

# **Report: Regulating the Lawyer-Enablers of Russia's War on Ukraine**

**Stanford Law School Policy Practicum on  
Regulating Professional Enablers**  
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## Table of Contents

<b><i>Executive Summary</i></b> .....	<b>8</b>
<b><i>Introduction</i></b> .....	<b>14</b>
1. Sanctions are critical to hastening an end to the war in Ukraine, yet they are faltering. ....	14
2. US professionals have played key roles in “enabling” sanctions evasion. ....	15
3. Due to confidentiality rules, lawyers are the quintessential enablers. ....	16
4. Strengthened oversight can help close the lawyer-enabling loophole. ....	17
5. The United States must protect sanctions as a tool for present and future crises. ....	17
<b><i>Part I: Problem Description</i></b> .....	<b>18</b>
A. How Russian “oligarchs” came into being .....	18
B. Oligarchs’ cash flows and the United States.....	19
C. Russian oligarchs are fueling the war on Ukraine .....	20
D. Sanctions evasion trends and tactics .....	22
E. U.S. professionals facilitate sanctions evasion .....	23
F. Lawyers play a key role in enabling sanctions evasion.....	25
Three scenarios of lawyers’ enabling activities .....	27
1. Direct evasion: hypothetical.....	27
2. Associate evasion: Vladimir Voronchenko .....	28
3. Shell company evasion: Andrey Kostin .....	29
<b><i>Part II: Current U.S. Regulatory Landscape</i></b> .....	<b>31</b>
A. Sanctions framework.....	31
1. IEEPA .....	32
2. Secondary sanctions .....	34
B. Sanctions compliance and Anti-Money Laundering (AML) efforts in the private sector.....	35
1. Customer Due Diligence and beneficial ownership verification .....	36
a. CDD for natural persons .....	36
1. Verification of customer identity.....	36
2. Customer risk assessment .....	37
3. Enhanced due diligence .....	37
4. Continued due diligence .....	38
b. CDD on a legal entity .....	38
1. Determination of beneficial ownership.....	38
2. Verification of the identity of beneficial owners .....	38
3. Customer risk assessment .....	39
2. Special cases and other rules .....	39
a. Identity verification under the CTA.....	39
b. Suspicious activity monitoring and reporting.....	40

c. Interest on Lawyers' Trust Accounts (IOLTAs).....	42
3. Compliance issues, costs, and effects of compliance .....	42
<b>C. Civil &amp; criminal enforcement of sanctions and AML laws.....</b>	<b>44</b>
1. Current enforcement efforts .....	44
2. Future enforcement potential: AML regulations and lawyers .....	46
<b>D. Lawyer supervision in the United States .....</b>	<b>46</b>
1. Forms of lawyer regulation .....	47
2. Key ethical duties & principles .....	48
a. Confidentiality .....	48
b. Communication .....	48
c. Rule 1.16: withdrawal & information collection .....	49
d. Professional misconduct & sanctions .....	50
3. Rule alteration & Sarbanes-Oxley.....	51
<b>E. Gaps in the current regulation of lawyers .....</b>	<b>52</b>
<b><i>Part III: Comparative Case Studies .....</i></b>	<b><i>53</i></b>
<b>A. Common law systems .....</b>	<b>55</b>
1. Canada.....	55
2. United Kingdom.....	58
<b>B. Civil law systems .....</b>	<b>61</b>
1. Brazil.....	61
2. Germany & the European Union.....	63
<b>C. Mixed civil/common law systems.....</b>	<b>66</b>
1. South Africa .....	66
2. United Arab Emirates (UAE) .....	68
<b><i>Part IV. Policy recommendations.....</i></b>	<b><i>71</i></b>
<b>Policy recommendation: Regulate lawyers pursuant to ENABLERS 2.0 .....</b>	<b>71</b>
1. Congress.....	72
1.1 Introduce anti-money laundering obligations for lawyers when performing certain corporate and financial services, under "ENABLERS 2.0." .....	72
1.2 Robustly fund FinCEN and other implementing agencies. ....	74
1.3 Mandate that lawyers comply with ENABLERS 2.0 within one year. ....	74
2. The Financial Crimes Enforcement Network.....	75
2.1 Require lawyers to complete CDD.....	75
2.2 Require lawyers to file Suspicious Activity Reports, with accommodations for lawyers' ethical duties. ....	76
2.3 Require lawyers to submit Currency Transaction Reports. ....	78
2.4 Designate state bar associations as the relevant compliance supervisory bodies. ....	78
3. The Biden Administration.....	79
3.1 Expand the list of foreign enablers of sanctions evasion who can be targeted with secondary sanctions. ....	79
4. The Office of Foreign Assets Control .....	79
4.1 Align the definition of beneficial ownership with other current laws. ....	79

4.2 Impose more individual sanctions on foreign lawyers committing sanctions evasion activities in third countries. ....	80
5. The Department of Justice .....	81
5.1 Pursue appropriate penalties for violations. ....	81
6. ABA & state bar associations.....	81
6.1 Create necessary trainings on lawyers' new responsibilities.....	81
6.2 Establish compliance monitoring programs. ....	82
Next steps & implementation timeline.....	82
<b>B. Discussion .....</b>	<b>82</b>
<b><i>Conclusion.....</i></b>	<b><i>86</i></b>
<b><i>Appendix A: Rebutting alternative proposals .....</i></b>	<b><i>87</i></b>
<b>Alternative I: Further changes to the ABA's Model Rules of Professional Conduct (Rejected) ..</b>	<b>87</b>
Considerations.....	87
<b>Alternative II: SAR reporting to state bar associations (Rejected) .....</b>	<b>88</b>
Considerations.....	89

## Table of Abbreviations

Abbreviation	Term
ABA	American Bar Association
AML	Anti-Money Laundering
BSA	Banking Secrecy Act
CDD	Customer/Client Due Diligence
CTA	Corporate Transparency Act
CTR	Currency Transaction Reports
CLE	Continuing Legal Education
DIFC	Dubai International Financial Centre
DNFBPs	Designated Non-Financial Businesses and Professionals
DOJ	Department of Justice
EDD	Enhanced Due Diligence
ENABLERS Act	Establishing New Authorities for Business Laundering and Enabling Risks to Security Act
FATF	Financial Action Task Force
FinCEN	Financial Crimes Enforcement Network
FIU	Financial Intelligence Unit
FLSC	Federation of Law Societies in Canada
IEEPA	International Emergency Economic Powers Act
IOLTAs	Interests on Lawyers Trust Accounts
MRPC	Model Rules of Professional Conduct
OFAC	Office of Foreign Assets Control
SDN	Specially Designated Nationals
SDN List	Specially Designated Nationals and Blocked Persons List
SAR	Suspicious Transaction/Activity Report
SBA	State Bar Associations
UAE	United Arab Emirates

## Executive Summary

**Lawyers represent a significant threat to the integrity of the U.S. sanctions regime.** This report analyzes that threat in the context of Russia's aggressive war against Ukraine. Sanctions, particularly individual sanctions, are a central weapon in the United States' national security arsenal. This report recommends that Congress, federal agencies, and state bar associations implement a comprehensive regulatory regime for lawyers engaging in certain transactional work to ensure U.S. lawyers are no longer enablers of sanctions evasion.

This report recommends amending the Banking Secrecy Act (BSA) to subject financial transactional work completed by lawyers to the same anti-money laundering and anti-sanctions evasion requirements to which banks are subject. Lawyers would be required to verify the true identity of their clients when completing financial transactions on their behalf and file reports with the government on suspicious client activity. This requirement would prevent oligarchs from gaming the U.S. anti-money laundering (AML) system by using lawyers instead of banks for these transactions. Congress must also fully fund the agencies that would implement this new law: the Financial Crimes Enforcement Network (FinCEN), the Office of Foreign Assets Control (OFAC), and the Department of Justice (DOJ). FinCEN must issue comprehensive rules clarifying lawyers' obligations under the BSA, and OFAC must amend its regulations to plug a critical gap in the current sanctions implementation framework. Finally, state bar associations must require that lawyers be trained on their new obligations.

### Report Roadmap

This report begins with a description of the problem: oligarchic wealth, how that wealth supports Putin's regime, and how U.S. lawyers enable sanctions evasion (Part I). It then gives an overview of the current regulatory landscape (Part II). Next, it presents how six other countries regulate lawyers as potential enablers of sanctions evasion and other crimes, including money laundering (Part III). Finally, it proposes a comprehensive legislative and regulatory regime to solve the lawyers-as-enablers problem (Part IV).

## Part I: Problem Description

**Russian oligarchs are fueling Russia's war on Ukraine.** Putin's regime is fueled in part by a close-knit coterie of individuals who rely on the regime for their massive wealth. While Putin may have granted many of these oligarchs their wealth, he also relies on their support and the tax revenue they generate.

**Sanctioning oligarchs targets a key Kremlin vulnerability.** As of 2023, at least 81 of the richest Russians are openly assisting the Russian military. Sanctioning oligarchs and freezing their offshore wealth can be used to pressure them into ending their support for Russia's aggressive war.

**The United States has leverage over oligarchs because of their offshore wealth.** Oligarchs often store their wealth abroad because their wealth is neither particularly useful nor safe in Russia. The United States and Western Europe are ideal homes for this wealth: to grow it and keep it safe from expropriation. If U.S. and allied authorities can find this wealth, they can seize or freeze it.



**Sanctions evasion, facilitated by U.S. professionals, undermines U.S. sanctions.** Evasion can seriously blunt the impact of individual sanctions. To gain entry to the lucrative U.S. market, sanctioned individuals often hire professionals, like lawyers, with expertise in the U.S. financial system. These professionals are experts at exploiting weaknesses in the U.S. sanctions regime by building complex corporate structures to conceal ownership or utilizing opaque, anonymity-friendly markets like real estate and art. Unlike traditional financial institutions, these professional enablers are not required to adopt any safeguards that can prevent money laundering, including conducting due diligence or reporting suspicious activity to the government.

**Lawyers are quintessential enablers.** Lawyers are able to weaponize their unique expertise and privileges to protect their sanctioned clients from the force of U.S. law. In particular, lawyers benefit from two unique characteristics that make them especially useful to sanctioned persons:

**Attorney-client privilege and confidentiality obligations** allow lawyers to perform most services not just confidentially, but behind a robust shield of legal protection.

Lawyers are only able to report potential money laundering schemes to authorities if they meet a high bar: lawyers must have “**actual knowledge**” of their client’s schemes.

**Lawyers’ enabling activities take three key forms:**

**Direct evasion:** The lawyer works directly for a sanctioned client and helps them transfer funds into and make transactions in the United States. Here, the lawyer uses confidentiality rules or attorney-client privilege to conceal their client’s identity from authorities. By doing so, the lawyer is committing a crime.

**“Associate” evasion:** A lawyer works with an associate of a sanctioned individual. This “associate” acts as a cut-out, pretending to be the true owner of the sanctioned individual’s funds.

**Shell company evasion:** A lawyer works with a shell company owned or controlled by a sanctioned individual. Because attorneys have no obligation to conduct Client Due Diligence (CDD) on legal entity clients, the attorney is not required to ascertain who the true owner of a company is.

## Part II: Current Regulatory Landscape

**Current U.S. sanctions framework:** The President has the power, under the International Emergency Economic Powers Act (IEEPA), to add foreign individuals who are a threat to the United States to the U.S. sanctions list. That list, the “Specially Designated Nationals and Blocked Persons” List (SDN List), is administered by OFAC. The United States can also sanction individuals who enable sanctions dodging through “secondary sanctions.” The process for adding individuals to the SDN List is time and resource intensive. OFAC needs to legally justify each designation and OFAC’s decision can be appealed.

**How sanctions compliance works now:** It is illegal for any U.S. individual or entity to do business with someone on the SDN List or for a sanctioned individual to do business in or through the United States. Financial institutions handle compliance with these sanctions through their AML programs required by the BSA.

**Client due diligence:** To be legally compliant, financial institutions must conduct CDD on every client to determine their true identity. For legal entity clients, financial institutions must also determine who the beneficial owner(s) of the entity is.

**Suspicious activity monitoring/reporting:** Financial institutions must also monitor client activity for suspicious activity that suggests the client may be laundering money, financing terrorism, evading sanctions, or otherwise breaking the law. If the client's activity is suspicious enough, the financial institution must file a suspicious activity report (SAR) with FinCEN.

**'Blocking' sanctioned client accounts:** If a financial institution determines it is doing business with an SDN-Listed person, it must "block" the account—placing the client's funds in an inaccessible account until the sanctions are lifted.

**Civil and criminal enforcement against sanctions evasion:** Individuals who knowingly do business with sanctioned individuals can be prosecuted under IEEPA and other federal laws (e.g., wire fraud, bank fraud, or money laundering statutes). Institutions that willfully fail to implement and maintain an effective AML and sanctions compliance program can be prosecuted under the BSA, even if they did not knowingly work with a sanctioned client.

**The United States has tried to address lawyer-enablers before.** The "Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act" (ENABLERS Act), which almost passed in 2022, would have subjected lawyers engaging in certain risky financial work to the BSA's regulatory regime. This proposal was supported by the Biden Administration, anti-corruption advocacy groups, Ukrainian diaspora organizations, and a bipartisan group of legislators.

**U.S. lawyers face few regulations that would prevent them from enabling sanctions evasion with impunity.** Lawyer regulation in the United States is primarily managed at the state level by ethical rules policed by state courts and bar associations. These rules are unclear about what a lawyer can or must do when she finds she has accidentally assisted with sanctions evasion and often outright prohibit them from reporting their suspicions to authorities. Because of these shortcomings, the rules also provide a veneer of legitimacy to bad-actor lawyers who wish to assist clients with sanctions evasion.

**U.S. lawyer regulation can change and has in the past.** In the wake of the Enron accounting fraud scandal, Congress passed the Sarbanes-Oxley Act in 2002, which subjected lawyers to a battery of new legal duties. The law changed the lawyer's duty of confidentiality in significant ways. When the federal government has stepped in to regulate lawyers in the past, the profession has adapted without dire consequences.

## Part III: Comparative Case Studies

This report finds that the United States would not be entering uncharted territory by imposing substantial CDD and SAR reporting obligations on lawyers. Particularly, the United Kingdom has imposed CDD and SAR requirements on lawyers for more than seven years. Overall, a survey of six countries with differing legal systems has found that:

**Several nations have successfully required legal professionals to file SARs** in the AML context, including close partners of the U.S such as the United Kingdom and Germany. The United Kingdom, Germany, South Africa, and the United Arab Emirates all imposed some SAR requirement on lawyers.

**Every country in the survey imposed stricter CDD requirements than the United States** does on legal professionals. Even countries that did not impose SAR obligations on legal professionals imposed mandatory CDD requirements on lawyers.

**Enforcement is of the utmost importance** in achieving success in these AML/anti-sanctions evasion regimes. The United Kingdom’s notionally strong legal regime has been undermined by insufficient enforcement. Pure self-regulatory regimes are significantly less effective than government regulation. The self-regulatory aspects of Canada’s regime are heavily criticized, and experts doubt their efficacy.

Country	Who Regulates?	CDD	SARs
United States	Pure self-reg	minimal <sup>1</sup>	✗
Canada	Self-reg with voluntary gov’t cooperation	✓	✗
United Kingdom	Gov’t/Indep. regulators	✓	✓
Brazil <sup>2</sup>	Gov’t/self-reg	✓	✓
Germany	Gov’t/self-reg	✓	✓
South Africa	Gov’t/self-reg	✓	✓
UAE (Dubai, DIFC)	Gov’t	✓	✓

## Part IV: Policy Recommendations

The United States must regulate legal services used for sanctions evasion. This report proposes a legal and regulatory regime to accomplish this goal:

**1.1 Congress should enact comprehensive legislation regulating certain risky legal services.** It should impose CDD and SAR requirements on lawyers engaging in types of transactional work that can be used for sanctions evasion. The bill would **expand the BSA’s definition of a regulated “financial institution” to encompass lawyers** when they provide: (a) legal entity arrangement, association, or formation services; (b) trust services; or (c) third party payment services. The bill would *not* apply to financial services directly related to civil litigation or criminal representation.

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<sup>1</sup> Attorneys are required to “inquire into and assess the facts and circumstances of each representation” but the scope of that inquiry is undefined. MODEL RULES OF PRO. CONDUCT r. 1.16(a) (AM. BAR ASS’N 2023).

<sup>2</sup> The Prosecutor General of Brazil maintains that the law covers lawyers, but the bar disputes this.

**1.2 Congress should fully fund the implementing agencies.** FinCEN, which oversees BSA compliance; OFAC; and the DOJ all need additional resources to enforce the new legislation. All three agencies are under-resourced for their mission to maintain and enforce a strong sanctions regime.

**1.3 Congress should mandate that lawyers comply with the law within one year.** The law should become effective within a year even if FinCEN is not able to publish a rule within that time frame. Lawyers can apply existing BSA guidance for financial institutions until FinCEN issues a rule.

**2. FinCEN must issue clear rules subjecting lawyers to CDD and SAR obligations.** Lawyers engaging in financial services would be required to ascertain the true identity of their client and file SARs on suspicious client activity. Lawyers would be allowed to inform the client after they filed a SAR. Congress should subject lawyers to currency transaction reporting obligations for large funds transfers through their client trust accounts. Lawyer-filed currency transaction reports (CTRs) would include the client's name as the owner of the funds, whereas current trust account CTRs filed by banks only list the lawyer.

**3. The Biden Administration should expand the list of foreign enablers eligible for secondary sanctions to include law firms and other non-financial professionals.** Updating Executive Order 14114 to allow these entities to be subject to secondary sanctions would allow OFAC to disable enablers abroad while FinCEN regulates potential enablers at home.

**4.1 OFAC should update its "50 Percent Rule" for companies owned by SDN-Listed persons.** OFAC should broaden its rule enforcing sanctions against legal entities owned by an SDN-Listed person. It should require that individuals block the accounts of legal entities which a listed person owns more than 25 percent of (up from the current 50 percent threshold) or entities controlled by an SDN-Listed person. This update would align the rule with BSA regulations and the Corporate Transparency Act (CTA).

**4.2 OFAC should implement secondary sanctions on non-U.S. lawyer-enablers.** Sanctioning enablers directly can seriously degrade oligarchs' sanctions-evasion networks. OFAC should expand its current secondary sanctions regime and add more enablers to the SDN List.

**5. The Department of Justice must define appropriate penalties for lawyers violating ENABLERS 2.0.** The DOJ should consider both individual and firm-level criminal and civil penalties for lawyers violating the new law. Both types of penalties are critical to deter violators.

**6.1 State bar associations (SBAs) should require lawyers to be trained on their new obligations.** SBAs should implement this requirement through their existing continuing legal education rules. The American Bar Association (ABA) can partner with SBAs to create this programming.

**6.2 SBAs should be tasked with auditing attorney compliance with the BSA.** Supervision by SBAs will ensure that investigations into attorney practices do not unduly infringe on the attorney-client privilege and confidentiality rules.

## Comment on Rejected Alternative Policy Options

Alternative permissive or self-regulatory approaches to policy solutions will not work. The report considers and discards two alternative regulatory approaches: changing the ABA model rules or requiring lawyers to report suspicious activity to state bar associations. Neither approach would be effective at detecting or deterring harmful conduct nor would they better protect the legal principles at issue, such as attorney-client privilege.

## Future Implications

Solving the lawyer-enablers problem is critical to ensuring the United States can respond to many growing threats **including an increasingly aggressive China and transnational drug trafficking**. Sanctions must remain a robust tool to respond to nations challenging the rules-based international order. If lawyers can be used to subvert these sanctions, the tool will become useless. Similarly, lawyers are currently effective agents that transnational criminal organizations can use to move their funds across borders without detection by authorities. The solution this report proposes will help tackle these threats as well as Russia's current war against Ukraine.

Finally, solving the lawyer-enabler problem is critical to protecting the integrity of the legal profession. Lawyers that enable sanctions evasion and money laundering cast a dark shadow over the profession as a whole. U.S. lawyers are supposed to safeguard democracy, not threaten it. **It is in every lawyer's interest to stop the weaponization of the legal profession at the hands of the United States' adversaries.**

## Introduction

In the United States and abroad, lawyers are weaponizing their professional privileges, often unwittingly, to help their clients evade sanctions. These lawyers threaten the United States' ability to effectively employ sanctions as a tool in conflicts with global rivals, to combat international narcotics trafficking, and to punish those who threaten human rights abroad. In the face of Russia's aggressive war against Ukraine, the International Working Group on Russian Sanctions commissioned this report to better understand vulnerabilities in the U.S. sanctions regime and suggest policy solutions to address them. This report identifies lawyers who enable sanctions evasion as a key vulnerability the United States must remedy. It further recommends legislation and executive action to fix this vulnerability.

### 1. Sanctions are critical to hastening an end to the war in Ukraine, yet they are faltering.

As of May 2024, Ukraine is down but not out. Alongside military aid, sanctions play a central role in U.S. strategy to counter Russian aggression.

Even before the war, sanctions played a key role in the international response to Russian's transgressions. In the mid-2010s, the United States and allied nations instituted the Magnitsky Act, a law targeting Russian human rights abusers with individual sanctions.<sup>3</sup> Then, in the wake of Russia's occupation of Crimea and the Donbas, the United States, European Union, and Canada led an international effort to ramp up sanctions.<sup>4</sup>

From the start of Russia's full-scale invasion in 2022, United States and Ukrainian policymakers made individual and sectoral sanctions central to their strategy. The United States and Ukraine instituted wide-ranging sanctions packages—targeting individuals, banks, businesses, financial exchanges, exports, and imports.<sup>5</sup> Dozens of countries followed suit. One of the primary goals of these sanctions has been to hold accountable “individuals and entities who profit from invasion and their proximity to the Kremlin” and “impos[e] severe costs on Putin's oligarchs.”<sup>6</sup> Policy makers also view sanctions as crucial to shortening the war. President of Ukraine Zelenskyy has

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<sup>3</sup> *The Global Magnitsky Act: Questions and Answers*, HUM. RTS. WATCH (Sep. 13, 2017), <https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act>.

<sup>4</sup> *Ukraine and Russia Sanctions*, U.S. DEP'T OF STATE, <https://www.state.gov/ukraine-and-russia-sanctions/> (last visited May 14, 2024); *EU Restrictive Measures Against Russia Over Ukraine*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/> (last visited May 14, 2024); *Canadian Sanctions Related to Russia*, GOV'T OF CAN., [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/russia-russie.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/russia-russie.aspx?lang=eng) (last visited May 14, 2024).

<sup>5</sup> CONG. RSCH. SERV., *RUSSIA'S WAR AGAINST UKRAINE: OVERVIEW OF U.S. ASSISTANCE AND SANCTIONS* (2023), <https://crsreports.congress.gov/product/pdf/IN/IN11869>.

<sup>6</sup> Press Release, U.S. Dep't of Treas., *With Wide-Ranging New Sanctions, Treasury Targets Russian Military-Linked Elites and Industrial Base* (Sep. 14, 2023), <https://home.treasury.gov/news/press-releases/jy1731>.

asserted that “[i]f we had received sanctions at once . . . the result would be tens of thousands of lives saved.”<sup>7</sup>

Putin's regime has felt the sting. By International Energy Agency estimates, Russia's monthly average oil revenues dropped in 2023 by \$4.2 billion.<sup>8</sup> Per another estimate, 70 percent of Russian banking system assets are under sanction.<sup>9</sup> However, many of the sanctions against Russian state assets and elites are not working as intended.<sup>10</sup> Though the government has sustained some long-term damage in the face of the largest sanctions package in human history, the Russian government has found ways to return to near-normalcy.<sup>11</sup> U.S. and allied officials are focusing more on sanctions evasion in response—recognizing that a sanctions regime is only effective if it is enforced.<sup>12</sup> But even in the face of these efforts, evasion remains a significant challenge.

## 2. US professionals have played key roles in “enabling” sanctions evasion.

Professional service providers in the United States and around the world are facilitating this evasion. These “enablers”—most notably professionals who move and hide illicit funds—come in many shapes and sizes. Where some work on their own, others operate within massive corporations. Yet all of them represent a critical vulnerability in the sanctions architecture. The breadth and depth of enablers' involvement in sanctions evasion can be surprising. Some of these enablers intentionally assist with sanctions evasion. But enabler networks depend heavily on professionals who provide their services with plausible deniability, legal legitimacy, and sometimes genuine ignorance of the illicit activities they are aiding. This second, larger pool of enablers might provide transactional services to disguise assets, lobby public officials and regulators, or use the media to rehabilitate their client's reputation—whatever it takes to serve the interests of their clientele in technical compliance with legal and professional standards.

Although sanctions packages typically target the oligarchs themselves, enablers may be the better chokepoint. New research suggests that there are significantly fewer enablers than there are

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<sup>7</sup> Suzanne Lynch, *Zelenskyy Tells Davos: We Want More Sanctions and More Weapons*, POLITICO (May 23, 2022), <https://www.politico.eu/article/volodymyr-zelenskyy-davos-more-sanctions-more-weapons/>.

<sup>8</sup> *Russia's War on Ukraine*, INT'L ENERGY AGENCY, <https://www.iea.org/topics/russias-war-on-ukraine> (last visited May 13, 2024).

<sup>9</sup> *What Are the Sanctions on Russia and Have They Affected Its Economy?*, BBC (Feb. 23, 2024), <https://www.bbc.com/news/world-europe-60125659>.

<sup>10</sup> The SWIFT ban, for example, applies to some banks, but exempts a number of institutions engaged in energy transfers. Philip Blenkinsop, *EU Bars 7 Russian Banks From SWIFT, but Spares Those in Energy*, REUTERS (Mar. 2, 2022), <https://www.reuters.com/business/finance/eu-excludes-seven-russian-banks-swift-official-journal-2022-03-02/>.

<sup>11</sup> BBC, *supra* note 9.

<sup>12</sup> National Security Advisor Jake Sullivan recently warned China that the country would face consequences if it helped Russia evade sanctions. Colin Clark, *White House's Sullivan Warns China Over Aid to Russia's Defense Industrial Base*, BREAKING DEFENSE (Jan. 31, 2024), <https://breakingdefense.com/2024/01/white-houses-sullivan-warns-china-over-aid-to-russias-defense-industrial-base/>. The European Union's most recent round of sanctions, meanwhile, cracked down on ship-to-ship transactions. Samuel Petrequin, Lorne Cook, & Raf Casert, *European Union Countries Agree on a New Package of Sanctions Against Russia Over the War in Ukraine*, ASSOCIATED PRESS (June 21, 2023), <https://apnews.com/article/european-union-sanctions-against-russia-ukraine-war-8df4e2ce3eeff80626c6a84bb86b3150>.



oligarchs.<sup>13</sup> Enabler networks operate as a hub-and-spoke system: one enabler may serve many oligarchs while an oligarch may only employ a few enablers.<sup>14</sup> An enabler wealth manager may serve many corrupt officials but each of those officials may only employ that wealth manager and perhaps one lawyer or accountant. Moreover, Russian oligarchs particularly are unusually distrustful and rely on a small number of boutique firms.<sup>15</sup> Therefore, disabling the enablers can destroy these sanctions evasion networks.<sup>16</sup>

### 3. Due to confidentiality rules, lawyers are the quintessential enablers.

Lawyers are especially valuable enablers because their work with clients can be shielded from authorities through attorney-client privilege and confidentiality protections. Today, lawyers around the world are weaponizing these professional privileges on behalf of sanctioned clients. While the United States' peer nations already regulate lawyers as potential enablers, the United States does not. The United Kingdom and European Union's anti-money laundering (AML) and combatting the financing of terrorism (CFT) systems explicitly cover lawyers. These countries require lawyers comply with a comprehensive customer due diligence (CDD) and suspicious activity report (SAR) submission regime that still protect a lawyer's critical role in the justice system.

But the United States' legal culture is unique: confidentiality is particularly sacrosanct. Nevertheless, by pursuing the kinds of reforms other countries have pioneered, the United States could hold more enablers accountable and improve the efficacy of the sanctions it already has in place without any additional burden on most attorneys or threatening the justice system. Recognizing that fact, some U.S. officials have sought to close this gap in sanctions enforcement mechanisms in recent years. The "Establishing New Authorities for Business Laundering and Enabling Risks to Security Act" (ENABLERS Act), which nearly passed in 2022, would have required lawyers, among others, to perform basic due diligence on their clients.<sup>17</sup> But, the American Bar Association (ABA) has actively opposed this effort and is against imposing any additional substantial legal obligations on lawyers.<sup>18</sup>

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<sup>13</sup> See Ho-Chun Herbert Chang et al., *Complex Systems of Secrecy: The Offshore Networks of Oligarchs*, 2 PNAS NEXUS 1, 2 (Feb. 28, 2023), <https://academic.oup.com/pnasnexus/article/2/3/pgad051/7059318> (analyzing data provided by the International Consortium of Investigative Journalists to find that a small number of enablers assist a greater number of oligarchs).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 4, 6.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> ENABLERS Act, H.R. 5525, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5525>.

<sup>18</sup> See Dylan Tokar, *ABA Passes Resolution Opposing Suspicious-Transaction Reporting Rule for Lawyers*, WALL ST. J. (Feb. 7, 2023), <https://www.wsj.com/articles/aba-passes-resolution-opposing-suspicious-transaction-reporting-rule-for-lawyers-11675803291>. In 2023, the American Bar Association (ABA) passed a largely symbolic resolution stating that lawyers had a duty to assess the facts and circumstances of their representation and withdraw, if need be, based on what they find. STANDING COMM. ON ETHICS AND PRO. RESP., STANDING COMM. ON PRO. REGUL., AM. BAR. ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 100 (2023), <https://www.americanbar.org/content/dam/aba/administrative/news/2023/am-res/100.pdf>.



## 4. Strengthened oversight can help close the lawyer-enabling loophole.

Given that the status quo of lawyer regulation is untenable, this report aims to:

1. *Explain how Russian individuals and entities are evading sanctions and how these mechanisms impact Russia's war of aggression against Ukraine.*
2. *Explore how lawyers help clients evade sanctions.*
3. *Recommend ways to regulate lawyers to strengthen sanctions' effectiveness and ultimately hasten the end of the war in Ukraine.*

This report begins with a description of the problem. It then analyzes the various legal and regulatory regimes related to lawyers and sanctions evasion around the world. Finally, the report presents policy recommendations based on these findings: Congress should pass legislation to regulate lawyers as potential enablers of sanctions evasion and fully fund the implementing agencies; the Financial Crimes Enforcement Network (FinCEN) should issue regulations clarifying lawyers' obligations under this legislation; the Office of Foreign Assets Control (OFAC) should issue secondary sanctions and amend its rules to plug critical gaps in the sanctions regime; and state bar associations should require that lawyers be trained on their new obligations.

## 5. The United States must protect sanctions as a tool for present and future crises.

Individual sanctions are a central tool in the United States' arsenal to combat threats to global peace and security. Therefore, ensuring that sanctions are effective must be a U.S. national security priority. Russia is not the only global power challenging the international order. Policymakers should look to the future and ensure sanctions will be effective in the case of an escalating conflict with China or other global power. Beyond state-based threats, sanctions must also be effective at ensuring safety at home. The rise of the international fentanyl trade raises the possibility that new counternarcotics sanctions may be necessary.<sup>19</sup> Ensuring lawyers at home and abroad do not degrade U.S. sanctions is critical to protecting against both threats.

Finally, U.S. lawyers' role in sanctions evasion threatens the integrity of the legal profession. Lawyers have a professional obligation to protect the integrity of the legal system. When U.S. lawyers engage in sanctions evasion on behalf of their clients, they violate that obligation and tarnish the reputation of all lawyers. To protect lawyers' role as stewards of the legal system, the United States must remove them from the sanctions evasion business.

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<sup>19</sup> DRUG ENFORCEMENT AGENCY, U.S. DEP'T OF JUST., DEA-DCT-DIR-008-20, FENTANYL FLOW TO THE UNITED STATES (2020), [https://www.dea.gov/sites/default/files/2020-03/DEA\\_GOV\\_DIR-008-20%20Fentanyl%20Flow%20in%20the%20United%20States\\_0.pdf](https://www.dea.gov/sites/default/files/2020-03/DEA_GOV_DIR-008-20%20Fentanyl%20Flow%20in%20the%20United%20States_0.pdf). See generally, OFF. OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF TREAS., NARCOTICS SANCTIONS PROGRAM (2014), <https://ofac.treasury.gov/media/6776/download?inline> (describing U.S. counter-narcotics sanctions programs).

## Part I: Problem Description

In recent years, American lawyers and other professional enablers have developed elaborate schemes to evade domestic scrutiny and assist bad actors around the world with money laundering and sanctions evasion. No example is as telling as the enablers whose problematic behavior supports sanctioned Russian assets and oligarchs. In the wake of Russia's full-scale invasion of Ukraine, the urgency of the issue is even more apparent. As a major international conflict rages, and the Russian state is as vulnerable as it has ever been in recent decades, oligarchs and affiliated business entities—uniquely dependent on wealth as a source of power—play an essential role in buttressing Putin's regime.

### A. How Russian “oligarchs” came into being

Russian oligarchs became prominent after many of them participated in the privatization of state-owned enterprises. Russia in the 1990s experienced hyperinflation and insolvency, and regulation was lax. In that chaotic post-Soviet world, oligarchs-to-be took advantage of the state's lurch toward privatization, quickly amassing huge and grossly undervalued ownership stakes in formerly state-owned enterprises.<sup>20</sup> In just a matter of years, newly wealthy oligarchs had become titans of industry; the state and other citizens paid the price.<sup>21</sup>

While the “new rich” wielded real influence in Boris Yeltsin's regime, the dynamic shifted when Vladimir Putin, the former KGB operative, came to power.<sup>22</sup> Shortly after becoming president in 2000, Putin called a meeting with the most powerful oligarchs in Russia in which he made clear: so long as they steered clear of political intervention and kissed the ring when needed, they could keep their wealth and even make some money along the way.<sup>23</sup> Sure enough, those who stayed loyal and provided occasional support to Putin's inner circle were usually free to make enormous amounts of money.<sup>24</sup> Those who subsequently tried to undermine Putin, though, often ended up in a Siberian prison, forced into exile, or dead.<sup>25</sup>

As he has purged disloyal oligarchs, Putin has also created new ones with the assets he seized. For example, the *siloviki* (“men of force”), the military men and former KGB agents who compose the regime's security forces, have benefited immensely from shakeups and oligarchic turnover.<sup>26</sup> Over the past two decades, many of them—particularly those with ties to Putin—have often been first

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<sup>20</sup> Greg Rosalsky, *How ‘Shock Therapy’ Created Russian Oligarchs and Paved the Path for Putin*, NPR (Mar. 22, 2022), <https://www.npr.org/sections/money/2022/03/22/1087654279/how-shock-therapy-created-russian-oligarchs-and-paved-the-path-for-putin>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Alexandra Prokopenko, *Putin Is Betting On a New Class of Asset Owners to Shore Up His Regime*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sep. 14, 2023), <https://carnegieendowment.org/politika/90543>; Greg Rosalsky, *How Putin Conquered Russia's Oligarchy*, NPR (Mar. 29, 2022), <https://www.npr.org/sections/money/2022/03/29/1088886554/how-putin-conquered-russias-oligarchy>.

<sup>24</sup> Rosalsky, *supra* note 20.

<sup>25</sup> Masha Gessen, *The Wrath of Putin*, VANITY FAIR (Mar. 2, 2012), <https://www.vanityfair.com/news/politics/2012/04/vladimir-putin-mikhail-khodorkovsky-russia>; Eric Spitznagel, *The Mysterious Death of Russian Oligarch Boris Berezovsky*, BLOOMBERG (Apr. 4, 2013), <https://www.bloomberg.com/news/articles/2013-04-04/the-mysterious-death-of-russian-oligarch-boris-berezovsky>.

<sup>26</sup> Rosalsky, *supra* note 20.

in line for favorably structured government contracts.<sup>27</sup> Others from Putin's past, like childhood friends, have also found themselves at the helm of some of Russia's biggest state enterprises.<sup>28</sup> These new-money oligarchs come from diverse backgrounds; but they are alike in that they usually owe their money and power to Putin's regime.

Today, oligarchs have mostly learned to coexist with the regime and each other. They dominate media, banking, energy, transportation, metal production, and sports.<sup>29</sup> And they found ways to accumulate far larger sums than their counterparts in most post-Soviet states, thanks in no small part to their symbiotic relationship with Putin.<sup>30</sup>

## B. Oligarchs' cash flows and the United States

Oligarchs often do not keep much of their private wealth in Russia: offshore transactions have become a popular way for them to spread eggs between baskets and conduct business without restrictions. Today, oligarchs' offshore wealth is three times larger than Russia's official net foreign reserves.<sup>31</sup> Largely, oligarchs worry about their money being taken by corrupt officials.<sup>32</sup> As one American lawyer with former ties to a Russian aluminum conglomerate put it, capital "flees Russia primarily out of fear . . . [because] Russia is a very dangerous environment for people with money."<sup>33</sup>

The best evidence regarding these flows usually comes from leaked financial documents. About 40 percent of the more than 2,000 offshore entities found among leaked Alpha Consulting data and published in the Pandora Papers have one or more Russian beneficial owners.<sup>34</sup> At least 45 oligarchs, including sanctioned billionaires, appear in the Pandora Papers.<sup>35</sup> And Russian political figures, including former ministers and ex-members of the Duma, the Russian parliament, own more documented offshore legal entities than the politicians of any other country.<sup>36</sup>

Enforcers in countries like the United States are struggling to prevent these activities. For one thing, oligarchs have found clever ways to lock up their wealth. By investing in real estate, corporate securities, and luxury assets like yachts, aircraft, and other assets that are hard to track, oligarchs can often avoid identification and regulation. For another, a large number of financial

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Giacomo Tognini & John Hyatt, *The Forbes Ultimate Guide to Russian Oligarchs*, FORBES (Apr. 7, 2022), <https://www.forbes.com/sites/giacomotognini/2022/04/07/the-forbes-ultimate-guide-to-russian-oligarchs>.

<sup>30</sup> See Filip Novokmet, Thomas Piketty, & Gabriel Zucman, *From Soviets to Oligarchs: Inequality and Property in Russia, 1905-2016* 14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23712, 2017).

<sup>31</sup> *Id.* at 5.

<sup>32</sup> Nataliya Vasilyeva, *Panama Files Show Putin's Failure to Stop Offshoring*, BOSTON GLOBE (May 11, 2016), <https://www.bostonglobe.com/news/world/2016/05/11/panama-files-show-russian-crackdown-offshoring-failing/VQfxLWB08xH2cITp7vj8MO/story.html>.

<sup>33</sup> Peter Whoriskey, *Three Dozen Tycoons Met Putin on Invasion Day. Most Had Moved Money Abroad.*, WASH. POST (May 3, 2022), <https://www.washingtonpost.com/world/interactive/2022/offshore-putin-russia-oligarchs-pandora/>.

<sup>34</sup> Nicole Sadek et al., *Pandora Papers: New Release Reveals More Than 800 Russians Behind Secret Companies*, IRISH TIMES (Apr. 11, 2022), <https://www.irishtimes.com/business/financial-services/pandora-papers-new-release-reveals-more-than-800-russians-behind-secret-companies-1.4850007>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

flows happen outside the “sanction coalition” countries. Smaller nations that establish favorable regulatory regimes can claim plausible deniability and reap economic benefits from oligarchs' secretive financial transactions and vehicles. For that reason, places like Cyprus and the British Virgin Islands have long been known as safe havens for Russian assets.<sup>37</sup>

That said, oligarchs usually do not want offshore holding companies to be final destinations for their wealth; instead, many hope to channel it to other countries with more attractive real estate, investment, work, and educational opportunities.<sup>38</sup> The United States is a particularly attractive option with its “lightly regulated investment industry,”<sup>39</sup> its own offshore economy larger than the GDP of China, and world-class investment opportunities in luxury mansions and apartments, manufacturing plants, and other valuable assets.<sup>40</sup> Notably, entering the attractive American market requires middlemen, “enablers” like lawyers, financial advisors, or real estate agents who know the intricacies of the financial system but often do not (and need not) ask where the money is coming from.<sup>41</sup>

## C. Russian oligarchs are fueling the war on Ukraine

Today, in the wake of its war against Ukraine, the Russian government is leaning on oligarchs more than ever. It needs cash on hand because, on top of its usual commitments, the regime now has to replace costly military equipment, foster public support for the war domestically, crack down especially hard on dissidents who might undermine support, and provide pensions, disability payments, and payments to the families of fallen soldiers.<sup>42</sup> Accordingly, since the war started, the liquid part of Russia's National Wealth Fund has fallen by \$58 billion—more than half of its February 2022 value.<sup>43</sup> Oligarchs have been supporting the war and the regime through “informal contributions to various government-affiliated foundations, organizations, or directly into the pockets of important officials, including Putin,” controlling pro-government media, and running

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<sup>37</sup> Neil Weinberg, *Cyprus Ignores Russian Atrocities, Western Sanctions to Shield Vast Wealth of Putin Allies*, INT'L. CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 14, 2023), <https://www.icij.org/investigations/cyprus-confidential/cyprus-russia-eu-secrecy-tax-haven/>.

<sup>38</sup> See, e.g., Press Release, U.S. Att'y's Off., S.D.N.Y., Sanctioned Russian Oligarch and Others Indicted for Sanctions Violations and Money Laundering (Feb. 22, 2024), <https://www.justice.gov/usao-sdny/pr/sanctioned-russian-oligarch-and-others-indicted-sanctions-violations-and-money> (charging oligarch Andrey Kostin and American co-conspirators related to payments made for superyacht operations and Kostin's home in Aspen, Colorado).

<sup>39</sup> David Enrich & Matthew Goldstein, *How One Oligarch Used Shell Companies and Wall Street Ties to Invest in the U.S.*, N.Y. TIMES (Mar. 21, 2022), <https://www.nytimes.com/2022/03/21/business/russia-roman-abramovich-concord.html>.

<sup>40</sup> Casey Michel, *Oligarchy: How the U.S. Became the World's Refuge for Dirty Money*, MOTHER JONES (January 2024), <https://www.motherjones.com/politics/2024/01/dirty-money-united-states-bahamas-sioux-falls-financial-crimes/>.

<sup>41</sup> *Id.*

<sup>42</sup> Anton Troianovski et al., *How the Russian Government Silences Wartime Dissent*, N.Y. TIMES (Dec. 29, 2023), <https://www.nytimes.com/interactive/2023/12/29/world/europe/russia-ukraine-war-censorship.html>.

<sup>43</sup> See Darya Korsunskaya & Alexander Marrow, *Russia's Reserves Dwindle, but Fiscal Safety Net Could Last Years*, REUTERS (Feb. 15, 2024), <https://www.reuters.com/markets/europe/russias-reserves-dwindle-fiscal-safety-net-could-last-years-2024-02-15/>; Bruno Waterfield, *Cost of Putin's War in Ukraine Is Half a Million Disabled Russians*, THE SUNDAY TIMES (Apr. 4, 2024), <https://www.thetimes.co.uk/article/vladimir-putin-cost-war-ukraine-disabled-men-russia-8666wj9nb>; András Rácz et al., *Russia's War Economy: How Sanctions Reduce Military Capacity*, GERMAN COUNCIL ON FOREIGN RELATIONS (Feb. 14, 2023), <https://dgap.org/en/research/publications/russias-war-economy>.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part I: Problem Description

day-to-day operations in the government.<sup>44</sup> They are also contributing to Russia's military and general state capacity through taxation. In 2023, the Duma approved a bill to impose a 10 percent one-off windfall tax on large Russian companies, a move expected to raise up to \$4 billion for a government in desperate need of military financing.<sup>45</sup> The Duma did the same thing in 2022, taxing Gazprom heavily after natural gas prices soared in the latter half of the year.<sup>46</sup> Given that the vast majority of Russian billionaires still have their primary residence and business in Russia, their wealth is a resource the regime can tap into at any time with limited consequences.<sup>47</sup>

But even more importantly, the Russian government needs willing business partners to support the war effort, and oligarchs actively contribute to it.<sup>48</sup> As of 2023, at least 81 of the richest Russians "were openly involved in supplying the Russian army and military-industrial complex" by completing military contracts to produce guns and rifles, ammunition, grenades, shells, missiles, and cartridges, and military equipment used to shoot civilians in Bucha, attack the city center of Vinnytsia, and bomb the Mariupol Drama Theater used as a shelter by civilians, killing 300-600 people.<sup>49</sup> Whether they own minority stakes in weapons production facilities, provide cheap raw materials to military contractors, or transport equipment in contravention of international regulations, oligarchs have found ways to pitch in.<sup>50</sup> Out of those oligarchs and riches identified, only 14 were sanctioned by all countries of the "sanctions coalition" as of July 31, 2023.<sup>51</sup>

Since Russia's invasion of Ukraine, oligarchs have been unified, in no small part because of the steep penalties for dissent. The Kremlin has criminalized "discrediting Russian armed forces," an offense punishable by up to fifteen years in prison, and has used the provision to target powerful dissenters.<sup>52</sup> Authorities also nationalized at least seventeen large enterprises in 2023, mostly from those who were seen as insufficiently loyal, and repurposed assets seized to reward members of the *siloviki* and more devoted oligarchs.<sup>53</sup> A string of mysterious deaths in the oil industry have further chilled dissent.<sup>54</sup> In a culture of terror and extraordinary riches, even the oligarchs that

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<sup>44</sup> Vitaly Soldatskikh et al., *Lapdogs of War: A Guide to Russia's Wartime Oligarchs*, PROEKT MEDIA (July 31, 2023), <https://www.proekt.media/en/guide-en/russian-war-oligarchs-en/>.

<sup>45</sup> Huileng Tan, *Russia Has Lost So Much Money Due to The Ukraine War That It's Now Trying to Raise \$4 Billion by Slapping a Windfall Tax on Its Oligarchs*, BUS. INSIDER (June 13, 2023), <https://www.businessinsider.com/russia-ukraine-war-oligarchs-raise-billions-by-slapping-windfall-tax-2023-6>.

<sup>46</sup> *Id.*

<sup>47</sup> Novokmet, *supra* note 30, at 22.

<sup>48</sup> Sydney P. Freedberg, Agustin Armendariz, & Jesús Escudero, *How America's Biggest Law Firm Drives Global Wealth Into Tax Havens*, INT'L. CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 4, 2021), <https://www.icij.org/investigations/pandora-papers/baker-mckenzie-global-law-firm-offshore-tax-dodging/>.

<sup>49</sup> Soldatskikh, *supra* note 44.

<sup>50</sup> Antoine Harari & Clément Fayol, *How an Oligarch with Links to the Russian Weapons Industry Is Shielded from EU Sanctions*, DISCLOSE (Dec. 13, 2022), <https://disclose.ngo/en/article/how-an-oligarch-with-links-to-the-russian-weapons-industry-is-shielded-from-eu-sanctions>; Chris Kirkham et al., *Sanctioned Weapons Mogul Who Supplied Russia's Troops Has Ties to Philip Morris*, REUTERS (Apr. 21, 2022), <https://www.reuters.com/world/europe/sanctioned-weapons-mogul-who-supplied-russias-troops-has-ties-philip-morris-2022-04-21/>.

<sup>51</sup> Soldatskikh, *supra* note 44.

<sup>52</sup> *Russia Criminalizes Independent War Reporting, Anti-War Protests*, HUMAN RTS. WATCH (Mar. 7, 2022), <https://www.hrw.org/news/2022/03/07/russia-criminalizes-independent-war-reporting-anti-war-protests>.

<sup>53</sup> Alexandra Prokopenko, *Oligarchs Are Losing Out as Putin Courts a New Class of Loyal Asset Owners*, FIN. TIMES (Oct. 4, 2023), <https://www.ft.com/content/dc16f9bb-dadd-404e-9e7f-8113216fe12a>.

<sup>54</sup> *Id.*



## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part I: Problem Description

disagree with the war stick with the status quo in light of the high cost of defection and the benefits of loyalty.

As a result, in the face of outside pressure, finding ways around sanctions has become even more important for Russian elites. Around the time of the invasion, many oligarchs started transferring beneficial ownership of their foreign companies, trusts, accounts, and assets to close associates or family members, both in Russia and abroad.<sup>55</sup> In response, the Treasury Department, in concert with global allies, subsequently blocked off or froze more than \$30 billion in assets tied to Russian oligarchs, as well as over \$300 billion in Russian central bank assets.<sup>56</sup> But in many cases, the transferred funds remain out of reach.

## D. Sanctions evasion trends and tactics

Against the backdrop of the Russian invasion of Ukraine, Russian oligarchs have employed evasive tactics to avoid sanctions, thereby impeding the sanction regime's national security and human rights-related objectives.<sup>57</sup> Prominent evasion strategies include burden shifting,<sup>58</sup> trade shifting,<sup>59</sup> and asset shifting.<sup>60</sup> Though burden shifting and trade flow shifting constitute integral

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<sup>55</sup> FIN. CRIMES ENF'T NETWORK, TRENDS IN BANK SECRECY ACT DATA: FINANCIAL ACTIVITY BY RUSSIAN OLIGARCHS IN 2022 3-5 (Dec. 2022), [https://www.fincen.gov/sites/default/files/2022-12/Financial%20Trend%20Analysis\\_Russian%20Oligarchs%20FTA%20\\_Final.pdf](https://www.fincen.gov/sites/default/files/2022-12/Financial%20Trend%20Analysis_Russian%20Oligarchs%20FTA%20_Final.pdf).

<sup>56</sup> Press Release, U.S. Dep't of Treas., Russian Elites, Proxies, and Oligarchs Task Force Joint Statement (June 29, 2022), <https://home.treasury.gov/news/press-releases/jy0839>.

<sup>57</sup> Kerim Can Kavakli, Giovanna Marcolongo, & Diego Zambiasi, *Sanction Evasion Through Tax Havens* 3 (Baffi Ctr. on Econ., Fin. & Regul., Working Paper No. 212, 2023), <https://dx.doi.org/10.2139/ssrn.4648158>.

<sup>58</sup> Burden shifting refers to scenarios where the sanctioned elite, rather than absorbing the economic impact themselves, extract it from the common people. *Id.* at 1. The ruling elite may impose higher taxes or increase the cost of basic necessities, as seen in Venezuela. Facing U.S. sanctions, President Maduro's regime has manipulated the currency exchange rate, leading to hyperinflation, and forcing ordinary Venezuelans to cope with skyrocketing prices for basic goods and services. CLARE RIBANDO SEELKE, CONG. RSCH. SERV., IF10715, VENEZUELA: OVERVIEW OF U.S. SANCTIONS POLICY 1 (2024); Kylie Madry et al., *Venezuela Inflation Accelerating, Heightening Risk of Return to Hyperinflation*, *Economists Say*, REUTERS (Jan. 5, 2023), <https://www.reuters.com/world/americas/venezuela-inflation-accelerating-heightening-risk-return-hyperinflation-2023-01-05/>.

<sup>59</sup> Evasion also manifests through shifting trade flows—a tactic Russia employed following the onslaught of sanctions in 2022—which is the use of intermediary countries in trade to circumvent sanctions. *See* Maxim Chupilkin, Beata Javorcik, & Alexander Plekhanov, *The Eurasian Roundabout: Trade Flows into Russia Through the Caucasus and Central Asia* 15-17 (EBRD, Working Paper No. 276, 2023), <https://doi.org/10.2139/ssrn.4368618>. An illustrative example of trade shifting is provided in *United States v. Goltsev*, where authorities in the Eastern District of New York apprehended and indicted three individuals involved in orchestrating a complex global procurement operation in November 2023. Press Release, U.S. Dep't of Just., Four Arrested and Multiple Russian Nationals Charged in Connection with Two Schemes to Evade Sanctions and Send U.S. Technology Used in Weapons Systems to Russia (Nov. 1, 2023), <https://www.justice.gov/opa/pr/four-arrested-and-multiple-russian-nationals-charged-connection-two-schemes-evade-sanctions> [hereinafter DOJ Goltsev Press Release]. Operating under the guise of two Brooklyn-based corporate entities, the perpetrators sourced and transported American electronic components and integrated circuits, using Turkey, Hong Kong, China, India, and the United Arab Emirates (UAE) as transshipment locations. Affidavit and Complaint in Support of an Application for Arrest Warrants ¶ 25, *United States v. Goltsev*, No. 1:23-mj-00956 (E.D.N.Y. Oct. 30, 2023), ECF No. 1. These components ultimately found their way onto the battlefields of Ukraine, where they powered Russian missile systems, aerial vehicles, helicopters, and tanks. DOJ Goltsev Press Release. While the FBI and the Department of Commerce actively investigate Goltsev and others who could be involved, this scenario underscores the substantial risks stemming from sanctions evasion that empower Russian aggression in Ukraine.

<sup>60</sup> Kavakli, *supra* note 57.

components of evasion strategies, this paper centers its focus on asset shifting due to the involvement of Western lawyers.<sup>61</sup> Asset shifting refers to the practice of sanctioned elites protecting their wealth by transferring their funds to safer entities and trusted individuals.<sup>62</sup> Lawyers facilitate such transactions through a number of tactics, including creating offshore accounts or concealing beneficial ownership. The complicity of lawyers has recently been noted by the Department of Justice (DOJ), with the recently anointed KleptoCapture task force targeting lawyers and money managers who “facilitate the illicit conduct of oligarchs” in supplying the Russian military with Western technology and equipment.<sup>63</sup> This paper further investigates the pivotal role of lawyers in facilitating evasion tactics that aid and abet sanctioned Russian elites.

## E. U.S. professionals facilitate sanctions evasion

Sanctions evasion is not a solitary endeavor. Gaining entry to the U.S. and international financial systems as a sanctioned individual requires finding access points embedded therein—licit channels through which illicit funds can flow. Those access points often open up through white-collar professionals, many of whom offer specialized services designed to safeguard the assets and interests of wealthy clients.<sup>64</sup> Sanctioned individuals can and do leverage these service providers to circumvent sanctions and export controls, rending tears in otherwise robust enforcement regimes. Sanctioned individuals use enablers to retain and grow their wealth through (1) corporate restructuring, (2) transferring assets to family members, and (3) concealing beneficial ownership.<sup>65</sup> Corporate restructuring involves reorganizing assets to evade scrutiny by authorities.<sup>66</sup> Transferring assets to family members allows sanctioned individuals to maintain control over their wealth while appearing to divest ownership.<sup>67</sup> Concealing ownership entails the use of complex webs of offshore accounts and trusts, layers of legal entities, and nominee directors to obscure the true ownership and beneficiaries of assets.<sup>68</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> See Dursun Peksen, *When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature*, 30 DEF. AND PEACE ECON. 635, 635-647 (2019); Jodi Vittori, *How Anonymous Shell Companies Finance Insurgents, Criminals, and Dictators*, COUNCIL ON FOREIGN RELS. (2017), <https://www.cfr.org/report/how-anonymous-shell-companies-finance-insurgentscriminals-and-dictators>; Reed Wood, *“A Hand Upon the Throat of the Nation”: Economic Sanctions and State Repression, 1976-2001*, 52 INT’L STUD. Q. 489, 489-513 (2008).

<sup>63</sup> Eun Young Choi, Deputy Assistant Att’y Gen., Keynote Remarks at GIR Live: Sanctions & Anti-Money Laundering Meeting (Nov. 16, 2023), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-eun-young-choi-delivers-keynote-remarks-gir-live>.

<sup>64</sup> THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *ENDING THE SHELL GAME: CRACKING DOWN ON THE PROFESSIONALS WHO ENABLE TAX AND WHITE COLLAR CRIME* 7 (Nov. 16, 2020), <https://www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collar-crime.pdf>.

<sup>65</sup> See Michael Levi, *Lawyers as Money Laundering Enablers? An Evolving and Contentious Relationship*, 23 GLOB. CRIME 126, 127-34, <https://www.tandfonline.com/doi/full/10.1080/17440572.2022.2089122>; Cameron Johnston, *Sanctions against Russia: Evasion, Compensation and Overcompliance* 1-3, E.U. INST. FOR SEC. STUD. (2015), <https://data.europa.eu/doi/10.2815/27414>.

<sup>66</sup> Johnston, *supra* note 65, at 1-2.

<sup>67</sup> *Id.* at 2-3.

<sup>68</sup> See Justyna Gudowska & Jonathan Winer, *Lawyers Should Be Key Reporters in Anti-Money Laundering Efforts*, BLOOMBERG LAW (Dec. 1, 2022), <https://news.bloomberglaw.com/us-law-week/lawyers-should-be-key-reporters-in-anti-money-laundering-efforts>.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part I: Problem Description

In practice, such evasive measures typically require a network of interlocking service providers. A series of incidents involving the sanctioned Rotenberg brothers exemplifies this dynamic.<sup>69</sup> Arkady and Boris Rotenberg, lifelong friends of Putin, occupy privileged positions within the Russian elite and have accumulated wealth through lucrative state contracts.<sup>70</sup> In 2023, an archive of over 50,000 private documents belonging to the Russian financial and legal firm Evocorp Management was leaked.<sup>71</sup> These files meticulously documented the extent of the Rotenberg family's illicit activities and the various Western lawyers and financial professionals who facilitated these transactions between 2013 and 2022, effectively shielding the Rotenbergs' assets from Western sanctions.<sup>72</sup> The files revealed, for example, that the Rotenbergs instructed their lawyer to discreetly facilitate corporate restructuring after the 2014 sanctions challenged their ownership of Hartwall Arena, a Finnish music arena.<sup>73</sup> Being sanctioned themselves, the Rotenbergs sold a portion of their stake in the arena to Boris's unsanctioned son, Roman, allowing business operations to evade scrutiny.<sup>74</sup> Boris Rotenberg's wife, Karina Rotenberg, a U.S. citizen, served as his representative in business affairs as evidenced by legal expenses from Monaco-based lawyer Donald Manasse.<sup>75</sup> And in 2016, Arkady Rotenberg transferred ownership of a luxury apartment building in Monaco and his stake in a major real estate firm to his secret romantic partner, Marija Borodunova, a 36-year-old Latvian cosmetologist.<sup>76</sup>

In the months following their designation as Specially-Designated Nationals (SDNs), the Rotenbergs also purchased over \$18 million in artwork from the U.S. market.<sup>77</sup> They accomplished this through a London-based law firm, which established and oversaw the shell companies that funded the purchases; and an art advisor with U.S. citizenship who bought and sold the majority of the artwork.<sup>78</sup> Art dealers, other art advisors, and a "boutique [New York-based] law firm with a practice focused on art matters" also played a role—each facilitated the authentication and

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<sup>69</sup> SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOV. AFFAIRS, THE ART INDUSTRY & U.S. POLICIES THAT UNDERMINE SANCTIONS 1 (2020), <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2020-07-29%20PSI%20Staff%20Report%20-%20The%20Art%20Industry%20and%20U.S.%20Policies%20that%20Undermine%20Sanctions.pdf>; Press Release, U.S. Dep't of Treas., Treasury Sanctions Russian Officials, Members Of The Russian Leadership's Inner Circle, and an Entity for Involvement in the Situation in Ukraine (Mar. 20, 2014), <https://home.treasury.gov/news/press-releases/jl23331>.

<sup>70</sup> Abdelhak El Idrissi, *Russian Oligarchs Boris and Arkady Rotenberg Evade Sanctions with Often Rudimentary Methods*, LE MONDE (June 22, 2023), [https://www.lemonde.fr/en/les-decodeurs/article/2023/06/22/russian-oligarchs-boris-and-arkady-rotenberg-evaded-sanctions-with-often-rudimentary-methods\\_6035182\\_8.html](https://www.lemonde.fr/en/les-decodeurs/article/2023/06/22/russian-oligarchs-boris-and-arkady-rotenberg-evaded-sanctions-with-often-rudimentary-methods_6035182_8.html).

<sup>71</sup> *Id.*

<sup>72</sup> *The Rotenberg Files*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (June 20, 2023), <https://www.occrp.org/en/rotenberg-files/> (last visited May 15, 2024).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Kevin Hall et al., *Sanctioned Russian Oligarch's Wife Had U.S. Passport*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (June 21, 2023), <https://www.occrp.org/en/rotenberg-files/sanctioned-russian-oligarchs-wife-had-us-passport> (Karina Rotenberg was not sanctioned by the Office of Foreign Assets Control until March 2022, eight years after her husband was sanctioned).

<sup>76</sup> Daniel Balint-Kurti et al., *Leaked Emails Reveal How Putin's Friends Dodged Sanctions With Help of Western Enablers*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (June 20, 2023), <https://www.occrp.org/en/rotenberg-files/leaked-emails-reveal-how-putins-friends-dodged-sanctions-with-help-of-western-enablers> (last visited May 15, 2024).

<sup>77</sup> STAFF OF S. SUBCOMM. ON INVESTIGATIONS, *supra* note 69, at 7.

<sup>78</sup> *Id.* at 3-4.



acquisition of the artwork.<sup>79</sup> These enablers claim to have been unaware of the buyers' identities.<sup>80</sup> Nevertheless, their activities allowed the Rotenbergs to slip through the cracks in the U.S. regulatory system, ultimately undercutting the sting of its sanctions regime.

Enablers operate at varying levels of legality and complicity. Though policy responses tend to focus on the "bad apples" in "gatekeeping" industries such as the legal industry—the individuals who break or bend rules on behalf of clients—the reality is far more complex.<sup>81</sup> While some enablers can provide services with full knowledge of their clients' identities and the source of their assets, others, thanks to those efforts, can retain some level of plausible deniability as they work to serve their clients' interests.<sup>82</sup>

As can be seen from the Rotenberg example, lawyers and other non-financial professionals are authorized to perform these types of transactions alongside purely financial institutions like banks. The Financial Action Task Force (FATF) classifies such actors as "Designated Non-Financial Businesses and Professions" (DNFBPs).<sup>83</sup> When DNFBPs engage in certain types of transactions, the FATF recommends applying the same safeguards that constrain financial institutions from undercutting regulatory schemes.<sup>84</sup> This reflects the shared nature of the tools each industry has at its disposal, all of which can be wielded to shield funds from external oversight.

## F. Lawyers play a key role in enabling sanctions evasion

Lawyers have the capacity to perform a wide range of services on behalf of sanctioned individuals. While some services, such as representation in childhood custody proceedings, have inherently low illicit funds risks, services that are essential to the specific transactions are more problematic.<sup>85</sup> Such services can include setting up and administering shell companies; purchasing properties and performing other transactions through trust or client accounts; transferring and managing assets; and acting as "nominees" to meet corporate structuring requirements.<sup>86</sup> American lawyers are attractive to sanctioned individuals not only because of these services—other professionals, such as real estate agents and financial advisors, can provide some of them—but because they also can use their unique Interest on Lawyers' Trust Accounts (IOLTAs), lawyers' bank accounts for client

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<sup>79</sup> *Id.* at 119-22.

<sup>80</sup> *Id.* at 122-24. Note, however, that the Senate report does not clarify which "client" the New York law firm was working on behalf of. The firm may have been retained by the Rotenbergs themselves, or merely one of their shell companies or other affiliates. It is therefore possible that the law firm knowingly facilitated the transaction on behalf of the Rotenbergs.

<sup>81</sup> Tena Prelec & Ricardo Soares de Oliveira, *Enabling African Loots: Tracking the Laundering of Nigerian Kleptocrats' Ill-Gotten Gains in Western Financial Centres*, 26 J. INT'L RELS. & DEV. 272, 272-73 (Apr. 24, 2023) <https://link.springer.com/article/10.1057/s41268-023-00292-4>.

<sup>82</sup> *Id.*

<sup>83</sup> In addition to lawyers, the Financial Action Task Force (FATF) DNFBP list includes casinos, real estate agents, dealers in precious metals and stones, notaries and other independent legal professionals, trust and company service providers, and accountants. FIN. ACTION TASK FORCE, THE FATF RECOMMENDATIONS: INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION 19-21, 91 (Nov. 2023), <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf>.

<sup>84</sup> *Id.*

<sup>85</sup> DEP'T OF TREAS., NATIONAL MONEY LAUNDERING RISK ASSESSMENT 91 (2024) [hereinafter 2024 NMLRA].

<sup>86</sup> Levi, *supra* note 65, at 128; *see also id.*

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part I: Problem Description

funds, to conceal ownership.<sup>87</sup> In short, the risk of money laundering and sanctions evasion is higher where attorneys act as intermediaries between a client and the U.S. financial system.<sup>88</sup>

Media investigations, data leaks, and court filings currently provide the main sources for understanding how lawyers can and do act as enablers.<sup>89</sup> Even this limited dataset reveals troubling vulnerabilities within the legal profession, however. A 2016 Global Witness investigation, for instance, suggests an alarming degree of receptivity to hiding suspect funds among certain members of the legal profession. The investigator posed as an advisor to a foreign government official and approached thirteen New York law firms for advice on how to move large sums of money anonymously.<sup>90</sup> During the meetings, only one refused to provide assistance.<sup>91</sup> The remaining twelve suggested using trusts or anonymous shell companies to hide the assets; of those twelve, only one sent a follow-up email declining the engagement.<sup>92</sup> Every lawyer who offered advice also notified the investigator that they would need to perform further checks before taking him on as a client, however; the investigation ended before ascertaining what those checks would have entailed,<sup>93</sup> but the possibility remains that the firms would have rejected the investigator at a later stage.<sup>94</sup> The takeaway nevertheless remains the same: a clear majority of firms in the sample set provided advice to a suspicious client seeking to hide foreign assets.<sup>95</sup>

Lawyer involvement in illicit activities can, of course, extend far beyond prospective client meetings. The role of lawyers in high-profile money laundering and sanctions evasion incidents has been documented for decades.<sup>96</sup> Some proportion of lawyers likely accept clients with full knowledge and intent to help them subvert sanctions regimes; others may simply turn a blind eye to the true identities and revenue sources of such clients.<sup>97</sup> This willful ignorance results from four distinctive characteristics of the legal profession that help insulate clients from external oversight:

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<sup>87</sup> 2024 NMLRA, *supra* note 85, at 91-93.

<sup>88</sup> *Id.*

<sup>89</sup> Levi, *supra* note 65, at 137.

<sup>90</sup> GLOBAL WITNESS, LOWERING THE BAR: HOW AMERICAN LAWYERS TOLD US HOW TO FUNNEL SUSPECT FUNDS INTO THE UNITED STATES 1 (Jan. 2016), [https://www.globalwitness.org/documents/18208/Lowering\\_the\\_Bar.pdf](https://www.globalwitness.org/documents/18208/Lowering_the_Bar.pdf).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Legal due diligence practices vary widely. Traditionally, law firms relied upon client- or vendor-provided forms to gather information, but firms are increasingly exploring new technologies for conducting risk assessment. THOMSON REUTERS, LAW FIRM DUE DILIGENCE: THE ONLY CONSTANT IS REGULATORY CHANGE 2 (2023) <https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/tr3193631.pdf>.

<sup>94</sup> GLOBAL WITNESS, *supra* note 90, at 6, 10.

<sup>95</sup> *Id.* Notably, the New York State Bar stepped up in response to the Global Witness investigation and sanctioned two of the attorneys who counseled a client knowing the client's conduct was illegal, although both were only publicly censured (finding of a violation of ethical rules without suspension of attorney's license). *See Matter of Jankoff*, 165 A.D.3d 58 (2018); *Matter of Koplik*, 168 A.D.3d 163 (2019).

<sup>96</sup> *See, e.g.*, SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOV. AFFAIRS, KEEPING FOREIGN CORRUPTION OUT OF THE UNITED STATES: FOUR CASE HISTORIES 5, 26-70 (Feb. 4, 2010) <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/FOREIGNCORRUPTIONREPORTFINAL710.pdf>; Freedberg, *supra* note 48.

<sup>97</sup> Levi, *supra* note 65, at 134.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part I: Problem Description

*(1) the misapplication of attorney-client privilege and confidentiality that allows lawyers to perform most services not just without ever disclosing the identity of the underlying client, but behind a robust shield of legal protection;*<sup>98</sup>

*(2) the high threshold of actual knowledge of client wrongdoing required to withdraw from representing the client;*<sup>99</sup>

*(3) the lack of meaningful client due diligence requirements;*<sup>100</sup> and

*(4) the absence of any legal obligation for lawyers to report suspicious activity in the United States in particular.*<sup>101</sup>

### Three scenarios of lawyers' enabling activities

This section introduces the three modes of lawyers' interactions with sanctioned individuals and entities. These are examples of how lawyers can help get access to the U.S. market for sanctioned individuals either by working with them directly or through intermediaries. Though they are presented separately for illustrative purposes, lawyers are likely to employ these tools together in practice to create maximum insulation for their clients and themselves.

#### 1. Direct evasion: hypothetical

The most basic form of lawyer's enabling of sanctions evasion is directly carrying out transactions for sanctioned individuals, which are not explicitly allowed by OFAC through an issuance of a license.<sup>102</sup> Potentially, lawyers can hold funds from clients in their IOLTA before sending them on for a given purpose.<sup>103</sup> In so doing, the lawyer shields the client's identity, because IOLTAs have a "presumed higher level of confidentiality accorded to an attorney-client relationship and any related transactions" and are not subject to ordinary reporting requirements that exist for other bank accounts.<sup>104</sup> In theory, any sanctioned oligarch could purchase real estate in New York City

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<sup>98</sup> *Id.* at 137.

<sup>99</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(a) (AM. BAR ASS'N 2023).

<sup>100</sup> FIN. ACTION TASK FORCE, UNITED STATES MUTUAL EVALUATION REPORT: ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES 9-10 (Dec. 2016), <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> [hereinafter 2016 FATF AML and CTF Report].

<sup>101</sup> *Id.*

<sup>102</sup> Lawyers can potentially benefit from the Office of Foreign Assets Control (OFAC) general or specific licenses that allow them to provide many types of legal services to sanctioned entities. In fact, even after the United States imposed sanctions on Russia in 2014 following Russia's annexation of Crimea, many U.S. law firms continued to represent Russian oligarchs and do business in Russia, perhaps subject to these exemptions. Farhad Alavi & Sam Amir Toossi, *Representing Designated Persons: A U.S. Lawyer Perspective*, GLOBAL INVESTIGATIONS REVIEW (Sep. 29, 2023), <https://globalinvestigationsreview.com/guide/the-guide-sanctions/fourth-edition/article/representing-designated-persons-us-lawyers-perspective>. However, even with these licenses, lawyers are still prohibited from providing legal advice and counseling to facilitate transactions that violate the sanctions regime. *See, e.g.*, 31 C.F.R. § 587.506 (exempting provision of certain legal services to designated Russian nationals).

<sup>103</sup> 2016 FATF AML and CTF Report, *supra* note 100, at 18.

<sup>104</sup> U.S. Immigr. and Customs Enf't, *Third Party Launderers*, XIII THE CORNERSTONE REPORT 1, 1-3 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/CSReport-13-4.pdf>.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part I: Problem Description

by sending money to the lawyer's trust account first without the bank, seller, or the U.S. government being any the wiser.<sup>105</sup>

Additionally, lawyers can perform a range of services that are not legal in nature, such as setting up trusts, arranging for the purchase and management of properties, and obtaining insurance on real estate and motor vehicles.<sup>106</sup> And until recently, lawyers could safely provide incorporation services for sanctioned individuals directly without the need to disclose the ultimate beneficiary. This is presumably now foreclosed or at least more difficult to do by the reporting requirements in the Corporate Transparency Act, explored in Part II in more detail. However, the effectiveness of this mechanism in preventing lawyers from incorporating shell companies on behalf of sanctioned individuals remains to be seen.

Although this is a hypothetical case in the sanctions evasion world, plenty of money-laundering cases involving foreign politicians accused of corruption had U.S. lawyers' facilitating the transactions. And while such scenarios are completely possible due to lawyers' ability to totally conceal their client's identity from all interested parties, given how easy and cheap it is to establish new business entities, transfer ownership, restructure companies, and change directors, this scenario, although important, most likely would give way to other, less direct forms of working with sanctioned individuals.<sup>107</sup> These schemes are described below.

#### 2. Associate evasion: Vladimir Voronchenko

A federal court recently unsealed an indictment of a Russian citizen and U.S. permanent resident, Vladimir Voronchenko, for making at least \$4 million in payments on behalf of Russian oligarch Viktor Vekselberg in violation of OFAC sanctions.<sup>108</sup> Key to this alleged scheme was Voronchenko's New York lawyer.<sup>109</sup> The indictment states that Voronchenko retained the attorney to facilitate the acquisition of several multimillion dollar real estate properties in New York between 2009 and 2018, all on Vekselberg's behalf.<sup>110</sup> The lawyer also made payments to maintain

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<sup>105</sup> SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOV. AFFAIRS, *supra* note 96, at 34 (Feb. 4, 2010) (describing the lawyer using his Interest on Lawyers' Trust Account (IOLTA) to conceal the identity of a family member of a foreign individual accused of corruption to pay for the client's estate and living expenses in the United States for a total of almost \$5 million).

<sup>106</sup> *Id.* at 66-69; 2016 FATF AML and CTF Report, *supra* note 100, at 61 (discussing the lawyer's involvement in setting up and managing the trust).

<sup>107</sup> For example, A1—a subsidiary of Russian financial titan Alfa Group, which has its founders, billionaires with ties to Vladimir Putin, and many of its subsidiaries sanctioned—was involved in funding bankruptcy litigation in New York and London. Moscow and New York lawyers helped in attempts to get escrow funds transferred to a Russian account under sanctions. When A1's billionaire directors were sanctioned, the company was sold to another director who had not been sanctioned. It took only six days and about \$900 to sell the company with \$8.1 million in assets. See Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financial Lawsuits (1)*, BLOOMBERG LAW (Mar. 28, 2024, 1:00 AM), <https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits> (last visited May 15, 2024).

<sup>108</sup> Press Release, U.S. Att'y's Off., S.D.N.Y., Associate of Sanctioned Oligarch Indicted for Sanctions Evasion and Money Laundering (Feb. 7, 2023), <https://www.justice.gov/usao-sdny/pr/associate-sanctioned-oligarch-indicted-sanctions-evasion-and-money-laundering> (last visited May 15, 2024).

<sup>109</sup> *Id.*

<sup>110</sup> Indictment ¶¶ 16-26, United States v. Voronchenko, No. 1:23-cr-00073-MKV (S.D.N.Y. Feb. 7, 2023), ECF No. 1.

and service the properties using his IOLTA. Voronchenko wired a total of \$18.5 million to that account over the same period—again, using funds ultimately derived from Vekselberg.<sup>111</sup>

As in the Direct Evasion archetype, the Voronchenko case illustrates the powerful role lawyers can play in sanctions evasion. Voronchenko's attorney directly facilitated millions of dollars in payments that violated OFAC sanctions, with the entire evasion scheme hinging upon his IOLTA account. Though Vekselberg was not designated an SDN until 2018, he relied on a network of shell companies owned by Voronchenko, his associate, to make each transaction.<sup>112</sup> Once OFAC imposed sanctions on Vekselberg, the source of the funds sent to the IOLTA account merely shifted to a new set of shell companies.<sup>113</sup> Voronchenko's attorney continued receiving and making payments at Voronchenko's direction up until March 2022—two months before Voronchenko was served with a grand jury summons.<sup>114</sup> Voronchenko's attorney himself stated that “though he had suspicions . . . he consciously avoided learning who the beneficial owner of the properties was.”<sup>115</sup>

### 3. Shell company evasion: Andrey Kostin

In 2024, the Department of Justice indicted Russian oligarch Andrey Kostin, a SDN, alongside others on five charges, including conspiracy to violate sanctions by selling a home in Aspen.<sup>116</sup> The indictment also listed three unnamed co-conspirators (CC-1, CC-2, and CC-3) who had helped facilitate the illegal transaction.<sup>117</sup> Each had managed shell companies for Kostin listed as nominal owners for his assets.<sup>118</sup> While the indictment included Kostin's “close associates” in Russia and Cyprus as co-conspirators, the most central enabler of all escaped condemnation, at least for now.<sup>119</sup> The DOJ described Kostin's Colorado-based lawyer—manager of the 40 North Star LLC shell company, which sold the Aspen home—as simply, “Lawyer-1.”<sup>120</sup>

Though an example of U.S. government success, the indictment from the Kostin may provide a window into how lawyers can wield shell companies to enable sanctions evasion. Kostin's lawyer managed 40 North Star LLC from the company's purchase of the Aspen home in 2010 until at least the sale in 2019.<sup>121</sup> The indictment alleges that the lawyer knew who Kostin was from the outset and continued working for him even after OFAC sanctioned Kostin in 2018.<sup>122</sup> Thus, the indictment suggests that a U.S.-based lawyer knowingly facilitated the central transaction of the conspiracy—and yet, because they did the work through shell companies, Kostin has successfully avoided disclosing his name for years.

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Chris Dolmetsch, *Lawyer for Sanctioned Russian Oligarch Avoids Jail for Money Laundering*, BLOOMBERG LAW (Dec. 4, 2023, 11:04 AM), <https://www.bloomberg.com/news/articles/2023-12-04/sanctioned-oligarch-s-ny-lawyer-avoids-jail-for-money-laundering> (last visited May 15, 2024).

<sup>116</sup> Sealed Superseding Indictment ¶¶ 1-4, United States v. Kostin, No. 1:24-cr-00091-GHW (S.D.N.Y. Feb. 20, 2024), ECF No. 13.

<sup>117</sup> *Id.* ¶¶ 8-10.

<sup>118</sup> *Id.* ¶¶ 29, 35.

<sup>119</sup> *Id.* ¶¶ 8-10.

<sup>120</sup> *Id.* ¶¶ 34, 38-40, 45-48.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part I: Problem Description

At issue in legal enabling is a pattern of bad behavior that has flourished in the absence of adequate regulation. Though tools like the IOLTA account and confidentiality have tremendous value and weight in empowering lawyers to be zealous advocates, these tools can also empower lawyers to eschew socially optimal outcomes. Of particular note is the dearth of examples wherein lawyers face accountability for their enabling. Two of the three presented archetypes contain real-world indictments where the U.S. government has brought charges against perpetrators.

## Part II: Current U.S. Regulatory Landscape

This section of the paper details the current state of the regulatory frameworks surrounding oligarchic money flows, specifically, sanctions on oligarchs and general anti-money laundering rules. It also describes how lawyers are currently regulated, and how their obligations bear on their ability to advise regarding oligarchic money flows. The aim of this section is to provide context for situating our recommendations for reform within these structures.

### A. Sanctions framework

This section of the Working Paper details the history and the current state of U.S. sanctions on Russia, focusing on individual sanctions against Russian oligarchs and others who support the Putin regime's current war in Ukraine.<sup>123</sup> The most serious U.S. sanctions that act against legal persons (both individuals and companies) are those that designate individuals on the Specially Designated Nationals and Blocked Persons List (SDN List). U.S. persons are broadly forbidden from doing business with persons on the SDN List, and these sanctions otherwise have broad implications that will be discussed below. The two primary individual sanctions programs connected to the war against Ukraine are promulgated under a series of executive orders dating back to the 2014 Russian invasion of Crimea<sup>124</sup> and the Magnitsky Sanctions program.<sup>125</sup> U.S.

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<sup>123</sup> These individual sanctions are only one part of the full regime of sanctions. These regimes include the Arms Export Control Act (AECA) and its subsequent regulations (the ITAR), which tightly regulate the sale of weapons to and from the United States, as well as the Export Control Reform Act (ECRA) and its implementing regulations (the EAR), which regulates the sale of dual-use commercial goods (goods that can be used for military or civilian purposes). The ITAR is managed by the Directorate of Defense Trade Controls (DDTC) within the Bureau of Political-Military Affairs in the Department of State, and the EAR is managed by the Bureau of Industry and Security (BIS) within the Department of Commerce. BIS also maintains several lists that function similarly to the Specially Designated Nationals and Blocked Persons List (SDN List), including the denied persons list, who cannot export products, as well as the entity list, who cannot receive products subject to the EAR. For details about these lists, see Bureau of Industry & Security, *Lists of Parties of Concern*, U.S. DEP'T OF COM., <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern> (last visited Mar. 16, 2024). Dealing with the complexities of these regulations is outside the scope of this report, but they are an important part of the U.S. overall sanctions regime, especially since the start of the current war. BIS maintains a specific website devoted to the ongoing evolution of the EAR and other export controls with regards to Russia and Belarus since the February 2022 invasion (see Bureau of Industry & Security, *Resources on Export Controls Implemented in Response to Russia's Invasion of Ukraine*, U.S. DEP'T OF COM. (last updated Feb. 23, 2024), <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/russia-belarus>). Additionally, the United States has restricted the activities of Russia's central bank, banned the import of its oil and energy products, and suspended normal trade relations (in conjunction with a wide array of strict export controls across defense, technology, energy, luxury, and other sectors). For a recent and comprehensive discussion of the U.S. sector-based sanctions on Russia, see *Russia's War Against Ukraine: Overview of U.S. Assistance and Sanctions*, CONG. RSCH. SERV. (Dec. 20, 2023), <https://crsreports.congress.gov/product/pdf/IN/IN11869>.

<sup>124</sup> As of April 2024, these executive orders include, in order of promulgation: E.O. 13660, E.O. 13661, E.O. 13685, E.O. 13694, E.O. 13757, E.O. 13848, E.O. 13849, E.O. 13883, E.O. 14024, E.O. 14039, E.O. 14065, E.O. 14066, E.O. 14068, E.O. 1407, and E.O. 14114. For a U.S. government explanation of how some of the executive orders create the current sanctions structure, see *Ukraine and Russia Sanctions*, U.S. DEP'T OF STATE, <https://www.state.gov/ukraine-and-russia-sanctions/> (last visited Apr. 7, 2024).

<sup>125</sup> The Magnitsky Sanctions program, which was first enacted in 2012, is the program by which the U.S. sanctions individuals who are responsible for human rights violations against individuals who seek to expose corruption or promote democracy in Russia. See 31 C.F.R. § 584.201(a)(2)(sanctioning all individuals determined to be

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

sanctions programs that designate persons for the SDN List in these two buckets are mostly based in legal authorities granted to the President in the International Emergency Economic Powers Act (IEEPA). This section describes these sanctions programs, related legal authorities, and the impact of these sanctions on the behavior of U.S. persons, particularly U.S. lawyers.

#### 1. IEEPA

IEEPA grants the President authority to declare a national emergency and exercise broad regulatory powers if he deems that there is “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>126</sup> These emergencies allow the President to use regulations to “investigate, regulate, or prohibit” a wide variety of economic activity, including foreign trade transactions, the use of credit or banking, the import and export of currencies, and transactions involving property, when any of these activities are conducted “subject to the jurisdiction of the United States.”<sup>127</sup> Violating the regulations promulgated under the authority of an IEEPA emergency, or conspiring to commit such violations, is a federal crime that can be punished with a fine up to \$1 million or a prison sentence of up to 20 years.<sup>128</sup> IEEPA emergency declarations are the most common legal basis for the sanctions regimes that target and designate particular individuals which are the primary concern of our analysis here. When an IEEPA emergency declaration is made, the President specifies in the relevant Executive Order what agency or agencies have the authority to enact relevant regulations and enforce it, as well as exactly what possible prohibitions from IEEPA are now in force against qualifying persons (typically individuals and corporate or government entities).<sup>129</sup>

The most common result of that process for a person is their listing on the SDN List, maintained and disseminated by the Office of Foreign Assets Control (OFAC) within the Department of the Treasury. After an individual is designated on the SDN List, all their assets in the United States are frozen, and “US persons are generally prohibited from dealing with them.”<sup>130</sup> Essentially, persons on the SDN List cannot do business in or with the United States or U.S. persons.

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“responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking: (i) To expose illegal activity carried out by officials of the Government of the Russian Federation; or (ii) To obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections, in Russia”). Since the beginning of the war in Ukraine, there has been at least one major instance of Magnitsky sanctions used against Russian nationals for war-related human rights violations by Russian government-affiliated individuals. In that case, three individuals who were involved in the arbitrary detention and imprisonment of Russian opposition politician Vladimir Kara-Murza, including against the judge who sentenced him, were sanctioned under Magnitsky authority. Press Release, U.S. Dep’t of Treas., Treasury Sanctions People Involved in Serious Human Rights Abuse Against Vladimir Kara-Murza (Mar. 3, 2023), <https://home.treasury.gov/news/press-releases/jy1320>.

<sup>126</sup> 50 U.S.C. § 1701.

<sup>127</sup> 50 U.S.C. § 1702(a).

<sup>128</sup> 50 U.S.C. § 1705(c).

<sup>129</sup> See, e.g., E.O. 13818 § 1 (spelling out the kinds of persons whose interests in property in the United States are now frozen, as well as the roles of the Secretaries of Treasury and State and the Attorney General in identifying such individuals and enforcing sanctions against them).

<sup>130</sup> For the current SDN List in its entirety, see OFAC Sanctions List Service, U.S. DEP’T OF TREASURY, <https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists> (last visited May 15, 2024). See 31 C.F.R. § 501 for the regulations governing the SDN List generally.



## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

Exceptions to these rules come in the form of licenses granted by the Department of Treasury, which can be either general or specific. General licenses are granted by OFAC and apply to anyone interacting with the sanctions program, while specific licenses require persons to apply and demonstrate to OFAC that it is in the U.S. government's interest to allow the proposed transaction to occur despite the sanctions.<sup>131</sup> Licenses that exempt certain kinds of transactions from a sanctions regime vary between sanctions regimes, but most sanctions regimes contain a general license allowing certain kinds of legal representation of Specially Designated Nationals (SDNs), including appeals to their designation.<sup>132</sup>

When an individual or entity is listed on the SDN List, OFAC includes the particular sanctions program under which they have come to be listed, along with their name, aliases, nationality, any known addresses, and sometimes other additional information in a publicly searchable U.S. government database.<sup>133</sup> Additionally, the SDN designation applies to any entity owned at least 50 percent by the designated person, or owned at least 50 percent by aggregated designated entities.<sup>134</sup> After such a determination has been made, the Treasury Department issues a press release announcing the determination to list a person, and files a Federal Register notice. Other agencies may take different actions against designated individuals.<sup>135</sup>

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<sup>131</sup> General and specific licenses are easier to understand in the context of particular sanctions programs. For Specially Designated National (SDN) designations related to Russia's illegal war in Ukraine, the goal of the individual sanctions programs are largely to block those who procure weapons for the Russian government or otherwise support the Russian government and economy's war machine. This can be seen in the formal language of these designations in the executive orders that provide the legal authority: "this [entity] is designated for operating or having operated in a sector of the Russian Federation economy determined to support Russia's military-industrial base pursuant to section 11 of Executive Order 14024." E.O. 14024. For discussion of how these designation phrases operate, as well as how general and specific licenses work within those programs, see *Russia-related Designations; Issuance of Russia-related General Licenses and New and Amended Frequently Asked Questions*, U.S. DEP'T OF TREAS., OFFICE OF FOREIGN ASSETS CONTROL (Feb. 23, 2024), <https://ofac.treasury.gov/recent-actions/20240223>. These legal updates on OFAC's website are also accompanied by press releases intended for the broader general public that describe what kinds of activities newly designated entities engage in that qualify as "support[ing] Russia's military-industrial base." For a recent example of these general public press releases, see Press Release, U.S. Dep't of Treas., On Second Anniversary of Russia's Further Invasion of Ukraine and Following the Death of Aleksey Navalny, Treasury Sanctions Hundreds of Targets in Russia and Globally (Feb. 23, 2024), <https://home.treasury.gov/news/press-releases/jy2117>.

<sup>132</sup> U.S. DEP'T OF TREAS., OFFICE OF FOREIGN ASSETS CONTROL, *supra* note 131.

<sup>133</sup> The process by which OFAC determines exactly which persons to sanction and when to sanction them under each authority is very opaque outside OFAC. To search the current SDN list and understand how OFAC presents information about sanctioned persons to the public, visit <https://sanctionssearch.ofac.treas.gov/>.

<sup>134</sup> *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked*, U.S. DEP'T OF TREASURY (Aug. 13, 2014), <https://ofac.treasury.gov/media/6186/download?inline>. For more information about how the 50 percent rule works, see also *FAQs: Entities Owned by Blocked Persons (50 Percent Rule)*, OFFICE OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/faqs/topic/1521> (last updated Aug. 11, 2020).

<sup>135</sup> For example, individuals who are sanctioned under the International Emergency Economic Powers Act (IEEPA) authorities are also typically sanctioned by the Department of State by having their visas revoked and being declared inadmissible aliens by the Bureau of Consular Affairs. This authority comes from the Immigration and Nationality Act (INA), which is typically also listed in the Executive Order declaring the emergency. Under the INA, the President has broad authority to "suspend the entry of all aliens or any class of alien . . . or impose on the entry of aliens any restrictions he may deem appropriate," which is the authority invoked in IEEPA emergencies to declare designated individuals inadmissible. 8 U.S.C. § 1182(f). The press releases generally give some description of the conduct for which an individual is being sanctioned, which also gives insight into what other actions might be taken against them. See, e.g., U.S. Dep't of Treas., *supra* note 131.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

The Treasury Department also provides a process by which persons may appeal their designation to the SDN List.<sup>136</sup> This appeal process can be engaged in without a lawyer, but in practice it seems that most individuals appeal through lawyers who specialize in sanctions work.<sup>137</sup> Any lawyer who chooses to represent an individual on the SDN List appealing their designation must have a license in order to accept payment for such work.<sup>138</sup> Some sanctions programs have general licenses allowing for this kind of legal work, but if there is none, the lawyer must apply for a specific license.

The United States has used IEEPA's emergency authority to designate individuals and entities supporting illegal or militaristic actions by Russia for over a decade, though since the February 2022 invasion, the number of possible authorities and the number of persons put on the SDN List in connection with the hostile activities of the Russian government has increased dramatically. For the purposes of this report, these sanctions began in 2014 after the illegal Russian occupation of Crimea, when President Obama declared a national emergency to sanction "persons who have asserted governmental authority in the Crimean region without the authorization of the Government of Ukraine."<sup>139</sup> Subsequent waves of sanctions targeting particular individuals and entities followed.<sup>140</sup> After Russia re-invaded Ukraine in 2022, President Biden declared a new emergency and issued a series of new executive orders to add additional individuals to the SDN List were promulgated.<sup>141</sup> These authorities and the designations they produce continue to evolve. Most recently, in February 2024, over 500 individuals and entities working in technology, defense, and a variety of other sectors of the Russian economy were sanctioned under these authorities as part of a crackdown on the two-year anniversary of the war.<sup>142</sup> Alternatively, Russian government officials who engage in human rights violations or otherwise repress attempts to expose corruption or promote democracy can be sanctioned under the Magnitsky Sanctions program, which predates even Russia's illegal invasion of Ukraine.<sup>143</sup>

## 2. Secondary sanctions

The United States is also not limited to designating Russian nationals who directly engage in the war effort or other prohibited conduct under the Russia sanctions programs. OFAC also sanctions individuals and entities in other jurisdictions who are known to enable sanctions dodging by Russian oligarchs and entities. These sanctions are called "secondary sanctions," since they target

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<sup>136</sup> See *Filing a Petition for Removal from an OFAC List*, U.S. Dep't of Treasury, <https://ofac.treasury.gov/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list> (last visited Feb. 25, 2024) (displaying frequently asked questions about how to appeal a listing); 31 C.F.R. § 501.807 (describing criteria for delisting).

<sup>137</sup> For an example of a law firm with an explicit practice group dedicated to helping persons appeal their SDN designation, see *OFAC SDN List Removal Lawyer*, ZARKESH LAW FIRM P.C., <https://www.ofacsanctionslawyers.com/practice-areas/ofac-sdn-list-removal-lawyer/> (last visited Mar. 16, 2024).

<sup>138</sup> Filing a Petition for Removal from an OFAC List, U.S. Dep't of Treasury, <https://ofac.treasury.gov/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list> (last visited Feb. 25, 2024) (describing the potential role of lawyers in appealing an SDN listing).

<sup>139</sup> E.O. 13660.

<sup>140</sup> E.O. 13661; E.O. 13662; E.O. 13685 (all related to the 2014 Russian invasion of Crimea).

<sup>141</sup> E.O. 14024 (note that this order actually came in the lead up to the war); E.O. 14114.

<sup>142</sup> U.S. Dep't of Treas., *supra* note 131.

<sup>143</sup> See details *supra* note 125.

not persons of primary interest, but those assisting them.<sup>144</sup> Identifying enablers around the world and then designating them under secondary sanctions is an important part of OFAC's work. Sanctions of this type often have major diplomatic consequences for the United States, particularly, if the target is in allied jurisdiction or is otherwise important to a foreign government (other than the Russian government). These designations are therefore made less often than they could be.

These designations are also rarely made against lawyers, though notably, individuals sanctioned in this way often engage in similar activities to lawyer-enablers, as in the case of the now-sanctioned Cypriot businessman Demetris Ioannides, who runs a company that helps Russian oligarchs hide their wealth in shell companies and buy commercial real estate in the United States.<sup>145</sup> Investigative reporting and academic research indicates that secondary sanctions against lawyers, accountants, and other financial professionals (like Ioannides and other individuals who are the targets of this report) are more effective at putting pressure on Putin's inner circle than sanctioning those individuals themselves would be.<sup>146</sup> Finding these individuals and designating them under the existing legal framework for U.S. sanctions, despite the diplomatic and legal challenges, is thus among the most critical tasks for U.S. policymakers to levy economic pressure against Russian oligarchs involved in the war against Ukraine.

## B. Sanctions compliance and Anti-Money Laundering (AML) efforts in the private sector

Sanctions designations work in tandem with the broader U.S. AML scheme. Banks, accountants, and other critical financial institutions are subject to a battery of AML laws that can serve as additional backstops to close legal holes in the sanctions regime. This section explains the critical AML regulations relevant to the work of keeping the illegal money flows of sanctioned oligarchs out of the U.S. economy, particularly by keeping this money out of the U.S. banking system. This section provides a broad overview of the U.S. AML regulatory scheme as applied to non-lawyer sectors of the economy, particularly through the Banking Secrecy Act (BSA) and the Corporate Transparency Act (CTA). Reviewing the regulations covering the financial services sector also indicates a path forward for the regulation of lawyers, who currently perform similar tasks without the oversight constraints of the financial services sector.

The compliance framework most relevant to the problem of lawyers as enablers in the sanctions context is financial institution compliance with both the BSA and OFAC promulgated sanctions. The financial institution compliance comparison is particularly appropriate as both the Senate and House versions of the "Establishing New Authorities for Business Laundering and Enabling Risks to Security Act" (ENABLERS Act) would have regulated lawyers as financial institutions under

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<sup>144</sup> For a general overview of secondary sanctions, see *U.S. Sanctions: Overview for the 118th Congress*, CONG. RSCH. SERV. (Mar. 4, 2024), <https://crsreports.congress.gov/product/pdf/IF/IF12390>. For a recent example of the United States' use of secondary sanctions against the Russian military in the context of the war in Ukraine, see *Russia Says U.S. Secondary Sanctions Aim to 'Contain' China*, REUTERS (May 3, 2024, 8:38 AM PDT), <https://www.reuters.com/world/russia-says-us-secondary-sanctions-aim-contain-china-2024-05-03/>.

<sup>145</sup> Spencer Woodman, *Oligarchs' Fixer Made Fortune from New York Apartment Building*, ICIJ (Nov. 15, 2023), <https://www.icij.org/investigations/cyprus-confidential/new-york-property-real-estate-cyprus-financial-services/>.

<sup>146</sup> Brenda Medina, *Analysis of ICIJ Data Shows How to Stop Russian Oligarchs in their Tracks*, ICIJ (Mar. 14, 2023), <https://www.icij.org/investigations/russia-archive/analysis-of-icij-data-shows-how-to-stop-russian-oligarchs-in-their-tracks/>.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

the BSA.<sup>147</sup> Incorporation service provider compliance with the newly-enacted CTA is also relevant since many lawyers offer incorporation services.<sup>148</sup> This section explains the practicalities of compliance with these laws in order to assess their value in regulating the legal market.<sup>149</sup>

#### 1. Customer Due Diligence and beneficial ownership verification

Customer Due Diligence (CDD) is the center of any sanctions and AML compliance regime. Put simply, a financial institution must know who its customer actually is in order to work with them. For clients who are natural persons, this requires collecting sufficient information on the customer to (1) verify their identity and (2) assess the risks associated with transacting with them. For clients that are legal entities (corporations, trusts, LLCs, etc.), this requires (1) identifying the persons who own, benefit from, and/or control the legal entity; (2) verifying the identities of those persons; and (3) assessing the risks associated with transacting with the entity and the individuals associated with it.

##### a. CDD for natural persons

For a natural person, the CDD process proceeds as follows:

##### 1. Verification of customer identity

A financial institution is legally required to have a “Customer Identification Program” under 31 CFR § 1020.220 that enables that institution to have a “reasonable belief that it knows the true identity of each customer.”<sup>150</sup> The financial institution must collect, at minimum, each customer’s name, date of birth, residential address, and an identification number.<sup>151</sup> The financial institution must also verify the accuracy of enough of this information to establish a “reasonable belief” that

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<sup>147</sup> Compare H.R. 7900, 117th Cong. § 5401 (2022) with H.R. 7900/S. 4543 (Amendment 6377), 117th Cong. (2022).

<sup>148</sup> See Shari L. Klevens & Alanna Clair, *What Lawyers Should Know About the Corporate Transparency Act*, LAW.COM: DAILY REP. (Dec. 4, 2023, 10:42 AM), <https://www.law.com/dailyreportonline/2023/12/04/what-lawyers-should-know-about-the-corporate-transparency-act/> (describing the scope and impact of the Corporate Transparency Act (CTA) as it applies to lawyers).

<sup>149</sup> While the anti-money laundering (AML)/combatting the financing of terrorism (CFT) and OFAC statutory regimes are legally distinct with different requirements for each, compliance with the two regimes is handled by firms as a somewhat coherent whole. Many of the functions that a financial institution will perform to comply with one regime are also necessary to comply with the other. In practice, the same compliance structure usually governs financial institution’s Banking Secrecy Act (BSA) and OFAC compliance. Therefore, this section is organized by function, rather than by statute. See Zoom Interview with Patrick Goodridge Due Diligence Manager, Dragonfly (Feb. 20, 2024) [hereinafter Goodridge Interview]. Compare FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: OFFICE OF FOREIGN ASSETS CONTROL 142-45 (2015), [https://bsaaml.ffiec.gov/docs/manual/07\\_OfficeOfForeignAssetsControl/01.pdf](https://bsaaml.ffiec.gov/docs/manual/07_OfficeOfForeignAssetsControl/01.pdf) [hereinafter FFIEC MANUAL: OFAC] (describing the procedures required for OFAC compliance), with FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: CUSTOMER IDENTIFICATION PROGRAM 7-8 (2021), [https://bsaaml.ffiec.gov/docs/manual/06\\_AssessingComplianceWithBSARegulatoryRequirements/01.pdf](https://bsaaml.ffiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/01.pdf) [hereinafter FFIEC MANUAL: CUSTOMER ID PROGRAM] (describing the procedures required for compliance with the BSA customer identification regulations). OFAC’s Specially Designated Nationals list is not one of the lists financial institutions are required to check as part of their BSA-mandated Customer Due Diligence, but it is required by OFAC’s implementing statutes. *Id.* at 7 (“Checking of customers against Office of Foreign Assets Control (OFAC) lists and 31 CFR 1010.520 (commonly referred to as section 314(a) requests) remain separate and distinct Requirements.”).

<sup>150</sup> 31 CFR § 1020.220(a)(2) (2023).

<sup>151</sup> FFIEC MANUAL: CUSTOMER ID PROGRAM, *supra* note 149, at 3.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

the customer is telling the truth about their identity.<sup>152</sup> It can do so by collecting documentary evidence, like a scan of the customer's passport or state ID, or through non-documentary evidence, like a phone call or in-person meeting.<sup>153</sup> If the financial institution received the customer from another financial institution with a valid compliance program, it can rely on that entity's identity verification.<sup>154</sup> There are no rigid requirements for what an financial institution must do if it cannot verify the customer's identity. However, financial institutions must have procedures to determine when, based on the risks of the customer interaction, it would be appropriate to:<sup>155</sup>

- Refuse to open an account;
- Allow the customer to use the account unencumbered while it attempts to verify the customer's identity;
- Allow the customer to use the account, with limitations, while it attempts to verify the customer's identity;
- Close the account after attempts to verify information have failed; and
- File a Suspicious Activity Report (SAR) on the customer.<sup>156</sup>

#### 2. Customer risk assessment

The financial institution must also assess the money laundering, terrorist financing, sanctions evasion, and general financial crime risks associated with each customer. It does so to determine when to file a SAR, close the customer's account, or take other measures to comply with the risk-based compliance approach mandated by the BSA. There are no legally required steps for customer risk assessments, but a financial institution must rate the money laundering and terrorist financing risk of each customer.<sup>157</sup> In practice, financial institutions almost always employ technology platforms to complete this step.<sup>158</sup>

#### 3. Enhanced due diligence

If the financial institution's procedure identifies a customer as high risk, the company conducts enhanced due diligence (EDD). Regulations or agency guidance also prescribe certain circumstances where EDD is either required or highly recommended, such as in the case of politically exposed persons. EDD similarly has no firm definition, but it involves collecting more detailed information on the customer. Such information can include the customer's source of funds, their occupation, or descriptions of their business. The Federal Financial Institutions

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<sup>152</sup> *Id.* at 4.

<sup>153</sup> *Id.* at 4-5.

<sup>154</sup> *Id.* at 5.

<sup>155</sup> *Id.* at 5-6.

<sup>156</sup> For more on customer identity-related Suspicious Activity Reports (SARs), see FIN. CRIMES ENF'T NETWORK, FINANCIAL TREND ANALYSIS—IDENTITY-RELATED SUSPICIOUS ACTIVITY: 2021 THREATS AND TRENDS (2024), available at [https://www.fincen.gov/sites/default/files/shared/FTA\\_Identity\\_Final508.pdf](https://www.fincen.gov/sites/default/files/shared/FTA_Identity_Final508.pdf).

<sup>157</sup> FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: CUSTOMER DUE DILIGENCE—OVERVIEW 2 (2021), [https://bsaaml.ffiec.gov/docs/manual/06\\_AssessingComplianceWithBSARegulatoryRequirements/02.pdf](https://bsaaml.ffiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/02.pdf) [hereinafter FFIEC MANUAL: CUSTOMER DUE DILIGENCE].

<sup>158</sup> Goodridge Interview, *supra* note 149.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

Examination Council's banking examiner guide provides a graphic to illustrate when EDD may be required.<sup>159</sup>

#### 4. Continued due diligence

Financial institutions must continue updating a customer's risk profile throughout the customer relationship, not just during intake. Most relevantly for this report, continued due diligence may reveal that a customer has been designated on the SDN List. In that situation, a different set of procedures kicks in: the financial institution is required to "block" the customer's assets and account. Blocked assets are placed in an interest-bearing account and held there until the customer is delisted or receives a license from OFAC to continue transacting.<sup>160</sup> The financial institution must report all blockings to OFAC within ten business days.<sup>161</sup>

#### b. CDD on a legal entity

For legal entities, the CDD process is largely the same with the addition of one step: the gathering of beneficial ownership information.

##### 1. Determination of beneficial ownership

In order to conduct the required due diligence on a legal entity trying to engage in business through a financial institution, the financial institution must determine who actually benefits from the operations of that entity. The financial institution gathers this information according to the strictures of the Financial Crimes Enforcement Network (FinCEN) CDD rule.<sup>162</sup> Financial institutions have to gather beneficial ownership information under both the "control" and the "ownership" prongs of the CDD rule.<sup>163</sup> Under the control prong, the financial institution must gather identity information about one person who has operational control over the entity, such as a CEO, CFO, or president.<sup>164</sup> Under the ownership prong, the financial institution must collect the same information on any individual who owns twenty-five percent or more of the legal entity.<sup>165</sup> Therefore, every legal entity will have at least one and at most five beneficial owners.

##### 2. Verification of the identity of beneficial owners

For each beneficial owner identified, the financial institution then needs to collect the same information it would for a natural person customer: name, date of birth, address, and identification number.<sup>166</sup> It can verify that information in the same way as well: through a combination of documentary and non-documentary evidence.<sup>167</sup> As with individuals, an inability to verify the

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<sup>159</sup> FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: APPENDIX K: CUSTOMER RISK VERSUS DUE DILIGENCE AND SUSPICIOUS ACTIVITY MONITORING, at K-1 (2015), [https://bsaaml.ffiec.gov/docs/manual/10\\_Appendices/12.pdf](https://bsaaml.ffiec.gov/docs/manual/10_Appendices/12.pdf) (demonstrating "the progressive methods of due diligence and suspicious activity monitoring systems that banks may deploy as the risk level rises").

<sup>160</sup> FFIEC MANUAL: OFAC, *supra* note 149, at 143 n.153.

<sup>161</sup> *Id.* at 145.

<sup>162</sup> See 31 C.F.R. § 1010.230 (2023), for the full text of the Financial Crimes Enforcement Network (FinCEN) requirements regarding legal entity Client Due Diligence (CDD).

<sup>163</sup> FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: BENEFICIAL OWNERSHIP REQUIREMENTS FOR LEGAL ENTITY CUSTOMERS—OVERVIEW 1 (2018), [https://bsaaml.ffiec.gov/docs/manual/06\\_AssessingComplianceWithBSARegulatoryRequirements/03.pdf](https://bsaaml.ffiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/03.pdf) [hereinafter FFIEC MANUAL: BO REQUIREMENTS FOR LEGAL ENTITIES].

<sup>164</sup> *Id.* at 1-2.

<sup>165</sup> *Id.* at 2.

<sup>166</sup> *Id.* at 2-3.

<sup>167</sup> *Id.* at 3-4.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

identity of a beneficial owner or obtain required beneficial ownership information can trigger a SAR filing.<sup>168</sup>

#### 3. Customer risk assessment

The financial institution then proceeds to conduct a customer risk assessment both on the legal entity itself and on each of its beneficial owners.<sup>169</sup> This assessment procedure is identical to the assessment for individual customers and employs the same technical tools. For OFAC compliance, if the legal entity itself is on the SDN List, the financial institution must block the entity's account and transactions.<sup>170</sup> However, if the legal entity is not designated but one of its beneficial owners is, a different framework applies. OFAC only requires blocking of the account or transaction if the blocked person owns fifty percent or more of the unlisted legal entity.<sup>171</sup> Even so, ownership by a blocked person of less than 50 percent of a legal entity would likely significantly impact their risk rating under the BSA's CDD requirements. Given that rating impact, a financial institution may need to decline to transact with an unlisted entity to comply with its BSA compliance policies.

## 2. Special cases and other rules

In addition to the procedures surrounding customer due diligence, there are additional facets of the AML regulatory landscape relevant to sanctions enforcement and lawyers as enablers. These are discussed below.

#### a. Identity verification under the CTA

As of January 1, 2024, the CTA requires all existing corporations, as well as those created in the future, to collect and send to FinCEN beneficial ownership information on the corporation as well as information on those people assisting with incorporation, including lawyers.<sup>172</sup> While the definition of beneficial ownership is largely the same as under the BSA (it contains the same control and ownership prongs), it is less flexible on identity verification. While the BSA allows the use of documentary and non-documentary evidence in whatever combination as long as it is sufficient to establish who the natural person or persons controlling the company are, the CTA specifically requires that an image of a government identity document be sent to FinCEN.<sup>173</sup> Since

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<sup>168</sup> *Id.* at 4.

<sup>169</sup> FFIEC MANUAL: CUSTOMER DUE DILIGENCE, *supra* note 157, at 3-4.

<sup>170</sup> FFIEC MANUAL: OFAC, *supra* note 149, at 143.

<sup>171</sup> U.S. DEP'T OF TREASURY, OFF. OF FOREIGN ASSETS CONTROL, *supra* note 134. Some sanctions programs like the Cuba and Sudan sanctions also block for different ownership or control thresholds. *Id.*

<sup>172</sup> FIN. CRIMES ENF'T NETWORK, SMALL ENTITY COMPLIANCE GUIDE: BENEFICIAL OWNERSHIP INFORMATION REPORTING REQUIREMENTS, at v-vi (2023) [hereinafter FINCEN SMALL ENTITY COMPLIANCE GUIDE] (describing the overall structure of the CTA). Given that creating legal entities is a major part of transactional practice, the CTA would cover those lawyers tasked with collecting beneficial ownership information on behalf of their clients. Tori J. Osler & Jacqueline N. Walton, *The Corporate Transparency Act: An Overview and Its Impact on Lawyers and Law Firms*, IDAHO STATE BAR (Jan. 2, 2024), <https://isb.idaho.gov/blog/the-corporate-transparency-act-an-overview-and-its-impact-on-lawyers-and-law-firms-by-tori-j-osler-and-jacqueline-n-walton/>; Shari Klevens & Alanna Clair, *What Lawyers Should Know About the Corporate Transparency Act*, LAW.COM: DAILY REPORT (Dec. 4, 2023), <https://www.law.com/dailyreportonline/2023/12/04/what-lawyers-should-know-about-the-corporate-transparency-act/>.

<sup>173</sup> Compare FFIEC MANUAL: CUSTOMER ID PROGRAM, *supra* note 149, at 4-5 (describing the BSA approach), with FINCEN SMALL ENTITY COMPLIANCE GUIDE, *supra* note 172, at 38 (noting that the CTA requires from all beneficial owners and company applicants a "unique identifying number and issuing jurisdiction from, and image of" either a passport, driver's license, or state-issued ID).



## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

lawyers often help individuals with incorporating legal entities, they are already subject to the CTA.

#### b. Suspicious activity monitoring and reporting

Under the BSA, financial institutions are required to report customer activity that raises suspicion the customer is committing a crime. These SARs are filed with FinCEN directly through their online portal.<sup>174</sup> Suspicious activity is a malleable concept with no firm definition under the law.<sup>175</sup> Financial institutions must file SARs for customer actions that “[m]ay involve potential money laundering or other illegal activity” or are “designed to evade the BSA or its implementing regulations,” but there are no specifics on what that activity looks like or the threshold at which point such activity reaches a level of concern requiring a SAR.<sup>176</sup> However, FinCEN does frequently issue alerts with sanctions evasion and money laundering “red flags.” These alerts provide more concrete guidance for what reportable suspicious activity looks like, including guidance specific to Russia’s invasion of Ukraine.<sup>177</sup> As with customer identity verification, the financial institution needs to develop a reasonable risk-based approach to suspicious activity monitoring and reporting to avoid criminal or civil sanction.<sup>178</sup>

To track suspicious activity, financial institutions employ a combination of manual transaction monitoring and “surveillance monitoring” systems, which involve use of the software suites, some of which are similar to those employed for CDD.<sup>179</sup> Both types of monitoring should trigger an alert when the software or employee detects unusual activity.<sup>180</sup> These alerts are then reviewed by a compliance team, after which review the company must decide whether the activity is suspicious

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<sup>174</sup> FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: SUSPICIOUS ACTIVITY REPORTING — OVERVIEW 69-70 (2015),

[https://bsaaml.ffiec.gov/docs/manual/06\\_AssessingComplianceWithBSARegulatoryRequirements/04.pdf](https://bsaaml.ffiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/04.pdf) [hereinafter FFIEC MANUAL: SUSPICIOUS ACTIVITY REPORTING]. See FIN. CRIMES ENF’T NETWORK: BSA E-FILING SYSTEM, <https://bsaefiling.fincen.treas.gov/main.html> (last visited May 11, 2024), for access to the e-filing system.

<sup>175</sup> The FFIEC Manual states that employees should be trained to identify “unusual or potentially suspicious transaction activity” but does not define either term. FFIEC MANUAL: SUSPICIOUS ACTIVITY REPORTING, *supra* note 174, at 62. The Manual then lists activities about which banks must file SARs. *Id.* at 60.

<sup>176</sup> *Id.*

<sup>177</sup> See, e.g., FIN. CRIMES ENF’T NETWORK, FIN-2022-ALERT001, FINCEN ADVISES INCREASED VIGILANCE FOR POTENTIAL RUSSIAN SANCTIONS EVASION ATTEMPTS (2022), <https://www.fincen.gov/sites/default/files/2022-03/FinCEN%20Alert%20Russian%20Sanctions%20Evasion%20FINAL%20508.pdf>.

<sup>178</sup> FFIEC MANUAL: SUSPICIOUS ACTIVITY REPORTING, *supra* note 174, at 61 (“Appropriate policies, procedures, and processes should be in place to monitor and identify unusual activity. The sophistication of monitoring systems should be dictated by the bank’s risk profile, with particular emphasis on the composition of higher-risk products, services, customers, entities, and geographies.”).

<sup>179</sup> *Id.* at 61. Oracle offers a product that allows for ongoing activity monitoring, as does PwC. *Oracle AML and Financial Crime Compliance Management—Customer Due Diligence*, ORACLE, <https://www.oracle.com/financial-services/aml-financial-crime-compliance/customer-due-diligence/#know-your-customer> (last visited May 11, 2024); *Using the Right Tools for Anti-Money Laundering Compliance*, PwC, <https://www.pwc.com/us/en/industries/financial-services/financial-crimes/anti-money-laundering/compliance-tools.html> (last visited May 11, 2024). Financial institutions that process few transactions or have a small number of customers can have a legally compliant SAR program with manual monitoring alone. FFIEC MANUAL: SUSPICIOUS ACTIVITY REPORTING, *supra* note 174, at 61-64.

<sup>180</sup> FFIEC MANUAL: SUSPICIOUS ACTIVITY REPORTING, *supra* note 174, at 61-62 (noting that a key component of any effective monitoring system—manual transaction or surveillance—is “identification or alert[ing] of unusual activity”).

## Regulating the Lawyer-Enablers of Russia’s War on Ukraine

### Part II: Current U.S. Regulatory Landscape

enough to require a SAR filing.<sup>181</sup> A SAR must be filed within thirty days of “initial detection,” which is the date when the unusual activity was reviewed and determined to be “suspicious.”<sup>182</sup> The SAR itself includes transaction information and a narrative description of the suspicious activity.<sup>183</sup> If the activity is ongoing, financial institutions are required to file SARs every 90 days.<sup>184</sup> For particularly serious suspicious activity, financial institutions must call law enforcement as soon as possible.<sup>185</sup> The Bank Policy Institute, an organization funded by the banking industry, has found that “a median of roughly 28 percent of SAR filings resulted in account terminations due to multiple filings.”<sup>186</sup>

The BSA has a strong “no tip-off” rule. When a financial institution files a SAR, the institution as well as all of its employees are prohibited from telling anyone involved in the transaction that a SAR has been filed.<sup>187</sup> Generally, a financial institution must retain records related to BSA compliance including SARs, CDD, and OFAC compliance actions for five years after the client relationship has ended.<sup>188</sup>

Filing a SAR for a client’s suspicious activity does not immunize the financial institution from civil or criminal sanction. Financial institutions are frequently prosecuted for insufficient BSA compliance programs related to particular incidents of financial crime even when they filed SARs related to the activity.<sup>189</sup> A financial institution’s compliance with the BSA is assessed holistically, not merely based on whether the financial institution files enough SARs. Financial institutions are also required to file currency transaction reports (CTRs) with FinCEN on all transactions valued

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<sup>181</sup> *Id.* at 67-68 (describing the process of reviewing alerts and deciding whether or not to file a SAR); Goodridge Interview, *supra* note 149.

<sup>182</sup> FFIEC MANUAL: SUSPICIOUS ACTIVITY REPORTING, *supra* note 174, at 70-71.

<sup>183</sup> *Id.* at 71-72 (describing the elements of a high-quality SAR).

<sup>184</sup> *Id.* at 69 (“FinCEN’s guidelines have suggested that banks should report continuing suspicious activity by filing a report at least every 90 calendar days.”).

<sup>185</sup> *Id.* at 67 n.63.

<sup>186</sup> BANK POL’Y INST., GETTING TO EFFECTIVENESS—REPORT ON U.S. FINANCIAL INSTITUTION RESOURCES DEVOTED TO BSA/AML & SANCTIONS COMPLIANCE 6 (2018).

<sup>187</sup> FFIEC MANUAL: SUSPICIOUS ACTIVITY REPORTING, *supra* note 174, at 73.

<sup>188</sup> For beneficial ownership information, “[a]t a minimum, the bank must maintain any identifying information obtained, including without limitation the certification (if obtained), for a period of five years after the date the account is closed.” FFIEC MANUAL: BO REQUIREMENTS FOR LEGAL ENTITIES, *supra* note 163, at 4. For sanctions compliance, “[b]anks must keep a full and accurate record of each rejected transaction for at least five years after the date of the transaction. For blocked property (including blocked transactions), records must be maintained for the period the property is blocked and for five years after the date the property is unblocked.” FFIEC MANUAL: OFAC, *supra* note 149, at 145. For general CDD records, “the bank must retain all identifying information at account at account opening for CIP purposes for a period of five years after the account is closed.” Moreover, the bank must keep for five years a description of the documents used to verify identity, the methods used to verify a client’s identity if non-documentary, and the resolution of any substantive discrepancy discovered when verifying the identifying information obtained.” FFIEC MANUAL: CUSTOMER ID PROGRAM, *supra* note 149, at 5-6.

<sup>189</sup> An article published by the National Association of Federally-Insured Credit Unions provides a list of prosecutions of its members. In many of these cases, the credit union filed a SAR but failed to do so in a timely fashion. Alma Calcano, *History Repeats Itself, Especially When You Ignore It: A 10-Year Look Back at BSA Enforcement Actions*, NAT’L ASS’N FEDERALLY-INSURED CREDIT UNIONS: COMPLIANCE BLOG (Jul. 19, 2019), <https://www.nafcu.org/compliance-blog/history-repeats-itself-especially-when-you-ignore-it-10-year-look-back-bsa-enforcement-actions>.

## Regulating the Lawyer-Enablers of Russia’s War on Ukraine

### Part II: Current U.S. Regulatory Landscape

at \$10,000 or more.<sup>190</sup> These CTRs must include customer identity information.<sup>191</sup> If the financial institution believes a client is trying to evade the CTR reporting requirement by “structuring” their transactions (i.e. transacting exclusively below the \$10,000 minimum), the financial institution is required to file a SAR.<sup>192</sup>

#### c. Interest on Lawyers’ Trust Accounts (IOLTAs)

CDD looks different for professional service provider accounts, like IOLTAs.<sup>193</sup> These accounts pose a unique risk of abuse given their opaque structure and the fact that the person who owns the funds is not the customer of the financial institution which hosts the IOLTA.<sup>194</sup> For trust accounts, the beneficial owner is the person who runs the account, not the person who owns the underlying assets.<sup>195</sup> As IOLTAs are trust accounts, financial institutions need only conduct CDD on the attorney and law firm that control the accounts, not the clients who actually own the assets.<sup>196</sup> Given the enhanced risk from these accounts, U.S. regulators recommend conducting EDD on any IOLTA “holding and processing significant dollar amounts.”<sup>197</sup> It also recommends building a risk mitigation program specifically for professional service provider accounts: “At account opening, the bank should have an understanding of the intended use of the account, including anticipated transaction volume, products and services used, and geographic locations involved in the relationship.”<sup>198</sup> While IOLTAs are not exempt from financial institutions’ CTR filing requirements,<sup>199</sup> the CTR would not identify the client that is actually responsible for the funds transfer because the beneficial owner is the attorney and/or law firm.

### 3. Compliance issues, costs, and effects of compliance

Financial institutions face rising compliance costs in the face of new sanctions regimes, AML/CFT laws, and the increasing complexity of consumer financial products.<sup>200</sup> 98 percent of financial institutions surveyed in a recent industry study reported rising compliance costs.<sup>201</sup> The same survey estimated financial institutions spend \$61 billion on compliance in North America alone.<sup>202</sup>

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<sup>190</sup> FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: CURRENCY TRANSACTION REPORTING 1 (2021).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 3; FIN. CRIMES ENF’T NETWORK, REPORTING SUSPICIOUS ACTIVITY: A QUICK REFERENCE GUIDE FOR MONEY SERVICES BUSINESSES (n.d.), [https://www.fincen.gov/sites/default/files/shared/report\\_reference.pdf](https://www.fincen.gov/sites/default/files/shared/report_reference.pdf) (providing examples of “structuring”).

<sup>193</sup> *IOLTA: Overview*, AM. BAR ASS’N, [https://www.americanbar.org/groups/interest\\_lawyers\\_trust\\_accounts/overview/](https://www.americanbar.org/groups/interest_lawyers_trust_accounts/overview/) (last visited May 14, 2024).

<sup>194</sup> FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: PROFESSIONAL SERVICE PROVIDERS—OVERVIEW 315 (2015) [hereinafter FFIEC MANUAL: PROFESSIONAL SERVICE PROVIDERS].

<sup>195</sup> FED. FIN. INSTS. EXAMINATION COUNCIL, BSA/AML EXAMINATION MANUAL: TRUST AND ASSET MANAGEMENT SERVICES—OVERVIEW 281 (2015) (noting that “for purposes of the CIP, the bank is not required to search the trust, escrow, or similar accounts to verify the identities of beneficiaries, but instead is only required to verify the identity of the named accountholder (the trust)”).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 283.

<sup>198</sup> FFIEC MANUAL: PROFESSIONAL SERVICE PROVIDERS, *supra* note 194, at 309.

<sup>199</sup> *Id.*

<sup>200</sup> FORRESTER, TRUE COST OF FINANCIAL CRIME COMPLIANCE STUDY, 2023 4 (2023); Goodridge Interview, *supra* note 149.

<sup>201</sup> FORRESTER, *supra* note 200, at 8.

<sup>202</sup> *Id.* at 8.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

But the compliance burden financial institutions face does not translate straightforwardly to the lawyer-enabler problem. The most difficult part of the compliance process for financial institutions is CDD during customer onboarding.<sup>203</sup> For companies with consumer-facing products, CDD obligations mean financial institutions are screening the identities of thousands of customers each day.<sup>204</sup> This volume is the source of most of the difficulty and cost of compliance.<sup>205</sup> Businesses with low customer volume and high margin-per-customer such as law firms would not face the same cost challenges.<sup>206</sup> CDD for a given customer can take as little as an hour for low-risk clients,<sup>207</sup> but timing is highly dependent on how quickly clients respond with the required identity documents.<sup>208</sup> For instance, during its 2016 CDD rulemaking, FinCEN estimated that—based on interviews with compliance personnel—requiring financial institutions to collect beneficial ownership information would increase onboarding time by 20 to 40 minutes.<sup>209</sup> CTA compliance burdens are similarly limited. In an interview, an account manager with an incorporation service provider, Marissa Mehler, noted “that after some back-and-forth with a business to obtain information needed for the ownership form and necessary copies of identification cards, it takes roughly 20 minutes to complete the new FinCEN form” and comply with the CTA.<sup>210</sup>

It is difficult to measure the effects of compliance with the BSA. There is a dearth of hard data on how often law enforcement follows up on SARs or how valuable the SAR requirement is to law enforcement. The Bank Policy Institute found, based on a survey of eight of its members, approximately four percent of SAR filings “warranted law enforcement contact.”<sup>211</sup> Assuming that figure is accurate, law enforcement likely followed up on 80,000 SARs filed last year by depository institutions alone.<sup>212</sup> Because of this opacity, the SAR system has drawn criticism. A 2020 investigation which analyzed leaked SARs painted a picture of a compliance regime where banks file SARs to avoid legal liability and then continue to funnel corrupt money through their institutions.<sup>213</sup> But this criticism misreads the BSA. Filing a SAR does not absolve a financial institution of liability. A financial institution that files a SAR related to a transaction can still be found liable for BSA violations if its overall compliance program is not sufficient to stop flows of

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<sup>203</sup> *Id.* at 14 (“The KYC process during account onboarding is the sternest challenge, ranking as respondents’ primary concern.”).

<sup>204</sup> Patrick Goodridge, a manager in the compliance space at Dragonfly, estimated that CDD for lawyers onboarding clients would take likely from one to three hours. Goodridge Interview, *supra* note 149.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29398, 29436 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

<sup>210</sup> Spencer Woodman, *New U.S. Company Ownership Database Faces Continued Political Attacks Weeks After Launch*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Jan. 17, 2024), <https://www.icij.org/investigations/fincen-files/new-us-company-ownership-database-faces-continued-political-attacks-weeks-after-launch/>.

<sup>211</sup> BANK POL’Y INST., *supra* note 186, at 6. In this context, “law enforcement context includes subpoenas, national security letters or requests for SAR backup documentation.” *Id.* at 6 n.19.

<sup>212</sup> Depository institutions filed 1,963,057 SARs in 2023, a total that was more than half of all SARs filed that last year. *Suspicious Activity Report Statistics (SAR Stats)*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/reports/sar-stats>.

<sup>213</sup> Michael W. Hudson et al., *Global Banks Defy U.S. Crackdowns by Serving Oligarchs, Criminals and Terrorists*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Sept. 20, 2020), <https://www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/>.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

dirty money.<sup>214</sup> In fact, one of the most problematic institutions identified in the FinCEN Files—Deutsche Bank—was fined \$186 million in 2023 for its inadequate BSA compliance.<sup>215</sup> SAR follow-up is also not the only metric of usefulness. FinCEN employs technical tools to analyze all SARs it receives.<sup>216</sup> However, even the agency itself agrees it needs more resources to follow up on SARs in order to fulfill its mandate.<sup>217</sup>

## C. Civil & criminal enforcement of sanctions and AML laws

### 1. Current enforcement efforts

Violations of U.S. sanctions money laundering law are enforced in a variety of ways.<sup>218</sup> Criminal enforcement of sanctions violations often involves charging individuals with a predicate crime (a violation of IEEPA, for example), as well as with conspiracy and the related wire fraud that often occurs as part of such global trade crimes.<sup>219</sup> While criminal enforcement, when successful, is extremely effective, it is a frustrating solution to violations ongoing as part of an urgent conflict, such as Russia's war against Ukraine, because bringing such prosecutions is a labor-intensive and lengthy process. Criminal enforcement also tends to prioritize activities such as smuggling weapons over the wealth concealment with which this report is concerned.<sup>220</sup> Additionally, the potential ability to restrain the role of lawyers in enabling sanctions evasion is much lower in the criminal context where individuals have a recognized and necessary right to counsel.

Because it is not responsive to stopping lawyer-enablers, this report does not focus on the potential of criminal and civil forfeiture as enforcement methods. Civil and criminal forfeiture can be used to seize Russian assets improperly gained or used in violation of the sanctions. In March 2022, Attorney General Merrick Garland created the KleptoCapture task force within the Department of Justice (DOJ) explicitly to go after ill-gotten gains pertaining to the war in Ukraine and associated

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<sup>214</sup> See *supra* Part II(B)(2)(b).

<sup>215</sup> Pete Schroeder & Chris Prentice, *U.S. Fed Fines Deutsche Bank \$186 Million for Slow Progress Against Money Laundering*, REUTERS (Jul. 19, 2023), <https://www.reuters.com/business/finance/fed-fines-deutsche-bank-186-mln-insufficient-progress-addressing-anti-money-2023-07-19/>.

<sup>216</sup> Goodridge Interview, *supra* note 149; Zoom Interview with Casey Michel, Dir., Combating Kleptocracy Program, Hum. Rts. Found. (Feb. 23, 2024).

<sup>217</sup> In 2022, FinCEN's acting director described the agency as "outmatched," when discussing its ability to keep up with new regulations and shifting financial flows. Spencer Woodman, *As U.S. Pledges Renewed Fight Against Dirty Money, Head of Financial Crime Agency Says Funding Shortfalls Have Caused Delays*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 29, 2022), <https://www.icij.org/investigations/pandora-papers/as-us-pledges-renewed-fight-against-dirty-money-head-of-financial-crime-agency-says-funding-shortfalls-have-caused-delays/>.

<sup>218</sup> For a detailed summary of a variety of enforcement efforts so far, see *FACT SHEET: Supporting Ukraine and Imposing Accountability for Russia's Invasion*, DEPT. OF JUSTICE, <https://www.justice.gov/opa/media/1339326/dl?inline> (last visited Apr. 7, 2024).

<sup>219</sup> As an example of these kinds of criminal charges in the current war, see the complaint in *Goltsev*, which charges three defendants who allegedly ran a weapons smuggling ring out of Brooklyn through Canada to the Russian frontlines. Affidavit and Complaint in Support of an Application for Arrest Warrants, *United States v. Goltsev*, No. 1:23-mj-00956 (E.D.N.Y. Oct. 30, 2023), ECF No. 1. Because the primary issue at hand is the illegal export of weapons, the charge is a wire fraud conspiracy surrounding the violation of ECRA and the EAR issued under ECRA, rather than under IEEPA's individually imposed sanctions.

<sup>220</sup> This distribution of enforcement actions can be seen in the Department of Justice's summary factsheet. See *FACT SHEET*, *supra* note 218.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

sanctions violations and money-laundering issues.<sup>221</sup> This enforcement targets the violator, rather than their lawyer-enabler, so although it is important, is not addressed in this report.

U.S. government agencies can work against enablers, in part, by determining what strategies are most likely to be used and guarding against them. FinCEN is an important U.S. government agency that connects other agencies to enforce anti-money laundering and anti-corruption laws. FinCEN has been particularly useful in identifying the risks that arise from commercial real estate acquired via shell companies as a way for sanctioned individuals to hide wealth inside the United States.<sup>222</sup> These concerns have been borne out in recent indictments, including one describing the role of a Colorado lawyer in managing an oligarch's home in Aspen through a series of shell companies for years even after the oligarch was placed on the SDN List.<sup>223</sup> The U.S. Treasury Department has also participated in a multinational group known as the REPO Task Force, which has attempted to plug holes exploited by enablers in the sanctions regime developed by the broader coalition of nations sanctioning Russia.<sup>224</sup>

Criminal and civil penalties in the BSA and the CTA are also possible enforcement avenues because of the connections between sanctioned activities and money laundering. Activities designed to evade various sanctions may constitute money laundering and can therefore be punished accordingly. For example, the DOJ earlier this year charged three individuals with committing money laundering as part of a scheme to violate IEEPA and provide money to Andrey Kostin, a Russian bank executive who is on the SDN List.<sup>225</sup>

Additionally, adapting to the changing landscape of sanctions is a critical part of AML work. Checking that potential clients are not designated on the SDN List is a fundamental part of due diligence practices already required in other professions under the BSA and the CTA.<sup>226</sup> This direct responsiveness to changes in circumstance is extremely useful in a wartime context, as well. For example, Financial Industry Regulatory Authority, a non-profit which oversees U.S. brokers who are subject to these stricter AML requirements, issued a regulatory notice to its members after the initial wave of February 2022 sanctions to alert them of the sanctions' existence and particular impact on the Russian banking sector.<sup>227</sup> However, because the legal industry is not currently subject to the BSA rules governing financial institutions here, the use value of this enforcement path against the lawyer-enabler is limited.

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<sup>221</sup> Oleksii Kovalenko, *Q&A: Prosecutor Discusses How U.S. Punishes Russian Sanctions Violators*, VOA (Mar. 28, 2023, 8:30 PM), <https://www.voanews.com/a/prosecutor-discusses-how-us-punishes-russian-sanctions-violators-/7026526.html>.

<sup>222</sup> *FinCEN Alert on Potential U.S. Commercial Real Estate Investments by Sanctioned Russian Elites, Oligarchs, and Their Proxies* (Jan. 25, 2023), [https://www.fincen.gov/sites/default/files/shared/FinCEN%20Alert%20Real%20Estate%20FINAL%20508\\_1-25-23%20FINAL%20FINAL.pdf](https://www.fincen.gov/sites/default/files/shared/FinCEN%20Alert%20Real%20Estate%20FINAL%20508_1-25-23%20FINAL%20FINAL.pdf).

<sup>223</sup> Sealed Superseding Indictment, *supra* note 116.

<sup>224</sup> See *Global Advisory on Russian Sanctions Evasion Issued Jointly by the Multilateral REPO Task Force*, U.S. DEP'T OF TREASURY (Mar. 9, 2023), [https://home.treasury.gov/system/files/136/REPO\\_Joint\\_Advisory.pdf](https://home.treasury.gov/system/files/136/REPO_Joint_Advisory.pdf) (describing major sanctions loopholes exploited by individuals).

<sup>225</sup> U.S. Att'ys Off., S.D.N.Y., *supra* note 38.

<sup>226</sup> These rules in other professions will be discussed in more depth *infra* Part II.

<sup>227</sup> Regulatory Notice 22-06: U.S. Imposes Sanctions on Russian Entities and Individuals, FINRA (Feb. 25, 2022), <https://www.finra.org/rules-guidance/notices/22-06>.

## 2. Future enforcement potential: AML regulations and lawyers

The increasingly obvious regulatory failures around gatekeeping practices in the legal industry have driven several attempts at reform, the most recent of which was the 2022 ENABLERS Act. Catalyzed by the October 2021 release of the Pandora Papers and increasing concerns around the efficacy of U.S. sanctions in response to the invasion of Ukraine, the ENABLERS Act was introduced in a uniquely receptive political environment. The bill quickly garnered bipartisan backing: a broad coalition of anti-corruption organizations, Ukrainian diaspora groups, and foreign policy experts signaled their support.<sup>228</sup> The Biden Administration endorsed the bill as well,<sup>229</sup> an unsurprising move given its promise to drive progress on the anti-corruption pillar of its National Security Strategy.<sup>230</sup>

If it had been enacted, the ENABLERS Act would have broadened the BSA to apply to lawyers and other quasi-financial service providers.<sup>231</sup> This would have brought the United States into compliance with international recommendations and shored up well-recognized vulnerabilities in the U.S. financial system.<sup>232</sup> The American Bar Association (ABA), Coinbase, and a range of other trade associations responded to the proposed reforms lobbied against the ENABLERS Act.<sup>233</sup> Though the Act passed the House, it ultimately failed in the Senate by a single vote.<sup>234</sup>

Within the legal industry itself, the ABA's Model Rules form the primary source of lawyer-specific guidelines. Individual law firms may also rely upon Money Laundering Reporting Officers to prevent attorneys from inadvertently performing illicit transactions, but this safeguard is purely voluntary.<sup>235</sup> Coupled with the sanctions regime outlined above, these mechanisms are the primary means of preventing lawyers from engaging in sanctions evasion and other gatekeeping activities.

## D. Lawyer supervision in the United States

This section turns to the world of U.S. lawyers. To understand why the extant regulatory structures are insufficient, it is first essential to understand how lawyers are currently regulated in this

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<sup>228</sup> Letter from Accountability Lab, et al. to Rep. Nancy Pelosi, Speaker, U.S. House of Representatives & Rep. Kevin McCarthy, Republican Leader, U.S. House of Representatives (Aug. 9, 2022), <https://us.transparency.org/resource/house-letter-of-support-for-the-enablers-act/>.

<sup>229</sup> *Remarks by National Security Advisor Jake Sullivan at the International Anti-Corruption Conference (IACC)*, WHITE HOUSE BRIEFING ROOM (Dec. 6, 2022) <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/12/06/remarks-by-national-security-advisor-jake-sullivan-at-the-international-anti-corruption-conference-iacc/>.

<sup>230</sup> *United States Strategy on Countering Corruption*, WHITE HOUSE (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>231</sup> H.R. 7900/S. 4543 (Amendment 6377), 117th Cong. (2022) <https://www.wicker.senate.gov/services/files/70F069DC-B6A3-4F64-9FD2-3AD683E6604B>.

<sup>232</sup> *Id.*

<sup>233</sup> See, e.g., *Coinbase Annual Lobbying Totals: 2022*, OPEN SECRETS <https://www.opensecrets.org/orgs/coinbase/lobbying?id=D000072255&lobbillsycle=2022> (last visited Mar. 15, 2023); Lauren Pachman, *PIA Asks Senate to Reject ENABLERS*, PIA ADVOCACY BLOG (Oct. 13, 2022) <https://piaadvocacy.com/2022/10/13/pia-asks-senate-to-reject-enablers/>.

<sup>234</sup> Will Fitzgibbon, *U.S. Senate blocks major anti-money laundering bill, the Enablers Act*, ICIJ (Dec. 12, 2022), <https://www.icij.org/investigations/pandora-papers/us-senate-blocks-major-anti-money-laundering-bill-the-enablers-act/>.

<sup>235</sup> Levi, *supra* note 65, at 127. Note as well that the efficacy of Money Laundering Reporting Officers in preventing law firms from engaging in illicit financial activities has not been empirically established. *Id.* at 139.



## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

country. The following subsections (1) provide an overview of the different forms of lawyer regulation in the country; (2) describe ethical rules promulgated by the ABA as the cornerstone of lawyer self-regulation; (3) detail past government regulation of lawyers; and (4) highlight the gaps in this regulatory regime that our proposals aim to fill.

#### 1. Forms of lawyer regulation

Lawyers in the United States, while not subject to all the rules that apply to financial institutions or other professions, are by no means an unregulated group. U.S. lawyers are subject to rules imposed by courts, administrative agencies, and federal and state legislatures. In jurisdictions where a lawyer wishes to practice, the lawyer is subject to the supervisory decisions and common law set forth by courts in that jurisdiction.<sup>236</sup> Likewise, administrative agencies can regulate lawyers who appear before them. This imposes a degree of federal control over the profession.<sup>237</sup> Federal and state legislatures, which create civil and criminal penalties, indirectly regulate lawyers by prohibiting them from providing legal assistance to clients committing criminal acts, including money laundering or sanctions evasion.<sup>238</sup>

However, the most noteworthy source of legal regulation—and the most relevant to this report—is the set of professional rules that each state's highest court adopts and enforces.<sup>239</sup> These rules are the main source of lawyers' ethical duties. Though they vary from state to state, state ethics codes draw heavily upon the ABA-issued Model Rules of Professional Conduct (MRPC).<sup>240</sup> Following the approval of a rule by the ABA House of Delegates, state bar associations will review the rule, sometimes at the request of state courts, and debate its adoption.<sup>241</sup> The state's highest court then chooses to adopt the rule as promulgated by the ABA and their state's bar association, adopt a modified version of the rule, or reject it.<sup>242</sup> Though only rules adopted by the highest court in a state or jurisdiction have legal effect in that jurisdiction (meaning many states have different versions of each rule),<sup>243</sup> the Model Rules serve as a source code and unifying proxy for legal ethics rules in all 50 states. This section therefore uses the MRPC to sketch out the ethical framework that covers lawyers, with specific focus on the ethical rules that interact with money laundering, sanctions evasions, and our proposed solutions, namely (1) confidentiality, (2) communication, (3) withdrawal and information collection, and (4) professional misconduct.

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<sup>236</sup> Fred Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1147-1148 (2009) ("The courts regulate lawyers separately as well through supervisory decisions in the course of litigation and by implementing common law civil liability rules that govern legal practice.").

<sup>237</sup> *Id.* at 1148 ("Administrative agencies— particularly federal agencies—also establish and implement rules governing lawyers who practice before them.").

<sup>238</sup> *Id.* ("Federal and state legislatures play a further role in regulating the bar, providing statutory regulations and criminal penalties that apply to lawyers.").

<sup>239</sup> LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 34 (Wolters Kluwer, 4th ed. 2016) ("While many institutions govern lawyers, applying many different bodies of law, perhaps the most important source of guidance for lawyers about their ethical obligations is found in the state ethics codes.").

<sup>240</sup> *Id.* at 36 ("By 2015, nearly every state had adopted some version of the Model Rules, as revised, as well as some version of its numbering system.").

<sup>241</sup> *Id.* at 27.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 36 ("[T]he state ethics codes that govern lawyers contain substantial variations from the ABA Model Rules, so practitioners must rely on the pertinent state rules, not the Model Rules.").

## Regulating the Lawyer-Enablers of Russia’s War on Ukraine

### Part II: Current U.S. Regulatory Landscape

Understanding U.S. lawyers’ ethical obligations is important for two reasons. First, lawyers and non-lawyers alike frequently describe the profession as self-regulating,<sup>244</sup> and the MRPC’s ethical rules are the main form of such self-regulation. Second, many of the solutions we propose in this report directly implicate lawyers’ ethical duties.

## 2. Key ethical duties & principles

### a. Confidentiality

The first of the ethical principles governing lawyers in the United States which interacts with enabling activities is the concept of confidentiality. Contained in Rule 1.6, confidentiality requires that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”<sup>245</sup> This general duty of confidentiality is subject to a few exceptions that allow—but do not require—lawyers to disclose confidential client information. Some exceptions allow lawyers to reveal information in situations where clients are planning on or have already engaged in criminal or fraudulent behavior that injures the “financial interests or property of another.”<sup>246</sup> In such situations, the lawyer may disclose the confidential information to the authorities if it could prevent such injury or mitigate its consequences.<sup>247</sup>

The disclosure exception most relevant to this report is Rule 1.6(b)(6), which allows a lawyer to reveal information “to comply with other law or a court order.”<sup>248</sup> The comment to Rule 1.6 explicitly contemplates that other law may supersede the general duty of confidentiality and makes clear disclosure in such circumstances is ethically permissible. Thus, lawyers who disclose confidential information pursuant to federal statutes or regulations mandating such disclosure have not violated their ethical duties.

Importantly, though Rule 1.6 only addresses an attorney’s duty of confidentiality to current clients, this duty also extends to both prospective and former clients as well. Rule 1.9 addresses the duty to former clients,<sup>249</sup> while Rule 1.18 covers prospective clients.<sup>250</sup> Under the MRPC, anyone who “consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter” qualifies as a prospective client.<sup>251</sup>

### b. Communication

Beyond a lawyer’s duty of confidentiality to their client, the Model Rules further impose a duty of communication upon attorneys. Rule 1.4 spells out the details of this duty, which generally requires

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<sup>244</sup> *Id.* at 20 (“[L]awyers, judges, and scholars assert often and with great confidence that law is a self-regulated profession, governed primarily by its members because of their respected status and their unique role in society.”).

<sup>245</sup> MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS’N 2023).

<sup>246</sup> MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2)-(3) (AM. BAR ASS’N 2023).

<sup>247</sup> MODEL RULES OF PRO. CONDUCT r. 1.6(b)(6) cmt (AM. BAR ASS’N 2023).

<sup>248</sup> MODEL RULES OF PRO. CONDUCT r. 1.6(b)(6) (AM. BAR ASS’N 2023).

<sup>249</sup> MODEL RULES OF PRO. CONDUCT r. 1.9(c) (AM. BAR ASS’N 2023) (“A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.”).

<sup>250</sup> MODEL RULES OF PRO. CONDUCT r. 1.18(b) (AM. BAR ASS’N 2023) (“Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.”).

<sup>251</sup> MODEL RULES OF PRO. CONDUCT r. 1.18(a) (AM. BAR ASS’N 2023).

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

that lawyers keep in close communication with their clients about the representation.<sup>252</sup> The rule lays out six types of attorney-client communications that attorneys must engage in, with three categories especially relevant: the duty to keep clients “reasonably informed about the status of the matter;”<sup>253</sup> the duty to “promptly comply with reasonable requests for information;”<sup>254</sup> and the duty to “consult with the client” if the lawyer believes that they will be limited in the assistance they can provide the client based on prohibitions in law or the MRPC.<sup>255</sup> In practice, an attorney’s disclosure of confidential information to the government via a Suspicious Activity Report would likely trigger this duty of communication, meaning lawyers would have to tell clients if they have filed such a SAR. Finally, the text of Rule 1.4 only discusses “clients” and nowhere mentions prospective or former clients, which suggests that attorneys do not have the same duty of communication to these individuals.

#### c. Rule 1.16: withdrawal & information collection

Rule 1.16 contains two requirements pertinent to this report. It (1) requires lawyers to collect certain information on their clients and (2) sets forth the criteria for both permissive and mandatory withdrawal from a representation.<sup>256</sup> On the information collection front, Rule 1.16 requires information at both the onset of and throughout the representation.<sup>257</sup> Prior to taking on a client, a lawyer must gather as much information as necessary to determine if they may accept the client at all.<sup>258</sup> And during an ongoing representation, a lawyer must collect enough information to ascertain whether they can continue the representation or instead have to withdraw.<sup>259</sup> In response to the initial introduction of the ENABLERS Act, the ABA issued Resolution 100 in an attempt to provide further guidance for lawyers on their information collection responsibilities.<sup>260</sup> Resolution 100 amended both the text of Rule 1.16 and the accompanying comments to clarify that a lawyer’s inquiry should be informed by risk that the client could use their services to further crime and that a change in facts and circumstances may require further inquiry.<sup>261</sup> The new comments to Rule 1.16 list several factors that an attorney should consider in deciding whether to accept a client<sup>262</sup>

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<sup>252</sup> MODEL RULES OF PRO. CONDUCT r. 1.4(a) (AM. BAR ASS’N 2023).

<sup>253</sup> MODEL RULES OF PRO. CONDUCT r. 1.4(a)(3) (AM. BAR ASS’N 2023).

<sup>254</sup> MODEL RULES OF PRO. CONDUCT r. 1.4(a)(4) (AM. BAR ASS’N 2023).

<sup>255</sup> MODEL RULES OF PRO. CONDUCT r. 1.4(a)(5) (AM. BAR ASS’N 2023).

<sup>256</sup> MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS’N 2023).

<sup>257</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(a) (AM. BAR ASS’N 2023) (“A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation.”).

<sup>258</sup> *Id.*

<sup>259</sup> MODEL RULES OF PRO. CONDUCT r. 1.16 cmt (AM. BAR ASS’N 2023) (noting that the obligation to inquire into the “facts and circumstances of each representation” from Rule 1.16(a) “continues throughout the representation and that “[a] change in the facts and circumstances relating to the representation may trigger a lawyer’s need to make further inquiry and assessment.”).

<sup>260</sup> STANDING COMM. ON ETHICS AND PRO. RESP., STANDING COMM. ON PRO. REGUL., AM. BAR. ASS’N, *supra* note 18.

<sup>261</sup> *Id.*

<sup>262</sup> MODEL RULES OF PRO. CONDUCT r. 1.16 cmt. (AM. BAR ASS’N 2023) (“Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the lawyer’s experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the lawyer’s client trust account, or any other accounts in which client funds are held.”).

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

and point lawyers towards the Financial Action Task Force (FATF) guidance on combatting money laundering for further guidance.<sup>263</sup>

Turning to the actual details of attorney withdrawal, Rule 1.16 sets out a series of situations in which a lawyer *must* withdraw their representation (“mandatory withdrawal” covered in 1.16(a)) and situations in which a lawyer *may* withdraw (“permissive withdrawal” covered in 1.16(b)). The two most relevant situations requiring mandatory withdrawal are (1) when a lawyer learns that representing a client would result in the lawyer violating either their ethical obligations or any other law<sup>264</sup> and (2) when a client tries to use the lawyer’s services “to commit or further a crime or fraud.”<sup>265</sup> In the latter situation, the lawyer has a further duty to counsel the client as to the criminality of the conduct and only if the client cannot be dissuaded from committing the conduct must the lawyer withdraw.<sup>266</sup>

In the world of permissive withdrawal, the behavior of enabling lawyers may implicate Rules 1.16(b)(2)-(4). Under these clauses, lawyers may withdraw (1) if they reasonably believe their clients are currently engaging in “criminal or fraudulent” behavior,<sup>267</sup> (2) if their client has in the past used the lawyer “to perpetrate a crime or fraud,”<sup>268</sup> or (3) if the lawyer believes the client’s behavior is “repugnant” or “fundamentally disagree[s]” with the behavior.<sup>269</sup> Notably, the first situation involving ongoing fraud requires a lower standard of “reasonable belief” to trigger the withdrawal option.<sup>270</sup> And though the third situation of repugnancy or fundamental disagreement appears broad, there has been a great deal of disparity in judicial interpretation of the clause and many courts have limited the circumstances in which a lawyer can withdraw based upon repugnancy.<sup>271</sup>

#### d. Professional misconduct & sanctions

Rule 8.4 of the MRPC addresses the general topic of attorney misconduct and declares that it is “professional misconduct” to engage in a wide range of behaviors.<sup>272</sup> Commissions of crimes that “reflect[] adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer”<sup>273</sup> and conduct that involves “dishonesty, fraud, deceit or misrepresentation”<sup>274</sup> are included in the list of sanctionable actions that are violations of the Model Rules.<sup>275</sup> And though the Model Rules do not

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<sup>263</sup> *Id.* (“For further guidance assessing risk, see, e.g., as amended or updated, Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals . . .”).

<sup>264</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1) (AM. BAR ASS’N 2023).

<sup>265</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(a)(4) (AM. BAR ASS’N 2023).

<sup>266</sup> *Id.* (incorporating the Rule 1.2(d) and 1.4(a)(5) duty to attempt to dissuade the client of illegal conduct).

<sup>267</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(b)(2) (AM. BAR ASS’N 2023).

<sup>268</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(b)(3) (AM. BAR ASS’N 2023).

<sup>269</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(b)(4) (AM. BAR ASS’N 2023).

<sup>270</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(b)(2) (AM. BAR ASS’N 2023) (allowing permissive withdrawal where “the client persists in a course of action involving the lawyer’s services that the lawyer *reasonably believes* is criminal or fraudulent”) (emphasis added).

<sup>271</sup> Vanessa A. Kubota, *Subjective Feeling or Objective Standard? The Misuse of the Word “Repugnant” in the Model Rules of Professional Conduct*, 35 GEORGETOWN J. OF ETHICS. 260, 302-03 (2022).

<sup>272</sup> MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS’N 2023).

<sup>273</sup> MODEL RULES OF PRO. CONDUCT r. 8.4(b) (AM. BAR ASS’N 2023).

<sup>274</sup> MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS’N 2023).

<sup>275</sup> MODEL RULES OF PRO. CONDUCT r. 8.4(a) (AM. BAR ASS’N 2023).

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part II: Current U.S. Regulatory Landscape

spell out the punishments for such professional misconduct, state courts and bar associations have the power to reprimand, suspend, or even disbar lawyers for such behavior.<sup>276</sup>

### 3. Rule alteration & Sarbanes-Oxley

While the Model Rules are expansive and important, external regulation does exist and the ABA can and has sometimes taken its lead from governmental regulation. The prime example of regulation prompting changes to the Model Rules is the Sarbanes-Oxley Act and associated changes to the Model Rules through Rule 1.13. As a response to the corporate fraud and accounting scandals of 2000-2001, most notably Enron,<sup>277</sup> Congress passed the Sarbanes-Oxley Act with bipartisan backing.<sup>278</sup> Section 307 of the Act empowered the Securities and Exchange Commission (SEC) to promulgate “minimum standards of professional conduct for attorneys appearing and practicing before the Commission.”<sup>279</sup> The SEC then introduced rules regarding a lawyer’s ability to report confidential information within an organization. As a result of these Rules, and in an effort to head off more intrusive government regulation of the profession, the ABA modified the Model Rules, creating what is now Rule 1.13, requiring lawyers to “report up” certain confidential information within an organization, and allowing for permissive disclosure of confidential information to prevent certain financial crime or fraud.<sup>280</sup>

Though the details of these changes may not directly affect the actions of lawyers engaged in money laundering or sanctions evasion given that the work done by enabling lawyers rarely entails practicing before the SEC or engaging with organizational clients, the broad narrative is relevant. The federal government stepped in to regulate lawyers in response to a perceived failure of self-regulation and a series of major crises. These government regulations, and the resulting changes to the Model Rules, significantly altered the common conceptions of confidentiality. However, even the ABA President Dennis Archer noted that although confidentiality was previously held as

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<sup>276</sup> LERMAN & SCHRAG, *supra* note 239, at 26. (“Lawyer disciplinary agencies (often called bar counsel’s offices or disciplinary counsels) investigate and prosecute misconduct that violates the state ethics code. Possible sanctions include disbarment, suspension, and public or private reprimand. These agencies usually are run by the highest court in the state, by the state bar association, or jointly by the court and the state bar.”).

<sup>277</sup> Michael Peregrine & Charles Elson, *The Important Legacy of the Sarbanes Oxley Act*, HARV. L. SCH. FORUM ON CORPORATE GOVERNANCE (Aug. 30, 2022). The Enron stock price dropped from \$90.75 to \$0.26 at their time of bankruptcy, after a whistleblower exposed debts hidden by accounting techniques. Enron’s bankruptcy was surpassed by WorldCom, as several other firms similarly fell, leading to thousands of people becoming unemployed, financial effects in other markets which served those firms, billions of dollars of loss in the markets, and a resulting loss of trust in those markets.

<sup>278</sup> Cornell L. Sch., *Sarbanes-Oxley Act*, LEGAL INFO. INST. WEX (Apr. 2021), [https://www.law.cornell.edu/wex/sarbanes-oxley\\_act](https://www.law.cornell.edu/wex/sarbanes-oxley_act).

<sup>279</sup> Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 307, 116 Stat. 745, 784 (July 30, 2002) (codified as amended at 15 U.S.C. § 7245). The Act further specified that these minimum standards were to include a rule “requiring an attorney to report evidence of a material violation . . . to the chief legal counsel or the chief executive officer of the company,” *id.* § 307(1), and that if that officer did not appropriately respond, the attorney was to be required to “report the evidence” to either the board of directors or a committee of the board, *id.* § 307(2).

<sup>280</sup> MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS’N 2023).

“very, very sacrosanct and untouchable,”<sup>281</sup> the need to prevent corporate fraud was more pressing in light of scandals like Enron.<sup>282</sup>

This report makes the case that the crisis of enabling lawyers today mirrors that of Enron two decades ago and merits similar government regulation. Though the Model Rules have enormous value, they are insufficient to regulate the entirety of the legal profession especially in a world where lawyers' roles are rapidly changing. Government regulation of the sort proposed by this report is necessary to fill in those gaps. The story of Sarbanes-Oxley makes it clear that such gap-filling will not destroy the legal profession or its core principles.

## E. Gaps in the current regulation of lawyers

This section concludes with a discussion of the major problems that exist in the current regulatory scheme. These problems generally fall into three categories: (1) lack of clarity in current regulations; (2) fundamental gaps in the regulations; and (3) insufficient detection and deterrence of problematic behavior. First, there are situations where the current regulations are generally headed in the right direction but lack clarity. This is the case for the information collection duty, which does not spell out what information collection looks like and leaves too much discretion for lawyers to abuse. Though narrowly tailored to one specific rule, this is key since CDD is a critical part of stopping sanctions evasion and AML. Second, there are fundamental gaps in the rules, particularly a lack of mandatory reporting. Current ethical rules are murky at best in terms of what lawyers may or must disclose in terms of confidential information because of both knowledge standards and permissive vs. mandatory disclosure. This allows bad actor lawyers to hide behind the shield of confidentiality given the general protection of confidentiality, and it allows downstream enablers to not have to disclose because the standards are unclear and there is no centralized reporting system.

Third, there are areas of insufficient detection and deterrence. Beyond the substantive issue of the rules failing to sufficiently address enabling behavior, the existing regulatory scheme cannot sufficiently detect or deter problematic behavior. Even if a lawyer fails to adhere to the information collection duty or should have disclosed some information, state bar associations are under-resourced to uncover all of these instances. It is noteworthy that the main examples of lawyers getting in trouble for enabling behavior were not undertaken by state bar associations, but rather the DOJ or non-governmental organizations. State bars often operate reactively, rather than proactively, in disciplining members. The next section will discuss how lawyers are regulated from an AML perspective around the world before suggesting policy options for the United States.

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<sup>281</sup> Clifton Barnes, *ABA, States, and SEC Hash out Lawyers' Responsibility in Corporate Settings*, 28 BAR LEADER 6, 6 (2003).

<sup>282</sup> *Id.* (“Archer says similar amendments came before the House of Delegates a couple of years ago but were voted down; what’s different now, he notes, is that scandals such as Enron have reminded us of the need to be especially vigilant.”).

## Part III: Comparative Case Studies

This section of the report seeks to explore compliance regimes covering legal professionals in a cross-section of peer countries. The countries discussed below are diverse with respect to geography, government structures, compliance frameworks, and the application of such frameworks to legal professionals. But each carries lessons for a strong, well-designed regulatory system in the United States that addresses the enablers problem. The below table provides an overview of the key components of global anti-money laundering (AML) frameworks as applied specifically to legal professionals. Next, the section explores in greater detail each country's approach to legal professional AML compliance and discusses insights for the United States. The most important findings of this section are as follows:

1. *Several peer nations, like the United Kingdom and Germany, have successfully brought legal professionals under AML regimes, including by mandating Suspicious Activity Reports (SARs).*
2. *Every country surveyed imposes stricter due diligence requirements on legal professionals than does the United States.*
3. *Enforcement is of the utmost importance in achieving success.*<sup>283</sup>

The question then is whether the United States will seize the opportunity before it to improve on what other nations have already achieved or remain a laggard in regulating enablers.

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<sup>283</sup> The United Kingdom is perhaps the clearest example of this lesson, as discussed further below.

Regulating the Lawyer-Enablers of Russia's War on Ukraine  
Part III: Comparative Case Studies

**Table 1: Key Components of Peer Country Lawyer Supervision Regimes**

	Who Regulates?	Client Due Diligence (CDD)	Secrecy <sup>284</sup>	Suspicious Activity Reports	Tipping Off <sup>285</sup>	Withdrawal
United States	Bar association.	Requirement to “inquire into and assess the facts and circumstances of each representation.”	Duty of confidentiality, privilege with exceptions.	No.	N/A	Required only where client <i>actually</i> seeks to use lawyer's services for crime/fraud.
Canada	Bar associations with power delegated from regional gov'ts.	Yes. Thorough document verification with heightened requirements for financial transactions.	Similar to the United States. Strong protection with exceptions.	No, except general duty to report property possibly belonging to a sanctioned person or terrorist group.	N/A	Required when lawyer knows/should know assisting client in illegal conduct.
United Kingdom	Combination gov't, independent regulators.	Yes.	Duty of confidentiality with exceptions.	Yes, with exceptions. <sup>286</sup>	Prohibited with limited exception.	Required if CDD not completed. Not required by filing SAR.
Brazil	Combination gov't, independent regulators.	Conflicting guidance on whether AML duties apply to lawyers, examined below.	Court held privilege does not extend to “non-legal” services like real estate purchases.	Conflicting guidance on whether AML duties apply to lawyers, examined below.	Prohibited.	Must not be “associated with” clients' unlawful conduct.
Germany	Combination gov't, independent regulators.	Yes. Risk-adjusted procedures.	Similar to United States. Strong protection with exceptions.	Yes. Confidentiality exceptions.	Prohibited.	Required if CDD not completed. Not required by filing SAR.
South Africa	Provincial law societies.	Yes.	Duty of confidentiality with exceptions.	Yes. Confidentiality exceptions.	Prohibited.	No requirement.
UAE (Dubai, DIFC)	National gov't, emirate-level gov't, and indep. free trade zone regulations.	<u>Dubai</u> : Yes. Risk-adjusted procedures. <u>DIFC</u> : Same.	<u>Dubai</u> : Duty of confidentiality. <u>DIFC</u> : Same.	<u>Dubai</u> : Yes. Confidentiality exceptions. <u>DIFC</u> : Yes.	<u>Dubai</u> : Prohibited. <u>DIFC</u> : Prohibited.	UAE Financial Intelligence Unit (FIU) may require in both Dubai and DIFC.

<sup>284</sup> “Secrecy” refers to each country's client confidentiality and/or privilege rules.

<sup>285</sup> “Tipping off” refers to whether lawyers may reveal to clients that they have submitted a SAR.

<sup>286</sup> Disclosure is not required where the information giving rise to the suspicion arose through privileged communications unless such communications were intended to further a criminal purpose. *See* Proceeds of Crime Act 2002, c. 29 §§ 330(6)(b), (10), (11) (UK) [hereinafter POCA].



## A. Common law systems

### 1. Canada

Like the United States, Canada struggles with money laundering in general and the regulation of lawyers in its AML regime specifically. Statutorily, the Proceeds of Crime (Money Laundering) and Terrorist Financing Act is the backbone of the Canadian AML scheme.<sup>287</sup> As originally enacted, the Act covered legal service providers.<sup>288</sup> However, Canadian law societies filed multiple legal challenges that culminated in a 2015 Canadian Supreme Court decision.<sup>289</sup> The Court held that searches of law offices violated privilege and constituted an unreasonable privacy violation and that certain verification and record-keeping requirements undermined the solicitor-client privilege and a lawyer's duty of commitment to their client's cause.<sup>290</sup> Consequently, Canadian lawyers are exempt from the federal AML regulations covering financial institutions, securities dealers, insurance companies, real estate brokers, and other potential enablers. The Court, however, noted the possibility that a modified regulatory scheme could provide the requisite constitutional protections while imposing obligations beyond lawyers' self-regulation.<sup>291</sup>

In the meantime, Canadian law societies have both imposed self-regulating measures and collaborated with local and federal agencies to combat money laundering. Regarding self-regulation, the Federation of Law Societies in Canada (FLSC), Canada's national lawyer supervisory body, has adopted three AML-specific model rules: the Cash Transaction Rule, the Client Identification and Verification Rule, and the Trust Accounting Rule.<sup>292</sup> Collectively, these rules impose AML obligations on Canadian lawyers that are absent in the United States, such as rigorous client due diligence requirements.<sup>293</sup> The CDD rules, for example, lay out specific documents that must be collected based on the type of client and additional record-keeping requirements for financial transactions.<sup>294</sup> In addition, the FLSC has formed a joint working group with national regulators, published various guidance documents, and created an online learning course to help Canadian lawyers understand their AML obligations.<sup>295</sup>

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<sup>287</sup> Norm Keith, *Anti-Money Laundering: A Comparative Review of Legislative Development*, 19 BUS. L. INT'L 245, 246 (2018); <https://www.osler.com/en/resources/business-in-canada/doing-business-in-canada/complying-with-regulatory-requirements/anti-money-laundering-and-terrorist-financing>.

<sup>288</sup> Paul D. Paton, *Cooperation, Co-Option or Coercion - The FATF Lawyer Guidance and Regulation of the Legal Profession*, 2010 J. PROF. LAW. 165, 172 (2010).

<sup>289</sup> *E.g.*, Fed. of L. Soc'ys of Can. v. Canada (Attorney General), 2013 B.C.C.A. 147, ¶ 20 (2013); Amy Salyzyn, *A False Start in Constitutionalizing Lawyer Loyalty in Canada (Attorney General) v. Federation of Law Societies of Canada*, Ottawa Faculty of L. Working Paper No. 2016-28, 5 (2016).

<sup>290</sup> Canada (Attorney General) v. Fed. of L. Soc'ys of Can., 1 S.C.R. 401, ¶¶ 34, 108 (2015).

<sup>291</sup> Canada (Attorney General) v. Fed. of L. Soc'ys of Can., 1 S.C.R. 401, ¶¶ 112-13 (2015).

<sup>292</sup> *What We Do: Fighting Money Laundering and Terrorist Financing*, FED. OF L. SOC'YS OF CAN., <https://flsc.ca/what-we-do/fighting-money-laundering-and-terrorist-financing/> (last visited Mar. 16, 2024).

<sup>293</sup> *See, e.g.*, MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION (FED. OF L. SOC'YS OF CAN. 2008).

<sup>294</sup> MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION, §10 (FED. OF L. SOC'YS OF CAN. 2008).

<sup>295</sup> *Terms of Reference*, FEDERATION OF LAW SOCIETIES OF CANADA AND THE GOVERNMENT OF CANADA WORKING GROUP ON MONEY LAUNDERING AND TERRORIST FINANCING (2019), <https://flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/WG-Terms-Reference-E-1.pdf>; *What We Do: Fighting Money Laundering and Terrorist Financing*, FED. OF L. SOC'YS OF CAN., <https://flsc.ca/what-we-do/fighting-money-laundering-and-terrorist-financing/> (last visited Mar. 16, 2024); *Anti-Money Laundering*, FED. OF L. SOC'YS OF CAN., <https://flsc.ca/anti-money-laundering/> (last visited Mar. 16, 2024).

# Regulating the Lawyer-Enablers of Russia’s War on Ukraine

## Part III: Comparative Case Studies

Although Canadian law societies have taken steps to help prevent lawyers from engaging in money laundering, notable gaps exist in the self-regulatory system that hinder the effectiveness of the overall Canadian AML scheme. First, Canadian lawyers are largely exempt from the duty to file SARs. The Standing Committee on Finance flagged this regulatory omission “as the most significant gap” within the Canadian AML regime.<sup>296</sup> Second, Canadian law societies lack external supervision and struggle with enforcing AML regulations. Finally, because of lawyers’ exemption from the federal AML statute, there is a “disconnect between information received by the legal profession and the national information processing system.”<sup>297</sup>

**Table 2: Canada Lawyer Supervisory Regime Summary**

Feature	National Provisions
CDD	<p>For all retainers, a lawyer is required to identify their clients and third parties for whom the clients are acting.<sup>298</sup> The specific information that lawyers must obtain depends on whether the client/third party is an individual or an organization.<sup>299</sup></p> <p>For retainers involving financial transactions, lawyers must verify client and relevant third-party entities using methods prescribed by law societies.<sup>300</sup> Lawyers must also obtain information about the source of funds in such transactions.<sup>301</sup></p> <p>Lawyers must retain a copy of every document used in the identification and verification processes.<sup>302</sup> They must also periodically monitor the professional business relationship with their clients.<sup>303</sup></p>
SARs	<p>Currently, neither statutes nor law society regulations require lawyers to file SARs related to money laundering. Law societies can, however, audit a lawyer’s records, including documents used to identify clients and those pertaining to trust accounts.<sup>304</sup></p> <p>Under the Criminal Code, Canadian persons must disclose the existence of property in their possession that they know is controlled by either a terrorist</p>

<sup>296</sup> STANDING COMMITTEE ON FINANCE, CONFRONTING MONEY LAUNDERING AND TERRORIST FINANCING: MOVING CANADA FORWARD, 121 (2018), <https://www.ourcommons.ca/DocumentViewer/en/42-1/FINA/report-24/page-5>.

<sup>297</sup> Michelle M. Galland, *Lawyers and Money Laundering Regulation: Testing the Limits of the Secrecy in Canada*, 3<sup>rd</sup> Global Conference on Transparency Research HEC Paris, 16 (2013).

<sup>298</sup> MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION, § 3(3) (FED. OF L. SOC’YS OF CAN. 2008).

<sup>299</sup> MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION, §§ 3(1)-(2) (FED. OF L. SOC’YS OF CAN. 2008).

<sup>300</sup> MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION, §§ 4-6 (FED. OF L. SOC’YS OF CAN. 2008).

<sup>301</sup> MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION, § 6(1) (FED. OF L. SOC’YS OF CAN. 2008).

<sup>302</sup> MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION, § 10 (FED. OF L. SOC’YS OF CAN. 2008).

<sup>303</sup> MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION, § 10 (FED. OF L. SOC’YS OF CAN. 2008).

<sup>304</sup> Jacob Millar & Alyssa Hall, REGULATION OF THE LEGAL PROFESSION IN CANADA: OVERVIEW 8 (2021), Westlaw; Model Trust Accounting Rule, §1 (Federation of Law Societies of Can. 2018).

Regulating the Lawyer-Enablers of Russia's War on Ukraine  
Part III: Comparative Case Studies

	group or a sanctioned person/entity and information about transactions involving such property. <sup>305</sup>  Under sanctions regulations, all Canadian persons must disclose to the Royal Canadian Mounted Police “the existence of property in their possession or control that they have reason to believe is . . . owned or controlled by a listed person . . . . They must also disclose information about any transaction or attempted transaction relating to that property.” <sup>306</sup>
Confidentiality & Privilege	At all times, a lawyer must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship. <sup>307</sup> A lawyer must not divulge confidential information, subject to few exceptions, including when required by law and by a law society. <sup>308</sup>
Tipping Off	N/A
Withdrawal	A lawyer must withdraw when he or she knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct. <sup>309</sup> In general, a lawyer must also refrain from receiving cash in amounts over CA\$7,500. <sup>310</sup>

Canada's approach to regulating money laundering offers both lessons and a note of caution for U.S. regulators. While the legal professions in both the United States and Canada are largely self-regulating, Canadian law societies have outperformed their U.S. counterparts in regulating money laundering. The law societies have successfully imposed obligations on lawyers such as client due diligence requirements, mandatory withdrawal duties, and a prohibition on receiving large amounts of cash. They have also actively collaborated with relevant agencies to supplement their regulations. Canadian measures taken together far exceed the force of American Bar Association (ABA) Resolution 100.<sup>311</sup>

The failures of the Canadian system, however, demonstrate the wisdom of foregoing an entirely self-regulatory system in favor of federal legislation. Despite the measures described above, significant concerns linger over the effectiveness of the current system. Tens of billions of dollars

<sup>305</sup> Criminal Code, R.S.C. 1985, c. C-46 § 83; *Advisory to Canadian Businesses on Canada's Sanctions Related to the Russian Invasion of Ukraine - Russian Invasion of Ukraine*, GOV'T OF CAN., [https://www.international.gc.ca/world-monde/issues\\_developpement-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/ukraine-advisory-directive.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/ukraine-advisory-directive.aspx?lang=eng) (Sep. 21, 2022).

<sup>306</sup> GOV'T OF CAN., *supra* note 305.

<sup>307</sup> MODEL CODE OF PRO. CONDUCT § 3.3-1 (FED. OF L. SOC'YS OF CAN. 2022).

<sup>308</sup> *Id.*

<sup>309</sup> MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION § 9 (FED. OF L. SOC'YS OF CAN. 2008).

<sup>310</sup> MODEL RULE ON CASH TRANSACTIONS, §§ 1-4 (FED. OF L. SOC'YS OF CAN. 2004).

<sup>311</sup> STANDING COMM. ON ETHICS AND PRO. RESP., STANDING COMM. ON PRO. REGUL., AM. BAR. ASS'N, *supra* note 18.

are laundered across Canada every year<sup>312</sup> and 75 percent of financial crime cases involve lawyers as either a direct suspect or someone identified during the investigation.<sup>313</sup> There are at least three possible issues at play. First, Canadian lawyers have no obligation to file SARs, which discourages lawyers from closely scrutinizing their professional activities. It also prevents law enforcement from accessing key information, impeding investigations. Second, law societies do not enforce their AML rules tightly. Self-regulation has a tendency to permit transgressions.<sup>314</sup> Given the complexity and scale of money laundering, Canadian law societies often lack the will, resources, and expertise to meaningfully enforce their own AML rules.<sup>315</sup> Third, self-regulation creates an information disconnect between the legal profession and relevant governmental agencies, despite Canadian law societies having taken steps to facilitate information sharing.<sup>316</sup>

## 2. United Kingdom

The United Kingdom, a close relative of the United States in the structure and history of its legal profession, boasts a robust and intricate AML regime, which, importantly, covers lawyers. Covered lawyers must engage in rigorous CDD and, when appropriate, file SARs. Importantly, the SAR requirements explicitly account for the ethical duty of confidentiality and attorney-client privilege, as discussed below. Taken altogether, the U.K. approach to regulating lawyers in the realm of money laundering, an approach similar to that proposed at the end of this report, has not brought about any major crises in its legal profession, nor have there been any major challenges to this legislation, which points to the feasibility of this report’s proposed solutions. And the imperfections in the U.K. AML regime—notably a lack of robust enforcement and ambiguity around issues specific to lawyers—motivate this report’s call for clear, detailed implementing regulations from the Financial Crimes Enforcement Network (FinCEN), accompanied by an increase in enforcement resources and dedication.

**Table 3: U.K. Lawyer Supervisory Regime Summary**

Feature	National Provisions
CDD	The Money Laundering Regulations require a risk-based approach when forming new client relationships and at various times over the course of the

<sup>312</sup> Andrew Russell, *As Canada’s Home Prices Soared During COVID-19, Real-estate Money Laundering Audits Fell 64 percent*, GLOB. NEWS (Feb. 6, 2022), <https://globalnews.ca/news/8585741/canada-home-prices-skyrocket-covid-19-real-estate-money-laundering-audits/>.

<sup>313</sup> FINA Committee Meeting Evidence, HOUSE OF COMMONS OF CAN. (Feb. 26, 2018), <https://www.ourcommons.ca/DocumentViewer/en/42-1/FINA/meeting-134/evidence#Int-9987630>.

<sup>314</sup> PHILLIP SLAYTON, *LAWYERS GONE BAD: MONEY, SEX AND MADNESS IN CANADA’S LEGAL PROFESSION* 318 (Penguin Canada 2008).

<sup>315</sup> Rebecca Bromwich, *(Where Is) the Tipping Point for Governmental Regulation of Canadian Lawyers: Perhaps It Is in Paradise: Critically Assessing Regulation of Lawyer Involvement with Money Laundering After Canada - Attorney General - v. Federation of Law Societies of Canada*, 41 MAN. L.J. 1, 25 (2018).

<sup>316</sup> Michelle M. Galland, *Lawyers and Money Laundering Regulation: Testing the Limits of the Secrecy in Canada*, 3RD GLOBAL CONFERENCE ON TRANSPARENCY RESEARCH HEC PARIS 16 (2013).

Regulating the Lawyer-Enablers of Russia’s War on Ukraine  
Part III: Comparative Case Studies

	client relationship. <sup>317</sup> The regulating statute sets forth specific elements of due diligence, which mostly require identification of the client, identity verification, and assessment of “the purpose and intended nature of the business relationship or occasional transaction.” <sup>318</sup>
SARs	<p>It is a criminal offense for an individual who (1) either knows, suspects, or has “reasonable grounds” for knowing or suspecting that someone else is engaged in money laundering; where (2) the information leading to such knowledge, suspicion, or reasonable grounds “came to him in the course of a business in the regulated sector”; and (3) the individual can identify the suspected money launderer; to (4) fail to make the required disclosure “as soon as is practicable.”<sup>319</sup></p> <p>SARs must include the identity of the suspected money launderer, “the whereabouts of the laundered property, so far as he knows it,” and the information forming the basis of the suspicion, knowledge, or reasonable belief.<sup>320</sup></p>
Confidentiality & Privilege	<p>The duty of confidentiality for solicitors generally tracks the U.S. equivalent. Solicitors are required to “keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents.”<sup>321</sup> Per the Law Society, this duty “applies to all confidential information about a client’s affairs, no matter how the solicitor came by that information” as well as to information from prospective clients.<sup>322</sup> However, the text of the Rule explicitly states exceptions are “required . . . by law.”<sup>323</sup> There also exists legal-professional privilege in the United Kingdom, which again largely tracks the U.S. equivalent.<sup>324</sup></p> <p>Regarding SARs, the U.K. regulations exempt lawyers from having to make disclosures of reasonably believed, suspected, or known money laundering</p>

<sup>317</sup> The Money Laundering Regulations 2007, S.I. 2007/2157; The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692 [hereinafter 2017 Regulations], § 28(2) (UK).

<sup>318</sup> *Id.* § 28(2).

<sup>319</sup> POCA, *supra* note 286, § 330(2)-(4).

<sup>320</sup> POCA, *supra* note 286, § 330(5).

<sup>321</sup> *SRA Code of Conduct for Solicitors, RELs and RFLs*, SOLICS. REGUL. AUTH. at Rule 6.3 (June 6, 2023), <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> [hereinafter *SRA Code of Conduct*].

<sup>322</sup> *LPP and Client Confidentiality*, L. SOC’Y (Mar. 12, 2020), <https://www.lawsociety.org.uk/topics/gdpr/lpp-and-client-confidentiality>.

<sup>323</sup> *SRA Code of Conduct*, at Rule 6.3.

<sup>324</sup> Though there exist four total types of privilege in the United Kingdom, the two most important are (1) legal advice privilege (protecting “confidential communications between lawyers and their clients that come into existence for the purpose of giving or obtaining legal advice”) and (2) litigation privilege (protecting “confidential communications made for the dominant purpose of existing, pending or reasonably contemplated litigation”). *What U.S. GCs Should Know About Privilege in England and Wales*, COOLEY (Mar. 7, 2017), <https://www.cooley.com/news/insight/2017/2017-03-07-what-us-gcs-should-know-about-privilege-in-england-and-wales>; *Legal Professional Privilege*, L. SOC’Y (Dec. 18, 2023), <https://www.lawsociety.org.uk/topics/civil-litigation/legal-professional-privilege-guide>.

Regulating the Lawyer-Enablers of Russia’s War on Ukraine  
Part III: Comparative Case Studies

	where the information leading to such belief, suspicion, or knowledge came to the solicitor “in privileged circumstances.” <sup>325</sup> However, this exception does not apply where the underlying information was “communicated or given with the intention of furthering a criminal purpose,” a carve-out similar to the U.S. crime-fraud exception. <sup>326</sup>
Tipping Off	It is a criminal offense for a lawyer to “tip off” their client to the fact that either the lawyer has filed a SAR or there is an investigation into money-laundering allegations against the client. <sup>327</sup> Legal advisers can, however, tell clients about otherwise non-disclosable information to “dissuad[e] the client from engaging in” the illicit conduct. <sup>328</sup>
Withdrawal	Withdrawal is not required purely for filing a SAR but is generally required if a lawyer is unable to complete CDD, <sup>329</sup> with a few limited exceptions for lawyers already representing clients in litigation and for transactional lawyers in the very early stages of transactional work. <sup>330</sup>

The U.K. approach to regulating money laundering is instructive for the United States both in its successes and failures. The very fact that the United Kingdom has imposed SARs and rigorous CDD requirements on attorneys and the legal profession has not cratered is a signal that the sorts of solutions proposed in this report are possible. Though there certainly exist complaints about the Proceeds of Crime Act and the Money Laundering Regulations,<sup>331</sup> there have not been the same sort of wholesale legal challenges as seen in Canada and threatened in the United States by the ABA. Likewise, the Proceeds of Crime Act presents a potentially valuable model of accommodating concerns about protecting privilege while not fully excusing lawyers from doing the necessary work of filing SARs. Finally, the decision to only regulate lawyers in specific sectors<sup>332</sup> who are engaging in largely transactional work that can often be done by non-lawyers underscores the validity and necessity of the more tailored approach proposed in this report.

<sup>325</sup> POCA, *supra* note 286, §§ 330(6)(b) and (10).

<sup>326</sup> POCA, *supra* note 286, § 330(11).

<sup>327</sup> POCA, *supra* note 286, § 333A.

<sup>328</sup> POCA, *supra* note 286, § 333D(2) (“A professional legal adviser or a relevant professional adviser does not commit an offence under section 333A if the disclosure—(a) is to the adviser’s client, and (b) is made for the purpose of dissuading the client from engaging in conduct amounting to an offence”).

<sup>329</sup> 2017 Regulations, *supra* note 317, § 31(1)(a)-(c).

<sup>330</sup> 2017 Regulations, *supra* note 317, § 31(3) (“[The requirement to withdraw] does not apply where an independent legal professional or other professional adviser is in the course of ascertaining the legal position for a client or performing the task of defending or representing that client in, or concerning, legal proceedings, including giving advice on the institution or avoidance of proceedings.”).

<sup>331</sup> Complaints include concerns that due diligence requirements would overburden legal professionals. L. SOC’Y, *Amendments to the Money Laundering Regulations 2017 Statutory Instrument 2022 - Law Society Response*, (2021) 2, <https://www.lawsociety.org.uk/campaigns/consultation-responses/amendments-to-the-money-laundering-regulations-2017-statutory-instrument-2022>. Weak enforcement has also been cited as a concern. HELEN TAYLOR & DANIEL BEIZSLEY, *A PRIVILEGED PROFESSION: HOW THE UK’S LEGAL SECTOR ESCAPES EFFECTIVE SUPERVISION FOR MONEY LAUNDERING, SPOTLIGHT ON CORRUPTION* 4 (2022).

<sup>332</sup> The U.K. Regulations only apply to “relevant persons” including “independent legal professionals,” a group which contains firms and solo practitioners who engage in a whole host of financial transactions. *See* 2017

The U.K. regime's shortcomings highlight areas in which the United States is positioned to become a global leader. Foremost among areas for improvement are increased enforcement and greater clarity. On the former, Spotlight on Corruption's report on the failure of the AML regime to police lawyers<sup>333</sup> and the general situation of money laundering in the United Kingdom underscore that without proper enforcement, even cutting-edge AML legislation and regulation are near-impotent.<sup>334</sup> There has been a wealth of reporting on the U.K. money laundering issues in just the last five years,<sup>335</sup> during which time period the current AML regime has been in full force. On the latter, there is a lack of clarity on key AML provisions like who and what activities are covered, when privilege applies, who will have access to SARs containing confidential information, and when lawyers are required to engage in ongoing CDD. This report seeks to address both these problems in the United States context by calling for (1) the issuance by FinCEN of a clear set of implementing regulations that are tailored to lawyers and provide detailed guidance aimed at addressing the ambiguities described above; and (2) the creation of a robust enforcement regime targeting lawyers who fail to adhere to the tailored regulations so issued by FinCEN.

## B. Civil law systems

### 1. Brazil

The debates in Brazil over AML obligations for lawyers provide additional insights. Brazil has proven itself willing to prosecute crimes related to money laundering, fraudulent financial transactions, tax evasion, and corruption. But there is dispute over whether Brazil's AML statute applies to lawyers. The Prosecutor General maintains that it does,<sup>336</sup> while the bar association takes the opposite position and refuses to adopt implementing rules despite being empowered to do by law.<sup>337</sup> One appellate court sided to some extent with the Prosecutor General in upholding AML requirements as applied to lawyers, namely SARs, where the service being rendered, the purchasing of real estate, did not qualify as the practice of law.<sup>338</sup> However, because Brazil's AML

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Regulations, *supra* note 317, § 12(1) (“(1) In these Regulations, “independent legal professional” means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning—(a) the buying and selling of real property or business entities; (b) the managing of client money, securities or other assets; (c) the opening or management of bank, savings or securities accounts; (d) the organisation of contributions necessary for the creation, operation or management of companies; or (e) the creation, operation or management of trusts, companies, foundations or similar structures, and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.”).

<sup>333</sup> Taylor & Beizsley, *supra* note 331, at 4.

<sup>334</sup> See, e.g., Kunal Datta, *London: 'A Global Haven for Criminal Financial Activity'*, CHANNEL 4 NEWS (Jan. 29, 2015), <https://www.channel4.com/news/london-tax-haven-financial-crime-terrorism> (quoting the head of the National Crime Agency as stating, “Many hundreds of billions of pounds of criminal money is almost certainly laundered through UK banks and their subsidiaries each year”); Patrick Radden Keefe, *How Putin's Oligarchs Bought London*, NEW YORKER (Mar. 17, 2022), <https://www.newyorker.com/magazine/2022/03/28/how-putins-oligarchs-bought-london> (describing activity of oligarchs in London, in particular).

<sup>335</sup> *Id.*

<sup>336</sup> PGR Brief No 7,743/2012, docketed in S.T.F., Ação Direta de Inconstitucionalidade No. 9965801-67.2012.1.00.0000, Relator: Min. Nunes Marques, 21.09.2012 (Braz.).

<sup>337</sup> OAB Proceeding No. 49.0000.2019.007857-0, rapporteur Joaquim Felipe Spadoni (Apr. 2021).

<sup>338</sup> TRF-1, Apelação Criminal No. 0004182-05.2007.4.01.3400, Relator: Des. Daniel Paes Ribeiro, 22.03.2010, Diário de Justiça Eletrônico [D.J.e] de 20.04.2010 (Braz.).

Regulating the Lawyer-Enablers of Russia's War on Ukraine  
Part III: Comparative Case Studies

statute explicitly empowers the bar association to define and implement AML obligations, the bar's intransigence continues to limit the statute's practical effect.<sup>339</sup>

**Table 4: Brazil Lawyer Supervisory Regime Summary**

Feature	National Provisions
CDD	Brazil's AML law requires any person providing a covered service to conduct CDD. <sup>340</sup> The Brazilian bar association denies that the legal profession is subject to these requirements, however, and has refused to implement the requirements, citing privilege concerns. <sup>341</sup>
SARs	The Brazilian bar association has also refused to implement a SAR requirement as the AML law seems to require it to do, <sup>342</sup> and as the Prosecutor General has urged. One court did find, as mentioned above, that a lawyer conducting a real estate transaction for a client was required to file a SAR because the information related to a service that was not fundamentally the practice of law, and thus not covered by attorney-client privilege. <sup>343</sup>
Confidentiality & Privilege	Communications between attorneys and their clients are presumptively confidential. <sup>344</sup> Failure to uphold attorney-client privilege may subject lawyers to criminal prosecution, along with disciplinary sanctions by the bar. <sup>345</sup>  Privilege may be waived, <i>inter alia</i> , if the waiver is necessary for the lawyer's own representation in court; <sup>346</sup> for example, if a lawyer were being

<sup>339</sup> Lei Federal No. 9,613, de 03 de marco de 1998, Diário Oficial da União [D.O.U] de 04.03.1998 (Braz.), articles 10 and 11. While Brazil's financial intelligence unit could seek information from lawyers regarding specific transactions and individuals in the absence of bar association rules, the provision establishing this authority does not address the issue of whether lawyers are subject to the existing AML statute. *See* Lei Federal No. 9,613, de 03 de marco de 1998, Diário Oficial da União [D.O.U] de 04.03.1998 (Braz.), article 10; STF, Proceeding No. 0083574-26.2023.1.00.0000, rapporteur Cristiano Zanin (Nov. 2023).

<sup>340</sup> Lei Federal No. 9,613, de 03 de marco de 1998, Diário Oficial da União [D.O.U] de 04.03.1998 (Braz.), articles 9-11.

<sup>341</sup> *See* FIN. ACTION TASK FORCE, BRAZIL MUTUAL EVALUATION REPORT: ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES 302-05 (2023); Fernanda F. Casagrande, Vulnerabilidades do Exercício da Advocacia e seu Envolvimento na Prática de Lavagem de Dinheiro (Fundação Getúlio Vargas, 2022), p. 30-31; Aldo R. Netto, Riscos de Responsabilidade Penal no Exercício da Advocacia: Uma Análise do Dever do Advogado de Comunicar Operações Suspeitas de Lavagem de Capitais (Fundação Getúlio Vargas, 2018), p. 65.

<sup>342</sup> *See* Lei Federal No. 9,613, de 03 de marco de 1998, Diário Oficial da União [D.O.U] de 04.03.1998 (Braz.), articles 9-11.

<sup>343</sup> TRF-1, Apelação Criminal No. 0004182-05.2007.4.01.3400, Relator: Des. Daniel Paes Ribeiro, 22.03.2010, Diário de Justiça Eletrônico [D.J.e] de 20.04.2010 (Braz.).

<sup>344</sup> OAB Rules of Professional Conduct (Resolution OAB No. 2/2015), articles 35 and 36.

<sup>345</sup> Decreto-lei No. 2,848, de 07 de Dezembro de 1940, Diário Oficial da União [D.O.U] de 31.12.1940 (Braz.), article 154; E.O.A.B, articles 7 and 36.

<sup>346</sup> Resolução OAB No. 2, de 19 de Outubro de 2015, Diário Oficial da União [D.O.U] de 04.11.2015 (Braz.), article 37.



Regulating the Lawyer-Enablers of Russia’s War on Ukraine  
Part III: Comparative Case Studies

	prosecuted for helping clients launder money. <sup>347</sup> Brazil’s bar association, however, has not provided guidance on the scope of this provision.
Tipping Off	If a SAR is required, informing a client of the filing is prohibited. <sup>348</sup>
Declining Representation	The bar’s Rules of Professional Conduct do not contain requirements on when it would be necessary for lawyers to decline representation. <sup>349</sup> Lawyers must, however, refrain from being “associated with” unlawful conduct, including by their clients. <sup>350</sup> Non-compliant practitioners may be suspended from legal practice for up to 12 months. <sup>351</sup>
Withdrawal	Neither the current regulatory framework nor the bar <sup>352</sup> have established triggers for mandatory withdrawal.  Lawyers may withdraw “at will” after providing written notice to their clients. <sup>353</sup> There are at least two situations where withdrawing would be particularly justified. The first would be if representation might aid a client or a related third party in committing an unlawful act. The second would be where attorneys have concerns about their clients’ integrity. <sup>354</sup>

The first key lesson to be drawn from Brazil is the court’s logic in the real estate sale case,<sup>355</sup> namely that attorney-client privilege is not a permissible excuse for failing to file SARs where the services rendered are not fundamentally legal in nature. Second, Brazil also helps highlight the limits of AML self-regulation for lawyers. Lawyers are not currently required to take affirmative steps to avoid enabling behavior, so the framework in force appears limited to law firms on their own accord attempting to implement AML best practices, though this is supported only by anecdotal evidence. Third, the intense debate over whether Brazil’s national AML legislation applies to legal professionals highlights the importance of precise statutory language. Because the law covers professionals in advising functions, it leaves room for debate on either side as to whether it encompasses legal professionals.

## 2. Germany & the European Union

<sup>347</sup> See Netto, *supra* note 341, at 123.

<sup>348</sup> Lei Federal No. 9,613, de 03 de marco de 1998, Diário Oficial da União [D.O.U] de 04.03.1998 (Braz.), article 11.

<sup>349</sup> Casagrande, *supra* note 341, at 37.

<sup>350</sup> E.O.A.B, articles 34 and 37; Resolução OAB No. 2, de 19 de Outubro de 2015, Diário Oficial da União [D.O.U] de 04.11.2015 (Braz.), article 2.

<sup>351</sup> E.O.A.B, articles 34 and 37; Resolução OAB No. 2, de 19 de Outubro de 2015, Diário Oficial da União [D.O.U] de 04.11.2015 (Braz.), article 2.

<sup>352</sup> See Casagrande, *supra* note 341, at 37.

<sup>353</sup> E.O.A.B, articles 5 and 34; Resolução OAB No. 2, de 19 de Outubro de 2015, Diário Oficial da União [D.O.U] de 04.11.2015 (Braz.), article 16.

<sup>354</sup> E.O.A.B, article 34; Resolução OAB No. 2, de 19 de Outubro de 2015, Diário Oficial da União [D.O.U] de 04.11.2015 (Braz.), article 10.

<sup>355</sup> TRF-1, Apelação Criminal No. 0004182-05.2007.4.01.3400, Relator: Des. Daniel Paes Ribeiro, 22.03.2010, Diário de Justiça Eletrônico [D.J.e] de 20.04.2010 (Braz.).

# Regulating the Lawyer-Enablers of Russia’s War on Ukraine

## Part III: Comparative Case Studies

The European Union is ideologically aligned with the United States, including on Russia. It is a key member of the sanctions coalition<sup>356</sup> and has also long prioritized fighting money laundering. Its intense focus in this area has resulted in a sprawling AML framework, at the heart of which are the EU Anti-Money Laundering Directives.<sup>357</sup> Germany is a useful case study within the EU for several reasons. First, member states are not bound by the EU directives themselves until they transpose them into national law, and Germany is among the most influential of the EU member states with a leading civil code on which numerous other countries have based their own legal systems.<sup>358</sup> Further, money laundering is a significant, ongoing concern in Germany.<sup>359</sup>

Under the European Union scheme, legal professionals trigger AML obligations when carrying out certain activities, such as financial and real estate transactions. These obligations include customer due diligence and mandatory reporting but are subject to carve-outs for protecting professional secrecy. Reporting is centralized and directed to member states’ FIUs. Germany has implemented the European Union Anti-Money Laundering Directives framework and where reports are required, legal professionals report directly to the German FIU.

**Table 5: Germany Lawyer Supervisory Regime Summary**

Feature	National Provisions
CDD	Risk-based approach required when forming new client relationships and periodically afterwards, with risk factors outlined by statute. <sup>360</sup>
SARs	Required if facts indicate (a) the activity involves property derived from criminal offense that’s a predicate offense to money laundering, (b) activity is related to terrorist financing, or (c) client failed to disclose beneficial owner behind the activity. <sup>361</sup>  Legal professionals must report directly to the German FIU when required. <sup>362</sup>

<sup>356</sup> See Press Release, U.S. Dep’t of Treas., U.S. and EU Sanctions Teams Enhance Bilateral Partnership (May 16, 2023), <https://home.treasury.gov/news/press-releases/jy1485>.

<sup>357</sup> See Delphine Nougayrède, *Anti-Money Laundering and Lawyer Regulation: The Response of the Professions*, 43 *FORDHAM INT’L L.J.* 321, 326 (2019) (“[T]he European directives are the real regulatory benchmark against which the standards issued by the FATF or in other national regimes should be compared.”).

<sup>358</sup> *German Civil Code*, BRITANNICA, <https://www.britannica.com/topic/German-Civil-Code> (last visited Feb. 25, 2024).

<sup>359</sup> See *Germany’s New Financial Crime Office Faces a Bulging In-Tray*, MOODY’S (Oct. 26, 2023), <https://www.moody’s.com/web/en/us/kyc/resources/insights/germanys-new-financial-crime-office-faces-bulging-in-tray.html>.

<sup>360</sup> Geldwäschegesetz [GwG] [Money Laundering Act], § 10, ¶ 3 (Ger.) [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/GwG\\_en.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/GwG_en.html).

<sup>361</sup> GwG, § 43, ¶ 1.

<sup>362</sup> See *id.*

Regulating the Lawyer-Enablers of Russia's War on Ukraine  
Part III: Comparative Case Studies

Confidentiality & Privilege	Generally, everything a legal professional learns while practicing is confidential, subject to narrow exceptions. <sup>363</sup>  Legal professionals are not required to file SARs where the information is protected by professional secrecy unless the legal professional knows the client is seeking help for the purpose of laundering money. <sup>364</sup>
Tipping Off	Prohibition on informing clients that a filing has been made against them. <sup>365</sup>
Withdrawal	Inability to complete CDD triggers mandatory withdrawal from client relationship unless client is seeking legal advice/representation. <sup>366</sup> If, however, legal professional knows the client is seeking help for the purpose of laundering money, exception does not apply. <sup>367</sup>  Filing a SAR, however, does not trigger a withdrawal requirement. <sup>368</sup>

The EU project and its implementation in Germany offer myriad lessons for the United States. First, legal challenges to the EU AML directives have centered on client confidentiality.<sup>369</sup> These challenges have largely failed. The United States should embrace European courts' approach to balancing client confidentiality and the importance of AML efforts, including mandatory reporting. In several cases, European courts have found that the need for an effective AML regime justifies sometimes requiring lawyers to report suspicious activity of clients.<sup>370</sup> Second, an AML regime can be comprehensive while protecting confidentiality. In Germany, there are express carveouts to traditional lawyering activities protected by confidentiality when it comes to mandatory SAR filing.<sup>371</sup> Third, AML regulations governing legal professionals can be fine-tuned. The European Union's primary anti-money laundering law leaves room for variance across member states, including on the scope of confidentiality exemptions.<sup>372</sup> Fourth, rigorous customer

<sup>363</sup> Bundesrechtsanwaltsordnung [Federal Code for Lawyers], § 43a, ¶ 2 (Ger.) [https://www.gesetze-im-internet.de/englisch\\_brao/englisch\\_brao.html](https://www.gesetze-im-internet.de/englisch_brao/englisch_brao.html) [hereinafter BRAO]; Berufsordnung [Rules of Professional Practice], § 2, ¶ 2 (Ger.) [https://www.brak.de/fileadmin/02\\_fuer\\_anwaelte/berufsrecht/bora\\_01\\_01\\_2015\\_en.pdf](https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/bora_01_01_2015_en.pdf) [hereinafter BORA];

Bundesnotarordnung [Federal Code for Notaries], § 18, ¶ 1 (Ger.) [https://www.gesetze-im-internet.de/englisch\\_bnoto/englisch\\_bnoto.html](https://www.gesetze-im-internet.de/englisch_bnoto/englisch_bnoto.html) [hereinafter BNotO].

<sup>364</sup> GwG, § 43, ¶ 2.

<sup>365</sup> GwG, § 47, ¶ 1.

<sup>366</sup> GwG, § 10, ¶ 9.

<sup>367</sup> *Id.*

<sup>368</sup> *See* GwG, § 46.

<sup>369</sup> *See, e.g.,* Michaud v. France, App. No. 12323/11, ¶ 15 (Dec. 6, 2012).

<sup>370</sup> Michaud v. France, App. No. 12323/11, ¶ 15 (Dec. 6, 2012); Case C-305/05, *Ordre des Barreaux Francophones & Germanophone & Others v. Conseil des Ministres*, 2007 E.C.R. I-5335.

<sup>371</sup> GwG, § 43, ¶ 2. There is an exemption for legal professionals from SAR requirements "if the reportable matter relates to information they received in the context of a client relationship subject to professional secrecy." *Id.*

<sup>372</sup> E.U. member states have some freedom to determine the scope of the confidentiality exemption for legal professionals. Nougayrède explains that this variation reflects different "national circumstances and professional

due diligence may obviate to some extent the need to file SARs. Carefully screening clients could reduce the likelihood that legal professionals accept work leading to circumstances in which a SAR becomes mandatory because European lawyers have expressed that “criminal clients typically disappear” during due diligence.<sup>373</sup>

## C. Mixed civil/common law systems

### 1. South Africa

South Africa, with its mixed legal system derived from civil, common, and customary law traditions, among other sources,<sup>374</sup> has implemented comprehensive AML regulations that apply to attorneys.<sup>375</sup> South Africa is an informative case study because it has a large financial sector at risk of money laundering and “has demonstrated a commitment to implementing AML/CFT systems”<sup>376</sup> in the face of challenges like public corruption<sup>377</sup> and poor beneficial ownership transparency.<sup>378</sup>

South Africa's foremost AML statute is the Financial Intelligence Centre Act, which provides for a full suite of CDD measures, SAR requirements, and risk management provisions.<sup>379</sup> The Act “works in concert” with two other major laws, namely the Prevention of Organised Crime Act, and the Protection of Constitutional Democracy against Terrorism and Related Activities Act.<sup>380</sup> Attorneys' compliance with the Financial Intelligence Centre Act is overseen by the Legal Practice Council (LPC), which is the general regulator of attorneys.<sup>381</sup> Looking next at the general professional secrecy context for attorneys in South Africa, legal professional privilege largely tracks the U.S. equivalent.<sup>382</sup> Unlike attorney-client privilege in the United States, legal professional privilege is a “fundamental substantive right” rather than simply an evidentiary rule.<sup>383</sup> Legal professional privilege does not apply to the pursuit of criminal ends.<sup>384</sup>

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cultures” and that “[i]t is not impossible to imagine that the same level of culturally-determined ‘idiosyncratic’ implementation and enforcement of these norms could occur in the United States as it has in Europe.” Nougayrède, *supra* note 357, at 338.

<sup>373</sup> Ola Svenonius & Ulrika Mörrth, *Avocat, Rechtsanwalt or Agent of the State? Anti-Money Laundering Compliance Strategies of French and German Lawyers*, 23 J. MONEY LAUNDERING CONTROL 849, 853-54 (2020).

<sup>374</sup> FIN. ACTION TASK FORCE, SOUTH AFRICAN MUTUAL EVALUATION REPORT: ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES 17 (2021).

<sup>375</sup> See Financial Intelligence Centre Act 38 of 2001 [hereinafter FICA] Schedule 1 (S. Afr.).

<sup>376</sup> FIN. ACTION TASK FORCE (2021), *supra* note 374, at 25.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at 5, 22.

<sup>379</sup> See FICA §§ 20A-21H, 29, 42.

<sup>380</sup> *The Financial Intelligence Centre*, FIC, <https://www.fic.gov.za/about/> (last visited May 13, 2024).

<sup>381</sup> FIN. ACTION TASK FORCE, *supra* note 374, at 27.

<sup>382</sup> See *Type of Privilege*, Baker McKenzie, GLOBAL ATTORNEY PRIVILEGE GUIDE: SOUTH AFRICA, <https://resourcehub.bakermckenzie.com/en/resources/global-attorney-client-privilege-guide/europe-middle-east-africa/south-africa/topics/02---type-of-privilege> (last visited May 13, 2024).

<sup>383</sup> *Regulatory Investigations*, Baker McKenzie, GLOBAL ATTORNEY PRIVILEGE GUIDE: SOUTH AFRICA, <https://resourcehub.bakermckenzie.com/en/resources/global-attorney-client-privilege-guide/europe-middle-east-africa/south-africa/topics/06---regulatory-investigation> (last visited May 13, 2024).

<sup>384</sup> *Id.*

Regulating the Lawyer-Enablers of Russia's War on Ukraine  
Part III: Comparative Case Studies

**Table 6: South Africa Lawyer Supervisory Regime Summary**

Feature	National Provisions
CDD	Lawyers must take reasonable steps to investigate suspicious activity. Due diligence typically includes the following. First, lawyers conduct customer identification using government-issued IDs. <sup>385</sup> Second, lawyers screen customers to establish a financial risk profile. <sup>386</sup> Clients are then classified as high-risk, medium-risk, or low-risk individuals. <sup>387</sup> Finally, lawyers are required to continuously re-evaluate clients' risk profiles. <sup>388</sup>
SARs	Lawyers must file SARs to the South Africa FIU within a prescribed period after becoming aware or suspicious that behavior is occurring that must be reported. <sup>389</sup> Lawyers must also make a report to the FIU upon identifying that a prospective client is on a sanctions list. <sup>390</sup>
Confidentiality & Privilege	There is a narrow carveout to SAR requirements for only the "common law right to legal professional privilege" but otherwise "no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance." <sup>391</sup>
Tipping Off	Prohibited with limited exceptions. <sup>392</sup>
Withdrawal	Attorneys must withdraw from client relationships if CDD cannot be completed. <sup>393</sup> Filing a SAR does not mandate withdrawal. <sup>394</sup>  Lawyers may, however, be criminally liable for accepting money from clients obtained illicitly, in practically speaking basically requiring withdrawal. <sup>395</sup> The standard is constructive knowledge. <sup>396</sup>

<sup>385</sup> See *A Complete Guide to KYC Requirements in South Africa*, KYC HUB, <https://www.kychub.com/blog/kyc-requirements-south-africa/> (last visited May 13, 2024).

<sup>386</sup> See *id.*

<sup>387</sup> See *id.*

<sup>388</sup> See *id.*

<sup>389</sup> FICA § 29C.

<sup>390</sup> FINANCIAL INTELLIGENCE CENTRE, LEGAL PRACTITIONERS' OBLIGATIONS IN TERMS OF THE FIC ACT (2020), <https://www.lssa.org.za/wp-content/uploads/2020/03/200311-Legal-practitioners-Article-FINAL-article-004.pdf>.

<sup>391</sup> FICA § 37(3).

<sup>392</sup> *Id.* § 29(3).

<sup>393</sup> *Id.* § 21E.

<sup>394</sup> See *id.* § 29(3) (specifying that the transaction at issue may be continued after the filing of a SAR unless the Financial Intelligence Unit (FIU) directs otherwise).

<sup>395</sup> See Abraham Hamman & Raymond Koen, *Carpe Pecuniam: Criminal Forfeiture of Tainted Legal Fees*, 2020 DE JURE L.J. 19, 20 (2020), <https://scielo.org.za/pdf/dejure/v53n1/02.pdf>.

<sup>396</sup> "For purposes of this Act a person has knowledge of a fact if—

(a) the person has actual knowledge of that fact; or

(b) the court is satisfied that—

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) he or she fails to obtain information to confirm the existence of that fact."

Prevention of Organised Crime Act 121 of 1998 § 1(2).

Regulating the Lawyer-Enablers of Russia's War on Ukraine  
Part III: Comparative Case Studies

As the U.K. section above notes, strong enforcement is key. One area for improvement in South Africa is achieving just that, as the Financial Action Task Force (FATF) has noted that “[t]here is a broad consensus that a relatively low number of money laundering prosecutions and convictions represents the weakest aspect of the regime.”<sup>397</sup> The challenge here is due at least in part to public corruption hampering the efforts of law enforcement agencies.<sup>398</sup> It also seems that reporting by attorneys is low relative to the assessed risk of money laundering in the provision of legal services.<sup>399</sup> Another lesson that can be drawn from the AML framework in South Africa is the importance of oversight. The supervisory body for attorneys, the LPC, leaves attorneys with “essentially no AML/CFT” oversight.<sup>400</sup> Other types of professionals and covered entities have been subject to remedial action, but lawyers have not.<sup>401</sup> Notably, attorney SAR reporting has been “very low,” marking another focus area.<sup>402</sup>

## 2. United Arab Emirates (UAE)

The UAE is a useful case study because of its reputation as a hub for illicit financial activities<sup>403</sup> but also for its significant advancements in building an AML regime.<sup>404</sup> As a word of introduction, in the UAE, some laws and regulations apply in the UAE mainland, whereas others apply only in the Dubai International Financial Centre (DIFC), which is a financial free zone in the Dubai emirate.<sup>405</sup> The federal civil and commercial laws of the UAE mainland do not apply in the DIFC, though the mainland's criminal laws, and some federal regulations, including notably its AML regulations, do apply.<sup>406</sup>

Looking specifically to professional secrecy in the legal profession, mainland UAE does not explicitly recognize attorney-client privilege, though attorney client communications are confidential, as recognized in both statute and professional codes of conduct.<sup>407</sup> The DIFC, however, does adhere to a concept of privilege (as well as confidentiality).<sup>408</sup>

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<sup>397</sup> FIN. ACTION TASK FORCE, *supra* note 374, at 42.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 22.

<sup>400</sup> *Id.* at 11.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 112.

<sup>403</sup> See Peter Kirechu, *Dubai's Vulnerability to Illicit Financial Flows*, in CARNEGIE ENDOWMENT FOR INT'L PEACE, DUBAI'S ROLE IN FACILITATING CORRUPTION AND GLOBAL ILLICIT FINANCIAL FLOWS 49 (Matthew Page & Jodi Vittori eds., 2020), [https://carnegie-production-assets.s3.amazonaws.com/static/files/PageVittori\\_DubaiCorruption\\_final.pdf](https://carnegie-production-assets.s3.amazonaws.com/static/files/PageVittori_DubaiCorruption_final.pdf).

<sup>404</sup> See Mohamed Daoud, *FATF Announces Decision to Remove the United Arab Emirates From its Grey List*, MOODY'S (Feb. 26, 2024), <https://www.moody's.com/web/en/us/kyc/resources/insights/fatf-announces-decision-remove-united-arab-emirates-grey-list.html> (explaining that FATF removed the UAE from its “grey list” after the nation made significant progress on AML efforts).

<sup>405</sup> See Baker McKenzie, *Discovery*, GLOBAL ATTORNEY PRIVILEGE GUIDE: UNITED ARAB EMIRATES, <https://resourcehub.bakermckenzie.com/en/resources/global-attorney-client-privilege-guide/europe-middle-east-africa/united-arab-emirates/topics/01---discovery> (last visited May 15, 2024).

<sup>406</sup> *Id.*

<sup>407</sup> Baker McKenzie, *Type of Privilege*, GLOBAL ATTORNEY PRIVILEGE GUIDE: UNITED ARAB EMIRATES, <https://resourcehub.bakermckenzie.com/en/resources/global-attorney-client-privilege-guide/europe-middle-east-africa/united-arab-emirates/topics/02---type-of-privilege> (last visited May 15, 2024).

<sup>408</sup> *Id.*

## Regulating the Lawyer-Enablers of Russia’s War on Ukraine

### Part III: Comparative Case Studies

In response to global pressures and evolving risks, the UAE has repeatedly updated its AML laws, which now cover non-financial businesses and professionals, including lawyers.<sup>409</sup> Although federal AML laws apply universally, free trade zones are responsible for ensuring compliance within their boundaries.<sup>410</sup>

Lawyers in the UAE must conduct minimum customer due diligence, i.e., with respect to clients’ identities, though additional CDD measures are somewhat discretionary.<sup>411</sup> The 2021 AML law requires covered entities, including legal professionals, to submit SARs when suspicion arises over funds.<sup>412</sup> Legal professionals, however, need not submit a report where the information is covered by “professional confidentiality.”<sup>413</sup> The UAE FIU is the central location for collecting and analyzing these reports, and it also works with law enforcement authorities and its international counterparts.<sup>414</sup>

**Table 7: UAE Lawyer Supervisory Regime Summary**

Feature	National Provisions
CDD	The UAE adheres to a risk-based approach to CDD that is outlined in the AML law’s implementing regulations. <sup>415</sup> Lawyers are required to ascertain the identity of clients and additional CDD measures are discretionary. <sup>416</sup>
SARs	Lawyers must submit SARs to the FIU “upon suspicion or when having plausible reasons to suspect the existence of money laundering or funds that are proceeds in whole or in part, or upon suspecting that such funds relate to the crime or will be used in the crime[.]” <sup>417</sup>
Confidentiality & Privilege	The AML law contains a carveout for covered entities where the relevant information “relates to the assessment of their Customers’ legal position, or defending or representing them before judiciary authorities or in arbitration or mediation, or providing legal opinion with regards to legal proceedings, including providing consultation concerning the initiation or avoidance of

<sup>409</sup> Kirechu, *supra* note 403, at 55.

<sup>410</sup> *Id.* at 49.

<sup>411</sup> Cabinet Decision No. (10) of 2019 Concerning the Implementing Regulation of Decree Law No. (20) of 2018 on Anti-Money Laundering and Combating the Financing of Terrorism and Illegal Organisations [hereinafter Cabinet Decision No. (10)], § 3 (U.A.E.)

<https://rulebook.centralbank.ae/en/rulebook/cabinet-decision-no-10-2019-concerning-implementing-regulation-decree-law-no-20-2018-anti>.

<sup>412</sup> Federal Decree-Law No. (20) of 2018 On Anti-Money Laundering, Combating the Financing of Terrorism and Financing of Illegal Organizations [hereinafter Federal Decree-Law No. (20)], art. 15 (U.A.E.)

<https://www.uaefiu.gov.ae/media/vr2p5uas/federal-decree-law-no-20-of-2018-on-anti-money-laundering-combating-the-financing-of-terrorism-and-financing-of-illegal-organizations.pdf>.

<sup>413</sup> *Id.*

<sup>414</sup> *The UAEFIU Mandate*, UAE FINANCIAL INTELLIGENCE UNIT, <https://www.uaefiu.gov.ae/en/about-us/mandate/> (last visited May 15, 2024).

<sup>415</sup> Federal Decree-Law No. (20), art. 16.

<sup>416</sup> *See* Cabinet Decision No. (10), § 3.

<sup>417</sup> Federal Decree-Law No. (20), art. 15.

Regulating the Lawyer-Enablers of Russia’s War on Ukraine  
Part III: Comparative Case Studies

	such proceedings . . .or in other circumstances where such Customers are subject to professional secrecy.” <sup>418</sup>
Tipping Off	Tipping off is prohibited. <sup>419</sup> It is specifically noted, in addition, that legal professionals attempting to dissuade customers from committing a violation does not constitute tipping off. <sup>420</sup>
Withdrawal	Filing SAR alone does not necessitate withdrawal from the customer relationship and legal professionals may make such a determination based on their risk tolerance. <sup>421</sup> The Dubai Financial Services Authority, the financial regulator for the DIFC, notes that the FIU may advise covered entities on whether or not to continue the client relationship after the filing of a SAR. <sup>422</sup>

The UAE has made significant progress in strengthening its AML legislation to bring it in line with global standards set by FATF.<sup>423</sup> Its progress in this respect demonstrates the power of global efforts at standard setting. But it also highlights, as do above case studies, the importance of enforcement. In particular, there are ongoing calls for improvement amid revelations of suspicious property purchases in the country<sup>424</sup> and incidents like that around Ekaterina Zhdanova, a Russian businesswoman based in the UAE, for helping Russian oligarchs evade U.S. sanctions by carrying out financial transactions in Dubai while concealing beneficial ownership information.<sup>425</sup>

<sup>418</sup> Cabinet Decision No. (10), art. 17.

<sup>419</sup> Cabinet Decision No. (10), art 18.

<sup>420</sup> *Id.*

<sup>421</sup> See ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM AND ILLEGAL ORGANISATIONS: GUIDANCE FOR LICENSED FINANCIAL INSTITUTIONS ON SUSPICIOUS TRANSACTION REPORTING, CENTRAL BANK OF THE U.A.E. 30, <https://www.centralbank.ae/media/hrgcmalf/amlcft-guidance-for-licensed-financial-institutions-on-suspicious-transaction-reporting.pdf> (discussing in the context of financial institutions).

<sup>422</sup> See Dubai Financial Services Authority, *AML 13.3.3 Guidance*, DFSA RULEBOOK, <https://dfs.ae.thomsonreuters.com/rulebook/aml-1333-guidance> (last visited May 15, 2024).

<sup>423</sup> Daoud, *supra* note 404.

<sup>424</sup> *Unfinished Business: Despite FATF Money Laundering List Exit, UAE Has Much to Prove*, TRANSPARENCY INT’L (Apr. 23, 2024), <https://www.transparency.org/en/news/money-laundering-list-exit-uae-much-to-prove>.

<sup>425</sup> *Treasury Designates Virtual Currency Money Laundered for Russian Elites and Cyber Criminals*, U.S. DEP’T OF TREAS. (Nov. 3, 2023), <https://home.treasury.gov/news/press-releases/jy1874>; *U.S. Sanctions Russian National for Helping Elites Launder Money*, REUTERS (Nov. 3, 2023, 8:48 AM PDT), <https://www.reuters.com/world/us-sanctions-russian-national-helping-elites-launder-money-2023-11-03/>.



## Part IV. Policy recommendations

To address the sanctions loopholes exploited by bad actors, this section recommends imposing modest due diligence, reporting, and record-keeping requirements on lawyers, modeled on the 2022 “Establishing New Authorities for Business Laundering and Enabling Risks to Security Act” (ENABLERS Act). **Part A** introduces our policy recommendations and discusses how Congress, the Financial Crimes Enforcement Network (FinCEN), and other stakeholders can collaborate to implement a revised ENABLERS Act that covers lawyers, along with other relevant professions, which we are calling “ENABLERS 2.0.” **Part B** discusses this proposal in view of three criteria: effectiveness, cost, and equity. Compared to alternative proposals, addressed in Appendix A and summarized in Table 8 below, ENABLERS 2.0 would reduce overall costs to the legal profession by confining obligations to a narrow band of quasi-financial services, while boosting detection and deterrence through FinCEN’s technical expertise and economies of scale. Overall, regulation of lawyers, alongside other relevant professions, in an ENABLERS 2.0 Act represents an efficient, effective means of enhancing sanctions enforcement and stopping abuse of the legal profession.

**Table 8: Policy Options Comparison**

Criterion	Element	Recommended Policy: ENABLERS 2.0	<i>Rejected Alternative I: Changes to the American Bar Association Model Rules</i>	<i>Rejected Alternative II: Suspicious Activity Reporting to state bar associations</i>
Effectiveness	Deterrence	(+)	(~)	(-)
	Detection	(+)	(-)	(~)
Cost	Public costs	(~)	(~)	(+)
	Private costs	(~)	(~)	(-)
Equity	De-risking	(+)	(-)	(-)
	Legal principles	(~)	(~)	(~)

(+) signifies that the option is strongly advantageous (i.e., increases effectiveness or reduces costs); (~) signifies that the option is neutral or mixed on this criterion; (-) indicates that the option is strongly disadvantageous.

### Policy recommendation: Regulate lawyers pursuant to ENABLERS 2.0

Lawyers continue to abuse confidentiality to help clients evade sanctions and launder money. To remove this loophole, we recommend that lawyers be subject to substantially the same anti-money laundering (AML) requirements as other financial service providers. Specifically, this includes client due diligence, suspicious activity reporting, filing currency transaction reports, and record-keeping. This would have been achieved by the 2022 ENABLERS Act, which covered lawyers and similar “gatekeeper” professionals like accountants. Our recommendations below address challenges to the original ENABLERS Act posed by lawyers’ unique ethical duties as laid out in the recommendations below, and Congress, FinCEN, the Biden Administration and other key stakeholders such as the Office of Foreign Assets Control (OFAC), the Department of Justice (DOJ), and the American Bar Association (ABA) and state bar associations should work together to urgently pass, implement, and enforce “ENABLERS 2.0.”

Regulating the Lawyer-Enablers of Russia’s War on Ukraine  
Part IV. Policy recommendations

**Table 9: Summary of Policy Recommendations by Stakeholder**

Stakeholder	Policy recommendation
1. Congress	1.1 Pass ENABLERS 2.0.
	1.2 Robustly fund FinCEN and other responsible agencies.
	1.3 Mandate that regulated entities comply within one year.
2. Financial Crimes Enforcement Network	2.1 Require lawyers to complete client due diligence (CDD), similar to other regulated industries.
	2.2 Require lawyers to submit Suspicious Activity Reports (SARs) with accommodations for lawyers’ ethical duties of communication and confidentiality.
	2.3 Require lawyers to submit Currency Transaction Reports (CTRs).
	2.4 Designate state bar associations as the compliance monitoring authority for lawyers.
3. The Biden Administration	3.1 Expand the definition of foreign enablers targeted with secondary sanctions in EO 14114 to include lawyers and other non-financial professionals.
4. Office of Foreign Assets Control	4.1 Lower the sanctions ownership threshold from 50 percent to 25 percent.
	4.2 Impose more individual sanctions on foreign lawyers committing sanctions evasion activities.
5. Department of Justice	5.1 Seek appropriate enforcement actions, along with FinCEN and other enforcing agencies.
6. ABA & state bar associations	6.1 Adopt necessary training programs and Continuing Legal Education.
	6.2 Establish compliance monitoring programs, in cooperation with FinCEN.

## 1. Congress

1.1 Introduce anti-money laundering obligations for lawyers when performing certain corporate and financial services, under “ENABLERS 2.0.”

**Recommendation 1.1:** Congress should pass a renewed ENABLERS Act, covering lawyers and other similar professionals, with a service-based definition of covered persons and an exemption for lawyers’ fees.

The ENABLERS Act, originally introduced in Congress in 2021, would have brought lawyers, when providing specific financial and corporate services, under the United States’ existing anti-money laundering laws, primarily the Banking Secrecy Act (BSA). It enjoyed broad support among foreign policy experts, Ukrainian advocacy groups, and civil society actors.<sup>426</sup> The policy follows a large body of international precedent, including in the United Kingdom and the European

<sup>426</sup> See, e.g., Letter from Razom for Ukraine to Sen. Jack Reed, Chairman, Senate Armed Services Committee, et al. (Oct. 20, 2022), <https://www.razomforukraine.org/wp-content/uploads/2022/10/Letter-on-NDAA-Ukraine-related-provisions-10-20-2022.pdf> (recommending passing the 2022 ENABLERS Act because “Vladimir Putin’s brutal and unprovoked war against Ukraine was made possible in part by his oligarchs having open access to the U.S. financial system”); Henry Pope, *U.S. Anti-Money Laundering Vulnerabilities Counter its Efforts to Aid Ukraine, Experts Say*, OCCRP (Mar. 27, 2023), <https://www.occrp.org/en/daily/17460-u-s-anti-money-laundering-vulnerabilities-counter-its-efforts-to-aid-ukraine-experts-say>; Accountability Lab, et al., *supra* note 228.

Regulating the Lawyer-Enablers of Russia’s War on Ukraine  
Part IV. Policy recommendations

Union, where lawyers are subject to AML obligations with a few accommodations.<sup>427</sup> To appropriately regulate lawyers, this paper proposes amending the definition of a “financial institution” in the BSA, the source of federal AML/CFT obligations, to include lawyers and other professionals, such as accountants and trust and company service providers, when providing a narrow set of financial services to a client.<sup>428</sup> As relevant to lawyers, the original ENABLERS Act sought to amend the list of “financial institution[s]” under 31 U.S.C. § 5312(a)(2) to include:

Any person who provides legal services:

(I) involve financial activities that facilitate—

(aa) corporate or other legal entity arrangement, association, or formation services;

(bb) trust services; or

(cc) third party payment services; and

(II) are not direct payments or compensation for civil or criminal defense matters.

*Figure 1: 2022 ENABLERS Act text amending the Banking Secrecy Act<sup>429</sup>*

We recommend using a similar text in ENABLERS 2.0 for several reasons. First, the discrete list of activities in Clause I ensures that only a narrow set of activities lawyers perform will come under AML obligations. In essence, lawyers who conduct these services are not acting as lawyers but rather as quasi-financial service providers.<sup>430</sup> The exception under Clause II, moreover, protects crucial “access to justice” equities. Scrutinizing transactions that are payments or compensation related to civil and criminal representation could seriously harm attorney-client trust without significantly increasing the efficacy of the law. Exemptions of this type are standard in peer countries surveyed.<sup>431</sup>

<sup>427</sup> The EU money laundering directive contains a similar service-based scope, covering legal professionals when they engage in “financial or corporate transactions . . . where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity or for the purpose of terrorist financing.” Council Directive 2015/849, 2015 O.J. (L 141) 73, 75 (EU). Germany covers lawyers providing services such as: “buying and selling real estate or commercial companies,” “managing of money, securities or other assets,” “opening or managing bank, savings or securities accounts,” “organising funds for the purpose of establishing, operating or managing companies or partnerships,” or “establishing, operating or managing Treuhand companies, companies, partnerships or similar arrangements.” GwG, § 2, ¶ 1.

<sup>428</sup> 31 U.S.C. § 5312(a)(2). These include trust formation, corporate entity arrangement, and other actions at high risk of being abused for money laundering and sanctions evasion. Specifying what type of attorney services are covered in the legislative text, rather than leaving this up to agency implementation, will ensure lawyers remain subject to the BSA under future political administrations, thus creating predictability and certainty for the legal industry.

<sup>429</sup> This text is drawn from the National Defense Authorization Act for Fiscal Year 2023 (NDAA) that was passed by the House of Representatives in 2022. H.R. 7900, 117th Cong. § 5401(c)(1)(B) (2022). The NDAA included a longer list of activities relevant to lawyers and other professionals, as well as a catch-all clause for Treasury to designate additional services. *Id.* § 5401(c)(2).

<sup>430</sup> See, e.g., FIN. ACTION TASK FORCE, *supra* note 83.

<sup>431</sup> See generally, *supra* Part III.

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part IV. Policy recommendations

#### 1.2 Robustly fund FinCEN and other implementing agencies.

**Recommendation 1.2:** Congress should robustly fund FinCEN, the DOJ, OFAC, and other agencies to supervise the newly covered entities.

To make the proposed legislation effective, FinCEN, OFAC, and the DOJ need more resources to detect and prosecute those persons, including lawyers, enabling sanctions evasion. FinCEN currently faces a funding crunch which delayed its implementation of the Corporate Transparency Act.<sup>432</sup> For the DOJ, investigations that lead to sanctions evasion prosecutions are time- and resource-intensive. A funding boost should be specifically designated for the KleptoCapture task force which has led the department's efforts to seize the wealth of sanctioned Russian oligarchs.<sup>433</sup> Similarly, OFAC needs more resources to identify and list more individuals and entities aiding (and enabling) Russia in its war effort to the Specially Designated Nationals and Blocked Persons List (SDN List). By reference, Ukraine has sanctioned over 18,000 persons related to Russia's invasion;<sup>434</sup> the United States, fewer than 2,500.<sup>435</sup>

#### 1.3 Mandate that lawyers comply with ENABLERS 2.0 within one year.

**Recommendation 1.3:** Congress should mandate that covered legal service providers comply with ENABLERS 2.0 even if FinCEN has not yet issued implementing regulations.

To ensure that the law addresses the present Ukraine crisis caused by the war, Congress should require covered persons, including attorneys who provide such services, to comply with these new obligations within one year—even if Treasury's relevant implementing bureau, FinCEN, has not finalized a rule before that date.<sup>436</sup> While we recommend above that Congress increase FinCEN's funding so the bureau can implement these rules swiftly, we still recommend this provision because the Administrative Procedures Act rulemaking process can be lengthy regardless of

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<sup>432</sup> Spencer Woodman, *supra* note 217.

<sup>433</sup> Press Release, Off. of Pub. Aff., U.S. Dep't of Just., Task Force KleptoCapture Announces Array of New Charges, Arrests, and Forfeiture Proceedings in Advance of Second Anniversary of Illegal Invasion of Ukraine (Feb. 22, 2024), <https://www.justice.gov/opa/pr/task-force-kleptocapture-announces-array-new-charges-arrests-and-forfeiture-proceedings>.

<sup>434</sup> National Security and Defense Council of Ukraine Office, Home Page, State Sanctions Registry, <https://drs.nsd.gov.ua/> (accessed Apr. 20, 2024).

<sup>435</sup> Norman Eisen et al., The Brookings Sanctions Tracker, Brookings Inst. (updated Jul. 20, 2023 n.d.), <https://www.brookings.edu/articles/the-brookings-sanctions-tracker/>. This is likely an overestimate as it counts all Ukraine- and Russia-related sanctions, including those not directly related to the war in Ukraine. *Id.* Although it is possible that these individuals may not have significant U.S. assets or cognizable actions under U.S. sanctions law, Ukraine continues to call on the U.S. to investigate new potential sanctions. Tim Kelly, *Ukraine PM Calls for Fresh Sanctions on Russia After Navalny's Death*, Reuters (Feb. 20, 2024), <https://www.reuters.com/world/ukraine-pm-calls-fresh-sanctions-russia-after-navalnys-death-2024-02-20/>.

<sup>436</sup> Representative Malinowski's 2021 version of the ENABLERS Act would have required lawyers to comply within two years. H.R. 5525, 117th Cong., *supra* note 17, § 2(c)(1).

Regulating the Lawyer-Enablers of Russia’s War on Ukraine  
Part IV. Policy recommendations

resources. In any case, FinCEN should be encouraged to issue regulations as part of an interim final rule,<sup>437</sup> which would allow them to become effective immediately upon publication.<sup>438</sup>

## 2. The Financial Crimes Enforcement Network

### 2.1 Require lawyers to complete CDD.

**Policy recommendation 2.1:** In its implementing regulations, FinCEN should require that lawyers complete CDD on new and ongoing client relationships.

Lawyers providing the financial services above should be subject to the same CDD requirements as other covered entities. Such due diligence should include:<sup>439</sup>

- Verifying the client’s legal name, address, date of birth, and identification number with a combination of documentary and non-documentary evidence.
- Verifying the real name, address, date of birth, and identification number of any beneficial owners for legal entity clients.
- Determining whether the client is a senior foreign political figure or subject to U.S. sanctions.
- Continuing to monitor and update the client’s sanctions evasion and anti-money laundering risk levels throughout the client relationship.
- Establishing standards for when a client’s heightened risk level would require enhanced due diligence (EDD).<sup>440</sup>
- Establishing a risk-based compliance program which includes rules for:
  - When to terminate a client relationship based on the risk that they are using the lawyer’s services for illegal ends; and
  - When the attorney would be required to file a SAR.
- Retaining records of the due diligence conducted for the duration of the client relationship and for five years after the relationship has ended.

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<sup>437</sup> See 5 U.S.C. § 553(b)(B) (allowing agencies to issue binding rules without going through the full rulemaking process if an agency finds “good cause” when notice and public procedure are “impracticable, unnecessary, or contrary to the public interest”); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 704, 720 (1999) (arguing that certain emergencies qualify for “good cause” requirement). See Securing the Information and Communications Technology and Services Supply Chain, 15 C.F.R. Part 7 for an example of an interim final rule issued because of urgent national security concerns.

<sup>438</sup> OFFICE FED. REG., A GUIDE TO THE RULEMAKING PROCESS 9 (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

<sup>439</sup> For the specifics of these requirements, see *supra* Part II(B)(1), see also 31 C.F.R. § 1010.620(b) (2023) for minimum due diligence requirements.

<sup>440</sup> For more on how enhanced due diligence operates for currently covered entities, see *supra* Part II(B)(1)(a)(3).

2.2 Require lawyers to file Suspicious Activity Reports, with accommodations for lawyers' ethical duties.

**Policy recommendation 2.2:** FinCEN should require lawyers to submit SARs, with accommodations for lawyers' ethical duties of communication and confidentiality.

This report proposes requiring lawyers to submit SARs on certain dubious transactions, as banks and other regulated entities must do. A SAR need only be filed if the client's request is suspicious—like when a transaction or client profile fits one of FinCEN's "red flag indicators."<sup>441</sup> The SAR database can be accessed by federal, state, and local law enforcement, which will alert authorities to potential sanctions evasion attempts and allow them to identify possible non-compliant lawyers with suspiciously few SAR filings relative to their risk profiles.<sup>442</sup> Moreover, repeated failure to file SARs can be independent grounds for prosecuting lawyers willfully aiding sanctions evasion, who might not meet the higher intent requirement to be prosecuted under U.S. sanctions laws.<sup>443</sup> In crafting the specifics of this requirement for lawyers, FinCEN should pay heed to two core legal ethics duties: the duty of client communication and the need to maintain attorney-client privilege.

First, FinCEN should allow lawyers to disclose to clients that they have filed a SAR where the lawyer believes that is necessary to uphold the duty of client communication. In most regulated financial industries, those filing SARs are prohibited from revealing to clients that they have done so (called "tipping off"), lest the client switch tactics to evade detection.<sup>444</sup> The "no tip-off rule," however, collides with lawyers' duty to keep clients informed about the status of a matter and relevant limitations on client conduct.<sup>445</sup> It would not be unreasonable for a lawyer to conclude that filing a SAR is a relevant fact, which they are bound to communicate to the client. While encouraging lawyers to use discretion to avoid letting clients evade detection, FinCEN should recognize that lawyers may sometimes be required to reveal this information to satisfy their ethical duties, and thus exempt lawyers from a strict no-tip off rule.

Second, FinCEN should clarify that SARs do not need to include privileged information. Attorney-client privilege shields from disclosure before a tribunal communications between the lawyer and client for the purpose of legal advice.<sup>446</sup> Whether a particular document is protected is a case-by-case determination based on the intent of the parties and the circumstances surrounding the

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<sup>441</sup> See, e.g., FIN. CRIMES ENF'T NETWORK, *supra* note 177, at 3-5.

<sup>442</sup> *Support of Law Enforcement*, FIN. CRIMES ENF'T NETWORK (accessed Mar. 3, 2024), <https://www.fincen.gov/resources/law-enforcement/support-law-enforcement>. For example, attorneys who facilitate luxury real estate purchases or form shell companies but have suspiciously few SAR filings may be harboring criminal clients. Law enforcement could use this lack of SAR reporting as a trigger for an investigation.

<sup>443</sup> See generally, *supra* Part I.

<sup>444</sup> See 31 U.S.C. § 5318(g)(2)(A)(i).

<sup>445</sup> See *supra* Part II(D)(2)(b).

<sup>446</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Work Product Privilege, another type of privilege which protects some attorney mental impressions and analysis, would also likely not apply in the case of SARs because the filing thereof is not in preparation for litigation. See Fed. R. Civ. P. 26(b)(3)(A); see also *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part IV. Policy recommendations

communication.<sup>447</sup> In the case of a SAR, the lawyer would likely not be disclosing the client's statements verbatim, yet must take care not to indirectly reveal client confidences. For instance, courts have upheld an attorney's refusal to reveal a client's financial records to the IRS which would tend to indicate the client's motivation for seeking legal representation.<sup>448</sup> In many cases, however, conversations about a transaction would not be privileged where the client knows that the attorney is obligated to later report key details to the government. Such an exception has been upheld in the context of tax disclosures where a client shares information intended to be disclosed in tax returns or where the attorney informs the client that they intend to comply with IRS inquiries about the client's taxes.<sup>449</sup> Discussions would also not be privileged if not for the purpose of legal advice, such as acting "merely as an intermediary or correspondent (following instructions) for a fee in rendering services of a non-legal nature."<sup>450</sup> Following the U.K. example,<sup>451</sup> FinCEN should thus clarify that SARs need not include privileged information, as they can usually be made on the basis of non-privileged details. This is already the case in the United States for lawyers' disclosures of cash receipts to the IRS, where courts have held that clients' identities and other information pertaining to the payment are not privileged.<sup>452</sup>

Finally, there is a question about whether lawyers could be subpoenaed to testify about the information contained in SARs. Lawyers cannot be forced to testify by subpoena about privileged material.<sup>453</sup> In the event that privileged information is included in a SAR despite this report's recommendation to the contrary, as provided above, privilege will likely be waived via disclosure to a third party outside the attorney-client relationship.<sup>454</sup> In that case, privilege would not serve as a barrier to compelling a lawyer's testimony.

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<sup>447</sup> Taylor Lohmeyer Law Firm P.L.L.C. v. United States, 957 F.3d 505, 509-10 (5th Cir. 2020) (quoting EEOC v. BDO USA, L.L.P., 876 F.3d 690, 695 (5th Cir. 2017)).

<sup>448</sup> In re Horn, 976 F.2d 1314, 1317-18 (9th Cir. 1992) (rejecting a subpoena specification because it would require producing "letters of consultation and retainer agreements describing the intended scope of the attorney-client relationship, billing records describing the services performed for his clients and the time spent on those services, and any other attorney-client correspondence relating to the performance of legal services and the rates therefor").

<sup>449</sup> Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962); United States v. White, 950 F.2d 426, 430-31 (7th Cir. 1991).

<sup>450</sup> Puerto Rico v. SS Zoe Colocotroni, 61 F.R.D. 653, 660 (1st Cir. 1980); *see also* United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981) (denying privilege to communications surrounding an attorney's tax preparation for a client because "although preparation of tax returns by itself may require some knowledge of the law, it is primarily an accounting service.").

<sup>451</sup> Proceeds of Crime Act 2002, c. 29, § 330(6)(b) (UK).

<sup>452</sup> *See, e.g.,* In re Grand Jury Subpoena Served upon Doe, 781 F.2d 238, 248 (2nd Cir. 1986) (finding that "disclosure of fee information and client identity is not privileged even though it might incriminate the client"). For an illustration of the bounds of privilege over the details of fee arrangements, compare Taylor Lohmeyer, 957 F.3d at 513 (enforcing an IRS subpoena to reveal the names of clients a firm had helped create foreign bank accounts), with United States v. Liebman, 742 F.2d 807, 810-11 (3d Cir. 1984) (denying an IRS summons seeking the names of the clients a firm had incorrectly advised, concluding this would constitute an admission of legal advice.).

<sup>453</sup> *See* Cornell L. Sch., *Attorney-Client Privilege*, LEGAL INFO. INST.

WEX, [https://www.law.cornell.edu/wex/attorney-client\\_privilege](https://www.law.cornell.edu/wex/attorney-client_privilege) (last visited May 1, 2024) ("Attorney-client privilege can be affirmatively raised in the face of a legal demand for the communications, such as a discovery request, during a deposition, or in response to a subpoena.").

<sup>454</sup> *See* Thomas E. Spahn, *Attorney-Client Privilege: Waiver (Federal)*, Thomson Reuters Practical Law, <https://us.practicallaw.thomsonreuters.com/w-023-5084> (last visited May 13, 2024).

### 2.3 Require lawyers to submit Currency Transaction Reports.

**Policy recommendation 2.4:** FinCEN should expand lawyers’ current duty to submit Cash Payment Reports to a formal CTR requirement, covering both receipts and withdrawals from their trust accounts.

To better detect evasive moves, FinCEN could require lawyers to file CTRs on cash transfers above \$10,000 through their “interest on lawyers’ trust accounts” (IOLTAs).<sup>455</sup> IOLTAs are a common vehicle for elite money laundering.<sup>456</sup> Lawyers are already required to file a Cash Payment Report to FinCEN for receipts of cash over \$10,000 into the IOLTA, yet are not required to report on cash *withdrawals* (although technically, those to whom they pay the cash would be).<sup>457</sup> However, there is still a risk that the lawyer may not report the original client’s name to the third party, thus masking the paper trail. Requiring the lawyer to submit a CTR, a more expansive version of the Cash Payment Report for financial institutions, ensures that both deposits and withdrawals are captured.<sup>458</sup>

### 2.4 Designate state bar associations as the relevant compliance supervisory bodies.

**Policy recommendation 2.4:** Empower state bar associations to monitor lawyers’ compliance with BSA obligations.

The BSA implementing regulations delegate compliance monitoring to various supervisory bodies for each type of regulated financial institution.<sup>459</sup> For lawyers, the most relevant authorities are state bar associations. In drafting its implementing regulations for lawyers, FinCEN should thus empower state bar associations to perform compliance audits and establish other monitoring mechanisms as they deem fit. Note that delegated supervisory authorities are generally required to submit periodic reports on supervised entities to FinCEN, allowing FinCEN and other agencies to pursue necessary enforcement penalties.<sup>460</sup> Moreover, both FinCEN and the delegated supervisors (state bar associations) would be empowered to “examine any books, papers, records, or other data of domestic financial institutions relevant to the recordkeeping or reporting requirements of this chapter.”<sup>461</sup> FinCEN should ensure that this authority, as applied, does not intrude upon attorney-client privilege, impinge on constitutional rights against self-incrimination and unreasonable searches, or jeopardize the legal profession’s independence. It is worth noting that the BSA currently designates the IRS as the catch-all supervisor for entities not closely supervised by another federal body. This could also be an option for lawyers, yet the principle of the legal profession’s independence militates against such federal intrusion. Empowering state bar

<sup>455</sup> For background on IOLTAs, see *IOLTA: Overview*, AM. BAR. ASS’N, [https://www.americanbar.org/groups/interest\\_lawyers\\_trust\\_accounts/overview/](https://www.americanbar.org/groups/interest_lawyers_trust_accounts/overview/) (last visited Mar. 14, 2024).

<sup>456</sup> See *supra* Part I(F).

<sup>457</sup> 31 C.F.R. § 1010.330(a); see also a parallel filing requirement for the Internal Revenue Service at 26 U.S.C. § 6050I.

<sup>458</sup> See 31 C.F.R. §§ 1010.310-1010.314.

<sup>459</sup> 31 C.F.R. § 1010.810(b).

<sup>460</sup> 31 C.F.R. §§ 1010.810(c)-(d).

<sup>461</sup> 31 C.F.R. § 1010.810(f).



associations will preserve some measure of independence while ensuring interoperability with FinCEN.

### 3. The Biden Administration

3.1 Expand the list of foreign enablers of sanctions evasion who can be targeted with secondary sanctions.

**Policy recommendation 3.1:** The Biden Administration should issue a new Executive Order expanding the list of foreign enablers eligible for secondary sanctions to include law firms and other non-financial professionals.

Executive Order 14114 marked an important step towards closing foreign enabling loopholes by allowing OFAC to impose “secondary” sanctions on foreign financial institutions facilitating transactions on behalf of “primary” sanctioned persons in key Russian sectors.<sup>462</sup> However, the list of financial institutions in Section 11(f) was narrow and would be out of step with regulated domestic financial institutions if ENABLERS 2.0 were to be passed. The Biden Administration should thus amend the list of covered institutions to include lawyers and other enabling professions such as accountants, real estate agents, and others noted in the original ENABLERS Act.

### 4. The Office of Foreign Assets Control

4.1 Align the definition of beneficial ownership with other current laws.

**Policy recommendation 4.1:** OFAC should align the definition of beneficial ownership with other current laws:

- (1) Lower the blocking threshold to 25 percent ownership by an SDN-Listed entity or person.
- (2) Require blocking if an SDN-Listed entity or person controls the legal entity.

Lawyers can still secure access to sanctioned persons’ assets through diversified corporate holding structures through unsanctioned “cut outs” discussed in Section I above.<sup>463</sup> OFAC should modify its “50 percent rule” for legal entity ownership by individuals on the SDN List.<sup>464</sup> The current rule requires financial institutions to block the account of a legal entity only when it is specifically

<sup>462</sup> Exec. Order No. 14,114, 88 Fed. Reg. 246 (Dec. 26, 2023).

<sup>463</sup> See generally, *supra* Part I(E). For instance, several mining and telecommunications companies owned by Alisher Usmanov, continued operating unfettered for more than a year after OFAC designated Usmanov in March 2022. Usmanov held a 49 percent ownership stake in the investment firm that controlled those companies; though concerns about driving up metals and other commodity prices may have factored into OFAC’s decision to delay imposing sanctions, the fact that Usmanov had not surpassed the 50 percent ownership threshold likely eased the decision-making process. Daphne Psaledakis & Echo Wang, *With Eye on Metal Prices, U.S. Cautious on Possible Sanctions of Usmanov Companies*, REUTERS (Mar. 8, 2022) <https://www.reuters.com/markets/funds/with-eye-metal-prices-us-cautious-possible-sanctions-usmanov-companies-2022-03-08/>.

<sup>464</sup> The SDN list is the primary list of individual U.S. sanctions. For more on the 50 percent rule, see *supra* Part II(A)(1).

listed or when a listed entity or person owns 50 percent or more of it. We propose OFAC make two changes to its “50 percent rule”:

(1) Lower the blocking threshold to 25 percent ownership by an SDN-Listed entity or person.

(2) Require blocking if an SDN-Listed entity or person controls the legal entity.

Lowering the blocking threshold would also bring the OFAC rule in line with the 25 percent beneficial ownership threshold under the BSA and Corporate Transparency Act (CTA). While this threshold may potentially catch some clean money, it will discourage unsanctioned individuals from doing business with listed persons, furthering OFAC's goal of financially isolating sanctioned persons.<sup>465</sup> Similarly, requiring blocking for SDN-controlled by Specially Designated Nationals (SDNs) would bring OFAC in line with the beneficial ownership rules under the BSA and CTA. Given that financial institutions are already required to collect information on both of these prongs, a “25 percent rule” would not impose any additional CDD burden. But this rule would block potentially damaging financial transactions from sanctioned individuals and entities.

4.2 Impose more individual sanctions on foreign lawyers committing sanctions evasion activities in third countries.

**Policy recommendation 4.2:** OFAC should impose more individual sanctions on foreign lawyers committing sanctions evasion activities in third countries.

Once appropriately empowered by an amended EO 14114, as recommended in 3.1 above, OFAC should impose secondary sanctions on lawyers and other enablers of Russian sanctions evasion in foreign jurisdictions. Recent research suggests such “secondary sanctions” targeting non-U.S. entities who aid the primary sanctions targets can be even more effective than sanctioning the oligarchs themselves.<sup>466</sup> The United States already employs secondary sanctions to target those who aid Iran and North Korea.<sup>467</sup> But few secondary sanctions currently target Russia.<sup>468</sup> In money laundering and sanctions evasion asset-shifting networks, enablers like lawyers serve as central nodes connecting oligarchs to the places they want to store their wealth.<sup>469</sup> Indeed, oligarchs often outnumber the enablers in these networks.<sup>470</sup> Therefore, removing the enablers can cause sanctions evasion networks to collapse.<sup>471</sup> If OFAC can, through sanctions, “remove” these enabling nodes from the network, it can disable the system through which oligarchs evade sanctions. Secondary sanctions will prohibit U.S. entities from transacting with these enablers, preventing them from placing their ill-gotten wealth in the United States, or buying U.S. goods to fuel Russia's war effort.

<sup>465</sup> For context on OFAC's sanctions rationale, see *supra* Part II(A).

<sup>466</sup> Jason Bartlett & Megan Ophel, *Sanctions by the Numbers: U.S. Secondary Sanctions*, CTR. FOR NEW AM. SECURITY (Aug. 26, 2021), <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-u-s-secondary-sanctions>.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* (noting that only 5% of secondary sanctions targeted Russia as of 2021).

<sup>469</sup> Chang et al., *supra* note 13, at 4.

<sup>470</sup> *Id.* at 3.

<sup>471</sup> *Id.* at 8-10.

## Regulating the Lawyer-Enablers of Russia’s War on Ukraine

### Part IV. Policy recommendations

Secondary sanctions will give lawyers abroad a choice: either help Putin’s cronies launder their money or have access to the U.S. market.

## 5. The Department of Justice

### 5.1 Pursue appropriate penalties for violations.

**Policy recommendation 5.1:** The DOJ should seek both individual- and firm-level civil and criminal penalties for violations of the BSA (as implemented by the ENABLERS Act).

Authorities should pursue lawyer-specific penalties for violating the BSA, as defined in FinCEN’s implementing regulations.<sup>472</sup> The DOJ, FinCEN, and other relevant enforcement entities should, where appropriate, bring firm-level and individual-level civil and/or criminal actions.<sup>473</sup> While company-level BSA prosecutions are currently more common, the DOJ has been increasingly willing to sanction individuals for BSA violations.<sup>474</sup> While firm-wide penalties may be effective for deterring bad acts by large firms, they may be much less effective for sole practitioners. For the sole-practitioner bad actor, like the attorney that aided Viktor Vekselberg,<sup>475</sup> individual penalties may be more effective. Moreover, individual penalties may be particularly effective due to the interaction between criminal prosecution and action by state bar authorities. Criminal conviction usually results in the temporary suspension of an attorney’s license or attorney’s disbarment.<sup>476</sup> We encourage law enforcement to utilize both types of prosecutions to deter and punish violations of lawyers’ new BSA obligations.

## 6. ABA & state bar associations

### 6.1 Create necessary trainings on lawyers’ new responsibilities.

**Policy recommendation 6.1:** The ABA should institute Continuing Legal Education (CLE) programs on lawyers’ new anti-money laundering duties, in partnership with law schools, state and local bar associations, and other entities.

To ensure attorneys have the information necessary to comply with the new law, we recommend state bar associations implement a new CLE requirement on AML/CFT and sanctions compliance. A CLE requirement would inform attorneys of their new CDD, SAR, and other compliance obligations. All attorneys need to be trained on these requirements as any attorney may conduct “third party payment services” covered by the law during their career, regardless of practice area. The key point is that lawyers must communicate to all clients in advance that they would have a duty to disclose suspicious activities for certain corporate and financial transactions. The ABA

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<sup>472</sup> 31 C.F.R. § 1010.810.

<sup>473</sup> FinCEN is also empowered to pursue civil penalties under the BSA and should continue to do so for newly regulated enabling entities. *See* 31 C.F.R. § 1010.810(d).

<sup>474</sup> *See generally*, JAY B. SYKES, CONG. RSCH. SERV. R45076, TRENDS IN BANK SECRECY ACT/ANTI-MONEY LAUNDERING ENFORCEMENT (2018).

<sup>475</sup> *See supra* Part I(F)(2).

<sup>476</sup> *See, e.g., Attorney Discipline Definitions*, STATE BAR OF CAL., <https://www.calbar.ca.gov/portals/0/documents/members/DisciplineKey.html> (last visited Mar. 1, 2024).

could partner with other entities like law schools and state and local bar associations to craft these materials and tailor them for relevant local legal context and risk profile.

#### 6.2 Establish compliance monitoring programs.

**Policy recommendation 6.2:** State bar associations, supported by the ABA, should establish compliance monitoring programs for regulated entities.

As discussed in Recommendation 2.4 above, state bar associations are the most natural fit to take on the delegated role of compliance supervision. Bar associations, supported by the ABA, should thus establish programs modeled off those of other delegated supervisory authorities, like the Federal Home Loan Bank Board or the Commodity Futures Trading Commission for their respective entities,<sup>477</sup> monitoring lawyers’ risk-based compliance programs, CDD checks, and other requirements. The details of such a mechanism would be determined by each bar association, and could include random audits of lawyers’ compliance policies, annual certifications for lawyers planning to offer the listed services, or other risk-based procedures. As noted in Recommendation 2.4 above, the BSA generally requires delegated supervisors to make periodic reports to FinCEN permitting enforcement action against noncompliant entities, which would empower FinCEN to examine lawyers’ policies and records.<sup>478</sup> State bar associations, like FinCEN, should ensure that such supervision does not unduly impinge on the legal profession’s independence or require disclosure of privileged information.

#### Next steps & implementation timeline

The changes above should all be implemented within the next one to two years.

## B. Discussion

This section analyzes the policy proposal above against criteria for cost, effectiveness, and equity, per Figure 2 below. It finds that regulating lawyers under ENABLERS 2.0 presents several compelling means to improve detection and deterrence while leveraging cost efficiencies between the federal government and the private sector.

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<sup>477</sup> See 31 C.F.R. § 1010.810(b).

<sup>478</sup> 31 C.F.R. §§ 1010.810(d)-(f).

Regulating the Lawyer-Enablers of Russia’s War on Ukraine  
Part IV. Policy recommendations




Criterion	Dimension	Definition
<b>Effectiveness</b> 	Detection	Ability to detect suspected illicit behavior through licit channels rather than diverting it ‘underground’
	Deterrence	Increases in the perceived costs of sanctions evasion / enabling to where it is no longer feasible or advantageous
<b>Costs</b> 	Public costs	Monitoring costs to FinCEN and OFAC; enforcement costs to the DOJ, state attorney generals, and state bars
	Private costs	Compliance costs to legal professionals, in some cases passed on to clients
<b>Equity</b> 	De-risking / discrimination	Spill-over effects on unsanctioned persons based on real or perceived (e.g., unfairly discriminatory) risks
	Legal principles	Potential challenges on the basis of due process, the right against self-incrimination, and the right to counsel

Figure 2: Policy decision criteria

*Detection:* ENABLERS 2.0 would address the single biggest problem in the current U.S. sanction framework: detection. Currently, lawyers enjoy virtually unchecked latitude to counsel clients under the veil of confidentiality and attorney-client privilege. As discussed in Part II above, in the example of Viktor Vekselberg, even where major law enforcement investigations suggest lawyers’ involvement in money sanctions evasion schemes, they may not be prosecuted in part due to such secrecy. Indeed, the primary ways we know of lawyers’ involvement in these schemes are through civil society investigations, such as the seminal 2016 Global Witness sting investigation, and data leaks like the Panama Papers, Pandora Papers, and FinCEN files.<sup>479</sup> Gaining even piecemeal data from lawyers could greatly enhance sanctions and law enforcement capabilities, especially because FinCEN could cross-reference lawyers’ SARs against a trove of data from banks and other covered institutions, thereby piecing together patterns.<sup>480</sup>

*Deterrence:* Alongside enhanced due diligence practices, the reporting obligations under the BSA promise to strengthen sanctions enforcement efforts. BSA reporting already plays a significant role in financial law enforcement efforts; from FY 2020-22, 83.2 percent of all criminal tax investigations recommended for prosecution involved a BSA filing.<sup>481</sup> Not only do such filings aid in the detection and prosecution of individual financial crimes, but they also enable law enforcement to detect broader trends within the financial crime space. Following the March 2022 sanctions, for instance, FinCEN leveraged BSA data to track and report on financial activity by

<sup>479</sup> See *supra* Part I(F).

<sup>480</sup> For example, if a bank submits a SAR on a client and shortly thereafter, a lawyer submits even a limited one on the same client, FinCEN analysts can fill in the gaps and identify evasive tactics.

<sup>481</sup> FIN. CRIMES ENF’T NETWORK, YEAR IN REVIEW FOR FY 2022 2 (Apr. 2023), [https://www.fincen.gov/sites/default/files/shared/FinCEN\\_Infographic\\_Public\\_2023\\_April\\_21\\_FINAL.pdf](https://www.fincen.gov/sites/default/files/shared/FinCEN_Infographic_Public_2023_April_21_FINAL.pdf).

## Regulating the Lawyer-Enablers of Russia's War on Ukraine

### Part IV. Policy recommendations

Russian oligarchs.<sup>482</sup> The threat pattern that emerged was necessarily limited to activity involving BSA-covered institutions, however. Expanding BSA reporting obligations to additional gatekeeping industries would fill in these detection gaps, enabling law enforcement to more effectively target and combat sanctions evasion incidents.

*Private costs:* The narrow service-based approach in the BSA, relative to say, a change in the ABA Model Rules, significantly reduces the burden on most attorneys and clients. Lawyers would only be covered when completing tasks which do not require a law degree, such as making property purchases, moving assets, registering corporations, and transferring cash—activities that are not inherently legal in nature.<sup>483</sup> Even among covered lawyers, the average time and paperwork burden is likely to be low because the average lawyer only takes on a fraction of the number of clients of a typical financial institution like a bank. One industry professional estimated that it might take only a few hours of paperwork per client.<sup>484</sup> It is worth noting that the supervisory roles delegated to state bar associations, however, would require additional funding, likely in the form of attorneys' fees. Bar associations could choose to require these fees only of lawyers planning to engage in the regulated services.

*Public costs:* This proposal would require funding increases to FinCEN to analyze SARs from the newly regulated entities. However, this funding would likely yield dividends in costly and difficult financial crimes investigations by providing law enforcement with important information. Moreover, if the ABA rather than FinCEN is responsible for conducting compliance program audits, the cost would be reduced further.

*Legal principles:* The AML requirements above, chiefly SARs, are largely harmonious with both the letter and spirit of lawyers' ethical duties and clients' rights to counsel. The Model Rules already contain embryonic CDD and SAR requirements in Rules 1.16 and 4.1 respectively.<sup>485</sup> Moreover, Rule 1.6(b)(6) on confidentiality permits disclosure of confidential information<sup>486</sup> to “comply with other law,”<sup>487</sup> as the ENABLERS Act would be. At the same time, Congress and others should review possible risks to other legal principles, such as lawyers' counselling and deterrence roles, the duties of loyalty and zealous advocacy, due process, and the right to counsel.

*De-risking & discrimination:* This recommendation would impose due diligence and reporting obligations only on a narrow set of legal services involving primarily high dollar value, high-risk transactions. This exempts all representative services (such as criminal and civil defense, family

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<sup>482</sup> See generally, FIN. CRIMES ENFORCEMENT NETWORK, FINANCIAL TREND ANALYSIS: TRENDS IN BANK SECRECY ACT DATA: FINANCIAL ACTIVITIES BY RUSSIAN OLIGARCHS IN 2022 (2022), [https://www.fincen.gov/sites/default/files/2022-12/Financial percent20Trend percent20Analysis\\_Russian percent20Oligarchs percent20FTA percent20\\_Final.pdf](https://www.fincen.gov/sites/default/files/2022-12/Financial%20Trend%20Analysis_Russian%20Oligarchs%20FTA%20_Final.pdf).

<sup>483</sup> See generally, *supra* Part I. U.S. courts often distinguish between legal and non-legal services provided by attorneys in determining, for instance, whether communications are privileged. See *United States v. Davis*, 636 F.2d at 1043, discussed *supra* note 450.

<sup>484</sup> For a discussion of the potential burden on lawyers, see Part II above.

<sup>485</sup> See *supra* Part II(D)(2)(b)-(c).

<sup>486</sup> The types of information that would be contained in SARs would generally be considered confidential under the Model Rules of Professional conduct as “information relating to the representation of a client.” See MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2023).

<sup>487</sup> MODEL RULES OF PRO. CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 2023). The rules also permit lawyers to reveal confidential client information in order “to prevent the client from committing a crime or fraud” in certain cases. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2) (AM. BAR ASS'N 2023).

law, immigration law, etc.) and only regulates lawyers *when they are acting as financial institutions*. Nonetheless, even financial institutions run into de-risking and discrimination problems, especially for innocent individuals from high-risk jurisdictions or even simply those with similar names.<sup>488</sup> These challenges are endemic across the AML landscape and should be taken seriously. Yet overall, this option presents fewer de-risking challenges than a change to the Model Rules would (and that the ABA's Resolution 100, in creating basic CDD requirements, already did), since these affect *all* types of services to clients.

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<sup>488</sup> For a discussion of de-risking and its humanitarian consequences, *see, e.g.*, TRACEY DURNER & LIAT SHETRET, UNDERSTANDING BANK DE-RISKING AND ITS EFFECTS ON FINANCIAL INCLUSION: AN EXPLORATORY STUDY 1 (Glob. Ctr. Coop. Sec., 2015). *See generally*, FIN. ACTION TASK FORCE, HIGH-LEVEL SYNOPSIS OF THE STOCKTAKE OF THE UNINTENDED CONSEQUENCES OF THE FATF STANDARDS (Oct. 2021), <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Unintended-Consequences.pdf>.

## Conclusion

Sanctions are not doing enough. Vladimir Putin's cronies continue to enjoy lives of luxury. In the face of heavy losses, U.S. experts predict that Russia can maintain its posture in Ukraine for years to come.<sup>489</sup> As the International Working Group on Russian Sanctions said in their Action Plan 2.0: "Every day that Russian armed forces are killing Ukrainians is a day that new sanctions should be imposed."<sup>490</sup> Legal enabling, the phenomenon whereby U.S. lawyers facilitate sanctions evasion through misuse of legal and ethical privileges, requires urgent action by Congress and the Treasury Department. A clear path forward exists. The United States has worked to close enabling loopholes in other U.S. industries. Allies like the United Kingdom have managed to navigate the complexity peculiar to lawyers enabling in the Anglo-American legal tradition. Drawing from such examples, the United States can, and must, close the legal and ethical loopholes.

In 2021, Treasury secretary Janet Yellen famously declared that the United States is the number one destination for dirty money in the world.<sup>491</sup> Five years prior, the FATF had published a damning report showing the United States to be far behind its peers and international standards for anti-money laundering regulation.<sup>492</sup> Today, despite compelling financial, moral, and national security implications, sanctioned funds continue to enter the United States. And as data and analysis presented in this report have shown, U.S. lawyers have played a significant role in driving illicit financial flows. So long as the U.S. economy maintains the legal enabling loophole, the United States will fail to meet its foreign policy objectives and compromise its financial integrity.

The United States must require that U.S. attorneys, where appropriate, employ established anti-money laundering and anti-sanctions evasion practices. The "Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act" (ENABLERS Act) would do just this. The bill almost passed both houses of Congress in 2022 with President Biden's endorsement. Moreover, regulating lawyers in this way has broad support among Ukrainian diaspora organizations, anti-corruption groups, and foreign policy experts.

We recommend that: Congress reintroduce and pass the ENABLERS 2.0 Act; FinCEN issue timely implementing regulations specific to lawyers; law enforcement utilize a variety of penalties for lawyers who break this law; Congress fully fund the implementing agencies; and the ABA and state bar associations introduce new training programs to equip lawyers for these duties. To close further loopholes through abuse of third jurisdictions, the United States should evaluate innovative new approaches toward a new global strategy. Some initial measures to consider may include imposing individual sanctions on lawyers committing severe sanctions evasion activities in third countries and other targeted measures against foreign enablers.

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<sup>489</sup> Alex Kisling et al., *Assessing the War in Ukraine*, CSIS PRESS BRIEFING (Feb. 14, 2024), <https://www.csis.org/analysis/assessing-war-ukraine>.

<sup>490</sup> WORKING GROUP PAPER 11: ACTION PLAN 2.0 (Freeman Spogli Inst., 2023), [https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia\\_sanctions\\_working\\_paper\\_11\\_action\\_plan\\_2.0\\_v2.pdf](https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_11_action_plan_2.0_v2.pdf).

<sup>491</sup> Christopher Condon, *Yellen Says U.S. May Be the Best Place to Launder Dirty Money*, BLOOMBERG (Dec. 9, 2021), <https://www.bloomberg.com/news/articles/2021-12-09/yellen-says-u-s-may-be-the-best-place-to-launder-dirty-money>.

<sup>492</sup> See generally, 2016 FATF AML and CTF Report, *supra* note 100.



## Appendix A: Rebutting alternative proposals

Based on analysis of the criteria above, this paper strongly recommends that the United States pursue ENABLERS 2.0. It considers but rejects two other potential policies based on select international examples. Alternative I: Further changes to the American Bar Association (ABA) Model Rules would not only do very little to improve detection or deterrence of sanctions evasions risks, and would impose unnecessary burdens on the legal profession with harms to due process, equity, and access to justice. Alternative II: Suspicious Activity Report (SAR) reporting to state bar associations is impracticable due to a lack of resources, expertise, and scale. It would be an extremely costly and ultimately ineffective measure that burdens average, well-intentioned lawyers while allowing bad actors to exploit oversight gaps.

### Alternative I: Further changes to the ABA's Model Rules of Professional Conduct (Rejected)

Further amending the Model Rules, e.g., to strengthen existing due diligence and mandatory reporting requirements, would be both a costly and inadequate solution. The ABA's Revised Resolution 100 previously amended Model Rule 1.16, the rule on declination and withdrawal, to add a modest due diligence requirement. Lawyers are now required to assess the facts of each representation to determine whether to accept or continue it. If circumstances indicate that a client seeks to engage in criminal or fraudulent activities, lawyers must refuse or withdraw after counseling the client of the legal consequences of their actions.<sup>493</sup> As discussed in Part II above, however, the lack of a minimum standard for this assessment, coupled with the removal of "client due diligence" terminology, could allow less scrupulous lawyers to remain willfully ignorant of illicit activities. Possible amendments include aligning the Comment to Rule 1.16 with stricter identification standards, adjusting the Rule 1.16 withdrawal standard to an "ought to know" basis to ensure accountability for incomplete due diligence, and expanding the existing mandatory reporting requirement under Rule 4.1 from actual knowledge to suspicion. However, as discussed below, even these modest changes would impose undue burdens across the whole legal profession, rather than narrowly focusing them on high-risk activities as in ENABLERS 2.0, and would not address the problem of bad faith actors.

### Considerations

*Detection:* This option would do little to aid authorities in detecting illegal conduct. Even if Rule 4.1 could be amended to resemble the type of mandatory disclosures in SARs, there is little to no incentive for bad actors to file these due to the lack of civil and criminal repercussions. Indeed, in the Canadian example, a government study flagged the lack of SARs for lawyers as the "most significant gap" in the Canadian anti-money laundering (AML) regime.<sup>494</sup>

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<sup>493</sup> For a discussion of ABA Resolution 100, see Part II above.

<sup>494</sup> There, lawyer annual self-reports to the bar association on matters like usage of their trust funds do not target suspicious transactions and rarely lead to subsequent investigations. As a Canadian law professor and AML expert concludes, "with no visibility by law enforcement on what enters and leaves a lawyer's trust account, many investigations are stymied." PETER M. GERMAN, DIRTY MONEY - PART 2: TURNING THE TIDE - AN INDEPENDENT REVIEW OF MONEY LAUNDERING IN B.C. REAL ESTATE, LUXURY VEHICLE SALES & HORSE RACING 121 (2019).

*Deterrence:* The Canadian case study affirms that a purely ethical, rather than legal, framework is insufficient to deter bad actors.<sup>495</sup> Given the existing low level of enforcement against lawyers for clear breaches of the existing Model Rules of Professional Conduct in the United States, a similar pattern is likely.

*Public costs:* Although this option would indeed impose costs on legal professionals, that does not necessarily mean that it saves the average taxpayer money. First, the lack of SAR reporting requirements would deprive law enforcement of essential leads to aid in complex investigations of sanctions evasion schemes. Moreover, the heavy burdens on attorneys for both information gathering, directly, and supervision and monitoring, indirectly out of bar fees, would likely be passed onto the average person seeking legal services.

*Private costs:* Although client verification itself would likely not impose a significant burden on lawyers, the aggregate costs of spreading these requirements across the entire profession rather than a narrow set of financial transaction services (as the ENABLERS Act proposes) would be large.

*De-risking/access to justice:* Requiring all lawyers, from public defenders to Supreme Court litigators, to search databases and gather information on prospective clients risks marginalizing low-income individuals without passports, mortgage forms, and the like, and especially undocumented persons who would likely be extremely unlikely to seek out legal help if it meant risking an extensive background check. Under ENABLERS, only clients wishing to undertake financial or corporate transactions must undergo Client Due Diligence (CDD)—just as they would if they sought those same services at a bank.

*Legal principles:* If Rule 4.1 on mandatory disclosures were amended to resemble a SAR (such as lowering its threshold from knowledge to reasonable suspicion), it would still require removing confidentiality in many cases. However, unlike the limit of such disclosures under the ENABLERS Act to financial transactions, such an amendment could inadvertently sweep in a huge range of activities revealed to lawyers in the context of, say, a criminal trial, in which there is a strong societal and indeed constitutional interest in upholding confidentiality.<sup>496</sup>

## Alternative II: SAR reporting to state bar associations (Rejected)

The country case studies reveal another potential model of lawyer supervision, which resembles typical AML regimes in other industries except that state bar associations serve as the ultimate supervisors, rather than the Financial Crimes Enforcement Network. This model can be seen to some degree in France, where lawyers complete many of the fundamental steps of AML (due diligence, record keeping, and risk monitoring), with the key difference that SARs are sent to the

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<sup>495</sup> Commentators have called it a “dead parrot” with “the tendency to create, encourage, or permit transgression.” Harry W. Arthurs, *The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?*, 33 ALTA L. REV. 800, 800 (1995); SLAYTON, *supra* note 314, at 318.

<sup>496</sup> The limitation in Rule 4.1 that the disclosure must relate to the lawyer’s *assistance* in criminal or fraudulent conduct would nonetheless present some limiting principle. See MODEL RULES OF PRO. CONDUCT r. 4.1.

bar association rather than the government.<sup>497</sup> However, as discussed below, this proposal lacks the effectiveness of ENABLERS while imposing inefficient burdens on lawyers and clients.

## Considerations

*Deterrence:* Similar to the argument under Alternative I, the fines and penalties imposed by state bar associations are relatively weak compared to civil and criminal penalties under the Banking Secrecy Act. It is likely that many lawyers will not be deterred from continuing to provide highly lucrative enabling services, particularly if enforcement lags.

*Detection:* State bar associations are unlikely to have the resources, scale, and expertise to effectively investigate SARs. Moreover, unlike the French model, the fact of state, rather than federal, supervision of lawyers in the United States means that the scale of detection and pattern recognition is reduced because there are separate state bar associations operating in each of the 50 states. It is highly likely that an individual who perceives the threat of detection in one state will simply seek services in another, and it is unlikely that state databases would have the requisite agility and interoperability to quickly detect and prevent this. Without access to complementary data and systems, this option would impose significant costs for very little benefit.

*Public costs:* Because the cost burden of the program would fall entirely on state bar associations, funded by attorney's annual membership fees, the public costs would be relatively low. Yet as discussed for Alternative I above, the lack of access to SARs would deprive law enforcement of crucial financial crime leads, thereby imposing indirect costs.

*Private costs:* To an even greater degree than Alternative I, analyzing SARs would impose a considerable financial, human, and technical burden on state bar associations that would likely entail an enormous increase in practitioners' fees. Many state bar associations are leanly staffed and primarily undertake activities such as training, standards-setting, and to a limited extent, discipline. Enacting SAR analysis programs with any meaningful degree in effectiveness would entail significant increases in attorneys' bar fees, ultimately burdening clients—many if not most of whom have no connection to the high-risk transactions with which this report is concerned.

*Legal principles:* Limiting reporting of suspicious transactions to other lawyers, rather than to the government, appears on its face to alleviate concerns about the erosion of confidentiality and loyalty. Perhaps a client who knows their lawyer might report them only to the bar association but not to the government would be more forthcoming. However, the practical effects of disclosure on underlying legal protections are likely to be the same whether to the bar association or to the government. Thus, while Alternative II appears cautious on the surface, it implicates many of the same rights-based considerations as a government reporting scheme, without any of the benefits.

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<sup>497</sup> Nougayrède, *supra* note 357, at 356. Whether or not it is related to the role of the bar association in initially receiving reports, the number of SARs by the French bar is extremely low. *Id.* at 357.