

THE EFFECT OF THE USA PATRIOT ACT ON THE MONEY LAUNDERING AND CURRENCY TRANSACTION LAWS

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The USA Patriot Act (hereinafter referred to as the "Patriot Act") is a comprehensive piece of legislation passed in the wake of the terrorist attacks of September 11th, 2001.³ It takes up more than 125 pages in the United States Statutes at Large.⁴ There are four main areas of the law: an expansion of surveillance methods (Title II), measures for protection of the border and changes to immigration procedures (Title IV), additional criminal sanctions against terrorism (Title VIII), and a comprehensive overhaul of the money laundering and currency transaction laws (Title III). This last component is the focus of this article.

A few examples can demonstrate the widespread effect of the Patriot Act on the laws of the United States. Section 106 authorizes the President to seize property under certain circumstances.⁵ Section 411 defines engaging in terrorist activity as "commit[ting] or . . . incit[ing] to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; . . .",⁶

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³ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (to be codified at 18 U.S.C. § 175(b) [hereinafter Patriot Act]).

⁴ See 115 Stat. 272 at 402 (2001).

⁵ See 50 U.S.C. § 1702(a)(1)(C) (2004). Seizure is restricted to situations such as armed hostilities or an attack by a foreign nation or nationals (e.g., a terrorist attack), and is limited in application to "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. . . ." No judicial review provision is specifically authorized.

⁶ 8 U.S.C. § 1182(a)(3)(B)(iv)(I) (2004). Defines terrorist activity as an unlawful act involving the "highjacking (sic) or sabotage of any conveyance" or any injury to, death, or abduction of any person to coerce a third party to do or abstain from a act

"prepar[ing] or plan[ning]" a terrorist act,⁷ "gather[ing] information on potential targets for terrorist activity,"⁸ or "solicit[ing] funds or other things of value."⁹ It is also considered engaging in terrorist activity for an individual to do any act which the actor knows will provide material support for commission of terrorist activity or to a terrorist organization.¹⁰

Section 607 of the Patriot Act amends the Family Education Rights and Privacy Act¹¹ and authorizes an administrative *ex parte* order for the release of educational records during the investigation of certain terrorism-related offenses.¹² There is a similar order directed to the Secretary of Education to release certain statistical records authorized for collection by the National Education Statistics Act of 1994¹³ that are "relevant to an authorized investigation or prosecution" of any offense cited above.¹⁴ Such an application must have a certification that there are "specific and articulable facts giving reason to believe that the information sought" is relevant to a criminal terrorism investigation.¹⁵

Section 817 of the Patriot Act amends the Biological Weapons Act to prohibit the possession of "any biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose . . ."¹⁶ Certain persons are not allowed to possess or use any biological agent or toxin if it is a select

in return for the release of such a person, a "violent attack" on an "internationally protected person" (defined at 18 U.S.C. § 1116(b)(4) (2004)), or any assassination, or any use of a "biological agent, chemical agent, or nuclear weapon or device, or explosive, firearm, or dangerous device. . ." with intent to cause injury or death.

⁷ 8 U.S.C. § 1182(a)(3)(B)(iv)(II) (2004).

⁸ 8 U.S.C. § 1182(a)(3)(B)(iv)(III) (2004).

⁹ 8 U.S.C. § 1182(a)(3)(B)(iv)(IV) (2004).

¹⁰ 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2004).

¹¹ 20 U.S.C. § 1232(g) (2004).

¹² 18 U.S.C. § 2332b(g)(5)(B)(2004) provides a basic laundry list of acts of terrorism. Such acts also include "an act of domestic or international terrorism" as defined in 18 U.S.C. § 2331 (2004). 18 U.S.C. §§ 2331(1)-(5) (2004) define "international terrorism" and "domestic terrorism" in almost identical terms: Unlawful actions intended to intimidate the civilian population or influence government actions or officials or affect governmental actions by "mass destruction, assassination, or kidnapping."

¹³ 20 U.S.C.S. §§ 9001-9009 (Law. Co-op. 2002), *repealed by* Act of Nov. 5, 2002, Pub. L. No. 107-279, § 403(1), 116 Stat. 1985.

¹⁴ *Id.* at § 9007(c)(1)(A).

¹⁵ *Id.* at § 9007(c)(2)(A).

¹⁶ Patriot Act, 115 Stat. 272 at 385. The penalty is a fine or imprisonment for not more than twenty years or both. The biological agent must be actively cultivated from its source.

agent as defined at 42 C.F.R. § 72.6.¹⁷ The persons restricted include anyone under indictment,¹⁸ or who has been "convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year[,]"¹⁹ or anyone who is a fugitive from justice.²⁰ Also restricted are any "unlawful user[s] of any controlled substance (as defined in section 102 of the Controlled Substances Act . . .)"²¹ illegal aliens,²² anyone adjudicated as a "mental defective or [who] has been committed to any mental institution[,]"²³ any dishonorably discharged veterans,²⁴ or foreign nationals (legal alien) of any country that the Secretary of State has determined to have "repeatedly provided support for acts of international terrorism. . ."²⁵ As many universities conduct research into items which may touch on this act, this part of the Patriot Act becomes relevant to campus law enforcement. A compliance officer, in addition to a system for conducting background checks, might be well warranted.

Section 1012 relates to the transport of hazardous materials. All fifty states have Commercial Drivers' Licenses (CDL's) and procedures to obtain these licenses. However, the Patriot Act forbids a state from issuing or renewing any sort of CDL to transport hazardous material²⁶ before the applicant is determined not to be a security risk.²⁷ There must be a background check as to criminal history, alien status, and, if relevant, international law enforcement databases.²⁸ There is also a requirement that states maintain a list of aliens and/or other personnel with CDL licenses as required by the Secretary of Transportation.²⁹

¹⁷ *Id.* at § 817(2), 115 Stat. 272 at 386 (to be codified at 18 U.S.C. § 175b(a)(1)).

¹⁸ Patriot Act, § 817(2), 115 Stat. 272 at 386 (to be codified at 18 U.S.C. § 175b(d)(2)(A)).

¹⁹ *Id.* (to be codified at 18 U.S.C. § 175b(d)(2)(B)).

²⁰ *Id.* (to be codified at 18 U.S.C. § 175b(d)(2)(C)).

²¹ *Id.* (to be codified at § 175b(d)(2)(D)) (citation omitted).

²² *Id.* (to be codified at § 175b(d)(2)(E)).

²³ *Id.* (to be codified at § 175b(d)(2)(F)).

²⁴ *Id.* (to be codified at § 175b(d)(2)(H)).

²⁵ *Id.* (to be codified at § 175b(b)(2)(G)). The statutes are 50 U.S.C. § 2405(j); 22 U.S.C. § 2371, and 22 U.S.C. § 2780(d).

²⁶ Defined as "any material defined as a hazardous material by the Secretary of Transportation" or "any chemical or biological material or agent determined by the Secretary of Health and Human Services or the Attorney General as being a threat to the national security of the United States. See 49 U.S.C. § 5103a(b)(2) (2004).

²⁷ 49 U.S.C. § 5103a(a)(1) (2004).

²⁸ 49 U.S.C. § 5103a(c)(2) (2004).

²⁹ 49 U.S.C. § 5103a(d)(1), (2) (2004).

The Patriot Act amended the Fair Credit Reporting Act, codified at 15 U.S.C. § 1681 et. seq., to allow the FBI to access by administrative order to individual credit histories for an "authorized investigation to protect against international terrorism or clandestine intelligence activities," provided that the investigation is not based on acts solely protected by the First Amendment.³⁰

Section 215 of the Patriot Act has engendered much controversy. However, the statute is fairly simple. In sum, the act authorizes the issuance of an administrative order for "any tangible things [including books, records, papers, documents, and other items] for an investigation to protect against international terrorism to clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution."³¹ There is also a secrecy requirement as to the subject of the investigation or anyone else not "necessary to produce the tangible things."³² The court "shall" issue the order as modified if the application is legal under this act.³³

There are also enhanced penalties and new crimes relating to terrorism. 18 U.S.C. § 1993 criminalizes various acts against mass transit and other passenger conveyances.³⁴ The harboring or concealment of a known terrorist is punishable by up to ten years in prison.³⁵ The assets of terrorist organizations are subject to forfeiture.³⁶ The predicate offenses relating to terrorism were updated.³⁷ The Patriot Act also enhances various compensation statutes to include the victims of terrorism whether the act of terror occurs within or outside the United States.³⁸

The most sweeping changes in the Patriot Act enhanced the United States' money laundering and currency transaction laws. The Patriot Act substantially increases the tools available to law enforcement officials who are investigating terrorism and the financing of terrorism. To illustrate the changes effected by the Act and their

³⁰ Patriot Act, § 505, 115 Stat. 272 (to be codified at 18 U.S.C. §175(b)). This Section also amends 18 U.S.C. § 2709 to authorize access to toll call records and the Right of Financial Privacy Act of 1978 (12 U.S.C. § 3414[a][5][A]) to financial records.

³¹ Patriot Act, § 215, 115 Stat. 272.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at § 803.

³⁵ *Id.*; 18 U.S.C. § 2339 (2004).

³⁶ Patriot Act, § 806, 115 Stat. 272; 18 U.S.C. § 981(a)(1)(G) (2004).

³⁷ *Id.* at § 808.

³⁸ *Id.* at §§ 611-614, 621-624 (Sections 611-613 refer to public safety and rescue officers. Sections 621-624 relate to grants and claims for terrorist attacks in the United States as well as abroad).

substantial effect on American jurisprudence, we begin with an overview of the concept of money laundering, as well as the laws as they existed before and after the Patriot Act.

WHAT IS MONEY LAUNDERING?

Money laundering, in the simplest of senses, is defined as a means or process by which proceeds from criminal activities are disguised in order to hide their illegal origin.³⁹ Criminals first engage in a substantive criminal act, such as narcotics trafficking, fraud or weapons sales, in order to make a profit. The profit from criminal activities still carries with it the taint of the criminal activity from which it was derived and therefore can still subject a person to criminal prosecution for its possession.⁴⁰ When a criminal profits from crime, in order to use the profits without detection, it is common for persons to launder their crime proceeds by taking steps to make the funds look like they came from a legitimate source.⁴¹ This could involve changing the form of the funds (from cash to real estate, for example), or by moving the funds to a less visible location.

The process of laundering money to make it appear to be legitimate funds generally involves three steps.⁴² The first is called placement, which involves the physical movement of currency or monetary funds derived from illegal activities into a less suspicious form.⁴³ This step is often as simple as taking paper currency and depositing it in an ordinary bank account, or by using cash to purchase money orders that

³⁹ *Basic Facts about Money Laundering*, Financial Action Task Force on Money Laundering (FATF-GAFI), at http://www1.oecd.org/fatf/MLaundering_en.htm (last visited January 21, 2003).

⁴⁰ 18 U.S.C. §§ 1956, 1957, and 2339A-B (2002) (In the United States, money laundering is a federal crime, as is the financing of terrorist activities or terrorist organizations).

⁴¹ See *Basic Facts about Money Laundering*, *supra* note 39.

⁴² SECRETARY OF THE TREASURY, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, AND SECURITY AND EXCHANGE COMMISSION, REPORT TO CONGRESS IN ACCORDANCE WITH § 356(c) OF THE USA PATRIOT ACT 7 (Dec. 2002) (hereinafter "SECRETARY OF THE TREASURY December Report").

⁴³ *Id.* In the United States, a bank is required to complete a Currency Transaction Form for all deposits of cash over \$10,000.00. 31 U.S.C. § 5313 (2002). The Currency Transaction Form documents particulars about the nature of the deposit and the depositor that many criminals seek to avoid. Criminals do so by "structuring" a large sum of money into smaller deposits under the \$10,000.00 limit in order to avoid the CTR form. However, the practice of "structuring" can be detected by a bank's use of a Suspicious Transaction Form and is a criminal offense under United States law as well. See 31 U.S.C. § 5324 (2002); 18 U.S.C. § 1957 (2002).

are subsequently be deposited in a financial institution for later movement.⁴⁴

The second step is layering.⁴⁵ The goal of layering is to separate the illegal proceeds from any connection to their illegal source by taking the funds and making a series of financial transactions that are designed to obscure any audit trail or attempt to follow the funds.⁴⁶ Money launderers can layer by making wire transfers of monies from one bank to another bank to a third bank.⁴⁷ Transfers of funds to countries who are known as "havens" (where bank secrecy laws protect accountholders' privacy) is common.⁴⁸

Once the money has been layered and moved to separate it from its original source, the money launderer will want to bring the money back to him by making it appear as if it is legitimate business earnings.⁴⁹ This third step is commonly called integration.⁵⁰ If the money launderer operates a business, one means of bringing the "cleaned" money back into his control is by overvaluing his assets or overstating his profits.⁵¹ For the types of businesses that deal with large amounts of cash sales and keep only minimal sales records, such as restaurants, casinos, arcades, and check cashing establishments, money laundering is easily accomplished, because money from illegitimate sources can be combined with legitimate income to hide its original source with relative ease, and little risk of detection.⁵²

There is no clear indication of exactly when money laundering as a practice itself began. However, one source suggests that it probably existed as far back in time as 2000 years before the birth of

⁴⁴ See *Basic Facts about Money Laundering*, *supra* note 39; see also Mark Kehoe, *The Threat of Money Laundering*, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, at <http://econserv2.bess.tcd.ie/SER/1996/mkehoe.htm> (last visited Feb. 16, 2003).

⁴⁵ SECRETARY OF THE TREASURY December Report, *supra* note 42, at 7.

⁴⁶ *Id.*; see also Kehoe, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ A search of the Internet using the words "haven" or "tax haven" or "shelter" turns up scores of websites offering services which are designed to hide assets in offshore banks and corporations. For example, one website entitled "Tax Havens of the World" provides a comprehensive list of countries which commonly operate as havens for investing money. *Tax Havens of the World*, at <http://www.escapeartist.com/taxhavens/taxhavens.htm> (last visited Apr. 16, 2003). It also includes links to companies and banks that will assist you in setting up an investment "haven" in various locations throughout the globe. *Id.*

⁴⁹ SECRETARY OF THE TREASURY December Report, *supra* note 42, at 7.

⁵⁰ See *Basic Facts about Money Laundering*, *supra* note 39; see also Kehoe, *supra* note 44.

⁵¹ JEFFREY ROBINSON, *THE LAUNDRYMEN* 12-13 (1996).

⁵² *Id.*

Christ.⁵³ That source claims that merchants in China, seeking to hide their assets from unscrupulous rulers who would simply take any valuables they wanted to from their citizens, would move assets to other areas of the country (even outside of the country) and invest assets in businesses to hide them from the view of their ruling authorities.⁵⁴ Another source suggests that money laundering became popular during Prohibition, when figures like Al Capone and Bugs Moran used coin-operated Laundromats to hide revenue from their illegal venues (gambling, prostitution, liquor law violations, etc).⁵⁵

Whatever its true origins, money laundering did not become a prosecutable offense until much more recently. The United States was the first country in the world to attempt to combat money laundering when it passed the Bank Secrecy Act in 1970.⁵⁶ The Bank Secrecy Act was designed to force banks and financial institutions to report all cash transactions over \$1,000 to the Internal Revenue Service.⁵⁷ It was largely ineffective due to the low threshold that had been set to trigger the reporting requirement, but was subsequently made useful when Congress raised the threshold limit to cash transactions over \$10,000.⁵⁸ A number of other countries have also passed bank secrecy laws, which have had varying degrees of success, and in some instances actually work to protect money launderers rather than exposing them.⁵⁹

The United States was the first country in the world to actually make money laundering a criminal offense which brought with it possible prison terms. The Money Laundering Control Act was enacted by Congress in 1986.⁶⁰ This legislation made it a crime to launder the proceeds of a specified list of crimes, which had been formulated as predicate offenses, each of which is now commonly known as a "speci-

⁵³ A brief history of money laundering, Countermoneylaundering.com, at <http://www.countermoneylaundering.com/p08.htm> (last visited Feb. 16, 2003). Other accounts suggest that medieval moneylenders and sea pirates engaged in the practice of money laundering to hide their assets as well. See also *Financial Havens, Banking Secrecy and Money Laundering*, United Nations Office on Drugs and Crime (1998), at <http://www.imolin.org/finhaeng.htm>.

⁵⁴ A brief history of money laundering, *supra* note 53. The Bank Secrecy Act's reporting requirements are codified at 31 U.S.C. § 5331 (2002).

⁵⁵ ROBINSON, *supra* note 51, at 4.

⁵⁶ *Id.* at 24.

⁵⁷ *Id.*; see also SECRETARY OF THE TREASURY December Report, *supra* note 42, at 2.

⁵⁸ ROBINSON, *supra* note 51, at 25.

⁵⁹ See *id.* at 36-37. In the 1990s, Luxembourg was one such country. Its bank secrecy laws prohibited banks from disclosing any information to either local or foreign authorities, and even now, banks only have to provide information on potential money laundering on a voluntary basis.

⁶⁰ 18 U.S.C. §§ 1956, 1957 (2002).

fied unlawful activity" or an SUA.⁶¹ The Act made it a crime to knowingly help to launder money from criminal activity by engaging in financial transactions, with either the intent to promote that criminal activity, to conceal the origin and source of the profits, or to avoid reporting requirements on the money.⁶² It also made it a crime to transport or transfer criminal proceeds over national borders with either the intent to promote that criminal activity, to conceal the origin and source of the profits, or to avoid reporting requirements on the money.⁶³ The United States' money laundering legislation has expanded over the years to include more substantial punishments and to define what constituted financial transactions under the statute.⁶⁴ In 1996 the crime of financing terrorism was added as an offense for which the laundered proceeds could result in charges of money laundering.⁶⁵ Additionally, under United States law, the laundered proceeds of criminal activity can be subject to forfeiture to the government, so money launderers face a double whammy in this country.⁶⁶

Following the United States' lead, there was an international effort to address money laundering in 1988 when the United Nations

⁶¹ See 18 U.S.C. § 1956(c)(7) (2002). A whole host of crimes are included as predicate offenses of which laundered proceeds can lead to a prosecution for money laundering, and include such crimes as robbery, bribery, counterfeiting, arm exports, computer fraud, and narcotics violations, among others. *Id.*

⁶² 18 U.S.C. § 1956(a)(1). 18 U.S.C. § 1957 (2000), which was enacted through the Money Laundering Control Act of 1986 as well, made it a crime to conduct transactions involving amounts of criminal proceeds over \$10,000.00. Money Laundering Control Act of 1986, 18 U.S.C. § 1956 (2000) (original version at Pub. L. No. 99-570, 100 Stat. 3207-18 (1986)). The Bank Secrecy Act contains the requirement that banks must report all such transactions, so criminals trying to avoid detection began to "structure" their transactions to avoid the reporting requirement. Bank Secrecy Act, 12 U.S.C. §§ 1830, 1831 (2000) (original version at Pub. L. No. 91-508, 84 Stat. 1114 (1970)). 18 U.S.C. § 1956 (2000) makes it a crime to launder proceeds even in amounts under \$10,000. See, e.g., 18 U.S.C. § 1956(c)(7) (2000).

⁶³ § 1956(a)(2).

⁶⁴ Financial transactions are defined by statute as ones which affect interstate or foreign commerce by using wire transfers, monetary instruments (including checks, negotiable instruments, money orders, etc), or real or personal property transfers, or transactions which otherwise involve a financial institution. § 1956(c)(4).

⁶⁵ Paul Bauer & Rhoda Ulmann, *Understanding the Wash Cycle*, ECONOMIC PERSPECTIVES: AN ELECTRONIC JOURNAL OF THE U.S. DEPARTMENT OF STATE, May 2001, at 19, available at <http://usinfo.state.gov/journals/ites/0501/ijee/clevelandfed.htm>.

⁶⁶ 18 U.S.C. § 1956. In some cases, proceeds may also be forfeitable under 18 U.S.C. §§ 981-985 (2000) (detailing civil and criminal forfeiture provisions).

met in Vienna.⁶⁷ At that time, the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was drafted.⁶⁸ Its goal was to take steps to curb the money laundering which arose from worldwide drug trafficking.⁶⁹ In terms of its money laundering provisions, the Vienna Convention, which has been signed and ratified by 168 nations,⁷⁰ required that member parties enact legislation to make money laundering a criminal offense.⁷¹ It also required member nations to enact measures to facilitate cooperative investigations and international cooperation in prosecution and extradition.⁷² Quite a number of countries subsequently did enact money laundering legislation that included provisions for criminal prosecution and forfeiture of laundered funds to comply with the Vienna Convention. A selection of money laundering laws from around the world will be discussed in greater detail later in this paper in order to explain whether those current money laundering laws can be useful in combating terrorism financing and money laundering by terrorists, or whether further reform is necessary to combat this new evil.⁷³

HOW ARE WE TRYING TO FIGHT MONEY LAUNDERING NOW?

On the International Level

There are actually anti-money laundering efforts being fought on a number of different levels. At the international level, the United Nations has implemented a number of measures to combat money laundering crimes on a worldwide scale. One of those measures is the International Convention for the Suppression of the Financing of Ter-

⁶⁷ *The 1988 Vienna Convention*, at http://www.ex.ac.uk/politics/pol_data/undergrad/rtb/global1.htm (last visited April 13, 2004).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *Monthly Status of Treaty Adherence: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, United Nations, at http://www.unodc.org/unodc/en/treaty_adherence.html (last visited April 14, 2004).

⁷¹ Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/15 and rev. 1 (1988), *adopted by consensus* Dec. 19, 1988, reprinted in 28 I.L.M. 493 (1989) [hereinafter *Convention*]. While a number of countries had already by this time made criminal proceeds forfeitable, few had legislation with real teeth in the form of criminal prosecution. See John L. Evans, *International Efforts To Contain Money Laundering*, Seminar: Money Laundering: Joining Forces To Prevent It (Apr. 8, 1997), available at <http://members.tripod.com/%7Eorgcrime/genmlinteff.htm>.

⁷² *Convention*, *supra* note 71, at art. 6-10.

⁷³ While there have been a number of subsequent international efforts to address money laundering throughout the years, a detailed discussion of those efforts is beyond the scope of this paper, and the reader is referred to Evans, *supra* note 71, for a more detailed history of international money laundering provisions.

rorism. The International Convention for the Suppression of the Financing of Terrorism, surprisingly, actually was enacted prior to the September 11, 2001 attacks on the United States, and was signed by a number of state parties in January 2000.⁷⁴ The members of the United Nations were greatly concerned about the escalation of terrorist activity throughout the world at that time, and it was thought that existing agreements did not address appropriately any prohibition of terrorist funding.⁷⁵

The International Convention for the Suppression of the Financing of Terrorism (hereinafter referred to as the "Convention") requires all states which signed the convention to enact legislation through whatever means appropriate to detect and freeze any funds that are determined to be funds connected to terrorist activity.⁷⁶ Funds are defined to be assets of any kind, both tangible and intangible, and can include checks, securities, and letters of credit, among other things.⁷⁷ The Convention considers it to be a punishable offense to either directly or indirectly "provide or collect funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, . . ." to carry out terrorist activity.⁷⁸ Even if the funds are not actually used to carry out the terrorist acts planned, the funds are illegal and therefore forfeitable to the state where they are found.⁷⁹ The caveat with this Convention is its provisions do not apply where there are no international activities involved.⁸⁰

A party to the Convention can contact those countries who have signed the Convention if they have evidence that a person who has allegedly raised funds for terrorism is within the other country's jurisdiction.⁸¹ The Convention obligates the member states to take action under their respective domestic laws to investigate the allegations

⁷⁴ International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR 6th Comm., 54th Sess., 76th mtg., Agenda Item 160, at art. 28, U.N. Doc. A/54/109 (1999).

⁷⁵ *Id.* at Preamble.

⁷⁶ *Id.* at art. 2, 8.

⁷⁷ *Id.* at art. 1.

⁷⁸ *Id.* at art. 2.

⁷⁹ See *id.* at art. 2; see also Summary, *International Convention for the Suppression of the Financing of Terrorism*, United Nations, available at <http://untreaty.un.org/English/tersumen.htm#4> (last visited Apr. 13, 2004) [hereinafter *Summary*].

⁸⁰ *Summary*, *supra* note 79, at art. 3. Countries who are attempting to fight domestic terrorism within their own boundaries must instead rely on their domestic laws for the ability to detect and freeze terrorist assets.

⁸¹ *Id.* at art. 9.

and prosecute and/or freeze assets if necessary.⁸² The Convention also provides a means for extradition of suspected terrorist financiers.⁸³

Currently, seventy-two countries have ratified or accepted the International Convention for the Suppression of the Financing of Terrorism.⁸⁴ Predictably, the United States is a party to the Convention, as are Australia, Cuba, France, Israel, Mexico, Portugal, the Russian Federation, Turkey, Great Britain, and Vietnam, among others.⁸⁵ While an additional sixty countries have signed the Convention, a number of them have not taken steps to ratify or otherwise accept the Convention's provisions.⁸⁶ Among them are countries such as Italy, the Bahamas, Germany, Colombia, Egypt, Jordan, Nigeria, Poland, South Africa, the Sudan, Switzerland, and Venezuela.⁸⁷

Additionally, the United Nations has passed a number of resolutions pertaining to money laundering related to terrorist financing. In particular, the United Nations passed two resolutions specifically directing that funds which were traced to Osama bin Laden, the Al Qaeda organization, and the Taliban were to be frozen by member states.⁸⁸ The ability to freeze assets belonging to terrorists derives from each individual state's existing money laundering laws which commonly allow for confiscation and seizure of assets for suspected money laundering offenses.⁸⁹ The United Nations also passed a Se-

⁸² *Id.* at art. 12. Requires parties to offer the "greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings" and states that countries may not refuse request for mutual assistance on the grounds of bank secrecy.

⁸³ *Id.* at art. 10-11.

⁸⁴ *Status of International Convention for the Suppression of the Financing of Terrorism* [hereinafter *Suppression of the Financing*], United Nations, available at http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp (last visited Apr. 13, 2004).

⁸⁵ *Id.* A number of parties to the Convention have signed it with reservations and objections.

⁸⁶ *Id.*

⁸⁷ *Id.* The same countries which have not subjected themselves to the provisions of the International Convention for the Suppression of the Financing of Terrorism also have less stringent anti-money laundering efforts in place as well.

⁸⁸ S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452nd mtg., at 1, U.N. Doc. S/RES/1390 (2002), available at <http://www.un.org/Docs/scres/2002/sc2002.htm>. S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., at 1, U.N. Doc. S/RES/1267 (1999), available at <http://un.org/Docs/scres/1999/sc1999.htm>.

⁸⁹ *Suppression of the Financing*, *supra* note 84. In most places that have enacted money laundering legislation, there are provisions within the law for freezing, seizure and forfeiture of assets if the offense with which the assets were connected is an actionable money laundering violation in that jurisdiction. The problem may arise with how broad the country's money laundering law is and whether the offense of terrorist financing fits within it.

curity Council Resolution that provides for a blanket ban on all terrorist financing, and requires all member states to "prevent and suppress the financing of terrorist acts."⁹⁰ Resolution 1373 was passed in response to the September 11, 2001 terrorist attacks on the United States and casts the widest net yet by the United Nations in their efforts to curb terrorism and rein in the financing that supports it.⁹¹

In terms of money laundering legislation in general (and not just money laundering by terrorists), the United Nations has also drafted model legislation designed for those jurisdictions which have not enacted such provisions that are looking for guidance in the process.⁹² However, this model legislation does not define the particular crimes which constitute predicate acts for prosecuting money laundering and freezing assets, and leaves those determinations of what crimes can be tied to money laundering to the individual countries.⁹³

In 1998, the General Assembly of the United Nations also enacted a Resolution designed to combat the money laundering associated with narcotics trafficking when they created the Declaration and Action Plan against Money Laundering.⁹⁴ In doing so, it recognized that there was a need to "harmonize national legislation" in a manner which would allow for maximum cooperation between states without intruding unnecessarily into a state's sovereignty.⁹⁵ Some of the measures that the Declaration and Action Plan called were things already called for by the Vienna Convention: enactment of legislation to criminalize money laundering, to freeze laundered assets and to prevent the use of bank secrecy laws from impeding money laundering investigations.⁹⁶

Regional and Independent Organizations

There are other organizations which are also participating in fight against terrorism and working to find new means of choking off terrorists from their assets. For example, the Financial Action Task Force-Groupe d'action financiPre sur le blanchiment de capitaux, com-

⁹⁰ S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., at 1, U.N. Doc. S/RES/1373 (2001), available at <http://www.un.org/Docs/scres/2001/sc2201.htm>.

⁹¹ *Id.*

⁹² UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Model legislation on laundering, confiscation and international cooperation in relation to the proceeds of crime* (1999), available at <http://www.imolin.org/ml99eng.htm> (1999).

⁹³ *Id.*

⁹⁴ *Political Declaration and Action Plan against Money Laundering*, G.A. Res. S20/4D, U.N. GAOR, 20th Spec. Sess., at 2 U.N. Doc. A/S-20/AC.1/L.1 (1998), available at <http://www.imolin.org/ungadec.htm> (June 10, 1998).

⁹⁵ *See id.*

⁹⁶ *See id.*; see also Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 71.

monly known as "FATF-GAFI," was established by the Summit of Heads of State or Government of the seven major industrialized countries (G-7) in 1989 to recommend measures to improve money laundering law.⁹⁷ The organization originally was comprised of sixteen members from a variety of nations worldwide, but expanded in the early 1990s to consist of twenty-eight members.⁹⁸ One of the most effective and useful tools to arise from FATF-GAFI is their "Forty Recommendations" which provides a comprehensive guide to fighting money laundering in a manner which is applicable to a wide range of money laundering typologies.⁹⁹ The "Forty Recommendations" are revised regularly to accommodate changing trends in money laundering in order to combat it most effectively.¹⁰⁰ The details of the "Forty Recommendations" will be discussed in greater detail later in the analysis of how well current anti-money laundering efforts are working to combat terrorism.

Beyond the international and widespread efforts of the United Nations and FATF-GAFI to provide the tools to combat money laundering, regional organizations also take the initiative to work on smaller-scale measures which can be put into effect in their respective member countries. For example, the European Union has issued a Council Directive on the prevention of the use of financial systems for money laundering.¹⁰¹ The current Council Directive recognizes that the former Directive only obliged members to fight money laundering associated with narcotics offenses.¹⁰² It concedes that many other types of crime, including organized crime, are related to money laundering, and calls upon members to allow for suspicious transaction reporting for a wider range of predicate offenses rather than just

⁹⁷ *More About the FATF and its Work*, FATF-GAFI, available at http://www.fatf-gafi.org/AboutFATF_en.htm (last visited Apr. 13, 2004).

⁹⁸ The FATF-GAFI was actually originally referred to merely as FATF, or the Financial Action Task Force. See *Id.*

⁹⁹ One of the ways in which FATF-GAFI operates is to hold yearly conferences at which specific topics of interest or which need focus are addressed and debated. FATF-GAFI publishes a Report of Money Laundering Typologies on a regular basis which memorializes the findings and suggestions of the group. For an example of one such report, the reader can refer to FINANCIAL ACTION TASK FORCE, 2002-2003 REPORT ON MONEY LAUNDERING TYPOLOGIES 6 (2002) at <http://www.oecd.org/pdf/M00025000/M00025449.pdf>.

¹⁰⁰ *More About the FATF and its Work*, *supra* note 97.

¹⁰¹ A council directive previously passed in 1991 has subsequently undergone revisions, most recently in 2001. See Council Directive 2001/97/EC, 2001 O.J. (L344) (amending Council Directive 91/308/EEC, 1991 O.J. (L166)), available at <http://europa.eu.int>.

¹⁰² *Id.*

narcotics violations.¹⁰³ The Directive also asks that money laundering associated with additional predicate offenses be criminalized.¹⁰⁴ It even suggests that since money laundering has increasingly involved non-financial businesses, the European Union members should require record keeping, customer identification, and suspicious transaction reporting of certain non-financial businesses as well.¹⁰⁵

Caribbean nations have also joined forces to combat money laundering in a region which has traditionally been rife with heavy, illicit drug trafficking. The Caribbean Financial Action Task Force ("CFATF") was created in 1990 and was formed to address the specific problems with criminal money laundering faced by the Caribbean region.¹⁰⁶ CFATF has worked on its regional level to help its member states implement the recommendations made by FATF-GAFI and strengthen money laundering laws in their respective countries.¹⁰⁷ It also issues its own recommendations for what specific areas need to be targeted for improvement.¹⁰⁸ For example, one recommendation that CFATF suggested to its member nations was an expansion of their international technical assistance programs to allow aid to be provided to smaller countries and countries with poorer economies in order to allow those nations to fight money laundering more effectively.¹⁰⁹ CFATF responded to the September 11th terrorist attacks by issuing recommendations to its members to prevent terrorists from using Caribbean financial systems to move their money, and to follow the guidelines set forth in the United Nations Convention on the Suppression of the Financing of Terrorism.¹¹⁰ Several of the Caribbean nations responded by issuing executive orders to freeze any terrorist assets in

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* It appears that the EU included this provision in their Directive based upon findings regarding non-financial businesses which had been compiled by FATF-GAFI. *See id.* These businesses include, in part, art dealers, casinos, auditors, and real estate agents. *See id.*

¹⁰⁶ Overview, Caribbean Financial Action Task Force, available at <http://www.cfatf.org/eng/home.html> (last visited Apr. 13, 2004). It consists of members such as Bermuda, Panama, Trinidad & Tobago, Aruba, Guatemala, the Dominican Republic, Nicaragua, and the Virgin Islands, among others. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ CARIBBEAN FINANCIAL ACTION TASK FORCE, REVISED CTATF 19 RECOMMENDATIONS (1999), available at <http://www.cfatf.org/eng/recommendations/cfatfrev/index.pdf>.

¹⁰⁹ *Id.* at 4.

¹¹⁰ Press Release, Caribbean Financial Action Task Force (Oct. 19, 2001), at <http://www.cfatf.org/eng/terror/Press%20Release-Terrorism%20Eng.pdf>.

the names of the individuals and organizations on the terrorist watch list developed by the United States.¹¹¹

While law enforcement devotes a substantial amount of resources toward anti-money-laundering efforts, not all of the work in fighting money laundering is done by law enforcement. Private financial institutions and businesses are obligated to follow their respective reporting laws as part of their compliance with money-laundering laws, while their customer service plans demand they protect the privacy of their customers.¹¹² This creates a question of how private institutions can best comply with the reporting requirements without sacrificing the customer's privacy.¹¹³ One solution is the use of an intermediary in the government, or a central body separate from law enforcement authorities to whom the information is reported.¹¹⁴ The Egmont Group, which is comprised of a number of "financial intelligence units" (FIU), recognized their unique role and endeavored to find ways to streamline communications and intelligence-sharing from one FIU to another in order to best track and prevent money-laundering transactions.¹¹⁵

The use of FIUs is common throughout the world. The FIU provides a central repository for the reports generated by institutions mandated or requested to report either suspicious transactions or transactions meeting certain specific statutory requirements.¹¹⁶ The FIU can then follow and collect evidence of trends in money movement, maintain a concise record of transactions for target individuals or groups, and provide such information to investigating and prosecuting authorities when appropriate.¹¹⁷ The purpose of this type of

¹¹¹ *Id.*

¹¹² *Banking Secrecy*, Swiss Federal Department of Finance (Jan. 2002), at http://www.efd.admin.ch/e/dok/faktenblaetter/efd-schwerpunkte/205_bankgeheimn.htm.

¹¹³ In some instances, countries will only release banking information if a law enforcement agency provides proof to substantiate the claims that a person or entity is engaging in money laundering. See Robert J. Mintz, *Swiss Bank Accounts and Bank Secrecy Havens*, in *ASSET PROTECTION FOR PHYSICIANS AND HIGH-RISK BUSINESS OWNERS* (2002), available at <http://www.rjmintz.com/appch10.html>. Luxembourg has banks within its borders which have never submitted transaction reports, likely because of the stringent bank secrecy laws there. See FINANCIAL ACTION TASK FORCE, *ANNUAL REPORT: 1995-1996 (FATF-VII)* (June 28, 1996), at http://www1.oecd.org/fatf/pdf/AR1996_en.pdf.

¹¹⁴ *Statement of Purpose*, Egmont Group of Financial Intelligence Units (June 13, 2001), at http://www.fatf-gafi.org/pdf/EGstat-200106_en.pdf. The Egmont Group was officially born in June 1995 when a group of financial intelligence unit representatives holding a regular meeting inspired the official title. *Id.*

¹¹⁵ *Id.*

¹¹⁶ *EGMONT GROUP, INFORMATION PAPER ON FINANCIAL INTELLIGENCE UNITS AND THE EGMONT GROUP 6*, at http://www.fatf-gafi.org/pdf/EGinfo-web_en.pdf.

¹¹⁷ *Id.*

agency is to prevent every single transaction-reporting form from having to be received and investigated by law enforcement officials in a variety of uncoordinated locales. It takes the task of sorting out the meaningful from the meaningless reports out of the hands of the people whose time is better spent investigating serious money-laundering crimes.

One such FIU is the Financial Crimes Enforcement Network (FinCEN).¹¹⁸ The primary function of FinCEN is to provide an intelligence and analytical network to help detect and investigate money laundering on both a domestic and an international scale.¹¹⁹ FinCEN established their "Gateway System," which allows state and federal law enforcement officers throughout the country to access FinCEN's database of intelligence reports, analyses, and other financial information received as part of their regulatory duties.¹²⁰ A query alert system allows FinCEN to detect when two different agencies access the same information, enabling investigators to more easily share information and to work collaboratively to investigate and prosecute money laundering.¹²¹ FinCEN also regularly assists FIUs in other countries and shares information where it will aid in international investigations and prosecutions.¹²²

On A National Level

The most significant work in fighting money laundering is done on the national level. Because there is no means for an international prosecution for money laundering at this time, all prosecutions must proceed through each country's own individual criminal justice system. Obviously, these systems can be vastly divergent, and what might be criminal in the United States may not be criminal in France. To illustrate this point, the money laundering laws of a number of nations throughout the world will be compared and contrasted, and evaluated to see what parts of what systems work best, and where the world's efforts need more tweaking.

The United States is a good starting point for comparison. After the September 11, 2001 terrorist attacks, the world was shocked to learn of the extensive money laundering network that enabled Al

¹¹⁸ *About FinCEN: Overview*, FinCEN, at http://www.fincen.gov/af_overview.html (last visited Mar. 4, 2003).

¹¹⁹ *About FinCEN: Frequently Asked Questions*, FinCEN, at http://www.fincen.gov/af_faqs.html (last visited Mar. 4, 2003).

¹²⁰ *Law Enforcement: Gateway*, FinCEN, at http://www.fincen.gov/le_gateway.html (last visited Mar. 4, 2003).

¹²¹ *See id.*

¹²² *International: Overview*, FinCEN, at http://www.fincen.gov/int_main.html (last visited Mar. 4, 2003).

Qaeda to train members, support operatives and buy the tools necessary to carry out terrorist schemes.¹²³ Even though the United States had already criminalized the funding of terrorism and named it as a predicate act for prosecuting money laundering, the country still moved quickly to add power to its anti-money laundering legislation. In October 2001, the United States passed the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT) Act.¹²⁴ The Patriot Act granted broader powers to law enforcement to obtain bank records and seize foreign assets of terrorists, expanded the reporting requirements of banks and other financial institutions, and lengthened the list of organizations or types of businesses that are required to file currency transaction reports.¹²⁵

The USA Patriot Act added to the already lengthy list of predicate offenses under 18 U.S.C. § 1956 by adding provisions allowing any foreign crime or foreign public corruption (if the United States would be required to extradite or prosecute the accused) and the operation of illegal money remission businesses as offenses to be the basis for a money laundering charge.¹²⁶ The Patriot Act also gave the government the authority to cause the civil forfeiture of assets of any person or organization engaged in terrorism.¹²⁷ Any assets collected by a person who is "a source of influence over" an organization and who collects the assets for the purpose of supporting, conducting or concealing terrorist activity are now subject to civil forfeiture.¹²⁸

Another measure that the United States took was to strengthen compliance requirements on banks by increasing the penalties a bank could face for participating or allowing money laundering to take place.¹²⁹ It placed limitations on banks maintaining "correspondent accounts" as well.¹³⁰ The Patriot Act also added enhanced resources for the United States' FIU, which is called FinCEN, en-

¹²³ Nicole M. Healy, *The Impact of September 11th on Anti-Money Laundering Efforts, and the European Union and Commonwealth Gatekeeper Initiatives*, 36 INT'L LAW. 733 (2002).

¹²⁴ International Money Laundering and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 296, § 301 (codified as amended at 31 U.S.C. § 5301 (2001)).

¹²⁵ Healy, *supra* note 123, at 734.

¹²⁶ See 18 U.S.C. § 1956(c)(7)(B) (2002) and 18 U.S.C. § 1960 (2002).

¹²⁷ 18 U.S.C. § 981 (2002).

¹²⁸ *Id.*

¹²⁹ Healy, *supra* note 123, at 737.

¹³⁰ *Id.* (citing 31 U.S.C. § 5318). Correspondent accounts are those set up between banks in order to carry out correspondent banking in which a bank in one country provides an account to another bank in order to "move funds, exchange currencies, or carry out other financial transactions"). Linda Gustitus, et al, *Correspondent*

hanced subpoena powers to foreign banks with representatives in the United States, and personal jurisdiction over foreigners, who commit money laundering, as well as better surveillance tools and a longer statute of limitations for terrorism related crimes.¹³¹ With the enactment of the Patriot Act, the United States has provided itself with ample tools to fight money laundering of terrorist funds.¹³²

The question then arises: what have other countries done and are they fighting terrorist money laundering as diligently as one would hope? It would obviously be impossible to discuss each and every nation in the world and their efforts (or lack of them) in fighting money laundering and terrorism. A limited selection of countries which have enacted money laundering laws which present unique perspectives and illustrations will be discussed in comparison to American legislation.¹³³

The country of Brazil, situated in South America between Colombia, Argentina, and Paraguay, has a large financial services industry and thanks to its proximity to prime sites for narcotics cultivation, a substantial money laundering problem.¹³⁴ Narcotics trafficking, firearms trafficking and illegal gambling are major sources of money laundering proceeds in Brazil.¹³⁵ Brazil enacted anti-money laundering legislation in 1998, under Law No. 9613, which made it an offense to hide or conceal the source of monies from illegal sources, or to use any proceeds in any financial transactions.¹³⁶ Illegal proceeds in Brazil are funds that originate from or are derived from narcotics trafficking (naturally), smuggling, extortion, corruption, financial crimes,

Banking: A Gateway for Money Laundering, ECONOMIC PERSPECTIVES (May 2001) at <http://usinfo.state.gov/journals/ites/0501/ijee/levin.htm>.

¹³¹ Healy, *supra* note 123, at 737. See also 31 U.S.C. § 5318, and 18 U.S.C. § 1956(a).

¹³² But see Healy, *supra* note 123, at 738-39 (suggesting that there will be problems with the United States' ability to detect and prosecute terrorist financing which is taking place through the hawala system and other informal systems of currency exchange). Healy also believes that the United States, even with these new tools at their disposal, will find themselves lacking in intelligence capabilities and in being able to obtain cooperation from foreign countries. *Id.* at 734.

¹³³ In addition to having formulated their Forty Recommendations, the FATF-GAFI, an organization dedicated to combating worldwide money laundering, has also developed guidelines specific to dealing with terrorist financing. See *Special Recommendations on Terrorist Financing*, FATF-GAFI, at http://www1.oecd.org/fatf/SrecsTF_en.html (last visited Feb. 28, 2003).

¹³⁴ 1999-2000 FINANCIAL ACTION TASK FORCE, ANN. REP.: 1999-2000 10-11 (June 22, 2000), at http://www1.oecd.org/fatf/pdf/AR2000_en.pdf.

¹³⁵ *Id.*

¹³⁶ Lex No. 9.613, de marzo de 1998, D.O.U. de 03.04.1998 (English translation available at http://www.undcp.org/odccp/legal_library/br/legal_library_1999-08-09_cover_1999-40.html).

organized crimes, other types of trafficking (such as trafficking in arms or other contraband), and terrorism.¹³⁷ Brazil also has in place a criminal forfeiture system which seizes assets from persons who are convicted of money laundering offenses, and can freeze assets or property if necessary.¹³⁸

Brazil also has a system for reporting suspicious transactions to a regulatory authority, but it also has bank secrecy laws that prohibit the release of certain information, and requires the bank to redact the reports of protected information before they are sent on to the regulatory repository agency.¹³⁹ Additionally, there is a prohibition on the release of information to foreign authorities.¹⁴⁰ The country also requires that a variety of institutions, from banks to insurance agents to money changers to dealers in precious jewels, obtain proper identification of their clients and maintain a registry of their transactions.¹⁴¹

The Swiss have traditionally been a secretive country, and have thus earned their reputation as a haven for those who believe that their money is safe as long as they put it in a "Swiss bank account." Switzerland does have anti-money laundering measures in place, and criminalizes the laundering of money from any crime.¹⁴² It has the power to freeze and seize monies and also has a system for reporting suspicious transactions.¹⁴³ The Swiss rely heavily on their banking institutions to conduct due diligence in monitoring customer transactions and give the institutions the authority to freeze assets if

¹³⁷ *Id.* The language that proceeds have to be "derived from" creates potential problems because it seems to require that criminal activity take place before the money attached to the activity becomes illegal. It is unclear whether this reading of the language simply results from the translation of Portuguese to English. However, while terrorism does not seem to be the sort of activity which turns a profit, it may be the intent of the nation to prosecute money laundering when it involves terrorism regardless of the specific manner in which the statute appears to read.

¹³⁸ *Id.*

¹³⁹ *Id.* International efforts to combat money laundering that involves Brazilian banks are very much stymied by the bank secrecy laws, as the nation does not allow release of any information to foreign jurisdictions absent formal rogatory letters. See 1999-2000 FINANCIAL ACTION TASK FORCE ANN. REP., *supra* note 134, at 10-11.

¹⁴⁰ Lex No. 9.613, *supra* note 136.

¹⁴¹ *Id.*

¹⁴² Code Penal Suisse Art. 305bis & 305ter (1990) (French version of this statute available at <http://www.imolin.org/swiss305.htm>). See Embassy of Switzerland, The Swiss Legislation Against Money Laundering, at http://www.eda.admin.ch/washington_emb/e/home/legaff/Fact/monlau.html (last visited Apr. 11, 2004).

¹⁴³ 1997-1998 FINANCIAL ACTION TASK FORCE ANN. REP. 13-15, at http://www1.oecd.org/fatf/pdf/AR1998_en.pdf (last visited Apr. 11, 2004).

they believe that money is being laundered even before intervention by law enforcement.¹⁴⁴ The Swiss Money Laundering Act imposes obligations to report and freeze assets on a number of entities other than banks, including tax preparers, insurance agents, stockbrokers, financial intermediaries (such as attorneys), and persons dealing in movable goods.¹⁴⁵ While the Swiss have a history of strong bank secrecy laws, in more recent times their financial institutions also tend to be more scrupulous in their financial matters and will refuse to deal with those whom they suspect of illegal activity.¹⁴⁶

The Republic of Turkey has made great progress in enacting anti-money laundering legislation. Turkey faces serious narcotics and weapons trafficking problems, making it of particular concern in the war on terrorism.¹⁴⁷ Turkey's statutes make it a criminal offense to launder money derived from smuggling, weapons violations, terrorism, and trafficking in human organs, among a variety of others.¹⁴⁸ Turkish law provides for criminal forfeiture of laundered proceeds upon conviction, and the immediate freezing of assets with Court approval.¹⁴⁹ Unique to Turkey's money laundering statute is that it contains a special provision that if the funds involved were either derived from terrorism or "committed to obtain sources for the offences of terrorism," there is a longer prison term required by law.¹⁵⁰

Institutions in Turkey are required to report suspicious transactions and certain transactions meeting a threshold level.¹⁵¹ In terms of institutions which are required to report and monitor for

¹⁴⁴ Money Laundering Act of Oct. 10, 1997, RS 955.0 RO 1998 832 (English version of this statute available at http://www.gwg.admin.ch/e/e_temp/e/mla.pdf).

¹⁴⁵ *Id.*

¹⁴⁶ See 1997-1998 FINANCIAL ACTION TASK FORCE ANN. REP. 13-15, *supra* note 143. It is reported that Switzerland waives bank secrecy laws to aid in money laundering prosecutions. See UNITED STATES DEPARTMENT OF STATE, 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT (Mar. 2002) available at <http://www.state.gov/g/inl/rls/nrcrpt/2001/rpt/8487.htm> (last visited Apr. 11, 2004).

¹⁴⁷ 1998-1999 FINANCIAL ACTION TASK FORCE ANN. REP. 22-23 at http://www1.oecd.org/fatf/pdf/AR1999_en.pdf.

¹⁴⁸ See Law No. 4208, The Law on Prevention of Money Laundering (Turk.) (English translation available at http://www.ymm.net/TaxGuide/money_laundering.htm). Turkey has since agreed to expand its money laundering legislation to include the proceeds of "all serious crimes." See also 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 146.

¹⁴⁹ Law No. 4208 The Law on Prevention of Money Laundering (Turk.), *supra* note 148.

¹⁵⁰ *Id.*

¹⁵¹ Regulation Regarding the Implementation of the Law No. 4208 on Prevention of Money Laundering (Turk.), Official Gazette 23037 (July 2, 1997) (English translation located at http://www.ymm.net/TaxGuide/money_laundering.htm). See also 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 146.

money laundering activity, their list is fairly comprehensive and includes banks, stock exchanges, investment companies, precious jewelry dealers, loan institutions, realtors, lottery hall operators, notaries, and money changers.¹⁵² However, as of its most recent review by FATF-GAFI, there were inadequate compliance programs to facilitate proper reporting.¹⁵³ While Turkey seems willing to prosecute, there is no indication that prosecutions have resulted from their legislation to date.¹⁵⁴ Turkey has given its law enforcement officers the authority to investigate money laundering and has authorized cooperation with international bodies and other countries in their efforts.¹⁵⁵

Japan, with its emphasis on technology and high productivity, has for years been recognized as a major financial center as well as a major avenue for money laundering. Until recently, Japan's money laundering law only made criminal the laundering of money associated with narcotics trafficking.¹⁵⁶ It has since expanded the list of predicate crimes to include murder, kidnapping, extortion, theft and fraud as bases upon which money laundering charges can be brought.¹⁵⁷ Japan has in place the suspicious transaction reporting mechanisms, and does not have bank secrecy laws to hinder a free exchange of information on suspected money laundering acts.¹⁵⁸ Unfortunately, there are low levels of reporting suspicious transactions, and as a result, successful efforts to prosecute money launderers have been hindered.¹⁵⁹ Additionally, Japan's forfeiture provisions are somewhat problematic because they require a direct link between a specific predicate offense and the proceeds, which is sometimes difficult to prove once money has

¹⁵² Regulation Regarding the Implementation of the Law No. 4208, *supra* note 151.

¹⁵³ FINANCIAL ACTION TASK FORCE, ANNUAL REPORT: 1998-1999, *supra* note 148, at 22-23.

¹⁵⁴ See *id.*

¹⁵⁵ See also 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 144.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* Partial English translations of Japan's money laundering statutes are located at <http://www.imolin.org/lawjapan.htm>. But see also *Developments on the Anti-Money Laundering Measures*, Japan's Financial Services Agency, at <http://www.fsa.go.jp/fiu/fiue.html> (last visited Mar. 1, 2003)(which states that the Anti-Organized Crime Law covers all serious crimes as predicate offenses).

¹⁵⁸ 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 148.

¹⁵⁹ 1997-1998 FINANCIAL ACTION TASK FORCE ANN. REP., *supra* note 148, at 21. *Newly enacted legislation in late 2001, which requires reporting of all transactions involving suspected terrorist ties, may resolve this problem, but it is too soon to evaluate its effectiveness at this time. See 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, supra note 148.*

been laundered thoroughly through a number of means and commingled with other assets.¹⁶⁰

Nigeria is a state which presents serious problems, more so than other countries described here. The country is known as a haven for terrorists, and is a money laundering center for much of the money laundering that occurs on the African continent.¹⁶¹ Nigerians are well known for a particular financial fraud, known as 419 scams. This entails Nigerians convincing unwitting persons to send them advance money, which is supposed to help them transfer a large sum of Nigerian funds out of the country, in return for a cut of the transferred proceeds.¹⁶²

Nigeria is considered to be a non-cooperating country in terms of fighting money laundering, due to the problems with its money laundering laws, the limited application and difficulty of their use, and the rampant corruption which is part of Nigerian politics.¹⁶³ Nigeria has enacted money laundering legislation, including the Money Laundering Decree of 1995. Yet, the only predicate offense listed for which money laundering is actionable is a narcotic offense.¹⁶⁴ Nigeria's other efforts to curb money laundering include a criminal forfeiture provision which requires that a person be convicted of money laundering before assets can be seized.¹⁶⁵ Nigeria has no mandatory suspicious transaction reporting requirements, and has two separate and often incompatible entities to whom suspicious transactions are to be reported.¹⁶⁶ The thresholds, which trigger any requirement for banks and financial institutions to maintain record keeping on customers, at \$100,000 U.S. dollars, is very high.¹⁶⁷ Additionally, Nigeria's money laundering provisions apply only to banks and not to a range of other

¹⁶⁰ 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 148.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ FATF-GAFI, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLD-WIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES (2002), at http://www1.oecd.org/fatf/pdf/NCCT2002_en.pdf; see also 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 148.

¹⁶⁴ 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 148.

¹⁶⁵ As of 2001, there were no convictions for money laundering even though the law had been in effect for six years and there were numerous opportunities to arrest and prosecute money launderers. While other countries described in this paper, such as Brazil, lack any successful convictions as well, the situation with Nigeria seems to stem from an endemic lackadaisical attitude toward the problem of money laundering rather than specific problems with its laws. See also 1997-1998 FINANCIAL ACTION TASK FORCE ANN. REP., *supra* note 148, at 13-15.

¹⁶⁶ 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 148.

¹⁶⁷ *Id.*

financial-type institutions such as brokerage houses and insurance companies.¹⁶⁸

Perhaps not surprisingly, the Russian Federation is also considered one of the jurisdictions not in cooperation with world-wide money laundering efforts.¹⁶⁹ Russia has also enacted anti-money laundering legislation, but its system is overrun by government corruption, which has hampered the effectiveness of efforts to clamp down on money laundering. The Federal Law on Action to Combat the Laundering of Proceeds from Crime, enacted in 2001, makes it a criminal offense to launder the proceeds of any crime.¹⁷⁰ Organizations which are required to monitor and report suspicious activity include banks, stock brokerage houses, insurance companies, pawnshops, and others who participate in the exchange of monetary assets.¹⁷¹ The law also contains a provision for compulsory reporting of transactions involving more than 600,000 rubles, in situations where cash is not typical of the business transaction or that involve the exchange of banknotes, and in cases where there are to be deposits to third party accounts.¹⁷² Although Russia has made progress in fighting money laundering since 2001, its system is too new to know whether it will be effective in preventing money laundering. According to one source, corruption in Russian banking is rampant, but is not a major concern to them.¹⁷³

Pakistan is also a country with problematic anti-money laundering laws, especially given its close proximity to the Afghan region where Al-Qaeda terrorists reside, and its major reliance on the Afghan drug trade as a source of income.¹⁷⁴ Furthermore, Pakistani use of an alternative remittance system called *hawala* makes detection of suspicious transactions, even if there were legislation in place to report them, difficult if not impossible.¹⁷⁵ Pakistan enacted its money laundering law in 1995, but it only criminalizes the laundering of money

¹⁶⁸ REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES, *supra* note 163.

¹⁶⁹ *Id.*

¹⁷⁰ Russian Federation Federal Law on Action to Combat the Laundering of Proceeds from Crime, 2001 (English translation available at <http://www.imolin.org/Rusmlaw.htm>).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Soyuz' Smolensky: *To Call it Money Laundering is Ridiculous*, BUSINESS WEEK ONLINE: DAILY BRIEFING, Sept. 15, 1999, at <http://www.businessweek.com.pl/bwdaily/dnflash/sep1999/nf90915a.htm>. (Arguing that a large amount of Russian monies that leave the country permanently is more like tax evasion than money laundering).

¹⁷⁴ 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 148.

¹⁷⁵ *Id.*

associated with narcotics offenses.¹⁷⁶ It provides for the reporting of suspicious transactions believed to be narcotics-related, and for the freezing and forfeiture of such funds, but there is no financial intelligence unit, nor any requirement that other suspicious transactions be reported at all.¹⁷⁷ That Pakistan does not have in place a more comprehensive anti-money laundering system is disappointing, given the important role that the United States has placed on the country in fighting the war on terrorism. While the Pakistanis have attempted to add terrorism and the financing of terrorism as predicate offenses to their money laundering law, it is not believed that the legislature has yet acted on such promises.¹⁷⁸

While the average American probably views the terrorist money laundering problem as being sponsored or supported by the Arab community, there are actually Arab nations which are working toward fighting money laundering and the financing of terrorism. One such place is Lebanon. Until recently, Lebanon's banking sector was shrouded in secrecy laws that prevented prosecution of any money launderers.¹⁷⁹ The FATF recently removed Lebanon from the list of non-cooperating jurisdictions after it made a number of strides to change its spots.¹⁸⁰ Lebanon's money laundering law now criminalizes the laundering of proceeds from narcotics, organized crime, terrorism, illegal arms trade, embezzlement and counterfeiting.¹⁸¹ There are provisions for freezing assets if suspected of being laundered funds once an institution reports suspicious transactions to the Special Investigation Commission.¹⁸² The reporting requirements are imposed on banking institutions, exchange houses, realtors, financial intermediaries, high-dollar precious items dealers, and insurance com-

¹⁷⁶ Ordinance No. XLVII of 1995 (Pak.) (English translation located at <http://www.imolin.org/Pakndo95.htm>).

¹⁷⁷ See *id.* See also 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 148.

¹⁷⁸ *Id.* See also Anti-Terrorism (Amendment) Ordinance, 2002 (Pak.), at http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinances/anti_terrorism_ordin_2002.htm. (Showing a complete absence of references to terrorist financing or financial impositions placed on terrorist financing).

¹⁷⁹ 2001 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 148.

¹⁸⁰ REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES, *supra* note 163, at 8.

¹⁸¹ Fighting Money Laundering, Law No. 318, Art. 1, (Leb.) (English translation located at http://taxesinlebanon.tripod.com/law/fighting_money_laundering.htm).

¹⁸² *Id.* at art. 8. (Discussing the Special Investigative Commission's authority to lift bank secrecy laws to aid in the investigation and prosecution of money laundering). REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES, *supra* note 163, art. 29.

panies.¹⁸³ One unique provision in their money laundering law is that institutions must maintain records of transactions over a certain dollar amount, but the law does not appear to mandate the reporting of these high dollar transactions to any authority unless the transactions are deemed suspicious.¹⁸⁴

This exercise should illustrate that nations around the world are at different stages in fighting money laundering and preventing the financing of terrorism in their countries. While it is not vital that every country criminalize money laundering and the financing of terrorism, it is important that nations have a basic anti-money laundering mechanism in place for utilization by countries which can prosecute for such offenses. Even if a country lacks the sufficient money laundering provisions to prosecute money launderers, if those countries have in place the means to provide information on transactions, intelligence support, and allow for extradition of suspects to locations where prosecution can take place, then their efforts can aid in stopping the funding of terrorism. Because the objective of money laundering is to hide or conceal the source of assets, money launderers naturally want their funds to cross national borders in order to confuse the systems tracking their steps. By moving money from one country to another where transaction reporting requirements are completely different and the transactions might not be noticed, the money launderer can thwart the efforts of the first country to find evidence of the transaction, to seize the assets and to initiate a criminal prosecution. The multi-jurisdictional nature of money laundering requires that countries cooperate with each other in order to stop it from occurring.

A reliable means for sharing information on suspicious transactions and money laundering activity between countries is necessary, as are cooperation in investigations, and a workable means for the country seeking criminal prosecution or forfeiture of assets to be able to do so. Countries also need to have in place mechanisms for extradition of accused money launderers, and a means for seizing domestic assets on the instruction of a foreign authority. Otherwise, money laundering will continue to run rampant and be employed by terrorists as a means for furthering their evil deeds.

HOW DOES THE USA PATRIOT ACT CHANGE THE UNITED STATES' MONEY LAUNDERING AND CURRENCY TRANSACTION LAWS?

Now that we know what other nations around the world do individually and collectively to combat money laundering and terrorist financing, we ask ourselves the question: Is the United States Patriot

¹⁸³ *Id.* at art. 4-5.

¹⁸⁴ *Id.* at art. 4.

Act better at solving the problem? To answer this question, we must turn back to the Act and evaluate how it has changed the way America fights money laundering on both a national and international levels.

The Patriot Act extensively amends both the money laundering and the related currency transaction laws in Title III, otherwise known as the International Money Laundering and Financial Anti-Terrorism Act of 2001.¹⁸⁵ After making extensive findings as to the need for money laundering laws not just to fight terrorism but also "narcotics trafficking, . . . arms smuggling and trafficking in human beings, [and] . . . financial frauds that prey on law-abiding citizens,"¹⁸⁶ the Act gives several broad powers to the Secretary of the Treasury as well as creates several new crimes. The Act also encourages international cooperation and the extension of the reach of certain statutes beyond the shores of the United States.

The Secretary of the Treasury may require all financial institutions to undertake certain special measures if the Secretary finds that a nation, or a foreign financial institution, or a class of transaction found outside the United States, or a type of account raises a "primary money laundering concern. . ."¹⁸⁷ There are limits on the duration of the special measure,¹⁸⁸ and the Secretary of the Treasury may consult with the Fed Chairman, other banking agencies, the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board, or other agencies and parties as the Secretary deems appropriate in its sole discretion.¹⁸⁹

There are certain criteria for a decision as to what special measure is appropriate.¹⁹⁰ The general rule for these special measures is the requirement of record-keeping and report preparation on the identity and address of the participants of the transaction, the legal capacity (e.g. corporate entity), the identity of the "real" owner of the funds, and a description of the transaction or transactions in question.¹⁹¹ In specific cases, such as payable-through and correspondent accounts,¹⁹²

¹⁸⁵ International Money Laundering and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 296, § 301 (codified as amended at 31 U.S.C. § 5301 (2001)).

¹⁸⁶ *Id.* at § 302 (a)(4) (codified as amended at 31 U.S.C. § 5311 (2001)).

¹⁸⁷ *Id.* at § 311 (codified as amended at 31 U.S.C. § 5318A (2001)).

¹⁸⁸ *Id.* at 31 U.S.C. § 5318A(a)(3) (2001) (indicating a period of 120 days).

¹⁸⁹ *Id.* 31 U.S.C. § 5318A(a)(4)(A) (2001).

¹⁹⁰ *Id.* 31 U.S.C. § 5318A(a)(4)(B) (2001).

¹⁹¹ *Id.*

¹⁹² *Id.* at 31 U.S.C. § 5318A(e)(B) (2001) (defining correspondent accounts are defined as ". . . an account[s] established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions re-

the domestic financial institution must find out all the actual owners or users of those accounts as if they were actual customers of the financial institution.¹⁹³

If any financial institution maintains a private banking¹⁹⁴ or correspondent account for a "non United States person,"¹⁹⁵ a category which includes foreign visitors or representatives of any non-United States person, that financial institution must establish unspecified "due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts."¹⁹⁶ The Secretary of the Treasury was required within

lated to such institution." and payable-through accounts are defined as "accounts . . . 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 sub-account, in banking activities usual in connection with the business of banking in the United States).

¹⁹³ *Id.* at § 321 (adding credit union directly at 31 U.S.C. § 5312(a)(2) and also adding, "Any futures commission merchant, commodity trading advisor, or commodity pool operator registered, or required to register, under the Commodity Exchange Act" to the additional institutions added at the end as 31 U.S.C. § 5312(c)(1)(A), because the Patriot Act does not make extensive changes in the meaning of "financial institution").

¹⁹⁴ See 31 U.S.C. § 5318 (I)(4)(B) (2001) (defining "private banking account" an account of not less than \$1,000,000, set up on behalf of one or more individuals who are the true owners of the account and there is an "... officer, director, or agent. . ." of the financial institution acting as a liaison between the true owners and the financial institution).

¹⁹⁵ Patriot Act, § 312, 31 U.S.C.S § 5318(i) (2004). The Act requires in all such cases due diligence by the financial institution in the form of "at a minimum" the identity and source of funds deposited so as to prevent proceeds of official corruption from being deposited if any depositor is a foreign political "political figure" (this could be a party leader and not necessarily an office holder) or his/her immediate family. The authors would define this as strict documentation of all funds in and out of the account to ascertain whether their source is legitimate. Otherwise the financial institution simply cannot accept the funds. Also see § 315 of the Patriot Act, 18 U.S.C.S § 1956(c)(7) (2004), that adds the proceeds of foreign corruption, certain arms smuggling [see 22 U.S.C. § 2778 (the United States Munitions list) and 15 C.F.R. Parts 730-774 (regulations of the Export Administration Regulations)] and any foreign offense that the United States must extradite or prosecute under the terms of a multilateral treaty as a predicate SUA under the money laundering act.

¹⁹⁶ 31 U.S.C.S. § 5318(i). The Act requires some enhanced procedures under certain circumstances. The domestic financial institution (keep always in mind the broad interpretation of that term) must ascertain the true ownership of the foreign banking institution, "enhanced scrutiny" of account or accounts to prevent money laundering and to report any suspicious transactions, and the domestic institution must require the foreign bank to provide the same information on correspondent accounts deposited in the foreign bank by other foreign banks. See 31 U.S.C.S.

§ 5318(i)(2)(B). These circumstances are mandatory when dealing with any bank operating under an offshore banking license (which the Act defines as a “. . . license to conduct banking activities. . .” but which license prohibits the nationals of the nation granting the license from depositing funds in that bank) or if the foreign bank is licensed in a nation found to be “non-cooperative with international anti-money laundering principles or procedures” established by an international entity the United States recognizes as authoritative or if the Secretary deems it appropriate to require such rules.

The Department of the Treasury has issued extensive regulations regarding identification of the accountholder. Banks, credit unions, savings institutions, private banks and trust companies must “implement a written Customer Identification Program (CIP). . .” This program must obtain name, street address, date of birth, and some sort of identification number such as a tax identification number or similar number for a non-citizen of the United States. 31 C.F.R. § 103.121(b)(2)(i). For credit card accounts through the bank, the bank may get verifying information through a third party. 31 C.F.R. § 103.121(b)(2)(C). The institution must also verify that identity through an “. . . unexpired government-issued identification evidencing nationality or residence and bearing a photograph or similar safeguard, such as a driver’s license or passport. . .” or corporate articles, “government-issued business license, a partnership agreement, or trust instrument.” 31 C.F.R. § 103.121(b)(2)(C). The CIP must also address non-documentary methods such as independently verifying identity by such things as a “. . . consumer reporting agency, public database, or other source, or other source; checking references with other financial institutions; and obtained a financial statement. . .” and the financial institution must assess the risk associated with opening the account. 31 C.F.R. § 103.121(b)(ii)(B). Banks must be able to anticipate situations where the depositor cannot present identification, where the bank is not familiar with the documents presented, where the account is opened without necessary documents, where the account is opened in absence, or where by other circumstances the bank cannot verify the actual identity of the depositor and establish protocol for dealing with such situations. *See* 31 C.F.R. § 103.121(b)(ii)(B)(2). Banks must get verifying information about the account or the signatories when the depositor is an entity. 31 C.F.R. § 103.121(b)(ii)(C). The CIP must have established procedures to be followed if the verification cannot be obtained. These include when implementation of guidelines for when a bank should not open an account at all, when a SAR should be filed, when only limited or conditional use of the account should be approved, and when the account must be closed if verification is wanting. 31 C.F.R. § 103.121(b)(iii). There are record-keeping requirements including a requirement to keep the records for a duration of five years after the account is closed. 31 C.F.R. § 103.121(b)(3). There is also a notice to depositor requirement (and a form) for those situations seeking verification of the identity of the depositor. 31 C.F.R. § 103.121(b)(5).

The customer requirements for broker-dealers in securities (31 C.F.R. § 103.122), futures commission merchants and introducing brokers (31 C.F.R. § 103.123), and mutual funds (31 C.F.R. § 103.130) are virtually identical in substance other than the credit card requirements for banks. The procedures for credit card systems are very different: Every operator of the credit card system must have effective 24 July 2002 a written anti-money laundering “reasonably de-

180 days of the enactment of the Patriot Act to enact further regulations to ensure due diligence, and section 312 became effective 270 days after enactment of those regulations.¹⁹⁷

The Patriot Act absolutely prohibits any domestic financial institution from establishing correspondent accounts for foreign shell banks.¹⁹⁸ A foreign shell bank is defined as a “. . . foreign bank that

signed” to prevent money laundering or terrorist use of the account. 31 C.F.R. § 103.135(b). The operator must have “policies, procedures and internal controls” to prevent any person from issuing this credit card unless the credit card operator can try to prevent credit cards from being issued to terrorists or to facilitate money laundering. 31 C.F.R. § 103.135(c)(1)(I). Foreign shell banks, persons on a Specially Designated Nationals List that the Office of Foreign Assets Control, persons operating under a government license by a government identified by the State Department as a sponsor of international terrorism (see 22 U.S.C. § 2371), unregulated banks with offshore banking licenses, institutions from a nation found to be non-cooperative with the United States’ anti-money laundering efforts, or persons from a jurisdiction found by 31 U.S.C. 5318A to warrant special measures (Section 302 of the Patriot Act) are presumed to pose a heightened risk for possible terrorist support or money laundering. 31 C.F.R. § 103.135(c)(ii). The credit card operator must also designate a compliance officer, training, and an independent audit system. 31 C.F.R. § 103.135.(c)(iii)(2-4). Finally, most other financial institutions are temporarily exempt from anti-money laundering regulations. See 31 C.F.R. § 103.170. (Government agencies, dealers in precious stones, metals or jewels, pawnbrokers, loan or finance companies, travel agents, telegraph companies, vehicle sales [boats and aircraft as well as motor vehicles], real estate closing or settlement companies, private bankers, insurance companies, commodity pool operator or trading advisor, or an investment company, bank not subject to federal regulation and a “person subject to supervision by any state or federal bank supervisory authority” are exempted from these regulations at the present time.)

¹⁹⁷ Patriot Act § 312(b), 115 Stat. 306(2) (codified as amended at 31 U.S.C.S. § 5318). Those regulations are extensive and are found at 31 C.F.R. §§ 103.175, 177, 181-83. A summary of these regulations are that insured banks, “. . . commercial banks; an agency or branch of a foreign bank in the United States; a federally insured credit union; a thrift institution; or a corporation acting under [12 U.S.C. 611 – that apparently authorizes the creation of foreign banks or banks in territories of the United States]. . .” must fully comply with 31 U.S.C. § 5318(I) effective July 23, 2002. See 31 C.F.R. § 103.181. The provision corresponding to private banking accounts in the Patriot Act (but not the provision for correspondent banking accounts) applies to securities brokers or dealers or futures commission merchants or introducing brokers. 31 C.F.R. § 103.182. All other financial institutions are completely exempt from this statute. 31 C.F.R. § 103.183. The certification form for correspondent accounts is found immediately after 31 C.F.R. § 103.185.

¹⁹⁸ Patriot Act § 313, 31 U.S.C.S § 5318(j)(1). Regulations governing this prohibition are found at 31 C.F.R. § 103.177. Financial institutions must take “reasonable steps” to ensure this law is not being evaded by the foreign bank. 31 C.F.R.

does not have a physical presence in any country.”¹⁹⁹ Due diligence is again required to ascertain that any foreign bank with a correspondent account in a domestic financial institution does not permit its use by that foreign bank to provide services for a foreign shell bank.²⁰⁰ There are exceptions for a foreign bank when it is serving as an affiliate of a “depository institution, credit union, or foreign bank” and is subject to the banking laws of the nation governing that foreign entity.²⁰¹ This provision became effective 60 days after the enactment of the Patriot Act.²⁰²

The laundering of money through a foreign bank is prohibited by adding the words “. . .any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. § 3101)” to the definition of a “financial institution” for purposes of the money laundering statute.²⁰³ A related statute makes laundering the proceeds of terrorism a crime.²⁰⁴

New crimes created under the Patriot Act include the prohibition of any “bulk cash smuggling,” which is defined as taking more than \$10,000 in United States currency into or out of the United States.²⁰⁵ There is a specific intent to “evade a currency reporting requirement under § 5316” and the penalty is stated as “pursuant to subsection (b).”²⁰⁶ In addition, the existing crime of operating an unlicensed money transmitting business was altered in a way to, in effect, make it a new crime.²⁰⁷

§ 103.177(a)(ii). Information must be verified or the account may have to be closed. 31 C.F.R. § 103.177(c).

¹⁹⁹ 31 U.S.C.S § Section 5318(j)(1).

²⁰⁰ *Id.* at § 5318(j)(2).

²⁰¹ *Id.* at § 5318(j)(3).

²⁰² Patriot Act § 313(b), 115 Stat. 307 (codified as amended at 31 U.S.C.S. §5318) (“The amendment made by subsection (a) shall take effect at the end of the 60-day period beginning on the date of enactment of this act”).

²⁰³ Patriot Act § 318, 115 Stat. 307; 18 U.S.C.S. § 1956(c)(6). The reason is that the definition of financial institution in Title 31 is designed to and does govern domestic entities (and foreign ones as well) doing business in the United States. But the money laundering in a foreign bank by foreign criminals as part of a criminal scheme ultimately headed to the United States (international drug trafficking is only one obvious example) needs to be a criminal act so as to reach funds of SUAs that never reach our shores.

²⁰⁴ Patriot Act § 376, 115 Stat. 307; 18 U.S.C.S § 1956(c)(7)(D). This section added an existing act (18 U.S.C. § 2339(B)) to the list of specific unlawful acts found at 18 U.S.C. § 1956(c)(7)(D).

²⁰⁵ Patriot Act § 371, 115 Stat. 307; 31 U.S.C.S. §5332(a) (2004).

²⁰⁶ *Id.* The penalty is not stated in the Act. There is no subsection (b) in the body of the statute. Section 371(b) authorizes the forfeiture of the currency.

²⁰⁷ 18 U.S.C. § 1960 (2004).

The old act contained a scienter requirement: the unlicensed money transmitting business had to be "intentionally operated" without an appropriate state license.²⁰⁸ The act was changed to forbid operation "...whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable."²⁰⁹ The act also adds a third crime that may be committed by either a licensed or unlicensed money transmittal business: knowingly transmitting funds derived from unlawful activity or which are intended to be used to promote or support unlawful activity.²¹⁰

The Patriot Act enhanced penalties and made technical changes for the counterfeiting of both domestic and foreign currency and obligations. Section 374 punishes the "making, dealing, or possessing" of a plate, stone or "analog, digital, or electronic image" of a domestic banknote or obligation.²¹¹ The maximum penalty for counterfeiting,²¹² uttering,²¹³ or dealing²¹⁴ in counterfeit currency or obligations was increased from fifteen to twenty years.²¹⁵ There was a technical amendment to 18 U.S.C. § 474 adding that "[w]hoever, with intent to defraud, makes, executes, acquires, scans, captures, records, receives, transmits, reproduces, sells, or has in such person's control, custody, or possession, an analog, digital, or electronic image of a of any obligation or other security of the United States; or. . ."²¹⁶ 18

²⁰⁸ 18 U.S.C. § 1960 (2001) (amended 1994). The crime was also complete if the money transmitting business failed to comply with the registration requirement of 31 U.S.C. § 5330 (2004).

²⁰⁹ This raises interesting questions, the first of which is whether the failure to register the money transmitting business has an inherent scienter element (it is not found in the statute), and if not, would it have run afoul of *Lambert v. California*, 355 U.S. 225 (1957) (stating that notice of the duty to register as a felon is required by due process). The second question is whether the abolition of scienter in this case as a element to prove (and as an affirmative defense) creates due process issues whether arising under the *In re Winship*, 397 U.S. 358 (1970) (stating that due process requires the government to prove each and every element beyond a reasonable doubt) line of cases and/or *Montana v. Egerhoff*, 518 U.S. 37 (1996) (holding that a state can abolish some but not all affirmative criminal defenses and the test is an historical one).

²¹⁰ 18 U.S.C. § 1960(b)(1)(C) (2004).

²¹¹ 18 U.S.C. § 470 (2004).

²¹² 18 U.S.C. § 471 (2004) ("Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation. . .of the United States. . .").

²¹³ 18 U.S.C. § 472 (2004) ("Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to. . .").

²¹⁴ 18 U.S.C. § 473 (2004) ("Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered. . .").

²¹⁵ *Id.*

²¹⁶ 18 U.S.C. § 474 (2004). The term "analog, digital, or electronic image" is defined as including ". . .any analog, digital, or electronic method used for the. . .

U.S.C. § 476 (prohibiting the taking of impressions of tools used in producing domestic securities or obligations of the United States) has a similar change and the maximum penalty is increased from ten to twenty-five years.²¹⁷ 18 U.S.C. § 484 (connection of parts of genuine notes with intent to defraud) had its maximum penalty increased from five to ten years.²¹⁸ The maximum penalty for the counterfeiting or forgery of certain lending agencies was increased from five to ten years.²¹⁹

Section 375 of the Patriot Act made similar changes to the statutes prohibiting the counterfeiting of foreign obligations or securities statutes. The counterfeiting statute had its maximum penalty increased from five to twenty years.²²⁰ The uttering statute and the possession of counterfeiting statute also had the maximum penalty increased to twenty years.²²¹ The possession of plates or stones of foreign obligations statute was amended in a way identical to what Section 374 of the Act did for domestic obligations.²²² Finally, 18 U.S.C. §§ 482²²³ and 483²²⁴ had the maximum penalty for its violation increased to twenty years.

Additionally, the extraterritorial reach of the omnibus federal statute prohibiting fraud and related crimes with the use of an access device²²⁵ has been extended to foreign use of an access device "issued,

retrieval, transmission, or reproduction of any obligation or security, unless such use is authorized by the Secretary of the Treasury." There is also a technical amendment adding the words "analog, digital, or electronic images" or related words. 18 U.S.C. § 474(a) (2004).

²¹⁷ 18 U.S.C. § 476 (2004). There is a similar statute prohibition the possession or selling the impressions of such tools. The identical change is made here.

²¹⁸ 18 U.S.C. § 484 (2004).

²¹⁹ 18 U.S.C. § 493 (2004).

²²⁰ 18 U.S.C. § 478 (2004) ("Whoever, within the United States, with intent to defraud, falsely makes, alters, forges, or counterfeits any bond, certificate, obligation, or other security of any foreign government, . . .").

²²¹ The uttering statute (18 U.S.C. § 479 (2004)) was increased from three years to twenty years; the possession statute (18 U.S.C. § 480 (2004)) was increased from one year to twenty years. These statutes are similar to their domestic counterpart.

²²² 18 U.S.C. § 481 (2004).

²²³ 18 U.S.C. § 482 (2004). This section prohibits the counterfeiting of ". . . any bank note or bill issued by a bank or corporation of any foreign country. . ."

²²⁴ 18 U.S.C. § 483 (2004). This section prohibits the uttering of such a foreign banknote.

²²⁵ 18 U.S.C. § 1029 (2004). The term "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 identifier, or other means of account access that can be used alone or in conjunction with another access device, to obtain money, goods, ser-

owned, managed, or controlled by a financial institution, account issuer, credit card system member, or other [domestic] entity. . .” if there is at least one overt act within the United States.²²⁶ The Act adds a similar civil long-arm statute found in 18 U.S.C. § 1956 that authorizes United States District Courts to enact a civil judgment for laundered funds against a foreign person (assuming proper service is made) if the foreign person commits an offense that involves a financial transaction whole or in part within the United States, converts funds that have been forfeited by order to the United States, or if the foreign person maintains a bank account in a domestic financial institution.²²⁷

The Federal Forfeiture Act²²⁸ is extensively amended in the USA Patriot Act.²²⁹ Essentially, this statute authorizes forfeiture of interbank funds of a foreign bank deposited in this country if a depositor subject to forfeiture has a deposit in that bank. The Attorney General may suspend enforcement of this statute if there is a conflict of law and it would both be in the interest of justice and would not harm United States’ interests.²³⁰ The federal government does not have to trace funds to seize the money,²³¹ and the actual owner may still contest the forfeiture in court.²³² An “interbank account” is defined in 18 U.S.C. § 984(d)(2) as “. . . an account held by one financial institution at another financial institution primarily for the purpose of facilitating customer transactions.”²³³

Title 31 of the United States Code is also known as the Bank Secrecy Act. It has been and is still extensively being amended by the USA Patriot Act. The existing record keeping requirements of the Bank Secrecy Act are extensive. 31 U.S.C. § 5313 generally requires domestic financial institutions to report currency transactions in ex-

vices 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). . .” This includes virtually any ATM card, debit card or a phone card obtained fraudulently.

²²⁶ 18 U.S.C. § 1029(h) (2004).

²²⁷ 18 U.S.C. § 1956(b) (2004).

²²⁸ 18 U.S.C. § 981 (2004).

²²⁹ *Id.* There are both criminal and civil forfeiture remedies available to the government for violations of 31 U.S.C. §§ 5313(reporting requirements), 5316(export/import of monetary instruments), and 5324(structuring requirements) of the Bank Secrecy Act. The defendant may be required to forfeit the property involved in the transaction upon conviction or the funds may be seized and forfeited pursuant to existing law.

²³⁰ 18 U.S.C. § 981(k)(1)(B) (2004).

²³¹ 18 U.S.C. § 981(k)(2) (2004).

²³² *Id.* at 981(k)(3).

²³³ *Id.* at 981(k)(4)(a).

cess of a certain amount.²³⁴ Foreign financial agency transactions,²³⁵ foreign currency transactions,²³⁶ and the import or export of monetary instruments,²³⁷ must be reported on documents and in forms prescribed by the Secretary of the Treasury.²³⁸ A suspicious activity report (SAR) is required in the event of "... a possible violation of law or regulation."²³⁹ The failure to prepare and file reports as required carries severe civil²⁴⁰ and criminal penalties.²⁴¹ Furthermore, the Secre-

²³⁴ 31 U.S.C. § 5313(a) (2004). The amount prescribed by regulation is \$10,000.00. See 31 C.F.R. § 103.30 (2004).

²³⁵ 31 U.S.C. § 5314 (2004).

²³⁶ *Id.* at § 5315.

²³⁷ *Id.* at § 5316.

²³⁸ *Id.* at §§ 5314(a)-(b), 5315(c), and 5316(b).

²³⁹ *Id.* at § 5318(g)(1). The USA Patriot Act also requires all securities brokers and dealers as well as futures commissions merchants, commodity traders and pool operators to file SARs pursuant to 31 U.S.C. § 5318(g).

²⁴⁰ *Id.* at § 5321. The penalty for willfully violating any part of the Bank Secrecy Act, except for §§ 5314 and 5315, is the greater of the amount involved in the transaction (up to \$100,000.00) or \$25,000.00. A violation of § 5318(a)(2) regarding anti-money laundering compliance constitutes a separate offense for each day and each office, branch, or place of business at which a violation occurs. *Id.* at § 5321(a)(1). A violation of § 5315 is punishable by a \$10,000 fine. *Id.* at § 5321(a)(3). The penalty for a violation of § 5314 is the amount of the transaction (up to \$100,000.00) or \$25,000.00, whichever is greater. *Id.* at § 5321(a)(5)(B)(i). If the violation relates to a failure to report the existence of an account or any identifying information necessary for such account, the penalty is the amount of the account (up to \$100,000.00) or \$25,000.00, whichever is greater. *Id.* at § 5321(a)(5)(B)(ii). Finally, if the financial institution is merely negligent in violating any provision of the Bank Secrecy Act, then the fine is \$500, unless there is a pattern of negligence in which case the fine can be up to \$50,000.00. *Id.* at § 5321(a)(6). The Patriot Act increases civil penalties for violations of the provisions of § 312 (the due diligence pertaining to foreign correspondent and private banking accounts provision), § 313 (the prohibition of correspondent accounts with foreign shell banks) and § 311 (special measures to prevent money laundering) to two times the transaction amount, but not more than a \$1,000,000.00. See 31 U.S.C. §§ 5318(i) & (j), 5318A. See also Patriot Act, § 363(a), 115 Stat. 272, at 332-33.

²⁴¹ 31 U.S.C. § 5322(a) (2004) prescribes that the willful violation of the Bank Secrecy Act (other than §§ 5315 and 5324) may be punishable by a fine of not more than \$250,000 and/or imprisonment for not more than five years. If the violation is part of another crime or is part of a pattern involving more than \$100,000.00 during a twelve-month period, the penalty increases to ten years imprisonment and/or a fine of \$500,000.00. *Id.* at § 5322(b). Violations of § 5318(a)(2) have the same "each day/each branch" provision as in the civil liability provision. The Patriot Act in § 363(b) increases criminal penalties for violation of the same provisions.

tary of the Treasury can seek injunctive relief to prevent or cease violations of the Act.²⁴²

The USA Patriot Act also strengthens civil immunity for both the voluntary and compelled reporting of a "...disclosure pursuant to this subsection or any other authority. . ." ²⁴³ and prohibits any notice to the person about whom the report is made.²⁴⁴ Section 5318(h) is amended to require certain anti-money laundering procedures and personnel, such as "the development of internal policies, procedures, and controls;" as well as a compliance officer, employee training program and outside audits to test compliance.²⁴⁵

While not a new tool provided by the Patriot Act, the Secretary of the Treasury, or his designee, has authority to issue a geographic targeting order directed toward financial institutions in a designated geographic area where "reasonable grounds exist" to find that additional record-keeping or reporting is necessary to enforce the money-

²⁴² 31 U.S.C. § 5320 (2004). Other provisions protect employees of a financial institution from being discharged for cooperating with the government in regard to this Act. *Id.* at § 5328. The Secretary can also order any financial institution or group of such institutions to report currency and/or coin transactions from a sixty-day period. The Secretary can require the financial institution to report certain transactions and the customer cannot be told of the report. *Id.* at § 5326. A financial institution may not "issue or sell a bank check, cashier's check, traveler's check, or money order to any individual . . ." in a transaction of over \$3,000.00, unless there is an account or adequate identification. *Id.* at § 5325(a). There is a reward program for informants, in which individuals are rewarded for providing original information that leads to the recovery of a criminal fine, civil penalty, or forfeiture. *Id.* at § 5323.

²⁴³ See Patriot Act, § 351(a), 115 Stat. 272. This section amends 31 U.S.C. § 5318(g)(3)(A).

²⁴⁴ Patriot Act, § 351(b), 115 Stat. 272. This section amends 31 U.S.C. § 5318(g)(2). There also is positive authority for the placement in employment references without fear of civil liability but does not require such reference. See 31 U.S.C. § 5318(g)(2)(B). The Patriot Act also amended the Federal Deposit Insurance Act [12 U.S.C. § 1828(w)] to grant a limited civil liability for similar employment references but refused to shield malicious (and presumably false) reporting. Patriot Act, § 355. See 12 U.S.C. at 1828(w)(3). 31 C.F.R. § 103.120 establishes various anti-money laundering requirements. Recent Treasury regulations also require anti-money laundering strategies. Banks, savings associations and credit unions must act in accordance with the rules of its Federal regulator. 31 C.F.R. § 103.120(b). Any financial institution "...regulated by a self-regulatory organization, including registered securities broker-dealers and futures commission merchants" must comply with both Federal regulators and approved rules of its regulatory agency. 31 C.F.R. § 103.120(c).

²⁴⁵ Patriot Act, § 352. The original section allowed the Secretary to authorize such regulations but now they are mandatory. The law became mandatory 180 days after passage of the Patriot Act.

laundering laws.²⁴⁶ It is used to impose stricter reporting and record keeping requirements on specified financial service providers in a certain geographical area for a limited time period.²⁴⁷ The Patriot Act amended the penalties for violations of such orders.²⁴⁸ Violation of a geographic targeting order or other regulation authorized by Section 21 of the Federal Deposit Insurance Corporation,²⁴⁹ now has the same civil or criminal penalties of sections 5321 and 5322 of volume thirty-one of the United States Code. There was a similar amendment to the anti-structuring statute.²⁵⁰

The Patriot Act also added provisions for the collection of data on the money laundering aspects of the financial proceeds of terrorism to the general statute providing for the establishment of a government wide anti-money laundering strategy.²⁵¹ The Patriot Act also authorizes a review after six months of whether the IRS should continue to receive these transaction reports and whether the IRS should continue to audit financial or gaming institutions.²⁵² The Bank Secrecy Act was amended to add the fight against terrorism as a purpose of the act and to allow the government agency receiving a SAR to forward it on to a supervisory or "United States intelligence agency for use in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."²⁵³

²⁴⁶ 31 U.S.C. § 5326; see also 31 C.F.R. § 103.26.

²⁴⁷ News Release, FINCEN, *Treasury Cracks Down On Remittances To Dominican Republic*, at <http://www.fincen.gov/drgto.html> (last visited Apr. 1, 2004). The GTO described in the news release required 20 money remitters in New York and Puerto Rico to provide the Department of Treasury with information on remittances of over \$750 for a 60-day period. *Id.* The Patriot Act extended the length of time a GTO could be in effect from a period of no more than 60 days to no more than 180 days, though it is renewable. Patriot Act § 353(d).

²⁴⁸ Patriot Act § 353.

²⁴⁹ *Id.* Section 21 of the FDIC Act is identical to § 121 et seq. of Public Law 91-508. See 12 U.S.C. § 1829a. There are criminal and civil penalties already stated in the statute and they are increased in accordance with § 353 of the Patriot Act.

²⁵⁰ Patriot Act § 353(c).

²⁵¹ Patriot Act § 354. This amends 31 U.S.C. § 5341(b)(12).

²⁵² Patriot Act § 357. There also is a provision authorizing the Secretary of the Treasury within 30 months of the enactment of this Act in consultation with various other officials and make recommendations as to further legislative action. Patriot Act § 324.

²⁵³ Patriot Act § 358(a), (b). The authors do not believe that this amends any prohibition on covert or other activities in the United States. The language says "[a] Government authority authorized to conduct investigations of . . . international terrorism." 12 U.S.C. § 3414(a)(1)(c) [as amended by § 358(h) of the Act]. Section 358 also adds similar purpose language to the FDIC Act and § 123(a) of the Patriot Act [12 U.S.C. § 1953(a)].

Section 358 of the Patriot Act also makes extensive changes to several acts to liberalize the availability of Bank Secrecy Act reports, first to state or federal financial regulators but also to any United States intelligence agency.²⁵⁴ There also is authority granted for counterterrorism exceptions to nondisclosure under both the Right to Financial Privacy Act²⁵⁵ and the Fair Credit Reporting Act.²⁵⁶

Section 359 of the USA Patriot Act requires an "informal money transfer system," such as *hawala*,²⁵⁷ to comply with the Bank Secrecy Act.²⁵⁸ The Secretary of the Treasury will have reports to

²⁵⁴ Patriot Act § 358(c). This subsection amends 31 U.S.C. § 5319.

²⁵⁵ 12 U.S.C. §§ 3412(a), 3414(a)(1), 3420(a)(2).

²⁵⁶ 15 U.S.C. Section 1681(v). (This section requires a credit reporting agency (Equifax/Experian/Transunion) to provide the credit history of an individual "...to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such governmental agency that such information is necessary. . ." and also bars reporting of the request to the consumer. The request will be made by a "supervisory official designated by the head of a Federal agency or an officer. . ." whose appointment has to be made by the President and confirmed by the Senate. 15 U.S.C. § 1726(a)(b). Unlike § 215, there is no requirement for judicial oversight. Furthermore, the credit reporting agency cannot disclose to the consumer the report nor is it cited on the credit history. 15 U.S.C. § 1726(c). Section (e) of this new section bars any suit for disclosure under this title.).

²⁵⁷ *Hawala* is an informal money transfer system practiced in Pakistan and neighboring nations. The *hawala* system, one of a number of informal value transfer systems, starts with a sender providing a sum of money to a local *hawaladar* (who usually charges a commission or fee for his services). SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, REPORT TO THE CONGRESS IN ACCORDANCE WITH § 359 OF THE USA PATRIOT ACT 5 (November 2002), available at <http://www.fincen.gov/hawalarptfinal11222002.pdf>. Other informal value transfer systems include the *hundi*, *fei ch'ien*, *hoe kuan*, *hui k'aun*. The local *hawaladar* then contacts a *hawaladar* in the location where the money is to be picked up by the recipient. There never has to be any actual transfer of money between the two *hawaladars*. While sometimes there are conventional wire transfers or false invoices on goods being shipped, there is also frequent use of a system of debts and credits in which the *hawaladars*, who know and deal frequently with each other, track which persons with whom they have credits and debts after the transfers. *Id.*

²⁵⁸ Section 359 of the Act amends the definition of "financial institution" to include a "...licensed sender of money. . .including any person who engages as a business any 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." In effect the underground economy is now a financial institution. 31 U.S.C. § 5312(a)(2)(R). The act also adds the same language to those required to obtain a money transmitting license. 31 U.S.C. § 5330(d)(1)(D). The informal dealer also must comply

Congress on the need for further legislation, including specifically "...whether the threshold for the filing of suspicious activity reports under section 5318(g) of Title 31, United States Code should be lowered. . ." for such systems.²⁵⁹ The Bank Secrecy Act was amended to require adequate identification of accountholders.²⁶⁰ The Secretary of the Treasury again is empowered to issue regulations on the subject,²⁶¹ but at a minimum, the financial institution is required to verify the identification of the depositor, keep records of the documents used to verify that identification, and to compare the identity with the list of known terrorists.²⁶² There was also established a highly secure network for a financial institution to file reports and receive alerts in a secure (encrypted, perhaps) manner.²⁶³

Section 365 of the Patriot Act is an amendment establishing a new statute that essentially gives even non-financial institutions a duty to comply with the Bank Secrecy Act. Any person engaged in any trade or business who receives coins or currency in a value of \$10,000.00 or greater must make reports of the receipt of the funds.²⁶⁴ The Act defines a "nonfinancial trade or business" as any business other than a financial institution "...that is subject to the reporting requirements of section 5313 and regulations prescribed under such section."²⁶⁵ Since virtually any institution or person may be required to do reports, this is a tremendous lever for law enforcement to be able

with section 21 of the FDIC Act. Section 359(c). The Patriot Act also adds to the SAR requirement all "nonfinancial trade or business(es)" that is defined as "...any trade or business other than a financial institution that is subject to the reporting requirements of § 5313 and regulations prescribed under such section." See § 365(adding new 31 U.S.C. § 5331). Only domestic financial institutions have to file such reports. Hence, the Patriot Act requires every person who handles money to file SARs. Structuring to avoid the filing of the SAR is prohibited. The report must be filed if there is a receipt of more than \$10,000.00 in coins or either domestic or foreign currency in either one transaction or two or more related transaction. 31 U.S.C. § 5331(a). The report must have at a minimum the name and address of the person from whom the funds came from, the amount of coins or currency, and date and nature of the transaction, and "such other information, including the identification of the person filing the report. . ." See 31 U.S.C. Section 5331(b).

²⁵⁹ See Patriot Act, § 359(d).

²⁶⁰ Patriot Act, § 326. Those regulations are extensive.

²⁶¹ 31 U.S.C. § 5318(l) Author's note: There are two subsections "l" in § 5318. The other follows and is unrelated.

²⁶² 31 U.S.C. § 5318(l)(A-C).

²⁶³ Patriot Act, § 362.

²⁶⁴ 31 U.S.C. § 5331. Structuring is also prohibited. 31 U.S.C. § 5324(b).

²⁶⁵ 31 U.S.C. § 5312(a)(4). (Section 5313 requires reports from the other party in a transaction with a financial institution to give a report if the Secretary requires it. See 31 U.S.C. § 5313(a). There are some mandatory and permissive exemptions from those reports, but essentially the Secretary of the Treasury can require any

to secure cooperation especially from “innocent” parties who may have unknowingly committed a federal crime. The Secretary of the Treasury is required by the Patriot Act to report to Congress about the mandatory or permissive exemptions to the SAR requirement to determine how to best aid law enforcement.²⁶⁶

Section 314 of the Patriot Act authorizes the Secretary of the Treasury to enact regulations governing cooperation among financial institutions and between a financial institution and law enforcement.²⁶⁷ A federal law enforcement agency may ask FinCEN²⁶⁸ to solicit “certain information from a financial institution or a group of financial institutions”²⁶⁹ and upon an appropriate certification.²⁷⁰ FinCEN can require the financial institution to “expeditiously search its records” for accounts and transactions and report to FinCEN the details on names, identifiers, and transactions.²⁷¹ Additional Treasury regulations authorize the voluntary sharing of financial information among financial institutions or associations of financial

person to file SARs. Wherever Alexander Hamilton is today, he must be smiling at the power of the office he once held.).

²⁶⁶ Section 366.

²⁶⁷ The regulations are found at 31 C.F.R. § 103.100 (required cooperation with law enforcement) and § 103.110 (authorizing cooperation among financial institutions).

²⁶⁸ 31 U.S.C.A. § 310 (2003). Established by Treasury Order 105-08 on April 25, 1990, FinCEN received additional Congressional authority by § 361 of the Patriot Act. This section establishes and empowers a Director of FinCEN appointed by the Secretary of the Treasury and authorizes regulations for the receipt and dissemination of financial reports.

²⁶⁹ 31 C.F.R. § 103.100(b)(1) (2003).

²⁷⁰ *Id.* The federal law enforcement officer must certify to the satisfaction of FinCEN, and that certification must include “. . .that each individual, entity, or organization about which the Federal law enforcement agency is seeking information is engaged in, or is reasonably suspected based on credible evidence of engaging in, terrorist activity or money laundering; include enough specific identifiers, such as date of birth, address, and social security number, that would permit a financial institution to differentiate between common or similar names; and identify one person at the agency who can be contacted with any questions relating to its request.”

²⁷¹ 31 C.F.R. § 103.100(b)(2) (2003). Whether this conflicts with the Right to Financial Privacy Act is not clear. The Patriot Act amended that law at § 358(h) to exempt from the Act “. . . 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.” 12 U.S.C. § 3414(a)(1)(c) (2003). This language would seem to exempt this report from the requirements of the Right to Financial Privacy Act but the courts will decide this exact question if and when financial records are introduced in a federal criminal case.

institutions if the financial institution suspects terrorist activity or money laundering.²⁷² The financial institutions in the sharing arrangement must each give a notice, renewable every twelve months, to FinCEN, and these financial institutions must reasonably seek verification among others before the sharing of financial information that such proper notice has been made.²⁷³ There also is a provision requiring the filing of either a SAR or a SAR with a telephone report to "an appropriate law enforcement authority and financial institution supervisory authorities. . ."²⁷⁴

Additionally, there are several miscellaneous provisions within the money laundering section of the Patriot Act. The first allows for a financial institution's anti-money laundering compliance record to be considered in determining if that institution will be allowed to acquire stock or merge with another such institution.²⁷⁵ The Secretary of the Treasury is empowered to seek foreign cooperation (in conjunction with the Attorney General and the Secretary of State) as to ensuring accurate identity of wire transfers sent to the United States.²⁷⁶ There is also a new crime that prohibits the corruption of any federal official to influence that official in the performance of "any official act,"²⁷⁷ or to defraud the United States, or to be ". . . induced to do or omit any act in violation of the official duty of such official or person. . ."²⁷⁸ Congress states that the Executive should negotiate with foreign financial leaders and officials to induce them to maintain and to give access to financial records in terrorism investigations.²⁷⁹ Finally, the Federal Reserves are authorized to deputize law enforcement personnel to safeguard the physical plants of the banks and to arrest for felonies committed on their property.²⁸⁰

²⁷² 31 C.F.R. § 103.110 (2003).

²⁷³ 31 C.F.R. §§ 103.110(b)(2)(3) (2003). The financial institution must take steps to preserve "security and confidentiality" of financial records, and if the financial institution follows 15 U.S.C. § 6801 (2003), (Gramm-Leach-Bliley Act) there can be no liability. 31 C.F.R. § 103.110(b)(4) (2003). There also is a limited safe harbor from civil liability if this regulation is followed. 31 C.F.R. § 103.110(b)(5) (2003).

²⁷⁴ 31 C.F.R. § 103.110(c) (2003). The additional telephone report shall be made when terrorist activity is suspected or the money laundering is ongoing.

²⁷⁵ Patriot Act, § 327, 115 Stat. at 318-19. This section amends both the Bank Holding Company Act of 1956 [12 U.S.C. § 1842(c) (2003)] and the FDIC Act [12 U.S.C. § 1828(c) (2003)].

²⁷⁶ *Id.*, at § 328, 115 Stat. at 319 (2001).

²⁷⁷ *Id.*, at § 329, 115 Stat. at 319-20 (2001).

²⁷⁸ *Id.* The penalty is up to fifteen years in the penitentiary and/or a fine of three times the thing of value. Compare this to 18 U.S.C. § 201 (2003) (the Federal bribery statute), as they seem to be identical offenses.

²⁷⁹ *Id.*, at § 330, 115 Stat. at 320 (2001).

²⁸⁰ *Id.*, at § 364, 115 Stat. at 333 (2001).

CONCLUSION

The Patriot Act has wrought great changes in the financial system of the United States of America. Few persons can totally escape the terms of it. It is true that effective anti-money laundering efforts can hinder drug traffickers and other criminals as well as hinder terrorists, and the Patriot Act's comprehensive provisions implementing a broad spectrum of new regulations gives the United States many more tools to combat criminal activity both inside and outside of our borders. Many more reports and disclosures will be required and there are severe penalties for their non-compliance. It is the hope of the authors that this article will empower persons in the performance of their legal duties and that this will stop criminals and terrorists from their evil deeds against Americans.