group consisting of Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. The European Union is also represented within the G-7. These countries are the seven major advanced economies as reported by the International Monetary Fund: the G-7 countries represent more than 64% of the net global wealth ($263 trillion). The organization was originally founded in 1975 to facilitate shared macroeconomic initiatives by its members in response to the collapse of the exchange rate 1971, during the time of the Nixon Shock, the 1970s energy crisis and the ensuing recession. Its goal was fine tuning of short term economic policies among participant countries to monitor developments in the world economy and assess economic policies.

Since 1975, the group meets annually on summit site to discuss economic policies; since 1987, the G-7 finance ministers have met at least semi-annually, up to 4 times a year at stand-alone meetings. In 1999, the G-7 decided to get more directly involved in "managing the international monetary system" through the Financial Stability Forum, formed earlier in 1999 and the G-20, established following the summit, to "promote dialogue between major industrial and emerging market countries".51

1. G-7 Agrees on Continuation of Actions on Tax and Entity, AML, and AC52

On May 27, 2016, the G-7 heads of state meeting at Ise-Shima, Japan, issued a communiqué, agreeing on additional actions in a number of international enforcement fields, including anti-money laundering, tax and entity transparency, anti-corruption, and migration enforcement.53

a. Tax Transparency and Enforcement

To restore public trust in tax systems by enhancing transparency of tax information, the G7 members reaffirmed the G-20’s call on all relevant countries including all financial centers and jurisdictions to implement the standard on automatic exchange of information by a committed deadline and to sign the Multilateral Convention, as well as the request to the OECD to establish the “objective criteria to identify non-cooperative jurisdictions with respect to tax transparency.” These actions, together with possible defensive measures to be considered against non-cooperative jurisdictions, will help ensure that all relevant countries and financial centers are committed to implementing the agreed standard of tax transparency.

The communiqué underscores the importance of improving the transparency of beneficial ownership of legal persons and legal arrangements to prevent misuse of these entities and arrangements for corruption, tax evasion, terrorist financing and money laundering. It is committed to

51 Leo Van Houtven, Rethinking IMF Governance, FINANCE & DEVELOPMENT (International Money Fund) 18 (September 2004).

52 This section is based on the article by Bruce Zagaris, G-7 Agrees on Continuation of Actions on Tax and Entity, Anti-Money Laundering, and Anti-Corruption, 32 INT’L ENFORCEMENT L. REP. 6 (Jun. 2016).

the implementation of the international standards on transparency, and call on all jurisdictions to do so. In this respect, the G7 members are said to look forward to the initial proposals of the Financial Action Task Force (FATF) and the Global Forum on Transparency and Exchange of Information for Tax Purposes on ways to improve the implementation of the international standards, including on the availability of beneficial ownership information and its international exchange, to be presented by the October meeting of G-20 Finance Ministers and Central Bank Governors.

b. Anti-Corruption

The G7 members endorsed the G7 Action to Fight Corruption, as set out in the Annex, which demonstrates their renewed commitment to fight corruption and ensure transparency worldwide. They will promote the effective implementation of the UN Convention Against Corruption (UNCAC), as well as other key international instruments such as the OECD Anti-Bribery Convention and will promote full participation in their respective review mechanisms.

The G7 members welcomed the outcomes and the momentum created by the Anti-Corruption Summit hosted by the United Kingdom in May to galvanize action against corruption in the international community, as well as valuable initiatives such as the Open Government Partnership, the Extractives Industries Transparency Initiative (EITI), and the UN Global Compact. They commit to lead by example in moving the global anti-corruption agenda forward including in other international fora.54

E. G5 Countries Agree to Exchange Beneficial Ownership Information55

On April 14, 2016, five European Union countries announced the start of a pilot initiative for automatic exchange of information on beneficial ownership in order to provide their tax and other relevant authorities full knowledge of vast amounts of information and assist in tracking the complex offshore trails used by criminals.56

The letter of the G5 countries explained that the initiative responds to the leaks from the International Consortium of Investigative Journalists on the Panama Papers. According to the letter, the international community must take firm collective action on increasing beneficial ownership transparency, especially since criminals continue to find ways to exploit the gaps in the current system, establishing complex structures in various and often multiple locations to hide their activities. Hence, a global response is required.

On beneficial ownership, all jurisdictions must apply enhanced standards of transparency. The five signatories commit to establishing as soon as possible registers or other mechanisms requiring that

54 Id.

55 This section is based on the article by Bruce Zagaris, G5 Countries Agree to Exchange Beneficial Ownership Information and G20 Mandates the OECD to Develop Criteria to Identify Non-Cooperative Countries by July, 32 INT’L ENFORCEMENT L. REP. 4 (Apr. 2016).

beneficial owners of companies, trusts, foundations, shell companies and other relevant entities and arrangements are identified and available for tax administration and law enforcement authorities. The latter calls on all other jurisdictions to do so.

As a first step, the signatory states announce the start of a pilot initiative for automatic exchange of such information on beneficial ownership. The goal is that this will mirror the ground-breaking steps they have taken on tax evasion under the Common Reporting Standards (CRS). Automatic exchange of beneficial ownership information will, as with the CRS, be subject to the usual data and confidentiality protections and to any appropriate exceptions. The signatories look to ensure that this information “is in a fully searchable format and that it also contains information on entities and arrangements closed during the relevant year.”

To be fully effective, as with the CRS, the exchange should be on a global basis. Hence, the letter, which was sent to the G-20 ministers, solicited their support of this initiative at the meetings on April 14-15, 2016 of the G-20 Finance Ministers and Central Bank Governors. The letter called on the OECD, in cooperation with the FATF, to prepare a new single global standard for such exchange of beneficial ownership. It should cover “the robust identification of beneficial ownership, the range of entities and arrangements which should be covered by such an exchange, timing of the exchange and wider exchange procedures.”

The letter called for, as a next step, the development of a system of interlinked registries containing full benefit ownership information and mandate the OECD, in cooperation with FATF, to develop common international standards of these registries and their interlinking.57

As of April 22, 2016, over 20 EU member states and related jurisdictions have joined the G-5 countries in signing onto a joint statement on a global initiative to develop a multilateral system for automatically exchanging beneficial ownership information.58

F. European Union Developments

The European Union has had enormous influence in developing anti-money laundering and counter-terrorism financial enforcement, tax transparency, and linking trade and aid with meeting minimum international standards. The fact that it has its own foreign policy enables its members to control or substantially influence many policy issues in the U.N., OECD, World Bank Group, G-7, G-20, FATF, and other international organizations and informal groups.

57 Id.
58 European Nations Issue Joint Statement on Automatic Beneficial Ownership Information Exchange, 2016 Worldwide Tax Daily 79-20, April 22, 2016. The countries making the statement are UK, France, Germany, Italy, Spain, Netherlands, Romania, Sweden, Finland, Croatia, Belgium, Slovakia, Latvia, Lithuania, Ireland, Slovenia, Denmark, Malta, Cyprus, Gibraltar, Isle of Man, Montserrat, Bulgaria, Estonia, Portugal, Greece, Czech Republic, Luxembourg, Austria and Hungary.
1. **EU Establishes an Inquiry Committee into “Panama Papers”**  

On June 8, 2016, the European Parliament agreed to establish an inquiry committee into the “Panama Papers” revelations of detailed information on offshore companies and their ultimate beneficiaries.

The Panama Papers triggered an inquiry into whether the European legislation for these priorities is adequate and whether Member States and the European Commission, as well as financial institutions as entities empowered and obliged by Union law to identify and report on their account holders, have mal-administered or have contravened provisions in their implementation of the aforementioned directives. These revelations are an opportunity for the European Union to advance its agenda to fight tax evasion, tax avoidance and money laundering.

The purpose of the Committee is to investigate the alleged failure of the Commission to enforce, and of Member States to implement and to enforce effectively, a number of legislative acts adopted at the EU level.

2. **UK Announces Implementation of Entity Transparency Initiative**

On November 15, 2015, during the G-20 meeting in Antalya, Turkey, the United Kingdom announced its actions to implement the commitment made by G-20 leaders in St. Petersburg to lead by example in fulfilling the Financial Action Task Force (FATF) Recommendations, and their Brisbane commitment to implement the G-20 High Level Principles on Beneficial Ownership Transparency, especially the standards on transparency of beneficial ownership information.

The U.K. listed nine of the following implementation actions it has taken.

1) It has published a national risk assessment of money laundering and terrorist financing in full consultation with the private sector and civil society, as well as with U.K. law enforcement agencies, supervisors and policy makers across government. The current FATF standards require that each of its members conduct such a national risk assessment and the

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59 This section is based on the article by Bruce Zagaris, *European Parliament Sets Up an Inquiry Committee into “Panama Papers”*, 32 INT’L ENFORCEMENT L. REP. 6 (Jun. 2016).

60 European Parliament decision of June 8, 2016 on setting up a Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion, its powers, numerical strength and term of office (2016/2726(RSO)), P8_TA-PROV(2016)0253.

61 Id.


63 This section is based on the article by Bruce Zagaris, *U.K. Announces Implementation of Entity Transparency Initiative*, 31 INT’L ENFORCEMENT L. REP. 11 (Nov. 2015).

current FATF mutual evaluations are assessing countries on such national risk assessments.\textsuperscript{65}

2) The U.K. will ensure Company Law and U.K. Money Laundering Regulations clearly set forth the criteria for ownership and control that identify a natural person as the “beneficial owner” of a company. The legislation will require companies to know who owns and controls them, by obligating that companies obtain and hold adequate, accurate and current information on their beneficial ownership. Companies must also make this information accessible to domestic competent authorities, including law enforcement, tax authorities, supervisory authorities and financial intelligence units.\textsuperscript{66}

3) The U.K. will require companies to report beneficial ownership information to a central register. The information will be adequate, accurate and current, and accessible to domestic competent authorities without alerting companies. After conducting a consultation, the U.K. has committed to make this register publicly accessible. The public register is expected to become operational in June 2016.

4) The U.K. will require trustees of express trusts to obtain and hold adequate, accurate and current beneficial ownership information for their trusts, including the settlor(s), trustee(s) and beneficiaries. The U.K. will develop mechanisms to ensure that domestic competent authorities have access to this information.\textsuperscript{67}

5) Legislation will require the transfer and holding in a central register the beneficial ownership of trusts that generate tax consequences in the U.K. Domestic competent authorities will be able to access this information.

6) The U.K. will publish regulations requiring that financial institutions and designated non-financial businesses and professionals (DNFBPs) undertake customer due diligence and will allow access to information held on the central register of company beneficial ownership

\textsuperscript{65} The current (2012) FATF standards require each country to conduct a national assessment risk of money laundering and terrorist financing threats. Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively. http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

The 4th and current Mutual Evaluation is directed to look at the following: Recommendation 1; Criterion 1.1; 86. [Example – “Country X has conducted separate risk assessments on Money Laundering (attached as document R1) and on Terrorist Financing (edited public version attached as document R2). These risk assessments are both used as the basis for the National Strategic Plan on AML/CFT (attached as document R3) which brings together both ML and TF risks.”] in Appendix 3 – Questionnaire for Technical Compliance Update, in PROCEDURES FOR THE FATF FOURTH ROUND OF AML/CFT MUTUAL EVALUATIONS at 32 (2015). http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf

\textsuperscript{66} On March 26, 2015, the UK gave Royal Assent to the Small Business, Enterprise and Employment Act 2015 which contains much of the company transparency rules. See Bruce Zagaris, U.K. Enacts Company Transparency Rules and Sets Stage for Other Countries, 31 INT’L ENFORCEMENT L. REP. 197 (June 1-June 30, 2015).

\textsuperscript{67} Id.
information. Trustees of express trusts who disclose their trusts must disclose their status, and provide beneficial ownership information of their trusts, when they act in their capacity as a trustee.

7) The U.K. will establish effective mechanisms to share beneficial ownership information, as required by bilateral and multilateral agreements, and work to improve international cooperation, including the timely and effective exclusion of information with foreign competent authorities.

8) The U.K. has committed to further action to improve company transparency. After consultations the U.K. has amended its Company Law to: prohibit U.K. companies from issuing bearer shares and require existing bearer shares to be surrendered and exchanged for registered shares, or cancelled and compensated; and prohibit the use of corporate directors, with exceptions, and update how legal duties apply to shadow directors to align more closely with legal duties for individual directors.

9) The U.K. has committed to consult on the extension of beneficial ownership transparency to foreign companies investing in high value property or bidding on U.K. public contracts.68

Unless otherwise stated, the U.K. will implement these commitments in 2017 through new U.K. Money Laundering Regulations, which will transpose the regulations of the 4th EU Anti-Money Laundering Directive, carrying out the 2012 revised FATF Recommendations.69

Clearly the U.K. has led the entity transparency initiative, both by putting it on the agenda of the G-20 meetings and also by quickly enacting laws and issuing regulations to implement the principles. The U.K. action has been important insofar as the U.K. has control over its overseas and dependent territories, especially since the overseas and dependent territories have important financial centers of their own.70 Notwithstanding the efforts of the U.K. government, a gap exists between its efforts and those of many of the other G-8 and G-20 governments on beneficial ownership transparency.

Despite the U.K. leadership role, Transparency International has criticized the U.K. for only covering domestic law and not the beneficial ownership standards for legal entities and trusts incorporated in the British Overseas Territories and Crown Dependencies. According to TI, the “weaker

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performance in many of the British Overseas Territories and Crown Dependencies on key beneficial ownership issues threatens to undermine the UK’s implementation to the G-20 principles as a whole."

G. Financial Stability Forum (FSF)

The Financial Stability Board (FSB) is an international body that monitors and makes recommendations about the global financial system. The FSB promotes international financial stability. It does so by coordinating national financial authorities and international standard-setting bodies as they work toward developing strong regulatory, supervisory and other financial sector policies. It fosters a level playing field by encouraging coherent implementation of these policies across sectors and jurisdictions.

The FSB, working through its members, seeks to strengthen financial systems and increase the stability of international financial markets. The policies developed in the pursuit of this agenda are implemented by jurisdictions and national authorities.

More specifically, the FSB was established to: assess vulnerabilities affecting the global financial system as well as to identify and review, on a timely and ongoing basis within a macro-prudential perspective, the regulatory, supervisory and related actions needed to address these vulnerabilities, and their outcomes; promote coordination and information exchange among authorities responsible for financial stability; monitor and advise on market developments and their implications for regulatory policy; monitor and advise with regard to best practices in meeting regulatory standards; undertake joint strategic reviews of the international standard setting bodies and coordinate their respective policy development work to ensure this work is timely, coordinated, focused on priorities and addresses gaps; set guidelines for establishing and supporting supervisory colleges; support contingency planning for cross-border crisis management, particularly with regard to systemically important firms; collaborate with the International Monetary Fund (IMF) to conduct Early Warning Exercises; and promote member jurisdictions’ implementation of agreed commitments, standards and policy recommendations, through monitoring of implementation, peer review and disclosure.

H. Anti-Corruption Global Summit Focuses on Exchanging Beneficial Ownership Information

On May 12, 2016, more than 40 governments attending the Anti-Corruption Summit in London 2016, issued a communiqué, pledging to act against corruption. The communiqué pledged to promote integrity, transparency and accountability, by exploring innovative solutions and new technologies, and by strengthening international cooperation. It pledged to monitor the success of policies and strategies,

71 Transparency International, Transparency International report shows G20 countries fail to keep their promises on fighting crime, Nov. 12, 2015.
72 For additional background on the FSB and its mandate, see http://www.fsb.org/about.
73 This section is based on the article by Bruce Zagaris, Anti-Corruption Global Summit Focuses on Exchanging Beneficial Ownership Information, 32 INT’L ENFORCEMENT L. REP. 5 (May. 2016).
learning from and embedding best practices. The communique noted the centrality of the UN Convention against Corruption (UNCAC) and its desire to implement and build on its provisions and those of other international, regional and bilateral anti-corruption instruments to which their countries may be a party. The participants pledged to support international institutions and encourage them to strengthen their individual and collective contributions to the fight against corruption. The Summit resulted, in addition to various pledges, some concrete efforts to strengthen the ability of countries to conduct asset recovery and help developing countries with prosecuting corruption cases and recovering assets from such cases.

To expose corruption, the communique stated that the misuse of companies, other legal entities and legal arrangements, including trusts, to hide the proceeds of corruption must stop. The participants pledged to enhance transparency over who ultimately owns and controls them, to expose wrongdoing and disrupt illicit financial flows. The participants declared they need to take firm collective action on increasing beneficial ownership transparency. The communique pledged to fully implement the Financial Action Task Force (FATF) Recommendations on Transparency and Beneficial Ownership of Legal Persons and Arrangements. The participants said they will ensure accurate and timely basic and beneficial ownership information (including legal ownership information) is collected, available and fully accessible to those who have a legitimate need for it, including to help prevent abuse. According to the communique, this requires mechanisms to ensure law enforcement and other competent authorities, including tax authorities, have full and effective access to accurate and up-to-date information. It may include establishing public central registers. The participants pledged to work to ensure that beneficial ownership information can be used effectively to detect and fight corruption, including working with business, civil society, and law enforcement. The participants pledged to support developing countries to collect beneficial ownership information and use it in public contracting and other sectors. The importance of strengthening access by financial intelligence units (FIUs) to information, such as access to bank and payment account information, is underscored.

The participants promised to eliminate loopholes that permit corruption to thrive through the misuse of these entities and work, in accordance with national law, to ensure a level playing field between foreign and domestic companies with respect to requirements to provide beneficial ownership information. The participants will work towards ensuring the effective exchange of beneficial ownership information, in line with applicable data protection laws and rules, both domestically and internationally, and between authorities, including tax authorities, asset recovery offices, financial intelligence units (FIUs), law enforcement and anti-corruption agencies. In this regard, the communique noted the recently announced initiative, joined by 40 jurisdictions, for the automatic exchange of beneficial ownership information of companies, trusts, foundations, shell companies and other relevant entities and legal arrangements. The FATF, the Organization for Economic Co-operation and Development (OECD) and the Global Forum on Transparency and Exchange of Information for Tax Purposes were asked to develop initial proposals on ways to improve the implementation of the

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75 UK Cabinet Office and Prime Minister’s Office, Communiqué Issued at Anti-Corruption Summit, May 12, 2016 https://www.gov.uk/government/publications/anti-corruption-summit-communique

76 Id.
international standards on transparency, including on the availability of beneficial ownership information and its international exchange. This will help tax and law enforcement authorities track the complex offshore trails used by criminals.77

The participants pledged to establish stronger partnerships between governments, regulators, law enforcement, financial intelligence units (FIUs) and businesses to detect and prevent the flow of illicit funds and to enable the private sector to act as a more effective first line of defense. The participants will also encourage all jurisdictions, where applicable national law permits, to improve information sharing between law enforcement authorities, FIUs, regulators and banks, and within and among private sector participants, both domestically and across borders. The participants recognized the importance effective implementation of FATF’s global standards to combat money laundering and counter-terrorist financing, and support FATF’s work to address barriers to information sharing between jurisdictions and within each financial group. The participants also recognized the key role of the Egmont Group of FIUs in this and welcome the Egmont Group’s consideration of a Center of FIU Excellence and Leadership. The participants encouraged jurisdictions to share financial intelligence expeditiously with law enforcement and to expand sharing initiatives by permitting FIUs to exchange information spontaneously.

In the non-financial professional services sector the participants called on all countries to regulate and effectively supervise the legal, accounting, property, trust and company services sectors and support the promotion of global industry best practice in these sectors to underpin full and consistent implementation of FATF standards globally. The participants will also be alert to activities or sectors emerging as vulnerable to being used for facilitating or laundering proceeds of corruption.78

The communiqué pledged to increase international transparency on tax to deter tax evasion and other tax crimes and to prevent individuals from concealing proceeds of crime, including corruption in other jurisdictions. The participants will endorse and take steps to implement the Common Reporting Standard (CRS) on automatic exchange of information, which is vital for global tax transparency, in time for the first exchanges in 2018 at the latest. The communiqué recognized the important contribution that efficient, fair and transparent tax systems can make to national and global efforts to challenge corruption. The participants support the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes and the Addis Tax Initiative in assisting developing countries to strengthen their tax systems and thereby enhance domestic resource mobilization. They support the principles of the Addis Tax Initiative.

The participants observed that new technologies and uses of data should empower ordinary people to fight corruption. They recognized the value of global open data principles, such as the Open Data charter, for relevant data release. They welcomed the creation of the Anti-corruption Innovation Hub.

77 Id.
78 Id.
The communiqué pledged to encourage and support international organizations to increase their focus on fighting corruption, including embedding it in their analysis, resourcing priorities and decision-making. International organizations were solicited to coordinate their work more effectively. The U.N. was requested to build partnerships of countries, international development partners and other stakeholders to fast-track the implementation of UNCAC and Sustainable Development Goal 16. The G-20 members were asked to show continuing leadership in fighting corruption, including by agreeing to an ambitious Anti-Corruption Action Plan for 2017-18. The participants called on the World Bank and IMF to strengthen their cooperation and welcomed their commitment to strengthen support for their clients to diagnose and address corruption, whether in-country or across borders, including assessing illicit financial flows through the World Bank’s country diagnostics. The communiqué looks forward to the planned update of the IMF’s governance guidance and welcomed the World Bank’s proposed commitment to Governance and Institutions in IDA 18. The OECD was invited, within its existing structures and mandate, to establish a member-steered anti-corruption and integrity platform to improve coordination and information sharing across OECD bodies and to maximize the impact of OECD expertise, convening power and outreach.

The participants recognized the value of the open Government partnership (OGP) in advancing transparency and good governance reform through national commitments made together with civil society, and the value of the OGP’s independent Reporting Mechanism in providing accountability. OGP participating governments will work with civil society to embed the Summit commitments into National Action Plans where appropriate and extend the invitation to others to join.

Among the concrete actions emanating from the Summit, the U.S. and the U.K. will co-host the first meeting of the Global Asset Recovery Forum (GFAR) in 2017 in Washington, D.C. The forum will create a robust mechanism to work collaboratively on major asset recovery cases where an emergent need exists to return assets for the benefit of the people harmed by corruption.

The International Anti-Corruption Coordination Center (IACCC) will coordinate cross-border investigative communication, increase data sharing between key financial hubs, and help developing countries with corruption cases. The IACCC will be based in London, in partnership with the U.S., Canada, Australia, New Zealand, Switzerland, Switzerland, and Interpol.

After doubling anti-corruption assistance in the past four years, the U.S. Department of State announced it is committing an additional $70 million, pending congressional approval, for capacity-building efforts globally including training for thousands of law enforcement and justice-sector officials worldwide; platforms that mitigate opportunities for graft; efforts to tackle the security and corruption nexus; and a consortium to support civil society and media organizations.

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80 U.K. Prime Minister’s Office, PM David Cameron hosts a major International Anti-Corruption Summit to step up global action to expose, punish and drive out corruption, May 12, 2016.

81 U.S. Department of State, supra.
Six countries (Afghanistan, France, Kenya, the Netherlands, Nigeria and the UK) agreed to publish registries of who owns and controls companies, and six more agreed to work to explore doing so. More will share information behind closed doors.

Thirteen countries agreed to implement Open Contracting Data Standards, public accountability standards where the default option is to publish information.\(^{82}\)

Nineteen countries agreed to work with international sports bodies to promote better governance and work towards an International Sports Integrity Partnership for 2017. There were commitments to have better legal instruments to tackle corruption in sport.\(^{83}\)

The communiqué contains promises to take comprehensive action against corruption. Among the limitations of the communiqué are that there are no formal institutions to combat transnational corruption and in many places “in accordance with national law.” The problem is that the national law in some key countries, such as the United States and China, does not allow the exchange of beneficial ownership information. The United States is the most important international financial jurisdiction. Its law does not yet provide for entity transparency or regulation of corporate formation agents, let alone, exchange of beneficial ownership information. A number of states and its private sector oppose amending these laws. As a result U.K. Prime Minister David Cameron called on the U.S. and China to act on entity transparency and exchange of beneficial ownership information.\(^{84}\) Meanwhile, Alan Bell, chief minister of the Isle of Man, and Alden McCloughlin, Cayman Islands president, also criticized the hypocrisy in the global debate and cited the U.S. as the country causing the lack of a level playing field.\(^{85}\)

Another limit of the call on all countries to regulate and effectively supervise the legal, accounting, property, trust and company services sector is that these soft law requirements, similar to those contained in the FATF 40 AML/CFT Recommendations are subject to fundamental law in participating countries. In many countries, such as Canada, courts have repeatedly said that some AML requirements, such as making suspicious activity reports (SARs), violates the attorney-client relationship, which is fundamental to democracy. In the U.S. Treasury has also taken a hands-off approach to the legal profession, as shown by Treasury’s issuance of final rules on Customer Due Diligence. The rules make an exception for escrow accounts of lawyers. Treasury has also not sought to impose SAR requirements on the legal community. As a result of the differences in fundamental law among countries and the nature of soft law commitments, there is no level playing field when it comes to anti-corruption and anti-money laundering requirements.

\(^{82}\) Transparency International, \textit{supra}.

\(^{83}\) \textit{Id}.


The success of the commitments in the communiqué will depend in part on the ability to establish an effective anti-corruption regime and network. Clearly, the participants are prioritizing enforcement and enforcement cooperation as important mechanisms.

I. U.S. States Adopt Anti-Tax Haven Laws

Notwithstanding all of the tax and regulatory carve-outs the federal and state governments provide to attract foreign investment, seven U.S. states have enacted anti-tax haven legislation. The laws seek to expand the scope of state taxation to encompass income earned by foreign subsidiaries in countries that a state defines as tax haven jurisdictions. Even though the Treasury includes states in TIEAs with Canada and Mexico and the Multilateral Convention on Administrative Assistance in Tax Matters, Treasury tells foreign jurisdictions that it has no authority to intervene in state taxation. Some states have issued blacklists based on lists that the OECD has not maintained for over a decade. These lists are arbitrary and non-manageable. States continue to develop new legislation even though the laws bring reduced business employment and investment, potential foreign retaliation, and constitutional challenges.

J. WTO Decision on Discrimination against Blacklisted Countries

On April 14, 2016, the World Trade Organization’s (WTO) Appellate Body issued its report in the Argentina – Financial Services dispute (DS453). Panama brought the case before a WTO first instance tribunal (the Panel) to challenge Argentine actions taken against services and service suppliers from jurisdictions, such as Panama, that do not exchange information for purposes of tax transparency and the prevention of money laundering and terrorist financing. On September 30, 2015, the Panel issued its report. Both Argentina and Panama appealed many of the Panel’s findings.

The Appellate Body reversed a number of the Panel’s findings of inconsistency with the WTO’s General Agreement on Trade in Services (GATS), thereby giving Argentina a victory on those points. The Appellate Body Report indicates that WTO Members will be given wide latitude in adopting and implementing measures taken for prudential reasons and affecting the financial services sector.

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86 Bruce Zagaris, Raising Revenue on the Backs of Caribbean Jurisdictions, 80 Tax Notes Int’l 607, Nov. 16, 2015.

87 Letter dated Oct. 15, 2015 from John A Koskinen, IRS Commissioner, to Sir. Ronald Sanders, Ambassador Extraordinary and Plenipotentiary, Embassy of Antigua and Barbuda (with respect to the state tax haven matter Koskinen states “(w)e play no role in the legislative process of the District of Columbia or the states and, as a result, we are not in a position to assist you in addressing this issue”).


Notwithstanding the result, additional WTO litigation is likely in the future concerning allegedly discriminatory action by one WTO member against another with respect to tax transparency and related areas.

K. Withdrawal of Correspondent Bank Relationships or De-risking

A result of significant sanctions against banks and financial institutions for failing to meet anti-money laundering and economic sanctions has been criminal prosecutions and administrative penal actions, resulting in harsh fines, loss of reputation, and in some cases independent monitors overseeing operations for one to three years. In addition, the Department of Justice guidance issued on September 9, 2015 by Sally Quillian Yates calls for more accountability by corporate executives and officers. The CDD guidance raises the AML requirements even further. These developments have resulted in U.S. and European banks increasingly terminating correspondent bank relationships with indigenous banks worldwide, although the Caribbean, Central America, and Africa have been especially adversely impacted.

1. De-risking in the Caribbean – CARICOM Response

On February 15, 2016, at its meeting in Placencia, Belize, the CARICOM Heads of Government adopted a resolution to respond and combat the issue of de-risking that is plaguing the region. At the opening ceremony of the 27th Intersessional Meeting of the Conference of Heads of Government of CARICOM, the Region Chair of the Community and Prime Minister of Belize, the Hon. Dean Barrow, used much of his address to focus on the correspondent banking scenario and what it portended for the Community. The matter was a key agenda item of the two-day Summit, and a Meeting of Finance Ministers.

At its Twenty-Six Inter-Sessional Meeting in February 2015 in the Bahamas, the Heads of Government established a Committee of Ministers of Finance on Correspondent Banking to address the issue.

a. The Threat to Correspondent Banking Relationships (CBRs)

The possible loss of access to international financial markets by predominantly small standalone indigenous banks and branches of foreign-owned commercial banks in CARICOM, pre-occupied policymakers at both the industry and political levels during much of 2015. Many international banks indicated to some clients in the region that they were no longer able to conduct business due to “de-risking” and altered business decisions.

The importance of international finance and banking services to economic growth and development are fueling discussions at various levels, both in the region and internationally, to ascertain...
the best mechanism to respond to the potential impact of reduced access to the international banking market and the actions that are required from all the parties concerned.

De-risking has the potential of delinking CARICOM economies from access to the global payments and financial system and significantly impacting some critical services including the more than USD$10 billion in remittance transfers, conducted through money service companies. Remittance is an important phenomenon for social stability in many Member States.

The adoption of de-risking by global banks, which provides correspondent banking services for domestic banks across the world, responds to record-setting fines and precedent-setting criminal prosecutions and enforcement actions. The actions were brought against financial institutions for violations of the Bank Secrecy Act/anti-money laundering (BSA/AML) and sanctions law by primarily U.S. regulators in 2014. In addition, bank executives encountered personal liability and public accountability for their actions and for compliance-related deficiencies within their areas of responsibility. Banks which have been sanctioned for regulatory infringements have experienced a downward trend in profitability and an erosion of shareholders’ value. They are recognizing that the increasing financial cost for regulatory infringement is among those factors forcing correspondent banks to reassess their relationships globally and to sever those relationships that pose a greater risk.

The response of the global banks to the heightened risk management expectations was the adoption of “de-risking” strategies which involved exiting whole business lines (e.g., money services businesses) that carry increased risk, instead of improving risk management and controls and evaluating customers individually. These strategies apparently take into account a transaction’s size with relatively small yields and low margins but with high transaction volume (characteristic of Caribbean business), which then requires more detailed scrutiny of each transaction in furtherance of Know Your Customer’s Customer (KYCC) dictum (pursuant to FATF), with any breach punishable by substantial fines. However, a lack of clarity exists about the implementation of the FATF guidelines with respect to whether correspondent banks are required to know their customer’s customer. In addition, no uniformity exists in the sanctions regime across countries. The situation results in considerable uncertainty for the correspondent banks. Hence, having measured the costs and benefits, global banks have reasonably concluded that the potential risks of maintaining possible high-risk businesses (e.g., money services businesses, third-party payment processors) as customers outweigh the possible rewards. Therefore, the expectation is that until benefits become better aligned with costs, “de-risking” will continue to be an issue.

b. Impact of CARICOM States

Since the start of the “de-risking” phenomenon, considerable efforts have been made to ascertain the actual concerns of the global banks and regulatory authorities; clarify the AML/CFT status of Member States; and seek the support of multilateral institutions and bilateral partners in redressing the situation. In addition, the Committee of Central Bank Governors, under the leadership of the Central Bank of Barbados, has under execution a Caribbean Project on De-Risking, which is aimed at facilitating discussions among all stakeholders, including global banks, their regulators and law
enforcement representatives in globally systemic countries. The Project also involves the analysis of the impact of de-risking on CARICOM banks.  

At a press conference on February 17, 2016, P.M. Barrow, noted the circumstances in Montserrat to underscore the gravity of the situation. Monserrat has only two banks and they are “having their status revoked.”

The findings of the Central Banks’ Research Team show that:

i. Correspondent banking services to CARICOM banks are provided by approximately 24 foreign banks primarily from the U.S., Europe and Canada. However, the threat of losing relationships are mainly from U.S. banks, with increasing regulatory interest shown by Canadian banks towards their branches in the region;

ii. CARICOM banks and financial institutions have been largely compliant and current and no evidence exists of lax AML/CFT systems in the Caribbean. All CARICOM States and Associate Members are committed to the international certification process of the IMF/World Bank Financial Sector Assessment Program (FSAP), Caribbean FATF, and the Global Forum. Bilateral commitments have also been made under the U.S. implementation regime for the Foreign Account Tax Compliance Act (FATCA);

iii. Perfect compliance does not guarantee immunity from allegations that harm a country’s reputation. Such allegations are potentially costly, in terms of public relations or legal defense costs; and

iv. Despite full compliance of regulatory practices with FATF and Global Forum Standards and certification by peer reviews and FSAPs, international transactions are still at risk for violating national sanctions and prohibitions in the U.S. and elsewhere.

The de-risking strategy has had an impact on certain classes of business and clientele, including check clearing, clearing and settlement, cash management services, international wire transfers, and trade finance.

C. Potential Proposed Remedies

Some of the areas for consideration in the design of a strategy and action plan include the following:

i. regional capacity building program for domestic banks aimed at:

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95 Id.

a. their adoption/incorporation of a risk-based approach to their due diligence procedures as well as the strengthening of their AML/CFT internal controls and the use of common reporting standards;

b. creating awareness about the obligations and related best practice procedures arising out of a country’s international commitments with respect to AML/CFT standards and Basel Core Principles. The harmonization of best practice procedures across CARICOM Members should be considered and extended to banks’ clients, policymakers, professionals serving the financial sector, and the public, in general.

ii. Develop regional approaches to strengthening the exchange of information and engaging in constructive dialogue among domestic (respondent) banks, correspondent banks and supervisory/regulated authorities;

iii. Transmission of information on the quality and international compliance of national AML/CFT frameworks and the zero tolerance stance of the regulatory authorities against financial crimes;

iv. Enhancing institutional, legal, technical and financial capacity of Financial Intelligence Units (FIUs) and other agencies with responsibility for dealing with financial crimes to ensure that there is effective enforcement action against such offenses;

v. Increased oversight and regulation of high-risk activities and the provision of guidance to domestic banks on risk assessments as well as greater collaboration by the regulatory authorities in supervising these businesses especially where they operate cross-border;

vi. Establishment of regional arrangements for supervisory and regulatory authorities to proactively monitor and respond to regulatory developments in the jurisdictions where correspondent banks are located;

vii. Deployment of a regional high-level advocacy team (with support, as required) to interact with global banks which provide correspondent bank services to Member States, foreign regulatory authorities, and international standard-setting bodies (such as FATF, FSB) and to generally represent the interests of the region, primarily in the U.S. and Canada.

d. Measures for Immediate Adoption of Member States

The Committee on Ministers of Finance on Correspondent Banking agreed on the following measures for immediate adoption by Member States:

i. Conduct an awareness program for banks’ clients, policymakers, professionals serving the financial sector, and the public, in general about the obligations and
related best practice procedures which flow from the country’s commitments concerning compliance with international standards for the financial sector;

ii. Consideration to the appointment of a high level advocacy body/group to represent the interests of the region in the U.S. especially;

iii. Dissemination of information on the quality and international compliance of national AML/CFT frameworks and the zero tolerance stance of the regulatory authorities against financial crimes;

iv. The adoption of a regional approach to strengthening the exchange of information and engaging in constructive dialogue among domestic (respondent) banks, correspondent banks and supervisory/regulatory authorities; and

v. Establishment of regional arrangements for supervisory and regulatory authorities to proactively monitor and respond to regulatory developments in jurisdictions where correspondent banks are located.

e. Analysis

Given the large enforcement actions against international banks and concomitantly the strengthened international and national AML/CFT standards, and the small size of indigenous banks in CARICOM and their comparative small market, responding to the threats of de-risking will be challenging.

The threats to correspondent banking and the link of Caribbean economies to the metropole shows the enormous implications that AML/CFT standards have worldwide. A consequence of de-risking is that Caribbean people and businesses have fewer banking choices and the remaining banks have an opportunity to raise prices and provide less service due to the reduced competition.97

2. IMF Considers Policy Actions on Withdrawal of Correspondent Banking98

On June 30, 2016, the International Monetary Fund (IMF) published a paper, “The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action”.99 The goal of the paper, as prepared by IMF staff, was to showcase policy-related analysis and research to elicit comments and to encourage debate.

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97 For additional discussion of de-risking in the Caribbean, see Bruce Zagaris, Regulation in the Caribbean – Part One of a Two Part Series, 262 OFFSHORE INVESTMENT 11 (Jan. 2016).

98 This section is based on the article by Bruce Zagaris, IMF Considers Policy Actions on the Withdrawal of Correspondent Banking Relationships, 32 INT’L ENFORCEMENT L. REP. 7 (Jul. 2016).

a. Evidence and Consequences

The paper arrives as correspondent banking relationships (CBRs), which enable the provision of domestic and cross-border payments, have been terminated in some jurisdictions following the global financial crisis. In recent years, several countries have reported a reduction in CBRs by global banks. Pressure on CBRs has been derived from restricted access to financial services by certain categories of customers, business lines, jurisdictions or regions. Survey and other available evidence indicates that smaller emerging markets and developing economies in Africa, the Caribbean, Central Asia, Europe and the Pacific as well as countries under sanctions may be the most affected. Trends in CBRs since the global financial crisis have included cutbacks in the number of CBRs; changes in the nature of correspondent banking services provided; with higher risk services reduced (e.g., nested correspondent banking, payable-through accounts); growing market concentration; increasing costs; and cutbacks to correspondent banking services in specific foreign currencies, especially U.S. dollars. Global banks’ withdrawal of CBRs is often referred to, as previously discussed, as “de-risking.”

The paper stated that the impact of the withdrawal of CBRs on certain jurisdictions can become systemic in nature, if unaddressed. It could disrupt financial services, including trade finance and remittances, and lead to financial exclusion for certain categories of customers, particularly Money Value Transfer Services and Non-Profit Organizations, which serve vulnerable segments of the population.

Where CBRs have been lost, the ability of financial institutions to find replacement CBRs has varied. Maintaining existing CBRs has had adverse effects: (i) newly imposed minimum activity thresholds below which the account is closed, (ii) higher costs (often associated with due diligence) passed on to the consumer when establishing a new CBR, and (iii) pressure on the respondent banks to limit their exposure to certain categories of customers in order to maintain a CBR (e.g., small banks have had to sever ties with Money or Value Transfer Services to maintain CBRs).

Small and medium-sized exporters, and small and medium-sized domestic banks have been the most adversely effected categories of customers. In addition, international wire transfers, clearing and settlement services and trade finance appear to have been especially effected.

b. Drivers of the Withdrawal of Correspondent Banking Relationships

The drivers of the withdrawal of CBRs generally reflect banks’ cost-benefit analysis, shaped by the re-evaluation of business models in the new macroeconomic environment and changes in the regulatory and enforcement landscape, especially with respect to more rigorous prudential requirements (global regulatory reforms have entailed a significant increase in banks’ capital and liquidity requirements, raising the cost of capital), economic and trade sanctions, anti-money laundering and combating the financing of terrorism (AML/CFT) (e.g., increased standards in the 2012 revised

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100 For a discussion of withdrawal of correspondent bank relationships in the Caribbean, see Bruce Zagaris, CARiCOM Heads of Government Adopt Resolution to Respond to De-Risking, 32 INT’L ENFORCEMENT REP. 81 (Mar. 2016).
standards)\textsuperscript{101} and tax transparency. Further pressures to withdraw CBRs may occur where regulatory expectations are unclear, risks cannot be mitigated, or legal impediments exist to cross-border sharing. These factors operate concurrently, although their relative significance varies case-by-case.

Tax transparency initiatives have been significant. In the wake of increased prosecution of banks, financial institutions, and professionals for their roles in cross-border tax crimes, and due to new due diligence requirements under both unilateral (Foreign Account Tax Compliance Act) and multilateral initiatives (e.g., the OECD Common Reporting Standards), some banks have closed their wealth management units and others have decided to avoid certain jurisdictions and/or products.

The trend towards enormous fines imposed on banks and individual executives involved in the misconduct and the adverse impact of enforcement and regulatory actions have changed the evaluation of risk tolerance curves.\textsuperscript{102}

Some banks and financial institutions have complained about the lack of clarity on the scope of customer due diligence requirements, including whether there is a need to conduct due diligence on a customer’s customer. While several U.S. and UK banks find the compliance expectations to be clear, some European correspondent banks have argued that U.S. regulations are unclear, inconsistently communicated, unevenly implemented by individual examiners, or not well understood, which leads to the banks’ decisions to withdraw CBRs. However, what many banks want is closer to regulatory certainty (rather than clarity) and perhaps some form of safe harbor. They have also noted that uncertainty as to whether regulatory expectations have been met could result in an overcautious use of enhanced due diligence by banks to shield from potential supervisory or enforcement actions.

c. Addressing the Withdrawal of Correspondent Banking Relationships

Coordinated efforts by the public and private sectors are required to mitigate the risk of financial exclusion and the potential adverse impact on financial stability. An enhanced understanding of the phenomenon, improved data collection, and continued dialogue among stakeholders are imperative to developing appropriate responses tailored to individual country circumstances. Timely implementation of the Financial Stability Board’s 2015 action plan endorsed by the G-20 Summit will be critical. Home authorities of global banks should communicate their regulatory expectations and affected countries should continue strengthening their regulatory and supervisory frameworks to meet relevant international standards, with the help of technical assistance where required.


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Clarifying these standards, including on AML/CFT, could help promote a baseline for regulatory expectations. Industry initiatives could be pursued to facilitate customer due diligence and help reduce compliance costs. Initiatives could include (i) ensuring continued dialogue between regulators and global financial institutions of countries affected, (ii) promoting proper information flows from home regulators and supervisors toward financial institutions of countries affected, (iii) creating better communication between home regulators and supervisors of those of affected countries, and (iv) technical assistance (TA) from home countries of global banks to the authorities of affected countries (or by correspondent banks to respondent banks).

When the withdrawal of CBRs is driven by the perception that a jurisdiction has unacceptable levels of risks (e.g., due to the inability of their own banks to properly conduct customer due diligence), enhancing compliance with international standards should be a key element of its policy response. Political buy-in to adopt necessary reforms, along with sufficient supervisory capacity and resources, is necessary. Increasing exchange of beneficial ownership information and ensuring greater cooperation among national supervisors, including a move toward a greater harmonization of regulatory frameworks and facilitating cross-border information sharing, would help alleviate some concerns. Finally, offshore financial centers must assess whether they need to change their business models to maintain their relevance in a world in which greater transparency and harmonization of tax and regulatory regimes would diminish incentives for complex corporate structures and tax avoidance.

Various industry initiatives have been proposed to reduce costs of compliance and risk management and to increase the overall efficiency of CBRs so as to reduce negative externalities. These include (i) using “Know Your Customer” utilities created by private sector entities with the aim of storing in a single repository relevant customer due diligence information, (ii) promoting the use of the Legal Entity Identifier for all banks involved in correspondent banking, 103 (iii) reviewing the format of payment messages to ensure that they meet the needs of clients, the financial industry, and law enforcement in a cost-effective way, and (iv) further facilitating enhanced due diligence by promoting the use of the Legal Entity Identifier for identifying corporate customers, including provisions on information sharing with correspondent banks into the contracts with cross-border payment services customers and developing centralized databases on the identities, business, and transactions of banks’ customers active in cross-border payment services.

In countries facing a severe loss of CBRs and diminishing access to the global financial system, the public sector may consider the feasibility of temporary mechanisms ranging from (1) enhanced communication with home authorities and global banks to understand the nature of their risk management concerns, (ii) developing a thorough understanding of domestic financial systems’ linkages with correspondent banks and alternative payment arrangements, which could involve non-banks in retail payments and the provision of cross payment services, (iii) mapping the necessary legal and regulatory changes to facilitate compliance with relevant international standards, and (iv) carefully

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103 The Legal Entity Identifier is a 20-character alpha-numeric code used to uniquely identify legally distinct entities that engage in financial transactions and is used by Local Operating Units of the Global Legal Entity Identifier System (http://www.leiroc.org/lei.htm).
assessing the benefits, costs, and risks of developing or using public entities or centralized payment systems to address a complete loss of CBRs.  

With respect to the role of the IMF, the issue of withdrawal of CBRs has been discussed in the context of bilateral surveillance when deemed macro-critical for a country. As withdrawal of CBRs is not at present considered to significantly affect the effective operation of the international monetary system it has not been considered in the Fund’s multilateral surveillance. However, this issue was discussed at the time of Article IV consultations with some countries that are home to global banks. The issue has been discussed in the context of the Financial Sector Assessment (FSAP) Program when relevant for financial stability. Through these discussions, together with TA and analytical work, IMF staff has been monitoring the impact of the withdrawal of CBRs, fostering a shared understanding of the complexity of this phenomenon and helping develop possible policy responses.

The IMF paper illustrates the fact that international financial regulatory and enforcement developments are causing negative externalities in the international economy. Although the paper does not discuss the fact that many of the rising costs of international financial regulatory and enforcement concern tax transparency. In recent months trust and entity structures are increasingly moving to the U.S. in order to avoid the tax transparency goals of the OECD’s Common Reporting Standard. U.S. states, such as South Dakota, Wyoming, and Nevada, have increased their international financial products, including the utility to anonymity. Because the U.S. financial regulators control unilateral and to a lesser extent international financial regulatory and enforcement standards, U.S. financial institutions and gatekeepers remain untouched by the withdrawal of CBRs, while they simultaneously continue to obtain market share and even ironically impose their own tax haven blacklists against small international financial jurisdictions. Presumably the dominant role of the U.S. in the IMF prevented the IMF paper from even discussing this trend. For instance, the paper uses the terminology offshore financial centers rather than international financial centers, apparently to focus only on the small jurisdictions.

L. Prospects for the Trump Administration and Analysis

The Trump Administration is unlikely to agree to sign and implement the CRS. Trump’s promise to mandate audits of the U.S. government’s funding for international organizations, pledging a 40 percent cut in funding for those organizations whose agendas he believes are “contrary to American

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104 Although not mentioned in the IMF paper, the Caribbean Community (CARICOM) has agreed to continue to lobby on the withdrawal of correspondent banking relationships. On July 6, 2016, a communiqué (http://www.caricom.org/media-center/communications/communiques/communique-issued-at-the-conclusion-of-the-thirty-seventh-regular-meeting-of-the-conference-of-heads-of-government-of-the-caribbean-community-caricom-4-6-july-2016-georgetown-guyana) issued at the conclusion of the CARICOM heads of government meeting underscored that “correspondent banking was an important global public good and that the current de-risking strategy was discriminatory and counter-intuitive to good public policy. They re-iterated that CARICOM’s trade, economic welfare and the transfer of remittances were gravely affected by the de-risking strategies of foreign banks.” CARICOM to continue robust advocacy against de-risking; CARIBBEANNEWS.COM, July 11, 2016.


106 See, e.g., Bruce Zagaris, Raising Revenue on the Backs of the Caribbean, TAX NOTES Int’l, November 16, 2015, p. 607.
interests,” does not bode well for the OECD, FATF, the G20, and G7, unless the Trump Administration decides that they are worthwhile, meaning consistent with the Administration’s policy of America 1st.

IV. LIMITS ON “BANK SECRECY”

Tax transparency initiatives, especially automatic exchange of information in the way of Foreign Account Tax Compliance Act and the Common Reporting Standard as well as beneficial ownership requirements, have eroded significantly traditional bank secrecy. The automatic exchange of information developments are covered by other presentations. This section discusses the growing role of whistleblowing, including the G-20 requirements to give minimum protection to whistleblowers and the increased networking between whistleblowers, on the one hand, and Wikileaks and the International Consortium of Investigative Journalists on the other. In addition, the role of civil society is increasingly instrumental in enforcing the limits on bank secrecy.

A. ICIJ Panama Papers Cause Waves in Transparency and Accountability

On April 3, 2016, the International Consortium of Investigative Journalists (ICIJ) published a series of stories about a massive leak of documents from Mossack & Fonseca, a Panamanian law firm that is reputedly the largest corporate formation agent in the world with branches in Hong Kong, Miami, Zurich, and more than 35 other locations around the world. The files cover from 1977 through the end of 2015 and reveal the offshore holdings of 140 politicians and public officials from around the world. Current and former world leaders in the data include the Prime Ministers of Iceland and Pakistan, the President of Ukraine and the King of Saudi Arabia. More than 214 offshore entities appear in the leak, connected to people in more than 200 countries and territories.

The cache of 11.5 million records reveals how a global industry of law firms and big banks sell financial secrecy to a wide variety of clients, including politicians, fraudsters and drug traffickers, as well as billionaires, celebrities and sports stars.

A team of more than 370 journalists from 76 countries reviewed the leaked records.

The files reveal offshore companies controlled by the Prime Ministers of Iceland and Pakistan, the King of Saudi Arabia and the children of the president of Azerbaijan.

The cache also has data on at least 33 persons and companies blacklisted by the U.S. government because of evidence that they had been involved in wrongdoing, such as doing business

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with Mexican drug lords, terrorist organizations like Hezbollah or rogue nations like North Korea and Iran.\textsuperscript{110}

1. Politically Exposed Persons and Grand Corruption

Political leaders who have led anti-corruption initiatives ironically are prominent in the leaked documents. The files reveal offshore companies linked to the family of Xi Jinping, China’s top leader who has promised to fight “armies of corruption.” The data also discusses companies connected to Ukrainian President Petro Poroshenko, who has promised anti-corruption reform. The data provides new details of offshore dealings by the late father of British Prime Minister David Cameron, a leader in corporate transparency and tax transparency.\textsuperscript{111}

Thousands of Icelanders took to the streets of Reykjavik on April 4 to demand the resignation of Prime Minister Sigmundur David Gunnlaugsson following the disclosure by ICJ, Reykjavik Media, and Süddeutsche Zeitung that he and two members of his cabinet had owned or controlled secret offshore shell companies.

On April 5, Iceland’s president refused a request from Prime Minister Gunnlaugsson to dissolve parliament and call snap elections, according to the Guardian.\textsuperscript{112}

After initially refusing to resign, Gunnlaugsson tendered his resignation on the afternoon of April 5.\textsuperscript{113}

The leaked files show how Prime Minister Gunnlaugsson and his wife secretly owned an offshore firm that held millions of dollars in Icelandic bank bonds during that country’s financial crisis. Gunnlaugsson has said that his wife’s overseas assets were taxed in Iceland and no tax wrongdoing occurred. However, critics say the findings of the Panama Papers raised questions about conflicts of interest and other possible improprieties nearly eight years after Iceland’s banking system collapsed amid the global financial crisis.

According to an Icelandic government spokesman, the company owned by Anna Sigurlaug, Gunnlaugsson’s wife, held bonds totaling more than $4.1 million in some of the collapsed banks. The leaked documents give rise to the accusations of possible conflicts by Gunnlaugsson, who oversaw negotiations with the banks’ creditors.\textsuperscript{114}

\textsuperscript{110} Id.

\textsuperscript{111} Id. With respect to China see also Ana Swanson, More relatives of Chinese leaders cited in Panama Papers, WASH. POST, Apr 7, 2016.

\textsuperscript{112} Ryan Chittum and Hamish Boland-Rudder, Investigations, protest, and call for election in Iceland as world responds to Panama Papers, Apr. 5, 2016 https://panamapapers.icij.org/blog/20160405-global-response.html

\textsuperscript{113} Id.

\textsuperscript{114} Id.
The records disclose a pattern of covert maneuvers by banks, companies and people linked to Russian leader Vladimir Putin. The records show offshore companies linked to this network moving money in transactions as large as $200 million at a time. Putin associates disguised payments, backdated documents and gained hidden influence within the country’s media and automotive industries.  

2. **FIFA and Soccer**

According to the ICIJ reports, the leaked documents show that the law firm of Juan Pedro Damiani, a member of FIFA’s ethics committee, had business relationships with three men who have been indicted in the FIFA scandal – former FIFA vice president Eugenio Figueredo and Hugo and Mariano Jinkis, the father-son duo accused of paying bribes to obtain broadcast rights to Latin American soccer events. The records indicate that Damiani’s law firm in Uruguay represented an offshore company linked to the Jinkises and seven companies linked to Figueredo.

In response to the news reports by the ICIJ and its media partners, FIFA’s ethics panel has started a preliminary investigation into Damiani’s relationship to Figueredo. A spokesman for the committee said Damiani first informed the panel about his business connections to Figueredo on March 18. This occurred one day after the reporting team sent questions to Damiani about his law firm’s work for companies tied to the former FIFA vice president.

The new data shows that Lionel Messi, the renowned Argentine soccer player, and his father owned a Panama company, Mega Star Enterprises, Inc. His offshore transactions are currently in litigation in a tax evasion case in Spain.

3. **Roles of Gatekeepers**

The documents raise issues about the roles of gatekeepers in the structuring and formation of entities. Ramon Fonseca, is quoted as saying the firm has no responsibility for what clients do with the offshore companies the firm sells.

Recently the German and Brazilian governments are reportedly investigating the firm as a result of the partial leaks of the firm’s files.

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117 Id.

118 Id.
In February 2015, Süddeutsche Zeitung reported that German law-enforcement agencies had started a series of raids targeting one of the country’s largest banks, Commerzbank, in a tax-fraud investigation that authorities said could result in criminal charges against Mossack Fonseca employees.

German tax authorities bought a smaller number of Mossack Fonseca documents from a whistleblower, resulting in raids in Germany in early 2015. These files have reportedly since been offered to tax authorities in the U.K., the U.S., and other countries.

In Brazil, authorities are reportedly investigating the firm for bribery and money laundering, as part of the “Operation Car Wash” (“Lava Jato”) investigation, which has led to criminal charges against leading politicians, an investigation of popular former president Luiz Inacio Lula da Silva, and the impeachment of Brazilian President Dilma Rousseff.\(^{119}\)

Ramón Fonseca resigned his position as adviser to Panamanian president Juan Carlos Varela after his law firm was caught in “Operation Car Wash.” Mossack Fonseca closed its Brazilian office after individuals who had opened accounts with the firm were implicated in the kickback scandal. Fonseca said the investigations had not mounted to anything and the firm may reopen its Brazilian office in the future.\(^{120}\)

The ICIJ reports allege that Mossack Fonseca may have helped persons involved in laundering money for the Brink’s-Mat plotters.

Sixteen months after a major robbery, Mossack Fonseca allegedly formed a Panama shell company called Feberion Inc. Jürgen Mossack was one of the company’s three “nominee” directors. An internal memo written by Mossack indicates he was aware in 1986 that the company was “apparently involved in the management of money from the famous theft from Brink’s-Mat in London.” The company itself has not been used illegally, but it could be that the company invested money through bank accounts and proprieties that were illegitimately sourced.

The Mossack Fonseca records from 1987 allegedly show fugitive money launderer Parry Gordon was behind Feberion. The law firm allegedly helped prevent British police from gaining control of the company.

After police obtained the two certificates that controlled the company’s ownership, Mossack Fonseca allegedly arranged for Feberion to issue 98 new shares, thereby depriving the British police from obtaining control of the company.

Only in 1995, three years after Parry went to prison for his role in the robbery, Mossack Fonseca terminated its business relationship with Feberion.

\(^{119}\) Id. Marina Lopes and Dom Phillips, Brazilian President Dilma Rousseff ousted in impeachment vote, WASH. POST, Aug. 31, 2016.

\(^{120}\) Jude Webber, Mossack Fonseca founder dismisses Panama Papers as ‘witch hunt’, FIN. TIMES, Apr. 5, 2016.
A Mossack Fonseca spokesman said the allegations the firm helped hide the proceeds of the Brink’s-Mat robbery “are entirely false.”\textsuperscript{121}

British Virgin Islands authorities fined Mossack Fonseca $37,500 for violating anti-money laundering rules because the firm incorporated a company for the son of former Egyptian President Hosni Mubarak but failed to identify the connection, even after the father and son were charged with corruption.\textsuperscript{122}

Ramón Fonseca said his firm did not deal with end-clients directly and that in its early days, before the introduction of tougher global and Panamanian regulations and know-your-customer laws, it would not even have known their identities. He observed that some of the files leaked dated back to the 1980s and its firm has opened more than 250,000 companies. He characterized its standards as “very high”.\textsuperscript{123}

4. Tax Transparency

After the ICIJ revelations, Pascal Saint-Amans, the head of Tax Division at OECD, said “there will be political pressure and commercial pressure” on Panama. The OECD has criticized Panama for not agreeing to participate in the Common Reporting Standard (CRS). The OECD has not mentioned the U.S. even though the U.S. has not signed the CRS and recently the IRS Commissioner Mr. Koskinen has said the U.S. needs authority from Congress before it can sign. In February 2016, the Financial Action Task Force removed Panama from its “grey list” of anti-money laundering high-risk countries after the FATF said it recognized Panama had “made significant progress” in improving its AML regime (e.g., tightening its rules on bearer shares at the end of 2015).\textsuperscript{124} Panama had been on the grey list since 2014. Some governments will take advantage of the Panama papers to put Panama on a blacklist. On April 5, 2016, French tax authorities restored Panama to their list of non-cooperative countries.\textsuperscript{125} The Panama papers increased pressure for regulators and law enforcement to in-turn impose increased pressure on small international financial jurisdictions to strengthen their regulatory standards.\textsuperscript{126}

The Caribbean Community, in a statement, said the loose attribution of the ‘tax havens’ label ignores the reality that the regulation of this sector in CARICOM is fully compliant with international standards.\textsuperscript{127}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Webber, supra.
\item Vanessa Houlder, Jim Brunsden and Catherin Belton, \textit{Panama faces pressure to come into the fold}, FIN. TIMES, Apr. 4, 2016.
\item Kejal Vyas and Juan Forero, \textit{Panama Chafes at Its Rap as Money-Laundering Center}, WALL ST. J., Apr. 6, 2016, at A11, col. 1.
\item CARICOM concerned about resurgence of ‘tax havens’ label in wake of Panama Papers leak, CARIBBEANNEWS.COM, on April 9, 2016.
\end{enumerate}
\end{footnotesize}
5. **Analysis**

Prior ICIJ stories and data dumps have led to legislation and official investigations in dozens of countries and scared offshore customers concerned that the public and especially law enforcement authorities will learn of their secret investments.\(^{128}\)

The International Consortium of Investigative Journalists is a global network of more than 190 investigative journalists in more than 65 countries who collaborate on in-depth investigative stories. They had a project called “Secrecy for Sale: Inside the Global Offshore Money Maze.”\(^{129}\) Their findings included: government officials and their families and associates in China, Azerbaijan, Russia, Canada, Pakistan, the Philippines, Thailand, Mongolia and other countries embracing the use of covert companies and bank accounts; the mega-rich use of complex offshore structures to own mansions, yachts, art masterpieces and other assets, gaining tax advantages and anonymity not available to average people; many of the world’s top’s banks – including UBS, Credit Suisse and Deutsche Bank – have aggressively worked to provide their customers with secrecy-cloaked companies in the British Virgin Islands and other offshore hideaways; a well-paid industry of accountants, middlemen and other operatives has helped offshore patrons shroud their identities and business interests, providing shelter in many cases to money laundering or other misconduct; and Ponzi schemers and other large-scale fraudsters routinely use offshore havens to pull off their shell games and move their ill-gotten gains.

Another ICIJ project has been “Lux leaks.” On November 16, 2015, representatives from some of the world’s best known multinational companies, including Disney, IKEA, Google and HSBC, faced a grilling from European parliamentarians, as part of a probe into corporate tax policies initiated following the publication of ICIJ’s Luxembourg Leaks investigation.

Eleven of the thirteen multinational corporations invited to participate sent representatives to the final meeting of the European Parliament’s TAXE Committee.

The committee was established after ICIJ’s Luxembourg Leaks investigation revealed how secret agreements between Luxembourg authorities and some of the world’s biggest multinational corporations allowed more than 370 companies - including Disney, IKEA, Pepsi and Deutsche Bank - to avoid billions of euros in taxes on profits channeled through Luxembourg.

“The time has come to end this and to replace the law of the jungle. So when it comes to company taxation there will be a before and after LuxLeaks,” said MEP Alain Lamassoure, Chairman of the EP TAXE Committee, in opening the committee hearing.

Questions from MEPs ranged from grilling companies over operations in known tax havens to quizzing their representatives about whether the companies would support transparency measures such as public country-by-country reporting of profits.

\(^{128}\) Houlder, Jim Brunsden and Catherin Belton, *supra.*

Undoubtedly investigators and prosecutors will read the ICIJ reports and use them to start investigations. Already, law enforcement authorities in the U.S., Germany, U.K., France, Spain, Australia, Costa Rica, Austria, Belgium, India, Sweden, Mexico, and Norway have started law enforcement investigations.\(^{130}\) Most likely, civil society will use the information to demand better transparency from governments and international organizations.\(^{131}\)

Answers varied, but most companies used the opportunity to reiterate that their corporate structures and tax activities complied with all relevant laws, and that they would continue to comply with tax laws and policies as they change in each jurisdiction.\(^{132}\)

The revelations show that financial privacy is a thing of the past.

B. Undercover Investigation of Foreign Oligarchs in Manhattan Real Estate Investment Leads to Reintroduction of ITLEA\(^{133}\)

The introduction of the two bills on the Incorporation Transparency and Law Enforcement Assistance Act followed an airing on January 31, 2016 on “60 Minutes,” a CBS program wherein Global Witness, a British-based civil society organization, filmed an undercover investigation. The investigation had a person posing as a German lawyer visiting American lawyers in 13 law firms in Manhattan, and saying he was an agent for an African minister who wanted to buy an apartment and yacht. The lawyers from 12 of the 13 firms suggested using anonymous companies or trusts to hide the minister’s assets in purchasing the assets. Global Witness also obtained advice from John Leubsdorf, Distinguished Professor of Law and Judge Frederick B. Lacey, Distinguished Scholar, Rutgers School of Law, William H. Simon, Arthur Levitt Professor, Columbia Law School, and Gertrude and William Saunders, Professor Emeritus, Stanford Law School. They opined that in their opinion, the conduct by three of the lawyers shown in these interviews does not comply with the professional responsibilities of lawyers asked for assistance with potentially unlawful transactions. The ethics professors also stated “it would be desirable for the authorities to revise current doctrine to remove any ambiguity about how it (the ethics rule) applies to such conduct. Among the desirable changes would be a revision to Rule 1.2(d) of the Rules of Professional Conduct that makes explicit that it applies to prospective as well as accepted clients. Your investigation is of great public importance. It suggests a willingness on the part of

\(^{130}\) Chittum and Boland-Rudder, supra.


\(^{132}\) Hamish Boland-Rudder, Companies grilled by EU politicians over tax dodging, Nov. 17, 2015 http://www.icij.org/blog/2015/11/companies-grilled-eu-politicians-over-tax-dodging

\(^{133}\) This section is based on two articles: Bruce Zagaris, Undercover Investigation of Counseling Foreign Oligarchs on Manhattan Real Estate Investment Leads to Reintroduction of Incorporation Transparency and Law Enforcement Assistance Act (ITLEA), 32 INT’L ENFORCEMENT L. REP. 3 (Mar. 2016); and Bruce Zagaris, FinCEN Extends and Expands the Reach of its Real Estate “Geographic Targeting Orders”, 32 INT’L ENFORCEMENT L. REP. 8 (Aug. 2016)
prominent lawyers to assist corrupt officials to profit from betrayals of public trust” (parenthetical material added).  

The airing of the Global Witness undercover investigation has called attention to the problem of corporate transparency, gatekeeper standards, and the application of both to the purchase of real property in the U.S. In 2006, the Financial Action Task Force found the U.S. non-compliant in corporate transparency and the gatekeeper standards. At present, FATF is now conducting its evaluation of U.S. compliance with the current standards. On January 13, 2016, following investigative reports by the New York Times on anonymous purchases of luxury U.S. real estate by foreign persons, including some apparently corrupt politicians, using shell companies, the U.S. Treasury’s Financial Crimes Enforcement Network (FinCEN) issued Geographic Targeting orders that temporarily require certain U.S. title insurance companies to identify the natural persons behind companies used to pay “all cash” for high-end residential real estate in the Borough of Manhattan and Miami-Dade County, Florida. The Global Witness undercover investigation illustrates the frustration of civil society and some of the international community with the failure of U.S. federal and state governments to meet international transparency standards, even though the U.S. prioritizes the same in its foreign policy and sanctions foreign financial institutions and professionals when they violate U.S. financial laws, such as the Foreign Corrupt Practices Act, and tax and money laundering laws.

C. Whistleblowing

1. European Data Protection Supervisor Releases Guidelines on Whistleblowing Procedures

An important component to limits on and erosion of bank secrecy and financial confidentiality has been the increasing incidence of whistleblowers. Around the world international organizations, informal groups and governments are increasing protection for whistleblowers. For instance, on July 18, 2016, the European Data Protection Supervisor (EDPS) issued Guidelines on Whistleblowing Procedures. 

The G-20 has established standards for its member governments to facilitate whistleblowing. Civil society is proactively monitoring the standards and advocating the G-20 to effectively enforce the standards.


136 This section is based on two articles: Bruce Zagaris, European Data Protection Supervisor Releases Guidelines on Whistleblowing Procedures, 32 INT’L ENFORCEMENT L. REP. 7 (Jul. 2016).

137 European Data Protection Supervisory, Data protection and Whistleblowing in the EU Institutions, Press release EDPS/2016/12, July 18, 2016.

138 See, e.g., Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, Whistleblower Protection Laws
Increasingly whistleblowers work with groups, such as the ICIJ and Wikileaks, so that the information about the alleged violations of tax transparency is widely disseminated.

D. UK Territories Agree to Measures on Tax Enforcement, Corporate Transparency, and Anti-Corruption

On December 1-2, 2015, the political leaders and representatives of the U.K. and the Overseas Territories (OTs) met at the Joint Ministerial Council (JMC) at Lancaster House in London and issued a Communiqué on several important international enforcement and regulatory issues concerning tax, corporate transparency, anti-corruption, and international enforcement concerning drugs, illegal fishing, and a host of other criminal matters.

The JMC is the highest political forum under the 2012 White Paper, bringing together U.K. Ministers, elected Leaders and Representatives of the Overseas Territories for the purpose of providing leadership and shared vision for the Territories. Its mandate is to monitor and drive forward collective priorities for action in the spirit of partnership.

1. Tax and Transparency

The Communiqué observed that it is not appropriate to refer to British Territories as “tax havens.”

All OTs with financial services confirmed their full commitment to international co-operation in tax matters, and to fight against money laundering, tax evasion, illicit finances and corruption. The commitment is demonstrated not only in adherence to bilateral and multilateral agreements, but also in implementing the Financial Action Task Force standards and enforcing legal instruments on a daily basis.

The OTs with financial services sectors has actively participated in the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes and welcomed the commitment of those Territories to be early adopters of the new OECD global standard on tax transparency, with the first exchange of data occurring in 2017.

The Communiqué committed to sustaining successful international centers that contribute to the prosperity and development of its societies, recognizing the importance of transparency, effective legal systems, and good governance in achieving this.

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139 This section is based on two articles: Bruce Zagaris, U.K. Territories Agree to Measures on Tax Enforcement, Corporate Transparency, and Anti-Corruption, 31 INT’L ENFORCEMENT L. REP. 12 (Dec. 2016).

2. **Beneficial Ownership**

The JMC agreed to hold beneficial ownership information in their respective jurisdictions through central registers or similarly effective systems. There exists discussion about what constitutes “similarly effective systems” and whether that means requiring incorporators or someone domestically connected with the entity to hold beneficial information and make it available on request.

They discussed the details of how these systems should be implemented, including through technical dialogue between the OTs and U.K. law enforcement authorities on further developing a timely, safe and secure information exchange process to increase their collective effectiveness for the purposes of law enforcement. They agreed to prioritize addressing the issue of beneficial ownership.

3. **Governance**

The Communiqué committed to support capacity building and the development of expertise in:

(i) public financial management and economic planning: maintaining sound public finances, building economic resilience and ensuring value for money in use of public funds, including through effective use of audit; (ii) standards in public life: creating a meaningful culture of ethics, integrity and transparency, including through Codes of Conduct for Ministers and civil servants where these are not already in place; (iii) public service reform: building capacity and supporting an effective, professional and transparent service that acts in the interests of all the people of the territories; (iv) human rights, democracy and the rule of law: building strong and effective institutions that promote democracy, human rights, the rule of law and deliver access to justice; and (v) security and anti-corruption: upholding Territories’ security and enhancing their reputation as sound jurisdictions for business, including through continued support for international efforts against bribery and corruption and fraud.

4. **Security**

The Communiqué welcomed the U.K.’s commitment to upholding the security and sovereignty of the OTs and their territorial waters, as discussed in the U.K. National Security Strategy and the 2015 Strategic Defense and Security Review. It welcomed the continued support provided by the Royal Navy in combating any threat to the Territories, as well as in the fight against drug trafficking, illegal unreported and unregulated fishing and other illicit activity and investment made in building capacity in the Caribbean Territories through the U.K.’s Conflict Security and Stability Fund. The Communiqué reiterated the OT’s shared commitment to tackling serious and organized crime and reducing reoffending in the Territories, including through conferences this year of Territory Commissioners and Chiefs of Police and Superintendents of Territory Prisons. The OTs committed to work together to update and simplify extradition processes between the OTs and the U.K. and between the OTs and third countries.

5. **Analysis**

The JMC serves as a mechanism to coordinate policies on international financial services, tax transparency, anti-money laundering, anti-corruption, and related issues. Hence, high on the
Communiqué the JMC expressed the inappropriateness of referring to the British Territories as “tax havens.” Although it is not expressly mentioned in the Communiqué the OTs grapple almost on a daily basis with the consequences of international organizations (e.g., the European Union), countries, states, and informal groups labeling them as tax havens. As a result, banks and financial institutions characterize correspondent relationships and transactions as risky and decide to close those relationships (e.g., de-risking).

The commitment to beneficial ownership is important although it will be important to monitor how the OTs implement the commitment. The OTs are particularly concerned that, due to the lack of a level playing field, the U.S. (and U.S. states) and other countries will continue to obtain market shares in international financial services from the OTs as a result of lower levels of compliance on important areas, such as corporate transparency and gatekeeper regulation. For instance, the fact that the U.S. has not committed to the Common Reporting Standard concerns the OTs because they see major international trust companies opening and enlarging their U.S. operations while de-risking from their operations in the OTs. Hence, the OTs have to compete with U.S. states on captive insurance, limited liability companies, and international trusts while having to meet a higher level of regulatory standards because they do not have a seat in the international organizations and international bodies that make and implement the rules. In this regard, the Communiqué mentioned the U.K.’s role in representing the Territories in international forums. The U.K. Government committed to working together with those OTs where they represent their own interests at international fora. Even when the OTs are able to send delegations to international fora, they often do not have the resources and information that the U.K. has.

The JMC is both an important mechanism for the OTs and also for the U.K. itself insofar as international enforcement and financial regulatory policies are made, implemented, and enforced.

**E. Prospects for the Trump Administration and the Way Forward**

The Trump Administration may not be likely to continue the initiatives to erode bank secrecy in part because it has fought to not release its own tax returns, to not reveal the details of the arrangements to turn over management of its business empire to his sons, and has championed the massive cut of regulations, anti-globalism, and America 1st. To the extent some U.S. states have attracted a lot of new business since the U.S. has announced it will not sign the CRS, the Trump Administration is likely to correctly believe that at least in the short term the U.S. stands to gain economically by holding the line on further eroding bank secrecy.141

**V. PRACTICAL LESSONS OF DEALING WITH INCREASINGLY COMPLEX TAX AND REGULATORY REGIMES**

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The practical lessons of dealing with the increasingly complex tax and regulatory regimes mean that practitioners must be cognizant of the complex rules of professional conduct. In particular, this section discusses the application of jurisdictional issues, identifying the client, especially in complex international trust and estate planning, and the duties of the lawyer to the client. With respect to the duties of a lawyer to the client, this section discusses the many elements of the duty of competence, the duty of zeal, especially vis-à-vis avoiding illegal and criminal acts. Finally, the duty of confidentiality is especially at stake with all the national and international transparency initiatives. This section also discusses the implications of practitioners’ obligations under Circular 230, the increasing prosecution of enablers, and some unique aspects of regulatory and enforcement convergence.

A. Rules of Professional Conduct

This section discusses some of the fundamentals of the ethical considerations. In particular, it considers jurisdictional issues in transnational legal matters and identifying the client. The section then explores selected duties of the lawyer to the client in a transnational practice: the duty of competence; the duty of zeal; the duty of confidentiality; the different duties of lawyers in different roles; and the problem of multinational standards for international lawyers and international lawyering.

1. Jurisdiction

A threshold issue is to which jurisdiction does a Florida or United States lawyer owe responsibility. Lawyers should pay attention to the jurisdictional reach of the ethical requirements of the jurisdiction in which they are based. Although some lawyers with ethical boards take the parochial position that a U.S. lawyer is only responsible for the ethical requirements of the jurisdiction in which they practice, lawyers increasingly must be aware of the broad reach of other rules of ethics of other countries. The best and modern approach in complying with ethical rules of multiple jurisdictions in international business is to be aware of the potential reach of the ethical rules of a jurisdiction other than your own in matters involving international and foreign law. A conflicts of law perspective is the best means to analyze a problem and determine whether the interest of a specific jurisdiction may be sufficient to pay attention. This is the same approach that a Florida lawyer would have to take to determine a jurisdictional overlap in ethics between Florida and New York.

An example is that a client, X corporation from the U.S. has received a notice of tax deficiency from the government of Zinterlandia. It requests your help. It believes the opportunity for recovery is very remote and therefore has told you that it will retain you only if your agree to work on a contingency fee basis. It is willing to pay a contingency of up to 50% of the recovery. However, after checking your correspondent office in Zinterlandia, you realize that one of the name partners is representing the Director of Inland Revenue and that his office is willing to represent your client. Among the potential ethical issues is whether, since it is not ethical to take the case on contingency in

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142 See, e.g., FRPC, Rule 4-8.5.

143 See e.g., Florida Bar Opinion 88-10 (May 1, 1988) concerning the correctness of contingent fee arrangements involving complex litigation involving complex litigation matters having contacts with other states.
Zinterlandia, you can represent X corporation. An additional issue is the ethical and even legal propriety of having a name partner of a firm work on a case while he is employed in the government, especially since he will have a financial interest in the matter. A choice of law analysis should be done and then advice on the legal and ethical issues should be obtained before the U.S. lawyer decides whether to be involved in this matter, and, if so, under what circumstances (i.e., through an hourly fee or through a contingency fee, but only with work on the U.S. aspects, and considerations of another foreign counsel).

2. Identifying the Client

While the identity of a client might not raise any problem when dealing with individuals, the same is not necessarily true with corporate clients. When representing one or more members of a group of related corporations located in various countries, the determination of the identity of the lawyer’s exact client becomes complex.

The ABA Code of Professional Responsibility (“CPR”) provides some guidance in the representation of corporate entities:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interest and his professional judgment should not be influenced by the personal desires of any person or organization. CPR, Ethical Canon (“EC”) 5-118.

The main focus in identifying the client is to avoid potential conflict of interest between the corporate client itself and some person or persons involved in its management or board. Indeed, in the general course of conduct, the corporate entity is very often identified with its management, its executives (with whom the lawyer is accustomed to deal), or its board. In the international arena, the lawyer may deal with international vice-presidents, presidents of operating subsidiaries, the parent company’s officers, vice-presidents marketing or other executives, or in-house general counsel. Since the international lawyer owes his/her allegiance to the specific corporate entity, he may well have to look beyond the individual executives or corporate agents with whom he is generally in contact, whenever the corporate entity is being mismanaged or badly served by such executives or agents. In case of mismanagement or misconduct, the international lawyer has not only the right, but even in some cases the duty, to report the same to a higher corporate authority, even though, by doing so, he would disregard agents’ or executives’ instructions. The bottom line is that an international lawyer may not forget that management, whether local or foreign, is not his/her ultimate client and that the interest of the corporate entity itself remains “paramount.”

The problems confronted in this regard by international lawyers are even more complicated. Indeed, a lawyer generally represents either a foreign subsidiary of an American parent company or an American subsidiary of a foreign parent company. In that context, he may be dealing on a day-to-day

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basis with the subsidiary’s management and even being paid by the subsidiary. Yet, it may well be that initially that same lawyer was engaged by the subsidiary. In those situations, the lawyer may possibly find himself in a conflict of interest position since both parent and subsidiary are two distinct entities with potentially different and conflicting interests.

This situation is somewhat similar to the simultaneous representations of multiple clients, governed by ECs 5-15 and 5-16 of the CPR. Under these Canons, the simultaneous representation of multiple clients is permitted as long as the potential conflict of interest is disclosed to both parties and the lawyer’s “independent professional judgment” is not “adversely affected.”

The lawyer’s “independent professional judgment” is not likely to be “adversely affected” when he represents both a parent and a 100-percent owned subsidiary. In such a case, should a conflict of interest arise between the two entities, the lawyer would be justified in respecting the parent company’s instructions, as the 100-percent shareholder of the subsidiary. Similarly, should the subsidiary’s management commit any mismanagement or misconduct, the lawyer would have the right, and presumably also the duty, to report the same to the parent.

The situation, however, is not as easy in the event the subsidiary is not 100-percent owned by the parent. This is particularly true whenever the subsidiary is a 50-50 joint venture, in which case potential conflicts of interest between the parent company and the subsidiary’s other owner are foreseeable. Generally speaking, it is advisable for the lawyer to refer the representation of the joint venture to another legal advisor.

3. The Duties of the Lawyer to a Client

d. The Duty of Competence

The FRPC, Model Rules of Professional Conduct “MRPC”, and the CPR require that a lawyer provide competent representation of his/her client. Competence involves legal knowledge, skill, thoroughness, preparation, and efficiency reasonably necessary for the specific representation. Hence, a lawyer may not handle a legal matter that s/he knows or should know s/he is not reasonably competent to handle on his/her own. This is especially true in the case of matters in specialized technical fields, such as niches of international corporation taxation and/or aspects of tax controversy work.

According to the Comments to Rule 4-1.1 FRPC (Comments on Legal Knowledge and Skill), a lawyer does not necessarily have to possess special training or prior experience to handle legal problems of a type to which the lawyer before has been unfamiliar. A lawyer can give adequate representation in a new legal area by undertaking the requisite amount of study. Another means by which a lawyer can obtain the needed legal knowledge and skill is through associating a lawyer of established competence of the legal area at issue.

145 For a general discussion on the duty of competence as it applies to international lawyers, see Goebel, supra.

146 See FRPC, Rule 4-1.1.
One important threshold issue when approached by a potential new client or even an existing client is whether the lawyer has or can attain the requisite competence to handle the matter. The issue can be difficult in dealing with international transactions because many times the client, unless such person has done a lot of international business, may not be aware of many of the particular traps for the unwary let alone even some of the issues.

To meet the requirements of thoroughness and preparation, a lawyer must make sufficient inquiry into, and analysis of, the factual and legal elements of the situation, use methods and procedures fulfilling the standards of competent practitioners, and consult with the client as to the degree of thoroughness and the level of preparation required as well as the estimated costs involved for the circumstances. The level of required attention, preparation, use of methods and procedures may be determined by the significance and complexity of the particular transaction.

For instance, if a client is involved in challenging a jeopardy assessment in U.S. District Court in the Southern District of Florida, a lawyer in Miami may not have such a difficult time representing a client based in Florida. However, a lawyer in San Francisco, who is the lead lawyer on the case for a client who for business or personal reasons must spend one year in East Africa on business, has a much more difficult job effectively representing the client. If you add to the facts that the client is a foreign national who has little contact with and knowledge of the U.S. legal system and even English, albeit obviously was in the U.S. long enough to have a tax problem, then to the distance and logistical problems you add communication and understanding. If you add that the bulk of the taxpayer’s records are in Africa and in a foreign language, then the degree of skill and attention to provide competent representation has risen considerably.

When a lawyer lacks expertise in a certain area, he or she ought to either transfer the case or request the assistance of a specialist without undue expense to the client. At the very least, a lawyer should not undertake a legal representation in an unfamiliar field without disclosing to his/her client the degree of his/her experience.

b. Advising on International and Foreign Law

The duty of competence becomes broader in the international area. Very often in international matters, a lawyer is asked to give advice on foreign law. Traditionally, American lawyers are deemed to have the necessary skill to know and understand foreign laws but neither the MRPCV nor the CPR offer guidance as to the necessary level of their preparation or thoroughness with regard to foreign laws and regulations. Hence, each international lawyer has an individually fundamental duty to know the limits of his/her own competence. For instance s/he should not give advice on a foreign transaction without first obtaining advice from a competent local practitioner. Similarly, an international lawyer should not advise on international transactions if s/he has not acquired sufficient competence in international conflict of laws, arbitration procedures, standard patterns of international commercial contracts,

147 See FRPC, Comments to Rule 4-1.1 (Thoroughness and Preparation).
148 Comments to MRPC, Rule 1.1.
international financing devices, or licensing. When requesting advice from foreign local lawyers, the American lawyer’s duty of competence requires that s/he verify and investigate to his/her satisfaction that the foreign lawyers are themselves competent.\textsuperscript{149}

In many cases whether the case concerns an American investing abroad or a foreigner investing in the U.S., they often will seek advice of the law of a foreign jurisdiction, especially on its interaction with either U.S. law and/or international law. The case may even involve the interaction of the law of two foreign countries. The latter situation is especially becoming commonplace in the context of economic integration in which a foreign investor wants to take advantage of an opportunity to invest in Mexico or the Caribbean, but for the purpose of exporting to North America, in which case the client has questions about the potential for the North American Free Trade Agreement, the existing bilateral investment treaty between the U.S. and Mexico, the Canada-U.S. Free Trade Agreement, and U.S. and Canadian law. Perhaps, for the same investment the client is intending to also export to Europe, perhaps to take advantage of the Economic Partnership Agreement (EPA) by the EU and CARIFORUM, in which case the client has questions about qualifying for the benefits of the EPA, and if the laws of several European and CARIFORUM countries since either joint venture partners and/or technical and financial assistance are potentially from Europe.

The trend of the law when an attorney advises on foreign law is to require a higher level of professional responsibility when advising on matters of foreign law.\textsuperscript{150}

A lawyer that is faced with a potential that foreign law matters may be germane to a transaction or case should first call them to the attention of the client and do so in writing. If the lawyer does not believe he or she is competent, the lawyer should require the client to seek counsel. If the client refuses and local law is critical, the lawyer should consider withdrawing. In some cases, it may be appropriate for a lawyer to advise on some very elementary points of the foreign law, especially if the client plans to have the elementary advice confirmed by competent foreign counsel. Defensive lawyering requires the U.S. lawyer to document that he or she is not qualified to practice in the laws of the foreign jurisdiction and that the client should seek competent foreign counsel. If a U.S. lawyer advises on foreign law, he or she potentially could be liable to laws that prohibit engaging in the unauthorized practice of law in foreign countries. Some Treaties of Friendship, Commerce and Navigation allow lawyers of one Contracting State to engage in practice in the other Contracting State on a national treatment basis.

Advising on the laws of foreign jurisdictions presents issues and problems analogous to the situations of advising on areas outside a lawyer’s competence since a U.S. lawyer, in addition to the normal problems of identifying the issues and finding the law, must know the legal culture, the method of implementing the law, and a myriad of other variables, many of which the U.S. lawyer may not even be able to identify. For instance, a U.S. lawyer may not be aware that the Deputy Minister in charge of

\textsuperscript{149} Goebel, supra.

\textsuperscript{150} Compare, e.g., the early case of Fenaille \& Despeaux v. Couder, 44 N.J.L. 286 (1882) (attorney is not required to know foreign law) with In Re Roel, 3 N.Y. 2d 224, 165 N.Y. 2d 224, 165 N.Y.S. 2d 31 (1957), appeal dismissed, 355 U.S. 604 (1958); Rekeweg v. Federal Mutual Insurance Co., 324 F.2d 150 (1964), cert. den., 376 U.S. 943 (1964) (attorneys cannot claim lack of knowledge of the foreign law).
enforcing tax laws changed in a country and therefore the administration of the written law is completely different even though the written law is essentially unchanged. A problem in some developing countries is that the law may not have been codified for decades. Therefore, without actually visiting the foreign country or talking with one or two persons in the country that have physical possession of the law, the U.S. lawyer cannot even begin to advise. Advising on implementation may sometimes involve knowing how to ensure prompt service and dividing line between when a payment or gift to a foreign official is proper or criminal under the Foreign Corrupt Practices Act in the U.S. and how it is treated under the laws of foreign country(ies).

i. Responsibility for Hiring and Supervising the Work of Foreign Lawyers

In many cases a client will request the assistance of U.S. counsel in finding a foreign counsel to work on a matter. If you are only referring a client to foreign counsel, there may be no responsibility. However, to be on the safe side, especially vis-à-vis the duty of competence in a continuing relationship with a client, it is important to qualify your knowledge (and lack of knowledge) of the country, substantive area, experience working with foreign counsel, and the limitations of your information on him and other potential professionals. Authority in at least one state is that a lawyer can be subject to discipline merely by not meeting the “competence” standards of Rule 4-1.1 in referring a client to a foreign counsel even if the lawyer does not provide any counsel on the substantive legal area.\textsuperscript{151}

If an attorney will be not just recommending, but hiring and supervising foreign counsel, then the lawyer owes reasonable due diligence in supervising the foreign counsel under Rule 4.5-1 of FRPC.

Before retaining new foreign counsel, assuming a lawyer is not familiar with their work, it may be useful to test more than one counsel by making a small request for clarification or some aspect of the assignment or in some way putting them to the test of giving you some substance. Clarifying the assignment, the expectations and their fee can be very important. Another critical element is whether the foreign counsel is being retained by you and your firm or your client. It may affect matters, such as the ability and responsibility to supervise, the financial liability, the quality of the work, and the attorney-client and work product privileges.

In working with foreign legal counsel, lawyers should pay attention to Rule 4-5.1(c)(1-2), FRPC. It makes a lawyer responsible for another lawyer’s violation of the Rules if the lawyer orders, or knowing of the specific conduct, ratifies the conduct, or the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the lawyer and knows of the conduct at a time when he can avoid or mitigate its consequences, but fails to take action.

One issue in dealing with and hiring foreign legal counsel is competence. Inexperienced U.S. lawyers who deal with international transactions or with a vanilla U.S. transaction for a person with foreign nationality or residence may fall below the competence standards merely by not identifying and advising their client of certain substantive legal issues or aspects of dealing with foreign legal counsel. Sometimes, it may be important to advise a client that, because of the lawyer’s unfamiliarity with a

given jurisdiction and/or legal area, the lawyer is aware of some issues, but that only a more comprehensive review by a lawyer from the home country can more thoroughly apprise him of the local treatment. This may be the case, for instance, with money movement questions and legal ethics on arranging fees.

An important way to reduce the amount of potential difficulty is for the U.S. lawyer to document the amount of work and advice rendered on the matter.

ii. Advising on Areas Outside Your Competence

As we will see below, the problem of the duty of competence can become tricky when a practitioner specializing in international tax planning and transactions has to advise on reporting requirements and complying with money movement laws and regulations not only of the country in which the counselor practices, but other jurisdictions whose laws may apply. For instance, if a client visits your office in the U.S., but you know the client owns a closely held company in Vargenzuelaiz, a country with strict exchange controls and is transferring money from trusts and other entities in the so-called secret low-tax jurisdictions, the duty of competence may arise in the context of money movement laws. The extent of one’s duty may depend on the context of the transaction.

iii. Advising on International Estate Planning

The practice of international estate planning may cause ethical issues. For instance, few lawyers have access to the text of current laws of most jurisdictions involved in international estate planning. Even if they do, without knowledge of the foreign country’s culture and jurisprudence, the lawyer may not be able to properly advise by reading the laws. Therefore, comparative analysis is not always easy. In many instances, knowledge of political, economic, or legal development in each individual jurisdiction is required in addition to legal knowledge. Unless a lawyer spends a considerable amount of time in each jurisdiction, he is unlikely to have this knowledge.

iv. Serving as a Member of a Corporate Client’s Board of Directors

Another aspect of the duty of competence relates to whether a lawyer should serve as a member of his/her corporate client’s board of directors. Such participation is not currently prohibited by either the MRPC or the CPR but it is not recommended in view of the potential conflict of interest between the lawyer’s duties to provide independent counsel and its fiduciary obligation as a member of the board. American international practitioners should refrain from serving on the boards of directors of either an American or foreign subsidiary while at the same time representing the parent company. The same principle should guide international lawyers whose corporate client asks them to serve on the board of its foreign holding company or foreign operating subsidiary. In addition to the conflict between the duty of competence and the fiduciary duty as members of the board, lawyers in that position may

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152 For a useful discussion of ethical issues in international estate planning, see Hendrickson, Ethical Issues in International Estate Planning, INTERNATIONAL ESTATE PLANNING Tab V (ABA National Instit. 1990).

153 Id.

154 This issue is directly addressed in Rule 1.9 of the MRPC. See also, Goebel, supra.
also be caught between fears of personal liabilities as a board member under local law, and their advice
to the parent with regards to adhering to local legal norms.

c. The Duty of Zeal: Avoiding Illegal/Criminal Acts

Pursuant to EC 7 of the CPR, a lawyer must serve his/her client “zealously within the bounds of
the law.” In other words, a lawyer, in fulfilling his/her duty of zeal, must do whatever is appropriate in
advising his/her client. However, he is limited in such zealous representation by another ethical
limitation, namely, EC 7-5 of the CPR. Under such Canon, a lawyer may “never encourage or aid (the)
client to commit criminal acts.” In representing his/her client, a lawyer may not “conceal or knowingly
fail to disclose that which he is required by law to reveal,” or “knowingly make a false statement of law
or fact,” or “counsel or assist his/her client in conduct that the lawyer knows to be illegal or fraudulent.”
Disciplinary Rules (“DR”) 7-102 of the CPR.

While these rules offer some guidelines in cases of clear violation of the law or clear fraudulent
behavior, it provides no help in borderline situations. Yet, in international practice, those borderline
situations frequently occur as a result of differences in the perception of behavior or transaction under
different legal systems. Is the client’s behavior or transaction judged by the lawyer’s country’s own
ethical country rules or instead by those in effect in the country in which the behavior or the transaction
occurs, or will be executed? In this regard, the Swiss financial regulatory, FINMA, issued a regulation in
2009, shortly after the UBS deferred prosecution agreement, that required Swiss financial institutions to
comply with international criminal and regulatory standards.

In international estate planning, questions have been raised with regard to the course of
conduct to be followed by a lawyer whenever it appears to the lawyer that his/her client will be
pursuing an objective that the lawyer considers illegal, fraudulent, criminal or even repugnant or
imprudent. Should he withdraw? Must he withdraw? What kind of advice can he give?

If conduct sought by the client is repugnant or imprudent, the lawyer may withdraw as long as
doing so does not cause material adverse effect to his/her client, unless otherwise permitted by the
MRPC (MRPC, Rule 1.2). For instance, if the lawyer reasonably believes his/her client’s behavior to be
criminal or fraudulent (as opposed to merely repugnant), he may withdraw regardless of any adverse
effect on his/her client. Similarly, if the lawyer knows or reasonably believes that a potential client is
seeking legal advice in order to commit some illegal or fraudulent act, he must decline the
representation (MRPC, Rule 1.16).

A more complicated situation exists when the lawyer does not know that his/her client is
pursuing a fraudulent or illegal activity but merely has reason to believe he is. In that case, does the
lawyer have a duty to further inquire in order to ascertain that a fraud is being or will be committed?
This issue is particularly relevant in international estate planning where lawyers may often have
suspicion as to the hiding of assets or transfer of assets from one jurisdiction to another in order to
escape taxation. Although Rule 1.2 of the MRPC does not deal specifically with these issues, it is
generally understood that even though there is no general duty for a lawyer to investigate his/her
client’s purposes and affairs, he is generally required to make some inquiry when the nature of his/her
employment or the surrounding circumstances indicate that failure to make further inquiry would be “unreasonable.” (MRPC 1.2(d)).

Assuming the client reveals that his/her objectives are fraudulent and the lawyer does wish to withdraw, what can he do for his/her client? Very little. Of course, he cannot participate in the fraud, but he could counsel or advice in a good faith effort to determine the validity, scope and meaning of the law as well as advise on the consequences of the client’s conduct. (MRPC, Rule 2.43).

On the other hand, if the lawyer finds out that the client is already involved in the fraudulent activity, e.g., has already set up a tax avoidance scheme, all further assistance must cease immediately. However, the lawyer remains bound by his/her client’s confidence.

Now assuming the client’s objective is not to violate U.S. laws but instead some foreign tax regulations, may an American lawyer advise him/her/it on how to achieve such goal? After the decision in *Pasquauntino v. United States*\(^\text{155}\) the U.S. counsel may have criminal liability if s/he assists the client to violate a criminal tax law of a foreign country. Although lawyers are not expected to know all the nuances of foreign laws, they cannot abandon their professional canons merely because they are advising on foreign laws. Also, if lawyers are subject to conflicting ethical rules because of their multi-jurisdiction advice, principles of conflicts of law would apply.

\[d. \text{ Duty of Confidentiality}\]

One of the ethical duties of an attorney is to safeguard confidentiality of information regarding a client.\(^\text{156}\) In particular, a lawyer must not reveal information concerning his/her representation of a client unless the client consents after consultation. An exception is made for disclosures that are implicitly authorized to carry out the representation. Another exception exists if a lawyer must disclose information that the lawyer reasonably believes is necessary to prevent the client from committing a crime the lawyer believes is likely to result in imminent death or substantial bodily harm or to establish a claim or defense on behalf of the lawyer in a controversy with the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

Although this paper discusses three selected aspects of confidentiality, others exist (i.e., intra-family privileges and privilege for physicians and psychotherapists). When the client is foreign and/or when the transaction has a large foreign element, special duty may exist to consider and communicate the application of these ethical and legal considerations to the client and others involved.

\[i. \text{ Attorney-Client Privilege}\]

The protection accorded certain confidential communication may be vital in a tax controversy matter. Normally, the taxpayer’s paramount interest may be to prevent the IRS from having access to document or testimony by asserting any applicable evidentiary privileges. In many cases a taxpayer may


\(^{156}\) The obligation of confidentiality of information is contained in MRPC, Rule 1-6.
be able to assert a claim of privilege in response to an Internal Revenue Service summons or a grand jury subpoena. Unless a taxpayer asserts an applicable privilege at the initial stage of an investigation, s/he may waive that privilege at a later stage, including trial. Although most courts hold that a waiver of the attorney-client privilege does not have to be intentional, to the extent that the client may be held to have waived the privilege by disclosing privileged information even if he or she did not intend such disclosure to serve as a waiver, a waiver will not occur if disclosure was coerced or involuntary.

ii. Work Product Immunity

An area somewhat related to the attorney-client privilege is the immunity for attorneys’ work product. The doctrine applies to civil and criminal litigation, as well as to grand jury investigations, and IRS summons. The work product immunity protects from disclosure documents prepared by an attorney in anticipation of litigation, even if no litigation is pending at the time he or she prepares the documents. The standard is whether “the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” After a government agency starts an investigation, the prospect of litigation becomes imminent enough that the work product doctrine will apply to any documents prepared related to such an investigation. Similarly, documents prepared by attorneys conducting an internal investigation of potential wrongdoing will qualify. Documents prepared in anticipation of litigation before an administrative tribunal are also privileged.

Among the protected work product materials are included: preliminary drafts of legal documents; attorneys’ memoranda or notes analyzing a party’s position or containing summaries of conferences and legal research; intra-office notes and memoranda, and statements from third-party

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157 Reisman v. Caplin, 35 U.S. 440, 44 (1964); U.S. v. Tratner, 511 F.2d 248, 251 (7th Cir. Cir. 1975).
158 U.S. v. Calandra, 414 U.S. 338, 346 (1974); Branzburg v. Hayes, 4098 U.S. 665, 668 (1972); In re Lochiatto, 487 F.2d 803, n.3 (1st Cir. 1975); In re Evans, 452 F.2d 1239, 1245 (DC Cir. 1971), cert. denied, 408 U.S. 929(1972); Fed.R. Evid 1101(c)(d)(2).
161 In re Grand Jury Subpoena (John Doe), 599 F.2d 504 (2d Cir. 1979); In re Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973).
163 In re Hughes, 633 F.2d 282, 285 (3d Cir. 1980).
166 See Upjohn v. U.S., supra.
167 Hercules v. Exxon Corp., supra.
168 Id. at 151.
witnesses. The work product immunity includes interviews of third parties conducted by the attorney's investigator, and to work papers of an accountant assisting the attorney.

The client in addition to the attorney can assert the product immunity. Even if the client has waived the attorney-client privilege, an attorney may still assert the immunity of his/her own work product.

Some courts have held that the client completely loses his/her right to claim the protection for the work product immunity if the client consults an attorney with the intent to perpetrate a future crime or fraud. In such case, the attorney can claim the protection only to the extent of his/her own mental impressions, conclusions, opinions, and legal theories. In cases in which an attorney is guilty of illegal or unethical conduct, some cases have held that the attorney may thereby forfeit his/her right to claim the work product privilege although the client may still assert the privilege in such a case.

iii. Accountants' Work papers

Since 1985, there is no work product privilege for tax accrual work papers. The reasoning is that the role of a certified public accountant is not analogous to that of an attorney. A CPA is not an advocate, but rather is "independent," owing duties to "the investing public" and to the client's "creditors and stockholders." The Court also reasoned that the auditor is ethically and professionally bound to ascertain that the corporation's tax accrual reserves are adequate. Without access to sufficient data to make that decision, the auditor would be unable to make an unqualified opinion as to the accuracy of the corporation's financial statements.

169 In re Grand Jury Subpoena (John Doe), supra, at 509-10.
170 In re Hughes, supra, at 285-86.
173 Duplan Corp. v. Moulinage et Retorderies, 487 F.2d 480, 483 (4th Cir. 1973); In re Grand Jury Subpoena (John Doe), supra, at 509.
174 In re Grand Jury Proceedings (Doe), 867 F.2d 539, 541 (9th Cir. 1989); In re antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986); In re Sealed, 676 F.2d 783, 812 (S.C. Cir. 1982); In re Special Sept. 1978 Grand Jury II, 640 F.2d 49, 63 (7th Cir. 1980).
175 Moody v. IRS, 654 F.2d 795, 799-801 (D.C. Cir. 1981), op. after remand, 683 F.2d 266 (D.C.Cir. 1982). See also in re Doe, 662 F.2d 1073 (4th Cir.), cert. denied, 455 U.S. 1000 (1981); In re Grand Jury Subpoena, 773 F.2d 204, 206 (9th Cir. 1985).
One planning mechanism resulting from the Arthur Young & CO. case is that some corporations will ask their lawyers, not their accountants, to render an opinion on the adequacy of their tax accruals, thereby protecting those work papers under the attorney-client privilege.178

B. Circular 230

To the extent practitioners are practicing before the Treasury and IRS, they are bound by Circular 230. It establishes various duties of tax professionals who practice before the IRS. Examples of provisions are the following:

§ 10.21 Knowledge of client’s omission.

“A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.”

§ 10.22 Diligence as to accuracy.

(a) In general.

A practitioner must exercise due diligence —

(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and

(3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.

31 U.S.C. § 330 provides that after notice and opportunity for a proceeding, the Secretary of the Treasury may suspend or disbar from practice before the Treasury, or censure, a representative who “(1) is incompetent; (2) is disreputable; (3) violates regulations prescribed under this section; or (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.”

178 See, e.g., Peterson, Attorney-Client Privilege in Internal Revenue Service Investigations, 54 MINN. L.R. 67 (1969); Garbis and Rubin, Implications of the Sup. Ct.; holding of no accountant’s privilege in Arthur Young, 60 J.TAX 342 (1984). The IRS has even opposed this view.
The same provisions authorize the Secretary to “impose a monetary penalty on any representative described in the preceding sentence. If the representative was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to such penalty, the Secretary may impose a monetary penalty on such employer, firm, or entity if it knew, or reasonably should have known, of such conduct. Such penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty and may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative.”

The Office of Professional Responsibility (OPR) administers Circular 230. In addition to imposing administrative sanctions, including debarment and monetary penalties, OPR can also make referrals for criminal prosecution.

C. Increasing Prosecution of Enablers

Throughout the world there has been a focus on increasing prosecution of enablers.

Perhaps the real precursors were some prosecutions of illegal U.S. tax shelters by Big Four accounting firms, law firms, and banks that were exposed beginning in 2003 and continuing through 2013. In early 2005, the United States member firm of KPMG International (KPMG LLP) was accused by the United States Department of Justice of fraud in marketing abusive tax shelters. Under a deferred prosecution agreement, KPMG LLP admitted to criminal wrongdoing in creating fraudulent tax shelters to help wealthy clients dodge $2.5 billion in taxes and agreed to pay $456 million in penalties. KPMG LLP will not face criminal prosecution as long as it complies with the terms of its agreement with the government. On January 3, 2007, the criminal conspiracy charges against KPMG were dropped.

On August 29, 2005, nine individuals, including six former KPMG partners and the former deputy chairman of the firm, were criminally indicted in relation to the multi-billion dollar criminal tax fraud conspiracy. The nine individuals named in the indictment were high-level officials of KMPG and a partner of a major law firm.

On October 17, 2005, another ten individuals were indicted on criminal conspiracy and tax evasion charges.

On March 1, 2013, Ernst & Young LLP (“E&Y”) admitted to wrongful conduct by certain E&Y partners and employees in connection with the firm’s participation, from 1999 to 2004, in four tax shelters that were used by approximately 200 E&Y clients in an effort to defer, reduce, or eliminate tax liabilities of more than $2 billion. E&Y entered into a non-prosecution agreement (the “NPA”) with the United States, in which the company agreed to pay $123 million to the United States and acknowledged

179 For more information on the OPR, see https://www.irs.gov/tax-professionals/office-of-professional-responsibility.

180 See, e.g., Stein v. KPMG, LLP, No. 06-4358 (2d Cir. May 23, 2007); David Kay Johnson. Wide Range of Tax Shelters Draws Senate Inquiry, N.Y. TIMES, October 22, 2003.
a detailed Statement of Facts in which it admitted to the wrongful conduct of certain partners and employees.  

The four tax shelters at issue were known as BLIPS, or bond linked issue premium structure; FLIPS, or foreign leveraged investment program; OPIS, or offshore portfolio investment strategy and a variant of FLIPS; and SOS, or short option strategies. The above-mentioned criminal case arose from investigations of the illegal U.S. tax shelters.

In the U.S. from 2008 through April 2013, the Tax Division has charged over 30 banking professionals and 60 account holders, thus far resulting in five convictions after trial and 55 guilty pleas, including 2 trial convictions and 16 guilty pleas in the first four months of 2013 alone.

Since the crackdown on U.S. taxpayers with undeclared foreign accounts, the U.S. Department of Justice has prosecuted and convicted foreign banks for conspiracy to commit tax crimes, including Credit Suisse and Wegelin. The DOJ initiated the Offshore Voluntary Disclosure Program for Swiss banks.

In addition to prosecuting and/or subjecting financial institutions to criminal and/or administrative penal measures, the DOJ has brought criminal proceedings against the following individuals:

i. **Bradley Birkenfeld**, June 19, 2008, Birkenfeld pleaded guilty to conspiring to defraud the United States in U.S. Dist Ct., S.D. Fla, whereby he was sentenced to 40 months in prison.

ii. On December 22, 2010, **Renzo Gadola**, a former UBS banker and at the time of his plea an asset manager, pleaded guilty to conspiring to defraud the United States in U.S. Dist Ct., S.D. Florida.

iii. On March 12, 2014 **Andreas Bachmann**, 56, of Switzerland, pleaded guilty to conspiring to defraud the Internal Revenue Service (IRS) in connection with his work as a banking and investment adviser for U.S. customers.

iv. On April 30, 2014 **Josef Dörig**, 72, of Switzerland, pleaded guilty in U.S. District Court in the E.D. of Virginia to conspiring to defraud the Internal Revenue Service (IRS) in connection with his work as the owner of a trust company in Switzerland.

v. On May 27, 2014, **Martin Lack**, the fourth ex-UBS AG banker plead guilty to aiding wealthy Americans in evading taxes, avoided prison for a 17-year scheme in which he helped U.S. clients maintain secret overseas accounts. Lack, a Swiss resident and citizen and an independent investment adviser, was sentenced to five years of probation and fined $7,500 in federal court in Fort Lauderdale, Florida, where he was indicted in 2011.

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vi. On March 31, 2015, Peter Amrein, 53, a Swiss citizen and former Swiss banker, pleaded guilty before U.S. District Judge Sidney H. Stein of the Southern District of New York pursuant to a plea agreement to one count of conspiracy to defraud the IRS, to evade federal income taxes and to file false federal income tax returns. He admitted committing these crimes while working with private clients at an unnamed bank in Switzerland.

vii. On April 2, 2015 Former UBS AG executive Hansruedi Schumacher, pleaded guilty to helping Americans dodge taxes and testified at trial against his former boss and was sentenced to five years of probation by a judge who granted him leniency. Schumacher, 57, was also fined $150,000 in federal court in West Palm Beach, Florida. Schumacher was indicted in 2009 and declared a fugitive until he surrendered to U.S. authorities and chose to cooperate.

Foreign governments are increasingly prosecuting and subjecting enablers to administrative penal measures

D. Increasing Convergence

An increasingly challenge for practitioners is to keep abreast of the increasing convergence between tax transparency and tax enforcement and other areas, such as AML, anti-corruption, and economic sanctions. More recently, the U.S. Congress and Executive are linking tax enforcement with travel.

On December 3, 2015, the U.S. Congress passed a $305 billion funding bill, which will provide funding for five years and has provisions linking the administration of passports to large tax debts.\textsuperscript{183}

On December 3, 2015, the Senate voted 83-16 in favor of H.R. 22, the conference bill negotiated with the House. Earlier in the day the House passed the same bill, called the Fixing America's Surface Transportation (FAST) Act, by a vote of 359 to 65.\textsuperscript{184}

1. Recent Law on Travel and Passports

Under current law the U.S. Department of State administers passports.\textsuperscript{185} The Secretary of State may refuse to issue or renew a passport if the applicant owes child support in excess of $2,500 or certain types of Federal debts. However, the authority does not authorize the rejection or revocation of a passport due to delinquent Federal taxes. Issuance of a passport requires a social security number or taxpayer identification number (“TIN”). When the passport applicant does not provide such information on his/her application, the State Department is supposed to report such information to the Internal Revenue Service (IRS) and the applicant may receive a $500 fine.\textsuperscript{186}


\textsuperscript{184} Id. The provisions dealing with the passport restrictions are found on page 1118. http://transportation.house.gov/uploadedfiles/crpt-114hrpt-hr22.pdf

\textsuperscript{185} Passport Act of 1926, 22 U.S.C.§ 211a et seq.
The Internal Revenue Code states that returns and return information are confidential. The IRS, Federal employees, State employees, and certain other individuals with access to such information cannot disclose returns and return information, except as provided in the Code.\textsuperscript{187}

Various exceptions to the general rule of nondisclosure authorize disclosure in specifically identified circumstances, including disclosure of information about Federal tax debts for purposes of reviewing an application for a Federal loan\textsuperscript{188} and for purposes of strengthening the integrity of the Medicare program.

\textit{a. Senate and House Amendments}

The Senate and House Amendments are identical. It requires the Secretary of State to deny a passport (or renewal of a passport) to a seriously delinquent taxpayer and is allowed to revoke any passport previously issued to such person. Besides the revocation or denial of passports to delinquent taxpayers, the Secretary of State has the authority to deny an application of a passport if the applicant does not provide a social security number or provides an incorrect or invalid social security number. The inclusion of an erroneous number serves as a basis for rejection of the application only if the erroneous number was provided willfully, intentionally, recklessly or negligently. Exceptions to these rules are allowed for emergency or humanitarian circumstances, including the issuance of a passport for short-term use to return to the U.S. by the delinquent taxpayer.\textsuperscript{189}

The new provision authorizes limited sharing of information between the Secretary of State and the Secretary of the Treasury. If the Commissioner of Internal Revenue certifies to the Secretary of the Treasury the identity of persons who have seriously delinquent Federal tax debts as defined in this provision, the Secretary of the Treasury or his/her delegate is authorized to transmit such certification to the Secretary of State for use in determining whether to issue, renew, or revoke a passport. Applicants whose names are included on the certifications provided to the Secretary of State are ineligible for a passport. The Secretary of State and Secretary of the Treasury are held harmless with respect to any certification issued pursuant to this provision.

A seriously delinquent tax debt generally includes any outstanding debt for Federal taxes in excess of $50,000, including interest and any penalties, for which a notice of lien or a notice of levy has been filed. This amount is to be adjusted for inflation annually, using calendar year 2014 as a base year, and a cost-of-living adjustment. Even if a tax debt otherwise fulfills the statutory threshold, it may not be considered seriously delinquent if (1) the debt is being paid in a timely manner pursuant to an installment agreement or offer-in-compromise, or (2) collection action with respect to the debt is

\textsuperscript{186} IRC, § 6039E.

\textsuperscript{187} IRC, § 6103.

\textsuperscript{188} IRC, § 6103(l)(3).

\textsuperscript{189} Joint Committee Explanation, Title XXXII – Offsets, A. Revocation or denial of passport in case of certain unpaid taxes (sec. 52101 of the Senate amendment, sec. 32191 of the conference agreement and secs. 6320 and 6331 and new secs. 7345 and 6103(k)(11) of the Internal Revenue Code).
suspended because a collection due process hearing or innocent spouse relief has been requested or is pending.

b. Conference Agreement

The Conference Agreement is aimed primarily at developing procedures to ensure due process is provided to taxpayers before action is taken to deny them passports. The provisions clarify the definition of a seriously delinquent tax debt, notification requirements, standards under which the Commissioner may reverse the certification of serious delinquency, and limits on authority to delegate the certification process. The agreement also gives a limited right to seek injunctive relief by a taxpayer who is wrongly certified as seriously delinquent.

The agreement clarifies the definition of “seriously delinquent tax debt” to allow revocation of a passport only after the IRS has followed its examination and collection procedures under current law and the taxpayers’ administrative and judicial rights have been exhausted or lapsed. The measure requires notice to taxpayers concerning the procedures. First, the provision adds the possible loss of a passport to the list of matters required to be included in notices to the taxpayer of potential collection activity under IRC §§ 6230 or 6331. Second, the provision requires that the Commissioner give contemporaneous notice to the taxpayer(s) when the Commissioner sends a certification of serious delinquency to the Secretary of the Treasury. Finally, in cases in which the Commissioner decertifies the taxpayer’s status as a delinquent taxpayer, he must provide notice to the taxpayer contemporaneous with the notice to the Secretary of the Treasury.

The conference agreement’s decertification process has a mechanism under which the Commissioner can correct an erroneous certification or end the certification because the debt is no longer seriously delinquent, due to certain events subsequent to the certification. If after certifying the delinquency to the Secretary of the Treasury, (1) the IRS receives full payment of the serious delinquent tax debt, (2) the taxpayer makes an installment agreement under § 6159, (3) the IRS accepts an offer in compromise under § 7122, or (4) a spouse files for relief from joint liability, the Commissioner must notify the Secretary that the taxpayer is not seriously delinquent. In each case the “decertification” is limited to the taxpayer who is the subject of one of the above actions.

In the case of a claim for innocent spouse relief, the decertification is only with respect to the spouse claiming relief, not both. The Commissioner must generally decertify within 3 days of the event that requires decertification. The Commissioner must send the notice of decertification to the Secretary of the Treasury, who must then promptly notify the Secretary of State of the decertification. The Secretary of State must delete the certification from the records regarding that taxpayer.

The provision limits the Commissioner’s authority to delegate duties under this section. The Commissioner can delegate the authority to certify or decertify a seriously delinquent tax debt only to the Deputy Commissioner for Services and Enforcement, or to a Division Commissioner (the head of an IRS operating division).
The amendments to the provision allow limited judicial review of the certification or a failure to reverse a certification.

The provision is effective upon the date of enactment. As of August 30, 2016, there have not been any proposed regulations or notice of intent to issue regulations.

c. Analysis

The State Department has not yet developed procedures for notifying taxpayers of the denial or revocation of their passports. In a letter to the Transportation & Infrastructure Committee, Kathryn Solon, international chair of Democrats Abroad, requested that at minimum, taxpayers receive a verified notification of their tax debt and have an opportunity to appeal the tax decision prior to any denial or revocation. Solon also asked that the State Department maintain the discretion to deny or revoke passports in view of its knowledge of potentially dangerous in-country events or circumstances that might arise for the individual U.S. citizen with denial or revocation.

The Joint Committee on Taxation estimated that the bill’s revocation or denial of passports to some individuals with tax debts of over $50,000 should net the government $395 million through 2025.

The idea goes back to 2011, when the Government Accountability Office reported on the potential for using the issuance of passports to collect taxes.

It was controversial then, but this time it passed with bipartisan support in both chambers of Congress. The measure was passed after a 15-minute debate in the House of Representatives via voice vote.

In 2006, the so-called “Reed amendment” provision was part of immigration reform. The Reed amendment provision bars re-entry to the U.S. of former citizens who expatriated for a principal

190 Id.


192 Hoffman, supra.

193 Robert W. Wood, IRS Power To Revoke Passports Signed Into Law, FORBES, Dec. 4, 2105 http://www.forbes.com/sites/robertwood/2015/12/04/irs-power-over-passports-signed-into-law/ U.S. Government Accountability Office, Federal Tax Collection Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes (March 2011) http://www.gao.gov/new.items/d11272.pdf (finding that State issued passports to about 16 million individuals during fiscal year 2008; of these, over 224,000 individuals (over 1 percent) owed over $5.8 billion in unpaid federal taxes as of September 30, 2008. In addition, in 2008, it states that the estimated amount of unpaid federal taxes is likely understated because it excludes individuals who have not filed tax returns or underreported income.)


195 The Reed amendment was contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. No. 104-208), enacted September 30, 1996.
The law also had statutory defects. The statute did not clarify whether it embraced all acts of expatriation or only those accomplished by formal oath of renunciation. It is also not clear what the applicable tax avoidance standard is or should be. Since the goal was to bar certain former citizens from re-entering the U.S. and hence to penalize them, it is questionable whether due process would allow the necessary tax avoidance to be presumed upon certain economic factors, pursuant to the changes in expatriation law under Health Insurance Portability and Accountability Act of 1996, §877.196 Despite the flaws in the “Reed amendment” provision, the enactment shows that the idea largely targets high-net-worth individuals who expatriate.197

In 2011, the GAO recommended that, if Congress is interested in pursuing a policy of linking federal tax debt collection to passport issuance, it may consider taking steps to enable the State Department to screen and prevent individuals who owe federal taxes from receiving passports. This could include asking the State Department and the IRS to jointly study policy and practical issues and develop options with appropriate criteria and privacy safeguards.198

According to the GAO report of the judgmentally selected 25 passport recipients to investigate for abuse related to the federal tax system or criminal activity, many of the taxpayers with seriously delinquent tax debt had international residence and/or activities. For instance, at least 16 passport recipients traveled outside the country while owing federal taxes. At least 4 passport recipients resided in another country at the time of the GAO’s investigation. Two individuals used the identities of deceased individuals to fraudulently obtain passports and then used these passports to travel to Mexico, France, and Africa. In one case, the unpaid tax debt belonged to a deceased individual, and in the other case, the debt was incurred by the imposter.199

The GAO report found as follows: “During our investigations, we also noted the following: at least 14 passport recipients did not file their annual income tax return for 1 or more years; for at least 20 passport recipients, IRS had filed federal tax liens against a recipient’s property; the IRS included at least 16 of the passport recipients in Federal Payment Levy Program for continuous levy;200 at least 10

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199 Id.
passport recipients had been indicted or convicted of violating federal laws; these include indictments and convictions for controlled substance distribution, making false statements to the government, bank fraud, and money laundering. Two of the individuals were State Department contractors but § 6103 prevented the GAO from disclosing these facts to State.”

Because of heightened security for counter-terrorism purposes, passports are increasingly being used for domestic purposes.

The threshold of $50,000 includes penalties and interest. Interest and penalties can add up quickly so that the actual tax debt may be much lower than $50,000.

The right to travel has been recognized as fundamental, both between states and internationally. While some restrictions have been upheld, it is not clear that this measure will pass the constitutional test when it will likely be challenged. According to the NGO, American Citizens Abroad, enactment of legislation permitting passport revocation on account of alleged unpaid debts would violate the notions of human liberty and freedom embodied in the Magna Carta, as well as numerous international human rights principles fully subscribed by the U.S., including the 1948 Universal Declaration of Human Rights. Freedom of movement has long been considered a fundamental human right, deserving of the utmost protection. In *Kent v. Dulles*, 357 US 116 (1958), the Supreme Court held that the federal government cannot restrict the right of travel without due process.

Opponents of the new provisions, which will likely take effect January 1, 2016, worry that the provisions can be abused or be done without the taxpayer’s realizing the problem. For instance, the IRS can file a Notice of Federal Tax Lien after: the IRS assesses the liability; it sends a Notice and Demand for Payment saying how much the taxpayer owes; and the taxpayer fails to fully pay within 10 days.

The bipartisan passage of the provisions indicate that, similar to FATCA and the anti-expatriation tax amendments, Congress, while not wanting to give new resources to the IRS or raise new taxes, is

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200 The Taxpayer Relief Act of 1997 authorizes the Internal Revenue Service (IRS) to collect overdue Federal tax debts of individuals who receive Federal payments, including Social Security payments. The law authorizes IRS to levy up to 15% of each payment until the tax debt is paid. See GN 02410.305 Federal Payment Levy Program (FPLP), TN 12 (09-01) Oct. 8, 2015 https://secure.ssa.gov/poms.nsf/lnx/0202410305


202 Id. at 19.

203 Wood, supra.

204 Id. See also Jacob Urist, *No Taxes, No Travel: Why the IRS Wants the Right to Seize Your Passport*, THE ATLANTIC, April 17, 2112 (quoting Prof. Timothy Meyer, U. of Georgia, Prof. Daniel Shaviro of New York Univ. School of Law, and Russell Panilis, Esq., Kramer Levin and a member at the time of the IRS Taxpayer Advocacy Panel, with respect to the constitutionality of linking passport issuance to tax debts).


willing to extend the laws and authorities to catch tax evaders, especially ones with foreign accounts and connections.

2. Trump’s Executive Order Banning Entry from Seven Countries

On January 27, 2017, President Trump issued an order called “Protecting the Nation from Foreign Terrorist Entry into the United States.” It contained a temporary entry ban that impacts citizens of seven countries – Iraq, Iran, Syria, Yemen, Sudan, Libya, and Somalia.207

The order is the fulfillment of the President’s campaign pledge to start the “extreme vetting” of immigrants and refugees, even though the U.S. already has the most rigorous and lengthy screening process in the world.208

While the order is aimed at preventing terrorism, it is likely to incite Muslims around the world and give credence to ISIS and Al Qaeda’s rallying cry of a Holy War between the West and the Muslim world. The order illustrates the fact that globalization, as it existed pre-Trump, is in serious danger. The Trump E.O. and the U.S. legislation linking tax debts to passports illustrate the growing importance of the ability to travel in international trust and estate planning.

VI. SUMMARY AND CONCLUSION

One of the trends has been that, as the U.S. has not agreed to sign the Common Reporting Standard and with U.S. corporate transparency standards less than those in most of the rest of the world, foreign trust companies have established offices recently in the U.S. and started moving structures to the U.S. The movement of funds into the U.S. risks that, if the money is derived from unlawful activity, including even foreign tax crimes, the Justice Department might consider mail or wire fraud charges, or even money laundering charges. Hence, practitioners, financial institutions and others are considering their own due diligence in such matters and monitoring, continuing regulatory and enforcement developments.209

With respect to the U.S. regulatory actions taken (e.g., CDD regulations and the proposed regulations on reporting by single-member LLCs), they show the trend in the U.S. to strengthen tax and corporate transparency. The other initiatives announced by President Obama and Treasury Secretary Jacob Lew require Congressional action and were announced during a lame duck period. It will be difficult in a lame duck session of Congress, especially when the Republicans control Congress, to achieve passage of these proposals. Hence, the initiative and the difficulty of achieving them in a lame duck open the door for criticism due to the hypocrisy of the professed U.S. leadership on these issues and the lack of concrete action.

207 For a text of the Executive Order, see http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/trump_executive_order_refugee_curbs.pdf


The principal reason for the initiatives is that the U.S. understands that its ability to mobilize the international community and sustain the commitment of other nations to the global financial architecture requires the perception that the U.S. is taking a lead in adopting the financial regulatory reforms that the U.S., international organizations, such as the OECD and IMF, and informal groups, such as FATF, the G-7, and G-20, are trying to impose on other countries. Recently U.S. Treasury Secretary Jacob Lew has admitted that sustaining U.S. leadership in the global economic system starts at home and that the U.S. must lead by example. In particular, the U.S. seeks to expand efforts to combat terrorist financing, corruption, money laundering, and other financial crimes. The U.S. is working through FATF to improve AML/CFT enforcement globally. In particular, the U.S. relies on the international community to pass resolutions to bolster the international efforts to combat terrorist financing, specifically against the Islamic State. Simultaneously, the Treasury Department is trying to achieve progress in combating money laundering and terrorist financing and the implementation of tax policies with emerging-market partners. As critics show the gaps between U.S. rhetoric and its own actions, it erodes the ability of the U.S. to assert its leadership.

The difficulties the U.S. government and private sector had on certain issues in BEPS and the tension between the U.S. and the EU over state aid in the Apple case illustrate that disputes in international tax policy are on the rise and without a proper international architectural framework to easily adjudicate the disputes.

The G-5 letter of April 14, 2016, the joint statement by twenty countries, and the G-20 Communiqué of April 15, 2016, demonstrate the continued efforts by governments to try to quickly alter international law by forming alliances and making “soft law” standards along with peer reviews to develop blacklists and countermeasures in order to incentivize the international community to abide by the new standards. The new alliances reflect minilateral strategies of international actors to network and develop new international enforcement regimes. A problem is that, insofar as these elite clubs try to press the standards on the entire world, the difficulties of having a level playing field limit the legitimacy of these new standards, especially insofar as the G-5, G-20, FATF, and OECD are all small groups that do not represent large numbers of the international community. Interestingly, the U.S. is not one of the twenty countries to agree to the exchange of beneficial ownership information. Nevertheless, given the power of the members of the network and the lack of organized resistance, they are likely to continue to successfully impose the new standards on the international community.

A clear trend is the increasing enforcement networks among high-level policy officials, bureaucrats in regulatory and enforcement agencies, civil society, investigative journalists, and international organization civil servants. These individuals and institutions are regularly interacting, sometimes in person, other times through social networking and webinars. They are moving the goal posts, so that the standards for financial privacy, tax and corporate transparency, tax enforcement cooperation, anti-corruption cooperation, and whistleblowing, are quickly changing.

Practitioners have to keep abreast of and anticipate the dynamic changes both to inform their clients, their colleagues, and themselves. While rules of professional conduct in the U.S. have not
changed quickly, the U.S. is likely to experience additional pressure from outside sources soon and from its own desire to keep its leadership on some of these issues.

Looking into the future, practitioners should pay attention to the FATF meeting in June for the likely release of the mutual evaluation of the U.S. with respect to its compliance with anti-money laundering standards.

On September 6, 2016, the G-20 Leaders’ Communique at the Hangzhou Summit asked the OECD to report back to the finance ministers and central bank governors by June 2017 on the progress made by jurisdictions on tax transparency and how the Global Forum will manage the country review process in response to supplementary review requests of countries. The Communique stated the intention for the OECD to prepare a list by the July 2017 G-20 Leaders’ Summit of those jurisdictions that have not yet sufficiently progressed toward a satisfactory level of implementation of the agreed international standards on tax transparency. Defensive measures will be considered against listed jurisdictions.210

Another development to anticipate is that, as foreseen in the BEPS Action Plan, tax treaty-related measures will be swiftly incorporated in tax treaties through the Multilateral Instrument (MLI) to Implement Tax Treaty-Related Measures to Combat BEPS, which 96 countries are currently negotiating. The text of the MLI was concluded in November, and was opened for signature. It will allow countries to meet the BEPS minimum standards to end treaty shopping (Action 6) and to improve the resolution of treaty-related disputes (Action 14). Given the breadth of countries participating in the negotiation, more than 2,000 bilateral tax treaties could be amended if these countries sign the MLI once it is completed. A signing ceremony for countries, including all G20 members, will be organized in the first half of 2017.211

International trust and estate professionals should monitor the forthcoming G7 meeting in Sicily on May 26-27, since one of the priority issues is tax and transparency. Similarly, the next G20 summit of the Heads of State and Government will be in Hamburg on July 7-8, 2017. The Summit has prioritized measures to combat harmful tax competition between countries and combat the aggressive tax policies adopted by international firms, an issue re-emphasized by the publication of the "Panama Papers". A package of measures has been adopted, and will now be implemented.212 The fact that President Trump still refuses to release his tax returns and is not likely to have taken steps to address U.S. failure to meet entity transparency standards, join the CRS, reciprocate on FATCA exchanges of information, and ratify the OECD Convention on MAATM are likely to pose significant challenges for the U.S. and may cause some countermeasures against the U.S. in the short- and medium-term.

210 For the complete text, see G20 Leaders’ Communique Hangzhou Summit, More Effective and Efficient Global Economic and Financial Governance, Sept. 4-5, 2016 http://www.g20.org/English/Dynamic/201609/t20160906_3396.html.
