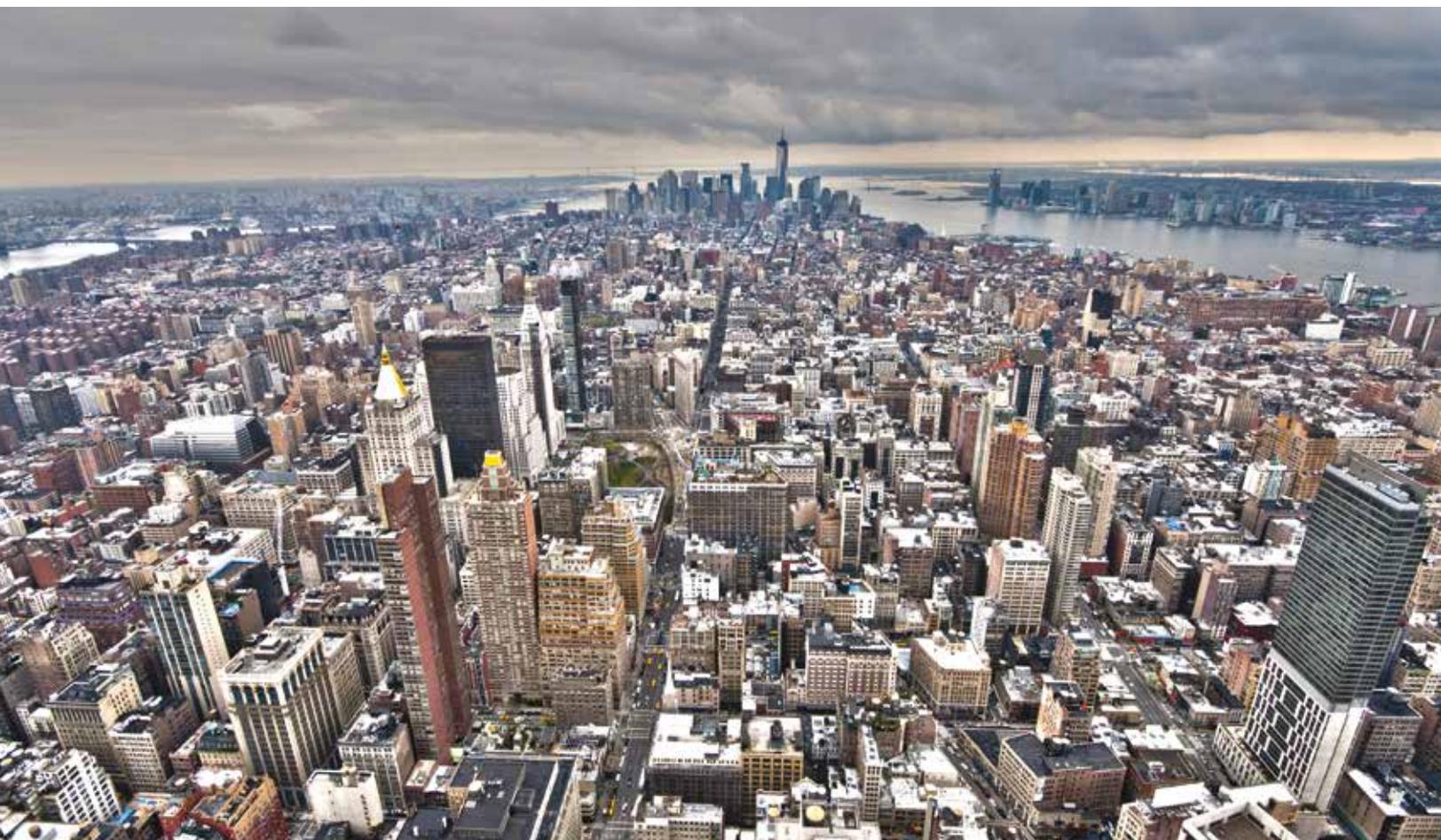




global witness

# LOWERING THE BAR

HOW AMERICAN LAWYERS TOLD US HOW TO  
FUNNEL SUSPECT FUNDS INTO THE UNITED STATES



JANUARY 2016

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# SUMMARY

The United States has long been a place for corrupt foreign government officials to keep and spend their money. This report exposes the flaws in the U.S. legal system that enable this corruption and threaten American interests. Corruption is a major problem which has a devastating human cost. In poor countries it kills people and traps millions more in poverty. It also undermines the global economy and threatens national security, affecting all countries.

Global Witness sent an undercover investigator to meet with 13 New York City law firms, posing as an advisor to an African minister who wanted to bring millions of dollars of suspect funds into the U.S. Our investigator told the lawyers that the money represented payments to him for helping companies receive mining concessions in his country. Our investigator had an introductory discussion with the lawyers, including the then-president of the American Bar Association (ABA), in which he asked how to move funds that should have raised suspicions of corruption. He secretly filmed what they said. The meetings were all preliminary, prior to any of the law firms taking on the investigator as a client.

All but one of the lawyers provided suggestions on how one could move suspect funds into the U.S. This is important: if you have suspect funds to move, you need access to the legal and financial system to hide money, and move it around without detection from law enforcement.

The lawyers that our investigator met with described a system which is wide open to abuse. Checks and balances either do not exist, or are weak, making it far too easy to move suspect money around without detection.

Our findings have been covered by the U.S. news program *60 Minutes* and the *New York Times*. This briefing details what our investigator found and what needs to be changed in order to stop the corrupt bringing suspect funds into America.

Global Witness' investigator found:

- Lawyers from 12 of the 13 law firms he visited in preliminary meetings suggested using anonymous companies or trusts to hide the minister's assets. The lawyers effectively suggested that the minister put his assets in the name of a company, rather than his own name. It is legal to have an anonymously-owned company, and some regard them as part of standard business practice, but such companies are the vehicle of choice for tax evaders, corrupt politicians and other criminals to hide their money. Worryingly, lawyers from 11 of the firms recommended using American companies.
- Several lawyers had additional suggestions for how to move suspect funds into the U.S. One option mentioned was to use the law firms' own bank accounts, as this would provide a further layer of anonymity to keep banks from determining who the money really belonged to. Another was to have the lawyer act as a trustee of an offshore trust and use this position to open a bank account. Another was to get a U.S. bank account by going to a small bank, on the presumption that smaller banks are less scrupulous in monitoring their clients.
- Only two of the law firms told the investigator that they could not help: one during the meeting, and another by email after the meeting.
- Most of the lawyers asked for some information about the source of the minister's funds and some of them mentioned the need to know the minister's name before taking him on as a client and/or the need to carry out further checks on the minister and his money before taking him on as a client. None of the lawyers actually agreed to take on the investigator as a client, and we do not know what conditions the lawyers would have imposed before doing so.



*John Jankoff, partner at Jankoff and Gabe.*



*Gerald Ross, partner at Fry and Ross.*



*James Silkenat, partner at Sullivan and Worcester and, at the time of filming, the president of the American Bar Association.*



*Marc Koplik, partner at Henderson and Koplik.*

Photos from Global Witness' undercover footage.

- Most of the lawyers failed to clearly say that they would not assist illegal conduct, and most did not insist on information that would have been necessary to determine whether the client's plans were illegal.

This is what is needed to fix the problem:

**The U.S. should put information about who ultimately owns and controls American companies into the public domain for all to see.** At present, the lack of information available on the people behind

American companies is a gift to individuals who want to use them to hide their identity and move their loot.

**The people who set up companies and trusts – lawyers, accountants and company service providers – should be required to be on the lookout for money laundering.** At present none of these people are required to carry out anti-money laundering checks on their customers.<sup>1</sup> They should be, especially when they are carrying out activities such as setting up companies and managing clients' money.

# HOW AMERICA'S LEGAL SYSTEM FACILITATES CORRUPTION

Corruption lies behind some of the worst problems of our time. It destroys livelihoods, economies and the environment in some of the poorest countries in the world. It keeps brutal dictators in power until their citizens get so fed up they pour onto the streets in violent protest, as has recently been seen repeatedly around the world.

The World Bank estimates that about \$1 trillion is paid every year in bribes.<sup>2</sup> The United Nations Office on Drugs and Crime estimates the total value of money laundering to be around \$2.1 trillion in 2009, or 3.6% of global GDP.<sup>3</sup> What is often not seen though is the role that western institutions, such as banks, law firms and anonymously-owned companies play in facilitating this problem.



Photo: Stockphoto.com/Christian Wheatley.

*This is what people tend to think of when you talk about secrecy jurisdictions, but in fact the U.S. is the most popular place among the corrupt in which to incorporate an anonymous company.*

Despots usually do not want to keep all of their ill-gotten money in their own country, because they fear losing it if they are thrown out of power. Instead they want to move it someplace where it is fun to spend it, like New York, Miami or London. And they need help getting it out without anyone noticing. In almost all cases they need lawyers and bankers to help them out.

There is plenty of evidence of the vulnerability of the U.S. to corrupt funds, and the role of lawyers:

- *The U.S. is the most popular place for corrupt government officials to create anonymously-owned companies.* A World Bank survey of more than 200 cases of grand corruption found that the U.S. was the most sought after destination for corrupt government officials to incorporate a company.<sup>4</sup>
- *The U.S. is the easiest place in the world to create anonymously-owned companies, according to a 2014 academic study.* The study looked at the willingness of lawyers and other professionals to set up a company with anonymous owners for someone who sounded like they posed a corruption or terrorism risk, or simply wanted to stay anonymous.<sup>5</sup>



Photo: Global Witness.

*Global Witness' report compiles cases of fraudsters, mobsters, money-launderers, tax-evaders and corrupt politicians using anonymously-owned American companies to cover their tracks and evade the authorities.*



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*The son of the President of Equatorial Guinea's \$30 million Malibu mansion was seized by the Department of Justice to settle corruption allegations.*

- *Ordinary Americans are harmed by anonymously-owned companies.* Global Witness' report, *The Great Rip Off*, was one of the first to compile cases of fraudsters, mobsters, money-launderers, tax-evaders and corrupt politicians using anonymously-owned American companies to cover their tracks and evade the authorities. The 22 cases from 27 U.S. states represent just the tip of the iceberg.<sup>6</sup>
- *Corrupt dictators, and their families, have used anonymously-owned companies and lawyers to bring money into the U.S.* A particularly notorious case is that of Teodorin Obiang, son of the President of Equatorial Guinea, and a government minister, who allegedly used the services of a number of U.S. professionals, including two American lawyers, to move at least \$110 million into the U.S. The lawyers helped him to incorporate anonymous companies in California and then helped these companies get American bank accounts and buy luxury property.<sup>7</sup> In October 2014, the U.S. Department of Justice seized some of that luxury property, in settlement of allegations that his assets were the proceeds of corruption.<sup>8</sup> Obiang contested the charges and settled without admitting any wrongdoing.<sup>9</sup>
- *High-end U.S. real estate is often bought via anonymously-owned companies.* In February 2015, the *New York Times* published 'The Towers of Secrecy', a five part exposé of how some of the most expensive real estate in New York was bought through anonymously-owned companies. The *Times* revealed how foreign officials and their family members funneled millions of dollars into Manhattan property, all while hiding their identity behind secretive companies. Shell companies were behind nearly half of all American residential purchases over \$5 million in recent years.<sup>10</sup>

Global Witness went undercover to speak to the people who should understand the potential for abuse that this lax system presents – the lawyers themselves.

# OUR INVESTIGATION

Global Witness’ investigator posed as an advisor to an African minister of mines. He visited 13 law firms in New York for one initial meeting and was never retained as a client. He told the lawyers that:

- The minister had been able to accumulate millions of dollars paid to him by companies seeking mining rights in his country.
- The minister wanted to get the money into the U.S. in order to buy a high end brownstone in New York and to perhaps buy a Gulfstream jet and/or commission a yacht.
- It was important that the minister’s name be kept secret.

- He used terms intended to raise suspicion. Depending on the meeting, these included the phrases “grey money”, “black money”, or “facilitation payments”.
- In the interviews with John Jankoff and Gerald Ross, the investigator explicitly stated that the minister wanted to bring bribe money into the U.S.

The investigator’s character was deliberately designed to raise red flags with the lawyers. Throughout the meetings the investigator repeatedly made comments that were designed to raise suspicions. Guidance agreed by the international community, and the voluntary guidelines produced by the ABA to combat money



Photography: iStockphoto.com/gregobagel, msubhaddeep and Flightlevel80.

*Our investigator pretended to be an advisor to an African minister who wanted to buy a brownstone in Manhattan, and perhaps buy a Gulfstream jet and/or commission a yacht.*

laundering, specify various things that might indicate money laundering.<sup>11</sup> While these two sets of voluntary guidelines do not technically apply until the client has formally engaged the lawyer, the investigator's story presented three types of recognized risk: (1) he was from West Africa, a region well-known for high level corruption (a 'geographic risk'); (2) he said the person who wanted the law firm's services was a government minister who, in anti-money laundering parlance is a 'politically exposed person' or 'PEP' (a 'client risk'); and (3) he said he wanted anonymity and to conceal the ownership of any companies that were set up (which are 'service risks').

With one exception, all of the lawyers that our investigator spoke to provided suggestions on how to move these questionable funds into the U.S., while concealing the identity of the minister.

*Mark Koplik, a partner at Henderson and Koplik: So we have to scrub it at the beginning, if we can, or scrub it at the intermediary location that I mentioned.*

All the lawyers who provided suggestions stated that they would have to do further checks on the minister before taking him on as a client. A number of them suggested that they would have to reassure themselves that no crimes had been committed. Global Witness' investigator did not hand over any money, and was never taken on as a client.

However, one lawyer, Jeffrey Herrmann, refused to provide any suggestions on how to move the money. After hearing our investigator's cover story, he kicked him out of his office.<sup>12</sup>

*Jeffrey Herrmann, an independent attorney: It's not for me, it's, it's too grey for me. [...] I'm not interested.*

*Investigator: Do you know anybody who would be able to...*

*Herrmann: I don't think so and I wouldn't recommend it either. Because those persons would be insulted.*

Why did the other lawyers did not behave in the same way?

To see videos of the meetings with the lawyers named in this report go to [www.globalwitness.org/shadyinc](http://www.globalwitness.org/shadyinc).

## The lawyers' suggestions on using anonymous companies and other structures

At the preliminary meetings, 12 of the 13 lawyers suggested using anonymous companies or trusts to hide who owned the house, jet or yacht. All but one of these lawyers recommended using American companies, with New York or Delaware Limited Liability Corporations (LLCs) being a particular favorite. Some lawyers suggested that these companies could in turn be owned by offshore companies or trusts.

*Gerald Ross, a partner at Fryer and Ross: If he's buying something... let's take the Brownstone for example, that's easy. Depending how much he wants to spend, there's lots of choices of Brownstone. But he can, let's say he buys one for \$5m, which is an average kind of Brownstone, nothing special [inaudible]. But so he buys one for \$5m and I've handled that kind of transaction for offshore clients. What would happen is we'd form an LLC to own the building, 123 LLC whatever, nothing to do with him.*

*Investigator: Why more than one?*

*Ross: No, I just used that artificial name, I'm sorry. ABC, just a name, nothing doing, nothing identifying. It doesn't identify him, it doesn't identify his country. It's incorporating address would probably be here.*

\* \* \*

*John Jankoff, a partner at Jankoff and Gabe: ...[T]he corporation in Delaware would be cleaner and freer.*

*Investigator: What do you mean cleaner and freer?*

*Jankoff: Delaware would not be as observant of the corporation and what it does as New York would be.*

Another layer of protection can be provided by having a ‘nominee’ or a ‘straw man’ listed in place of the real owners and directors. Such nominees are a dream come true for someone like the fictitious minister: they enable him to place more distance between his suspect funds and his name.

*Investigator: One crucial point: because the minister is a politician, and there is more and more pressure as well on those countries in Africa to be more transparent and do something against corruption. It's corruption, but we name it differently, as I told you. So, he is giving lots of speeches about all the measures the government has put into force against corruption and so on. So if his name is in or is out...*

*Jankoff: He would set up this Swiss bank account. If it's not in his name, then he needs what is known as a straw man.*

Another method suggested by some of the lawyers was to use an offshore trust, which is an even more secretive legal structure, to hide the true ownership of the assets, including the Gulfstream jet that our investigator said that the minister wanted to buy.

*Ross: [You] probably want to set up a trust. I'm a trustee of a trust with a client. The trust would, might even be offshore. Probably should be. That would fund the airplane deal. You basically want a couple of layers.*

### **The lawyers' suggestions on how to open a U.S. bank account**

In order to own a big house, yacht and plane in the U.S., it is important to have an American bank account to do things like pay staff salaries or property taxes. United States banks, unlike lawyers, are required to do anti-money laundering checks on their customers, and to do extra-



Photo: Christian Aid and Mano Mylvaganam.

*Like a Russian doll, companies can be stacked inside each other, with each layer of ownership providing another degree of anonymity.*

stringent checks on high risk customers, such as foreign politicians. At the preliminary meetings, some of the lawyers the investigator spoke to had suggestions on how to reduce the chances of rigorous scrutiny by the bank.

One firm noted how some people use a small bank that requires less detail on ownership of funds.

Another lawyer, Gerald Ross, described using a structure involving a trust to conceal the true owner of a company (in this case an LLC), which in turn could open a bank account. For example, he suggested he could be the trustee himself and said that he, as the trustee, could open a U.S. bank account for the minister.

*Investigator: Who would set up the LLC [bank] account?*

*Ross: I would. I'd just go to the bank and say listen, I've got a new situation. This asset's been sold. I shouldn't really keep the money in my escrow account for more than a short time. So we'll set up an account in the name of that LLC, which is owned by the so-and-so trust of which I'm trustee.*

## The lawyers' suggestions on how to get suspect funds into the U.S.

Some lawyers gave suggestions on how to get the suspect funds into the U.S., and outlined how easy it was to do so.

One of the lawyers, Marc Koplik, suggested using smaller firms of investment advisors as described in the quote below.

*Koplik: ...I'm the trustee of various family trusts. So we deal with a lot of trustees and money managers. And I would suggest three or four to you. Some are bigger, some are smaller. The smaller ones are often more flexible and understanding and less concerned about their reputation, because they fly to a greater extent below the radar screen. So in the end, I might recommend, if they're not objectionable to you, some of the smaller people who are closer to what true private bankers used to be.*

Mr. Koplik, and another lawyer, Gerald Ross, also described a method that could enable the minister to reduce the chances of a U.S. bank doing anti-money laundering checks when wiring money into the country. What they suggested was to use their law firm's client, or escrow, account to bring the money into the U.S.

This is a loophole because the bank must do its checks on the law firm, and is not obliged to do any checks on the person whose money the law firm is moving. In other words, lawyers' client accounts can be used to disguise the fact that a foreign politician with suspect funds – a high risk customer – is accessing the U.S. banking system. Lawyers have no obligation to report such high risk clients to their bank or to law enforcement, although they are prohibited from actively helping money laundering.<sup>13</sup>

*Investigator: And you don't have to declare to bank authorities where the money comes from, because you said you even don't know who they are?*

*Ross: Well, they've asked me twice at [name of bank redacted], I use [name of bank redacted]. They've asked me 'so you have a lot of money coming in'. I said yes, it's real estate deals. 'Oh thank you very much' [said the bank].*

*Investigator: No other question asked? Even if it's foreign money?*

*Ross: The money came in; they can tell it's from an offshore bank. I said: 'I did a real estate deal'. The money came in day one, it went out on day five, that's the way it works.*

*Investigator: And the only question asked was?*

*Ross: What's it there for? I did a deal. That's it.*

Mr. Ross also noted that this was normal business practice for his real estate transactions:

*Ross: That's how I do, that's my normal real estate pattern no matter who the client is. So it's totally normal, nothing unusual about what I just described. Nothing at all.*

## James Silkenat, the then-president of the American Bar Association

One of the lawyers whom Global Witness filmed undercover was James Silkenat who, at the time, was the president of the ABA, and one of the leading figures in the profession. In other words, the issues covered by this report apply to law firms across the board. The meeting with Mr. Silkenat helps to demonstrate the extent to which American lawyers currently consider it normal practice to offer suggestions on how to move suspect money for prospective clients, and illustrates some of the weak points in the regulatory regime. Mr. Silkenat is a partner at Sullivan and Worcester, an international firm with 175 lawyers.<sup>14</sup>

However, we do not believe that Mr. Silkenat falls into the same category as the other lawyers named in this report. During the meeting, Mr. Silkenat and his colleague, Hugh Finnegan, made a number of caveats:

- They did not agree to represent the purported client.
- They said that to accept the minister as a client they would need to know more about him and all the facts.
- They stated that they had to make sure that no crimes had been committed in the U.S. or elsewhere before taking on the investigator as a client.
- They said that if crimes had been committed, they would have to report them.

*Investigator: So if you are confident that no U.S. law is being violated by getting this money, then that would be fine?*

*James Silkenat, partner at Sullivan and Worcester: That's the right start. We want to find the rest of the facts, too, but that's a preliminary beyond which, if that was a problem, we'd have a problem right at the start."*

Our investigator even reassured them late in the meeting that the payments to the minister did not violate American laws or the laws of the minister's country.

*Silkenat: ... if there were you know quote unquote crimes to be committed someplace else, that starts to be an issue.*

Nonetheless, despite red flags about the nature of the funds, Mr. Silkenat and his colleague offered information to a prospective client on how to potentially move suspect funds. At the beginning of the meeting, our investigator made it clear that the minister's salary was relatively low – comparable to that of a teacher in the U.S. – yet in the next breath explained how the minister wanted to spend tens of millions of dollars on luxury property, a private jet and a superyacht, which are obviously inconsistent with his modest official salary.

*Silkenat: Because presumably his salary in wherever it is would not cover the kinds of acquisitions he's...*

*Investigator: Oh for sure. That's a salary of a teacher here [in the U.S.]. And so how can we make sure that he is being able to buy property here and to live a nice life, but his name being out?*

*Silkenat: Any guesses as to how much money we're talking about for the brownstone and the other items?*

*Investigator: For the brownstone, you have to probably account for between five and twenty million; it depends where. Let's say, probably about ten million dollars. For second-hand gulfstream I could imagine ten, twenty million. A yacht would be at least, if you're talking about an Abramovich yacht, this dimension would be around two hundred, three hundred million. So I would start, let's say with around fifty million coming here and so it's not a one off.*

Despite this suspicious description of the funds, Mr. Silkenat described how layers of companies could be used to own the assets in order to hide the minister's identity and "to insulate his ownership from public view". According to Mr. Silkenat, this is common practice in New York: "Lots of the big apartment buildings here, where the purchase price ranges from \$30m to \$90m now are done through a corporate entity to shield whoever's buying it from public discussion".

*Investigator: Presumably we would set up a little bit of a series of owners to try and protect privacy as much as anything else.*

*Silkenat: So Company A is owned by Company B, who is owned jointly by Company C and D and your party owns all of or the majority of the shares of C and D.*

\* \* \*

*Hugh Finnegan, James Silkenat's colleague: ... [M]any foreign owners just don't want anybody to know who they are. So they set up either corporations or in some cases they set up limited liability companies and it's usually one or two other companies up the food chain, making it more difficult to identify [who the real owner is].*

This is a classic way of using complicated company structures to hide the true owner of an asset: like a Russian doll, companies are stacked inside each other, with each layer of ownership providing another degree of protection. Anyone trying to work out who owns these assets – such as a law enforcement official or an investigative journalist – faces a time consuming, expensive process that is potentially impossible.

As well as providing suggestions on how to use complicated company structures to obscure the ownership of assets, Mr. Silkenat also provided suggestions for how to use the banking system to move funds (see above section for examples provided by the other lawyers). He explained that some banks carry out less rigorous checks on their customers and he said that he had experience at identifying such banks.

*Silkenat: Most banks in the U.S. have rules about knowing who their customers are and knowing what their source of funds is. That might be a problem, depending on what the facts and circumstances are concerning the minister.*

*Investigator: If the owner is you said a trust for instance in Isle of Man, then for the receiving banks here it would be the Isle of Man wouldn't it, not the beneficial or the final owner?*

*Silkenat: We would have to look into how far specific banks look into the know-your-customer laws and how far they would dig.*

*Investigator: Do you have experience?*

*Silkenat: I do.[...]*

*Silkenat: And there may be other banking systems that are less rigorous on this than the U.S.*

*Investigator: What would it be?*

*Silkenat: A number of possibilities. England has got increasingly tough on this too. The usual banking havens but it would be ones you want to consider. We could provide you with the list of countries where the banking systems require less detail on ownership or source of funds.*

Global Witness wrote to James Silkenat and Hugh Finnegan to give them a chance to respond to the allegations made in this report. In response, counsel for the two lawyers stated that they had acted responsibly and backed this up with a formal opinion from a respected legal ethics expert, Prof. Stephen Gillers. According to Prof. Gillers, there is no expectation that lawyers carry out money laundering checks on potential clients at a preliminary meeting. In support of this point, Mr. Silkenat's and Mr. Finnegan's counsel indicated that the voluntary ABA money laundering guidelines recommend only that client due diligence take place at, or following, client intake – which he interpreted as only after both parties have decided to form an attorney-client relationship. Prof. Gillers further emphasized that the two lawyers had said that they would have to do checks on our investigator before taking him on as a client and asserted that no real world harm had been done since the investigator never became a client. Mr. Silkenat and Mr. Finnegan also claimed that they were under the misconception that our investigator was a lawyer, which supposedly enhanced his credibility.<sup>15</sup>

Finally, Mr. Silkenat and Mr. Finnegan stated that shortly after the meeting with the investigator, they had mentioned it to a member of their firm's management committee, indicating that they found our investigator "dishonest and untrustworthy" and had concluded at that time that under no circumstances would the firm take on such a client.<sup>16</sup>

While Mr. Silkenat and Mr. Finnegan may not have taken on the investigator as a client, the preliminary meeting demonstrates both the ease with which prospective clients can obtain ideas on how to move suspect funds into the U.S., and the need for reform of the legal system to make it more difficult to move suspect funds.

# RECOMMENDATIONS

## A. What should be done to ensure that anonymously-owned companies cannot be abused?

**Recommendation 1. Every country should require all companies and trusts to disclose who ultimately owns and controls them and make this information public. The U.S., where so many of the world’s anonymous companies are created, should be leading this change, not trailing behind as is currently the case.**

During the last two years global momentum to tackle the problem of anonymous companies has been building. In 2013, the issue of anonymous company ownership was high on the agenda of the G8, the group of leading western economies. All G8 countries, including the U.S., endorsed broad principles about company ownership disclosure and agreed to take concrete steps to tackle the problem.<sup>17</sup> In 2014, the G20, again including the U.S., signed up to new high level principles on company ownership transparency that go

further than the current international standard, as set by the Financial Action Task Force (FATF).<sup>18</sup>

The United Kingdom, Norway and Ukraine are moving forward with the world’s first public registries of who really owns and controls companies – known as the “beneficial owner”.<sup>19</sup> In addition, all European Union must create national registers of the beneficial owners of companies and that members of the public will have access to these registers providing that they can pass a “legitimate interest” test.<sup>20</sup> The U.K. government is considering legislation that would require the identification of beneficial owners of U.K. real estate.<sup>21</sup>

In the U.S., the Obama Administration has committed to push for legislation that would require meaningful disclosure of beneficial ownership information at the time a company is formed.<sup>22</sup> Since 2008, there have been bipartisan bills pending in Congress that would require American companies to disclose their beneficial owners to the government when they are created and to keep that information up to date.



Photo: James Duncan Davidson.

*Global Witness’ co-founder Charmian Gooch won the 2014 TED prize with a wish “for us to know who owns and controls companies so they can no longer be used anonymously against the public good”.*



Photo: Stefan Rousseau/PA Wire. URN:130066260 (Press Association via AP Images)

*The UK Prime Minister David Cameron committed to put the beneficial ownership details of British companies in the public domain at the 2013 Open Government Partnership meeting.*

In addition, the Departments of Justice and Treasury have offered \$40 million of the money they have recovered from prosecuting precisely the types of criminals that this sort of legislation would help stop to offset the cost of states updating their systems to include beneficial ownership information.<sup>23</sup>

There are sound financial reasons for this move. A change in the law would save money from states' budgets by reducing the time and money currently spent trying to track down the anonymous company owners behind so many crimes in the U.S. The law would also generate new revenue for states, by increasing the collection of fines, penalties, and asset forfeitures that result from the improved ability of law enforcement to pursue and prosecute criminals.

There are also sound business reasons for this move, as laid out by The B Team, a group of business leaders founded by Richard Branson (Virgin Group's Founder and CEO) and Jochen Zeitz (former Chairman and CEO of Puma). They argue that being more transparent about company ownership would increase competitiveness, reduce risks, manage financial exposure and reduce impunity.<sup>24</sup>

*Criminals continue to make their way into our financial system. [...] With other countries taking steps to prevent the abuse of shell companies in their jurisdictions, it is simply untenable for the United States to allow this risk to go unaddressed.*

David Cohen, who at the time was the Treasury's Undersecretary for Terrorism and Financial Intelligence and is now the Deputy Director of the Central Intelligence Agency<sup>25</sup>

However, progress remains stalled because of organized opposition from the National Association of Secretaries of State, the ABA and others.

Some recent developments show that the time for change may be now. In May 2015, a new rule went into effect in New York City requiring companies that buy real estate in the city to disclose their owners to the authorities in order to curb tax avoidance. This is a welcome step forward; however, the information will only be on the legal owner of the company, and not the ultimate owner, and the disclosures will not be available to the public.<sup>26</sup>

In January 2016, the U.S. Treasury Department announced it will require people purchasing high end real estate in Manhattan and Miami to disclose who they really are.<sup>27</sup> This is another important step toward stopping criminals and the corrupt from hiding behind anonymously owned companies to launder the proceeds of crime through the U.S. property market. To maximize the effect and intent behind this requirement, the U.S. government should expand the program to cover the entire country, make it permanent and place the ownership information in the public domain. These rules came into effect after our undercover interviews of the New York lawyers.

*This Global Witness report highlights the important issue of the use of anonymous corporate vehicles in the United States to hide and potentially launder foreign assets. Our laws and legal institutions should be used to propagate justice and increase transparency, not to shelter assets of corrupt foreign nationals. Global Witness should be applauded for its continued work to shine a much needed light on these practices.*

New York Attorney General Eric T. Schneiderman<sup>28</sup>

**Recommendation 2. U.S. banks should be required to identify and verify the beneficial owner of all their clients.**

International anti-money laundering guidelines, which the U.S. helped to draft, require banks to identify the ultimate beneficial owner of all their clients.<sup>29</sup> However, U.S. banks do not currently have to do this for all clients.<sup>30</sup>

The U.S. Administration has committed to close this loophole through a rulemaking that would explicitly require banks to identify the beneficial owners of all legal entities.<sup>31</sup> The Treasury Department issued a proposed rule in July 2014,<sup>32</sup> which needs to be strengthened as it provides would-be money launderers with a blueprint for evading detection. To date, a final rule has not been issued. This should change.

**B. What should be done to ensure that U.S. lawyers turn away suspect funds?**

**Recommendation 3. The U.S. should ensure that it complies with international anti-money laundering standards. This means that the U.S. should pass legislation requiring transactional lawyers, and anyone else who creates companies, to carry out anti-money laundering checks. The ABA should also update its Model Rules of Professional Conduct to require lawyers to carry out anti-money laundering checks.**

Laundering money is, of course, illegal in the U.S. The ABA's Model Rules of Professional Conduct prohibit lawyers from counseling a client to engage in conduct that the lawyer knows is illegal,<sup>33</sup> and in order to carry out that requirement lawyers need to do some due diligence. This is not enough however, to satisfy the requirements of the global anti-money laundering standard, and not enough to prevent dirty money getting into America.

America needs a law that specifies what due diligence lawyers have to carry out before accepting a client; requires lawyers to have to identify higher risk clients; and requires them to have to report suspicious transactions to law enforcement. These are all specified by the international anti-money laundering standards set by the FATF,<sup>34</sup> of which the U.S. is a founding member. The U.S. has not implemented these international standards in large part due to sustained lobbying from the legal profession.

Currently the "Voluntary Good Practices Guidance For Lawyers To Detect and Combat Money Laundering and Terrorist Financing" produced by the ABA states that "any time lawyers 'touch the money' they should satisfy themselves as to the bona fides of the sources and ownership of the funds in some manner and should inquire of any involved financial institution as to any CDD [customer due diligence] performed by such institution".<sup>35</sup> A number of state bar associations, including in New York, have adopted similar language. However, these measures are only voluntary, although lawyers are barred from explicitly assisting illegal conduct.

This investigation has demonstrated the weakness in the current system. The U.S. should require any individual or entity that creates, manages or controls companies, including transactional lawyers, to have to carry out specific anti-money laundering checks.

Attorney-client privilege, which keeps certain conversations between a lawyer and their client private, should not prevent lawyers from being able to carry out anti-money laundering checks, or report any suspicions they may have to the authorities.

The World Bank has pointed out that lawyers often seek to justify not giving information about companies they set up to law enforcement because of attorney-client privilege. However, the World Bank says that law enforcement should guard against the unjustified use of this duty of confidentiality, and notes that some jurisdictions have carved out statutory or other exceptions to legal privilege in cases in which the attorney is acting as a financial intermediary or in some other strictly fiduciary or transactional capacity, rather than as a legal advocate.<sup>36</sup> The U.S. should ensure that attorney-client privilege does not extend to the activity of creating, managing, advising on or controlling companies and other legal entities. This should be in addition to the existing exemption if a lawyer thinks disclosure will prevent a crime from being committed.

There is a precedent in the U.S. for circumscribing attorney-client privilege. For example, tax lawyers and others who advise on certain risky types of tax transactions are obligated to report them to the tax authority, or risk penalties.<sup>37</sup>

**Other key players**

These changes to ensure that lawyers turn away suspect funds need to be enhanced by putting similar obligations on other players. United States real estate

agents and escrow agents should also be required to do anti-money laundering checks – a change that could happen without the need for any new legislation. Provisions of the 2001 PATRIOT Act aimed at curbing terrorist financing required ‘persons involved in real estate closing and settlements’ to establish anti-money laundering programs. Six months later however, in 2002, the Treasury Department ‘temporarily’ exempted them from having to do this.<sup>38</sup> More than thirteen years later, this ‘temporary’ exemption is still in place, but could be ended by the Treasury Department.

### C. What should be done to tighten attorney ethics rules?

#### **Recommendation 4: Legal ethics rules should be revised to explicitly bar lawyers from assisting prospective clients in illegal or fraudulent conduct.**

Global Witness has sought the view of two leading U.S. legal ethics professors, William Simon of Columbia Law School and John Leubsdorf of Rutgers School of Law on the legal ethics rules governing lawyers. The ethics professors concluded that Mr. Silkenat and his partner, Mr. Finnegan, did not violate the governing legal ethics rules and provided the following opinion on the conduct of Marc Koplik, John Jankoff and Gerald Ross in the preliminary meetings. Their opinion reinforces that the legal ethics rules should be revised to explicitly bar lawyers from assisting prospective clients in illegal or fraudulent conduct.

#### **Excerpt from the joint opinion of William Simon, professor of law, Columbia Law School and John Leubsdorf, professor of law, Rutgers School of Law**

We have reviewed the transcripts you sent of interviews your investigator conducted in New York with Marc Koplik, John Jankoff, and Gerald Ross.

In our opinion, the conduct by the above-named lawyers shown in these interviews does not comply with the professional responsibilities of lawyers asked for assistance with potentially unlawful transactions. Initially, we note that the situation and the client your investigator described to the lawyers were fictitious, and we express no opinion as to how that fact might affect any action that might be brought against the lawyers. Our opinion considers whether the conduct would have been an acceptable response to an actual request for assistance. Further, we note that the relevant doctrine contains ambiguities, and we do not

expect that all lawyers will agree with us. Nevertheless, we believe that our conclusion rests on the most plausible interpretation of the doctrine.

Under the ethical rules of New York and every other American jurisdiction, lawyers are prohibited from counseling or assisting clients in illegal or fraudulent activity. These rules should be interpreted to apply to someone who seeks and receives advice from a lawyer even though neither has yet committed to a full-fledged representation. Certainly, the relevant public policies are equally at stake with prospective as well as accepted clients. Complying with the prohibition entails reasonable and good faith efforts to ascertain facts needed to determine the extent to which the assistance sought would further illegality. It also requires communicating clearly to a client, or to any prospective client that the lawyer advises, a refusal to assist in illegal activity when it appears that the client or prospective client contemplates using the lawyer’s services in such activity.

We believe that the conduct shown in these interviews is not consistent with these duties. Your investigator’s statements indicated a substantial possibility that the money the putative client was seeking to conceal was obtained in violation of his own country’s laws and/or the U.S. Foreign Corrupt Practices Act. Large sums of money were involved, and the putative client was a government official anxious to conceal his identity. There was thus a further substantial possibility that the requested assistance would violate the U.S. anti-money laundering statutes. The lawyers made scant effort to explore this possibility or to undertake necessary due diligence. They offered advice to your investigator by volunteering various suggestions for designing such transactions and asserted their ability to design and implement them without making serious efforts to determine whether it would be lawful to do so for the putative client.

The professional responsibility rules in question are stated in general terms, and we are not aware of any cases in which enforcement agencies have applied them to the specific circumstances involved here. However, our opinion represents the most plausible understanding of the rules. It is also the only interpretation that is consistent with the bar’s claims that professional regulation promotes respect for law. Nevertheless, it would be desirable for the authorities to revise current doctrine to remove any ambiguity about how it applies to such conduct. Among the desirable changes would be a revision to Rule 1.2(d) of the Rules of Professional Conduct that makes explicit that it applies to prospective as well as accepted clients.

Your investigation is of great public importance. It suggests a willingness on the part of prominent lawyers to assist corrupt officials to profit from betrayals of public trust. Regardless of the legality of such assistance, it will be considered deplorable by a large segment of the public, since it both rewards and encourages corruption in developing countries. Because the work of attorneys is usually shielded by confidentiality norms, conduct such as that of these lawyers would not normally come to light. Your exposure of it will subject such conduct to moral appraisal in public discussion. In addition, it is likely to promote consideration of reforms that might limit such conduct's unfortunate effects.

For the full comment from Professors Leubsdorf and Simon, see [www.globalwitness.org/loweringthebar](http://www.globalwitness.org/loweringthebar).

Global Witness wrote to Mr. Koplik, Mr. Jankoff and Mr. Ross to get their response to the issues raised by their meetings with our investigator and provided them with a summary of the meetings. Both Mr. Koplik and Mr. Jankoff told us through their lawyers that they could not be expected to provide a meaningful response without first having an opportunity to review the full recordings of the meeting. As is common journalistic practice, Global Witness declined this request. Mr. Ross has not responded to Global Witness to date.

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## CONCLUSION

This investigation exposes how the American legal system has the potential to enable corruption and threaten American interests.

Anonymously-owned companies allow drug gangs, terrorists, fraudsters and money launderers to enjoy the fruits of their crimes on American soil with zero accountability. And the criminals typically rely on lawyers to help them set up and run these anonymously-owned companies.

In some states across America you need less identification to open up a company than you do to get a library card. And in fact, there are ten times as many companies in the U.S. than in all of the world's

tax havens combined.<sup>39</sup> There's a global movement to stop the secrecy behind company ownership – the U.S. should not only get on-board, but should resume its global leadership role by requiring beneficial ownership transparency of all American companies.

American lawyers should be properly regulated. As with banks, they should be required to carry out checks on their clients to actively look out for suspicious activity when carrying out financial transactions. European lawyers are required to carry out such checks, and the global anti-money laundering standards, which the U.S. itself was instrumental in drafting, also require lawyers to carry out checks.

*Corporate opacity is not inadvertent: it is the cumulative achievement of the sustained effort of some of the most brilliant professional minds on the planet. These people should hang their heads in shame.*

Paul Collier, development economist<sup>40</sup>

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Global Witness is a UK based non-governmental organisation which investigates the role of natural resources in funding conflict and corruption around the world.

Global Witness is a company limited by guarantee and registered in England (no. 02871809).

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ISBN 978-0-9931067-9-8  
© Global Witness, 2016