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The Financial Action Task Force and the Legal Profession

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The Financial Action Task Force and the Legal Profession

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This article is based on remarks given at the *New York Law School Law Review* symposium entitled: “Combating Threats to the International Financial System: The Financial Action Task Force.”

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THE FINANCIAL ACTION TASK FORCE AND THE LEGAL PROFESSION

The Financial Action Task Force (FATF) was established in 1989 by the G7 nations (United States, United Kingdom, Germany, France, Italy, Japan, and Canada), the European Commission, and eight other countries.¹ The FATF was created “to adopt and implement measures designed to counter the abuse of the financial system by criminals.”² In 1990, within a year of its inception, the FATF issued the original version of its now well-known Forty Recommendations. These recommendations were essentially a comprehensive plan of action to fight money laundering.

In 2001, the FATF expanded its mission to include the fight against terrorist financing (combat the financing of terrorism, or CFT). That October, following the September 11 terrorist attacks, the FATF adopted eight new Special Recommendations to its original forty, and, in 2004, added a ninth Special Recommendation. These new Recommendations were sometimes collectively referred to as the 40+9 Recommendations, but in February 2012, the FATF consolidated the 40+9 Recommendations into a revised Forty Recommendations, which remain today as the international standards for combating money laundering and terrorist financing. Most pertinent to the practice of law are Recommendations 22 through 25 regarding customer due diligence and transparency-beneficial ownership of legal persons or arrangements.

As of April 2014, the FATF is composed of thirty-four member jurisdictions and two regional organizations. Delegates to the FATF are not elected, and the FATF has no legislative authority. The FATF cannot make law, but member countries voluntarily support and are committed to its principles. The FATF makes legislative recommendations to its members, countries then respond (or don't), and the FATF monitors and evaluates the implementation of the Forty Recommendations. If members fail to enact laws based on the Recommendations, the FATF applies peer pressure through a number of mechanisms to encourage and promote the requisite legislation.³

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1. *History of the FATF*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/historyofthefatf/> (last visited Apr. 10, 2015). For an exceptional treatment of the history of the Financial Action Task Force (FATF) from a U.S. perspective, see Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers*, 43 REAL PROP. TR. & EST. L.J. 607 (2009).
 2. Paul Vlaanderen, *Foreword to Global Money Laundering & Terrorist Financing Threat Assessment*, FIN. ACTION TASK FORCE 3 (2010), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Global%20Threat%20assessment.pdf>.
 3. The mechanisms used by the FATF include:

In the self-assessment exercise, every member country provides information on the status of its implementation of the 40 Recommendations . . . by responding each year to a standard questionnaire. This information is then compiled and analyzed, and provides the basis for assessing the extent to which the Recommendations have been implemented by both individual countries and the group as a whole. The second element for monitoring the implementation of the 40 Recommendations is the mutual evaluation process. Each member country is examined in turn by the FATF and MONEYVAL on the basis of an on-site visit conducted by a team of selected experts in the legal, financial and law enforcement fields from other member governments. The purpose of the visit is to draw up a report assessing the extent to which the evaluated country has moved forward in implementing an effective system to counter money laundering and to highlight areas in which further progress may still be required. The mutual evaluation process is enhanced by the FATF's policy for dealing with members not in compliance with the 40

According to the article “Monitoring the Implementation of the Forty Recommendations,” the FATF’s policy for handling noncompliant countries includes steps such as the following: requiring the noncompliant country to submit a progress report; a letter or high-level mission from the president of the FATF to the country not in compliance; a statement to financial institutions requesting that special attention be given to any transactions involving the noncompliant country; and suspending the noncompliant country’s membership in the FATF.⁴ The FATF also has powerful institutional allies in the World Bank and the International Monetary Fund and has suggested that the influence of these organizations will be brought to bear against recalcitrant nations worldwide.

For the past ten years, I along with others—as representatives of The American College of Trust and Estate Counsel (ACTEC) and of the American Bar Association (ABA)—have engaged with both the FATF and the U.S. Department of the Treasury. The Treasury is responsible for carrying out the FATF’s mandates in the United States on the subjects of anti-money laundering (AML) and CFT recommendations as they affect the practice of law in the United States. The decade of my involvement coincides with the timeframe in which the FATF has sought to extend its mandate from financial institutions to include “designated non-financial businesses and professions” (DNFBPs) such as lawyers.⁵ In this role, I have come to the conclusion that the FATF process is deeply flawed. And while some good has come from it, the exercise has been not only biased, but inefficient from a time, effort, and cost perspective.

By sheer coincidence, approximately ten years ago I was a member of a program committee charged with putting together a presentation for The International Academy of Estate and Trust Law (“Academy”) at its annual meeting in Santa Fe, New Mexico. The Academy attempts to have programs that focus on the laws within the meeting venue’s jurisdiction. What the program committee quickly learned is that three separate and vibrant legal systems hold sway in New Mexico: indigenous Native American laws, civil law via Mexico and Spain, and common law from the

Recommendations. The measures contained in this policy represent a graduated approach aimed at reinforcing peer pressure on member governments to take action to tighten their anti-money laundering systems.

European Union Comm., *Money Laundering and the Financing of Terrorism*, 19th Report of 2008–2009 Sess. (Vol. II), at 110 (2009).

4. FIN. ACTION TASK FORCE, THIRD ROUND OF AML/CFT MUTUAL EVALUATIONS: PROCESS AND PROCEDURES 14 (2009), available at <http://www.fatf-gafi.org/media/fatf/documents/process%20and%20procedures.pdf>.
5. See FIN. ACTION TASK FORCE, THE FATF RECOMMENDATIONS 19–20 (2012), available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (A decade after the creation of the FATF, Recommendation 22 sought to enlist the support of so-called “gatekeepers” to combat money laundering and terrorist financing. “Gatekeepers” include certain designated non-financial businesses and professions (DNFBPs) such as lawyers, notaries, trust and company service providers (TCSPs), real estate agents, accountants, and auditors who assist with transactions involving the movement of money in the domestic and international financial systems. This effort is known as the “Gatekeeper Initiative.”).

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United Kingdom. Furthermore, these three regimes do not peacefully co-exist, do not fit neatly together, and produce constant tensions in their interactions.⁶

Similar dysfunctionality is at work in the FATF process where a clash between civil law and common law jurisprudence is playing out in the FATF's operations. The roles that lawyers and notaries play in civil law systems do not parallel the roles their counterparts play in common law regimes. As a general matter, civil law practitioners and notaries are considered facilitators and functionaries integral to the operation of the legal process, as opposed to the more independent role that lawyers typically play in common law countries. Again, as a generalization (but not an overstatement), the role of the lawyer as an independent actor in the legal system is more fundamental to common law jurisdictions.

In this regard, the FATF's grouping of DNFBSs is both odd and telling. This broad category cavalierly lumps lawyers together with businesses, such as casinos and dealers in precious metals and stones. Such a peculiar and circumscribed view of the role of lawyers in society could only be produced by a mindset that perceives lawyers as simply one more commercial trade in need of AML and CFT regulation, with no special considerations. However, if the FATF has its way and continues to ignore the unique role of lawyers as guardians of the personal freedoms, liberties, and protections to which citizens are entitled, some of those protections (such as the attorney-client privilege and the duties of loyalty and confidentiality owed by lawyers to their clients) will be marginalized.

As matters presently stand in the United States under the FATF Recommendations, lawyers are not required to report suspicious client activities of relevant information obtained in circumstances of "professional secrecy or legal professional privilege." However, the FATF's reluctance to distinguish the role of lawyers in society from the roles of other professionals is pushing the FATF in the direction of broader application of simplified due diligence, suspicious activity reporting, and suspicious transaction reporting requirements for lawyers. This trend, in turn, threatens the integrity of core

6. The complexities of these regimes are exhibited in water law, criminal law, civil law on pueblos, and state law.

Water Law: Where a person owns land on a water system (river) and there are pueblos near or on the same system, then the issue as to priority is first in time is first in right. Federal law allows pueblos to claim water based upon use of every practicably irrigable acre. *See generally* Samantha Ruscavage-Barz & Diane Albert, *Indian Reserved Water Rights*, <http://dianealbertlaw.com/documents/INDIAN%20RESERVED%20WATER%20RIGHTS.pdf> (last visited Apr. 10, 2015). This can mean that pueblo use could consume all available water on a stream system or river system. The old Spanish system of first in use (beneficial use) is first in time. New Mexico has adopted this approach. N.M. STAT. ANN. § 72-1-2 (2013).

Criminal Law: If a crime is committed on a reservation, the federal criminal law applies. Misdemeanors on a reservation are managed by pueblo court systems, and state law does not apply. *See* Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/may-2012/indian-country-and-the-tribal-law-and-order-act-of-2010> (last visited Apr. 10, 2015).

Civil Law on Pueblos: Unless there is a waiver of sovereign immunity by a pueblo (which must be done with the Bureau of Indian Affairs' consent), you must sue in pueblo court and state courts have no jurisdiction. If a pueblo Indian conducts business off the reservation, then New Mexico Civil law applies, or federal law if you are in federal court. *See* Padilla v. Pueblo of Acoma, 754 P.2d 845 (N.M. 1988).

State Law: State law applies to all contracts outside of pueblo exterior boundaries, both civil and criminal. Pueblo Indians are subject to state law off the pueblo. 25 U.S.C. § 1321 (2013).

principles of the U.S. legal system, including the attorney-client privilege, the duty of client confidentiality, the duty of client loyalty, the independence of lawyers, and the historical prerogative of state regulation of lawyers—not to mention the Sixth Amendment to the U.S. Constitution, which ensures the right to counsel in criminal cases.

Lawyers are bound by ethical rules controlling their professional activities. The ABA's Model Rules of Professional Conduct ("Model Rules") have been adopted by forty-nine states, the District of Columbia, and the U.S. Virgin Islands (with modifications in some cases). The ABA believes that the intersection of the practice of law with matters of AML and CFT is already properly defined by the Model Rules and the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing ("Good Practices Guidance"), and that they are more than sufficient to help lawyers avoid unwitting assistance to unlawful activities, such as money laundering and terrorist financing. On May 23, 2013, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing on this subject. Formal Opinion 463 concludes that by implementing the Good Practices Guidance, lawyers can avoid aiding illegal activities in a manner consistent with the Model Rules. Further, it indirectly suggests that certain aspects of the FATF's proposals to regulate lawyers as "gatekeepers" to the financial system may be inconsistent with the Model Rules.

To date, the approach to engaging lawyers in the fight against money laundering has been risk-based, has avoided the filing of suspicious activity reports, and has been voluntary. To continue in these directions—and to blunt the rules-based trend of thinking currently evident at the G8, the FATF, and in some corners of Congress and the White House—the acceptance of the Good Practices Guidance by lawyers in the United States needs to be enthusiastic and participatory. Anything less by lawyers and their organizations may well result in burdensome federal regulation of the legal profession.

Contrast the FATF's DNFBP mindset with the much broader and more fundamental lawyer role recently underscored in a Canadian appellate court decision. The Canadian Court of Appeal for British Columbia recently held unconstitutional laws that applied AML and CFT obligations to lawyers. While acknowledging the importance of the fight against money laundering and terrorist financing, the court held that the application of that specific Canadian legislation to lawyers violated the liberties guaranteed under Canadian constitutional law.⁷

While the case was affirmed by the Supreme Court of Canada,⁸ it is the appellate court's language that resonates: The independence of the bar "is fundamental to the way in which the legal system ought to operate." Regulation of the bar must be designed to protect the legal profession from state interference. "The public interest in a free society knows no area more sensitive than the independence, impartiality,

7. Fed'n of Law Societies of Can. v. Canada, 2013 BCCA 147.

8. Fed'n of Law Societies of Can. v. Canada, 2015 S.C.C. 7.

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and availability to the general public of the members of the bar and through those members, legal advice, and services generally.”⁹

This decision well articulates a philosophy that seeks to protect the liberty interests of the attorney and the client. This independence of lawyers and the duties owed to citizens are inherent aspects of a free and democratic system. However, such wide-ranging notions of the lawyer’s role are not endemic to civil law systems.

Another factor in the clash of systems stems from the formation and operation of European Union jurisprudence. The EU itself states:

The EU is a unique economic and political partnership between 28 European countries that together cover much of the continent. . . . The EU is based on the rule of law: everything that it does is founded on treaties, voluntarily and democratically agreed by all member countries. These binding agreements set out the EU’s goals in its many areas of activity.¹⁰

The consequence of these goals and principles is necessarily a sacrifice of national sovereignty, but it seems also to have led to a collective willingness to acquiesce to the recommendations or actions of any international body without meaningful dissent.

There is significant overlap of membership between the EU member countries and the FATF member countries. Therefore, the bureaucratic attitude of deference to international organizations is consistent between the two. Indeed, most FATF member countries have accepted, without challenge, the Forty Recommendations, even in the face of well-reasoned assertions that some of the Recommendations are not supported by empirical evidence.¹¹

Another challenge for those coming from civil law countries is the lack of trust law jurisprudence in civil law systems. As common law practitioners know, a trust is not an entity—it is a relationship. This concept is completely foreign to civil law and its practitioners and, for many of them, it is impossible to comprehend. The FATF delegates from civil law countries appear not to understand the separation of legal and equitable title, and they typically encounter trusts only in the context of tax evasion.

Indeed, the FATF’s Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing describes the following services as high risk for money laundering abuses: “Services that inherently have provided more anonymity or

9. Robert C. Lawrence, III & Margaret Van Houten, *Anti-Money Laundering and Counter Terrorist Financing Laws Not Applicable to Canadian Lawyers and Law Firms*, AM. C. TR. & EST. COUNSEL (2013), http://www.actec.org/public/FATF_Whitepaper_Anti_Money_Laundering_Laws_Not_Applicable_to_Canadian_Lawyers.asp#_ftn1 (quoting *Canada v. Law Soc’y of B.C.*, [1982] 2 S.C.R. 307, 336 (Can.)).

10. *How the EU Works*, EUR. UNION, http://europa.eu/about-eu/index_en.htm (last visited Apr. 10, 2015).

11. The author knows of four cases, two in France and two in Belgium, where lawyers contested the FATF Recommendations: (1) *Michaud v. France*, App. No. 12323/11, Eur. Ct. H.R. (2012); (2) Conseil d’État [CE] [highest administrative court] decision No. 296845,29690, Apr. 10, 2008, <http://www.conseil-etat.fr> (Fr.); (3) Cour Constitutionnelle [CC] [Constitutional Court] decision No. 91/308, June 26, 2007, <http://www.const-court.be> (Belg.); and (4) Cour Constitutionnelle [CC] [Constitutional Court] decision No. 10/2008, Jan. 23, 2008, <http://www.const-court.be> (Belg.).

can readily cross international borders, such as online banking, stored value cards, international wire transfers, private investment companies and *trusts*.”¹²

This bald assertion is simply untrue. While there might be a certain ambiguity or anonymity with respect to trust beneficiaries, that is the exception—not the rule. And there is certainly no ambiguity or anonymity regarding the trustee, i.e., the named party who controls the trust assets. In addition, the notion that trusts can “readily cross international borders” is patently false, as anyone who has tried to migrate a trust to another jurisdiction knows full well. Finally, this grouping of trusts with such things as “stored value cards” is as anomalous as the previously mentioned grouping of lawyers with casinos. Both groupings reflect dichotomies in fundamental comprehension; trusts, and not stored value cards, are used as estate planning tools, just as lawyers, and not casinos, serve to protect our citizens’ freedoms and liberties.

This conclusion by the FATF that trusts are high risk has not been supported by evidence, or even one real life example. Nevertheless, the FATF has pushed hard for the engagement of trust lawyers in their processes, has recommended that trust lawyers be subjected to onerous obligations, and has been successful in persuading the European Parliament to pass legislation to require member states to implement public registries of trusts.

While ACTEC was invited to assist the FATF with trust issues, its voice was ultimately ignored. Efforts by ACTEC to address these misunderstandings were to no avail. For example, the following is an Interpretive Note by the FATF to Recommendation 25: “Countries should require trustees of any express trust governed under their law to obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust.”

That language was discussed at a meeting convened by the FATF with the private sector in Milan in December of 2011.¹³ Trust lawyers argued for revisions to the then-proposed Interpretive Note to make clear that the focus of compliance and enforcement should be on the jurisdiction where the *trustee* is located. Under trust law, the only way to achieve meaningful compliance results is to put the burden on the country with jurisdiction over the trustee, not the country whose governing law has been selected for the trust, since the latter country would likely have no knowledge that the trust even exists.

The following example was offered. Assume a trust is created by a New Zealand resident, with a New Zealand trustee, and funded with New Zealand assets, but the settlor selects Delaware as the governing law for the trust. Under the FATF approach, since Delaware is the governing law of the trust, the compliance burden would be

12. FIN. ACTION TASK FORCE, GUIDANCE ON THE RISK-BASED APPROACH TO COMBATING MONEY LAUNDERING AND TERRORIST FINANCING: HIGH LEVEL PRINCIPLES AND PROCEDURES 24 (June 2007), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf>.

13. Memorandum from Kevin L. Shepherd, Partner, Venable LLP, summarizing a Fin. Action Task Force Private Sector Meeting held on Dec. 5–6, 2011 in Milan, It. to Am. Bar Ass’n Task Force on Gatekeeper Regulation & the Profession; William H. Clark Jr., Partner, Drinker Biddle & Reath LLP; R. Larson Frisby, Am. Bar Ass’n Assoc. Dir. of Governmental Affairs; and Duncan E. Osborne, Partner, Osborne, Helman, Knebel & Scott LLP (Jan. 9, 2012) (on file with author).

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placed on the United States (via Delaware) even though there is no way that either the United States or Delaware would know what had been done in New Zealand. This self-evident point was ignored by the FATF, and I advocated that the issue be addressed before the language of the Interpretive Note became final.

The above example is all too typical. The FATF's staging of private sector consultations has been in many aspects a charade. There is the appearance of an interactive forum and a meaningful exchange of ideas, but in all too many cases the FATF has already choreographed and scripted its positions, which are not altered in the consultation process. Agendas and discussions are preset and are not changed no matter how compelling the arguments. No substantive dialogue ensues at these meetings—and debate is hollow.

Another example of misguided thinking is the FATF's perception that lawyers are a significant part of the money laundering and terrorist financing problem. In the face of persistent requests for examples of lawyer involvement in money laundering and terrorist financing schemes, the FATF ultimately produced a Typologies Report in which nearly all evidence of lawyer participation was knowing and intentional involvement, i.e., lawyers committed to a criminal enterprise.¹⁴ Nevertheless, the FATF proposes to regulate the vast body of law-abiding lawyers in order to abate the actions of a handful of lawyers who certainly will not be paying any attention to the FATF as they deliberately, intentionally, and knowingly commit money laundering and terrorist financing crimes. Thus, there is no connection between the problem the FATF diagnoses and the cure it prescribes. A cynic might conclude that the FATF's real motive is not to regulate lawyers, but rather to have them serve as detectives and reporters for law enforcement.

Lawyers engaged in the FATF process have, however, acknowledged a real risk of a law-abiding attorney becoming unwittingly involved in a money laundering or terrorist financing scheme. Since the FATF had no examples of such activity, lawyer groups have independently embarked on an effort to produce such typologies.¹⁵

On yet another front, the FATF is part of the apparently universal chorus calling for "transparency" in all things legal while demonstrating a stubborn unwillingness to question the goal of transparency or to consider logical conditions or restraints on transparency. For the FATF, apparently, every person and every legal entity or arrangement must reside in a glass house. Forgotten is the fact that very valid reasons for personal and professional privacy exist. In the business world, trade secrets and business plans often depend on confidentiality. In our highly competitive society, businesses and professions may fail or succeed depending on the sanctity of information.

14. *See generally* FIN. ACTION TASK FORCE, MONEY LAUNDERING AND TERRORIST FINANCING VULNERABILITIES OF LEGAL PROFESSIONALS (June 2013), *available at* www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf; *see also* INT'L BAR ASS'N, AM. BAR ASS'N, & COUNCIL OF BARS & LAW SOCIETIES OF EUR., A LAWYER'S GUIDE TO DETECTING AND PREVENTING MONEY LAUNDERING (Oct. 2014) [hereinafter *LAWYER'S GUIDE*], *available at* <http://www.actec.org/public/Documents/A-Lawyers-Guide-to-Detecting-and-Preventing-Money-Laundering-October-2014.pdf>.

15. *LAWYER'S GUIDE*, *supra* note 14.

On the personal front, an individual's desire for privacy can stem from personal and practical sources. Certainly concerns about kidnapping, personal safety, and identity theft are valid. A person can have understandable and reasonable goals regarding: (1) his profile or visibility in a community; (2) confidentiality in relationships; (3) solicitations, charitable and noncharitable; and (4) sensitive estate planning goals accomplished through trusts. The runaway race to transparency tramples heedlessly over these legitimate objectives and, while the FATF gives an obligatory nod to privacy and individual rights, there is no meaningful effort to balance the competing goals of individual privacy and legal transparency.

Finally, and most compelling, history is filled with an ever-enduring abuse of citizens by governments. Examples are legion, and who is to say that the result of this blind devotion to the icon of transparency without thought, scrutiny, or balance cannot lead to another round of governments abusing citizens?

In my view, the efforts of the FATF exercise have been neither effective nor cost efficient. To the contrary, those efforts are moving us in the direction of serious infringements on individual liberties and costly burdens on financial institutions and DNFBPs. I am not alone in this conclusion.

On January 30, 2014, the Center on Law and Globalization issued its paper "Global Surveillance of Dirty Money: Assessing Assessments of Regions to Control Money-Laundering and Combat the Financing of Terrorism." This study concludes that there has been no serious effort to assess the costs versus the benefits of the FATF system, and the entire effectiveness of the FATF work is called into question.

On February 6, 2014, Gregory J. Millman of the *Wall Street Journal* stated:

Anti-money laundering efforts by the International Monetary Fund and the Financial Action Task Force have built a "Potemkin village" and a "paper reality" based on "a plausible fold theory" rather than data and evidence of what works, co-authors of a new, independent report said in interviews with Risk & Compliance Journal. The report had the cooperation of IMF and FATF officials and examined the third round of country assessments for anti-money laundering, conducted in the 2003-2012 period. "We find that the current system is pervasive and highly intrusive but without any evidence as to tangible effect," said Terence C. Halliday, co-director of the Center on Law and Globalization.¹⁶

While I have been quite critical of the FATF and its processes, there have been some benefits from the overall FATF effort. As a result of extensive and somewhat heated arguments by lawyers, the FATF ultimately agreed to develop separate templates for the various DNFBPs. The FATF had originally proposed a single, monolithic guidance for all DNFBPs, such as guidance that attempted to regulate lawyers and, for example, dealers in precious metals and stones, in exactly the same way. The lack of wisdom in that approach was finally recognized, and the FATF gave up on its one-size-fits-all model. Eventually, in October 2008, the FATF

16. Gregory J. Millman, *The Morning Risk Report: The Potemkin Village of Anti-Money Laundering*, WALL ST. J. RISK & COMPLIANCE J. (Feb. 6, 2014, 6:23 AM), <http://blogs.wsj.com/riskandcompliance/2014/02/06/the-morning-risk-report-the-potemkin-village-of-anti-money-laundering/>.

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adopted the Risk Based Approach Guidance for Legal Professionals (“2008 RBA”). While this was certainly a positive development, the FATF subsequently initiated a process of updates to the risk-based guidance documents for the private sector. It is possible that the gains achieved in the 2008 RBA may be swept away under the guise of revisions. A case in point is the treatment of lawyers filing suspicious activity reports on their clients. This concept was appropriately addressed in the 2008 RBA, but is now apparently back on the table for discussion.

Another welcomed side effect of the FATF exercise is the previously mentioned Good Practices Guidance. Departing from the 2008 RBA, this Guidance was produced by a collaborative effort of representatives of the ABA Task Force on Gatekeeper Regulation and Profession, the ABA Section of Real Property, Trust and Estate Law, the ABA Section of International Law, the ABA Section of Business Law, the ABA Section of Taxation, the ABA Criminal Justice Section, ACTEC, the American College of Real Estate Lawyers, the American College of Mortgage Attorneys, and the American College of Commercial Finance Lawyers. Ultimately the U.S. Treasury Department endorsed the document:

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.¹⁷

I would interject here that the interactions with officials from the Treasury Department have differed markedly from those with the FATF bureaucrats. Treasury personnel have certainly not always agreed with representatives of the U.S. legal profession, but their communications have been open, rational, and reasoned. These substantive and meaningful dialogues have helped all parties find common ground and avenues for progress in the areas of AML and CFT.¹⁸

The Good Practices Guidance and seminars related to its dissemination have alerted lawyers to real life money laundering issues, precautionary measures, and the appropriate responses thereto. Lawyers have been—and are being educated about—money laundering and terrorist financing risks, the greatest of which is unintentionally allowing illicit funds to flow through a law firm trust account or client account.

Another positive result of the FATF process has been the issuance of Formal Opinion 463, discussed above.¹⁹ The Opinion is important because it harmonizes the

17. 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/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf>.

18. Special recognition goes to Sarah Runge, Director, Office of Strategic Policy, Terrorist Financing and Financial Crimes; Michael Rosen, Policy Advisor, Office of Strategic Policy, Terrorist Financing and Financial Crimes; and Gary Sutton, Office of General Counsel, Senior Legal Advisor for Financial Crimes.

19. Kevin L. Shepherd, *Ethically Speaking . . . Just What Are My Obligations Under the Gatekeeper Initiative?*, 27 PROB. & PROP. MAG. 43 (Sept./Oct. 2013), available at <http://www.americanbar.org/publications/>

Guidance and the Model Rules. By adopting client intake and monitoring procedures, lawyers can ensure that they do not unwittingly provide legal services which facilitate money laundering or terrorist financing, and they can do so in ways that are consistent with ethical principles of loyalty and confidentiality.

The Opinion makes clear that, (1) the Model Rules do not mandate that lawyers perform a gatekeeper role in deterring their clients from engaging in wrongdoing; and (2) the filing of a suspicious activity report would run afoul of the Model Rules. The Opinion underscores the fundamental point in the Model Rules that a lawyer cannot knowingly counsel or assist a client to commit a crime or fraud.

In conclusion, it is my opinion that the FATF has been given an unsupervised and unmonitored license to address AML and CFT problems, and that the FATF has done so without thoughtfully considering the merits of its arguments and pronouncements, without any consideration whatsoever to costs, without meaningful engagement of the private sector, and with a willful obliviousness to both the reality and practical consequences of its work.

Along with a fine group of other U.S. lawyers, I have devoted many hours to this struggle with the FATF and its ill-considered encroachments against the role of the lawyer in the common law system. On the rare occasion I need reminding why I am doing so, I simply recall the words of Pericles: "Freedom is the sure possession of those alone who have the courage to defend it." I stay engaged in this process because of the risks to individual freedom and liberties at stake.