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Fatal Broadside: The Demise of Caribbean Offshore Financial Confidentiality Post USA PATRIOT Act

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TABLE OF CONTENTS

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"Secrecy is the first essential in the affairs of the state"[1]

I. INTRODUCTION

As the world becomes more financially interconnected, large governments seek to impose stringent disclosure requirements upon both domestic and foreign financial institutions.[2] Motivated by a desire to recover lost tax revenue and curtail money laundering, the United States and the international community have embarked on a mission to eliminate offshore banking secrecy.[3] As a result, many Caribbean States with strict confidentiality practices find themselves in a precarious position.[4] Maintaining strict financial confidentiality is a sure trigger for attacks by many of the world's financial giants, most notably the United States.[5] On the other hand, raising the veil of confidentiality and allowing access to sensitive information endangers the viability of offshore financial centers that are critical to the economies of many Caribbean countries.[6] As the United States and the international community apply pressure upon offshore financial centers to disclose confidential financial information, the once ironclad banking secrecy

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1. ROSE-MARIE BELLE ANTOINE, CONFIDENTIALITY IN OFFSHORE FINANCIAL LAW, Oxford University Press (2002) (citing Cardinal Richelieu in the introduction).

2. *See* Frank C. Razzano, *So You Want to be an International Financial Center . . . Are You Prepared to Spit in the Giant's Eye*? 28 SEC. REG. L. J. 326, 327 (2000); ANTOINE, *supra* note 1, ¶ 1.03; *see generally* Vaughn E. James, *Twenty First Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM Countries of Their Tax and Economic Policy Sovereignty*, 34 U. MIAMI INTER-AM. L. REV. 1, 2 (2002) (noting that regulations of the Organization for Economic Cooperation and Development ("OECD") that "blacklisted" Caribbean nations with preferential tax treatment were stripping sovereign nations of the ability to structure their own economic and tax policies).

3. Razzano, *supra* note 2, at 334-36; ANTOINE, *supra* note 1, ¶¶ 1.07, 11.01; S. REP. No. 99-130, at 1 (1985).

4. *See* Keri Geiger, *The Very Long Arm of US Law*, LATIN FINANCE, June 1, 2002, at 34, *available at* 2002 WL 15266623 (discussing the potential collapse of Caribbean financial industries as a result of the U.S. government's use of the USA PATRIOT Act to deal with both money laundering and tax evasion); Aline Sullivan, *World Watchdogs Make Life Unpleasant Offshore Tax Havens/Going, Going, Gone?*, INT'L HERALD TRIB., Mar. 15, 2003 at 13, *available at* 2003 WL 4535722 (stating that intense pressure from the United States and international organizations could be the end of offshore banking as we know it, as new regulations erode bank secrecy).

5. *See* ANTOINE, *supra* note 1, ¶¶ 1.03, 2.39 (describing the clash between offshore jurisdictions that view confidentiality as an essential ingredient in their financial industry and onshore jurisdictions that are hostile to confidentiality and have taken drastic measures to prevent it). Additionally, mentioning that the primary attack upon confidentiality has been by the United States and the Organisation for Economic Cooperation and Development. *Id.*; Razzano, *supra* note 2, at 362; *see also* Jason Ennis, *Cleaning Up the Beaches: The Caribbean Response to the FATF's Review to Identify Non-Cooperative Countries or Territories*, 8 L. & BUS. REV. AM. 637, 638 (2002) (discussing the international response, through the Financial Action Task force ("FATF"), to what it perceived as inadequate banking regulations in five Caribbean nations). The FATF then recommended that banks in its member nations pay "special attention" to transactions coming from those Caribbean countries. *Id.*

6. *See* ANTOINE, *supra* note 1, ¶¶ 2.36 (noting that many Caribbean offshore financial centers, are dependent upon their financial industries because of their location and narrow export economies); *see also* James, *supra* note 2, at 9-10 (discussing how many Caribbean countries turned from agricultural production to financial services, demonstrating the importance of the financial sector to their economies).

of the Caribbean financial industry whittles away to nothing.[7] This serves as a disincentive to both individuals and international companies for doing business with offshore financial centers[8] and will likely result in the demise of once thriving offshore financial centers.[9] Contrary to popular belief, elimination of offshore banking secrecy in itself will not solve the global problem of money laundering or help governments recover lost tax revenues.[10]

This Comment explores the future of confidentiality in Caribbean offshore banking by focusing on the USA PATRIOT Act[11] and international actions.

Part II of this Comment outlines the differences between jurisdictions concerning the protection of financial information. Specifically, this section compares and contrasts different jurisdictions' approaches to financial confidentiality. First, this section examines common law confidentiality protections. Second, it focuses on the United States, which has limited its financial confidentiality protections.[12] Finally, this section discusses two types of confidentiality in offshore jurisdictions,[13] the

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7. *See* Barbara T. Kaplan & Patrick T. O'Brien, *Secrecy Associated with Offshore Banking is Evaporating*, 119 BANKING L.J. 736, 736-37 (2002) (concluding that pressure from the FATF and the OECD, combined with tax disclosure agreements with the United States, have made offshore banking in the Caribbean dangerous); ANTOINE, *supra* note 1, ¶ 4.09 (stating that offshore centers are aware that an attack upon confidentiality could cause financial ruin); *see also* Sullivan, *supra* note 4, at 18 (noting that pressure from global and regional organizations, individual countries, and the United States may result in the demise of tax havens).

8. *See infra* note 19 and accompanying text (defining the term "offshore financial center").

9. *See* Razzano, *supra* note 2, at 327 (observing that over the last thirty years the United States has attacked offshore secrecy and has won); ANTOINE, *supra* note 1, ¶ 11.36 (noting that if current trends continue, offshore centers will have little choice but to increase disclosure); Akiko Hishikawa, *The Death of Tax Havens*, 25 B.C. INT'L & COMP. L. REV. 389, 417 (2002) (concluding that even though not entirely successful, OECD and international pressure have made the "death of tax havens inevitable"); *see also* Kaplan, *supra* note 7, at 736-37 (stating that recent events, including tax and anti-money laundering regulations have made it dangerous to rely on bank secrecy regulations to protect financial privacy when dealing with Caribbean offshore financial institutions); Susan Bibler Coutin, Bill Maurer & Barbara Yngvesson, *In the Mirror: The Legitimization Work of Globalization*, 27 LAW & SOC. INQUIRY 801, 832 (2002) (stating that when Caribbean nations ceased to be colonies, agriculture and tourism declined, leaving them no choice but to enter the financial sector).

10. Jack A. Blum et al., *Financial Havens, Bank Secrecy and Money Laundering*, 5 CRIME PREVENTION & CRIMINAL JUSTICE NEWSLETTER (United Nations Office for Drug Control and Crime Prevention) (New York, N.Y., 1998), *available at* http://www.imolin.org/finhaeng.htm (copy on file with *The Transnational Lawyer*) (last visited Feb. 12, 2004); *see also* ANTOINE, *supra* note 1, ¶ 2.53 (commenting on the misperceptions surrounding offshore confidentiality).

11. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Specifically this comment will focus on Title III of the Act which amends 31 U.S.C.A § 5318A (West 2003).

12. *See* ANTOINE, *supra* note 1, ¶ 2.39 (stating that the United States has aggressively attacked confidentiality practices of offshore finance); *see also* Berta Esperanza Hernandez, *RIP to IRP Money Laundering and Drug Trafficking Controls Score a Knockout Victory Over Bank Secrecy*, 18 N.C. J. INT'L L. & COM. REG. 235, 258 (1993) (concluding that even after modern legislation the U.S. position with regard to bank secrecy calls for limited confidentiality of financial information).

13. *See* ANTOINE, *supra* note 1, ¶ 2.01 (defining the different methods that offshore jurisdictions use to maintain strict financial confidentiality).

statutory hybrid model created by Switzerland, and a public policy approach followed by many Caribbean jurisdictions.[14]

Part III discusses the current U.S. and international attempts to undermine banking confidentiality in Caribbean offshore financial centers, and proposes that this is an effort to recover lost tax revenue and curtail money laundering. The section begins by exploring current domestic and international tax regulations used as tools to discourage use of offshore banks and to gain access to financial documents maintained by those offshore banks.[15] Next, it addresses the domestic and international response to money laundering prior to the USA PATRIOT Act. Finally, these sections examine how Caribbean governments have reacted to efforts to undermine confidentiality.[16]

Part IV explores the impact of recent U.S. legislation and international actions affecting banking confidentiality in the Caribbean, such as the USA PATRIOT Act. This comment concludes that faced with the devastating consequences of non-compliance with global pressure, offshore banking confidentiality is threatened with extinction.[17]

II. CONCEPTS OF CONFIDENTIALITY

Prior to any discussion regarding the confidentiality of financial information, the difference between onshore and offshore banking must be explained.[18] In addition, it is necessary to define the term "offshore financial center" to understand the distinct legal and policy considerations present in many Caribbean jurisdictions.[19] Furthermore, to understand jurisdictional differences regarding financial confidentiality, it is helpful to explain core terms.[20] The term "onshore" is used to describe those nations that do not engage in offshore activity.[21] The

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14. *See id.* ¶¶ 2.02-.07 (analyzing two models of offshore financial confidentiality by tracing the background of bank confidentiality from Switzerland to Caribbean offshore jurisdictions).

15. *See* Benjamin R Hartman, *Coercing Cooperation From Offshore Financial Centers: Identity and Coincidence of International Obligations Against Money Laundering and Harmful Tax Competition*, 24 B.C. INT'L & COMP. L. REV. 253, 254 (2001) (discussing strategies the international community has used to label many offshore financial centers as "non-cooperative" and as a threat from a tax competition standpoint as well as from a money laundering and global financial stability standpoint).

16. *See generally* ANTOINE, *supra* note 1, ¶¶ 3.18-.20 (noting that Caribbean nations are under no obligation, as sovereign nations, to comply with the United States but do so anyway); Razzano, *supra* note 2, at 327 (stating that the United States has been successful in eroding confidentiality in offshore financial centers).

17. *See* ANTOINE, *supra* note 1, ¶ 11.35 (concluding that offshore centers will have to retrofit and come into line with OECD regulations); Hishikawa, *supra* note 9, at 417 (noting that even though not entirely successful OECD and international pressure have made the "death of tax havens inevitable").

18. *See* ANTOINE, *supra* note 1, ¶ 1.03 n.2 (stating that it is convenient to term jurisdictions that engage in offshore finance as "offshore" versus those jurisdictions that don't as "onshore").

19. *See id.* ¶ 1.18 (defining "offshore" as those jurisdictions that have made the needs of "non-resident investors" a primary concern of their financial centers).

20. *See* ANTOINE, *supra* note 1, ¶¶ 1.13-.17 (observing the need to redefine the definition of "offshore financial center" as the world becomes more globalized and offshore centers change).

21. *See id.*, ¶ 1.03 n.2 (describing onshore jurisdictions as those jurisdictions that don't participate in offshore finance).

term "offshore" is a qualitative term referring to investments located specifically in foreign jurisdictions where the legislative, regulatory and tax framework is less restrictive compared to an investor's home-base.[22] Many Caribbean nations, in an attempt to encourage economic growth, have made an effort to attract out-of-country business by offering favorable taxes and regulations.[23] These nations, which are categorized as offshore financial centers, cater to non-resident individuals as well as non-resident corporations. [24] For example, the Cayman Islands and the Bahamas, two of the oldest offshore centers, have very strict financial confidentiality laws.[25]

The term "offshore financial center" replaces the term "tax haven" which is obsolete and portrays offshore jurisdictions as allowing individuals and large companies to evade taxes.[26] An offshore financial center is a "complex creature" whose focus is on the transnational manner of providing a wide array of financial and business services for modern businesses and individuals.[27] To understand offshore confidentiality protections fully it is useful to understand global perspectives towards financial confidentiality.[28]

A. At Common Law

The importance of banking confidentiality can be traced back to before Roman times, when temples acted as banks making financial confidentiality vital to an individual's privacy.[29] Banking transactions reflect a person's "lifestyle, personal interests, and political beliefs."[30] Therefore, access to an individual's

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22. *Id.* ¶¶ 1.16-.17 (stating that home base is best described as the onshore location where the non-resident offshore investor resides).

23. *See id.* ¶ 1.14 (noting that the modern offshore financial center provides a wide array of modern financial services for large transnational companies and small investors).

24. *See id.* ¶¶ 1.18, 1.22 & n.13 (listing Caribbean financial centers as Panama, Anguilla, Antigua, Belize, Barbados, Bermuda, the Cayman Islands, Grenada, the Virgin Islands (United States and British), the Turks and Caicos Islands, St. Vincent, Costa Rica, Dominica, St. Lucia and the Bahamas).

25. *See id.* ¶¶ 1.22 & n.13 (discussing the global focus of offshore financial centers and mentioning the Cayman Islands and the Bahamas as two of the oldest offshore financial centers in the world).

26. *See id.* ¶¶ 1.14-.15 (noting that even though the term "offshore financial center" is difficult to describe, it has been determined that "tax haven" is obsolete because offshore centers offer such a variety of services to modern business).

27. *See id.* (describing offshore financial centers as catering to global clientele rather than just as a haven for tax evaders); *see also id.* ¶1.18. (defining an "offshore financial center" as "a regime which has chosen as a main or important path to development, legislative, financial and business infrastructure which is more flexible than orthodox infrastructures, and which caters more specifically, and often exclusively, to the needs of non-resident investors").

28. *See generally* ANTOINE, *supra* note 1, ¶¶ 2.01-.07, 2.27-.31 (detailing and defining both the limits and exceptions to offshore confidentiality).

29. *See id.* ¶ 2.04 (discussing the ancient origins of financial confidentiality).

30. Robert S. Pasley, *Privacy Rights v. Anti-Money Laundering Enforcement*, 6 N.C. BANKING INST. 147, 152-53 (April 2002) (discussing Matthew N. Kleiman, Comment, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 NW. U. L. REV. 1169, 1169 (1992)).

financial information reveals nearly everything about a person's life.[31] On the other hand, a competing interest which necessitates financial disclosure is the apprehension of criminals.[32] Access to financial records allows authorities to frustrate crime by preventing criminals from conducting transactions in secret and creating an easily followed paper trail to plundered funds.[33]

Historically, the common law imposed a duty of confidentiality on banks regarding financial records of clients.[34] In *Tournier v. National Provincial Bank*,[35] an early English case, the court held that bankers had a contractual duty not to disclose a client's financial information. The *Tournier* principle was adopted by many nations, and expanded to cover areas other than banking. For example, the United Kingdom and her dependencies have expanded *Tournier* to cover commercial transactions.[36] Common law courts recognize the importance of requiring a stringent standard of confidentiality.[37] However, common law confidentiality is not absolute, as the *Tournier* case indicates by listing specific exceptions to the rule.[38] Under *Tournier*, disclosure will be permitted in four instances: first, under compulsion of law; second, when disclosure is in the public interest; third, when disclosure is in the best interests of the banker; and fourth, with express or implied consent by the customer.[39]

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31. *See id.* at 152-54 (examining the danger of allowing access to an individual's financial history, which contain intimate details of our lives, such as memberships to organizations, groups, and social causes supported); *see also Suburban Trust Co. v. Waller*, 408 A.2d 758, 762 (Md. Ct. Spec. App. 1979) (summarizing the danger of disclosure of financial information by stating "[i]f it is true that a man is known by the company he keeps, then his soul is almost laid bare to the examiner of his checking account").

32. *See generally* Charles Thelen Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW. 69, 69-70 (1988) (discussing the tension between the usefulness of using financial information in finding evidence for criminal acts and the need to prevent disclosure of financial information that may reveal sensitive information).

33. *See id.* at 69-70 (stating that by accessing records the government is able to find wrongdoers by following an audit trail); *see also* Hernandez, *supra* note 12, at 258 (explaining that the purpose of the Banking Secrecy Act was to allow authorities to get records of transactions by mandating that banks maintain those records).

34. *See* ANTOINE, *supra* note 1, ¶ 2.27 (analyzing the common law duty of confidentiality as a contractual obligation between banker and client).

35. [1924] 1 K.B. 461 (C.A.), *available at* [1923] WL 17957 (copy on file with *The Transnational Lawyer*); *see* Pasley, *supra* note 30, at 174 (discussing *Tournier* in great detail).

36. *See* ANTOINE, *supra* note 1, ¶ 2.28 (discussing the expansion of the *Tournier* concept of confidentiality); Danforth Newcomb, *United States Litigation and Foreign Bank Secrecy: The Origins of the Conflict*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 47, 49 (1988) (noting that many British dependencies, including those in the Caribbean, have adopted *Tournier*-like principles of confidentiality).

37. Peterson v. Idaho First Nat'l Bank, 367 P.2d 284; *Tournier*, [1924] 1 K.B. 461; *see* Hernandez, *supra* note 12, at 244 (stating that bank secrecy laws demonstrate that strict bank secrecy is "deeply grounded" in the common law).

38. *See* ANTOINE, *supra* note 1, ¶ 2.27 (noting that *Tounier* clearly states exceptions when disclosure of financial information is permitted); Newcomb, *supra* note 36, at 55 (explaining that the duty of secrecy established in *Tournier* is qualified); Pasley, *supra* note 30, at 174-75 (noting that *Tournier*, in recognizing strict confidentiality, limited the duty by stating four exceptions).

39. ANTOINE, *supra* note 1, ¶ 2.27; Pasley, *supra* note 30, at 174-75.

Thus, without stringent bank secrecy laws, it appears that under the common law standard of confidentiality, financial records can be compromised.[40] This is the very reason why many nations, like offshore financial centers, have enacted laws to prevent unwarranted disclosure of financial information.[41] However, some nations like the United States have opted for more limited protection.[42]

B. The United States

In *United States v. Miller*,[43] the Supreme Court held that Fourth Amendment protection does not extend to bank records that are in the possession of third parties. Specifically, the court relied on the fact that the Bank Secrecy Act required banks to maintain records such as copies of checks, deposit slips and financial statements.[44] The court inferred that the records were the property of the bank because checks were not personal property but rather instruments of commercial transactions, and financial statements were voluntarily given over to the bank.[45] Therefore, an individual did not have a constitutional right of privacy over those documents.[46] In response to the decision in *Miller*, Congress enacted the Right to Financial Privacy Act ("RFPA") to prevent possible governmental abuse of individual financial records, and define the extent of financial privacy rights in the United States.[47]

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40. *See* Pasley, *supra* note 30, at 152-53 (stating the importance of protecting financial records to prevent revealing personal information); *see also* Plombeck, *supra* note 32, at 69 (noting that though financial information is useful to track criminal transactions there is also a strong need for banking secrecy as demonstrated in the United States by the Right to Financial Privacy Act ("RFPA")); ANTOINE, *supra* note 1, ¶¶ 2.01-07 (explaining that countries that still maintain strict confidentiality laws have either enacted a statutory framework or have such strong public policy that courts zealously defend it).

41. *See* ANTOINE, *supra* note 1, ¶¶ 2.01-.07 (noting that many nations, including Switzerland and many Caribbean nations, have enacted strict laws to protect financial information); *see also* Hernandez, *supra* note 12, at 235-48 (comparing and contrasting the differences in levels of protection provided by different nations' bank secrecy laws).

42. *See* MICHAEL P. MALLOY, INTERNATIONAL BANKING: CASES, MATERIAL AND PROBLEMS 357 (1998) [hereinafter INTERNATIONAL BANKING] (discussing how the United States has limited financial secrecy laws); Pasley, *supra* note 30, at 165-67 (concluding that unlike general privacy rights under the 4th Amendment, financial privacy rights have been narrowly interpreted and limit the protection given to an individual's financial privacy); *see also* Blum, *supra* note 10, at 41 (stating that the United States is viewed as the country that seeks disclosure of the most financial information from its banks).

43. *See* 425 U.S. 435, 436 (1976) (involving a bank disclosing financial data to the government including transactions, checks, and financial statements). Information was used as evidence against Miller, showing that he was running an illegal alcohol business. *Id.*

44. *Miller*, 425 U.S. at 442-43; *see* Pasley, *supra* note 30, at 172-73 (discussing how the court inferred that if Congress wanted a constitutionally protected interest in financial records it would not have passed the BSA requiring banks to maintain certain records, which effectively placed ownership of those records with the bank); Newcomb, *supra* note 36, at 50 (outlining how the BSA required banks to maintain records where previously none were needed).

45. *Miller*, 425 U.S. at 442-43.

46. *Miller*, 425 U.S. at 442-43; *see* Pasley, *supra* note 30, at 172-73.

47. 12 U.S.C. §§ 3401-3422 (2003); *see* Pasley, *supra* note 30, at 198 (noting that the RFPA did not contradict the holding in *Miller* but merely established safeguards to prevent abuse by the government; thus

The RFPA was enacted to halt the erosion of financial privacy by providing when the government could request and when banks could disclose financial information.[48] However, any protection that the RFPA promised is illusory for several reasons. [49] For example, the RFPA does not protect the individual when the bank initiates the disclosures to the government.[50] A bank is allowed to disclose information without civil liability if it suspects possible statutory or regulatory violations. [51] In addition, actual notice to the customer is limited.[52] When formal requests are made, or judicial or administrative subpoenas are served, the government is required to mail or serve notice to the customer that day.[53] This provides the customer with an opportunity to contest the disclosure. A contest must be made within ten days of notice or the information is disclosed.[54] Moreover, in recent amendments to the RFPA, Congress further restricted customer notice procedures.[55] Finally, the RFPA has provisions concerning situations where the government can request delayed notice to the individual.[56] In short, under the RFPA, the United States has narrowly interpreted individual

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reinforcing the premise that banks, not individuals, own the financial information, limiting an individual's privacy rights in those documents).

48. *See* 12 U.S.C. § 3402 (2003) (listing ways that the government can easily gain access to financial information through: (1) written consent by the customer, (2) search warrant, (3) administrative subpoena, (4) formal written request [from government], (5) judicial subpoena, or (6) grand jury subpoena); Pasley, *supra* note 30, at 172-73 (stating that the RFPA was enacted to halt the erosion of financial privacy due to the contrary decision in *Miller*); *see also* Hernandez, *supra* note 12, at 245-46 (tracing the evolution of financial confidentiality protections). The RFPA does not prevent the erosion of financial privacy but does define exceptions as to when the government can gain access to information. *Id.*; INTERNATIONAL BANKING, *supra* note 42, at 357-58 (discussing the history of bank secrecy in the United States, specifically its limits).

49. *See* Hernandez, *supra* note 12, at 245-46 (concluding that RFPA does not actually prevent banks from disclosing information, it only requires notice to the customer prior to disclosing information to the government).

50. *See* 12 U.S.C. § 3403(c) (2003) (noting that a bank can disclose information to the government without repercussion).

51. *See id.* § 3403(c) (stating that a bank is not civilly liable for disclosures made, regardless of whether the transactions were actually in violation of the law); *see also* Razzano, *supra* note 2, at 342 (noting that the RFPA provides that banks can report suspected violations without repercussion).

52. *See* Hernandez, *supra* note 12, at 245-46 (critiquing the ease with which banks can disclose information to the government without civil liability, regardless of whether the transactions were actually in violation of the law).

53. *See* 12 U.S.C. §§ 3405(2), 3407(2), 3408(4)(A) (2003) (stating when and how much notice the government must give to customers depending on the type of request).

54. *See* 12 U.S.C. § 3410(a) (2003) (explaining the procedures for a customer to challenge a disclosure made to the government).

55. *See* 12 U.S.C. § 3413(i) (2003) (illustrating limited financial privacy in the United States as banks are prohibited from giving notice to individuals when a request is made pursuant to a grand jury subpoena or court order).

56. *See* 12 U.S.C. § 3409 (2003) (covering specific situations where the investigation is within the jurisdiction of the government). Situations include when the records are believed to be relevant to a law enforcement inquiry and there is reason to believe that the inquiry will result in the endangering of life or safety, flight, destruction of evidence, intimidation of witnesses or otherwise seriously jeopardizing the investigation. *Id.*

protections for financial information.[57] This is in stark contrast to strict confidentiality protections of other nations in the world, namely the offshore financial centers.[58]

C. Offshore Financial Confidentiality

The development of the offshore financial center is "one of the most significant and fascinating legal and socioeconomic phenomena in contemporary times."[59] Many Caribbean nations have evolved into international banking centers with strict bank secrecy laws.[60] By vigorously guarding privacy and providing for private investment with little or no tax exposure, Caribbean States are able to "attract funds, provide jobs and facilitate economic development."[61] The policy decision to enact laws favorable to banking secrecy proved to be advantageous, as the region flourished and became an important banking center.[62]

1. Origins

The Caribbean is perhaps the most successful offshore financial region in the world, due to its strict banking secrecy laws and its proximity to the United States and.[63] While under European control, many Caribbean States had agriculturally-based economies, producing a wide range of products from coffee to sugar cane.[64] However, after independence many of these States began to

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57. *See* INTERNATIONAL BANKING, *supra* note 42, at 357 (discussing how the United States has very limited financial secrecy laws); Pasley, *supra* note 30, at 165-67 (stating that unlike general privacy rights under the 4th Amendment, financial privacy rights have been narrowly interpreted and limit the protection given to an individual's financial privacy); *see also* Blum, *supra* note 10, at 41 (noting that the United States is viewed as the country that seeks the greatest degree of disclosure of financial information from its banks).

58. *See* Hernandez, *supra* note 12, at 249-50 (concluding that the United States places little emphasis on financial privacy as compared to many other nations, which is the cause of conflict with other jurisdictions); *see also* Razzano, *supra* note 2, at 334, 336 (commenting on the United States' assault on banking secrecy).

59. *See* ANTOINE, *supra* note 1, ¶ 1.08; *see also* Ennis, *supra* note 5, at 642 (discussing the creation of Caribbean offshore financial centers and their unprecedented growth).

60. *See, e.g.*, Blum, *supra* note 10, at 41 (commenting on the evolution of Caribbean offshore banking centers and their strict bank secrecy regulations); Ennis, *supra* note 5, at 641 (noting that Caribbean offshore financial centers began after independence as an effort to diversify their economies).

61. Ennis, *supra* note 5, at 642; *see also* Paul Jensen & Pam Spikes, *Offshore Credit Card Records: Invasion by the IRS*, 29 INT'L TAX J. 59 (2003) (observing that a major selling point for offshore accounts is their strict bank secrecy laws).

62. *See* Ennis, *supra* note 5, at 641-42 (describing the importance and growth of the financial industry in the Caribbean region using the Cayman Islands as an example). In 1964, the Cayman Islands had only two banks, but today it is the world's fifth largest financial center. *Id.*; *see also* ANTOINE, *supra* note 1, ¶ 1.23 (discussing the evolution and growth of the offshore financial sector).

63. *See* Ennis, *supra* note 5, at 641 (noting the proximity of many Caribbean offshore centers to the United States and the reasons behind their development); James, supra note 2, at 10 (tracing the development of the Caribbean offshore centers).

64. *See* James, *supra* note 2, at 9-10 (describing the agricultural products grown to support the colonial economies of the Caribbean nations).

diversify as a way to stabilize their economies.[65] This diversification was necessary because of limiting economic factors such as agricultural decline, remote location, small populations causing high per capita government costs, reliance on external trade, susceptibility to natural disasters, and narrow resource bases.[66] From this diversification came tourism and offshore banking.[67] Initially, it was the international community that encouraged Caribbean nations to enter the offshore financial sector as a means of supplementing their post-colonial economies.[68] Ironically, the same industrialized nations that encouraged the creation of the offshore centers are now attempting to close those centers down.[69]

Offshore financial centers attract a wealth of business because they have strict confidentiality rules that appeal to individuals and companies who wish to reduce their tax liability and withhold information from competitors, suppliers, creditors and customers for legitimate reasons.[70] A number of scenarios created fertile grounds for the development of offshore banking.[71] First, many of the existing national banking procedures are in place for individualistic and arbitrary reasons.[72] This frustrates international business.[73] Second, international regulations currently in place fail to provide transnational[74] firms with clear guidelines on how to conduct business across multiple borders.[75] Lastly, the legal and tax systems of nations often expose transnational companies to duplicative liabilities and regulations.[76] These factors encourage companies to move offshore

65. *See* Ennis, *supra* note 5, at 641 (stating that Caribbean offshore financial centers developed as an effort to diversify their depressed economies); *see also* James, *supra* note 2, at 9-10 (noting that Caribbean nations attempted to diversify their post colonial economies by creating a tourist and financial market).

66. *See* Ennis, *supra* note 5, at 641 (listing the motivations behind many Caribbean nations in creating financial centers to boost their economies).

67. *See* James, *supra* note 2, at 9-10 (commenting on the fact that tourism and finance are the two money-makers in the Caribbean but the financial sector provides more stability as the hurricanes have damaged the tourism industry).

68. *See id.* at 29 (noting that after becoming independent many former colonies were encouraged by their former masters to boost their economies by entering the financial arena); The Hon. Mia Mottley, *Remarks of the Honorable Mottley, Attorney General & Minister of Home Affairs of Barbados*, 35 GEO. WASH. INT'L L. REV. 411, 413 (2003) (observing that the United States and European nations encouraged Caribbean nations to enter into the financial sector); *see also* Coutin, *supra* note 9, at 832 (stating that as the agriculture and tourism industries of post-colonial Caribbean nations declined they had no choice but to enter the financial sector).

69. James, *supra* note 2, at 29.

70. Ennis, *supra* note 5, at 642; Blum, *supra* note 10, at 41.

71. *See* ANTOINE, *supra* note 1, ¶¶ 1.23-.25 (using the theory of an economist named Gorostiaga, who traced the rise of Caribbean financial centers to increased multinationalism of companies). The author found that as companies became more internationally focused, the use for offshore banks increased. *Id.*

72. *Id.* ¶ 1.24.

73. *See id.* ¶¶ 1.23-.24 (critiquing "national" financial systems that are not set up to handle the fast paced and electronic nature of international business). Many national systems have procedures that make it difficult for international companies to do business. *Id.*

74. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1225 (10th Ed. 1994)) (defining transnational as "extending beyond national boundaries").

75. ANTOINE, *supra* note 1, ¶ 1.25.

76. *See id.* ¶¶ 1.24-.25 (noting that transnational companies favor using offshore banks as a base for their transactions, fearing conflict of laws between countries with concurrent jurisdiction over transactions).

where tax liability is minimal or non-existent, and strict confidentiality gives the corporations the protections they need.[77] By relocating their businesses offshore, transnational companies are able to operate with more certainty.[78]

2. *Confidentiality Models*

Compared to the United States and common law standards, offshore financial centers have more stringent financial confidentiality regulations.[79] Jurisdictions that are protective of financial information can be separated into two types: the statutory hybrid model and the public policy approach.[80]

a. Statutory Hybrid Model

The first model is the statutory hybrid model, created by the Swiss.[81] This approach stems from the belief that financial privacy is a fundamental right.[82] It combines common law banking confidentiality principles, such as the banker-client relationship, with a comprehensive statutory framework that codifies strict confidentiality standards.[83] In addition, the statutory hybrid model provides protection from disclosure to both government entities and private citizens.[84]

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77. *See id.* (concluding that when faced with duplicative laws, companies opted for moving to offshore jurisdictions where little or no tax would be charged against them).

78. *See id.* (stating that as companies became transnational, the uncertainty over which laws applied and more importantly which country's taxes applied, was remedied by moving operations offshore where favorable tax regulations and strict confidentiality laws protected the companies' interests).

79. *See id.* ¶¶ 2.01-.13 (determining that offshore financial centers that have strict confidentiality have their roots in the common law, but have evolved either a strong statutory framework or public policy against disclosure); Hernandez, *supra* note 12, at 243-45 (stating that many dependencies of the United Kingdom, such as the Cayman Islands and the Bahamas, have built upon the common law to provide more stringent confidentiality laws).

80. *See* ANTOINE, *supra* note 1, ¶ 2.01 (differentiating between common law jurisdictions and two types of offshore financial centers).

81. *See id.* ¶ 2.02-.03 (noting that in addition to the belief that financial privacy is a fundamental right, Swiss Banking Law, article 47 creates criminal penalties for breaches of confidentiality). This demonstrates the strict statutory framework not present in the common law. *Id.*

82. *See* Hernandez, *supra* note 12, at 240 (observing that Switzerland treats the right to financial privacy as a fundamental right and imposes both civil and criminal penalties for violations); *see also* INTERNATIONAL BANKING, *supra* note 42, at 357 (discussing how many nations, including Switzerland, infer a fundamental privacy right for financial information); *see* ANTOINE, *supra* note 1, ¶¶ 2.01-.04 (tracing the historical content of financial privacy as a fundamental right from Rome to Switzerland and finally the Caribbean).

83. *See* ANTOINE, *supra* note 1, ¶ 2.03

84. *See* Peter Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C. J. Int'l L. & Com. Reg. 1, 1-2 (1983) (discussing banking secrecy specifically article 47 of the Swiss Banking Law and how Switzerland prohibits disclosure to both public and private sources); *see* INTERNATIONAL BANKING, *supra* note 42, at 357 (noting that as Switzerland views financial privacy as a fundamental right, it applies to disclosures to individuals as well as the government); *see also* Hernandez, *supra* note 12, at 24 (comparing Switzerland's financial protections regarding banking transactions to a lawyer/client or doctor/patient relationship).

Like their Swiss counterparts, many Caribbean nations have adopted strict requirements on disclosure of financial information.[85] This is because Caribbean nations view financial privacy not only as a fundamental right but also an essential element in sustaining their economy, as offshore economies are dependent on the viability of their financial sectors.[86] This public policy has encouraged many Caribbean financial centers to codify the obligation of financial confidentiality.[87] Some Caribbean nations followed the Swiss approach and made the duty of strict confidentiality a statutory mandate.[88] Other Caribbean jurisdictions have made confidentiality a matter of public policy rather than a statutory duty.[89]

b. Caribbean Offshore Centers: A Matter of Public Policy

Many offshore financial centers were British colonies and find their secrecy laws rooted in the common law.[90] Several Caribbean jurisdictions such as Barbados, the British Virgin Islands, and St. Lucia have not codified the duty of confidentiality.[91] Rather, offshore courts in the previously mentioned jurisdictions recognize strict confidentiality as a matter of public policy and a necessary foundation of the offshore economy.[92] The courts extend the duty of confidentiality beyond that of the common law.[93] The *Tournier* exceptions to

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85. *See* INTERNATIONAL BANKING, *supra* note 42, at 357 (discussing how other nations infer a fundamental privacy right for financial information and from those rights strict bank secrecy laws have evolved); *see also* Hernandez, *supra* note 12, at 245-46 (discussing a Supreme Court case, *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974), which held that banks were owners of the individuals financial information in direct contrast with many jurisdictions with strict bank secrecy where the individual is deemed the owner of the information); *see* ANTOINE, *supra* note 1, ¶¶ 2.36-.38 (noting that confidentiality is a vital ingredient in offshore banking and quoting the legislative purpose behind confidentiality statutes in the Cayman Islands and the Bahamas was to protect the financial sector).

86. *See* Ennis, *supra* note 5, at 641 (discussing the vital importance of strict bank secrecy laws to the economic viability of many Caribbean nations and how banking confidentiality is protected as a key right by both criminal and civil law); *see also* INTERNATIONAL BANKING, *supra* note 42, at 357 (contrasting the liberal policies in the United States of gaining access to financial records with the stringent requirements of other nations).

87. *See* ANTOINE, *supra* note 1, ¶ 2.05 (observing that many offshore financial centers in the Caribbean have, like Switzerland, codified confidentiality protections); *see also* Razzano, *supra* note 2, at 328-29 (discussing the advent of international financial centers and their strict confidentiality requirements prohibit disclosure under penalty of law).

88. Razzano, *supra* note 2, at 328-29 (observing that many offshore jurisdictions like the Swiss have codified their confidentiality protections); ANTOINE, *supra* note 1, ¶ 2.05.

89. ANTOINE, *supra* note 1, ¶ 2.05-.06 (commenting that the British Virgin Islands, St. Lucia and Barbados have not codified their confidentiality laws but still maintain strict confidentiality).

90. *See id.* ¶ 2.29 (listing the Bahamas and the Cayman Islands as examples of very successful offshore financial centers that were former British colonies); *see also* Newcomb, *supra* note 36, at 49 (noting that many former British colonies have adopted common law notions of bank secrecy).

91. *Id.* ¶ 2.06.

92. *See id.* ¶¶ 2.05-.07, 2.29 (stating that even without a statutory framework, several Caribbean nations have strict financial protections based solely on public policy).

93. *Id.* ¶ 2.29.

confidentiality are narrowly construed, favoring confidentiality over disclosure.[94] The interplay of traditional common law notions of financial privacy, public policy and statutory law makes Caribbean offshore financial centers a unique legal environment.[95] Perhaps the best way to understand why many Caribbean nations view strict confidentiality as a matter of public policy is through their history.[96]

III. ATTACKING CONFIDENTIALITY

A. Buccaneer Legends: Myths and Mysteries of the Offshore Financial Center

Strict confidentiality is both the offshore financial center's greatest asset and greatest enemy.[97] On one hand, strict confidentiality is a great tool because secrecy in business and banking transactions is an important facet of the global economy.[98] Indeed, levels of investment and consumer confidence within a country are contingent upon the level of protection accorded to personal financial information.[99] Unfortunately, many offshore financial systems are vulnerable to illicit use, and when confidentiality protections are repeatedly used or allowed to hamper legitimate law enforcement, public confidence in the judicial system erodes. [100]

Offshore financial centers are widely criticized as specializing in hiding ill-gotten gains of criminal enterprises.[101] The U.S. Senate has reported that offshore financial institutions are "hiding" between $150 and $600 billion dollars in unreported income.[102] Offshore centers are viewed as routinely abusing and misusing their confidentiality laws to protect tax evaders and criminal enterprises.[103] A 1985

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94. *Id.* ¶ 2.31.

95. *Id.* ¶ 2.06.

96. *See id.* ¶¶ 11.30 (stating that without their financial sectors, many Caribbean economies would face certain collapse); *see also* Coutin, *supra* note 9, at 832 (noting that without colonial aid, many offshore centers depend on revenue from their financial centers).

97. ANTOINE, *supra* note 1, ¶ 1.62

98. *Id.*; Michael Imeson, *Offshore Centers Adapt to Survive*, PRIVATE BANKER INT'L 6 (Jan. 17, 2003), *available at* 2003 WL 11065075 (detailing the effects of international pressures against offshore banking confidentiality laws).

99. *See* ANTOINE, *supra* note 1, ¶ 1.62. (noting the importance of confidentiality to all banking systems because persons who feel their confidential information is accessible to all, will not trust the financial system).

100. *Id.*; *see also* Kathleen A. Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 NW.J. INT'L L. & BUS. 263, 275 (2003) (noting that offshore centers face problems because strict confidentiality can be used by both legitimate and illegitimate investors).

101. *See* ANTOINE, *supra* note 1, ¶ 2.53 (commenting on several well known myths regarding offshore centers); *see also* S. REP. No. 99-130, *supra* note 3, at 1.

102. James P. Springer, *An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases*, 22 GEO. WASH. J. INT'L L. & ECON. 277, 281 (1988) (referring to a 1982 Senate report).

103. *See* ANTOINE, *supra* note 1, ¶¶ 1.09, 2.53 (discussing that Caribbean offshore jurisdictions are erroneously viewed as providing protection for criminals under their confidentiality protections); *see* Lacey, *supra* note 103, at 275 (noting that offshore "tax havens" are used by criminals to avoid detection due to those jurisdiction's strict secrecy laws); *see* S. REP. No. 99-130, *supra* note 3, at 1.

U.S. Senate report noted that "offshore haven secrecy law is the glue that holds many U.S. criminal organizations together."[104]

The international community, most notably the United States, has sought to solve this problem by attempting to eradicate offshore confidentiality protections.[105] However, eliminating strict banking secrecy laws alone will not solve the problems of tax evasion and money laundering.[106] The belief that removing strict confidentiality protections will solve the problem is "false and simplistic," because the problem does not lie in the presence of strict confidentiality rules.[107] Rather, the problem derives from a "tool kit" of innovative instruments, such as trusts and bank accounts, and a history of non-cooperation with the international community in the matters of tax and money laundering investigations.[108]

The level of illegal activity in offshore banking is greatly overstated and sensationalized.[109] While some illegal activities do occur offshore, the vast majority of investors are legitimate.[110] In addition, many offshore centers are well regulated, have enacted measures to reduce criminal activity and view misuse of confidentiality as a threat to their economic stability.[111] In fact, the Bahamian money laundering statute may be more modern than those of most nations, including the United States.[112] Ironically, many nations with highly regulated banking systems have been victims of elaborate money laundering schemes.[113]

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104. S. REP. No. 99-130, *supra* note 3, at 1; *see* Springer, *supra* note 102, at 280-81 (noting that the U.S. Senate concluded that crime was flourishing in offshore centers because of strict secrecy laws); b*ut see* ANTOINE, *supra* note 1, ¶ 1.63 (commenting on the U.S. hostility to offshore confidentiality and citing a U.S Senate special report on offshore finance).

105. Razzano, *supra* note 2, at 334; ANTOINE, *supra* note 1, ¶ 1.04.

106. Blum, *supra* note 10, at 5 (noting that removing bank secrecy itself will not solve the problem and a more holistic approach is needed); *see* ANTOINE, *supra* note 1, ¶ 2.53 (commenting on the misperceptions surrounding offshore confidentiality).

107. ANTOINE, *supra* note 1, ¶ 2.53.

108. Blum, *supra* note 10, at 5.

109. ANTOINE, *supra* note 1, ¶¶ 2.54, 2.58.

110. *Id.*

111. *See id.* ¶¶ 2.59, 2.61, 11.21 (stating that many Caribbean nations are aware of their reputation as a haven for criminals and are hostile to potential abuse by criminals); *see also* Greg Fields, *Bahamian Banking Fears; Archipelago's Valuable Financial Sector Shrinking*, HAMILTON SPECTATOR, Oct. 28, 2002, at D11, *available at* 2002 WL 101893282 (noting the sting of international criticism and new regulations on the offshore financial industry).

112. ANTOINE, *supra* note 1, ¶ 6.09 (observing the Bahamas boast of the sophistication of their anti-money laundering laws in comparison to many onshore jurisdictions).

113. *See id.* ¶¶ 2.55-.56, 11.02; Julie Fendo, *Attacking the Tools of Corruption: The Foreign Money Laundering Deterrence and Anticorruption Act of 1999*, 23 FORDHAM INT'L L.J. 1540, 1540-41 (2000) (discussing widespread money laundering through U.S. banks); James, *supra* note 2, at 39 (observing that more dirty money passes through New York and London in a day than the Caribbean combined); *see also* Nick Mathiaso, *City Slated for Fraud*, OBSERVER, Sept. 30, 2001, at 1 (criticizing London banks for lax regulations); David Pallister, Ed Harriman & Jamie Wilson, *Looted Dollars 1bn Sent Through London*, GUARDIAN (London), Oct. 4, 2003, at 1 (reporting widespread money laundering throughout London banks); Keith R. Fisher, *In Rem Alternatives to Extradition for Money Laundering*, 25 LOY. L.A. INT'L & COMP. L. REV. 409, 419 (2003) (observing that money launders have become more sophisticated and highly industrialized nations like the

Nonetheless, offshore financial centers find their confidentiality laws subject to a two-pronged attack from other nations, most notably the United States.[114] The first prong is the international attack, headed by the United States, on tax evasion and unfair tax competition.[115] The second prong is a global crackdown upon money laundering.[116] A justification set forth under this prong is that access to confidential financial information of the institutions where illegal money is placed would lead law enforcement to the source.[117] Thus, the United States and other nations attempt to break through confidentiality protections under the guise of pursuing tax evaders and money launderers.[118]

B. Tax Question

Perhaps the most fervent attack upon offshore financial confidentiality is stems from a concern over an eroding tax base.[119] The offshore financial center's main attraction, besides strict confidentiality, is a favorable or non-existent tax rate as compared to the home nation.[120] Thus, offshore financial centers find themselves under attack by nations, like the United States, that are attempting to obtain information about individuals and companies who are allegedly evading taxes.[121] By playing the tax card, there is an attempt to part the veil of confidentiality to access information and money protected by strict confidentiality laws.[122]

United States and the United Kingdom have fallen victim). Moreover, even the USA PATRIOT Act has not kept pace with advances in money laundering. *Id.*

114. *See* ANTOINE, *supra* note 1, ¶¶ 3.01, 6.01 (defining the two major threats to offshore confidentiality as tax and money laundering initiatives); *see also* INTERNATIONAL BANKING, *supra* note 42, at 373; Razzano, *supra* note 2, at 327 (commenting on the United States' ongoing attack on offshore secrecy); Lacey, *supra* note 100, at 276 (noting that the United States, prior to the September 11th attacks, began attacking offshore confidentiality using both tax evasion and money laundering as justifications).

115. James, *supra* note 2, at 2-3; ANTOINE, *supra* note 1, ¶ 3.01; Kimberly Carlson, *When Cows Have Wings: An Analysis of the OECD's Tax Haven Work as It Relates to Globalization, Sovereignty and Privacy*, 35 J. MARSHALL L. REV. 163, 164 (2002).

116. *See* Todd Doyle, *Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law*, 24 HOUS. J. INT'L L. 279 (2002) (referring to a 1990 report from the FATF that an estimated $85 billion in drug proceeds were available for laundering).

117. Ennis, *supra* note 5, at 640.

118. Razzano, *supra* note 2, at 327.

119. *See* ANTOINE, *supra* note 1, ¶¶ 10.52; *see also* Jensen, *supra* note 61, at 1 (concluding that the IRS has targeted offshore bank accounts in attempts to recoup lost revenue).

120. *See* ANTOINE, *supra* note 1, ¶ 1.25; Blum, *supra* note 10, at 39.

121. *See id.* ¶¶ 3.01-.02; Razzano, *supra* note 2, at 335 (noting the strict that the United States has passed laws to prevent the use of offshore financial centers).

122. *See id.* ¶ 3.02; S. REP. No. 99-130, *supra* note 3, at 2 (commenting on the serious problem of tax evasion and offshore financial centers).

In addition, the Organization for Economic Co-operation and Development ("OECD")[123] has launched attacks upon the viability of offshore financial centers by claiming that centers which provide favorable or non-existent taxes are engaging in unfair tax competition.[124] The attacks upon offshore confidentiality under the guise of tax regulations have a two-fold purpose.[125] By attacking confidentiality, nations not only attempt to gain access to financial records of supposed tax evaders, but also hope to make investments with offshore financial centers unattractive by disassembling the confidentiality framework.[126]

Measures taken by nations to fight tax evasion in offshore holdings are varied and focus on undermining offshore confidentiality.[127] These initiatives range from general plans that monitor onshore businesses and individuals that do business offshore to more specific measures that target offshore financial centers themselves.[128] For example, the Internal Revenue Service ("IRS") pressures onshore parties by increasing reporting requirements on those who utilize offshore centers. By establishing detailed reporting requirements, such as reporting foreign bank accounts and shares in companies and trusts, the IRS hopes to gather information on offshore assets.[129] Accordingly, problems arise when onshore extra-jurisdictional tax investigations conflict with the confidentiality protections of the offshore jurisdiction.[130]

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123. *See, e.g.*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 16 (1998), *at* http://www.oecd.org/dataoecd/33/0/1904176.pdf) (last visited Feb. 12, 2004) [hereinafter OECD 1998 Report] (copy on file with *The Transnational Lawyer*) (describing the creation of the OECD in 1961 as an international organization to promote global economic growth and expansion of multilateral trade).

124. *See* James, *supra* note 2, at 2-3 (noting that in April 1998, OECD launched an attack on several Caribbean nations in regards to unfair tax competition); *see also* Ben Sessel, *The Bermuda Reinsurance Loophole: A Case Study of Tax Shelters and Tax Havens in the Globalizing Economy*, 32 U. MIAMI INTER-AM. L. REV. 541, 565-66 (2001) (commenting on the controversial nature of OECD's actions in declaring several Caribbean financial centers as participating in unfair tax competition); Lacey, *supra* note 100, at 275.

125. *See* ANTOINE, *supra* note 1, ¶¶ 3.01-.02 (commenting that both individual nations and the international community strive to recover lost taxes and prevent future avoidance).

126. *Id.*

127. *Id.* ¶¶ 3.35-.37.

128. *Id.* ¶¶ 3.37-.38.

129. *See* Razzano, *supra* note 2, at 359-62 (noting that each taxpayer is required to report existence of foreign bank accounts in excess of $10,000). Ideally, the IRS can learn of new offshore accounts and begin investigations. *Id.* Also, there are a variety of additional requirements that the IRS places on taxpayers to disclose information. *Id.*

130. *See* ANTOINE, *supra* note 1, ¶ 3.16 (observing that offshore jurisdictions are under no obligation to disclose information to onshore authorities); *see also* Daniel Drezner, *On Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 329 (2001) (noting that the United States and the European Union have used international law to violate the sovereignty of other nations).

1. It's My Island: The Interplay of Comity[131] and Sovereignty[132]

As sovereign nations, offshore financial centers in the Caribbean are under no duty to aid onshore tax authorities in recovering taxes from funds deposited offshore.[133] It is recognized that one sovereign nation has no duty to enforce the judgments of another nation.[134] In fact, in two cases, one involving the Cayman Islands and the other the Bahamas, the courts stated that a sovereign nation is under no obligation to execute the laws of another country.[135] While this statement sounds impressive, the reality of the situation is that the modern trend is moving towards relaxing the strict standards of confidentiality and allowing disclosure in specific instances.[136] For example, the Cayman Islands has relaxed its position, and now permits disclosure when a sufficient reason is provided.[137]

This is not to say Caribbean courts do not scrutinize disclosure requests to determine if they are legitimate and not just "fishing expeditions."[138] In instances where offshore courts determine that disclosure goes against public policy, release of information will not be allowed.[139] It appears that offshore courts are using the principle of comity, a standard that allows sovereign nations to resolve issues when conflicts of laws occur.[140] The application of comity dictates that the jurisdiction with the more important justification should prevail.[141] For offshore jurisdictions, where strict confidentiality is a matter of public policy and often a matter of law, the issue of making disclosures based on an onshore nation's

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131. *See* BLACK'S LAW DICTIONARY 261-62 (7th ed. 1999) (defining comity as courtesy among political entities; such as nations, states or courts of different jurisdictions; especially mutual recognition of legislative, executive and judicial acts); *see also* ANTOINE, *supra* note 1, ¶ 10.03 (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1894) that comity is often defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws").

132. *See* Drezner, *supra* note 130, at 323 (defining sovereignty as the power endowed in a government to "regulate its affairs of a well defined territory and its resident population without interference from organizations or individuals external to that jurisdiction").

133. *See* ANTOINE, *supra* note 1, ¶ 3.16 (stating that tax regulations of one country are the business of that country and there is no obligation to enforce regulations of other countries); *see also* Whitney Whisenhunt, *To Zedillo or Zedillo: Why the World Needs an ITO*, 16 TEMP. INT'L & COMP. L.J. 541, 556 (2002) (observing that taxation is a matter of sovereignty).

134. ANTOINE, *supra* note 1, ¶ 3.16.

135. *See id.* ¶ 3.17 (quoting from *Stutts v. Premeir Capital Trust* [1992-93] CILR 605 a Cayman Islands case and *Re Lambert and Pinto*, Sup. Ct., Bahamas, Case No. 962 of 1986, per Strachan J. a Bahamas case, in both cases the courts denied access to records based on sovereignty).

136. *See id.* ¶¶ 3.43-.48 (discussing the trend in several Caribbean nations to allow disclosure of financial records in response to requests for tax enforcement purposes).

137. *See id.* ¶¶ 3.48, 4.33-.35 (quoting sufficient reason as "at least specific and provable allegations of civil and criminal wrongdoing").

138. *See id.* (exploring methods of disclosure for many Caribbean nations); *see also* ANTOINE, *supra* note 1, at chs. 4-6 (discussing in detail disclosure in offshore financial centers).

139. *Id.* ¶ 3.46.

140. *Id.* ¶¶ 10.01-.04.

141. *Id.* ¶¶ 10.04-.05.

legitimate interest may not be that simple.[142] As a result, offshore courts must tread carefully, especially in jurisdictions where there are civil or criminal penalties for disclosure.[143] Offshore courts' strict scrutiny of onshore requests for disclosure ensures that onshore justifications for disclosure are related to crime prevention rather than mere tax purposes.[144] It is evident that the shield of offshore confidentiality has suffered some cracks as the United States and other nations directly attack its "*raison d'être.*"[145]

2. *The United States*

The IRS has estimated that the United States loses $70 billion a year in revenue from investments and monies placed in offshore financial centers.[146] When combined with the revenue lost from other nations, it is understandable that there is a concerted effort to access confidential financial information in order to recover that revenue.[147] For example, the IRS is eager to gain access to offshore bank records because much of the evidence of alleged violations are likely to be held in offshore financial centers. [148] In fact, many IRS investigations go nowhere when the offshore jurisdictions fail to disclose critical evidence needed to obtain convictions and recover revenue.[149] The United States, realizing the difficulty in accessing confidential information through offshore courts, has focused on entering into bilateral tax treaties with offshore financial centers, circumventing the sovereignty issue altogether.[150]

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142. *Id.*

143. *Id.* ¶¶ 10.05, 10.07.

144. *Id.* ¶¶ 3.23, 4.35.

145. *See* Drezner, *supra* note 130, at 329 (noting that the United States has used a variety of means to get its way in the international arena including treaties, custom, and coercion); *Are All Trusts Suspect? Of All the Products*, I'NTL MONEY MKTG. (Nov. 8, 2002), *available at* 2002 WL 11697654.

146. *See, e.g.*, Sullivan, *supra* note 4, at 13; Jensen, *supra* note 61, at 4; Debra B. Treyz & Anthony E. Woods, *Recent Developments in International Anti-Money Laundering and Tax Harmonization Initiatives*, SG 018 ALI-ABA 443, 446 (Oct. 4-5, 2001) (quoting an exchange between Senator Carl Levin and Treasury Secretary Paul O'Neil); Lacey, *supra* note 100, at 275-76.

147. *See* ANTOINE, *supra* note 1, ¶¶ 2.63-.64; Razzano *supra* note 2, at 359.

148. Springer, *supra* note 102, at 283; ANTOINE, *supra* note 1, ¶¶ 3.37-.38.

149. *See* Springer, *supra* note 102, at 283 (citing a 1987 Senate report that noted that between 1978 and 1983 the IRS was forced to drop 36 cases due to evidentiary problems when denied access to offshore accounts); *see also* ANTOINE, *supra* note 1, ¶ 2.66 (commenting on the problems onshore tax authorities have in recovering revenue held offshore).

150. *See* ANTOINE, *supra* note 1, ¶ 3.101 (noting that mutual assistance treaties have the greatest potential for "whittling away" offshore confidentiality).

The United States has had some difficulty negotiating tax treaties with nations because its tax policy is rather inflexible.[151] However, on the whole, U.S. efforts in entering into tax treaties with other nations have been successful.[152] Some treaties allow disclosure on a showing by the United States that the individual "took affirmative action on the likely effect which was to mislead or conceal."[153] Others, like a pending treaty with the Cayman Islands, require the United States to state the reason for the request, and the Cayman Islands reserve the right to refuse the request if it violates public policy or any privilege.[154] On the other hand, Bermuda has agreed to disclose information without requiring "reasonable grounds" that the transaction or party is involved with a tax investigation.[155] Although it appears that offshore confidentiality protections are still intact the United States through treaties, has been able to ensure disclosure for tax matters.[156]

There are also some drawbacks with tax treaties. For instance, small or developing nations lack the resources or bargaining power to effectively negotiate and ratify treaties.[157] One possible solution is to create an International Taxation Organization ("ITO") which would apply multilaterally to all countries, rather than bilaterally between nations.[158] An ITO could deal with global tax issues in a less coercive environment, allowing smaller nations to have more of a say without fearing pressure from larger, more industrialized nations.[159] Thus,

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151. *See* Bruce Zagaris, *The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots,* 35 GEO. WASH. INT'L L. REV. 331, 331-32 (2003) (concluding that the United States is inflexible in its tax policy and would get a better response if they provided incentives rather than disincentives).

152. *See* ANTOINE, *supra* note 1, ¶¶ 3.101-.05 (describing the effectiveness of treaties between the United States and several Caribbean nations).

153. *See id.* ¶ 3.102 (noting that the Antigua agreement allows Antigua to refuse requests if there is no legitimate purpose in requesting the information); *see also* Agreement Between the Government of the United States of America and the Government of Antigua and Barbuda For the Exchange of Information With Respect to Taxes, Dec. 6, 2001, U.S.-Ant. & Barb., WORLDWIDE TAX TREATIES DOC. 2001-30385, art. 4 § 4d-e, [hereinafter Antigua & Barbuda Treaty] (stating that Antigua can refuse to disclose information it deems in violation of public policy or tax law).

154. Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, for the Exchange of Information Relating to Taxes, Nov. 27, 2001, U.S.-Cayman Is., WORLDWIDE TAX TREATIES DOC. 2001-29858, art. 2 (pending) [hereinafter Cayman Treaty].

155. ANTOINE, *supra* note 1, ¶ 3.105; *see* Agreement Between the Government of the United States of America and the Government of the Commonwealth of the Bahamas For the Provision of Information With Respect to Taxes and for Other Matters, Jan 25, 2002, U.S.-Bah., WORLDWIDE TAX TREATIES Doc. 2002-2120, art. 2 § 3 [hereinafter Bahamas Treaty] (pending) (stating grounds for disclosure regarding tax matters should be "framed with the greatest degree of specificity as possible").

156. *See* ANTOINE, *supra* note 1, ¶¶ 3.101-.05; *see, e.g.*, Antigua & Barbuda Treaty, *supra* note 153, at art. 4 § 4d-e; Bahamas Treaty, *supra* note 155, at art. 2 § 3; Cayman Treaty, *supra* note 154, art. 4.

157. Whisenhunt, *supra* note 133, at 547; *see* Zagaris, *supra* note 151, at 331-32 (noting that the United States does not provide many incentives for countries to enter into tax treaties).

158. *See* Whisenhunt, *supra* note 133, at 556-57 (discussing the advantages of multilateral treaties versus bilateral ones, for example, increased cooperation).

159. *Id.*; Carlson, *supra* note 115, at 186.

with an ITO in place more nations would cooperate, as there would be a forum to address their concerns.[160] As a result, the United States and international organizations could fortify their relationships with many smaller nations.[161]

3. *The International Community*

The international community has made a concerted effort to undermine offshore confidentiality on the basis of unfair tax competition.[162] By attacking confidentiality, the OECD and Financial Action Task Force ("FATF") seek to prevent financial crimes, such as money laundering and tax evasion.[163] For example, the main concern of the OECD is that tax competition has a potential to distort trade and investments and erode national tax bases.[164] To deal with this concern, the OECD blacklists nations when they are deemed non-compliant with OECD regulations.[165] To accomplish this task, the OECD first determines if the nation offers low or no taxes; next the OECD determines if this low tax rate is unavailable to local residents; then the OECD examines the nation's tax structure to see if there is sufficient transparency; finally the OECD considers whether the jurisdiction in question exchanges information with other nations.[166] However, upon close examination it is evident that the real issue is financial competition and the erosion of national tax bases.[167] A 1998 OECD report addressed the concern that small countries were able to take substantial capital from larger, more industrial nations by offering a more favorable or non-existent tax rate.[168]

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160. *See id.* (predicting increased cooperation as small nations left out of previous treaties would now be able to state their concerns regarding any given policy).

161. Whisenhunt, *supra* note 133, at 157.

162. *See* ANTOINE, *supra* note 1, ¶¶ 3.96, 11.02 (noting that OECD's main target is offshore confidentiality even though supposedly focused on unfair tax competition); James, *supra* note 2, at 2-3; Hishikawa, *supra* note 9, at 393-94; Alexander Townsend, Jr., *The Global Schoolyard Bully: The Organisation for Economic Co-Operation and Development's Coercive Efforts to Control Tax Competition*, 25 FORDHAM INT'L L.J. 215 (2001); Sessel, *supra* note 124, at 565.

163. *See* ANTOINE, *supra* note 1, ¶ 11.01 (asserting that the FATF and the OECD are "sibling" organizations focused on the same goal of preventing financial crime by attacking confidentiality); Hartman, *supra* note 15, at 263-64 (stating that international community uses coercion to force offshore centers to cooperate); Fields, *supra* note 111, at D11 (commenting on recent international regulations and their disastrous effect on offshore centers).

164. OECD 1998 Report, *supra* note 123, at 16 (listing potential harms of allowing harmful tax competition); ORG. FOR ECON. CO-OPERATION AND DEV., TOWARDS GLOBAL TAX CO-OPERATION: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICE, Page 5 (2000), *at* http://www.oecd.org/dataoecd/33/0/1904176.pdf (last visited Feb. 12, 2004) [hereinafter OECD 2000 Report] (copy on file with *The Transnational Lawyer*) (reiterating the findings of the 1998 report); *see* ANTOINE, *supra* note 1, ¶ 11.14; Hishikawa, *supra* note 9, at 393.

165. ANTOINE, *supra* note 1, at ¶ 11.12; James, *supra* note 2, at 3-4.

166. OECD 1998 Report, *supra* note 123, at 25-35 (detailing the factors used in defining jurisdictions with harmful tax competition); *see* ANTOINE, *supra* note 1, ¶ 11.06; James, *supra* note 2, at 12.

167. *See* ANTOINE, *supra* note 1, ¶¶ 2.55-.56, 11.02 (noting that the true reason behind the OECD and FATF attacks is about competition and taxes as demonstrated by the fact that onshore banks have been the major targets of money laundering and terrorist financing).

168. ANTOINE, *supra* note 1, ¶ 11.02-.03; *see* James, *supra* note 2, at 3-4 (describing the 1998 OECD Report); Hishikawa, *supra* note 9, at 393. (detailing the effects of OECD regulations).

The OECD report suggested that the global community should coordinate to "rigorously and consistently" use current tools and new procedures to prevent onshore tax base erosion.[169] Subsequently, a 2000 OECD report specifically targeted Caribbean offshore centers by listing them as non-compliant.[170] In order to get off the list, "blacklisted" nations need to comply with nineteen different items including signing tax treaties, exchanging information, and changing domestic policy.[171] This requirement illustrates the hostile position the international community has taken towards Caribbean offshore centers and its stringent banking confidentiality policies.[172]

4. The Caribbean Reaction

The Caribbean community responded negatively to the 1998 OECD report, as it threatened the stability of the Caribbean community's financial reputation.[173] Without a viable offshore sector, many Caribbean nations would not be able to sustain their economies.[174] To make matters worse, a 2000 OECD report listed several defensive countermeasures that onshore jurisdictions could use to defend their tax bases, including not allowing deductions related to non-compliant jurisdictions, increasing reporting requirements, withholding taxes on payments to residents of those jurisdictions, not entering or terminating tax treaties with non-cooperating jurisdictions, and adding charges to transactions with non-compliant jurisdictions.[175] The founding members of the OECD possess tremendous economic clout.[176] Conversely, small offshore nations lack the political or economic strength to withstand such a barrage.[177] Consequently, it is not a surprise that many offshore centers have either complied with the OECD

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169. OECD 1998 Report, *supra* note 123, at 37.

170. OECD 2000 Report, *supra* note 164, at 16-17 (listing jurisdictions that are non-compliant); Hishikawa, *supra* note 10, at 395-96; James, *supra* note 2, at 4; *see* ANTOINE, *supra* note 1, ¶ 11.01 (noting that the OECD has singled out confidentiality protections of offshore financial centers as its main target).

171. *See* ANTOINE, *supra* note 1, ¶ 11.09; OECD 2000 Report, *supra* note 164, at 7 (referring to recommendations listed in OECD 1998 Report).

172. ANTOINE, *supra* note 1, ¶ 11.12; James, *supra* note 2, at 5-6; Sullivan, *supra* note 4, at 13.

173. *See* James, *supra* note 2, at 4; ANTOINE, *supra* note 1, ¶ 11.25.

174. *See* ANTOINE, *supra* note 1, ¶ 11.30 (commenting on offshore dependence on the financial sector); James, *supra* note 2, at 9-10 (tracing the reasons behind the development of Caribbean offshore finance); Coutin, *supra* note 9, at 832 (stating that as Caribbean nations no longer derive income from their colonial parents they need the offshore sector to sustain their economies); Hishikawa, *supra* note 9, at 401 (noting that Caribbean nations fear that crackdowns will damage their economies); Peter Richards, *Leader Urges Pullout From Offshore Banking Forum*, INTER PRESS SERVICE, Oct. 27, 2003, *available at* 2003 WL 66986136 (noting that a northern initiative could destroy offshore confidentiality).

175. *See* OECD 2000 Report *supra* note 164, at 24-5 (listing possible defensive measures that can be used as an approach to eliminating harmful tax competition).

176. ANTOINE, *supra* note 1, ¶ 11.25; Townsend, *supra* note 162, at 217-18; Richards, *supra* note 174; Hartman *supra* note 15, at 255-56; Carlson, *supra* note 115, at 178-79.

177. *See supra* note 176 and accompanying text.

regulations or at least opened channels of communication.[178] It appears that confidentiality's greatest weakness is the coercive efforts by the global community to "name and shame" offshore centers into compliance.[179] If this trend continues, offshore centers will have no choice but to bow to international pressure, potentially ending confidentiality as we know it.[180]

C. *Money Laundering*

Money laundering can be defined as "the process by which one conceals the existence, illegal source, or illegal application of income and then disguises that income to make it appear legitimate in the open economic market."[181] Money laundering has received a lot of attention in the past twenty-five years because it is a global problem affecting financial institutions in every country.[182] It is estimated that each year criminals launder about $300 billion in the United States alone.[183] Thus, money laundering not only undermines public trust in banks and financial centers, but also endangers the stability of nations.[184] By attacking money laundering transactions, authorities can cripple criminal organizations and identify and apprehend the heads of organized crime networks.[185] Also, tracking money laundering activity is much easier than discovering the underlying crimes that create the smuggled currency.[186]

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178. *See* Hishikawa, *supra* note 9, at 411-12 (observing that both Bermuda and the Caymans have been removed from the OECD's list, Aruba; Barbuda and Antigua have made commitments to the OECD and the Bahamas, Anguilla, the British Virgin Islands, Montserrat and the Turks and Caicos are expected to make commitments soon).

179. *See* ANTOINE, *supra* note 1, ¶ 11.12; Mottley, *supra* note 68, at 414.

180. *See* Antoine *supra* note 1, ¶ 11.35; Hishikawa, *supra* note 9 at 417 (stating international pressures have made the "death of tax havens inevitable"); *see also* Mottley, *supra* note 68, at 413-15 (commenting on how Caribbean offshore centers are constantly having their confidentiality protections bombarded by onshore jurisdictions); Richards, *supra* note 174 (tracing the onslaught on offshore confidentiality).

181. Lacey, *supra* note 100, at 267; *see, e.g.*, Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 144 (1995); Fisher *supra* note 113, at 428-29.

182. *Id.* at 145; *see* Ennis *supra* note 5, at 640-41 (commenting on the global scope of money laundering concerns, and attempts to combat money laundering); Hitesh Patel, *Analysis—Money Laundering—Dirty Money*, ACCOUNTANCY, July 10, 2003, at 64, *available at* 2003 WL 60211236. (commenting on the global scale of money laundering).

183. Sultzer, *supra* note 181, at 146.

184. *See* Fisher *supra* note 113, at 416-17 (determining that money laundering has disastrous social consequences and is a threat to a nation's security); S. REP. No. 99-130, *supra* note 3, at 1 (noting that money laundering destabilizes the economy by eroding public confidence in the justice system and preventing the collection of taxes on large sums of money); *see also* Lacey, *supra* note 100, at 268-69 (stating that money laundering has many negative effects including harming global economic welfare). The actions of Ferdinand Marcos, former president of the Philippines, and Mobutu Sese Seko of Zaire, demonstrate the crippling effect money laundering can have on a nation. *Id.*

185. *See* Sultzer, *supra* note 181, at 145 (observing that money laundering is the "life blood" of criminal organizations).

186. *See id.* at 147 (noting that often launderers are separated from the underlying crimes that produce the funds); Plombeck, *supra* note 32, at 69 (describing how discovery of financial proceeds of a crime can lead back to those who participated in the crime).

1. Mechanics

The mechanics of money laundering involve placing funds obtained from illegal activity into legitimate financial systems without disclosing their origin.[187] A money launderer takes three steps to clean illicit funds: placement, layering and integration.[188] In activities that produce large amounts of cash, the trick is to try and "place" or deposit the money into a bank without alerting the government.[189] Next, the money is wire-transferred to many different bank accounts around the world.[190] This helps hide the origin of the illicit booty.[191] As there are huge numbers of wire transfers each day, it is very difficult to trace a specific transfer back to the source.[192] The final step is to take the transferred funds and integrate them into the economy by purchasing real estate and other assets or investing in businesses.[193]

2. Counter Measures

a. The United States

In the late 1970s, the United States began attacking offshore financial confidentiality in response to an escalating drug problem.[194] Offshore financial centers were viewed as providing drug dealers with a safe and anonymous way to launder their illicit funds.[195] Congress sought to take the profit from the drug trade by preventing this process.[196] By accessing records of transactions, authorities can follow an "audit trail" to the criminal organization.[197] Thus began the United States' ongoing assault on the bastions of offshore financial confidentiality.[198] Anti-money laundering statutes passed by Congress focus on detecting potentially illegal transactions at the placement stage.[199] This is because the funds

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187. *See* Johnathan P. Straub, *The Prevention of E-Money Laundering: Tracking the Elusive Audit Trail*, 25 SUFFOLK TRANSNAT'L L. REV. 515, 517-19 (2002) (describing the money laundering process in detail).

188. *Id.*

189. *Id.* at 517-18.

190. *Id.* at 518-19.

191. *See id.*

192. *Id.* at 517-19.

193. *Id.* at 519.

194. *See* Razzano, *supra* note 2, at 334 (tracing the history of the U.S. attack on offshore financial confidentiality); *U.S. Money Laundering Laws: Overview*, 1, *at* http://www.moneylaundering. com/MLLaws.htm (last visited 11/13/2003) [hereinafter *Money Laundering Overview*] (copy on file with *The Transnational Lawyer*).

195. Razzano, *supra* note 2, at 334.

196. *Id.*

197. *See* Ennis, *supra* note 5, at 640-41 (defining an audit or paper trail as documentation that allows law enforcement to trace a deposit back to an individual or company to determine its legitimacy).

198. Razzano, *supra* note 2, at 334.

199. Lacey, *supra* note 100, at 290; Fendo, *supra* note 113, at 1545-46.

are more easily traced when they are closer to the original source of the transactions.[200]

The United States requires that financial institutions[201] record transactions when more than $10,000 is deposited or withdrawn from an account during a 24 hour period.[202] Institutions are also required to record any transactions "to, through or by" another financial institution.[203] Moreover, financial institutions are required to report suspicious activities involving $5,000 or more.[204] Furthermore, individuals must declare monies in excess of $10,000 that they transport across U.S. borders, or face seizure of the funds.[205] U.S. citizens must also declare the possession of any foreign bank account.[206]

Additional statutes give the Financial Crimes Enforcement Network ("FinCEN")[207] the ability to require financial institutions to execute anti-money laundering programs and procedures.[208] These "know your customer" rules require that banks make a reasonable effort to determine the identity of customers and ownership of accounts.[209] In mandating these steps, the United States has taken an aggressive approach to the prevention of money laundering by increasing record keeping and disclosure requirements of certain transactions.[210]

The United States has applied money laundering statutes with efficiency, freezing both domestic and international assets of large banks that have committed money laundering violations.[211] In one such case, the U.S. government froze $80 billion in accounts across the globe from a bank that allegedly received

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200. *Id.*

201. *See* Razzano, *supra* note 2, at 337-38 (defining "financial institution" as including banks, broker/dealers, investment companies, insurance companies, loan/finance companies, telegraph companies or businesses defined as such by the Secretary of the Treasury).

202. *See* Lacey, *supra* note 100, at 295; *see also* Razzano, *supra* note 2, at 334-51 (examining the history of U.S. legislation concerning bank secrecy).

203. *See* Razzano, *supra* note 2, at 337 (stating that U.S. statutes require documentation of monies transferred to a bank, through a bank, or from a bank). So even those transactions that merely pass through a bank must be disclosed. *Id.*; Lacey, *supra* note 100, at 295-96.

204. *See* Lacey, *supra* note 100, at 296-97; *see also* Razzano, *supra* note 2, at 338, 342 (giving examples of suspicious behavior, such as unknown sources of money or unknown individuals making deposits).

205. *See* Lacey, *supra* note 100, at 297 (noting that failure to declare monies of $10,000 risks forfeiture of those monies when crossing U.S. borders).

206. *Id.*

207. *See* Razzano, *supra* note 2, at 343 (observing that FinCEN was created in 1990 by the Department of Treasury to combat money laundering).

208. *See* ANTOINE, *supra* note 1, ¶ 6.15; *see also* Razzano, *supra* note 2, at 343 (discussing the potential effect of more thorough disclosure requirements).

209. *See* Lacey, *supra* note 100, at 290-91 (stating that prior to September 11, 2001 there was extreme resistance to continued efforts to expand disclosure requirements); Razzano, *supra* note 2, at 334, 343 (commenting on the United States' continued attacks on confidentiality and the push to expand disclosure requirements).

210. *See* Razzano, *supra* note 2, at 343-44.

211. *See id.* at 350 (demonstrating an example where the United States effectively shut down a bank, in the *Banko De Occidente* case, due to violations of money laundering laws).

and laundered drug money originating from the United States.[212] Banks that violate money laundering statutes face significant fines or criminal penalties.[213] This demonstrates the serious repercussions of participating in money laundering and the long reach of U.S. enforcement.[214] Offshore financial centers also face international pressure in response to money laundering concerns.[215]

b. The International Community

In the late 1980s, upon recognizing the need for money laundering policies, the international community created the FATF.[216] The FATF is made up of experts and policymakers charged with creating anti-money laundering policy and reviewing international compliance.[217] In 1990, the FATF drafted forty recommendations as a blueprint for nations to follow to create effective policies to combat money laundering.[218] These recommendations encourage countries to adopt various provisions with regard to financial institutions, including increased due diligence requirements, reporting of suspicious transactions, and mutual assistance with other nations regarding money laundering investigations.[219] Furthermore, the recommendations provide that financial institutions of nations that fail to comply should have their transactions given "special attention."[220] This veiled threat is consistent with the international community's current attitude of hostility towards offshore financial centers.[221]

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212. *Id.*

213. *Id.*

214. *Id.*; Hernandez, *supra* note 12, at 250 (describing the extra-jurisdictional reach of U.S money-laundering enforcement); *see also Money Laundering Overview*, *supra* note 194, at 3 (noting that the United States has extra-territorial jurisdiction over some transactions).

215. *See* Financial Action Task Force on Money Laundering, *Basic Facts on Money Laundering* (2003), *at* http://www.1.oecd.org/fatf/MLaundering_en.htm (last visited Feb. 12, 2004) [hereinafter *Basic Facts on Money Laundering*] (copy on file with *The Transnational Lawyer*) (describing the international response to the problem of money laundering including the FATF and the United Nations).

216. *Id.* at 6; Straub, *supra* note 187, at 526-27; Fisher *supra* note 113, at 432; *see supra* notes 162-63 and accompanying text (discussing the interrelated nature of international organizations that are attacking offshore banking confidentiality, and illustrating that attacks are not limited to any one organization but a concerted international effort).

217. *Basic Facts on Money Laundering*, *supra* note 215; Financial Action Task Force on Money Laundering, *The Forty Recommendations* (June 20, 2003), *at* http://www1.oecd.org/fatf/40Recs_ en.htm#Forty [hereinafter *Forty Recommendations*].

218. *Forty Recommendations, supra* note 217. The introduction to the Forty Recommendations describes how the original recommendations were drawn up in 1990 and updated in 1996. *Id.*

219. *Id.* at 2, 5-6, 10-11.

220. *See id.* at 7 (providing measures to be taken in response to non-compliant nations). However, the Forty Recommendations fail to define what constitutes "special attention." *Id.*

221. ANTOINE, *supra* note 1, ¶¶ 11.12,11.30; Townsend, *supra* note 162, at 217-18 (discussing he pressure on developing nations to comply with industrialized standards).

The FATF has been effective in coercing offshore jurisdictions into adopting its regulations.[222] By labeling nations as non-cooperative, the FATF ensures that offshore jurisdictions follow its recommendations.[223] Failing to comply with the FATF recommendations can have disastrous effects upon the economy of an offshore center.[224] In fact, the United Kingdom has encouraged the FATF to "name and shame" nations that failed to comply with FATF procedures.[225] For example, in 1999 Antigua suffered a financial drought when the United States and the United Kingdom issued financial institutions in Antigua an advisory warning, recommending closer scrutiny for transactions.[226] This illustrates the immense international pressure that offshore centers must comply with or risk facing sanctions.[227] Because of the increasing pressure from both the United States and the international community, it is imperative for Caribbean offshore financial centers to comply in order to ensure that their economies stay afloat.[228]

c. *The Caribbean Reaction*

Most Caribbean offshore financial centers have responded positively to both U.S and international concerns regarding money laundering.[229] These centers realize that their economies need funds derived from offshore business.[230] Any

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222. *See* Ennis, *supra* note 5, at 647 (describing in detail the coercive efforts of the international community to ensure that offshore centers comply with new regulations); James, *supra* note 2, at 50 (commenting on the OECD's bullying tactics to make Caribbean offshore centers comply).

223. *See* Ennis, *supra* note 5, at 651-52 (noting that the Bahamas rapidly updated its money laundering policies when the FATF labeled it non-cooperative in 2000); *see also Hot-Money Havens Blacklisted*, AUSTRALIAN FIN. REV., June 24, 2000, at 9 (stating that sixteen countries toughened their banking rules in an attempt to stay off the blacklist).

224. Ennis, *supra* note 5, at 649; *see* James, *supra* note 2, at 38 (noting that nations blacklisted by the OECD and the FATF face economic hardship).

225. *Id.* at 647.

226. *Id.* at 649.

227. *See* ANTOINE, *supra* note 1, ¶ 6.01 (stating that the FATF and the OECD have targeted confidentiality as a barrier to both money laundering and tax investigations); Ennis, *supra* note 5, at 649 (observing that small nations with large financial sectors cannot afford to fail to comply with the international community); Doyle, *supra* note 116, at 308-09 (concluding that though questionable, the FATF's threat of sanctions could have serious detrimental effects on the global flow of capital).

228. *See* Ennis, *supra* note 5, at 649, 651-52 (noting that the Bahamian reaction to being blacklisted was to immediately comply); *see also* ANTOINE, *supra* note 1, ¶ 6.76; (observing that many offshore jurisdictions have responded to concerns regarding money laundering by enacting statutes); Coutin, *supra* note 9, at 832 (illustrating that Caribbean nations are very aware of the precarious nature of their economies).

229. *See* ANTOINE, *supra* note 1, ¶ 6.76; (remarking that many offshore jurisdictions enacted statutes in response to concerns regarding money laundering); *see also* DENIS A. KLEINFELD & EDWARD J. SMITH, LANGER ON PRACTICAL TAX PLANNING § 6:3.3 (Practising Law Institute 2001) (mentioning that Antigua has signed treaties and increased disclosures amidst allegations of money laundering); Imeson, *supra* note 98, at 6 (claiming that the Cayman Islands are cooperating with international regulations); Press Release, Office of the Financial Secretary Cayman Islands, IMF Team Arrives for Review of Financial Services Industry (Sept. 29, 2003) (copy on file with *The Transnational Lawyer*) (noting that private banks have responded to new regulations).

230. ANTOINE, *supra* note 1, ¶ 11.30; Fields, *supra* note 111, at D11 (illustrating that in the Bahamas income from banking is second only to tourism).

illegal activity, such as money laundering, is a far more serious threat to the economic stability of offshore centers than anything else.[231] These nations realize that not only will they come under attack from the United States and the international community, but also any practices that encourage money laundering will drive away legitimate investors.[232] Therefore, most offshore centers are well regulated and view misuse of confidentiality as a threat to their economic stability.[233]

IV. PIRACY ON THE HIGH SEAS: THE USA PATRIOT ACT'S DEVASTATING ATTACK ON OFFSHORE FINANCIAL CONFIDENTIALITY

The horrific events of September 11, 2001, triggered the latest U.S. and international crackdown on offshore financial confidentiality.[234] Though loosely associated with money laundering prior to the September 11th attacks, terrorist financing has become the focus of many money laundering statutes and investigations.[235] Naturally, as the United States and the world demand more stringent banking regulations and wider disclosures, offshore centers are the immediate focus of attention.[236] The reality is that terrorist financing is a global problem.[237] In fact, terrorists laundered most of their monies through onshore financial center, such as London.[238] Nonetheless, the United States and the international community have passed resolutions as well as statutes, and have conducted themselves in a manner that will inevitably shatter offshore confidentiality protections.[239] The USA PATRIOT Act is the latest weapon for the United States in its war on offshore confidentiality.[240]

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231. *See* ANTOINE, *supra* note 1, ¶¶ 2.58, 4.09, 11.30 (stating that many Caribbean nations are aware of the potential economic disaster that would accompany any labeling by the FATF); *see also* Ennis, *supra* note 5, at 649 (demonstrating the impact of a mere advisory on offshore economies and how quickly Antigua responded); Kleinfeld, *supra* note 229, para. 1 (noting Antigua's prompt compliance to money laundering regulations after allegations); Coutin, *supra* note 9, at 832 (describing that Caribbean nations are very aware of the precarious nature of their economies).

232. *See* Sultzer, *supra* note 181, at 203 (observing that both Panama and the Bahamas lost many legitimate investors due to involvement in money laundering and corruption); James, *supra* note 2, at 38-39 (concluding that the OECD and the FATF blacklisting results in a decline of offshore economies).

233. ANTOINE, *supra* note 1, ¶ 2.61; *see supra* notes 111-12 and accompanying text (discussing offshore financial regulations).

234. *See* MICHAEL P. MALLOY, BANKING LAW AND REGULATION § 12.4A (2004) [hereinafter BANKING LAW]; ANTOINE, *supra* note 1, ¶¶ 6.69–.71 (discussing terrorism as an impetus for a crackdown on money laundering); *see generally* Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 328-29 (2003).

235. *See* ANTOINE, *supra* note 1, ¶¶ 6.69-.71.

236. *See id.* ¶ 6.71; Andres Rueda, *International Money Laundering Law Enforcement & The USA PATRIOT ACT of 2001*, 10 MSU-DCL J. INT'L L. 141, 183 (2001) (discussing how the Patriot Act makes money laundering enforcement an international issue).

237. *See* ANTOINE, *supra* note 1, ¶¶ 2.55-.56, 6.71 (providing an example of money being funneled from Russia).

238. *Id.* ¶ 2.56.

239. *See* Hishikawa, *supra* note 9, at 417 (noting that even though not entirely successful, the OECD

A. The USA PATRIOT Act

1. Precursors

On September 14, 2001, President George W. Bush declared a state of emergency in response to the terrorist attacks.[241] He made clear his intention to mobilize the military to defend against any additional threat.[242] Subsequently, on September 24, 2001, the President expanded his response in an executive order which gave the government the authority to freeze all assets of persons[243] who "have committed, or . . . pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States."[244] Moreover, the President made it clear that foreign financial institutions needed to improve cooperation with the United States in disclosing financial information due to "the pervasiveness and expansiveness of the financial foundation of foreign terrorists."[245] Finally, the President authorized imposition of agricultural and medical sanctions against those who violate the order.[246] Therefore, if an offshore jurisdiction failed to disclose requested material of a party who is thought to be a threat, the United States could restrict their food and medical supplies. This power is an effective bargaining chip.[247] Thus, soon after the terrorist attacks, the United States made it clear that offshore financial centers needed to make more disclosures or face the penalties.[248] This is consistent with the climate of hostility toward offshore confidentiality.[249] Notwithstanding the new assault on offshore confidentiality,

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and international pressure will ensure the demise of the offshore financial industry); ANTOINE, *supra* note 1, ¶ 11.12 (noting that it is the coercive pressure of sanctions and name and shame campaigns that are the greatest threat to offshore centers).

240. Lacey, *supra* note 100, at 301; Rush D. Holt, *Growing Concerns About Implementation of the PATRIOT ACT of 2001*, 4 No. 3 PRIVACY & INFO. L. REP. 7, 1 (2003); Bantekas, *supra* note 234, at 328-29 (discussing the domestic measures taken in the United States).

241. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001); *See* BANKING LAW, *supra* note 234, § 12.70 (discussing the impact of Proclamation No. 7463 and the President's response to the terrorist attacks).

242. Proclamation No. 7463, 66 Fed. Reg. 48,199; *see* BANKING LAW, *supra* note 237, § 12.4.A.1 (noting that in taking "dramatic steps" the President gave statutory authority to mobilize reserve troops and recall active duty personnel).

243. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079-80 (Sept. 23, 2001) (stating that section 3(a) defines person as "an individual or entity" and section 3(b) defines entity to include "partnership, association, corporation or other organization, group or subgroup").

244. *See* 66 Fed. Reg. 49,079 (giving the Secretary of the Treasury and Attorney General the power to determine who violates the executive order); *see generally* Eric J. Gouvin, *Bringing Out the Big Guns: The USA PATRIOT Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955, 959 (2003) (discussing the purpose of Executive Order 13,224).

245. Exec. Order No. 13,224, 66 Fed. Reg. 49,079.

246. Exec. Order No. 13,224, 66 Fed. Reg. 49,080-81.

247. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,080-81; BANKING LAW, *supra* note 234, § 12.71, 12.4A.1 (discussing the ability of the President to sanction states for participation in crime).

248. Exec. Order No. 13,224, 66 Fed. Reg. 49,079; BANKING LAW, *supra* note 234, §12.4A.1.

249. *See* ANTOINE, *supra* note 1, ¶ 11.12; *see also* Hishikawa, *supra* note 9, at 417; James, *supra* note 2, at 5-6; Sullivan, *supra* note 4, at 13.

the signing of the USA PATRIOT Act gave the United States the tools it required to compel disclosures and effect financial services regulations.[250]

2. *The Act*

On October 26, 2001, only weeks after the September 11th attacks, the USA PATRIOT Act was signed into law with little debate or opposition.[251] The purpose of the USA PATRIOT Act is to "Unite and Strengthen America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."[252] The Act also gave the government new tools to track down terrorists by greatly expanding federal power.[253] Subsequently, critics expressed concern that the hastily enacted legislation greatly increases the government's police powers, allowing the government to tread on individual civil liberties, including financial privacy.[254] These sweeping new powers and the government's use of them have drawn much criticism.[255]

3. *Concerns*

Initially, resistance to the USA PATRIOT Act was seen as unpatriotic.[256] However, with the passage of time, there has been growing domestic and international concern regarding the USA PATRIOT Act's effect on civil liberties.[257] One article describes the Attorney General's response to the September 11th attacks as "mounting a wholesale assault against civil liberties."[258] Originally created in response to terrorist attacks against America,

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250. *See* BANKING LAW, *supra* note 234, § 12.4A.3 (exploring the expanded regulations after the USA PATRIOT Act); Lacey, *supra* note 100, at 305 (commenting on the expansion of banking regulations post USA PATRIOT Act).

251. Holt, *supra* note 240, at 1; Jennifer C. Evans, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933, 966-68; Gouvin, *supra* note 244, at 960-61 (remarking that when Congress adopted the Patriot Act there was minimal deliberation).

252. BANKING LAW, *supra* note 234, §12.4A.4.1; Holt, *supra* note 240, at 1.

253. BANKING LAW, *supra* note 234, §12.4A.4.1; Holt, *supra* note 240, at 1; *See* Evans, *supra* note 251, at 968, 971-72 (describing changes to federal law allowing increased telephone surveillance, permitting the Central Intelligence Agency to gather information about Americans and letting courts delay notice of a warrant).

254. Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 1, 4 (2002).

255. *See* Evans, supra note 251, at 934, 968 (noting that the Patriot Act chips away at Constitutional protections); Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233, 1233 (2003) (criticizing the actions of John Ashcroft and the Patriot Act).

256. Lacey, *supra* note 100, at 310-11.

257. *See* Cohn, *supra* note 255, at 1233; Holt, *supra* note 240, at 1; *see also* Barbara Dority, *Your Every Move*, THE HUMANIST, Jan. 1, 2004, at 14 (discussing Jimmy Carter's condemnation of the U.S. leaders' infringement on civil liberties).

258. Cohn, *supra* note 255, at 1233.

the USA PATRIOT Act has been used to investigate many non-terrorist crimes.[259] It can be inferred from the government's aggressiveness in violating the rights of citizens and foreign nationals living inside the United States that the government will not hesitate to force foreign banks to disclose more confidential information.[260] In fact, on September 24, 2001, after signing executive order 13,224 which authorized the financial attack upon terrorism, President Bush put "banks and financial institutions around the world on notice."[261] Naturally, this is a concern for the offshore banking industry as the USA PATRIOT Act retrofitted U.S. money laundering policy and gave the government many new tools.[262] In passing the USA PATRIOT Act, the United States may have overreacted to the horror of the September 11th at the expense of important rights, such as financial privacy.[263]

B. Banking Secrecy Post September 11th

The USA PATRIOT Act is the United States' most recent attack upon Caribbean offshore banking.[264] Prior to September 11th, increased disclosure requirements met a great deal of resistance because they were viewed as an invasion of privacy and the procedures involved were considered unduly burdensome.[265] In fact, two bills prior to the USA PATRIOT Act increased disclosure, but failed to pass because of objections from the financial community

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259. *See* Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, Sept. 28 2003, at 1 (noting that a guidebook for a Justice Department seminar on financial crimes stated that the USA PATRIOT Act could be used for ordinary crime control); *see generally* Dority, *supra* note 257, at 9 (discussing infringement on civil liberties).

260. *See* Steve Tetreault, *House Votes to Expand Powers*, LAS VEGAS REVIEW-JOURNAL, Nov. 21, 2003, at 18A; Bantekas, *supra* note 234, at 329 (noting that within a three month period after September 11, 2001, the United States froze seventy-nine bank accounts); Cohn, *supra* note 255, at 1233 (claiming that Attorney General Ashcroft mounted "a wholesale assault on civil liberties").

261. Press Release from the White House, President George W. Bush, Secretary of the Treasury O'Neil and Secretary of State Powell, Remarks by the President, Secretary of the Treasury O'Neil and Secretary of State Powell on Executive Order (Sept. 24, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/print/20010924-4.html (last visited Feb. 12, 2004) (copy on file with *The Transnational Lawyer*) (discussing the intent to block terrorist funding worldwide).

262. USA PATRIOT Act § 358; *see* John W. Whitehead and Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1131 (2002) (noting that section 358 expands disclosures of banking records for "financial analysis" a very low standard, yet a great investigative tool); Rueda, *supra* note 236, at 145 (describing the USA PATRIOT Act as expanding U.S. ability to punish foreign banks).

263. *See* Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL'Y & L. 345, 373 (2003) (observing that the extreme U.S. response to September 11th showed signs of panic); Lacey, *supra* note 100, at 304 (noting that opposition to the USA PATRIOT Act was considered unpatriotic).

264. Geiger, *supra* note 4, at 34; *see* Lacey, *supra* note 100, at 304 (stating that the USA PATRIOT Act expanded financial disclosure). Specifically, amendments to the RFPA and the "know your customer" provisions increased disclosure requirements. *Id.*; Mottley, *supra* note 68, at 414 (noting that the USA PATRIOT Act targets the offshore banking industry).

265. Lacey, *supra* note 100, at 304.

and Congressional concerns for financial privacy.[266] However, the emotional turmoil that followed the September 11th attacks provided the government with the ideal climate to pass such legislation.[267]

Since its enactment in 2001, the United States has realized the potential of the USA PATRIOT Act to access financial information.[268] Title III of the USA PATRIOT Act, also known as the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ("IMLAAFA"),[269] most directly affects offshore financial centers.[270] The IMLAAFA revamps U.S. money laundering legislation and gives a few more cannons to American law enforcement to compel financial disclosure.[271]

The Act provides the Secretary of the Treasury with the power to require domestic financial institutions to take "special measures" concerning jurisdictions that are deemed a threat.[272] These special measures increase the necessary record-keeping and report-filing procedures, including the duration and manner in which the reports are kept, the identity and address of parties to transactions, the description of any transaction, and the ownership of accounts.[273] These measures apply to both domestic and foreign banks that deal with the United States, and are a significant expansion of previous requirements.[274] Failure to comply with U.S. regulations will

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266. *See id.* at 290-91 (referring to the Foreign Money Laundering Deterrence and the Anti-Corruption Act, H.R. 2896, 106th Cong. (1999) and the Money Laundering Act of 2000, H.R. 4695, 106th Cong. (2000) which both failed to pass due to vocal objections regarding privacy and financial confidentiality).

267. *See id.* at 304 (noting that previous vocal opposition to near identical money laundering provisions contained in the USA PATRIOT act was muted); *see also* Evans, *supra* note 251, at 965-68 (noting that the USA PATRIOT act was passed six weeks after the attacks, was debated for only two weeks, and faced little resistance).

268. *See* Lichtblau, *supra* note 259, at 1 (commenting on a Justice Department seminar on financial crime that proposed using the USA PATRIOT Act for ordinary crime control); Dority, *supra* note 257, at 4 (describing the government use of increased information for ordinary crime control); Holt, *supra* note 240, at 1 (noting that there has been criticism about how the government is accessing personal information); *see also* Press Release, U.S. Dep't of the Treasury, Testimony of Juan C. Zarate, Deputy Assistant Sec'y for Terrorism and Violent Crime, U.S. Dept of the Treasury, to the House Financial Subcomm., Oversight and Investigations (Feb. 12, 2002), *available at* http://www.treas.gov/pres/releases/po1009.htm?IMAGE.X=17%5C&IMAGE.Y=8 (last visited Jan. 25, 2004) (copy on file with *Transnational Lawyer*) (testifying before Congress, the Deputy Assistant Secretary for Terrorism and Violent Crime, U.S Department of the Treasury stated that "[d]aily we are in contact with foreign financial officials and are engaged in bilateral and multilateral discussions regarding international cooperation and action against terrorist activities and financing").

269. 31 U.S.C.A § 5318A; *see* USA PATRIOT Act § 311 (amending 31 U.S.C.A § 5318A).

270. *See* BANKING LAW, *supra* note 234, §§12.76-.77 (determining that IMLAAFA imposes regulations on both domestic and foreign banks); Whitehead, *supra* note 262, at 1131 (observing that the IMLAAFA increases monitoring financial transactions); Rueda *supra* note 236, at 151-52 (concluding that the IMLAAFA allows the United States to punish foreign banks).

271. *See supra* note 270 and accompanying text; Fisher, *supra* note 113, at 450-51 (describing how the IMLAAFA expands the ability of U.S. law enforcement agencies to coerce disclosure).

272. 31 U.S.C.A § 5318A (a)(1)); BANKING LAW, *supra* note 234, § 12.76; Rueda, *supra* note 236, at 151-52; Fisher *supra* note 113, at 450-51.

273. 31 U.S.C.A § 5318A (b)(1).

274. 31 U.S.C.A §§ 5318A (a-b); *see Money Laundering Update 2002: What You Need to Know Now*, 1337 PLI/CORP 361, 412 (Oct. 2002) (writing that the USA PATRIOT Act expands the reach of U.S. law

likely result in the government implementing sanctions such as freezing assets, agricultural and medical embargos, and prohibiting domestic banks from dealing with that jurisdiction.[275]

A large number of investors and transactions in Caribbean offshore financial centers originate in the United States.[276] The IMLAAFA could be devastating because the United States now has the ability to eviscerate offshore confidentiality.[277] Clearly, the USA PATRIOT Act goes beyond combating terrorism.[278] It allows the government to access financial information for ordinary crime control purposes.[279] This is consistent with the limited protection that the United States has traditionally given financial privacy.[280]

C. *Legitimacy*

Perhaps because of U.S. pressure, the international community has responded in keeping with the United States' expanded definition of money laundering.[281] In fact, the United Nations and the FATF have adopted provisions similar to the USA PATRIOT Act.[282] Now there is a great deal of concern that the USA

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enforcement to restrict or prohibit access to designated foreign banks); *see, e.g.,* BANKING LAW, *supra* note 234, §§ 12.76-.77; Rueda, *supra* note 236, at 189-90; Betty Santangelo, Tim O'Neal Lorah, and Megan Elizabeth Murray, *Analysis of Anti-Money Laundering Provisions of USA PATRIOT Act 4*, (2001), *at* http://www.sia.com/moneyLaundering/pdf/usPatriot.pdf (last visited on Feb. 16, 2004) (copy on file with *The Transnational Lawyer*).

275. 66 Fed. Reg. 49,079 § 4; *see* Razzano, *supra* note 2, at 350 (demonstrating that the United States has made effective use of its money laundering statutes; Rueda *supra* note 236, at 151-52 (concluding that Congress took advantage of U.S. economic power to enforce sanctions in creating the IMLAAFA).

276. *See* ANTOINE, *supra* note 1, ¶ 1.11 (stating that the majority of investors and transactions are from the United States and the United Kingdom).

277. USA PATRIOT Act § 302(a)(4) (noting that offshore jurisdictions provide the anonymity needed for terrorist financing); *see* Rueda, *supra* note 236, at 183 (determining that IMLAAFA targets offshore financial centers); BANKING LAW, *supra* note 234, § 12.76-.77 (explaining the scope of Title III of the USA PARTIOT Act).

278. *See* F. Mark Terison and H. Peter Del Bianco, Jr., *Feature: Is Big Brother Watching Out For US?*, 17 MAINE BAR J. 20, 26 (2002) (commenting that the USA PATRIOT Act goes beyond fighting terrorism); *see also* Lichtblau, *supra* note 259 (noting that the justice department held a training seminar on how to use the USA PATRIOT Act for ordinary crime control).

279. Terison, *supra* note 278, at 26; Lichtblau, *supra* note 259.

280. *See* INTERNATIONAL BANKING, *supra* note 42, at 357 (concluding that the United States has limited financial secrecy laws); *see also* Pasley, *supra* note 30, at 165-67 (stating that unlike general privacy rights under the 4th Amendment, financial privacy rights have been narrowly interpreted and limit the protection given to an individual's financial privacy); Blum, *supra* note 10, at 41 (stating that the United States is viewed as the country that seeks disclosure of the most financial information from its banks).

281. *See* ANTOINE, *supra* note 1, ¶ 6.72 (observing that the FATF was asked to expand its standards for money laundering and terrorist financing); *see also* Press Release, U.S. Dep't of the Treasury, Testimony of Juan C. Zarate, Deputy Assistant Sec'y for Terrorism and Violent Crime, U.S. Dep't of the Treasury, to the Senate Foreign Relations Comm., (Mar. 18, 2003), *at* http://www.treas.gov/pres/ releases/js139.htm?IMAGE.X=17%5C&IMAGE.Y=8 (last visited Jan. 25, 2004) [hereinafter Zarate] (copy on file with *The Transnational Lawyer*) (describing U.S. efforts to persuade the international community to expand terrorist offences); *see also* Rueda *supra* note 236, at 153-58. (commenting on the European Union and the United Kingdom in their efforts to combat terrorism).

282. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. § 1, U.N. Doc. S/RES/1373 (2001); *The Forty*

PATRIOT Act and other international regulations have expanded the definition of money laundering.[283]

Prior to the September 11th attacks, the definition of money laundering encompassed transactions designed to hide or clean proceeds of illegal activities, thus preventing people who have profited from criminal acts from enjoying the rewards of their illegal behavior.[284] After the attacks, the definition was expanded to include those transactions which used legitimate funds transferred to an alleged terrorist organization.[285] Thus, a person who transfers legitimate funds to an organization that the United States determines is a terrorist organization may face criminal charges, in addition to having their legitimate funds frozen.[286] Freezing legitimate funds of an individual because of "extraneous illegal activity" does not appear to be the proper use of a statute designed to prevent laundering of illegal proceeds of criminal enterprise.[287] Moreover, there are many legitimate reasons for wanting to conceal one's identity when making legitimate banking transactions.[288] Regardless, the United States, using this expanded definition, has used the IMLAAFA section of the USA PATRIOT Act to pursue individuals who have used legitimate funds to support organizations that the United States determines are terrorist organizations.[289] Critics argue that this is not permissible because an individual can be punished for legitimate transactions with organizations that the government has deemed a terrorist organization regardless of intent.[290] In fact, a recent U.S. court decision struck down this

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Recommendations, *supra* note 217, at 2; Mark Kantor, *The War on Terrorism and the End of Banking Neutrality*, 118 BANKING L.J. 891, 896-97 (2001); *see* OFFICE OF THE COMPTROLLER OF THE CURRENCY, MONEY LAUNDERING: A BANKER'S GUIDE TO AVOIDING PROBLEMS 7 (2002), *at* http://www.occ.treas.gov/moneylaundering2002.pdf (copy on file with *The Transnational Lawyer*) (listing the various international agencies proactive response to terrorism).

283. *See* ANTOINE, *supra* note 1, ¶ 6.74 (stating that using terrorism as a predicate offense to money laundering is dangerous as it criminalizes use of legitimate funds); Kantor, *supra* note 282, at 896-97 (stating that U.N. Security Council Resolution 1373 supports the USA PATRIOT Act's expanded power to confiscate foreign assets); Gouvin, *supra* note 244, at 962 (observing that tracing terrorist financing is much different than money laundering).

284. *See* ANTOINE, *supra* note 1, ¶ 6.74 (concluding that money laundering legislation targets funds that are the product of illegal activity rather than legitimate funds that are used to support illegal activities).

285. *Id.*

286. *Id.*

287. *See id.* (questioning the legitimacy of using a statute that focuses on the proceeds of criminal enterprise to criminalize the use of legitimate funds).

288. *See, e.g.*, *id.* ¶ 2.58; Ennis, *supra* note 5, at 642; Blum, *supra* note 10, at 41.

289. *See* Molly McDonald, *Judge Opposes "Vagueness" In Anti-Terror Laws*, ABA J. E-REPORT (Jan. 30, 2004), *available at* http:///www.abanet.org/journal/ereport/j30partiot.html (last visited Feb. 7, 2004) (copy on file with *The Transnational Lawyer*) (noting that the 9th Circuit declared unconstitutional a section of the USA PATRIOT Act that made it illegal to fund an organization the government had determined was a terrorist organization regardless of the individual's intent).

290. *See* Gouvin, *supra* note 244, at 959 (reinforcing the idea that expanded U.S. powers to freeze foreign assets through "guilt by association" is at odds with international law). Additionally, the author states that it is very difficult to define a terrorist organization because "one person's terrorist is often another person's freedom fighter." *Id.* at 976-77; *see* ANTOINE, *supra* note 1, ¶ 6.74; McDonald, *supra* note 289.

portion of the USA PATRIOT Act as unconstitutional.[291] Perhaps a better idea is to create a new offense of terrorist financing rather than incorporating it into current money laundering statutes.[292] Regardless of concerns about the legitimacy of terrorism as a predicate offense for money laundering, Caribbean jurisdictions have responded quickly to assist the United States in tracking down terrorist financing.[293]

V. CONCLUSION

Scrutiny of financial records has become commonplace as the global hunt for terrorists continues.[294] The reality is that Caribbean offshore jurisdictions have overwhelmingly complied with policies and regulations established by both the United States and the international community regarding tax evasion, money laundering, and terrorist financing because failure to do so will result in economic disaster.[295] Offshore jurisdictions realize that they cannot survive an extended period with their financial systems under siege.[296] It is apparent that failure to comply with requests for information regarding money laundering and terrorist financing will result in the United States imposing economic sanctions.[297] If a mere "advisory" or allegation of misconduct can cause serious financial repercussions in offshore jurisdictions, then one can imagine the impact of being labeled "on the terrorist watch list."[298] Broadly worded statutes, like the USA PATRIOT Act, arm government agencies with an arsenal of regulations that aid in compelling disclosure from offshore financial institutions.[299] If the United

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291. Humanitarian Law Project v. Ashcroft, 352 F.3d 382, 385 (9th Cir. 2003); *see* McDonald, *supra* note 289 (noting that the section of the Act was vague).

292. ANTOINE, *supra* note 1, ¶ 6.74

293. *Id.*

294. *See* ANTOINE, *supra* note 1, ¶ 6.69-72 (observing that post September 11th the international community began searching for terrorist monies and focused on offshore centers); *see also* Rueda, *supra* note 236, at 183 (stating that the USA PATRIOT Act is designed to attack the offshore banking industry).

295. *See* ANTOINE, *supra* note 1, ¶ 6.76; (listing the Bahamas as one of several offshore jurisdictions that has enacted sophisticated anti-money laundering statutes); *New Year Greeting from the Managing Director*, THE SCHOONER (Cayman Is. Monetary Auth., Cayman Is.) (Dec. 2001) (stating that the Cayman Islands joins forces with the world to fight terrorism and endorses the FATF recommendations against terrorism); *see also* Hishikawa, *supra* note 9, at 417 (noting compliance to OECD regulations by offshore jurisdictions); Mottley, *supra* note 68, at 413-14 (explaining that many Caribbean nations have complied with international demands).

296. *See* ANTOINE, *supra* note 1, ¶ 11.35 (noting that offshore centers will have to retrofit and fall in line with OECD regulations); *see also* Hishikawa, *supra* note 9, at 417 (commenting that blacklisting nations will result in substantial detriment to their economies).

297. *See* Ennis, *supra* note 5, at 647 (discussing the current climate in which the United States would not hesitate to sanction non-cooperative nations).

298. *See* Razzano, *supra* note 2, at 350-51 (citing several cases where banks failing to comply with money laundering statutes were heavily penalized); *see also* Sultzer, *supra* note 181, at 203 (noting that both Panama and the Bahamas lost many legitimate investors due to involvement in money laundering and corruption).

299. *See* Kaplan, *supra* note 7, at 736-37 (stating that recent events, including tax and anti-money laundering regulation have made it dangerous to rely on bank secrecy regulations to protect financial privacy

States and the international community do not show restraint, current polices are sure to deal Caribbean offshore confidentiality a fatal broadside, leaving those nations changed forever.[300]

when dealing with Caribbean offshore financial institutions); Hishikawa, *supra* note 9, at 417 (noting that OECD regulations are an effective tool in coercing offshore jurisdictions into compliance); *see also* Sessel *supra* note 124, at 565-66 (stating that offshore jurisdictions are under attack from multinational organizations); Razzano *supra* note 2, at 327 (commenting on the U.S. onslaught on offshore banking confidentiality); Rueda, *supra* note 236, at 145 (concluded that the USA PATRIOT Act gives the United States the ability to "punish" foreign banks).

300. *See* ANTOINE, *supra* note 1, ¶ 2.39 (stating that the United States and the international community have aggressively attacked confidentiality practices of offshore financial centers, thus reinforcing that confidentiality by statute is no longer effective in shielding activities); *see also id.* ¶ 4.09 (stating that any attack on offshore confidentiality will result in the financial ruin of offshore centers); Sullivan, *supra* note 4, (describing offshore financial centers as going the "way of the dodo" as intense pressure from "global watchdogs" and the United States will forever change offshore banking); ANTOINE, *supra* note 1, ¶ 12.23 (concluding that fundamental human rights and the rights of sovereign nations must be respected and the power to limit these rights must be done proportionally); Hishikawa, *supra* note 9, at 417 (noting that the OECD and international pressure have made the "death of tax havens inevitable").

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