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How Countries Seek to Strengthen Anti-Money Laundering Laws in Response to the Panama Papers, and the Ethical Implications of Incentivizing Whistleblowers

Carmina Franchesca S. Del Mundo

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How Countries Seek to Strengthen Anti-Money Laundering Laws in Response to the Panama Papers, and the Ethical Implications of Incentivizing Whistleblowers

*Carmina Franchesca S. Del Mundo**

Abstract:

The Panama Papers is currently the world's largest whistleblower case that involved 11.5 million leaked documents and over 214,000 offshore entities. It all linked back to one Panamanian law firm, Mossack Fonseca. In 2016, over 400 investigative journalists collaboratively and simultaneously published stories that exposed the money laundering and tax-evading schemes committed by the rich and powerful. This included political figures and heads of states, celebrities, sports figures, criminal organizations, and terrorist groups.

This article aims to dissect the innerworkings of Mossack Fonseca's asset-shielding strategy and investigate how the Panamanian law firm was able to circumvent the tax and anti-money laundering laws of over 50 countries. We will also examine the global responses to the Panama Papers, the proposed reforms and strategies, and the obstacles to moving forward. Finally, this article explores the ethical duties of lawyers, the significance of attorney-client privilege, and the implications of monetarily incentivizing whistleblowers.

* J.D., Northwestern Pritzker School of Law, 2020; B.A., University of Southern California, 2012. I would like to thank the editorial staff of Northwestern Journal of International Law and Business for their contribution to this article. I would like to also thank my parents, Mike and Carol Del Mundo, without whom none of this would have been possible.

TABLE OF CONTENTS

I. Introduction.....	89
II. The Panama Papers: The Global Scale Of Corruption	90
A. Who were the True Clients?	91
B. How It Worked	92
C. The Aftermath.....	94
III. Global Responses To The Panama Papers: Proposed Reforms & Objections	95
A. The Need for Transparency	95
1. Panama	96
2. The United States	98
3. The European Union	103
4. Germany	105
IV. Ethical Implications Of Whistleblowing	107
A. Incentivizing Whistleblowers	107
B. Ethical Duties of Lawyers	109
V. Who Pays The Price?	112
VI. Challenges To Moving Forward	113
A. The False Positives	113
B. “Know Your Customer” & Know Your Employees	114
C. Formation of Shell Companies	115
D. Transnational Cooperation & Information Sharing	116
E. Captive Entities.....	118
VII. Conclusion.....	122

I. INTRODUCTION

The Panama Papers refer to the 11.5 million documents that an anonymous source leaked to journalists in 2015. It exposed the fraudulent and criminal activities committed by political figures, celebrities, sports figures, criminal organizations, and terrorist groups.¹ It is currently the world's largest whistleblower case, and as Edward Snowden² describes it, "the biggest leak in the history of data journalism."³ The documents revealed financial records, email chains, and corporate filings associated with more than 214,000 offshore holdings and tax havens, which all linked back to one Panamanian law firm, Mossack Fonseca.⁴

It all started when journalist Bastian Obermayer of Germany's *Süddeutsche Zeitung*⁵ received a message from "John Doe," the anonymous source. At first, the story was going to be handled by only Bastian Obermayer and Frederik Obermaier of *Süddeutsche Zeitung*.⁶ However, they soon discovered that there were thousands of shell companies and over forty years of records detailing how these offshore tax havens operated under the radar.⁷ Therefore, the two journalists reached out to Gerard Ryle, the director of the International Consortium of Investigative Journalists (ICIJ), and as they delved deeper into the sea of leaked documents, it was clear that they needed to expand their team.⁸

About 400 journalists from over eighty countries secretly collaborated

¹ Luke Harding, *Foreword* to BASTIAN OBERMAYER & FREDERIK OBERMAIER, *THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH & POWERFUL HIDE THEIR MONEY*, at vii, viii (2016).

² Edward Snowden, a former National Security Agency (NSA) employee, leaked classified information to journalists in 2013 regarding the U.S. government's global surveillance operations, which consisted of surveillance and storage of communications data of anyone within the United States or abroad. *See generally* JOURNALISM AFTER SNOWDEN: THE FUTURE OF THE FREE PRESS IN THE SURVEILLANCE STATE (Emily Bell, Taylor Owen, Smitha Khorana & Jennifer Henrichsen eds., 2017).

³ *See* front page of OBERMAYER, *supra* note 1.

⁴ Harding, *supra* note 1, at viii.

⁵ *Süddeutsche Zeitung* (translates to "South German Newspaper") is one of Germany's largest daily newspapers. It won numerous awards for its investigative journalism and is known to have spearheaded the Panama Papers investigation.

⁶ OBERMAYER, *supra* note 1, at 10; note that Obermayer and Obermaier are not at all related.

⁷ Gerard Ryle, *How the Panama Papers Journalists Broke the Biggest Leak in History*, TED.COM: TEDSUMMIT (June 2016), https://www.ted.com/talks/gerard_ryle_how_the_panama_papers_journalists_broke_the_biggest_leak_in_history?language=en#t-776082.

⁸ OBERMAYER, *supra* note 1, at 24. The International Club of Investigative Journalists (ICIJ) is an initiative under the Center for Public Integrity (CPI) that encourages journalists to share investigative material with each other when it is of international relevance. *See generally* INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/about/> (last visited Sept. 7, 2019).

and investigated the millions of leaked documents for over a year.⁹ They agreed to simultaneously publish the story and expose the global pattern of corruption and criminal activity on April 3, 2016.¹⁰ To protect the source's identity, the 400 journalists had agreed not to give the public access to the entire database of leaked documents. The Panama Papers "spawned the biggest journalism collaboration in history . . . [journalists were] working shoulder to shoulder, sharing information, but telling no one."¹¹ The journalists called it the "Panama Papers" as a "conscious echo of the Pentagon Papers," which were volumes of top-secret documents leaked by Daniel Ellsberg in 1971 that "lifted the lid on the [United States (U.S.)] War in Vietnam."¹²

In response to the Panama Papers, numerous domestic and international jurisdictions have looked to strengthening their laws to regulate the criminal activities of tax evasion and money laundering. However, in seeking to address this global issue, it seems that the call for transparency and incentivizing whistleblowers could come at the expense of preserving attorney-client privilege. This paper will compare the challenges that many countries face in reforming Anti-Money Laundering (AML) laws after the Panama Papers, as well as analyze the implications that these proposed reforms have on legal ethics.

II. THE PANAMA PAPERS: THE GLOBAL SCALE OF CORRUPTION

Mossack Fonseca,¹³ a Panamanian-based law firm with over forty offices worldwide, became a "one-stop shop for all the asset-shielding needs of the rich and powerful."¹⁴ Its client-billings exceeded \$42 million, and a majority of its clients sought to evade taxes and conceal their financial activities using offshore shell companies.¹⁵ The millions of leaked documents linked back to 500 banks from all over the world, dozens of dictators and heads of states, families of political figures and public officials, celebrities, and even terrorist organizations.¹⁶ The Panama Papers unearthed the tax-evasion tactics of the super wealthy—revealing how,

⁹ Harding, *supra* note 1, at ix.

¹⁰ *Id.*

¹¹ Ryle, *supra* note 7; *see also* OBERMAYER *supra* note 1, at 24.

¹² Harding, *supra* note 1, at viii-ix.

¹³ Mossack Fonseca was founded in 1986 by Jurgen Mossack, a German who grew up and practiced law in Panama, and Ramón Fonseca, a Panamanian lawyer, politician and author. *See generally* OBERMAYER *supra* note 1, at 25-31.

¹⁴ Joe Mont, *Inside the Panama Papers*, 13 COMPLIANCE WEEK 22, 24 (2016).

¹⁵ Will Fitzgibbon, *Offshore Secrecy: Panama Papers Law Firm Mossack Fonseca Closes its Doors*, THE INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Mar. 14, 2018), <https://www.icij.org/investigations/panama-papers/panama-papers-law-firm-mossack-fonseca-closes-doors>; *see also* Harding, *supra* note 1, at, vii.

¹⁶ Mont, *supra* note 14, at 24.

through Mossack Fonseca, billions of dollars were “earned from arms, drug and blood-diamond trafficking, and other illegal business[es].”¹⁷

A. Who were the True Clients?

A majority of Mossack Fonseca’s clients who were involved in fraudulent activities and money laundering were politicians and heads of states. The list includes:

[T]he prime ministers of Iceland¹⁸ and Pakistan; the king of Saudi Arabia; Ukraine President Petro Poroshenko; \$2 billion in transactions connected to associates of Russian President Vladimir Putin; and offshore companies linked to the family of Xi Jinping, general secretary of China’s Communist Party. In Brazil, [Mossack Fonseca was] entangled in “Operation Car Wash,”¹⁹ a bribery and money laundering scandal that [involved] former president Luiz Inacio Lula da Silva²⁰ . . . and President Dilma Rousseff.²¹

Additionally, the then Argentinian President Cristina Kirschner was involved with 123 shell companies to hide the \$65 million she had smuggled out of the country.²² Journalists also found links to FIFA, the UEFA, and their respective presidents.²³ There were connections to “African dictators, Central American drug barons, convicted sex

¹⁷ OBERMAYER, *supra* note 1, at 9.

¹⁸ The Prime Minister of Iceland was named “Businessman of the Year” before his crimes came to surface; OBERMAYER, *supra* note 1, at 315.

¹⁹ See, e.g., David Segal, *Petrobras Oil Scandal Leaves Brazilians Lamenting a Lost Dream*, N.Y. TIMES (Aug. 7, 2015), <https://www.nytimes.com/2015/08/09/business/international/effects-of-petrobras-scandal-leave-brazilians-lamenting-a-lost-dream.html> (This involved bribe payments to politicians through the gifting of Rolex watches, yachts, and helicopters by construction and service-work companies that wanted to be contracted with the state-run oil company, Petrobras).

²⁰ Former President Lula da Silva negotiated his surrender with the police and is now serving a 12-year prison sentence for corruption and money laundering; see *Law and Justice in Brazil: Lula Goes to Jail*, THE ECONOMIST (Apr. 8, 2018), <https://www.economist.com/the-americas/2018/04/08/lula-goes-to-jail>.

²¹ Mont, *supra* note 14, at 24. Note that President Dilma Rousseff was impeached in August 2016.

²² OBERMAYER, *supra* note 1, at 4. Many of these shell companies were actually found in the United States—in the tax haven state of Nevada; see also J. Weston Phippen, *Nevada, a Tax Haven for Only \$174: The Panama Papers Show How the U.S. State Has Become a Favored Destination Rivaling the Cayman Islands and Switzerland*, THE ATLANTIC (Apr. 6, 2016), <https://www.theatlantic.com/national/archive/2016/04/panama-papers-nevada/476994/> (In Nevada, there are “minimal reporting and disclosing requirements” and “stockholders are not public record[s];” “The state offers tax benefits [and] also removes much of the liability from the owner in case of a lawsuit.”).

²³ OBERMAYER, *supra* note 1, at 315. FIFA stands for Fédération Internationale de Football Association (French for “International Federation of Association Football”), which is an organization that is known for major international football tournaments, such as the World Cup. UEFA stands for the Union of European Football Associations.

offenders,”²⁴ mafia organizations, Hezbollah, and Al Qaeda; each of these entities were found to be associated with an offshore company that Mossack Fonseca helped establish.²⁵

B. How It Worked

With 140 politicians involved, including heads of state and elected officials from more than fifty countries,²⁶ how did Mossack Fonseca keep these fraudulent activities under the radar for many years? The key was to create a complicated web of relationships among all parties involved to camouflage any link between the law firm and the true beneficiaries. Mossack Fonseca never worked directly with the true beneficial owners. Instead, the “actual clients” on record were these intermediaries who were often accountants, asset managers, bank representatives, or other lawyers.²⁷ They were the ones ordering the “products,” paying the bills, and communicating with Mossack Fonseca on behalf of the true beneficiaries.²⁸

It starts with an intermediary contacting Mossack Fonseca to discuss what the true owner was looking for, which was usually an offshore company.²⁹ Then, the firm offers offshore companies from a variety of jurisdictions, “most frequently in the British Virgin Islands[,] Panama, . . . the Bahamas, Bermuda, Samoa, Uruguay, Hong Kong, the [U.S.] tax havens³⁰ of Nevada, Wyoming[,] Delaware and . . . Florida and the

²⁴ *Id.* at 59.

²⁵ *Id.* at 59, 315.

²⁶ *Panama Papers: The Power Players*, THE INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/panama-papers/the-power-players/> (last visited Nov. 20, 2018).

²⁷ Harding, *supra* note 1, at viii.

²⁸ OBERMAYER, *supra* note 1, at 12-13.

²⁹ *Id.*

³⁰ In the United States, the Bank Secrecy Act (BSA) was passed to help the Financial Crimes Enforcement Network (FinCEN) and the Internal Revenue Service (IRS) access bank records and facilitate investigations for money laundering. However, detecting and investigating money laundering activities becomes a challenge when (1) in some states, LLCs are not required to disclose the true beneficial owners, and (2) foreign sources of income are not subject to U.S. taxes.

See Peter D. Hardy, Scott Michel and Fred Murray, *Is the United States Still a Tax Haven? The Government Acts on Tax Compliance and Money Laundering Risks*, J. of Tax Prac. & Proc. 25, 26 (June-July 2016) (“[T]he States of Nevada, Wyoming and Delaware, . . . allow for the quick creation of limited liability companies (LLCs) without identifying the true beneficial owners”). In the United States, incorporation is a state matter, not a federal issue.

Furthermore, according to IRS.gov, “foreign [sources of] income received by a nonresident alien is not subject to U.S. taxation.” Therefore, money earned outside the United States are not taxed. See also, Samuel Brunson, *The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule*, 5 COLUM. J. OF LAW 170, 178 (2016) (“For more than ninety years, nonresident aliens and foreign corporations have owed no U.S. tax on interest they

Netherlands.”³¹ An offshore company is then sold to the intermediary from nearly fifty different offices worldwide.³² As Obermayer explains it,

A standard shell company costs the seller next to nothing and the formalities are quickly dispatched. The buyer has his company in a click of the fingers for only a few hundred [U.S.] dollars and can dispose of it [quickly] and easily once it has served its purpose. Also, no one will ever find out whom it belonged, which is ideal for dodgy dealings.³³

To ensure that there was a “protective screen” around the identities of the true beneficiaries/owners, Mossack Fonseca would hire or “nominate” individuals to act as “directors”³⁴ of these new offshore companies. Their job was to act as the true owners and sign all the necessary legal documents.³⁵

In reality, these “Nominee Directors” were only following orders from Mossack Fonseca and the true owners of the company; they did not benefit much from their role.³⁶ In fact, “they are the exploited underclass of the offshore world.”³⁷ Many of them were working-class citizens who did not even understand the documents that they were signing. David Cameron’s late father, Ian, who had an offshore fund connected to Mossack Fonseca, “hired a small army of Bahamas residents to sign paperwork, including a part-time Bishop.”³⁸

Another example is a 55-year-old Filipina housekeeper, Nesita Manceau, who did everything required from an actual corporate director.³⁹ There also was Leticia Montoya Moran, a 63-year-old working-class Panamanian who had a monthly salary of only \$900, yet had sat as a “corporate officer” and on boards of 10,969 companies.⁴⁰ When confronted,

earn on bank deposits in U.S. banks. As a result, nonresidents hold hundreds of billions of dollars in U.S. bank deposits. In addition, nonresident aliens and foreign corporations who receive U.S.-source ‘portfolio interest’ owe no taxes on that interest, even though U.S. persons holding the same securities would owe taxes on the interest.”).

³¹ OBERMAYER, *supra* note 1, at 12-13.

³² *Id.*

³³ *Id.* at 14.

³⁴ Also known as “Nominee Directors”. See OBERMAYER, *supra* note 1, at 14-15.

³⁵ OBERMAYER, *supra* note 1, at 14-15.

³⁶ *Id.*; see also Tim Johnson, *Did this Panama Papers Housekeeper Really Direct a North Korean Arms Deal?*, McCLATCHY DC BUREAU (May 10, 2016 at 10:18 AM), <https://www.mcclatchydc.com/news/nation-world/national/article76635047.html>.

³⁷ OBERMAYER, *supra* note 1, at 324.

³⁸ Harding, *supra* note 1, at viii; see also Juliette Garside, *Fund Run by David Cameron’s Father Avoided Paying Tax in Britain*, THE GUARDIAN (Apr. 4, 2016), <https://www.theguardian.com/news/2016/apr/04/panama-papers-david-cameron-father-tax-bahamas>.

³⁹ Johnson, *supra* note 36.

⁴⁰ OBERMAYER, *supra* note 1, at 324.

Montoya admits, “I have no idea what the companies are for, who they are sold to, or what exactly they do.”⁴¹ As Jack Blum⁴² puts it, “[even] if you waterboard [these Nominee Directors], they wouldn’t come up with the name of the beneficial owner because they don’t know.”⁴³

An example of this structure is Sergei Roldugin’s⁴⁴ offshore company. A Rossiya Bank representative held the power of attorney to conduct business on Roldugin’s behalf and was the point of contact for a Zurich-based law firm.⁴⁵ This Zurich-based law firm was an intermediary that relayed the true owner’s (Roldugin’s) wishes to a Mossack Fonseca subsidiary in Geneva.⁴⁶ Through this complex web of relationships, Mossack Fonseca therefore only needed to communicate with its Geneva subsidiary. This structure is similar to the telephone game⁴⁷ children play — effectively concealing the true identity of the beneficiary and owner.⁴⁸

C. *The Aftermath*

Mossack Fonseca stated, in response to the leak, that it “merely help[ed] incorporate companies” and that it had “conduct[ed] a thorough due-diligence process” of every client it agreed to work with.⁴⁹ It was not until ten months after the leak that the Panamanian police arrested Jurgen Mossack and Ramon Fonseca.⁵⁰ Although both faced money laundering charges linked to the Petrobras bribery scandal, they both were released on bail only a few months after their arrest.⁵¹ In March 2018, Mossack Fonseca released a statement that it was to close all of its remaining offices due to the “reputational deterioration” and “irreparable damage” caused by the

⁴¹ *Id.*

⁴² Jack Blum is a Washington D.C. lawyer who investigated offshore corporations and money laundering schemes for decades.

⁴³ Johnson, *supra* note 36.

⁴⁴ Sergei Roldugin is a famous cellist, a godfather to the Russian President’s eldest daughter, and Vladimir Putin’s best friend. He owned “a small stake” in Rossiya Bank, which is private bank in St. Petersburg; *see* OBERMAYER, *supra* note 1, at 7-19.

⁴⁵ OBERMAYER, *supra* note 1, at 20.

⁴⁶ *Id.*

⁴⁷ The Telephone Game is where players form a line and pass down a message from one end to the other by whispering the message to the player in front of them. The first player comes up with a message, which is then whispered to the ear of the second player, then the second player passes the same message to the third player, and so on—all until it reaches the final player.

⁴⁸ OBERMAYER, *supra* note 1, at 20.

⁴⁹ Richard L. Cassin, *Mossack Fonseca to Close Doors at End of Month*, THE FCPA BLOG (Mar. 16, 2018 at 8:22 AM), <http://www.fcablog.com/blog/2018/3/16/mossack-fonseca-to-close-doors-at-end-of-month.html>; *see also* *Due Diligence and “Know your Customer,”* MOSSACK FONSECA, <http://mossfonmedia.com/> (last visited Nov. 19, 2018).

⁵⁰ Fitzgibbon, *supra* note 15.

⁵¹ *Id.*

media.⁵²

After the Panama Papers were released, and all the fraudulent activities were disclosed around the world, the public began pressuring their own governments to act. Several public officials eventually stepped down. Several governments around the world conducted their own investigations, which resulted in over \$700 million in back taxes and fines—bringing money back onshore.⁵³ Many have also tried to strengthen their anti-money-laundering laws. However, while these attempts may be seen as a step forward, some reforms proposed in response to the Panama Papers have not been successful or effective.

III. GLOBAL RESPONSES TO THE PANAMA PAPERS: PROPOSED REFORMS & OBJECTIONS

In response to the Panama Papers, numerous domestic and international jurisdictions looked to strengthening their laws to regulate the criminal activity of money laundering. The necessity to address this issue stems from the fact that offshore shell companies are not only being used by the super-wealthy tax evaders, but also by criminal organizations and terrorist groups.⁵⁴ On the other hand, there are concerns that these types of public disclosures could not only create national security issues and cause political instability, but could also impact a client's willingness to rely on attorney-client privilege.⁵⁵

A. *The Need for Transparency*

Transparency International⁵⁶ calls for public registers of all beneficial owners to restrict corrupt individuals from using secret trusts and companies to hide illicit wealth.⁵⁷ As Jose Ugaz, Chair of Transparency International, stated, “world leaders must come together and ban the secret companies that fuel grand corruption and allow the corrupt to benefit from

⁵² *Id.*

⁵³ Cecile S. Gallego, *Panama Papers Investigations Bring More Than \$700 Million Back Onshore*, THE INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (June 26, 2018), <https://www.icij.org/blog/2018/06/panama-papers-investigations-bring-700-million-back-onshore/>.

⁵⁴ See also Bruce Zagaris, *The Merging of The Counter-Terrorism and Anti-Money Laundering Regimes*, 34.1 LAW AND POLICY IN INT'L BUS., 45 (2002).

⁵⁵ See generally Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers: Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807 (2017).

⁵⁶ Transparency International is a nongovernmental organization that “is committed to advancing accountability, integrity and transparency”; See TRANSPARENCY INTERNATIONAL, *Our Accountability*, <https://www.transparency.org/> (“we aim to be an example of good governance, ethical practice and openness to greater transparency.”)

⁵⁷ Press Release, Transparency International Secretariat, *Transparency International Calls for Immediate Action by World Leaders to Stop Secret Companies*, TRANSPARENCY INT'L (Apr. 4, 2016), https://www.transparency.org/news/pressrelease/transparency_international_calls_for_immediate_action_by_world_leaders_to_s

ill-gotten wealth.”⁵⁸ The G20 promised to act⁵⁹ and has supported measures to increase the transparency of beneficial ownerships.⁶⁰ However, not much has been done to implement such reforms.

In 2014, the G20 countries adopted the “G20 High-Level Principles on Beneficial Ownership Transparency.”⁶¹ Even before the Panama Papers, the G20 “encourage[d] all countries to tackle the risks raised by the opacity of legal persons and legal arrangements. . . . Improving the transparency of legal persons and arrangements is important to protect the integrity and transparency of the global financial system.”⁶² Since 2014, the G20 countries have not done much to improve their legal frameworks to implement a system of transparency.

In particular, ten G20 countries and two G20 guest countries have ‘very weak’ legal frameworks when it comes to providing law enforcement, tax authorities and financial intelligent units with access to any beneficial ownership information. The UK is the only G20 country to have established a central register of beneficial ownership information that is publicly available. . . . Argentina, India, Russia, Saudi Arabia, South Africa and Turkey have not significantly improved their framework since 2015.⁶³

Nevertheless, there has been a trend towards “entity transparency,” which aims to target money laundering, consumer fraud, tax fraud, and other criminal activities.⁶⁴

1. Panama

On April 29, 2016, soon after the release of the Panama Papers, Panamanian President Juan Carlos Varela Rodriguez, through an Executive Decree, established the Committee of Independent Experts—an independent committee that was mandated to formulate recommendations “to achieve transparency objectives required by the international community.”⁶⁵ According to the Ambassador of the Republic of Panama to

⁵⁸ *Id.*

⁵⁹ OBERMAYER, *supra* note 1, at 20.

⁶⁰ Transparency International Secretariat, *supra* note 57.

⁶¹ See *G20 High-Level Principles on Beneficial Ownership Transparency*, G20 Australia (2014), <https://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Documents/G20High-LevelPrinciplesOnBeneficialOwnershipTransparency.pdf>.

⁶² *Id.*

⁶³ Press Release, Transparency International Secretariat, *G20 Countries Moving Too Slowly to Combat Financial Crime*, TRANSPARENCY INT’L (Apr. 19, 2018), https://www.transparency.org/news/pressrelease/g20_countries_moving_too_slowly_to_combat_financial_crime.

⁶⁴ See generally Jenik Radon & Mahima Achuthan, *Beneficial Ownership Disclosure: The Cure for the Panama Papers Ills*, 70.2 J. OF INT’L AFFAIRS, 85 (2017).

⁶⁵ *Committee of Independent Experts, Final Report* (Nov. 18, 2016), <https://www.>

Washington, D.C., Emanuel Gonzalez-Revilla, the committee is expected to “deliver nothing less than an honest, accurate, and independent assessment of Panama’s system and how it can better promote transparency.”⁶⁶ The Committee eventually released a report, recommending that:

Panama achieve a high standard in transparency and effective control of illicit flows, while retaining its competitiveness as a financial, service and domiciliary center of international organizations and remain off any discriminatory list or qualification of opacity or lack of transparency. Achieving these goals will require investment, legislation and a high degree of commitment by the authorities and regulatory bodies of Panama, and require the strengthening of the control and reporting systems for the different productive sectors of the country and all organizations that are domiciled in Panama.⁶⁷

The Committee also recommended the Financial Intelligence Unit and the Panamanian judicial system to be completely independent and free from the influence of other powers of the State.⁶⁸ The report further attempted to balance the need to implement stronger international transparency standards with the maintenance of Panama’s competitive international financial services.⁶⁹

Since the release of the Panama Papers, Panamanian authorities closed down more than 275,000 offshore companies and have “sanctioned delinquent offshore companies with financial penalties.”⁷⁰ As part of the effort, budgets for financial regulatory agencies have also been raised.⁷¹ Furthermore, the government also implemented “Operation Patria” to reduce organized crime and illicit cash flows.⁷² In the following statement, President Varela reaffirmed his commitment to transparency:

presidencia.gob.pa/tmp/file/1503/INDEPENDENT%20EXPERT%20COMMITTEE.pdf.

⁶⁶ Emanuel Gonzalez-Revilla, *Panama Ambassador to U.S.: Our Transparency Commitment Remains Strong*, TIME (Aug. 14, 2016), <http://time.com/4450180/panamas-transparency-commitment/>.

⁶⁷ Bruce Zagaris, *Panama Committee of Independent Experts Issues Report On Improving Transparency*, 32 NO. 12 INT’L ENFORCEMENT L. REP. 471 (2016).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Will Fitzgibbon, *The Biggest Change After the Panama Papers? The One Inside People’s Heads*, THE INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2018), <https://www.icij.org/investigations/panama-papers/biggest-change-panama-papers-one-inside-peoples-heads/>.

⁷¹ Hugh Bronstein, *Panama Needs New Anti-Corruption Laws to Combat Tax Dodgers: Panel*, REUTERS (Nov. 21, 2016), <https://www.reuters.com/article/us-panama-tax/panama-needs-new-anti-corruption-laws-to-combat-tax-dodgers-panel-idUSKBN13H08H>.

⁷² Press Release, *Government implements “Operation Patria” to reduce organized crime and traffic of illicit substances*, THE MINISTRY OF THE PRESIDENCY (Oct. 20, 2015), <https://www.presidencia.gob.pa/en/News/Government-implements-Operation-Patria-to-reduce-organized-crime-and-traffic-of-illicit-substances->.

In the 21 months of my administration, we had already improved our international reporting standards and introduced ‘know your client’ regulations for law firms that register corporations. . . . Panama is fully committed to bilateral automatic information exchange as part of our efforts to promote greater financial and legal transparency.⁷³

While Panama has shown its commitment, there is still much to be done.

2. The United States

On May 6, 2016, U.S. President Barack Obama⁷⁴ announced that the United States intended on passing initiatives on tax and entity transparency. He called for a “Reciprocal Foreign Account Tax Compliance Act” (Reciprocal FATCA) which aims to strengthen the ability of the United States government to work with other countries to fight tax evasion through full reciprocity.⁷⁵ Since 2010, FATCA required foreign banks to tell the Internal Revenue Service (IRS) about American-held accounts.⁷⁶ A “Reciprocal” FATCA would encourage transnational cooperation by requiring the United States to engage in the automatic information exchange.

On November 13, 2018, Singapore signed a Tax Information Exchange Agreement (TIEA) and a Reciprocal FATCA Model 1 Intergovernmental Agreement (IGA) with the United States.⁷⁷ The purpose

⁷³ Juan Carlos Varela, *President of Panama: Embrace Transparency to Fight Corruption*, TIME (May 1, 2016), <http://time.com/4312546/president-of-panama-transparency/>.

⁷⁴ In July 2010, President Barack Obama signed the Dodd Frank Wall Street Reform and Consumer Protection Act (PUB. L. NO. 111-203, 124 Stat. 1376, 1841 (2010)), hereinafter “Dodd Frank,” which is over 2,300 pages long, and includes numerous provisions to help prevent and expose fraud and corruption.

⁷⁵ Bruce Zagaris, *President Obama Announces Initiatives on Tax and Entity Transparency, Anti-Money Laundering and Anti-Corruption*, 32 NO. 5 INT’L ENFORCEMENT L. REP. 176 (2016).

⁷⁶ Joe Pinsker, *Governments Don’t Stand a Chance Against Rich People Who Don’t Like Taxes*, THE ATLANTIC (Nov. 7, 2017), <https://www.theatlantic.com/business/archive/2017/11/paradise-papers-panama-taxes/545198/>. See also, Internal Revenue Service, *Foreign Account Tax Compliance Act*, IRS.GOV, <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca> (last updated Feb. 28, 2019) (“The Foreign Account Tax Compliance Act (FATCA), which was passed as part of the HIRE Act [Hiring Incentives to Restore Employment Act], generally requires that foreign financial institutions and certain other non-financial foreign entities report on the foreign assets held by their U.S. account holders or be subject to withholding on withholdable payments. The HIRE Act also contained legislation requiring U.S. persons to report, depending on the value, their foreign financial accounts and foreign assets.”).

⁷⁷ Agreement Between the Government of the Republic of Singapore and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA, Sing.-U.S., Nov. 13, 2018, accessible via INLAND REVENUE AUTHORITY OF SINGAPORE (IRAS.GOV) <https://www.iras.gov.sg/irashome/uploadedFiles/>

was to “improve international tax compliance through mutual assistance in tax matters based on an effective infrastructure for the automatic exchange of information.”⁷⁸ The Agreement states:

The Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with Singapore [T]he United States is committed to further improve transparency and enhance the exchange relationship with Singapore by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange.⁷⁹

Although the agreement was recently signed, it has not yet been ratified, and therefore, it currently does not have the force of law.⁸⁰ Nevertheless, it is a step towards cross-border collaboration.

Furthermore, on May 6, 2016, President Obama also called on Congress to step up; there had been eight tax treaties that the Senate had not passed for years, which could give the government stronger tools to investigate American offshore accounts.⁸¹ On February 6, 2018, the Senate held a Judicial Committee hearing on “Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency.”⁸² There was a proposal to create a registry of beneficial owners, which may be a “pragmatic and necessary step to combat money laundering.”⁸³ This bill,

IRASHome/Quick_Links/International_Tax/Singapore-US%20FATCA%20Model%201A%20IGA.pdf.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* (“This Agreement shall enter into force on January 1 of the calendar year next following the later of (1) the date of entry into force of the TIEA and (2) the date of the last notification of an exchange of written notifications between the United States and Singapore confirming the completion of each Party’s necessary internal procedures for entry into force of this Agreement”); see also Inland Revenue Authority of Singapore, *Singapore and The United States of America Signed Agreements for Exchange of Information*, IRAS.GOV (Nov. 16, 2018), <https://www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Release-s-and-Speeches/Media-Releases/2018/Singapore-and-The-United-States-of-America-Signed-Agreements-for-Exchange-of-Information/> (“The signing took place in Singapore, between Deputy Secretary (Planning) of the Singapore Ministry of Finance, Yee Ping Yi, and the United States of America Chargé d’Affaires to Singapore, Stephanie Faye Syptak-Ramnath.”).

⁸¹ Tanya Somanader, *President Obama’s Efforts on Financial Transparency and Anti-Corruption: What You Need to Know*, THE WHITE HOUSE BLOG (May 6, 2016, 9:24 AM), <https://obamawhitehouse.archives.gov/blog/2016/05/06/president-obamas-efforts-promote-financial-transparency-and-combat-corruption-what>.

⁸² Bruce Zagaris, *U.S. Senate Holds Hearing on Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency*, 32 NO. 2 INT’L ENFORCEMENT L. REP. 50 (2018).

⁸³ *Id.* (“Under the TITLE Act, every state must collect the name, residential or business address, and a unique identifying number from a passport, state driver’s license or state identification card for each beneficial owner of a corporation or limited liability company at

known as the True Incorporation for Transparency for Law Enforcement Act (TITLE Act), allows for both civil and criminal penalties, such as a fine, a prison term for up to three years, or both, when an individual has provided false or fraudulent beneficial ownership information, or has willfully failed to provide complete or updated beneficial ownership information.⁸⁴ However, there were many concerns raised during the judicial hearing about these proposed bills on transparency.⁸⁵ On one hand, there was Senator Mike Lee, who had concerns about the impact on free speech.⁸⁶ Along his side was Brian O'Shea,⁸⁷ who raised concerns about the failure of the TITLE Act to adequately protect privacy rights and prevent the misuse of information that would be available to several people.⁸⁸ On the opposite end was Senator Sheldon Whitehouse who argued that U.S. secrecy only weakens U.S. national security overall.⁸⁹

The American Bar Association (ABA) also opposes the proposed Beneficial Ownership Transparency Reform.⁹⁰ One of the major objections of the ABA is the impingement on lawyer-client confidentiality and the undermining of attorney-client privilege.⁹¹ While the ABA “supports reasonable and necessary domestic and international measures to fight these illicit activities,” the TITLE Act would reclassify lawyers as “formation agents” under the Bank Secrecy Act (BSA)—thereby subjecting them to the

the time it is created.”).

⁸⁴ *True Incorporation Transparency for Law Enforcement Act or the TITLE Act (S.1454)*, CONGRESS.GOV (June 28, 2017), <https://www.congress.gov/bill/115thcongress/senate-bill/1454>.

⁸⁵ In addition to the True Incorporation for Transparency for Law Enforcement Act, which is also known as the TITLE Act (S. 1454), another pending bill that was discussed was the Corporate Transparency Act (H.R. 3089/S.1717); see Zagaris, *supra* note 82 (Unlike the TITLE Act, “the Corporate Transparency Act (H.R.3089/S.1717) does not require states to collect beneficial ownership information. Instead, it requires the Financial Crimes Enforcement Network (FinCEN) to collect the name, residential or business address, and a unique identifying number from a passport, state driver’s license or state identification card for each beneficial owner of a corporation or limited liability company at the time it is created unless the state in which the company is formed chooses to collect the relevant information as set forth in the statute.”).

⁸⁶ Zagaris, *supra* note 82.

⁸⁷ Brian O'Shea is Senior Director of the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce in Washington, D.C.

⁸⁸ Zagaris, *supra* note 82 (*Clay Fuller of the American Enterprise Institute in Washington, D.C. also testified*).

⁸⁹ *Id.*

⁹⁰ See Matthew Stephenson, *Why Does the American Bar Association Oppose Beneficial Ownership Transparency Reform?*, THE GLOBAL ANTICORRUPTION BLOG (Feb. 6, 2018), <https://globalanticorruptionblog.com/2018/02/06/why-does-the-american-bar-association-oppose-beneficial-ownership-transparency-reform/>.

⁹¹ Press Release, *ABA Sends Letter to Senate Judiciary Committee Opposing S. 1454, Anti-Money Laundering Bill*, AMERICAN BAR ASSOCIATION (Feb. 02, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/aba_sends_letterto/.

BSA's suspicious activity reporting (SAR) requirements.⁹² In other words, the TITLE Act "would compel lawyers to report certain privileged or confidential client information to government authorities . . . under penalty of harsh civil and criminal sanctions."⁹³ Another reason for the opposition is the cost of compliance; "it would impose burdensome, costly, and unworkable new regulatory burdens on small business."⁹⁴

The ABA further argues that the TITLE Act seems duplicative and unnecessary because the Financial Crimes Enforcement Network (FinCEN) already issued a new Customer Due Diligence Rule (in effect in May 2018).⁹⁵ This rule requires financial institutions "to collect certain specific beneficial ownership information regarding entities that establish new bank accounts" and provide access to federal law enforcement.⁹⁶ FinCEN's Customer Due Diligence Rule has four core elements:

- (1) customer identification and verification, (2) beneficial ownership identification and verification, (3) understanding the nature and purpose of customer relationships to develop a customer risk profile, and (4) ongoing monitoring for reporting suspicious transactions and maintaining and updating customer information.⁹⁷

Although it looks like a good start, it is not enough. Former Michigan Senator Carl Levin explains that this FinCEN Rule was a "significant step backward from current practice" because it was still quite limited and did not go far enough to prevent "terrorists, money launderers, tax evaders and other wrongdoers" from anonymously misusing financial institutions.⁹⁸

⁹² Letter to Senate Judiciary Committee, Hilarie Bass, *Hearing on 'Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency' and Concerns Regarding S. 1454, the "True Incorporation Transparency for Law Enforcement (TITLE) Act," and Other Similar Legislation*, AMERICAN BAR ASSOCIATION (Feb. 01, 2018), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/1feb2018-abalettertosjco pposings1454.authcheckdam.pdf> ("In particular, the ABA opposes the provisions of the [TITLE Act] that would regulate many lawyers and law firms as financial institutions under the Bank Secrecy Act (BSA) when they help clients to establish small corporations and limited liability companies (LLCs). . . . Under the bill, lawyers and law firms that help clients to form small corporations or LLCs would be considered "formation agents" (and hence a new category of "financial institution") under the BSA and would be subject to the strict AML and SAR requirements of the BSA. These SAR requirements would compel lawyers to report certain privileged or confidential client information to government authorities.").

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Alyssa Marchetti, *Stricter Anti-Money Laundering Rules for Financial Institutions*, 36 REV. BANKING & FIN. L. 30, 33 (2016) (citing Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,398 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, and 1026)).

⁹⁸ Marchetti, *supra* note 97 (citing Evan Weinberger, *Obama's Moves to Eliminate Shell*

Janis Meyer, a professional liability partner at Hinshaw & Culbertson, further explains that “[w]hile large firms typically do have systems in place to alert them if a potential client has been flagged by a law enforcement agency, every jurisdiction has its own rules regarding what kind of due diligence is mandatory.”⁹⁹

While there has been disagreement as to how to reform the laws to address the problem of tax evasion and money laundering, the United States investigation of the Panama Papers, at the very least, seems to be moving forward. On December 4, 2018, four men were criminally charged in the United States for their involvement with the Panama Papers and Mossack Fonseca.¹⁰⁰ Each of these four men were “charged with wire fraud, tax fraud, money laundering, and other crimes.”¹⁰¹ “Wire fraud can carry a jail term of 20 years.”¹⁰²

Among these four men were Ramses Owens, a Panamanian attorney who worked for Mossack Fonseca, and Dirk Brauer, who was a German investment manager for Mossack Asset Management, a Mossack Fonseca affiliate.¹⁰³ Investigators discovered that both Owens and Brauer had established and managed “sham foundations, opaque offshore trusts and undeclared bank accounts” to assist Mossack Fonseca’s American clients in concealing their income from United States tax authorities.¹⁰⁴ American clients were advised how to illegally bring money into the United States from their offshore accounts through “specially created debit cards and [by] falsely claiming [that] the money had come from the sale of companies.”¹⁰⁵

In addition to these two were Richard Gaffey, an American accountant, and Harald Joachim von der Goltz, a former Mossack Fonseca client and former United States resident.¹⁰⁶ Von der Goltz falsely claimed

Companies Easy to Evade, LAW360 (May 6, 2016, 7:04 PM), <http://www.law360.com/articles/793365/obama-s-moves-to-eliminate-shell-companies-easy-to-evade>).

⁹⁹ Nell Gluckman, *Law Firms Look for Lessons—and Clients—in Panama Papers Leak*, THE AM. LAW. LITIG. DAILY (May 12, 2016), https://www.sheppardmullin.com/media/article/1506_Panama%20Papers.pdf.

¹⁰⁰ Jon Swaine & Stephanie Kirchgaessner, *Panama Papers Investigation: Four Men Criminally Charged in US: Prosecutors Say Quartet Went to ‘Extraordinary Lengths to Circumvent US Tax Laws’ to Boost the Wealth of Their Clients*, THE GUARDIAN (Dec. 4, 2018), <https://www.theguardian.com/world/2018/dec/04/panama-papers-investigation-four-men-charged-us>.

¹⁰¹ *Id.*

¹⁰² *Panama Papers: Four Charged in US With Fraud and Tax Evasion*, BCC NEWS (Dec. 4, 2018), <https://www.bbc.com/news/world-us-canada-46449696>.

¹⁰³ Swaine & Kirchgaessner, *supra* note 100; “Mossack” is short for Mossack Fonseca. See also Jesse Drucker, *U.S. Prosecutors Bring Their First Charges Over the Panama Papers*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/business/panama-papers-indictment.html>.

¹⁰⁴ Swaine & Kirchgaessner, *supra* note 100.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

that his Guatemalan mother was the actual owner of his offshore holdings.¹⁰⁷ In connection with these four men, German authorities had deployed about “170 police officers, prosecutors, and tax inspectors” to investigate “six Deutsche Bank offices around Frankfurt,” specifically two bank employees who allegedly assisted in the establishment of these offshore shell companies and helped clients launder money.¹⁰⁸ This comes to show that a transnational collaborative effort is imperative in the investigation of the Panama Papers, as well as in tackling the global problem of money laundering, tax evasion, and other related fraudulent activities.

This is the first criminal prosecution that has developed from the Panama Papers in the United States. As Brian Benczkowski, an assistant attorney general, stated, “[t]he charges announced today demonstrate our commitment to prosecute professionals who facilitate financial crime across international borders and the tax cheats who utilize their services.”¹⁰⁹ While the proposed legislative and administrative reforms have not been so successful, the prosecution of these four men at least demonstrates to the public and to the international community that the United States is still dedicated to deterring money laundering and tax evasion schemes.

3. The European Union

The European Union (E.U.) sought to amend its Anti-Money Laundering Directive (AMLD) to address the illegal and fraudulent use of offshore shell companies. It required the E.U. Member States to strengthen their laws regarding the disclosure of beneficial owners, create a shared registry of beneficial owners, and implement penalties for noncompliance.¹¹⁰ It was a push towards a more multilateral framework to better fight the global problem of corruption.

Because each E.U. Member State had different policies, definitions, and sanctions regarding money laundering violations, it was harder to hold criminals accountable. Therefore, to effect cross-border cooperation, both judicially and through law enforcement, it was important to create a multilateral agreement among the Member States. The amended AMLD not only allowed for the exchange and sharing of information among Member States, but it also created more uniform rules, especially because “[t]hese differences in legal frameworks can also be exploited by criminals and terrorists who could carry out financial transactions where they perceive

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Nicholas Vail, *Cracking Shells: The Panama Papers & Looking to the European Union’s Anti-Money Laundering Directive as a Framework for Implementing a Multilateral Agreement to Combat the Harmful Effects of Shell Companies*, 5 TEX. A&M L. REV. 133, 134-135 (2018).

anti-money laundering measures to be weakest.”¹¹¹

For example, Article 18 of the fourth amended AML Directive (4AMLD) requires the application of “enhanced customer due diligence (ECDD) measures when dealing with natural or legal entities established in high risk third countries.”¹¹² Article 12 of the 4AMLD also addressed the use of online prepaid cards by lowering the thresholds (from 250 to 150 EUR) to which ECDD measures would apply.¹¹³ “Limiting the anonymity of prepaid instruments will incentivize using such instruments for legitimate purposes only, and will decrease their attractiveness for terrorist and criminal purposes.”¹¹⁴ Also, Article 30 and 31 of the 4AMLD included rules regarding the collection, storing, and access to information on the ultimate beneficiaries/owners of companies.¹¹⁵

Furthermore, on June 8, 2016, the European Parliament decided to set up an inquiry committee, known as the PANA Committee,¹¹⁶ to investigate and “acquire more detailed information on offshore companies and their ultimate beneficiaries.”¹¹⁷ The European Union was the “first regional organization to adopt a comprehensive [Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF)] regulatory framework.”¹¹⁸ However, while these efforts have been strong, there are still implementation issues and problematic inconsistencies. The definition of money laundering under E.U. law has expanded through several amendments, but much more needs to be done in the synchronization of

¹¹¹ *Security Union: Proposal for a Directive on Countering Money Laundering by Criminal Law – Questions & Answers*, EUROPEAN COMM’N (Dec. 21, 2016), <http://europa.eu/rapid/press-releaseMEMO-16-4452en.htm>.

¹¹² Bruce Zagaris, *EU Reaches Agreement on Amendments to the 4th Anti-Money Laundering Directive*, 33 No. 12 INT’L ENFORCEMENT L. REP. 444 (2017).

¹¹³ *Id.* at 112-13.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See generally Michael Plachta, *European Parliament Sets Up an Inquiry Committee into “Panama Papers”*, 32 INT’L ENFORCEMENT L. REPORTER 221-222 (2016).

¹¹⁷ Michael Plachta, *European Parliament Adopts Report, Recommendations in the “Panama Papers” Affair*, 33 No. 11 INT’L ENFORCEMENT L. REPORTER 398 (2017). See generally EUR. PARL.-POL’Y DEP’T ON BUDGETARY AFF., *THE IMPACT OF SCHEMES REVEALED BY THE PANAMA PAPERS ON THE ECONOMY AND FINANCES OF A SAMPLE OF MEMBER STATES* (2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/572717/IPOL_STU\(2017\)572717_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/572717/IPOL_STU(2017)572717_EN.pdf) (“Upon request by the European Parliament’s Committee of Inquiry [PANA Committee] to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion . . . , this study assesses the impacts of the schemes revealed by the Panama Papers, a set of documents leaked from the law firm Mossack Fonseca detailing tax evasion and avoidance practices, and published by the International Consortium of Investigative Journalists (ICIJ) in April 2016.”).

¹¹⁸ Leonardo Borlini & Francesco Montanaro, *The Evolution of The EU Law Against Criminal Finance: The “Hardening” Of FATF Standards Within The EU*, 48.4 GEO. J. OF INT’L L., 1009, 1030 (2017).

enforcement efforts.¹¹⁹

4. Germany

On April 11, 2016, several days after the Panama Papers were disclosed globally, Germany's Finance Minister, Wolfgang Schäuble, published an "Action Plan against Tax Fraud, Tax Avoidance Schemes and Money Laundering – 10 Next Steps for a Fair International Tax System and a More Effective Combat Against Money Laundering."¹²⁰ In addition to urging countries to work together by closely coordinating with the E.U. and the Organization for Economic Cooperation and Development (OECD), the goal was to also convert some of the key points from this Action Plan into legislative proposals to the German Parliament.¹²¹

First, Germany urged Panama to cooperate by providing an "automatic exchange of information" and requiring "full transparency," such that "[s]hareholders or managers must be obliged to provide proof on a regular basis of the economic activities that their company performs."¹²² Second, to implement a more global and collaborative solution, the OECD would need to create uniform criteria to harmonize national and international blacklists.¹²³ Germany suggested that the Europeans will be taking the lead in creating such joint list.¹²⁴

Third, "the new standard for the automatic exchange of information on tax matters" should not only involve 100 countries, but instead, there must be a collective effort to "increase the pressure" on other countries in order "to make sure that offering a haven for illicit earnings is no longer worth it."¹²⁵ Schäuble recognized the global impact of money laundering, and the necessity of establishing a global collaborative effort to curtail fraudulent and tax-evasion schemes.

Fourth, there is a need for a mechanism to monitor the automatic exchange of information among countries.¹²⁶ Although establishing a system to monitor the transnational exchange of information may be expensive, collaboration could expedite investigations and create greater obstacles for those seeking to engage in money laundering. Fifth, global

¹¹⁹ *Id.* at 1031.

¹²⁰ Press Release, *Fighting effectively against tax cheating, devious tax avoidance and money laundering*, FEDERAL MINISTRY OF FINANCE (Apr. 12, 2016), <https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Taxation/Articles/2016-04-12-10-points-plan.html>.

¹²¹ Joerg Brodersen, Thomas Eckhardt & Christian Ehlermann, *Germany's Ten-Point Plan Against Tax Fraud, Avoidance Schemes, Money Laundering*, 27.7 J. OF INT'L TAX'N 6 (2016).

¹²² Press Release, *supra* note 120.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

registers of beneficial owners are needed to effect more transparency on a global scale, which has already been agreed within the E.U. Member States through the AMLD.¹²⁷ Sixth, a systematic link among national registers should be established to perform data comparisons and create a stronger global effort in tracking down corrupt and fraudulent financial activities.¹²⁸

Seventh, while banks are already subject to criminal sanctions if they support the tax evasion schemes of their clients, firms that offer tax-saving models should also be subjected to disclosure obligations.¹²⁹ Eighth, companies can and should be held responsible to a greater degree even if the criminal activity was done independently by an employee working as an agent of the institution.¹³⁰ This would incentivize institutions to take a more supervisory role of their employees, and to require employees to conduct more thorough investigative due diligence of potential clients.

Ninth, tax evaders should not be able to avoid punishment and escape sanctions through “limitation periods” (i.e., statute of limitations), but instead, “limitation periods” should only start to run once the tax evader has “fulfilled the (existing and new) reporting obligations for foreign relations.”¹³¹ Finally, Germany will be establishing strict AML measures and “require a legal initiative to enhance the skimming-off of profits from illegal transactions as well as introducing tougher sanctions and making it easier to freeze assets.”¹³²

In addition to the Action Plan, the German Federal Criminal Police Office (also known as “BKA” or *Bundeskriminalamt* in German) has been persistent in tracking down German-based criminals and fraudsters linked to the Panama Papers; the BKA wanted access to the complete database of leaked documents that only a selected number of journalists have access to.¹³³ However, to protect its anonymous source, *Süddeutsche Zeitung* had refused to hand over a copy of the Panama Papers to German officials. Nonetheless, the German Federal Criminal Police Office was able to purchase a copy of the 11.5 million leaked documents for 5 million EUR from an anonymous source.¹³⁴ While payment for the leaked documents in this instance did not go directly to the whistleblower, there seems to be greater ethical implications if whistleblowers are monetarily incentivized.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Panama Papers: Germany ‘Pays Millions’ for Leaked Data*, BBC NEWS (July 5, 2017), <https://www.bbc.com/news/world-latin-america-40505300>.

¹³⁴ *Id.*

IV. ETHICAL IMPLICATIONS OF WHISTLEBLOWING

Many offshore tax havens, several of which were former British colonies, have been practicing the British common laws' "banking secrecy rules" where a banker owed its client an implied contractual duty of confidentiality, and thereby, maintaining assets in strict secrecy.¹³⁵ While most countries do offer a similar kind of duty to their clients, the main distinction is that these offshore havens "will not breach their wall of secrecy even when a major violation of another nation's laws may be involved"; they assert that their municipal law prohibits the breach of confidentiality.¹³⁶

In response to the Panama Papers leak, the Panama National Bar Association (PNBA) issued a communiqué.¹³⁷ It deemed the disclosures as "unlawful, both the theft of correspondence as well as the non-authorized disclosure of attorney-client communications."¹³⁸ The PNBA also called for increased prison sentences to those who violate the infringement of privacy.¹³⁹

A. Incentivizing Whistleblowers

While most offshore havens strongly disincentivize whistleblowing, there are other countries that have laid out incentives and protections for whistleblowers. In the United States, a whistleblower who voluntarily provides information to the Security and Exchange Commission (SEC) which successfully leads to SEC enforcement or "administrative action in which the SEC obtains monetary sanctions totaling more than \$1,000,000 may receive an award equal to between 10% and 30% of the monetary sanctions collected by the SEC."¹⁴⁰ On May 24, 2016, the SEC announced that it "will jointly award more than \$450,000 to two individuals for a tip that led the agency to open a corporate accounting investigation and for their assistance once the investigation was underway."¹⁴¹ As Edward

¹³⁵ Reid K. Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. Online 93, 103 (2016) (quoting Douglas J. Workman, *The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes*, 73 J. CRIM. L. & CRIMINOLOGY 675, 679 (1982)).

¹³⁶ Workman, *supra* note 135, at 679.

¹³⁷ Bruce Zagaris, *Panama Bar Association Reacts to Panama Papers*, 32.5 INT'L ENFORCEMENT L. REP. 180 (2016).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Amy Deen Westbrook, *Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign Corrupt Practices Act*, 75 WASH. & LEE L. REV. 1097, 1122 (2018) (citing 15 U.S.C. § 78u-6(b)); *see also* 17 C.F.R. § 240.21F-4(d) (2018) ("The SEC rules permit aggregation of multiple SEC cases that arise out of a common nucleus of operative facts.").

¹⁴¹ Jaclyn Jaeger, *SEC Awards Two More Whistleblowers*, COMPLIANCE WEEK (May 24, 2016), <https://www.complianceweek.com/blogs/enforcement-action/sec-awards-54m-to-two-whistleblowers#.WR8rOJRdPY>.

Snowden puts it, unveiling corruption “doesn’t happen by itself.”¹⁴² Still, while whistleblowing helps reveal corruption, there are ethical implications of monetarily incentivizing whistleblowers.

A lot is at stake when someone “blows the whistle.” Yet, the anonymous source behind the Panama Papers, as well as Edward Snowden, did not seek monetary compensation.¹⁴³ Without a personally-driven incentive, it is easier to understand the motives of a whistleblower. The individual behind the Panama Papers, John Doe, was more motivated by “the scale of injustice that the documents would reveal.”¹⁴⁴

‘I do not work for any government or intelligence agency, directly or as a contractor, and I never have,’ [John Doe] wrote in his manifesto ‘My viewpoint is entirely my own, as was my decision to share the documents with *Süddeutsche Zeitung* and the International Consortium of Investigative Journalists, not for any specific political purpose, but simply because I understood enough about their contents to [realize] the scale of the injustices they described.’¹⁴⁵

Furthermore, journalists from *Süddeutsche Zeitung*, including Obermayer and Obermaier, “never [pay] for information, not only because [they] don’t have the money, but primarily on principle. This also reduces people’s temptation to fob [them] off with fake documents.”¹⁴⁶ It is already challenging to ascertain the true motives of a whistleblower, but it is even more complicated when money is involved. On one hand, potential whistleblowers fear for their safety and job security, which is likely why money could be an incentive. However, monetary incentives could also influence individuals with bad motives.

It seems like the real incentive should be a form of actual protection. “Whistle-Blowers aren’t particularly well protected, even in Germany, and each person who knows an informant’s identity is a potential risk—even, or perhaps especially, if that person is a journalist.”¹⁴⁷ Furthermore, job security and reputations are at stake, because no company would want to hire an employee who is known to whistle-blow.¹⁴⁸ Reputations are at stake

¹⁴² Tamsyn Burgmann, *Panama Papers Leaks Show Change Doesn’t Happen by Itself*, *Says Edward Snowden*, THE CANADIAN PRESS (Apr. 6, 2016).

¹⁴³ OBERMAYER, *supra* note 1, at 3.

¹⁴⁴ Ryle, *supra* note 7.

¹⁴⁵ Boer Deng Washington, *Panama Tax Whistleblower Steps Forward*, TIMES (London), May 7, 2016, at 22.

¹⁴⁶ OBERMAYER, *supra* note 1, at 4.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ See Zizi Petkova, *Interpreting the Anti-Retaliation Provision of the Dodd-Frank Act*, 18.2 U. PA. J. BUS. L. 573, 574-76 (In response to the 2008 market crash, Congress tried to expand the whistleblower protections in the Dodd-Frank Act to include both internal and external disclosures. However, “the statute has presented an inherent ambiguity in

because if you attach your name to the whistleblowing, everyone will know, including your current and future clients and colleagues. In addition to professional insecurity, one's life could also be in danger. As such, it is quite unenticing for people to come forward, even if money is involved.

B. Ethical Duties of Lawyers

The purpose of securities laws like the Foreign Corrupt Practices Act (FCPA)¹⁴⁹ is to “substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus . . . achieve a high standard of business ethics in the securities industry.”¹⁵⁰ Congress designed the FCPA as a “strong anti-bribery law . . . urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”¹⁵¹ In the United States, attorneys use the American Bar Association (ABA) Model Rules of Professional Conduct as a guide. While the Model Rules are not “law” per se, many states have adopted these rules along with their own statutes on legal ethics.

There are times when the ABA Model Rules conflict with the FCPA or other securities regulations. Conflict between these rules may arise when an attorney must make disclosures to the Department of Justice or the Securities and Exchange Commission (SEC) about a client, but such information is usually protected by attorney-client privilege. An example is the FCPA requirement for lawyers to make certain financial disclosures to the SEC.¹⁵²

Under ABA Model Rule 1.8., “a lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.”¹⁵³ Monetarily incentivizing whistleblowers lawyers is a violation of the lawyer's duty of loyalty to its client, per Rule 1.8. Not only is the whistleblower lawyer using information to the disadvantage of its client, but it is also used against the client for the whistleblower's own

delineating who is protected from employer retaliation after blowing the whistle. . . . Read in isolation, the whistleblower definition seems to indicate that only disclosures to the [SEC] are protected The SEC ruled that while the narrow definition applies to whistleblowers seeking monetary awards, the anti-retaliation provisions covers three classes of whistleblowers, including those who make internal disclosures.”; However, some circuits, like “the Fifth Circuit[,] [have] refused to defer to the SEC interpretation and [have] limited the anti-retaliation protection exclusively to external disclosures.”); *see also* *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

¹⁴⁹ The Foreign Corrupt Practices Act was implemented in 1977.

¹⁵⁰ *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963).

¹⁵¹ COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1977, S. REP. NO. 95-114, at 4 (1977).

¹⁵² William Alan Nelson, II, *Attorney Liability Under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions*, 39 U. MEM. L. REV. 255, 270 (2009).

¹⁵³ MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 5 (AM. BAR ASS'N 2016).

advantage (monetary compensation for whistleblowing). However, it all goes back to the “crime and fraud” exception of 1.6:

A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another . . .¹⁵⁴

Even though there is a definite conflict of interest here, disclosing under these exceptions could make the lawyer immune to a Rule 1.8 violation. However, that immunity might not stand if the primary motivation for establishing an attorney-client relationship and disclosing confidential and/or privileged information is to acquire a monetary reward for whistleblowing. Furthermore, although Rule 1.6(b)(2) does not automatically “require” the lawyer to reveal the client’s misconduct,¹⁵⁵ the lawyer may not counsel or assist a client in furtherance of criminal or fraudulent activities—which is different from what Mossack Fonseca did.¹⁵⁶ Under Rule 1.16, “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law.”¹⁵⁷

If there are laws that supersede the ABA Model Rules that require disclosure (e.g., SEC, FCPA, or other federal law), then the lawyer must comply with the law and disclose.¹⁵⁸ Furthermore, Mossack Fonseca attorneys, if licensed to conduct legal services in the United States, would have also violated Rule 1.4(a)(5), where a lawyer shall “consult with the client about any relevant limitation on the lawyer’s conduct” when it is clear that the client “expects assistance not permitted by the Rules . . . or

¹⁵⁴ MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2) (AM. BAR ASS’N 2016)(emphasis added).

¹⁵⁵ The diction of the rule uses the phrase “may reveal,” as opposed to “should.”

¹⁵⁶ MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 7 (AM. BAR ASS’N 2016); MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (AM. BAR ASS’N 2016) (“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.”). If lawyers who worked for and with Mossack Fonseca had a law license in the United States, violation of these rules could result in disbarment.

¹⁵⁷ MODEL RULES OF PROF’L CONDUCT R. 1.16 (AM. BAR ASS’N 2016).

¹⁵⁸ MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. 12 (AM. BAR ASS’N 2016) (“When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.”).

other law.”¹⁵⁹ In this instance, Rule 1.4(a)(5) requires the lawyer to explain to its client its inability to assist.¹⁶⁰ Instead of detailing their inability to serve clients who intended to commit fraud and corruption, Mossack Fonseca continued to assist in its full capacity. According to Rule 8.4(c), “[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”¹⁶¹

Moreover, if John Doe, the whistleblower, was a lawyer working within Mossack Fonseca and was aware “that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer,”¹⁶² and if he had a license to practice in the United States, then John Doe would have had a duty to disclose—which he had fulfilled anonymously.

On the other hand, lawyers employed by organizations, such as in-house counsels to corporations, have duties that slightly differ from a law firm lawyer. According to the SEC,—which had adopted a final rule establishing standards of professional conduct “for attorneys who appear and practice before the commission on behalf of issuers”—to deter corporate misconduct and fraud,

Corporate wrongdoers at the lower or middle levels of the corporate hierarchy will be aware that an attorney who becomes aware of their misconduct *is obligated* under the rule to report it up-the-ladder to the highest levels of the corporation. In the event that wrongdoing or fraud exists at the highest levels of a corporation, those committing the misconduct will similarly know that the corporation’s attorneys are *obligated* to report any misconduct of which they become aware up-the-ladder to the corporation’s board and its independent directors.¹⁶³

However, it is stipulated in the Model Rules that a lawyer “shall proceed as is reasonably necessary in the best interest of the organization.”¹⁶⁴ This objective standard and room for discretion might be a way for a lawyer to flee from responsibility. For example, “[i]f the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably

¹⁵⁹ MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(5) (AM. BAR ASS’N 2016).

¹⁶⁰ *Id.*

¹⁶¹ MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (AM. BAR ASS’N 2016).

¹⁶² MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (AM. BAR ASS’N 2016).

¹⁶³ SEC. & EXCH. COMM’N, FINAL RULE: IMPLEMENTATION OF STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS, 17 CFR PART 205 (2003)(emphasis added), <https://www.sec.gov/rules/final/33-8185.htm>.

¹⁶⁴ Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1031 (2007); see also MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (AM. BAR ASS’N 2016).

conclude that the best interest of the organization does not require that the matter be referred to higher authority.”¹⁶⁵ On the other hand, “[i]f the matter is of sufficient seriousness, . . . referral to higher authority in the organization may be necessary . . . [But] [a]ny measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons *outside* the organization.”¹⁶⁶ Although the in-house lawyer does not have an affirmative duty to report out of the organization—unless stipulated by laws that supersede the ABA Model Rules (e.g., SEC, FCPA or other federal laws)—the lawyer may proceed as reasonably necessary to prevent injury to the organization. This may involve having to report out of the organization if the lawyer’s efforts to address the issue with the highest authority who can act on behalf of the organization fails (e.g., if such authority refuses to act or insists upon a clear violation of law), and if the harm “might be imputed to the organization” and would likely “result in substantial injury to the organization.”¹⁶⁷

V. WHO PAYS THE PRICE?

While the super-rich have benefitted from offshore tax havens and money laundering schemes, people with low socio-economic backgrounds are really the ones who have paid the price. Luke Harding, a British journalist and foreign correspondent for *The Guardian*, emphasized that “[t]hose who dutifully paid their taxes, were, in fact, dupes.”¹⁶⁸ The citizens of these countries whose tax receipts have been reduced due to tax avoidance by the wealthy have caused public funds to also be funneled out.¹⁶⁹ Snowden explains that “[the] trove of leaked data about offshore tax havens in Panama highlights more than ever the vital role of the whistleblower in a free society.”¹⁷⁰

Obermayer further clarifies, “Africa loses out on twice as much money through tax evasion as it receives in development aid.”¹⁷¹ Because African-based tax evaders have paid very little taxes in their countries, governments continue to lack money for public programs and are unable to provide affordable food and clothing.¹⁷² The concealment tactics of the offshore industry have promoted illegal arms trading, drug smuggling, and terrorist activities.¹⁷³ “It has [also] led to water scarcity in Spain, child labor in

¹⁶⁵ MODEL RULES OF PROF’L CONDUCT R. 1.13, cmt. 4 (AM. BAR ASS’N 2016).

¹⁶⁶ *Id.* (emphasis added).

¹⁶⁷ MODEL RULES OF PROF’L CONDUCT R. 1.13 (AM. BAR ASS’N 2016) (see exceptions).

¹⁶⁸ Harding, *supra* note 1, at vii.

¹⁶⁹ OBERMAYER, *supra* note 1, at 312.

¹⁷⁰ Burgmann, *supra* note 142.

¹⁷¹ OBERMAYER, *supra* note 1, at 312.

¹⁷² *Id.*

¹⁷³ *Id.*

China, illegal logging in Indonesia, unsafe medicine in Nigeria, and poorly constructed buildings in Turkey, where collapses have killed people.”¹⁷⁴ As Snowden puts it, “it happens without our knowledge, without our awareness, without our consent.”¹⁷⁵

VI. CHALLENGES TO MOVING FORWARD

Money laundering is a globalized industry. As money laundering and tax evasion schemes are becoming more and more sophisticated through the evolution of technology, there also has been quite an evolution in the global and domestic AML/CTF efforts to curtail financial fraud. We see this in how various governments and international agencies have responded to the Panama Papers. However, some of the proposed solutions require tremendous regulatory costs, which could be a hindrance in countries that cannot afford it. This includes developing countries where money laundering is prevalent, yet regulatory resources are in a deficit because monetary resources are being displaced out of the country as a result of illegal tax evasion practices by the super-wealthy. Furthermore, most, if not all, banks “have [AML] systems in place, yet global money laundering transactions are still estimated at 2 to 5 percent of global GDP.”¹⁷⁶ The bottom line is that money laundering continues to be a complicated issue for governments and financial institutions to tackle.

A. *The False Positives*

There are several challenges to the implementation of AML strategies. In addition to compliance costs, an important challenge is assessing the efficiency and success of newly implemented AML initiatives. Not only is money laundering already hard to detect without the help of whistleblowers, but it is also difficult to evaluate whether these AML initiatives are, in fact, preventing and catching money laundering schemes.

Larger financial and corporate institutions continuously face the challenge of keeping up with the evolution of technology. As such, criminals who are adamant to launder money could find loopholes much faster than it is for firms and financial institutions to update their outdated systems. Current AML systems also tend to flag a large number of false positives, which seems counterproductive and inefficient.¹⁷⁷ As Imam

¹⁷⁴ Trautman, *supra* note 55, at 846 (quoting Francis X. Donnelly & Sarah Kellogg, *Understanding Corruption*, GEO. WASH. BUS., Fall 2011, at 9).

¹⁷⁵ Burgmann, *supra* note 172.

¹⁷⁶ Imam Hoque, *Old AML Systems Hinder the Fight Against Financial Crime*, CORPORATE COMPLIANCE INSIGHTS (Oct. 26, 2018), <https://www.corporatecomplianceinsights.com/old-aml-systems-hinder-the-fight-against-financial-crime/>.

¹⁷⁷ *Id.*

Hoque¹⁷⁸ explains:

Today, 90 to 95 percent of alerts are false positives, yet analysts are legally obliged to investigate, regardless of legitimacy, due to the fear of enormous fines and the fact that there is now an increased drive to hold compliance officers, senior executives and board members personally liable for failing to have . . . adequate AML programs in place.¹⁷⁹

In an effort to detect illegal activity, financial institutions have implemented transaction monitoring systems (TMS) to flag suspicious activities.¹⁸⁰ However, “[i]n an attempt to avoid missing any potential criminal activity, current TMS flag tenuous links,” which ultimately result in numerous false positives.¹⁸¹

Money laundering analysts become “demotivated and demoralized from having to check very large numbers of false positives.”¹⁸² Focusing solely on tenuous transactions is also not enough because money laundering is not about a single transaction, but rather, it involves a sophisticated network of entities working in concert. “On top of that, these investigations are labor- and cost-intensive, keeping banks in a vulnerable position as they continue to waste time investigating false positives and making it more difficult to spot cases of true illegal activity.”¹⁸³

B. “Know Your Customer” & Know Your Employees

Money laundering involves a complex web of entities—from inconspicuous individuals to shell companies. In addition to tracking financial transactions, there also has been a focus on detecting entities that might be linked to money laundering schemes or criminal networks. Improving due diligence procedures and implementing “Know Your Customer” (KYC) initiatives are some of the most important types of internal reform. Since 1998, “[t]he Americans had systematically fought against adopting the KYC principles because it was widely believed that they represented too great a degree of invasion of the principles of personal privacy.”¹⁸⁴ Although most firms in the United States now conduct some form of due diligence about their current and potential clients, it has not

¹⁷⁸ See *id.*, (“Imam Hoque is the COO & Head of Product at Quantexa. He has spent 29 years in the IT services and software industry and now specializes in large data-driven AI solutions with a focus on financial crime and network analytics.”).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Dionysios S. Demetis, *Fighting Money Laundering with Technology: A Case Study of Bank X in the UK*, 105 DECISION SUPPORT SYSTEMS 96, 99 (2018).

¹⁸³ Hoque, *supra* note 176.

¹⁸⁴ Rowan Bosworth-Davies, *Money Laundering - Chapter 3*, 10.1 J. OF MONEY LAUNDERING CONTROL 47, 57 (2007).

always been effective.

Improving due diligence efforts becomes a challenge when it could come at the expense of losing a potential client, especially when demanding information that they do not want to share. As Megan M. Brooks, a financial risk manager for Capstone Associated Services, Ltd., had put it, “[d]e-risking has led some institutions to opt-out of long-term relationships with clients deemed ‘high-risk’.”¹⁸⁵ Because banks have to conduct more intensive due diligence of potential clients, “[q]uestions have become more intrusive, even to go as far in some cases to research bills of lading to ensure the source of funds. Banks are now following the ‘Know Your Customer’s Customer’ mantra, due to increased regulation.”¹⁸⁶ A procedure of this kind might be more exhaustive, but it could also be a detriment to the business as a whole, especially if it deters clients from working with you.

Furthermore, gathering information about a client is not the only priority; due diligence on employees should also be improved. While it is typical to do a standard background check on employees and performance reviews, perhaps having annual diligence reports may help deter malpractice. These reports would not just be about the quality of their work, but also about the types of work being done using company assets. This could include information and work conducted on a company’s laptop, or purchases made using company’s assets, such as travel reimburses or taking clients out for dinner. While the awareness of being supervised could discourage illegal behavior and malpractice, it might also negatively affect an employee’s confidence and relationship with the company. This also could be a violation of privacy or labor law even if it is fairly or equally enforced to every employee in the firm.

C. Formation of Shell Companies

In addition to firms’ internal due diligence efforts, the government should also improve efforts in identifying criminal or shell entities. In the United States, individual states govern the formation of companies. A corporation is formed by filing the Articles of Incorporation (AOI), also known as a Charter, with the Secretary of State. Each state has minimum filing requirements, but, generally, state corporate law has become less restrictive over time. In most states, corporations are now permitted to incorporate for any purpose. In addition, the powers of corporate board of directors and officers have been enhanced, especially when the court gives deference to the business judgment rule.

The same leeway is given in the formation of Limited Liability

¹⁸⁵ Megan M. Brooks, *Overcoming Bank Over-Regulation Hassles*, CAPSTONE ASSOCIATED SERVICES (Dec. 2015), <https://www.capstoneassociated.com/pdfs/bank-over-regulation-captives.pdf>.

¹⁸⁶ *Id.*

Companies (LLCs). To form an LLC, Articles of Organization also need to be filed with the secretary of state. Because each state has its own requirements, tax-evaders and money launderers choose to create their shell companies in states that are not so strict. The “[s]tates of Nevada, Wyoming and Delaware, . . . allow for the quick creation of [LLCs] without identifying the true beneficial owners.”¹⁸⁷

Perhaps the office of the Secretary of State could start conducting due diligence work on the directors and officers listed in newly filed AOs. Having a due diligence process could help restrict the formation of shell companies in tax-haven states like Nevada and Florida. However, aside from regulatory and enforcement costs, adding extra layers to the process (e.g., a screening process) can have real economic implications; complicating the process can easily disincentivize the formation of new businesses.

D. Transnational Cooperation & Information Sharing

Money laundering does not only thrive on transactional opacity, but also through anonymity—hiding the identities of all parties involved by using a complex web of entities that are usually based in different countries. Transnational cooperation, similar to what the European Union has established in response to the Panama Papers, could be an effective way to hone in on tax-evaders.

Through cross-border cooperation and the sharing of information, participating countries could better track the outward flow of capital. While it has not yet been adequately tested, the motive for having a mode for transnational information sharing is to create a more efficient and streamlined process in the investigation of potential fraudsters and malpractice. “According to the OECD, for example, automatic exchanges of bulk taxpayer information are the most effective way to help assist tax authorities with enforcing their cross-border tax laws.”¹⁸⁸ “Third party reporting and tax-withholding disclosures can provide information to tax authorities to allow them to better gauge risks of offshore tax evasion and aggressive international tax planning.”¹⁸⁹ However, while some countries grant their government with direct access to taxpayer information, others do not.

“In countries such as the United States and Canada, privacy interests are additionally protected by constitutional guarantees that cannot generally be violated by state action (e.g., the right to be free from an improper search or seizure).”¹⁹⁰ There is also a concern for data security, especially since the

¹⁸⁷ Hardy, *supra* note 30.

¹⁸⁸ Arthur J. Cockfield, *How Countries Should Share Tax Information*, 50 VAND. J. TRANSNAT’L L. 1091, 1109 (2017).

¹⁸⁹ *Id.* at 1110.

¹⁹⁰ *Id.* at 1117; *see generally* Daniel J. Solove, *Digital Dossiers and the Dissipation of*

IRS “experiences one million attempts every week to hack its information technology systems.”¹⁹¹ The misuse of information is also a valid concern.

In addition to tax-holder information, disclosures about the beneficial owners of offshore assets, along with the amount and nature of offshore investments facilitated by offshore financial intermediaries, are also valuable. However, many countries are reluctant to fully participate in the automatic exchange of information due to concerns about privacy law and national security. Other countries simply cannot afford the regulatory and enforcement costs.

Additional challenges include the quality and reliability of information shared. Several countries, especially tax havens, “simply do not track these tax information sources” and, therefore, “they are unable to exchange this information when called upon to do so.”¹⁹² As Arthur Cockfield, a professor at Queen’s University Faculty of Law in Canada explained:

As revealed by an analysis of tax haven data leaks, a major vulnerability in these efforts is the lack of reporting by hundreds of offshore service providers, such as trust, finance, or other financial service providers based in tax havens. In many cases, these offshore service providers at times did not report accurate tax and financial information on cross-border investments as required by FATF [the Financial Action Task Force] recommendations. Noncompliance resulted from a lack of due diligence, willful neglect, and legal insulation through indemnification agreements between the offshore service provider and the nonresident investor.¹⁹³

Because information shared may not be accurate, the recipient of offshore data will have to cross-reference the reported inflow and outflow of capital with the alleged source (i.e., other financial institutions that the offshore service provider had allegedly engaged with).

Tom Keatinge, a former investment banker and the director of the Centre for Financial Crime and Security Studies at the Royal United

Fourth Amendment Privacy, 45 SO. CAL. L. REV. 1083, 1121 (2002).

¹⁹¹ *Id.* at 1116, referencing Steve R. Johnson, *The Future of American Tax Administration: Conceptual Alternatives and Political Realities*, 7 COLUM. J. TAX L. 5, 17 (2016).

¹⁹² *Id.* at 1111.

¹⁹³ *Id.* at 1113, referencing Arthur J. Cockfield, *Big Data and Tax Haven Secrecy*, 12 FLA. TAX REV. 483, 519-522 (2016). See generally, *The Financial Action Task Force*, THE FINANCIAL CRIMES ENFORCEMENT NETWORK, <https://www.fincen.gov/resources/international/financial-action-task-force> (last visited Mar. 15, 2019) (“The Financial Action Task Force (FATF) is an inter-governmental policymaking body whose purpose is to establish international standards, and to develop and promote policies, both at national and international levels, to combat money laundering and the financing of terrorism. It was formed in 1989 to set out measures to be taken in the fight against money laundering. Since then, the FATF has issued 40 recommendations to fight money laundering and 9 special recommendations to fight terrorist financing.”).

Services Institute, explains that money laundering thrives as a globalized industry; borders are immaterial when structuring these types of tax-evading transactions, yet “borders are not immaterial for the cops who are trying to chase you.”¹⁹⁴ While the ideas of transnational cooperation and the sharing of information sound ideal, there are so many challenges that need to be resolved before implementation begins. A robust system would have to be in place to ensure that financial information of citizens is properly protected. As such, regulatory and enforcement costs would be quite high, especially because of the man-power required to verify whether the information provided by another country is accurate; there needs to be a way to ensure that the data has not been altered. As Keatinge expressed, information gathering and sharing are not enough; “[w]e know that supervision doesn’t get the bad guys It’s investigation that gets the bad guys.”¹⁹⁵

E. Captive Entities

Another area that has not received much attention is captive entities. A “captive” is defined as “an institution intended to provide services to a promoter and his/her associates”; it is a subsidiary company for one parent company or a group of companies, and is usually located in offshore tax havens.¹⁹⁶ There are different kinds of captive entities. The most common type is captive insurance companies.

A captive insurance company is a wholly owned subsidiary company that provides risk-mitigation services for its parent company or a group of related companies The tax concept of a captive insurance company is relatively simple. The parent company pays insurance premiums to its captive insurance company and seeks to deduct these premiums in its home country, often a high-tax jurisdiction. A parent company will [therefore] locate the captive insurance company in tax havens, such as Bermuda and the Cayman Islands to avoid adverse tax implications. Today, several states in the US allow the formation of captive companies. The protection from tax assessment is a sought-after benefit for the parent company.¹⁹⁷

While legitimately formed captive entities are legal, the United States Internal Revenue Service (IRS) “has continually listed certain small captive (microcaptive) insurance arrangements on its ‘Dirty Dozen’ list of tax-

¹⁹⁴ Juliette Garside, *Is Money-Laundering Scandal at Danske Bank the Largest in History?*, THE GUARDIAN (Sept. 21, 2018), <https://www.theguardian.com/business/2018/sep/21/is-money-laundering-scandal-at-danske-bank-the-largest-in-history>.

¹⁹⁵ *Id.*

¹⁹⁶ *Captive Bank Law and Legal Definition*. US LEGAL INC., <https://definitions.uslegal.com/c/captive-bank/>.

¹⁹⁷ Julia Kagan, *Captive Insurance Company*, INVESTOPEDIA (Feb. 16, 2018), <https://www.investopedia.com/terms/c/captive-insurance-company.asp>.

abusive transactions . . . [since] the premiums paid in captive arrangements are often not legitimate ordinary and necessary business expenses.”¹⁹⁸ Although there are hardly any reported instances of captive companies being used for money laundering, captives are more susceptible to the risk of fraudulent activities—including money laundering and terrorist financing. “Money laundering using reinsurance could occur either by establishing fictitious reinsurance companies or reinsurance intermediaries, fronting arrangements and captives, or by misusing the normal reinsurance transactions.”¹⁹⁹ Having independent intermediaries, which captive entities lack, play an important role in deterring money laundering activities.

“The Cayman Islands [mere 22 miles in length] are the second-largest captive insurance jurisdiction in the world.”²⁰⁰ As of December 31, 2018, the Cayman Islands had a total of 703 active captives.²⁰¹ In addition, “the total value of premiums in Cayman’s international insurance industry was \$15.4 billion, up from \$12.4 billion in 2017, and the total assets over \$68.7 billion, up from \$61 billion in 2017.”²⁰² In general terms, the Cayman Islands

offers a low-tax, regulation-light environment for financial players from around the world, particularly Europe and the United States. In terms of its ratio of GDP to foreign assets, Cayman is the most intensive offshore financial [center] in the world, with foreign assets at 1,500 times the size of the domestic economy.²⁰³

Over the past decade, and especially after the Panama Papers, there has been a heightened level of AML/CTF initiatives that have impacted both the banking and captive industries. “For captives domiciled offshore, some institutions deny captive bank account applications without even reading through the application; namely UBS and Royal Bank of

¹⁹⁸ Philip Garrett Panitz, *Captive Insurance: Avoiding the Risks*, J. OF ACCT. (June 1, 2018), <https://www.journalofaccountancy.com/issues/2018/jun/captive-insurance-entities.html>. Philip Garrett Panitz, Esq., LL.M., is the senior tax partner at the law firm Panitz & Kossoff LLP.

¹⁹⁹ Haemala Thanasegaran & Bala Shanmugam, *Exploitation of the Insurance Industry for Money Laundering: The Malaysian Perspective*, 11 J. MONEY LAUNDERING CONTROL 135, 138 (2008).

²⁰⁰ *The Cayman Islands as a Captive Domicile: An Introduction*, CAPTIVE INSURANCE NEWS (Dec. 5, 2018), <https://www.captive.com/news/2018/12/05/the-cayman-islands-as-a-captive-domicile-an-introduction>.

²⁰¹ Ned Holmes, *Cayman Welcomes 33 New Captives in 2018*, CAPTIVE INS. TIMES (Feb. 19, 2019), http://www.captiveinsurancetimes.com/captiveinsurancenews/industryarticle.php?article_id=6257.

²⁰² *Id.*; see also generally U.S. DEP’T OF STATE, BUREAU OF INT’L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INT’L NARCOTICS CONTROL STRATEGY REP. 91-93 (2015).

²⁰³ *Financial Secrecy Index 2018: Narrative Report on Cayman Islands*, TAX JUST. NETWORK (2018), <http://www.financialsecrecyindex.com/PDF/CaymanIslands.pdf>.

Canada.”²⁰⁴ This obstacle stems from the increased pressure on banks to “Know Your Customer.” As so, financial institutions domiciled onshore are reluctant to take on potential offshore clients that might be “high-risk” for money laundering.

On May 1, 2017, the United Kingdom (UK) had adopted “an amendment to the Sanctions and Anti-Money Laundering Bill” which would require the 14 British overseas territories, including the Cayman Islands, to introduce public registers of beneficial ownership by the end of year 2020.²⁰⁵ The Cayman Islands Ministry of Financial Services was not pleased with this requirement and indicated that if necessary, the government will challenge this requirement in the “Cayman Islands courts through an order in council.”²⁰⁶ The Ministry had stated that “a public register will not be introduced in the Cayman Islands until such registers are adopted as a global standard. [So far, only] EU countries are required to introduce public registers by 2020, under the [fifth amended] AMLD.”²⁰⁷

Furthermore, the Cayman Islands government argued that having public registers of beneficial ownership conflict with the Cayman Islands Constitution, “which provides a positive obligation on the Government to protect a person’s legitimate need for privacy with regard to their financial affairs.”²⁰⁸ The Ministry of Financial Services asserts that:

The Cayman Islands Government has long [recognized] the importance of maintaining beneficial ownership information, compiling this information on a private register with information only made available to law enforcement agencies upon request to satisfy their legitimate needs for access, such as to carry out a law enforcement investigation The Cayman Islands takes its place as a leader in global finance very seriously and [recognizes] that beneficial ownership information – not provided publicly, but rather through proper legal channels to relevant authorities – does support the global fight against financial crimes.²⁰⁹

While the Cayman Islands government has been slowly chipping on its wall of secrecy to keep up with international AML pressures, it is difficult to ignore that the territory’s economy does rely heavily on its

²⁰⁴ Brooks, *supra* note 185.

²⁰⁵ Ned Holmes, *Cayman Islands ‘Aggrieved’ by ‘Constitutional Overreach’ of Anti-Money Laundering Bill*, CAPTIVE INS. TIMES (May 15, 2017), http://www.captiveinsurancetimes.com/captiveinsurancetimes/regulationarticle.php?article_id=5802. This requirement is similar to the EU 4AMLD mentioned previously.

²⁰⁶ Denise Grower, *Transparency and Privacy A Delicate Balance*, CAPTIVE INSIGHT, <https://captiveinsight.ky/transparency-and-privacy/> (last visited Mar. 14, 2019).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*; see also generally *Cayman Islands Government Displeased with Anti-Money Laundering Bill*, CAPTIVE INSURANCE NEWS (May 9, 2018), <https://www.captive.com/news/2018/05/09/cayman-islands-displeased-with-anti-money-laundering-bill>.

confidentiality laws. It is one of the most popular financial centers in the world because it allows companies to be easily formed while providing both asset protection and financial privacy protection. The international concern here is the fact that having a wall of secrecy to protect beneficial ownership information attracts potential money launderers who thrive on anonymity and opacity.

In addition to captive insurance companies, the Cayman Islands also prospers from the financial industry. With “banking assets worth US \$1.026 trillion in June 2017,” the Cayman Islands is the eighth biggest banking center in the world.²¹⁰ Similar to captive insurance companies, there are also captive banks.

Usually, a captive bank is wholly owned subsidiary of a multinational group of companies. The purpose of a captive bank is to provide banking service to the group or to the parent organization. A captive bank works only for the parent, its customers and suppliers. In order to avail low capital requirements and freedom from exchange control, captive banks are usually located in a tax haven. Services provided by a captive bank include safe keeping of deposits, merchant banking, financing, and other services in association with commercial banks.²¹¹

Since captive entities function as subsidiaries of another, usually a non-bank institution, and since they often operate in tax havens like the Cayman Islands, their activities are not very transparent. Perhaps in the wake of the Panama Papers, UK officials thought that focusing on captive and offshore entities and forcing them to disclose beneficial ownership information would disincentivize money laundering that is drawn to anonymity.

There has been a consistent evolution of AML initiatives to confront the wall of secrecy in tax havens. To tackle the issue of money laundering, effort and cooperation is required from all valuable players: intergovernmental/transnational collaborations, onshore firms conducting KYC due diligence work, and offshore entities disclosing beneficial ownership information. The parent companies that are domiciled in non-tax haven countries should be required to disclose information about their subsidiaries that are domiciled in tax-havens. Without cross-border collaboration and cooperation, efforts in preventing money laundering and tax evasion schemes that thrive from a transnational network of anonymous entities would almost be futile.

²¹⁰ *Financial Secrecy Index 2018*, *supra* note 203.

²¹¹ *Captive Bank Law and Legal Definition*. US LEGAL INC., <https://definitions.uslegal.com/c/captive-bank>.

VII. CONCLUSION

Journalists risked their lives to achieve transparency. Some have already been killed for it.²¹² Each of the 400+ journalists from over eighty countries who unveiled the truth behind the Panama Papers knew about this risk. They understood that by participating in the investigation, they “stood between rule of law and those who sought to violate it.”²¹³ One of the investigative journalists of the Panama Papers was killed in Malta by a car bomb. Daphne Caruana Galizia was investigating several Maltese politicians and had discovered offshore ties to the Maltese Prime Minister Joseph Muscat’s inner circle.²¹⁴ Daphne’s sister, Corinne Vella, explains that “[t]hey wanted to shut her up She obviously spoke truth to power. That was threatening to people in power.”²¹⁵

The Panama Papers unveiled how the most privileged and powerful people in the world have been operating by a different set of rules. We need to develop a culture of transparency and accountability to protect our basic freedoms. “Developing a culture of transparency and accountability, where we not only know what [the] government is doing, but recognize that we have not just the right but the responsibility to actually act in changing the nature of government, . . . directly holds these individuals to account.”²¹⁶ After all, “the ones who pay the price for the tax haven model are the citizens of all the countries whose tax receipts are reduced due to the activities of shell companies, or whose public funds are funneled out of the country and stashed away in the Caribbean.”²¹⁷

²¹² See Andrew Higgins and Liam Stack, *Malta in an Uproar Over Killing of an Investigative Journalist*, THE N.Y. TIMES (Oct. 20, 2017) (revealing that Daphne Caruana Galizia, an investigative journalist of the Panama Papers, was killed by a car bomb), <https://www.nytimes.com/2017/10/20/world/europe/pope-francis-maltajournalist.html>

²¹³ *Id.*

²¹⁴ Jon Henly and Julliette Garside, *Murdered Panama Papers journalist’s son attacks Malta’s ‘crooks,’* THE GUARDIAN (Oct. 17, 2017), <https://www.theguardian.com/world/2017/oct/17/murdered-panama-papers-journalist-son-malta-crooks-daphne-caruana-galizia>.

²¹⁵ See also Joanna Kakissis, *Who Ordered the Car Bomb that Killed Maltese Journalist Daphne Caruana Galizia*, NPR NEWS (July 22, 2018), <https://www.npr.org/2018/07/22/630866527/mastermind-behind-malta-journalist-killing-remains-a-mystery>.

²¹⁶ Burgmann, *supra* note 142.

²¹⁷ Obermayer, *supra* note 1, at 312.