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# ANONYMOUS BANK ACCOUNTS: NARCO-DOLLARS, FISCAL FRAUD, AND LAWYERS

*William W. Park \**

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*There is only one thing in the world worse than being talked about, and that is not being talked about.*<sup>1</sup>

## INTRODUCTION

Oscar Wilde's observation about humankind's proclivity toward public recognition does have exceptions. For a variety of reasons, men and women throughout the world have often sought confidentiality in their financial affairs, chiefly through banking in jurisdictions with a tradition of bank secrecy. Usually the depositor seeks the assurance that the banker will not disclose account information to curious tax inspectors, anxious creditors, and intrusive relatives.

On occasion, the depositor may seek to hide his identity from the bank itself, as well as from third parties. To this end, an account may be opened in the name of an offshore shell corporation. Sometimes called a "letterbox company," such an entity often has no staff of its own, and no premises other

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1. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 2 (Isabel Murray ed., Oxford University Press 1974) (1891).

than a rented post office box.<sup>2</sup> The account might also be opened in the name of an attorney acting as agent for the undisclosed true account owner.

Those who seek confidentiality are not a homogeneous group. Banks organized in jurisdictions with strict secrecy laws, such as Switzerland and Luxembourg, have attracted customers that range from garden variety tax cheats to victims of Nazi persecution, and from dictators and gangsters to managers of legitimate export/import businesses.

Perhaps the most common profile of the individual who values bank secrecy is that of the international merchant living in a country with political instability, weak currency, and runaway inflation. For obvious reasons, such an individual will be anxious to have some assets beyond the reach of exchange controls and potential spoliation by his own government.<sup>3</sup> He may be a member of a religious or racial minority that has already suffered, or seen others suffer, from discriminatory expropriations.<sup>4</sup>

Bank secrecy has become a hot topic for discussion primarily in the context of worldwide concern about the laundering of narco-dollars.<sup>5</sup> The press has focused chiefly on the complex ways in which megabuck drug-trafficking touches bankers. Especially since news of the Bank of Credit and Commerce International (BCCI) scandal captured the public attention, even those who are not specialists in the area have shown keen interest in the role of bankers in money-laundering.

What has been relatively neglected, however, is the *lawyer's*

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2. Another common term for such entities is "domiciliary" companies, so-named because of their practice of electing to be domiciled in the offices of an accommodating lawyer or accountant.

3. For a brief discussion of how exchange controls operate, see FRITZ A. MANN, *THE LEGAL ASPECT OF MONEY* 355-56, 357-71 (4th ed. 1982).

4. The relative stability of both the U.S. dollar and the U.S. political system has led some in the United States to forget that similar blessings are not always found in other parts of the world. Europe in the 1930s and many of the developing nations of Africa, Asia, and Latin America should remind us of the pervasive suffering engendered by political, social, and economic instability.

5. See *Your Friendly Neighborhood Cleaners*, *TIME*, Dec. 18, 1989, at 50. For discussion of the mechanics of alleged money laundering in a recent case, see accounts of the Rhode Island "coin shop connection" in Bruce D. Butterfield, *The Coin Shop Connection*, *BOSTON GLOBE*, Nov. 27, 1991, *Metro/Region*, at 1, and Peter G. Gosselin & John H. Kennedy, *Money-Laundering Ring Halted, U.S. Says*, *BOSTON GLOBE*, Nov. 26, 1991, *Metro/Region*, at 1, 31.

role in money laundering. In at least two ways, members of the legal profession have participated in the process of recycling narco-dollars by obscuring identification of the real beneficial owners of bank accounts. First, lawyers have assisted in the creation and the upkeep of corporations designed to add a screen of anonymity between the banker and the client, often providing both premises and staff to companies whose creation they have counseled and implemented. Second, attorneys in some jurisdictions have opened bank accounts on behalf of clients whose true identities have not been disclosed to the financial institution.

This Article will focus on how lawyers in countries with a tradition of bank secrecy have played a part in maintaining their clients' anonymity *vis-à-vis* bankers. For comparative purposes the Article will also comment on the banker's interest in knowing his or her customer's identity in a tax context, particularly when the customer claims the benefits of income tax treaties. My modest purpose is to help us all to be more aware of the divergent ethical implications of bank account anonymity.

### I. *NARCO-DOLLARS AND MULTILATERAL NORMS*

Legal norms are often responses to problems with particular temporal or geographical limits. Laws against cattle rustling are more to be expected in farm states than in large urban areas. Piracy on the high seas is more likely to be a concern of sea-faring peoples than of mountainous, land-locked folks. And laws against money laundering have arisen in a world where drug barons establish multinational enterprises by recycling their profits through banks in countries known for their traditions of bank secrecy.

Drug runners are usually motivated not by the need to show an expertise in identifying various powders, but rather by the more primitive satisfaction that comes from making money.<sup>6</sup> For this reason, governments struggling against the

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6. I am reminded of the eight jurisprudential value categories elaborated by Yale Professor Myres McDougal: power, wealth, respect, well-being, affection, skill, enlightenment, and rectitude. In the vocabulary of this New Haven school of jurisprudence, one might say that "wealth," rather than "skill," is the drug runner's core value. See AARON M. SCHREIBER & W. MICHAEL REISMAN, *JURISPRUDENCE: UNDER-*

narcotics plague have decided to chase money as well as powder.

In the United States, the crime of money laundering includes the conduct of a financial transaction involving the proceeds of illegal activity, when the transaction is intended to conceal the source of ownership of the illicitly obtained funds.<sup>7</sup> European national statutes use different words to characterize the crime, but with roughly the same thrust.<sup>8</sup>

Where the Americans and the Europeans diverge, however, is in the practical implementation of their respective initiatives to catch the crooks. The United States focuses on getting banks to report cash transactions. Monetary transaction reporting rules require banks to report transactions in currency exceeding US\$10,000.<sup>9</sup> In many European countries,

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STANDING AND SHAPING LAW 583 (1987) (quoting Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971)).

7. Money Laundering Control Act of 1986, 18 U.S.C. § 1956 (1988). This statute punishes by fine or imprisonment, for up to twenty years,

[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity

(A) (i) with the intent to promote the carrying on of specified unlawful activity . . .

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity, or  
(ii) to avoid a transaction reporting requirement under State or Federal law.

*Id.* § 1956(a)(1).

Two years later, U.S. measures against money laundering were strengthened by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988). Title VI of this act is the Anti-Drug Abuse Amendments Act of 1988. *Id.*, 102 Stat. 4312. Subtitle E of this act is the Money Laundering Prosecution Improvements Act of 1988. *Id.*, 102 Stat. 4354. This act amended 18 U.S.C. §§ 1956-1957 (1988) and added 31 U.S.C. § 5325 (1988). The civil and criminal forfeiture sanctions for laundering money added by the acts permit the Attorney General to seize any property involved in a violation or attempted violation of section 1956 or 1957 of Title 18 of the U.S. Code.

See generally Charles Thelen Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW. 69 (1988).

8. See, e.g., Loi No. 90-614, Relative à la Participation des Organismes Financiers à la Lutte Contre le Blanchiment des Capitaux Provenant du Trafic des Stupéfiants, 1990 J.O. 8329, corrected by 1990 J.O. 13,327 (Fr.); CP art. 305 Bis (Switz.); Criminal Justice (International Co-operation) Act of 1990, ch. 5, § 14 (U.K.); Drug Trafficking Offenses Act of 1986, ch. 32 (U.K.).

9. See 31 U.S.C. §§ 5311-5323 (1988), and particularly sections 5313 and 5316,

however, the use of large amounts of cash for legitimate transactions is commonplace. The focus among national and international banking supervisory groups, therefore, has been more on making sure the banker knows the real customer—the ultimate beneficial owner of the account—so that the banks themselves can take prophylactic measures to keep drug traffickers from ever having bank accounts at all.<sup>10</sup>

The latest multilateral pronouncement about knowing one's customer is a European Community ("EC") Council Directive of June 10, 1991. The directive requires Community financial institutions to ascertain "the real identity of the persons on whose behalf the customers are acting."<sup>11</sup>

Outside the EC framework, two other important multilateral policy statements have reaffirmed the banker's duty to know his customer.<sup>12</sup> First, the statement of principles issued in 1988 by the twelve countries that constitute the so-called "Basle Committee"<sup>13</sup> prohibits banking activity with a customer who will not provide identification of the account owner.<sup>14</sup> Second, in 1990 a multilateral financial action task force issued a report on the drug trafficking problem that con-

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implemented by 31 C.F.R. § 103.22, which originally constituted Title II of the somewhat ironically named Bank Secrecy Act of 1970.

10. See *infra* notes 24-30 and accompanying text (discussing CP art. 305 Ter (Switz.)). This is not to say that U.S. authorities are insensitive to the importance of having bankers know their customers. Quite the contrary. For example, the Comptroller of the Currency publication on money laundering states: "Firm *know your customer* and *know your employee* policies are a bank's most effective weapon against being unwittingly used to launder money." Office of the Comptroller of the Currency, *Money Laundering: A Banker's Guide to Avoiding Problems* 7 (Supervision Policy/Research, Dec. 1989).

The report then goes on to list suspicious transactions of which a banker should beware, many of which involve large amounts of cash. However, the United States has not yet enacted its general policy admonitions into positive law.

11. Council Directive No. 91/308, art. 3(5), O.J. L 166/77, at 80 (1991). The know-the-customer requirement applies not only when accounts are opened, but at the time of any transaction over 15,000 ECU. Based on a basket of European currencies, one ECU was valued at about US\$1.27 in May 1992.

12. Other related multilateral initiatives not discussed here include the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 30 I.L.M. 148 (1991), and the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, U.N. Doc. E/Conf. 82/15 (1988), reprinted in 28 I.L.M. 493 (1989).

13. See Basle Committee on Banking Regulations and Supervisory Practices, *Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering* [hereinafter *Basle Committee Principles*], reprinted in Fed. Banking L. Rep. (CCH) ¶ 11,785 (1988).

14. *Id.* art. II.

tained proposals to reduce laundering of drug money.<sup>15</sup>

The Financial Action Task Force was set up in 1989 at the heads of state summit of the so-called "Group of 7" major industrialized nations (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States), plus the EC Commission. The "G-7" were augmented for this purpose by another seven countries, including Switzerland.<sup>16</sup> The Task Force recommendations called explicitly for increased diligence by financial institutions in ascertaining the true beneficial owners of the bank accounts.<sup>17</sup>

Luxembourg, both an important secrecy jurisdiction and a member of the EC, has already put in place its own national "know your customer" rules. The Luxembourg banking authorities—the *Institut Monétaire Luxembourgeois* ("IML")—have issued a circular letter<sup>18</sup> to banks licensed in Luxembourg which draws banks' attention to the fact that the Luxembourg anti-money laundering legislation punishes "any failure in professional duty" that would result in a grant of assistance to a financial operation designed to hide the origin of funds from sale of illegal drugs.<sup>19</sup>

In application of this general principle, the IML instructed banks to verify the identity of all customers, both individual and corporate, so as to determine the ultimate beneficial owner<sup>20</sup> of any intermediate juridical entity that might be used as a screen, including holding companies, trusts, and foundations.<sup>21</sup> The IML also requires banks to refuse to open an account in any case in which the bank "encounters difficulties" in

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15. See generally *La Lutte Contre le Blanchiment de Capitaux*, Paris, 7 February 1990 [hereinafter *Task Force Report*]. The English language version was published under the title *Financial Action Task Force on Money Laundering Report*.

16. The recently added countries are Australia, Austria, Belgium, Luxembourg, the Netherlands, Sweden, and Switzerland.

17. *Task Force Report*, *supra* note 15, recomm. 13.

18. Institut Monétaire Luxembourgeois, *Blanchiment d'Argent Provenant du Trafic de la Drogue*, Circulaire IML 89/57 (Nov. 15, 1989) [hereinafter IML Circular].

19. See Loi du 7 juillet 1989 Portant Modification de la Loi Modifiée du 19 Février 1973 Concernant la Vente de Substances Médicamenteuses et la Lutte Contre la Toxicomanie (Lux.), *cited in* IML Circular, *supra* note 18, at 1.

20. The concept rendered as "beneficial owner" in English is *ayant droit économique*, in the original French, which translates literally as "he who has the economic right."

21. *Anstalts* and *stiftungs*, creatures of some European legal systems that are little known to Anglo-American lawyers, are included.

the verification of a potential customer's identity.<sup>22</sup>

## II. THE SWISS EXPERIMENT

Although not an EC member, Switzerland has established a comprehensive system designed to ensure that bankers know the origin of the money or securities deposited with them.<sup>23</sup> Switzerland has explicitly criminalized banker carelessness in determining the ultimate beneficial owner of accounts. Moreover, the Swiss have set in place a procedure by which bankers must identify the real owner of accounts opened in the name of so-called "letterbox companies." The Swiss regime is based on the assumption that a custodian of valuables is in fact able to ascertain the real economic owner of the property in question. Whether this assumption is realistic or naive depends of course on the context of its application.

Switzerland's money laundering rules entered into force almost a year before the EC directive was adopted. Swiss Code pénal article 305 Bis punishes actions that tend to thwart the identification of the origin of what the Code calls *valeurs patrimoniales*, which might best be translated as "valuables," and includes cash, securities, jewels, and precious metals.<sup>24</sup> The offence covers cases in which the offender—the person helping to obscure the origin of the valuables—knows, or should have known, that the assets had their source in a crime. An English translation of the section reads as follows:

1. Whoever undertakes an action tending to thwart the identification, the discovery, or the seizure of valuables which he knows, or must assume, stem from a crime will be punished with imprisonment or a fine.
2. In serious cases the punishment will be up to five years penal servitude or imprisonment. This sentence will be combined with a fine up to one million Swiss francs.

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22. IML Circular, *supra* note 18, at 4.

23. For a discussion of the Swiss Code pénal Section 305 Ter and the *Convention de Diligence*, see discussion *infra* notes 29-40.

24. Cf. art. 305 Bis (Switz.). Switzerland also provides for forfeiture of amounts gained in illegal drug trafficking. However, the burden of proving that the suspicious amounts were gained in illegal activities seems to be on the government, which means that a drug dealer who has a respectable job as a sideline may end up keeping the profits of his drug operation unless they can be specifically traced to the illicit activity. See generally Shelby R. du Pasquier & Andreas von Planta, *Money Laundering in Switzerland*, 18 INT'L BUS. LAW. 394 (1990).



A case is especially serious when the perpetrator

- a. acts as a member of criminal organization;
  - b. acts as a member of a gang which has formed for the purpose of systematic money laundering;
  - c. becomes a money launderer by trade and by doing so attains a large turnover or a considerable profit.
3. The perpetrator will also be punished if the main crime was committed in a foreign country and if it is also punishable where it was committed.<sup>25</sup>

The legislation covers the laundering of proceeds of a felony but not proceeds of a misdemeanor.<sup>26</sup> Characterization of the offense must be made according to Swiss law. Thus, a banker would normally be under no duty to reject financial transactions involving the fruit of insider trading, which is only a misdemeanor in Switzerland,<sup>27</sup> unless the insider trading also involved a related felony such as fraud (*escroquerie*).<sup>28</sup>

In addition to this plain vanilla prohibition on money laundering, Switzerland also punishes the acceptance of deposits by a banker (or anyone who helps invest or transfer valuables on a professional basis) without the use of care in identification of the beneficial owner of the valuables.<sup>29</sup> The stan-

25. The French original of article 305 Bis reads as follows:

1. Celui qui aura commis un acte propre à entraver l'identification de l'origine, la découverte ou la confiscation de valeurs patrimoniales dont il savait ou devait présumer qu'elles provenaient d'un crime, sera puni de l'emprisonnement ou de l'amende.

2. Dans les cas graves, la peine sera la réclusion pour cinq ans au plus ou l'emprisonnement. La peine privative de liberté sera cumulée avec une amende d'un million de francs au plus. Le cas est grave, notamment lorsque l'auteur.

- a. Agit comme membre d'une organisation criminelle;
- b. Agit comme membre d'une bande formée pour se livrer de manière systématique au blanchissage d'argent;
- c. Réalise un chiffre d'affaires ou un gain importants en se livrant au blanchissage d'argent par métier.

3. L'auteur sera également puni lorsque l'infraction principale a été commise à l'étranger et qu'elle est aussi punissable dans l'Etat où elle a été perpétrée.

26. The distinction between a *crime* (felony) and a *délit* (misdemeanor) turns on whether the jail sentence is characterized as prison (*emprisonnement*) or hard labor (*réclusion*).

27. The *délit* of *opérations d'initiés* is set forth in CP art. 161 (Switz.).

28. See *id.* art. 148.

29. *Id.* art. 305 Ter.

dard of culpability seems to be one of negligence, calling for "care appropriate to the circumstances":

Whoever on a professional basis accepts, preserves, helps to invest or to transfer assets of another and does not, with care appropriate to the circumstances, verify the identity of the beneficial owner, will be punished by imprisonment for up to one year, by attachment of assets or by fine.<sup>30</sup>

Swiss law is thus much stricter than U.S. law in this respect. A banker who fails to use due diligence in determining the ultimate beneficial owner of a bank account risks a year in jail.

To strengthen the enforcement of Switzerland's anti-money laundering measures, the Swiss Federal Banking Commission in April 1991 issued directives mandating the termination of anonymous bank accounts. The context for understanding this development and its impact on Swiss lawyers lies in the *Convention Relative à l'Obligation de Diligence des Banques* ("CDB"),<sup>31</sup> which is a privately sponsored code of conduct contained in an agreement among Swiss banks, and administered by the Swiss Bankers Association.<sup>32</sup>

The CDB requires Swiss bankers to identify the ultimate beneficial owner of an account before opening it. This includes not only physical persons, but also any shell company without premises or employees of its own. The CDB "know-your-customer" procedures<sup>33</sup> require banks to identify the beneficial ownership of account-holders by completing a document called "Form A."<sup>34</sup>

30. *Id.* The French original of CP 305 Ter reads:

Celui qui, professionnellement, aura accepté, conservé, aidé à placer ou à transférer des valeurs patrimoniales d'un tiers et qui aura omis de vérifier, conformément à la vigilance requise par les circonstances, l'identité de l'ayant droit économique, sera puni de l'emprisonnement pour une année au plus, des arrêts ou de l'amende.

31. See Swiss Bankers Association, *Convention Relative à l'Obligation de Diligence des Banques* [hereinafter CDB]. The CDB might be literally translated as the "Agreement on the Banks' Duty to Exercise Due Diligence." See generally Carlo Lombardini, *The 1987 Agreement on the Observance of Care by the Banks in Accepting Funds and on the Practice of Banking Secrecy*, 5 J. INT'L BANKING L. 84 (1990).

32. Violation is punishable by a fine of up to ten million Swiss francs, or about US\$7 million at today's exchange rates. See CDB, *supra* note 31, art. 11.

33. The current version entered into force on July 1, 1987 for a five-year period.

34. Article 2 of Form A requires verification of identity in cases of deposit and passbook (*livret*) accounts, securities accounts, fiduciary transactions, safe-deposit

The *CDB* explicitly requires identification of the beneficial owner of what it calls "domiciliary companies"—*sociétés de domicile*—commonly called "shell entities," "screen companies," or "letterbox companies."<sup>35</sup> Usually such corporate entities that are set up principally to serve as a screen for a family or an individual have neither staff nor premises of their own, but rather rely on the employees and the offices of outside lawyers for these purposes. Information about the account's beneficial owner is recorded on Form A.<sup>36</sup>

A cautious banker will also monitor account activity, even after the Form A has been completed, in order to check for suspicious transactions that are either unusual or oddly complex, including large cash deposits, wire transfers made in a quick "in/out" turnaround fashion, and commercially unjustifiable letters of credit, guarantees or back-to-back loans. In their annual report to the Federal Banking Commission, a bank's external auditors are asked to indicate any instances in which the audited bank has violated the *CDB*.<sup>37</sup>

Until recently, the *CDB* know-your-customer rules have had a significant escape hatch. Lawyers could substitute themselves for the real account owner by signing another document—the "Form B"—which stated that the lawyer knew the identity of the account's beneficial owner, but could not disclose this identity because of the attorney-client privilege.<sup>38</sup> The signer of Form B was required to declare absence of any

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box rental and cash transactions above 100,000 Swiss francs. Form A is reproduced as an Appendix to this Article.

35. The term *société de domicile*, which is defined in section 25 (a subdivision of article 4) of the *CDB*, *supra* note 31, reflects the fact that such entities often have their headquarters, which is to say their legal domicile, at the offices of a lawyer or accountant. The frequently used expression "letterbox company" reflects a different reality, which is that a shell corporation often has no premises other than a letterbox in a tax haven.

36. The concept rendered "beneficial owner" in English is *ayant droit économique* in the original French and *wirtschaftlich Berechtigter* in the original German. The *CDB* requires only identification of the beneficial owner, not verification of the owner's identity by means of any particular document such as a passport.

It is worth noting that bearer shares are common with *sociétés de domicile*. A prudent banker should require deposit of bearer shares in order to monitor corporate ownership. Section 32 of article 4 of the *CDB* requires only that the banker repeat the identification procedure when there is a change in the signatory powers of a *société de domicile*.

37. *CDB*, *supra* note 31, art. 10.

38. *See id.* Similar privilege was given to certain asset managers acting as fiducia-

suspicion that the assets were acquired through criminal activity.

In the original version of the *CDB*, the lawyer signing Form B had to state only that he knew of no illegal transaction being carried on by the owner of the account.<sup>39</sup> Some lawyers reportedly marketed themselves as signers of Form B. A potential customer with an unsavory reputation might be sent by the banker to an equally unsavory attorney down the street. The attorney, of course, could sign the declaration stating no knowledge of the customer's illegal activity, precisely because the lawyer usually knew *nothing at all* about the customer's activity, legal or illegal.

This abuse led to a change in the *CDB* and Form B to weed out attorney-client relationships that were transitory and superficial in nature. The latest version of Form B requires the lawyer to certify that the lawyer's relationship with the client is neither provisional in nature, nor aimed primarily at concealing the name of the beneficial owner of the account.<sup>40</sup>

Recently, Swiss lawyers have seen even more dramatic changes to procedures for opening accounts for clients. On May 3, 1991, the Federal Banking Commission issued a communiqué reporting its decision of the previous week to require banks to end the use of Form B, and to establish the identity of the beneficial owner of accounts in all but a very limited set of circumstances.<sup>41</sup> As of July 1, 1991, Swiss banks were forbidden to accept a Form B from a customer's lawyer or fiduciary. By September 30, 1992, Form B must be replaced by evidence

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ries for the potential bank customers. Form B is reproduced as an Appendix to this Article.

39. See the 1977 version of the *CDB*, *supra* note 31, art. 5(1).

40. *CDB*, *supra* note 31, app.

41. Effective July 1, 1991, the decision of April 25, 1991 is titled "*Identification de l'Ayant Droit Economique/Interdiction des Formulaire B*," and cites as its legal basis article 3(2)(c) of the Loi Fédérale sur les Banques et les Caisses d'Epargne, RS 952.0 (1934) (Switz.) [hereinafter Swiss Banking Law] and article 9(3) of a federal banking ordinance, the Ordonnance d'Exécution de la Loi sur les Banques et les Caisses d'Epargne, RS 952.02 (1972) (Switz.). Any existing Form B must be replaced by a correct Form A by September 30, 1992. For recent commentary, see generally Horace Gautier, *Anonymous Swiss Bank Accounts: The End of a Myth*, 10 INT'L FIN. L. REV. 9 (1991). See also Carlo Lombardini, *The Changing Face of Swiss Banking Law*, 1991 DIRITTO DEL COMMERCIO INTERNAZIONALE 363.

showing the ultimate beneficial owner of the account.<sup>42</sup>

The Federal Banking Commission based its decision on the new article 305 Ter of the Swiss Code pénal, which as we have seen makes it a crime for a bank to accept a deposit without using "care appropriate to the circumstances" to establish the beneficial owner of the assets. The Commission declared that continued use of Form B was simply inconsistent with these "know-your-customer" obligations.<sup>43</sup>

It is important to note that the Swiss Federal Banking Law of 1934 requires banks, in order to keep a license, to show what it calls "irreproachable conduct" (*une activité irréprochable*).<sup>44</sup> Failure to conform to the Federal Banking Commission's view of the appropriate standard of care in identifying customers could be evidence of a conduct less than irreproachable. This threat of potential loss of license for a bank that does not comply with the Commission's decision leads one to expect that the decision will end the use of Form B, at least until a court decides otherwise.

It should be emphasized that Switzerland has not changed its bank secrecy provisions requiring bankers to maintain the confidentiality of the information supplied by the customer. Some U.S. newspapers carried exaggerated reports of the

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42. The Banking Commission's decision provided four exceptions for temporary accounts held by lawyers, to cover:

- (i) payments connected with judicial proceedings currently under way, such as a retainer or an advance on costs;
- (ii) amounts the lawyer is holding in an unliquidated estate settlement;
- (iii) amounts held in an unsettled divorce case;
- (iv) amounts held in escrow related to litigation, for example when the parties are about to end an arbitration and put the settlement amount in the hands of a lawyer while awaiting the formal withdrawal of the claim.

43. Article 2.1 of the Banking Commission decision of April 25, 1991 states: "La réglementation d'exception de la CDB 1987 concernant l'emploi de formulaires B1 et B2 ne se concilie ni avec le texte, ni avec le but de l'article 305 ter CPS." Article 2.2 then continues:

Par conséquent, contrairement à la réglementation d'exception de l'article 5 CDB 1987, les banques sont désormais tenues, en cas de doute, d'établir l'identité de l'ayant droit économique d'une façon exacte au moyen du formulaire A . . . même lorsque celui-ci agit par l'intermédiaire d'un avocat, d'un notaire, d'un fiduciaire ou d'un gérant de fortune.

44. Swiss Banking Law, *supra* note 41, art. 3(2)(c). On a bank's duty of "irreproachable conduct," see generally Ch.-A. Junod, *La garantie d'une activité irréprochable—De la surveillance à la tutelle des banques*, in *BEITRÄGE ZUM SCHWEIZERISCHEN BANKENRECHT* 91 (Bern, Verlag Stämpfli 1987).

death of bank secrecy in Switzerland.<sup>45</sup> For example, one newspaper stated "Swiss End Secret Bank Accounts."<sup>46</sup> Nothing could be further from the truth.

Article 47 of the Swiss Federal Banking Law<sup>47</sup> provides that a bank director, officer or employee who discloses a bank secret—such as a customer's identity—can be jailed for six months.<sup>48</sup> Of course, disclosure may be made to a public official in the context of a legal inquiry. For example, a Swiss judge in charge of a rogatory commission might ask questions on behalf of U.S. authorities making a request for information under the U.S.-Switzerland mutual judicial assistance treaty.<sup>49</sup>

What changed in 1991 relates to anonymity, not secrecy. The banker must now know the customer's real identity, including the ultimate beneficial owner of any "letterbox company" that may be the titular account holder. If the banker has reason to know that his customer is depositing the proceeds of illegal activity, the relationship must be terminated.<sup>50</sup>

45. See, e.g., *Swiss End Secret Bank Accounts*, BOSTON GLOBE, May 4, 1991, at 4.

46. *Id.* The Swiss Bankers Association issued a special communiqué making clear that secrecy legislation remains in force. For other articles dealing with the subject, see James Bates, *Swiss Phasing Out Secret Bank Accounts*, L.A. TIMES, May 4, 1991, at D1; Steven Mufson, *Swiss to End Anonymous Bank Accounts*, WASH. POST, May 4, 1991, at A20; Mitya New, *Proposed Swiss Laws Seen Toughest Against Money-Laundering*, Reuters, May 7, 1991, available in LEXIS, Nexis Library, Currnt file; Reuters, *Switzerland Plans to Abolish Anonymous Bank Accounts*, N.Y. TIMES, May 4, 1991, § 1, at 34.

47. Swiss Banking Law, *supra* note 41, art. 47.

48. On Swiss bank secrecy, see generally M. AUBERT, J.-P. KERNAN & H. SCHÖNLE, *LE SECRET BANCAIRE SUISSE* (2d ed. 1982); D. BODMER, B. KLEINER & B. LUTZ, *KOMMENTAR ZUM BUNDESGESETZ ÜBER DIE BANKEN UND SPARKASSEN* (1976 & supp. 1988); Peter C. Honegger, *Swiss Banking Secrecy*, 5 BUTTERWORTHS J. INT'L BANKING & FIN. L. 344 (1990).

49. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019. See generally P. Bernasconi, *Droits et devoirs de la banque et de ses clients dans la procédure d'entraide judiciaire internationale en matière pénale*, in BEITRÄGE ZUM SCHWEIZERISCHEN BANKENRECHT, *supra* note 44, at 343.

50. Proposals have been made by the government to authorize bankers to advise Swiss governmental authorities of doubtful transactions. This would result in a modification to Code pénal article 305 Ter to add that "persons covered by this section [i.e., the duty to know the customer] have the right to communicate to appropriate Swiss authorities information permitting them to establish that valuables come from a crime." The French original reads, "Les personnes visées par le premier alinéa ont le droit de communiquer aux autorités suisses compétentes les informations leur permettant d'établir que des valeurs patrimoniales proviennent d'un crime." See Office Fédéral du Justice, *Modification du Code pénal et du Code pénal militaire, Avant-Projet et Rapport Explicatif* 44-50 (1991).

There may already be a principle of "increased diligence" that arises when a

As one might expect, the reaction of the Swiss bar has not been universally favorable. Indeed, there has been resistance by some Helvetic attorneys to several aspects of the Banking Commission decision. In part, of course, this was to be expected, because the abolition of Form B removes a source of income for certain attorneys. However, even some lawyers who do not depend on Form B for their livelihood perceive overkill. They believe that the new rules hinder the use of a law firm account for many normal and innocent transactions. For example, I might send a Swiss lawyer friend 100 dollars to buy me the latest treatise of the famous Professor X at the University of Geneva. My friend would normally deposit the money into his firm's bank account, and make an entry in the firm's internal accounts indicating that I was a creditor in the amount of 100 dollars until the book was purchased and sent.

Under the new Banking Commission principles, however, this transaction could be construed as failure to disclose to the bank the real beneficial owner of the funds. Until such time as my friend buys and sends me the books, I am the beneficial owner of the 100 dollars. But I am not known to the bank. Book buying, of course, does not fit within any of the four special exceptions for a lawyer's transitory accounts. So it would seem that my friend should return the money to me or open an account with Form A completed in my name.

### III. FISCAL IMPROPRIETY

It may be instructive to compare the ethical and legal implications of anonymous bank accounts in money laundering with their role in helping a tax evader to hide income from fiscal authorities. When we shift our attention from the laundering of narco-dollars to tax evasion, the concerns for anonymity relate to authorities both in the customer's home country and in the country of the income's source.

Currency instability has led governments in many parts of the world to impose exchange controls that prohibit their resi-

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banker knows or should know that a freeze order is about to be issued to attach a customer's assets. In such a case, a banker might attempt to hold onto the customer's assets for a period of time sufficient to allow the freeze order take effect. See the Federal Banking Commission's discussion of the *devoir accru de diligence* in the matters of the Marcos and Duvalier assets, reported in RAPPORT DE GESTION/JAHRESBERICHT 127-29 (1986).

dents from having foreign bank accounts without authorization. At one point or another since World War II, such controls have been imposed even by our closest allies and trading partners. In return, currency instability and its attendant erosion of monetary value in some of these countries have led their residents to persistent efforts to safeguard the financial fruits of their labor and enterprise.<sup>51</sup>

Imagine someone living in a country with exchange controls who has decided to seek hard currency assets and thereby diversify his portfolio by holding U.S. stocks and bonds, who asks a Swiss bank to serve as nominee to purchase the securities. This investor will be concerned not only with minimizing U.S. tax liability on the investments, but also—and perhaps more importantly—with the need to keep any tax-related inquiries in the United States from coming to the ears of authorities in his home country. For example, to qualify for the special exemption from withholding tax on “portfolio interest” earned by non-U.S. holders of bonds issued by U.S. companies in registered form,<sup>52</sup> interest recipients must provide a Form W-8 to the U.S. payor, identifying the beneficial owner.<sup>53</sup> If the taxpayer wishes to qualify for treaty benefits on dividend income, a different form must be filed: this is Form 1001, which now also requires an indication of the beneficial owner of the income.<sup>54</sup> The impact of the tax collection process thus creates for the investor a problem within a problem, because in the wrong hands either form could create difficulties in the investor’s own country.

For bankers, the need to know the customer’s identity in a tax context often relates to what is called “treaty shopping.” A country with a network of income tax treaties will often find that non-residents attempt to obtain benefits under its income tax treaties by the use of banks as nominees, hoping to reduce

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51. The European Economic Community, in contrast, is implementing a directive to abolish such exchange controls. See Council Directive No. 88/361, O.J. L 178/5 (1988).

52. See I.R.C. §§ 871(h), 881(c) (1988).

53. *Id.* § 871 (h)(2); see 26 C.F.R. 35a.9999-5(b) (1991). Portfolio interest includes interest on obligations issued after July 18, 1984. It includes neither obligations held by 10 percent shareholders nor loans entered into by banks in the ordinary course of their business. See I.R.C. §§ 871(h), 881 (c) (1988).

54. See 26 C.F.R. § 1.1441-6(b) (1991). The Form 1001 was amended in 1990 to require identification of the person ultimately entitled to the income.



withholding tax on payments of dividends and interest. For example, a South American textile merchant living outside Switzerland might be tempted to ask his Swiss banker, as nominee, to buy securities issued by a U.S. company, the income from which would normally be subject to a 30 percent withholding tax. Under the U.S.-Switzerland treaty, however, the dividends and interest would be subject to lower rates, at 15 percent or 5 percent, respectively. The merchant might also incorporate the No-Tell Finance Company S.A., a Swiss entity wholly owned by the merchant, designed to achieve the same tax result.

For forty years, a Swiss federal decree has prohibited just such treaty abuse.<sup>55</sup> And it is in this context that the banker must be particularly vigilant to know his or her customer, at least to the extent of identifying who is or is not entitled to treaty benefits. When a bank has received dividends or interest which have been subject to a reduced withholding rate under the U.S.-Switzerland Income Tax Treaty,<sup>56</sup> any amounts collected as nominee for the account of a third party are subject to a supplementary withholding tax at 15 percent (for dividends) or 25 percent (for interest), paid to Swiss tax authorities in Bern, then remitted to U.S. authorities in Washington, in order to bring the total withholding up to 30 percent. The decree permits reimbursement of these supplementary withholding amounts only to Swiss residents.<sup>57</sup>

From the perspective of the banker, a supplementary with-

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55. See Arrêté fédéral concernant l'exécution des conventions internationales conclues par la Confédération en vue d'éviter les doubles impositions, 22 June 1951, and Ordonnance concernant la convention américano-suisse de double imposition, 2 November 1951 [hereinafter *Ordonnance*]. Article 14 of the *Ordonnance* imposes a withholding obligation on a Swiss bank that has received dividends and interest from U.S. payors who themselves have been subject to an obligation to withhold tax at the reduced rates of 15 percent for dividends and 5 percent for interest, as provided under the U.S.-Switzerland Income Tax Treaty, discussed *infra* text accompanying note 56, if the Swiss bank collects such amounts as nominee for fiduciary for the accounts of a third party. Such "supplementary withholding" is paid by the bank to the Swiss Federal Tax Administration in Bern. Article 17 of the *Ordonnance* permits reimbursement of these supplementary withholding amounts to Swiss residents, except U.S. citizens resident in Switzerland. See Arrêté du Conseil fédéral instituant des mesures contre l'utilisation sans cause légitime des conventions conclues par la Confédération en vue d'éviter les doubles impositions, 14 December 1962, RO 1962, 1680.

56. May 24, 1951, U.S.-Switz., 2 U.S.T. 1751.

57. Article 17 of the *Ordonnance*, *supra* note 55, permits reimbursement of these

holding is a more palatable solution to tax fraud than sending the customer away altogether. The non-Swiss customer at least has the option to maintain the confidentiality of the banking relationship at the price of bearing the full 30 percent through the supplementary withholding tax. This is particularly important for individuals from countries who do not want to invoke the income tax treaty of their home countries, for fear that their own government authorities will discover undisclosed assets. Traditionally, an important part of the Swiss banker's clientele includes publicity-shy Frenchmen and Italians.

### *CONCLUSION*

Sophisticated bankers have come to realize that there can be little safety for their customers' funds or their shareholders' equity without safety for the financial institution itself, which in turn means protecting the integrity of the bank's reputation. Almost the last thing wanted by depositors seeking confidentiality is to learn that their bank is being investigated on suspicion of money laundering or some other crime, since this usually triggers snooping by government agents, or official requests for bank files.

The suggestion that lawyers provide assistance to bankers trying to evade the law is more often likely to be false than true. Usually, the lawyer's role is to encourage compliance with complex or poorly drafted legislation that a banker might otherwise be tempted to ignore. Usually the lawyer's role is to restrain rather than to facilitate impropriety. For example, the manager of a U.S. bank may be uncertain about "subpart F" of the Internal Revenue Code, whose complex provisions tax certain categories of foreign subsidiary income in the United States even if never repatriated as a dividend.<sup>58</sup> It is the bank's lawyer who often enlightens the bankers about the extent of their duty to report such income.<sup>59</sup> Thus the international law-

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supplementary withholding amounts to Swiss residents other than U.S. citizens, who are excluded for obvious reasons.

58. See I.R.C. §§ 951-960 (1988).

59. In many countries local statutes prevent foreign (i.e., U. S.) authorities from conducting investigations on foreign territory. See, e.g., CP art. 271 (Switz.).

yer more often than not serves as a police officer, and paradoxically a police officer paid directly by the potential offender.

Lawyers counseling banks about international transactions are rarely asked to facilitate illegal or unethical behavior. Rather, the lawyer's job is to make sure that the multinational enterprise does not sail too close to the wind with respect to a plethora of frequently unclear and inconsistent national norms, as well as its own corporate code of conduct. This usually calls for multi-dimensional analysis of laws applicable both at the foreign place of operation and at the home office. One government may seek to compel disclosure of information while another prohibits its disclosure. The wise business manager usually will want counsel to err on the side of caution. Saying "no" to an ethically doubtful deal may result in lost profits. Saying "yes," on the other hand, may mean damage to both the corporate reputation and the manager's career.

## APPENDIX A

**A**

Account No.: \_\_\_\_\_

Holder: \_\_\_\_\_  
\_\_\_\_\_**Declaration on opening an account or securities account**

(Form A as per Art. 3 and 4 CDB)

The undersigned hereby declares:  
(mark with a cross where applicable)☐ **as holder of the account,**☐ that he is the beneficial owner of the assets to be deposited with the bank,☐ that the beneficial owner of the assets to be deposited with the bank is:

Full name (or firm)

Address/Domicile/Country  
(or location of head office)  
\_\_\_\_\_☐ **as representative of the account holder,**

that the following person(s) is/are the beneficial owner(s) of the assets to be deposited with the bank:

Full name (or firm)

Address/Domicile/Country  
(or location of head office)  
\_\_\_\_\_

The undersigned takes due note that:

- the banking secrecy privilege protected by Art. 47 of the Federal Law on Banks and Savings Banks of November 8, 1934/March 11, 1971 is not unrestricted. The officers, employees and mandataries of the bank are liable to provide evidence and information vis-à-vis the authorities when required to do so under federal or cantonal laws (such as during a criminal proceeding). Such an obligation also exists vis-à-vis foreign authorities, insofar as the Swiss Confederation grants judicial assistance to the country concerned;
- the system of numbered or coded accounts and deposits is a purely internal measure of the bank and in no way affects the obligation to provide evidence or to testify to the authorities.

\_\_\_\_\_  
Full name, or firm, if applicable\_\_\_\_\_  
Exact address\_\_\_\_\_  
Place and date\_\_\_\_\_  
Signature

## APPENDIX B

**B<sup>1</sup>**

Account No.: \_\_\_\_\_

Holder: \_\_\_\_\_  
\_\_\_\_\_**Declaration by Swiss attorney or notary  
upon opening an account or securities account**

(Form B as per Art. 5 CDB)

The undersigned hereby declares:

- that as attorney\*/notary\* he is subject to professional secrecy as protected by Art. 321 SPC (Swiss Penal Code) and governed by the cantonal laws.

He certifies, in said capacity:

- that he is acting as legal counsel in accordance with his appointment as attorney\*/notary\*;
- that the purpose of said appointment is not primarily that of administering assets, whether directly or indirectly (such as through a company);
- that the account\*/securities account\* is directly related to the aforesaid appointment;
- that his appointment is not merely temporary in nature and is not primarily aimed at keeping the beneficial owner's name secret from the bank;
- that he knows the identity of the beneficial owner of the assets to be deposited with the bank;
- that after having made appropriate, diligent inquiries, he has not learned of any fact that might indicate that his client or the beneficial owner is abusing the banking secrecy privilege, or, in particular, that the assets concerned have been acquired through criminal acts;
- that he will supervise the transactions made in the account\*/securities account\*, and will immediately inform the bank if his powers hereunder are revoked or if the conditions under which this declaration has been established should change.

The undersigned also duly notes the fact:

- that the bank may be required, in accordance with penal procedures or bilateral judicial assistance, to report his name to the authorities conducting the inquiry;
- that the bank, the Swiss Bankers Association or an agency set up by the CDB will report him to the competent regulatory authority for breach of professional ethics if there is evidence that he has abused his special status.

\_\_\_\_\_  
Full name\_\_\_\_\_  
Private\* or business\* address\_\_\_\_\_  
Place and date\_\_\_\_\_  
Signature

\* delete where inapplicable

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**Holder:**

(Form B as per Art. 5 CDB)

- that the bank, the Swiss Bankers Association or an agency set up by the CDB will report him to the competent regulatory authority for breach of professional ethics if there is evidence that he has abused his special status.

Signature \_\_\_\_\_

*A.*