

# U.S. and International Anti-Money Laundering Developments

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## I. Introduction

No new major money laundering legislation was enacted in 2010. Nonetheless, a raft of new laws and agreements did appear that will significantly impact anti-money laundering (“AML”) compliance requirements both in the U.S. and around the world. The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), the U.K. Bribery Act, amendments to the Bank Secrecy Act (“BSA”), and other developments in 2010 portend a 2011 of increased regulatory obligations for financial institutions and other regulated entities. It is likely that some 2010 decisions, such as the U.K. Court of Appeal’s ruling in *Shah v. HSBC Private Bank UK (Limited)* and the enactment of the Hiring Incentives to Restore Employment Act (HIRE Act) force, will challenge institutions seeking to comply with seemingly conflicting rules and regulations. Looking at the efforts of public international organizations such as the Organisation for Economic Co-operation and Development (OECD), the Financial Action Task Force (FATF), and others, and at legislation in the U.S. and U.K., we will clearly be working in an environment of ever greater levels of record-keeping, tracking, and transparency around global financial transactions for the foreseeable future.

## II. U.S. Developments

### A. FEDERAL LEGISLATIVE DEVELOPMENTS

#### 1. *The Dodd-Frank Act*

The Dodd-Frank Act<sup>1</sup> will likely impact existing federal oversight of AML and BSA-compliance significantly. Included within the Act is the Private Fund Investment Advisors Registration Act of 2010 (the “Private Fund Act”) that now brings investment advisors of private funds, private equity funds, hedge funds, and real estate funds under reporting and

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1. See generally Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2011).

record-keeping requirements similar to those of companies currently registered with the Securities and Exchange Commission ("SEC"). Under the rules governing SEC registrants, investment advisors will now have to demonstrate that they have written and actively implemented anti-money laundering policies and monitoring programs. These new policies add to, rather than replace, other regulatory compliance programs. There are some limited exceptions for funds that fall below certain asset classes and values. Overall, however, the Act will dramatically impact the managers of these funds, who must now allocate significant resources to implementing or enhancing their compliance programs to meet the new rule's requirements. The Private Fund Act goes into effect on July 21, 2011, one year after the implementation of the Dodd-Frank Act. Additionally, the Dodd-Frank Act eliminates The Office of Thrift Supervision and merges its operations into the Office of the Comptroller of the Currency and other federal banking agencies. This change will likely have the greatest impact on current thrift-chartered banks. It will increase compliance burdens for banks and affect how the BSA anti-money laundering exam is structured and applied.<sup>2</sup>

## 2. *Amendments to the U.S. Bank Secrecy Act*

On February 10, 2010, the Financial Crimes Enforcement Network ("FinCEN") issued a final rule to amend the relevant Bank Secrecy Act information-sharing rules. Under the new rule, state and local law enforcement agencies and certain foreign law enforcement agencies may submit requests for information to financial institutions. The new rule conforms the 314(a) program to agreements with certain foreign jurisdictions, specifically the Mutual Legal Assistance Treaty ("MLAT") between the U.S. and the European Union ("EU"). U.S. state and local law enforcement agencies may now submit information requests concerning significant money laundering or terrorist financing investigations to U.S. financial institutions through FinCEN. Previously, only federal law enforcement enjoyed such access. "Significant money laundering investigations" include hawala operations involving a sanctioned country; arms trafficking; alien smuggling resulting in fatalities; cigarette smuggling; nationwide investment fraud with many victims; international criminal networks involved in identify theft and wire fraud; and multi-agency drug trafficking investigations. "The rule also clarifies that FinCEN itself, on its own behalf and on behalf of other appropriate components of the Department of the Treasury ("Treasury"), may submit such requests."<sup>3</sup>

On April 14, 2010, FinCEN issued a final rule that included mutual funds within the general definition of "financial institution" in regulations implementing the Bank Secrecy Act ("BSA"). The final rule subjects mutual funds to 31 C.F.R. §103.33, which requires the creation, retention, and transmittal of records or information for transmittals of funds. Mutual funds will no longer have to file FinCEN/IRS form 8300, but they must now file Currency Transaction Reports ("CTRs"). Because few funds engage in currency transactions, the new rule should make transaction monitoring easier. At the same time, however, the rule increases the compliance requirement on funds for recordkeeping and

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2. See *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, S. BANKING COMM., (July 1, 2010), [http://banking.senate.gov/public/\\_files/070110\\_Dodd\\_Frank\\_Wall\\_Street\\_Reform\\_comprehensive\\_summary\\_Final.pdf](http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf).

3. *Id.*

retention of records on fund transmittals. This includes creating and retaining records regarding the extension of credit, cross-border currency transfers, monetary instruments, investments, and checks for any transaction exceeding \$10,000. Additionally, the final rule amends the definition of “mutual fund” and requires mutual funds to establish Anti-Money Laundering (“AML”) compliance programs. It further requires mutual funds to transmit transactional information to other financial institutions in the payment chain (“Recordkeeping and Travel Rule”). The Recordkeeping and Travel Rule applies to amounts that equal or exceed \$3,000. It imposes the requirements that the transmitter’s financial institution obtain and retain name, address, and other information on the transmitter and the transaction; the recipient’s financial institution, and in certain instances, the transmitter’s financial institution, obtain or retain identifying information on the recipient; and certain information obtained or retained by the transmitter’s financial institution “travel” with the transmittal order through the payment chain.

Lastly, the final rule amends the rule that delegates authority to examine institutions for compliance within the BSA. The amendment makes it clear that FinCEN has not delegated to the Internal Revenue Service the authority to examine mutual funds for compliance with the BSA. Instead, FinCEN has delegated this power to the SEC because it is the federal functional regulator of mutual funds. On October 6, 2010, FinCEN extended the compliance date to April 10, 2011.<sup>4</sup>

### 3. *The Hiring Incentives to Restore Employment (HIRE) Act*

On March 18, 2010, the Hiring Incentives to Restore Employment (“HIRE”) Act was signed into law.<sup>5</sup> Tax-evasion, not money laundering, is the actual focus of the HIRE Act. Nonetheless, several sections of the HIRE Act will directly impact financial institutions and how they collect, maintain, and share customer information with regulators and enforcement authorities, particularly as they relate to foreign customers, and foreign financial institutions (“FFIs”) with which they do business. Subtitle A of Title V of the HIRE Act, entitled Foreign Account Tax Compliance (“FATC”), made numerous changes to U.S. tax law to improve tax compliance. These include changes with respect to foreign accounts and cross-border transactions. Section 501 provides a new withholding regime that expands reporting on foreign accounts owned by certain U.S. persons and disclosure of U.S. owners of certain foreign entities. Section 1471 applies to FFIs that are organized outside of the U.S. An FFI is any entity that is not a U.S. person and accepts deposits in the ordinary course of a banking or similar business as a substantial portion of its business, holds financial assets for the account of others, or is engaged (or holds itself out to be engaged) primarily in the business of investing, reinvesting or trading in securities, partnership interests, commodities or other interests, including derivatives. Information reporting obligations will apply to foreign investment funds, master-feeder funds, funds-of-funds, and their investment advisors that have, directly or indirectly, certain U.S. invest-

4. Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations; Defining Mutual Funds as Financial Institutions; Extension of Compliance Date, 75 Fed. Reg. 63,382-83 (Oct. 15, 2010) (to be codified at 31 C.F.R. pt. 103), available at [http://www.fincen.gov/statutes\\_regs/frn/pdf/MF-extension-of-applicability.pdf](http://www.fincen.gov/statutes_regs/frn/pdf/MF-extension-of-applicability.pdf).

5. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (2010).

tors. The new provisions will affect U.S. and foreign investors and how pooled investment vehicles are structured.

The HIRE Act does not simplify existing rules. Instead, it imposes an additional layer of compliance obligations on the managers of these vehicles. The Treasury Department is expected to issue further guidance on whether current customer due diligence (“CDD”) standards under AML rules will suffice to meet these new HIRE disclosure standards.<sup>6</sup>

## B. PROCEDURAL GUIDANCE RELEASES

### 1. *FinCEN on Beneficial Ownership*

On March 5, 2010, the Financial Crimes Enforcement Network (“FinCEN”), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (“FDIC”), the National Credit Union Administration (“NCUA”), the Office of the Comptroller of the Currency (“OCC”), the Office of Thrift Supervision (“OTS”), and the Securities and Exchange Commission (“SEC”), in consultation with staff of the Commodity Futures Trading Commission, issued Guidance on Obtaining and Retaining Beneficial Ownership Information (“The Guidance”). The Guidance clarifies and consolidates regulatory expectations for obtaining beneficial ownership information for certain accounts and customer relationships. The Guidance reiterates that a financial institution should know its customers and the risks that they present. It specifically provides that where an institution sees heightened risks with an account or customer, the institution should conduct enhanced due diligence. The Guidance states that “a financial institution should establish and maintain CDD procedures that are reasonably designed to identify and verify the identity of beneficial owners of an account, as appropriate, based on the institutions’ evaluation of risk pertaining to an account.”<sup>7</sup> Thus, this clarification appears to impose a duty on many financial institutions to verify the identity of certain beneficial owners and to conduct greater scrutiny of certain account holders. The SEC has not yet issued additional clarification.<sup>8</sup>

### 2. *American Bar Association Guidance for Lawyers*

In April 2010, the American Bar Association (“ABA”) published the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (the “Good Practices Guide”). The goal of the Good Practices Guide is to help lawyers understand how to identify potential laundering by clients. It is intended to provide a broad framework for implementing a risk-based approach to client due diligence for the legal profession. The Good Practices Guide draws strongly from the Financial Action Task Force (“FATF”) publication “Risk Based Approach (“RBA”) Guidance for Legal Professionals.” Using the FATF Guidance, the Good Practices Guide aims to help U.S.-based legal professionals understand which specific activities are covered under the FATF Guidance and calculate risk in common practice situations. The Guide includes hy-

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6. See *Hedge Fund Update: April 2010*, ROPES & GRAY LLP, Apr. 14, 2010, <http://www.ropesgray.com/hedgefundupdateapril2010/>.

7. Guidance on Obtaining and Retaining Beneficial Ownership Information, FIN. CRIMES ENFORCEMENT NETWORK, (Mar. 5, 2010), [http://www.fincen.gov/statutes\\_regs/guidance/pdf/fin-2010-g001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2010-g001.pdf).

8. See *id.*

potheticals that point out to lawyers which factors they may wish to consider when seeking to minimize money-laundering exposure by and from clients.<sup>9</sup>

### C. PROSECUTIONS AND ENFORCEMENT ACTIONS

#### 1. *Gibraltar Bank & Trust*

On October 15, 2010, OTS served Gibraltar Private Bank and Trust Co., a privately-held bank based in Coral Gables, with a cease and desist order.<sup>10</sup> OTS cited unsound banking practices related to its Bank Secrecy Act and Anti-Money Laundering policies and procedures and problem loans as the reason. Under the terms of the six page order, Gibraltar is barred from granting any dividends without regulatory approval, nor may it change any senior executive officer's or director's compensation or benefits agreement without notifying regulators.

#### 2. *Penson Financial Services*

On February 2, 2010, the Financial Industry Regulatory Authority ("FINRA") "fined Penson Financial Services, a Dallas-based securities clearing firm, \$450,000 for failing to establish and implement an adequate anti-money laundering ("AML") program to detect and trigger reporting of suspicious transactions, as required under the Bank Secrecy Act and FINRA rules and other violations."<sup>11</sup> FINRA found that Penson failed to regularly review penny stock deposits and liquidations. FINRA further found that Penson allowed its customers to disburse funds out of certain accounts with check-writing features without AML reviews. Executive Vice President and Chief of Enforcement for FINRA, Susan L. Merrill, stated: "Firms must tailor their AML programs to fit their business models and must consider the technological environment in which they operate and the nature of their client base."<sup>12</sup> FINRA found that only one or two Penson employees were responsible for reviewing certain AML exception reports for suspicious activity even though some reports were thousands of pages in length. FINRA cited Penson for failing to allocate sufficient resources to its AML compliance program and for inconsistently reviewing exception reports. Even though Penson had implemented a sophisticated electronic program to monitor transactions, FINRA noted, it "still failed to conduct *timely* investigations of activity identified by the automated system as potentially suspicious because of continued inadequate staffing."<sup>13</sup>

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9. *Id.*

10. *In re Gibraltar Bank And Trust Co.*, Order to Cease and Desist, No. SE-10-046 (Office of Thrift Supervision, 2010), available at [http://www.ots.treas.gov/\\_files/enforcement/97490.pdf](http://www.ots.treas.gov/_files/enforcement/97490.pdf).

11. Press Release, Fin. Indus. Regulatory Auth., FINRA Fines Firms \$750,000 for Inadequate Anti-Money Laundering Programs, Other Violations (Feb. 2, 2010), available at <http://www.finra.org/Newsroom/NewsReleases/2010/P120859>.

12. *Id.*

13. *Id.*

### 3. *Pinnacle Capital Markets*

FINRA fined Pinnacle Capital Markets \$50,000 for failing to verify foreign customer identities and to detect and report suspicious activities.<sup>14</sup> Pinnacle's primary business is concentrated online where it provides mostly foreign customers direct access to U.S. securities markets by allowing them to execute electronic trades. FINRA found that many of Pinnacle's foreign financial institution clients had opened sub-accounts for foreign customers, which allowed them direct activity without disclosing their identity. FINRA found that Pinnacle had failed to verify the identity of the sub-account holders from January 2006 through September 2009, even though the customers were based overseas in jurisdictions that the U.S. Department of State had classified as high-risk. According to FinCEN director, James H. Freis, Jr.,

Of particular relevance in this case was the firm's failure to conduct adequate due diligence under its customer identification program when dealing with non-U.S. persons that were subaccount holders with direct access to U.S. securities markets. The evidence revealed that Pinnacle could not form a reasonable belief that it knew the identity of thousands of customers. This action serves to emphasize that all broker-dealers, regardless of size, must implement systems and controls to comply with the Bank Secrecy Act. . . . Any firm operating without effective anti-money laundering and customer identification programs is vulnerable to misuse by clients and sanctions by government authorities.<sup>15</sup>

### 4. *United States v. Lazarenko*

On April 10, 2009, the 9th Circuit rendered a unanimous opinion in *U.S. v. Lazarenko*, in the money laundering prosecution of former Prime Minister of Ukraine, Pavel Ivanovich Lazarenko.<sup>16</sup> Lazarenko was convicted of money laundering and conspiracy to commit money laundering. On appeal, Lazarenko challenged the district court's order that he retribute more than \$19 million to his co-conspirator, Peter Kiritchenko. The 9th Circuit held that, in the absence of exceptional circumstances, a co-conspirator cannot recover restitution. Finding that no exceptional circumstances existed, the court reversed and vacated the restitution order.

### 5. *United States v. Settineri*

Roberto Settineri, a Miami Beach resident, pleaded guilty to a one count superseding information charging him with conspiracy to commit money laundering:<sup>17</sup> "According to the information and statements made during the plea hearing, Settineri admitted to conspiring with others to launder \$10 million in funds and concealed assets represented to be

14. Press Release, Fin. Crimes Enforcement Network, Civil Money Penalty Assessed Against Pinnacle Capital Markets, LLC, (Sept. 1, 2010), available at [http://www.fincen.gov/news\\_room/nr/html/20100831.html](http://www.fincen.gov/news_room/nr/html/20100831.html).

15. *Id.*

16. *United States v. Lazarenko*, 564 F.3d 1026, 1029 (9th Cir. 2010).

17. Press Release, U.S. Dep't of Justice, Roberto Settineri Pleads Guilty to Money Laundering Charge (Aug. 25, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-crm-959.html>. See *United States v. Settineri*, No.10-CR-60015 (S.D. Fla. 2009).

the proceeds of a large scale fraudulent scheme.”<sup>18</sup> The initial investigation was part of a joint U.S. and Italian law enforcement action investigating organized crime. Settineri was sentenced to four years in federal prison.

#### 6. *United States v. Webster*

In September 2010, the 9th Circuit Court of Appeals affirmed the conviction of Lamar Webster on drug, conspiracy, money laundering, and fraud charges.<sup>19</sup> In December 2008, Lamar Webster had been tried and convicted on four counts related to methamphetamine dealing: “(1) conspiracy to possess with intent to distribute methamphetamine, 21 U.S.C. § 846, (2) possession with intent to distribute over 500 grams of methamphetamine, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2, (3) money laundering conspiracy, 18 U.S.C. §§ 2, 1956(h), and (4) money laundering, 18 U.S.C. § 1956(a)(1)(A)(I).”<sup>20</sup> The district court instructed the jury on the four counts:

Notably, the instructions for Webster’s money laundering and money laundering conspiracy counts referred to the “proceeds” of unlawful activities. For example, one element of the money laundering charge required proof “the defendant knew that the property represented the proceeds of the illegal distribution of methamphetamine.” The district court did not define “proceeds.” The jury returned guilty verdicts on all four counts. On appeal, Webster challenge[d] the admission of . . . a business record of a \$300 wire transfer identifying Webster as the recipient. In addition, Webster. . . challenge[d] the district court’s failure to define “proceeds” in the jury instructions.<sup>21</sup>

Relying on its reading of *United States v. Santos*, the 9th Circuit held that “proceeds” includes all “receipts.”<sup>22</sup> Webster’s offense was not a commercial undertaking, however, but a drug conspiracy, and where “a money laundering count is based on transfers among co-conspirators of money from drug sales, ‘proceeds’ includes all receipts,”<sup>23</sup> and not the narrower definition of profits. The 9th Circuit held: “Because the broad ‘receipts’ definition of ‘proceeds’ was permissible, the district court did not err in its jury instructions by failing to define ‘proceeds’ narrowly to mean ‘profits.’”<sup>24</sup>

A Western Union check transfer had been admitted into evidence under the business record rule. The defendant objected to the name on the transfer as it was to a co-conspirator’s. Because it was a co-conspirator, it came in as an admission of a party opponent. The district court’s original decision occurred one month before the 2009 Fraud Enforcement and Recovery Act (“FERA”) went into effect. FERA amended two federal money laundering statutes—18 U.S.C. §§ 1956 and 1957. FERA amended “18 U.S.C. § 1956(c) to define ‘proceeds’ as ‘any property derived from or obtained or retained, directly or

18. U.S. Dep’t of Justice, *supra* note 17.

19. *United States v. Webster*, 623 F.3d 901, 908 (9th Cir. 2010). See also Memorandum from the U.S. Dep’t of Justice, New Approval and Reporting Requirements for Certain Money Laundering Prosecutions (Jan. 6, 2010), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02187.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02187.htm).

20. *Webster*, 623 F.3d at 903.

21. *Id.*

22. *Id.*

23. *Id.* at 906.

24. *Id.*

indirectly, through some form of unlawful activity, including the gross receipts of such activity.”<sup>25</sup> FERA also inserted a conforming reference into 18 U.S.C. § 1957. The provision was designed to eliminate the confusion created by the Supreme Court’s decision in *United States v. Santos*, which held that the “proceeds” of crime may be limited, at least in some money laundering prosecutions, to “net profits” of the predicate offense or specified unlawful activity. FERA eliminates this confusion and defines “proceeds” in the money laundering statutes as “gross receipts” of unlawful activity.

### 7. *Wachovia Bank*

Wachovia Bank will forfeit \$110 million and pay a \$50 million fine to resolve allegations that it failed to maintain an anti-money laundering program or failed to identify, detect, and report suspicious transactions.<sup>26</sup> The Bank Secrecy Act requires financial institutions to maintain programs designed to detect and report suspicious activity that might indicate money laundering. In an information filed as part of a settlement between the government and Wachovia, the government alleges that Wachovia failed to establish an anti-money laundering program including:

- (a) the development of internal policies, procedures, and controls designed to guard against money laundering; (b) the designation of a compliance officer to coordinate and monitor day-to-day compliance with the Bank Secrecy Act and anti-money laundering requirements; (c) the establishment of an ongoing training program; and (d) the implementation of independent testing for compliance conducted by bank personnel or an outside party.<sup>27</sup>

According to the DOJ, Wachovia’s failures allowed Mexican drug cartels to launder \$110 million. Wachovia also entered into a deferred prosecution agreement that will require it to implement remedial measures.

## III. International Developments

### A. POLICY

#### 1. *Australia*

Australia amended its anti-money laundering laws, adding chapters to address certain concerns regarding customer identification. Three new chapters, 46, 47, and 48, were added to the AML/CTF Rules. Chapter 46 recognizes that the customer identification rules provided in other sections of the AML/CTF Rules may not be feasible under certain special circumstances. These circumstances include stockbrokers, where the transaction may have to occur before customer identification procedures can be accomplished due to the speed of market conditions and demands. Therefore, Chapter 46 allows relevant reporting entities up to five business days after the institution has started the transaction to

25. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

26. Press Release, U.S. Atty’s Office for the S. Dist. of Fla., Wachovia Enters Into Deferred Prosecution Agreement (Mar. 17, 2010), available at <http://www.justice.gov/usao/fls/PressReleases/100317-02.html>; see *United States v. Wachovia Bank*, No. 10-20165-CR-LENARD (S.D. Fla. Mar. 12, 2010).

27. *Wachovia*, No. 10-20165-CR-LENARD.



identify the customer, subject to some restrictions. Chapter 47 addresses the conflict of “risk-only life policies” where insurance policies are only triggered by specific events such as death or permanent incapacity, and exempts reporting entities with these types of policies from having to include them in their AML/CTF reporting. Chapter 48 clarifies that the “reporting entities that provide salary packaging administrative services for an employer client,” excluding services to employers so long as the entity does not undertake transactions when it receives or pays “physical currency.”<sup>28</sup>

## 2. *Belgium*

On January 18, 2010, Belgium adopted a law implementing the European Commission’s Third Anti-Money Laundering Directive. The law went into effect on February 5, 2010. In addition to implementing the third directive, the law appears to apply recommendations made by the Financial Action Task Force (“FATF”) after FAFT audited the Belgian anti-money laundering rules. The new law consolidates a number of earlier Belgian laws that were first drafted under the Law of 11 January 1993 On Preventing Use of the Financial System for Purposes of Laundering Money and Terrorism Financing and 1991 Council Directive On Use of the Financial System for Purposes of Laundering Money.<sup>29</sup> For a longer discussion on the Third Directive, *see* France below.

## 3. *Bermuda*

Under the Proceeds of Crime Regulations (Supervision and Enforcement) Amendment Act 2010 (“PCRA Act”), the Bermuda government set up a new supervisory authority to regulate lawyers and accountants to prevent money laundering in the country. The Bermuda Bar Association and the Institute of Chartered Accountants in Bermuda will jointly establish the authority, to be known as the AML/ATF Board. The goal of the new PCRA Act is to bring anti-money laundering compliance up to international standards. It was designed to help enforce compliance with the AML/ATF regulations that Bermuda promulgated in 2008. Under the PCRA Act, regulated professional firms and practitioners who fail to comply with the regulations could be fined up to \$250,000.<sup>30</sup>

## 4. *China*

In January 2010, China’s Central Bank and the Anti-Money Laundering Ministerial Joint Conference announced their jointly-issued, first ever, anti-money laundering strategy. The China 2008-2012 Anti-Money Laundering Strategy will focus on terrorism financing networks. The stated goal is to set up the country’s anti-money laundering mechanism based on Chinese realities by 2012. The Central Bank has stated that China’s anti-money laundering efforts will not only examine terrorist financing networks, but it will also address the following: enacting criminal anti-money laundering laws; improving anti-money laundering supervision; establishing non-financial industry anti-money laun-

28. *Id.*

29. *See* Comm’n Bancaire, Financiere et des Assurances [Comm’n on Banking, Finance, and Insurance] (Fr.), Circulaire CBFA 2010, Apr. 6, 2010, *available at* [http://www.ing.be/xpedio/groups/internet/@public/@internet/@ingbe/documents/portalcontent/452903\\_fr.pdf](http://www.ing.be/xpedio/groups/internet/@public/@internet/@ingbe/documents/portalcontent/452903_fr.pdf).

30. *Id.* pt. 4A, 301 (1).

dering systems; strengthening exchanges between enforcement departments; training anti-money laundering experts; participating in international cooperation efforts; and developing new relevant standards. The new strategy is to include such non-financial sectors as lottery and payment settlement organizations.<sup>31</sup>

#### 5. *Guernsey & Jersey*

Following an International Monetary Fund (“IMF”) review of Jersey’s AML laws, the Guernsey Financial Services Commission introduced amendments to its current laws in an effort to close gaps, adopt specific IMF recommendations, and “adapt to changing criminal practices.”<sup>32</sup> Changes to the laws include: mandating that postage stamp and gold bullion dealers now comply with AML reporting requirements; making all accountants, insolvency practitioners, auditors and tax advisors comply with AML reporting structures; and making proceeds-of-crime offenses prosecutable.<sup>33</sup>

#### 6. *Indonesia*

In October 2010, Indonesia amended its Law on the Prevention and Eradication of Money Laundering to grant greater powers to the national anti-money laundering agency, the PPATK, and to the anti-corruption unit, the Corruption Eradication Commission (“KPK”). The amended law will strengthen the country’s financial intelligence unit by authorizing it to regulate and supervise investigations and to collect and analyze information on financial transactions. The PPATK will now be able to freeze transactions and the KPK will be able to conduct its own investigations independent of the Attorney General’s office. The revised law will also subject financial service providers to new reporting thresholds, mandating that they report all cross-border transactions and international fund transfers with a minimum value of INR 500m to the PPATK.<sup>34</sup>

#### 7. *Ireland*

The Irish Parliament passed the Criminal Justice (Money Laundering and Terrorist Financing) Act on April 28, 2010. Irish President, Mary McAleese, signed the bill on May 5, 2010.<sup>35</sup> In doing so, Ireland finalized its adoption of the European Commission’s third anti-money laundering directive. This law applies to the financial sector and to lawyers, notaries, accountants, real estate agents, casinos, trusts, and company service providers. All these parties must: identify and verify their customers and their customers’ beneficial

31. *Id.*

32. Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing, GUERNSEY FIN. SERV. COMM. (Fr.), (2010), [http://www.gfsc.gg/TheCommission/Policy%20and%20Legislation/Handbook%20for%20FSBs%20\(tracked\)%20August%202010.pdf](http://www.gfsc.gg/TheCommission/Policy%20and%20Legislation/Handbook%20for%20FSBs%20(tracked)%20August%202010.pdf); *Registration of Auditors, External Accountants, Insolvency Practitioners, and Tax Advisors*, GUERNSEY FIN. SERV. COMM. (Fr.), <http://www.gfsc.gg/AML-CFT/News/Pages/Registration-of-Auditors,-External-Accountants,-Insolvency-Practitioners-and-Tax-Advisers.aspx> (last visited Feb. 22, 2011).

33. *Id.*

34. *Id.*

35. *France Asked to Comply with Third Money Laundering Directive*, IBA ANTI-MONEY LAUNDERING FORUM, June 10, 2010, [http://www.anti-moneylaundering.org/News\\_2010\\_5.aspx#10062010](http://www.anti-moneylaundering.org/News_2010_5.aspx#10062010); Peter Oakes, *Ireland—Irish Parliament Finally Passes New Law to Transpose the 3rd EU Directive*, KYC360, May 4, 2010, [http://www.kyc360.com/hot\\_topic/show/108?set=1](http://www.kyc360.com/hot_topic/show/108?set=1).

owners; monitor their business relationship with their customers; and report suspicions regarding laundering activities. All providers of goods, when payments in excess of €15,000 are made in cash, come under this law.

#### 8. *Spain*

Spain's law implementing the third anti-money laundering directive of the European Commission was passed unanimously on April 28, 2010.<sup>36</sup>

#### 9. *United Kingdom*

The U.K. Bribery Act 2010 (the "Bribery Act") will go into effect in April 2011.<sup>37</sup> The Bribery Act will have an impact not only on U.K. companies, but also on U.S. financial institutions and U.S. companies because it contains requirements for additional monitoring of both bribery and money-laundering activities. Under the Bribery Act, banks may be expected to have requisite knowledge as part of their enhanced CDD practices that money has come from a bribe. Under the Bribery Act, financial institutions have a duty to disclose proceeds held in their institutions that may have derived from bribes. Financial institutions that breach this duty face what the Serious Fraud Office is calling "an increased likelihood of a civil action."<sup>38</sup> Although it is not mandatory for an institution or company to disclose bribery itself, if money flowed through a company and they failed to report the money, the company would in all likelihood trigger the money laundering act and the Bribery Act. SFO Director Richard Alderman and Charles Monteith, Head of Assurance for the SFO, have spoken at numerous public events this year, where they have stated that the SFO is reminding companies that bribery could amount to criminal conduct and that under U.K. law, money laundering offenses are concerned with property derived from criminal conduct. Therefore, if bribery has occurred, there will be a distinct likelihood of money laundering in relation to the proceeds of the bribery and thus, companies will be held responsible. This culpability is expected to be extended to include bankers, accountants, and financial advisors, all of whom will now have additional exposure to prosecution for failure to report to the authorities instances where they suspect or should have suspected money laundering by another, including their (corporate) clients. The U.K. Ministry of Justice is expected to release additional guidance in January 2011.

36. *France Asked to Comply with Third Money Laundering Directive*, *supra* note 35.

37. Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010), MINISTRY OF JUST. (U.K.), 4 (2010), <http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf>. See generally *The Bribery Act, 2010* (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

38. David Bunting, *U.K. Anti-Bribery Law Will Mean New Compliance Duties for U.S. Banks*, RISK HEADQUARTERS, Nov. 3, 2010, <http://www.riskheadquarters.com/u-k-anti-bribery-law-will-mean-new-compliance-duties-for-u-s-banks/>.

## B. ENFORCEMENT ACTIONS

1. *Dubai, UAE*

In October 2010, a Dubai court ordered the extradition of Nigerian former-government official, James Ibori, to the United Kingdom to face money-laundering charges.<sup>39</sup> Ibori allegedly stole approximately \$292 million whilst in office for eight years. Ibori fled to Dubai after Nigerian security agencies tried to arrest him. A British court has already convicted Ibori's sister, Christine Ibori-Ibie, and his alleged mistress, Udoamaka Okoronkwo-Onuigbo, for money laundering, wire and mortgage fraud. Each is now serving a five year prison sentence. The U.K. Metropolitan Police, assisted by the Nigerian Economic and Financial Crimes Commission ("EFCC"), presented evidence to the Dubai court. The U.K. trial is expected to begin in early 2011.

2. *France*

On June 3, 2010, the European Commission acted to ensure that France respects the common rules on financial crime. The Commission has formally requested France to comply with a judgment from 2009 (C-170/09). The Court ruled that France had failed to fulfill its obligations under the third anti-money laundering law by not fully transposing the Directive into national law before the implementation deadline.<sup>40</sup> In its letter of formal notice, the Commission asked France to comply with the Court judgment and complete the implementation of the Directive. If France does not comply, the Commission may refer the case to the European Court of Justice and ask the Court to impose a lump sum or penalty payment. The Third Directive applies to the financial sector and to lawyers, notaries, accountants, real estate agents, casinos, trusts, and company service providers. "Its scope also encompasses all providers of goods, when payments in excess of €15,000 are made in cash. Those subject to the Directive need to: identify and verify the identity of their customer and of its beneficial owner, and to monitor their business relationship with the customer; [and] report suspicions of money laundering or terrorist financing to the public authorities-usually the national financial intelligence unit."<sup>41</sup> Under the Directive, relevant parties must take supporting measures, which include ensuring proper training of personnel and establishing appropriate internal preventive policies and procedures. The Directive also adds "requirements and safeguards for situations of higher risk (e.g. trading with correspondent banks situated outside the EU)."<sup>42</sup> According to the European Commission, France has failed to implement the rules into its national laws by the deadline of December 15, 2007.<sup>43</sup>

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39. Lanre Adewole & Sylvester Idowu, *Dubai Court Orders Ibori's Extradition to UK As EFCC, NSA Meet Over Him*, NIGERIAN TRIB., Oct. 18, 2010, <http://www.tribune.com.ng/index.php/front-page-news/12239-dubai-court-orders-iboris-extradition-to-uk-as-efcc-nsa-meet-over-him>.

40. Press Release, EUROPA, Financial Crime: Commission Asks France to Respect European laws on Anti-Money Laundering (June 3, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/681&format=HTML&aged=0&language=EN&guiLanguage=en>.

41. *Id.*

42. *Id.*

43. *Id.*

### 3. *Russia*

In March 2010, Russian authorities arrested a crime group that had laundered more than \$1.6 billion for companies and individuals in the greater Moscow area since 2007. According to the Russian Interior Ministry, “the group charged a fee of 1 percent and 7 percent to legalize ill-gotten gains through three commercial banks and seventy-nine domestic and foreign firms.”<sup>44</sup>

In August, Russian police detained an adviser to the chairman and the head of client services management at two Moscow banks, Tempbank and Imperia Bank, respectively. Both are suspected of laundering more than two billion rubles (\$65 million) a month, according to the Interior Ministry’s Economic Security Department. According to Russian authorities, “the ‘organized group’ charged companies a commission of 3 percent to 9 percent and state entities 12 percent to 17 percent, to launder funds. . . .”<sup>45</sup> Furthermore, “Investigators raided the offices of three banks—OOO Bank Imperia, OAO Tempbank and Basmany—and seized financial documents, 120 registration stamps from shell companies and “electronic keys” to a bank account-management system. . . .”<sup>46</sup>

### 4. *United Kingdom*

*Shah and Anor v. HSBC Private Bank (UK) Limited*, a 2010 decision by the British Civil Court of Appeal, may significantly impact financial institutions and others subject to the AML regulations, such as lawyers and accountants.<sup>47</sup> At issue were the disclosure of banks’ internal documents related to money laundering disclosure protocols and the filing of Suspicious Activity Reports (“SARs”). The Court of Appeal held that, “Where a bank entertained suspicion about money-laundering concerning a proposed transaction on a customer’s account, and had failed to carry out instructions promptly, the customer might be entitled to proceed with a claim in breach of contract or duty.”<sup>48</sup> Until *Shar*, when a customer’s attempted financial transaction was forestalled or aborted because a financial institution had satisfied a duty under the Proceeds of Crime Act 2002 (“PoCA”), the customer could seek judicial review to challenge the specific action by the Serious Organized Crime Agency (“SOCA”), the agency where SARs are filed. The Court of Appeal’s decision in *Shar* has changed this position. It raises the possibility that an aggrieved customer may have a cause of action against those who file SARs to SOCA. The court may have attempted to redress the perceived lack of private law remedy for customers whose transactions have been delayed or halted by the filing of a SAR. The result, however, is that financial institutions and other regulated industries that are subject to client/customer instructions now face a conflict. Under PoCA, they cannot notify the customer that a SAR has been filed because this constitutes an illegal forewarning. PoCA makes any act in connection with suspected money laundering a criminal offense unless the act is reported to SOCA before it is accomplished. If a financial institution now files a SAR, and if the

44. *Id.*

45. *Id.*

46. *Id.*

47. See *Shah & Mahabeer v. HSBC Private Bank Ltd.*, [2010] EWCA (Civ) 31, [2010] Lloyd’s Rep. 276 (Eng.).

48. *Banks Torn Between Two Duties*, TIMES (U.K.), Apr. 1, 2010, <http://business.timesonline.co.uk/tol/business/law/reports/article7081404.ece>.

filing is erroneous or if it cannot be adequately supported, and if it causes the customer's transaction to be halted or delayed in some way that potentially causes harm, financial institutions risk being sued by the client for failing to disclose that they filed a SAR in the first place. Regulated industries must walk a tightrope between the failure to carry out a transaction (lest they break a fundamental money laundering law) and informing the client. Under *Shah*, institutions must disclose to a customer who is the subject of a SAR filing the basis for the suspicion and the nature of the suspicion itself, which will be investigated and established. If the institution fails to prove the reason for filing the SAR, then by definition a SAR has not been properly filed and, thus, the customer may claim damages suffered as a result.

At issue in *Shah* was a SAR that HSBC filed after customers Jayesh Shah and Shaleetha Mahabeer sought to transfer money out of the country. The bank argued that: (i) it had suspected that certain transactions constituted money-laundering under the relevant provisions of the PoCA; (ii) it had made an authorized disclosure seeking consent to effect them under section 338 of the 2002 Act; and (iii) it would have been illegal for it to effect the transactions any earlier than it did. In reply, the claimants, Mr. Shah and Ms. Mahabeer, asked HSBC to prove the basis of their claimed suspicion. But, the present case raised the question whether the same considerations as applied initially also apply during a subsequent action for damages for breach of contract or other duty, which will necessarily be resolved well after the time within which authorization had to be allowed or a restraint order applied for.

As a result of this decision, customers can now obtain disclosure of banks' internal documents related to money laundering disclosures. It also raises the possibility that financial institutions may have an obligation to inform their customers when they have filed a SARs on them. Whilst the decision primarily affects financial institutions and other regulated entities who owe duties to carry out customers' or clients' instructions, it may well apply wherever a party makes a SAR which causes loss to a third party. It might apply, for example, if a subject of a SAR seeks to sue the maker for defamation. The Court of Appeal confirmed, however, that the defendant firm does not need to show that its suspicion was reasonable. Defendant institution need only show that its suspicion was not just a "gut-feeling" or an irrational suspicion. Regulated parties now must confront what duties they have to make disclosures to clients/customers.<sup>49</sup>

In a September 30, 2011 letter, J.P. Morgan Chase informed embassies and missions of forty governments that the bank will be closing their business accounts, effective March 31, 2011. The U.S. State Department observed that the move to close the accounts "could strain U.S. foreign relations."<sup>50</sup> Of the approximately forty countries affected, sixteen are African nations. Bank of America Corp, Citibank, and HSBC Bank USA, who conduct only a small portion of embassy banking, have indicated that they too will follow suit in closing foreign government accounts with their respective institutions. Whilst J.P. Morgan did not offer a specific reason in its letter to government account holders, the move to distance itself from conducting business with certain countries is thought to be due in large part to the bank's efforts to strengthen their anti-money laundering compli-

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49. See *id.*; Paul Marshall, *Does Shah v. HSBC Private Bank Ltd. Make the Anti-money Laundering Consent Regime Unworkable?*, BUTTERWORTH'S J. INT'L BANKING & FIN. L., May 2010, at 287, 288-90.

50. *Id.*

ance programs. The governments who received the letter, including Angola, are thought to pose particularly high risks for institutions, and offer little in the way of revenue.

### C. INTERNATIONAL TREATIES AND INTERNATIONAL ORGANIZATIONS

#### 1. *Cross-Debarment*

In April 2010, “the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group and the World Bank Group”<sup>51</sup> reached an agreement to cross-debar companies and individuals found to have engaged in fraud or corruption in connection with projects financed by the banks. Under the agreement, a contractor debarred by one bank for a period of a year or more will also be barred from bidding on projects for the same period of time with all five banks. “Under the 2006 agreement, the institutions agreed to harmonize their definitions of sanctionable practices [including laundering] and to share greater investigative information among the banks.”<sup>52</sup>

#### 2. *FATF*

On February 18, 2010, FATF issued a list of jurisdictions that are subject to countermeasures, have AML deficiencies that have not been addressed, or have deficiencies that are in the process of being addressed. The countries listed include Iran for ongoing and substantial money laundering and terrorist financing risks. Also on the list are Angola, the Democratic People’s Republic of Korea, Ecuador, and Ethiopia for AML/CFT deficiencies and for failing to commit to an action plan developed with FATF to address their respective deficiencies. FAFT also cited Pakistan, Turkmenistan, and São Tomé, and Príncipe for having strategic AML/CTF deficiencies which have yet to be addressed as of the list issue date.<sup>53</sup>

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51. *Id.*

52. *Id.*

53. *Id.*

