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Money Laundering: Current Law and Proposals

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Summary

In passing the International Money Laundering Abatement and Anti-Terrorist Act, Title III of P.L. 107-56, Congress amended federal anti-money laundering laws and ordered various studies to determine whether further legislation is needed. The anti-money laundering laws include criminal statutes that prohibit laundering the proceeds of specified crimes and reporting and record keeping requirements that involve criminal and civil penalties. Since the late 1970's financial institutions have been required to report cash transactions in excess of $10,000 and to keep records of certain foreign transactions. Since 1996, banks have been required to report suspicious activity. Many institutions have maintained know-your-customer procedures that profile depositors, borrowers, or security traders on an informal basis. A regulatory proposal to formalize this type of requirement was withdrawn in 1999 following an unprecedented number of comments.[1] International money laundering proposals before the 107th Congress and incorporated in P.L. 107-56 call for stricter scrutiny of accounts held in the U.S. in the name of foreign persons and institutions, including correspondent accounts held for foreign banks. Various bills comprise the legislative history of anti-money laundering provisions in P.L. 107-56. Among those that were passed by either the House or the Senate are: H.R. 2975, the PATRIOT Act; S. 1510, the USA Act of 2001; and H.R. 3004. Parts of each were included in the final legislation, as were provisions that had no counterpart in previously introduced legislation.

Anti-Money Laundering Laws. Money laundering involves concealing illegally obtained income and recycling it until its illegal origin is completely obscured. It is addressed primarily by four types of federal law: (1) recordkeeping and reporting requirements with civil and criminal sanctions, (2) substantive criminal offenses, (3) procedural protections against federal access to financial records, and (4) agreements with foreign countries with respect to procedures and conditions under which financial records may be secured for law enforcement

[1] The FDIC received 254, 394 comments with an "overwhelming majority" "strongly opposed." 64 *Fed. Reg.* 14845 (March 29, 1999).

purposes. The Bank Secrecy Act of 1970[2] and its major component, the Currency and Foreign Transactions Reporting Act,[3] require reports and records of cash, negotiable instrument, and foreign currency transactions and authorize the Secretary of the Treasury to prescribe regulations to insure that adequate records are maintained of transactions that have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[4] The regulations set civil and criminal penalties for their violation. There are also substantive federal criminal statutes that define as offenses, laundering of monetary instruments[5] and engaging in monetary transactions in property derived from unlawful activity.[6] The Right to Financial Privacy Act[7] details the procedures that federal agencies, including law enforcement agencies, must use to gain access to financial records of individuals. Treaties of mutual assistance with foreign governments detail the conditions under which each signatory government may obtain judicial assistance for access to financial information from institutions within the other signatory's jurisdiction.[8]

The Supreme Court upheld the constitutionality of the Bank Secrecy Act in *California Bankers Association v. Schultz*, 416 U.S. 21 (1974), as a valid exercise of federal power under the commerce clause. It ruled that the Bank Secrecy Act's recordkeeping and reporting burden was not so onerous as to deprive the institutions of due process, did not involve an illegal search and seizure in violation of the Fourth Amendment, and did not invade associational interests protected by the First Amendment. Subsequently, in *United States v. Miller*, 425 U.S. 435 (1976), the Court held that the Fourth Amendment does not recognize an expectation of privacy in a person's financial records held by a bank *vis-a-vis* a governmental agency's interest in examining those records. Thereafter, the federal Right to Financial Privacy Act of 1978[9] was enacted with a dual purpose: "protect[ing] the customers of financial institutions from unwarranted intrusions into their records [by federal government authorities] while at the same time permitting legitimate law enforcement activity."[10] It sets procedures for the federal government's access to bank customer records.[11] One of the exceptions to these procedures states

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[2] 12 U.S.C. §§ 1829b and 1951-1959, and 31 U.S.C. 5311-5322.

[3] 31 U.S.C. §§ 5311-5322.

[4] 12 U.S.C. § 1829b.

[5] 18 U.S.C. § 1956.

[6] 18 U.S.C. § 1957.

[7] 12 U.S.C. § § 3401 - 3422.

[8] See Michael Abel and Bruno A. Ristau, 3 *International Judicial Assistance* §§ 12-4-1 and related appendices (1990)

[9] P.L. 95-630, Tit. XI, 92 *Stat.* 3641, 3697-3710; 12 U.S.C. §§ 3401 -2422.

[10] H.Rept. 95-1383, 95th Cong., 2d Sess. 33; 1978 U.S.Code Cong. & Ad. News 9305.

[11] RFPA's application is extensive in terms of the information it covers and limited in terms of the customers to which it applies. It defines "financial record" to include information derived from records held by a financial institution pertaining to an individual or partnership of five or fewer individuals. 12 U.S.C. §§ 3401(2), (4), and (5). It defines "financial institution" to mean "any office of a bank, savings bank, card issuer..., industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States,

(continued...)

that "[n]othing in this ... [law] shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder."[12] It, thus, effectively incorporates the Bank Secrecy Act into the Right to Financial Privacy Act.

Implementing Regulations. The Currency and Foreign Transactions Reporting Act requires financial institutions and other specified businesses to maintain records of foreign domestic financial transactions and to report to the Secretary of the Treasury certain currency transactions in excess of $10,000. A subsequent amendment, section 1359 of the Anti-Drug Abuse Act of 1986,[13] ordered the federal banking regulators to prescribe regulations "requiring insured banks to establish and maintain procedures reasonably designed to assure and monitor the compliance of such banks with the requirements of" the Bank Secrecy Act. Under the implementing regulations, promulgated by the Financial Crimes Enforcement Network of the Department of the Treasury (FinCen), the following types of reports are required: (1) Currency Transaction Reports (CTR's) on currency transactions of more than $10,000;[14] and (2) reports relating to the physical transportation of currency or monetary instruments from or into the United States; regarding foreign financial accounts, or transactions with foreign financial agencies.[15] The regulations also require maintaining various records in connection with purchases of bank checks, money orders, and traveler's checks in excess of $3,000,[16] as well as copies of records of various other transactions that the Secretary of the Treasury has determined to have a high degree of usefulness in investigative proceedings.[17]

Since April, 1996,[18] the regulations require that banks, depository institutions, and money services businesses submit Suspicious Activity Reports (SARs)[19] of any transaction involving at least $5,000, which the institution suspects: to include funds from illegal activities; to have been conducted to hide funds from illegal activities or designed to evade the BSA requirements; which have "no business or apparent lawful purpose;" or are "not the sort [of transaction] in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and

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[11] (...continued)
the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands."

[12] 12 U.S.C. § 3412(d).

[13] P.L. 99-570, 100 Stat. 3207, 3207-27; 12 U.S.C. § 1818s.

[14] 31 C.F.R. § 103.22.

[15] 12 C.F.R. §§ 103.23 -103.25.

[16] 31 C.F.R. § 103.29.

[17] 31 C.F.R. §§ 103.31 - 103.39.

[18] 61 Fed.Reg. 4326 (February 5, 1996). Included in the notice were implementing regulations applicable to national banks and to state chartered member banks.12 C.F.R. §§ 21.11 and 208.20. Promulgated soon thereafter were regulations applicable to state chartered nonmember banks; 12 C.F.R. § 353.3; federally insured credit unions (12 C.F.R. § 748.1); and federally insured savings associations, 12 C.F.R. § 563.180.

[19] 31 C.F.R. §§ 103.18, 103.19. The authority to require suspicious activity reports derives from 31 U.S.C. § 5318(g), authorizing the Secretary of the Treasury to require financial institutions to report suspicious transactions, originally enacted as section 1518 of the Housing and Community Development Act of 1992, P.L. 102-550, 106 Stat. 3672,4059.

purpose of the transaction."[20] The banking regulators have also issued rules requiring the institutions that they supervise to "establish and maintain procedures reasonably designed to assure and monitor their compliance" with the Bank Secrecy Act and regulations.[21] One portion of these regulations requires that each institution develop a written compliance program with internal controls, independent testing, training of personnel, and designating individuals to coordinate and monitor an institution's program. The proposed "Know Your Customer" regulations would have expanded upon these requirement. The Money Laundering Suppression Act of 1994[22] sets forth mandatory exemptions to the currency reporting requirements that include other depository institutions and governmental entities. It authorizes the Secretary of the Treasury to issue regulations to permit institutions to designate business customers in certain categories as exempt from the currency reporting requirements. Under the regulations that have been issued, institutions are authorized to exempt banks, government entities, and publicly traded companies according to one set of procedures, and companies not publicly traded and business entities that use cash for their payrolls according to another set of procedures which include biennial renewals.[23]

The "Know Your Customer" Proposed Regulations. On December 7, 1998, the federal banking regulators proposed "Know Your Customer" regulations that would have meant regularized, systematic increased scrutiny of documentation of customer's identity, both individual and corporate, and possible further investigation of persons, including private banking clients,[24] who begin or maintain relationships with regulated institutions.[25] In March 1999, the proposals were withdrawn following an unprecedented number of negative comments citing increased costs and privacy concerns.[26] Similar requirements, however, have been imposed on various banking institutions operating internationally following money laundering investigations

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[20] 31 C.F.R. § 103.21(a)(2).

[21] 52 Fed. Reg. 2858 (January 27, 1987), promulgating 12 C.F.R. § 21.21 (Office of the Comptroller of the Currency, applicable to national banks); 12 C.F.R.§ 208.14 (subsequently, 12 C.F.R. § 208.63) (Board of Governors of the Federal Reserve System, applicable to state member banks); 12 C.F.R. § 326.8 (Federal Deposit Insurance Corporation, applicable to federally insured state nonmember banks); 12 C.F.R. § 563.17-7 subsequently 12 C.F.R. § 563.177(Federal Home Loan Bank Board, the predecessor of the Office of Thrift Supervision, regulator of savings associations, applicable to federally insured thrift institutions); and 12 C.F.R. § 742.2 (National Credit Union Administration, applicable to federally insured credit unions).

[22] P.L. 103-325, tit. 4, sec. 402 (a), 108 Stat. 2243, 31 U.S.C. § 513(d).

[23] See 63 Fed. Reg. 50147 (September 21, 1998); 31 C.F.R. § 103.22.

[24] Private banking includes "personalized services such as money management, financial advice, and investment services for high net worth clients," that "have become an increasingly important aspect of the operations of some large, internationally active banking organizations." Board of Governors of the Federal Reserve System, SR 97-19 (SUP), at 1 (June 30, 1997)[http://www.federalreserve.gov/board docs/SRLETTERS/1997/SR9719.HTM]. The Know Your Customer rules follow revelations of how the private banking services of Citibank were employed to aid Raul Salinas de Gortari, brother of Carlos Salinas, former president of Mexico, in transferring large sums from Mexico to Swiss banks. See U.S. General Accounting Office, "Private Banking: Raul Salinas, Citibank, and Alleged Money Laundering," GAO/OSI-99-1 (October 1998).

[25] 63 *Fed. Reg.* 67516.

[26] 64 *Fed .Reg.* 14845 (March 29, 1999).

that called into question their ability to monitor international transfers as required under the Currency and Foreign Transaction laws and regulations.[27]

The International Money Laundering Abatement and Anti-Terrorist Financing Act. The major piece of anti-money laundering legislation in the 107th Congress is Title III of the USA-PATRIOT Act, P.L. 107-56.[28] Prior to its passage on October 26, 2001, the anti-money laundering proposals included H.R. 3004 and Title III of S. 1510, parts of which were incorporated into H.R. 3162, which became P.L. 107-56. Of the many implementing regulations, one of the most controversial, effective October 25, 2002, requires institutions to retain copies of new customers' drivers licenses for five years.[29]

The major provisions of the anti-money laundering portions of P.L. 107-57 authorize the Secretary of the Treasury to impose special record keeping and reporting requirements regarding financial transactions between domestic institutions and those in foreign jurisdictions determined to be of primary money laundering concern. Such requirements are directed at securing information on the identity of beneficial owners of funds being held for, transferred to, or transferred from persons and financial institutions in the foreign jurisdiction. The Secretary is also be empowered to place conditions on the establishment of correspondent accounts with U.S. financial institutions by the banking organizations of such a jurisdiction. Primary money laundering concern is to be determined by weighing such factors as the jurisdiction's bank secrecy laws, its banking supervision and counter-money laundering laws, and its reputation as an off-shore banking haven. The legislation includes provisions to insulate financial institutions and personnel from liability for reporting suspected violations of law. Also included are criminal penalties for violating and structuring to avoid geographic targeting orders issued under the authority of the Currency and Foreign Transactions Reporting Act. The measure also includes a provision permitting depository institutions to include information relating to the possible involvement of an institution-affiliated person in potentially unlawful activity in response to an employment inquiry from another financial institution. Federal regulators are to provide Congress with a report reconciling the penalties under the Currency and Foreign Transaction Reporting Act with those under the enforcement provisions of the Federal Deposit Insurance Act. Included are statements reflecting the sense of Congress on measures to be taken respecting corruption of foreign governments and how the United States should support the activities of the Financial Action Task Force on Money Laundering.

There are other measures to counter money laundering contained in P.L. 107-56 outside of Title III.[30] Among them are provisions that were included in both H.R. 2975, both as introduced and as passed by the House, and in S. 1510, as passed by the Senate. Laundering the proceeds

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[27] These included a cease and desist order directed against the Banco Nacional de Mexico, Banka Serfin, Banco Internacional, Bancomer, and Banco Santander in June 1998; and written agreements, sometimes with state regulators or other Federal Reserve banks, with the Bank of New York, the Banco Popular de Puerto Rico, and the Banco Bilbao Vizcaya Argentaria. See Harold Adams Crawford, "Managing Reputation Risk: Bank Secrecy and Bank Privacy," 19 *Banking and Financial Services Policy Report* 1 (December 2000).

[28] See CRS Report RL31208, *International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Title III of P.L. 107 - 56*.

[29] See 67 *Fed. Reg.* 48290 (July 23, 2002), implementing § 326 of Pub. L. 107-56.

[30] See CRS Report RL31200, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*.

of terrorist activity is added to the list of money laundering predicate offenses; the asset forfeiture provisions relating to support for terrorist organizations are broadened; and there is an authorization for the disclosure of tax information in terrorism and national security investigations.

Other Legislation. Title II of P.L. 107-134 authorizes the Internal Revenue Service to disclose certain taxpayer information in terrorism and national security investigations. S. 2066, S. 2475, S. 2476, and H.R. 3583, address the issue of terrorist organization abuse of charities and nonprofit organizations.

Many of the anti-money laundering measures that had been introduced early in the Congress were, in some form, incorporated into the USA PATRIOT Act. H.R. 1114, offered by Rep. LaFalce for himself and Rep. Velazquez, and a substantially similar bill, S. 398, introduced by Sen. Kerry, like H.R. 3886 of the 106th Congress (H.Rept. 106-728), address the problem of international money laundering. H.R. 2922, introduced by Rep. Roukema, criminalizes the knowing concealment of $10,000 or more in currency or monetary instruments and transportation of it into or out of the United States.

S. 16, introduced by Sen. Daschle, contains various amendments to the substantive money laundering provisions. One permits forfeiture of a money transmitting business operating with a state license upon proof that the defendant knew that the business lacked such a license. Others authorize procedures for the Attorney General to seek restraint of the U.S. assets of persons arrested or charged in a foreign country of money laundering or Controlled Substances Act offenses; provide authority for asserting jurisdiction over foreign persons committing a money laundering offense involving a transaction occurring in part in the United States; extend the coverage of the criminal money laundering statutes to foreign banks; and add various crimes to the list of money laundering predicate offenses. Also included are amendments respecting the prosecution and presentation of evidence in money laundering cases, encouraging financial institutions to notify law enforcement officers of suspicious transactions, amending the substantive money laundering criminal statute to reach conduct that involves funds commingled with the proceeds of illegal activity, and extending criminal penalties to violations of geographic targeting orders.

S. 1371, introduced by Sen. Levin, adds foreign corruption offenses to the list of predicates under the federal money laundering statutes; requires financial institutions to keep records of the owners of interests in accounts held in the name of foreign entities; prohibits correspondent accounts with offshore shell banks; require enhanced due diligence procedures for private banking relations with foreign persons; provides federal court jurisdiction over foreign persons committing money laundering offenses; provides jurisdiction over money laundering through a foreign bank; prohibits false statements to a financial institution regarding the identity of a customer; requires the Secretary of the Treasury to issue regulations regarding concentration accounts held in U.S. depository institutions in the name of foreign banks; permits charging multiple instances of money laundering in a single count of an indictment; allows seizure of funds held in a U.S. bank's interbank accounts for a foreign bank; and enhances procedures for law enforcement access to bank records and to forfeit substitute property.