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International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Title III of P.L. 107-56

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International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Title III of P.L. 107-56

Summary

Title III, of the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (2001), the "International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001," contains three subtitles that deal with: International Counter Money Laundering and Related Measures; Bank Secrecy Act Amendments and Related Improvements; and, Currency Crimes and Protection. It contains a list of 10 findings and 13 purposes, relating the scope of international money laundering to the financing of global terrorism and focusing on problems in the international banking system that have facilitated money laundering. Among the purposes of the legislation are: increasing the strength of U.S. measures to prevent, detect, and prosecute international money laundering and the financing of terrorism, to provide a national mandate for subjecting to special scrutiny foreign jurisdictions, financial institutions operating outside the United States, and classes of international transactions or types of accounts that pose particular opportunities for criminal abuse, and to ensure that all appropriate elements of the financial services industry are subject to appropriate requirements to report potential money laundering transactions to proper authorities.

The legislation contains over forty separate sections, each of which is summarized in this report. Some of them are technical in the sense that they address criminal and civil judicial or administrative proceedings; others enhance criminal penalties for various types of financial crimes. Among the provisions that have garnered the most attention are those that affect financial institutions such as the grant of authority to the Secretary of the Treasury to impose special measures, including requiring the closure of certain accounts with foreign banks. To impose these special measures, the Secretary must find that a jurisdiction, class of transactions, or institution is of "primary money laundering concern." In addition, there are provisions that specifically address and specify increased due diligence for correspondent accounts, payable-through accounts, and private banking accounts for non-U.S. persons as well as accounts with off-shore or foreign shell banks. There are requirements and standards for increased cooperation by financial institutions in responding to government requests for information and new requirements for regulations mandating standards for identifying persons opening accounts. The legislation also requires financial institutions to institute anti-money laundering programs, and the Secretary of the Treasury, within 3 months, to issue regulations setting minimum requirements.

Some of the provisions of the legislation went into effect with the President's signature. Some need no implementing regulations. Much of the legislation, however, requires implementing regulations. The full impact, therefore, will emerge over the course of time. By including many requirements for studies and reports, Congress has indicated that it is prepared to conduct fine tuning should the need arise.

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Introduction

The USA PATRIOT ACT, Pub. L. 107-56, 15 Stat. 272 (2001),[1] which became law on October 26, 2001, includes as Title III, the "International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001." Title III derives from H.R. 3004, [2] as passed by the House, and Title III of S. 1510, as passed by the Senate. Although each of the last several Congresses has examined the adequacy of United States laws targeting money laundering, there was insufficient support for any legislation until the September 11 attacks focused attention on the financing of international terrorism and the role that financial institutions could play in identifying and cutting off its source of funding.

This legislation, which has been deemed "the most significant anti-money-laundering legislation in more than 30 years,"[3] is designed to prevent terrorists and others from using the U.S. financial system anonymously to move funds obtained from or destined for illegal activity. It seeks to impose new requirements on banks, the institutions that have heretofore been the focus of the anti-money laundering record keeping and reporting requirements, and on other participants in the financial services industry–brokers and dealers, investment companies, and informal money transmitting networks. Although its main target is international money laundering and terrorists, its reach is broader.

Among the purposes of the legislation are: increasing the strength of U.S. measures to prevent, detect, and prosecute international money laundering and the financing of terrorism. Another aim is to provide a national mandate for subjecting to special scrutiny foreign jurisdictions, financial institutions operating outside the United States, and classes of international transactions or types of accounts that pose particular opportunities for criminal abuse. Another significant purpose of the legislation is to ensure that all appropriate elements of the financial services industry

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[1] The full title is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorists."

[2] H.R. Rep. 107-250, 107th Cong., 1st Sess. (2001).

[3] Todd Stern, Satish M. Kini, and Stephen R. Heifetz, "Array of Regulations to Flow from Anti-Laundering Law," *American Banker* 18 (Nov. 2, 2001) (available in LEXIS-NEXIS, BANKNG Library, CURNWS file).

are subject to appropriate requirements to report potential money laundering transactions to proper authorities.

The legislation contains over forty separate sections, each of which is summarized in this report. Some of them are technical in the sense that they address criminal and civil judicial or administrative proceedings; others enhance criminal penalties for various types of financial crimes. Among the provisions that have garnered the most attention are those that affect financial institutions such as section 311' s grant of authority to the Secretary of the Treasury to impose special measures on financial institutions upon finding a jurisdiction, class of transactions, or institution to be of "primary money laundering concern" that could include opening or maintaining accounts. In addition, there are provisions that specifically address and specify increased due diligence for correspondent accounts, payable-through accounts, and private banking accounts for non-U.S. persons as well as accounts with off-shore or foreign shell banks. There are requirements and standards for increased cooperation by financial institutions in responding to government requests for information and new requirements for regulations mandating standards for identifying persons opening accounts. The legislation also requires financial institutions to institute anti-money laundering programs and the Secretary of the Treasury, within 3 months, to issue regulations setting minimum requirements.

Since much of the legislation requires implementing regulations, the full impact will emerge over the course of time. Because many of its provisions impose requirements for studies and reports, Congress has indicated that it is prepared to conduct fine tuning should the need arise.

Pre-existing Law

This legislation builds on existing law, which includes substantive criminal statutes defining and prohibiting money laundering and statutes calling for a regulatory regime of record keeping and reporting on various financial transactions and prescribing civil and criminal penalties for violations of that scheme and its regulations. The major components of this array of anti-money laundering laws are presented below.

1. 18 U.S.C. § 1956 prohibits anyone from knowingly engaging in various financial transactions that involve the proceeds of specified illegal activity. A person may be convicted under this statute if proven to have engaged in any of various types of financial transactions without actually knowing that the proceeds of illegal activity are involved provided the prosecution proves willful blindness.[4] It is a crime that uniquely involves the activities of financial institutions and, therefore, requires their diligence both to cooperate with law enforcement and to avoid liability.

2. Under 18 U.S.C. § 1957, anyone who knowingly engages in a monetary transaction in criminally derived property of more then $10,000, that has been derived from specified unlawful activity, is subject to criminal penalties.

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[4] *United States v. Jensen*, 69 F. 3d 906 (8th Cir. 1995), *cert. denied*, 517 U.S. 1169.

3. Titles I and II of P.L. 91-508, including 12 U.S.C. §§ 1829b, and 1951 - 1959; 31 U.S.C. §§ 5311 *et seq.*, the Bank Secrecy Act (BSA) of 1970 and its major component, the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311 *et seq.*, require reports and records of transactions involving cash, negotiable instruments, or foreign currency and authorize the Secretary of the Treasury to prescribe regulations to insure that adequate records are maintained of transactions that have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Violation of the regulations is subject to civil and criminal penalties.

4. Since April, 1996,[5] the regulations require that banks and other depository institutions submit Suspicious Activity Reports (SARs)[6] of any transaction involving at least $5,000, which the institution suspects: to include funds from illegal activities; to have been conducted to hide funds from illegal activities or designed to evade the BSA requirements; have "no business or apparent lawful purpose;" or are "not the sort [of transaction] in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and purpose of the transaction."[7]

5. Under the Money Laundering Suppression Act of 1994, 31 U.S.C. § 5330(a), the Secretary of the Treasury is required to establish a system to register money transmitting businesses. Financial Crimes Enforcement Network (FinCEN"s) regulations require registration by December 31, 2001. 31 C.F.R. 103.41.

Implementation

While much of the new law will require regulations to be issued by the Treasury Department in consultation with other federal financial institution regulators,[8] some provisions take effect immediately. Among them are the following:

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[5] 61 Fed.Reg. 4326 (February 5, 1996). Included in the notice were implementing regulations applicable to national banks and to state chartered member banks.12 C.F.R. §§ 21.11 and 208.20. Promulgated soon thereafter were regulations applicable to state chartered nonmember banks; 12 C.F.R. § 353.3; federally insured credit unions (12 C.F.R. § 748.1); and federally insured savings associations, 12 C.F.R. § 563.180.

[6] 31 C.F.R. § 103.21. The authority to require suspicious activity reports derives from 31 U.S.C. § 5314(h), authorizing the Secretary of the Treasury to require financial institutions to report suspicious transactions, originally enacted as section 1518 of the Housing and Community Development Act of 1992, P.L. 102-550, 106 Stat. 3672,4059.

[7] 31 C.F.R. § 103.21(a)(2).

[8] See: Federal Reserve Board, Division of Banking Supervision and Regulation, SR 01-29, "The USA PATRIOT Act and the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (November 26, 2001). [http://www.federalreservegov/boarddocs/SRLETTERS/2001/sr0129.HTM].

1. The prohibition on U.S. correspondent accounts with shell banks, *i.e.*, banks having no physical presence in their chartering country, becomes effective December 25, 2001. Section 313 of the Act.

2. A covered financial institution is required to provide records relating to its anti-money laundering program or its customers within 120 hours of a request from the appropriate regulator. Section 319(b).

3. Banks holding correspondent accounts for foreign banks are required to maintain certain records identifying the owners of the foreign bank and the name of an agent in the U.S. authorized to accept legal process that they might be produced within seven days of their receipt of a subpoena from the Department of the Treasury or the Attorney General. Section 319(b).[9]

4. Due diligence standards are required to be in place to detect and report money laundering by all financial institutions that maintain private banking accounts or correspondent accounts in the U.S. for non-U.S. persons, including individuals and entities. Enhanced standards are required for certain correspondent accounts, *e.g.*, those with foreign banks with offshore licenses or from particular jurisdictions. Minimum due diligence standards are specified for private banking accounts, accounts with minimum deposits of $1 million and managed by a person who acts as a liaison between the bank and the beneficial owner, held for foreign owners. Sec. 312.

International Money Laundering Abatement and Financial Anti-Terrorism Act

SUBTITLE A–International Counter Money Laundering and Related Measures

Special Measures. Sec. 311 authorizes the Secretary of the Treasury (the Secretary) to impose certain regulatory restrictions, known as "special measures," upon finding that a jurisdiction outside the U.S., a financial institution outside the U.S., a class of transactions involving a jurisdiction outside the U.S., or a type of account, is "of primary money laundering concern." To make this finding, the Secretary must consult with the Secretary of State and the Attorney General and consider certain factors relating to the foreign jurisdiction or the particular institution targeted. Among the factors to be considered in imposing special measures relating to a jurisdiction are: involvement with organized crime or terrorists, bank secrecy laws and regulations, the existence a mutual legal assistance treaty with the U.S., and level of official corruption. The special measures generally involve detailed record keeping and reporting requirements relating to underlying transactions and beneficial ownership of accounts. Special measures could involve prohibiting the maintenance

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[9] On November 20, 2001, Treasury issued "Interim Guidance Concerning Compliance by Covered U.S. Financial Institutions with New Statutory Anti-Money Laundering Requirements Regarding Correspondent Accounts Established or Maintained for Foreign Banking Institutions." [http://www.treas.gov/press/releases/regs.htm].

of payable-through or correspondent accounts for such institutions or jurisdictions, provided that there has been consultation with the Secretary of State, the Attorney General, and the Chairman of the Federal Reserve Board, as well as with other appropriate federal banking agencies and consideration has been given to whether other nations have taken similar action, whether there would be a significant competitive disadvantage on U.S. financial institutions, and any effect upon the international payment system. "Account" is defined for banks, with authority delegated to the Secretary to define the term for other financial services businesses upon consultation with the appropriate federal regulators.

Generally, unless there are other provisions of law on which the Secretary may base a special measure, none may remain in effect beyond 120 days unless a regulation has been promulgated and none may be ordered unless accompanied by a proposed rule. Moreover, no order prohibiting or imposing conditions on maintaining correspondent accounts may be issued unless final regulations have been promulgated. In addition, the Secretary is required to issue a regulation defining "beneficial ownership" for purposes of this legislation.

Special Due Diligence for Correspondent Accounts and Private Banking Accounts. Sec. 312 requires every financial institution with a private banking or correspondent account for a foreign person or bank to establish policies and controls designed to detect and report money laundering through the accounts. If a correspondent account is maintained for a foreign bank that operates under an offshore license–*i.e.*, does not and may not do banking business in the chartering country–or that is licensed by a jurisdiction designated for special measures or listed as non-cooperative by an international organization in which the U.S. participates and concurs, enhanced due diligence policies are required. For correspondent accounts for foreign banks, U.S. banks, at the minimum, must secure ownership information on the foreign bank, maintain enhanced scrutiny of the account, and ascertain due diligence information on the foreign banks for which the target bank provides correspondent banking services. For foreign private banking clients, *i.e.*, those with aggregated deposits of $1,000,000, information must be secured on the identity of the named owners of the accounts and the actual or beneficial owners, and the source of the funds. Enhanced scrutiny is required for accounts held for senior foreign political figures. This section becomes effective within 180 days of enactment; regulations must be issued within 120 days of enactment.

Prohibition on Correspondent Accounts for Foreign Shell Banks. Sec. 313 prohibits U.S. banks, thrifts, private banks, foreign bank agencies and branches operating in the U.S., and brokers and dealers licensed under the Securities Exchanges Act of 1934, 15 U.S.C. 78a *et seq.*, from maintaining correspondent accounts for foreign shell banks–banks that have no physical presence in any country. It requires that the covered institutions take reasonable steps to preclude their providing services to such shell banks through other banks and requires the Secretary to issue implementing regulations.

Cooperative Efforts to Deter Money Laundering. Sec. 314 requires the Secretary to issue regulations within 120 days of enactment to encourage further cooperation among financial institutions and regulatory and law enforcement authorities to promote sharing information on individuals, entities, and organizations

engaged in or suspected of engaging in terrorist acts or money laundering. In these regulations, the Secretary may require each financial institution to designate persons to receive information and to monitor accounts and establish procedures to protect the shared information. No information received by a financial institution under this provision may be used for any purpose other than identifying and reporting activities involving terrorism or money laundering. If a financial institution uses this information for those purposes, it may not be held liable for unauthorized disclosure or failure to provide a notice under any law or regulation, state or federal, or any contract or agreement. The Secretary is required to provide a semiannual report analyzing suspicious activity reports.

Foreign Corruption Offenses Added to List of Money Laundering Predicates. Sec. 315 adds to the list of offenses under foreign law, the proceeds of which may form an element of a federal money laundering prosecution: any crime of violence; bribery of a public official; theft, embezzlement, or misappropriation of public funds; certain smuggling or export control violations; and, offenses for which the U.S. would be obliged to extradite alleged offenders. Also added would be certain offenses under the U.S. criminal code relating to customs, importation of firearms, firearms trafficking, computer fraud and abuse, and felony violations of the Foreign Agents Registration Act.

Right to Raise Innocent Property or Innocent Owner Defense in Terrorist-Related Confiscations or Forfeitures. Prior to enactment of the USA PATRIOT Act, the President had authority to order the vesting of seized foreign assets under the Trading With the Enemy Act § 5(b), 50 U.S.C. App. § 5(b), which applies when there has been a declaration of war, but not under the International Emergency Economic Powers Act (IEEPA), 50 U.S. C. 1702, which applies when the President has declared the existence of an unusual or extraordinary threat to the U.S. national security, foreign policy, or economy having its source, in whole or substantial part, outside the United States. Section 106 of the new law amends IEEPA to authorize the President, "when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals," to "confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States."

Sec. 316 authorizes judicial review of confiscation of terrorist related assets and sets forth two defenses for those claiming the property that must be proven by a preponderance of the evidence: (1) that the property is not subject to forfeiture under the applicable law, and (2) the innocent owner defense detailed in the criminal forfeiture provision of 18 U.S.C. § 983(d). It also authorizes the government to offer otherwise inadmissible evidence provided the court finds that complying with the Federal Rules of Evidence would jeopardize national security. There is also a clause alluding to the right to raise Constitutional claims and claims under the Administrative Procedure Act and a savings clause preserving other remedies.

Long-Arm Jurisdiction Over Foreign Money Laundering. Sec. 317 provides jurisdiction over foreign persons, including financial institutions, for substantive money laundering offenses under 18 U.S.C. §§ 1956 and 1957, provided

there is a valid service of process and either the offense involved a transaction in the U.S. or the property has been the subject of a forfeiture judgment or a criminal sentence. The district courts are authorized to appoint a receiver to take control of the property.

Money Laundering Through a Foreign Bank. Sec. 318 amends the substantive money laundering criminal statute, 18 U.S.C. § 1956, to cover laundering money through a foreign bank.

Forfeiture of Funds in U.S. Interbank Accounts. Sec. 319 amends 18 U.S.C. § 981 to permit forfeiture, including forfeiture under the Controlled Substances laws, of accounts in offshore offices of foreign banks by substituting funds in interbank accounts in U.S. financial institutions up to the value of the funds in the targeted account. The section authorizes the Attorney General to suspend or terminate such a forfeiture action on conflict-of-law grounds or upon a finding that to do so would be in the interest of justice and would not harm the national interests of the U.S.

Sec. 319, effective within 60 days of enactment, amends the Currency and Transaction Reporting Act, 31 U.S.C. § 5311, *et seq.*, to require U.S. banks, thrifts, private banks, foreign bank agencies and branches operating in the U.S., and brokers and dealers licensed under the Securities Exchanges Act of 1934, 15 U.S.C.§ 78a et seq., to provide federal regulators, upon request, information on the institution's compliance with anti-money laundering requirements or on a customer's account, within 120 hours. It also authorizes the Secretary of the Treasury or the Attorney General to subpoena records from a foreign bank that has a correspondent account in the U.S. that relate to that account, including records maintained abroad. It requires U.S. institutions maintaining correspondent accounts for foreign banks to maintain records identifying the owners of such foreign banks and indicating the name and address of a U.S. resident authorized to accept service of legal process for records relating to the correspondent account. U.S. institutions having such correspondent accounts are required to provide federal law enforcement officers with these names and addresses within 7 days of receiving a request and are required to terminate correspondent accounts within 10 business days of receiving a notice from the Secretary or the Attorney General that the foreign bank has failed to comply with a subpoena or to contest its issuance. U.S. financial institutions are not to be held liable for terminating such accounts and are subject to civil penalties of $10,000 per day for failing to do so.

This section also amends the criminal forfeiture provisions of the Controlled Substances Act, 21 U.S.C. §§ 853(p) and 853(e) to permit a court to order return to the jurisdiction of substitute assets, property that may be substituted for unreachable property subject to forfeiture, and to issue a pre trial-order to a defendant to repatriate such substitute assets.

Proceeds of Foreign Crimes. Section 320 authorizes the forfeiture of property derived from or traceable to felonious violations of foreign controlled substances laws, provided the offense is punishable by death or a term of imprisonment of more than one year under the law of the foreign nation and under U.S. law, had it occurred within the jurisdiction of the U.S.

Credit Unions and Commodity Futures Trading Corporation Regulatees. Sec.. 321 adds credit unions and CFTC- regulated or registered futures commission merchants, commodity trading advisors, and commodity pool operators to the specific list of financial institutions subject to the requirements of the Currency and Foreign Transaction Reporting Act.

Corporation Represented by a Fugitive. Sec. 322 amends 28 U.S.C. § 2466 to include corporations having a majority stockholder who is a fugitive, thus, disallowing such corporations to successfully pursue innocent owner claims in a civil or criminal forfeiture case.

Enforcement of Foreign Judgments. Sec. 323 amends 28 U.S.C. § 2467 to extend authority for judicial enforcement of foreign confiscation from the previous provisions limiting such enforcement to confiscations related to drug trafficking offenses. Under the newly enacted provision U.S. district courts may enforce foreign confiscations related to any offense under foreign law that, if committed under U.S. law, would have permitted forfeiture.

Report. Sec. 324 requires the Secretary of the Treasury, within 30 months of enactment, to make a report on operations respecting the provisions relating to international counter-money laundering measures and any recommendations to Congress as to advisable legislative action.

Concentration Accounts. Sec. 325 authorizes the Secretary of the Treasury to prescribe regulations governing maintenance of concentration accounts by financial institutions. If issued, such regulations must prohibit financial institutions from allowing clients to direct transactions through those accounts, prohibit financial institutions from informing customers of the means of identifying such accounts, and require each financial institution to establish written procedures to document all transactions involving a concentration account in such a way that amounts belonging to each customer may be identified.

Verification of Identification. Sec. 326 requires the Secretary of the Treasury, jointly with appropriate regulators of financial institutions, within a year of enactment, to prescribe minimum standards for identifying customers opening accounts at financial institutions. These are to include procedures to verify customer identity and compare with government lists of terrorists and terrorist organizations. Under this section, the Secretary is required to submit a report to Congress within six months of enactment, recommending a means of insuring similarly accurate identification of foreign nationals, requiring an identification number similar to a Social Security number or a tax identification number for foreign nationals opening accounts at financial institutions, and setting up a system for financial institutions to review information held by government agencies to verify identities of foreign nationals opening accounts.

Consideration of Anti-Money Laundering Record. Sec. 327 amends the Bank Holding Company Act and the Federal Deposit Insurance Act, to require that, before approving certain acquisition or merger applications under the Bank Holding Company Act or the Federal Deposit Insurance Act, the Board of Governors of the

Federal Reserve System and the Federal Deposit Insurance Corporation must consider the institution's effectiveness in combating money laundering.

International Cooperation on Identification of Originators of Wire Transfers. Sec. 328 requires the Secretary of the Treasury to encourage foreign governments to require the name of the originator in wire transfer instructions and include it from origination to disbursement. The Secretary is to report annually on progress toward this end to the House Financial Services Committee and Senate Banking, Housing, and Urban Affairs Committee.

Criminal Penalties. Sec. 329 criminalizes the soliciting or acceptance of a bribe by anyone acting on behalf of an entity of the Federal Government in connection with the administration of the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, subject to a fine of up to three times the value of the thing constituting the bribe, 15 years imprisonment, or both.

International Cooperation in Money Laundering Investigations. Sec. 330 states the sense of Congress that international negotiations should be pursued for further cooperative efforts to insure that foreign financial institutions maintain adequate records relating to foreign terrorist organizations and money launderers and make such records available to U.S. law enforcement officials and domestic financial institution supervisors.

SUBTITLE B–BANK Secrecy Act Amendments and Related Improvements

Amendments Relating to Reporting of Suspicious Activities. Sec. 351 amends the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5318(g)(3), to extend the safe harbor provisions for financial institutions and their employees who provide information as to possible law violations to cover all voluntary disclosures of possible law violations made to any federal government agency. Also covered are employees or agents of institutions who require others to make such disclosures. The immunity provided under the legislation covers potential liability under contracts and other legally enforceable agreements.. Previously, immunity was provided only for disclosures of violation of law or regulation pursuant to law or regulation; there was no specific immunity for those requiring others to make disclosures; and, immunity extended only to liability under laws or regulations of the United States or constitution, law, or regulation of a state or political subdivision thereof. The section makes it clear that the liability does not extend to prosecutions brought by governmental entities. Disclosure to the subject of the tip-off is prohibited. Information disclosed about potential law violations may be used in employment references to other financial institutions as well as, under the rules of the securities exchanges, in termination notices.

Anti-Money Laundering Programs. Sec. 352, effective 180 days after enactment, requires each financial institution to develop an anti-money laundering program to include development of internal policies, designation of a compliance officer, ongoing employee training, and an independent audit function to test the programs. It authorizes the Secretary of the Treasury to prescribe minimum standards

for such programs and to exempt those financial institutions that are not covered by the regulations promulgated under the Currency and Foreign Transactions Reporting Act. It requires the Secretary to prescribe regulations that consider the extent to which the requirements imposed under this section comport with the size, location, and activities of the financial institutions to which they apply.

Geographic Targeting Orders–Penalties and Extension of Permissible Period. Sec. 353 extends the civil and criminal penalties under the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5321(a) and 5322, to include violations of geographic targeting orders issued under that Act and willful violations of regulations prescribed under the record keeping requirements of the Bank Secrecy Act, found in Section 21 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1829(b), or violations of regulations covering uninsured financial institutions issued by Treasury under the authority of 12 U.S.C. §§ 1951 - 1959. Before enactment of USA-PATRIOT, 18 U.S.C. § 1829(b) carried no criminal penalties and set civil penalties for violations of regulations issued under 12 U.S.C. § 1829(b) at up to $10,000. Section 1955 of Title 12, U.S.C. carried civil penalties of up to $10,000; and, 12 U.S.C. § 1956 carried a criminal penalty of up to $1,000 and imprisonment for one year. 31 U.S.C. § 5321(a) permits civil penalties of $25,000 or the amount of the instrument (not to exceed $100,000); 31 U.S.C. § 5322 permits criminal penalties of up to $250,000 in fines and imprisonment of up to 5 years for a single offense and enhancement for offenses committed in conjunction with other offenses or as a pattern of criminal activity.

The section also extends the prohibitions on structuring transactions to avoid reporting requirements, 31 U.S.C. § 5324, to cover structuring to avoid geographic targeting orders and record keeping requirements of the Bank Secrecy Act, found in Section 21 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829(b), and 12 U.S.C. §§ 1951- 1959. It extends the permissible length of geographic targeting orders from 60 to 180 days.

Anti-Money Laundering Strategy. Sec. 354 includes in the list of topics prescribed for inclusion in the Administration's annual anti-money laundering strategy, data regarding the funding of international terrorism acts.

Authorization to Include Suspicions of Illegal Activity in Written Employment References. Sec. 355 authorizes depository institutions, "[n]otwithstanding any other provision of law," to disclose the possible involvement of institution-affiliated parties in potentially unlawful activity. Such disclosures may be made to other insured depository institutions requesting employment references, provided the disclosure is not made with malicious intent.

Suspicious Activities Reports by Securities Brokers. Sec. 356 requires the Secretary of the Treasury, by January 1, 2002, to publish proposed regulations requiring registered brokers and dealers to file suspicious activity reports under 31 U.S.C. § 5318(g). It also authorizes the Secretary to prescribe such regulations for futures commission merchants, commodity trading advisors, and commodity pool operators registered under the Commodity Exchange Act. It also requires a report, within one year of enactment, recommending effective regulations under the Currency and Foreign Transactions Reporting Act for investment

companies, as defined in the Investment Company Act of 1940, and to evaluate the possibility of requiring trusts and personal holding companies to disclose their beneficial owners when opening accounts at depository institutions.

Special Report on Administration of Bank Secrecy Provisions. Sec. 357 requires the Secretary of the Treasury to submit a report, within six months of enactment, on the role of the Internal Revenue Service in administering the Bank Secrecy Act's Currency and Foreign Transactions Reporting Act. The report is specifically to address such issues as whether processing of information is to be shifted from the Internal Revenue Service and whether the Internal Revenue Service is to retain authority for auditing compliance by money services businesses and gaming businesses with BSA requirements.

Bank Secrecy Provisions and Activities of U.S. Intelligence Agencies to Fight International Terrorism. Sec. 358 authorizes the Secretary of the Treasury to refer suspicious activity reports to U.S. intelligence agencies for use in the conduct of intelligence or counterintelligence activities to protect against international terrorism. It authorizes the release of information under the Currency and Foreign Transactions Reporting Act and other provisions of the Bank Secrecy Act, the Right to Financial Privacy Act, and the Fair Credit Reporting Act, to U.S. intelligence agencies by amending 31 U.S.C. §§ 5311, 5318(g)(4)(b), 5319; 12 U.S.C. § 1829(b), 1953; 12 U.S.C. 3412(a); 15 U.S.C. § 1681x.

Reporting of Suspicious Activities by Underground Banking Systems. Sec. 359 specifically includes "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 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" as a "financial institution" subject to the requirements of the Currency and Foreign Transactions Reporting Act. It subjects them to any regulations promulgated under the authority of section 21 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829b. That section of the law provides authority for the regulations issued under 31 C.F.R. Part 103, requiring reports of currency and foreign transactions, including those requiring suspicious activity reports from money services businesses, 31 C.F.R. § 103.20.

Sec. 359 also mandates a report by the Secretary, within a year of enactment, on whether further legislation is needed with respect to these underground banking systems, including whether the threshold for reporting suspicious activities ($2,000) should be lowered for them.

Use of Authority of U.S. Executive Directors. Sec. 360 authorizes the President to direct the U. S. executive directors of international financial institutions to use their voices and votes to support countries or entities that have contributed to the U.S. anti-terrorism efforts and ensure that no funds of their institutions are paid to persons who threaten to commit or support terrorism. International financial institutions, as defined in 22 U.S.C. § 262r(c)(2), include the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment

Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the Inter-American Investment Corporation.

Financial Crimes Enforcement Network (FinCEN). Sec. 361, by enacting 31 U.S.C. § 310, transforms FinCEN from a Treasury Department bureau established administratively to a statutory bureau in the Treasury Department. It specifies that it is to be headed by a Director to be appointed by the Secretary. It details its duties and powers. Subject to applicable legal requirements and guidance by Treasury, FinCEN is to maintain a government-wide data access service to information collected under the anti-money laundering reporting laws, information on currency flows, and other records maintained by other government offices as well as privately and publically available information;. It is to analyze and disseminate data : (1) to federal, state, local, and foreign law enforcement officials to identify possible criminal activity; and (2) to regulatory officials to identify possible violations of the anti-money laundering reporting requirements. It is to determine emerging trends and methods in money laundering; and, support intelligence activities against international terrorism.

FinCEN is to establish and maintain a financial crimes communications center to furnish law enforcement authorities with intelligence information relating to investigations and undercover operations. It is to furnish informational services to financial institutions, federal regulatory agencies, and law enforcement authorities, in the interest of countering terrorism, organized crime, money laundering, and other financial crimes. It is to assist law enforcement and regulatory authorities in combating the use of informal nonbank networks permitting transfer of funds or the equivalent of funds without records and in insuring compliance with criminal and tax laws. It is to provide computer and data support and data analysis to the Secretary of the Treasury for tracking and controlling foreign assets. It is to administer the anti-money laundering reporting requirements as delegated by the Secretary of the Treasury.

Sec. 361 further specifies that the Secretary is to prescribe procedures with respect to the government-wide data access service and the financial crimes communications center maintained by FinCEN to provide efficient entry, retrieval, and dissemination of information. This is to include a method for submitting reports by Internet, cataloguing of information, and prompt initial review of suspicious activity reports. Sec. 361 requires the Secretary to develop, in accordance with the Privacy Act, 5 U.S.C. § 552a, and the Right to Financial Privacy Act, 12 U.S.C. §§ 3401, *et seq.*, procedures for determining access, limits on use, and "how information about activities or relationships which involve or are closely associated with the exercise of constitutional rights are screened out."

Appropriations of such sums as are necessary are authorized for fiscal years through 2005.

The Secretary is to study methods for improving compliance with the reporting requirements under 31 U.S.C. § 5314, relating to foreign currency transactions, and to submit an annual report to Congress on the subject, beginning six months after enactment.

Establishment of Highly Secure Network. Sec. 362 requires the Secretary to establish as operational within nine months, a highly secure network in FinCEN to allow financial institutions to file electronically reports required under the Bank Secrecy Act and to provide financial institutions with alerts and other information regarding suspicious activities warranting immediate and enhanced scrutiny.

Increase in Civil and Criminal Penalties for Money Laundering. Sec. 363 amends 31 U.S.C. §§ 5321(a) and 5322 to permit the Secretary to impose a civil money penalty and a court to impose a criminal penalty equal to 2 times the amount of the transaction, but not more than $1,000,000 for violations of the suspicious activity reporting requirements, under 31 U.S.C. §§ 5318(i) and (j) or any special measures imposed under 31 U.S.C. § 5318A. Under pre-existing law, the Secretary had authority to impose a civil money penalty of the amount of the transaction, up to $100,000, or $25,000; and, a criminal fine for a violation of the suspicious activity reporting requirement was set at not more than $250,000.

Uniform Protection Authority for Federal Reserve Facilities. Sec. 364 authorizes the Federal Reserve Board to issue regulations, subject to the approval of the Attorney General, to authorize personnel to act as law enforcement officers to protect the Board's personnel, property, and operations, including the Federal Reserve banks, and for such personnel to carry firearms and make arrests.

Reports Relating to Coins and Currency Received in Non-Financial Trade of Business. Sec. 365 adds a new section to the anti-money laundering reporting requirements, 31 U.S.C. § 5331. It requires anyone engaging in a trade or business, who receives $10,000 in coins or currency (including foreign currency and financial instruments) in a single transaction or in two related transactions to file a report on the transaction to FinCEN as prescribed by the Secretary in regulations. The form for such reports must include the name and address of the person from whom the coins or currency are received, the date and nature of the transaction, and such other information as the Secretary may prescribe. Exemptions are made for reports filed by financial institutions under 31 U.S.C. § 5313 and its implementing regulations, and for transactions occurring outside the United States–unless the Secretary so prescribes. The section also includes a provision that prohibits structuring transactions to cause such businesses to evade these reporting requirements or requirements under implementing regulations.[10] "Nonfinancial trade or business" is defined to mean any trade or business other than a financial institution subject to reporting requirements under 31 U.S.C. § 5313 and regulations thereunder

Efficient Use of Currency Transaction Report System. Sec. 366 requires the Secretary to study expanding the statutory exemption system to the currency transaction reporting requirements, under 31 U.S.C. § 5313, authorizing exemptions for transactions with various entities and qualified business customers from the domestic currency and coin reporting requirements. The study is to address methods for improving financial institutions' use of these exemptions to reduce the

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[10] There appears to be a typographical error in the text of the legislation. The prohibition on structuring refers to 31 U.S.C. § 5333, rather than to 5331.

submission of reports with little or no value for law enforcement purposes. A report on this is required within one year.

SUBTITLE C–Currency Crimes and Protection

Bulk Cash Smuggling into or out of the United States. Sec. 371 creates a new criminal offense, knowingly concealing more than $10,000 and transporting it or attempting to transfer it out of or into the United States. Conviction under the statute is subject to imprisonment for up to 5 years and forfeiture of any property involved in the offense. Preexisting law, 31 U.S.C. § 5316, requires a report by anyone transporting monetary instruments, defined to include currency, of more than $10,000 into or out of the U.S. In *United States v. Bajakajian*, 524 U.S. 324 (1998), the Supreme Court ruled it unconstitutional to require forfeiture of $357,144, in cash that the defendant possessed legitimately and was attempting to carry with him when leaving the United States. The Court found the penalty disproportional to the gravity of the offense and a violation of the Excessive Fines Clause of the Eighth Amendment to the U. S. Constitution. In reaching that decision, the Court considered the fact that the offense was merely a reporting offense since it was not illegal to transport the currency.

Forfeiture in Currency Reporting Cases. Sec. 372 authorizes criminal forfeiture and civil forfeitures for violations of the reporting requirements relating to monetary instruments and makes the criminal forfeiture procedures of section 413 of the Controlled Substances Act and the civil forfeiture procedures of 18 U.S.C. § 981(a)(1)(A) (money laundering) applicable to criminal and civil forfeiture, respectively, under 31 U.S.C. §§ 5313 (reports on domestic coins and currency), 5316 (reports on exporting monetary instruments), and 5324.(structuring transactions to evade reporting requirements).

Illegal Money Transmitting Businesses. Sec. 373 prohibits anyone from knowingly conducting, controlling, managing, supervising, directing, or owning a money transmitting business: (1) without a license in a state that requires such a license and subjects those operating without a license to state misdemeanor or felony penalties; (2) not registered with Treasury under 31 U.S.C. § 5330; or (3) involves the transportation or transmission of funds that the defendant knows to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity. The section prescribes a federal penalty of up to five years' imprisonment and criminal fines and authorizes civil forfeiture of property involved in transactions in connection with this offense.

Counterfeiting Domestic Currency and Obligations. Sec. 374 extends the definition of counterfeiting obligations of the United States to cover analogs, digital or electronic images, as well as "any plate, stone, or other thing or part thereof, used to counterfeit" such obligations or securities, as provided in pre-existing law.18 U.S.C. § 470(2). This section is also amended to provide penalties for offenses committed outside the U.S. as are applicable to those within the U.S. Other provisions increase the penalties under other counterfeiting statutes to 20 years' imprisonment: 18 U.S.C. §§ 471 (obligations or securities of the U.S.); 472 (uttering

counterfeit obligations or securities); 473 (dealing in counterfeit obligations or securities); and, 474 (using plates or stones for counterfeiting).

The section amends 18 U.S.C. § 474 to cover counterfeiting involving an analog, digital or electronic image of U.S. obligations, unless authorized by Treasury. It amends 18 U.S.C. § 476 (taking impressions of tools used for obligations or securities of the U.S.) to increase the penalty from 10 years to 25 years' imprisonment. It amends 18 U.S.C. § 477 (possessing or selling impressions of tools used for obligations or securities) to cover an analog, digital, or electronic image. It raises the penalty for connecting parts of different notes, 18 U.S.C. § 484, from five years' to ten years' imprisonment, and for offenses under 18 U.S.C. § 493 (bonds and obligations of certain lending agencies), from five to ten years' imprisonment.

Counterfeiting Foreign Currency and Obligations. Sec. 375 increases the penalties for violations of various offenses involving foreign currency and obligations as follows: 18 U.S.C. § 478 (foreign obligations or securities, penalty raised from five to 20 years; 18 U.S.C. § 479 (uttering counterfeit foreign obligations, penalty raised from three to twenty years); 18 U.S.C. § 480 (possessing counterfeit foreign obligations or securities, penalty raised from one to twenty years); 18 U.S.C. § 481 (plates or stones for counterfeiting foreign obligations or securities, penalty raised from five to twenty years); 18 U.S.C. § 482 (foreign bank notes, penalty raised from two to twenty years); and 18 U.S.C. § 483 (foreign bank notes, penalty raised from two to twenty years). The section also criminalizes counterfeiting involving an analog, digital, or electronic image of foreign obligations and securities.

Laundering the Proceeds of Foreign Terrorism.. Sec. 376 adds 18 U.S.C. § 2339B, providing material support to designated foreign terrorist organizations, as a predicate offense for a money laundering prosecution under 18 U.S.C. § 1956.

Extraterritorial Jurisdiction. Sec. 377 enhances the applicability of 18 U.S.C. § 1029 (computer fraud) by covering offenses committed outside the U.S. that involve an access device issued by a U.S. entity, such as a credit card, provided the defendant transports, delivers, conveys, transfers to or through, or otherwise stores, secrets, or holds within the jurisdiction of the U.S., any article used to assist in the commission of the offense or the proceeds of such offense or property derived therefrom