

2003

## International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift

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### Recommended Citation

George A. Lyden, *International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift*, 8 Fordham J. Corp. & Fin. L. 201 (2003).

Available at: <https://ir.lawnet.fordham.edu/jcfl/vol8/iss1/7>

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# THE INTERNATIONAL MONEY LAUNDERING ABATEMENT AND ANTI-TERRORIST FINANCING ACT OF 2001: CONGRESS WEARS A BLINDFOLD WHILE GIVING MONEY LAUNDERING LEGISLATION A FACELIFT

*George A. Lyden\**

*"Bad laws are the worst sort of tyranny."*

*-Edmund Burke*

## INTRODUCTION

On October 26, 2001, President Bush signed into law the USA Patriot Act<sup>1</sup> ("Act"), which was drafted as a consequence of the attacks on the World Trade Center and the Pentagon only six weeks earlier.<sup>2</sup> The Act is divided into ten sections with perhaps the most noteworthy provisions being Title II, "Enhanced Surveillance Procedures"; Title III, "International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001"; Title IV, "Protecting the Border"—dealing with immigration issues; and Title VIII, "Strengthening the Criminal Laws Against Terrorism".<sup>3</sup> This Note focuses on the Act's Title III anti-money

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1. 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).

2. See Matthew Purdy, *A Nation Challenged: The Law; Bush's New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at 1A; 78 Interpreter Releases 1703 (Nov. 5, 2001) (giving a broad overview of the Act).

3. See generally USA Patriot Act. The other titles of the Act are Title I, "Enhancing Domestic Security Against Terrorism"; Title V, "Removing

laundering provisions, its impact on financial institutions, and its potential for thwarting organized crime and future terrorist activity.

The Act was rammed through Congress with “only one public hearing and little debate,”<sup>4</sup> and was one of the “swiftest-moving bills in federal history.”<sup>5</sup> It was approved 356-66 by the House of Representatives and 98-1 by the Senate.<sup>6</sup> Some of the more important provisions of the Act are as follows:

- Expanded federal ability to conduct electronic surveillance and nationwide search warrants. That includes roving wiretaps that allow tapping conversations of an individual no matter what phone he or she uses. And it includes wide latitude to screen computers, including e-mail messages and e-mail address books.
- FBI access to private records “to protect against international terrorism.”
- Detention for as long as a week of immigrants suspected of terrorism or of supporting terrorism without their being legally charged with a crime or immigration violations. The new law also permits deportation of foreigners who raise money for terrorist groups.
- A requirement that banks find the sources of money in some large private accounts and that foreign banks detail suspect transactions.

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Obstacles to Investigating Terrorism”; Title VI, “Providing for Victims of Terrorism, Public Safety Officers, and their Families”; Title VII, “Increased Information Sharing for Critical Infrastructure Protection”; Title IX, “Improved Intelligence”; and Title X, “Miscellaneous”. *Id.*

4. *See infringing on Civil Liberties*, ST. PETERSBURG TIMES, Oct. 29, 2001, at 10A.

5. J.M. Lawrence, *War on Terrorism; Anti-Terror Laws in Place; Feds Urgently Implement Crackdown*, BOSTON HERALD, Oct. 27, 2001, News, at 5.

6. *See id.*

- In an effort to appease civil libertarians, the law has a sunset provision—its major provisions expire in 2004 unless extended—and a provision that the Justice Department prepare reports on how it is affecting civil liberties.<sup>7</sup>

Despite the overwhelming support the Act received from Congress, it has already come under harsh criticism by liberals and conservatives alike for unleashing unprecedented powers on government authorities that in some cases have been challenged as unconstitutional.<sup>8</sup> The balance between national security and civil liberties has been debated for years, and it seems to have resumed prominence in the conscience of many constitutional scholars.<sup>9</sup> To date, the Act has primarily been analyzed and challenged on

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7. Ann McFeatters, *Bush Signs Anti-Terror Bill; Says Tough Law Will Preserve Constitutional Rights*, PITTSBURGH-POST GAZETTE, Oct. 27, 2001, at A6.

8. See generally George Lardner, Jr., *On Left and Right, Concern over Anti-Terrorism Moves; Administration Actions Threaten Civil Liberties, Critics Say*, WASH. POST, Nov. 16, 2001, at A40 (discussing various criticisms of the Act with respect to its encroachment on civil liberties, such as “the order empowering [Attorney General] Ashcroft to violate the attorney-client privilege without a court order” and citing Sen. Patrick Leahy’s observation that “[t]here’s a lot of disquiet among both Republican and Democratic senators who think the rules of law are being turned on their head, and they wonder what we gain by it.”); Ross K. Baker, *Nobody Named Bush King Yet*, L.A. TIMES, Nov. 27, 2001, at B11 (“The U.S. Constitution proclaims that ‘the executive power shall be vested in a president of the United States.’ It does not say that exclusive power shall be vested in the president. Yet that seems to be the interpretation placed on its responses to terrorism in recent weeks by the Bush administration.”).

9. See, e.g., Mark G. Young, *What Big Eyes and Ears You Have! A New Regime for Covert Government Surveillance*, 70 FORDHAM L. REV. 1017, 1046–1109 (2001) (analyzing the Act’s electronic surveillance provisions within the context of the Fourth Amendment, and concluding, in part, that “as Fourth Amendment doctrine has evolved the government/law enforcement component has grown steadily more robust and expansive, while the rights component has remained static or has weakened.”); Marion Davis, *Immigrants Urged to Be Alert to Loss of Liberties*, PROVIDENCE J., Mar. 11, 2002, at B1 (discussing constitutional challenges to the Act’s immigration provisions and comparing the U.S. response to prior periods in U.S. history in which immigration policies were revised).

constitutional grounds for its electronic surveillance provisions<sup>10</sup> and its rules with respect to immigrants.<sup>11</sup>

Perhaps due to the outcry over the civil liberties ramifications of Titles II and IV, the Act's Title III overhaul of U.S. money laundering legislation appears to have been somewhat overlooked. Title III is known formally as the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ("IMLA Act").<sup>12</sup> It will have a significant impact on the way financial institutions do business, and it will similarly affect many businesses not traditionally regarded as "financial institutions."<sup>13</sup> Banks have long been involved with the federal government in the fight against money laundering through such measures as the filing of currency transaction reports ("CTRs") and suspicious activity reports ("SARs").<sup>14</sup> The IMLA Act not only expands the duties of banks

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10. See Young, *supra* note 9, at 1046–1109. To locate the electronic surveillance provisions, see 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, §§ 201–225, 115 Stat. 272 (2001).

11. See Davis, *supra* note 9, at B1. To locate the immigration provisions, see USA Patriot Act §§ 401–428.

12. USA Patriot Act §§ 301–377.

13. See, e.g., Katherine Goncharoff, *New Laundering Rules Draw VCs' Interest*, DAILY DEAL, Mar. 19, 2002, available at 2002 WL 6788514 (providing an overview of the Act's impact on financial institutions, particularly venture capital firms, and stating that "financial institutions that previously didn't have to worry much about money laundering will be required to comply with the new laws, among them securities broker dealers, money transfer businesses, credit unions, issuers of travelers' checks and some credit-card system operators.").

14. The Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 114 (1970) (codified as amended at 31 U.S.C. §§ 5311–5314, 5316–5324) requires banks to file currency transaction reports for all cash deposits and withdrawals in excess of \$10,000. See Geoffrey M. Connor, *Banking Aspects of the USA PATRIOT Act*, N.J. L.J., Dec. 3, 2001, at 2–3. The Bank Secrecy Act also requires that banks file SARs when they are a party to a transaction of \$5,000 or more "and the bank knows, suspects, or has reason to suspect that the transaction involves funds derived from illegal activities" or "the transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage." Peter Carbonara, *Dirty Money: Terrorism Has Shed New Light on Global Money Laundering—Here's How It Works, Why It Exists and Why the Proposed Government Crackdown Could Change the Way We All Do Business*, MONEY MAGAZINE, Jan. 1, 2002, at 90.

in reporting high-risk activities, it also substantially raises the stakes for non-compliance with federal money laundering legislation and increases the scope of businesses now required to participate in anti-money laundering efforts.<sup>15</sup>

Part I of this Note provides an overview of the crime of money laundering and summarizes some of the important provisions of the IMLA Act. Part II analyzes how the money laundering provisions of the Act will affect financial institutions and the public in general, as well as a critique of how effective the IMLA Act will be in the war against terrorism. In brief, this Note concludes that while the IMLA Act will probably have certain unintended benefits, such as the improved ability to target and prosecute drug trafficking and tax evasion, it will be substantially ineffective in the war on terrorism, and it will reduce the competitiveness of U.S. financial institutions and other businesses to an extent that will cause most critics to conclude that the Act's burdens outweigh its benefits.

## I. WHAT IS MONEY LAUNDERING?

### A. The Three Stages of Money Laundering

Money laundering has been defined as “the process by which one conceals the existence, illegal source, or illegal application of income, and disguises that income to make it appear legitimate.”<sup>16</sup> It has become a virtual requirement for large organized crime groups to engage in money laundering, because it is the sustaining force that enables drug-dealers, terrorist groups, and other organized crime units to hide substantial amounts of wealth and to perpetuate further criminal activity.<sup>17</sup>

To understand the mechanics of money laundering transactions, it helps to conceptualize a three-stage process.<sup>18</sup>

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15. See Goncharoff, *supra* note 13.

16. Kelly Neal Carpenter, *Eighth Survey of White Collar Crime: Money Laundering*, 30 AM. CRIM. L. REV. 813, 813 (1993).

17. See *id.* at 814.

18. See Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 145 (1995).

“Placement,” “layering,” and “integration” are names that have been used to describe these three stages.<sup>19</sup> “Placement” refers to the initial step in which the cash proceeds from an illicit activity are transferred to a legitimate business or a bank,<sup>20</sup> or are “converted to negotiable instruments, such as cashier’s checks, money orders, or traveler’s checks.”<sup>21</sup> Most of the crimes that the money laundering statutes are intended to target are crimes that tend to produce significant sums of cash, such as drug dealing.<sup>22</sup> The sheer weight and volume of the cash produced by such activities can become impossibly cumbersome. For example, while a kilo of heroin weighs about 2.2 pounds, the equivalent value of cash, in small denomination bills, can weigh as much 256 pounds.<sup>23</sup> Among the primary obstacles to simply depositing dirty funds in a bank account are the provisions of the Bank Secrecy Act of 1970,<sup>24</sup> which requires that financial institutions file IRS Form 4789, Currency Transaction Report, “whenever an individual or a person acting on the individual’s behalf conducts one or more cash transactions in a single day which involve, in the aggregate, over \$10,000.”<sup>25</sup> The Bank Secrecy Act of 1970 also requires government reporting when monetary instruments with a value exceeding \$10,000 are transported into or out of the United States.<sup>26</sup>

One method frequently employed by money launderers is the technique of “smurfing,” whereby the placement stage is accomplished by distributing illicit funds to numerous couriers who make large numbers of deposits that avoid bank reporting requirements.<sup>27</sup> The placement stage of money laundering has also

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19. See *id.*

20. See Teresa Adams, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 GA. ST. U. L. REV. 531, 536 (2000).

21. Sultzer, *supra* note 18, at 149.

22. See *id.*

23. See William F. Bruton, *Money Laundering: Is It Now a Corporate Problem?*, 17 DICK. J. INT’L L. 437, 440–41 (1999).

24. The Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 114 (1970) (codified as amended at 31 U.S.C. §§ 5311–5314, 5316–5324).

25. Sultzer, *supra* note 18, at 152–53.

26. See *id.* at 153.

27. See Louis Csoka, *Combating Money Laundering: A Primer for Financial Services Professionals*, 20 ANN. REV. BANKING L. 311, 335–36 (2001).

been accomplished by depositing funds with institutions like casinos that do not have the strict reporting requirements that banks have,<sup>28</sup> or to convert the funds to negotiable instruments such as money orders or traveler's checks.<sup>29</sup> Another of the unlimited number of placement techniques used by launderers is to use dirty money to purchase inventory or supplies for an otherwise legitimate business, or to simply purchase expensive items, such as cars or boats, then to promptly sell the items and create a paper trail that appears on the surface to be legal.<sup>30</sup>

The placement stage of money laundering is the most risky for criminals, because it entails the greatest likelihood of detection.<sup>31</sup> Once dirty funds have been placed, the second stage in the money laundering cycle, called "layering," can begin. This step typically involves transferring funds by wire to offshore "shell" corporations that have been carefully established so as to conceal the identity of the parties in control.<sup>32</sup> Countries that are frequently chosen for such schemes include the Bahamas, Switzerland, the Cayman Islands, Hong Kong, and other stable locales that have lenient bank reporting laws.<sup>33</sup> This is an ideal strategy for money

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28. See Adams, *supra* note 20, at 536.

29. See Sultzer, *supra* note 18, at 149 (explaining that conversion of funds to negotiable instruments has the added benefit of enabling the money launderer to avoid detection under the Bank Secrecy Act's cash reporting requirements).

30. See Adams, *supra* note 20, at 536–37.

31. See Sultzer, *supra* note 18, at 149.

32. See Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 167 (1995); see also Adams, *supra* note 20, at 537.

33. See Csoka, *supra* note 27, at 336; Barbot, *supra* note 32, at 167. But see *infra* notes 78–94, 109–17 (discussing provisions of the Act intended to compel offshore banking locales with lenient bank reporting laws to cooperate with U.S. anti-money laundering efforts); Aline Sullivan, *Shadows Lift on Sunny Havens: Offshore Accounts Attract More Scrutiny From Tax Authorities*, BARRON'S, Feb. 11, 2002, at 30 (discussing measures recently taken by U.S. regulators to get popular offshore banking locales and tax havens to cooperate in the effort to deter money laundering and tax evasion, and stating that "[f]or the first time, U.S. regulators are shining harsh spotlights on the shady parts of some sunny island nations. The Organization for Economic Cooperation and Development, too, is cracking down on offshore tax havens, and those that remain on its blacklist . . . may be subject to financial sanctions."); David Hardesty, *Cayman Islands Agrees to Share Tax Information* (2001) (discussing an agreement between the U.S. and the Cayman Islands that calls for granting access by U.S.



launderers, because when the source of deposited funds is not identified by the bank, the launderer's transfers become untraceable.<sup>34</sup> The task of detecting such a layering transaction in the endless sea of daily wire transfers has been compared by bankers to "searching for tainted dollars that mathematically represent a grain of sand in the Sahara."<sup>35</sup>

Suspicious Activity Reports are a tool employed by financial institutions and law enforcement authorities to improve the odds of detecting illicit layering transactions.<sup>36</sup> The Bank Secrecy Act requires that banks file SARs when they are a party to a transaction of \$5,000 or more "and the bank knows, suspects, or has reason to suspect that the transaction involves funds derived from illegal activities" or "the transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage."<sup>37</sup> Records of SARs must be maintained on file, for inspection by the Treasury Department and IRS.<sup>38</sup>

The final stage of any successful money laundering scheme is known as "integration," and results in the laundered funds returning to a status of expendability in the hands of the organized crime group that generated them.<sup>39</sup> The funds are typically used directly to perpetuate further criminal activity or invested in legitimate businesses that support organized crime.<sup>40</sup> Depending on the skill and care of the money launderer, the funds at this point are generally safe from investigative authorities, because they have traveled through a sufficient number of banks, shell companies,

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tax authorities to Cayman Island bank accounts starting in 2004), *available at* <http://www.ecommercetax.com/doc/120901.htm> (last visited Jan. 30, 2002).

34. See Adams, *supra* note 20, at 537.

35. Sarah Jane Hughes, *Policing Money Laundering Through Funds Transfers: A Critique of Regulation Under The Bank Secrecy Act*, 67 IND. L.J. 283, 307 (1992).

36. See Carbonara, *supra* note 14.

37. *Id.* To download SAR forms, visit [http://www.fincen.gov/bsaf\\_main.html](http://www.fincen.gov/bsaf_main.html) (last visited Jan. 30, 2002).

38. The Bank Secrecy Act of 1970, Pub. L. No. 91-508, § 101, 84 Stat. 114 (1970) (codified as amended at 31 U.S.C. §§ 5311-5314, 5316-5324).

39. See Adams, *supra* note 20, at 537-38.

40. See *id.*

and investments to make the original source of the funds untraceable.<sup>41</sup>

### B. The 1986 Act

Recent estimates place the dollar volume of money laundered in the United States at \$600 billion annually,<sup>42</sup> yet the act of money laundering was not recognized as a crime in the United States until passage of the Money Laundering Control Act of 1986 ("1986 Act").<sup>43</sup> In brief, the 1986 Act extends criminal culpability to anyone involved in a financial transaction who knows or has reason to know that the funds involved were obtained illicitly.<sup>44</sup> The legislative history indicates that the 1986 Act was intended to apply not only to the parties directly involved in such a transaction, but also to those who perform mere "ministerial duties" that comprise the performance of a money laundering deal.<sup>45</sup>

The 1986 Act is generally regarded as the legislation that first made money laundering a criminal offense,<sup>46</sup> although the Bank Secrecy Act of 1970 can be thought of as somewhat of a pre-cursor to the 1986 Act. The 1986 Act has two sections, 1956 and 1957, both of which apply to international transactions as well as purely domestic ones.<sup>47</sup> Section 1956 has three main subdivisions which address the topics of "transaction" money laundering, "transportation" money laundering, and the authorization of certain government sting operations.<sup>48</sup> The term "specified unlawful activity" is used in both Sections 1956 and 1957, and is used to refer to any of an exhaustive list of offenses, including

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41. See generally, Carbonara, *supra* note 14.

42. See Adams, *supra* note 20, at 531.

43. 18 U.S.C. §§ 1956–1957 (1994 & Supp. IV 1998), amended by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 726, 110 Stat. 1214, 1301–02 (1998); Adams, *supra* note 20, at 532.

44. See Carpenter, *supra* note 16, at 814.

45. See *id.*

46. See Peter J. Kacarab, *An Indepth Analysis of the New Money Laundering Statutes*, 8 AKRON TAX J. 1 (1991) (stating that Congress has for the first time acknowledged the criminal enterprises' penchant for money laundering).

47. See Adams, *supra* note 20, at 544.

48. See Daniel H. April & Angelo M. Grasso, *Money Laundering*, 38 AM. CRIM. L. REV. 1051, 1054 (2001).

drug-related crimes, kidnapping, arson, robbery, extortion, smuggling, etc.<sup>49</sup>

The transaction money laundering provisions of Section 1956 make it a crime to engage in four types of activity using illicitly obtained funds: (1) engaging in financial transactions intended to promote "specified unlawful activity;"<sup>50</sup> (2) tax evasion;<sup>51</sup> (3) conducting a financial transaction designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of criminal activity;<sup>52</sup> and (4) engaging in a transaction with the purpose of avoiding a state or federal reporting requirement.<sup>53</sup>

The transportation money laundering provisions of Section 1956 encompass activities designed to move illegally obtained funds into or out of the United States.<sup>54</sup> There are three types of transportation money laundering crimes: (1) transportation of dirty money into or out of the U.S. for purposes of engaging in specified illegal activity;<sup>55</sup> (2) transportation for the purpose of concealing or disguising the nature, location, source, ownership, or control of the proceeds of criminal activity;<sup>56</sup> and (3) transportation of dirty money into or out of the U.S. for the purpose of avoiding a state or federal reporting requirement.<sup>57</sup>

The third and final subdivision of Section 1956 addresses money laundering transactions that occur as part of a government sting operation.<sup>58</sup> When a law enforcement officer represents that funds have been obtained through a specified illegal activity, Section 1956 makes it a crime to use such sting money to conduct, or attempt to conduct, a financial transaction with the intent to do any of the following: (1) promote a specified unlawful activity;<sup>59</sup> (2) conceal or disguise the nature, location, source, ownership, or

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49. See 18 U.S.C. § 1956(c)(7) (2001); 18 U.S.C. § 1957(f)(3) (2001).

50. 18 U.S.C. § 1956(a)(1)(A)(i).

51. *Id.* § 1956(a)(1)(A)(ii).

52. *Id.* § 1956(a)(1)(B)(i).

53. *Id.* § 1956(a)(1)(B)(ii).

54. *Id.* § 1956(a)(2).

55. *Id.* § 1956(a)(2)(A).

56. *Id.* § 1956(a)(2)(B)(i).

57. *Id.* § 1956(a)(2)(B)(ii).

58. *Id.* § 1956(a)(3).

59. *Id.* § 1956(a)(3)(A).

control of such funds;<sup>60</sup> or (3) avoid a state or federal transaction reporting requirement.<sup>61</sup>

Compared to the above Section 1956 provisions, Section 1957 of the 1986 Act is quite simple, making it a crime when one “knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity.”<sup>62</sup> The scope of Section 1957 is frighteningly broad, as it is intended to criminalize even the most ordinary of transactions involving illegally derived funds, provided the \$10,000 threshold is exceeded. The legislative history of the 1986 Act’s Section 1957, as explained in *United States v. Johnson*, indicates that Section 1957 is aimed at “those third persons—bankers, brokers, real estate agents, auto dealers and others—who have aided [criminals] by allowing them to dispose of the profits of [criminal] activity, yet whose conduct has not been considered criminal under traditional conspiracy law.”<sup>63</sup> The broad scope of Section 1957 is due in part to the fact that it lacks several of the key elements of Section 1956; most notably it “does not require that the recipient exchange or launder the funds, nor that he have any intent to further or conceal such an activity.”<sup>64</sup>

The “knowledge” component of Sections 1956 and 1957 of the 1986 Act requires only that the defendant know that the funds were acquired through some type of criminal conduct, and not necessarily what type of conduct.<sup>65</sup> The standard in both sections is “actual” knowledge, as opposed to some lesser standard such as “should have known” or “reckless disregard.”<sup>66</sup> While actual knowledge is often difficult to prove, courts seem to be in agreement that it can be proven using only circumstantial evidence.<sup>67</sup> Furthermore, many courts have adopted the somewhat

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60. *Id.* § 1956(a)(3)(B).

61. *Id.* § 1956(a)(3).

62. *Id.* § 1957(a).

63. *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992).

64. Carpenter, *supra* note 16, at 824.

65. *See* April & Grasso, *supra* note 48, at 1058–59.

66. *See id.* at 1059.

67. *See* *United States v. Heaps*, 39 F.3d 479, 484 (4th Cir. 1994); *United States v. Rasheed*, 663 F.2d 843, 848 (9th Cir. 1981).

softer standard of allowing proof of "willful blindness" to constitute actual knowledge.<sup>68</sup> "Willful blindness" refers to the concept of "conscious avoidance of knowledge," and the legislative history of the 1986 Act indicates that "deliberately closing one's eyes is tantamount to actual knowledge for purposes of the laundering offenses, despite the ultimate wording of the statute."<sup>69</sup>

Another key to understanding the money laundering provisions of the 1986 Act is the concept of "tracing," which refers to the prosecution's burden, in certain situations, of showing that the funds that are the subject of an alleged money laundering transaction originated from specified criminal activity.<sup>70</sup> It is generally agreed that Section 1956 does not require the government to trace alleged money laundering funds back to a

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68. See April & Grasso, *supra* note 48, at 1060. For example, in *United States v. Giraldi*, 86 F.3d 1368 (5th Cir. 1996), the court upheld a private banker's money laundering conviction when the prosecution proved the defendant's willful blindness, based on the following findings:

[T]he banker did not follow "know-your-client" procedures and later lied about it; the banker failed to investigate his client although he had a duty to do so; the banker ignored false statements of his client about the source of the client's funds; the banker failed to properly document the transactions on his client's behalf; and the banker engaged in damage control once the federal investigation began.

Csoka, *supra* note 27, at 326. It has been observed that judicial application of the willful blindness doctrine in money laundering cases has been inconsistent and somewhat arbitrary. See, e.g., Frans J. Von Kaenel, *Willful Blindness: A Permissible Substitute for Actual Knowledge Under the Money Laundering Control Act?*, 71 WASH. U. L.Q. 1189, 1209-13 (1993) (citing money laundering cases that inconsistently apply the willful blindness doctrine and suggesting amendments to the existing legislation that might prevent such inconsistencies).

69. Carpenter, *supra* note 16, at 828. The willful blindness doctrine has particularly onerous implications for broker-dealers and other financial services providers who perform transactions for clients in well-known money laundering havens such as the Cayman Islands and the Bahamas. See, e.g., Betty Santangelo et al., *Money Laundering and Suspicious Activity Reporting: What's a Broker-Dealer to Do?*, 1046 PLI/CORP 293, 300-03 (Apr. 1998) (inferring that courts often construe activity in offshore money laundering havens to be inherently suspicious, and therefore providers of financial services who perform transactions in those locales appear to be more susceptible to application of the willful blindness doctrine when charged with money laundering).

70. See Carpenter, *supra* note 16, at 839; April & Grasso *supra* note 48, at 1062-63.

specific illegal act;<sup>71</sup> this applies even when the defendant commingles both clean and dirty funds in an account which is subsequently used to finance an alleged laundering transaction.<sup>72</sup> Section 1957, on the other hand, has been construed by some courts as requiring the prosecution to trace allegedly laundered funds when they have been commingled. For example, in *United States v. Rutgard*,<sup>73</sup> the court distinguished Section 1957 from Section 1956, stating that Section 1957:

Does not create a presumption that any transfer of cash in an account tainted by the presence of a small amount of fraudulent proceeds must be a transfer of these proceeds . . . . To create such a presumption in order to sustain a conviction under § 1957 would be to multiply many times the power of that draconian law.<sup>74</sup>

Tracing has also been required in cases that require a defendant to forfeit laundered funds.<sup>75</sup>

The penalties set forth in the 1986 Act are severe. A conviction under Section 1956 carries a maximum criminal penalty of twenty years in prison, a fine not to exceed the greater of \$500,000 or twice the value of the laundered funds, or both.<sup>76</sup> Section 1957 provides for criminal penalties of up to ten years in prison, a fine, or both.<sup>77</sup> The two sections also carry identical civil penalties, which are limited to the greater of \$10,000 or the amount of the funds laundered.<sup>78</sup> Because each money laundering transaction that affects interstate commerce is a separate indictable offense,<sup>79</sup> the penalties under Sections 1956 and 1957 can add up quickly to result in extremely harsh punishment. The applicable Senate Report states as follows:

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71. See *United States v. Blackman*, 904 F.2d 1256, 1257 (8th Cir. 1990); *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991).

72. See *Jackson*, 935 F.2d at 840.

73. *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997).

74. *Id.* at 1292–93.

75. See *April & Grasso*, *supra* note 48, at 1063–64.

76. 18 U.S.C. § 1956(a)(1)(B)(ii) (2001).

77. *Id.* § 1957(b)(1).

78. *Id.* §§ 1956(b)(1)(A)–(B).

79. See *Carpenter*, *supra* note 16, at 835.

[A] drug dealer who takes \$1 million in cash from a drug sale and divides the money into smaller lots and deposits it in 10 different banks (or in 10 different branches of the same bank) on the same day has committed 10 distinct violations . . . . If he then withdraws some of the money and uses it to purchase a boat or condominium, he will have committed two more violations, one for the withdrawal and one for the purchase.<sup>80</sup>

This notion that related yet distinct money laundering acts can be separately indicted was challenged in *United States v. Martin*,<sup>81</sup> and was upheld on the basis that each transaction under consideration was a separate transaction for purposes of the 1986 Act, and each required examination of separate and distinct evidence.<sup>82</sup>

### C. Money Laundering Provisions of the Act

Title III of the Act is named the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.<sup>83</sup> It is divided into three subtitles: International Counter Money Laundering (Subtitle A),<sup>84</sup> Bank Secrecy Act Amendments and Related Improvements (Subtitle B),<sup>85</sup> and Currency Crimes and Protection (Subtitle C).<sup>86</sup> Title III has a total of forty-three sections, and the following is a discussion of its most important provisions.

#### 1. Section 302: Findings and Purposes

Section 302 discusses the findings and purposes of Congress in enacting Title III. It provides a general discussion regarding the enormous costs that money laundering has inflicted on the world

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80. April & Grasso, *supra* note 48, at n.110.

81. *United States v. Martin*, 933 F.2d 609 (8th Cir. 1991).

82. *Id.* at 611-12.

83. 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, §§ 301-377, 115 Stat. 272 (2001).

84. *See id.* § 311-330.

85. *See id.* § 351-366.

86. *See id.* § 371-377.

economy, and cites an estimate by the International Monetary Fund that money laundering amounts to between two and five percent of the global gross domestic product.<sup>87</sup> Section 302 targets offshore banking institutions as primary facilitators of money laundering activities, due to their “weak financial supervisory and enforcement regimes.”<sup>88</sup> Also targeted are “correspondent banking facilities” and private banking services, which are recognized for their frequent manipulation by money launderers and proclivity to conceal the identities of account owners.<sup>89</sup> Section 302 cites the outmoded nature of some of the existing money laundering laws and the need to tailor new legislation to curb terrorist activity, instead of focusing with virtual exclusivity on drug-related laundering.<sup>90</sup>

2. Section 311: Special Measures For Jurisdictions, Financial Institutions, Or International Transactions Or Accounts Of Primary Money Laundering Concern

Section 311 authorizes the Secretary of the Treasury to require domestic financial institutions and domestic financial agencies<sup>91</sup> to take any of five new “special measures” if, after consultation with the Secretary of State and the Attorney General, the Secretary of the Treasury finds that such action is warranted to deter a “primary money laundering concern” imposed by sources outside the United States.<sup>92</sup> The five new special measures would require domestic financial institutions and financial agencies to (1) perform

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87. See *id.* § 302(a)(1).

88. See *id.* § 302(a)(4).

89. See *id.* §§ 302(a)(6)–(7).

90. See *id.* § 302(b).

91. The term “financial institution” refers to any of a broad list of entities summarized in 31 U.S.C. § 5312(a)(2) (2002), including (1) insured banks, (2) commercial banks, (3) an agency or branch of a foreign bank in the United States, (4) a broker or dealer registered with the SEC, (5) investment banks, (6) credit card issuers, (7) pawnbrokers, (8) the U.S. Postal Service, (9) sellers of cars and other vehicles, (10) private banks, and (11) telegraph companies. See Betty Santangelo et al., *Summary of Anti-Money Laundering Provisions of USA PATRIOT Act of 2001*, n.3 (2001), available at <http://www.srz.com/PDF-files/sec-win02-santangelo.PDF> (last visited Jan. 30, 2003).

92. USA Patriot Act § 311(a)(1).



additional record-keeping and reporting relative to transactions identified as posing a "primary money laundering concern," including tracking the name and address of parties to such transactions and identifying the legal capacity in which a party acts;<sup>93</sup> (2) identify the beneficial owner(s) of an account opened or maintained in the United States by a foreign person;<sup>94</sup> (3) maintain records of customers who make use of "payable-through"<sup>95</sup> accounts connected to any foreign jurisdictions, financial institutions, or classes of transactions that are of "primary money laundering concern;"<sup>96</sup> (4) identify customers who use interbank "correspondent accounts"<sup>97</sup> opened by a foreign bank at a U.S. bank;<sup>98</sup> and (5) prohibit the opening or maintenance of correspondent and payable-through accounts involving a "primary money laundering concern."<sup>99</sup> Failure to comply with the above "special measures" can result in stiff penalties totaling "not more than two times the amount of the transaction, but not more than \$1,000,000."<sup>100</sup>

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93. See *id.* § 311(b)(1); see also D. Jean Veta et al., *Recent Developments in Anti-Money Laundering Legislation: The International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001*, 12 (2001), available at <http://www.aba.com/NR/rdonlyres/00004a3ctceeanffcdxnxesr/Money+Laundering+Report+Nov+1-01+JD97.pdf> (last visited Jan. 30, 2003).

94. USA Patriot Act § 311(b)(2).

95. Defined as:

[A]n account, including a transaction account (as defined in Section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States.

*Id.* § 311(e)(1)(C).

96. *Id.* § 311(b)(3).

97. Defined as "an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution." *Id.* § 311(e)(1)(B).

98. *Id.* § 311(b)(4); see also, 147 CONG. REC. S10990-02 (2001).

99. USA Patriot Act § 311(b)(5).

100. Veta et al., *supra* note 93, at 14.

3. Section 312: Special Due Diligence for Correspondent Accounts and Private Banking Accounts

This Section took effect on July 23, 2002<sup>101</sup> and requires U.S. financial institutions to conduct enhanced due diligence procedures with respect to correspondent accounts and private banking accounts<sup>102</sup> that are maintained on behalf of non-United States persons or their representatives.<sup>103</sup> The due diligence required under this section involves maintenance of records identifying the beneficial owners of such accounts and the source of funds deposited; it also provides for the filing of a Suspicious Activity Report (“SAR”) when the situation warrants.<sup>104</sup> For private banking accounts, “enhanced scrutiny” is required for the accounts of senior foreign political figures, their close associates, and immediate family.<sup>105</sup> For correspondent accounts, additional scrutiny is required to determine whether “the correspondent foreign bank has correspondent banking relationships with other foreign banks and, if so, the U.S. financial institution must identify such other banks and conduct general due diligence . . . with respect to them.”<sup>106</sup> A financial institution that fails to comply with the provisions of Section 312 can incur the same penalties outlined above under Section 311.<sup>107</sup>

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101. See Santangelo et al., *supra* note 91, at 21.

102. Defined as:

[A]n account (or combination of accounts) that (i) requires a minimum aggregate deposit of funds or other assets of not less than \$1,000,000; (ii) is established on behalf of one or more individuals who have a direct or beneficial ownership interest in the account; and (iii) is assigned to, or administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account.

USA Patriot Act § 311(b)(5).

103. See Veta et al., *supra* note 93, at 14–15.

104. See *id.* at 15–16.

105. See *id.* at 15.

106. DIVISION OF BANKING AND SUPERVISION AND REGULATION SR 01-29 (Nov. 26, 2001), *available at* <http://www.federalreserve.gov/boarddocs/SRLETTERS/2001> (last visited Jan. 30, 2003).

107. See Veta et al., *supra* note 93, at 16.

#### 4. Section 314: Cooperative Efforts to Deter Money Laundering

This section directs the Secretary of the Treasury to issue regulations on or before June 23, 2002 that provide guidelines encouraging and enabling financial institutions and regulatory and law enforcement agencies to share information about individuals and entities suspected of terrorist acts and money laundering activities.<sup>108</sup> Section 314 also grants financial institutions, upon notifying the Secretary of the Treasury, the immediate authority to share among themselves information about persons and entities engaged in, or suspected of, terrorism or money laundering.<sup>109</sup> The Act provides that “such sharing generally will not constitute a privacy violation of the applicable provisions of the Gramm-Leach-Bliley Act.”<sup>110</sup>

#### 5. Section 315: Inclusion of Foreign Corruption Offenses as Money Laundering Crimes

This section expands the list of foreign crimes treated as predicate acts required for a money laundering charge. Before the IMLA Act, this list consisted only of drug trafficking, bank fraud, and certain crimes of violence such as murder, robbery, extortion, and the use of explosives.<sup>111</sup> Section 315 adds the following to the list of acts that constitute a “specified illegal activity”:

- Bribery of a public official, or the misappropriation,

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108. See Charles Doyle, *Terrorism: Section By Section Analysis of the USA PATRIOT Act*, CRS Report for Congress (Dec. 10, 2001), 21, available at <http://fpc.state.gov/documents/organization/7952.pdf> (last visited Jan. 30, 2003).

109. See 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, § 314(b), 115 Stat. 272 (2001).

110. DIVISION OF BANKING AND SUPERVISION AND REGULATION, *supra* note 106; USA Patriot Act § 314(c). The Gramm-Leach-Bliley Act normally requires that “financial institutions notify consumers before disclosing any non-public personal information to non-affiliated third parties.” Veta et al., *supra* note 93, at 23.

111. See David M. Nissman, *Money Laundering* (Feb. 18, 2001), 3, available at <http://www.corpusjurispublishing.com/Articles/moneylaundering.pdf> (last visited Jan. 30, 2003); USA Patriot Act § 319(a).

theft, or embezzlement of public funds by or for the benefit of a public official.

- Smuggling or export control violations involving an item listed on the U.S. Munitions List,<sup>112</sup> or an item controlled under regulations under the Export Administration Regulations.<sup>113</sup>
- An offense for which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States.<sup>114</sup>

Thus, individuals or groups caught using the proceeds of any of the above activities in a U.S. financial transaction will be guilty of money laundering provided there is the requisite intent (or if more than \$10,000 is exchanged).<sup>115</sup>

6. Section 317: Long-Arm Jurisdiction Over Foreign Money Launderers

The 1986 Act, discussed above,<sup>116</sup> defines the crime of money laundering, but is silent with respect to jurisdiction over foreigners.<sup>117</sup> Section 317 of the IMLA Act gives U.S. courts “long arm” jurisdiction over foreign persons and foreign financial institutions that commit money laundering acts that take place in the United States, or, in the case of a financial institution, that maintains a bank account at a financial institution in the United States.<sup>118</sup> Service of process must be made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign

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112. 22 U.S.C. § 2778 (2002).

113. 15 C.F.R. §§ 730–774 (2002).

114. See Veta et al., *supra* note 93, at 30.

115. See Nissman, *supra* note 111, at 3.

116. See *supra* notes 43–82 and accompanying text.

117. See Veta et al., *supra* note 93, at 30.

118. See *id.* at 31.

person is found.<sup>119</sup>

Section 317 has two other important provisions. The first gives the U.S. jurisdiction over foreign persons who convert property to their own use after such property has been ordered to be forfeited as a result of a violation of U.S. money laundering laws.<sup>120</sup> The second allows U.S. courts to issue restraining orders to preserve property in the U.S. and appoint a receiver to collect and take possession of assets “in satisfaction of criminal or civil money laundering or forfeiture judgments.”<sup>121</sup>

### 7. Section 319: Forfeiture of Funds in United States Interbank Accounts

Section 319 has several important provisions. The first allows the U.S. government to seize funds and bring a forfeiture action on accounts deposited in a foreign bank that has a correspondent account in the United States when there is reasonable cause to believe the funds are derived from criminal activity: “[T]he funds deposited into the [foreign bank] shall be deemed to have been deposited into the correspondent account in the United States, and the government may seize, arrest or restrain the funds in the correspondent account ‘up to the value of the funds deposited’ into the foreign bank.”<sup>122</sup> The government is not required to establish that the funds seized are directly traceable to the funds deposited with the foreign bank.<sup>123</sup> Moreover, while it was previously possible for the foreign bank in this type of situation to subvert such forfeiture actions by claiming ownership of the funds, Section 319 precludes such measures in most cases.<sup>124</sup>

Section 319 also establishes the “120 hour rule” which requires

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119. *See id.*

120. *See* 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, § 317, 115 Stat. 272 (2001); *see also* Nissman, *supra* note 111, at 4.

121. *See* 147 CONG. REC. S10990-02 (2001); *see also* Santangelo et al., *supra* note 91, at 31.

122. Nissman, *supra* note 111, at 5.

123. *See* USA Patriot Act § 319(a).

124. *See* Nissman, *supra* note 111, at 5.

“covered financial institutions”<sup>125</sup> to provide federal banking agencies with information related to anti-money laundering compliance not later than 120 hours after receiving a request to produce such information.<sup>126</sup> This provision pertains to “all accounts at a covered financial institution and not just accounts of foreign persons or non-citizens,” and does not require court approval.<sup>127</sup>

Lastly, Section 319 vests the Secretary of the Treasury and the Attorney General with the power to summon and subpoena records of foreign banks that have correspondent accounts in the United States, and request records relating to such accounts, including records maintained outside the United States relating to the deposit of funds into a foreign bank.<sup>128</sup> Thus, this section provides U.S. authorities with the power to circumvent mutual legal assistance treaties and “other procedures dependent on cooperation of foreign governments.”<sup>129</sup> It also sets forth civil penalties of up to \$10,000 per day on U.S. banks that maintain correspondent accounts for foreign banks that fail to comply with such a summons or subpoena.<sup>130</sup>

#### 8. Section 326: Verification of Identification

Section 326 of the Act will have a significant impact on the operations of financial institutions, as it requires the Secretary of the Treasury to issue regulations setting minimum standards for verification of customers’ identities.<sup>131</sup> These new regulations must be issued on or before October 26, 2002,<sup>132</sup> and will require

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125. Defined to include insured banks, commercial banks and trust companies, private banks, agencies or branches of foreign banks in the United States, and thrift institutions. Santangelo et al., *supra* note 91, at 27.

126. USA Patriot Act § 319(b).

127. Mark A. Rush & Heather Hackett, *USA Patriot Act—Money Laundering and Asset Forfeiture*, available at <http://www.kl.com/practiceareas/wccrime/publications/asset-forfeiture.pdf> (last visited Feb. 2, 2003).

128. USA Patriot Act § 319(b).

129. Nissman, *supra* note 111, at 5.

130. See Rush & Hackett, *supra* note 127, at 10.

131. USA Patriot Act § 326(a).

132. 147 CONG. REC. S10990-02 (2001).

financial institutions to verify customers' identities, maintain records relating to identity verification, and consult lists of known or suspected terrorists.<sup>133</sup>

9. Section 351: Amendments Relating to Reporting of Suspicious Activities

As noted above, the Act provides various measures requiring financial institutions to submit suspicious activity reports to the federal government.<sup>134</sup> Section 351 of the Act deals with the liability of financial institutions for such reports. The Bank Secrecy Act provides immunity from civil liability to financial institutions and their officers, directors, employees, and agents who report suspicious activities.<sup>135</sup> Such immunity provides protection from any "person" under the Bank Secrecy Act ("BSA"), but Section 351 of the IMLA Act amends the BSA to exclude governments and government agencies from the definition of "person."<sup>136</sup> This section was presumably enacted to give financial institutions some degree of accountability relative to their duty to file SARs, while continuing to grant financial institutions immunity from the individuals and entities that are the subject of the SARs.

10. Section 352: Anti-Money Laundering Programs

Section 352 requires financial institutions to institute anti-money laundering programs that have the following characteristics:

- (i) the development of internal policies, procedures, and controls;
- (ii) the designation of a compliance officer;
- (iii) an ongoing employee training program; and

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133. See Santangelo et al., *supra* note 91, at 31.

134. See *supra* note 104 and accompanying text.

135. See 31 U.S.C. § 5318(g)(3) (2001); Rush & Hackett, *supra* note 127, at 13.

136. See USA Patriot Act § 351(a); Veta et al., *supra* note 93, at 18.

(iv) an independent audit function to test programs.<sup>137</sup>

This section took effect on April 24, 2002<sup>138</sup> and requires the Secretary of the Treasury to issue, on or before that date, regulations that “consider the extent to which the requirements imposed under this section are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.”<sup>139</sup> It is anticipated by some that the Secretary will use this provision of the Act to allow certain “non-regulated service providers such as real estate closing agents and vehicle sellers,” which are included in the Act’s definition of “financial institution,” to adopt less cumbersome anti-money laundering programs than those that will be required of entities that fit the traditional definition of the term “financial institution.”<sup>140</sup> Moreover, it is expected that large, traditional financial institutions with operations overseas are expected to have more sophisticated anti-money laundering programs than smaller, strictly domestic ones.<sup>141</sup>

The financial services industry will wait anxiously as Section 352 takes its ultimate shape over the coming months. Most large, traditional financial institutions have had anti-money laundering programs in place for many years, and they have incurred significant costs in doing so.<sup>142</sup> While most financial institutions, at least for the time being, seem to be taking a patriotic “grin and bear it” attitude to the money laundering provisions of the Act, a few have expressed concern over the additional costs they expect to incur.<sup>143</sup> International Bank of Commerce (“IBC”), based in Laredo, Texas, has had a “know your customer policy” in place for twenty years, and it processed roughly 40,000 currency transaction reports in the year 2000.<sup>144</sup> IBC already spends about \$700,000 a

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137. USA Patriot Act § 352(a).

138. See Santangelo et al., *supra* note 91, at 34.

139. USA Patriot Act § 352(c).

140. Rush & Hackett, *supra* note 127, at 14.

141. See *id.* at 15.

142. See Money Laundering Monitor, 8 No. 12 BUS. CRIMES BULL. 2 (Jan. 2002).

143. See *id.*

144. See *id.*



year investigating and reporting suspicious transactions, and has “complained that the new act’s requirement to investigate the bank’s customer list would be a daunting and expensive proposition, involving some 1 million accounts.”<sup>145</sup>

11. Section 359: Reporting of Suspicious Activities By Underground Banking Systems

Although this section of the Act does not specifically use the term “hawala,” it is primarily intended to expand the definition of “financial institution,” as that term is used in the money laundering statutes, to include hawalas and other informal banking systems.<sup>146</sup> Specifically, Section 359 amends the definition of “financial institution” to include:

[A] licensed sender of money or any other person who engages as a business in the transmission of funds, including through an informal value transfer banking system or network of people facilitating the transfer of value domestically or internationally outside of the conventional financial institutions system.<sup>147</sup>

Section 359 also directs the Secretary of the Treasury to issue a report to Congress on or before October 26, 2002 detailing the need for any additional legislation regarding the regulation of informal banking networks.<sup>148</sup>

12. Section 361: Financial Crimes Enforcement Network

The Financial Crimes Enforcement Network (“FinCEN”) has been in existence since 1990, when it was created by an order from the Secretary of the Treasury,<sup>149</sup> and has served primarily as a “clearinghouse for financial information” such as the CTRs and

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145. *Id.*

146. *See* Santangelo et al., *supra* note 91, at 37.

147. 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, § 359(a), 115 Stat. 272 (2001).

148. *See id.* § 359(d); Veta et al., *supra* note 93, at 40.

149. *See* Veta et al., *supra* note 93, at 35.

SARs filed by financial institutions.<sup>150</sup> FinCEN has often been criticized for its inefficiency, but it is hoped that changes made by the IMLA Act will help it shed this image and become an effective contributor to the war on money laundering.<sup>151</sup> The IMLA Act specifies the responsibilities of FinCEN's director, "significantly expands" the duties of FinCEN,<sup>152</sup> and, for the first time, gives it statutory authority to perform its functions.<sup>153</sup> However, one has to wonder whether FinCEN's skimpy 2003 budget of \$52.3 million will allow it to fulfill the lofty new role that Congress has given it.<sup>154</sup>

13. Section 371: Bulk Cash Smuggling Into or Out of the United States

Under existing currency reporting laws, one must declare cash or other monetary instruments when they are transported into or

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150. See Scott Bernard Nelson, *The Money Trail War on Terrorism Gives Financial Crimes Unit New Stature, Challenges*, BOSTON GLOBE, Dec. 5, 2001, at F1.

151. See *id.*

152. The expanded duties of FinCEN have been summarized as follows:

Maintaining a government-wide data access service, with access, in accordance with applicable legal requirements, to: (a) information collected by the Department of the Treasury, including CTRs, SARs, and CMIRs; (b) information regarding national and international currency flows; (c) other records and data maintained by other federal, state, local, and foreign agencies, including financial and other records developed in specific cases; and (d) other privately and publicly available information; Analyzing and disseminating the available data in accordance with legal requirements and policies and guidelines by the Secretary and the Under Secretary for Enforcement to: (a) identify possible criminal activity to appropriate law enforcement agencies; (b) support ongoing criminal financial investigations and prosecutions; (c) identify possible instances of financial non-compliance for enforcement by other federal financial agencies; (d) evaluate and recommend possible uses of special currency reporting requirements under 31 U.S.C. § 5326; (e) determine emerging trends and methods in money laundering and other financial crimes; (f) support the conduct of intelligence or counter-intelligence activities to protect against international terrorism; and (g) support government initiatives against money laundering.

Veta et al., *supra* note 93, at 35–36.

153. See *id.* at 36.

154. See Jeannine Aversa, *Official: More Terrorist Money Frozen*, AP ONLINE, Jan. 22, 2002, available at 2002 WL 10034136. The 2003 budget represents a 6.3% increase over the prior year. *Id.*

out of the United States.<sup>155</sup> Section 371 of the IMLA Act creates the new criminal offense of bulk cash smuggling.<sup>156</sup> It applies to individuals who knowingly conceal more than \$10,000 in currency in any fashion in an attempt to evade currency reporting requirements and who transport, or attempt to transport, such currency into or out of the United States.<sup>157</sup> According to one author, this section “elevates the seriousness of smuggling currency into or out of the United States to the same level as the smuggling of firearms, jewels or counterfeit merchandise.”<sup>158</sup> Violation of this section of the Act carries a penalty of up to five years imprisonment and forfeiture of any property used in or traceable to the offense.<sup>159</sup>

Interestingly, some reports have indicated that the September 11 hijackings were at least partially funded by cash that was legally transported and declared into the United States.<sup>160</sup> The *Washington Post* reported that:

[T]wo of the hijackers, Ahmed Alghamdi and Mohand Alshehri, may have brought large amounts of cash into the country in person—even adhering to customs rules that require travelers to declare at least \$10,000 in cash. A man with Alghamdi’s name declared \$14,000 on Aug. 10 in Newark, while a man listing his name as Alshehri declared \$20,000 on Aug. 14 in Atlanta.<sup>161</sup>

The same article reports that many of the hijackers and their supporters opened bank accounts in the United States using their passports and visas, rather than social security numbers, which made it impossible for banks to run credit and identity checks.<sup>162</sup>

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155. See Doyle, *supra* note 108, at 30.

156. See *id.*

157. 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, § 371(c), 115 Stat. 272 (2001); Nissman, *supra* note 111, at 7.

158. Nissman, *supra* note 111, at 7.

159. USA Patriot Act § 371(c).

160. See Dan Eggen & Kathleen Day, *U.S. Ties Hijackers’ Money to Al Qaeda; Investigators See Cash Trail As Key*, WASH. POST, Oct. 7, 2001, at A1.

161. *Id.*

162. *Id.*

Thus, while the bulk cash smuggling provisions of the IMLA Act (Section 371) will do nothing to deter similar future movements of legally declared cash into the U.S., it is possible that the Act's identity verification provisions (Section 326) and/or general anti-money laundering awareness requirements (e.g., Sections 352, 359, 361) will be effective at preventing similar movements of funds by individuals with ties to terrorist organizations.

## II. ANALYSIS OF THE IMLA ACT: STRENGTHS AND WEAKNESSES OF THE ACT AND THE FUTURE OF MONEY LAUNDERING

### A. Initial Responses to the Act: Will It Accomplish What the Previous Legislation Did Not?

Perhaps due to a fear of being perceived as unpatriotic, critics of the Act's money laundering provisions have remained surprisingly mute. Most of the criticism levied on the Act to date has been aimed at the constitutionality of its surveillance and immigration provisions.<sup>163</sup> Nevertheless, the Act's money laundering provisions have not remained completely unscathed. Some consider them to be an administrative burden with great potential to decrease the competitiveness of U.S. "financial institutions," as that word is loosely defined in the Act, without noticeably curtailing terrorism and other forms of organized crime.<sup>164</sup> Others have argued that the Act is unconstitutionally vague, and that courts will be unable to determine Congress' intent

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163. See *supra* notes 8–11 and accompanying text.

164. See, e.g., Matthew Haggman, *Law Targeting Terrorist Funding Sources Proves to Be Windfall for Professional Services Firms*, PALM BEACH DAILY BUS. REV., July 1, 2002, at 6 ("Like many experts, former federal prosecutor Sharon L. Kegerreis doubts that the anti-money laundering provisions of the Act will do much to interfere with international terrorists' ability to fund their operations. 'This is like trying to eradicate coca in Colombia,' says Kegerreis."); Jeremy Quittner, *Gauging the New Law's Consumer Impact*, AMERICAN BANKER, Apr. 23, 2002, at 11 (citing concerns by some in the banking industry that the Act will "impose additional burdens on the already limited compliance resources of community-based financial institutions," and "[t]here is a disproportionate burden on institutions that are least likely to be involved in money laundering.").

due to the Act's scant legislative history.<sup>165</sup> Another viewpoint is that a public backlash will occur when members of the general public realize that financial institutions now have the right to probe and control their private lives to an alarming degree.<sup>166</sup>

The existing legislation has done surprisingly little to deter money laundering, especially the international variety, since the crime of money laundering was first established by Sections 1956 and 1957 of the 1986 Act. Since its enactment, "just over 100 cases have been brought in federal court which resulted in a conviction under § 1956(a)(2),"<sup>167</sup> and "[o]n the domestic front, U.S. Department of Justice figures show that from 1987 to 1995, only 3,000 money laundering cases, against 7,300 defendants, were filed, yielding 580 guilty verdicts and 2,295 guilty pleas."<sup>168</sup> Whether the money laundering provisions of the Act will bring about significant improvements remains to be seen, but Congress' lack of care in formulating the Act does not instill confidence:

Congress' so-called deliberative process was reduced to this—closed door negotiations; no conference committee; no committee reports; no final hearing at which opponents could testify; not even an opportunity for most of the legislators to read the 131 single-spaced pages about to become law. Indeed, for part of the time, both the House and Senate were closed because of the anthrax scare; congressional staffers weren't able

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165. See Robert A. Levy, *The USA Patriot Act: We Deserve Better*, available at <http://www.cato.org/current/terrorism/pubs/levy-martial-law.html> (last visited Jan. 30, 2003).

166. See, e.g., *Investigating Patterns of Terrorism Financing: Testimony of John A. Herrera on Behalf of the Credit Union National Association (CUNA) and World Council of Credit Unions (WOCCU)* (Feb. 12, 2002) (discussing the Act's potential impact on financial institutions' "know your customer" policies and the detrimental effects they may have on minorities), available at 2002 WL 25098874 [hereinafter John A. Herrera Testimony] (statement of John A. Herrera, Vice President for Latino/Hispanic Affairs, Self-Help Credit Union and Board Chair of the Latino Community Credit Union (LCCU)).

167. Madelyn J. Daley, *Effectiveness of United States and International Efforts to Combat International Money Laundering*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 175, 194 (2000).

168. Diane Marie Amann, *Spotting Money Launderers: A Better Way to Fight Organized Crime?*, 27 SYRACUSE J. INT'L L. & COM. 199, 227 (2002).

to access their working papers.<sup>169</sup>

There is little doubt that there will be a high price to pay for the additional security the IMLA Act is intended to provide. It has been estimated that the new reporting rules will cause banks in Florida alone to lose \$18 billion to \$34 billion of the \$49 billion they presently hold in accounts of non-resident aliens.<sup>170</sup>

Many provisions of the Act are maddeningly vague; in fact some critics have contended that the Act as a whole should be declared unconstitutionally vague.<sup>171</sup> It seems highly unlikely, however, that the Act will be overturned, and it should be noted that numerous sections require interpretive regulations to be issued. Nevertheless, the Act's negligible legislative history will make it difficult for courts to discern the intent of Congress.<sup>172</sup>

#### B. Impact of the Act on Financial Institutions and Other Businesses

The IMLA Act conscripts into service numerous entities that previously had limited or no involvement in the fight against money laundering. For example, Section 365 of the Act requires *all* businesses, not just financial institutions, to file a CTR with the federal government for every cash transaction in excess of \$10,000.<sup>173</sup> Broker-dealers will have a similarly expanded role in anti-money laundering efforts. While broker-dealers have long

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169. Levy, *supra* note 165.

170. See FIRST WATCH, "Money Laundering!": *How Does It Work and How Does It Affect U.S. Citizens?*, (Nov. 2001), available at <http://www.firsttradenet.com/its/newsletter/pdf/NewsletterNOV.pdf> (last visited Feb. 22, 2002).

As early as 1998, alleged terrorist mastermind Osama bin Laden was linked in congressional testimony to money laundering. Despite many hearings in recent years, financial institutions helped kill several measures to tighten controls. Members of Congress who waged war for enhanced money-laundering laws say they tried but failed to overcome powerful financial institution lobbyists that pumped \$350 million into political campaigns since 1990.

*Id.*

171. See Levy, *supra* note 165.

172. See *id.*

173. 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, § 365(a), 115 Stat. 272 (2001).

been subject to the same CTR filing requirements as banks, they have not been compelled to file SARs.<sup>174</sup> This exemption, however, is expected to change pursuant to proposed rules filed by the Treasury Department on December 21, 2001.<sup>175</sup> "Given the proposed \$5,000 threshold for suspicious activity reporting and the breadth of instances in which reports are required, broker-dealers will need to significantly increase due diligence activities regarding account transactions."<sup>176</sup> Broker-dealers have also never been legally obligated to conduct "know your customer" procedures, although the industry has strongly encouraged such activities for many years.<sup>177</sup> This, too, will soon change as broker-dealers are included among those who, under Section 326 of the Act, must follow the Treasury Department's guidelines regarding identity verification and record-keeping.<sup>178</sup>

It seems ironic that the nation's financial institutions now seem to be publicly embracing legislation that they have spent years trying to defeat. Banks and other members of the financial services industry have spent the last decade lobbying against stiffer money laundering regulations,<sup>179</sup> presumably because such legislation has the potential to create administrative burdens that can require significant compliance expenditures. Passage of the IMLA Act has created concerns among industry analysts regarding the ability of U.S. financial institutions to compete internationally.<sup>180</sup> Nevertheless, John J. Byrne, Senior Counsel and Compliance Manager of the American Bankers Association, recently claimed, "[t]he banking industry strongly supported Title

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174. See William J. Sweet et al., *The USA Patriot Act of 2001 Impact on Broker-Dealers: Statutory, Regulatory and Compliance Lessons From Banks' Experience with Bank Secrecy Act and Anti-Money Laundering Enforcement*, 1289 PLI/CORP 139, 144-45 (Jan. 23, 2002).

175. See *id.* at 161-62.

176. *Id.* at 164.

177. See *id.* at 149-50.

178. See *id.* at 150; see also *supra* notes 131-33 and accompanying text.

179. See FIRST WATCH, *supra* note 170, at 2; Lauren Bielski, *Technology to the Rescue?: OFAC Lists and Related Anti-Terror Requirements Increase Demand for Tools That Can Monitor a Variety of Frauds*, A.B.A. BANKING J., Jan. 1, 2002, at 37.

180. See *Marketplace Morning Report* (Minnesota Public Radio, Dec. 31, 2001).

III of the USA Patriot Act,”<sup>181</sup> and Charlotte Bahin, regulatory counsel for America’s Community Bankers, stated “in spite of the inevitability of new regulatory requirements associated with the act, I haven’t heard anybody complain.”<sup>182</sup> It seems that banks and other financial services providers, at least for the time being, are willing to do what is perceived as their patriotic duty; or perhaps some might be concerned about the public relations backlash that might occur if they opposed the IMLA Act’s provisions.

Banks were already saddled with enormous financial reporting requirements prior to the passage of the Act. The Bank Secrecy Act, for example, requires banks to file currency transaction reports for all cash deposits and withdrawals in excess of \$10,000 (a threshold, incidentally, that has not changed since the passage of the BSA in the 1970s).<sup>183</sup> This requirement results in a monumental amount of paperwork for the government to process, in addition to substantial fines for non-compliant banks, such as the \$10 million U.S. Trust recently paid.<sup>184</sup> Nearly thirteen million CTRs are filed each year, and the sentiment shared by many bankers is that they are “virtually useless.”<sup>185</sup> Naturally, this viewpoint might be colored somewhat by the fact that financial institutions are not typically permitted to observe how the CTRs they file are ultimately used in criminal investigations, or even which ones are

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181. *Investigating Patterns of Terrorism Financing: Testimony of John J. Byrne on Behalf of the American Bankers Association Before the Subcomm. on Oversight and Investigations of the Comm. on Financial Services United States House of Representatives*, 107th Congress (2002) [hereinafter John J. Byrne Testimony] (statement of Senior Counsel and Compliance Manager of the American Bankers Association).

182. *Banking Daily, Federal Banking Regulatory Agendas Dominated by USA Patriot Act Rulemaking* (Jan. 23, 2002), available at <http://www.cbanet.org/Issues/documents/outlook2002.pdf> (last visited Jan. 30, 2003).

183. See Geoffrey M. Connor, *Banking Aspects of the USA PATRIOT Act*, N.J. L.J., Dec. 3, 2001, at 2–3.

184. See *id.* at 3.

185. Krysten Crawford, *Drawing a Bead on Terrorism Funds: Financial Fight May Be Mission Impossible*, LEGAL TIMES, Jan. 28, 2002, at 1. Clearly, CTRs and SARs have proven useful in establishing a paper trail that presents evidence of money laundering. See, e.g., Adams, *supra* note 20, at 539 (discussing the use of CTRs by prosecutors in money laundering cases).



used.<sup>186</sup> Clearly, a different view is held by prosecutors who rely heavily on CTRs and SARs to establish money laundering paper trails.<sup>187</sup>

Despite the regulatory burdens already faced by banks, the Act not only expands the definition of "financial institution," it greatly expands the due diligence measures required of such organizations.<sup>188</sup> It also provides substantial incentives to err on the side of maximum reporting, since the Act now allows for financial institutions to be held liable for failure to identify terrorist activities, and it grants financial institutions immunity from the individuals and entities that are the subject of CTRs and SARs.<sup>189</sup> According to some experts, the additional expense and time required by these regulations hardly seems justified. James Rockett, a San Francisco bank attorney, recently had this to say about the Act's enhanced regulatory burdens on banks: "[t]he popular myth is that this will allow [the government] to identify terrorist activities . . . . I think that belief is misplaced. The more likely impact on banks is that they're not going to be able to identify terrorists any better, but they're going to be held accountable."<sup>190</sup> Furthermore, while the filing requirements for

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186. See Todd Stern et al., *The Money Laundering Abatement and Anti-Terrorist Financing Act of 2001*, 119 *BANKING L.J.* 1, 7 (2002). Nevertheless, "during a three-year period ending in fiscal 1997, for instance, the IRS initiated fewer than 1,000 investigations based on CTRs and suspicious-activity reports, despite the filing of around 35 million CTRs." Michael Allen, *U.S. to Cut Bank Reports on Cash Deals*, *WALL ST. J.*, Sept. 21, 1998, at A3.

187. See, e.g., Adams, *supra* note 20, at 539 (discussing the use of CTRs by prosecutors in money laundering cases).

188. See generally Joseph J. Norton, *Money Laundering Law and Terrorist Financing: Post-September 11 Responses—Let Us Step Back and Take a Deep Breath?*, 36 *INT'L L.* 103, 119–21 (2002) (discussing the due diligence requirements of financial institutions under the Act).

189. See *supra* text accompanying notes 135–36. However, the Act does not provide immunity from civil or criminal actions brought by any government or governmental agency to enforce any constitution, law, or regulation. See *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, § 351(a), 115 Stat. 272 (2001); Veta et al., *supra* note 93, at 18.

190. Michael A. Hiltzik, *Response to Terror: A Changed America*, *L.A. TIMES*, Jan. 13, 2002, at A1.

CTRs remain fairly concrete, the type of “suspicious” activity that compels the filing of a SAR remains nebulous and primarily subjective.<sup>191</sup> “The head of the Treasury’s Financial Crimes Enforcement Network has been quoted as saying the decision to report will often come down to ‘a hunch.’”<sup>192</sup> With heavy penalties at stake for financial institutions that fail to identify suspicious activities, one would think that more clearly definable standards would be established.

Another aspect of the Act that has received criticism is its failure to adequately address money laundering that occurs through informal banking systems such as hawalas and the black market peso exchange. Hawalas have been around for centuries, and are used primarily in the Middle East and parts of Asia to serve as unlicensed, unregulated banks that engage in paperless monetary transfers.<sup>193</sup> The U.S. Treasury has specifically identified Pakistan, India, and Dubai as the “hawala triangle,” as these areas of the globe have unusually high reliance on hawala systems.<sup>194</sup> The typical hawala operates as follows: an individual who wishes to transfer money to a target individual gives the funds to a hawala dealer and provides him with a code.<sup>195</sup> The dealer contacts one of his associates near the target individual, who is granted access to the funds upon furnishing the appropriate code.<sup>196</sup> The dealer and his associate typically engage in a series of similar transactions, and settle up their debts on a periodic basis.<sup>197</sup> A typical transaction, however, is untraceable because there is no wiring of funds or transfer of cash between the dealer and his associate, and record-

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191. See Patti Waldmeir, *Inside Track—Unaccustomed Warriors—A New Law in the U.S. Will Draft Thousands of Businesses Into the Fight Against Terrorism*, FINANCIAL TIMES, Mar. 21, 2002, available at 2002 WL 16943248.

192. *Id.*

193. See Kavita Natarajan, *Combating India’s Heroin Trade Through Anti-Money Laundering Legislation*, 21 FORDHAM INT’L L.J. 2014, 2021 (1998); Ed Blanche, *The Labyrinthian Money Trail of Osama bin Laden: President George W. Bush Is Committed to Separating Osama bin Laden from His Financial Support—but Before He Can Confiscate It, First He Must Find It*, MIDDLE EAST, Jan. 1, 2002, at 22.

194. See Blanche, *supra* note 193, at 22.

195. See Natarajan, *supra* note 193, at 2021.

196. See *id.*

197. See *id.*

keeping is minimal, if not non-existent.<sup>198</sup>

As discussed, above, Section 359 of the Act expands the definition of "financial institution" to include hawalas and other informal banking systems.<sup>199</sup> Stefan D. Cassella, the assistant chief of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice, feels that Congress should have done more to address the problems presented by hawalas and other unregulated financial entities.<sup>200</sup> For example, Cassella suggests that Congress, in passing the IMLA Act, failed to close a loophole in the law that arguably allows every hawala-type transaction to escape the statutory definition of money laundering.<sup>201</sup> Under the existing law, a financial transaction must involve criminal proceeds to constitute money laundering, and Cassella indicates that the parallel, yet separate, transactions that characterize all hawala transfers could be construed by courts as not technically constituting money laundering.<sup>202</sup> Cassella points to *United States v. Covey* as an example of a case involving such parallel transactions that did produce a criminal conviction, but he nevertheless proposes "an amendment that says that, if a financial transaction involves criminal proceeds, then any parallel transaction, or transaction that completes or complements that transaction, involves [criminal] proceeds as well. Closing this potential loophole would nip a major international money laundering problem in the bud."<sup>203</sup>

Another flaw of the IMLA Act that will reduce its effectiveness is its failure to adequately address the threat posed by individuals who launder funds using the internet and other unregulated digital payment systems. The worldwide proliferation of internet usage has resulted in the emergence of various non-traditional payment systems that can be anonymously utilized and virtually impossible to trace.<sup>204</sup> Money launderers have increasingly

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198. See Blanche, *supra* note 193, at 22.

199. See *supra* text accompanying notes 146–48.

200. See Stefan D. Cassella, *Money Laundering Has Gone Global: It's Time to Update the Federal Laws*, FED. LAW., Jan. 2002, at 30–31.

201. *Id.*

202. *Id.*

203. *Id.*

204. See Rajeev Saxena, *Cyberlaundering: The Next Step for Money*

turned to such digital payment systems as their preferred means to hide criminally derived proceeds.<sup>205</sup> However, the IMLA Act does not specifically regulate digital payment systems, which have been described as having the capacity to “eliminate the effectiveness of laws that establish paper trails.”<sup>206</sup> For example, “money transferred from a bank account onto a [stored value card]<sup>207</sup> at an ATM or through an electronic wallet connected to a personal computer can be transferred anywhere in the world without a single reporting requirement.”<sup>208</sup> Stanley Morris, Director of the Financial Crimes Enforcement Network, “has expressed concern about ‘anonymous international cash flows’ made possible by the worldwide web. ‘These new technologies can make it possible to conduct large-scale transactions instantaneously, remotely, and anonymously, and they may permit such transactions to take place without the involvement of traditional financial institutions.’”<sup>209</sup> It seems that Congress has missed the boat by continuing to turn a blind eye to technologically advanced laundering techniques and choosing instead to remain in the twentieth century. It is difficult to imagine that crime and terrorism will be significantly impacted by antiquated and unimaginative laws such as the “know your customer” provisions of Section 326,<sup>210</sup> the bulk cash smuggling provisions of Section 371,<sup>211</sup> and the modestly expanded role of

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*Launderers?*, 10 ST. THOMAS L. REV. 685, 688 (1998).

205. *See id.*

206. Christopher D. Hoffman, *Encrypted Digital Cash Transfers: Why Traditional Money Laundering Controls May Fail Without Uniform Cryptography Regulations*, 21 FORDHAM INT’L L.J. 799, 856 (1998).

207. Hoffman, *supra* note 206, at 813.

Stored value cards, also known as smart cards, hold a prepaid amount of funds that consumers can access by inserting the card into a device called the point of sale terminal. Merchants can transfer the funds accumulated at the terminal to a bank account by telephone. One type of stored value card, the magnetic-stripe card, can be used at terminals mounted on photocopiers or laundry machines. Commuters in New York, San Francisco, and Washington D.C. can use magnetic-stripe cards to pay mass transit fares.

*Id.*

208. *Id.* at 856.

209. *Id.*

210. *See supra* notes 131–33 and accompanying text.

211. *See supra* notes 155–62 and accompanying text.

FinCEN as provided in Section 361.<sup>212</sup>

A number of solutions have been proposed that would enable law enforcement authorities to more effectively combat money laundering that occurs through such non-traditional channels. These remedies include: (1) amending the existing money laundering statutes to allow them to encompass emerging technologies;<sup>213</sup> (2) re-defining the focus of money laundering legislation to target not just "financial institutions" but also non-financial institutions that facilitate or engage in such digital monetary transfers;<sup>214</sup> and (3) providing law enforcement authorities with access to digital cryptographic keys.<sup>215</sup> This last solution is riddled with privacy invasion issues, which could be avoided somewhat by allowing key escrow agencies to maintain "records of all cryptographic keys in use by the public and releasing them under judicial subpoena."<sup>216</sup>

Another criticism of the IMLA Act is that when financial institutions put into place the "know your customer" policies required by the Act, many Americans may find them to be intrusive or even discriminatory. John A. Herrera, Vice President for Latino/Hispanic Affairs, Self-Help Credit Union and Board Chair of the Latino Community Credit Union, recently testified before Congress expressing his concerns that vital financial institution services are likely to be denied to legal immigrants, for example, because they may not be eligible to obtain a social security number and thus not able to furnish information required by some banks and credit unions to open an account.<sup>217</sup> Herrera's statement included the following points:

The lack of certainty in the current regulatory environment results in many banks not welcoming immigrants . . . . Since September 11, members of credit unions have begun encountering problems in obtaining individual tax identification numbers so that they can open accounts, earn interest and pay

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212. See *supra* notes 149–54 and accompanying text.

213. See Saxena, *supra* note 204, at 717–18.

214. See *id.*

215. See Hoffman, *supra* note 206, at 802–03.

216. See *id.*

217. See John A. Herrera Testimony, *supra* note 166.

taxes . . . . We believe it is imperative that policymakers do not develop rules that will result in unreasonable obstacles to serving our members.<sup>218</sup>

Herrera was particularly concerned about Section 326 of the Act,<sup>219</sup> which requires the Secretary of the Treasury to issue regulations setting minimum standards for verification of customers' identities.<sup>220</sup> These new regulations must be issued on or before October 26, 2002,<sup>221</sup> and will require financial institutions to verify customers' identities, maintain records relating to identity verification, and consult lists of known or suspected terrorists.<sup>222</sup> Herrera indicated that individuals who are denied basic banking services are unable to earn interest, more likely to be victims of violent crime (due to their resultant increase in cash holdings), and are susceptible to the inequities of predatory lenders.<sup>223</sup>

### C. Will the IMLA Act Really Help Stop Terrorism?

The Act's Title III anti-money laundering provisions were enacted in large part due to the belief that terrorist groups, like Osama bin Laden's al Qaeda, are becoming increasingly sophisticated and well-financed.<sup>224</sup> Some reports of al Qaeda's financial savvy have been greatly exaggerated, however. For example, shortly after the September 11 attacks, federal and international authorities began investigating reports that the terrorists had made strategic investments designed to profit from the attacks.<sup>225</sup> The investigations focused on suspicious short sales

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218. *Id.*

219. *Id.*

220. 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, § 326(a), 115 Stat. 272 (2001).

221. See 147 CONG. REC. S10990-02 (2001).

222. See Santangelo et al., *supra* note 91, at 31.

223. John A. Herrera Testimony, *supra* note 166.

224. See USA Patriot Act § 302(a) (stating that "money laundering, and the defects in financial transparency on which money launderers rely, are critical to the financing of global terrorism and the provision of funds for terrorist attacks.").

225. See Michael Kranish, *Tracking Money Behind Plot*, BOSTON GLOBE,

of certain airline and insurance company stocks that occurred shortly before September 11.<sup>226</sup> Munich Re, a German insurance company which issued numerous insurance policies for tenants of the World Trade Centers, saw its stock fall twelve percent on the four days prior to the attacks and fifteen percent on September 11.<sup>227</sup> Newspaper headlines during the days following the attacks were filled with stories alleging how the terrorists appeared to have financially benefited from their actions, but the allegations ultimately proved to be largely without merit.<sup>228</sup> *The New York Times* reported as follows on September 28, 2001:

After almost two weeks of investigation, financial regulators around the world have found no hard evidence that people with advance knowledge of the terrorist attacks in New York and Washington used that information to profit in the international securities markets. And a number of officials are beginning to express doubt that such a plan existed.<sup>229</sup>

Some of the most suspicious and heavily investigated short trading activity on airline stocks turned out to have been done by another airline as part of a common hedging strategy to protect from economic downturns in the industry. The coincidental decline of Munich Re's stock price shortly before the attacks has since been attributed to negative securities analyst reports issued during the week prior to September 11.<sup>230</sup>

While reports of the terrorists' ability to financially profit from the attacks seem to be exaggerated, it is undisputed that groups like al Qaeda have vast financial resources that spread like tentacles throughout the world.<sup>231</sup> Bin Laden's personal fortune

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Sept. 18, 2001, at A20.

226. See William Drozdiak, *Stock Trades Probed for Tie to Bin Laden; Investigation Focuses on Sales of Shares of Airlines and Insurers Before Attacks*, WASH. POST, Sept. 18, 2001, at A8.

227. See *id.*

228. See Kurt Eichenwald & Edmund L. Andrews, *Regulators Find No Evidence That Advance Knowledge of Attacks Was Used for Profit*, N.Y. TIMES, Sept. 28, 2001, at B4.

229. *Id.*

230. See *id.*

231. See generally Christopher R. Fenton, *U.S. Policy Towards Foreign Direct*

has been estimated to be as high as \$300 million, and private donors are believed to contribute several million dollars to his terrorist network every year.<sup>232</sup> This is an impressive sum, but even more alarming is that bin Laden's wealth "is not the sole or even the primary source of al Qaeda funds today, according to a variety of sources, including United States government reports, Pakistani intelligence sources and the testimony of a former associate."<sup>233</sup> Fund-raising activities of al Qaeda allegedly have run the gamut from "operating ostrich farms and shrimp boats in Kenya, to owning forest land in Turkey, to engaging in diamond trading in Africa and acquiring agricultural holdings in Tajikistan."<sup>234</sup>

It is important to note that, unlike the narcotics trafficking activities that our nation's money laundering provisions were originally enacted to combat, much of the funding of al Qaeda and other terrorist networks is obtained legally. Obviously, this makes it less likely for such organizations to need to resort to money laundering, and more important for law enforcement authorities to have to rely on other laws and means to thwart terrorist activities. Indeed, it seems entirely possible that the IMLA Act could very well have more of an impact in stopping drug-related crimes than terrorism.

Al Qaeda and certain other terrorist networks may be well-funded, and the attacks that occurred on September 11, 2001 may have required unprecedented levels of sophisticated planning, but it does not appear that vast sums of money were used in planning or carrying out the recent attacks. Reports indicate that the terrorists were initially funded with a wire transfer of \$100,000 that

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*Investment Post-September 11: Exon-Florio in the Age of Transnational Security*, 41 COLUM. J. TRANSNAT'L L. 195, 228–29 (2002) (discussing various international efforts to target and seize terrorist funds, and stating that "[b]y the end of December, 2001, the Department of Treasury had frozen USD \$61 million in Al Qaeda assets, while approximately one hundred and forty-two nations have issued orders to block any accounts found to be connected to international terrorism.").

232. See Robert O'Harrow, Jr. et al., *Bin Laden's Money Takes Hidden Paths to Agents of Terror; Records Hint at Complex Financial Web*, WASH. POST, Sept. 16, 2001, at A13.

233. *Id.*

234. *Id.*



was subsequently supplemented by occasional additional deposits, usually of \$10,000 or less.<sup>235</sup> The funds were ultimately dispersed among roughly nine checking accounts at a Florida bank, and it has been observed that there was no unusual activity in those accounts that would have alerted authorities under even the most intense scrutiny.<sup>236</sup> This is hardly surprising, considering that "banks in Florida hold about \$49 billion in non-resident alien deposits."<sup>237</sup>

It is believed that the hijackers often paid cash for flight training lessons that cost as much as \$20,000.<sup>238</sup> This would certainly raise eyebrows, but given the enormous demands on the time of the FBI and other federal agencies, it would be hard to speculate that such transactions would ever amount to more than a momentary blip on their radar. Still, some have indicated that, even with the existing policies and procedures, someone should have noticed that something was awry: Senator Charles E. Grassley (R-Iowa), ranking minority member of the Senate Finance Committee, indicated that "law enforcement officials did not take notice of large cash transactions by hijackers or their associates, which should have been documented by Suspicious Activity Reports, or SARs, collected by the IRS."<sup>239</sup>

It is highly questionable whether the money laundering provisions of the Act would have deterred or prevented the World Trade Center attack. As discussed above, Section 371 of the Act provides new bulk cash smuggling rules that prohibit transporting more than \$10,000 into or out of the U.S. in an attempt to evade

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235. See Eggen & Day, *supra* note 160, at A1.

236. See O'Harrow, Jr. et al., *supra* note 232, at A13. *But see infra* note 239 and accompanying text (citing a quotation attributed to Senator Charles E. Grassley of Iowa indicating that Senator Grassley believes there may have been sufficient suspicious activity in the terrorists' accounts to warrant scrutiny by government officials). It is debatable whether the increased awareness of suspicious transactions that has developed since September 11, 2001 will result in detection of future transactions similar to those made by the hijackers and their associates. The guidelines for the filing of SARs remain very subjective, although the onus is certainly now on financial institutions to err on the side of caution. See *supra* notes 30, 134–36 and accompanying text.

237. FIRST WATCH, *supra* note 170, at 2.

238. See Eggen & Day, *supra* note 160, at A1.

239. See *id.* at A1.

currency reporting requirements.<sup>240</sup> Stefan D. Cassella, the assistant chief of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice feels that the new bulk cash smuggling rules are inadequate.<sup>241</sup> Cassella notes that the September 11 terrorists “engaged in moving quantities of money from place to place in the United States, using public transportation and other facilities of interstate commerce, and clearly intending that the money be used to commit one of the greatest criminal acts ever perpetrated on American soil,” and he suggests that “[t]ransporting such a large quantity of cash—on a highway, in an airport, or on a train or bus—should be an offense as well, if the courier knows the money is criminal proceeds or that it is intended to be used for an unlawful purpose.”<sup>242</sup> Cassella believes that U.S. money laundering laws in general are too retrospective in nature; they ask “what was the source of the laundered money and how has the bad guy tried to hide it?” instead of “what is the bad guy planning to do with the money that he is going to such great lengths to conceal it.”<sup>243</sup>

#### CONCLUSION

It is a cliché to observe that the world became a different place after September 11, 2001, but many things have changed, and the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 is part of the new landscape. It will affect most Americans in some way, and many will undoubtedly be affected to a profound degree. Only time will tell if the IMLA Act will accomplish the objectives of its creators, but Congress’ failure to adequately debate the Act’s provisions is alarming, and the cost of the act in terms of increased regulatory burdens and decreased privacy of Americans is immeasurable. Swift action is needed in times of crisis, but it does not augur well when a panicked Congress passes legislation that has been repeatedly rejected over a period

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240. See *supra* text accompanying notes 155–62.

241. Stefan D. Cassella, *Money Laundering Has Gone Global: It's Time to Update the Federal Laws*, FED. LAW., Jan. 2002, at 24–31.

242. *Id.* at 30.

243. *Id.*

of many years.<sup>244</sup>

It is entirely possible that the IMLA Act will have benefits other than those intended. The Act clearly has the purpose of targeting and thwarting terrorist activity, but it is likely that the Act will also provide law enforcement authorities with greater leverage to deter and prosecute more traditional laundering activities, such as those conducted by narcotics traffickers. It has also been suggested that the Act will help the IRS crack down on tax evasion, a crime commonly associated with money laundering. "[T]he IRS has been pushing for some of the same disclosure and information provisions provided in [the IMLA Act] in its pursuit of U.S. citizens and residents using foreign bank accounts and trusts to avoid U.S. taxes."<sup>245</sup> Moreover, several traditional offshore banking havens have recently succumbed to pressure by U.S. tax authorities to be more cooperative in rooting out tax evasion. An example is the agreement recently reached between the U.S. and the Cayman Islands that calls for granting access by U.S. tax authorities to Cayman Island bank accounts starting in 2004.<sup>246</sup>

Terrorism is fundamentally different from other varieties of organized crime in the sense that its ultimate objective does not directly involve the financial enrichment of its perpetrators. Money laundering has only been a crime since 1986, and since that time it has primarily been used, with moderate success, to combat the war on drugs.<sup>247</sup> The new legislation is intended to expand the 1986 Act to allow its provisions to help fight terrorism. There is no doubt that every American would feel more secure if groups like al Qaeda were to be stripped of their financial resources; but the reality is that such groups often derive the vast majority of their funds through legitimate contributions and businesses, and the attacks like the one that occurred on September 11, 2001 can be accomplished with minimal resources. Clearly, law enforcement will have to rely on other means if it is going to be successful in thwarting terrorism. Our money laundering laws will continue to

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244. See *supra* notes 4, 5, 179 and accompanying text.

245. Mark A. Luscombe, *Tax-Related Provisions in the New Anti-Terrorism Law*, TAXES, Dec. 1, 2001, at 3.

246. See Hardesty, *supra* note 33.

247. See *supra* notes 43, 167, 168 and accompanying text.

be used in the effort to thwart organized crime, but the provisions of the IMLA Act will have a negligible effect on the war against terrorism while creating serious headaches for financial institutions and many Americans.

## *Notes & Observations*