

**FREQUENTLY ASKED QUESTIONS
ABOUT
THE GATEKEEPER INITIATIVE AND THE VOLUNTARY GOOD PRACTICES
GUIDANCE**

- **What is the Gatekeeper Initiative?** The Gatekeeper Initiative is an effort by governmental authorities to impose stringent anti-money laundering (“AML”) and counter-terrorist financing obligations on “gatekeepers” to the domestic and international monetary systems, such as lawyers, civil law notaries, trust and company service providers, real estate agents, accountants and auditors.
- **What is the source of this initiative?** In 1989, the United States and other major industrial nations formed an intergovernmental body known as the Financial Action Task Force on Money Laundering (“FATF”) to coordinate efforts to combat money laundering. After the 9/11 terrorist attacks, the mandate of the FATF was also expanded to combat the financing of terrorism. The FATF issues formal Recommendations to its member countries for legislation and procedures to achieve these objectives. The countries then pass laws and rules that are consistent with the Recommendations and their respective legal systems.
- **What role has the United States played with the FATF?** The United States is a major participant in the FATF proceedings, and in partial response to the FATF’s Recommendations, Congress passed the USA PATRIOT Act (“PATRIOT Act”), which amended and strengthened certain AML provisions of the United States Code that originated with the Bank Secrecy Act of 1970 (“BSA”). The BSA and, later, certain provisions of the PATRIOT Act, were directed primarily at banks and other financial institutions.
- **Why should I care?** Lawyers should be extremely concerned because Congress is considering legislation that would impose burdensome and intrusive gatekeeper regulations on lawyers, including measures that could subject the legal profession to key AML compliance provisions of the BSA. If enacted, this legislation would undermine the traditional role of state courts in regulating lawyers, erode the attorney-client privilege and interfere with the confidential attorney-client relationship, impose excessive new federal regulations on lawyers engaged in the practice of law, and impinge on the delivery of legal services in general.
- **How is the legal profession impacted?** Beginning in about 2005, the FATF determined that other “designated non-financial businesses and professions”—including lawyers—should be subject to the same AML and counter-terrorist financing rules and regulations as financial institutions. These rules and regulations include the obligation to know your customers or clients and to perform due diligence, monitor, and file suspicious transaction reports (“STRs”) (referred to as “suspicious activity reports” or “SARs” in the United States) on the customers or clients. Similarly, the proposed legislation referenced above could potentially impose onerous suspicious transaction or activity reporting requirements on lawyers by authorizing the Treasury Department to issue such regulations.

- **Would not such requirements on lawyers affect their ethical duties to their clients?** Absolutely, and such requirements would harm both lawyers and the clients that they serve. Although the ABA supports the enactment of reasonable and balanced initiatives designed to detect and prevent money laundering and terrorist financing, the ABA opposes any law or regulation that would compel lawyers to disclose confidential information to government officials or otherwise compromise the attorney-client privilege, including any mandate that lawyers file SARs on their clients. Such a requirement would directly conflict with numerous state bar ethical rules that require lawyers to maintain client confidentiality and to provide their clients with competent representation and undivided loyalty. Lawyers should not be subject to federal regulation in this area. Rather, lawyers should continue to be regulated primarily by state supreme courts (and their state bar agencies) that license the lawyers. Although lawyers should take reasonable steps to combat money laundering and terrorist financing, these actions should only be conducted in a manner that is consistent with applicable state bar ethical rules and standards.
- **What else is the ABA doing?** The ABA—through its Task Force on Gatekeeper Regulation and the Profession (“Task Force”) and several ABA sections with expertise in this area—worked in cooperation with several specialty bar associations to develop voluntary good practices guidance (“Guidance”) designed to alert U.S. lawyers to the risks of money laundering and terrorist financing. The Guidance is “risk-based,” which allows lawyers to assess the money laundering and terrorist financing risk posed by each client and then take prudent steps that are appropriate under the circumstances rather follow a rigid, burdensome set of prescriptive rules in all cases, as other “rules-based” proposals would do.
- **As a practical matter how does this really impact my practice?** Any lawyer who closes the sales of businesses or real estate, who handles client money through a firm trust account, or who creates business entities or trusts could be deemed to be unwittingly facilitating money laundering or terrorist financing under the FATF’s standards and hence should follow the Guidance.
- **Are all lawyers covered?** Lawyers who “prepare for or carry out” any “specified activity” are covered by the Guidance.
- **What are the “specified activities”?** The “specified activities” consist of the following five categories: (i) buying and selling of real estate, (ii) managing of client money, securities, or other assets, (iii) management of bank, savings, or security accounts, (iv) organization of contributions for the creation, operation, or management of companies, and (v) creation, operation, or management of legal persons or arrangements, and buying and selling of business entities.

Note that the primary focus is on transactional lawyers and lawyers who “touch the money.” Therefore, any lawyer who has money flow through a client trust account or law firm trust account is implicated. This would include lawyers serving as trustees and other fiduciaries, escrow agents, disbursing agents (for example, in the case of mass tort or class action proceeds), or in any other situation where money is otherwise under a lawyer’s control.

- **Does this mean I have to do due diligence any time I engage in one of the listed specified activities or any time I touch the money?** The short answer to this question is “yes.” However, the FATF recognizes that resources must be allocated proportionately, so the Guidance provides for a risk-based assessment. Thus, situations in which the risks are deemed to be higher require more attention and due diligence, while situations involving less risk may require a lower degree of attention and due diligence.
- **Are there instructions to help understand higher risk situations?** Yes. The Guidance addresses geographic risk, client risk, and service risk and discusses in detail the challenges associated with each of these risk situations in conjunction with the specified activities. Practical examples are provided. There is a misconception that the risks arise primarily in international transactions. This is definitely NOT the case. Although certain international transactions are covered, the Guidance also applies to transactions that are totally domestic in nature.
- **What if I’m serving as local counsel on a business transaction? Do I have to perform client due diligence in accordance with the Guidance?** It depends on the degree of involvement the local counsel has in the transaction. If the local counsel’s role is limited or peripheral, the lawyer may not have to perform client due diligence on the ultimate client, with whom the local counsel may have no direct contact or involvement. If, however, the local counsel plays a more material role in the transaction, the local counsel may need to perform client due diligence.
- **Where can I find out more information?** The Task Force website contains a copy of the Guidance and other information: <http://apps.americanbar.org/crimjust/taskforce/home.html>
- **What can the state and local bars do to promote awareness of the Guidance?** State and local bar associations should alert their members regarding the government’s Gatekeeper Initiative and should also encourage their members to follow the Guidance. As one important step in that process, bars should post links on their websites to the Task Force website, the full text of Guidance, and these Frequently Asked Questions. Congress and the U.S. Department of Treasury have asked the ABA to promote awareness of the Guidance, and the state and local bars are well situated to do so.
- **Who should I contact for more information?** Please feel free to contact the following individuals for more information:

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