The Attorney's Facilitation of Transnational Corruption: Shortcomings of the United States Anti-Money Laundering Framework

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INTRODUCTION

In the modern era, major international corruption scandals grace news networks with alarming frequency, often exposing corrupt actors from the highest levels of government and describing criminal schemes of a staggering scale.[1] Corruption has become a scourge, one with enormous impacts on government functions, social and environmental outcomes, inequality, and political instability.[2] The annual cost of bribery alone was recently estimated to reach nearly $2 trillion, or roughly two percent of the global gross domestic product ("GDP"), although the broader costs of all types of corruption likely far exceed that.[3] This is not a victimless crime—corruption has incredibly real direct and indirect economic and social costs that impact millions daily.[4] Corruption plays an insidious

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1. *See*, *e.g.*, Stephanie Clifford & Matt Apuzzo, *After Indicting 14 Soccer Officials, U.S. Vows to End Graft in FIFA*, N.Y. TIMES (May 27, 2015), https://www.nytimes.com/2015/05/28/sports/soccer/fifa-officials-arrested-on-corruption-charges-blatter-isnt-among-them.html?hp&action=click&pgtype=Homepage&module=a-lede-package-region&region=top-news&WT.nav=top-news&_r=0 [https://perma.cc/6WC8-FV79].

> All cross-border grand corruption cases need a combination of anonymous companies and bank accounts to succeed. Transparency International notes, for example, how the Brazilian construction company Odebrecht relied on banks in Antigua, Panama, Switzerland and the United States, among others, to make bribe payments to Brazilian and foreign public officials and politicians.

Maíra Martini & Maggie Murphy, *G20 Leaders or Laggards? Reviewing G20 Promises on Ending Anonymous Companies*, TRANSPARENCY INT'L 40 (Apr. 19, 2018), http://files.transparency.org/content/download/2231/13941/file/2018_G20%20Leaders%20or%20Laggards_EN.pdf [https://perma.cc/GJ5G-HTCB] [hereinafter *Leaders or Laggards*]; *see also* Indictment, United States of America v. Jeffrey Webb, 15 CR-252 (RJD)(RML), USDC-EDNY (May 20, 2015).

2. *See* Bernardin Akitoby et al., *Corruption: Costs and Mitigating Strategies*, INT'L MONETARY FUND 5 (May 2016), https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Corruption-Costs-and-Mitigating-Strategies-43888 [https://perma.cc/EML9-RK5T] [hereinafter *IMF Discussion Note*]; *see also Lowering the Bar: How American Lawyers Told Us How to Funnel Suspect Funds into the United States*, GLOB. WITNESS 1 (Jan. 2016), https://www.globalwitness.org/documents/18208/LoweringtheBar.pdf [https://perma.cc/S3Y6-UB4A] [hereinafter *Lowering the Bar*].

3. *IMF Discussion Note*, *supra* note 2, at 5.

4. Rhoda Weeks-Brown, Gen. Couns. and Dir. of the Legal Dep't, Int'l Monetary Fund, Keynote Address at the American Conference Institute: 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018).

role in the degradation of the state and the economy, sowing seeds of distrust among the public, weakening governments' ability to execute necessary functions, and stifling the potential for economic growth.[5] Unfortunately, each of the issues that come with an inept government and poor growth can also feed directly into an escalation in corruption, thus producing a vicious and persistent cycle.[6] The modern global consensus that corruption is a crucial issue illustrates the gravity of its overwhelming impact on all levels of society and all nations worldwide.

Not only does corruption easily permeate a country, but it also has far-reaching influences and consequences transnationally.[7] Corruption can be best understood through division into several categories, the first two being the demand-side of corruption and the supply-side. The demand-side of corruption is often primarily a domestic concern, afflicting developing nations where it has become systemic.[8] Conversely, the supply-side of corruption presents a truly international problem.[9] There exist actors from other countries "who are able and very willing to bribe foreign officials in corrupt countries[,]" and these actors, which are often powerful multinational corporations, tend to hail from richer, more developed nations.[10] While such countries may not bear the same systemic corruption as seen on the demand-side, there may still exist "cracks in their legal and institutional frameworks that contribute to global corruption," particularly the supply-side facilitation of corruption through concealment.[11] Wealthier nations can still maintain significant gaps in their anti-corruption frameworks that allow individuals to conceal the proceeds of their corrupt acts.[12] Since corrupt individuals often want to hide their illicit funds by sending them abroad, actors in wealthier nations with sophisticated financial sectors are usually the ones facilitating this concealment.[13] This is commonly accomplished through the use of anonymous "shell" companies.[14] Because they are a legal, effective, and commonplace instrument in multiple jurisdictions, anonymous companies are a "vehicle of choice" for corrupt politicians, tax evaders, and others who wish to launder and hide their money.[15] Unfortunately, anonymous companies remain under-detected and contribute greatly to the concealment of corruption worldwide.[16] In countries with weak anti-facilitation strategies, anonymous companies may be one arrangement highly prone to abuse.

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5. *IMF Discussion Note*, *supra* note 2, at 5.
6. *Id*. at 5.
7. *See* Weeks-Brown, *supra* note 4.
8. *See id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *See generally* J.C. SHARMAN, MICHAEL FINDLEY & DANIEL NIELSON, GLOBAL SHELL GAMES: EXPERIMENTS IN TRANSNATIONAL RELATIONS 2–3 (2014) [hereinafter GLOBAL SHELL GAMES].
15. *Lowering the Bar*, *supra* note 2, at 1.
16. *See id* at 1, 13, 15.

One such nation with weak anti-facilitation controls in its anti-corruption framework is the United States. Traditionally, the United States has been a global leader in the criminalization and prosecution of corruption and bribery of foreign public officials, helping spearhead the Organization for Economic Co-operation and Development's landmark international Anti-Bribery Convention and instituting the Foreign Corrupt Practices Act at home.[17] However, the United States continues to lag behind other developed nations in instituting appropriate mitigation controls for behaviors such as money laundering.[18] The World Bank and United Nations have shown that, in addition to being the most popular place for corrupt government officials to create anonymously owned companies,[19] the United States also may be the *easiest* country in the world to create these companies.[20] In one recent case, the son of the President of Equatorial Guinea, who was also a government minister, moved over $110,000,000 into the United States with the help of two U.S. lawyers.[21] These lawyers enabled the incorporation of anonymous shell companies in California, which were then used to obtain American bank accounts and luxury property.[22]

The weaknesses in the U.S. anti-concealment framework are becoming more apparent as international scandals and domestic investigators expose the United States' role in transnational corruption. In 2016, one such investigator—Global Witness—decided to examine the role of U.S. lawyers in the facilitation and concealment of corruption. In their study, Global Witness sent an undercover investigator to thirteen New York law firms[23] posing as an adviser of an African minister who wished to bring several million suspect U.S. dollars into the country.[24] The investigator conducted preliminary talks with each of the attorneys to

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17. *See* Jack Boorman, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, INT'L MONETARY FUND 3 (Sep. 2001), https://www.imf.org/external/np/gov/2001/eng/091801.pdf [https://perma.cc/PN7R-RMYE]; *see also* Foreign Corrupt Practices Act, as amended, 15 U.S.C. §§ 78dd-1, *et seq*; Sean Hagan, Former Gen. Couns., Int'l Monetary Fund, Seminar Class at Georgetown University Law Center: Corruption Facilitation – Addressing Concealment (Nov. 5, 2019) ("The United States is the one who truly *created* the OECD anti-bribery convention.").

18. *Leaders or Laggards*, *supra* note 1, at 4, 10.

19. Emile van der Does de Willebois et al., *Puppet Masters*, *How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*, THE WORLD BANK 121, 142 (Oct. 24, 2011), http://star.worldbank.org/star/publication/puppet-masters [https://perma.cc/EC6H-EZ87].

20. This is according to a study that examined the willingness of attorneys and other facilitators to set up legal arrangements with anonymous beneficiaries. *See* GLOBAL SHELL GAMES, *supra* note 14, at 17.

21. Press Release, U.S. Dep't of Justice, Department of Justice Seeks to Recover More than $70.8 Million in Proceeds of Corruption from Government Minister of Equatorial Guinea (Oct. 25, 2011), http://www.justice.gov/opa/pr/2011/October/11-crm-1405.html [https://perma.cc/2HJ5-RAB6]; *Lowering the Bar*, *supra* note 2, at 4.

22. *Lowering the Bar*, *supra* note 2, at 4. In fact, some of New York's most expensive properties have been purchased through anonymous legal arrangements, with half of all New York City real estate worth more than $5,000,000 bought through shell companies. *See* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), http://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warnercondos.html [https://perma.cc/UE6C-YPM7].

23. *Lowering the Bar*, *supra* note 2, at 1.

24. *Id*.

learn how he might move that amount of money without raising the suspicions of the authorities.[25] Attorneys from twelve out of the thirteen firms provided suggestions, including "using anonymous companies or trusts to hide" the minister's assets, despite the investigator describing his funds as "grey money," "black money," and "facilitation payments," all of which were intended to raise concerns.[26] With two attorneys, the Global Witness investigator explicitly stated that the money came from bribes, yet those lawyers simply suggested that the minister put his assets in the name of an anonymous company instead of his own.[27] Other recommendations included using the law firm's bank accounts to provide an additional layer of anonymity, having the lawyer act as a trustee of an offshore trust to open a bank account, and opening an account at a smaller bank that might have more lenient monitoring.[28] Furthermore, while most of the lawyers did ask about the source of the minister's assets, they did not request the information necessary to determine if the client was engaged in illegal conduct.[29] The results of the Global Witness investigation suggest that, while corruption facilitation and concealment continues to rise in importance for the international community, the United States continues to lag behind in mitigating its own role in the problem. This is particularly true regarding the substandard controls over the legal industry—a finding that has been corroborated in the subsequent anti-money laundering assessments of several international bodies.[30] The unfortunate reality is that U.S. attorneys, who hold a very significant gatekeeper position in the ecosystem of corruption, do not seem adequately perturbed by the prospect of facilitating transnational corruption.[31]

This Note aims to explore the reasons for U.S. attorney facilitation and concealment of corruption and the remedies that may mitigate it. On one hand, the laws of the United States remain underdeveloped to tackle attorney facilitation. As suggested, the international community has set forth standards for anti-

25. *Id.*

26. *Id.* at 5-6.

27. *Id.* at 5-8.

28. *Id.* at 8.

29. *Id.* at 2, 10; *see also* Steve Kroft, *Anonymous, Inc.*, CBS NEWS (Jan. 31, 2016), http://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation/ [https://perma.cc/KT74-B6RH] (Only one lawyer, Jeffrey Herrmann, refused to provide any suggestions on how to move the money and kicked the investigator out of his office.).

30. *See, e.g.*, Fin. Action Task Force [FATF], *Anti-Money Laundering and Counter-Terrorist Financing Measures, United States Mutual Evaluation Report* 220-21 (Dec. 2016), https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf [https://perma.cc/W23U-LTBT] [hereinafter *FATF US MER*]; *see also* Maira Martini & Maggie Murphy, *Just for Show? Reviewing G20 Promises on Beneficial Ownership*, TRANSPARENCY INT'L 10 (Nov. 2015), http://files.transparency.org/content/download/1936/12755/file/2015_G20BeneficialOwnershipPromises_EN.pdf [https://perma.cc/SGP6-BGSM] [hereinafter *Just for Show?*]; Int'l Monetary Fund Legal Department, *United States, Financial Sector Assessment Program, Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT)—Technical Note*, INT'L MONETARY FUND 4 (July 2015), http://www.imf.org/external/pubs/ft/scr/2015/cr15174.pdf [https://perma.cc/H36D-DMUF].

31. *See generally Lowering the Bar*, *supra* note 2.

corruption frameworks that the United States has yet to meet. Two crucial areas of weakness that persist in the United States include (1) poor company ownership transparency due to uncollected beneficial ownership information and (2) weak client due diligence requirements of Designated Non-Financial Businesses or Professions ("DNFBP"), including lawyers and others within the legal industry.[32] On the other hand, the ethical guidelines for lawyers, the *Model Rules of Professional Conduct*, also remain insufficient to target attorney-facilitated corruption concealment.[33] There is neither (1) mandatory due diligence by lawyers to determine if their clients' conduct is illegal nor (2) mandatory withdrawal from representation should a lawyer reasonably believe illegal conduct has occurred.[34] Also, the American Bar Association ("ABA") guidelines that might otherwise modernize the U.S. ethical standards for legal professionals remain voluntary and thus unenforceable.[35]

Should the United States wish to make substantive progress in mitigating a vital stage in the transnational corruption lifecycle—concealment—it will need to address the role attorneys play in the creation of money laundering arrangements. Furthermore, while amending the *Model Rules of Professional Conduct* would provide better industry guidance on ethical attorney conduct, those changes alone would be an insufficient remedy for targeting cross-border corruption. Any amendments should be accompanied by the adoption and codification of certain international standards by the United States, which are necessary for a comprehensive anti-corruption strategy.

I. LEGALITY OF THE ATTORNEYS' CONDUCT UNDER CURRENT ANTI-CORRUPTION REGULATION

A. WHY WERE NO LAWS BROKEN?

The recommendations made by the attorneys in the Global Witness investigation did not expressly violate the laws of the United States, even if what they

32. *See Leaders or Laggards*, *supra* note 1, at 38, 40.

33. *See Lowering the Bar*, *supra* note 2, at 13–14; *but see* Letter from John Leubsdorf & William H. Simon, to Global Witness 1 (Jan. 28, 2015) (asserting that "complying with the prohibition [on assisting clients in illegal or fraudulent Activity] entails reasonable and good faith efforts to ascertain facts needed to determine" if the conduct is illegal).

34. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) [hereinafter MODEL RULES]; MODEL RULES R. 1.16(b).

35. AM. BAR ASS'N, ABA H.D. RES. 116 (2010) (adopted) (adopting and recommending the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing); *see generally* ABA Task Force on Gatekeeper Reg. and the Prof., Sec. of Real Prop., Tr. & Est. Law, Sec. of Int'l Law, Sec. of Bus. Law, Sec. of Tax'n, Crim. Just. Sec., Am. College of Tr. & Est. Couns., Am. College of Real Est. Lawyers, Am. College of Mortg. Att'ys, and Am. Com. Fin. Lawyers, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* 2010), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_gtfgoodpracticesguidance.authcheckdam.pdf [https://perma.cc/77K5-QGMC] [hereinafter Good Practices Guidance]; *FATF US MER*, *supra* note 30, at 123 ("[T]he the best practice guidelines . . . are not enforceable.").

suggested would strike the average person as suspicious, if not nefarious.[36] A recent assessment of the G20 countries determined that the laws of the United States still comprise "weak" or "very weak" areas in its overall anti-corruption and anti-money laundering framework.[37] The significant gaps in U.S. anti-corruption regulation comprise two interrelated issues. First, beneficial ownership information is not collected or disclosed to authorities when a company is created, meaning no centralized repository of beneficial ownership information exists in the United States.[38] Second, even if the United States were to never institute beneficial ownership information requirements, it might mitigate this by requiring U.S. lawyers and other DNFBPs to conduct Client Due Diligence ("CDD")—but the United States does not do this either.[39] These two shortcomings directly conflict with the international standards provided by the Financial Action Task Force, suggesting why, in these two areas, the United States lags behind other jurisdictions in the global fight against corruption.[40] In a world where most major corruption scandals involve complex webs of shell companies and the aid of industry professionals,[41] it is no wonder that insufficient laws targeting these areas might lead to the conversations captured by the Global Witness team.[42]

1. LACK OF BENEFICIAL OWNERSHIP INFORMATION

The attorneys featured in the Global Witness investigation suggested that the creation of anonymous companies would best obscure the fictitious African minister's connection to his shady financial assets.[43] Anonymous shell companies—legal entities without a clear beneficial owner—can operate away from the watchful eye of the law or the public, yet open bank accounts and wire money as a normal company might.[44] As noted by the Organisation for Economic Cooperation and Development ("OECD"), "[u]sing corporate vehicles as conduits to perpetrate illicit activities is potentially appealing because these vehicles may enable the perpetrators to cloak their malfeasance behind the veil of a separate legal entity."[45] In the United States, creating these companies without revealing their true beneficial owners is entirely possible and legal. Unfortunately, these

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36. *See Lowering the Bar*, *supra* note 2, at 6–8; *see also* Kroft, *supra* note 29.

37. *Leaders or Laggards*, *supra* note 1, at 56.

38. *FATF US MER*, *supra* note 30, at 6.

39. *Id*. at 126, 257.

40. *See Leaders or Laggards*, *supra* note 1, at 56; *see also Just for Show?*, *supra* note 30, at 53.

41. *See, e.g.*, Indictment, United States v. Jeffrey Webb, 15 CR-252 (RJD)(RML), USDC-EDNY, (May 20, 2015) (indicting Fédération Internationale de Football Association officials for allegedly funneling at least $150 million USD in bribes through the United States).

42. *See generally Lowering the Bar*, *supra* note 2.

43. *Id* at 1.

44. *See* GLOBAL SHELL GAMES, *supra* note 14, at 7.

45. ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], BEHIND THE CORPORATE VEIL: USING CORPORATE ENTITIES FOR ILLICIT PURPOSES 13 (2001) https://www.oecd.org/daf/ca/43703185.pdf [https://perma.cc/XP32-4B76].

shortcomings violate the same standards that the United States helped to draft as a founding member of the Financial Action Task Force ("FATF").[46] This can be seen in comparing U.S. practices with the FATF's International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation—the "40 FATF Recommendations."[47]

The FATF's standards for the collection of beneficial ownership information comprise Recommendations 24 and 25, which address measures to ensure the transparency of legal persons and arrangements.[48] The former recommendation states that:

> Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. . . . Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs . . . .[49]

Additionally, the latter suggests:

> Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities.[50]

The Recommendations thus dictate that beneficial ownership information of companies and trusts ought to be collected in such a way that makes current, complete, and reliable information available to relevant law enforcement agencies.

To what information do these standards apply? Clearly, to comply with Recommendations 24 and 25, a country must first identify who or what qualifies as a beneficial owner. The G20 group—to which the United States is a signatory and party—defines a beneficial owner as "the natural, real person who ultimately owns, benefits from, or controls, directly or indirectly, a company or legal arrangement."[51] This language closely mirrors the definition provided in the

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46. *See* Fin. Action Task Force [FATF], *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (Feb. 2012), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf [https://perma.cc/Z8UK-NK37] [hereinafter *FATF Recommendations*].

47. *Lowering the Bar*, *supra* note 2, at 1; *see also FATF Recommendations*, *supra* note 46.

48. *FATF Recommendations*, *supra* note 46, at 20.

49. *Id.*

50. *Id.*

51. *Leaders or Laggards*, *supra* note 1, at 22; *see also* Maíra Martini, *Technical Guide: Implementing the G20 Beneficial Ownership Principles*, TRANSPARENCY INT'L 4 (July 30, 2015), https://www.transparency.org/whatwedo/publication/technical_guide_implementing_the_g20_beneficial_ownership_principles [https://perma.cc/XTD9-8RKY] [hereinafter *Technical Guide*].

FATF Recommendations, which further elaborates that the "[r]eference to 'ultimately owns or controls' ... refers to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control."[52] For the implementation of its High-Level Principles on Beneficial Ownership Transparency, the G20 published a Technical Guide that includes definition guidelines for individual countries.[53] In reviewing the Guide, an adequate definition of beneficial ownership "covers the natural (not legal) persons who actually own and take advantage of the capital or assets of the legal person or arrangement, rather than just the persons who are legally (on paper) entitled to do so."[54] This should also include those who maintain de facto control of the arrangement regardless of whether they are in a formal position or listed on a corporate register.[55] Unfortunately, the United States still has weaknesses in its definition for beneficial owner, despite recently issuing a new definition in 2016.[56] For example, in the United States, one can name an officer, manager, or "other individual" as the beneficial owner of a company regardless of whether that person has any ownership interest or control over the assets.[57] These loose parameters of beneficial ownership weaken the term and allow obfuscation of true control, even if a "beneficial owner" were identified.[58]

Furthermore, even if the United States were to adequately define beneficial ownership, it still maintains no requirements that this ownership information is collected,[59] and the absence of this information presents few, if any, roadblocks for parties wishing to remain anonymous in their transactions.[60] The FATF conducted a Mutual Evaluation Report ("MER") of the United States' anti-money laundering standards in 2016, using the 40 Recommendations as a guideline.[61] In comparing U.S. beneficial ownership laws to the FATF Recommendations 24 and 25, the MER found that "[m]easures to prevent or deter the misuse of legal persons and legal arrangements are generally inadequate," and the lack of beneficial ownership information does not impede financial institutions conducting transactions.[62] It is therefore unsurprising that the attorneys filmed in the Global Witness investigation would suggest using anonymous companies and multiple

52. *FATF Recommendations*, *supra* note 46, at 113 n.54. "*Beneficial owner* refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement." *Id.* at 113. "This definition should also apply to beneficial owner of a beneficiary under a life or other investment linked insurance policy." *Id.* at 113 n.55.

53. *Technical Guide*, *supra* note 51 at 2, 4.

54. *Leaders or Laggards*, *supra* note 1, at 22; *see Technical Guide*, *supra* note 51, at 4.

55. *Id.*

56. *Id.* at 22–23.

57. *Id.*; *see also* 31 C.F.R. § 1010.230 (outlining Beneficial Ownership Requirements for Legal Entities).

58. *Leaders or Laggards*, *supra* note 1, at 23.

59. *FATF US MER*, *supra* note 30, at 153.

60. *Id.*

61. *Id.* at 15; *see also FATF Recommendations*, *supra* note 46, at 7.

62. *FATF US MER*, *supra note* 30, at 153; *see also Leaders or Laggards*, *supra* note 1, at 44.

layers of ownership to shroud the African minister as the true beneficiary.[63] After all, the formation of companies without identifying their true owner is entirely legal, and creation of these anonymous companies is often considered an effective, standard business practice.[64] Still, U.S. laws do not seem to reflect a level of concern that mirrors the extent to which anonymous companies are abused.

The absence of some collection mechanism for beneficial ownership, as seen in the United States, greatly hinders the efforts of law enforcement to investigate potential abuse by money launderers, since identifying the ultimate beneficiary of a company can prove arduous, if not impossible.[65] While the United States requires companies to keep a shareholder or members' register, the register "only includes information on legal ownership and shares that may be registered in the name of another company or of a nominee," which can make identifying the true individual behind the company impossible.[66] This is further aggravated when information that is gathered remains incomplete, fragmented, or contradictory between states or provinces, as is the case here.[67] In Delaware, for instance, information on the identities of company shareholders or directors remains entirely uncollected.[68] Furthermore, even where states do collect beneficial ownership information, it often proves unhelpful to law enforcement, because states do not verify the information they receive.[69] International anti-money laundering guidelines require banks to identify beneficial owners of all clients, but U.S. financial institutions do not implement that rule using independent and reliable sources.[70] The FATF notes that this issue was flagged in previous evaluations of the United States, but that any efforts to ameliorate these "serious gaps" have proven to be unsuccessful.[71] Without reliable and complete beneficial ownership information, identifying the ultimate owner can be a futile task. On the international scale, this is especially true—"[i]f the shareholder of a company is another foreign company registered offshore, finding the real beneficial owner might take years."[72] How, then, is law enforcement supposed to prevent and prosecute corrupt acts?

Similarly, trusts are a legal arrangement that are prone to money laundering abuse yet poorly regulated to prevent it.[73] Since the United States already has a weak definition of beneficial owner and has not implemented FATF

63. *See* Kraft, *supra* note 29.
64. *See Lowering the Bar*, *supra* note 2, at 1.
65. *See Leaders or Laggards*, *supra* note 1, at 13.
66. *Id*. at 29.
67. *Id*. at 13.
68. *Id*.
69. *FATF US MER*, *supra* note 30, at 153.
70. *Just for Show?*, *supra* note 30, at 39; *see also FATF Recommendations*, *supra* note 46, at 12; Int'l Monetary Fund Legal Department, *supra* note 30.
71. *FATF US MER*, *supra* note 30, at 156.
72. *Leaders or Laggards*, *supra* note 1, at 30.
73. *See id*. at 35.

Recommendation 25, trusts are particularly susceptible to nefarious uses.[74] Trusts include multiple positions for separate ownership and control, so multiple individuals could be the potential beneficial owner.[75] Law enforcement can have an especially difficult time investigating trusts, since multiple money trails might exist among settlors, beneficiaries, or trustees.[76] In fact, "cases involving trusts are so much more difficult to investigate, prosecute or recover assets that they are seldom prioritized in corruption investigations," and prosecutors infrequently bring charges against trusts, because proving their role in a crime is so arduous.[77] For those who truly wish to obscure their connection to their assets, a combination of a company and trust can prove most effective,[78] which explains why this arrangement increasingly appears as a standard part of modern money laundering protocol.[79] In the United States, only some types of trusts must keep information on all trust parties, and there is no requirement of trustees to disclose their status to intermediaries.[80] The structure of trusts makes them particularly successful at concealing illicit funds, and yet, like other anonymous legal arrangements, they remain insufficiently regulated by the laws of the United States.

Overall, legislative efforts of the United States to gather "adequate, accurate, and current beneficial ownership information" of companies, trusts, and other legal persons in compliance with FATF Recommendations 24 and 25 have not proven successful or effective, and instead, significant gaps in the U.S. regulatory framework persist.[81] With these weaknesses in the legal framework of the country, one can understand why the New York lawyers in the Global Witness investigation had few qualms about suggesting the use of shell companies and trusts to hide their prospective client's assets.[82] The instruments that the lawyers recommended were certainly legal, whether or not they would facilitate and conceal the proceeds of illicit activity.

2. INSUFFICIENT REGULATION OF DNFBPS

Even if the United States were to forestall gathering beneficial ownership in compliance with FATF Recommendations 24 and 25, it might make up for this shortcoming by requiring client due diligence ("CDD") from its attorneys as outlined in Recommendations 10 and 12 and implemented in Recommendations 22

74. *Id.*; *see supra* Part I.A.1.

75. *Leaders or Laggards*, *supra* note 1, at 35.

76. *See id.*

77. *Id.*

78. Van der Does de Willebois et al., *supra* note 19, at 45.

79. "[T]rusts which hide the identity of the grantors and the beneficiaries have become a standard part of money laundering arrangements." Jack A. Blum et al., U.N. Office for Drug Control and Crime Prevention, Glob. Programme Against Money Laundering, *Financial Havens, Banking Secrecy and Money Laundering*, 95, U.N. Doc. UNDCP/TS/8 (1998).

80. *Leaders or Laggards*, *supra* note 1, at 37.

81. *FATF US MER*, *supra* note 30, at 4.

82. *See* Kraft, *supra* note 29. *See generally Lowering the Bar*, *supra* note 2, at 1.

and 23.[83] Unfortunately, the United States does not have even these laws.[84] In the scenario produced by Global Witness, not only would the creation of anonymous companies be a legal way to hide the African minister's assets, but the lawyers themselves would not be required by U.S. law to identify the beneficial owner of their high-risk client or conduct the most basic of CDD functions.[85] This is because the "weak" regulation of DNFBPs in the United States does not satisfy international anti-money laundering standards.[86] DNFBPs in the United States, which include attorneys and other intermediary professions, are bound by a very limited preventative framework that leaves significant vulnerabilities to corruption—especially in the formation of legal persons, such as companies.[87] Because lawyers are very frequently employed to create, manage, and advise complex legal persons and arrangements, the gaps that exist in their regulation pose a significant risk to anti-money laundering objectives.[88]

As part of their anti-corruption framework, the FATF Recommendations 10 and 12 outline customer due diligence requirements for financial institutions to better prevent facilitation and concealment.[89] Recommendation 10 states that the appropriate client due diligence measures to be taken include:

> (a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.
> (b) Identifying the beneficial owner and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.
> (c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.
> (d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.[90]

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83. *See FATF Recommendations*, *supra* note 46, at 12–14, 17–18.
84. *See FATF US MER*, *supra* note 30, at 220.
85. *See Leaders or Laggards*, *supra* note 1, at 14.
86. *Id*. at 17; *see also Just for Show?*, *supra* note 30, at 42 (explaining that the United States is one of five countries that do not require DNFBPs to identify the beneficial owners of their clients).
87. *FATF US MER*, *supra* note 30, at 220–22.
88. *Id*. at 41.
89. *FATF Recommendations*, *supra* note 46, at 12–14.
90. *Id*. at 12.

In conjunction with these four baseline measures, Recommendation 12 further asserts that, where a client or beneficial owner is a politically exposed person ("PEP"),[91] additional CDD measures are necessary to:

> (a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;
> (b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;
> (c) take reasonable measures to establish the source of wealth and source of funds; and
> (d) conduct enhanced ongoing monitoring of the business relationship.[92]

Recommendation 22 then states that the above customer due diligence obligations should apply to lawyers:[93]

> when they prepare for or carry out transactions for their client concerning the following activities:
>
> - buying and selling of real estate;
> - managing of client money, securities or other assets;
> - management of bank, savings or securities accounts;
> - organisation of contributions for the creation, operation or management of companies;
> - creation, operation or management of legal persons or arrangements, and buying and selling of business entities.[94]

Lastly, Recommendation 23 adds that "[l]awyers . . . should be required to report suspicious transactions when, on behalf of or for a client, they engage in a

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91. *Id*. at 14.

> A politically exposed person (PEP) is defined by the Financial Action Task Force (FATF) as an individual who is or has been entrusted with a prominent public function. Due to their position and influence, it is recognised that any PEPs are in positions that potentially can be abused for the purpose of committing money laundering (ML) offences and related predicate offences, including corruption and bribery . . . . The potential risks associated with PEPs justify the application of additional anti-money laundering . . . preventive measures with respect to business relationships with PEPs. . . . The FATF first issued mandatory requirements covering foreign PEPs, their family members and close associates . . . [but] expanded the mandatory requirements to domestic PEPs and PEPs of international organisations, in line with Article 52 of the *United Nations Convention against Corruption* (UNCAC). Article 52 of the UNCAC defines PEPs as "individuals who are, or have been, entrusted with prominent public functions and their family members and close associates", and includes both domestic and foreign PEPs.

Fin. Action Task Force [FATF], *FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)* 3 (June 2013), https://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf [https://perma.cc/5WXX-ZSAC].

92. *FATF Recommendations*, *supra* note 46, at 14.

93. *Id*. at 12–18 (outlining Recommendations 10, 11, 12, 15, 17, and 22).

94. *Id*. at 18.

financial transaction in relation to the activities described in paragraph (d) of Recommendation 22."[95]

Therefore, as outlined under the FATF Recommendations, DNFBPs—including lawyers—should be subject to customer due diligence requirements during certain activities and especially with certain clientele, like PEPs.[96] However, in clear breach of these standards, the United States maintains no laws that require DNFBPs to identify beneficial owners of their clients, even if they are carrying out business on behalf of high-risk clients like Global Witness's fictitious African minister.[97] Attorneys in the United States also have no responsibility to report suspicious transactions to organizations like the Financial Crimes Enforcement Network ("FinCEN"), even though Recommendation 23 strongly endorses this.[98] Reflecting on the overall regulation of the legal industry in the United States, the FATF MER noted: "[l]awyers . . . who establish or otherwise facilitate access to financial services for legal persons and arrangements, are not subject to comprehensive AML/CFT requirements, and are not systematically applying basic or enhanced due diligence processes" in the United States.[99] While some might argue that this deficiency is somewhat mitigated by the professional entry and ethical requirements of lawyers in the United States, the FATF notes that these industry requirements "do not adequately address" money laundering vulnerabilities or require that attorneys report suspicious client behavior.[100]

Part of this might be explained—in addition to insufficient regulatory law, the United States also experiences insufficient industry awareness.[101] There exists no compelling evidence that attorneys in the United States have an adequate understanding of the money laundering vulnerabilities in the legal industry or the need to mitigate them.[102] Additionally, while the ABA recognizes a broad understanding of vulnerabilities in the legal sector, it remains unequipped to evaluate any potential risks posed by specific law firms and resists adopting the money-laundering standards established by the Banking Secrecy Act.[103] These facts suggest that, at an industry-wide level, attorneys in the United States lack both the information and the guidelines needed for a comprehensive anti-corruption system. Unfortunately, this deficiency does not reflect the crucial gatekeeper role played

95. *Id*. at 18–19.

96. *Id* at 17–19 (outlining which CDD and record-keeping requirements should apply to lawyers and other DNFBPs).

97. The United States is one of only four G20 countries that has no legal requirements for lawyers to identify the beneficial owners of their clients. *Leaders or Laggards*, *supra* note 1, at 46; *Lowering the Bar*, *supra* note 2, at 1.

98. *FATF US MER*, *supra* note 30, at 221; *FATF Recommendations*, *supra* note 46, at 83.

99. *FATF US MER*, *supra* note 30, at 10.

100. *Id*.

101. *Id*. at 142.

102. *Id*. at 123.

103. *Id*. at 142.

by attorneys, especially in the formation of companies and other legal persons that are prone to abuse in the United States.[104]

B. DID THE ATTORNEYS VIOLATE THE ABA *MODEL RULES OF PROFESSIONAL CONDUCT*?

Attorneys in the United States, including those featured in the Global Witness investigation, are governed not only by law but also the ethical standards promulgated by the ABA, codified in the *Model Rules of Professional Conduct*, and adopted in some form in "most jurisdictions."[105] While none of the current *Model Rules* expressly prohibits the actions of the lawyers captured by the Global Witness investigation,[106] some lawyers can and have disagreed.[107] This insufficiency and ambiguity prevent the *Model Rules* from being an effective guideline for lawyers, leaving the legal industry susceptible to facilitating and concealing corruption. Indeed, the FATF determined in 2016 that the U.S. legal industry's ethical code, conduct requirements, and professional supervision are not focused on money laundering risks.[108] There are a few places in the ABA *Model Rules* where these deficiencies are most significant: (1) lawyers are only prohibited from counseling a client if they have *actual knowledge* that the client's conduct is criminal, yet there is no due diligence requirement for lawyers to gather sufficient client information to determine this;[109] (2) lawyers are not required to withdraw from representing a client, even if the client continues to use the lawyer's services to act in a way that the lawyer reasonably believes is criminal or fraudulent or has used the lawyer's services to perpetrate a crime or fraud;[110] and (3) the ABA Voluntary Good Practices Guidance, which would close gaps in the ethical rules and fulfill some international standards on DNFBP oversight, remains voluntary and thus unenforceable.[111]

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104. *Id*.

105. Mike Donaldson, *Lawyers and the Panama Papers: How Ethical Rules Contribute to the Problem and Might Provide a Solution*, 22 LAW & BUS. REV. AM. 363, 366 n.16 (2016) ("The ABA Rules represent a broad consensus about what the ethical rules ought to be, and they significantly influence the content of the ethical rules that are adopted in many jurisdictions."); *Model Rules of Professional Conduct*, AM. BAR ASS'N, (Apr. 4, 2020, 2:05 PM), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/VCY4-PHCW].

106. *See* Donaldson, *supra* note 105, at 374.

107. *See* Leubsdorf & Simon, *supra* note 33, at 1.

108. *FATF US MER*, *supra* note 30, at 145.

109. MODEL RULES R. 1.2(d).

110. MODEL RULES R. 1.16(b).

111. ABA H.D. Res. 116 (2010) (adopted).

1. MODEL RULE 1.2(D): NO DUE DILIGENCE REQUIRED TO OBTAIN ACTUAL KNOWLEDGE

Model Rule 1.2(d) states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[112]

But what does it mean for a lawyer to *know*? Model Rule 1.0(f) says that "'knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question."[113] Furthermore, actual knowledge is a category distinct from "reasonably should know" or "reasonably believes," suggesting that, "[a]s long as [a] lawyer doesn't 'actually know' [her] client is breaking the law, she is not breaking Rule 1.2(d)."[114] Of course, the lawyers in the Global Witness investigation "reasonably should know" that their prospective client had engaged in corrupt activities, but since they did not *actually* know, Rule 1.2(d) could not be clearly violated.[115] Theoretically, to ensure compliance with such a rule, lawyers would need to conduct some due diligence and gather information on their client, but this is not the reality—lawyers are not required to conduct client due diligence in compliance with global anti-money laundering standards.[116] The 2016 MER of the United States found as much—the assessment stated that "lawyers . . . have no requirements to apply [client due diligence] measures, enhanced or otherwise. There is no evidence that, in practice, they make any more enquiries about customers than is absolutely necessary."[117]

The ABA has suggested that the lawyer's duty of competence might offset this lack of due diligence, since the duty of competence requires all attorneys to be fully informed of all material facts of a case, and failure to ask sufficient

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112. MODEL RULES R. 1.2(d).

113. MODEL RULES R. 1.0(f).

114. *See* Donaldson, *supra* note 105, at 374; *see also* MODEL RULES R. 1.0(i) ("'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."); MODEL RULES R. 1.0(j) ("'Reasonably should know' when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question."); MODEL RULES R. 1.0(h) ("'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.").

115. MODEL RULES R. 1.2(d); Donaldson, *supra* note 105, at 374; *see also Lowering the Bar*, *supra* note 2, at 5–6 (noting that, although voluntary guidelines do not apply until the client is formally taken on, the Global Witness investigators raised numerous red flags that should have concerned the attorneys, even in preliminary consultations).

116. *See Lowering the Bar*, *supra* note 2, at 13.

117. *FATF US MER*, *supra* note 30, at 126; *see also* Murray L. Schwartz, *The Professional and Accountability of Lawyers*, 60 CALIF. L. REV. 669, 671, 690–91 (1978) (proposing that non-advocate attorneys are not, but should be, subject to greater accountability than attorneys acting as advocates, since non-advocate attorneys do not operate within the adversarial system).

questions would be a breach.[118] However, ensuring "competent representation" would not necessarily obligate an attorney to determine the source of a client's funds or delve into all aspects of their conduct, since Rule 1.1 only requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation."[119] The text of Rule 1.1 is thus vague and does not specify CDD measures as necessary components of competent representation. In this light, the conduct of the New York attorneys did not violate Rule 1.2(d) or the duty of competence, even though the attorneys did not ask about the amounts of payments, the identity of payers, or what the minister did in return for the money.[120] The duty of competence is not a sufficient placeholder for client due diligence, since those two obligations fulfill different objectives. Without a due diligence requirement, the attorneys from the Global Witness investigation could not have violated Rule 1.2(d), as there was no evidence they possessed actual knowledge of illegal conduct.

In their letter to Global Witness, two leading U.S. legal ethics professors, William Simon of Columbia Law School and John Leubsdorf of Rutgers School of Law, disagree.[121] However, they do concede that the *Model Rules* contain ambiguities, and they "do not expect that all lawyers will agree" with them.[122] In their opinion, the professors argue that to avoid assisting clients in illegal activity requires a good faith effort to learn the facts needed to determine if illegal conduct is occurring.[123] This seems like wishful thinking, however, since we have already shown that the plain language of Rule 1.2(d) indicates no explicit due diligence requirements.[124] Even if the Rules should be interpreted that way, there is no bright line in the Rules' language to delineate what constitutes a violation.[125]

2. MODEL RULE 1.16: VOLUNTARY WITHDRAWAL DESPITE PERPETRATED FRAUD OR THE REASONABLE BELIEF OF FUTURE FRAUD

Model Rule R. 1.16(b) states:

> Except as stated in paragraph (c), a lawyer may withdraw from representing a client if . . .(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud.[126]

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118. *See* ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Informal Op. 1470 (1981).
119. MODEL RULES R. 1.1 (2016).
120. Letter from John Leubsdorf & William H. Simon, to Global Witness, *supra* note 33, at 2.
121. *Id.* at 1.
122. *Id.*
123. *Id.*
124. *See* MODEL RULES R. 1.2(d).
125. Donaldson, *supra* note 105, at 372; The *Model Rules* also do not explicitly prohibit an American lawyer from assisting a client with a scheme to break the law of a foreign jurisdiction, so long as the specific acts done in the United States avoid violating any U.S. law. *Id.*
126. MODEL RULES R. 1.16(b)(2)–(3).

Model Rule 1.0(i) further clarifies that "'[r]easonable belief' or 'reasonably believes,' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."[127] Still, Rule 1.16(b) suggests that, even if a lawyer justifiably believes her client is engaging in criminal activity, she is not required to withdraw from representation. This is true even if the client has indeed used the lawyer's services to perpetrate fraud.[128]

The allowances granted by Rule 1.16 seem to violate the international standards for lawyers set forth by multiple international organizations. The International Bar Association ("IBA") and OECD have formed a Task Force on the Role of Lawyers and International Commercial Structures.[129] The Task Force declares that "[a] lawyer must not act unethically, unprofessionally or in any manner that condones, encourages or constitutes participation in illegal conduct."[130] The language of Rule 1.16(b) can certainly be construed to condone, if not encourage, illegal conduct by allowing attorneys to aid clients that have used their services to perpetrate crimes or fraud. This additionally violates the Fourth Principle of the Task Force, which advises lawyers to "terminate the retainer" if a client persists in "conduct [that] is, may be or becomes illegal."[131] By allowing termination and withdrawal to be voluntary, the *Model Rules* do not adequately prevent attorneys from facilitating the corrupt acts of their clients. In 2012, the FATF even recommended that lawyers and other DNFBPs report suspicious transactions like certain financial institutions do, in addition to withdrawing representation.[132] Such requirements have clearly not found favor with the ABA, and the *Model Rules* are another manifestation of the U.S. legal industry's insufficient anti-money laundering framework.

3. THE ABA VOLUNTARY GOOD PRACTICES GUIDANCE IS . . . VOLUNTARY

Instead of adopting standards in the FATF's Guidance for a Risk-Based Approach for Legal Professionals—guidelines intended to help attorneys avoid corruption facilitation—the ABA published the Voluntary Good Practices Guidance as a risk-based, anti-money laundering approach for the U.S. legal

127. MODEL RULES R. 1.0(i).

128. MODEL RULES R. 1.16(b). While it is true that there is no concrete obligation for a lawyer to withdraw representation after the fact, Rule 1.16(a) provides that a lawyer must withdraw representation preemptively, should it "result in violation of the rules of professional conduct or other law." MODEL RULES R. 1.16(a).

129. Int'l Bar Ass'n & the Secretariat of the Org. for Econ. Co-operation and Dev. [IBA & OECD], *Report of the Task Force on the Role of Lawyers and International Commercial Structures* 1–2 (May 2019), https://www.ibanet.org/Document/Default.aspx?DocumentUid=3b4fda81-d105-4c49-824c-2a3f6cb60bc2 [https://perma.cc/5SLB-H9F8] [hereinafter *Task Force Report*].

130. *Id*. at 1.

131. *Id*. at 4.

132. Fin. Action Task Force [FATF], *Guidance for a Risk-Based Approach for Legal Professionals* 18 (June 2019), https://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Legal-Professionals.pdf [https://perma.cc/2UVC-R7UE] [hereinafter *FATF Attorney Guidance*].

industry.[133] Many of the recommendations found in the Good Practices would help fulfill standards set forth in international standards—for example, it states "any time lawyers 'touch the money' they should satisfy themselves as to the bona fides of the sources and ownership of the funds in some manner and should inquire of any involved financial institution as to any CDD performed by such institution."[134] Certainly, these requirements would bolster the current ethical regulation of attorneys, helping institute the necessary client due diligence to ensure that legal professionals do not knowingly or unknowingly aid clients in corrupt acts. However, the FATF notes that, while the voluntary best practices guidelines are "good," there is no indication that lawyers comply with the guidelines, since they are unenforceable.[135] Because of this, there are no prosecutorial actions taken against attorneys who ignore or violate the Good Practices Guidance.[136] The voluntary nature of the Guidance further illustrates that the United States lags behind other jurisdictions, like the European Union, in combatting money laundering and corruption concealment.[137] Why would the ABA make such important rules voluntary? As one industry professional put it, "the bar has for many years stymied changes to ethics and law urged by the intergovernmental Financial Action Task Force in favor of an 'educational' approach against money laundering."[138] Why that is remains a topic of debate and speculation to be discussed later, though several legal professionals have suggested self-interested concerns are at play.[139] Unfortunately, the Global Witness investigation manifests the relative "worthlessness" of the ABA's Voluntary Good Practices Guidance for Lawyers in mitigating the U.S attorney's role in transnational corruption.[140]

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133. *See id*. at 6, 53; *see also* American Bar Association, ABA H.D. Res. 116 (2010) (adopted).

134. *Good Practices Guidance*, *supra* note 35, at 13.

135. *See FATF US MER*, *supra* note 30, at 123 ("It is also not clear that lawyers comply with the best practice guidelines as they are not enforceable.").

136. *Id*. at 149. (While there is some good (non-enforceable) guidance in place in relation to lawyers, there was no indication as to the level of compliance with the guidance and, as it is voluntary, there would be no remedial action taken against lawyers for non-compliance.").

137. Richard Malish, *Can US Lawyers be Trusted to Regulate Themselves?*, NICE ACTIMIZE (Apr. 14, 2017), https://www.niceactimize.com/blog/Can-US-lawyers-be-trusted-to-regulate-themselves-537 [https://perma.cc/2CE6-GNAB].

138. Michael Goldhaber, *When a Kleptocrat Comes Calling: Global Money Laundering and the ABA*, AM. LAW. (Mar. 16, 2016), https://www.law.com/almID/1202749826597/When-a-Kleptocrat-Comes-Calling-Global-Money-Laundering-and-the-ABA/?slreturn=20191010205741 [https://perma.cc/MQT8-2Q85].

139. Matthew Stephenson, *Why does the ABA Oppose Beneficial Ownership Transparency Reform?*, GLOB. ANTI-CORRUPTION BLOG (Feb. 6, 2018), https://globalanticorruptionblog.com/2018/02/06/why-does-the-american-bar-association-oppose-beneficial-ownership-transparency-reform/ [https://perma.cc/DXB2-VLFV].

140. Goldhaber, *supra* note 138.

II. POTENTIAL REMEDIES FOR ATTORNEY FACILITATION AND CONCEALMENT

The issue of U.S. lawyers facilitating and concealing international corruption would be best addressed by multiple remedies that simultaneously target both opaque beneficial ownership and insufficient oversight of attorneys as DNFBPs. By adopting the modern anti-money laundering standards promulgated by the FATF and OECD, as well as ethical standards of the IBA, the United States might reduce its role in the supply-side of global corruption. To implement these standards, the United States should look to codifying new rules on beneficial ownership and DNFBP client due diligence, as well as amending the *Model Rules of Professional Conduct* that regulate the legal industry's professionals.

A. ADOPTION OF INTERNATIONAL STANDARDS ON BENEFICIAL OWNERSHIP INFORMATION

The FATF's anti-money laundering guidelines outline some of the highest anti-corruption standards at the international level.[141] In adopting these standards, the United States might institute the provisions necessary to obtain accessible and reliable beneficial ownership information. As seen before, Recommendations 24 and 25 of the FATF address such measures to ensure the transparency and beneficial ownership of legal persons and arrangements.[142] If the United States were to fully implement Recommendations 24 and 25, it may take steps to ensure that accurate, current, and useful beneficial ownership information was gathered and available to all relevant law enforcement agencies. To do this, information should be collected at the federal level and comprise beneficial owner identification for *all* legal persons, including those made to hold properties.[143] Adopting these standards would also entail adopting a definition of "beneficial owner" in line with the FATF guidelines, which is more comprehensive and effective than the governing U.S. definition.[144] Together, codifying Recommendations 24 and 25 would target several of the United States' beneficial ownership information issues identified above, including the (1) weak definition of beneficial owner, (2) dearth of complete and accurate beneficial ownership information, (3) total anonymity of companies and other legal arrangements, (4) incongruent reporting obligations among the states, (5) difficulty of law enforcement investigating offshore arrangements, and (6) abuse of trusts to further obscure beneficial ownership.[145]

Effective implementation of Recommendations 24 and 25 can be seen today in several countries that have adopted the FATF. One illustrative example is Spain,

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141. Interview with Chady El-Khoury, Senior Counsel, Intl'l Monetary Fund [IMF], in Washington, D.C. (Nov. 5, 2019) (on file with author); *see generally FATF Recommendations*, *supra* note 46.

142. *FATF Recommendations*, *supra* note 46, at 20.

143. *See id.*; *FATF US MER*, *supra* note 30, at 37–38.

144. *FATF Recommendations*, *supra* note 46, at 113; *see also supra* Part I.A.1.

145. *See supra* Part I.A.1.

which uses multiple mechanisms to collect beneficial ownership information.[146] The FATF itself noted that "Spain's system for ensuring access to beneficial ownership information on legal persons is an example of a good practice," and that law enforcement in Spain has demonstrated the ability to "successfully investigate complex money laundering networks of legal persons, and can identify and prosecute the beneficial owners in such cases."[147] Beneficial ownership in Spain is centralized and quickly available to the relevant authorities through the "Single Computerised Index" and "Beneficial Ownership Database."[148] The Single Computerised Index contains reliable and accurate legal and beneficial ownership information that can be accessed by law enforcement agencies in real-time, while the Database builds upon the Index and aggregates all the information available on beneficial ownership and share transfers.[149] Implemented in 2004, the Index contains the names of beneficial owners of new Spanish companies and other companies that act before notaries, who are always responsible for identifying and recording the beneficial owner of a newly incorporated entity.[150] The Beneficial Ownership Database "offers two levels of information: (i) the beneficial ownership information obtained by the individual notary in the conduct of the normal [client due diligence] requirements . . ."; and (ii) "[f]or SLs . . . beneficial ownership information obtained through aggregating the information on" transfers of shares.[151] This due diligence by notaries is also complemented by other account ownership information in the notarial database, which helps the notaries verify that information gathered is correct.[152] The notaries additionally review a comprehensive list of risk indicators, and any transactions that include these indicators are reported to a central prevention body called the Órgano Centralizado de Prevención del Blanqueo ("OCP").[153] These obligations also apply to trusts in Spain, with Article 6 of Royal Decree 304/2014 requiring specified actors, such as trustees, "to identify and verify the identity of the settlor, the

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146. Fin. Action Task Force [FATF], *Anti-Money Laundering and Counter-Terrorist Financing Measures, Spain Mutual Evaluation Report* 117–18 (Dec. 2014) https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Spain-2014.pdf [https://perma.cc/E8XW-3JTP] [hereinafter *FATF Spain MER*].

147. *Id*. at 9.

148. *Id*. at 9, 121.

149. The "Single Computerised Index is seen by the LEAs as an effective way to facilitate the tracing of the beneficial owner(s) of complex, opaque networks of companies." *Id*. at 46, 121.

150. *Id*. at 94–95.

> Since notaries are required to be involved in these transfers, this information is always verified and updated. It includes the names of all natural persons who are beneficial owners through direct or indirect ownership of more than 25% of the shares, and of those who hold less than 25% but exercise control. Information on intermediary intervening parties is also available (through the record of any transfer of shares except those of SA that are not listed on the stock exchange).

Id. at 121.

151. *Id*. at 121.

152. *See id.*

153. *Id*. at 97.

trustees, the protector, the beneficiaries, and any other natural person who exercises ultimate effective control over express trusts or similar arrangements, even through a chain of control or ownership."[154] Due to these beneficial ownership information obligations, the FATF rates Spain as largely compliant with Recommendations 24 and 25.[155] The United States might look toward similar implementation of the FATF in considering amendments to its legal framework.

In the past, the United States Department of the Treasury has tested such implementation of FATF standards on a much smaller scale—in Manhattan and Miami, those who wished to purchase high-end real estate in "all-cash" transactions had been required to temporarily disclose their identities in 2016.[156] While no longer in effect, these "Geographic Targeting Orders" were a FinCEN risk-based approach to combating money laundering in real estate,[157] and the principles behind this approach should be expanded and standardized for the rest of the country.[158] While skeptics may still argue that identifying and tracing beneficial ownership information will remain persistently difficult and arduous—after all, the sheer amount of illicit money circling the globe is staggering[159]—the United States should, at the very least, take steps needed for codifying a collection system on par with the international community and other developed nations, such as Spain. Should the collection of beneficial ownership become mandatory in the United States, legal professionals will be less likely to wittingly or unwittingly aid corrupt actors from around the globe. With more contemporary laws, the United States will also become a less attractive destination for laundering illicit assets—minimizing its supply-side role. In all aspects, increasing the transparency of legal persons and arrangements in the United States is a crucial step in protecting the legal industry from involvement in the corruption lifecycle.

B. ADOPTION OF INTERNATIONAL STANDARDS ON DNFBP REGULATION

The United States should also institute FATF Recommendations on the guidance and oversight of DNFBPs. Even if the standards of Recommendations 24

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154. *Id.* at 118.

155. *Id.* at 117–18.

156. Press Release, U.S. Dept. of Treasury, Fin. Crimes Enf't Network, FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami, "Geographic Targeting Orders" Require Identification for High-End Cash Buyers (Jan. 13, 2016), https://www.fincen.gov/news_room/nr/pdf/20160113.pdf [https://perma.cc/4CVM-YSJU].

157. *Id.*

158. *See infra* Part II.D. The United States House of Representatives has recently passed H. R. 2513, the "Corporate Transparency Act," which aims to rectify beneficial ownership collection in the United States. The bill has since been referred to the Senate's Committee on Banking, Housing, and Urban Affairs, and whether it will pass the Senate remains unclear. Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019).

159. Matthew Taylor, *Helping U.S. Lawyers in the Fight Against International Corruption*, COUNCIL ON FOREIGN REL. (July 12, 2017), https://www.cfr.org/blog/helping-us-lawyers-fight-against-international-corruption [https://perma.cc/766P-RALR] ("[T]he law firm at the heart of the Panama Papers, Mossack Fonseca, alone was responsible for creating 214,000 offshore accounts, a huge haystack for investigators to dig through.").

and 25 were not implemented, enacting FATF Recommendations 22 and 23 would ensure that lawyers were collecting the beneficial ownership information of the companies and other arrangements they help create. Through DNFBP regulation, the legal industry may contribute to a more robust anti-money laundering framework, making up for shortcomings in other areas of the law. Most importantly, adopting Recommendations 22 and 23 would better dissuade U.S. attorneys from facilitating and concealing the proceeds of corruption from around the world.

In line with Recommendation 22, attorneys should perform customer due diligence when forming business relationships, carrying out transactions above 15,000 U.S. Dollars ("USD"), there are money laundering or terrorist financing ("ML/TF") concerns, or there are doubts about the accuracy of existing customer identification data.[160] Procedures undertaken for customer due diligence must include (1) "identifying the customer and verifying that customer's identity using reliable, independent source" information; (2) "identifying the beneficial owner, and taking reasonable measures to verify" the owner identity; (3) gathering information on the purpose of the business relationship; and (4) "conducting ongoing due diligence" on the transactions undertaken; furthermore, the heightened standards of CDD for PEPs should be followed as outlined in Recommendation 12.[161]

To comply with Recommendation 23, the FATF clarifies that lawyers are not obligated to file a suspicious transaction report ("STR") should they be "subject to professional secrecy or legal professional privilege."[162] However, interpretation of this recommendation distinguishes between lawyers who have a valid privilege claim and those that do not. The FATF suggests that privileged information would "normally cover information lawyers . . . [gather] (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings."[163] This suggests that, while advocate lawyers who are actively representing clients maintain a valid claim to professional privilege, those attorneys who simply perform transactional work may not be shielded from STR obligations.[164] Still, the Recommendations recognize that each country must determine for itself which matters fall under professional privilege in the context of suspicious transaction reports.[165]

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160. *FATF Recommendations*, *supra* note 46, at 12–14, 18-19.

161. *Id*. at 12–14.

162. *Id*. at 85.

163. *Id*.

164. *See id*. Certain jurisdictions have imposed anti-money laundering reporting obligations and due diligence requirements on attorneys "if relevant suspicious conduct is known to a lawyer." *See Task Force Report*, *supra* note 129, at 33. For example, anti-money laundering laws in Bosnia and Herzegovina, England and Wales, Poland, South Africa and Sweden all require attorneys to report suspicious transactions. *Id*. at 133 n.54.

165. *FATF Recommendations*, *supra* note 46, at 85.

As with the Recommendations on beneficial ownership information, Spain is an example of a country with DNFBP due diligence measures that are "largely compliant" with Recommendations 22 and "compliant" with 23.[166] Spain applies the same anti-money laundering requirements to both financial institutions and DNFBPs, including lawyers, and those requirements include all of the activities outlined in Recommendation 22 and seen above.[167] In fact, the FATF's MER of Spain found no deficiencies that relate to the customer due diligence regime for DNFBPs relating to either Recommendation 22 or 23,[168] instead noting that it comprehensively implements the CDD obligations of Recommendation 10[169] and the heightened scrutiny for PEPs in Recommendation 12.[170] To name a couple of examples, "[t]he identity of the participants must be verified before entering into the business relationship," and there is a "general requirement to understand the purpose and nature of the business relationship . . . ."[171] Additionally, DNFBPs are required to apply reasonable measures to determine whether the customer or beneficial owner is a PEP, and if necessary, implement the four heightened CDD measures for PEPs in Recommendation 12.[172] The FATF's MER does note that the Spanish system is not perfect, however, pointing out that lawyers convicted of money laundering offenses do not seem to suffer sufficient penalties and are thus inadequately deterred.[173] Additionally, industry awareness of money laundering risks is not fully adequate among Spanish lawyers, and the FATF recommends even more focused supervision of lawyers as a "sub-sector" within the DNFBPs.[174] Should the United States move forward in codifying CDD standards

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166. *FATF Spain MER*, *supra* note 146, at 90.

167. *Id*.

168. *Id*.

169. *See id*. at 165–68.

> Financial institutions are required to identify the beneficial owner and take appropriate steps to verify their identity and status before entering a relationship or executing an occasional transaction. This includes a requirement to gather the information required to find out the identity of the persons on whose behalf the client is acting. The act defines the "beneficial owner" in a manner which is compatible with the FATF's definition of beneficial ownership.

Id. at 166. For additional CDD measures in Spain, see *id*. at 165–68.

170. *Id*. at 169–70.

171. *Id*. at 166–67. Additionally, financial institutions, and thus DNFBPs, are "not permitted to enter into a business relationship or execute a transaction, in cases where the required CDD measures cannot be applied." *Id*. at 90, 168.

172. *Id*. at 169–70."Spain meets all four criteria of R.12. R.12 *is rated compliant*." *Id*. at 177.

> Spain defines three categories of PEPs: persons who perform or have performed prominent public functions, through an elective office, appointment or investiture, in either: (a) an EU Member State or third country; (b) the Spanish State (or an international organisation); or (c) Spanish Autonomous Communities (or a Spanish trade union, employers' organisation or political party).

Id. at 169.

173. "There are numerous cases where disbarment from exercising a profession for five years have been utilised against lawyers, which is the maximum disbarment period allowable for these professions." *Id*. at 56, 65.

174. *Id*. at 12.

for its DNFBPs, particularly its lawyers, it might learn from the Spanish framework's strengths and deficiencies. While full implementation of Recommendations 22 and 23 might not occur all at once, codifying basic DNFBP obligations for customer due diligence and requiring STRs in certain cases would go a long way in modernizing anti-corruption in the United States and bolstering the capabilities of law enforcement. This, in addition to heightened industry standards from the ABA, could finally place appropriate responsibility on U.S. lawyers for the transactions they facilitate.

C. AMENDMENTS TO THE ABA *MODEL RULES OF PROFESSIONAL CONDUCT*

As seen above, the ABA *Model Rules of Professional Conduct* fall short in addressing money laundering concerns.[175] To mitigate these shortcomings, the ABA should amend the *Model Rules* to require customer due diligence, as well as mandatory withdrawal and submittal of STRs when client conduct likely becomes illegal. Such requirements have already been adopted and endorsed by the IBA and OECD, and the ABA should consider incorporating some of these international standards into its own *Model Rules*.[176]

First, the ABA should amend Model Rule 1.2(d) to include due diligence requirements. Presently, the Rule only precludes lawyers from aiding clients if the lawyer has actual knowledge of illegal client conduct, yet there is no due diligence for lawyers to gather that relevant information.[177] The IBA-OECD Task Force has addressed this issue in its Principles 1 and 3, stating that "[a] lawyer should not facilitate illegal conduct, and should undertake the necessary due diligence to avoid doing so inadvertently,"[178] including identifying and verifying a client, identifying the ultimate beneficiary of a transaction, and identifying the origin of funds.[179] By implementing a due diligence standard, attorneys will have less leeway in claiming ignorance should they facilitate or conceal their client's corrupt acts. Presently, lawyers are not explicitly required to ask the questions that would reveal a client's illegal conduct, but client due diligence, in line with IBA and OECD requirements, can help constrict this loophole.

Second, ABA Model Rule 1.16(b) should not permit a lawyer to continue representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent" or "if the client has used the lawyer's services to perpetrate a crime or fraud."[180] Instead, withdrawal should be mandatory in those situations. In Principle 4, the Task Force supports this, stating:

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175. *See supra* Part I.B.
176. *See generally Task Force Report*, *supra* note 129.
177. *See* MODEL RULES R. 1.2(d).
178. *Task Force Report*, *supra* 129, at 3.
179. *Id.* at 4.
180. MODEL RULES R. 1.16(b).

> Where the conduct of a client is, may be, or becomes illegal . . . a lawyer should advise the client of the consequences of the conduct and recommend that the client pursues alternative solutions. If the client persists in the conduct, the lawyer should give due and proper consideration to ceasing to act, and terminate the retainer.[181]

By incorporating IBA language into Model Rule 1.16(b), the ABA can raise the standard from voluntary to mandatory withdrawal of representation in the face of future or perpetrated illegal conduct by the client. This is a stronger, brighter-line standard that could better prevent lawyers from condoning, if not facilitating the corrupt acts of potential clients.

Finally, the Voluntary Good Practices Guidance, which aims to combat money laundering and terrorist financing facilitation within the legal industry, should become mandatory guidelines to aid lawyers in fulfilling the *Model Rules*. For example, the Good Practices, which identify the red flags that suggest illicit client conduct, recommend withdrawal if the lawyer remains skeptical after asking the appropriate questions.[182] Together, mandatory Good Practices Guidance and amended *Model Rules* would raise the industry standards of anti-money laundering for attorneys in the United States and better prevent their facilitation of transnational corruption. Certainly, such amendments might make lawyers—such as those featured in Global Witness's investigation—more conscientious of their clients' objectives, in turn thwarting the goals of corrupt actors like the fictitious African minister.[183]

D. THE CORPORATE TRANSPARENCY ACT AND PUSHBACK FROM THE AMERICAN BAR ASSOCIATION

In light of the anti-facilitation and concealment shortcomings in the U.S. anti-corruption framework, a recent push for greater anti-money laundering controls has led to the introduction of related legislation in Congress.[184] One corporate and business law professional points out that this impetus is primarily thanks to a combination of terrorism and money laundering concerns mixed with general worries about broader corruption.[185] Scandals such as the Panama and Paradise Papers, as well as the Global Witness investigation, have helped bring greater

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181. *Task Force Report*, *supra* note 129, at 4.

182. *See* ABA H.D. Res. 116 (2010) (adopted); *Good Practices Guidance*, *supra* note 35, at 37.

183. Kraft, *supra* note 29.

184. Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019).

> A[n] A[ct] [t]o ensure that persons who form corporations or limited liability companies in the United States disclose the beneficial owners . . . in order to prevent wrongdoers from exploiting United States corporations and limited liability companies for criminal gain, to assist law enforcement in detecting, preventing, and punishing terrorism, money laundering, and other misconduct . . . .

Id.

185. Email from Robert Thompson, Jr., Professor of Bus. Law, Georgetown Univ. Law Ctr., to author (Nov. 26, 2019, 11:10 EST) (on file with author).

public attention to the issue.[186] Perhaps more important, however, is the support from law enforcement agencies like FinCEN that are advocating for greater transparency.[187] Unfortunately, many efforts to pass legislation targeting opaque beneficial ownership and related problems are hindered by the governmental structure of the United States.[188] Because corporate law resides at the state level, greater transparency in corporate ownership "would require federalization of a traditionally state area or passage by the legislatures" in all fifty states.[189] Still, even legislation at the federal level "lacks an easy home," and that while nesting this issue within the Internal Revenue Service "seems most likely," they also "seem reluctant to take it on."[190]

That being said, the House of Representatives passed anti-money laundering legislation—the Corporate Transparency Act ("H.R. 2513")—on October 22, 2019, that would require companies and their creators to disclose information about the businesses' beneficial owners.[191] This bill, sponsored by Representative Carolyn Maloney from New York, has gotten further than any previously proposed legislation on corporate transparency—although it is still well short of enactment.[192] This bipartisan proposal, which benefits from the support of a broad coalition including "anticorruption and tax justice NGOs, law enforcement groups, banking and financial services, and parts of the business community," has the potential to end the creation of anonymous companies, yet there still exists the risk of it dying.[193]

Troublingly, one of the largest opponents to the proposed legislation is the ABA.[194] In a letter from President Robert Carlson to the House Committee on Financial Services, the ABA asserts several claims in opposition to the Corporate Transparency Act, yet their arguments fall flat on multiple grounds.[195] First, the letter claims that the increased costs of compliance would be overly arduous for small businesses and their lawyers, requiring "small businesses with twenty or

186. *Id*.
187. *Id*.
188. *Id*.
189. *Id*.
190. *Id*.
191. Corporate Transparency Act of 2019, *supra* note 184, at 1.
192. *Id*.; Email from Robert Thompson, Jr., *supra* note 185.
193. Matthew Stephenson, *Will 2019 Be the Year the US Finally Passes Anonymous Company Reform? Not If the ABA Gets Its Way*, GLOB. ANTI-CORRUPTION BLOG (Jan. 15, 2019), https://globalanticorruptionblog.com/2019/01/15/will-2019-be-the-year-the-us-finally-passes-anonymous-company-reform-not-if-the-aba-gets-its-way/ [https://perma.cc/9CSD-DDUS]; *see* Am. Bankers Assoc., Opinion Letter on H.R. 2513, the Corporate Transparency Act of 2019 as amended (Oct. 21, 2019); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2513 – CORPORATE TRANSPARENCY ACT OF 2019, AS AMENDED BY MANAGER'S AMENDMENT (Oct. 22, 2019).
194. *See* Letter from Robert M. Carlson, President, Am. Bar Ass'n, to Representative Maxine Waters, Chairwoman, House Comm. on Fin. Serv., Re: Concerns Regarding the Amendment in the Nature of a Substitute to H.R. 2513, the "Corporate Transparency Act of 2019." (May 6, 2019) ("On behalf of the American Bar Association (ABA), I write to express our concerns . . . .").
195. *Id*.; *see also* Stephenson, *supra* note 193.

fewer employees . . . to disclose detailed information about their beneficial owners," and that the "[m]any lawyers and law firms that help clients to form companies could also be subject to these burdensome disclosure and recordkeeping requirements."[196] This claim remains unsubstantiated by evidence in the face of the bill's relatively basic identity-verification requirements.[197] As Matthew Stephenson points out, "costs of compliance would only be high if the lawyer really had no idea who [their] actual client was . . . and in that case, we probably don't want these entities formed in the first place."[198] Second, the ABA suggests that "the legislation would not be effective in fighting money laundering, terrorist financing, or other crimes,"[199] yet such a statement is unsupported by any explanation and instead runs counter to the views of countless law enforcement and national security experts.[200] Third, the letter claims that "requirements in the substitute bill are unnecessary and duplicative" in light of the federal government's existing anti-money laundering framework.[201] As seen previously, the current U. S. provisions are insufficient to target the facilitation and concealment of corruption.[202] Furthermore, while the ABA claims "both FinCEN's new CDD rule and the IRS' SS-4 Form provide the federal government with extensive beneficial ownership information," the information that FinCEN collects is not reported to the government, and the SS-4 form does not require identification of the beneficial owner.[203]

Previous iterations of H.R. 2513 also required formation agents, such as lawyers who help create companies, to identify and verify information on the beneficial ownership of their clients.[204] Now, the Corporate Transparency Act does not even mention lawyers, but the ABA has claimed that such a requirement would have violated the attorney-client privilege. This is patently false—just because the law would require companies to provide this information through a formation agent, who might be a lawyer, does not make that information a client secret that falls under the privilege.[205] The ABA has also claimed that placing reporting requirements on attorneys conflicts with the confidentiality privilege.[206] While

196. Letter from Robert M. Carlson, *supra* note 194.

197. *See* Corporate Transparency Act of 2019, *supra* note 184.

198. Stephenson, *supra* note 193.

199. Letter from Robert M. Carlson, *supra* note 194.

200. *See* Greg Baer, *American Bar Association Opposes Anti-Money Laundering Efforts. Objection!*, BANK POL'Y INST. (May 14, 2019), https://bpi.com/american-bar-association-opposes-anti-money-laundering-efforts-objection/ [https://perma.cc/P9NZ-XUBM]("H.R. 2513 is strongly supported by a wide and diverse variety of groups, including the Fraternal Order of Police, the FACT Coalition, the National District Attorneys Association, Delaware Secretary of State Jeffrey W. Bullock, and the Main Street Alliance (a small business advocacy group), to name a few.").

201. Letter from Robert M. Carlson, *supra* note 194.

202. *See supra* Part I.

203. Letter from Robert M. Carlson, *supra* note 194; Baer, *supra* note 200.

204. Stephenson, *supra* note 193.

205. As Matthew Stevenson puts it: "This is just stupid." *Id.*

206. *Id.*

perhaps more plausible, this argument also fails, since the bill had exempted lawyers from this obligation—identity verification and reporting could be outsourced, meaning that lawyers who ultimately would report to FinCEN would know nothing about the client save for the identity.[207]

Still, even after the latest iterations of H.R. 2513 dropped obligations on formation agents, the ABA still remains opposed. One can only speculate the ABA's true objections given the implausible, weak arguments they put forth in the Carlson letter, but as multiple industry professionals suggest, "self-serving" motives seem largely at play.[208] The ABA itself is a complex, "bureaucratic web," and while composed of many parts, the Bar maintains an official, uniform position regarding the legislation.[209] Over the past year, the ABA's Corporate Laws Committee, in conjunction with the Unincorporated Entities/LLC Committee, traversed multiple steps to propose a resolution before the ABA's House of Delegates to change this existing policy.[210] However, at the last moment, the International Law Section opposed the resolution, and so the existing policy stands.[211] Still, with any hope, Congress will recognize the importance of this much-needed legislation regardless of the official position and pushback from the ABA.

CONCLUSION

The United States has historically led many global anti-corruption efforts, helping draft international guidelines for anti-money laundering and terrorist financing and implementing effective controls at home. However, as contemporary scandals and investigations continue to enter the public domain, significant shortcomings in the U.S. anti-corruption framework have become increasingly apparent. As revealed by Global Witness, one such weakness is that attorneys are vulnerable to facilitating and concealing transnational corruption, particularly through the creation of anonymously owned "shell" companies. Because anonymous companies remain a vehicle of choice for those wishing to conceal their assets, mitigating their abuse and the complicit role of U.S. lawyers remains a crucial step in identifying the proceeds of corrupt activity. Unfortunately, the United States has fallen short in addressing the exploitation of anonymous companies, illustrated by insufficient laws and weak legal industry standards. Should the United States wish to improve its anti-corruption framework, it must codify laws for the collection of beneficial ownership information and the oversight of DNFBPs, as well as amend the attorney's ethical obligations under the ABA *Model Rules of Professional Conduct*. To do this, anti-corruption and anti-money

207. *Id.*

208. *See id.*

209. Email from Robert Thompson, *supra* note 185; Letter from Robert M. Carlson, *supra* note 194.

210. Email from Robert Thompson, *supra* note 185.

211. Professor Thompson believes that the International Law Section may have opposed the resolution "in part . . . because it didn't go far enough, even though it went beyond the existing policy." *Id.*

laundering standards from international bodies can serve as effective guidelines for the United States to implement, adoption of which could also improve the United States' credibility in the global anti-corruption community. Ultimately, the future reputation of the U.S. legal industry remains in the hands of the country and the lawyers themselves. Should the status quo continue, some attorneys will remain complicit facilitators and concealers of others' corruption, likely at the expense of the legal industry's repute overall. The time has come for the United States to adopt modern international anti-money laundering standards that may reverse this decay among legal professionals and reaffirm the United States' role as a leader in the global fight against corruption.