FEATURE:
INTERNATIONAL PRACTICE

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Long Arm of the Law

The risk to U.S. practitioners of prosecution for facilitating foreign tax offenses

Recent years have seen an increase in U.S. enforcement actions against tax advisors, bankers and other "enablers" for assisting clients and customers in evading taxes, including non-U.S. advisors whose activities were largely offshore. Most U.S. enforcement actions have focused on federal tax compliance. However, there's growing concern among practitioners that the U.S. government may take a closer look at the potential role of U.S. tax and estate-planning lawyers who advise international clients in the facilitation of tax avoidance and money laundering in other countries. Twenty years ago, few U.S. practitioners would have given much thought to their own exposure in such matters. However, prosecution in the United States for aiding and abetting the evasion of another country's tax laws or for (perhaps unwittingly) becoming an accessory to money laundering isn't out of the question, particularly in the wake of multiple investigations now underway following the release of the Panama Papers. Moreover, other countries could take a page from the U.S. government's playbook and begin targeting U.S. advisors they consider to be facilitating evasion of their own tax laws.

Background

The Department of Justice (DOJ) Tax Division's initiatives aimed at offshore tax evasion have yielded billions of dollars in fines, penalties and restitution from 90 foreign financial institutions accused of facilitating the concealment of U.S.-related accounts and aiding in U.S. tax evasion. Pursuant to various non-prosecution and deferred prosecution agreements (including 80 agreements through the Swiss Bank Program announced in 2013), these institutions have cooperated in turning over information on thousands of U.S. accountholders.[1] Notably, between 2008 and 2016, the DOJ prosecuted more than 160 U.S. taxpayers who used foreign financial accounts, foreign structures or foreign tax havens to evade U.S. tax and reporting obligations and nearly 50 bankers and other enablers who facilitated such activities.[2]

The U.S. government's recent successes in combating offshore tax evasion likely wouldn't have been possible without the cooperation of other countries. Apart from information-sharing provisions under various tax treaties, the centerpiece of U.S. enforcement efforts is its network of intergovernmental agreements (IGAs) for the implementation of the Foreign Account Tax Compliance Act (FATCA). As of March 29, 2017, the Treasury Department had entered into IGAs or announced agreements in substance with 113 foreign governments to collect and remit information on U.S. beneficial owners of foreign accounts to the Internal Revenue Service.[3] These IGAs have been critical to FATCA's success. However, there's a considerable disparity between the information that foreign financial institutions are required to provide with respect to direct and indirect U.S. owners of foreign financial accounts and the information that their U.S. counterparts are required to provide. While foreign financial institutions subject to Model 1 reciprocal IGAs are required to look through entities wherever they're resident and report information on certain U.S. owners, no such look-through requirement is imposed on U.S. financial institutions subject to the same IGAs. Moreover, reporting by U.S. financial institutions doesn't extend to accounts held by entities that aren't resident in the FATCA partner jurisdiction, and no reporting is

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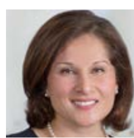


required for non-cash U.S. accounts, whether held by individuals or entities, unless there's U.S. source income that's subject to withholding in the United States.[4]

The reason for these lopsided reporting obligations is that Congress hasn't enacted implementing legislation allowing the Treasury Department to fully reciprocate. In some respects, this disparity is nothing new. The United States' zeal in extending its jurisdictional reach beyond its own borders has seldom been matched by a willingness to countenance the same from other countries. The United States is almost alone among developed countries in opting not to participate in the automatic exchange for information under the Common Reporting Standard (CRS) developed by the Organisation for Economic Cooperation and Development.[5] Even when the United States makes attempts at multilateralism, such gestures often are heavily qualified.[6]

This lack of reciprocity has been a growing source of contention with IGA partners and potentially could impact the long-term success of the Treasury Department's and DOJ Tax Division's offshore initiatives, as well as the full implementation of FATCA. For example, reciprocal Model 1A IGAs include provisions to the effect that the parties will consult in good faith to amend the IGA as necessary to reflect progress on the United States' commitments, with a target date—Dec. 31, 2016—that's now behind us.[7] As some commentators have observed, the United States could soon face genuine blowback from its IGA counterparties if Congress fails to take any meaningful action towards the eventual passage of implementing legislation—a possibility that looks increasingly remote.[8] This situation is further compounded by the United States' unwillingness to adopt CRS and the lack of disclosure requirements for the beneficial owners of trusts and companies formed in a number of U.S. states. Given the ease with which companies and trusts may be formed in some jurisdictions without disclosing the identities of the beneficial owners and principals, the United States' trading partners have voiced concerns that the United States is becoming an offshore tax haven in its own right. A report issued by the European Parliament in March 2017 on tax evasion, money laundering and tax transparency and United States-European Union cooperation (the European Parliament Report) described the United States' role in offshore tax evasion in strikingly blunt terms:

> The United States of America (USA) is seen as an emerging leading tax and secrecy haven for rich foreigners. By resisting new global disclosure standards, it provides an array of secrecy and tax-free facilities for non-residents at federal and state levels, notably in Nevada, Delaware, Wyoming, and South Dakota.[9]

The European Parliament Report goes on to detail the lack of beneficial ownership information available from trusts and companies formed in various U.S. jurisdictions, as well as the lack of suspicious activity

The Treasury Department has taken several concrete steps in the last year to combat foreign tax evasion and money laundering in the United States and begin collecting information on foreign beneficial owners.

reporting obligations for lawyers in the United States (discussed in more detail below). In contrast, following the enactment of the Fourth European Union Anti-Money Laundering Directive on June 25, 2015 (Fourth AML Directive), EU member states are moving towards the implementation of beneficial ownership registries to share information on the ultimate beneficial ownership of trusts and business entities, and many already impose suspicious activity reporting requirements on lawyers, accountants and other related professionals.

The Financial Action Task Force (FATF), an intergovernmental body whose mandate focuses on the implementation of legal, regulatory and operational measures to combat money laundering and other threats to the integrity of the international financial system, expressed similar concerns in its Mutual Evaluation Report of the United States (MER) issued in

December 2016.[10] Although describing U.S. structures in place to combat money laundering and terrorism financing as generally "well developed and robust," the MER identified both the lack of a comprehensive system for beneficial ownership reporting (particularly at the state level) and the lack of suspicious activity reporting requirements for lawyers and other non-financial advisors, as areas of concern.[11]

As discussed in the next section, the Treasury Department has taken several concrete steps in the last year to combat foreign tax evasion and money laundering in the United States and begin collecting information on foreign beneficial owners that ultimately could be shared with trading partners under tax treaties and information exchange agreements, and cooperation under such agreements appears to be continuing under the current administration.[12] However, the U.S. government may need to demonstrate reciprocity in other ways. Prosecuting tax and estate planners in the United States for facilitating tax crimes overseas—or for money laundering more broadly—is one option that the Treasury Department and DOJ Tax Section could pursue without any new legislation and in a way that doesn't cede control to other countries. As explained below, prosecutors already may have the tools to do this.

> Federal mail, wire and bank fraud and money laundering statutes provide several possible paths for the U.S. government to prosecute tax and estate-planning lawyers for violations of foreign tax laws, as well as other offenses.

Tax Evasion/Money Laundering

The United States hasn't adopted across-the-board beneficial ownership reporting on the scale adopted by many EU members in the wake of the Fourth AML Directive.[13] However, over the past year or two, the Treasury Department has introduced measures requiring beneficial ownership disclosures or self-reporting in three specific areas: (1) geographic targeting orders requiring title insurance companies to determine the beneficial owners of certain shell companies, (2) new customer due diligence rules imposed on financial institutions, and (3) new IRS Form 5472 reporting requirements imposed on U.S. disregarded entities with foreign owners. As the Treasury Department and DOJ Tax Division gather more information on U.S. structures employed by non-U.S. taxpayers holding assets in the United States, not only will the U.S. government be in a better position to meet some of its information-sharing obligations with treaty and information exchange agreement partners, but also the Treasury Department and DOJ Tax Division will likely gain more insights into the types of structures being used by non-U.S. taxpayers to hold assets in the United States and the role of U.S. advisors in setting up those structures.

Geographic targeting orders (GTOs). The Treasury Department has issued GTOs requiring title insurers to determine the identities of the owners of limited liability companies (LLCs) that buy high-end residential real estate in all cash transactions above specified dollar thresholds in certain designated markets. Originally limited to Manhattan and Miami, the GTOs were expanded in July 2016 to cover all-cash transactions in the following geographic areas: (1) all five boroughs of New York City, (2) Miami-Dade County and the two counties immediately to the north (Broward and Palm Beach), (3) Los Angeles County, (4) San Francisco, San Mateo and Santa Clara Counties, (5) San Diego County, and (6) Bexar County (including San Antonio).[14] The dollar thresholds for reporting vary by geographic area.[15] This requirement doesn't apply to purchases made by wire transfer.[16] In a Feb. 23, 2017 press release, the Financial Crimes Enforcement Network (FinCEN) reported finding that 30 percent of the transactions covered by the prior GTOs turned out to involve beneficial owners or purchaser representatives who were subject to previous suspicious activity reports, "[corroborating] FinCEN's concerns about the use of shell companies to buy luxury real estate in 'all-cash' transactions."[17] Accordingly, the GTOs were extended for an additional 180 days beginning Feb. 24, 2017.

FinCEN customer due diligence (CDD) regulations. On May 11, 2016, FinCEN announced new CDD rules for banks, brokers, mutual funds and futures commission merchants that will be effective May 11, 2018.[18] Affected financial institutions will be required to collect information about certain beneficial owners of accounts held by "legal entities." Information will be required for individuals who own (directly or indirectly) 25 percent or more of the equity of the entity holding the account or who have significant responsibility to control, manage or direct the entity (such as a CEO, CFO, COO, president, vice president, managing member, general partner, treasurer or other officer with similar authority). Because trusts aren't legal entities, the CDD rules don't require reporting institutions to obtain information on the beneficiaries of trusts, although the institutions are required to obtain information on the trustees and any other control persons (for example, the settlor of a revocable trust).[19]

New IRS Form 5472 reporting requirements for U.S. disregarded entities with foreign owners. On May 10, 2016, the Treasury Department issued proposed regulations under Section 6038A of the Internal Revenue Code requiring U.S. single-member LLCs and other domestic disregarded entities with foreign owners to file IRS Form 5472 information returns identifying their foreign owners and reporting certain related party transactions.[20] The regulations were issued in final form effective for tax years beginning on or after Jan. 1, 2017 and ending on or after Dec. 13, 2017.[21] Entities covered by the new rules will continue to be disregarded for most federal tax purposes, but they'll be treated as corporations for the limited purpose of IRS Form 5472 reporting, record keeping and other compliance requirements imposed on certain domestic corporations with foreign owners under IRC Section 6038A.

The preamble to the proposed regulations cited the lack of any reporting or record-keeping requirements with respect to such disregarded entities as a hindrance to international law enforcement efforts and the U.S. government's ability to meet its obligations under information exchange agreements. It explained that the expansion of the reportable transaction categories was specifically intended to capture transactions (including contributions and distributions) between the disregarded entity and its owner (or another disregarded entity with the same owner) that wouldn't have any income tax significance or otherwise be reportable for U.S. tax purposes.[22]

The breadth of transactions considered "reportable transactions" under the final regulations essentially makes it almost impossible to fund a new structure or unwind an existing one without triggering a reporting obligation.[23] This requirement will force many disregarded entities with foreign owners that don't already have employer identification numbers to obtain them to satisfy their Form 5472 filing obligations next year.[24]

Risk of U.S. Prosecution

The IRC contains a number of criminal and civil enforcement provisions, including provisions for tax evasion and false statements, but they only cover U.S. federal taxes.[25] However, federal mail, wire and bank fraud and money laundering statutes provide several possible paths for the U.S. government to prosecute tax and estate-planning lawyers for violations of foreign tax laws, as well as other offenses.

Mail, wire and bank fraud statutes. Mail or wire fraud charges may be brought under 18 U.S.C. Sections 1341 and 1343, respectively, against an individual who uses the interstate mail or wires to effect a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses…" The maximum sentence is 20 years (30 years in the case of mail or wire fraud that affects a financial institution or is connected to a federally declared disaster or emergency). Bank fraud is similarly defined under 18 U.S.C. Section 1344 and carries a maximum sentence of 30 years. As other commentators have noted, the breadth of these statutes makes them "go-to" statutes for federal prosecutors in a "vast array" of fraud and corruption cases.[26] A 2005 U.S. Supreme Court case, *Pasquantino v. United States*,[27] (discussed below), illustrates how prosecutors could use these statutes against an individual committing (or facilitating) foreign tax fraud or evasion.

Note: Conspiracy charges also could be alleged against any individual who conspires to defraud or commit any offense (including wire fraud) against the United States under 18 U.S.C. Section 371.[28] Such charges can be a powerful tool for prosecutors because they enable the prosecution to introduce conduct of unindicted co-conspirators at trial and potentially address acts that otherwise would fall outside the statute of limitations if they're part of the same conspiracy.[29]

Money laundering statutes. Another way that a tax or estate-planning lawyer could face prosecution in the United States on account of a client's actions overseas is through the federal money laundering statutes. Broadly stated, the purpose of money laundering is to disguise or "wash" the proceeds of criminal activity so that they may be used without alerting authorities to the illegal means by which they were obtained. Very generally, the charge of money laundering in 18 U.S.C. Sections 1956 and 1957 involves a financial transaction affecting interstate or foreign commerce conducted with the proceeds of a "specified unlawful activity" (also known as a "predicate offense").[30]

Mail, wire and bank fraud are all predicate offenses.[31] Tax evasion isn't (although it may satisfy the intent requirement). However, as discussed below, there are a number of ways that crimes associated with U.S. or foreign tax evasion could give rise to a money laundering charge:

> The overwhelming majority of tax and estate-planning lawyers wouldn't knowingly assist clients in defrauding their governments, but there could be morally or factually ambiguous situations.

- 18 U.S.C. Section 1956, which carries a maximum sentence of 20 years, generally requires the defendant to act with: (1) the intent to promote the underlying predicate offense, (2) the intent to evade federal taxes,[32] (3) knowledge that the purpose of the transaction is to conceal the nature, source, ownership or control of the proceeds of the predicate offense, or (4) knowledge that the purpose of the transaction is to avoid federal or state transaction reporting requirements.
- 18 U.S.C. Section 1957, which carries a maximum sentence of 10 years, requires only a showing that the defendant engaged in or attempted to engage in a monetary transaction with property derived from specified unlawful activity worth at least $10,000 with knowledge that the property was derived illegally.[33]

***Pasquantino* and other cases.** The case that's probably generated the most attention from the tax and estate-planning community for its potential use in the prosecution of foreign tax crimes in the United States is *Pasquantino*.[34] In *Pasquantino*, the Supreme Court held that federal wire fraud statutes could apply to the use of interstate wires to defraud a foreign taxing authority. The defendants had colluded to smuggle liquor into Canada without paying duties owed to the Canadian government upon entry. As discussed above, 18 U.S.C. Section 1343 applies to the use of interstate wires to effect a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . ." The Supreme Court reasoned that the Canadian government's right to collect the duties constituted a property right and that an attempt to deprive a foreign sovereign of this "property right" by fraudulent means was within the scope of the wire fraud statute no less than if a foreign individual or corporation had been defrauded while acting as a market participant.

Revenue rule doesn't bar U.S. prosecution. The defendants argued that the government's action should be barred by the "revenue rule." Under the revenue rule, a common law principle dating back to 18th century English case law, courts generally won't enforce tax judgments of a foreign country. The defendants thought the Supreme Court should construe the language of the wire fraud statutes to exclude frauds directed at evading foreign taxes in deference to this rule. They made the related argument that the Canadian government's right to restitution under the Mandatory Victims Restitution Act of 1996 following their conviction would amount to the indirect enforcement of foreign tax laws. The Supreme Court rejected these arguments, stressing that the U.S. government's primary objective in prosecuting the defendants was to punish fraudulent behavior on U.S. soil. The Canadian government's recovery of stolen revenue was secondary, and the revenue rule had no bearing on the U.S. government's right to enforce its own laws. The majority also pushed back on the dissent's argument that such prosecution gives

"extraterritorial effect" to the statute, noting that, "[their] offense was complete the moment they executed the scheme inside the United States" because "[the] wire fraud statute punishes the scheme, not its success."[35] A subsequent U.S. Court of Appeals for the Second Circuit decision reaffirmed the continued application of the revenue rule to prevent foreign governments from enforcing their tax laws in the United States (in that case by seeking treble damages under a Racketeer Influenced and Corrupt Organization (RICO) statute) but emphasized the distinction between enforcement actions by the U.S. government and attempts to collect by a foreign government.[36]

Tax evasion as indirect predicate to money laundering. As noted above, tax evasion isn't itself a predicate offense to money laundering. However, in establishing that a scheme devised in the United States to commit tax fraud against a foreign country is actionable under the wire fraud statute, *Pasquantino* laid the groundwork for money laundering charges with respect to the same activities because wire fraud is a predicate offense.

- In *Yusuf v. United States*,[37] the Third Circuit followed *Pasquantino* in applying the mail and bank fraud statutes in connection with a scheme by the owners of a small supermarket chain in the U.S. Virgin Islands to defraud the government of gross receipts taxes. Over several years, the defendants and their employees deliberately withheld cash receipts from deposits that were subject to the gross receipts tax, using a combination of traveler's checks, cashier's checks and money orders to funnel money offshore in amounts small enough to fall below the thresholds for mandatory reporting. The defendants filed fraudulent tax returns deliberately underreporting their taxable receipts using the U.S. mail. The Third Circuit held that mail (and bank) fraud, although in furtherance of tax evasion, were themselves predicate offenses for money laundering.[38]
- In a more recent case, a federal district court upheld a civil forfeiture action under 18 U.S.C. Section 981(a)(1)(A) against real property acquired in the United States out of the proceeds of a "specified unlawful activity" (predicate offense) under the money laundering statutes.[39] The owner allegedly had set up an organized crime ring to engage in large scale tax evasion in Romania. Although tax evasion itself isn't a specified unlawful activity, the court noted that setting up an organized crime group to evade taxes would be a serious crime in both the United States and Romania and, as such, would be an extraditable offense under the multilateral United Nations Convention Against Transnational Organized Crime, and thus, a specified unlawful activity described in 18 U.S.C. Section 1956(c)(7)(B)(vi) ("an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States").

These are just two examples of how, given the sheer number and variety of predicate offenses, activities in furtherance of tax evasion can give rise to a money laundering charge.

Implications for U.S. tax and estate-planning attorneys. *Pasquantino* leaves open the possibility that wire fraud and money laundering statutes might be alleged against a U.S. tax or estate-planning lawyer assisting a foreign or U.S. client in a transaction or plan involving foreign tax avoidance or other violations of foreign law (for example, foreign source income that wasn't reported in another country, amounts that should have been reported as a taxable gift or transfers that violate foreign exchange control laws). However, it's important to note that, nearly a dozen years after it was decided, *Pasquantino* hasn't exactly generated a flood of prosecutions for foreign tax evasion, let alone prosecutions of tax or estate-planning lawyers for facilitating foreign tax avoidance (or money laundering for that matter). This relatively small number of prosecutions may be attributable in part to the need to allocate resources elsewhere but likely also is driven by the DOJ Tax Division's own stated policy of restraint in this area. The Tax Division generally won't authorize mail or wire fraud charges alone or as a predicate to a RICO or money laundering charge in a tax prosecution unless warranted by "unusual circumstances."[40] The idea is that these more severe provisions, which carry much longer sentences than the criminal tax provisions under the IRC, shouldn't be used to "convert routine tax prosecutions into RICO or money laundering cases."[41]

Mail/wire fraud charges. You almost certainly will communicate with clients by phone and/or email, which

could establish the requisite use of interstate wires for a wire fraud charge. However, there's the matter of intent. The overwhelming majority of tax and estate-planning lawyers wouldn't knowingly assist clients in defrauding their governments, but there could be morally or factually ambiguous situations (for example, a client taking measures to avoid a politicized enforcement action or confiscatory regime) that could lend themselves to different interpretations. The lack of case law in this area might suggest that actual prosecution for facilitating foreign tax fraud under these statutes would require fairly bad facts (that is, a lawyer genuinely acting in good faith wouldn't expect to be broadsided by an indictment), but practitioners should be aware that the tools are there for prosecutors if they cross the line. As discussed below, the money laundering provisions arguably present more traps for an unwary practitioner to unwittingly run afoul of the law.

Money laundering charges. There are a number of ways that a U.S. tax or estate-planning lawyer could become implicated in a money laundering scheme whether or not he plays a role in the client's foreign tax planning. First, a wide range of federal, state and even foreign offenses—many with only minimal nexus with the U.S. financial system—count as specified unlawful activities. One typically associates money laundering with drug trafficking, racketeering and similar offenses, but numerous other offenses—both domestic and foreign—are counted as predicate offenses, including, among (many) others:[42]

- A false statement to a credit agency or bank.
- Bribery of public officials and the misappropriation, theft or embezzlement of public funds by or for a public official (domestic or foreign).
- Fraud by or against a foreign bank. This could include false statements made to secure credit even if such activities may be commonplace in the jurisdiction in question.
- Violations of the Foreign Corrupt Practices Act.
- Smuggling and export control violations.
- Offenses with respect to which the United States would be obligated by a multilateral treaty to either extradite or prosecute the alleged offender.
- Mail, wire and bank fraud, potentially including fraud against a foreign government in a *Pasquantino*-type scenario, if there's a subsequent financial transaction.

Thus, without regard to whether one is involved in a client's foreign tax planning, an obvious way to become implicated in a client's money laundering activities is by assisting a client in the cash purchase of real estate in the United States or funding a trust or charity (particularly one in a jurisdiction with relatively little monitoring or regulation) using funds of questionable provenance. As discussed in the next section, these are among the services that were specifically identified by both the FATF and the American Bar Association (ABA) as "high risk" services because of the potential for "washing" the source of ill-gotten gains. FinCEN's new CDD rules for certain financial institutions and recent GTOs requiring the reporting of all-cash purchases of high-end real estate in designated areas, as well as the new IRS Form 5472 reporting requirements for foreign-owned disregarded entities, suggest that the U.S. government is very much interested in the source of such funds and that we, as practitioners, should be as well.

A few other points to bear in mind with regard to money laundering:

- The U.S. practitioner needn't know the exact nature of the underlying predicate offense to have the requisite intent for the "lesser" money laundering charge under 18 U.S.C. Section 1957 so long as he knows that the property involved represents the proceeds of "some form of unlawful activity."[43] This raises the question of how far back you need to look for unlawful activity.
- The "proceeds" of any predicate offense (including wire and mail fraud) are subject to confiscation whether or not the government prevails on the money laundering charge.[44] The statute also allows for confiscation of property "involved" in or traceable to the money laundering offense itself.[45] This makes money laundering charges a very powerful weapon for prosecutors.

One point that we hope readers won't lose sight of is that these types of charges are what can happen in a worst-case scenario. As discussed in the next section, although there are gray areas, there are many steps that careful practitioners can take as a matter of best practices to minimize their exposure.

The Recommendations

In 1989, the G-7 nations, including the United States, formed the FATF to develop policies and procedures to combat money laundering.[46] The culmination of these efforts produced the so-called "Forty Recommendations," issued in 1990 and last adopted in 2012. The Forty Recommendations were reviewed in 1996, and supplemented in 2001, to include eight new Special Recommendations related to terrorist financing following the wake of the Sept. 11th attacks. A further Special Recommendation was added in 2003 to expand the reach of the Recommendations to bodies, including lawyers and other service providers, that provide "access points" to financial systems (referred to as the "gatekeepers") who could themselves be unwitting participants in money laundering and terrorist financing. The 2012 version included the recommendation that countries include tax crimes as a predicate offense for money laundering. The Forty Recommendations, as supplemented by the nine Special Recommendations noted above, are referred to as "40+9 Recommendations" (the Recommendations) and are the international standards for combating money laundering and terrorist financing activities.[47]

In the United States, the Recommendations are responsible for parts of the Bank Secrecy Act and the USA Patriot Act having to do with customer/client due diligence and suspicious activity report (SAR) obligations applicable to banks and other U.S. financial institutions, along with associated prohibitions against tipping off a client that an SAR has been filed (the no tipping off or NTO rule). With increasing pressure brought to bear by member countries, the Recommendations and related criticism from U.S. trading partners about the lack of transparency in domestic entity arrangements are also responsible for FinCEN's recent issuance of the new CDD regulations and GTOs, as well as the new IRS Form 5472 reporting requirements for U.S. disregarded entities with foreign owners.[48]

Extension of recommendations to lawyers. Recommendations 22 and 23 specifically urge for the adoption of laws, rules and regulations that impose CDD and suspicious transaction report (STR) obligations on gatekeepers along with prohibitions against tipping off their clients. These rules would apply to lawyers performing, among other services, the sorts of work tax and estate-planning lawyers are accustomed to providing.

To be clear, the Recommendations aren't law and apply only if member countries adopt laws, rules and regulations to implement them. Several countries have enacted laws implementing them or even expanding on them. The United Kingdom, for example, has enacted the Proceeds of Organized Crimes Act 2002, which requires, among other things, solicitors to file STRs (the United Kingdom equivalent of SARs) with respect to their clients under certain circumstances and to avoid tipping off a client that an STR has been filed (the United Kingdom's NTO rule). Unlike the United Kingdom and certain other jurisdictions, the United States hasn't adopted the United Kingdom's approach in extending these requirements to lawyers.[49] Professional legal organizations have argued that such an approach would violate cardinal duties of trust, loyalty and zealous representation that a lawyer owes to a client under the rules of professional conduct that regulate the U.S. legal profession.

Beginning in 2004, FATF met with representatives of the legal profession, including the American College of Trust and Estate Counsel (ACTEC), to discuss, develop and implement guidance applicable to lawyers similar to that applicable to financial institutions, but which didn't undermine the attorney-client privilege or the duty of client confidentiality or otherwise impede the delivery of legal services generally. Following those discussions, FATF issued guidance on a risk-based approach to CDD for legal professionals: *RBA Guidance for Legal Professionals* (*Lawyer Guidance*)[50] in 2008. *Lawyer Guidance* doesn't purport to offer direction in specific factual situations, nor does it take into account the practical realities of the practice of law in an increasingly complex environment or jurisdictional differences among the member countries. Rather, it urges the legal profession to develop "good practice in the design and implementation of an effective risk-based approach."[51] Answering the call, the ABA, working with ACTEC, among others, has used *Lawyer Guidance* to develop the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (*Good Practices Guidance*).[52] *Good Practices Guidance* identifies the "red flag indicators" that might signal the existence of money laundering or terrorist financing risks, thus requiring a higher level of CDD or rejection of a proposed engagement.[53] It has many of the

same AML elements applicable to financial institutions, except it doesn't require lawyers to file an SAR for their clients.[54]

***Good Practices Guidance* for U.S. lawyers.** *Good Practices Guidance* suggests that each law firm should have policies and procedures in place to ensure that CDD measures are consistently applied at client intake and throughout the course of the representation. The level of CDD may vary, depending on the risk profile of the client, but at a minimum should involve: (1) identifying and appropriately verifying the identity of each client; (2) identifying the natural persons who are the beneficial owners of entity clients where appropriate, and adopting reasonable measures to verify their identity; and (3) obtaining information to understand the nature of the client's business and the scope of the engagement. *Good Practices Guidance* is applicable to the following services, which have been identified as vulnerable to money laundering:

> Practitioners should always be mindful not only of their legal exposure, but also of the potential for reputational risk to themselves and their firms.

- Buying and selling of real estate,
- Managing of client money, securities or other assets,
- Management of bank, savings or securities accounts,
- Organization of contributions for the creation, operation or management of companies, and
- Creation, operation or management of legal persons or arrangements and buying and selling of business entities.

For tax and estate-planning lawyers, the last category, being the most broad-based, covers many types of services a lawyer may be asked to provide during the scope of a routine representation of a non-U.S. client. For example, a client wishing to invest in the United States and/or who has U.S. beneficiaries may be advised from a U.S. tax and succession planning point of view to create a foreign grantor trust with one or more underlying foreign and/or domestic entities through which the penultimate U.S. assets are held. The first category also may come into play in advising a non-U.S. client on how to structure the purchase of real estate in the United States.

Good Practices Guidance divides risk into three categories: (1) country/geographic risk, (2) client risk, and (3) service risk, each of which has a number of elements or factors that should be evaluated separately. Each category is described briefly below.

1. "Country/geographic risk" refers generally to those countries subject to sanctions, embargoes or similar measures or identified by reputable organizations as lacking the appropriate AML laws and other measures, or supporting terrorist activity or having significant levels of corruption or other criminal activity. Many trusts and estates lawyers deal exclusively with parties and clients in the United States and for them, country risk probably isn't a significant source for concern. However, lawyers representing non-U.S. clients with multijurisdictional trust and entity structures holding assets and having beneficiaries in different countries should be asking questions about the client's domicile, the location of assets and the sources of funding, all of which are significant to assessing country risk.
2. "Client risk" refers to representation of politically exposed persons, criminals, entity structures or relationships that make it difficult to identify beneficial ownership or controlling interests or where there's no logical reason or nexus, one-off engagements, the use of intermediaries based in jurisdictions without adequate AML rules, unregulated charities and cash-intensive businesses. There can be situations in which a lawyer suspects an individual client is acting for a third party or the client expresses a preference for bearer shares, nominee shares or other complicated ownership structures that appear to have no purpose other than to conceal identify and ownership. Transparency of beneficial ownership is a prevalent and recurring theme in FATF guidance.
3. "Service risk" involves: (1) situations in which a lawyer may act as an intermediary and handle receipt

and transmission of funds and provide other services that make the beneficial owners less visible to the relevant authorities, (2) the handling of payments from unknown third parties, (3) unusually high premiums for services that don't warrant a premium, and (4) transfers of real estate between parties in an unusually short amount of time. Estate-planning lawyers typically will handle receipt of funds in the context of creating and funding trusts and other succession planning vehicles.

Gray Areas and Open Questions

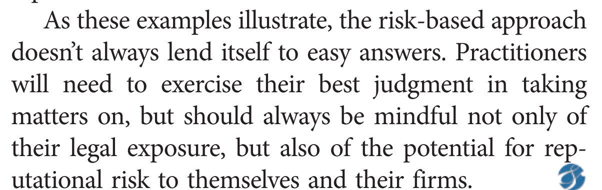
The above guidance provides lawyers with a framework for assessing and managing risk, but questions and areas of ambiguity still remain about when violations of foreign laws rise to the level of criminality in the United States. As noted, tax evasion isn't a predicate offense to money laundering, but the breadth of the money laundering statutes—particularly the range of activities that qualify as predicate offenses—create the potential for activities closely associated with tax evasion to themselves serve as predicate offenses. Moreover, even if the activities don't rise to the level of criminality in the United States, if another country views the tax or estate-planning lawyer as aiding and abetting the violation of its own laws, it may pursue enforcement action against the lawyer in the United States. Even if the resources and ability of the foreign authorities to reach the lawyer in the United States are limited (for example, on account of the revenue rule), the reputational damage inflicted on the U.S. lawyer could be significant.

If a U.S. tax or estate-planning lawyer is asked to assist with domesticating a foreign trust, what issues are implicated if the lawyer knows or has reason to suspect the taxpayer may not have been compliant with local tax and reporting obligations in his home jurisdiction? In many foreign countries, the tax regimes are heavily politicized, whether in the drafting of the laws themselves or in their implementation. Residents of those countries may have a legitimate interest in protecting themselves from an unfair and confiscatory taxing regime. Some may also fear more severe threats, such as extortion or kidnapping if information collected falls into the wrong hands, particularly as more and more countries begin to publish beneficial ownership registries. This arguably implicates the "client risk" factor, but what's the extent of the lawyer's duty to inquire further? In this situation, you likely would want comfort from local counsel.

Tax rules aren't uniformly applied in many jurisdictions, and there may be gaps between what the law actually says and how it's implemented in practice. For example, if a client informs you that no one pays a given tax in his home country, there may be a judgment call as to whether the local government has actually taken the informal position to not enforce a given tax or simply hasn't attempted to do so for lack of resources. This is another situation in which you likely would want input from local counsel. It's also a situation in which context, such as the country involved and "country risk" factors, may be quite relevant. For example, the client's explanation possibly might be plausible in a country that has a less developed legal infrastructure (or a comparatively informal economy). However, you would need more than just the client's assurance in this case.

Suppose that you know that a client hasn't been fully compliant with her home country tax reporting obligations in the past, but a tax amnesty program patterned after the U.S.'s offshore voluntary disclosure program is available. The client would like your assistance in establishing a trust in the United States for the benefit of her children who've become U.S. residents, not as a money laundering vehicle, but just as part of her normal estate planning. In this case, the client has a logical basis for establishing a trust in the United States, but you may want to engage local counsel to learn more about her country's tax amnesty program before you assist her in setting up a structure with funds that weren't properly reported.

As these examples illustrate, the risk-based approach doesn't always lend itself to easy answers. Practitioners will need to exercise their best judgment in taking matters on, but should always be mindful not only of their legal exposure, but also of the potential for reputational risk to themselves and their firms.



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Endnotes

1. News release, U.S. Department of Justice (DOJ), "Justice Department Reaches Final Resolutions Under Swiss Bank Program" (Dec. 29, 2016), *www.justice.gov/opa/pr/justice-department-reaches-final-resolutions-under-swiss-bank-program*.
2. News release, DOJ, "Principal Deputy Assistant Attorney General Caroline D. Ciraolo Delivers Remarks at the Cambridge International Symposium on Economic Crime" (Sept. 5, 2016), *www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-caroline-d-ciraolo-delivers-remarks-cambridge*.
3. *See* U.S. Department of the Treasury Resource Center, "Foreign Account Tax Compliance Act (FATCA)," *www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx*.
4. Treasury Regulations Sections 1.6049-4(b)(5) and 1.6049-8 require reporting of certain deposit interest paid to nonresident alien individuals.
5. A list of the 100 countries that have signed on as of April 10, 2017 is available on the Organisation for Economic Co-operation and Development's (OECD) website. *See* "OECD, AEOI: Status of Commitments" (April 10, 2017), *www.oecd.org/tax/transparency/AEOI-commitments.pdf*.
6. For example, although the United States is a party to the multinational Convention on Mutual Administrative Assistance in Tax Matters (the Convention), in ratifying the Convention it made a reservation to the provisions on enforcement of tax claims and service of documents.
7. Reciprocal Model 1A IGAs are available at the Treasury Resource Center, *supra* note 3.
8. *See* Laurie Hatten Boyd, "Are Problems Looming for FATCA and the 'Reciprocal' IGA?," *The Tax Adviser* (June 1, 2016), *www.thetaxadviser.com/issues/2016/jun/problems-looming-for-fatca-and-reciprocal-iga.html*.
9. European Parliamentary Research Service, "EU-US Trade and Investment Relations: Effects on Tax Evasion, Money Laundering and Tax Transparency: Ex-Post Impact Assessment" (March 6, 2017), *www.europarl.europa.eu/RegData/etudes/IDAN/2017/598602/EPRS_IDA(2017)598602_EN.pdf*.
10. Financial Action Task Force, "Anti-money laundering and counter-terrorist financing measures—United States, Fourth Round Mutual Evaluation Report," (Dec. 1, 2016) (Mutual Evaluation Report), *www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html*.
11. A helpful summary of the Financial Action Task Force's (FATF) mandate and overall framework, as well as the Mutual Evaluation Report, was included in a recent report on anti-money laundering measures prepared by the Congressional Research Service. *See* Rena S. Miller and Liana W. Rosen, "Anti-Money Laundering: An Overview for Congress," Congressional Research Service (March 1, 2017), *https://fas.org/sgp/crs/misc/R44776.pdf*.
12. *See, e.g.*, news release, DOJ, "Court Authorizes Service of John Doe Summons Seeking Information About Dutch Residents Using American Express Cards Linked to Non-Dutch Bank Accounts" (April 3, 2017), *www.justice.gov/opa/pr/court-authorizes-service-john-doe-summons-seeking-information-about-dutch-residents-using*.
13. There have been attempts to pass legislation in Congress requiring beneficial ownership reporting for companies formed in states that don't otherwise require basic disclosure, but the bills have struggled to get out of committee. The most recent effort, "The Incorporation Transparency and Law Enforcement Assistance Act of 2016," went nowhere. *See* H.R. 4450 and S. 2489, 114th Congress, 2d Sess. (2016).
14. *See* news release, Treasury, Financial Crimes Enforcement Network (FinCEN), "FinCEN Expands Reach of Real Estate 'Geographic Targeting Orders' Beyond Manhattan and Miami" (July 27, 2016), *www.fincen.gov/news/news-releases/fincen-expands-reach-real-estate-geographic-targeting-orders-beyond-manhattan*.
15. A table of dollar thresholds broken down by geographic area is available at Treasury, FinCEN, "Geographic Targeting Order Covering Title Insurance Companies," *www.fincen.gov/sites/default/files/shared/Title_Ins_GTO_Table_072716.pdf*.
16. *See* Treasury, FinCEN, "Frequently Asked Questions, Question 4" ("What methods of payment are covered under Section II.A.2.iv. of the GTOs?") (Aug. 19, 2016), *www.fincen.gov/sites/default/files/shared/GTO_Phase_2_FAQs%20_081916.pdf*.
17. *Supra* note 14.
18. *See* 31 CFR Section 1010.230, 81 F.R. 29397 (May 11, 2016).
19. Additional interpretive guidance on the Customer Due Diligence rules has been provided by FinCEN on a guidance page titled "Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions," *www.fincen.gov/resources/statutes-regulations/guidance/frequently-asked-questions-regarding-customer-due-diligence*.
20. *See* 81 Fed. Reg. 28784 (May 10, 2016).
21. *See* T.D. 9796 (Dec. 13, 2016). Note that the White House issued an executive order on April 21, 2017 requiring the Treasury Department to review all "significant" regulations issued on or after Jan. 1, 2016 and identify in an interim report to the President within 60 days all such regulations that: (1) impose an undue financial burden on United States taxpayers, (2) add undue complexity to the federal tax laws, or (3) exceed the statutory authority of the Internal Revenue Service. A final report would be due within 150 days. It isn't entirely clear at this stage what criteria would be used to make these determinations. That said, we would expect more controversial regulations, such as the Section 385 and 2704 regulations, to invite more scrutiny. *See www.whitehouse.gov/the-press-office/2017/04/21/presidential-executive-order-identifying-and-reducing-tax-regulatory*.
22. *See* 81 Fed. Reg. 28784, 28786 (May 10, 2016).
23. *See* Treas. Regs. Sections 1.6038A-2(a)(2), (b)(3) and (b)(4).
24. If there's no responsible person with a Social Security number or individual taxpayer identification number, then a responsible person may need to apply for one before the disregarded entity itself can apply for an employer identification number. *See* IRS, Instructions for Form SS-4 (rev.

February 2016), *www.irs.gov/pub/irs-pdf/iss4.pdf.*

25. Internal Revenue Code Sections 7201 and 7206(2).
26. Peter D. Hardy, Scott D. Michel and Fred Murray, "Is the United States Still a Tax Haven? The Government Acts on Tax Compliance and Money Laundering Risks," *J. of Tax Prac. & Proc.* (June-July 2016), at p. 33, *www.capdale.com/files/18522_Is_the_United_States_Still_a_Tax_Haven.pdf.*
27. *Pasquantino v. United States*, 544 U.S. 349 (2005).
28. The basic elements of conspiracy are: (1) an agreement between two or more persons (2) to achieve an illegal goal with knowledge of the conspiracy (3) with actual participation in the conspiracy and (4) at least one overt act by a conspirator in furtherance of the agreement. *United States v. Parks*, 68 F.3d 860 (5th Cir. 1995); *United States v. Knox*, 68 F.3d 990 (7th Cir. 1995).
29. For example, when the DOJ prosecuted principals at KPMG, Ernst & Young and several law firms for the promotion of tax shelters in the early 2000s, some of the most damning statements against interest included in the indictments were actually made by unindicated (and often unnamed) co-conspirators. *See, e.g.,* indictment filed as to Jeffrey Stein et al., *United States v. Stein*, No. 05 Cr. 888 (S.D.N.Y. Aug. 29, 2005); information filed as to Peter Cinquegrani, *United States v. Cinquegrani*, No. 08 Cr. 849 (S.D.N.Y. Sept. 11, 2008); indictment filed as to Paul Daugerdas et al., *United States v. Daugerdas*, No. 09 Cr. 581 (S.D.N.Y. Jun. 9, 2009) and superseding indictment filed June 23, 2009.
30. The Congressional Research Service has provided a detailed overview of the federal money laundering statutes. *See* Charles Doyle, "Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law," Congressional Research Service (Feb. 8, 2012) (2012 Congressional Research Service Summary), *https://fas.org/sgp/crs/misc/RL33315.pdf.*
31. 18 U.S.C. Section 1956(c)(7)(D).
32. As noted above, although federal tax evasion may satisfy the intent requirement, federal tax evasion isn't itself a predicate offense under either of the two money laundering statutes. In other countries, including the United Kingdom, tax evasion is a predicate offense to money laundering.
33. Readers will be happy to note that there's an exception to the "monetary transaction[s]" prong for attorney's fees. *See* 18 U.S.C. Section 1957(f)(1).
34. *Pasquantino, supra* note 27.
35. *Ibid.*, at p. 371 (quoting *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000)).
36. *See European Cmty. v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005).
37. *Yusuf v. United States*, 536 F.3d 178 (3d Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009).
38. Note that there's disagreement among the circuit courts as to whether unpaid taxes count as proceeds for purposes of the money laundering statutes. *See Khanani v. United States*, 502 F.3d 1281 (11th Cir. 2007) (unpaid employment taxes in connection with the hiring of undocumented workers didn't count as proceeds for purposes of the money laundering statutes).
39. *See United States v. Real Property Located at 9144 Burnett Rd.*, 104 F. Supp.3d 1187 (W.D. Wash. 2015).
40. *See* DOJ, Office of the U.S. Attorneys, Tax Division Directive No. 128 (Oct. 29, 2004), *www.justice.gov/usam/tax-resource-manual-14-tax-division-directive-no-128.*
41. *Ibid.* Note that tactical considerations, such as the ability to seek forfeiture of proceeds, introduce additional evidence at trial or seek restitution at sentencing, may be taken into account in bringing such charges. Prosecutors also may be more inclined to look to federal wire fraud or money laundering statues if they don't have an available provision for foreign tax crimes under the IRC.
42. *See* 18 U.S.C. Section 1956(c)(7).
43. 18 U.S.C. Section 1956(c). *See* discussion in 2012 Congressional Research Service Summary.
44. 18 U.S.C. Section 981(a)(1)(C).
45. 18 U.S.C. Section 981(a)(1)(A).
46. A history of the FATF and its recommendations is available on the FATF website. *See www.fatf-gafi.org/about/historyofthefatf/.*
47. FATF, FATF Recommendations (February 2012), *www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html.*
48. *See* 81 Fed. Reg. 28784 (May 10, 2016).
49. Both the Mutual Evaluation Report and the European Parliament Report highlighted the lack of suspicious transacation report requirements for lawyers and other non-financial advisors in the United States.
50. FATF RBA Guidance for Legal Professionals (Lawyer Guidance) (Oct. 23, 2008), *www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf.* It should be noted that the American College of Trust and Estate Counsel (ACTEC) issued its own "Recommendations of Good Practices" in 2005 (the ACTEC Recommendations), well before the Lawyer Guidance. ACTEC, "Recommendations of Good Practices for ACTEC Fellows Seeking to Detect and Combat Money Laundering" (Oct. 24, 2005), *www.actec.org/resources/recommended-good-practices-guidance-for-lawyers-to-detect-and-combat-money-laundering-and-terr/.*
51. Lawyer Guidance, at p. 4.
52. *See www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_gtfgoodpracticesguidance.authcheckdam.pdf.* In October 2014, the ABA, together with the International Bar Association and the Council of Bars and Law Societies of Europe, issued an updated guide, "A Lawyer's Guide to Detecting and Preventing Money Laundering." *See www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf.* In addition, the ACTEC Recommendations still remain a useful tool for trusts and estates lawyers.
53. *See* ACTEC, "Combatting Money Laundering; FATF and the Lawyer's Role," *www.actec.org/resources/fatf-and-the-lawyers-role/.*
54. The ABA Standing Committee on Ethics and Professional Responsibility issued an Advisory Opinion (Formal Opinion 463) on May 23, 2013 acknowledging the usefulness of the risk-based CDD evaluation process and confirming that *Good Practices Guidance* is consistent with the ethical obligations of lawyers under the Model Rules (a version of which has been adopted in most states).