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The International Comparative Legal Guide to:

# Anti-Money Laundering 2018

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## Country Question and Answer Chapters:

# Overview of Recent AML Gatekeeper International and U.S. Developments

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## I Introduction

Money laundering is the process by which a person or entity conceals the existence, nature or source of the proceeds of illegal activity and disguises them to appear legitimate and avoid government detection. Money laundering sustains criminal activity that generates proceeds, facilitating terrorist financing, sanctions violations, and tax evasion, among other illicit activities. Experts disagree on the amount of funds that are laundered annually or even if the scope can be reliably measured.[1] All agree that, despite a recent dramatic increase in international cooperation and law enforcement efforts, the global money laundering problem is one of staggering proportions and continues to threaten stability, including by funding terrorism and nuclear proliferation. The problem persists, in part, because of the cleverness of the wrongdoers and the skill of the professional gatekeepers who are willing to assist them.

The United States and countries around the world have imposed anti-money laundering compliance measures on financial institutions and other businesses to prevent and detect money laundering. The main organisation behind the harmonisation of money laundering countermeasures is the Financial Action Task Force ("FATF"). FATF was established in 1989 as an international body dedicated to "set[ting] standard and promot[ing] effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system".[2] Following the Moscow 1999 Ministerial Conference of the G-8 Countries on Combating Transnational Crime, which recognised the role of "gatekeepers",[3] FATF similarly sharpened its focus on gatekeepers, including lawyers, in facilitating money laundering schemes.[4] Specifically, FATF recognised that "perfectly legitimate functions may . . . be sought out by organised crime groups or the individual criminal" both with the "desire to profit from the expertise of such professionals in setting up schemes that will help to launder criminal proceeds" and in order to cloak themselves with "the veneer of legitimacy".[5] FATF proposed what is known as the "Gatekeeper Initiative" – extending certain anti-money laundering regulations to gatekeeper professionals. This proposal "enlists the support of gatekeepers to combat money laundering and terrorist financing", similar to the way financial institutions have been engaged for many years.[6]

The Gatekeeper Initiative has been met with considerable resistance from the legal community, including in the United States. Lawyers around the globe have emphatically argued that certain anti-money laundering obligations, particularly a mandate that lawyers report suspicious activity relating to their clients, would undermine the relationship of trust and the attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law".[7]

The debate in the United States is far from over. As other countries successfully adopt the Gatekeeper Initiative, as the global threats of drug trafficking, human trafficking, terrorism, and nuclear proliferation intensify, and as long as the United States continues to be an attractive venue for money launderers, it will face pressure to regulate gatekeepers, including attorneys. Because the United States views itself as a leader in eradicating money laundering and terrorist financing, the U.S. legal community may be forced to accept some of the compromises that other jurisdictions have found workable in order to implement the full extent of FATF's recommendations.

This article provides an historical overview of the Gatekeeper issue and discusses recent developments, which are significant, and potential next steps in 2018 and beyond. First, this article will discuss the history of FATF and the Gatekeeper Initiative. It will also address attorney resistance to the Gatekeeper Initiative, focusing especially on criticism of it in the United States. Second, this article will discuss the approaches that major jurisdictions have taken toward gatekeeper regulation in the European Union, the United Kingdom, Hong Kong, Australia, Canada, and the United States. Finally, this article will describe the current climate surrounding gatekeeper regulation, particularly in the United States, including the recently renewed U.S. Congressional interest in enacting gatekeeper legislation and the legal community's response. This article does not take a position on the appropriate course of action in the United States.

## II The Financial Action Task Force & the Gatekeeper Initiative

### A The Financial Action Task Force

FATF is an international body "that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction".[8] The G-7 countries established FATF at the 1989 Economic Summit Group in Paris.[9] Since then, FATF has spearheaded international anti-money laundering ("AML") efforts. "Its current objectives include 1) revising and clarifying the global standards for combating money laundering and terrorism financing; 2) promoting global implementation of its standards; 3) identifying and responding to new money laundering and terrorist financing threats; and 4) engaging with stakeholders and partners throughout the world".[10]

Most major global financial centers are represented at FATF. It has grown from its G-7 roots to include 35 member jurisdictions (as well as two "Observers").[11] FATF's Forty Recommendations (the "FATF Recommendations" or the "Recommendations"), first adopted in 1990, most recently updated in 2012, and now backed by over 180 countries, embody the framework of FATF's effort to combat money laundering.[12] The Recommendations represent a "comprehensive and consistent framework" to be implemented by each member nation to combat money laundering and terrorist financing.[13] The Forty Recommendations are considered to be the "international standard".[14] Over the years, the initial Recommendations have been refined and expanded to address the changing money laundering landscape, as they were in 2003 to address counter-terrorist financing in the wake of the September 11, 2001 terrorist attacks in the United States.[15]

FATF lacks legal authority with respect to its members. The Recommendations have the effect of "soft law"[16], which are "nonbinding transnational governance standards" promulgated by "substate actors meet[ing] with their peers from other jurisdictions to exchange information, coordinate enforcement, and harmonize the regulatory rules applied at home".[17] Implementation depends on the political will of FATF members, which has been consistently strong in the case of the United States in spite of changing political administrations. FATF seeks enforcement by exerting political pressure on its members, which it does by critiquing them through a mutual evaluation process.[18] Through this evaluation process, 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".[19] FATF is currently conducting its fourth round of mutual evaluations.[20]

### B The Gatekeeper Initiative

Interest in regulating gatekeepers first appeared in the 1996 revisions to the Recommendations. Changes to the original Recommendations included "extending the preventive duties beyond the financial sector".[21] Specifically, the 1996 version suggested that authorities "should consider applying [customer due diligence ("CDD"), recordkeeping, and reporting requirements] to the conduct of financial activities . . . by businesses or professions which are not financial institutions".[22] The list of what was covered by this provision, however, focused on activities (e.g., "money changing"), rather than specific professions.[23] Similarly, the Communique coming out of the Moscow 1999 Ministerial Conference of the G-8 Countries on Combating Transnational Crime recognised the role of gatekeepers.[24]

In 2002, FATF issued a Consultation Paper proposing the expansion of AML regulations to cover non-financial professions that could act as access points or "gatekeepers" to the financial markets for money laundering schemes, whether by serving as financial intermediaries or by providing financial advice.[25] "Gatekeepers" include lawyers, notaries, trust and company service providers, real estate agents, accountants, auditors, as well as other designated non-financial businesses and professions ("DNFBPs") "who assist with transactions involving the movement of money in domestic and international financial systems".[26] The FATF Consultation Paper proposed that certain AML initiatives be extended to these professionals, including CDD, internal compliance training, recordkeeping, filing reports of suspicious activity ("SARs" or "STRs," collectively referred to herein as SAR/STR), and the prohibition against tipping-off, or alerting customers that a SAR/STR involving them is being or has been filed.[27]

Lawyers are seen as especially attractive targets for AML regulation because of their relationship to clients as advisors and confidants.[28] Lawyers' relationships with clients may involve a gatekeeping role in influencing client behavior; for example, lawyers typically advise clients on proper conduct or revise clients' arguments to comply with the duty of candor.[29] Of course, lawyers cannot engage in or perpetuate the client's unlawful conduct and may break attorney-client confidences where necessary (for example, the crime-fraud exception).[30]

Lawyers can, wittingly or unwittingly, play a role in money laundering activity. For example, attorneys can use complex corporate structures, entities, and trusts to mask the source of monies, whether legitimate or criminal.[31] Lawyers' services and their accounts can also be misused in order to "layer[] and conceal[] funds, exploiting the secrecy offered by the legal privilege, and obtaining a veneer of respectability".[32] The Gatekeeper Initiative focuses particularly on unwitting lawyer facilitation of money laundering activities, as intentional facilitation is covered in most countries by criminal statutes.

FATF issued an updated set of Recommendations on June 20, 2003, adopting the Gatekeeper Initiative proposals made in the 2002 Consultation Paper.[33] The revised Recommendations expanded CDD, recordkeeping, and suspicious activity reporting requirements so that they applied to DNFBPs, including lawyers, for financial transactions related to: (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.[34]

The Recommendations stated that the SAR/STR requirement does not apply if the "relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege. . . . [i]t is for each country to determine the matters that would fall under legal professional privilege or professional secrecy".[35] However, national legislation incorporating the exception typically has compounded the considerable "uncertainty about the proper scope and application" of the Recommendations' gatekeeper obligations.[36] Although the Recommendations included attorney-client privilege exceptions from suspicious transaction reporting requirements and the no tipping-off rule[37], these exceptions have not forestalled attorney resistance to the Gatekeeper Initiative, as discussed below.

In 2008, FATF published the Risk-Based Approach Guidance for Legal Professionals, similar to a guide that it had previously provided to financial institutions.[38] According to FATF, the purpose of this guidance was to "[s]upport the development of a common understanding of what the risk-based approach involves", "[o]utline the high-level principles involved in applying the risk-based approach", and "[i]ndicate good practice in the design and implementation of the risk-based approach".[39] The guidance acknowledged that this approach is not mandatory but is instead an option to assist lawyers with the efficient allocation of resources, "so that the greatest risks receive the highest attention".[40] FATF also suggested that individual countries "should aim to establish an active dialogue" with attorneys in order to arrive at an effective AML programme.[41]

### C Criticism of the Gatekeeper Initiative

The Gatekeeper Initiative has been criticised by many lawyers around the globe. Some have expressed concerns that "FATF incorporated lawyers into its regime of covered parties, but without meaningful dialogue with the private sector as to causation or appropriate, tailored, and targeted solutions".[42] Others have argued that the costs of applying the Recommendations to lawyers outweigh the benefits.[43] Many have also argued that there is no clear benefit to the Gatekeeper Initiative without stronger evidence that lawyers have been *unknowingly* facilitating money laundering (particularly considering that intentional participants already fall under the ambit of the law).[44] According to this argument, lawyers who intentionally conspire with their clients to launder money would not be deterred by new regulation. Those in opposition have stressed that there are significant costs to upsetting the sanctity of client confidentiality, the independence of the bar, and an attorney's duty of loyalty.[45] Moreover, some have noted that there are substantial monetary costs, particularly for small and solo practices, linked with increased monitoring and tracking.[46]

Despite professional responsibility regimes that differ by country, bar associations around the world have taken up a common cause regarding the effect of the Recommendations.[47] For example, in 2003, bar associations from the United States, Canada, the European Union, Japan, and Switzerland executed the "Joint Statement by the International Legal Profession to the FATF" ("Joint Statement").[48] The Joint Statement highlighted the signatory bar associations' concerns about the consequences of the Recommendations for the principles of the profession.[49] The Joint Statement listed several threatened "core attributes", including client confidentiality, "the independence of the bar from the government," and the duty of loyalty, all of which are "recognised in all [the] legal systems, despite their many differences".[50]

Some in the United States organised legal community opposed the Gatekeeper Initiative. Despite the United States' historic FATF leadership role, FATF's 2006 Third Mutual Evaluation determined that the United States was "non-compliant" with respect to certain Recommendations in part because of the failure to act with respect to gatekeepers.[51] As discussed below, this criticism was repeated in the Fourth Mutual Evaluation of the United States in 2016.[52] The United States has not passed any legislation authorising the direct application of recordkeeping, reporting, and AML compliance programme requirements to attorneys, in contrast to many of its FATF peers.

The American Bar Association ("ABA") has opposed the Gatekeeper Initiative for many years. In February 2002, the ABA organised a Task Force on Gatekeeper Regulation and the Profession ("Task Force") to review FATF and U.S. government proposals and develop positions on the application of anti-money laundering regulations to lawyers.[53] The ABA's policy on the Gatekeeper Initiative, as crafted by the Task Force, remains unchanged today:

> The ABA supports reasonable and necessary domestic and international measures designed to combat money laundering and terrorist financing. However, the Association opposes legislation and regulations that would impose burdensome and intrusive gatekeeper requirements on lawyers, including bills that would subject the legal profession to key anti-money laundering compliance provisions of the Bank Secrecy Act.[54]

The ABA's opposition to AML legislation regulating attorneys is based on a series of arguments. First, the ABA argues that a mandatory reporting scheme for lawyers will interfere with the important separation between the legal profession and the government.[55] The ABA is also opposed to regulations that would affect the "relationship of trust" between attorneys and clients, which it describes as a "bedrock of the U.S. administration of justice and rule of law".[56] According to the ABA, such regulations would undercut an attorney's obligation of confidentiality and duty of loyalty to a client.[57] Even with exceptions for attorney-client privilege, the ABA asserts that clients might decline to seek legal advice if there was a fear that confidences may be broken.[58] Additionally, the ABA raises constitutional concerns related to the Sixth Amendment of the U.S. Constitution's guarantee of effective counsel in criminal proceedings and the Tenth Amendment's reservation of regulatory authority over lawyers to the states.[59] Also, the ABA argues that regulation creates an inherent conflict of interest, raising questions about withdrawal and malpractice risks after reporting a client.[60] Next, the ABA asserts that the vagueness of the term "suspicion" and the complexity of AML regulatory schemes may cause counsel to either over-report or decline representation.[61] Furthermore, the ABA points out that the costs of compliance will likely raise the cost of legal services, and that there is a lack of evidence supporting the benefits of AML legislation applying to attorneys.[62] Finally, the ABA maintains that lawyers are already "subject to extensive ethical requirements and enforcement" and are "obligated under existing ethical rules to counsel their clients to abide by the law".[63]

The ABA's opposition has been consistent with its vigorous defence of the legal professional's adherence to privilege and confidentiality. Skeptics have questioned whether this view has also been partly driven by a commercial motive to maintain the United States as an attractive jurisdiction for investment, incorporation, and the free flow of foreign capital.[64] This investment and incorporation activity, and the attractiveness of businesses being subject to U.S. jurisdiction and wealth being protected by U.S. political and economic stability, is a significant source of legal revenue. As discussed below, the fact that segments in the U.S. legal community appear to have been willing to work with clients with questionable sources of funds may cause pressure to mount to place AML requirements on lawyers.

## III Approach in Many Jurisdictions

### A Most Countries Have Implemented Gatekeeper Regulations

The majority of FATF member jurisdictions have complied with the FATF Recommendations and imposed gatekeeper regulations on attorneys. As of this writing, the International Bar Association reports that 113 jurisdictions have enacted national legislation that is directly applicable to lawyers.[65]

#### 1 The European Union

The current obligation in the EU's Member States for lawyers to file SARs/STRs arises in relation to transactional work with protections to exempt reporting based on privileged advice or where the facts arise in the conduct of civil or criminal litigation. Enforcement actions against lawyers who have failed to file SARs/STRs or who have breached the no-tipping-off laws are rare but do exist. This regime has come about through the European Union's rigorous implementation of FATF Recommendations, adopting legislative directives to the extent of the Recommendation soon after the issuance of each set of Recommendations and often going beyond FATF standards.[66] Directives are binding on Member States as European Union policy, and each Member State then implements the directive into its national law.[67] The European Union has introduced four directives addressing money laundering and terrorist financing.[68]

In 1991, the European Community adopted the first money laundering directive based on the original FATF Recommendations.[69] The First Directive included obligations only for financial entities.[70] Further revisions to bring the European Union in line with FATF's 1996 revised Recommendations prompted a second AML directive ("Second Directive").[71] The Second Directive was met with considerable resistance from the European legal community,[72] as it applied to specific DNFBP professions, including lawyers, rather than only certain financial activities as had been the 1996 FATF Recommendations.[73] This was a sticking point in negotiations between the European Council and the European Parliament, which lasted over two years.[74] The delay was primarily due to the European Parliament's concerns regarding the potential impact of the proposed obligations on the right to a fair trial and lawyer-client confidentiality.[75] In the wake of the September 11, 2001 terrorist attacks on the United States, however, a compromise was reached by allowing exemptions from SAR/STR and the no tipping-off rules for attorneys in certain circumstances.[76] The Second Directive was adopted in December 2001.[77]

Another AML directive ("Third Directive") was published in 2005 to implement the 2003 FATF Recommendations.[78] Changes affecting attorneys included the removal of exemptions from the no tipping-off rule and a new requirement that SAR/STR reports filed with bar associations, which was how France, amongst others, had implemented the SAR/STR requirement, be forwarded to financial intelligence units.[79]

While Member States began to implement the Directives, the Second Directive's reporting obligation for attorneys was challenged in Belgian and French courts on the basis that the regulations "contravene rights conferred by the European Convention on Human Rights".[80] As to whether it violated the right to a fair trial, the European Court of Justice ruled in 2007 that it did not because, lawyers only had reporting obligations in relation to a specified class of transactional work, and that as soon as a lawyer engaged in such transactional work was called upon to defend "the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings", that lawyer would be exempted from the reporting obligation.[81]

On June 25, 2015, the most recent directive ("Fourth Directive") was adopted.[82] The Fourth Directive continues to apply AML regulations to lawyers participating in specified financial transactions.[83] Like the Second and Third Directives, the Fourth Directive recognised an attorney's duty to the client:

> However, where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.[84]

European Union Member States were advised to transpose measures of the Fourth Directive by June 26, 2017.[85] To date, all but five Member States have implemented the Fourth Directive.[86]

### 2 The United Kingdom

Under the Proceeds of Crime Act 2002 (as amended) ("POCA"), lawyers in the United Kingdom who are carrying out transactional, corporate formation, trustee, asset management, and other similar work have a positive reporting obligation if, in the course of that work, they come to know or suspect, or have reasonable grounds to suspect, that another person is involved in money laundering.[87] Lawyers who fail to report under POCA face possible criminal prosecution.[88] The Court of Appeal in R v. Da Silva clarified that the suspicion does not have to be "clear" or "firmly grounded and targeted on specific facts", but there must be a "possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice".[89]

In the United Kingdom, a lawyer must file an "internal" SAR/STR with his or her firm's Money Laundering Reporting Officer ("MLRO"). Failure to so report is a criminal offence by that lawyer.[90] Once the MLRO has received that SAR/STR, and if the MLRO also takes the view that there is sufficient reason to have knowledge or suspicion that a third party is money laundering, then (subject only to a limited number of exceptions) the MLRO commits a criminal offence if he or she does not in turn file a SAR/STR with the UK's National Crime Agency ("NCA").[91] To provide for this possibility, law firms will often have wording about the SAR/STR obligation in their engagement letters. Moreover, section 337 states, in accordance with the EU Second Directive, that the filing of a SAR/STR will not be a breach of a restriction on disclosure, and section 338(4A) provides for immunity from civil liability for SARs/STRs filed in good faith.

POCA contains three key protections for lawyers and clients. First, a lawyer performing other kinds of work for a client – most notably the conduct of litigation – is outside the regime imposing a positive reporting obligation. This was clarified and reinforced by the English Court of Appeal in Bowman v. Fels.[92] The second key protection is that POCA has a statutory privilege regime. Under section 330(6) a lawyer does not have to file a SAR/STR if the information forming the basis of any knowledge or suspicion comes to such lawyer in "privileged circumstances". Privileged circumstances include when information is communicated: (i) by a client (or client representative) in connection with obtaining legal advice; (ii) by a person seeking legal advice (e.g., a prospective client); or (iii) by a person in connection with actual or contemplated legal proceedings (e.g., a witness who may not be a client).[93] As with privilege at common law, there is a "crime/fraud exception" so that if the advice is sought "with the intention of furthering a criminal purpose", the protection then falls away regardless of whether the lawyer knowingly participated in pursuit of the criminal purpose.[94] The final key protection for lawyers is that, in determining whether a lawyer has committed an offence, a court must take into consideration the extent to which that lawyer has complied with approved guidance from the England and Wales Law Society and other similar organisations in other parts of the United Kingdom.[95] A lawyer mistakenly committing an offence while following a regulator's guidance is unlikely to be prosecuted.

The United Kingdom's money laundering laws derive from the European Union directives discussed above.[96] POCA gave effect to the Second Directive, while the Third Directive was implemented in the United Kingdom through regulations in 2007,[97] and the Fourth Directive was mainly implemented through new regulations in 2017.[98]

The extent to which UK and EU policy and legislation continue to be aligned after BREXIT remains to be seen, but it is likely that the key tenets of UK anti-money laundering laws will remain broadly similar to those in place in Europe, at least for the foreseeable future.

### 3 Hong Kong

Like the EU and the United Kingdom, Hong Kong has enacted AML legislation directly applicable to attorneys. Hong Kong law requires lawyers to report suspicious transactions. Sections 25A(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance ("DTRPO") and the Organized and Serious Crimes Ordinance ("OSCO") impose a duty on a person, who knows or suspects that any property represents proceeds of, was used in connection with, or is intended to be used in connection with "drug trafficking" or of an "indictable offense," to disclose that knowledge or suspicion to an "authorized officer".[99] Failure to disclose is a criminal offence with a penalty of up to three months' imprisonment and a 50,000 HKD fine.[100]

Hong Kong law provides an exception to SAR/STR obligations for legal professional privilege, but it does not provide any for the duty of confidentiality.[101] Section 2(14) of the DTRPO and section 2(18) of the OSCO exempt information subject to the legal professional privilege.[102] While the obligation to report does not override the duty of the legal professional privilege, the Hong Kong courts have held that the legal professional privilege does not protect communications made in order to obtain advice to further a criminal purpose or communications unconnected to the legal advice given or sought; therefore, the obligation to report exists in such circumstances.[103]

FATF's Third Mutual Evaluation Report of Hong Kong, released on July 11, 2008, noted the relative lack of suspicious transaction reporting by DNFBPs.[104] It stated, "[t]here is a very low level of reporting by some [categories of] DNFBPs and complete lack of reporting from others. With the limited exception of the estate agency profession, there are no formal structures in place to monitor [anti-money laundering and combating the financing of terrorism ("AML/CFT")] compliance within the DNFBP sectors", suggesting that the reporting system lacks effectiveness.[105]

There have been recent changes to Hong Kong's AML legislation. Prompted in part by adverse ratings in the last mutual evaluation and the upcoming 2018 evaluation, the Hong Kong legislature recently passed the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Ordinance 2018.[106] This amendment, which came into effect on March 1, 2018, extends CDD recordkeeping requirements to solicitors when preparing for or carrying out certain transactions for clients.[107]

## B Some Countries Have Been Unable to Implement Gatekeeper Regulations

Many FATF member jurisdictions have not imposed gatekeeper regulations on attorneys. As of this writing, the International Bar Association reports that 35 jurisdictions have enacted legislation that is indirectly applicable to lawyers and seven jurisdictions have yet to enact any national legislation directly or indirectly applicable to lawyers.[108]

### 1 Australia

Australia considered AML legislation applicable to lawyers around 2007 but did not implement any due to industry opposition.[109] The Law Council of Australia (the "Council") made many of the same arguments as the ABA against such legislation, including that it would threaten "the operation of the doctrine of client legal privilege".[110]

In late 2016, the Australian government proposed a plan to strengthen its AML framework.[111] Specifically, it sought to develop options for applying the SAR/STR regime to lawyers.[112] The proposal was likely a response to FATF's 2015 criticism of Australia for failing to expand AML obligations to DNFBPs.[113] The Council opposed it. In its 2016 updates to its AML guidance for legal practitioners, the Council made clear that a reporting regime remains "fundamentally incompatible" with the role of lawyers and the concept of privilege.[114] In a February 2017 response to the government's proposal, the Council also questioned the efficacy of FATF regulations, particularly considering the "deleterious and unintended consequences" arising out of "further regulation of legal practitioners".[115] It argued that "to date the reduction of financial crime because of a FATF-based response appears to remain elusive".[116] The Council also reiterated that that there remains a dearth of evidence that lawyers are so involved in facilitating money laundering that further regulation is warranted.[117]

Some are skeptical of this argument. Commentators have noted that "a blanket opposition to a reporting obligation based on a perceived lack of evidence that Australian lawyers are involved in money laundering is, at the least, curious".[118] They suggested that the motivation might have been to attract more business – even if it came from money launderers, who can take advantage of Australia's less severe AML regulations paired with its sophisticated financial market.[119]

### 2 Canada

In 2000, the Canadian Parliament enacted the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (the "PCMLTFA"), the basis of Canada's AML/CFT regime. Any person or entity subject to the PCMLTFA is required to conduct client identification and verification, maintain records of financial transactions, report proscribed transactions to the government, and establish internal AML/CFT programmes.[120] The PCMLTFA applies to lawyers and law firms when they engage in certain conduct on behalf of a client, including: "receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail" or when "giving instructions in respect to" any of the aforementioned conduct.[121]

Canadian lawyers challenged this legislation after it was enacted.[122] In 2015, after nearly a decade of litigation, the Canadian Supreme Court deemed that certain provisions of the PCMLTFA were a threat to "fundamental justice" by impinging on the attorney-client privilege and a lawyer's duty of commitment to the client.[123] The Canadian Supreme Court thus struck down as unconstitutional the portions of Canada's PCMLTFA that allowed warrantless searches and seizures at lawyers' offices and required lawyers to monitor and report their clients' financial activities to the government.[124]

Former ABA president William C. Hubbard suggested that this opinion has "resonance" for the United States, serving as an important reminder to lawmakers that "regulation of the legal profession has limits".[125] Others were critical of the ruling, noting the gap left in the country's money laundering defenses by "Canada's lawyer loophole".[126] Adam Ross, author of a recent Transparency International report, stated in an interview that, "[t]he law societies claim to have rules in place to prevent money laundering but they are weak, non-transparent and almost never enforced".[127] FATF agreed that these rules are inadequate. Canada's 2016 Mutual Evaluation noted:

> Representatives of the Federation of Law Societies . . . did not demonstrate a proper understanding of [the money laundering/terrorist financing] risks of the legal profession. In particular, they appeared overly confident that the mitigation measures adopted by provincial and territorial law societies (i.e., the prohibition of conducting large cash transactions and the identification and recordkeeping requirements for certain financial transactions performed on behalf of the clients) mitigate the risks.[128]

In a February 2018 report, Canada's Department of Finance recognised lawyers as gatekeepers and referenced a 2015 National Inherent Risk Assessment that found the legal sector to pose a high AML risk.[129] Acknowledging that Canada's Supreme Court struck down the PCMLTFA's application to lawyers, the paper cited to FATF's evaluation, stating that the "lack of inclusion of the legal profession in Canada's AML/ATF framework is a major deficiency that negatively affects Canada's global reputation".[130] Although the paper offered no concrete solutions as to gatekeepers, it affirmatively stated the willingness "to engage Canada's law societies and bar associations to work with the Government to find solutions" and "to develop constitutionally compliant legislative and regulatory provisions that would subject legal counsel and law firms to the PCMLTFA".[131]

Despite FATF's and the Department of Finance's positions, the law societies in Canada still supported self-regulation. On March 20, 2018, the Federation of Law Societies of Canada submitted comments to the House of Commons Standing Committee on Finance's review of the PCMLTFA.[132] The comments argued that FATF and the Department of Finance "ignore the serious regulatory initiatives of Canada's law societies in this area and the ongoing monitoring of members of the legal profession that law societies engage in including both periodic and risk-based audits".[133] Specifically, the Canadian law societies have also implemented rules prohibiting attorneys from accepting more than $7,500 in cash and requiring client identification and verification.[134] The law societies emphasised their continued efforts, including a "special working group . . . on draft amendments to . . . clarify some of the provisions and add additional obligations," as well as the preparation of "guidance on best practices" and "educational materials for the legal profession" to understand and address risks.[135]

## IV The United States History and 2018 Developments

Attempts in the United States to enact AML legislation applicable to attorneys have not succeeded so far. Although proposed legislation has not been enacted, in 2017 and to date in 2018 there has been substantial U.S. legislative activity that might change the outcome.

### A Historical Background

Following the 1999 G-8 meetings that resulted in FATF's focus on gatekeepers, the Department of Justice chaired an Interagency Working Group to "examine the responsibilities of professionals, such as lawyers and accountants, with regard to money laundering".[136] Congressional hearings in 2000 outlined a "national strategy to combat money laundering" including "studies on the appropriate role of 'gatekeepers' in the international financial system, such as lawyers and accountants".[137] Testimony by administration officials around the same time highlighted that the executive branch was "aggressively pursuing programs aimed at the lawyers, accountants and auditors who function as 'gatekeepers' to the financial system".[138] The Treasury Deputy Secretary testified to the House Committee on Banking and Financial Services that "[w]hile legal rules properly insulate professional consultations . . . those rules should not create a cover for criminal conduct".[139]

Bills were later introduced that would have covered lawyers engaged in company formation. Beginning in 2007, Senator Carl Levin sponsored a succession of bills requiring the establishment of a reliable corporate registry of beneficial ownership.[140] The proposed legislation would have also made formation agents, which appeared to cover some lawyers, liable for providing false information about beneficial ownership.[141] The legislation also sought to expand the definition of "financial institution" under the Bank Secrecy Act ("BSA")[142] to include "any person involved in forming a corporation, limited liability company, partnership, trust, or other legal entity".[143]

In response to these efforts, the ABA argued that oversight of the state supreme courts, the threat of prosecution, and voluntary guidance are sufficient to detect and prevent unwitting facilitation of money laundering.[144] The ABA pointed out that lawyers are also bound by the ABA Model Rules of Professional Conduct, which have been adopted by most jurisdictions.[145] Several Model Rules, the ABA argued, serve similar functions as FATF's Recommendations in detecting and preventing money laundering. For example, "the confluence of the mandates in Rules 1.1, 1.2(d), and 8.4 should result in the lawyer obtaining substantial client information and underscoring his duty to refrain from facilitating any illegal conduct the client may wish to carry out".[146]

Furthermore, the ABA reasoned, the most effective way to combat unwitting attorney facilitation of money laundering is to educate lawyers.[147] The ABA proposed that lawyers would be more aware if they better understood the ways in which their services might be taken advantage of by criminals.[148] To this end, in 2010, the ABA implemented the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing ("Good Practices Guidance") to "serve as a resource that lawyers can use in developing their own voluntary risk-based approaches" to CDD and monitoring procedures to detect potentially suspicious transactions.[149] The ABA's intention was that the Good Practices Guidance would encourage vigilance and prove legislation of attorneys to be unnecessary.[150] Critics have argued that the Good Practices Guidance is not sufficient. Legal counsel for Global Financial Integrity noted that, "[i]f you went out and asked lawyers, 'Have you ever heard of these voluntary guidelines?' 99 percent will say they have never heard of them".[151] One attorney in Washington, D.C. said that "[t]he ABA voluntary guidance is a joke because there are no consequences, unless you're prosecuted, and that happens once every five years".[152]

### B Current State of Play

In December 2016, FATF issued its first Mutual Evaluation Report of the United States in a decade.[153] Although the United States was deemed largely compliant, the 2016 Report noted that the U.S. regulatory framework had significant gaps. Areas of non-compliance included the absence of federal beneficial ownership reporting requirements for all domestic companies and a lack of AML/CFT requirements for most DNFBPs, including lawyers.[154] According to one prominent practitioner commenting at the time, "[t]he noncompliant rating issued by FATF for the legal profession will undoubtedly stir increased federal legislative and regulatory action seeking to impose AML/CFT obligations on U.S. lawyers".[155]

In addition to the release of the Mutual Evaluation Report, recent high-profile events have suggested that lawyers can be facilitators of money laundering and that there may be holes in the U.S. AML regime with respect to gatekeepers generally. In 2015, Global Witness, an international non-governmental organisation, whose mission is to fight global corruption, conducted a sting operation on New York lawyers.[156] The investigation eventually aired on CBS's *60 Minutes* (a prominent U.S. television news programme) in February 2016. As part of the exposé, an undercover investigator approached 13 lawyers, posing as an advisor to an African minister and claiming the minister had accumulated millions of dollars helping companies receive mining concessions in his country.[157] He sought advice on moving the funds in ways that may have aroused suspicions – suggesting that the minister wanted to purchase a townhouse, a jet, or a yacht through corporate structures that did not connect his name to the purchases.[158] According to Global Witness, all but one of the 13 lawyers approached appeared to provide at least preliminary advice on moving suspect funds into the United States.[159]

Less than a year later, two prominent incidents generated substantial global interest in gatekeeper regulation and exposed the potential role of segments of the legal profession in money laundering. First were the leaks of the Panama Papers in April 2016 and the Paradise Papers in 2017, both of which illustrated the extent to which law firms may have been involved in concealing criminal proceeds and fostering tax evasion.[160] Just a few months later, the United States Department of Justice filed a civil asset forfeiture case involving stolen funds from the Malaysian sovereign wealth fund, allegedly moved through a trust account at a major U.S. law firm.[161]

These events reinvigorated some lawmakers to hold hearings and reintroduce legislation mandating the collection of beneficial ownership information and extending BSA requirements to attorneys engaged in business formation activities.[162] For example, on February 3, 2016, Senators Sheldon Whitehouse and Dianne Feinstein and Representatives Carolyn Maloney and Peter King reintroduced the Incorporation Transparency and Law Enforcement Assistance Act[163], a redux of earlier proposed prior beneficial ownership bills, referencing the Global Witness investigation in supporting press releases.[164]

Over a year later, on June 28, 2017, Senator Whitehouse (along with Senators Feinstein and Charles Grassley) introduced a very similar bill, the True Incorporation Transparency for Law Enforcement ("TITLE") Act.[165] Citing recent events, Senator Whitehouse explained that the proposed legislation "would address corporate transparency loopholes exposed by the Panama Papers" by "extend[ing] money laundering due diligence requirements that currently apply to banks to professionals that help form business entities".[166] The same day, Representatives Maloney and King introduced the similar Corporate Transparency Act of 2017[167], also citing to the Panama Papers incident.[168] Senators Ron Wyden and Marco Rubio introduced a Senate version of the Corporate Transparency Act of 2017 on August 2, 2017.[169]

Similar to prior proposed legislation, these bills seek to apply the duty of collecting, maintaining, and reporting beneficial ownership information to law firms, lawyers, and other "formation agents" who assist clients in forming corporate entities.[170] These five recent bills cite FATF's criticism of the United States for failing to meet standards for the collection of beneficial ownership information and the need to "level the playing field" of states' formation and incorporation rules.[171] Significantly, all the bills provide civil and criminal penalties – including imprisonment – which would be applicable to formation agents for "knowingly failing to obtain or maintain credible, legible, and updated beneficial ownership information".[172]

Notably, the bills, along with legislation introduced on April 5, 2017 by Senator Whitehouse and Representative Lloyd Doggett[173], would also bring attorneys who act as formation agents (persons engaged in the business of forming corporations and limited liability companies) under BSA anti-money laundering requirements. Specifically, the bills would amend 31 U.S.C. § 5312(a)(2) to include formation agents in the definition of "financial institution" under the BSA and would instruct the Secretary of the Treasury to publish BSA regulations requiring formation agents "to establish anti-money laundering programs" under 31 U.S.C. § 5318(h) (including, at a minimum, the development of policies, the designation of a compliance officer, ongoing employee training, and independent audit functions).[174] Once designated as a financial institution under the BSA regulations, the Department of the Treasury could exercise its authority under the BSA to impose additional BSA requirements on formation agents, including the requirement to report suspicious activity. It is noteworthy that these provisions do not cover all the activities of lawyers that are the subject of the FATF Gatekeeper Initiative.[175]

In 2016, the Obama administration, also citing the Panama Papers leaks, supported these efforts to build a reliable corporate registry with beneficial ownership information, even drafting their own version of the legislation; notably, it did not include a gatekeeper provision.[176]

It remains to be seen whether the Congressional momentum will continue on this issue and whether the Trump administration will encourage or support gatekeeper legislation. Congressional hearings in late 2017 and early 2018 indicate that the issue remains important for lawmakers and stakeholders alike. At a November 29, 2017 hearing before the House Financial Services Subcommittee on Financial Institutions and Consumer Credit and Terrorism and Illicit Finance, Stefanie Ostfeld of Global Witness testified that "while banks serve as the frontline of defense . . . . [t]hose seeking to move suspect funds utilize the services of a wide range of professional gatekeepers," including lawyers.[177] Ostfeld further testified that, in compliance with international standards and FATF's assessment, the United States should subject formation agents to AML obligations, including customer due diligence and recordkeeping requirements.[178]

On January 9 and January 17, 2018, the Senate Committee on Banking, Housing, and Urban Affairs held hearings on BSA reforms and enforcement. Also citing to FATF's findings and the Panama Papers incident, Heather Lowe of Global Financial Integrity, testified before the Committee that "[a]lthough banks serve as an immediate gateway . . . [o]ther actors handle large sums of money, such as . . . lawyers [and] must also take responsibility for knowing with whom they are doing business and guard against their services being used to launder dirty money".[179]

At a February 6, 2018 hearing before the Senate Judiciary Committee, Senator Grassley, citing to the Panama Papers incident, again pushed for an improvement in beneficial ownership transparency.[180] Referencing the Global Witness investigation, he stated that "[t]he lawyers who help set up these companies are complicit," concluding that "[a]lmost all of the lawyers happily agreed [to set up companies to hide assets], eager to generate fees".[181] Senator Grassley chastised the ABA for "defend[ing] these practices".[182] Gary Kalman, Executive Director of the Financial Accountability and Transparency Coalition, testified at the hearing about the problem of individuals using "front people," including attorneys, to file paperwork under the attorney's name, "even though the attorney has no control or economic stake in the company".[183] Kalman also rebuffed the ABA's complaints, arguing that the TITLE Act's "intentionality standard is narrower—with greater protections for those who might make a mistake—than the standard in the American Bar Association's guidelines to lawyers for handling potential anti-money laundering situations".[184] And, at the same hearing, Chip Poncy, President of the Financial Integrity Network, testified that attorney-client privilege concerns by law firms "should not be used to shield company formation agents—including law firms that wish to engage in such activity—from implementing AML/CFT program requirements".[185] He continued that these procedures have the added benefit of protecting "the integrity of company formation agents, including law firms . . . . Any such legitimate firm . . . should agree".[186] Significantly, however, none of this proposed legislation has been referred out of committee.

The ABA has continued to oppose the lawmakers' efforts.[187] In a May 24, 2016 letter, then-ABA President Paulette Brown reiterated that these efforts would "undermine the attorney-client privilege, the confidential lawyer-client relationship, and the state court regulation of the legal profession".[188] There is some movement, however, within the ABA to adopt a model rule that would obligate attorneys to perform risk-based due diligence on prospective clients or matters; significantly, such a rule would subject non-compliant attorneys to discipline by the state bar rather than by the government.[189] On November 27, 2017, the ABA also submitted a letter to the House Committee on Financial Services, opposing legislation "that would impose burdensome and intrusive regulations on millions of small businesses and their lawyers" by requiring them "to submit extensive information about the companies' 'beneficial owners' to the Treasury Department's Financial Crimes Enforcement Network (FinCEN)".[190]

Most recently, the ABA submitted a letter in connection with the Senate Judiciary Committee's February 6, 2018 hearing on "Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency". The ABA maintained its position that this (and similar) legislation "would undermine the attorney-client privilege and impose burdensome and intrusive regulations on millions of small businesses, their agents, and the states".[191] Specifically, ABA President Hilarie Bass argued that the legislation's reporting requirements "would compel lawyers to report certain privileged or confidential client information to government authorities," which is "plainly inconsistent with their ethical duties and obligations".[192] Consistent with the ABA's historical position, Bass wrote that these reporting requirements are also unnecessary because "the federal government, financial institutions, and the legal profession have developed other tools and taken other steps," including the ABA's Good Practices Guidance, which "are much more effective and practical".[193]

The force of FATF soft law cannot be underestimated even though the next Mutual Evaluation is not until 2026. The United States has enacted legislation and promulgated BSA regulations responsive to the FATF recommendations for over 20 years. Criticism from the first Mutual Evaluation eventually led to the imposition of anti-money laundering requirements on the insurance industry, after many years of consideration. Similarly, FATF criticism arguably inspired the BSA customer due diligence regulations that will come into force on May 11, 2018. External events can also drive action, just as the tragedies of September 11, 2011 led to the PATRIOT Act, which enacted many BSA provisions that had been pending in Congress for several years. The continued pressure in the United States to enact anti-money laundering requirements on gatekeepers and fulfill its commitment to FATF may eventually override the opposing arguments and concerns.


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