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RECENT DEVELOPMENTS IN ANTI-MONEY LAUNDERING LEGISLATION: THE INTERNATIONAL MONEY LAUNDERING ABATEMENT AND FINANCIAL ANTI-TERRORISM ACT OF 2001

SUMMARY

PREPARED BY COVINGTON & BURLING

EXECUTIVE SUMMARY

Spurred by the terrorist attacks of September 11th, the 107th Congress passed new anti-money laundering legislation on October 25th, which was signed into law by President Bush on October 26th. The legislation, entitled the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001 (the “Act”), is part of the Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.¹ The Act represents a significant restructuring of federal anti-money laundering programs, expanding the Secretary of the Treasury’s regulatory authority, imposing new reporting and recordkeeping requirements on financial institutions and financial agencies, and revising the criminal statutes on money laundering. Although the Act primarily affects financial institutions and financial agencies, it also presents significant implications for brokerage firms and securities firms (*see, e.g.*, Part III.E), commodities traders (*see, e.g.*, Part II.L., Part III.F), investment companies (*see, e.g.*, Part IV.B), and other entities providing financial services.

Among the Act’s significant measures are:

- A. Authorizing the Secretary to impose “special measures” directed towards one or more jurisdictions outside of the United States, financial institutions outside the United States, classes of transactions within or involving a jurisdiction outside of the United States, or types of accounts that are of “primary money laundering concern.” The Secretary is required to consult with specific agencies before imposing any “special measure.” The “special measures” may be imposed through regulation, order, or other lawful manner. However, “special measures” imposed through order may remain in effect only 120 days without being subjected to rulemaking.

¹ The effective date of the legislation is October 26, 2001. However, many of the new provisions will be implemented through regulations that will be promulgated later, as specified in the memorandum.

- B. Creating new recordkeeping requirements, reporting requirements, and banking prohibitions including:
1. Imposing new due diligence requirements on financial institutions that establish, maintain, administer, or manage private banking accounts or correspondent accounts in the United States for foreign persons;
 2. Prohibiting correspondent accounts with “shell banks,” which are described as foreign banks that do not, directly or through affiliation, have a physical presence in any country;
 3. Imposing a 120-hour period during which financial institutions must respond to federal banking agencies’ requests for records concerning money laundering compliance;
 4. Requiring financial institutions to terminate correspondent relationships upon ten days written notice from the Attorney General or the Secretary of the Treasury that a correspondent foreign bank has failed to respond to or contest a summons or subpoena regarding their United States correspondent account(s);
 5. Expanding the grounds under which federal agencies may request personal financial records from financial institutions to include intelligence and anti-terrorism activity; and
 6. Requiring “any person . . . engaged in a trade or business” to submit a currency transaction report when that person receives more than \$10,000 in cash in a transaction.
- C. Creating new regulatory authority for the Secretary of the Treasury including:
1. Directing the Secretary to issue regulations to enhance anti-money laundering and anti-terrorism cooperation among financial institutions, regulatory agencies, and law enforcement;
 2. Authorizing the Secretary to issue regulations ensuring that concentration accounts are not used to prevent the association of funds with their direct or beneficial owner;
 3. Directing the Secretary to issue regulations establishing standards for financial institutions and their customers regarding the identification that must be provided and maintained when a customer seeks to open a new account;
 4. Authorizing the Secretary, after consultation with federal banking agencies, to establish minimum standards for financial institution

compliance with the statutory requirement that financial institutions establish anti-money laundering programs;

5. Directing the Secretary to issue regulations requiring registered brokers and dealers to file Suspicious Activity Reports akin to those currently filed by financial institutions; and
 6. Authorizing the Secretary, after consultation with the Commodity Futures Trading Commission, to prescribe regulations requiring futures commission merchants, commodity trading advisers, and commodity pool operators registered under the Commodity Exchange Act to file Suspicious Activity Reports akin to those currently filed by financial institutions.
- D. Requiring the Secretary of the Treasury and other agencies to provide Congress with various reports on issues such as whether to require a personal identification number for foreign nationals, whether to extend the Bank Secrecy Act's reporting requirements to "investment companies," and whether to extend the statutory exemptions available in connection with the filing of currency transaction reports;
- E. Amending the criminal money laundering statute and other criminal laws, including:
1. Extending federal criminal law jurisdiction to reach foreign banks and other foreign persons under certain circumstances;
 2. Extending the federal forfeiture statute to reach United States "interbank accounts" of foreign banks;
 3. Creating the new crimes of bulk cash smuggling and conducting an illegal money transacting business; and
 4. Extending seizure and forfeiture provisions to cover currency not properly reported in a currency transaction report.
- F. Other miscellaneous statutory changes, including:
1. Amending the Right to Financial Privacy Act to allow for disclosure of personal financial records to government agencies conducting investigations of, or intelligence or counter-intelligence analyses related to, international terrorism;
 2. Amending the Fair Credit Reporting Act to allow consumer reporting agencies to furnish customer reports and other information on any individual to federal agencies conducting investigations or intelligence activities related to international terrorism;

3. Revising statutory definitions to allow the Bank Secrecy Act to reach “hawala” and other underground banking systems; and
4. Recognizing the Financial Crimes Enforcement Network (“FinCEN”), formerly created by order of the Secretary of the Treasury, as a bureau in the Department of the Treasury and giving FinCEN significant information collection, collation, maintenance, analysis, and dissemination duties in addition to such enforcement and compliance responsibilities as the Secretary chooses to delegate.

This memorandum provides an overview of the new legislation, highlighting the recordkeeping, reporting, and record maintenance duties imposed on financial institutions, financial agencies, and other entities providing financial services, as well as other developments that may impact your business.

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I. SECRETARY DISCRETION FOR “SPECIAL MEASURES” TO FIGHT MONEY LAUNDERING

The Act grants the Secretary of the Treasury relatively broad authority to require domestic financial institutions² and financial agencies³ to increase the amount and type of information they acquire, maintain, and report about their customers and the financial institutions and financial agencies with which they work. *See* 31 U.S.C. § 5318A. If the Secretary finds that reasonable grounds exist for concluding that “a jurisdiction outside of the United States, 1 or more financial institutions operating outside of the United States, 1 or more classes of transactions within, or involving, a jurisdiction outside of the United States, or 1 or more types of accounts” is of “primary money laundering concern,” the Secretary may require domestic financial institutions and financial agencies to take any combination of five “special measures.”

Under the Act, all “primary money laundering concerns” generally have some foreign component. For example, “primary money laundering concerns” could be specific foreign countries, particular foreign banks, a particular class of transactions within or involving a foreign jurisdiction (such as an international wire transfer), or a type of account involving one or more of these (such as a payable-through account opened by a foreign bank). By contrast, “primary money laundering concerns” generally would not include jurisdictions inside the United States,

² The Bank Secrecy Act defines “financial institution” at 31 U.S.C. § 5312(a)(2). Examples include: commercial banks or trust companies; an agency or branch of a foreign bank in the United States; a thrift institution, a broker or dealer in securities or commodities; an investment banker or investment company; and an insurance company.

³ The Bank Secrecy Act defines “financial agency” as “a person acting for a person (except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member) as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.” 31 U.S.C. § 5312(a)(1).

financial institutions operating solely domestically, classes of transactions that do not involve a foreign jurisdiction, or types of accounts that have no international connection.

The Secretary is to consult with the Secretary of State and the Attorney General in determining “primary money laundering concerns.” In determining whether a jurisdiction is a “primary money laundering concern,” the Secretary must consider factors including:

- Evidence that terrorist or organized crime groups have transacted business in the jurisdiction;
- The extent to which the jurisdiction or financial institutions operating in the jurisdiction offer bank secrecy or special regulatory advantages to non-residents or non-domiciliaries of that jurisdiction;
- The quality and substance of the jurisdiction’s administration of bank supervisory and anti-money laundering laws;
- The relationship between the volume of financial transactions occurring in the jurisdiction and its economy;
- The extent to which the jurisdiction is considered an “off-shore banking or secrecy haven” by credible international organizations or multilateral expert groups;
- Whether the United States has a mutual legal assistance treaty with the jurisdiction;
- The experience of United States law enforcement and regulatory officials in obtaining information about transactions originated in or routed through the jurisdiction; and
- The extent of official or institutional corruption in the jurisdiction.

In determining whether financial institutions, classes of transactions, or types of accounts involving a foreign jurisdiction are a “primary money laundering concern,” the Secretary must consider factors including:

- The extent to which the financial institutions, classes of transactions, or types of accounts are used to facilitate or promote money laundering in or through the jurisdiction;
- The extent to which the financial institutions, classes of transactions, or types of accounts are used for legitimate purposes in the jurisdiction; and
- The extent to which imposing one or more of the “special measures” will guard against money laundering and other financial crimes.

See id. at § 5318A(c)(2).

Before implementing any “special measure,” the Secretary must consult with the Secretary of State, the Chairman of the Board of Governors of the Federal Reserve System, appropriate federal banking regulators, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board, and such other interested agencies and parties as the Secretary deems appropriate. In selecting which “special measure” or “special measures” to impose, the Secretary is to consider:

- Whether other nations or multilateral groups have taken or are taking similar actions;
- Whether the imposition of any particular “special measure” would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;
- The extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular jurisdiction, institution, or class of transactions targeted; and
- The effect of the action on United States national security and foreign policy.

See id. at § 5318A(a)(4)(B).

The “special measures” may be imposed through regulation, order, or other lawful mechanism.⁴ Any “special measure” issued by order must be accompanied by a notice of proposed rulemaking and may not remain in effect for more than 120 days unless it becomes a rule.

The five “special measures” the Secretary may require are as follows:

⁴ The “special measure” prohibiting or placing conditions on opening or maintaining certain payable-through or correspondent accounts may only be imposed through regulation. *See* Part I.E below.

A. Recordkeeping and Reporting of Certain Financial Transactions

The Secretary may require domestic financial institutions and domestic financial agencies to maintain records, file reports, or both, detailing individual transactions or the aggregate amount of transactions with respect to any “primary money laundering concern.”

These records and reports may include:

- The identity and address of the participants in a transaction or relationship, including the identity of the originator of any funds transfer;
- The legal capacity in which any participant in a transaction is acting;
- The identity of the beneficial owner of the funds involved in any transaction, in accordance with such procedures as the Secretary determines to be “reasonable and practicable” to obtain and retain the information; and
- A description of any transaction.

See id. at § 5318A(b)(1)(B). The Secretary is granted broad discretion to set the manner and timing of these records and reports, as well as the retention period for such records.

B. Information Relating to Beneficial Ownership

The Secretary may require domestic financial institutions and domestic financial agencies to take such steps as are “reasonable and practicable” to obtain and retain information concerning the beneficial ownership of any account opened or maintained in the United States by a foreign person (including legal persons such as corporations) or a representative of the foreign person that “involves” any “primary money laundering concern.” *See id.* at § 5318A(b)(2). The Act exempts from this requirement foreign entities whose shares are subject to public reporting requirements or are listed and traded on a regulated exchange or trading market. *See id.*

C. Information Relating to Certain Payable-Through Accounts

The Secretary may require domestic financial institutions or domestic financial agencies to collect information for payable-through accounts⁵ connected to any foreign jurisdictions, financial institutions, or classes of transactions that are of “primary money laundering concern.” *See id.* at § 5318A(b)(3). The Secretary may require that the records identify each customer (and representative of that customer) of the financial institution who is permitted to use, or whose transactions are routed through, the payable-through account. The information collected should be “substantially comparable” to that which the depository institution obtains in the ordinary course of business with its customers residing in the United States. This recordkeeping requirement mirrors guidance regarding payable-through accounts provided since 1995 by the Board of Governors of the Federal Reserve System.⁶

D. Information Relating to Certain Correspondent Accounts

The Secretary may require that records be maintained for correspondent accounts⁷ connected to any “primary money laundering concern.” The Secretary may require records identifying each customer (and representative of that customer) who is permitted to use, or whose transactions are routed through, the correspondent account. *See* 31 U.S.C. § 5318A(b)(4). The information collected should be “substantially comparable” to that which the depository

⁵ The Act defines “payable-through account” as “an account, including a transaction account (as defined in Section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States.” *Id.* at § 5318A(e)(1)(C).

⁶ The Board’s guidance was issued in a March 3, 1995 letter, “Payable Through Accounts,” addressed to the officer in charge of supervision at each Federal Reserve bank.

⁷ The Act defines “correspondent account” as “an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution.” 31 U.S.C. § 5318A(e)(1)(B).

institution obtains in the ordinary course of business with its customers residing in the United States.

E. Prohibitions or Conditions on Opening or Maintaining Certain Correspondent or Payable-Through Accounts

The Secretary may prohibit or impose conditions on maintaining or opening payable-through and/or correspondent accounts involving any “primary money laundering concern.” *See id.* at § 5318A(b)(5). Before implementing this “special measure,” the Secretary must consult with the Secretary of State, the Attorney General, and the Chairman of the Board of Governors of the Federal Reserve System. Unlike the other “special measures,” this “special measure” may only be imposed through regulation. *See id.* at § 5318A(a)(2)(B).

The Act sets the civil and criminal penalties for violating a “special measure” at “an amount equal to not less than 2 times the amount of the transaction, but not more than \$1,000,000.” *Id.* at §§ 5321(a)(7), 5322(d).

II. RECORDKEEPING REQUIREMENTS, REPORTING REQUIREMENTS, AND BANKING PROHIBITIONS

A. Special Due Diligence for Certain Correspondent Accounts and Private Banking Accounts

The Act places new due diligence requirements on financial institutions that establish, maintain, administer, or manage a private banking account⁸ or a correspondent account in the United States for a non-United States person (or a representative of that person), including

⁸ The Act defines “private banking account” as “an account (or any combination of accounts)” that: “(i) requires a minimum aggregate deposits of funds or other assets of not less than \$1,000,000; (ii) is established on behalf of 1 or more individuals who have a direct or beneficial interest in the account; and (iii) is assigned to, or is administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account.” 31 U.S.C. § 5318(i)(4)(B).

a foreign individual visiting the United States. *See* 31 U.S.C. § 5318(i). These financial institutions are required to establish “appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts.” The new requirements will apply to all such accounts, whether opened before, on, or after the date of enactment.

Regarding private banking accounts requested or maintained by, on, or on behalf of a non-United States person, the new due diligence programs must take reasonable steps to:

- Identify the nominal and beneficial owners and the source of funds deposited into the account, as needed to prevent money laundering and to file a Suspicious Activity Report (“SAR”); and
- Provide for “enhanced scrutiny” of accounts requested or maintained by or on behalf of a “senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure” with the aim of preventing, detecting, and/or reporting transactions that might involve funds procured through foreign corruption.

New due diligence requirements also apply to correspondent accounts requested or maintained by, or on behalf of, foreign banks operating under offshore banking licenses or under a banking license issued by a country that has been (a) designated as noncooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization to which the United States belongs,⁹ or (b) designated by the Secretary of the Treasury as warranting “special measures” due to money laundering concerns.

⁹ For example, the United States belongs to the Financial Action Task Force (“FATF”), which lists as Non-Cooperating Countries and Territories (“NCCTs”) those countries that represent “critical weaknesses in anti-money laundering systems which serve as obstacles to co-operation in this area.” The current list of NCCTs consists of the following: the Cook Islands, Dominica, Egypt, Grenada, Guatemala, Hungary, Indonesia, Israel, Lebanon, the Marshall Islands, Myanmar, Nauru, Nigeria, Niue, the Philippines, Russia, St. Kitts and Nevis, St. Vincent and the Grenadines, and Ukraine. *See* http://www1.oecd.org/fatf/NCCT_en.htm.

Regarding correspondent accounts for these foreign banks, the new due diligence programs must take reasonable steps to:

- Identify owners for such foreign banks that are not publicly traded and the extent and nature of their ownership interest;
- Provide for “enhanced scrutiny” of the correspondent account to guard against money laundering and to be able to file an SAR; and
- Ascertain whether the foreign bank account-holder itself provides correspondent accounts to other foreign banks, and, if so, discover the identity “and related due diligence information” of those foreign banks.

The Act requires the Secretary, in consultation with other federal financial regulators and within 180 days of the date of enactment (April 24, 2002), to issue regulations delineating “the due diligence policies, procedures, and controls required” under these new provisions. The Act’s provisions concerning these new due diligence requirements will take effect 270 days after the date of enactment (July 23, 2002), regardless of whether the Secretary has issued the required regulations.

The Act allows the Secretary to impose civil and criminal penalties in “an amount equal to not less than 2 times the amount of the transaction, but not more than \$1,000,000” on any financial institution or financial agency that violates these new provisions. *See* 31 U.S.C. §§ 5321(a)(7), 5322(d).

B. Prohibition on Correspondent Accounts with Foreign Shell Banks

The Act prohibits financial institutions from establishing, maintaining, administering, or managing a correspondent account in the United States for, or on behalf of, any foreign bank that does not have a physical presence in any country (*i.e.*, a “shell bank”). *See* 31 U.S.C. § 5318(j). Financial institutions are required to take “reasonable steps” to ensure that their correspondent accounts are not being used by a foreign bank to indirectly provide banking services to shell banks. The Act directs the Secretary to issue regulations delineating these

“reasonable steps.” The requirements do not apply to a correspondent account with a foreign bank if the foreign bank is both (a) an affiliate of a depository institution, credit union, or foreign bank that maintains a physical presence in the United States or abroad, and (b) subject to a banking authority in the foreign country regulating the affiliated depository institution, credit union, or foreign bank. This provision takes effect 60 days after the date of enactment (December 25, 2001).

The Act allows the Secretary to impose civil and criminal penalties in “an amount equal to not less than 2 times the amount of the transaction, but not more than \$1,000,000” on any financial institution that violates these new provisions. *Id.* at §§ 5321(a)(7), 5322(d).

C. The 120-Hour Rule

The Act requires that financial institutions covered by the Bank Secrecy Act (“BSA”) provide information and account documentation related to anti-money laundering compliance by a financial institution or a customer of such a financial institution, “for any account opened, maintained, administered, or managed in the United States” by the financial institution within 120 hours of receiving a request from a federal banking agency.

31 U.S.C. § 5318(k)(2).

D. Foreign Bank Records For Correspondent Accounts

Under the Act, the Attorney General or the Secretary of the Treasury may issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and request records related to the correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank. *See* 31 U.S.C. § 5318(k)(3). Financial institutions that maintain a correspondent account in the United States for a foreign bank are required to maintain records identifying the owners of the

foreign bank and the name and address of a person who resides in the United States who is authorized to accept service of legal process for records regarding the correspondent account. The financial institution must provide the information within seven days of a request for such information by federal law enforcement.

The Act also requires financial institutions to terminate any correspondent relationship with a foreign bank within ten business days of receipt of written notice from the Secretary or the Attorney General that the foreign bank has failed to (a) comply with a summons or subpoena issued under this section or (b) initiate proceedings in a United States court contesting such summons or subpoena. Financial institutions are not liable to any person in a court or arbitration proceeding for terminating a correspondent account pursuant to these requirements. Failure to so terminate a correspondent account could result in a civil penalty against the financial institution of up to \$10,000 per day until the correspondent account is terminated. Financial institutions have a grace period of 60 days from the date of enactment (December 25, 2001) before they must comply with this provision.

E. Civil Liability Immunity for Disclosures

The Bank Secrecy Act provides financial institutions with a safe harbor from civil liability to any “person” for disclosures made in a Suspicious Activity Report. *See* 31 U.S.C. § 5318(g)(3). The Act amends the safe harbor provision to clarify that a “person” does not include any government or agency of government. The Act also provides that the immunity provided does not guarantee immunity from civil or criminal actions brought by any government or governmental agency to enforce any constitution, law, or regulation.

F. Prohibition on Notification of Disclosures

The Act amends the BSA's prohibition on notifying persons who are the subject of an SAR that such a report has been filed. Previously, the non-disclosure duty applied only to financial institutions and their directors, officers, employees or agents. The Act extends the prohibition on notification to all levels of federal, state, and local government employees, other than as necessary to fulfill the employee's duties. *See* 31 U.S.C. § 5318(g)(2).

The Act also clarifies that information disclosed in an SAR may be included in (a) a written employment reference provided in accordance with Section 18(w) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(w), after a request from another financial institution,¹⁰ and (b) a written termination notice or employment reference provided in accordance with the rules of a self-regulatory organization registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission. However, neither document may disclose that the information was included in an SAR or that an SAR was filed.

G. Penalties for Violations of Geographic Targeting Orders under the BSA

Previously, the civil and criminal penalties provisions of the BSA applied only to violations of the BSA and its regulations. The Act amends the civil and criminal penalties provisions to reach violations of orders issued under the BSA, such as geographic targeting orders.¹¹ *See* 31 U.S.C. § 5321(a)(1). The Act also adds that the civil and criminal penalty

¹⁰ The Act adds 12 U.S.C. § 1828(w), which allows insured depository institutions to include suspicions of illegal activity in written employment references provided to other federally insured depository institutions. A voluntary disclosure under this subsection with malicious intent is not shielded from liability. *See* Pub. L. No. 107-56 § 355, 115 Stat. 272.

¹¹ Geographic targeting orders, issued pursuant to 31 U.S.C. § 5326, target specific geographic areas where the Secretary has determined that extra recordkeeping is necessary to carry out the purposes of the Bank Secrecy Act. One area targeted by the Secretary has been Texas, due to concerns about money laundering related to narcotics trafficking.

provisions do not apply to willful violations of Section 21 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829(b) (recordkeeping regulations for insured depository institutions) or Public Law 91-508 § 123 (recordkeeping regulations for uninsured banks and financial institutions); rather, the separate civil and criminal penalties set forth in those two statutes will apply.

H. Prohibition on Structuring Transactions to Evade Reporting Requirements

The BSA previously prohibited structuring transactions to evade certain recordkeeping requirements, including the filing of Currency Transaction Reports (“CTRs”) and recordkeeping on purchases of bank checks and drafts, cashier’s checks, money orders, and traveler’s checks from \$3,000 up to \$10,000. *See* 31 U.S.C. § 5324(a). The Act extends the prohibition on structuring to apply to attempts to evade the recordkeeping requirements of 31 U.S.C. § 5326 (geographic targeting orders), Section 21 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829(b) (recordkeeping regulations for insured depository institutions), and Public Law 91-508 § 123 (recordkeeping regulations for uninsured banks and financial institutions). Previously, the prohibition only mentioned the reporting requirements of 31 U.S.C. § 5313(a) (CTRs) and § 5325 (identification needed to purchase certain monetary instruments).

I. Extension of the Effective Period of Geographic Targeting Orders

Previously, geographic targeting orders could not last more than 60 days without renewal. Such orders may now last up to 180 days without renewal. *See* 31 U.S.C. § 5326(d).

J. Availability of Reported Information

Previously, the reports filed under 31 U.S.C. §§ 5313 (CTR reporting requirement), 5314 (reports on foreign financial agency transactions), 5316 (Report of International Transportation of Currency or Monetary Instruments (“CMIR”) reporting requirement) were available for dissemination from the Secretary of the Treasury to “any State

financial institutions supervisory agency.” After enactment of the Act, all reports filed with the Secretary under the BSA, 31 U.S.C. §§ 5311-5331, are available for dissemination to state financial institutions supervisory agencies, and they are also available to United States intelligence agencies. *See id.* at § 5319.

K. Reports Relating to Currency Received in Non-Financial Trade or Business

Prior to the passage of the Act, the Internal Revenue Code required any person engaged in a trade or business to file a report (IRS Form 8300) with the IRS for receipts of more than \$10,000 in cash in one transaction (or two or more related transactions) received in the course of that trade or business. *See* 26 U.S.C. § 6050I. The Act amends the BSA to provide that such receipts of cash should be reported to the Financial Crime Enforcement Network (“FinCEN”) at such time and in such manner as the Secretary prescribes. *See* 31 U.S.C. § 5331. Once the Secretary designates the cash transactions to be reported to FinCEN, IRS Form 8300 will no longer need to be filed on those transactions, provided that “the Secretary determines that reporting under this section [of the Internal Revenue Code] would duplicate the reporting to the Treasury” under the BSA. 26 U.S.C. § 6050I(c)(1).

The reporting obligation under the Act, as implemented by the Secretary, is similar to the requirement under the Internal Revenue Code, 26 U.S.C. § 6050I. The report to FinCEN must contain:

- The name and address, and such other identification information as the Secretary requires, of the person from whom the currency was received;
- The amount of currency received;
- The date and nature of the transaction; and
- Such other information, including the identification of the person filing the report, as the Secretary prescribes.

Like the IRS reporting requirement, the Act's provision does not apply to transactions reported by a financial institution in a CTR or to transactions occurring entirely outside the United States (except to the extent prescribed by the Secretary). The Act also contains a prohibition on structuring transactions to avoid the reporting requirement. The Secretary is required to issue regulations to implement the new reporting requirement within six months of the Act's enactment date (April 26, 2002).

L. Reporting Requirements for Commodities Traders

The Act expands the BSA's definition of "financial institution" to include "any futures commission merchant, commodity trading adviser, or commodity pool registered under the Commodity Exchange Act." 31 U.S.C. § 5312(c)(1). The commodity businesses will now have to comply with the BSA's recordkeeping, reporting, and maintenance requirements.

III. NEW REGULATORY AUTHORITY

A. Regulations Regarding Cooperative Efforts to Deter Money Laundering

The Act directs the Secretary of the Treasury to adopt regulations within 120 days of the date of enactment (February 23, 2002) that aim to enhance cooperation among financial institutions, regulatory authorities, and law enforcement agencies regarding individuals, entities, or organizations suspected of being engaged in terrorism or money laundering. *See* Pub. L. No. 107-56 § 314(a), 115 Stat. 272. This provision has the purpose of encouraging regulatory authorities and law enforcement authorities to share information with financial institutions regarding terrorism and money laundering suspects. The regulations may include or create procedures for cooperation and information sharing focusing on:

- Matters specifically related to the finances of terrorist groups; the means by which terrorist groups transfer funds around the world and within the United States, including through the use of charitable institutions, non-profit organizations, and non-governmental organizations; the extent to which financial institutions in the United States are

unwittingly involved in such finances; and the extent to which such institutions are at risk as a result;

- The relationship, particularly the financial relationship, between international narcotics traffickers and foreign terrorist organizations; the extent to which their memberships overlap and engage in joint activities; and the extent to which they cooperate with each other in raising and transferring funds for their respective purposes; and
- Means of facilitating the identification of accounts and transactions involving terrorist groups and facilitating the exchange of information concerning such accounts and transactions between financial institutions and law enforcement organizations.

The regulations may require that financial institutions (a) designate one or more persons to receive shared information, (b) monitor any suspect's accounts, and (c) establish security procedures to protect shared information. The Act prohibits financial institutions from using shared information for any purpose other than identifying and reporting to the regulatory authorities and/or law enforcement agencies on terrorist or money laundering activities.

However, if financial institutions (and any association of financial institutions) notify the Secretary, they may share information regarding suspects among themselves for anti-money laundering purposes without liability to the account holder. Also, sharing information in compliance with this provision will not constitute a violation of Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6827, which usually requires that financial institutions notify consumers before disclosing any non-public personal information to non-affiliated third parties.¹²

The Act requires the Secretary to publish and distribute, at least semi-annually, to financial institutions a report "containing a detailed analysis identifying patterns of suspicious

¹² The Gramm-Leach-Bliley Act has its own law enforcement exception. However, because the Act specifically references liability under the Gramm-Leach-Bliley Act, financial institutions may use the Act's information-sharing provision as a shield from liability without need to rely on the Gramm-Leach-Bliley Act's protections.

activity and other investigative insights” derived from SARs and from federal, state, and local law enforcement investigations.

B. Regulations on Concentration Accounts

The Act amends the BSA to give the Secretary of the Treasury the authority to issue regulations to ensure that concentration accounts¹³ are not used “to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner.”¹⁴ 31 U.S.C. § 5318(h)(3). The regulations must:

- Prohibit financial institutions from allowing clients to direct transactions that move their funds into, out of, or through the financial institution’s concentration accounts;
- Prohibit financial institutions and their employees from informing customers of the existence of or means of identifying the financial institution’s concentration accounts; and
- Require each financial institution to establish written procedures governing documentation of all transactions involving a concentration account which ensure that any time a transaction involving a concentration account commingles funds belonging to customers, the identity of and amount belonging to each customer is documented.

C. Regulations on Verification of Identification

The Act directs the Secretary to prescribe regulations “setting forth the minimum standards for financial institutions and their [foreign and domestic] customers regarding the identity of the customer that shall apply in connection with the opening of an account.”

31 U.S.C. § 5318(l)(1). The regulations must, at a minimum, require financial institutions to implement, and customers to comply with (after adequate notice), “reasonable procedures” for:

¹³ “Concentration account” is an undefined term in the BSA and in the Act. The Comptroller’s Handbook for National Bank Examiners § 301.1, Office of the Comptroller of the Currency (1994), defines “concentration account” as “a corporate demand deposit account used as a clearing account for receipts and/or disbursements.”

¹⁴ The Act does not specifically limit the provision to foreign customers, so the provision appears to apply to all customers, foreign and domestic.

- Verifying the identity of any person seeking to open an account to the extent “reasonable and practicable”;
- Maintaining records of the information used to verify a person’s identity, including their name, address, and other identifying information; and
- Consulting lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any governmental agency to determine whether a person seeking to open an account appears on any such list.

For financial institutions engaged in financial activities described in Section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843(k) (financial activities that do not generally pose a substantial risk to the safety or soundness of depository institutions or the financial system generally, including financial activities subject to the jurisdiction of the Commodity Futures Trading Commission), the regulations prescribed by the Secretary must be prescribed jointly with each “federal functional regulator” (as defined at Section 509 of the Gramm-Leach-Bliley Act). The Secretary, together with any applicable federal financial agencies, may exempt “any financial institution or type of account” from the regulations, “in accordance with such standards and procedures as the Secretary may prescribe.” Final regulations are to take effect within one year of the date of enactment (October 26, 2002).

D. Regulations Setting Minimum Standards for Anti-Money Laundering Programs

The Act gives the Secretary, after consultation with appropriate federal banking regulators, the authority to establish minimum standards for the anti-money laundering programs of financial institutions. *See* 31 U.S.C. § 5318(h). The programs must:

- Develop internal policies, procedures, and controls;
- Designate a compliance officer;
- Establish ongoing employee training programs; and
- Independently audit the anti-money laundering program.

The Secretary may exempt from compliance with the minimum standards any financial institution that is not subject to the regulations issued pursuant to the BSA (found at 31 C.F.R. § 103.11-87).

The Act requires the Secretary to prescribe regulations that “consider the extent to which the requirements imposed under this section are commensurate with the size, location, and activities of the financial institutions to which such regulations apply” within 180 days of the date of enactment (April 24, 2002).

E. SAR Reporting Requirement for Registered Brokers and Dealers

Brokers and dealers are not required to file Suspicious Activity Reports for suspicious transactions. The Act requires the Secretary, after consulting with the Securities and Exchange Commission and the Board of Governors of the Federal Reserve System, to issue final regulations before January 1, 2002, requiring registered brokers and dealers registered with the SEC to file SARs. Final regulations must be published by July 1, 2002.

F. SAR Reporting Requirement for Commodity Traders

With the passage of the Act, entities engaged in commodities activities became subject to the BSA reporting requirements. *See* Part II.L above. In addition, the Act provides that the Secretary, in consultation with the Commodity Futures Trading Commission, may prescribe regulations requiring futures commission merchants, commodity trading advisers, and commodity pool operators registered under the Commodity Exchange Act, 7 U.S.C. §§ 1-25, to file SARs. *See* Pub. L. No. 107-56 § 356(b), 115 Stat. 272.

IV. REQUIRED REPORTS TO CONGRESS

A. Report on Foreign Nationals

The Act directs the Secretary, in consultation with appropriate government agencies, to report to Congress within six months of the date of enactment (April 26, 2002) regarding recommendations regarding the most effective way to require foreign nationals to provide domestic financial institutions with information comparable to that required of United States nationals, to enable those institutions to comply with the new identification requirements. *See* Pub L. No. 107-56 § 326(b), 115 Stat. 272. The Act directs the Secretary to recommend whether to require foreign nationals to obtain an identification number akin to a social security number or a taxpayer identification number. The report must also include recommendations for establishing a system for domestic financial institutions to review information maintained by government agencies for purposes of verifying the identities of foreign nationals trying to open accounts at those institutions.

B. Report on Extending Reporting Responsibility to Investment Companies

The Act requires the Secretary, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission to jointly submit, within one year of the Act's date of enactment (October 26, 2002), a report to Congress on recommendations for effective regulations to extend the BSA reporting requirements to "investment companies," as that term is defined in Section 3 of the Investment Company Act of 1940, 15 U.S.C. § 80a-3.¹⁵ The BSA requirements do not currently apply to such entities.

¹⁵ The report should cover any person that, but for the exceptions found at 15 U.S.C. § 80a-3(c)(1)-(7), would be an "investment company."

The report must also include recommendations as to whether the Secretary should promulgate regulations to include within the definition of “financial institution” under the BSA any corporation or business whose assets are predominately securities, bank certificates of deposit, or other securities or investment instruments and that has five or fewer common shareholders or holders of beneficial or other equity trust. The report must also recommend whether to require such corporations to disclose their beneficial owners when opening accounts or initiating funds transfers at any domestic financial institution. *See*

Pub. L. No. 107-56 § 356(c)(4), 115 Stat. 272.

C. Report on Administration of the BSA

The Act requires the Secretary to submit a report to Congress within six months of the date of enactment recommending whether the processing of information reported to the Department of the Treasury under the BSA should be shifted from the Internal Revenue Service to another agency or agencies. The report must also address whether the IRS should retain responsibility for auditing and examining money services businesses and gaming institutions for BSA compliance. If the Secretary recommends transferring the IRS’s information processing or audit and examination responsibilities, the report is to include recommendations on how to redistribute the responsibilities.

D. Catch-All Report

The Act requires the Secretary, in consultation with the Attorney General, federal banking agencies, the National Credit Union Administration Board, the Securities and Exchange Commission, and such other agencies as the Secretary determines, to evaluate the operations of the provisions of the Act and make such recommendations to Congress as the Secretary

determines to be necessary or advisable, within 30 months of the date of enactment (April 24, 2004).

E. Study and Report on Efficient Use of the CTR System

The Act directs the Secretary to conduct a study of the possible expansion of the statutory exemptions for the BSA's CTR reporting requirement and of methods to improve financial institution use of the exemptions to reduce the submission of CTRs with little or no value to law enforcement. *See* Pub. L. No. 107-56 § 366, 115 Stat. 272. The Act requires submission of a report to Congress detailing the findings and conclusions of this study and recommendations for legislative and administrative action within one year of the Act's date of enactment (October 26, 2002).

V. MONEY LAUNDERING CRIMES, CRIMINAL JURISDICTION, AND FORFEITURE

A. Inclusion of Foreign Corruption Offenses as Money Laundering Crimes

Conducting, or attempting to conduct, a financial transaction that involves the proceeds of "specified unlawful activity" is a federal money laundering crime.¹⁶ *See* 18 U.S.C. § 1956(a)(1). The Act expands one definition of "specified unlawful activity." *See id.* at § 1956(c)(7)(B). Before amendment, the definition included:

- The manufacture, importation, sale, or distribution of a controlled substance;
- Murder, kidnapping, robbery, extortion, or destruction of property by means of explosive or fire; and
- Fraud, or any scheme to attempt to defraud, by or against a foreign bank.

After amendment, the definition also includes:

¹⁶ The "specified unlawful activity" that provides the underlying basis for a money laundering crime is also referred to as the "predicate offense."

- Murder, kidnapping, robbery, extortion or destruction of property by means of a crime of violence;
- Bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;
- Smuggling or export control violations involving an item listed on the United States Munitions List, 22 U.S.C. § 2778, or an item controlled under regulations under the Export Administration Regulations, 15 C.F.R. §§ 730-774; and
- An offense for which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States.

B. Anti-Terrorist Forfeiture Protection

The Act allows the owner of property confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists to contest the confiscation by filing a claim in accordance with the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims). The owner may assert an affirmative defense that (a) the property is not subject to confiscation under such provision of law, or (b) the innocent owner defense found at 18 U.S.C. § 983(d) applies. In considering the claim, a court may admit evidence that would be inadmissible in court under the Federal Rules of Evidence, if the court determines that the evidence is reliable and the exclusion would jeopardize “the national security interests of the United States.” Nothing in this new provision limits or otherwise affects remedies available under 18 U.S.C. § 983 or other provisions of law.

C. Long-Arm Jurisdiction Over Foreign Money Launderers

Prior to passage of the Act, the criminal money laundering statute’s jurisdictional provision did not specifically address jurisdiction over foreign persons, applying instead to “whoever conduct[ed] or attempt[ed] to conduct a transaction described in [18 U.S.C. § 1956(a)(1) or (a)(3)], or a transportation, transmission, or transfer described in [18 U.S.C. § 1956(a)(2)].” The Act amends the jurisdictional provision to include jurisdiction

over “any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found.” *See* 18 U.S.C. § 1956(b). Jurisdiction will exist only if the foreign person: (a) commits an offense under 18 U.S.C. § 1956(a) (the general criminal money laundering provision) involving a financial transaction that occurs in whole or in part in the United States; (b) converts, to his own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or (c) is a financial institution that maintains a bank account at a financial institution in the United States. *See id.*

The Act also allows courts (a) to issue pre-trial restraining orders or take other actions necessary to ensure that property, including that in bank accounts, held by the defendant in the United States is available to satisfy a judgment under the money laundering statute, 18 U.S.C. § 1956, and (b) to appoint a “federal receiver” to “collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located,” to satisfy a judgment under 18 U.S.C. §§ 981, 982, 1956(a), or 1957. *Id.* at §§ 1956(b)(3), 1956(b)(4).

D. Laundering Money Through a Foreign Bank

With the passage of the Act, the criminal money laundering statute also applies to “foreign banks” as defined by Section 1 of the International Banking Act of 1978, 12 U.S.C. § 3101. *See* 18 U.S.C. § 1956(c)(6). Previously, the statute applied only to “financial institutions” as defined in the BSA, 31 U.S.C. § 5312(a). The expansion of the definition means that certain money laundering activities that take place through a foreign bank will now be considered money laundering crimes in the United States.

E. Forfeiture of Funds in United States Interbank Accounts

The Act amends the general federal criminal forfeiture statute to cover “interbank accounts” (as defined at 18 U.S.C. § 984(c)(2)(B)) that it did not previously cover. *See* 18 U.S.C. § 981(k). The funds now covered include those “deposited into an account at a foreign bank that has an interbank account in the United States with a covered financial institution (as described in 31 U.S.C. § 5312(a)(A) - (G)).”¹⁷ These funds “shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign bank, may be restrained, seized, or arrested.”

18 U.S.C. § 981(k)(1)(A). Forfeitures under this provision may be suspended or terminated by the Attorney General, in consultation with the Secretary of the Treasury, if the Attorney General determines that a conflict of law exists between the two jurisdictions regarding “liabilities arising from the restraint, seizure, or arrest of such funds, and that suspension or termination would be in the interest of justice and would not harm the national interests of the United States.” *Id. at* § 981(k)(1)(B). The Act also provides that it is not necessary that the government be able to trace the forfeited funds directly to the funds deposited into the foreign bank. The contestation provisions found at 18 U.S.C. § 983 apply to forfeited interbank funds.

¹⁷ Certain funds are also included under the Controlled Substances Act, 21 U.S.C. §§ 801-971.

F. Proceeds of Foreign Crimes

The Act amends the general federal forfeiture provision to include the amended definition of “specified criminal acts” discussed above in Section V.A. *See* 18 U.S.C. § 981(a)(1)(B).

G. Criminal Penalties for Governmental Employees

The Act imposes a fine of “not more than 3 times the monetary equivalent of the thing of value” and/or up to 15 years in prison for any person who is an employee of any “department, agency, bureau, office, commission, or other entity of the Federal Government, and any other person who is acting for or on behalf of any such entity, who, directly or indirectly, in connection with the administration” of the Act “corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for” (a) being influenced in an official act, (b) participating in any fraud on the United States, or (c) doing or omitting to do an act in violation of the official duty of such person. *See* Pub. L. No. 107-56 § 329, 115 Stat. 272.

H. Currency Crimes

1. Bulk Cash Smuggling

The Act creates the criminal offense of “smuggling bulk cash.” *See* 31 U.S.C. § 5332. Anyone who, with the intent of evading the CMIR reporting requirement, “knowingly conceals more than \$10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, and transports or transfers or attempts to transport or transfer such currency or monetary instruments from a place within the United States to a place outside of the United States, or from a place outside the United States to a place within the United States, shall be guilty of a currency

smuggling offense.” The punishment includes a prison term of up to five years and forfeiture of any property, real or personal, used in or traceable to the offense.

2. Seizure and Forfeiture of Unreported or Misreported Currency

Previously under the BSA, 31 U.S.C. § 5317(c), if a CMIR was required but not filed for monetary instruments exported or imported, or if a person structured any importation or exportation of monetary instruments to avoid the CMIR reporting requirement, the monetary instruments could be seized and forfeited to the federal government. The Act expands the forfeiture provision to reach any property involved in a violation of the CTR reporting requirement, 31 U.S.C. § 5313. The Act clarifies that the property may be forfeited under criminal forfeiture and civil forfeiture provisions. With the passage of the Act, criminal forfeiture will be governed by the procedures set forth in Section 413 of the Controlled Substances Act, 21 U.S.C. § 853. Similarly, civil forfeiture will be governed by the procedures governing civil forfeitures in money laundering cases pursuant to 18 U.S.C. § 981(a)(1)(A).

I. Unlicensed Money Transmitting Businesses

The Act creates the crime of conducting an unlicensed money transmitting business. *See* 18 U.S.C. § 1960. The crime applies to “[w]hoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business” and is punishable by up to five years in prison and a fine. The term “unlicensed money transmitting business” is defined as “a money transmitting business which affects interstate or foreign commerce in any manner or degree” and:

- “[I]s operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable”;
- “[F]ails to comply with the money transmitting business registration requirements under” 31 U.S.C. § 5330 or regulations prescribed thereunder; or

- “[O]therwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity.”

J. Counterfeiting Domestic and Foreign Currency

The Act revises the criminal counterfeiting laws in light of new technologies. For example, one portion of the domestic counterfeiting law that referred to “plates” and “stones” as the technology used for printing has been amended to include “analog, digital, or electronic” images. *See* 18 U.S.C. § 470(2). The Act also enhances the criminal penalties for counterfeiting. For example, the Act extends the maximum prison sentence for “dealing in counterfeit [domestic] obligations or securities” from 10 years to 20 years. *See id.* at § 473.

VI. MISCELLANEOUS

A. FinCEN

The Act makes the Financial Crimes Enforcement Network (“FinCEN”), which was created by an order from the Secretary of the Treasury in 1990, a bureau in the Treasury Department. *See* 31 U.S.C. § 310. The Director of FinCEN is to be appointed by the Secretary of the Treasury and charged with:

- Advising and making recommendations on matters relating to financial intelligence, criminal financial activities, and other financial activities to the Under Secretary of the Treasury for Enforcement;
- Maintaining a government-wide data access service, with access, in accordance with applicable legal requirements, to: (a) information collected by the Department of the Treasury, including CTRs, SARs, and CMIRs; (b) information regarding national and international currency flows; (c) other records and data maintained by other federal, state, local, and foreign agencies, including financial and other records developed in specific cases; and (d) other privately and publicly available information;
- Analyzing and disseminating the available data in accordance with legal requirements and policies and guidelines established by the Secretary and the Under Secretary for Enforcement to: (a) identify possible criminal activity to appropriate law enforcement agencies; (b) support ongoing criminal financial investigations and prosecutions; (c) identify possible instances of financial non-compliance for enforcement by other federal financial agencies; (d) evaluate and recommend possible uses of special currency

- reporting requirements under 31 U.S.C. § 5326; (e) determine emerging trends and methods in money laundering and other financial crimes; (f) support the conduct of intelligence or counter-intelligence activities to protect against international terrorism; and (g) support government initiatives against money laundering;
- Establishing and maintaining a financial crimes communication center to provide law enforcement with intelligence information related to investigations and undercover operations;
 - Furnishing research, analytical, and informational services to financial institutions, federal regulatory agencies with regard to financial institutions, and appropriate federal, state, local, and foreign law enforcement authorities, in the interest of detection, prevention, and prosecution of terrorism, organized crime, money laundering, and other financial crimes;
 - Assisting federal, state, local, and foreign law enforcement authorities in combating the use of informal, non-bank networks and payment and barter systems that permit the transfer of funds (or the equivalent of funds) without records and without compliance with criminal and tax laws;
 - Providing computer and data support and data analysis to the Secretary for tracking and controlling foreign assets;
 - Coordinating with financial intelligence units in other countries on anti-terrorism, anti-money laundering, and similar efforts;
 - Administering the requirements of the Bank Secrecy Act, Section 21 of the Federal Deposit Insurance Act (12 U.S.C. § 1829(b)) (recordkeeping requirements for insured depository institutions), and Chapter 2 of Title I of Public Law 91-508 (recordkeeping requirements for uninsured banks and financial institutions) to the extent delegated such authority by the Secretary; and
 - Such other duties and powers as the Secretary may delegate or prescribe.

FinCEN has worked since 1990 towards fulfilling many of these information collection, collation, and dissemination charges, functioning under Secretarial order rather than statutory foundation. See http://www.ustreas.gov/fincen/af_main.html The Act represents a significant expansion of FinCEN's duties, which may expand further still if the Secretary chooses to delegate aspects of his enforcement authority to FinCEN.

The Act also requires the Secretary to establish "a highly secure network" for FinCEN that:

- Allows financial institutions to file certain required reports, including SARs, through the network; and
- Provides financial institutions with alerts and other financial information regarding suspicious activities that warrant immediate and enhanced scrutiny.

The Act network must be “fully operational” within nine months of the Act’s date of enactment (July 26, 2002).

B. Consideration of Anti- Money Laundering Record in Bank Holding Company Applications

The Act amends Section 3(c) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(c), to include the effectiveness of a company’s anti-money laundering record as a factor to be considered in deciding on applications relating to bank holding companies (such as the acquisition of a bank by a bank holding company). Pub L. No. 107-56 § 327, 115 Stat. 272.

C. Enforcement of Foreign Judgments

The Act amends the federal statute providing for the enforcement of foreign court judgments to allow the federal government to apply for a restraining order under 18 U.S.C. § 983(j) to ensure the availability of funds or property to satisfy the foreign forfeiture or confiscation judgment. *See* 28 U.S.C. § 2467(d)(3). Previously, the government lacked this power. In issuing the restraining order, a court may rely on information set forth in an affidavit describing the nature of the foreign proceeding and setting forth a “reasonable basis” to believe that the property to be restrained will be named in the judgment of forfeiture. The United States court also may register and enforce a restraining order issued by a foreign court of competent jurisdiction and certified by the Attorney General. The restraining order may not be contested on any grounds parallel to those being contested in the foreign court.

D. International Cooperation on Identification of Originators of Wire Transfers

The Act directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to “take all reasonable steps” to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the United States and other countries, and for the information to remain with the transfer from its origination until the point of disbursement. *See* Pub. L. No. 107-56 § 328, 115 Stat. 272. The Secretary is to report annually to the House and Senate banking committees on the progress towards this goal.

E. Amendments to the Right to Financial Privacy Act

Previously, customer financial records obtained by a government agency under the Right to Financial Privacy Act (“RFPA”), 12 U.S.C. §§ 3401-3422, could only be transferred to another agency or department if necessary for a “legitimate law enforcement inquiry.” The Act provides that the records may also be transferred for legitimate “intelligence or counter-intelligence activity, investigation or analysis related to international terrorism.”

See id. at § 3412(a).

Before the Act, the RFPA’s exemptions did not apply to requests for the production and disclosure of financial records pursuant to requests from a government authority authorized to conduct foreign counter- or positive-intelligence activities for the purpose of conducting those activities. Nor did the RFPA’s exemptions apply to requests from the Secret Service for the purpose of conducting its protective functions. The Act extends the RFPA exemptions to requests from “a Government authority authorized to conduct investigations of, or intelligence or counterintelligence analyses related to, international terrorism for the purpose of conducting such investigations or analyses.” *Id.* at § 3414(a)(1).

F. Amendment to the Fair Credit Reporting Act

The Act amends the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t, to require consumer reporting agencies to furnish consumer reports and all information in a consumer's file to a government agency authorized to conduct investigations, intelligence activities, or analysis related to international terrorism when presented with a written certification from such agency that the information is necessary. The consumer reporting agency and its employees must refrain from alerting the consumer that the government agency has sought or obtained his information. Consumer reporting agencies relying in good faith on such government certifications receive a safe harbor from liability to the consumer. *See* Pub. L. No. 107-56 § 358(g), 115 Stat. 272.

G. Dealing with "Hawala" and Other Underground Banking Systems

The Act expands the definition of "financial institution" in the BSA. *See* 31 U.S.C. § 5312(a)(2). Previously, the BSA defined "financial institution" to include "a licensed sender of money." The Act replaces the inclusion of a "licensed sender of money" to now include "a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business an informal money transfer system or network of people who engage as a business in the transfer of money domestically or internationally outside of the conventional financial institutions system." *See id.* at § 5312(a)(2)(R).

The Act also expands the definition of "money transmitting business," which previously included any business that "provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments." The term now includes "any other person who engages as a business

in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.” *Id.* at § 5330(d)(1)(A).

The Act also expands the scope of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1835a, through these definitional changes. Any rules promulgated under Section 21 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829b (recordkeeping requirements for insured depository institutions), apply to these newly defined “financial institutions.” *See* 31 U.S.C. § 5318(l).

The Act directs the Secretary of the Treasury to submit a report to Congress within one year of the Act’s enactment date (October 26, 2002) regarding the need for any additional legislation relating to persons who engage as a business in an informal money transfer system and relating to anti-money laundering controls for underground money movement and banking systems. *See* Pub. L. No. 107-56 § 359(d), 115 Stat. 272.

H. Use of the Authority of United States Executive Directors

If the President determines that a particular foreign country has taken or committed to take actions that contribute to efforts of the United States to respond to, deter, or prevent acts of international terrorism, the Secretary of the Treasury may, consistent with other applicable provisions of law, instruct the United States Executive Director of each “international financial institution” (as defined by the International Financial Institutions Act, 22 U.S.C. § 262r(c)(2)) to use the voice and vote of the Executive Director to support any loan or other utilization of funds of the international financial institution for the country or public or private entities within the country. *See* Pub. L. No. 107-56 § 360, 115 Stat. 272. The Secretary

also may instruct the Executive Director to “aggressively use” the voice and vote of the Director to require an auditing of disbursements from the international financial institution to ensure that no funds are paid to persons who commit, threaten to commit, or support terrorism.

I. Extraterritorial Jurisdiction for Access Device Fraud and Related Activity

The Act extends the crime of fraudulent use of an access device¹⁸ to include such use outside the United States if the offense “involves an access device issued, managed, or controlled by a financial institution, account issuer, credit card system member, or other entity within the jurisdiction of the United States” and the person “transports, delivers, conveys, transfers to or through, or otherwise stores, secrets, or holds within the jurisdiction of the United States” any article used to assist in the commission of the offense or the proceeds of such offense or property derived from the proceeds of the offense. *See* 18 U.S.C. § 1029.

This summary of the new anti-money laundering legislation is intended to highlight the provisions of general interest. Financial institutions, financial agencies, other entities providing financial services, and their customers will need to consider the specific details and nuances of these provisions, and other changes that are more technical may still have an important practical impact.

¹⁸ “Access device” is defined as “any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identified, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument.” 18 U.S.C. § 1029(e)(1).

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