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Recent Patriot Act Developments

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Overview

- Outline of Patriot Act Provisions (Title III)
- Congressional Findings re: Offshore Jurisdictions
- Operation of Title III Provisions – Major Impact on Offshore Financial Institutions
- Restraint/Forfeiture in Offshore Jurisdictions following US requests for assistance – position in Caymans?
- Recent Patriot Act litigation in the US
- Key Supreme Court decisions on definitions/scope of money laundering & complex fraud prosecutions



Patriot Act Title III Outline

- Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT).
- Enacted October 26, 2001 in response to 9/11 attacks.
- Variety of functions, amends a variety of other Federal Statutes.
- **Title 3: International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001** (aspect of PATRIOT of greatest interest to delegates).
 - International Counter Money Laundering and Related Measures (major focus).
 - Bank Secrecy Act Amendments and Related Improvements.
 - Currency Crimes (e.g. bulk cash smuggling, forfeiture in currency reporting cases, counterfeiting, etc.)
- Money laundering “provides the financial fuel that permits transnational criminal enterprises to conduct and expand their operations to the detriment of the safety and security of American citizens.”
- Particular concerns re: correspondent accounts, private banking



Congressional Findings re: Offshore Jurisdictions; Sunset?

- When enacting PATRIOT, Congress found that
 - “certain jurisdictions outside of the United States that offer `offshore' banking and related facilities designed to provide anonymity, coupled with weak financial supervisory and enforcement regimes, provide essential tools to disguise ownership and movement of criminal funds, derived from, or used to commit, offenses ranging from narcotics trafficking, terrorism, arms smuggling, and trafficking in human beings, to financial frauds that prey on law-abiding citizens... [T]ransactions involving such offshore jurisdictions make it difficult for law enforcement officials and regulators to follow the trail of money earned by criminals, organized international criminal enterprises, and global terrorist organizations.” (Emphasis added.)
- Part of justification for IMLA-ATFA was the existence of “outmoded and inadequate” statutory provisions in the US for dealing with money laundering allegations connected to foreign countries, banks or persons.
- Sunset Provisions: Title III could have expired in 2005 if Congress had passed a joint resolution to abolish the IMLA-ATFA 2001. Congress did not do so.



How Does It Work? (1)

- **S.311** – amends 31 USC 53 (Monetary Transactions – Records & Reports) to **require domestic financial institutions to take special measures** re: certain financial institutions operating outside the US, classes of transactions involving institutions outside the US, or types of accounts, which are of “primary money laundering concern.”
 - Special measures may include:
 - (a) maintaining records & filing reports re: each transaction or aggregate of such transactions, including identity and address of participants, legal capacity of participants, identity of beneficial owner of funds, description of transactions;
 - (b) for domestic banks opening or maintaining payable-through or correspondent accounts on behalf of foreign banks, disclosure identity of customers entitled to use or whose transactions are routed through those accounts, and disclosure of information substantially comparable to that which deposit institutions obtain re: customers resident in the United States, outright prohibition of such accounts in certain situations;
- **Jurisdiction is of primary money laundering concern** if there is evidence that organized criminal groups or international terrorists have transacted business in that jurisdiction, if there are special advantages to nonresidents or non-domiciliaries banking in that jurisdiction, if banking supervision and AML are inadequate in that jurisdiction, if there is a relationship between the volume of financial transactions in the jurisdiction and the size of its economy, the extent to which international institutions characterize the jurisdiction as an offshore banking/secretcy haven, presence of MLA treaties with US, presence of high levels of official or institutional corruption.
- **S. 312: due diligence** for US private banking/correspondent banking involving foreigners – due diligence re: foreign ownership, scrutiny of accounts, SAR’s etc.



How Does It Work? (2)

- **S. 313: Prohibition on US Correspondent Accounts with Foreign “Shell” Banks**
– ban on creation or maintenance of such accounts for banks without “a physical presence in any country.”
- **S. 314: Sharing of Information** between Banks, Regulatory Authorities & Law Enforcement. Such information “shall not be used for any other purpose” other than identifying and reporting on activities connected to terrorist/ML activities.
- **S. 315: Foreign Corruption Offences** are now predicate offences for money laundering crimes
- **S. 316: Preservation of Rights** re: Forfeiture Provisions (18 USC 983).
- **S. 317: Long Arm AML Provisions:** for purposes of adjudicating an action or enforcing a penalty under Title 18, Federal District Courts shall now have jurisdiction over any foreign person, including foreign financial institutions, if service of process made in accordance with FRCP or laws of foreign country in which foreign person found. Court may take action against assets (including bank accounts) in the US.
- **S. 318: Laundering Money through a foreign bank**, as defined in s.1 IBA 1978, is now an offence under 18 USC s. 1956.
- **S. 319: Forfeiture from Interbank Accounts:** If funds deposited in an account at a foreign bank, and that bank has an Interbank account in the US with a covered financial institution, funds are deemed to have been deposited in the US. Thus any restraining order, seizure warrant, or arrest warrant *in rem* re: those funds can be served on covered financial institution, and funds in Interbank account up to value of funds deposited in foreign account can be restrained, seized or arrested.



How Does It Work? (3)

- **S. 320 – definition of proceeds of crime for purposes of civil forfeiture provisions** (18 USC s.981) expanded to include property derived from offenses against foreign nations.
- **S. 326 – Verification of Identification** – important KYC provisions for financial institutions.
- **S. 327:** Bank Holding Company Act of 1956 (12 USC 1842), which deals with the acquisition of bank shares or assets and requires the prior approval of a Board, amended to **require Board to take into account AML record of companies**, including vis-à-vis overseas branches.
- **S. 328 – greater international cooperation re: info as to origins of wire transfers.**
- **S. 329 – criminal penalties for Feds & agents who perpetrate fraud** in violation of their official duties – fine of 3 x monetary equivalent, and/or up to 15 years prison.
- **S. 352 – establishment of AML programs by financial institutions.**
- Various other provisions re: Bank Secrecy Act Amendments (e.g. 12 USC 1953 re: record-keeping by banks, specifically of information useful in counter-terrorism/AML operations) , bulk cash smuggling/counterfeiting and other cash crimes (e.g. illegal money transmitting businesses) including forfeiture provisions in relation to those crimes, etc.



Major Impacts on Offshore Financial Institutions

- ALL US financial institutions (banks, securities firms, insurance companies, cash transfer businesses etc) must exercise due diligence before allowing non-US financial institution to open correspondent account with them.
- ALL US financial institutions must have AML procedures, including verifying ID of all clients (including foreign clients).
- US Financial Institutions barred from opening accounts for non-US shell banks without any physical presence or affiliation with another bank.
- US Secretary of the Treasury and US Attorney General have unprecedented authority to demand and obtain information from US Financial Institutions that relate to correspondent accounts maintained for non-US banks/persons.
- Broadly, major changes to AML requirements, information disclosure & banking administration both in US and overseas.



Forfeiture in Offshore Jurisdictions where request made by US?

- Restraint/Forfeiture where request for assistance made by US?
- Helpful guidance in similar cases in England & Wales, Jersey and the Isle of Man.
- England & Wales: *In re: SL (Restraint Order – External Confiscation Order)* [1996] QB 272.
- Jersey: *In the Matter of Batalla-Esquivel* [2001] JLR 160.
- Isle of Man: *In the Matter of the Criminal Justice Act 1990 as modified by the Criminal Justice Act 1990 (Designated Countries & Territories) Order 1996*, Unreported, Staff of Government Division of the Isle of Man High Court, 17 February 2005.
 - Cases concern applications by the US Government, as represented by local prosecutors, to restrain assets (usually bank accounts) in other jurisdictions based on criminal and civil forfeiture proceedings against certain individuals and assets in the United States.
 - Issue in these cases is whether a restraint order can be made in the local jurisdiction where the relevant foreign order is a civil judgment *in rem* in the US (i.e. a judgment that the money restrained or seized in the US is in and of itself the wrongdoer, as opposed to the person in possession of those funds, who may or may not be subject to identification and prosecution in the US.) Broad reach of US AML provisions important in determining scope of US orders.
 - All three jurisdictions – England & Wales, Jersey and the Isle of Man – have judicially determined that United States proceedings *in rem*, founded on the finding or allegation that relevant assets are the proceeds of crime, do fall within the relevant definitions and that as such, restraint orders and confiscation orders can be made in the local jurisdiction in relation to those persons' assets, typically bank accounts.
 - Relevant definitions: e.g. where the local statute requires that proceedings have been instituted against "a defendant" in a designated country, and where "a defendant" is defined in equivalent terms to "a person against whom an external confiscation order has been made, or a person against whom proceedings which may result in [such an order] being made have been, or are to be, instituted in a designated country."



Forfeiture (2) – UK position

- England & Wales: *In re: SL (Restraint Order – External Confiscation Order)* [1996] QB 272.
 - Restraint order obtained in London against accounts opened in London by a drug dealer, S, in the name of his wife and parents. Money alleged to be proceeds of drug trafficking in the US.
 - Restraint order obtained on the basis that confiscation orders 'likely' to be made in putative criminal proceedings in the United States. However, S was in Columbia. No extradition treaty between Columbia and the US. In the end, no criminal proceedings ever instituted.
 - Four years later, US government obtained external confiscation order from a New York Court. Application in UK to set aside restraint order vs. UK bank accounts, on basis that High Court had no power to make restraint order in support of external confiscation order where there was no defendant and no person against whom external confiscation order could be made.
 - Court of Appeal determined that "the statement [in the relevant UK legislation] that a person against whom an external confiscation order has been made is referred to in [that legislation] as the defendant, does not of itself exclude the possibility of such an order being made. . .without there being a person named as defendant."
 - Weight must be given to the purpose of the legislation – e.g. to permit the making of restraint orders where funds in London banks represent the proceeds of drug trafficking – and the word "defendant" in the Act should not be construed to require proceedings *in personam*.



Forfeiture (3) – Cayman Islands?

- Is the legislation in the Caymans differently worded to the equivalent legislation in the UK, Jersey and the Isle of Man?
 - 1986 MLA Treaty w/United States.
 - Criminal Justice (International Cooperation) Law
 - Provides that where request made for purposes of identifying, tracing or immobilising assets, or assisting in proceedings related to forfeiture and restitution, provisions of POCL apply.
 - Also provides that “[t]he Authority may, where it has assisted a requesting party, enter into an arrangement with the requesting party respecting the sharing of confiscated or forfeited assets between the Government of the Islands and the requesting party.
 - Earlier Proceeds of Criminal Conduct Laws, e.g. POCCL 2007, s.43: procedure for registration of an external confiscation order, and broad definition of “realisable property” in Schedule to POCCL.
 - Current position: Proceeds of Crime Law 2008
 - Section 188: provides for registration of external confiscation orders, where:
 - External order is at least thirty thousand dollars, or its in the public interest to register an order for a lesser amount;
 - At the time of registration, the order is in force and not subject to an appeal;
 - Where person against whom order is made did not appear in proceedings, that he nevertheless received notice of them in sufficient time to enable him to defend them;
 - Enforcing order in the Islands would be in the interests of justice.



Forfeiture (4) – Caymans (cont'd)

- Proceeds of Crime Law 2008 (cont'd):
 - Section 195: describes “external confiscation order” and “external investigation”, explaining that the latter is an investigation into whether property has been obtained as a result of or in connection with criminal conduct or into whether a money laundering offence has been committed.
 - Section 195 describes “relevant property” in connection with those external orders and investigations broadly, in the following terms:

“Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made.”
 - Schedule 5 of POCL: describes procedures for dealing with impact of external confiscation orders here in the Caymans, and for dealing with impact of proceedings which “have been or are to be instituted and which may result in such external confiscation orders being made.”
 - Among various powers of Grand Court in Sch. 5, Grand Court may prohibit any person from dealing with realisable property by way of restraint order, where such an external order has or may be made.
 - “Defendant” means person against whom external confiscation order made, or person against whom proceedings which may result in ECO have been/will be instituted.
 - “Realisable property” defined in Sch 5 (s.3(2)) means:
 - In relation to an external confiscation order, property specified in the order;
 - In any other case, any property held by the defendant, and any property held by a person to whom the defendant has made a tainted gift.
 - Probably similar enough to Jersey/UK legislation to create same result? Caselaw?



Recent Patriot Act Caselaw in US

- Information-gathering by Law Enforcement?
 - Standing to sue re: intelligence gathering by the FBI – such standing can be based on very broad principles such as the “chilling” effect on free speech of such information-gathering. *See, e.g., Muslim Community Association of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592 (ED Mich. 2006)).
 - Issuance of National Security Letters protected against FOIA disclosure by “law enforcement” exception – *see, e.g., Catledge v. Mueller*, 323 Fed.Appx.464 (7th Cir 2009).
 - Declaratory Judgment that Patriot Act provisions violated 4th Amendment privacy rights of the arrestee would not provide a remedy to the arrestee, meaning the arrestee did not have standing to pursue such a challenge. *Mayfield v. United States*, 599 F.3d 964 (9th Cir 2010).
- Definitions and parameters of financial crimes under the Patriot Act?
 - Foreign corruption now a predicate offence for money laundering, but this change in the law is almost superfluous, as non-violent extortion already a predicate offense – thus, only change made by Patriot Act was “extortion under colour of official right.” *See, e.g., US v. Lazarenko*, 564 F.3d 1026 (9th Cir. 2009).
 - Giving money to organizations such as Hamas can expose donee to lawsuits relating to unlawful killings carried out by Hamas, given broad definition of “international terrorism” in Patriot Act: *see, e.g., Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (8th Cir. 2008).
 - Can sue for damages under Fair Credit Reporting Act if wrongly placed on OFAC’s Specifically Designated Nationals List under Patriot Act powers: *see, e.g., Cortez v. Trans Union LLC*, 2010 WL 3190082 (3rd Cir. 2010).
 - Patriot Act provisions restricting unlicensed money transfer businesses are not unconstitutionally vague based on removal of mens rea element of offence; person operating in highly regulated industry could reasonably be expected to know there were licensing requirements: *see, e.g., US v. Dimitrov*, 546 F.3d 409 (7th Cir. 2008).



Recent Caselaw (2)

- Definitions and parameters of financial crimes (cont'd)
 - The bulk cash smuggling forfeiture provisions in the Patriot Act were not a constitutionally prohibited excessive fine under the Eighth Amendment to the US Constitution: *see, e.g., United States v. Jose*, 499 F.3d 105 (1st Cir. 2007).
 - Patriot Act's venue provisions, which allowed prosecution for conspiracy to commit money laundering in any US district where an overt act in furtherance of the conspiracy to commit money laundering took place, cannot be read as requiring the prosecution to prove any overt act in furtherance of the conspiracy – Patriot Act provisions were permissive, not proscriptive. *See, e.g., Whitfield v. US*, 543 US 209 (S Ct. 2005).
- Recent Supreme Court Developments in Money Laundering & Fraud Prosecutions:
 - *Cuellar v. United States* (S. Ct. 2008): to successfully prosecute for money laundering, must show intent to launder (i.e. that a scheme was designed to conceal or disguise the nature, source, ownership or control of funds), rather than the mere structuring of a scheme in such a fashion as to conceal funds.
 - *United States v. Santos* (S. Ct. 2008): “proceeds” in the Federal Money Laundering Statute (18 USC 1956) only captures profits, not receipts (contrast w/UK and Caymans position, & note legislative response in 18 USC 1956 (c)(9), which now defines “proceeds” as including “the gross receipts of [unlawful activity].”).
 - *United States v. Skilling* (S. Ct. 2008): “honest services” fraud in 18 USC 1346 only captures schemes involving bribes or kickbacks, but not “undisclosed self-dealing by a public official or private employee.”



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Conclusion

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