NOTE

THEY'RE WATCHING YOU:

AN EXAMINATION OF WHETHER THE UNITED STATES SHOULD IMPOSE ANTI-MONEY LAUNDERING REGULATIONS ONTO US LAWYERS

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I. INTRODUCTION

The goal of any criminal enterprise, whether it's human trafficking, drug dealing, or any other organized crime, is to generate a profit.[1] However, after earning their illegal gains, criminals must introduce those funds into a legitimate financial system, lest they risk raising the suspicion of law enforcement officers or leaving a trail of incriminating evidence.[2] Money laundering is the process criminals use to disguise their financial assets so that they can spend their ill-gotten gains without risking exposing their underlying crimes.[3] Therefore, since money laundering provides the "fuel for drug dealers, terrorists, arms dealers, and other criminals to operate and expand their criminal enterprises," reducing money laundering is critical to reducing international and domestic criminal activities.[4] However, the current anti-money laundering ("AML") legislative framework in the United States, the Bank Secrecy Act of 1970 (the "BSA"),[5] has been ineffective in significantly curtailing domestic money laundering.[6]

One proposal to address the weaknesses of AML regulations, which has gained traction internationally, is to expand the regulations to cover lawyers.[7] Lawyers, through their specialized expertise, allow criminals to create legal vehicles that can subvert AML regulations and facilitate money laundering,[8] specifically

1. *See* Fin. Action Task Force, *What is Money Laundering?*, http://www.fatf-gafi.org/faq/moneylaundering/ [perma.cc/HA73-TD3P] (last visited Apr. 11, 2020); *see also* United Nations Office on Drugs and Crime, *Introduction to money-laundering*, https://www.unodc.org/unodc/en/money-laundering/introduction.html?ref=menuside [perma.cc/DU99-ZESH] (last visited Apr. 11, 2020).

2. *See* Fin. Action Task Force, *supra* note 1.

3. *See id.*; *see also* U.S. Dep't of Treasury, *Money Laundering,* https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/money-laundering [perma.cc/6T7R-PNVE] (last visited Apr. 14, 2020); Rebecca Gregory, *The Lawyer's Role: Will Uncle Sam Want You in the Fight against Money Laundering and Terrorism?*, 72 UMKC L. REV. 23, 23n.1 (2003) ("For a discussion of the elements the government must prove to establish money laundering, see, for example, United States v. Kneeland, 148 F.3d 6, 17 (1st Cir. 1998), United States v. Isabel, 945 F.2d 1193, 1200-04 (1st Cir. 1991), United States v. Massac, 867 F.2d 174, 177-78 (3d Cir. 1989).").

4. *See* Fin. Action Task Force, *supra* note 1.

5. *See* Fin. Crimes Enforcement Network, *What We Do*, https://www.fincen.gov/what-we-do [perma.cc/2S7W-AD5P] (last visited Apr. 20, 2020).

6. *See infra* Part II.B.1.

7. *See* Fin. Action Task Force, International Standards On Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations ¶22 (2018), https://www.fatf-gafi.org/publications/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferationthefatfrecommendations.html [perma.cc/ACA5-8RFY].

8. *See infra* text accompanying notes 180-81.

through the use of anonymous shell corporations.[9] However, in the United States, enforcement of AML regulations by lawyers remains voluntary and patchwork[10] and the American Bar Association (the "ABA") opposes expanding mandatory AML compliance to the legal profession.[11]

One country that has expanded AML regulations to cover lawyers, however, is the United Kingdom.[12] In the United Kingdom, the two pieces of legislation that address AML regulations are the U.K. Money Laundering Regulations 2007 (the "Regulations 2007") and the Proceeds of Crime Act 2002 ("POCA").[13] The United Kingdom initially extended some of its AML regulations to lawyers in response to a 2001 directive from the European Union,[14] but in December 2007, it formally adopted the Regulations 2007 that were drafted to conform with international standards set by the Financial Action Task Force ("FATF").[15]

Part II of this Note examines the current AML regulatory framework in the United States, including how the BSA regulates financial institutions, the impact it has had on them, and how American lawyers currently self-regulate AML risks. Part III explores how the United Kingdom expanded its AML regulations to the legal field, including an analysis of the international standards it adopted from the FATF's "RBA Guidance for Legal Professionals" (the "Lawyer's Guidance"), and why the ABA opposes adopting the United Kingdom's approach to regulating lawyers. Part IV recommends that the United States should not adopt the United Kingdom's approach of mandating AML regulations in the legal field.

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9. *See infra* Part II.B.1.a.

10. *See infra* Part II.C.

11. *See infra* Part III.C.

12. *See* FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: UNITED KINGDOM MUTUAL EVALUATION REPORT 208 (Dec. 2018), https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf [perma.cc/ML8F-E25Q]; *see also infra* Part III.A.

13. *See infra* Part III.A.1.

14. *See* Colin Tyre, *Anti-Money Laundering Legislation: Implementation of the FATF Forty Recommendations in the European Union*, J. PROF. L. 69, 76 (2010).

15. *Compare id.* at 79, *with* European Commission Press Release MEMO/12/112, Frequently asked questions: EU fight against money-laundering and terrorist financing moves up a gear: European Commission takes action to meet the revised international standards adopted by the Financial Action Task Force (Feb. 16, 2012).

II. CURRENT ANTI-MONEY LAUNDERING REGULATIONS IN THE UNITED STATES

In the United States, the framework for AML regulations of financial institutions is the BSA.[16] The BSA requires financial institutions to assist US government agencies in detecting and preventing money laundering through internal control and reporting requirements.[17] However, the BSA's impact on the amount of money laundered in the United States is unclear thus far, and there is evidence that it has not impacted the amount of money laundered at all.[18] Further, the costs of these regulations may have led to unintended consequences.[19] While the BSA has historically and primarily targeted banks,[20] in recent years other industries, including casinos, card clubs, and money service businesses, have fallen under certain regulations within the BSA.[21] However, the BSA regulations have never been expanded to legal professionals, leaving lawyers free to self-regulate how they address AML risks through ethical rules and ABA educational programs.[22]

16. *See* Office of the Comptroller of the Currency, *Bank Secrecy Act (BSA)*, https://www.occ.treas.gov/topics/compliance-bsa/bsa/index-bsa.html [perma.cc/ST83-39TR] (last visited Apr. 14, 2020); *see also* FDIC, *Bank Secrecy Act/Anti-Money Laundering*, https://www.fdic.gov/regulations/examinations/bsa/index.html [perma.cc/QR2Q-N5LP] (last visited Apr. 11, 2020).

17. *See* Fin. Crimes Enf't Network, *FinCEN's Mandate From Congress,* https://www.fincen.gov/resources/statutes-regulations [perma.cc/7QV2-HJVT] (last visited Apr. 20, 2020).

18. *See infra* Part II.B.1.

19. *See infra* Part II.B.2.

20. *See generally* Office of the Comptroller of the Currency, *supra* note 16.

21. *See generally* 31 C.F.R. §§ 1020-1030 (listing the different types of entities that FinCEN regulates). A money service business includes any person offering "check cashing; foreign currency exchange services; or selling money orders, travelers' checks or pre-paid access (formerly stored value) products" or who "engage[] as a business in the transfer of funds." *See* Internal Revenue Serv., *Money Services Business (MSB) Information Center*, https://www.irs.gov/businesses/small-businesses-self-employed/money-services-business-msb-information-center [perma.cc/AG5N-T6M5] (last visited Apr. 11, 2020); *see also* Fin. Crimes Enf't Network, *Money Services Business Definition*, https://www.fincen.gov/money-services-business-definition [perma.cc/V6VV-7563] (last visited Apr. 11, 2020).

22. *See infra* Part II.C.

A. The Bank Secrecy Act As Applied To US Financial Institutions

1. AML Compliance Requirements

Currently, the BSA requires US financial institutions to assist US government agencies in detecting and preventing money laundering,[23] and the Financial Crimes Enforcement Network ("FinCEN"), which covers more than 80,000 financial institutions,[24] oversees the BSA's implementation and enforcement.[25] The BSA requires financial institutions to implement an AML program that includes: (1) internal controls to ensure BSA compliance; (2) independent compliance testing; (3) designating a BSA compliance officer; (4) employee training; and (5) risk-based procedures for conducting ongoing customer due diligence, which should include: (i) understanding the nature and purpose of customer relationships to develop a customer risk profile, and (ii) conducting ongoing monitoring to identify and report suspicious transactions, and maintaining and updating customer information and beneficial ownership information.[26] The statute and regulations do not dictate the specifics of these programs, instead, they allow each financial institution to tailor its program to its size, location, and business activities.[27]

Banks must tailor their AML programs to their specific risks by first assessing their vulnerabilities to money laundering.[28] This risk depends on a bank's (1) offered products and services, (2)

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23. *See* Fin. Crimes Enf't Network, *supra* note 17; *see also* Office of the Comptroller of the Currency, *supra* note 16; 31 U.S.C. § 5312(a)(2) (1970) (defining "financial institution").

24. *See Statement of Jamal El-Hindi, Acting Dir., FinCEN U.S. Dep't of the Treasury Before the H. Subcomm. On Terrorism and Illicit Fin.*, 115th Cong. 3 (2017). Approximately 4,700 of these covered financial institutions are commercial banks. *See* FDIC, *Statistics At A Glance As of December 31, 2018*, https://www.fdic.gov/bank/statistical/stats/2018dec/industry.pdf [perma.cc/X7J8-UQ4G] (last visited Apr. 11, 2020).

25. *See* Fin. Crimes Enf't Network, *supra* note 17.

26. 31 C.F.R. § 1020.210.

27. *See Prepared Remarks of FinCEN Director James H. Freis, Jr., SIMFA Anti-Money Laundering Compiance Conference* (Mar. 10, 2008) ("our rules recognize that one size does not fit all. . . . Rather, based upon a risk assessment, a firm should focus its AML program, and thus its finite AML compliance resources, most significantly on the areas of greatest risk.").

28. STEVEN MARK LEVY, FEDERAL MONEY LAUNDERING REGULATION: BANKING, CORPORATE & SECURITIES COMPLIANCE, 6-24 (2nd ed. 2020).

customer types served, and (3) geographic locations.[29] Attempts to launder money can originate from many sources, but certain products, services, customers, entities, and geographic locations may be more vulnerable to abuse.[30] Banks should evaluate the risk of certain products or services, including ones that may facilitate greater anonymity in transacting or involve handling high volumes of currency,[31] as well as the risk posed by their customers by looking at the "nature of their business, occupation, or anticipated transaction activity,"[32] and the specific risks of doing business in certain geographic locations[33] where there may be a higher risk of illicit activity.[34]

2. Customer Due Diligence

The key component of Money Laundering compliance is Customer Due Diligence ("CDD"). CDD "means understanding who the customers are and what type of transactions they conduct."[35] Financial institutions must verify the identity of their customers[36] and then develop a customer risk profile based on the nature and

29. *See* FED. FIN. INST. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL 19 (2014).

30. *Id.*

31. *Id.*

32. *Id.* at 20.

33. *Id.* at 21. These higher risk geographic areas can include countries identified as sponsoring terrorism, countries with weak AML regulatory regimes of their own, or areas in the United States known to have a high degree of drug trafficking. *See id.* at 21-22.

34. Such higher risk jurisdictions can include "[j]urisdictions or countries monitored for deficiencies in their regimes to combat money laundering and terrorist financing by international entities such as the Financial Action Task Force (FATF)." *Id.* at 22. One such recent addition to this list includes Iceland, which was added to the FATF's list of jurisdictions with strategic deficiencies on October 18, 2019 and was included in a subsequent FinCEN Advisory Notice for deficiencies in beneficial ownership transparency and in implementing financial sanctions. *See* FINANCIAL ACTION TASK FORCE, IMPROVING GLOBAL AML/CFT COMPLIANCE: ON-GOING PROCESS – 18 OCTOBER 2019 (Oct. 18, 2019), http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/fatf-compliance-october-2019.html [perma.cc/39YJ-BGUA]; FINCEN, ADVISORY ON THE FINANCIAL ACTION TASK FORCE-IDENTIFIED JURISDICTIONS WITH ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM DEFICIENCIES AND RELEVANT ACTIONS BY THE UNITED STATES GOVERNMENT 15 (Nov. 12, 2019), https://www.fincen.gov/sites/default/files/advisory/2019-11-12/FATF%20Advisory%20October%202019%20FINAL_508.pdf [perma.cc/HQW5-ZY8Y].

35. Levy, *supra* note 28, at 6-36.

36. *See infra* text accompanying notes 39-40.

purpose of the customer relationship,[37] which is then used to monitor the customer's activity for suspicious transactions.[38] The financial institution must verify the identity of each customer to the extent reasonable and practicable under a risk-based approach[39] to enable the bank to form a reasonable belief that it knows the identity of each customer.[40]

Further, to address the risk that individuals may use "straw men" or nominees to shield themselves from identification,[41] effective May 2018,[42] financial institutions are required to verify the identities of the beneficial owners behind their customers, or the true owners of the relevant account.[43] This means that financial institutions must verify: (i) any individual who owns twenty-five percent or more of the equity of a customer;[44] (ii) an "individual with significant responsibility to control, manage, or direct a legal entity customer;" or (iii) if a trust owns twenty-five percent or more of a legal entity customer, the trustee.[45] However, a bank may rely on the representations of the customer itself as to its own beneficial ownership information, even if provided by the nominee.[46]

3. Reporting Requirements

Under the BSA, financial institutions are also required to "file reports on large cash transactions [a 'Currency Transaction Report' or 'CTR'], transactions that raise suspicions [a 'Suspicious Activity Report' or 'SAR'], and other transactions that may relate to money laundering, terrorism, or other crime."[47] The CTR and SAR

37. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29398, 29398, 29420 (May 11, 2016).

38. *Id.* at 29398, 29420.

39. *See* 31 U.S.C. § 5318 (2014).

40. 31 C.F.R. § 1020.220(a)(2).

41. Customer Due Diligence Requirements for Financial Institutions, *supra* note 37, at 29410.

42. Customer Due Diligence Requirements for Financial Institutions; Correction, 82 Fed. Reg. 45182, 45182 (Sept. 28, 2017).

43. 31 C.F.R. § 1010.230.

44. *Id.* This means that the financial institution must verify the identity of any individual who owns 25% or more of the equity of the corporation, partnership, or other entity that is the customer of the financial institution.

45. *Id.*

46. *Id.*

47. Levy, *supra* note 28, at 12-3.

are the two most common and central reports filed by banks under the BSA.[48] Financial institutions are required to file a CTR and verify the customer's identification for each transaction greater than US$10,000.[49]

Financial institutions file SARs when they detect "suspicious activity related to money laundering, terrorist financing, or other criminality."[50] About 1.4 million and 1.5 million SARS were filed in 2018 and 2017 respectively.[51] Financial institutions are in a unique position to serve as the eyes and ears of the government since most money laundering activity passes through a financial institution at least once, giving staff a face-to-face opportunity to observe launderers when they set up their accounts and judge if their activity is suspicious.[52] Banks are required to maintain a copy of a filed SAR with supporting documentation for five years after filing[53] and to make the documentation available to any law enforcement or federal regulator examining the bank's BSA compliance.[54] SARs, and any information that would reveal their existence, are confidential[55] and financial institutions are prohibited from notifying persons involved in a transaction that a SAR was filed.[56]

B. Problems with Current Regulations

The BSA has been ineffective in reducing the flow of money laundering throughout the United States.[57] Instead the BSA has

48. *See id.* at 13-5.
49. *See* 31 C.F.R. § 1010.311 (listing the other requirements for CTR filings).
50. *See* 31 U.S.C. § 5318(g) (2018); *see also* 31 U.S.C. § 1010.320 (2018).
51. *See* FinCEN, *Suspicious Activity Report Statistics*, https://www.fincen.gov/reports/sar-stats [perma.cc/86HP-ELFF] (last visited Apr. 14, 2020). Filtered for all industries and states/territories, for the years 2017, and 2018, and for Money Laundering Suspicious Activity Category; *see also* FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: UNITED STATES MUTUAL EVALUATION REPORT 54 (Dec. 2016) (noting an average of 1.7 million SARS filed annually between 2012 and 2014).
52. *See* Levy, *supra* note 28, at 14-14.
53. 31 C.F.R. § 1020.320.
54. *Id.*
55. *See id.* § 1020.320(e). However, there are certain exceptions to this confidentiality such as with compliance audits or in communications between banks concerning a joint SAR. *See, e.g.*, *id.* § 1020.320(e) (2020); 12 C.F.R. § 208.62(j) (2020); 12 C.F.R. § 563.180(d)(12) (2020); 12 C.F.R. § 21.11(k) (2018).
56. 31 U.S.C. 5318(g)(2)(A)(i) (2018).
57. *See* discussion *infra* Part II.B.1.

been burdensome on banks, with many banks considering the BSA regulations to be the most expensive regulations they face.[58] These regulations have also driven many banks to have to consolidate and drop certain customers, reducing access to the financial system in the United States.[59]

1. AML Regulations have not Proven to be Effective

US AML regulations have been ineffective in combating international money laundering.[60] The amount of money laundered globally is not precisely known,[61] however a widely quoted estimate is "somewhere between two and five percent of the world's gross domestic product,"[62] or about US$1.5 trillion to US$3.7 trillion in 2015.[63] Estimates of the amount of money laundered in the United States meanwhile, appear to have remained stable at approximately US$300 billion per year since 2010 up to as recently as 2018.[64]

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58. *See* discussion *infra* Part II.B.2.

59. *Id.*

60. *See* discussion *infra* Part II.B.1.

61. Fin. Action Task Force, *supra* note 1 ("[d]ue to the illegal nature of the transactions, precise statistics are not available and it is therefore impossible to produce a definitive estimate of the amount of money that is globally laundered every year.")

62. *Id.*; *see also* United Nations Office on Drugs & Crime, *Money-Laundering and Globalization*, https://www.unodc.org/unodc/en/money-laundering/globalization.html [perma.cc/PA4T-JWYE] (last visited Apr. 14, 2020); United Nations Office on Drugs & Crime, *Illicit money: how much is out there?* (Oct. 25, 2011), https://www.unodc.org/unodc/en/frontpage/2011/October/illicit-money_-how-much-is-out-there.html [perma.cc/VU3N-RLCD] (noting that in 2009, "Criminals, especially drug traffickers, may have laundered around $1.6 trillion, or 2.7 per cent of global GDP.").

63. John A. Cassara, *Countering International Money Laundering* 9 (2017), https://thefactcoalition.org/wp-content/uploads/2019/12/Countering-International-Money-Laundering-Report-August-2017-FINAL.pdf [perma.cc/DP8Q-ME4B]. This would also be about US$1.7 trillion to US$4.3 trillion in 2018. THE WORLD BANK, GDP (CURRENT US$), https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2018&start=1960&view=chart [perma.cc/5J5F-PWA3] (last visited Apr. 12, 2020) (multiplying two percent and five percent by 2018 world GDP of US$85.91 trillion).

64. *See Combating Money Laundering and Other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform: Statement Before the S. Comm. on Banking, Housing, & Urban Affairs*, 115th Cong. (2018) (statement of Steven M. D'Antuono, Section Chief, Crim. Division Fed. Bureau of Investigation) ("The U.N. Office on Drugs and Crimes estimates that annual illicit proceeds . . . of crime generated in the United States were estimated to total approximately $300 billion in 2010, or about two percent of the overall U.S. economy at the time."); *see also* U.S. DEP'T OF TREASURY, NATIONAL MONEY LAUNDERING RISK ASSESSMENT 86 (2015) ("An estimated $300 billion is generated through illicit activity annually in the United States"); U.S. DEP'T OF TREASURY, NATIONAL MONEY LAUNDERING RISK

Meanwhile, the crime of money laundering itself is also significantly under-enforced. Less than one percent of global illicit financial flows are seized and forfeited[65] and, in the United States, money launderers face a less than five percent risk of conviction for their crime.[66] In absolute terms, there are only about 700 to 1,200 federal money laundering convictions per year in the United States, which is a small amount considering this number includes individuals who only had money laundering charges added to an existing indictment.[67] Further, there has never been a cost-benefit analysis undertaken of AML efforts and "[t]here is no evidence that any governments have made rigorous efforts to weigh costs [of AML regulations] against benefits."[68]

a. Anonymous Shell Corporations Form a Significant Barrier to AML Enforcement

A key deficiency driving the ineffectiveness of US AML and combating the financing of terrorism ("CFT") measures has been the abuse of creating anonymous corporations ("shell companies") to hide beneficial ownership information,[69] with the United States

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ASSESSMENT 2 (2018) (noting that the United States continues to estimate that $300 billion was potentially laundered in 2018); Press Release, Am. Bar Found., Report Questions Global Fight against Money Laundering and Terrorism (Jan. 30, 2014) (citing TERENCE HALLIDAY, GLOBAL SURVEILLANCE OF DIRTY MONEY: ASSESSING ASSESSMENTS OF REGIMES TO CONTROL MONEY-LAUNDERING AND COMBAT THE FINANCING OF TERRORISM (2014) (noting no convincing evidence "that proceeds of crime are reduced or crime itself is better controlled with anti-money laundering measures.")), http://www.americanbarfoundation.org/news/675 [perma.cc/R3Z7-V8VK].

65. Samuel Rubenfeld, *Is Anti-Money Laundering Working? No, It's Failing*, WALL STREET J. (Nov. 21, 2017), https://blogs.wsj.com/riskandcompliance/2017/11/21/is-anti-money-laundering-working-no-its-failing/ [perma.cc/T76U-P7BB]; *see also* United Nations Office on Drugs & Crime, *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized crimes* 7 (Oct. 2011), https://www.academia.edu/2998395/Estimating_illicit_financial_flows_resulting_from_drug_trafficking_and_other_transnational_organized_crimes [perma.cc/7ZWA-TELX]

("Globally, it appears that much less than 1% (probably around 0.2%) of the proceeds of crime laundered via the financial system are seized and frozen.").

66. Cassara, *supra* note 63, at 17.

67. *Id.*; *see also* Fin. Action Task Force, *supra* note 51, at 64 ("the U.S. . . . achieves over 1200 Federal ML convictions per year on average.").

68. *See* Am. Bar Found., *supra* note 64 (citing Halliday, *supra* note 64).

69. *See* Fin. Action Task Force, *supra* note 51, at 4; *see also Financial Secrecy Index 2020: Narrative Report on USA*, TAX JUST. NETWORK 8, https://fsi.taxjustice.net/PDF/UnitedStates.pdf [perma.cc/A86W-MHMM] (last visited Mar. 28, 2020) [hereinafter *Financial Secrecy Index*] (noting how the United States is used as a secrecy jurisdiction by foreigners, including the use of US banks to launder money for

considered one of the most secretive financial jurisdictions in the world.[70] A shell company is a company or legal person formed with no significant assets or operations in the jurisdiction in which it is registered.[71] Shell corporations are easy to set up and "can be [opened] in as little time as it takes to open up an e-mail account and with less information than it takes to sign-up for a library card."[72]

Shell corporations can aid money launderers and impede law enforcement investigations by shielding beneficial ownership information.[73] Criminals can create a network of shell corporations to increase the layers of secrecy and "hire [an unrelated] nominee" as a company director to make it harder for law enforcement officers to find the true beneficial owner.[74] Banks can exacerbate this obfuscation by failing to verify the beneficial ownership of shell corporations, sometimes even accepting passport photos of a shell's straw-man without requiring any further information.[75] For law firms that assist in incorporating these shells, many are unable to assist law enforcement officers in identifying beneficial owners because they do not work with potential beneficial owners

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Mexican drug gangs, Miami's attraction of "dirty" money, and how US real estate is used as a tax haven for foreign wealth).

70. *See Financial Secrecy Index*, *supra* note 69, at 1 (ranking the United States the second most secretive financial jurisdiction in the world); *see also* Idelys Martinez, *The Shell Game: An Easy Hide-And-Go Seek Game For Criminals Around the World*, 29 ST. THOMAS L. REV. 185, 197-98 (2017).

71. *See Money Laundering & Terrorist Financing Through the Real Estate Secto*r, FIN. ACTION TASK FORCE 14 (Jun. 29, 2007), http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20through%20the%20Real%20Estate%20Sector.pdf [perma.cc/ZV4L-UDLR] [hereinafter *Money Laundering & Terrorist Financing*]; *see also* Martinez, *supra* note 70, at 195 ("In essence, shell companies are business entities that are hollow and are intended to carry out operations in the shadows").

72. *See* Martinez, *supra* note 70, at 196-97; *see also* Jim Zarroli, *Want to Set Up A Shell Corporation To Hide Your Millions? No Problem*, NPR (Apr. 13, 2016, 4:41 PM), https://www.npr.org/2016/04/13/474101127/want-to-set-up-a-shell-corporation-to-hide-your-millions-no-problem [perma.cc/QHW4-SJ5Y] ("[S]etting up a shell corporation turns out to be something that any average Joe can do.").

73. *See* Cassara, *supra* note 63, at 16; *see also Money Laundering & Terrorist Financing*, *supra* note 71, at 14 (noting how shell companies represent a significant challenge when seeking to determine a beneficial owner).

74. *See* Martinez, *supra* note 70, at 197.

75. *Id.* at 201 n.78.

personally,[76] and those that do will often incorporate their companies even if the owner's motives appear suspicious.[77]

The new beneficial ownership requirement, discussed in Part II.A.2, that requires banks to identify beneficial owners of entities[78] is one way the United States has adapted to address these issues, but these regulations have been criticized as ineffective. John Cassara, a former US Intelligence Officer and Treasury Special Agent,[79] argues that the regulation's definition of a beneficial owner does not comport with the internationally recognized definition and has multiple loopholes.[80] The beneficial ownership requirement mandates that a bank identify any shareholder with a twenty-five percent or greater interest in a corporation that banks with them,[81] but Cassara notes that if no one person owns that twenty-five percent threshold of the corporation, then the bank need not identify any shareholders at all.[82] Further, Cassara notes that alternatives, such as listing a senior manager or trustee as the beneficial owner, do not serve the correct purpose because they are not the true owner of a corporation's or trust's assets.[83] Additionally, banks do not need to incorporate the beneficial ownership information into their records or keep copies of the verification information, and the bank can rely on the information provided by the filer, even though the form is not filed under penalty of perjury.[84]

2. The Regulations are Expensive

Some of the most significant problems with current US AML regulations are the expense of maintaining compliance and the

76. *Id.* at 202.
77. *Id.* at 203.
78. *See supra* Part II.A.2.
79. Cassara, *supra* note 63, at 27.
80. *Id.* at 22.
81. *See supra* Part II.A.2.
82. Cassara, *supra* note 63, at 22.
83. *Id.*
84. *Id.* (noting that the form only requires that the individual provide information "to the best of their knowledge"); *see also* Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29397, 29405 (July 11, 2016) ("Some commenters urged FinCEN to make the Certification Form an official U.S. Government document, with the certification made under the penalty of perjury (rather than only to the best of the knowledge of the certifying party).").

costs of penalties that can be imposed on institutions.[85] Both costs are particularly burdensome for smaller institutions.[86] These costs are exacerbated by the ambiguity of the regulations, which creates uncertainty for financial institutions.[87] To reduce costs, banks will drop customers they determine to be riskier, a process known as "de-risking."[88]

a. The Compliance Costs are Significant

To comply with the BSA, financial firms collectively spend about US$25.3 billion per year[89] and studies have found that "[b]anks pay more to comply with money-laundering rules than any other regulations."[90] These compliance costs are even more significant for smaller institutions that do not have the economies of scale to meet these requirements and keep costs down.[91] An increasing number of smaller institutions have responded to these costs by consolidating, thereby reducing the number of smaller banks in the United States.[92]

Part of the problem is the amount of time banks must spend filling out CTRs and SARs. It is estimated that financial institutions, on average, devote sixty minutes to each CTR filed,[93] which means that financial institutions collectively spent approximately 14.8 million hours filling out CTRs in 2011 and 14 million hours in

85. *See infra* Part II.B.2.a, II.B.2.b.

86. *See infra* text accompanying notes 97–102, 114–15.

87. *See infra* text accompanying notes 118–21.

88. *See infra* Part II.B.2.c.

89. *Anti-Money Laundering compliance costs U.S. financial services firms $25.3 billion per year, according to LexisNexis Risk Solutions*, LEXISNEXIS RISK SOLUTIONS (Oct. 10, 2018), https://risk.lexisnexis.com/about-us/press-room/press-release/20181010-true-cost-aml [perma.cc/U8QA-V24N]; *see also A New Paradigm: Redesigning the U.S. AML/CFT Framework to Protect National Security and Aid Law Enforcement*, CLEARING HOUSE 3 (Feb. 2017), https://www.theclearinghouse.org/~/media/TCH/Documents/TCH%20WEEKLY/2017/20170216_TCH_Report_AML_CFT_Framework_Redesign.pdf [perma.cc/PUW7-2GWP] .

90. *See* Todd Davenport, *Laundering Rules Top Compliance Expenses Survey*, AM. BANKER, Jun. 23, 2003, at 23.

91. *See infra* text accompanying note 104.

92. *See infra* text accompanying note 103.

93. Robert G. Rowe, III, *Comment Letter on Currency Transaction Report, FinCEN Form 104*, AM. BANKERS ASS'N (DEC. 1, 2009), https://www.aba.com/archive/Comment_Letter_Archive/Comment%20Letter%20Archive/fincen-pra-12109.pdf [perma.cc/P3LA-G6RN].

2010.[94] For SARs, FinCEN estimates the average reporting burden as two hours per SAR, or a total of 4,696,790 hours per year.[95] In addition, financial institutions incur significant expenses to hire and train employees on BSA compliance, to purchase account-monitoring software, to implement adequate internal controls, and to conduct independent compliance testing.[96]

These costs are more significant for smaller banks,[97] which are hit hardest by AML compliance costs relative to their bottom lines.[98] This is due to certain overhead investment requirements for AML programs that exist regardless of scale.[99] Additionally, an American Banking Association 2012 survey found that mid-sized banks, banks with US$1-US$9 billion in assets, "have an average of four full-time compliance employees dedicated to BSA/AML functions," which is beyond the staffing capacity of many smaller banks.[100] There is also the burden of finding BSA compliance employees, as small banks can have a difficult time hiring for these positions due to stiff competition from larger banks and the difficulty in finding experts knowledgeable in fields like cybersecurity.[101] These costs of finding and hiring more staff and paying consultants to address BSA/AML compliance have led to earnings losses and foregone dividends.[102]

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94. *See* ANNUAL REPORT: FISCAL YEAR 2011, FINCEN 7 (2011) ("about 14.8 million CTRs were filed in fiscal year 2011, compared with about 14 million in fiscal year 2010."). Given the American Banker's Association's estimate of 60 minutes of time expended per CTR on average, *see* text accompanying *supra* note 93.

95. *See* Proposed Collection; Comment Request; Update and Revision of the FinCEN Suspicious Activity Reports Electronic Data Fields, 82 Fed. Reg. 9109, 9110-11 (Feb. 2, 2017).

96. *See* Levy, *supra* note 28, at 13-5; *see also supra* Part II.A.1 (discussing the compliance requirements for financial institutions).

97. *See infra* text accompanying notes 97–102.

98. LEXISNEXIS RISK SOLUTIONS, *supra* note 89 (calculating that the cost of compliance for smaller firms up to .83% of total assets, but only .08% for larger firms).

99. *Id.*

100. Daniel S. Alter, *How to Lighten Community Banks' AML Compliance Load*, AM. BANKER, May 1, 2015.

101. *Id.* ("[T]he market is short on qualified personnel to satisfy expanding BSA and AML demands."); *see also* Bill Stoneman, *New Regulatory Problem: Filling Compliance Jobs*, AM. BANKER, Mar. 1, 2005, at 12 (noting that small banks have difficulty finding compliance officers).

102. *See,* e.g., John Reosti, *BSA Staff Goes from 3 to 22 at One Community Bank*, AM. BANKER, Jan. 2017, at 4 (detailing how Carter Bank in Virginia's BSA/AML compliance costs, such as increasing the number of employees in its BSA department from 3 to "a minimum of 22," increasing board oversight of BSA compliance, overhauling and upgrading its

The BSA, along with other costly regulations, has also forced many small banks to consolidate, thereby reducing the number of small banks in the United States.[103] In 2015, the Harvard Kennedy School of Government found an increasing trend of consolidation among small community banks, primarily driven by "regulatory economies of scale [because] larger banks are better suited to handle heightened regulatory burdens than are smaller banks, causing the average costs of community banks to be higher."[104] The report found that among the regulations causing these burdens were the BSA and other AML regulations.[105] The US Government Accountability Office (the "GAO")[106] also found BSA/AML regulations to be some of the most burdensome to smaller institutions.[107] Representatives from the smaller banks that the GAO examined cited the time their staff spent addressing the regulations, the costs of implementing system upgrades or hiring third party compliance specialists, and the costs of due-diligence as responsible for causing the burdens placed on smaller banks.[108]

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training and retaining an outside firm to conduct a review, led to forgoing its fourth quarter 2016 dividend and how CU Bancorp expected annual expenses to rise by about $3 million due to BSA compliance); *see also* Allison Prang, *BSA compliance costs take toll on Investors Bancorp earnings*, AM. BANKER, Jul. 31, 2017 (describing how Investor Bancorp in Short Hills, N.J. blamed a drop in Q2 2017 quarterly earnings on the costs of addressing BSA/AML compliance).

103. *See* Leslie Picker & Matthew Monks, *Small Banks Feel the Urge to Merge*, BLOOMBERG BUS. WEEK, Oct. 7, 2013, at 49-52.

104. *See* Marshall Lux & Robert Greene, *The State and Fate of Community Banking* 21 (Harvard Kennedy Sch., Working Paper No. 37, 2015); *see also* Stoneman, *supra* note 101, at 12 ("[T]he growing compliance burden is one reason that" First Fowler Bancorp Inc. agreed to be sold to Sunflower Bank); James Wilcox, *Economies of Scale and Continuing Consolidation of Credit Unions*, FRBSF ECON. LETTER, Nov. 4, 2005, at 1 (finding that BSA costs are born disproportionately by smaller institutions, which incentivizes consolidation); Laura Thompson Osuri, *Small-Bank Deal Drivers: Costs, Regulatory Pressure*, AM. BANKER, May 24, 2005 ("[T]he preponderance of small, underperforming banks reflects merger trends, growing pains, and a heavier regulatory burden.").

105. *See* Lux & Greene, *supra* note 104; *see also* Alter, *supra* note 100 ("[T]he American Banking Association has identified BSA and AML requirements as 'the most costly regulatory burden.'").

106. The GAO is an agency that examines how tax dollars are spent and provides government agencies with reports and testimonies to help them work more efficiently. *See Overview*, U.S. GOV'T ACCOUNTABILITY OFFICE, https://www.gao.gov/about/ [perma.cc/EA3V-F2HK] (last visited Apr. 14, 2020).

107. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, COMMUNITY BANKS AND CREDIT UNIONS: REGULATORS COULD TAKE ADDITIONAL STEPS TO ADDRESS COMPLIANCE BURDENS 51 (2018); *see also* John Reich, *Tackling the Burden*, COMMUNITY BANKER, Sept. 2005, at 38.

108. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 107, at 18-20.

b. Penalties are also a Significant Cost to Financial Institutions

The cost of penalties imposed on banks for compliance deficiencies is also significant.[109] Banks that violate certain provisions of the BSA can face "criminal money penalties up to the greater of $1 million or twice the value of the transaction."[110] In fact, Regulators assessed US$5.2 billion in fines, penalties, and forfeitures for violations of BSA/AML regulations from 2009 to 2016.[111] Further, trends appear to indicate that the frequency and size of these penalties will rise in the future.[112]

Each individual penalty can also be significant, with some penalties in excess of US$1 billion.[113] Even smaller fines can be significant, for example, a fine imposed against the Bank of Mingo of Williamson, West Virginia of only US$4.5 million[114] amounted to

109. *See infra* text accompanying notes 110-12.

110. 31 U.S.C. § 5322(d) (2018); *see also* FED. FIN. INST. EXAMINATION COUNCIL, *supra* note 29, at 9.

111. Reosti, *supra* note 102, at 4; *see also*, FINANCIAL INSTITUTIONS: FINES, PENALTIES, AND FORFEITURES FOR VIOLATIONS OF FINANCIAL CRIMES AND SANCTIONS REQUIREMENTS, U.S. GOV'T ACCOUNTABILITY OFFICE 11 (2016).

112. *See* Sharon Brown-Hruska, *Developments in Bank Secrecy Act and Anti-Money Laundering Enforcement and Litigation* 7-8 (2016), https://www.nera.com/content/dam/nera/publications/2016/PUB_Developments_BSA_AML_Lit-06.16.pdf [perma.cc/HA2F-D3C7]; *see also* Sullivan & Cromwell LLP, *2015 Year-End Review of BSA/AML and Sanctions Developments and Their Importance to Financial Institutions* 2 (2016), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2015_Year_End_Review_of_BSA_AML_3_3_16.pdf [perma.cc/NHD6-BHPK] ("In 2015, we continued to see record-setting fines . . . against financial institutions for violations of BSA/AML . . . laws.").

113. *See, e.g.*, Press Release, FinCEN, JPMorgan Admits Violation of the Bank Secrecy Act for Failed Madoff Oversight; Fined $461 Million by FinCEN (Jan. 7, 2014), https://www.fincen.gov/news/news-releases/jpmorgan-admits-violation-bank-secrecy-act-failed-madoff-oversight-fined-461 [perma.cc/FC7X-Q3QW] (fining JP Morgan $2.05 billion for violating the BSA by failing to report suspicious transactions arising from the Bernie Madoff Scandal); *see also* Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations [perma.cc/R5CQ-ZNWQ] (fining HSBC about $1.9 billion for violations of the BSA, the International Emergency Economic Powers Act, and the Trading with the Enemy Act).

114. Press Release, FinCEN, FinCEN Penalizes W. Va. Bank for Serious BSA Violations and Actions by a Branch Manager That Assisted Criminal Activity (Jun. 15, 2015), https://www.fincen.gov/news/news-releases/fincen-penalizes-west-virginia-bank-serious-bsa-violations-and-actions-branch [perma.cc/58CF-XAVV].

about seventy-three percent of its equity capital.[115] In addition to monetary penalties, the Department of Justice will also impose costly independent monitors on non-compliant banks to ensure BSA compliance.[116] In an extreme case, Riggs Bank in Washington, D.C. faced such intense scrutiny from regulators that it was forced to shut down its more scrutinized business with embassies, and the bank was shut down and sold to PNC Bank.[117]

Further exacerbating the costs of penalties, examiners take a highly subjective approach in determining whether a bank has complied with AML regulations.[118] Financial institution officials may reasonably disagree with regulators on the risks posed by certain customers and the extent to which financial institutions must go to verify a customer's identity.[119] Yet, regulators may sanction financial institutions whose officials believed they were taking reasonable steps in a risk-based approach.[120] For example, in a GAO report, one financial institution reported that a BSA examiner questioned the way the financial institution was rating the risk of two countries on the firm's risk matrix, but "did not provide a basis for believing that certain countries should be higher on the firm's risk ranking."[121]

c. AML Regulations lead to Financial Institution De-Risking

Another cost imposed by the BSA is that some financial institutions pursue a policy of de-risking, which is the termination of product lines or relationships with categories of high-risk

115. *See* Brown-Hruska, *supra* note 112, at 8.

116. *See* Deferred Prosecution Agreement, United States v. HSBC Bank USA N.A., No. 1:12-cr-763, 15-17 (E.D.N.Y. Dec. 11, 2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-executed.pdf [perma.cc/W2KB-UP7A] (imposing a 5-year monitorship on HSBC as part of its deferred prosecution agreement).

117. *See* Associated Press, *PNC agrees to buy troubled Riggs bank*, NBC NEWS (Jul. 16, 2004, 2:01 PM), http://www.nbcnews.com/id/5451203/ns/business-us_business/t/pnc-agrees-buy-troubled-riggs-bank/ [perma.cc/ZY96-9MLW]; *see also* Paul S. Pilecki & Michael A. Mancusi, *Riggs Order Articulates Bank Secrecy Act Compliance Requirements*, J. OF INV. COMPLIANCE, 2004, at 85; *Riggs Bank Fined $25 Million*, TELLERVISION, 2004, at 3.

118. *See infra* text accompanying notes 119-21.

119. USA PATRIOT ACT: ADDITIONAL GUIDANCE COULD IMPROVE IMPLEMENTATION OF REGULATIONS RELATED TO CUSTOMER IDENTIFICATION AND INFORMATION SHARING PROCEDURES, U.S. GOV'T ACCOUNTABILITY OFFICE 23-24 (2005).

120. *Id.*

121. *Id.*

customers to reduce AML risk,[122] as a response to increased regulatory scrutiny.[123] If a bank cannot determine if a transaction is legitimate, it may err on the side of caution[124] and opt to stop working with businesses that draw scrutiny.[125] This can result in mass customer exit programs where banks terminate existing relationships and cut ties with whole sectors or client types,[126] such as embassies, money service businesses, and foreign correspondent banks due to the higher risk of money laundering they present.[127] Many smaller banks have also restricted access to international customers[128] and have scaled back their international remittance businesses due to the risk of assisting money transfers in higher-risk countries.[129] One of the pitfalls of de-risking however, is that as large banks leave higher risk areas customers will migrate to smaller institutions that lack resources and expertise to manage the risk and who are pressed for sources of revenue.[130] Further, de-risking inhibits charities from servicing

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122. *See* Bukola Adisa, *AML De-Risking: An effective method of plugging AML control failures? Association of Certified Anti-Money Laundering Specialists* 3 (2014), AML De-Risking: An effective method of plugging AML control failures? Association of Certified Anti-Money Laundering Specialists.

123. *Id.* at 4 (noting that many financial institutions de-risk to plug deficiencies due to the increased costs of penalties and fines); *see also supra* Part II.B.2 (detailing the costs of AML compliance and failure to financial institutions).

124. Alan Kline, *Small Banks Suffering Too in 'Derisking' Push*, AM. BANKER, Dec. 26, 2014.

125. *Id.*

126. Adisa, *supra* note 122.

127. *Id.*; *see also* Kline, *supra* note 124 (noting some banks "might not be comfortable banking casinos, marijuana dispensaries, payday lenders or others that could be perceived as fronts for money laundering."); U.S. GOV'T ACCOUNTABILITY OFFICE, BANK SECRECY ACT: DERISKING ALONG THE SOUTHWEST BORDER HIGHLIGHTS NEED FOR REGULATORS TO ENHANCE RETROSPECTIVE REVIEWS 18-19 (2018) (noting de-risking as a factor responsible for account terminations and branch closures in the southwest border region).

128. *See* Laura Thompson Osuri, *Small Banks in Fla. Lash Out on BSA*, AM. BANKER, Sept. 2, 2005, at 1.

129. *See* Andy Peters, *Too Hot to Handle*, AM. BANKER, Apr. 2015, at 10. These higher risk geographic areas can include countries identified as sponsoring terrorism, countries with weak AML regulatory regimes of their own, or areas in the United States known to have a high degree of drug trafficking. *See* FED. FIN. INST. EXAMINATION COUNCIL, *supra* note 29, at 21-22.

130. *See* Adisa, *supra* note 122, at 16; *see also* Tracy Durner & Liat Shetret, *Understanding De-Risking and its Effects on Financial Inclusion*, GLOB. CTR ON COOP. SEC. 19 (2015), https://www.globalcenter.org/wp-content/uploads/2015/11/rr-bank-de-risking-181115-en.pdf [perma.cc/46Y7-JVTV] ("As a result, those riskier businesses are becoming customers of smaller banks. This is cause for concern, since smaller institutions are less likely to have the stringent controls that their larger competitors have in place.").

higher risk international regions that are poor or facing humanitarian crises, which can exacerbate those problems.[131]

C. Lawyer's Roles in Regulating AML

Unlike financial institutions, American lawyers currently self-regulate the enforcement of AML risks. Their regulations are more patchwork than financial institution AML regulations. Lawyers regulate AML risks through ethical requirements, existing criminal statutes, education efforts, and the ABA's "Voluntary Good Guidance for Lawyers" (the "Voluntary Guidance").

1. Professional Ethics Requirements and Criminal Statutes

While American lawyers are not obligated to comply with BSA/AML regulations, they are still first and foremost governed by existing money laundering statutes.[132] Attorneys who participate in the laundering of illicit funds for their clients can be held criminally liable for money laundering[133] and can have their legal fees subject to forfeiture.[134] Attorneys also cannot shield themselves from liability through "willful ignorance" of their client's bad deeds.[135]

Additionally, state ethical requirements mandate that lawyers not assist their clients in conduct the attorney knows to be criminal

131*. See* Durner & Shetret, *supra* note 130, at 20-21.

132. Lawton P. Cummings & Paul T. Stepnowsky, *My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money Laundering through Commercial Transactions*, 2011 J. PROF. L. 1, 14 (2011).

133*. See, e.g.,* United States v. King, 865 F.3d 848 (6th Cir. 2017) (upholding a money laundering conviction of an attorney who offered to launder funds).

134. Cummings & Stepnowsky, *supra* note 132, at 18; s*ee also* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) ("[N]o lawyer, in any case, . . . has the right to . . . accept stolen property, or . . . in payment of a fee. . . . The privilege to practice law is not a license to steal.") (citing Laska v. United States, 82 F.2d 672, 677 (10th Cir. 1936)).

135*. See* Glob.-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 755-56 (2011) (describing the concept of "willful blindness," noting that defendants who "subjectively believe that there is a high probability that a fact exists" and who "take deliberate actions to avoid learning of that fact" can be found to have acted "knowingly or willfully."); *see also* United States v. Flores, 454 F.3d 149, 154-55 (3d. Cir. 2006) (an attorney was criminally convicted of money laundering based on a theory of "willful blindness" because he ignored numerous red flags including the client using false social security numbers, the large amount of transactions without apparent commercial justification, and inquiries from the lawyer's accountant as to the suspicious nature of the transactions).

or fraudulent[136] and withdraw from the representation if it will result in the violation of the rules of professional conduct or other laws.[137] A lawyer "may" also withdraw from representation if the client uses the lawyer for services that the lawyer reasonably believes to be criminal or fraudulent or if "the client has used the lawyer's services to perpetrate a crime or fraud."[138] Further, a lawyer may reveal information relating to a representation to the extent the lawyer reasonably believes necessary to prevent a crime or fraud or prevent, mitigate or rectify financial harm to another that resulted from a client's crime or fraud.[139]

However, a lawyer is not mandated to withdraw from representation unless the lawyer has actual knowledge that his or her client committed a crime or fraud and the lawyer is not required to disclose any information related to that fraud or crime.[140] Therefore, a lawyer may continue to "ethically" represent a client he or she reasonably believes to be committing a crime and it is not required by ABA regulations to disclose the client's wrongdoing even after discovered.[141] The ABA has, however, issued an opinion that lawyers are in compliance with ethical requirements if they implement a risk-based approach to identify and detect money laundering and terrorist financing in compliance with the Voluntary Guidance.[142] Finally, lawyers are already required to report to the IRS the receipt of currency "over [US]$10,000, on reports (IRS Form 8300) that require the lawyer to disclose the source of the payment and whether that source is a client."[143]

136. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983); *see also* Gregory, *supra* note 3, at 43.

137. MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 1983).

138. *Id.* r. 1.16(b)(2)-(3).

139. *Id.* r. 1.6(b)(2)-(3).

140. *Id.* r. 1.6(b)(2)-(3), 1.16(b)(2)-(3) (noting that both rules use the word "may," not "must" or "shall").

141. *See id.* r. 1.6(b)(2)-(3), 1.16(b)(2)-(3).

142. ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 463 (2013); *see also infra* Part II.C.3 (providing details on the "Voluntary Good Guidance for Lawyers").

143. A.B.A. Task Force on Gatekeeper Reg. and the Prof., *Comments of the ABA Task Force on Gatekeeper Regulations and the Profession on the Financial Action Task Force Consultation Paper dated May 30*, 2002, A.B.A. 9 (2002), https://www.fincen.gov/sites/default/files/shared/krauland.pdf [perma.cc/X6ZS-NFLF]; *see also* 26 U.S.C. § 6050-I (2018).

2. Education Programs

The ABA also works to educate practicing attorneys on money laundering, terrorist financing, and how attorneys can avoid unwittingly assisting in these activities.[144] The educational efforts have included "the development of policy statements, continuing legal education (CLE) sessions, articles, casebook discussions, and state bar web page articles or links."[145] These efforts have largely targeted attorneys who work in the fields identified by the FATF's recommendations as involving activities that should be subject to AML requirements[146] including, lawyers who handle real estate matters, trusts and estates, international practice, and corporate formation and management.[147] There have also been efforts to educate ethics experts who provide advice regarding risk management and rule compliance, such as general counsel in law firms and legal ethics academics.[148]

Additionally, the ABA has worked to promote the Voluntary Guidance,[149] which was created by the ABA to educate American attorneys on money laundering and terrorist financing to assist them in "designing and implementing effective risk-based approaches."[150] These efforts have included putting the Voluntary

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144. *See* Laurel S. Terry, *U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing*, 59 N.Y. L. SCH. L. REV. 487, 502 (2015); *see also* Int'l Bar Ass'n et al., *A Lawyer's Guide to Detecting and Preventing Money Laundering*, A.B.A. 2 (Oct. 2014), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf [perma.cc/3CKS-VL5L] ("This Guide is intended as a resource to be used by lawyers and law firms to highlight the ethical and professional concerns relating to AML and to help lawyers and law firms comply with their legal obligations in countries where they apply."); *see also* Gregory, *supra* note 3, at 43 (describing efforts the ABA has made to develop education programs for lawyers on money laundering risks and "help lawyers render legal services in accordance with practices intended to deter actual money launderers and terrorist financiers from engaging the legal profession.").

145. *See* Terry, *supra* note 144, at 503.

146. *See* Fin. Action Task Force, *supra* note 7, ¶ 22(d).

147. *See* Terry, *supra* note 144, at 504-05.

148. *See id.* at 505.

149. *See infra* Part II.C.3 (providing details on the "Voluntary Good Guidance for Lawyers").

150. *See* A.B.A. Task Force on Gatekeeper Reg. and the Prof., *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, A.B.A. 2-3 (2010), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_gtfgoodpracticesguidance.authcheckdam.pdf [perma.cc/SQS4-QGGL].

Guidance in CLE sessions, placing the guidance on bar association websites, publishing stories in the ABA Journal, and encouraging professional responsibility academics to teach the guidance to law students.[151] The hope is that, while it is unlikely education alone can stop lawyers from intentionally committing or assisting money laundering,[152] the educational resources provided can help lawyers avoid unwittingly assisting clients in money laundering.[153]

3. Voluntary Good Guidance for Lawyers

The Voluntary Guidance was adopted by the ABA in 2010 and supported by the US Department of Treasury,[154] partially in response to anticipation that the legal profession might face mandatory federal regulation in this area due to international pressure from the FATF.[155] The Voluntary Guidance is a manual intended to educate lawyers on assessing the risk that a client may be laundering funds with the lawyer's assistance.[156] The Voluntary Guidance is modeled after the FATF's Lawyer's Guidance, targeting the same types of lawyers and recommending the same AML approach.[157]

However, unlike the Lawyer's Guidance,[158] the Voluntary Guidance is not a mandatory regulatory requirement and is only meant as a voluntary educational tool to help lawyers address their own risks of unwittingly assisting money laundering or terrorist financing.[159] If a lawyer determines that a client presents an unacceptable risk, the Voluntary Guidance only recommends that the lawyer comply with ethics requirements and terminate the

151. *See* Terry, *supra* note 144, at 508.

152. *See id.* at 502 ("If the vast network of federal criminal laws and enforcement mechanisms are insufficient to deter intentional criminal acts by lawyers, it is unlikely that any additional efforts by the profession would deter such conduct.").

153. *See id.*

154. *See* A.B.A. Task Force on Gatekeeper Reg. and the Prof., *supra* note 150, at iii.

155. *See id.* at 2-3; *see also* Terry, *supra* note 144, at 508.

156. Cummings, *supra* note 132, at 20.

157. *Compare* A.B.A. Task Force on Gatekeeper Reg. and the Prof., *supra* note 150, *with* Fin. Action Task Force, *RBA Guidance for Legal Professionals* 15 (2008), https://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf [perma.cc/4TVF-E63F].

158. *See generally* Fin. Action Task Force, *supra* note 157.

159. *See* A.B.A. Task Force on Gatekeeper Reg. and the Prof., *supra* note 150, at 3.

representation.[160] There is no penalty in the Voluntary Guidance that would apply to lawyers who do not adopt the risk-based approach.[161] Further, while the FATF does not mandate suspicious activity reporting, it encourages individual jurisdictions to apply their own suspicious activity reporting rules.[162] The Voluntary Guidance conversely does not recommend any reporting requirement.[163]

There are, however, critics who note that the Voluntary Guidance is not sufficient to accomplish its goal.[164] The guidance is voluntary and there are no consequences for disregarding its provisions.[165] The guidance is also not actually that well known among lawyers, meaning that it cannot even have its intended effect of educating lawyers on how to reduce risks of inadvertently assisting clients in money laundering or terrorist financing.[166] Therefore, further action must be taken for the Voluntary Guidance to be effective.

III. THE UNITED KINGDOM APPROACH TO REGULATING ATTORNEY MONEY LAUNDERING RISKS

Internationally, one solution to curtail money laundering has been to expand the scope of AML regulations to encompass other industries beyond traditional financial institutions.[167] In the United States, this has meant expanding the BSA to target additional industries such as casinos, card clubs, and money

160. *See id.*; *see also* MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(2)-(3) (AM. BAR ASS'N 1983).

161. *See* A.B.A. Task Force on Gatekeeper Reg. and the Prof., *supra* note 150.

162. *See infra* text accompanying note 245.

163. *See generally* A.B.A. Task Force on Gatekeeper Reg. and the Prof., *supra* note 150.

164. *See* Glob. Legal Grp., *International Comparative Legal Guide to: Anti-Money Laundering*, GIBSON, DUNN & CRUTCHER 6 (2018), https://www.gibsondunn.com/wp-content/uploads/2018/06/Brooker-and-Cohen-Anti-Money-Laundering-2018-ICGL-2018.pdf [perma.cc/5H6B-7KJR].

165. *See id.* (internal citation) ("The ABA voluntary guidance is a joke because there are no consequences, unless you're prosecuted, and that happens once every five years.").

166. *See id.* (internal citation) ("If you went out and asked lawyers, 'Have you ever heard of these voluntary guidelines?' 99 percent will say they have never heard of them.").

167. *See supra* Part I.

service businesses.[168] Internationally, however, this has also meant expanding the regulations to include lawyers.[169]

As mentioned briefly above, the United Kingdom has expanded AML regulations to cover attorneys.[170] The United Kingdom first extended the AML requirement to transactional attorneys when it passed the POCA and the Money Laundering Regulations of 2003 in response to a directive from the European Commission.[171] These regulations first required transactional attorneys to perform due diligence on their clients and report reasonable suspicions of money laundering to the National Criminal Intelligence Service.[172] In 2007, the United Kingdom furthered its AML regulations of the legal profession by adopting the Regulations 2007 to implement the requirements of the European Union's Third Money Laundering Directive and FATF 40 Recommendations, which took a risk-based approach to AML regulations.[173]

The model for the United Kingdom's regulation of attorneys was originally developed by the FATF,[174] an inter-governmental body established by the G-7 nations,[175] responsible for setting and promoting international AML standards.[176] As part of its mandate,

168. *See generally* Bank Secrecy Act, 31 C.F.R. § 1020-1030 (2010) (listing the different types of entities that FinCEN regulates).

169. *See* Glob. Legal Grp., *supra* note 164, at 2; *see also* 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, 622 (2009).

170. *See* FIN. ACTION TASK FORCE, *supra* note 12.

171. *See* Cummings & Stepnowsky, *supra* note 132, at 15-16; *see also* John A. Terrill II & Michael A. Breslow, *The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach*, 59 N.Y.L. SCH. L. REV. 433, 438 (2015).

172. Cummings & Stepnowsky, *supra* note 132, at 16.

173. *See* Terrill II & Breslow, *supra* note 171 at 438; *see also* The Money Laundering Regulations 2007, Explanatory Memorandum ¶¶ 2.1, 4.1 (Eng.). The European Union's Third Money Laundering Directive was implemented to bring AML Regulations among European Union Member States into compliance with the FATF's most recent recommendations. *See* Council Directive 2005/60, 2005 O.J. (L 309) 1 (EC). The FATF recommendations that further explained these AML requirements are discussed further below. *See infra* Part III.B.

174. *See* The Money Laundering Regulations 2007, Explanatory Memorandum, *supra* note 173, ¶ 7.1.

175. *See* Fin. Action Task Force, *Who we are*, http://www.fatf-gafi.org/about/ [https://perma.cc/K8YU-L6BG] (last visited Apr. 13, 2020); *see also* Fin. Action Task Force, *History of the FATF*, https://www.fatf-gafi.org/about/historyofthefatf/ [perma.cc/RE6Z-Q3AA] (last visited Apr. 14, 2020).

176. *See id.*

the FATF releases a series of recommendations, which set out a comprehensive framework of AML regulations that individual countries can and do use[177] to create their own AML frameworks adapted for their specific circumstances.[178] Beginning in 2003, the FATF first began including recommendations that lawyers, among other non-financial businesses and professionals ("DNFBPs"), be covered under AML/CFT regulations.[179] The FATF noted an "'increasing concern' that money laundering schemes involve the use of professionals" such as lawyers to act as financial intermediaries or provide expert advice.[180] The concern was that their specialized expertise allowed them to create corporate vehicles, trusts, and other legal arrangements that can facilitate money laundering.[181] Lawyers were also noted to be in a unique position to observe and identify potentially suspicious activities, but they were subject to confidentiality commitments that underlie the very relationships that allowed them to perform these roles.[182]

177. *See* Fin. Action Task Force, *Consolidated Table of Assessment Ratings*, 3 (2020), https://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf [perma.cc/6M9S-G4P5] (last visited Apr. 14, 2020).

178. *See* Fin. Action Task Force, *The FATF Recommendations*, http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html [perma.cc/94EV-PCA5] (last visited Apr. 13, 2020).

179. *See* Fin. Action Task Force on Money Laundering, *Ann. Rep.: 2002–2003*, 1 (June 20, 2003), https://www.oecd.org/newsroom/2789358.pdf [perma.cc/E9MZ-RXW6]. FATF's general movement to expand the umbrella of AML/Terrorist Financing regulations to other Designated Non-Financial Professional Businesses ("DNFPBs") includes not just lawyers, but also casinos, real estate agents, accountants, notaries, and trust and company service providers. *See, e.g.*, *Ann. Rep.: 2002–2003*, *supra*, at 1; *see also* Shepherd, *supra* note 169, at 622 (noting that the FATF added DNFPBs to the 2003 FATF Recommendations without sufficient input from the ABA).

180. *See* Shepherd, *supra* note 169, at 620; *see also* Fin. Action Task Force on Money Laundering, *Ann. Rep.: 2001–2002*, 18 (June 21, 2002) http://www.fatf-gafi.org/media/fatf/documents/reports/2001%202002%20ENG.pdf [perma.cc/FQ3C-CANQ] (noting the increased use by criminals of DNFBPs in laundering funds); *Ann. Rep.: 2002–2003*, *supra* note 179, at 6 ("[F]or a number of years the FATF has observed a displacement effect, whereby money launderers seek to use businesses or professions outside the financial sector, due to the preventive measures being put in place in the financial sector.").

181. *See* Fin. Action Task Force on Money Laundering, *Review of the FATF Forty Recommendations Consultation Paper*, ¶ 272 (May 30, 2002), http://www.antiguagaming.gov.ag/Money%20Laundering/FATF%2040%20Review.pdf [perma.cc/GK77-VJ4V].

182. Aaron R. Hutman et al., *Money Laundering Enforcement and Policy*, 39 INT'L LAW. 649, 660 (2005); *see also* Fed'n of Law Societies of Canada v. Canada (Attorney Gen.), [2013] B.C.C.A. 147, para. 93 (Can.) ("Lawyers often have specific knowledge of their clients' activities and the circumstances surrounding the transaction in question.").

The FATF further noted that criminals will sometimes use lawyer-client accounts for the placement and layering of funds directly, which offers the launderer even further privilege protection.[183]

A. United Kingdom Application of Lawyer's Guidance

1. UK's AML Regime

a. Money Laundering Regulations 2007

The two central pieces of legislation in the United Kingdom that address AML/CFT regulations are the Regulations 2007 and POCA.[184] The Regulations 2007 establish CDD requirements for relevant persons, which includes "independent legal professionals" carrying out the Lawyer's Guidance's five specified activities.[185] The Regulations 2007 also adopted the risk-based approach and CDD requirements outlined by the Lawyer's Guidance, including identifying the beneficial ownership of a client.[186] The Regulations 2007 define a beneficial owner as an individual who owns more than twenty-five percent of the interest,[187] or otherwise exercises control over the entity or trust;[188] or, if the legal entity or arrangement is not a corporate body, partnership, or trust, an individual who benefits from or controls at least twenty-five percent of the property of the entity.[189]

If the solicitor[190] is unable to perform the CDD requirements to identify the customer and beneficial owner before the business

183. *See Review of the FATF Forty Recommendations Consultation Paper*, *supra* note 181, ¶ 272.

184. *See generally* Terrill II & Breslow, *supra* note 171.

185. *See infra* text accompanying note 218; *see also* The Money Laundering Regulations 2007, SI 2007/2157, art. 3, ¶ 9 (Eng.).

186. *Compare* The Money Laundering Regulations 2007, *supra* note 185, ¶ 2, *with* Part III.B. (discussing the Lawyer's Guidance risk assessment and implementation requirements).

187. *See* The Money Laundering Regulations 2007, *supra* note 185, art. 6, ¶¶ 1-3.

188. *See id.*

189. *See id.* art. 6, ¶ 6 ("[W]here the individuals who benefit from the entity or arrangement have yet to be determined, [the beneficial owner is] the class of persons in whose main interest the entity or arrangement is set up or operates.").

190. The UK has a division of two distinct legal professions, Solicitors and Barristers. Barristers are primarily advocates who have virtual monopoly rights on trial work in the higher courts and Solicitors are primarily office lawyers who advise clients, negotiate and

relationship or transaction begins,[191] the solicitor may not begin either the business relationship or transaction.[192] After establishing the relationship, the solicitor is still required to monitor ongoing transactions to ensure they are consistent with the practitioner's "knowledge of the customer, his business[,] and risk profile."[193] The Regulations 2007 also require that solicitors keep CDD records for five years,[194] maintain policies and procedures relating to their CDD program,[195] and ensure all relevant employees are trained in AML/CFT laws and policies.[196]

b. Proceeds of Crime Act

POCA imposes criminal penalties on individuals who participate in money laundering or who become aware of or suspect money laundering and fail to report it.[197] POCA further makes it a crime to conceal criminal property;[198] enter into an arrangement one knows or suspects involves the control of criminal property;[199] or acquire, use, or have possession of criminal property.[200] However, solicitors who disclose suspicious activity to the government and seek consent to proceed are

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draft documents, interview witnesses, and prepare cases that will be tried by Barristers. Maimon Schwarzschild, *The English Legal Professions: An Indeterminate Sentence*, 10 FED. SENT'G REP. 253, 253 (1998).

191. However, the verification may be completed "during the establishment of" the business relationship if it is "necessary not to interrupt the normal conduct of business" and "there is little risk of money laundering or terrorist financing occurring." *See* The Money Laundering Regulations 2007, *supra* note 185, art. 9, ¶ 3.

192. *See id.* art. 11, ¶ 1. However, this rule does not apply "where a lawyer or other professional adviser is in the course of ascertaining the legal position for his client or performing his task of defending or representing that client in, or concerning, legal proceedings, including advice on the institution or avoidance of proceedings." *See id.* art. 11, ¶ 2.

193. *See id.* art. 8, ¶¶ 1-3.

194. *See id.* art. 19, ¶¶ 1-3.

195. *See id.* art. 20.

196. *See id.* art. 21.

197. *See* Terrill II & Breslow, *supra* note 171, at 442; *see also* Proceeds of Crime Act 2002, c. 29 (U.K.).

198. *See* Proceeds of Crime Act 2002, c. 29, § 327 (U.K.); *see also* Proceeds of Crime Act 2002, c. 29, § 340 (U.K.) (defining criminal conduct as conduct that "constitutes an offence in any part of the United Kingdom" and criminal property as property that constitutes "a person's benefit from criminal conduct or it represents such a benefit" and the offender "knows or suspects that it constitutes or represents such a benefit.").

199. *See id.* § 328.

200. *See id.* § 329.

provided a legal defense for continuing their work.[201] A solicitor's failure to disclose does not require that the solicitor actively participated in the conduct, and it even applies if the solicitor declined the representation.[202] It is also criminal for a solicitor to "tip off" a client that a disclosure has been made and an investigation is ongoing[203] or "prejudice an investigation" by making a disclosure likely to obstruct the investigation.[204]

To balance the requirement that solicitors report on their client's activities with the ethical obligation of attorney confidentiality, POCA includes exceptions to preserve privilege for these criminal sanctions.[205] The key question is whether the solicitor obtained client information in privileged circumstances,[206] or in connection with providing legal advice or in connection with a legal proceeding.[207] This does not include information communicated to a solicitor for a criminal purpose.[208] When a client seeks a solicitor's advice with criminal intent, and the solicitor suspects money laundering, that solicitor must disclose under POCA and file a SAR.[209] The standard for the crime/fraud exception to be applied is if a solicitor either knows the transaction he is working on is a principal offense[210] or knows of prima facie evidence that his services are being used to further a crime.[211] However, there is an exception to this exception, allowing a solicitor to claim a reasonable excuse defense if he genuinely, but mistakenly, believed that privilege applied.[212]

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201. *See id.* §§ 327(2)(a), 328(2)(a), 329(2)(a); *see also* Terrill II & Breslow, *supra* note 171, at 445.

202. Terrill II & Breslow, *supra* note 171, at 447-48.

203. *Id.* at 448 (citing Proceeds of Crime Act 2002, c. 29, §§ 330A(1), 330A(3) (U.K.)).

204. *See* Proceeds of Crime Act 2002, c. 29, § 342(2) (U.K.).

205. *See* Terrill II & Breslow, *supra* note 171, at 449-50; *see also* Proceeds of Crime Act 2002, c. 29, § 330(6) (U.K.) (discussing the exception for a failure to disclose), Proceeds of Crime Act 2002, c. 29, § 333D(2) (U.K.) (discussing an exception for tipping off), Proceeds of Crime Act 2002, c. 29, § 342(3)(c) (U.K.).

206. Terrill II & Breslow, *supra* note 171, at 449 (citing Proceeds of Crime Act 2002, c. 29, § 330(6) (U.K.)).

207. *Id.* (citing Proceeds of Crime Act 2002, c. 29, § 330(10) (U.K.)).

208. *Id.*; *see also* Proceeds of Crime Act 2002, c. 29, § 330(11) (U.K.).

209. Terrill II & Breslow, *supra* note 171, at 451; *see also* Proceeds of Crime Act 2002, c. 29, § 330(b)(6) (U.K.).

210. Legal Sector Affinity Group, *Anti-Money Laundering: Guidance for the Legal Sector*, THE L. SOC'Y ¶ 7.4.5 (2018) ("If you know the transaction you're working on is a principal offence, you risk committing an offence yourself.").

211. *Id.* ¶ 7.4.5 (citing O'Rourke v Darbishire [1920] AC 581).

212. *Id.* ¶ 7.4.5.

B. The FATF's "Lawyer's Guidance"

To understand how lawyers in the United Kingdom regulate AML risks using the risk-based approach, it is important to examine the FATF's guidance, which was the basis for the United Kingdom's approach.[213] The Lawyer's Guidance was adopted during a 2008 plenary meeting in Rio de Janeiro in response to the FATF's concerns of lawyer's services being used to facilitate money laundering.[214] This guidance was meant to indicate how an effective risk-based approach should be designed and was meant to be read in conjunction with the FATF's Recommendations.[215]

1. Overview of the "Lawyer's Guidance"

The Lawyer's Guidance outlines the risk factors that lawyers need to account for in developing a risk-based system.[216] It is not prescriptive and should be applied based on each country's unique circumstances, accounting for how the legal profession in each country is regulated.[217] It only applies to lawyers who prepare for and carry out transactions concerning one or more of the FATF's Recommendation's five specified activities, including: (1) real estate transactions; (2) client money and securities management; (3) the management of bank savings and securities accounts; (4) contribution organization for the creation, operation or management of companies; or (5) the creation, operation, or management of legal arrangements, and buying and selling of business entities.[218] However, lawyers who provide services or advice peripheral to the overall transaction are not considered to

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213. *See* The Money Laundering Regulations 2007, Explanatory Memorandum 1 (Eng.) (explaining that the Money Laundering Regulations 2007 were implemented to make U.K. money laundering regulations better reflect the FATF 40 Recommendations).

214. *See* Shepherd, *supra* note 169, at 626-47; *see also* Fin. Action Task Force, *supra* note 157, at 4 ("After further international consultation with both public and private sectors, the FATF adopted this [Legal Professional] Guidance at its October 2008 Plenary.").

215. *See* Fin. Action Task Force, *supra* note 157, at 4-7.

216. *See* Shepherd, *supra* note 169, at 647-48; *see also generally* Fin. Action Task Force, *supra* note 157.

217. *See* Fin. Action Task Force, *supra* note 157, at 15.

218. *See id.* at 6-7; *see also* Fin. Action Task Force, *supra* note 7, ¶ 22(d).

be preparing for or carrying out the transaction and therefore, are not required to observe AML obligations.[219]

Illustrating the determination of which lawyers are covered by the Lawyer's Guidance, Kevin Shepherd, a real estate attorney practitioner, offers an example of a local real estate lawyer who advises on local law issues for a "purchase of a multistate real property portfolio."[220] The portfolio transaction involves property in ten states, but the local lawyer is approached to only advise on potential legal issues in California.[221] The local lawyer never represented the client in the past, never met the client, and only sends her invoices to the referring attorney.[222] The local attorney still runs a conflict check, which comes back satisfactory.[223] Shepherd concludes that the local counsel's role is peripheral and not preparing for or carrying out the transaction, so she need not verify the client's beneficial ownership.[224]

2. Risk Assessment under the "Lawyer's Guidance"

The Lawyer's Guidance maps out the implementation of the risk-based approach in three steps: (1) assessing the risks of the lawyer's practice, (2) performing due diligence on customers based on those risks, and (3) implementing internal controls to ensure an effective risk-based approach.[225] Initially, the law firm should assess its risk through three categories: the country/geographic, client, and service risks.[226] There is no universal definition of a country's risk, but some indicators of risk include (1) the existence of "sanction, embargoes, or similar measures" issued by bodies such as the United Nations; (2) lax

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219. *See* Fin. Action Task Force, *supra* note 157, at 7; *see also* Fin. Action Task Force, *supra* note 157, at 30 ("Subject to other factors . . . providing limited legal services in the capacity of a local or special counsel may . . . mean that the legal professional is not "preparing for" or "carrying out" a transaction for a regulated activity specified in Recommendation 12.").

220. *See* Shepherd, *supra* note 169, at 659.

221. *See id.*

222. *See id.*

223. *See id.* at 659-60.

224. *See id.* at 660.

225. *See* Fin. Action Task Force, *supra* note 157, at 25-35.

226. Though, the Lawyer's Guidance notes that these categories are only the most "commonly identified risk categories" and that "there is no universally accepted set of risk categories." *See id.*

AML/CFT laws; or (3) the existence of significant corruption.[227] Clients whose activities may indicate a higher risk include cash intensive clients, clients using intermediaries not subject to adequate AML/CFT laws, or clients conducting business in unusual circumstances.[228] Further, the lawyer should assess the context of the services being offered, accounting for any mitigating circumstances that would warrant increased risk assessment.[229]

The Lawyer's Guidance also includes another "variable" risk factor, accounting for the "differences in practices, size, scale and expertise, amongst legal professionals."[230] A significant factor is whether the proposed work would be unusual or suspicious for the particular legal professional.[231] This risk factor allows the lawyer to tailor their risk assessment to the size and scope of their own individual practice.[232] For example, one of the factors potentially triggering a higher risk assessment includes services to improperly conceal beneficial ownership information;[233] however, for real estate attorneys, concealing a beneficial owner for a real estate developer seeking to purchase adjoining land parcels through fictitious names to avoid price-run ups may not be untoward.[234] Additionally, another risk factor is for services that deliberately depend upon more anonymity regarding client identity than is normal under the circumstances,[235] but for a sophisticated transactional attorney, tiered ownership structures created for legitimate tax and liability reasons may be normal.[236]

3. Application of Risk-Based Approach

After the risk assessment, the lawyer should perform CDD, which enables a legal professional to form a reasonable belief about the true identity of each client.[237] The standard diligence

227. *See id*. at 26.
228. *See id*. at 28.
229. *See id*.
230. *See id*. at 29.
231. *See id* at 31-32.
232. *See id*. at 29-31 (listing the factors to account for in the assessment of variable risk).
233. *See id.* at 28.
234. *See Shepherd*, *supra* note 169, at 655-56 (noting that if the landowners discovered the true beneficial owner had deep pockets, that might drive up the prices).
235. *See* Fin. Action Task Force, *supra* note 157, at 29.
236. *See* Shepherd, *supra* note 169, at 656-57.
237. *See* Fin. Action Task Force, *supra* note 157, at 31.

should include procedures to: (1) identify and verify the client's identity, (2) identify and take reasonable measures to verify the client's beneficial owner, and (3) understand the client's circumstances and business.[238] The CDD will be informed by the initial risk assessment, and a practitioner may reduce the standard level of due diligence "after consideration of appropriate risk variables, and in recognized lower risk scenarios" such as in representing publicly listed companies, financial institutions with strong AML/CFT controls, or certain government entities.[239] Conversely, if the client is deemed higher risk, increased CDD or enhanced due diligence may be warranted.[240]

Lawyers should then continually monitor clients for changing risk factors, money laundering, or terrorist financing activity.[241] The nature of the monitoring depends on the type and size of the firm, the AML/CFT risks identified, and the nature of the regulated activity provided.[242] This monitoring is not meant to be a deputation of legal professionals, but is instead only maintaining awareness while working for a client.[243] The FATF originally wanted to impose Suspicious Transaction Reporting ("STR") requirements on legal professionals, but after lawyer groups argued that this would run afoul of attorney duties of confidentiality and injure attorney-client relations,[244] the FATF left the determination to countries to proscribe their own regulatory requirements.[245] The Lawyer's Guidance acknowledges that law firms "differ significantly from financial institutions in terms of size," noting that unlike financial institutions, many law firms are much smaller and therefore, the framework for internal controls should account for this difference.[246] The extent of the AML/CFT controls needs to be proportionate to the risk of the services offered, and legal professionals should examine their own

238. *See id*. at 32.

239. *See id*.

240. *See id*. at 31.

241. *See id*. at 32-33.

242. *See id*. at 32.

243. *See id*. at 32-33.

244. *See* Shepherd, *supra* note 169, at 635-36 (citing Memorandum from Edward Manigault summarizing the Paris meeting (Apr. 29, 2008) (on file with author)).

245. *See* Fin. Action Task Force, *supra* note 157, at 33 ¶ 120.

246. *See id.* at 34, ¶ 123. ("For a number of DNFBPs, a single person may be responsible for the functions of front office, back office, money laundering reporting, and senior management.").

practice's profile in determining the nature and extent of the controls.[247]

4. Ambiguity of the Risk-Based Approach under the Lawyer's Guidance

There is ambiguity, however, in when a legal professional is preparing for and carrying out a specified activity, as the Lawyer's Guidance does not define these terms beyond explaining that legal professionals providing "advice or services . . . peripheral to the overall transaction" would not be subject to AML requirements.[248] This determination should be made on a case-by-case basis with consideration of the scope of the local counsel's involvement in relation to the overall transaction, though there is no bright line rule as to when the services would be considered peripheral.[249] Once a lawyer determines that he has crossed the threshold to a more central role in the transaction, the lawyer would then be required to employ appropriate AML/CFT measures.[250]

The definition of the specified activities[251] covered under the Lawyer's Guidance can also be ambiguous. For example, the "[b]uying and selling of real estate" is not defined in either the Lawyer's Guidance or in the FATF Recommendations.[252] This language does not address whether financing real estate transactions or leasing activities fall within this category.[253] The risk factors themselves can also be ambiguous, such as what would constitute "readily apparent inadequate consideration" for a transaction under the Lawyer's Guidance.[254] Further, the Lawyer's

247. *See id.* at 34-35, ¶ 125-26 (detailing the fourteen-point framework that law firm's internal controls should include).

248. *See id.* at 6-7, ¶ 13.

249. Kevin Shepherd provides several examples of different levels of involvement and whether they constitute "preparing for and carrying out" a transaction, but he does not define the degree of involvement that would reach that point. *See* Shepherd, *supra* note 169, at 668-69.

250. *See id.* at 668; *see also* FATF, Fin. Action Task Force, *supra* note 157, at 13, ¶ 49.

251. *See supra* Part III.B.1.

252. *See* Fin. Action Task Force, *supra* note 157; *see also* Fin. Action Task Force, *supra* note 7.

253. Though, based on his discussion, Kevin Shepherd appears to believe that "leasing activities" would not be covered under the "[b]uying and selling of real estate." *See* Shepherd, *supra* note 169, at 649-50.

254. *See id.* at 28.

Guidance does not explain if the determination of what is inadequate should be made on an objective or subjective basis.[255]

C. ABA Opposition to AML Regulations for Lawyers

While the United Kingdom has adopted AML regulations for its lawyers,[256] in the United States, the ABA opposes the implementation of AML regulations on American legal professionals.[257] The ABA argues that imposing such AML/CFT requirements on American lawyers would injure the confidential lawyer-client relationship and that it would "impose burdensome, costly, and unworkable beneficial ownership reporting requirements on small businesses, their lawyers, and states."[258] The ABA also argues that the reporting requirements are unnecessary because there are more effective regulatory tools that have been developed by the legal profession and federal government.[259]

The ABA claims that mandatory AML regulations would disturb the bedrock principle of loyalty and confidentiality central to the attorney-client relationship, which are critical for the independence of American attorneys and our legal adversarial system.[260] The vagueness of the STR and "no tipping off" requirements combined with criminal sanctions would discourage

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255. *See id.* at 656; *see also* Fin. Action Task Force, *supra* note 157, at 28.

256. *See supra* Part III.A.

257. *See Gatekeeper Regulations on Lawyers, Key Points*, A.B.A., https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ [perma.cc/4ZWV-H6P2] (last visited Mar. 29, 2020) [hereinafter Gatekeeper Regulations on Lawyers].

258. *See id.*; *see also* Letter from Kevin Shepherd to FinCEN on Department of the Treasury Financial Crimes Enforcement Network Advance Notice of Proposed Rulemaking—Customer Due Diligence Requirements for Financial Institutions RIN 1506-AB15, 77 Fed. Reg. 13046 (May 4, 2012) (on file with A.B.A.), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012may4_customerduediligence_c.authcheckdam.pdf [perma.cc/2HNL-8QKR].

259. *See Gatekeeper Regulations on Lawyers*, *supra* note 257.

260. A.B.A. Task Force on Gatekeeper Reg. and the Prof., *supra* note 143, at 7; *see also* William C. Hubbard, *Op-Ed: Confidentiality Versus Money-Laundering Laws*, NAT'L L. J. (Mar. 10, 2015) ("[T]he American Bar Association . . . [believes] a voluntary, risk-based compliance approach aimed at educating lawyers about how to detect and prevent [money laundering and terrorist financing] works best and is far preferable to intrusive federal regulation of the legal profession that would erode the attorney-client privilege and harm clients.").

privileged communications.[261] AML/CFT requirements could also raise Sixth Amendment concerns that the right to effective assistance of counsel could be jeopardized.[262]

Lawyer-client confidentiality ensures client candor and trust, which are necessary for effective representation, and harming this relationship will harm the ability of lawyers to effectively represent their clients.[263] Lawyers may be forced to view each client with suspicion due to the vagueness of the regulations and the breadth of the underlying offenses.[264] There can be valid personal and professional reasons for a desire for privacy, including individuals who are concerned about "kidnapping, personal safety, and identity theft"[265] or businesses concerned about "trade secrets and business plans."[266] Further, confidentiality can protect a client's profile in the community, estate planning goals, or solicitations, both charitable and noncharitable.[267]

The ABA also noted that information collected by the Internal Revenue Service (the "IRS") and financial institutions is already adequate to fight money laundering and terrorist financing and that the Voluntary Guidance developed by the ABA is sufficient to regulate AML concerns among American lawyers without the "burdensome and costly rules-based approach" of the Lawyer's Guidance.[268] There are also already considerable consequences for attorneys who commit money-laundering that are sufficient to

261. A.B.A. Task Force on Gatekeeper Reg. and the Prof., *supra* note 143, at 16 n.8 (noting that although the FATF exempts "privileged information" from STR requirements, the distinction between privileged and non-privileged information is likely to be unclear).

262. *See* Blake Bryant Goodsell, *Muted Advocacy: Money Laundering and the Attorney-Client Relationship in a Post 9/11 World*, 34 J. LEGAL PROF. 211, 225-26 (2009); *see also* United States v. Sindel, 53 F.3d 874, 877 (8th Cir. 1995).

263. *See* Danielle Jasmin Kirby, *The European Union's Gatekeeper Initiative: The European Union Enlists Lawyers in the Fight against Money Laundering & Terrorist Financing*, 37 HOFSTRA L. REV. 261, 310 (2008) (quoting Patricia Shaughnessy, *The New EU Money-Laundering Directive: Lawyers as Gate-Keepers and Whistle-Blowers*, 34 L. & POL'Y INT'L BUS. 25, 44 (2002)).

264. *See id.*

265. Duncan E. Osborne, *The Financial Action Task Force and the Legal Profession*, 59 N.Y. L. SCH. L. REV. 421, 428-29 (2014).

266. *Id.*

267. *Id.* at 429.

268. *See Gatekeeper Regulations on Lawyers*, *supra* note 257.

deter intentional wrongdoing.[269] The ABA also argues that these regulations would not appear to be effective as well, noting the failure of SAR reporting under the BSA.[270] In addition to the ABA, the Council of Bars and Law Societies of Europe noted in 2011 that there was no evidence from the FATF that lawyers were being unwittingly targeted by launderers, except in circumstances where a lawyers willfully participates in money-laundering.[271]

IV. THE UNITED STATES SHOULD NOT ADOPT AML REQUIREMENTS FOR LAWYERS

The United States should not adopt AML requirements for American lawyers like the United Kingdom, but should instead continue with the ABA's efforts to educate American attorneys about money laundering risks and the risk-based approach. The BSA has already proven to be a burdensome regulatory regime with little apparent impact on the amount of money laundered in the United States or globally, and these costs would likely be exacerbated if applied to legal professionals in the United States. Further, invading the sanctity of the attorney duty of confidentiality could have adverse impacts on the independence of the Bar. The current self-regulating approach taken to detect and prevent money laundering facilitation among American attorneys is sufficient to regulate money laundering in the United States.

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269. *See* Terry, *supra* note 144, at 501-02 (noting that there is a vast network of federal criminal laws and enforcement mechanisms" to deter intentional criminal acts and therefore, the focus of AML efforts should be on education); *see also* Comment Letter on Preliminary Reaction to Typologies Draft from Kevin L. Shepherd, Chair of ABA Task Force on Gatekeeper Regulation and the Profession, to John Carlson, Principal Administrator of FATF Secretariat ¶2a, ¶1a (May 6, 2013) (on file with A.B.A.) (noting that complicit criminal activity by legal professionals is unusual and not typical).

270. *See* Letter from Kevin Shepherd to John Carlson, *supra* note 269, ¶6 ("In the United States the empirical or anecdotal evidence seems quite the opposite, with many STRs being filed by financial institutions that never result in law enforcement action.").

271. *See CCBE Response to the Commission, The Review of the Third Anti-Money Laundering Directive*, Council of Bars and Law Soc'ys of Eur., ¶3.2 (Sept. 9, 2010), https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ANTI_MONEY_LAUNDERING/AML_Position_papers/EN_AML_20111021_CCBE_Response_to_the_Commission_The_review_of_the_third_anti-money_laundering_Directive.pdf [perma.cc/S8TK-MA7W] (noting further in ¶3.5 that even assuming legal professionals are targeted by money launderers, "[e]xperience seems to suggest that the scale of the targeting is in fact relatively low and the question must therefore be asked if a reporting duty is justified."); *see also* Osborne, *supra* note 265, at 428 (noting the FATF had no examples of attorneys becoming unwittingly involved in a money laundering or terrorist financing scheme).

A. Existing AML Regulations Have Not Proven To Be Sufficiently Effective To Justify Expanding Them To Lawyers

The BSA has not been effective enough in reducing money laundering in the United States to justify expanding its regulations to the legal profession. The amount of money laundered globally and in the United States annually has not been reduced by efforts to regulate financial institutions, insurance companies, casinos, and other industries[272] and the FATF's evidence that lawyers contribute significantly to global money laundering is inadequate to justify imposing costs of billions of dollars on US law firms.[273] Further, one of the reasons cited for expanding AML regulations to lawyers is that individuals looking to launder money may approach lawyers to create more complex entities to better hide their activity[274] and use anonymous shell corporations to hide their identity from law enforcement officers.[275]

The Lawyer's Guidance specifically addresses this risk by requiring that lawyers identify beneficial ownership when performing due diligence.[276] However, the beneficial ownership identification requirement under the United Kingdom's approach to regulating attorney money laundering risks is substantially identical to the requirement now imposed on financial institutions in the United States[277] and contains the same problems.[278] As with US financial institutions, should a corporate shell in the United Kingdom have no single owner with a twenty-five percent or greater stake, the lawyer would not need to identify the owner of the entity, but would need to only identify the individual who controls the entity,[279] who may not actually be the "true owner" of the corporation's assets.[280]

Shell corporations are also easy to form without legal expertise,[281] so adding these requirements may not accomplish the

272. *See supra* Section II.B.1.

273. *See* Council of Bars and Law Soc'ys of Eur., *supra* note 271; *see also* Am. Bar Found., *supra* note 64.

274. *See supra* text accompanying notes 180-83.

275. *See supra* Section II.B.1.a.

276. *See supra* text accompanying note 238.

277. *Compare supra* text accompanying notes 187-89, *with supra* Section II.A.2.

278. *See supra* text accompanying notes 80-83.

279. *See supra* text accompanying notes 187-89.

280. *See supra* text accompanying note 83.

281. *See supra* text accompanying notes 71-72.

intended goal. Attorneys may sometimes aid suspicious individuals in establishing anonymous shell corporations without performing appropriate due diligence,[282] but banks have been guilty of doing this as well, at least prior to the beneficial ownership requirement.[283] Therefore, the new beneficial ownership identification requirements on financial institutions may help improve this problem without necessitating the expansion of burdensome requirements to other industries.

Another issue is the potential for de-risking among law firms, which is one of the ways financial institutions have responded to the current AML regulatory scheme.[284] For financial institutions, de-risking can increase the possibility of money laundering as the remaining institutions in an area are less capable of handling the increased AML risks.[285] Law firms would likely face the same problems. There is the additional issue that de-risking among law firms could pose Sixth Amendment issues in certain industries, within certain geographic areas, or even to certain clients[286] as these individuals will be unable to solicit legal representation. Further, scrutiny on international business and money transfers has pushed smaller financial institutions away from international customers,[287] however, if applied to law firms, it could discourage important work that lawyers do internationally in areas of human rights, international development, and other pro bono matters.[288]

De-risking also poses implications for the independence of the Bar and Judiciary because de-risking is done in response to regulatory scrutiny.[289] When regulators identify a certain area as high risk, banks have responded by de-risking, as was the case for the southwest border, money service businesses, embassies, and

282. *See supra* text accompanying notes 76-77.

283. *See supra* text accompanying note 75.

284. *See supra* Section II.B.2.c.

285. *See* Adisa, *supra* note 122, at 16.

286. *See supra* text accompanying notes 126-27 (noting the types of sectors and clients who have lost access to banking services).

287. *See supra* text accompanying notes 128-29.

288. *See* Jones Day, *Pro Bono and Public Service: Giving Back Worldwide* 23 (2010) (highlighting Jones Day's economic development work in Rwanda); *see also* Orrick, *Impact Finance*, ORRICK, HERRINGTON & SUTCLIFFE, https://www.orrick.com/Practices/Impact-Finance [perma.cc/DQ9U-GKMH] (last visited Mar. 28, 2020) (highlighting Orrick's Impact Finance and Investment global Pro Bono work, which works to raise "the quality of life for people in every part of the world.")

289. *See supra* Section II.B.2.c.

international customers.[290] This means the government could push law firms, and especially smaller law firms, out of certain industries or areas by imposing more scrutiny and more severe penalties on firms that engage those areas.

Requiring attorneys to file SARS would also not improve the current AML regulatory scheme. Financial institutions file millions of SARs each year,[291] many of which do not result in a law enforcement response.[292] If millions of SARs a year are only producing about 1,200 money laundering convictions,[293] adding more SAR filings will accomplish little. Beyond cost, requiring lawyers to file SARs would fundamentally change the attorneys' position in the US legal system as one of confidentiality and privilege.[294] Forcing attorneys to look at every client with suspicion could chill the attorney-client relationship, making clients less candid and making it more difficult for lawyers to represent their clients.[295] Disturbing this bedrock principle by forcing attorneys to report on their client's activity to the government may be justifiable if there were some considerable benefit, but there is not enough evidence that growing the pile of unused SARs would generate any such benefit.[296]

Further, the United Kingdom's efforts to expand money laundering regulations to solicitors have failed to reduce the amount of money laundered in the United Kingdom. While the exact scale of money laundered in the United Kingdom cannot be determined with certainty,[297] there is still a significant amount of

290. *See supra* text accompanying notes 126-27.

291. *See supra* text accompanying note 51.

292. *See* Letter from Kevin Shepherd to John Carlson, *supra* note 269, ¶6.

293. *See supra* text accompanying note 67.

294. *See supra* text accompanying note 260.

295. *See supra* text accompanying note 264.

296. *See* Letter from Kevin Shepherd to John Carlson, *supra* note 269, ¶6.

297. *See* Hilary Osborne, *UK vulnerable to money laundering on a massive scale, finds MPs*, GUARDIAN (Mar. 7, 2019), https://www.theguardian.com/uk-news/2019/mar/08/uk-vulnerable-to-money-laundering-on-a-massive-scale-find-mps [perma.cc/DZ2K-LF87]; *see also* Anton Moisenko & Tom Keatinge, *The Scale of Money Laundering in the UK: Too Big to Measure?*, ROYAL UNITED SERVS. INST. FOR DEF. & SEC. STUDIES 10 (2019), https://rusi.org/sites/default/files/20190211_moiseienko_and_keatinge_extent_of_money_laundering_web.pdf [perma.cc/S5PB-RK84] ("It is unlikely that the UK government or researchers will be able to produce a comprehensive estimate of money laundering in the UK.").

money laundered through the United Kingdom.[298] In fact, many consider London to be the money laundering capital of the world.[299] Without any evidence that the United Kingdom's expanded approach to regulating money laundering risks has reduced the amount of money laundered in its economy, the United States should not follow suit and risk billions of dollars in costs[300] for an uncertain benefit.

B. The Expense Of Expanding AML Requirements To Lawyers Would Be Significant

The cost of the current AML requirements on banks has been significant[301] and it would likely be the same for attorneys if they are required to implement AML policies. Under the United Kingdom's approach, attorneys in the United States would be required to comply with many of the same AML requirements as financial institutions in the Unites States, including implementing a risk-based analysis of customers, performing CDD, implementing internal controls, and ensuring appropriate employee training on how to identify and prevent money laundering and terrorist financing.[302] Multiple studies have already found that AML regulations are among the most significant that financial institutions face,[303] and those institutions already face numerous burdensome regulations.[304] Law firms conversely, are typically

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298. *See* Chris Stokel-Walker, *Why the UK is losing its costly battle against money laundering*, WIRED (Dec. 10, 2018), https://www.wired.co.uk/article/money-laundering-in-the-uk-russian-banks [perma.cc/N4UW-KQN3]; *see also* Chris Stokel-Walker, *New data shows London's property boom is a money laundering horror*, WIRED (Apr. 9, 2019), https://www.wired.co.uk/article/money-laundering-hmrc-tax-update [perma.cc/QTY9-QGTT]; *London's financial flows are polluted by laundered money*, ECONOMIST (Oct. 11, 2018), https://www.economist.com/leaders/2018/10/11/londons-financial-flows-are-polluted-by-laundered-money [perma.cc/7LU4-EEJE].

299. *See* Avinash D Persaud, *London: the money laundering capital of the world*, PROSPECT MAGAZINE (Apr. 27, 2017), https://www.prospectmagazine.co.uk/economics-and-finance/london-the-money-laundering-capital-of-the-world [perma.cc/9WPV-DKXC]; *see also* Nico Hines, *London: The World's Money Laundering Capital*, DAILY BEAST (Jul. 8, 2015), https://www.thedailybeast.com/london-the-worlds-money-laundering-capital [perma.cc/M4NJ-TTSS].

300. *See supra* Part II.B.2.

301. *See supra* Part II.B.2.

302. *Compare supra* Part III.B.3, *with supra* Part II.A.2.

303. *See supra* text accompanying notes 103-08.

304. *See* Lux & Greene, *supra* note 104, at 23.

regulated at the state level,[305] and imposing these onerous regulatory burdens on them, which even major financial institutions find burdensome,[306] would significantly change how law firms operate and structure themselves. These costs would then get passed down to clients, which would further restrict access to affordable legal representation.

Law firms are also fundamentally structured differently than financial institutions.[307] While a majority of banking is performed by a smaller number of large banks,[308] the number of lawyers employed by small firms is significant.[309] AML requirements have had a disproportionate impact on small financial institutions[310] and if they were expanded to cover attorneys, this disproportionate impact would be the norm of the industry. The Lawyer's Guidance does include variables in its analysis to account for the different sizes of law firms, allowing them to account for their lack of manpower in their approach to AML compliance;[311] however, banks are also permitted to take a risk-based approach in AML regulations[312] and it has not helped them to avoid targeting from regulators.[313]

305. *See* Rhonda McMillion, *ABA and Other Bar Groups Work to Limit Federal Regulation of Lawyers*, AM. BAR ASS'N J. (Dec. 2010), http://www.abajournal.com/magazine/article/let_the_states_do_it_aba_working_to_limit_federal_regulation_of_lawyers [perma.cc/SYW7-FQWJ].

306*. See supra* text accompanying notes 103-08.

307*. See supra* text accompanying note 246.

308*. See* Camden R. Fine, *BankThink No, there aren't too many banks in the U.S.*, AM. BANKER (Oct. 25, 2017, 9:30 AM), https://www.americanbanker.com/opinion/no-there-arent-too-many-banks-in-the-us [perma.cc/99AM-TB3E] ("Just 0.2% of U.S. banks hold more than two-thirds of industry assets."); *see also* Hester Peirce & Stephen Matteo Miller, *Small Banks by the Numbers, 2000 – 2004*, MERCATUS CTR. (Mar. 17, 2015), https://www.mercatus.org/publication/small-banks-numbers-2000-2014 [perma.cc/C6AR-BABA] ("Since the financial crisis, US banking assets and deposits have continued a long trend of consolidation in a handful of large banks.").

309. *See* Margaret Grisdela, *Overview of the U.S. Legal Market*, HG.ORG, https://www.hg.org/marketing-us-market.html [perma.cc/HJ5D-JDQ2] (last visited Apr. 14, 2020) ("The vast majority of attorneys in private practice (70%) work in a law firm with ten or fewer attorneys. In fact, a solo practice is the career and lifestyle choice of almost half (48%) of private legal practitioners. Only 14% of attorneys work in firms with more than 100 lawyers, according to the ABA.").

310*. See supra* text accompanying notes 97-102.

311*. See, e.g.*, Fin. Action Task Force, *supra* note 157, at 29.

312*. See supra* Part II.A.1.

313*. See supra* Part II.B.2.b.

Further, the variables in the Lawyer's Guidance accounting for the differences in sizes among law firms is vague and it is unclear what the Lawyer's Guidance means when it says that smaller practices can take into account their smaller size in their risk assessment.[314] Therefore, without more specific language, it is likely that smaller practices will still feel pressure to expend resources to "over-comply" with AML requirements. Further, a significant number of these smaller firms are solo law practices,[315] which would be hit even harder by these compliance and reporting requirements.[316]

Beyond the financial costs, AML regulations have contributed heavily to an increasing trend of consolidation in the financial industry, as banks race to achieve efficient economies of scale to address their growing regulatory burdens.[317] Pushing the legal field onto the same path of mergers and consolidations that smaller banks already face could adversely impact the availability of access to legal representation. Additionally, banks already have difficulty finding compliance specialists to work in their institutions and aid with regulatory compliance.[318] It would be even more difficult if the government increased the demands for these services by imposing these requirements on many more firms.

Another significant cost would be the cost of ambiguity and uncertainty created by implementing a regulatory scheme based on the United Kingdom. Financial institutions already face a regulatory scheme in the BSA with significant unclarity, resulting in those institutions being assessed as deficient due to a difference of opinion between a regulator and a bank over how to categorize certain risks.[319] This uncertainty would be exacerbated by the United Kingdom's approach because it is not even clear who the underlying Lawyer's Guidance covers, whereas the BSA more clearly delineates the covered entities.[320] Specifically, the Lawyer's Guidance defines covered attorneys as those preparing for or

314. *See, e.g.*, Fin. Action Task Force, *supra* note 157, at 29.

315. *See* Grisdela, *supra* note 309.

316. *See supra* Part II.B.2.

317. *See supra* text accompanying notes 103-05.

318. *See supra* text accompanying notes 101-02.

319. *See supra* text accompanying notes 118-21.

320. *See* 31 U.S.C. § 5312(a)(2)(2018); *compare* Part III.B.4, *with* 31 U.S.C. § 5312(a)(2) (2018).

carrying out a specified activity.[321] This vague term would likely result in law practices that would not be considered to be facing a significant risk of money laundering, still implementing AML policies and procedures out of an abundance of caution, which could impose needless significant compliance costs on law firms and invade people's privacy with no benefit.[322] Further, it means that regulators will be able to stretch the definition of which legal practitioners are covered by the AML requirements, allowing them to impose significant penalties and fines[323] on unsuspecting legal professionals who believed they were not covered by the regulations.

C. Current Measures Are Sufficient To Address AML Risks

Current measures in place are adequate to address AML risks for attorneys. There is a vast array of criminal laws, enforcement mechanisms, and ethical requirements that are already in place to deter attorneys from willfully facilitating money laundering schemes.[324] Attorneys are also subject to ethical requirements beyond the regulatory requirements already imposed on bankers,[325] which makes assisting a client in laundering funds riskier, and subjects the attorney to more severe punishment. Like bankers, attorneys are already subject to criminal sanction for assisting money laundering.[326] However, attorneys could also lose their license to practice for assisting a client in laundering funds.[327] Therefore, there are enough enforcement mechanisms to discourage attorneys from willfully facilitating money laundering and additional AML regulations would not dissuade individuals who are not already deterred by the existing rules and requirements.

As for attorneys who unwittingly assist in money laundering schemes, there is already a standard in place to ensure that lawyers address reasonable suspicions of criminal wrongdoing by their clients and ensure that lawyers do not turn a blind eye to

321. *See supra* Part III.B.1.
322. *See supra* Part III.B.4.
323. *See supra* Part II.B.2.b.
324. *See supra* Part II.C.1.
325. *See supra* Part II.C.1.
326. *See supra* text accompanying notes 132-35.
327. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 1983).

misconduct.[328] Some attorneys may not have enough experience to understand the risks created by clients seeking to use their services to advance a money laundering scheme, but this is an educational problem that the Voluntary Guidance was meant to address.[329] Imposing mandatory AML regulations on lawyers would encourage them to better understand money laundering risks, but imposing burdensome regulatory obligations and criminal sanctions is not a cost-effective way to promote educational material. While the ABA's efforts to educate lawyers about the Voluntary Guidance and money laundering risks[330] have not yielded significant results,[331] a more targeted approach may lead to more lawyers understanding the guidance and being able to use it without the significant costs[332] that would come with mandatory AML regulations. One possible solution would be to require lawyers within the fields of the specified activities[333] to take CLE credits pertaining specifically to AML risks or the Voluntary Guidance. This would also fix the problem that the Voluntary Guidance itself is not well known.[334] Using the Voluntary Guidance to educate attorneys about the risks of money laundering from clients,[335] while ensuring that those attorneys who turn a blind eye to suspicious clients are penalized appropriately,[336] is a more efficient means to deal with this problem than imposing burdensome regulatory requirements on law firms and placing ambiguous requirements on them that could result in significant penalties.[337]

Further, POCA's balancing of privilege and reporting requirements is inferior to how they are balanced in the United States. In the United Kingdom, the standard for when a solicitor must report on his client for suspected wrongdoing does not differ significantly from the standard imposed on American lawyers. The standard for solicitors is either "knowing" or having "prima facie

328. *See supra* text accompanying note 135.
329. *See supra* Part II.C.3.
330. *See supra* Part II.C.2.
331. *See supra* text accompanying note 166.
332. *See supra* Part II.B.2.
333. *See* Fin. Action Task Force, *supra* note 157, at 6-7.
334. See supra text accompanying note 166.
335. *See supra* Part II.C.2.
336. *See supra* text accompanying notes 133-35.
337. *See supra* Part II.B.2; *see also supra* Part II.B.1.

evidence" of wrongdoing.[338] However, American lawyers are already under ethical requirements not to assist clients in activity the lawyers know to be illicit[339] and could face criminal charges if they turned a blind eye to prima facie evidence of wrongdoing.[340] Imposing a requirement to file a SAR in this scenario while also not "tipping off" the client to the SAR,[341] and at the same time making the lawyer withdraw from the representation[342] would impose contradictory obligations. If a lawyer is required to file a SAR, but then tells the client that he suspects wrongdoing and must withdraw from representation, then the lawyer has effectively "tipped off" the client to the existence of a likely SAR filing. The solution would be to either force the lawyer to continue representing a criminal client, putting the lawyer in an uncomfortable and costly situation, or force the lawyer to begin lying to clients, which is disruptive to the foundational lawyer-client relationship.[343] Allowing a lawyer to tell a client the truth and withdraw from representation[344] is a better approach, both for the lawyer's legal and ethical exposure, and for the protection of the lawyer-client relationship.

Finally, the United States should protect the sanctity and privilege of the lawyer client relationship that currently exists. The lawyer-client confidential relationship was not meant to shield clients from the law, but is instead meant to promote client candor and trust which is necessary for effective legal representation.[345] While the United Kingdom and the FATF both took efforts to limit the breadth of AML regulations to limit the impact on attorney-client confidentiality and privilege,[346] the regulations they created are still too vague and broad and would chill the attorney-client relationship.[347] Further, responding to the regulations necessitates that lawyers view their clients in an adversarial nature, as their

338. *See* Legal Sector Affinity Group, *supra* note 211.

339. *See supra* text accompanying notes 136-37.

340. *See supra* text accompanying note 135.

341. *See* Terrill, *supra* note 171, at 448 (citing Proceeds of Crime Act 2002, c. 29, §§ 330A(1), 330A(3) (U.K.)).

342. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 1983).

343. *See supra* text accompanying note 260.

344. *See supra* Part II.C.1.

345. *See* Kirby, *supra* note 263.

346. *See supra* Part III.B; *see also supra* Part III.A.

347. *See supra* text accompanying note 261.

interests may no longer align, which only reduces the candor between lawyers and their clients.[348] There are many valid reasons businesses and individuals might want privacy and confidentiality ranging from the objectives of promoting business to simply protecting themselves from financial harm.[349] The government also has a history of losing sensitive data to hacks and leaks.[350] Even clients who may be willing to trust their attorneys in a more adversarial position[351] may be hesitant to be as candid, knowing that any interaction could end up in a government database, subject to exposure by a hacker or whistleblower.

V. CONCLUSION

It is more appropriate to expand the efforts of the ABA to educate attorneys on the risks of facilitating money laundering than to impose on law firms costly and unclear regulatory requirements that have not been effective in their use on financial institutions. Imposing these requirements would not address any of the significant problems with the current US AML regulatory scheme and would instead burden small law firms in the United States that would be unable to cope with the significant costs of such a regulatory expansion. Further, the fundamental changes to the attorney-client relationship would injure the nature of the relationship with little benefit. Therefore, the United States should instead invest in educational efforts to allow attorneys to address the risks of money laundering in a more cost-effective approach.

348. *See* Kirby, *supra* note 263, at 310.

349. *See* Osborne, *supra* note 265, at 29.

350. *See* Cybersecurity Res. Ctr., *CyberSecurity Incidents*, U.S. OFFICE OF PERS. MGMT., https://www.opm.gov/cybersecurity/cybersecurity-incidents/ [perma.cc/UP3F-KFL4] (last visited Apr. 14, 2020) (detailing the 2015 leak of "personnel data of 4.2 million current and former Federal government employees."); s*ee also* Deb Riechmann, *Costs of Snowden leak still mounting 5 years later*, AP NEWS (Jun. 4, 2018), https://www.apnews.com/797f390ee28b4bfbb0e1b13cfedf0593 [perma.cc/M6MC-78CU] (discussing the breach of the National Security Agency by Edward Snowden).

351. *See supra* text accompanying notes 263-64.