Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime

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I. Introduction

Swiss banking secrecy has protected victims of persecution for over three centuries. First created to protect Huguenots fleeing France, Swiss banking secrecy was maintained during World War II to protect the identity of refugees from Nazi persecution. More recently, however, money laundering and organized crime have subverted this underlying, noble purpose of Swiss banking secrecy. In order to meet the challenge presented by the sheltering of criminal activity, Switzerland must reconsider its renowned commitment to absolute banking secrecy. An amendment to Article 305 of the Swiss Penal Code, recently adopted by the Swiss parliament, maintains the basic principle of banking secrecy while tailoring appropriate exceptions aimed at criminal banking activity. As a result, the new law appeases international pressure on Switzerland to relax its banking secrecy laws, eliminates conflicts currently existing in Swiss law concerning banking secrecy, and provides an increased deterrent to money laundering. However, success in curbing money laundering merely by its enactment is unlikely. The Swiss bankers’ willingness to avail themselves of the new law will be the determinative factor.

Critics have labelled Switzerland as the money laundering center of the world. One critic blames the Swiss banking system for the reputation...
Switzerland obtained as the country where money laundering is so efficient that laundering there guarantees "a whiter wash." Since the 1970s, Swiss banking officials have attempted to prevent the image of the Swiss financial market from being tarnished. Despite legislative initiatives during the 1980s and early 1990s, the Swiss financial market is still struggling to regain its integrity. To this end, the Swiss Federal Council proposed the new law which is designed to change the nature of Swiss banking secrecy, from a disposition that shields criminals, back to its original nature, which was to protect only law-abiding persons. This Note argues that the new law provides a mechanism to curb money laundering and organized crime, appeases international pressure, and eliminates conflicts created by prior agreements and legislation by providing Swiss financiers the opportunity to report criminally suspicious financial activities. Additionally, the new law helps to reestablish the Swiss financial market's integrity internationally and prevents money laundering activities from further tarnishing it.

This Note first examines the background of Swiss banking secrecy; its distinctive features and its legal sources. Then the Note examines several factors that created a need for amending Swiss banking secrecy, including money laundering activities, international pressure to make banking secrecy less of an absolute right, and previous agreements and legislation which created conflicts in Swiss law. Switzerland and the international community have made many previous attempts at changing Swiss banking secrecy. These attempts include: several international treaties, agreements within the Swiss banking community, and Swiss penal law. Each of these attempts at change have either been ineffec-


5 See generally JEAN ZIEGLER, DIE SCHWEIZ WASCHT WEISER [THE SWISS WASH IT WHITER] (1990) (Jean Ziegler is a Swiss Professor of Sociology at the University of Geneva).

6 See discussion infra Section V.B.

7 See discussion infra Section V.A-C.

8 See discussion infra Sections II, III.

9 See discussion infra Section IV.A.

10 See discussion infra Section IV.C.

11 See discussion infra Section IV.D.

12 See discussion infra Section V.A.

13 See discussion infra Section V.B.

14 See discussion infra Section V.C.
tive or have created conflicts in Swiss law. This Note then discusses the new law, its legislative history, and its terms and demonstrates how the new law can solve the problems now created by Swiss banking secrecy. Finally, this Note argues that the strengths of the Swiss banking system support this Note’s conclusion that the new law is not likely to have any negative effects on Swiss banking.

II. BACKGROUND ON SWISS BANKING SECRECY

Bank secrecy in Switzerland derives from the principle of personal privacy and reflects the value placed by Switzerland on individual economic liberties. Swiss law does not specifically define Swiss banking secrecy, but according to legal custom its definition is "a banker's professional obligation to keep in strictest confidence, all business and affairs related to the financial and personal circumstances of clients and some third parties to the extent that knowledge of such matters is acquired in the course of business." A special feature of Swiss banking secrecy is that a violation is subject to criminal prosecution. Although violations of professional secrecy are prosecuted only upon the express request of the injured party, the courts may prosecute a breach of banking secrecy on their own initiative. Because of its strict banking secrecy law Switzerland is frequently referred to as a money-haven. However, many other countries are internationally renowned as money-havens along with Switzerland. For example, the banks in Luxembourg and the Caymen Islands hold large amounts of foreign deposits. Austria and the Principality of Liechtenstein have stringent bank secrecy laws similar to those in Swit-

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15 See discussion infra Section VI.
16 See discussion infra Section VI.A.
17 See discussion infra Section VI.B.
18 Personal privacy is as important in Switzerland as first Amendment rights are in the United States. NICHOLAS L. DEAK & JOANNE CELUSAK, INTERNATIONAL BANKING 230 (1984); Olivier Dunant & Michele Wassmer, Swiss Bank Secrecy: Its Limits Under Swiss and International Law, 20 CASE W. RES. J. INT'L L. 541 (1988).
19 CAMPBELL, supra note 1, at 668.
20 FEDERAL BANKING LAW art. 47 (Switz.) [hereinafter FBL]; CAMPBELL, supra note 1, at 669.
21 FBL art. 47(4); CAMPBELL, supra note 1, at 669.
22 Switzerland's strict secrecy laws and conservative taxing system have contributed to its reputation as a money-haven. Fletcher N. Baldwin & Robert J. Munro, Switzerland, in MONEY LAUNDERING, ASSET FORFEITURE AND INTERNATIONAL FINANCIAL CRIMES 1, 3 (1993).
23 Id.
III. THE SOURCES OF SWISS BANKING AND OTHER FINANCIAL SECRECY

Swiss banking secrecy derives from a diverse number of authoritative legal sources: the Penal Code, the Banking Code, the Swiss Constitution, the Civil Code, and the Code of Obligations. The Banking Code is the one source that is most frequently specifically referred to in relation to banking secrecy, the other legal authorities relate to professional secrecy in general. The sources are characterized as criminal and civil liability sources for the financier.

A. Criminal Liability

In the Swiss Penal Code several articles address professional secrecy. However, Article 321 of the Swiss Penal Code states that the actual bank secrecy provision which punishes violations of professional secrecy should be left to the Banking Code itself. Article 162 of the Swiss Penal Code applies to the non-bank sector of the Swiss financial market and prohibits financiers from disclosing commercial and business secrets. Under Article 273, dealing with "espionage and the supplying of economic information to foreign officials and private organizations," the Swiss Penal Code imposes the duty of banking secrecy on the financier under the theory that a disclosure of domestic information might harm Switzerland economically.

The Swiss Banking Code specifically prescribes violations of banking secrecy and outlines the consequences under criminal law of such a violation. Article 47 of the Bank and Savings Bank Federal Act of June 8, 1934, as amended in 1971, provides the language which prohibits bankers and other professionals from revealing secret information. Article 47 provides:

(1) Every person working at a bank has a duty to keep secrets;

24 DEAK & CELUSAK, supra note 18, at 231-32.
25 Dunant & Wassmer, supra note 18, at 542. See also PENAL CODE art. 321 (Switz.).
26 Dunant & Wassmer, supra note 18, at 544. "Any person who reveals a . . . business secret which he was bound to maintain by virtue of a legal or contractual obligation and any person who profits thereby shall, upon complaint, be punished with imprisonment or a fine." PENAL CODE art. 162 (Switz.).
27 See PENAL CODE art. 273 (Switz.).
28 CAMPBELL, supra note 1, at 666-67.
(2) Third parties who lead others to infringe the secrecy duty are also to be punished, even if the offense never takes place;

(3) Infringement due to pure negligence, as well as intentional infringement, is to be punished;

(4) The infringement of bank secrecy may be prosecuted by the court on its own initiative;

(5) The penalties are a prison term not to exceed six months or a fine not to exceed Sfr. 50,000; either penalty may be cumulated;

(6) Breach of professional secrecy remains punishable even after termination of a public or private employment relationship or the practice of a profession; and

(7) Bank secrecy is not absolute; in specific legal circumstances, Swiss authorities are to be granted the right of access to private banking records.

Several qualifications to banking secrecy have been provided for under Swiss domestic law. Exceptions may arise in civil proceedings, where some cantons allow bankers to testify. Swiss criminal proceedings provide a similar exception for all cantonal and federal levels. In

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29 FBL, supra note 20.
30 The obligation to testify or submit documents before a civil court will mainly be determined by the rules of civil procedure of the specific canton [a canton is comparable to a state or province but is unusual in the amount of autonomy granted it by the federal government], since the cantons have jurisdiction under the Swiss Constitution to regulate their own courts and proceedings brought before them.

Nicholas Pierard & Nicolas Killen, Switzerland, 26 Int'l Law. 545, available in LEXIS, ABA Library, INTLAW File. As a result some cantons have exempted all persons bound by professional secrecy from the duty to testify (Argau, Berne, Geneva, Jura, Neuchatel, St. Gallen, and Vaud). Others expressly mention all categories of professionals who are exempted from the duty of testifying, without listing bankers (Appenzell, Basel, Glarus, Grisons, Oberwalden, Schaffhausen, Solothurn, and Thurgau). Lastly, some cantons allow the judge to decide in each case, whether it is necessary for bank officers to testify (Fribourg, Niderwalden, Schwyz, Ticino, Uri, Zug, and Zürich). CAMPBELL, supra note 1, at 674; Dunant & Wassmer, supra note 18, at 548; HANS SCHULTZ, BANKING SECRECY AND THE SWISS-AMERICAN TREATY ON LEGAL ASSISTANCE IN CRIMINAL MATTERS 10 (1977).

31 The Federal Law on Criminal Procedure art. 77 RS 3120 (Switz.) specifies: "[t]he only persons entitled not to testify are priests, doctors, lawyers, and public notaries,
the course of administrative proceedings the only exception made to the duty to banking secrecy involves tax fraud or tax evasion.\footnote{32}

B. Civil Liability

The individual’s right to privacy is not included as a specially protected fundamental right in the Swiss Constitution.\footnote{33} However, the Federal Supreme Court time and again upholds the existence of individual rights and “considers those rights not specifically enumerated in the Constitution to be unwritten fundamental rights with constitutional validity and protection.”\footnote{34}

The Swiss Civil Code provides for the right of a person or corporation to be free of invasions of privacy, which includes their economic privacy.\footnote{35} Article 28(1) of the Civil Code specifies: “[w]hossoever suffers an illegal offense against his person is entitled to ask the judge for help against anyone joining in the offense.”\footnote{36} Anyone offending another’s economic privacy, such as bankers violating their client’s banking secrecy, can therefore have recourse to the courts under the Civil Code.

The Code of Obligation in Switzerland discusses banking secrecy in that it derives from contractual and agency principles.\footnote{37} Article 394 specifies that an “agent undertakes to carry out the contractually agreed upon business transaction or services which he has been entrusted by the client.”\footnote{38} Article 398 requires the agent to exercise the same care as the employee would be required to exercise.\footnote{39} The Swiss banker must perform the contract with his client carefully and faithfully, which means maintaining banking secrecy.

\footnotesize{\begin{itemize}
\item chemists, and midwives and their assistants.”\textsuperscript{30} Pierard & Killen, supra note 30.
\item In the case of tax fraud or evasion “[b]ank secrecy will . . . be lifted in the course of a tax fraud prosecution when the tax authorities are empowered to investigate in direct cooperation with the banks and to seize documents.”\textsuperscript{31} Dunant & Wassmer, supra note 18, at 551;\textsuperscript{18} CAMPBELL, supra note 1, at 678; Pierard & Killen, supra note 30.
\item CONSTITUTION (Switz.);\textsuperscript{32} CAMPBELL, supra note 1, at 664.
\item CAMPBELL, supra note 1, at 664.
\item Dunant & Wassmer, supra note 18, at 542.
\item CAMPBELL, supra note 1, at 664. See Beat Kleiner, Banking Law, in INTRODUCTION TO SWISS LAW 173-84 (François Dessemontet et al. eds., 1981) (explaining public banking laws applied to banks as institutions).
\item CAMPBELL, supra note 1, at 665; Dunant & Wassmer, supra note 18, at 542.
\item CODE OF OBLIGATION art. 394 (Switz.) (Simon L. Goren ed., 1987) [hereinafter CODE OF OBLIGATION].
\item Id. at art. 398.
\end{itemize}}
IV. FACTORS ENCOURAGING A RELAXATION OF SWISS BANKING AND FINANCIAL SECTOR SECRECY

Because of the increase in criminal banking activity, Swiss officials became concerned that the world community would perceive Switzerland negatively. Bankers are so concerned with the poor image of Swiss banking that the Swiss Bankers' Association (SBA) recently described itself as the "professional body charged with safeguarding the interests and reputation of Swiss banking. . ." Additionally, the preamble of the SBA emphasized the: "view of preserving the good name of the Swiss banking community, nationally and internationally. . ." In order to maintain its status as a leader in Europe's financial market, Switzerland needs to restore its tarnished image. The main factors that contribute to the urgency include money laundering problems, organized crime activities, international pressure, and the need to eliminate conflicts.

A. Money Laundering

Switzerland realizes that it is in its self-interest to combat money laundering and organized crime. Switzerland is internationally notorious as a haven for money laundering activities. Money laundering activities are a problem in the Swiss financial market, involving and affecting many aspects of the Swiss financial market other than banks.

According to Article 305bis, money laundering is a criminal act when the proceeds derive from any criminal activity. Money laundering

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41 SWISS BANKERS' ASSOCIATION AGREEMENT ON THE SWISS BANKS' CODE OF CONDUCT WITH REGARD TO THE EXERCISE OF DUE DILIGENCE (1992) (emphasis added) [hereinafter SBA AGREEMENT].
42 See discussion infra Section V.B.1.
43 See discussion infra Section V.B.1 (emphasis added).
44 Protokol 1, supra note 40, at 89.
45 See supra notes 4-5 and accompanying text.
46 See infra notes 49-59 and accompanying text.
47 In Switzerland, Article 305bis of the Swiss Penal Code statutorily defines money laundering:

1. He who shall have committed an act tending to impede the identification of the source, the discovery or the confiscation of the assets which he knew or should have known to be of criminal origin shall be punished by imprisonment or a fine.
2. In serious cases, the punishment shall be criminal confinement for no more than five years. The imprisonment shall be concurrent with a fine of up to one million francs.
internationally, involves at least three activities: "[s]muggling dirty money to a secret Swiss . . . bank account; . . . [a]ltering its nature and/or origin; . . . [r]epatriating the ‘newly clean’ money and using it for investment, pleasure or in some cases bribery." However, in Switzerland the days of the direct transfer of suspect liquid funds are practically over. Money laundering activities in the 1990s more commonly encompasses pre-laundering of funds in off-shore markets before transferring the funds to Switzerland. However, evidence of such pre-laundering activities has also been discovered within Switzerland. In 1989, a parliamentary investigating committee found that several financial institutions knowingly involved themselves in pre-laundering activities.

Pre-laundering activities typically involve "paper corporations" that

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The case is serious, particularly, when the perpetrator:

a) acts as a member of a criminal organization;

b) acts as a member of a gang formed to systematically engage in money laundering;

c) makes a significant turnover or gain in engaging in money laundering by profession.

3. The perpetrator shall also be punished when the principal offense has been committed outside of Switzerland is also punishable in the country which it has been perpetrated.

Franco Taisch, Swiss Statutes Concerning Money Laundering, 26 INT'L LAW. 695, available in LEXIS, ABA Library, INTLAW File quoting PENAL CODE art. 305 (Switz.). The legal definition of money laundering in the United States includes activities such as the "investment or other transfer of money flowing from racketeering, drug transactions, and other illegal sources into legitimate channels so that its original source cannot be traced." 18 U.S.C. § 1956 (1991).


49 Message, supra note 3, at 276.

50 Id.


52 ZIEGLER, supra note 5, at 99. Some of the institutions that were found by the committee to have engaged in these pre-laundering activities include: Shakarchi Trading/Shakarco AG, Zürich, Mecattaf AG, Zürich, El Ariss AG, Zürich, Guardog AG, Zürich, and Mirelis AG, Genf. According to the report, the bank employees that are in the responsible positions to deal with those customers are aware that they are dealing with monies that are the proceeds of illegal activities. Id.

53 The Message refers to these corporations as "letter box societies" because frequently the only evidence of the existence of the corporation is a letterbox and perhaps a file in the desk drawer of some administrator. Message, supra note 3, at 276. See also CLARKE & TIGUE, supra note 48, at 116 (describing the physical arrangements of "letter boxes"). This is not surprising considering the corporation's sole function is to
are set up in countries like Liechtenstein, Panama, or other small offshore havens.\(^{54}\) Paper corporations make it more difficult for dirty money to be traced to suspect criminal activities. Swiss authorities are faced with that difficulty today that when paper corporations are used in conjunction with a Swiss bank account, criminals are twice or thrice shielded.\(^{55}\) Criminal origins are obscured by transferring funds to "paper corporations," which in turn engage in financial transactions involving Swiss banks and other financial institutions. The Swiss Federal Council is acutely aware of the pre-laundering problem and other money laundering activities in Switzerland.\(^{56}\)

Some Swiss bankers deny that money laundering is still a real problem in Switzerland.\(^{57}\) However, their view is limited, because money laundering involves pre-laundering activities encompassing the entire financial market. Therefore, although the direct transfer of funds of criminal origin to Swiss banks may occur rarely today, the presence of pre-laundering activities which include laundering in other countries before reaching Switzerland is not easily recognizable to Swiss bankers. A Financial Action Task Force (FATF)\(^{58}\) study conducted in early 1993 openly criticized the laxity of Swiss law regulating activities outside of the bank sector and stressed that corrective measures are needed.\(^{59}\)

move funds to Switzerland from the corporation instead of from an individual.

\(^{54}\) CLARKE & TIGUE, supra note 48, at 115.

\(^{55}\) Id. at 115.

\(^{56}\) The Swiss Federal Commission perceived the reason that money launderers especially choose Switzerland for their activities to be their recourse "to keepers of professional secrets, to fallible individuals, to 'letter box' societies and to complex commercial structures to confer to illegal values the appearance of legal profit." Message, supra note 3, at 276. In addition to the international money laundering efforts previously described, the Federal Council is concerned about money laundering problems involving local drug markets. Profits from Swiss drug dealings generally are distributed by individuals, recycled, and hidden in Swiss banks. Id.

\(^{57}\) "Money laundering is not a problem any more in Switzerland. In this respect Swiss legislation is 5-10 years behind. Tax evasion is the problem we deal with most frequently now." Interview with Andre Lamprecht, Counsel, Legal Department of Credit Suisse, in New York, N.Y. (Nov. 3, 1993) [hereinafter Interview with Lamprecht]. Andre Lamprecht is a member of the legal department of Credit Suisse, one of the most prominent Swiss banks.

\(^{58}\) See infra notes 89-93 and accompanying text.

early as 1984, the U.S. President's Commission on Organized Crime warned that "every financial institution, including banks, savings and loan institutions, currency exchange and casinos should assume that it is a potential target for use by organized crime in money laundering schemes."\(^6\) However, money laundering is not the only problem Swiss legislators are faced with. A related problem that faces Switzerland is organized crime.

**B. Organized Crime in Switzerland**

A second abuse of Swiss banking secrecy is by organized crime. Organized crime problems, such as small-time crime organizations, "the turning plate of the service sector" and "the infiltration of the legal economy" were found to be especially troublesome in large financial districts such as Zürich, Geneva, and the Tessin. The Federal Council established that legislation is needed to address the infiltration.\(^6\) Since there are no statistics in Switzerland concerning cases of organized crime specifically, examples must be used instead.\(^2\) However, the total crime realized in Switzerland rose steadily from 310,930 cases in 1988 to 359,201 cases in 1991.\(^3\)

The first manifestation of organized crime is described in the report as "islands of 'basic criminal' organizations."\(^4\) These include structures somewhere between criminal gangs and mafia-like organizations. Specifically, the Federal Council identified gangs that conceal or steal checks, car thieves,\(^5\) and small-time drug traffickers.\(^5\) Because these "islands of criminality" do not control any large segment of Swiss society, the Federal Council seems reassured that they will not have an influence on

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\(^6\) Raul Lautenschütz, Das organisierte Verbrechen in der Schweiz; Erscheinungsformen und Risiken [Organized Crime in Switzerland; The Forms in Which It Appears and the Risks], Neue Zürcher Zeitung, July 1, 1993, at 19 (translated by the author).


\(^6\) Id. at 25.

\(^6\) Id. at 274.


\(^5\) The total cases reported as having violated the drug law rose from almost 6,000 cases in 1976 to almost 24,000 cases in 1991. Id. at 26; Message, supra note 3, at 274.
the Swiss economy or on political decisions in Switzerland.\textsuperscript{67}

Another manifestation of organized crime is "the turning plate in the service sector,"\textsuperscript{68} which is a reference to money laundering.\textsuperscript{69} The Message in which the new law was proposed mentions two groups of actors in the sector of financial services. One group is comprised of people who are ready to place the advantages of the Swiss financial market at the disposition of even suspect international clients.\textsuperscript{69} The other group is very active as intermediaries on the gray market\textsuperscript{70} providing a great number of contacts with organized crime, crime involving finance, and, in the past, even with arms dealings.\textsuperscript{71} Scandals involving organized crime and Swiss banking have previously included the "Pizza Connection"\textsuperscript{72} and the "Lebanon Connection."\textsuperscript{73} This manifestation of crime is interlinked with banking and other financial secrecy problems in Switzerland in that criminal funds in foreign currencies were easily transferred to Swiss banks undetected, and thus gave no rise to any suspicion. Once they were clients of Swiss banks, these criminal organizations were protected by Swiss banking secrecy.

The most dangerous manifestation of organized crime in Switzerland

\textsuperscript{67} Lautenschütz, \textit{supra} note 61, at 20. This is at least not a serious problem when compared to some of the southern neighboring countries to Switzerland. Protokol des 1.3.1994, StGB und MStG Strafbarkeit der kriminellen Organisation: Botschaft und Gesetzsentwürfe [Protocol of March 1, 1994 StGB and MStG Criminal Liability of the Criminal Organizations: Message and Bills], June 30, 1993 at 2024 (translated by author) [hereinafter Protokol 2].

\textsuperscript{68} \textit{Message, supra} note 3, at 275.

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} "The term ‘gray market goods’ is a loosely used expression intended to connote any goods sold outside normal, authorized distribution channels." SETH E. LIPNER, \textit{THE LEGAL AND ECONOMIC ASPECTS OF GRAY MARKET GOODS} 1 (1990). Gray market goods are distinguished from black market goods in that gray market goods are genuine trademarked goods that are marketed without the local trademark owner’s permission. \textit{Id.}

\textsuperscript{71} \textit{Message, supra} note 3, at 275.

\textsuperscript{72} The "Pizza Connection" was a “heroin smuggling ring, uncovered in 1984. Prosecutors alleged that Swiss banks aided in the laundering of proceeds derived from the sale of heroin . . . ." Baldwin & Munro, \textit{supra} note 22, at 3; \textit{Message, supra} note 3, at 277. \textit{See also} SHANA ALEXANDER, \textit{THE PIZZA CONNECTION: LAWYERS, MONEY, DRUGS, MAFIA} (1988) (describing in depth the trial of the “Pizza Connections”).

\textsuperscript{73} In the “Lebanon Connection” “several of Switzerland’s largest banks were alleged to have aided in laundering approximately one billion dollars over a two-year period. The subsequent investigation led to the resignation of the Swiss Justice Minister.” Baldwin & Munro, \textit{supra} note 22, at 3. \textit{See also} Swiss to Expel Lebanese Brothers Jailed for Money-laundering, Reuter World Service, July 6, 1991, at 1, available in LEXIS, WORLD Library, REUWLD File.
according to the Federal Council is the "infiltration of the legal economy." This problem has so far not manifested itself in Switzerland. The reason for the Federal Council's concern is the possibility that Swiss enterprises in financial difficulty may become dependent on funding from organized crime which would enable the criminal organization to participate in Swiss enterprises in the future. As an example, the Federal Council points to foreign countries such as Italy where, in hindsight, it became clear that the determining factor that enabled a criminal organization to widen its influence on a foreign country's politics and economy was such a dependency by enterprises. Switzerland is not alone in its fear of waves of criminal activity; such activities are an international concern.

C. International Pressure to Relax Swiss Banking Secrecy Laws

Switzerland realized that in order to combat money laundering effectively, cooperation between states is necessary. In the world community, there is a trend toward lifting bank secrecy more easily than in the past, "particularly in view of the growing need for transnational cooperation in combating international and organized crime." The world community also expects Switzerland to respect certain requirements in connection with international cooperation and joint development. The international pressure on Switzerland to change its banking secrecy laws includes pressure from the United States, the European Community and the FATF, all of which perceive the Swiss financial market as being under-regulated and in need of stronger anti-money laundering measures.

Criticism by the United States of Swiss banking secrecy has been strong. Switzerland entered in to the Swiss-U.S. Treaty Concerning Assistance in Criminal Matters in 1975 in an attempt to grant the

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74 The infiltration of the legal economy refers to infiltration of organized crime into the legal, political, and economic communities of Switzerland. Message, supra note 3, at 275.
75 Id.
76 Id.
77 Lautenschütz, supra note 61, at 20 (citing Message, supra note 3).
78 Message, supra note 3, at 312; Dunant & Wassmer, supra note 18, at 541. "In view of the international intertwining of the economy and business life, namely the expansion of the business arena, the deregulation, the increasing mobility, but also the compulsion to migrate, it is not surprising that crime is organizing itself increasingly internationally." Protokol 1, supra note 40, at 82.
79 CAMPBELL, supra note 1, at 696.
80 See discussion infra Section VI.C.
United States assistance in its criminal investigations. However, the United States was not able to compel disclosure of protected bank records unless the criminal offense the United States was investigating also was considered a crime in Switzerland.\textsuperscript{82} Money laundering was not considered a crime in Switzerland prior to 1990.\textsuperscript{83} Due to the difficulty of obtaining confidential banking information from the Swiss government and the banking community, the United States pressured Switzerland to enact legislation making money laundering a crime in Switzerland.\textsuperscript{84} As a result, Article 305\textsuperscript{bis} of the Swiss Penal Code was enacted in 1990, which granted U.S. prosecutors access to bank records protected by banking secrecy for the prosecution of money launderers.\textsuperscript{85} This change somewhat appeased U.S. pressure, but the relaxing of Swiss banking secrecy laws further eased U.S. investigations of money laundering offenses in Switzerland.

Pressure from E.C. members concerning Swiss banking secrecy legislation is interlinked with pressure on Switzerland to join the E.C. Current E.C. members studied the money laundering situation and measures that could be taken against money laundering world-wide. A directive was advanced in the E.C. that promoted the creation of a right and an obligation to communicate for bankers.\textsuperscript{86} An interdepartmental group specifically concerning Switzerland was established under the direction of the Federal Department of Finance with the mandate to propose legislation that could be introduced to Switzerland that would satisfy the requirements of the aforementioned directive.\textsuperscript{87} The group envisioned the introduction of an obligation to communicate for the entire Swiss financial sector.\textsuperscript{88}

The FATF,\textsuperscript{89} which is part of the Organization for Economic Coop-
eration and Development based in Paris, was formed in 1989 by the G-7. Switzerland is a member of the FATF. In February 1990, the FATF presented forty recommendations concerning the use of the financial sector for the purposes of money laundering. Among these, recommendation Number 16 advocated the creation of a right or obligation of communication for the financier. The FATF has applauded Switzerland’s efforts in combatting money laundering. This praise was tempered, however, by their criticism that Switzerland has not done enough to curb money laundering in the non-banking sector of the Swiss financial market.

D. The Elimination of the Dilemma Created by Article 305\textsuperscript{er} of the Penal Code

Two distinguishing situations can arise in which criminal activity may be brought to the banker’s attention. In one situation the banking relationship has not yet been established and there is no dilemma because the banking secrecy privilege has not yet been established. The banker can refuse the client or inform the authorities without criminal liability. However, in the second, more frequent situation banking relationships have already been established. The banker’s dilemma arises in this situation.

Article 305\textsuperscript{er} of the Penal Code, enacted in 1990, created a dilemma for bankers in Switzerland. Bankers found themselves in a situation and the United States. Id. Forty recommendations for combatting money laundering were adopted by the group in 1990. Id. The FATF evaluation focuses on the implementation of these measures. Id.

90 Id. G-7 stands for the “group of seven major industrialized countries.” Id.
92 Annual FATF Report, supra note 89, at 313.
93 Id.
94 Message, supra note 3, at 316.
95 Id. at 315.
96 PENAL CODE art. 305\textsuperscript{er} (Switz.). See also discussion infra Section V.C.
97 Message, supra note 3, at 270.

The Swiss Federal Banking Commission enunciated the conflicts of interest involved: It [the bank] has to weigh up on the one hand:
- the violation of the customer’s trust by a suspicion that may later prove unfounded;
- the risk of the bank’s liability for damages under civil law if it delays, or fails to implement, a customer’s instructions to withdraw assets until it receives appropriate notification from the competent authorities.

and on the other hand:
where if they reported suspicions of criminal activity involving financial transactions, they could be held criminally liable for violating banking secrecy, according to Article 47 of the Banking Code. But if they failed to communicate such a belief to the authorities, they could also be criminally liable for money laundering under Article 305° of the Penal Code.°

Bankers cannot invoke any legal defense to justify communicating suspicions.°° Specifically, bankers can neither invoke a legal obligation nor a duty of the function of the profession nor a legitimate legal defense.°°° There is, however, some disagreement among the legal academics in Switzerland concerning other non-legal defenses which could be asserted.°°°° Because of the lack of legal defenses, however, bankers who find themselves in the aforementioned dilemma have no legal "out."

A right to communicate solves the dilemma presented here and allows the banker to escape criminal liability for violating banking secrecy. According to one member of the National Council, the only way to eliminate the Swiss financier's dilemma is to provide the financier the right to communicate substantiated suspicions to the authorities. This change is included in the new law.°°°°°

V. PREVIOUS ATTEMPTS AT CHANGING SWISS BANKING SECRECY AND REASONS FOR THEIR INEFFECTIVENESS

By entering into innovative international agreements and by modifying its own laws concerning money laundering, Swiss legislators aspired to lead Europe in combatting money laundering.°°°°°° In the process, Swiss legislators are torn between considerations of federalism, legal protection,
and efficiency. However, repeatedly legislators have overcome these difficulties because of the strong consensus in Switzerland that its image needs to be maintained internationally. Legislation and agreements that have attempted to address money laundering problems in Switzerland include international treaties, private agreements between Swiss bankers, and Swiss legislation dating back to 1905. Much of this legislation, however, has either been ineffective in changing Swiss banking secrecy laws, has created conflicts within Swiss law, or has created new obligations for the banker that the Swiss legal system is not equipped to handle.

A. Treaties Concerning Assistance in International Matters and Commitment to Combat Money Laundering

1. The Hague Convention on Civil Procedure

International judicial assistance involved in this area can be traced back to the Hague Convention of 1905. The Hague Convention on Civil Procedure provided that bank secrecy questions concerning Switzerland should be resolved domestically. According to the Convention, if foreign authorities want to obtain information protected by banking secrecy from Switzerland, they must request official assistance from a Swiss judge. These requests are then to be executed according to the Swiss cantonal law concerning procedure. On its face the Hague Convention on Civil Procedure addressed only procedure, not the substantive law of Swiss banking secrecy.

2. Swiss-U.S. Treaty Concerning Assistance in Criminal Matters

Because of the difficulties of obtaining information concerning Swiss banking, the United States perceived the need to take special measures to relax the stringency of the Swiss secrecy laws in the 1970s, especially concerning U.S. criminal investigations. The Swiss-U.S. Treaty Concern-

\[\begin{align*}
104 & \text{Id.} \\
105 & \text{Id.} \\
106 & \text{See discussion infra Section V.A.1-3.} \\
107 & \text{See discussion infra Section V.B.} \\
108 & \text{See discussion infra Section V.C.} \\
109 & \text{Dunant & Wassmer, supra note 18, at 552 (citing The Hague Convention Relating to Civil Procedure, July 17, 1905 (codified as RS O.274.12 and revised in 1957) [hereinafter The Hague]).} \\
110 & \text{Dunant & Wassmer, supra note 18, at 552.} \\
111 & \text{The Hague, supra note 109, art. 14.}
\end{align*}\]
ing Assistance in Criminal Matters was signed on May 25, 1975 for that purpose.\footnote{112}{Treaty on Mutual Assistance in Criminal Matters, \textit{supra} note 81.} The treaty contains two relevant parts. The first part concerns "General Assistance" which provides for Swiss cooperation in criminal matters where foreign states have an interest. The second part provides for a special procedure which is intended to facilitate the prosecution of what is described as "organized groups of criminals."\footnote{113}{"Each party to the Treaty attempts to grant assistance to the other in investigations and court proceedings for criminal offenses, the punishment of which falls within the jurisdiction of the authorities of the requesting state." Dunant & Wassmer, \textit{supra} note 18, at 557.} It is in this treaty that Switzerland for the first time defined what should be considered as a criminal organization in Switzerland.\footnote{114}{Protokol 2, \textit{supra} note 67, at 2025.} As discussed previously, many practical difficulties arose with this treaty.\footnote{115}{See \textit{supra} notes 78-81 and accompanying text.}

3. European Agreement on Money Laundering, 1993

In 1993, Switzerland ratified the European Accord on Fighting Money Laundering.\footnote{116}{It came into effect September 1, 1993. Übereinkommen Nr. 141 des Europarates über Geldwäsche sowie Ermittlung, Beschlagnahme und Einziehung von Erträgen aus Straftaten, Sept. 1, 1993, Council of Europe, Switz. BBI 1992 VI, at 9 [hereinafter European Agreement]; \textit{Switzerland Ratifies Accord on Money Laundering}, Reuter European Community Report, May 11, 1993, \textit{available in} LEXIS, WORLD Library, REUEC File. Switzerland was the third country to sign after Great Britain and Germany.} The Accord obliges the signatories to actively prevent and punish money laundering offenses. The first part of the treaty defines a national minimum standard concerning ascertainment, confiscation, and impoundment of funds with illegal origins. The signatories are bound to create penal law provisions against money laundering. To this end, the treaty ensures international cooperation in matters of ascertainment, confiscation, and impoundment.\footnote{117}{European Agreement, \textit{supra} note 116.}

The Council of Europe, a twenty-seven nation pan-European Group which aims to protect human rights and freedoms and increase European cooperation, drew up the Agreement, which is an indication of the strong commitment among European countries to find a comprehensive international solution to the remaining money laundering problems.\footnote{118}{\textit{Id}.} The effects of this agreement have yet to be realized; however, it did provide the basis and impetus for Swiss legislators to reform the internal legal
mechanisms to combat money laundering more effectively.119

B. Swiss Bankers’ Agreements

1. Swiss Bankers’ Association Agreements

The Swiss banking community took it upon itself to enact an agreement for the purpose of preventing illegal activities relating to banking. In 1977 Swiss banks, through the SBA,120 entered into the Agreement of Observance of Care.121 This agreement concerns the accepting of funds and the practice of banking services. Mainly, the agreement requires banks to know the identity of their clients, to refuse funds with criminal origin and to avoid assisting in capital flight or tax fraud matters.122 This agreement does not affect bank secrecy in scope or extent, it simply provides guidelines to avoid criminal problems altogether.123

In 1992, this Agreement was renewed in the Agreement on the Swiss Banks’ Code of Conduct with Regard to the Exercise of Due Diligence.124 This updated version of the agreement provides clear guidelines for banks when the relationship with the client has not yet been established.125 Additional guidelines prohibit providing active assistance in the flight of capital and cases of tax evasion. These guidelines, however, do not clarify what degree of knowledge is required for a bank to refuse services and what, other than the refusing services, banks should do in case of such a discovery.126

119 Id. at 13; Protokol 1, supra note 40, at 85.
120 The Swiss Bankers’ Association (Schweizerische Bankvereinigung) is the most important trade organization in the banking field in Switzerland. Presidents, vice-presidents, delegates, managers, and deputy managers of banks and bank-like financial organizations, private bankers, and partners of firms admitted to stock exchanges are offered membership. The association “devotes itself to the protection of the rights interests of the banking trade in general, as well as the interests of the Swiss investor in particular, especially in foreign countries.” HANS J. BAR & DANIEL U. ALBRECHT, THE BANKING SYSTEM OF SWITZERLAND 40-41 (1973). Recently, the Association described its duties: “the Swiss Bankers Association in its capacity as the professional body charged with safeguarding the interests and reputation of Swiss banking.” SBA AGREEMENT, supra note 41 (emphasis added).
121 SWISS BANKERS’ ASSOCIATION AGREEMENT OF OBSERVANCE OF CARE (1977).
122 CAMPBELL, supra note 1, at 695.
123 Id. at 696.
124 SBA AGREEMENT, supra note 41.
125 Id.
126 Id.
2. Swiss Federal Banking Commission Guidelines

The Swiss Federal Banking Commission\(^{127}\) also issued a directive which eliminated anonymous bank accounts by September, 1992.\(^ {128}\) Today, Form A accounts require the contracting parties to affirm that they are the beneficial owners, or in the alternative, to disclose the identity of the beneficial owner.\(^ {129}\) Although the directive "increased vigilance" in the banking sector, the SBA stated that Swiss banking secrecy itself was not materially changed in content or significance.\(^ {130}\) This belief is largely due to the fact that in the guidelines do not provide for a legal obligation to report suspicious activity once the contracting relationship has been entered into. Additionally, neither the elimination of Form B or the enactment of Article 305\textsuperscript{bis} and 305\textsuperscript{ter} affected the non-bank sector of the marketplace in any way.\(^ {131}\)

C. Swiss Law On Money Laundering: Article 305\textsuperscript{bis} and 305\textsuperscript{ter} of the Swiss Penal Code

Article 305\textsuperscript{bis} and 305\textsuperscript{ter} of the Swiss Penal Code were enacted in 1990 in an attempt to appease U.S. and domestic pressure.\(^ {132}\) The effect of Article 305\textsuperscript{bis} was to criminalize money laundering proceeds, which according to Swiss law derived from any felony criminal activity.\(^ {133}\) Article 305\textsuperscript{ter} was to punish individuals who assist in these money laundering schemes by failing to establish the identities of beneficial owners.

\(^{127}\) The Swiss Federal Banking Commission (Eidgenössische Bankenkommission EBK) represents all Swiss banks and publishes the Federal Banking Commission Bulletin. On important legal and banking issues the Commission issues directives or guidelines to be followed by all banks. Membership is largely made up of previous bank directors and business attorneys. Ziegler, supra note 5, at 98. The EBK has been criticized as only wielding symbolic power in the banking field today. Ziegler, supra note 5, at 98.

\(^{128}\) SFBC Guidelines, supra note 97. This involved the elimination of the infamous Form B or numbered accounts.

\(^{129}\) Baldwin & Munro, supra note 22, at 5; Singh, supra note 83, at 860; Taisch, supra note 47.

\(^{130}\) Baldwin & Munro, supra note 22, at 5; Taisch, supra note 129; Pierard & Killen, supra note 30; Singh, supra note 83, at 860.

\(^{131}\) The Federal Commission addressed this fact in the Message by stating: "[i]t would be suitable to promote . . . vigilance in the entire financial sector." Message, supra note 3, at 276.

\(^{132}\) Taisch, supra note 129.

\(^{133}\) Penal Code art. 305\textsuperscript{bis} (Switz.); Baldwin & Munro, supra note 22, at 4, 5; Taisch, supra note 129; Pierard & Killen, supra note 30; Singh, supra note 83, at 853-55.
of accounts in their individual professions. This provision has also been termed the "due diligence" provision requiring financial professionals to be held to that standard. Although, the Swiss Federal Council concluded that the legislation was effective in increasing the care with which bankers accept clients and deal with their accounts, it has not yet reached its expected potential in fighting money laundering. The main problem is that "only small, thin fish are being caught in the net and not the fat financial sharks." Additionally, Article 305ter of the Penal Code creates a conflict for the Swiss financier when combined with Article 47 of the Banking Code.

D. Summary

One result of the heavy international and national legislation in this area is the creation of legal inconsistencies and conflicts. The danger that inconsistencies may arise necessitates a constant review of the current statutory law by Swiss legislators. For example, the Guidelines for the Combating and Prevention of Money Laundering of the Swiss Federal Banking Commission and the 1992 Agreement of the Swiss Bankers Association both required bankers to engage in conduct that inevitably led them to an increased awareness of suspicious activity that may be of a criminal nature. The question that then confronted the bankers was what to do with the information they obtained. Since the enactment of Article 305ter, the danger of criminal liability for money laundering faced

134 PENAL CODE art. 305ter (Switz.); Baldwin & Munro, supra note 22, at 4, 5; Taisch, supra note 129; Pierard & Killen, supra note 30; Singh, supra note 83, at 853-55.

135 The Federal Council recognizes that "[t]he penal legislation relative to money laundering and the directive of the Federal Banking Commission for the combat and prevention of money laundering have contributed in a sensible manner to increase the vigilance in the banking sector principally." Message, supra note 3, at 276.

136 Protokol 2, supra note 67, at 2025. The first important cases concerning Art. 305ter money laundering include a judgment from the criminal court in Bern on July 19, 1991 (in which the amount of money involved came to SFr. 5,000); a judgment of the Kassationshof at the Federal court on January 20, 1993, BGE 119 IV 59 (which involved SFr. 120,000); and a judgment of the same court on September 22, 1993, BGE 119 IV 242 (which involved SFr. 205,000). Jörg Gillessen, Die Straftatbestände der Geldwäsche (Art. 305b and 305ter StGB) at 4 (May 1994) (unpublished manuscript on file with author).

137 PENAL CODE art. 305ter (Switz.) provides for criminal liability of bankers involved in money laundering.

138 Federal Banking Law, art. 47 (Switz.) creates criminal liability of bankers who reveal banking secrecy. See discussion supra Section IV.D.

139 Protokol 1, supra note 40, at 88; Protokol 2, supra note 67, at 2030.
bankers. Therefore, careful bankers observing their duty under the law, the Guidelines and the Agreement had no safe means to transfer the useful information they obtained. Additionally, new international agreements such as the European Agreement 1993,\footnote{European Agreement, supra note 116.} created the obligation for Swiss legislators to live up to the international commitment made and to reform Swiss domestic laws accordingly.\footnote{Protokol 1, supra note 40, at 99.} Assuring domestic legal consistency is the only means by which Switzerland can maintain its image as an internationally responsible country.

VI. THE NEW LAW: ARTICLE 305\textsuperscript{m}, MARGINAL NOTE, AND SECOND PARAGRAPH

In an effort to keep Swiss law modern and to eliminate conflict with other Swiss domestic law and international agreements, Swiss legislators proposed the amendment to Article 305\textsuperscript{m}.\footnote{Message, supra note 3, at 277.} The Swiss Parliament enacted the new law on August 1, 1994. The new law provides:

Marginal Note: want of vigilance in financial operations and the right to communicate.

Second Paragraph: The persons designated by the first paragraph\footnote{See discussion supra Section V.C. for definition of persons.} [Art. 305\textsuperscript{m}], have the right to communicate observations that enable the conclusion, that assets were the proceeds of a crime to the interior authorities of penal pursuit and to the federal authorities designated by law.\footnote{PENAL CODE art. 305\textsuperscript{m} Marginal Note and Para. 2 (Switz.).}

Basically, financier have the right to communicate substantiated suspicions of criminal activity involving their financial institutions to Swiss authorities. A discussion of the process of enacting the new law and a detailed explanation of its terms and its projected effectiveness follow.

A. Legislative History: the Decision-Making Process in Switzerland

The Swiss decision-making process is unlike that of most other party-based parliamentary democracies in that decisions are not primarily enacted in Parliament and the cantons and special interest groups customarily have a great deal of influence.\footnote{Jürg Steiner, Switzerland, in POLITICS IN WESTERN EUROPE 296, 320 (Gerald A. Dorfman & Peter J. Duignen eds., 1991).} Interest groups that participate in
the pre-parliamentary phase of drafting a proposal usually have representatives who participate in the parliamentary phase as members of Parliament.\footnote{146} There are three distinct stages in the Swiss decision-making process: pre-parliamentary, parliamentary, and referendum stages.\footnote{147}

1. Pre-parliamentary Stage

In the pre-parliamentary stage, an expert committee drafts a bill. Representatives of special interest groups in favor of or opposed to the proposed bill usually compose such a committee.\footnote{148} This way, those whom the legislation will affect are represented and those who have special technical knowledge in the area being legislated are involved.\footnote{149}

In this case, Deputy to the Council of States first asked the Federal Council for its opinion on the problem of organized crime in Switzerland.\footnote{150} The Federal Council then charged the Federal Office of Justice on September 11, 1989 to direct an interdepartmental group to examine measures that could be taken concerning money laundering.\footnote{151} Following the group's proposal that suggested a right to communication, a consultation between all the cantons was conducted. All the cantons and the federal tribunal, which participated in the consultation,\footnote{152} came to a consensus approving of the right to communication.\footnote{153}

Before reaching the parliamentary stage, the Federal Council reviewed the results of the consultation and instructed the Federal Department of Justice and Police to elaborate on proposed legislation and to solicit the opinion of the Expert Committee which had been charged by the Federal Council with revising the Penal Code.\footnote{154} The Federal Council has little leeway in this process. Special interest groups and associations influence the decision as to who should be appointed to an Expert Committee.\footnote{155} Although deliberations of Expert Committees always proceed behind closed doors and may take many different forms, the goal

\footnotesize{\begin{tabular}{l}
146 Id. at 319. "This is in sharp contrast to the American system, where the place of special interest groups is to lobby Congress itself." Id. \\
147 Id. at 317. \\
148 Id. at 318. \\
149 Id. \\
150 Message, supra note 3, at 269. \\
151 Id. at 271. \\
152 The duration of the consultation was from March 11 to June 30, 1991. Id. at 279. \\
153 Id. at 280-82 (several cantons even advocated an obligation of communication). \\
154 Id. at 285. \\
155 Steiner, supra note 145, at 318.
\end{tabular}}
usually is to reach a consensus among the participants. The participants of the Expert Committee discussing the bill in this case, contemplated an eventual transformation of the right to communicate into an obligation to communicate. They decided, however, that the obligation to communicate would be too harsh and made no material modification to the project.

2. Parliamentary Stage

After the Expert Committee reports to the Federal Council, the Federal Council submits the draft bill to Parliament. If a consensus has been reached in the pre-parliamentary stage then Parliament will usually approve the consensus. One reason for this is that many special interest group representatives on the Expert Committees are also members of Parliament. In the case of the new law, the Expert Committee charged with examining and elaborating on it did come to a consensus. On December 9, 1993 the Canton Council discussed and voted on the proposal. The proposal was approved unanimously.

Since the new law was drafted by members of the banking community, was approved of by the banking community, and largely affects the banking community, the likelihood of it also passing in the National Council was great.

156 Id. at 319.
157 Id. at 319.
158 Id., supra note 3, at 287. The protocols of the discussion are, however, not available since discussions were conducted behind closed doors. Letter from Jean-Claude Hoyz, Document Center, Swiss Federal Assembly, (Nov. 23, 1993) (on file with author).
159 Steiner, supra note 145, at 319.
160 If no consensus is reached by the Expert Committee, Parliament will have to decide between the opposing positions. The political parties (Free Democrats, Social Democrats, Christian democrats, Swiss People's Party, and some minor parties) will take an official position and the vote may be close. See id. at 319.
161 Id.
162 Id., supra note 3, at 287; Protokol 1, supra note 40, at 89.
163 The Canton Council, or "Ständerat" in German, is a chamber of Parliament.
164 The vote was unanimously in favor by 21 votes, but since this was not a majority of all the members (there are 44 Ständerat members) there had to be a second vote at which 23 members unanimously voted in favor of the bill. Protokol 1, supra note 40, at 138.
165 National Council is called the Nationalrat in German.
166 Discussion took place in the Nationalrat (which is similar to the House of Representatives in the United States) in the spring of 1994. Letter from Hoyz, supra note 157.
On March 2, 1994, the bill was approved in the National Council. The vote and discussion of the National Council was significant in that the alternative, the obligation to communicate, was voted on as well as the proposed right to communicate. The minority that argued for the obligation to communicate, raised several arguments. One argument was that the right to communicate is less than what was suggested by the international community who urged the obligation to communicate and Switzerland would appear to be lagging. The other argument was that the right to communicate still leaves financiers all the options, even if they have substantiated suspicion that funds may have a criminal origin. The obligation to communicate on the other hand, would provide clarity and coherence as to the financiers duties. The majority countered that Swiss legislators should take one step at a time. The main problem with enacting a duty to communicate at the time of the National Council’s discussions was that no guidelines had been prepared as to how the obligation to communicate was to function, and what the exact requirements and sanctions would be. If the obligation to communicate had been enacted in August, 1994, it would have been considered a “lex imperfecta” in Switzerland. Significant, however, is the commitment Swiss legislators are showing to continue the fight against money laundering even to the point of eliminating Swiss banking secrecy entirely by providing for an obligation to communicate.

3. Referendum Stage

Should there prove to be opposition in the National Council to a bill, a national referendum may be held. This process involves referendum campaigns which constitute a battle between the active interest groups. Again, political parties usually play only a secondary role. The deadline for a Referendum concerning the new law was July 4, 1994. No referendum was held, and the law is currently in force.

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166 Protokol 2, supra note 67, at 3007. The duty to communicate received a minority of 58 votes, and the right to communicate received 101 votes. None was opposed.
167 Id.
168 Id.
169 Id.
171 Steiner, supra note 145, at 320.
172 Id.
B. Comment on the Law

Although Federal Court decisions may further elucidate the meaning of the new law, its provisions currently must be examined in light of the language of the Message, discussions in the Canton Council, and discussions in the National Council. The following closely examines the entire language of the new law, and attempts to clarify what will be required of financiers in order to assert their right to communicate. With the exception of a few minor ambiguities, the new law is clearly defined on its face.

1. Persons Designated by the First Paragraph

“Persons designated by the first paragraph” is defined by the Federal Council as “persons working in banks, financial institutions, fiduciaries, those operating in auction sales as well as placed consultants, financial administrators, foreign exchange officers, sellers of precious metals and business advocates.” This includes the bank sector and the non-bank sector which comprise the financial market in Switzerland. For the first time, non-bankers are included in Swiss measures taken against money laundering. In the Canton Council discussions, the question was raised whether attorneys are included in this description. Minister of Justice Koller clarified that attorneys are only included in the provision insofar as they are acting as business attorneys dealing with estate planning of financial assets. Any traditional attorney activities are not included in the right to communicate, which means that attorney confidentiality is completely unaffected by the new law.

2. The Right to Communicate

Financiers have “the right” to communicate. Basically, the Federal Council defines this right as resolving the conflict which currently exists in the law between the banking secrecy laws and the possibility of being criminally liable for money laundering. The new law allows a

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172 Message, supra note 3, at 316. The persons described here will hereinafter be broadly referred to as “financiers.”
174 Id.
175 Protokol 1, supra note 40, at 109.
176 Id.
177 Id. Article 321 of the Swiss Penal Code is the provision punishing the violation of professional secrecy. PENAL CODE art. 321 (Switz.).
178 Message, supra note 3, at 322.
financier to report suspected criminal activity in the financial market, which under current law can lead to criminal liability. This reporting is necessary to advance the policy to which Swiss law makers have committed themselves; combatting organized crime and money laundering. Even if financiers wrongly claim that funds were derived from a crime, they cannot be held criminally liable. The right in and of itself eliminates the duty of a banker to maintain confidence in all cases.

3. Right to Communicate

The new law provides the financier with the right to “communicate.” In describing the type of communication, the Federal Council specifies here that because of possible future investigation or litigation it is necessary that the financier be able to offer proof supporting the communication to the competent authority at the time of the communication. Simple accusations are not sufficient. Financiers must be prepared to verify and document any claim they wish to make of suspected criminal activity.

4. Communicating Observations

Financiers may communicate “the observations that enable the conclusion that assets were the proceeds of a crime.” The Federal Council points out that not just any information is to be transmitted to authorities, but only “that which permits ‘establishing that assets originated from a crime.’” Examples of “observations” reported are pertinent observations, questions, doubts, and all other useful information to establish proof. These examples indicate that more than an unsubstantiated suspicion, but less than certainty, is required to report to the authority; the new law does not require knowledge. Exactly what level of suspicion is necessary is not specified. By “observations” the Federal

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179 Id. at 316. "The right accorded by the present disposition . . . intends . . . only the justification of a comportment in itself penally reprehensible - of knowing the violation of the banking secret . . . - and illicit to the civil plan, being in violation of obligations of discretion of the agent." Id. at 316.

180 Id. at 317. The Message does not specify what level of mistake is allowed. It could be only negligence or even intentional wrong claims.

181 Id. at 317.

182 Id. at 322.

183 Id. at 317.

184 Id. at 317.

185 Günther Arzt claims that the Message leaves so much uncertainty as to what level of suspicion is required that only a “logical second” exists in which a banker can
Council does not mean proof in a strict sense nor simple vague impressions but something "founded on suspicion" that can be brought before the authorities. 166

"Assets" which are involved in the financial transaction the financier considered suspicious should be interpreted in a broad sense. "It also encompasses currencies, titles, the rights of trusts/credit in general, metals and precious stones, works of art, all other sorts of personal property as well as real estate and the rights attached to it." 167 Again, the Federal Council intended this term to expand the means of combating money laundering beyond the bank sector to the rest of the Swiss financial market.

5. Reporting Suspicious Assets

The report is to be made to "interior authorities of penal pursuit and to the federal authorities designated by the law." 168 The Federal Council does not want to define this too narrowly, as authority structures may change. 169 As it stands, difficulties may easily arise in practical application if state authorities, for example, have no training or experience for dealing with the kind of information banks may provide them. The Federal Council recognizes this potential difficulty. The Canton Council discussed a proposal for the creation of a Central Station specializing in the combat of organized crime. This Central Station would be assigned the duty of coordinating data concerning organized crime and providing contacts to foreign service areas. 190 They could then dispatch their own police liaison officer to important foreign destinations. 191 Priorities include Washington or Lyon (Interpol) through which information could efficiently be exchanged. 192

According to the Message "[w]hatever will be the future evolution of

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166 Message, supra note 3, at 317.
167 Id.
168 Id. at 322.
169 Id.
190 Protokol 1, supra note 40, at 99.
191 Id.
192 Id.
the structures for the prevention and the repression of crime, fiscal, customs authorities, or the police of foreign countries are not included among the destinations of the communication.\textsuperscript{193} The report is to be made to Swiss authorities and only to Swiss authorities. The new law is not designed to aid foreign countries in their investigations, but only to aid Swiss authorities in combatting money laundering and organized crime.

6. Summary

The main problem with the language of the new law is its vagueness concerning the amount of suspicion and proof that is required.\textsuperscript{194} The Federal Council probably intended the question to be resolved by the federal or cantonal courts applying the law. The language of the new law clearly defines the most important terms of the provision, which are the legal right to communicate and the classification of who has that right.\textsuperscript{195} The details of the right to communicate are simply left to the courts to decide in their cases of first impression under this law.

C. The New Law Is Properly Tailored to Meet the Needs

1. Curbing Money Laundering Activities in Switzerland

As noted above bankers did not report money laundering after the passage of the 1990 legislation creating Article 305\textsuperscript{194a} and 305\textsuperscript{194b} because they could be held criminally liable for violating Article 47 of the Banking Code protecting banking information if their conclusion that money laundering activity was taking place proved wrong.\textsuperscript{196} The new law eliminates this problem by providing financiers the right to communicate signs of money laundering to Swiss authorities in order that false suspicions will not be criminally punishable.\textsuperscript{197}

The new law also solves the problem of money laundering in the non-banking sector of the Swiss financial market. As discussed earlier, the bulk of the money laundering activities in Switzerland is conducted through pre-laundering activities.\textsuperscript{198} The Federal Council clearly establishes that the entire Swiss financial market is conferred the right to communicate in the new law by providing the non-bank sector with the

\textsuperscript{193} Id.
\textsuperscript{194} See discussion supra Section VI.B.
\textsuperscript{195} Id.
\textsuperscript{196} Message, supra note 3, at 270.
\textsuperscript{197} Id. at 322.
\textsuperscript{198} See supra notes 50-56 and accompanying text.
same right the bank sector is provided. The language in the Message and the Federal Council's Comment specifically addresses the problem areas perceived in money laundering activities in Switzerland. Thus, the new law may help curb money laundering.

However, whether the new law will curb money laundering is a different question. One Swiss banker perceives problems with the practical application of the law. Mainly, he cautioned that there may be a reluctance by bankers to report suspicious activities, since a thorough investigation by Swiss authorities is sure to follow. Such an investigation may easily lead to suspicions of the banker's own involvement in money laundering. Legal departments at banks will choose the option which is least likely to expose the bank to risks. The inference to be drawn from these statements is that only highly suspicious activity is likely to be reported.

Another conceivable problem is that if the financial professionals report mere suspicions, it may lead to difficulties for completely innocent clients. The prevailing fear of the obligation to communicate, which also applies to the right to communicate, is that financiers might become investigators and an extension of law enforcement in Switzerland.

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199 Message, supra note 3, at 316. An additional indication that all financiers have a right to communicate is the definition of “assets” in the Comment, which includes values that would be dealt with by non-bank institutions. Id. at 318.

200 An interesting trend in the fight against money laundering is that the emphasis has been on criminal law rules. Mario Giovanoli, Switzerland: Some Recent Developments in Banking Law, in EUROPEAN BANKING LAW: THE BANKER-CUSTOMER RELATIONSHIP 183, 198 (Ross Carnston ed., 1993). The main Article enforcing banking secrecy is not in the criminal code, but rather in Article 47 of the Banking Code. This is an indication that money laundering is often considered to be part of larger criminal activities, such as drug and arms dealings. Also, the main effect of the laws (Article 305 and the Message) is to be retributive rather than preventive. See id. Finally, however, it seems that although criminalizing money laundering was an agent in fighting money laundering, the best results will be obtained by relying on the prudent behavior of financial professionals. Id. In general, it seems that one problem concerning money laundering in Switzerland has been the belief of the general public that Criminal law rules would be sufficient to fight money laundering. Im Kampf gegen die Geldwäscherei Überschätzte Möglichkeiten des Strafrechts [Overestimated Possibilities of the Penal Code in the War Against Money Laundering], NEUE ZÜRCHER ZEITUNG, July 8, 1992.

201 Interview with Lamprecht, supra note 57.

202 Id.

203 Id.

204 Id.

205 Id.

206 Giovanoli, supra note 200, at 197.
However, since such behavior by the financier will in the long-run harm the financier, this danger is minimal.

2. Providing a Mechanism to Combat Organized Crime in Switzerland

The Message addresses the "turning plate of the service sector" part of the Federal Council's analysis, which involves the Swiss financial arena being placed at the disposition of possibly criminal clients.\textsuperscript{207} In the Canton Council discussions, Minister of Justice Koller stated with conviction that "the Federal Council is convinced, that the proposed improvements will enable a considerably more feasible combat against organized crime."\textsuperscript{208} One of the most successful tactics in fighting organized crime is to attack its financial basis, for example in this case, punishing money laundering.\textsuperscript{209} However, the problem created by financiers who intentionally put the Swiss market place at the disposal of suspect clients cannot be eliminated by a right to communicate, since they will certainly not avail themselves of it. Only an obligation to communicate suspicious activities and the provision of criminal liability for failure to do so could curb organized crime in this respect.\textsuperscript{210} The same holds true for active intermediaries on the gray market.

Although the new law may not eliminate organized crime in one fell swoop, it is a building block in the overall plan.\textsuperscript{211} Any effort to take measures against organized crime will improve the Swiss image of neutral inactivity internationally.

3. Appeasing Most International Pressure

The international community will applaud the new law's attempt at combating organized crime and money laundering.\textsuperscript{212} The United States will benefit from the new law if financiers choose to report suspicious

\begin{footnotes}
\footnote{207} "Islands of 'basic criminal' organizations" and "the risk of infiltration in the legal economy" problems are addressed by Art. 260 \textsuperscript{\textsuperscript{260}} P-CP and art. 58 ss of the Bill. \textit{Message, supra} note 3, at 274.

\footnote{208} Protokol 1, \textit{supra} note 40, at 110.

\footnote{209} Bundesblatt 1992 VI 9 (Switz.).

\footnote{210} The new law does not create an obligation of communication. This is not to say that an obligation to communicate would solve all money laundering problems in Switzerland. The obligation of communication was not included in the new law at least partially due to the fact that "the notion of an obligation to denounce is foreign to Swiss Penal Law." \textit{Message, supra} note 3, at 314.

\footnote{211} Protokol 1, \textit{supra} note 40, at 98.

\footnote{212} See discussion infra Section VI.C.3.}

\end{footnotes}
activity involving a U.S. matter. However, the United States already attained what it desired from Swiss authorities in the 1990 legislation which outlawed money laundering.\textsuperscript{213} Also, the FATF, whose review of Swiss attempts at combating money laundering is already so positive as to label Switzerland a paragon in combating money laundering,\textsuperscript{214} is likely to be extremely satisfied with the new law. The FATF had only criticized Switzerland for its failure to combat money laundering in the non-bank sector of the market place.\textsuperscript{215} Because the new law encompasses the entire financial market place, not just the banking sector, that loophole has been eliminated. On the other hand, since the interdepartmental group of the E.C. proposed an obligation to communicate for the entire Swiss financial market,\textsuperscript{216} they are unlikely to be completely satisfied with the diluted version of it - the right to communicate.\textsuperscript{217}

4. The Elimination of the Dilemma Created for Swiss Bankers by Article 305\textsuperscript{er}

There are two contrasting views on whether the new law will eliminate the Article 305\textsuperscript{er} dilemma offered by critics and proponents in Switzerland. On the one hand, the Swiss Bankers’ Association stated in an official statement to the Federal Council that the new law\textsuperscript{218} offers a feasible solution to the dilemma that bankers are confronted with.\textsuperscript{219} On the other hand, one criticism of the new law’s ability to eliminate the dilemma is presented by Prof. Dr. jur. Günther Arzt.\textsuperscript{220}

Although Arzt labels the new law as reasonable and approves of it, he emphatically denies that it will eliminate the dilemma for the Swiss banker.\textsuperscript{221} In fact, Arzt claims that not only will the right to commu-

\textsuperscript{213} See discussion supra Section V.C.
\textsuperscript{214} FATF Report, supra note 59.
\textsuperscript{215} Financial Action Task Force on Money Laundering, supra note 59.
\textsuperscript{216} See supra notes 83-85 and accompanying text.
\textsuperscript{217} Message, supra note 3, at 322.
\textsuperscript{218} It was, at the time, only a pre-draft. Id.
\textsuperscript{219} Letter from Jean Paul Chapuis & A. Hubschmid, Swiss Bankers’ Association (June 28, 1991) (on file with author). In addition to the right to communicate, the Association suggested that the bill also contain a provision that the financier also not be civilly liable if they report their findings in “good faith.” Message, supra note 3, at 322.
\textsuperscript{220} Professor of Criminal Law at the University of Bern, Switzerland. See generally Günther Arzt, Organisierte Kriminalität- Bemerkungen zum Massnahmenpaket des Bundesrates [Organized Crime - Comments to the Package of Measures of the Federal Council], in AKTUELLE JURISTISCHE PRAXIS 1187 (Oct. 1993).
\textsuperscript{221} Id. at 1188.
nicate not free the banker from his dilemma, but it will create a dilemma where there was previously none.\textsuperscript{222} Arzt explains it this way: currently there is no dilemma.\textsuperscript{223} First, under current legislation, bankers are entitled to break off all business ties with the suspected criminal without being held liable for money laundering, since the law allowed them no alternative.\textsuperscript{224} However, even if the relationship between the banker and the client has not already progressed far enough to make the banker criminally liable under Article 305\textsuperscript{225}, the pursuit to combat money laundering is hampered by a policy that encourages bankers to break off all ties with money launderers thus eliminating the possibility of prosecution since no proof can be attained. This is not in accordance of the Swiss policy of combatting money laundering.\textsuperscript{226}

Secondly, Arzt points to the “collisions in duty” defense\textsuperscript{227} which he claims could be asserted by the banker to support his theory that there is no dilemma in current Swiss law concerning banking secrecy.\textsuperscript{228} Another Swiss legal scholar describes this concept more generally as the “justification due to an emergency”\textsuperscript{229} or as a “preservation of a higher interest” defense.\textsuperscript{230} The argument applies when bankers are presented with a situation where they discover suspicious criminal activity, yet are bound by banking secrecy not to report the activity. According to these Swiss scholars, they should be able to side-step their absolute duty of banking secrecy in order to discover whether the law requires them to report the activity in order to escape criminal liability themselves.\textsuperscript{231} Additionally, the related defense of “preservation of higher interests” refers to the interest of securing assets that are of suspect criminal origin.\textsuperscript{232} There is currently a debate among legal scholars in Switzerland concerning the applicability of this defense.\textsuperscript{233} However, the Federal

\textsuperscript{222} Id. at 1193.
\textsuperscript{223} This is contrary to what the Federal Council, the Expert Committee, and the Bankers’ Association believe. Message, supra note 3, at 318.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} HARRO OTTO, PFLECHTKOLLISION UND RECHTSWIDRIGKEITSURTEIL 38-53 (1974);
“Pflichtenkollision” or the “collision in duty” defense is a nebulous concept over which Swiss legal scholars themselves are not in agreement. Message, supra note 3, at 315.
\textsuperscript{227} Arzt, supra note 221, at 1193. The “collision of duties” defense is not founded on law; it is a non-legal defense. Message, supra note 3, at 315.
\textsuperscript{228} The concept of an “emergency” defense derives from Article 34 of the Swiss Penal Code. PENAL CODE art. 34 (Switz.).
\textsuperscript{229} Stratenwerth, supra note 185, at 112.
\textsuperscript{230} Id. at 113.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
Council takes the position that no defense exists for bankers in the dilemma situation created by Article 305°.\textsuperscript{233}

The new dilemma being created by the new law that Arzt perceives arises because of timing problems. If financiers communicate too early, before they can substantiate their suspicion, they would be criminally liable for violating banking secrecy. On the other hand, if financiers communicate too late, they would be liable for money laundering.\textsuperscript{234}

Basically, Arzt claims that the new law only provides one small "logical second" in which the financiers' rights to communicate exonerate them from all liability.\textsuperscript{235} Arzt fails to recognize that it is quite reasonable for Swiss legislators to require some proof or signs that substantiate the financier's suspicion of criminal activity. More than likely, whatever gave rise to the suspicion would be enough to substantiate it.\textsuperscript{236} Additionally, financiers are not likely to report suspicions without being able to substantiate them because they would risk losing clients.

The underlying concern evident in the Arzt article is that Swiss authorities might use financiers as secret detectives to investigate money launderers.\textsuperscript{237} This is not entirely avoidable since more information may be required to prosecute suspects after the initial communication has been made, and the evidence needed may not be readily available. However, since Swiss financiers approve of the new law because of its value in combating money laundering, this criticism lacks significance.

The Commission reviewing the new law, aware of Arzt's criticism, decided that no changes should be made.\textsuperscript{238} Although the right to communicate may not eliminate all delicate questions concerning the line between the right to communicate and the duty of confidentiality, which the Commission admits,\textsuperscript{239} the new law proves the dedication of Swiss legislators have to be innovators in combating organized crime and money laundering. The right to communicate will ensure that financiers, who report suspicious activities and can substantiate their claims, are immune

\textsuperscript{233} Message, supra note 3, at 315.

\textsuperscript{234} This is the dilemma which exists under current Swiss law. Arzt, however, believes that defenses existed previously which provided the banker with an "out." The dilemma he sees being created is actually a much narrower one which is unlikely to exist since it would involve financiers reporting suspicions that they absolutely could not substantiate. The new law would not protect the financier in case of such a communication. Id. at 317.

\textsuperscript{235} Arzt, supra note 221, at 1194.

\textsuperscript{236} See supra notes 182-87 and accompanying text.

\textsuperscript{237} Arzt, supra note 221, at 1195.

\textsuperscript{238} Id.

\textsuperscript{238} Protokol 1, supra note 40, at 88.
from criminal prosecution for breaching banking secrecy. In such instances the dilemma is eliminated for the financier.

D. Swiss Banking Goes Unharmed

Switzerland is a “nation of bankers.”\textsuperscript{240} The awareness by the international community of the change in Swiss banking secrecy laws creates the possibility that cautious investors may choose to do their investing in other countries with more stringent secrecy laws. According to one Swiss banker,\textsuperscript{241} however, the new law should have no perceivable effect on Swiss banking or the volume of money coming into Switzerland.\textsuperscript{242} His conclusion is based on the fact that the strength in Swiss banking is in corporate, not private, banking. It is a myth that Swiss banking secrecy, which allows for money laundering abuses, is the cornerstone of Swiss banking.\textsuperscript{243} Banking secrecy has often overshadowed “the diversity of services and depth of technical expertise which are the true hallmarks of the Swiss [banking] system.”\textsuperscript{244}

Today in Switzerland foreign business accounts are responsible for one-third of the total banking profits.\textsuperscript{245} Among Swiss bank’s most efficient services are investment consulting and portfolio management.\textsuperscript{246} Additionally, the Swiss Financial Center has a major currency market “providing foreign-exchange facilities for transacting and safe-guarding international trade and guaranteeing unlimited, around the clock access to liquid funds in any currency.”\textsuperscript{247} Because of the expertise and stability in Swiss banking, a change in the banking secrecy law will not significantly dent Swiss banking.

\\textsuperscript{240} This is considering that in 1988 there existed a total of 5,600 banks and branch offices. \textit{Presence of Switzerland}, supra note 1, at 132.

\textsuperscript{241} \textit{Id}.

\textsuperscript{242} \textit{Id}.

\textsuperscript{243} \textit{Deak & Celusak}, supra note 18, at 223.

\textsuperscript{244} \textit{Id}. Historically Switzerland benefitted from the political instability of its neighbors. During and after the two world wars there was a considerable inflow of capital. \textit{Presence of Switzerland}, supra note 1, at 132. These favorable banking conditions and Switzerland’s security-conscious population “elevated Switzerland to one of the world’s major financial centers.” \textit{Id}. Also, Swiss banking legislation, which requires banks to maintain high levels of capital reserves, created the essential investor security base. \textit{Id}.

\textsuperscript{245} \textit{Presence of Switzerland}, supra note 1, at 132.

\textsuperscript{246} \textit{Id}.

\textsuperscript{247} \textit{Id}.
VII. NEW PROPOSAL: SWISS FEDERAL LAW CONCERNING THE FIGHT AGAINST MONEY LAUNDERING IN THE FINANCIAL SECTOR

Swiss legislators committed to the combat against money laundering proposed to introduce a law containing seventeen articles crafted to fight money laundering in a comprehensive manner. The Draft specifies the duties of the financiers in Switzerland so that money laundering can be prevented and that penal authorities have the necessary legal instruments at their disposal to fight this kind of criminal activity. This law will be different from the new law discussed in this Note in that it will not be part of the Penal Code, but will be an independent federal administrative law.

The most significant Article in the Draft, is the obligation for the financier to communicate. According to the Draft, the right to communicate in PC Article 305 Paragraph 2, and the obligation to communicate in GwG article 8 VE, are to be understood as the same concept. The

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248 Swiss Money Laundering Draft Preamble, supra note 170. This proposal, which includes an obligation to communicate for the financier, was introduced while the new law, PENAL CODE art. 305 Marginal Note and Para. 2, was still under consideration in the Parliament. See Bundesgesetz zur Bekämpfung der Geldwäscher im Finanzsektor, [Federal Law to Combat Money Laundering in the Financial Sectors] GwG art. 8 VE (Switz.) [hereinafter Swiss Money Laundering Draft Act]; Message, supra note 3.

249 Swiss Money Laundering Draft Preamble, supra note 170, at 2.

250 Id. at 3.

251 Swiss Money Laundering Draft Act, supra note 248.

1. Whoever knows or has a substantiated suspicion, that an act punishable by Article 305 of the Swiss Penal Code was committed, must inform the appropriate authorities of penal pursuit or the federal authority of the police without delay.

2. In this case, the business relation may not be commenced or the transaction completed, until the decision of the federal authorities, according to Article 10 or the authorities of penal pursuit according to Article 11 has been made, unless, a delay is not possible. If within 5 workdays no decision has been made, then a business relation can be commenced or the transaction can be completed. The relevant files must in any case be secured.

3. Until the decision according to Paragraph 2, but the latest during the deadline of five workdays, neither those concerned, nor third persons may be informed about the communication or any information, unless the denial of a transaction must be explained. The authorities of penal pursuit and the federal authorities may extend this deadline.

4. Whosoever after the application of the care, which may be demanded of him according to the circumstances, offers a communication or does not complete a transaction according to paragraph 2, cannot be made liable because of a violation of the administrative-, professional- or business secrecy or be held civilly liable.

Id.

252 Id. at 20.
difference is that the obligation to communicate requires knowledge or a substantiated suspicion that a criminal activity according to PC article 305bis was actually committed, while the right to communicate only requires evidence of a suspicion that monies have a criminal origin. What is to result if the Draft is enacted as written, is a spectrum of awareness, which begins with a suspicion and ends with certainty. Where there is at first a right to communicate for the financier, and finally an obligation to communicate, once there is evidence that PC article 305bis was violated. The drafter’s intention was that the two laws would complement each other in this way.

At last, it is possible to speculate that the end of Swiss banking secrecy may be near should this Draft be enacted. Discussions in the National Council concerning the new law clearly indicated that Swiss legislators are willing to make drastic changes in Swiss law in the name of fighting money laundering. Until the financial sector's reactions concerning the Draft manifest themselves, however, the likelihood of its passage is difficult to assess. Considering the recent support of the new law by the financial sector, the view is likely to be prevalent that the right to communicate is sufficient for the time being.

VIII. CONCLUSION

The new law does not eliminate the basic principle of banking secrecy established by Article 47 of the Swiss Banking Code. It simply provides an exception for financiers who are in the position of being able to substantiate suspicions of criminal activity involving Swiss financial institutions. With the exclusion of this carefully carved exception, Swiss banking secrecy remains unaffected.

The new law is well-tailored to meet the majority of the needs and problems that the Federal Council recognized in Switzerland, especially concerning money laundering and organized crime. Even money launderers who engage in pre-laundering schemes involving non-banking financial institutions will encounter great difficulty in Switzerland when presented with unwilling and suspicious financiers. The financier in Switzerland finally has a weapon to strike out against criminal abuse of the Swiss financial market. The new law will have a deterrent effect.

Whether the new law proves successful in its aim at curbing money laundering and organized crime will take longer to assess. The Swiss
financial market’s image, on the other hand, will immediately experience an intended improvement. Swiss legislators, well aware of the value bestowed by international approval of legislation aimed at preventing money-laundering, were quick to announce the proposed bill (now the new law) to the international press on the day the bill was presented to the Federal Council. By the speedy approval of the new law and the recent ratification of the European Agreement on Fighting Money Laundering in 1993, Switzerland intends to signal to the world that its financial market is no longer the financial haven the world perceives it to be. The success of the legal change is not determined by the enactment of the law, but by the financiers’ willingness to avail themselves of their legal right to communicate substantiated suspicions to the authorities and the authorities’ ability to handle the information effectively. Although the right to communicate may not be the end all solution to money laundering in Switzerland it is a tool that the financier was in dire need of. Fighting money laundering in Switzerland is an ongoing process which may include an eventual obligation for the financier to communicate suspicious activity as foreseen in the Draft proposed in January of 1994.

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these dangerous forms of criminal activity. Protokol 2, supra note 67, at 2025.


258 “The best criminal law norms will not be useful to us at all, if they are not as well applied efficiently at the front.” Protokol 2, supra note 67, at 2026.