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THE FINANCIAL ACTION TASK FORCE: THE WAR ON TERRORISM WILL NOT BE FOUGHT ON THE BATTLEFIELD

The open nature of U.S. society, the international financing system that exists today, and the sheer volume of capital transfers that regularly take place — more than a trillion dollars a day — making tracing terrorist funds an exquisitely difficult task. Legitimate daily financial transfers are the bedrock of what we know as globalization, and the United States has no desire to stop them. The movement of funds finances international trade, provides profits to those engaged in moving the money, and makes resources available for investment in countries that receive the flows. The international financing system is unfortunately used for clandestine and often nefarious purposes as well, such as avoiding taxes and laundering billions of dollars of receipts from the narcotics trade. Tracing terrorist funds is exactly as difficult as some have described it — looking for the needle in a large and essential haystack.

-Sidney Weintraub¹

The concept of money laundering as a basis of crime has been commonplace for many years in the United States and around the world. While the primary focus of previous investigations has been to stop this practice worldwide, in recent months it has become apparent that proactive measures are necessary. Nations are turning their focus to the terrorist networks of Osama bin Laden and other terrorist organizations and attempting to freeze their assets.

The amount of money that is laundered around the globe is staggering. It has been estimated that worldwide money laundering is around 2-5 percent of the gross global product, between \$800 billion and \$2 trillion.² The largest laundering operation in the American hemisphere is the Colombian drug trade with around \$5 billion per year.³ While much of the drug product of the Colombian drug trade ends up in the United States, the operation does

¹ WASH. QUARTERLY, Winter 2002

² *Id.*

³ *Id.*

not actively launder money in the United States. Clearly, money laundering is an international problem.

The problems encountered in tracking money used by terrorist organizations stem from the privacy laws of many tax havens. Jews attempting to escape Hitler utilized Swiss banks due to the secrecy of their banking laws. The secrecy laws of banking around the globe frustrate the ability to discover the transfer of illegal funds. While free market economics promote the legitimate use of tax havens to save money, organized crime has realized the ease in utilizing these systems as well. In order to properly combat the flow of illegal funds around the globe, a conscious choice must be made between the value of secrecy and the goals of combating global money laundering. The primary policy mechanism used by the international community is the French-based Financial Action Task Force ("FATF").

I. MEMBERSHIP

The FATF was formed in 1989 and is made up of twenty-nine member countries⁴ and two international organizations.⁵ Along with its member nations, the FATF works with various regional financial task forces⁶ and other financial institutions⁷ around the

⁴ Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States, (2002) available at http://www.fatf-gafi.org/Members_en.htm

⁵ FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING (FATF), EUROPEAN COMMISSION AND THE GULF CO-OPERATION COUNCIL (2002), available at http://www.fatf-gafi.org/Members_en.htm.

⁶ The FATF works with regional bodies such as "the Asia/Pacific Group on Money Laundering (APG), the Caribbean Financial Action Task Force (CATF), the Council of Europe Select Committee of Experts on Evaluation of Anti-Money Laundering Measures (PC-R-EV) and the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)." FAFT, ANNUAL REPORT, (June 22, 2001), available at http://www.fatf-gafi.org/pdf/AR2001_en.pdf

⁷ The FATF works with regional financial institutions such as "Asia Development Bank (ADB), the Commonwealth Secretariat, the European Bank for Reconstruction and Development (EBRD), the European Central Bank (ECB), Europol, the International Monetary Fund (IMF), the Inter-American Development Bank (IADB), the Inter-American Drug Abuse Control Commission of the Organization of American States (OAS/CICAD), Interpol, the International Organization of Securities Commissions (IOSCO), the Offshore Group of Banking Supervisors (OGBS), the United Nations Office for Drug Control and Crime Pre-

globe. The members of the FATF delegate their representatives from disciplines such as “experts from the Ministries of Finance, Justice, Interior and External Affairs, financial regulatory authorities, and law enforcement agencies.”⁸ The presidency of the FATF rotates between member countries on a yearly basis, with the president serving a term of one year from July until June of the following year.⁹

Primarily, the FATF functions as a policymaking group for its member nations. It has no enforcement mechanism aside from the peer review of member nations. Essentially, FATF creates recommendations for the member nations to enact in accordance with their own domestic legal framework. The FATF will continue to operate until 2004, at which point the member nations must vote on whether to extend its mandate.¹⁰

As originally mandated, the FATF activities focus on three main areas. First, the FATF is focused on spreading the anti-money laundering message to all continents and regions of the globe.¹¹ Second, it focuses on improving members’ implementation of the Forty Recommendations,¹² which serve as the foundational policies of the FATF.¹³ Finally, the FATF attempts to strengthen the review of money laundering methods and counter-measures.¹⁴ At a special meeting on October 31, 2001, the FATF expanded its focus to include the combat of terrorist financing around the globe.¹⁵

In order to become a member country, the FATF lays out five requirements:

- to be fully committed at the political level: (i) to implement the 1996 Recommendations within a rea-

vention (UNODCCP), the World Bank, and the World Customs Organization (WCO).” See ANNUAL REPORT, *supra* note 6.

⁸ See ANNUAL REPORT, *supra* note 6.

⁹ Currently, Hong Kong’s Commissioner for Narcotics, Claire Lo Ku Kalle, serves as the president. Her term will end on June 30, 2002. Germany will hold the FATF Presidency for 2002-2003. See FAFT, MORE ABOUT THE FATF AND ITS WORK, (December 4, 2001), available at http://www.fatf-gafi.org/AboutFATF_en.htm.

¹⁰ See ANNUAL REPORT, *supra* note 6.

¹¹ See ANNUAL REPORT, *supra* note 6.

¹² See discussion II, *infra*.

¹³ See ANNUAL REPORT, *supra* note 6.

¹⁴ See ANNUAL REPORT, *supra* note 6.

¹⁵ FATF Special Recommendations on Terrorist Financing, (October 31, 2001), available at http://www.fatf-gafi.org/SRecsTF_en.htm.

sonable timeframe (three years), and (ii) to undergo annual self-assessment exercises and two rounds of mutual evaluations;

- to be a full and active member of the relevant FATF-style regional body (where one exists), or be prepared to work with the FATF or even to take the lead, to establish such a body (where none exists);
- to be a strategically important country;
- to have already made the laundering of proceeds of drug trafficking and other serious crimes a criminal offense; and
- to have already made it mandatory for financial institutions to identify their customers and to report unusual or suspicious transactions.¹⁶

II. THE FORTY RECOMMENDATIONS¹⁷

The Forty Recommendations were drawn up in 1990 for countries to adopt in the fight against money laundering and later revised in 1996 after a review by member nations.¹⁸ “These Forty Recommendations set out the basic framework for anti-money laundering efforts and they are designed to be of universal application. They cover the criminal justice system and law enforcement; the financial system and its regulation, and international cooperation.”¹⁹ Because they have not been reviewed since 1996, the FATF set up three working groups²⁰ in 2001 to analyze the Recommendations and their effectiveness in the new global climate.²¹

Countries that do not participate in the war on money laundering are placed on a list of non-cooperative countries and territories (“NCCT”).²² In order to ensure fairness, when a jurisdiction is be-

¹⁶ See ANNUAL REPORT, *supra* note 6.

¹⁷ FATF, THE FORTY RECOMMENDATIONS, (2002), available at http://www.fatf-gafi.org/40Recs_en.htm

¹⁸ FATF, MORE ABOUT THE FATF AND ITS WORK, (December 4, 2001), available at http://www.fatf-gafi.org/AboutFATF_en.htm

¹⁹ FATF, THE FORTY RECOMMENDATIONS, *supra* note 17.

²⁰ The three working groups are working on “Customer Identification and Suspicious Transaction Reporting,” “Corporate Vehicles,” and “Gatekeepers.” See FATF, ANNUAL REPORT, *supra* note 6.

²¹

²² Currently, this list includes: Cook Islands, Dominica, Egypt, Grenada, Guatemala, Hungary, Indonesia, Israel, Lebanon, Marshall Islands, Myanmar, Na-

ing considered for review to be put on the NCCT list, they are notified and have a chance to respond to the findings of the FATF.²³ Later, they may meet with an FATF expert to discuss any unresolved questions or issues in the FATF findings.²⁴ In order to be removed from the NCCT list, the FATF must be satisfied that the jurisdiction has addressed the deficiencies identified by the FATF by enacting significant legislation and regulations.²⁵ The FATF specifically looks at the jurisdiction's criminal laws, financial supervision, customer identification, suspicious transactions reporting and international cooperation.²⁶

Once a jurisdiction has become a member, it is subject to evaluations in order to continue membership. The FATF evaluates members through two processes. The first is a mutual evaluation by other member countries that focuses on the effectiveness of the anti-money laundering systems in the jurisdiction.²⁷ The primary goal is to ensure that predicate crimes for money laundering are similar amongst member nations.²⁸ Furthermore, the FATF examines the banking sector of each jurisdiction coupled with the securities and insurance industries by focusing on internal controls, training, guidelines and supervision.²⁹ Finally, the FATF reviews the scope of the application of the anti-money laundering laws of the jurisdiction.³⁰

The second evaluation is a self-assessment that takes place on a yearly basis and is reported to the FATF at the annual meeting in June.³¹ The goal of the self-assessment is to examine what measures have been put into place in the past year by a particular jurisdiction.³² It is intended as the primary means by which to measure the goal of full compliance with the recommendations by all member jurisdictions.³³ "The self-assessment process focuses on the im-

uru, Nigeria, Niue, Philippines, Russia, St. Kitts and Nevis, St. Vincent and the Grenadines, Ukraine.

²³ See FATF, ANNUAL REPORT, *supra* note 6.

²⁴ See FATF, ANNUAL REPORT, *supra* note 6.

²⁵ See FATF, ANNUAL REPORT, *supra* note 6.

²⁶ See FATF, ANNUAL REPORT, *supra* note 6.

²⁷ See FATF, ANNUAL REPORT, *supra* note 6.

²⁸ FAFT, ANNUAL REPORT, (June 22, 2001), available at http://www.fatf-gafi.org/pdf/AR2001_en.pdf.

²⁹ See FATF, ANNUAL REPORT, *supra* note 28.

³⁰ See FATF, ANNUAL REPORT, *supra* note 28.

³¹ See FATF, ANNUAL REPORT, *supra* note 28.

³² See FATF, ANNUAL REPORT, *supra* note 28.

³³ See FATF, ANNUAL REPORT, *supra* note 28.

plementation of key legal, financial and international co-operation measures as related to the 28 FATF Recommendations requiring specific action.”³⁴ As of the 2001 Annual Meeting, ten members³⁵ were in full compliance and another five³⁶ were short of compliance by only one Recommendation. Most of the member jurisdictions have implemented more than 24 of the Recommendations.³⁷

III. THE WAR ON TERRORISM

The attacks of September 11, 2001 brought the role of the FATF to the forefront of international economic discussion. In a special meeting in Washington, D.C. on October 29 and 30, 2001, the FATF expanded its mission beyond money laundering to focus on the worldwide combat of terrorist financing.³⁸ FATF Executive Secretary Patrick Moulette discussed the expansion of the group’s mission.

Up to now we had established measures only for money laundering, and it was necessary to agree on how to tackle terrorist financing. It is difficult to single out one issue as the most important, as they are all important and complementary. These measures should be taken altogether and implemented all together. . . . Our immediate priority was to agree and issue recommendations. We have also agreed to a plan of action for implementation. One aspect is to conduct an assessment, which is due to start in a couple of weeks.³⁹

³⁴ “The Recommendations requiring specific action are: Recommendations 1-5, 7, 8, 10-12, 14-21, 26-29, 32-34, 37, 38 and 40.” See FATF, ANNUAL REPORT, *supra* note 28.

³⁵ Belgium, Brazil, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, New Zealand and Norway. FATF Annual Report, See FATF, ANNUAL REPORT, *supra* note 28.

³⁶ Austria, Finland, Portugal, Singapore and Switzerland. See FATF, ANNUAL REPORT, *supra* note 28.

³⁷ The Annual Report says that more than three-quarters have implemented more than 24 Recommendations. See FATF, ANNUAL REPORT, *supra* note 28.

³⁸ FATF, SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING, (October 31, 2001), available at http://www.fatf-gafi.org/SRecsTF_en.htm.

³⁹ *Financing Centres Ready To Bar Terrorist Financing*, INT’L MONEY MARKETING, December 6, 2001 at 3.

The FATF reached out to the G-20 members⁴⁰ in order to implement and enforce eight special recommendations on terrorist financing.⁴¹ FATF members will be assessed for compliance at the next annual meeting of the FATF in June 2002.⁴² Furthermore, the FATF has increased its communications with the World Bank and International Monetary Fund to combat the flow of money to terrorist organizations. These steps will offer a more cohesive international structure to disrupt the financing of terrorist organizations.

In the annual assessments conducted by the FATF, many alarming trends have been detected. One of the most complicated issues to arise relates to the Internet as a medium for monetary transactions. Due to the "anonymity and geographic separation" of the Internet, new challenges confront the FATF in the war against terrorist financing.⁴³ Another alarming trend has been the use of trusts in complex money-laundering schemes. Because the terms of

⁴⁰ "The G-20 promotes discussion, and studies and reviews policy issues among industrialized countries and emerging markets with a view to promoting international financial stability." It was created ". . . to establish an informal mechanism for dialogue among systematically important countries within the framework of the Bretton Woods institutional system." FATF, ANNUAL REPORT, *supra* note 28. The members are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, and the European Union. G-20 Backgrounder. *Id.*

⁴¹ The new recommendations will commit all FATF members to:

- immediately take steps to ratify the 1999 United Nations convention on the suppression of terrorist financing;
- criminalize the financing of terrorism, terrorist acts and terrorist organizations;
- freeze and confiscate terrorist assets;
- require their financial institutions to report suspicious transactions that may be linked to terrorism;
- assist other countries' investigations of terrorist financing networks;
- impose anti-money laundering requirements on alternative remittance systems;
- strengthen customer identification requirements for domestic and international wire transfers; and
- ensure the entities, in particular non-profit organizations, cannot be misused to finance terrorism.

FATF, *Special Recommendations on Terrorist Financing*, (October 31, 2001), available at http://www.fatf-gafi.org/SRecsTF_en.htm.

⁴² *FATF To Focus On Terrorism*, PRIVATE BANKER INT'L, December 7, 2001 at 5.

⁴³ See FATF, ANNUAL REPORT, *supra* note 28.

trusts are not part of the public record, they provide a secret haven by which criminal organizations can move assets and money virtually undetected.⁴⁴ In order to utilize these trusts, many “lawyers, notaries, accountants and other non-financial professionals often play the role of ‘gatekeepers.’”⁴⁵

Furthermore, the FATF has examined the way that terrorist organizations finance their operations around the world. The purpose is to compare the methods used by terrorists and those used by organized crime groups.⁴⁶ Findings indicated that there is little difference, and in fact the methods used for laundering money are almost identical.⁴⁷

In 2002, the FATF has meetings scheduled for February and June.⁴⁸ At the February meeting, the FATF examined the gatekeeper initiative⁴⁹ but did not implement a specific plan of action. Also, the FATF declined to remove the Philippines from the NCCT list, despite various legislative enactments in the past year.⁵⁰ The Pacific island of Nauru⁵¹ was singled out for not regulating its offshore banking sector despite enacting legislation in December

⁴⁴ See FATF, ANNUAL REPORT, *supra* note 28.

⁴⁵ See FATF, ANNUAL REPORT, *supra* note 28.

⁴⁶ See FATF, ANNUAL REPORT, *supra* note 28.

⁴⁷ See FATF, ANNUAL REPORT, *supra* note 28.

⁴⁸ The June meeting will consider counter-measures against NCCT jurisdictions identified in 2001 that have not made progress. It will also analyze jurisdictions analyzed in June 2000 whose efforts have stalled. See *Hong Kong: Meeting on Measures Against Terrorist Financing Held*, BBC MONITORING ASIA PACIFIC, February 1, 2002.

⁴⁹ “The gatekeeper initiative raises the extent to which intergovernmental organizations are able to afford meaningful participatory input from the persons regulated. The initiative will also challenge the manner in which various nongovernmental organizations that represent gatekeepers will take notice and be able to effectively participate. While the gatekeepers’ initiative concerns anti-money laundering and independent professionals, many of the same issues apply to other areas of international criminal and enforcement policy and law.” INTERNATIONAL ENFORCEMENT LAW REPORTER, January 2002.

⁵⁰ According to FATF President Claire Lo Ku Ka-Lee, “We had a number of face-to-face meetings with non-complying countries and territories and in the case of the Philippines we noted that the Government implemented the anti-money laundering act but that there were still some deficiencies that have been identified and which have to be addressed.” Louis Beckerling, *Manila Told To Redraft Money Laundering Law*, SOUTH CHINA MORNING POST, February 2, 2002 at 1.

⁵¹ Nauru operates as a tax haven for approximately \$70 billion of Russian mafia money. *Task Force Warns Terrorists It Will Track Down Their Funds*, AGENCE FRANCE PRESSE, February 1, 2002.

2001,⁵² after being admonished by the FATF in December.⁵³ But not all the news was negative, as Hungary, St. Kitts and Nevis were all praised for the progress they made in the past year.⁵⁴ The FATF requested all three to submit the plans by which they will implement their new legislation at the June 2002 annual meeting.⁵⁵ Saudi Arabia declared that it intends to comply with mandates of the FATF in response to the outrage of the international community in the wake of September 11, 2001.⁵⁶

The FATF also invited all countries of the world, not just the FATF members, to analyze their laws in light of the eight recommendations⁵⁷ proposed in October 2001.⁵⁸ To that end, the FATF has asked all countries to complete a questionnaire on their financial regulations by May 1, 2002.⁵⁹ FATF President Lo said, "Many countries, which are not FATF members, have indicated their wish to join the global fight against terrorist financing."⁶⁰ At the meeting in June 2002, the FATF will assess the NCCTs and consider the imposition of "counter-measures" against those that have not improved their policies.⁶¹

Despite the altruistic purposes on which the FATF is founded, many participating nations have not taken the directives very seriously. In fact, the United States and Canada are among the least compliant with the recommendations of the FATF.⁶² But, in the wake of the attacks on September 11, 2001, many nations are taking another look at their money laundering regulations. Whereas in the past mere lip service was paid to those initiatives, the FATF is evolving as a major force in the war against terrorism. The FATF at

⁵² James Mackintosh, *Money Laundering Sanctions Plan*, FINANCIAL TIMES (London), February 2, 2002 at 6.

⁵³ *FATF Decides To Impose Counter-Measures On Nauru*, (December 5, 2001), available at http://www.fatf-gafi.org/pdf/PR-20011205_en.pdf

⁵⁴ Beckerling, *supra* note 50.

⁵⁵ Beckerling, *supra* note 50.

⁵⁶ *Saudi Arabia Hunts Out Firms With Terrorist Links In Kazakhstan*, BBC MONITORING INTERNATIONAL REPORTS, February 2, 2002.

⁵⁷ See FATF, *supra* 41.

⁵⁸ Beckerling, *supra* note 50.

⁵⁹ *Task Force*, *supra* note 51.

⁶⁰ *Global Task Force Pushes Fight Against Terrorist Financing*, Japan Economic Newswire, February 1, 2002.

⁶¹ James Mackintosh, *Money Laundering Sanctions Plan*, FINANCIAL TIMES (London), February 2, 2002 at 6.

⁶² Michael Peel, *U.S. 'Failing To Do Enough' On Financial Crime*, FINANCIAL TIMES, June 23, 2001 at 1.

its February 2002 meeting pointed out that new terrorist threats “are rising at an unprecedented rate,” which only underscores the importance of the war on terrorist financing.⁶³

In the United States, the attacks of September 11, 2001, created a newfound dedication amongst lawmakers to effectuate changes. In 2000, legislation to fight money laundering stalled in Congress due to the opposition of the banking industry over concerns of privacy. Treasury Secretary Paul O’Neill intervened just before the Organization for Economic Cooperation and Development was scheduled to make a determination on tax havens and delayed their decision. But since September 11, 2001, the United States has been acting with a new, bi-partisan resolve. President Bush issued an executive order⁶⁴ on September 24, 2001, freezing the assets of 27 persons and institutions.⁶⁵ The United Nations Security Council issued Resolutions 1267, 1333 and 1368 to combat all forms of terrorism and the underlying financing of those activities.⁶⁶ With the global outrage at the attacks and the ability to cut the financing to the terrorist networks, governments have made money laundering a primary concern on their legislative agendas.⁶⁷

As this new war against terrorism is fought in the halls of our financial institutions, the role of the Financial Action Task Force will continue to grow. As the list of member nations continues to grow, the influence of the FATF will increase as well. The war

⁶³ *Task Force On Money Laundering Steps Up Fight Against Funding Of Terrorism*, CHANNEL NEWSASIA, February 1, 2002.

⁶⁴ *Executive Order 13224 – Blocking Property And Prohibiting Transactions With Persons Who Commit, Threaten To Commit, Or Support Freedom*, (September 23, 2001), available at <http://www.ustreas.gov/terrorism.html>.

⁶⁵ Peter Dizikes, *Money Trail: Freezing Terrorists’ Assets*, (September 26, 2001), available at http://abcnews.go.com/sections/business/DailyNews/WTC_moneyexplainer010926.html.

⁶⁶ These resolutions include U.N. Resolutions 1267, 1269, 1333, 1368, 1373. U.S. DEP’T OF STATE, *O’Neill And G-7 Ministers On Blocking Terrorist Assets*, (October 6, 2001), available at <http://usinfo.state.gov/topical/pol/error/01100604.htm>; United Nations Security Council, Resolution 1373 (2001), September 28, 2001.

⁶⁷ More than 150 countries have expressed support for the campaign against terrorism and more than 80 have issued blocking orders on accounts of terrorist organizations. *O’Neill Urges Group To Set Standards On Terrorist Funds: U.S. Official Hopes Task Force Will Reach Out to All Nations*, ASIAN WALL STREET JOURNAL, October 30, 2001 at 7.

against terrorism may be won by the destruction of checkbooks instead of on a battlefield.

Andrew Ayers

