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U.S. Legal Profession Efforts to Combat Money Laundering and Terrorist Financing

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New York Law School's April 2014 symposium entitled "Combating Threats to the International Financial System: The Financial Action Task Force" was the first law school symposium to address the impact of the Financial Action Task Force (FATF) on the legal profession.¹ For this reason, I was pleased to have been invited to participate and contribute this article discussing the efforts by the U.S. legal profession to combat money laundering and terrorist financing.

Part I of this article provides a brief overview of the FATF. Part II explains that money laundering and terrorist financing are federal crimes to which U.S. lawyers are subject. Part III addresses the U.S. legal profession's efforts to combat money laundering and terrorist financing by educating U.S. lawyers on how to avoid unwitting involvement. This section describes the educational efforts to date, explains why additional efforts are warranted, and offers suggestions for further steps that might be undertaken. The article concludes by noting that, while progress has been made, there is still work to be done to educate U.S. lawyers about how to avoid unwitting involvement in money laundering and terrorist financing schemes.

I. FINANCIAL ACTION TASK FORCE BACKGROUND

Established in 1989, the FATF is an intergovernmental organization whose objectives include "combating money laundering, terrorist financing and other related threats to the integrity of the international financial system."² Although the FATF is comprised of only thirty-four members and two regional associations, it has a number of affiliates that collectively generate a worldwide impact.³ The United States is a founding member of the FATF and considers the FATF to be a critical part of U.S. efforts to combat money laundering and terrorist financing.⁴

1. New York Law School Law Review Symposium: Combating Threats to the International Financial System: The Financial Action Task Force (Apr. 25, 2014) [hereinafter New York Law School FATF Symposium], *available at* <http://www.nylslawreview.com/fatf/>.
2. *Who We Are*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/whoweare/> (last visited Apr. 10, 2015). When the FATF was established in 1989, its focus was on money laundering. *See id.* After the September 11, 2011 attacks, the Financial Action Task Force (FATF) expanded its mission to include combating terrorist financing. *See History of the FATF*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/historyofthefatf/> (last visited Apr. 10, 2015).
3. *Members and Observers*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/membersandobservers/> (last visited Apr. 10, 2015). In addition to the thirty-six members, the FATF has eight "Associate Members," including the Asia/Pacific Group on Money Laundering (APG); the Caribbean Financial Action Task Force (CFATF); the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measure and the Financing of Terrorism (MONEYVAL); the Eurasian Group (EAG); the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG); the Financial Action Task Force on Money Laundering in South America (GAFISUD); the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA); and the Middle East and North Africa Financial Action Task Force (MENAFATF). *Id.* There are also a number of entities that are FATF Observers, such as The World Bank, the African Development Bank, the Asian Development Bank, and the European Central Bank (ECB). *Id.*
4. *See, e.g.*, Michael Rosen, Policy Advisor, U.S. Dep't of the Treasury, Remarks at New York Law School Law Review Symposium: Combating Threats to the International Financial System: The Financial Action Task Force Symposium (Apr. 25, 2014), *available at* <https://www.youtube.com/watch?v=4F8TpKweET8>

One of the primary means by which the FATF seeks to accomplish these goals is by having its members agree to implement the FATF Recommendations.⁵ For many years, these Recommendations were known as the 40+9 Recommendations,⁶ but they were reformulated in February 2012 and are now known as either the FATF Forty Recommendations or the FATF Recommendations (“Recommendations”).⁷

(explaining the importance of the FATF to the United States); Press Release, United Nations Office on Drugs & Crime (Oct. 25, 2011) (estimating that criminals may have laundered US\$1.6 trillion in 2009), available at <http://www.unodc.org/unodc/en/press/releases/2011/October/unodc-estimates-that-criminals-may-have-laundered-usdollar-1.6-trillion-in-2009.html>. The founding members of the FATF were the countries that comprised the G7 Summit in 1989: Canada, France, West Germany, Italy, Japan, the United Kingdom, and the United States, along with the president of the European Commission. See *History of the FATF*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/historyofthefatf/> (last visited Apr. 10, 2015); *About the G8*, U.S. DEP’T STATE, <http://www.state.gov/e/eb/ecosum/2012g8/about/> (last visited Apr. 10, 2015) (“During the 1970s, the United States, France, the United Kingdom, Germany, Japan, and Italy formed the Group of Six (G6) as an informal grouping of advanced industrialized economies that would meet annually to discuss matters of political and economic significance. Canada was added in 1976 to form the Group of 7 (G7).”).

5. See *infra* notes 8–9 and accompanying text.
6. See FIN. ACTION TASK FORCE, *FATF FORTY RECOMMENDATIONS* (Oct. 2003), available at <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>; FIN. ACTION TASK FORCE, *IX SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING* (Oct. 2001), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>. The original Forty Recommendations date from 1990 and were amended in 1996. FIN. ACTION TASK FORCE, *FATF FORTY RECOMMENDATIONS 2* (Oct. 2003), available at <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>. In 2001, soon after the September 11, 2001 attacks, the FATF added eight Special Recommendations to address terrorist financing. FIN. ACTION TASK FORCE, *IX SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING 88* (Oct. 2001), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>. In 2003, the FATF amended the Forty Recommendations by, inter alia, adding the provisions to address gatekeepers other than financial institutions. In 2004, the FATF adopted a ninth Special Recommendation. See FIN. ACTION TASK FORCE, *THE FATF RECOMMENDATIONS 7* (Feb. 15, 2012) [hereinafter 2012 RECOMMENDATIONS], available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf. Collectively these Recommendations were known as the FATF 40+9 Recommendations. See, e.g., Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers*, J. PROF. LAW., 2010, at 88 [hereinafter Shepherd RBA] (referring to the 40+9 Recommendations).
7. 2012 RECOMMENDATIONS, *supra* note 6. The 2012 revisions consolidated, reorganized, and renumbered the existing Recommendations, which had been amended over a series of years. See *id.* at 4–5. As the introduction explains:

The revisions address new and emerging threats, clarify and strengthen many of the existing obligations, while maintaining the necessary stability and rigour in the Recommendations. The FATF Standards have also been revised to strengthen the requirements for higher risk situations, and to allow countries to take a more focused approach in areas where high risks remain or implementation could be enhanced.

Id. at 8.

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Although the Recommendations do not have the force of law,⁸ FATF members have agreed that the failure to implement them is grounds for expulsion from the organization.⁹ Despite the soft-law nature of the Recommendations, they are extremely influential because it is unlikely that countries such as the United States would want to be excluded from the FATF, which is a powerful tool in the fight against money laundering and terrorist financing.¹⁰

FATF members evaluate their compliance with the Recommendations through a mutual evaluation process.¹¹ The United States has undergone three Mutual Evaluations, the most recent in June 2006,¹² and is scheduled to undergo the on-site visit for its Fourth Mutual Evaluation in early 2016, with the FATF Plenary Discussion tentatively scheduled for October 2016.¹³ In 2013, FATF members agreed that during the fourth round of mutual evaluations, efforts would be made to measure not just technical compliance with the Recommendations, but also the “effectiveness” of a country’s measures.¹⁴

8. See Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, J. PROF. LAW., 2010, at 6–7.

9. See FIN. ACTION TASK FORCE, FATF MEMBERSHIP POLICY (Feb. 29, 2008), *available at* <http://www.anti-moneylaundering.org/Document/Default.aspx?DocumentUid=02AAE10F-F553-433A-8242-FBDDF0AE969F>. Step 2(c) states:

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

Id.

10. See Rosen, *supra* note 4.

11. *Mutual Evaluations*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/topics/mutualevaluations/> (last visited Apr. 10, 2015) (“The FATF conducts peer reviews of each member on an ongoing basis to assess levels of implementation of the FATF Recommendations, providing an in-depth description and analysis of each country’s system for preventing criminal abuse of the financial system.”).

12. See FIN. ACTION TASK FORCE, THIRD MUTUAL EVALUATION REPORT ON ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM, UNITED STATES OF AMERICA (June 23, 2006) [hereinafter U.S. THIRD MUTUAL EVALUATION], *available at* <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf>.

13. See FIN. ACTION TASK FORCE, GLOBAL ASSESSMENTS CALENDAR (Nov. 6, 2014), *available at* <http://www.fatf-gafi.org/media/fatf/documents/assessments/Global-Assessment-Calendar.pdf> (listing the schedule for assessments under the 2013 methodology in Annex 1). This date already has been changed once and is subject to further change.

14. *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/topics/mutualevaluations/documents/4th-round-procedures.html> (last visited Apr. 10, 2015) (“The scope of the evaluations will involve two inter-related components for technical compliance and effectiveness. The technical compliance component will assess whether the necessary laws, regulations or other required measures are in force and effect, and whether the supporting anti-money laundering and counter-terrorist financing (AML/CFT) institutional framework is in place. The effectiveness component will assess whether the AML/CFT systems are working, and the extent to which the country is achieving the defined set of outcomes.”); see also CENTER ON LAW & GLOBALIZATION, GLOBAL SURVEILLANCE OF

The FATF's efforts to combat money laundering and terrorist financing go beyond the Recommendations and the mutual evaluation process. The FATF also issues a number of advisory papers and other documents.¹⁵ For example, the FATF has published a number of different reports to help various kinds of entities use a risk-based approach (RBA) to assess the risks of money laundering and terrorist financing.¹⁶ A risk-based assessment stands in contrast to a rigid rules-based "check-off-the-box" approach;¹⁷ the rationale is that everyone benefits if a potential "gatekeeper" concentrates its resources on those clients and customers that pose the greatest risk.¹⁸ One of the most important documents from the legal profession's

DIRTY MONEY: ASSESSING ASSESSMENTS OF REGIMES TO CONTROL MONEY-LAUNDERING AND COMBAT THE FINANCING OF TERRORISM (Jan. 30, 2014), *available at* http://www.lexglobal.org/files/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf (discussing assessment methods and offering recommendations).

15. *See generally Documents*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/documents/documents.jsp?lang=en> (last visited Apr. 10, 2015) (containing dropdown menus that allow one to select from many different types of documents). The document categories include Guidance, Meeting, News, Other, Public Consultation, Recommendations, Report, Risk Based Approach, Speech, and Statistics. *See id.*
16. *See, e.g., Risk Based Approach*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/documents/riskbasedapproach/> (last visited Apr. 10, 2015) (listing reports for the Banking Sector, Prepaid Cards, Mobile Payments and Internet-Based Payment Services, the Life Insurance Sector, Money Services Businesses, Legal Professionals, Casinos, Real Estate Agents, Accountants, Trust and Company Service Providers (TCSPs), Dealers in Precious Metals and Stones, and Combating Money Laundering and Terrorist Financing—High Level Principles and Procedures). The FATF's first risk-based guidance was produced for financial institutions. *See* Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers*, 43 REAL PROP. TR. & EST. L.J. 607, 626 & nn.108–10 (2009) [hereinafter Shepherd, *Guardians*]; Shepherd RBA, *supra* note 6, at 91; FIN. ACTION TASK FORCE, *FATF GUIDANCE ON THE RISK-BASED APPROACH TO COMBATING MONEY LAUNDERING AND TERRORIST FINANCING: HIGH LEVEL PRINCIPLES AND PROCEDURES* (June 2007), *available at* <http://www.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf> (containing information directed towards financial institutions).
17. Under a "check-off-the-box" approach, those responding may view this as a required ministerial task that must be completed without thoughtfully becoming engaged with the underlying issues. *See* Shepard, *Guardians*, *supra* note 16, at 625 & n.106 ("The theoretical and practical underpinning of the risk-based approach is to ensure that limited resources to combat money laundering and terrorist financing are employed and allocated in the most efficient manner possible so that the greatest risks receive the highest attention. In this fashion, the risk-based approach differs fundamentally from a rules-based approach. Under a rules-based approach, a lawyer is required to comply with particular laws, rules, or regulations irrespective of the underlying quantum or degree of risk."). Some commentators outside of the United States refer to this concept as "tick-off-the-box" rather than "check-off-the-box."
18. *See generally FATF Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing—High Level Principles and Procedures*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/documents/riskbasedapproach/fatfguidanceontherisk-basedapproachtocombatingmoneylaunderingandterroristfinancing-highlevelprinciplesandprocedures.html> (last visited Apr. 10, 2015). The term "gatekeepers" has been used to refer to the category of entities that were added to the FATF Recommendations in 2003. At that time, the Recommendations were expanded beyond financial institutions to include others that might serve as "access points" for money launderers or terrorist financing. As explained *infra* note 29 and accompanying text, the Recommendations refer to the covered entities as "designated non-financial businesses and professions" (DNFBPs), but they are colloquially known as "gatekeepers."

perspective is the 2008 FATF RBA Guidance for Legal Professionals (“FATF RBA”),¹⁹ which sets forth a risk-based approach for the legal profession.²⁰

The FATF RBA is “high level guidance intended to provide a broad framework for implementing a risk-based approach for the legal profession.”²¹ It applies to lawyers who are engaged in one of five specified activities: “[1] buying and selling of real estate; [2] managing of client money, securities or other assets; [3] management of bank, savings or securities accounts; [4] organisation of contributions for the creation, operation or management of companies; and [5] creation, operation or management of legal persons or arrangements, and buying and selling of business entities.”²²

The FATF RBA has been the subject of controversy. For example, as Duncan Osborne’s symposium article and remarks reveal,²³ the FATF has been criticized for the process used to develop the FATF RBA, including its unwillingness to engage meaningfully with private sector representatives.²⁴

A second controversy concerned whether the FATF would produce a separate RBA for the legal profession. Given the legal profession’s important role with respect to the administration of justice, the rule of law, traditional concepts of attorney-client confidentiality, and the independence of the legal profession from governments, the legal profession thought it was important to have a risk-based report that addressed its situation rather than including it with casinos, precious metal dealers, and others.²⁵ The FATF initially was reluctant to prepare separate reports, although

19. See FIN. ACTION TASK FORCE, RBA GUIDANCE FOR LEGAL PROFESSIONALS (Oct. 23, 2008) [hereinafter FATF RBA], available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf>.

20. See *Risk Based Approach*, *supra* note 16; Terry, *supra* note 8, at 15–16 (“[I]n addition to the document for the legal profession, the FATF has produced guides on using a risk-based approach for the financial sector, real estate agents, accountants, dealers in precious metals and stones, casinos, services businesses, and the life insurance sector.”); Shepherd RBA, *supra* note 6, at 92 (“Guidance for each of the other [designated sectors] was published separately in 2008.”); *Dialogue with the Private Sector*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/private-sector-march-2014.html> (Mar. 26, 2014) (“The FATF organised a meeting of the Private Sector Consultative Forum to discuss implementation of the anti-money laundering and counter-terrorist financing (AML/CFT) measures set out in the *FATF Recommendations*, seek input and feedback into ongoing FATF work, and hear about issues of concern or interest to the private sector.”). The legal profession was the last of the DNFBPs for which a risk-based approach (RBA) report was produced. See *id.* Following the legal profession RBA, the FATF produced risk-based reports for sectors that were not DNFBPs. See *Risk Based Approach*, *supra* note 16.

21. See Shepherd RBA, *supra* note 6, at 93.

22. 2012 RECOMMENDATIONS, *supra* note 6, at 19–20 (Recommendation 22(d)). As Kevin Shepherd observes, no further definitions are provided. See Shepherd RBA, *supra* note 6, at 93.

23. See, e.g., Duncan Osborne, *The Financial Action Task Force and the Legal Profession*, 59 N.Y.L. SCH. L. REV. 421 (2014–2015); Shepherd, *Guardians*, *supra* note 16, at 626–47.

24. See, e.g., Osborne, *supra* note 23, at 428, 431.

25. See *supra* note 20 and accompanying text.

it ultimately agreed to issue separate documents for each sector.²⁶ The FATF RBA was the resulting document for the legal profession.²⁷

The third controversy concerned how the FATF RBA would address suspicious transaction reporting (STR), which currently is found in Recommendation 23.²⁸ To understand this issue, some background is necessary. Recommendation 22 applies to “designated non-financial businesses and professions” (DNFBPs), which is a FATF term of art that includes casinos, real estate agents, precious metal dealers, trust and company service providers, and “lawyers, notaries, other independent legal professionals and accountants.”²⁹ Recommendation 22 states that when these DNFBPs engage in certain specified activities,³⁰ they must comply with customer due diligence and record-keeping requirements set out in other Recommendations.³¹ Recommendation 23 supplements Recommendation 22 and sets forth STR requirements for the previously defined DNFBPs; it states that DNFBPs, which include lawyers, “should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22.”³²

As one might imagine, legal profession representatives from around the world have objected to the implementation of this provision because it ignores principles of client confidentiality and attorney-client privilege, and raises concerns related to the administration of justice and rule of law.³³ As a result of vigorous objections by legal

26. See Shepherd, *Guardians*, *supra* note 16, at 629.

27. See *id.* at 629–30, 635–36.

28. Compare FIN. ACTION TASK FORCE, THE FORTY RECOMMENDATIONS 6 (Recommendation 16) (June 20, 2003) [hereinafter 40+9 RECOMMENDATIONS], available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf>, with 2012 RECOMMENDATIONS, *supra* note 6, at 20–21 (Recommendation 23). Because the FATF RBA was issued in 2008, before the 2012 Recommendations were adopted, it refers to the older numbers. For internal consistency purposes, this article uses the current Recommendation numbers even though the FATF RBA uses the older numbers.

29. 2012 RECOMMENDATIONS, *supra* note 6, at 20 (Recommendation 22 (d)). Similar to lawyers, the other DNFBPs identified in Recommendation 22 are only subject to the Recommendations when engaged in specified activities, which differ, however, for different DNFBPs. *Id.* at 19–20. In the 40+9 version of the Recommendations, what is currently Recommendation 22 was Recommendation 12. Compare 40+9 RECOMMENDATIONS, *supra* note 28, at 5 (Recommendation 12), with 2012 RECOMMENDATIONS, *supra* note 6, at 19–20 (Recommendation 22).

30. See 2012 RECOMMENDATIONS, *supra* note 6, at 19–20 (identifying the five specified activities).

31. Recommendation 22(d) states that Recommendations 10, 11, 12, 15, and 17 apply to lawyers who are engaged in the specified activities. See 2012 RECOMMENDATIONS, *supra* note 6, at 19–20 (Recommendation 22).

32. *Id.* at 20 (Recommendation 23(a)).

33. See, e.g., Shepherd RBA, *supra* note 6, at 87 (“The [suspicious transaction reporting (STR)] requirement and the [no-tipping-off (NTO)] rule have been a controversial aspect of the application of the Forty Recommendations to the legal profession.”); Ronald J. MacDonald, *Money Laundering Regulation—What Can Be Learned from the Canadian Experience*, J. PROF. LAW., 2010, at 144 n.2 (2010) (citing Canadian litigation and the Council of Bars and Law Societies of Europe (CCBE) Money Laundering Committee web page and its contents).

profession and government representatives, the Recommendations include an Interpretative Note to Recommendation 23, which states that lawyers and other legal professionals “are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.”³⁴

Controversy over the STR Recommendation surrounded the development of the FATF RBA, as well as the Recommendations. The legal profession’s representatives argued that lawyers had different attributes than the other types of DNFBPs, such as casinos or real estate dealers, and that lawyers should not be subject to either the STR or the “no-tipping-off” rules.³⁵ Although the FATF initially seemed reluctant

34. 2012 RECOMMENDATIONS, *supra* note 6, at 83. Because of the importance of this Interpretative Note, it is reprinted below, despite its length:

INTERPRETIVE NOTE TO RECOMMENDATION 23
(DNFBPS – OTHER MEASURES)

1. Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.
2. It is for each country to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings.
3. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR to their appropriate self-regulatory organisations, provided that there are appropriate forms of cooperation between these organisations and the FIU.
4. Where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping-off.

Id.

The 2012 Recommendations include the following explanation regarding the significance of Interpretive Notes:

The FATF Standards comprise the Recommendations themselves and their Interpretive Notes, together with the applicable definitions in the Glossary. The measures set out in the FATF Standards should be implemented by all members of the FATF and the FSRBs, and their implementation is assessed rigorously through Mutual Evaluation processes, and through the assessment processes of the International Monetary Fund and the World Bank – on the basis of the FATF’s common assessment methodology. Some Interpretive Notes and definitions in the glossary include examples which illustrate how the requirements could be applied. These examples are not mandatory elements of the FATF Standards, and are included for guidance only. The examples are not intended to be comprehensive, and although they are considered to be helpful indicators, they may not be relevant in all circumstances.

Id. at 8.

35. See Shepherd, *Guardians*, *supra* note 16, at 617–18. The “no-tipping-off” rule prohibits a lawyer from advising a client that the lawyer has submitted a suspicious transaction report regarding that client. See

to discuss these issues,³⁶ it ultimately agreed to omit these requirements from the FATF RBA for lawyers.³⁷ It is worth noting that the FATF expected each country to develop its own approach to elaborate upon the high-level guidance provided in the FATF RBA.³⁸

As a final background point, it is important to note that with respect to the legal profession, the FATF's Third Mutual Evaluation of the United States rated it "noncompliant" or "partially compliant" on several points.³⁹ These noncompliant ratings involved, inter alia, the United States' failure to have its lawyers subject to

generally 2012 RECOMMENDATIONS, *supra* note 6, at 20 (Recommendation 23(a)) (incorporating the no-tipping-off requirements in Recommendation 21).

36. See Shepherd, *Guardians*, *supra* note 16, at 618.

37. *Id.* at 635–36 ("Importantly for lawyers, the Paris meeting led to a resolution, if not an uneasy truce, on the contentious STR issue. . . . After considerable debate, FATF and the lawyers resolved the issue by acknowledging that STRs are not part of risk assessment; rather, STRs represent a response mechanism once a suspicion of money laundering has been identified. Because of the risk-based approach orientation of *Lawyer Guidance*, FATF agreed to language that would not impose a mandatory STR obligation on legal professionals." (footnotes omitted)).

38. See, e.g., FATF RBA, *supra* note 19, at 4–5.

6. The purpose of this Guidance is to:

- Support the development of a common understanding of what the risk-based approach involves.
- Outline the high-level principles involved in applying the risk-based approach.
- Indicate good practice in the design and implementation of an effective risk-based approach.

7. However, it should be noted that applying a risk-based approach is not mandatory. A properly applied risk-based approach does not necessarily mean a reduced burden, although it should result in a more cost effective use of resources. For some countries, applying a rules-based system might be more appropriate. Countries will need to make their own determinations on whether to apply a risk-based approach, based on their specific money laundering/terrorist financing risks, size and nature of the DNFBP activities, and other relevant information. The issue of timing is also relevant for countries that may have applied anti-money laundering/counter-terrorist financing (AML/CFT) measures to DNFBPs, but where it is uncertain whether the DNFBPs have sufficient experience to implement and apply an effective risk-based approach.

Id. (footnotes omitted). Despite the FATF's adoption of a risk-based approach and the FATF RBA, some countries have adopted more of a rules-based check-off-the-box approach. See generally John A. Terrill, II & Michael A. Breslow, *The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach*, 59 N.Y.L. SCH. L. REV. 433 (2014–2015); MacDonald, *supra* note 33, at 150 (criticizing the Federation of Law Societies of Canada (FLSC) for its rules-based approach). For additional information about the implementation of the Recommendations with respect to the legal professions in various countries, see generally Terry, *supra* note 8, and the International Bar Association's (IBA) Anti-Money Laundering Forum web page, which is available at: <http://www.anti-moneylaundering.org>.

39. See U.S. THIRD MUTUAL EVALUATION, *supra* note 12, at 299–303.

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STR, no-tipping-off rules, and the customer due diligence provisions found in the FATF Recommendations.⁴⁰

II. MONEY LAUNDERING AND TERRORIST FINANCING ARE U.S. CRIMES

Money laundering and terrorist financing are serious problems.⁴¹ Even though law enforcement efforts have increased dramatically in the past ten to fifteen years,⁴²

40. *Id.* at 300–01. The following are excerpts related to lawyers from Table 1 in the United States’ Third Mutual Evaluation, where NC means noncompliant and PC means partially compliant:

Forty Recommendations	Rating	Summary of factors underlying rating
12. DNFBP – R.5, 6, 8-11	NC	<ul style="list-style-type: none"> Accountants, dealers in precious metals and stones, lawyers and real estate agents are not subject to customer identification and record keeping requirements that meet Recommendations 5 and 10. None of the DNFBP sectors is subject to obligations that relate to Recommendations 6, 8 or 11 (except for casinos in relation to R.11).
16. DNFBP – R.13-15 & 21	NC	<ul style="list-style-type: none"> Casinos are the only DNFBP sector that is required to report suspicious transactions; however, there is a threshold on that obligation. Accountants, lawyers, real estate agents and TCSPs are not subject to the “tipping off” provision or protected from liability when they choose to file a suspicious transaction report. Accountants, lawyers, real estate agents and TCSPs are not required to implement adequate internal controls (i.e. [sic] AML Programs). There are no specific obligations on accountants, lawyers, real estate agents or TCSPs to give special attention to the country advisories that [the Financial Crimes Enforcement Network (FinCEN)] has issued and which urge enhanced scrutiny of financial transactions with countries that have deficient AML controls.
24. DNFBP – regulation, supervision and monitoring	PC	<ul style="list-style-type: none"> There is no regulatory oversight for AML/CFT compliance for accountants, lawyers, real estate agents or TCSPs.

Id.

41. See, e.g., Shima Baradaran et al., *Funding Terror*, 162 U. PA. L. REV. 477, 480–84 (2014); Lawton P. Cummings & Paul T. Stepnowsky, *My Brother’s Keeper: An Empirical Study of Attorney Facilitation on Money Laundering Through Commercial Transactions*, J. PROF. LAW., 2010, at 6 (2011) (“The International Monetary Fund (‘IMF’) estimates that money laundering in a single year accounts for ‘between two and five percent of global gross domestic product, [which] amounts to hundreds of billions, and possibly trillions, of dollars in criminal proceeds that are annually laundered through the banking system.’ The transactions used to launder the money would be legal, if the money were not derived from criminal activity. Therefore, the crime of money laundering is aimed at deterring the predicate crimes, as well as protecting the financial system from abuse.” (footnotes omitted)); JAMES K. JACKSON, THE FINANCIAL ACTION TASK FORCE: AN OVERVIEW 8 (2012), available at <http://www.fas.org/sgp/crs/misc/RS21904.pdf> (last visited Apr. 10, 2015) (“The economic implications of money laundering and terrorist financing pose another set of issues that argue for gaining greater control over this type of activity. According to the IMF, money laundering accounts for between \$600 billion and \$1.6 trillion in economic activity annually.”); see also FIN. CRIMES ENFORCEMENT NETWORK, STRATEGIC PLAN FOR FISCAL YEARS 2012–2016 (2012), available at http://www.fincen.gov/news_room/rp/files/Strategic_Plan_2012-2016_508.pdf (last visited Apr. 10, 2015).
42. The USA PATRIOT Act, which was adopted after the September 11, 2001 attacks, significantly increased the United States’ powers with respect to money laundering and terrorist financing. The 2009 Intelligence

problems remain due to new financing systems and the creativity of those who seek to evade law enforcement measures.⁴³

In the United States, several laws address money laundering. For example, the Money Laundering Control Act makes it illegal to knowingly “(i) conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law.”⁴⁴ Lawyers are subject to these requirements⁴⁵ and are also among those subject to Internal Revenue Code § 6050I(a), which requires individuals to report the receipt of more than \$10,000 in cash.⁴⁶ “Structuring” cash payments to avoid the \$10,000 reporting requirement is also a crime; thus, one could not intentionally deposit \$9,500 and \$600 in order to avoid the IRS reporting requirements.⁴⁷ Lawyers are among those who may be convicted for violating this provision.⁴⁸

Reform and Terrorism Prevention Act (IRTPA) also increased U.S. powers. *See, e.g.*, Terrill & Breslow, *supra* note 38, at 443–44 n.63 (regarding IRTPA); AM. BAR ASS’N, FREQUENTLY ASKED QUESTIONS ABOUT THE GATEKEEPER INITIATIVE AND THE VOLUNTARY GOOD PRACTICES GUIDANCE 1 [hereinafter ABA FAQ], available at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/gatekeeper_faq.pdf (last visited Apr. 10, 2015) (“The United States is a major participant in the FATF proceedings, and in partial response to the FATF’s Recommendations, Congress passed the USA PATRIOT Act (‘PATRIOT Act’), which amended and strengthened certain AML provisions of the United States Code that originated with the Bank Secrecy Act of 1970 (‘BSA’). The BSA and, later, certain provisions of the PATRIOT Act, were directed primarily at banks and other financial institutions.”).

43. *See, e.g.*, Baradaran et al., *supra* note 41, at 489 (“Traffickers constantly employ the latest technologies to keep ‘one step ahead of law enforcement’ efforts.”); *see also* Saby Ghoshray & Houman Shadab, Remarks at New York Law School Law Review Symposium: Combating Threats to the International Financial System: The Financial Action Task Force (Apr. 25, 2014), available at <http://www.nylslawreview.com/financial-action-task-force-program/>.
44. 18 U.S.C. § 1956(a)(1)(B)(i)–(ii) (2013); U.S. DEP’T OF THE TREASURY, 2007 NATIONAL MONEY LAUNDERING STRATEGY 94 (2007) [hereinafter 2007 NATIONAL MONEY LAUNDERING STRATEGY], available at http://www.fincen.gov/news_room/rp/files/nmls_2007.pdf (citing, *inter alia*, 18 U.S.C. §§ 982, 1956, 1957, and 1960).
45. *See, e.g.*, Cummings & Stepnowsky, *supra* note 41, at 26 (noting an empirical study of money laundering cases in the Second Circuit, finding that “[o]f the ten cases [out of forty money laundering cases] with lawyer involvement, four of the cases involved lawyer self-directed frauds”). These four lawyers were defendants in the criminal cases. *Id.* at 27.
46. *See, e.g.*, I.R.C. §§ 6050I, 5331 (2012).
47. *See, e.g.*, 31 U.S.C. §§ 5324(a)(3), (d)(1)–(2) (2013); *see also* 2007 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 44, at 94 (citing 31 U.S.C. §§ 5313, 5316, 5317, 5324, and 5332 as statutes used to prosecute defendants). In 2012, a Nevada lawyer was convicted on three counts of structuring financial transactions in violation of these provisions. *See* United States v. Wommer, No. 2:10-cr-00596-GMN-GWF-1, 2013 WL 7390622 (D. Nev. Aug. 27, 2013). On December 17, 2013, at the request of the state bar, the Nevada Supreme Court issued an order of temporary suspension and referral to disciplinary board with respect to this lawyer. *See* Bar Counsel Report, *Supreme Court of Nevada In re: Paul E. Wommer*, NEV. LAW., Feb. 2014, at 36, available at <http://nvbar.org/articles/content/bar-counsel-report-february-2014>.
48. *See, e.g.*, United States v. Jarrett, 494 F. App’x 615 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 1299 (2013) (convicting the lawyer, among other things, of structuring payments); *see also* United States v. Sinko, 394 F. App’x 843 (3d Cir. 2010) (affirming the lawyer’s sentence for conspiracy to commit money laundering and aiding and abetting money laundering for structuring a purchase agreement in a way that avoided disclosure of cash payments).

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The United States also has adopted, and aggressively enforces, a number of criminal laws to address the issue of terrorist financing.⁴⁹ For example, it is illegal for anyone—including lawyers—to engage in commercial or financial transactions with persons or entities on the government’s specially designated nationals list or the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) list.⁵⁰ A number of federal agencies investigate cases of suspected money laundering and terrorist financing, including the Financial Crimes Enforcement Network, Federal Bureau of Investigation, Department of Justice, Department of the Treasury, Securities and Exchange Commission, and Immigration and Customs Enforcement (ICE).⁵¹ Statistics in the National Money Laundering Strategy Report (a government document) indicate that there have been a significant number of investigations, arrests, indictments, convictions, fines, and restitutions obtained on the basis of the work of a variety of government entities.⁵² Moreover, the regulatory structure has generated significant private sector involvement. For example, in 2004, money service businesses filed 296,284 suspicious activity reports and the securities and futures industry filed 5,705 Reports.⁵³

49. See generally 2007 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 44, at 16–19.

50. The U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) maintains a specially designated nationals list (SDN), which identifies individuals and entities with whom lawyers and others may not have commercial or financial transactions. See, e.g., AM. BAR ASS’N, SELF REGULATORY BODIES CALL FOR INFORMATION AND CASES 11 (2012) [hereinafter ABA RESPONSE TO FATF], available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012nov26_gatekeeperreg_authcheckdam.pdf.

The United States government maintains and enforces an extensive array of legal restrictions in this regard, including various executive orders issued by the President of the United States and regulations promulgated by the U.S. Department of the Treasury, Office of Foreign Assets Control pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 - 1705, that prohibit lawyers and others from engaging in commercial or financial transactions with such designated persons and entities. See also 18 U.S.C. §§ 2339A and 2339B.

Id. at 11. This document was submitted to the FATF in connection with the preparation of the FATF Legal Profession Typologies Report. The SDN list is sometimes referred to colloquially as the “OFAC list,” even though OFAC maintains sanctions lists that are different from the SDN list. See Resource Center: Specially Designated Nationals List (SDN), U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last visited Apr. 10, 2015); Resource Center: Foreign Sanctions Evaders (FSE) List, U.S. DEP’T TREASURY, http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/fse_list.aspx (last visited Apr. 10, 2015) (identifying six OFAC lists, including the SDN list).

51. See, e.g., 2007 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 44, at 1–11, 97–99 (identifying various responsibilities and goals).

52. *Id.* at 89–95.

53. See *id.* at 86. The FATF has defined money service businesses as follows:

According to the generally accepted definition, money service businesses (MSBs) are non-bank financial institutions that provide certain types of financial services. Although the precise scope of the activities that fall into category “money service” vary from country to country (for example, the requirements for MSBs may only apply if the value of individual transactions and/or its turnover exceeds a certain value limit. They may also only apply to businesses that carry out the specified activities on regular basis or as an organised business concern, etc.).

U.S. lawyers are among those who have been convicted of money laundering and terrorist financing.⁵⁴ Some lawyers appear to have masterminded the money laundering schemes,⁵⁵ while others appear to have been brought into these criminal schemes by their clients or other associates.⁵⁶ Make no mistake, however, these lawyers are criminals and their convictions demonstrate that lawyers are subject to U.S. criminal law. The FATF's Legal Professionals Typologies Report suggests that the United States has been more aggressive than many countries in prosecuting lawyers for money laundering and terrorist financing violations.⁵⁷

FIN. ACTION TASK FORCE, MONEY LAUNDERING THROUGH MONEY REMITTANCE AND CURRENCY EXCHANGE PROVIDERS 77 (June 2010), *available at* <http://www.fatf-gafi.org/media/fatf/ML%20through%20Remittance%20and%20Currency%20Exchange%20Providers.pdf> (citations omitted). For the U.S. definition, see 31 C.F.R. § 1010.100(ff) and *Money Services Businesses*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/financial_institutions/msb/definitions/msb.html (last visited Apr. 10, 2015).

54. *See, e.g., In re Blair*, 40 A.3d 883 (D.C. 2012) (disbarring an attorney convicted of money laundering, witness tampering, and obstruction of justice because obstruction of justice and witness tampering constituted moral turpitude per se); *In re Tezak*, 898 A.2d 383 (D.C. 2006) (lawyer disbarred); *In re Abbell*, 814 A.2d 961 (D.C. 2003) (lawyer disbarred); *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001) (affirming lawyer's money laundering conviction); *In re Lee*, 755 A.2d 1034 (D.C. 2000) (lawyer disbarred); *In re Toussaint*, 753 S.E.2d 118 (Ga. 2014) (per curiam) (describing a lawyer's voluntary surrender of law license due to his violation of Model Rules of Professional Conduct Rule 1.15 as "tantamount to disbarment"); *Office of Lawyer Regulation v. Stern*, 830 N.W.2d 674 (Wis. 2013) (suspending lawyer for two years as a result of his complicity in client's bankruptcy fraud, which resulted in the lawyer's criminal conviction of money laundering and sentence of one year, one day); *see also Discipline: Cheryl B. Chadwick*, OR. ST. B. BULL., *available at* <http://www.osbar.org/publications/bulletin/07jun/discipline.html> (last visited Apr. 10, 2015). Two recent cases from Nevada show the interrelationship of the criminal law and discipline. *See Bar Counsel Report, Supreme Court of Nevada In re: Paul E. Wommer*, NEV. LAW. 36 (Feb. 2014), *available at* <http://nvbar.org/articles/content/bar-counsel-report-february-2014>; Martha Neil, *Lawyer Takes Plea in Money-Laundering Case Linked to Convicted Ex-client's Ponzi Scheme*, A.B.A. J. (Jan. 24, 2014) (describing the conviction of Nevada lawyer Christopher Reade and noting the then-upcoming May 2, 2014 sentencing), *available at* http://www.abajournal.com/news/article/lawyer_takes_plea_in_money-laundering_case_linked_to_convicted_ex-client/; Jeff German, *Las Vegas Lawyer Pleads Guilty in Money Laundering Scheme*, LAS VEGAS REV. J. (Jan. 22, 2014) ("State Bar Counsel David Clark said he would file a petition asking the Nevada Supreme Court to temporarily suspend Reade's license until the bar takes action."), *available at* <http://www.reviewjournal.com/news/las-vegas-lawyer-pleads-guilty-money-laundering-scheme>; *see also* cases cited *infra* note 57.
55. *See Cummings & Stepnowsky*, *supra* note 41, at 26; *In re Blair*, 40 A.3d 883.
56. *See, e.g.,* cases cited *supra* note 54.
57. *See, e.g.,* FIN. ACTION TASK FORCE, FATF REPORT: MONEY LAUNDERING AND TERRORIST FINANCING VULNERABILITIES OF LEGAL PROFESSIONALS 30 (2013) [hereinafter *TYPOLOGIES REPORT*], *available at* <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> ("Criminal prosecutions were started in sixteen countries, with Austria, Spain, Italy, and Poland joining the Netherlands, the United Kingdom, and the United States reaching double figures of prosecutions in the last five years."); *see also* U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS: COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, KEEPING FOREIGN CORRUPTION OUT OF THE UNITED STATES: FOUR CASE HISTORIES (2010), *available at* <http://www.hsgac.senate.gov/download/report-psi-staff-report-keeping-foreign-corruption-out-of-the-united-states-four-case-histories> (cited in the FATF Typologies Report).

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In addition to criminal penalties, lawyers are subject to professional discipline and may lose their licenses if they counsel or assist a client to engage in criminal, fraudulent, or other conduct reflecting adversely on their fitness to practice law.⁵⁸ In

The U.S. cases cited in the FATF Typologies Report included twenty-nine U.S. criminal prosecution or discipline cases against lawyers. *TYPOLOGIES REPORT*, *supra*, at 39–146. Because these cases were spread out over more than one-hundred pages, and because the report did not provide full citations for some of these cases, the U.S. cases found in the FATF Typologies Report are listed below, with the FATF report case number appearing in brackets following the citation: *United States v. Jarrett*, 494 F. App'x 615 (7th Cir. 2012) [Case 5]; *In re Blair*, 40 A.3d 883 (D.C. 2012) [Case 123]; *United States v. Sinko*, 394 F. App'x 843 (3d Cir. 2010) [Case 61]; *United States v. Monea*, 376 F. App'x 531 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 356 (2010) [Case 27]; *United States v. Crawford*, 281 F. App'x 444 (6th Cir. 2008) [Case 118]; *United States v. Graham*, 484 F.3d 413 (6th Cir. 2007), *cert. denied*, 552 U.S. 1280 (2008) [Case 106]; *United States v. Flores*, 454 F.3d 149 (3d Cir. 2006), *cert. denied*, 549 U.S. 1046 (2006) [Case 113]; *United States v. Elso*, 422 F.3d 1305 (11th Cir. 2005) [Case 119]; *United States v. Robertson*, 67 F. App'x 257 (6th Cir. 2003), *subsequent appeal remanded by sub nom.* *United States v. Rorrer*, 161 F. App'x 518 (6th Cir. 2005) [Case 60]; *In re Abbell*, 814 A.2d 961 (D.C. Cir. 2003) [Case 45]; *United States v. Oberhauser*, 284 F.3d 827 (8th Cir. 2002), *cert. denied*, 537 U.S. 1071 (2002) [Case 112]; *United States v. Nolan Cooper*, 155 F.3d 221 (3d Cir. 1998) [Case 105]; *United States v. Anderskow*, 88 F.3d 245 (3d Cir. 1996) [Case 29]; *United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992), *cert. denied*, 506 U.S. 998 (1992) [Case 62]; *United States v. George*, 839 F. Supp. 2d 430 (D. Mass. 2012) [Case 35]; *United States v. Harmon*, No. CR 08-00938JW, 2011 WL 7937876 (N.D. Cal. Aug. 18, 2011), *rev'd*, 537 F. App'x 719 (9th Cir. 2013) (reversing a district court order for a new trial, finding harmless error) [Case 57]; *United States v. Abramoff*, No. 06-cr-00001(ESH), 2014 U.S. Dist. LEXIS 119614 (D.D.C. July 14, 2014) [Case 49]; *United States v. Ferguson*, 142 F. Supp. 2d 1350 (S.D. Fla. 2000) [Case 46]; *United States v. Nesser*, 939 F. Supp. 417 (W.D. Pa. 1996) [Case 73]; *United States v. Foster*, 868 F. Supp. 213 (E.D. Mich. 1994) [Case 59]; *United States v. One White Crystal Covered Bad Tour Glove*, No. 11-cv-3528 (C.D. Cal.) and *United States v. One Gulfstream G-V Jet Aircraft*, No. 11-cv-1874 (D.D.C.), *resolved by settlement*, *United States v. One Michael Jackson Signed Thriller Jacket*, No. 2:13-cv-09169-GW-SS (C.D. Cal. Oct. 15, 2014) [Case 32]; *United States v. Delgado*, No. 3:12-cr-02106-DB (W.D. Tex.), *United States v. Delgado*, No. 3:13-cr-00370-DB (W.D. Tex. Feb. 26, 2013), and *United States v. FirstCaribbean Int'l Bank Account No. 10286872*, No. EP 12-cv-0479 (W.D. Tex.) [Case 104]; *United States v. Bristol*, No. 10-cr-1239 (S.D.N.Y. May 2, 2011) [Case 58]; *Ky. Bar Ass'n v. Dixon*, 373 S.W.3d 444 (Ky. 2012) [Case 3]; *In re Shepherd*, 91 So. 3d 283 (La. 2012) [Case 117].

58. *See, e.g.*, *TYPOLOGIES REPORT*, *supra* note 57, at 30 (“[T]en countries provided advice about disciplinary action taken, however the number of disciplinary cases reported exceeded double figures only in the Netherlands, the United Kingdom and the United States.”). The discipline rules that apply in the United States are the state equivalents of American Bar Association (ABA) Model Rules of Professional Conduct Rules 1.2(d), 1.16(a), and 8.4. Under Model Rule 8.4, it is misconduct for a lawyer to, *inter alia*: “(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” *MODEL RULES OF PROF’L CONDUCT* R. 8.4 (2014). Violating Rule 8.4 subjects a lawyer to discipline, including possible license revocation. *Id.* at cmt. 1. Rule 1.2(d) provides: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” *Id.* R. 1.2(d). Rule 1.16(a) provides in part: “Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law” *Id.* R. 1.16(a). Rule 1.16(c) requires a lawyer to “comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.” *Id.* R. 1.16(c) (2013). The exception in

the United States, lawyer discipline is handled in a proceeding that is separate from a criminal prosecution.⁵⁹

In sum, lawyers who are engaged in money laundering or terrorist financing, or who are intentionally assisting a client in such activities, are subject to both criminal and disciplinary sanctions.⁶⁰

III. U.S. LEGAL PROFESSION EFFORTS TO COMBAT MONEY LAUNDERING AND TERRORIST FINANCING

A. Why the Focus Is on Lawyers Who Unwittingly Assist Money Laundering

The U.S. legal profession supports the government's efforts to fight money laundering and combat terrorist financing. Each gatekeeper resolution adopted by the ABA begins with a paragraph expressing the ABA's commitment to support all reasonable and necessary efforts made by the U.S. government to combat money laundering and terrorist financing.⁶¹ The reports accompanying the ABA resolutions have referenced the National Money Laundering Strategy Report, thus highlighting the seriousness of money laundering and terrorist financing issues.⁶²

While it is regrettable that any U.S. lawyer has been implicated in such schemes, whenever you have a group of individuals—even professionals—some of them may intentionally violate the law. If the vast network of federal criminal laws and enforcement mechanisms are insufficient to deter intentional criminal acts by

Rule 1.16(c) will likely be inapplicable. See FATF RBA, *supra* note 19; see also John A. Terrill, II & Laurel S. Terry, *Ethical Dimensions of Client Due Diligence*, in Kevin L. Shepherd, *THE GATEKEEPER INITIATIVE AND THE RISK-BASED APPROACH TO CLIENT DUE DILIGENCE* (forthcoming 2015).

59. See, e.g., *Model Rules of Lawyer Disciplinary Enforcement*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html (last visited Apr. 10, 2015).

60. See *supra* notes 54, 58 and accompanying text.

61. See, e.g., AM. BAR ASS'N TASK FORCE ON GATEKEEPER REGULATION & THE PROFESSION, SECTION OF REAL PROP., PROBATE & TRUST LAW, CRIMINAL JUSTICE SECTION, SECTION OF LITIG., SECTION OF INT'L LAW & PRACTICE, REPORT TO THE HOUSE OF DELEGATES (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/recommendations03/104.authcheckdam.pdf> ("RESOLVED, That the American Bar Association supports the enactment of reasonable and balanced initiatives designed to detect and prevent domestic and international money laundering and terrorist financing."); AM. BAR ASS'N, ADOPTED BY THE HOUSE OF DELEGATES, RESOLUTION 300 OPPOSING FEDERAL BENEFICIAL OWNERSHIP (2008) [hereinafter ABA RESOLUTION 300], available at http://www.americanbar.org/content/dam/aba/directories/policy/2008_am_300.authcheckdam.pdf ("RESOLVED, That the American Bar Association supports all reasonable and necessary efforts of the United States government and the international community to combat money laundering and terrorist financing activity in the international financial system[.]"); AM. BAR ASS'N, ADOPTED BY THE HOUSE OF DELEGATES, RESOLUTION 116 ADOPTING THE VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2010) [hereinafter ABA RESOLUTION 116], available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf> ("RESOLVED, That the American Bar Association acknowledges and supports United States Government efforts to combat money laundering and terrorist financing[.]").

62. See, e.g., ABA RESOLUTION 116, *supra* note 61, at 2; ABA RESOLUTION 300, *supra* note 61, at 4.

lawyers, it is unlikely that any additional efforts by the profession would deter such conduct.⁶³ Accordingly, the legal profession can have the greatest impact if it helps lawyers avoid *unwittingly* assisting clients who are engaged in money laundering or terrorist financing.⁶⁴

The legal profession has determined that the most effective way it can educate lawyers to avoid unwitting involvement is by helping them understand the ways in which sophisticated criminals might use them to facilitate their crimes. While most (if not all) lawyers know the black-letter rule that they may not assist or counsel a client regarding criminal activities, many lawyers may not yet recognize the types of fact patterns that suggests these crimes are underway. In other words, lawyers know the “rule,” but they need to learn more about these kinds of “application” issues.⁶⁵

As part of their educational efforts, U.S. legal organizations have strongly encouraged U.S. lawyers to employ the FATF-approved risk-based approach—particularly during the client intake stage. The U.S. approach encourages the profession to do more than mechanically “check off a box” or apply a set of formal requirements (or have a staff assistant do so). It seeks to change the culture in order to make lawyers as sensitive to these issues as they are to conflicts of interest. The focus of a risk-based approach is to have lawyers thoughtfully evaluate the

63. See *supra* notes 54, 57, 58 and accompanying text.

64. See Shepherd RBA, *supra* note 6, at 98 n.54 (“The endorsement by the ABA of the Good Practices Guidance responds to requests by FATF, Congress, and federal regulators for guidance to the legal profession” that uses a risk-based approach). On the other hand, the legal profession has frequently pointed out to the FATF that there is no empirical evidence to suggest that lawyers’ unwitting involvement in money laundering or terrorist financing is a widespread problem. See, e.g., COUNCIL OF BARS & LAW SOCIETIES OF EUR., RESPONSE TO THE COMMISSION: THE REVIEW OF THE THIRD ANTI-MONEY LAUNDERING DIRECTIVE 6, § 3.2 (2010), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_211011_CCBE_Respo1_1319525363.pdf.

Although there has been no empirical evidence suggesting widespread unwitting involvement by lawyers, it certainly remains a possibility. While the legal profession is committed to doing its part concerning these criminal activities, it has called for an appropriate balance on the part of the FATF and its members when implementing the Recommendations for the legal profession. As recognized in the United Nations Basic Principles on the Role of the Lawyer and in other documents, the legal profession plays a unique role with respect to the rule of law and administration of justice. Implementation efforts that undermine lawyer independence and attorney-client confidentiality and privilege need to be carefully considered so they do not have a deleterious effect on the administration of justice, particularly when there has been no empirical evidence of widespread unwitting involvement of lawyers in money laundering and terrorism financing schemes. See *generally id.* The importance of these issues was recognized in a British Columbia decision in which the Province’s highest court affirmed the lower court decision that the government’s money laundering regime was invalid, reasoning that the independence of the bar was a principle of fundamental justice with which the Regime interfered to an unacceptable degree. See *generally* Fed’n of Law Soc’y of Can. v. Canada, 2013 BCCA 147. The result was affirmed by the Supreme Court of Canada, although the reasoning differed. Fed’n of Law Soc’y of Can. v. Canada, 2015 S.C.C. 7.

65. As is described in greater detail *infra* notes 112–16 and accompanying text, the legal profession had urged the FATF to focus on unwitting lawyer involvement in its Typologies Report. The report, however, focused on existing case studies and thus on intentional wrongdoing. As a result, the ABA, CCBE, and IBA commissioned their own Typologies Report that focused on unwitting involvement, rather than intentional wrongdoing. See *infra* notes 110–16 and accompanying text.

circumstances of the representation in order to make an informed decision about whether to proceed.⁶⁶ The following section identifies some of the educational efforts that have been undertaken to help lawyers understand these application issues and to foster this cultural change.

B. Efforts Undertaken to Educate U.S. Lawyers About How They Might Unwittingly Facilitate Money Laundering or Terrorist Financing

A number of legal organizations have been heavily involved in the efforts to educate U.S. lawyers about money laundering and terrorist financing.⁶⁷ The deployed efforts include the development of policy statements,⁶⁸ continuing legal education (CLE) sessions,⁶⁹ articles,⁷⁰ casebook discussions,⁷¹ and state bar web page articles or links.⁷²

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66. See, e.g., Shepherd RBA, *supra* note 6, at 94; see also MacDonald, *supra* note 33, at 150 (criticizing the FLSC rule for abandoning a risk-based approach and suggesting that a different direction was warranted).
 67. The organizations that have been most active include the ABA, many of its sections, and its Task Force on Gatekeeper Regulation and the Profession; The American College of Trust and Estate Counsel (ACTEC), which co-sponsored the New York Law School FATF symposium; the American College of Real Estate Lawyers; the American College of Mortgage Attorneys; and the American College of Commercial Finance Lawyers. There are a handful of individuals within these organizations who deserve to be recognized for the countless pro bono hours they have devoted to educating U.S. lawyers regarding these issues. Several of these individuals spoke at the New York Law School symposium, including Kevin Shepherd, Duncan Osborne, and John Terrill. See generally New York Law School FATF Symposium, *supra* note 1.
 68. See *supra* note 61 (citing ABA Resolutions 104, 116, and 300).
 69. See *infra* notes 74–77 (citing, respectively, continuing legal education (CLE) sessions directed towards real estate lawyers, trusts and estates lawyers, and lawyers who form corporations).
 70. See, e.g., *supra* notes 6, 8, 23 (citing law review articles); *infra* note 83 (citing articles that appeared in the *ABA Journal*).
 71. See *infra* notes 79, 80, 127 and accompanying text (regarding the efforts to include this information in law school casebooks and in education materials for lawyer regulators).
 72. See, e.g., ALA. STATE BAR, THE GATEKEEPER INITIATIVE—ONE FORM OF ASSISTANCE TO LEGAL PROFESSION: ADDENDUM 5 (June 2013), https://www.alabar.org/assets/uploads/2014/09/june-2013_addendum_rev4.pdf; *Good Practices Prevent Money Laundering and Terrorist Financing*, ST. B. ARIZONA, <http://www.azbar.org/lawyerregulation/rulesandotherresources/goodpracticespreventmoneylaundering> (last visited Apr. 10, 2015); Andrew Tuft & Rachel Chapman, *Beware of Helping Finance Terrorists*, CAL. ST. B.J. (Apr. 10, 2011), available at http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=55; Paula Frederick, *Money for Nothing*, 18 GA. B.J. 50 (Aug. 2012); *Legal Links: Gatekeeper*, MD. ST. B. ASS'N, <http://www.msba.org/resources/legallinks.aspx> (last visited Apr. 10, 2015); *Money Laundering & Terrorist Financing*, MINN. BENCH & B., <http://mnbenchbar.com/2012/12/money-laundering/> (last visited Apr. 10, 2015); *Voluntary Good Practices to Combat Money Laundering and Terrorist Financing*, MO. B., <http://www.mobar.org/practice-resources/voluntary-good-practices-to-combat-money-laundering-and-terrorist-financing.htm> (last visited Apr. 10, 2015); *Voluntary Good Practices Guidance to Combat Money Laundering and Terrorist Financing*, ST. B. NEVADA, <http://www.nvbar.org/content/voluntary-good-practices-guidance-combat-money-laundering-and-terrorist-financing> (last visited Apr. 10, 2015); *Task Force on Gatekeeper Regulation and the Profession*, ST. B. NEW MEXICO, <http://www.nmbar.org/AboutSBNM/gatekeeper.html> (last visited Apr. 10, 2015); *Voluntary Good Practices Guidance to Combat Money Laundering and Terrorist Financing*, ST. B. ASS'N NORTH DAKOTA, <https://sband.org/News/NewsDetail.aspx?NewsId=643> (last visited Apr. 10, 2015); *Notice on the ABA Task Force on Gatekeeper Regulation and the Profession, 2013*, PA. B. ASS'N, <http://www.pabar.org/public/sections/rlpropco/gatekeeper.asp> (last visited Apr. 10, 2015).

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Many of the educational efforts have targeted lawyers engaged in the five specified activities listed in Recommendation 22.⁷³ For example, efforts have been made to reach lawyers who handle real estate matters,⁷⁴ trusts and estates,⁷⁵ international practice,⁷⁶

Apr. 10, 2015); *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, S.C. B., <http://www.scbar.org/News/NewsDetails/ArticleId/1575/Voluntary-Good-Practices-Guidance-to-Combat-Money-Laundering-and-Terrorist-Financing.aspx> (last visited Apr. 10, 2015); *Voluntary Good Practices Guidance to Combat Money Laundering and Terrorist Financing*, St. B. SOUTH DAKOTA, <http://www.sdbar.org/new/members/gatekeeper.html> (last visited Apr. 10, 2015); *Voluntary Good Practices to Combat Money Laundering and Terrorist Financing*, St. B. TEXAS, http://www.texasbar.com/AM/Template.cfm?Section=Resource_Guides&Template=/CM/HTMLDisplay.cfm&ContentID=18944 (last visited Apr. 10, 2015); *Voluntary Good Practices Guidance to Combat Money Laundering and Terrorist Financing*, VA. ST. B., <http://www.vsb.org/site/news/item/voluntary-good-practices-ABA-2012> (last visited Apr. 10, 2015).

In addition to these web pages, members of the ABA Gatekeeper Task Force have previously noted web pages for the District of Columbia, Connecticut, Florida, New York, North Carolina, Ohio, Oklahoma, Oregon, Utah, and Wyoming, however the links have either been changed or eliminated.

73. See 2012 RECOMMENDATIONS, *supra* note 6, at 19–20 (identifying the five specified activities); see also *supra* note 29 and accompanying text.
74. Examples of articles include Shepherd, *Guardians*, *supra* note 16 (article published in the *Real Property, Trust and Estate Law Journal*), and Kevin L. Shepherd, *Ethically Speaking . . . Just What Are My Obligations Under the Gatekeeper Initiative?*, 27 PROB. & PROP. MAG., Sept.-Oct. 2013, at 43, available at http://www.americanbar.org/publications/probate_property_magazine_2012/2013/september_october_2013/2013_aba_rpte_pp_v27_5_article_shepherd_gatekeeper_initiative.html. Examples of CLE sessions include: Pa. Bar Inst., *The Gatekeeper Initiative: Are You Unwittingly Helping Your Clients Launder Money?*, 17th Annual Real Estate Conference (Dec. 6, 2013); Am. Coll. of Mortg. Attorneys, *Risky Business: Are You Unwittingly Helping Your Clients Launder Money?* (Sept. 27, 2013); see also ABA RESPONSE TO FATF, *supra* note 50, at 21–32 (Exhibit A cites educational efforts).
75. See, e.g., FATF and Circular 230: The Expanding Impact of Federal Initiatives on Legal Ethics, ACTEC 2012 Annual Meeting (March 7–8, 2013); The Financial Action Task Force and the Good Practices Guidance: The Impact on Trust and Estate Lawyers, Cal. B. Ass'n (Jan. 19, 2013); International Planning Update/FATF & the Global Forum, 47th Annual Heckerling Inst. on Estate Planning (Jan. 12–16, 2013); The Financial Action Task Force and the Good Practices Guidance, 10th Annual Sophisticated Trusts & Estates Law Inst. (Nov. 8–9, 2012); FATF Tutorial Workshop, ACTEC Fall Meeting (Oct. 19–20, 2012); Ethics in Offshore Planning, Am. Law Inst.: Int'l Trust & Estate Planning (Aug. 23–24, 2012); Wealth Planning for High Net-Worth Individuals and Owners of Closely-Held Companies, N.Y. Univ. Sch. of Continuing & Prof'l Studies, Summer Inst. in Tax'n (July 25–26, 2012); Guidance on Good Practices to Combat Money Laundering, Soc'y of Trust & Estate Practitioners (STEP) (Mar. 11, 2011); see also ABA RESPONSE TO FATF, *supra* note 50, at 21–32 (Exhibit A cites educational efforts).
76. See, e.g., Mikhail Reider-Gordon & Truman Kirkland Butler, *Anti-Money Laundering*, 46 INT'L LAW. 375 (2012); The New FATF Recommendations and the AML/CTF Methodology, Am. Bar Ass'n Section of Int'l Law Int'l Anti-Money Laundering Comm. (May 6, 2014) (A non-CLE teleconference and in-person program); *Int'l Anti-Money Laundering Comm.*, AM. B. ASS'N, <http://apps.americanbar.org/dch/committee.cfm?com=IC700500> (last visited Apr. 10, 2015) (including many useful links). U.S. lawyers and academics have also been very active in the IBA's efforts to educate lawyers about money laundering. For example, Professor Clark Cunningham has spoken on this topic at IBA Conferences, assembled materials, and even prepared a video for the IBA. See *IBA Anti-Money Laundering Forum Website Updates Dec 2011*, INT'L B. ASS'N, http://www.ibanet.org/ENews_Archive/IBA_12December_2011_AntiMoney_Laundering_Forum_website_updates.aspx (last visited Apr. 10, 2015). Professor Cunningham is the executive director of Georgia State's National Institute for Teaching Ethics & Professionalism (NIFTEP) and is the creator of the International Forum on

and corporate formation and management.⁷⁷ There also have been concerted efforts to educate ethics experts, such as general counsel in law firms⁷⁸ and legal ethics academics,⁷⁹ since they provide advice regarding risk management and rule compliance. The goal is to have a “cradle-to-grave” approach to education that begins in law school⁸⁰ and concludes by educating the regulators responsible for disciplining lawyers.⁸¹ State supreme court chief justices have also been included in the educational efforts,⁸² and additional audiences have been reached by publishing articles in the ABA Journal sent to all ABA members.⁸³

When educating the constituencies listed above, one of the primary tools is the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (“Guidance”), which took more than a year to

Teaching Legal Ethics and Professionalism. For a wealth of additional information, see *Anti-Money Laundering Forum*, INT’L B. ASS’N, <http://www.anti-moneylaundering.org/> (last visited Apr. 10, 2015), and Terry, *supra* note 8, at 20–27 (summarizing the data found in the IBA’s 2010 Global Chart).

77. See, e.g., Tuft & Chapman, *supra* note 72 (online CLE session); *An Update on the FATF Guidance for Legal Professionals and Development of Good Practice Guidelines*, COM. NEWSL. (Am. Bar Ass’n Sec. of Bus. Law, Jan. 2009, at 39, available at <http://apps.americanbar.org/buslaw/committees/CL190000pub/newsletter/200901/all.pdf>; *Message from the Chair, Linda Hayman*, AM. B. ASS’N SEC. BUS. L., Apr. 2007, 1–2, <http://apps.americanbar.org/buslaw/newsletter/0058/materials/print.pdf>; see also ABA RESPONSE TO FATF, *supra* note 50, at 21–32 (Exhibit A cites educational efforts).
78. See, e.g., *Hot to Pot: Money Laundering, Formal Opinion 463, and Legal Marijuana*, AM. B. ASS’N, <http://www.americanbar.org/content/aba/calendar/2014/05/40th-aba-national-conference-on-professional-responsibility/conferencematerials/session5.html> (last visited Apr. 10, 2015); AM. BAR ASS’N, FORMAL OPINION 463: CLIENT DUE DILIGENCE, MONEY LAUNDERING, AND TERRORIST FINANCING (2013) [hereinafter FORMAL OPINION 463], available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf.
79. See, e.g., *2010 FATF Symposium*, J. PROF. LAW., 2010, at 1, available at http://www.anti-moneylaundering.org/2010_FATF_Symposium.aspx (This symposium is discussed *infra* note 126). The International Forum on Teaching Legal Ethics and Professionalism has collected resources on money laundering from legal academics from around the world, including materials from the 2012 money laundering session held in Banff at the conference immediately preceding the International Legal Ethics Conference VI. See, e.g., *Money Laundering*, INT’L FORUM ON TEACHING LEGAL ETHICS & PROFESSIONALISM, <http://www.teachinglegalethics.org/category/teaching-topics/money-laundering> (last visited Apr. 10, 2015).
80. The author has personal knowledge of the fact that U.S. Department of the Treasury officials have met with several different chairs of the Association of American Law Schools’ (AALS) Section on Professional Responsibility, including Professors Jack Sahl and Peter Margulies. The chairs have also met with representatives of the ABA Task Force on Gatekeeper Regulation and the Profession. One of the goals of these meetings has been to encourage legal ethics academics to include more of this material in their classes and casebooks.
81. See Nat’l Org. of Bar Counsel, Program of the Midyear Meeting in New Orleans (Feb. 1–4, 2012) (including a Plenary session entitled “Money Laundering/Counter Terrorist Financing”).
82. See Shepherd RBA, *supra* note 6, at 98 n.55 and accompanying text.
83. See, e.g., Michael A. Lindenberger, *Into the Breach: Voluntary Compliance on Money Laundering Gets a Boost from the ABA and Treasury*, 97 A.B.A. J. 56 (Oct. 2011); David L. Hudson, Jr., *ABA Endorses Guidance for Lawyers on Fighting Money Laundering and Terrorist Financing*, 99 A.B.A. J. 64 (Sept. 2013); ABA FAQ, *supra* note 42.

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develop⁸⁴ and has been formally endorsed by a number of U.S. legal organizations, including the ABA itself and the Conference of Chief Justices.⁸⁵

As noted earlier, the FATF RBA Guidance for Legal Professionals invited countries to develop guidance for their lawyers.⁸⁶ The Guidance represents the U.S. legal profession's response and provides more detailed information than is found in the FATF RBA.⁸⁷

Similar to the FATF RBA, the Guidance recommends that, during the client intake process, a lawyer consider questions about the nature of the client, the countries involved, and the type of service a client requests.⁸⁸ The degree of due diligence that a lawyer performs should be determined by these client, geography, and service risk-factors.⁸⁹

84. See, e.g., Shepherd, *Guardians*, *supra* note 16, at 662–63 nn.307–11 and accompanying text; see also ABA RESOLUTION 300, *supra* note 61 (2008 ABA Resolution calling for the development of the Guidance); ABA RESOLUTION 116, *supra* note 61 (August 2010 endorsement of the Guidance); AM. BAR ASS'N, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2010) [hereinafter GOOD PRACTICES GUIDANCE], available at http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/voluntary_good_practices_guidance.authcheckdam.pdf. It should be noted that the development of the Guidance and the other efforts have not been entirely altruistic and directed towards stopping money laundering and terrorist financing. They were also undertaken in the hope that steps such as this would make federal legislation unnecessary. See, e.g., Shepherd RBA, *supra* note 6, at 97.

85. The Guidance was formally endorsed or approved by all of the entities whose representatives participated in its development, the ABA Section of Law Practice Management, and the ABA itself. See GOOD PRACTICES GUIDANCE, *supra* note 84, at 1; ABA RESOLUTION 116, *supra* note 61, at 3. For information about the Conference of Chief Justices' endorsement, see *infra* note 98.

86. See *supra* note 38 and accompanying text.

87. See generally GOOD PRACTICES GUIDANCE, *supra* note 84; see also Shepherd RBA, *supra* note 6, at 96 (“[The FATF RBA] offers little practical guidance to U.S. lawyers.”). The Guidance includes Practice Pointers and a Client Intake Appendix. The Client Intake Appendix can be found on The American College of Trust and Estate Counsel's web site, which is available at: http://www.actec.org/public/Governmental_Relations/Voluntary_Good_Practices.asp. The Appendix to this article provides a summary of the ABA Guidance and cites the page numbers on which the practice pointers are found. One example of a practice pointer states:

Practice pointer: For example, a general practitioner in rural Montana would have no reason to engage in extensive due diligence or know your client measures . . . if a long term client called the lawyer and asked her to form a limited liability company for the purpose of buying a ranch. However, if that same lawyer received a call from a new and unknown client saying that the client had just won several million dollars at poker in Nevada and needed the lawyer to form a limited liability company to buy a ranch, then a risk based approach would suggest that in this latter case, more extensive due diligence and know your client measures would be appropriate.

GOOD PRACTICES GUIDANCE, *supra* note 84, at 8.

88. Compare FATF RBA, *supra* note 19, at ¶ 106 (identifying geography, service, and client risks), with GOOD PRACTICES GUIDANCE, *supra* note 84, at 15 (“The Lawyer Guidance identifies three major risk categories with regard to legal engagements: (a) country/geographic risk, (b) service risk, and (c) client risk.”).

89. GOOD PRACTICES GUIDANCE, *supra* note 84, at 27–33.

As is true with the conflicts of interest analysis that a lawyer performs at the outset of a client matter, the level and nature of the lawyer's gatekeeper inquiry varies with the circumstances. For example, the Guidance indicates that the standard due diligence a lawyer performs may sometimes need to be adjusted upwards depending on the number and nature of the risk factors.⁹⁰ Where enhanced due diligence is appropriate, the Guidance identifies additional steps that lawyers could find useful.⁹¹ Thus, a lawyer may want to ensure that for certain types of high-risk clients there is peer or managerial oversight regarding a lawyer's decision to accept a client.⁹²

In addition to noting the circumstances in which enhanced due diligence would be appropriate, the Guidance also sets forth circumstances in which a reduced level of due diligence might be appropriate.⁹³ For example, reduced levels of due diligence may be appropriate for publicly listed companies or clients, such as banks, that already are subject to extensive anti-money laundering and counter-terrorist financing rules.⁹⁴ This section of the Guidance also presents thirteen variables that may change the analysis, including the length of time the lawyer has known the client.⁹⁵ These due diligence efforts are designed to help lawyers make a thorough and informed decision about whether it is appropriate to proceed with (or continue) representing a client. If a lawyer concludes that a client wants to use the lawyer to facilitate money laundering or terrorist financing, that lawyer should decline (or terminate) the representation.⁹⁶

90. *Id.* at 28–32. The Guidance provides a list of ten factors that may lead one to conclude that there is a heightened level of risk associated with the client. *Id.* at 17–21. The Guidance also identified fourteen types of “service” that could lead a lawyer to conclude that there is a heightened level of risk. *Id.* at 21–28. With respect to geographic risk, the Guidance recommends that lawyers consult credible sources, which include “information that is produced by well-known bodies that generally are regarded as reputable and that make such information publicly and widely available. Examples of credible sources include the FATF, the International Monetary Fund, The World Bank, FinCEN, OFAC, and the U.S. Department of State.” *Id.* at 16. See also discussion *supra* note 50 regarding the SDN list produced by OFAC. The 2008 FATF RBA, like the Guidance, noted that the level of due diligence may need to be adjusted upwards depending on client, service, or geographic risks. See, e.g., FATF RBA, *supra* note 19, at ¶¶ 111–13.

91. GOOD PRACTICES GUIDANCE, *supra* note 84, at 32–34.

92. *Id.* at 33.

93. *Id.* at 28–32.

94. *Id.* at 36.

95. *Id.* at 28–32. This section of the Guidance identified the following variable that might affect a lawyer's analysis of the risk involved: (1) the nature of the client relationship; (2) existing regulation; (3) reputation and publicly available information; (4) regularity/duration of relationship; (5) familiarity with country/laws; (6) duration/magnitude of attorney-client relationship; (7) local counsel; (8) geographic disparity; (9) one-shot transactions; (10) technological developments favoring anonymity; (11) client origination/referral source; (12) structure of client/transaction; (13) trusts that are pension funds. *Id.*

96. *Id.* at 34, 37 (“The fundamental starting point for implementing a risk-based approach is for the lawyer to make an overall risk assessment of the client. Most lawyers perform elements of that assessment as part of their established client intake and conflicts review system. . . . *Not every risk-based approach analysis of a potential client will inexorably lead to the conclusion that, with appropriate controls, the lawyer can accept and proceed with the proposed engagement. It may be possible that the lawyer's analysis will lead the lawyer to reject the engagement or to withdraw from the representation.*”) (emphasis added).

The U.S. legal profession worked closely with the U.S. Department of the Treasury when developing the Guidance. Although Treasury had not previously endorsed a private-industry group-policy statement, it supported the Guidance and Treasury's statement of support was included in the materials distributed to the ABA House of Delegates prior to its approval of the Guidance.⁹⁷ In 2014, the Conference of Chief Justices endorsed the Guidance.⁹⁸

The Guidance has been prominently featured at a number of CLE sessions,⁹⁹ but the efforts to publicize the Guidance have gone even further. For example, the ABA Gatekeeper Task Force prepared a Frequently Asked Questions document to make the Guidance more accessible.¹⁰⁰ The ABA has asked bar associations to place the Guidance on their web sites,¹⁰¹ and the Task Force has persuaded the *ABA Journal* to publish several stories that reference it.¹⁰² Task Force members have encouraged professional responsibility academics to teach this material to law students and to include this material in ethics casebooks.¹⁰³ Members have promised to provide hypothetical problems (with a suggested Teacher's Guide) that academics may use to introduce their students to the Guidance.¹⁰⁴ They also convinced the ABA to publish a book on gatekeeper issues; this book should become available in 2015 and will include

97. See ABA RESOLUTION 116, *supra* note 61, app. at 3 ("STATEMENT FROM UNITED STATES DEPARTMENT OF TREASURY[.] The Treasury Department welcomes this Good Practices paper as a useful step in protecting the legal profession as well as the broader financial system from the risks of money laundering and terrorist financing. Treasury looks forward to continuing engagement with the ABA to facilitate implementation of effective policies and procedures to protect against money laundering and terrorist financing.").

98. See CONFERENCE OF CHIEF JUSTICES, RESOLUTION 7: IN SUPPORT OF THE VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2014), *available at* <http://ccj.ncsc.org/~media/microsites/files/ccj/resolutions/07232014-support-of-voluntary-good-practices-for-lawyers.ashx>.

99. See *supra* notes 75–78 for a list of some of these CLE sessions. There is also a useful list in the ABA RESPONSE TO FATF, *supra* note 50, at 21–32.

100. AM. BAR ASS'N, FREQUENTLY ASKED QUESTIONS ABOUT THE GATEKEEPER INITIATIVE AND THE VOLUNTARY GOOD PRACTICES GUIDANCE, *available at* http://www.americanbar.org/content/dam/aba/publications/criminaljustice/gatekeeper_faqs.pdf (last visited Apr. 10, 2015).

101. See, e.g., Letter from Laurel G. Bellows, Am. Bar Ass'n President, to State and Local Bars (July 31, 2013), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013jul31_abaformalopinon463_1.authcheckdam.pdf (urging states to educate their members in various ways, including through their web page and by providing resources); Letter from Stephen N. Zack, Am. Bar Ass'n President, to State and Local Bars (Apr. 8, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apr08_goodpractices_o.authcheckdam.pdf (encouraging states to distribute and post the ABA Guidance on their web pages).

102. See Lindenberger, *supra* note 83; Hudson, *supra* note 83.

103. The author has personal knowledge that Kevin Shepherd, chair of the ABA Task Force on Gatekeeper Regulation and the Profession, has met with successive chairs of the AALS's Section on Professional Responsibility. In addition, a representative from Treasury was encouraged to (and did) attend the 37th National Conference on Professional Responsibility, which was held in 2011 in Memphis, Tennessee under the auspices of the ABA Center for Professional Responsibility. See *supra* note 80.

104. The author has participated in conversations on this topic.

information on the Guidance.¹⁰⁵ In short, the Guidance has proved to be a lynchpin in the efforts to educate U.S. lawyers on money laundering and terrorist financing.

A formal ethics opinion issued by the ABA Standing Committee on Ethics and Professional Responsibility has also begun to play a leading role in educational efforts.¹⁰⁶ Members of the ABA Task Force on Gatekeeper Regulation and the Profession requested an opinion from the Standing Committee to assist them in their efforts to educate U.S. lawyers.¹⁰⁷ These efforts came to fruition in 2013 when the Standing Committee issued ABA Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing.¹⁰⁸ This opinion confirms that lawyers using the risk-based control measures detailed in the Guidance are acting in a manner consistent with the Model Rules of Professional Conduct.¹⁰⁹

A third document that is expected to play a central role in educating U.S. lawyers is the Lawyer's Guide Report issued by the ABA, the Council of Bars and Law Societies of Europe (CCBE), and the International Bar Association (IBA),¹¹⁰ which was released in October 2014 during the IBA Annual Meeting in Tokyo.¹¹¹

The history of the Lawyer's Guide is interesting. In 2013, the FATF published a Typologies Report for the legal profession,¹¹² along with reports for other sectors,¹¹³ which "identifies a number of [money laundering and terrorist financing] methods that commonly employ or, in some countries, require the services of a legal professional."¹¹⁴ Prior to issuing this report, legal profession representatives advised the FATF that the

105. See Kevin L. Shepherd, *THE GATEKEEPER INITIATIVE AND THE RISK-BASED APPROACH TO CLIENT DUE DILIGENCE* (forthcoming 2015).

106. FORMAL OPINION 463, *supra* note 78 (discussing client due diligence, money laundering, and terrorist financing).

107. The author has personal knowledge of these facts. See also Dennis Rendleman, Counsel to the ABA Comm. on Ethics & Prof'l Responsibility, Remarks at the 40th National Conference on Professional Responsibility (May 30, 2014).

108. See FORMAL OPINION 463, *supra* note 78.

109. *Id.*

110. See INT'L BAR ASS'N, AM. BAR ASS'N, & COUNCIL OF BARS & LAW SOC'YS OF EUR., *A LAWYER'S GUIDE TO DETECTING AND PREVENTING MONEY LAUNDERING* (Oct. 2014) [hereinafter *LAWYER'S GUIDE*], available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf.

111. See *What's New in Washington*, AM. B. ASS'N, http://www.americanbar.org/advocacy/governmental_legislative_work/new.html (last visited Apr. 10, 2015) (follow "Read more..." hyperlink under "October 2014: ABA, IBA, and CCBE Release Lawyer's Guide to Detecting and Preventing Money Laundering").

112. See *TYPOLOGIES REPORT*, *supra* note 57.

113. See, e.g., FIN. ACTION TASK FORCE, *MONEY LAUNDERING AND TERRORIST FINANCING THROUGH TRADE IN DIAMONDS* (Oct. 2013), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/ML-TF-through-trade-in-diamonds.pdf>; FIN. ACTION TASK FORCE, *THE ROLE OF HAWALA AND OTHER SIMILAR SERVICE PROVIDERS IN MONEY LAUNDERING AND TERRORIST FINANCING* (Oct. 2013), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Role-of-hawala-and-similar-in-ml-tf.pdf>.

114. See, e.g., FIN. ACTION TASK FORCE, *METHODS AND TRENDS: MONEY LAUNDERING AND TERRORIST FINANCING VULNERABILITIES OF LEGAL PROFESSIONALS 4* (June 2013), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf>.

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report would be most useful if it focused on unwitting involvement by lawyers, rather than intentional criminal activity.¹¹⁵ Despite the legal profession's requests, the FATF report relied on case studies from its member countries, most of which involved criminal conduct by lawyers.¹¹⁶ Thus, despite requests to do so, the FATF report provides little guidance to lawyers on how to avoid unwitting involvement in money laundering or terrorist financing. The Lawyer's Guide was drafted in order to provide such guidance.

In sum, the Guidance, ABA Formal Opinion 463, and the Lawyer's Guide, along with the Recommendations, are the anchor documents around which U.S. educational efforts are built. These documents have been, and will continue to be, the focus of CLE sessions, articles, and web sites that have been directed towards U.S. lawyers. U.S. legal profession organizations hope to educate lawyers so that it is as natural for lawyers to consider money laundering and terrorist financing issues as it is for them to consider conflict of interest issues. Similar to conflicts of interest, this type of inquiry would be appropriate both at the outset and throughout the course of the entire attorney-client relationship as new facts emerge or circumstances change. While this type of educational approach is unlikely to persuade lawyers who are undeterred by the criminal law system and intentionally engage in illegal activities, the hope is that internalized education will reduce unwitting involvement by lawyers in money laundering or terrorist financing.

115. *See, e.g.*, Letter from the Am. Bar Ass'n, to Fin. Action Task Force regarding Draft Typologies Report on Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals (May 6, 2013), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013may8_gatekeeperregfatf_1_authcheckdam.pdf.

We are pleased that [the] FATF formed a working group to examine typologies involving legal professionals. We feel this was a productive step to address the long-standing concern we have repeatedly expressed regarding the absence of helpful typologies involving legal professionals, especially those typologies highlighting unwitting involvement of legal professionals in money laundering or terrorist financing activities. . . . One of the concerns we have expressed, most recently during our conference call in February with the co-chair of the typologies working group, is that it is critically important that the typologies be practical, meaningful, and helpful in assisting legal professionals to detect money laundering and terrorist financing in their client intake processes and, later, in their representation of clients on an on-going basis. Measured from that standard, we feel that portion of the Typologies Draft dealing with the typologies falls short in the following ways. a. First, some of the typologies contain dense factual patterns that invariably involve complicit criminal activity by the legal professional.

Id. at 1–2; *accord* Letter from the Council of Bars & Law Soc'ys of Eur., to Fin. Action Task Force regarding the Draft Typologies Report on Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals (June 4, 2013), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Final_Letter_to_FATF1_1370434174.pdf (“We note that the draft report unfortunately does not meet its initial objective of identifying potential money laundering/terrorist financing ‘vulnerabilities’ of the legal profession. This implied the elaboration of typologies illustrating situations where there are risks for lawyers to unwittingly participate in money laundering activities even when lawyers have completed their due diligence requirements.”).

116. *See, e.g.*, *TYPOLOGIES REPORT*, *supra* note 57, at 96–107.

C. While Progress Has Been Made, Work Remains to Be Done

Although significant educational steps have been undertaken, more work needs to be done to minimize the chance that U.S. lawyers will be used to facilitate money laundering or terrorist financing. During the symposium, Professor Shima Baradaran spoke of an article she co-authored entitled “Funding Terror” that contains the results of an empirical study.¹¹⁷ For this study, the authors sent several versions of an email to firms around the world asking them if they would create a shell corporation and maintain anonymity.¹¹⁸ Some of the emails included references to countries recognized as sites of terrorism or to charitable organizations that might serve as fronts for terrorist financing.¹¹⁹

While the article should be reviewed in its entirety, the results of this study were both encouraging and discouraging. On the positive side, U.S. law firms scored relatively high, meaning that not many responded to the fake email requests to set up a shell corporation.¹²⁰ Although U.S. law firms responded “inappropriately”¹²¹ at a higher rate than corporation service providers in a number of tax-haven countries,¹²² they were less likely to respond to these emails than providers in a number of other countries, including Australia, Canada, and the United Kingdom.¹²³ The discouraging aspect of this study was the fact that some U.S. lawyers responded to these emails.¹²⁴

As Baradaran’s article and my own experience¹²⁵ reveal, additional work needs to be done to ensure that as many U.S. lawyers as possible consider issues of money laundering and terrorist financing when deciding whether—and how—to represent a

117. See Baradaran et al., *supra* note 41; see also New York Law School FATF Symposium, *supra* note 1.

118. Baradaran et al., *supra* note 41, at 509–13, 531–33.

119. *Id.* at 512.

120. The article stated that 84.1 percent of U.S. law firms declined to respond to the emails. *Id.* at 516 n.195. Failing to respond is consistent with the risk-based approach that U.S. legal profession organizations have endorsed.

121. It is worth noting, however, that because of the methodology the authors used, a U.S. law firm could be rated partially compliant or even noncompliant for omitting actions that are not legally required of U.S. lawyers (for example, failing to obtain notarized copies of government-issued identity documentation or any photo identification). *Id.* at 513, 516.

122. The article offers a convincing explanation that tax haven countries may have a high rate of compliance because they are subject to regular government scrutiny and “[t]hese governments understand the importance of business clients and want to maintain a respectable reputation internationally for incorporation and banking.” See *id.* at 528–29.

123. *Id.* at 521 fig.3. Before becoming too complacent with the U.S. law firms’ relatively strong performance, it must be noted that the United States was the only country for which the authors disaggregated the data regarding law firms and other corporation service providers. Accordingly, while we know that U.S. law firms were less likely to respond positively to the fake emails than corporation service providers from many other countries, we do not know how well U.S. law firms performed compared to law firms in other countries. See *id.*

124. See *id.*

125. When I speak at CLE sessions to U.S. lawyers, I often ask for a show of hands of those who are familiar with the Recommendations and the Guidance. While the numbers are growing, the responses have convinced me that there is a need for ongoing education.

client. But it is also clear that progress has been made in the efforts to educate U.S. lawyers about these issues, which can play an important role in the global efforts to reduce money laundering and terrorist financing. The next section suggests steps that might be undertaken, in addition to continuing the previously described educational efforts.

D. Additional Educational Steps That May Be Useful

Although I have been active in efforts to educate U.S. lawyers about FATF issues,¹²⁶ my preparation for the symposium led me to ask myself whether there was anything additional that either I, or the U.S. legal profession, might undertake in order to promote better awareness of these issues. I concluded that the answer to both of those questions was “Yes.”

On a personal level, I decided that there was more that I could be doing in the classroom. This year, for the first time, my legal ethics casebook contained material about the FATF.¹²⁷ I discussed with my students the FATF information, showed the ABA Gatekeeper web page, and discussed issues related to the Guidance. I could do more, however. As a result of comments at the symposium by Professor Jack Sahl, next year I plan to distribute the two-page Client Intake Form found in the Appendix to the Guidance.¹²⁸ In addition, I plan to distribute a summary of the Guidance that directs students to its Practice Pointers so that they can more easily synthesize the information found in the forty-page document (the Appendix to this article is the summary that I plan to distribute). Finally, I plan to distribute the recommendations that ACTEC attaches to the Guidance.¹²⁹ Although the ACTEC recommendations are designed for a trusts and estate practice, they provide a useful starting point to help students visualize how both large firms and small firms might implement the concepts embodied in the Guidance.¹³⁰

126. See, e.g., Terry, *supra* note 8. This article was part of a FATF program I helped organize for the AALS's 2010 Annual Meeting, when I was chair of the AALS Section of Professional Responsibility. The presentation slides from that program, along with my presentation slides from the 2012 Midyear Meeting of the National Organization of Bar Counsel, are cited on my “Presentations” web page under the heading “Financial Action Task Force (FATF) and Lawyer Regulation.” See Laurel S. Terry, *Selected Presentations*, PENN ST., <http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm> (last visited Apr. 10, 2015). For the last two years, I have served as a member of the ABA Task Force on Gatekeeper Regulation and the Profession.

127. RUSSELL G. PEARCE, DANIEL J. CAPRA, BRUCE A. GREEN, RENEE KNAKE & LAUREL TERRY, *PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH* 404 (West 2d ed. 2013) (containing a “Global Perspectives” note that focuses on the FATF and the Guidance).

128. See *GOOD PRACTICES GUIDANCE*, *supra* note 84, at 38–39.

129. See *Recommendations of Good Practices for ACTEC Fellows Seeking to Detect and Combat Money Laundering*, AM. C. TRUST & EST. COUNSEL (Oct. 24, 2005), http://www.actec.org/public/Governmental_Relations/FATFBestPractices.asp.

130. *Id.* One can also look outside the United States for assistance. For example, the Federation of Law Societies of Canada has adopted model rules related to Know Your Client (KYC) and accepting cash from clients. See *Model Rules to Fight Money Laundering and Terrorist Financing*, FED’N L. Soc’yS CANADA, available at <http://www.flsc.ca/en/model-rules-to-fight-money-laundering-and-terrorist>

I also took the opportunity while writing this article to consider actions the ABA Gatekeeper Task Force might take to increase the effectiveness of its outreach. I concluded that it might be useful to post on its web site a summary of the Guidance (similar to that found in the Appendix to this article) and links to the outreach efforts by state bars.¹³¹ Having these links centralized on a web page could encourage those jurisdictions that currently do not have links to add them, and could also make it easier for lawyers to locate the web pages, CLE sessions, and webinars that are most relevant to their practice. Another step I recommend is posting on the ABA Gatekeeper web page a set of clearly labeled “CLE” materials that state bars and others could use when creating an education program. This package could include not only the Guidance and the FAQ, but newly generated documents such as the summary referred to above, sample intake forms, hypotheticals, and perhaps some law review and *ABA Journal* articles.

Finally, I recommend that the ABA Task Force prepare a short summary of the U.S. government document entitled “Money Laundering Threat Assessment” to use in connection with CLE sessions and to post on its web page.¹³² This document would help lawyers understand the seriousness of these issues and why it is important for lawyers to avoid unwittingly assisting money launderers or those involved in terrorist financing. U.S. lawyers need to recognize the important role they can play in facilitating—or inhibiting—these types of criminals.

V. CONCLUSION

Most U.S. lawyers are not criminals and will not intentionally participate in money laundering or terrorist financing schemes. For those lawyers who are willing to engage in such intentional wrongdoing, however, the United States has an elaborate system of criminal laws and disciplinary sanctions.

Because intentional conduct is addressed by both criminal law and lawyer discipline, the U.S. legal profession’s response to the Recommendations has focused on educational efforts to help U.S. lawyers avoid *unwittingly* assisting a client who is

financing/ (last visited Apr. 10, 2015). These rules have been implemented throughout Canada. A number of provinces provide forms for lawyers to use as part of the client identification and verification process. *See, e.g.*, LAW SOC’Y OF UPPER CAN., BYLAW 7.1, PART III: CLIENT IDENTIFICATION AND VERIFICATION 7, available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485777> (last visited Apr. 10, 2015); N.S. BARRISTERS’ SOC’Y, REGULATIONS MADE PURSUANT TO THE LEGAL PROFESSION ACT § 4.5 (2014), available at <http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/currentregs.pdf>. Although the Canadian KYC rules have been criticized by a leading Canadian commentator for not utilizing the risk-based approach, *see* sources cited *supra* note 66, the Canadian forms can provide helpful, concrete questions for lawyers who are unsure where to begin with a risk-based approach and for whom the trusts-and-estates-based sample intake form is inapplicable.

131. *See supra* note 72 (highlighting some of these web pages).

132. For information about the most recent Threat Assessment, *see* 2007 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 44, at app. A. The web page of the ABA Task Force on Gatekeeper Regulation and the Profession is a useful one-stop location for relevant information. *See Task Force on Gatekeeper Regulation and the Profession*, AM. B. ASS’N, http://www.americanbar.org/groups/criminal_justice/gatekeeper.html (last visited Apr. 10, 2015).

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engaged in money laundering or terrorist activities. Over the years, U.S. legal organizations have developed a series of policy documents that are more detailed and profession-specific than the Recommendations. These documents include the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, referred to in this article as the Guidance; the ABA FAQ document regarding the Guidance; ABA Formal Opinion 463; and the 2014 Lawyer's Guide prepared by the ABA, CCBE, and IBA.

These documents provide the backbone for the educational efforts directed towards U.S. lawyers and regulators. The goal is to encourage U.S. lawyers to use a risk-based approach in which they thoughtfully consider client, service, and geographic risks when deciding whether to represent a client. While there is still work to be done with respect to educating U.S. lawyers about how to avoid unwitting involvement in money laundering or terrorist financing, it is clear that progress is being made. U.S. lawyers and legal organizations should continue their efforts so, at the client intake stage, it becomes as natural for lawyers to consider money laundering and terrorist financing issues as it is for them to consider conflict of interest issues.

In my view, the U.S. government and the U.S. legal profession are to be commended for taking the "long view" in their approach to implementing the Recommendations. Done well, a risk-based approach can engage lawyers' hearts and minds and draw upon their commitment to avoid assisting money launderers or terrorists. I believe that few lawyers would knowingly and willingly provide such assistance. For this reason, an educational approach can be much more effective in stopping terrorism and money laundering than a rules-based approach that may lead to lawyers (or their staff) mindlessly checking boxes without thinking of the consequences. Lawyers must learn how sophisticated clients might attempt to use their services and take steps to avoid unwittingly assisting such clients. Such a result would be helpful to the United States and to the world at large.

APPENDIX

**Laurel Terry's Summary & Supplement to the
Voluntary Good Practices Guidance (VGPG)¹**

(Prepared by Laurel Terry, LTerry@psu.edu)

ABA Model Rule 1.2(d) provides that a “lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” ABA Model Rule 1.16(a) requires that a lawyer withdraw from representation if “the representation will result in violation of the rules of professional conduct or other law.” Under Rule 8.4, a lawyer is subject to discipline if the lawyer violates or attempts to violate a rule of professional conduct, commits a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; or engages in conduct involving dishonesty, fraud, deceit or misrepresentation, or that is prejudicial to the administration of justice. Most state ethics rules are substantially similar to these Model Rules. Because U.S. lawyers are subject to stringent conflict of interest rules (Rules 1.7–1.9), client identification is a necessary part of lawyers’ practices.

In 2008, the FATF adopted a risk based guidance document entitled “RBA Guidance for Legal Professionals.” This document is “high-level” guidance intended to provide a broad framework for implementing a risk-based approach for the legal profession. It urged the legal profession and individual countries to develop and implement “an effective risk-based approach.” (FATF RBA Guidance at ¶¶ 6–7). In 2010, a significant number of U.S. legal profession organizations endorsed the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (VGPG) (The ABA House of Delegates endorsed the VGPG document in August 2010). The VGPG summarizes the FATF RBA Guidance but provides more detailed guidance to U.S. lawyers by including Practice Pointers and Appendix A (p. 38) regarding client intake. ABA Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing (May 23, 2013) confirms that lawyers who use the risk-based control measures detailed in the VGPG to avoid aiding illegal activities are acting in a manner consistent with the Model Rules. This Summary is not intended to replace the VGPG but to provide a shorter, more visual summary and to help U.S. lawyers more quickly locate the relevant section of the VGPG, including its Practice Pointers.

- In addition to the VGPG, lawyers may find it useful to consult the October 2014 Lawyers’ Guide jointly prepared by the International Bar Association, the CCBE, and the ABA.²

1. AM. BAR ASS’N, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2010), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/voluntary_good_practices_guidance.authcheckdam.pdf.

2. AM. BAR ASS’N, A LAWYER’S GUIDE TO DETECTING AND PREVENTING MONEY LAUNDERING (2014), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf.

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Are any of the following present? (See VGPG Practice Pointers (PP) found on pp. 12–14)

1. Buying or selling of Real Estate?
2. Managing client money, securities, or other assets?
3. Management of bank, savings, or securities account?
4. Organization of contributions for the creation, operation, or management of companies?
5. Creation, operation/management of legal persons or arrangements, and buying and selling of business entities?

❖ *If the answer to any of these questions is “YES,” perform **Client Due Diligence** (CDD).*

In determining the appropriate *level* of CDD,
consider the three major risk categories:

1. **Country/Geographic Risk** (See PP on p. 16)
2. **Client Risk** (See PP on pp. 17–21)
The FATF RBA Guidance identifies ten categories of potentially higher risk clients: (1) politically exposed persons (PEPS); (2) unusual activity; (3) masking beneficial ownership; (4) cash intensive business (unless subject to AML/CFT regulation); (5) charities and NPOs not subject to monitoring or supervision; (6) financial intermediaries not subject to adequate AML/CFT rules; (7) clients with criminal convictions; (8) clients with no address/multiple addresses; (9) unexplained change in instructions; and (10) structures with no legal purpose.
3. **Service Risk** (See PP on pp. 21–28)
The FATF RBA Guidance identifies fourteen types of services that are at higher risk for money laundering and terrorist financing. These typically involve the movement of funds and/or the concealment of beneficial ownership: (1) touching the money test; (2) concealment of beneficial ownership; (3) performing services outside area of expertise; (4) accelerated real estate transfers; (5) cash payments and payments from other sources; (6) inadequate consideration; (7) estate administration where the decedent had been convicted of proceeds generating crimes; (8) extraordinary legal fees; (9) source of funds/wealth; (10) out of character transactions; (11) shell companies; (12) hard-to-identify trust beneficiaries; (13) anonymity; and (14) trust services.

Controls for Higher Risk Clients: The FATF RBA Guidance does not prohibit a lawyer from representing a higher-risk client, but it directs the lawyer to implement appropriate measures and controls to mitigate the potential money laundering and terrorist financing risks of those higher-risk clients.

- ❖ These measures and controls may include the following: (1) general training; (2) specific training; (3) enhanced due diligence; (4) peer/managerial oversight; (5) evolving evaluation of services; (6) ongoing/evolving evaluation of clients; and (7) overlap.

These measures, together with a Practice Pointer, are set forth in greater detail on pp. 32–34.

Variables That May Affect Risk: In determining the appropriate level of CDD, the FATF RBA Guidance identifies a number of variables that may require *enhanced* due diligence or that may lead the lawyer to conclude that *standard CDD can be reduced*:

- ❖ These variables include: (1) the nature of the client relationship; (2) existing regulation; (3) reputation and publicly available information; (4) regularity/duration of relationship; (5) familiarity with country/laws; (6) duration/magnitude of attorney-client relationship; (7) local counsel; (8) geographic disparity; (9) one-shot transactions; (10) technological developments favoring anonymity; (11) client origination/referral source; (12) structure of client/transaction; and (13) trusts that are pension funds.

Each of these risk variables is discussed in greater detail in the VGPG Practice Pointers on pp. 28–32.

Basic Protocol for Client Intake and Assessment (VGPG pp. 34–39), including its Appendix A:

Standard Level of Client Due Diligence

Individual Clients	Organizational Clients (including trusts & estates)
<p>1. <u>Identify</u> the client and <u>verify</u> that client's identity using reliable independent source documents, data, or information. <u>Document</u> the findings. <i>See</i> VGPG on p. 35</p> <p><i>See</i> VGPG on p. 35 at 6.1 for examples of information and documents the lawyer may use. <i>See</i> Appendix A at 1.1, p. 38 for additional identity information a lawyer should seek depending on the circumstances. <i>See</i> 2.1 for potential verification steps, depending on the risk profile of the client, including an OFAC scan, other searches, and background checks. <i>See</i> VGPG Appendix A, #2 on p. 39; <i>see also</i> url cited on the following page.</p> <p>2 Obtain information on the purpose and intended nature of the business relationship. <i>See</i> p. 35.</p>	<p>1. <u>Identify</u> the client and <u>verify</u> the client's identity using reliable independent source documents, data, or information. <u>Document</u> the findings. <i>See</i> VGPG on p. 35.</p> <p><i>See</i> VGPG on p. 35 at 6.1 and 6.2 for examples of information and documents the lawyer may use. <i>See</i> Appendix A at 1.2, p. 38 for additional identity information a lawyer should seek depending on the circumstances. <i>See</i> Appendix A at 2.1 on p. 39 for potential verification steps, depending on the risk profile of the client, including an OFAC scan, other searches, and background checks.</p> <p>2. Obtain information on the purpose and intended nature of the business relationship. <i>See</i> VGPG p. 35.</p>

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Enhanced Level of Client Due Diligence	Reduced Level of Client Due Diligence
<ul style="list-style-type: none"> • Clients that are reasonably determined by the lawyer to be of higher risk require enhanced CDD. • Enhanced client due diligence means a more in-depth, systematic inquiry into the client and its ownership and business activities. • The lawyer needs to ensure that the client and its ownership and business activities comply with applicable law and that no criminal activity is involved. <i>See VGPG PP at p. 36.</i> 	<p>Lawyers can use reduced CDD with:</p> <ol style="list-style-type: none"> 1. Publicly listed companies. 2. Financial institutions subject to AML/CFT regulation. 3. Government authorities and state-run enterprises. <i>See VGPG p. 36.</i> <p><i>See also the prior risk-based analysis on pp. 488–489.</i></p>

CRITICAL NOTE: “Not every risk-based approach analysis of a potential client will inexorably lead to the conclusion that, with appropriate controls, the lawyer can accept and proceed with the proposed engagement. ***It may be possible that the lawyer’s analysis will lead the lawyer to reject the engagement or to withdraw from the representation.***” *See VGPG p. 37; see also your state’s equivalent of ABA Model Rules 1.2(d), 1.16, and 8.4. Periodic review may be appropriate depending on the risk factors. The VGPG and ACTEC Sample Intake forms are very helpful. See generally AM. BAR ASS’N, APPENDIX A: BASIC CLIENT INTAKE, http://www.americanbar.org/content/dam/aba/uncategorized/GAO/voluntarygoodpracticesguidance_Appendix%20A.authcheckdam.pdf (last visited Apr. 10, 2015); AM. COLL. OF TRUST & ESTATE COUNSEL, FATF AND THE GOOD PRACTICES GUIDANCE (Mar. 11, 2010), *available at* <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/ACTEC%20Appendix%20C.authcheckdam.pdf>.*

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