

2007

## Practicing Globally: Extraterritorial Implications of the USA Patriot Act's Money-Laundering Provisions on the Ethical Requirements of US Lawyers in an International Environment

Pamella Seay

Follow this and additional works at: <https://scholarcommons.sc.edu/scjilb>



Part of the [International Law Commons](#)

---

### Recommended Citation

Seay, Pamella (2007) "Practicing Globally: Extraterritorial Implications of the USA Patriot Act's Money-Laundering Provisions on the Ethical Requirements of US Lawyers in an International Environment," *South Carolina Journal of International Law and Business*: Vol. 4 : Iss. 1 , Article 3.

Available at: <https://scholarcommons.sc.edu/scjilb/vol4/iss1/3>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Journal of International Law and Business by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

# **PRACTICING GLOBALLY: EXTRATERRITORIAL IMPLICATIONS OF THE USA PATRIOT ACT'S MONEY-LAUNDERING PROVISIONS ON THE ETHICAL REQUIREMENTS OF US LAWYERS IN AN INTERNATIONAL ENVIRONMENT**

*Pamella Seay\**

## **INTRODUCTION**

The USA PATRIOT Act<sup>1</sup> adopted in October 2001 created, among many other provisions, the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001.<sup>2</sup> The purpose of this section, as stated in the Act, is to “prevent, detect and prosecute international money laundering and the financing of terrorism.”<sup>3</sup> Recognizing that money laundering consists of at least \$600,000,000,000 (600 billion US dollars) per year, representing from two to five percent of global gross domestic product,<sup>4</sup> the impact on legitimate financial transactions and services is substantial. The international community deemed ‘financing of terrorism’ important enough to draft and adopt a treaty on its suppression.<sup>5</sup>

---

\* Professor, Florida Gulf Coast University, Fort Myers, Florida. J.D., 1989, University of South Carolina School of Law; LL.M. cum laude (international law), 2007, Stetson University College of Law. Licensed to practice in South Carolina and Florida, certified in International Law by The Florida Bar since 2000, past chair of The Florida Bar International Law Certification Committee, and member of The Florida Bar Professional Ethics Committee. Special thanks to Dean John Cooper of Stetson University College of Law International Programs for his guidance and support which led to the development of this article and to the late James V. Dunbar, Jr. who inspired my interest and involvement in international law.

<sup>1</sup> 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 (codified as amended in scattered sections of resident George W. Bush on October 26, 2001).

<sup>2</sup> *Id.* tit. III

<sup>3</sup> *Id.* tit. III, sec. 302(b).

<sup>4</sup> *Id.* tit. III, sec. 302(a).

<sup>5</sup> International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/Res/54/109.(Dec. 9, 1999).

Amendments to the Bank Secrecy Act<sup>6</sup> and clarifications relating to currency crimes<sup>7</sup> also contained in the USA PATRIOT Act added to these efforts.<sup>8</sup> Both the domestic and extraterritorial application of these provisions of the Act have caused controversy and concerns across the business community.<sup>9</sup> Banking disclosure requirements have expanded the information available to law enforcement and intelligence agencies in the war on terror.<sup>10</sup> But, these disclosure requirements raise questions about the relationship between clients and attorneys in their national as well as international dealings.<sup>11</sup>

Requirements of confidentiality<sup>12</sup> and the related rule of the attorney-client privilege<sup>13</sup> are hallmarks of the American legal system. These essential doctrines are not, however, unique to the United States.<sup>14</sup> Confidentiality and attorney-client privilege play important roles in many legal systems throughout the world, though the application and interpretation of these doctrines vary widely.<sup>15</sup>

These protections, considered by many to be indispensable in an attorney-client relationship, are in danger of becoming unfortunate victims in the war on terror, both in the United States and in other legal systems around

---

<sup>6</sup> 31 U.S.C. §§ 5301 et. seq. (2007).

<sup>7</sup> USA PATRIOT Act at tit. III, subtit. C, secs. 371-377.

<sup>8</sup> *Id.* at tit. III, subtit. B, secs. 351-366.

<sup>9</sup> See, e.g., Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001*, 22 BERKLEY J. INT'L L. 123 (2004).

<sup>10</sup> See USA PATRIOT Act, at tit. III. See in particular the requirements under section 314 Cooperative efforts to deter money laundering, section 328 International cooperation on identification of originators of wire transfers, section 330 International cooperation in investigations of money laundering, financial crimes, and the finances of terrorist groups, and section 356 Reporting of suspicious activities by securities brokers and dealers; investment company study.

<sup>11</sup> See, e.g., Tom D. Snyder, Jr., *A Requiem for Client Confidentiality?: An Examination of Recent Foreign and Domestic Events and Their Impact on the Attorney-Client Privilege*, 50 LOY. L. REV. 439 (2004); G. Scott Dowling, Comment, *Fatal Broadside: The Demise of Caribbean Offshore Financial Confidentiality Post USA PATRIOT Act*, 17 TRANSNAT'L LAW 259 (2004).

<sup>12</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2006).

<sup>13</sup> FED. R. EVID. 501.

<sup>14</sup> See, e.g., Case C-155/79, *AM & S Europe Ltd. v. Comm'n of the European Communities*, 1983 E.C.R. 1575 (describing the status and applicability of the doctrines of confidentiality and attorney-client privilege in several European nations).

<sup>15</sup> See, e.g., LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW (Edwin Godfrey ed., International Bar Association, 1995).

the world.<sup>16</sup> The USA PATRIOT Act, in particular its amendments to the Bank Secrecy Act,<sup>17</sup> the Money Laundering Abatement and Financial Anti-Terrorism Act of 2001,<sup>18</sup> and its intended extraterritorial application,<sup>19</sup> have created a conundrum for the international practitioner and the multinational business. To what extent these doctrines have been impacted by the USA PATRIOT Act is the focus of the pages which follow.

The purpose of the Act is to identify and prevent terrorist activity through the provision of the necessary tools needed to achieve those ends. Beginning with a definition for "terrorism," the next step Congress took was to identify the ways in which it intended to address terrorist acts. Though the USA PATRIOT Act is an extensive and involved document, its premise is simple. The Act delineates three areas in which it will provide the tools to combat terrorism: (1) modernization to meet changing technology, (2) improved communication of information, and (3) enhancing and extending existing rules.<sup>20</sup>

Modernization to meet changing technology refers to a long-needed update to many outmoded statutory sections as they pertained to technology and innovation. Commonplace technologies, such as cellular telephones, internet usage, email, and other developments in technology, were noticeably absent in much of the existing legislation that has been used in investigation of terrorism and related matters.

Communication requires the sharing of information. Provisions of the Act give authorization to share information where necessary to fight terrorist activity. According to U.S. Attorney General Alberto Gonzales, "First and foremost, the Act helped break down the so-called 'wall' that prevented our national security investigators and law enforcement personnel from working together to 'connect the dots' to prevent further . . . attacks."<sup>21</sup>

Extension of existing rules refers to the desire to make already available investigative tools applicable in other settings. Provisions to fight money laundering are a key component of the USA PATRIOT Act and serve

---

<sup>16</sup> See, e.g., CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE (Maya Goldstein Bolocan, ed., A.B.A. 2002).

<sup>17</sup> 31 U.S.C. §§ 5311–5330 (2001).

<sup>18</sup> *Id.*

<sup>19</sup> USA Patriot Act, Pub. L. No. 107-56, § 317 (2001) (discussing long-arm jurisdiction over foreign money launderers).

<sup>20</sup> 147 CONG. REC. S10, 589 (2001).

<sup>21</sup> Alberto Gonzales, *Ask the White House*, Jan. 25, 2006, <http://www.whitehouse.gov/ask/20060125.html> (last visited Nov. 25, 2006).

to update the rules relating to finance and banking.<sup>22</sup> "United States anti-money laundering efforts have been impeded by outmoded and inadequate statutory provisions that make investigations, prosecutions, and forfeitures more difficult, particularly in cases in which money laundering involves foreign persons, foreign banks, or foreign countries."<sup>23</sup>

With globalization as a foundational assumption and money laundering as the primary focus, the questions of "What information is confidential" and "When does the attorney-client privilege arise" are critical components of any business decision to be made. Analyzing these questions requires, first, a knowledge of the purpose behind the USA PATRIOT Act Anti-Money-Laundering provisions and the mandates imposed by those provisions. Second, it requires an understanding of both the rules of confidentiality and the requirements of the attorney-client privilege within the confines of the Anti-Money-Laundering provisions. Third, it will be necessary to consider the conflicting duties imposed on attorneys in different jurisdictions. Lastly, the impact of the Anti-Money-Laundering provisions on the attorney-client relationship will be examined in light of the fundamental purpose of combating terrorism.

### GLOBAL PRACTICE

Disputes often arise in the context of international business transactions. How those disputes are settled will vary depending on the facts, the parties, the terms of their agreements, as well as on the location of their businesses and disagreements. In the event of a dispute, businessmen and women often turn to their legal counsel for advice. But, when they do, are they taking a risk that the information they share with their legal counsel may in some way be used against them? These questions are not solely within the ambit of disputes. Ordinary business transactions are now being called into question through the application of certain provisions of the USA PATRIOT Act, with implications far beyond the borders of the United States.<sup>24</sup>

---

<sup>22</sup> International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Pub. L. No. 107-56, §§ 301-377 (2001).

<sup>23</sup> *Id.* § 302(a)(8).

<sup>24</sup> See generally Ronan Reinart, *Money Laundering and Crime Management: Laundering Around the World: Legislative Responses to Money Laundering in Canada, the United States, and Bermuda*, 4 *ASPER REV. INT'L BUS. & TRADE L.* 131 (2004); Joan M. O'Sullivan-Butler, *Combating Money Laundering and International Terrorism: Does the USA Patriot Act Require the Judicial System to Abandon Fundamental Due Process in the Name of Homeland Security?*, 16 *ST. THOM L. REV.* 395 (2003-04); Symposium, *Brave New World: U.S. Responses to the Rise in International Crime:*

The practice of law across borders has existed probably for as long as there have been both boundaries and the legal profession, and is on the increase.<sup>25</sup> It consists of a wide range of advising, consultation, and referrals. It can be as simple as providing advice and representation to family or business persons on the best way to immigrate into a country. Or, it can be as complex as representing a multinational corporation in its efforts to invest and build manufacturing facilities in a foreign jurisdiction, or defending it later when it is accused of bad business practices, or when it fights the nationalization or expropriation of its business interests.<sup>26</sup> In all of these instances, the attorney is governed by the rules of his or her home jurisdiction. In the United States, the attorney is subject to the Rules of Professional Conduct which apply in the state in which he or she is admitted to practice. Many foreign countries have similar requirements. The rules often limit the ability of an attorney to practice the legal profession outside the jurisdiction in which he or she holds a license.<sup>27</sup>

In recent years, there has been a profound increase in bilateral and multilateral trade agreements throughout the world. In 1994, the United States, Canada, and Mexico entered into the North American Free Trade Agreement.<sup>28</sup> In addition to the NAFTA, the United States is a party to the World Trade Organization<sup>29</sup> as well as a number of regional and bilateral trade agreements.<sup>30</sup> The international community has seen the rise of trade

---

*Fighting International Crime and its Financing: the Importance of Following a Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583 (2005).

<sup>25</sup> For example, the Central European and Eurasian Law Initiative cites statistics from the U.S. Department of Commerce Bureau of Economic Analysis showing an increase, between 1986 and 1996, from \$97 million annually to \$1.9 billion annually in the export of U.S. legal services. Concurrently, the import of foreign legal services increased from \$40 million to \$516 annually over the same time frame. Bolocan, *supra* note 16, at 92.

<sup>26</sup> See generally GLOBAL LAW IN PRACTICE (J. Ross Harper, ed., Kluwer Law International and the International Bar Association, 1997).

<sup>27</sup> For a description of the challenges facing international attorneys living and practicing in the Peoples' Republic of China, see Mia Prieur, *The Shot Heard 'Round the World: A Brewing Revolution Against Foreign Law Firms in China?*, CHINA LEGAL WATCH, CCH, June 2006.

<sup>28</sup> The North American Free Trade Agreement can be viewed in its entirety at the NAFTA website, [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=78](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78), last accessed November 19, 2006.

<sup>29</sup> Created on January 1, 1995 as a result of the Uruguay Round trade negotiations, and as of November 2006 has 146 members, including the United States. <http://www.wto.org/>.

<sup>30</sup> See [http://www.ustr.gov/Trade\\_Agreements/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Section_Index.html), website of the Office of the United States Trade Representative for a list of the current trade agreements in which the United States is a party.

agreements in countless regions. Agreements such as Mercosur in South America,<sup>31</sup> the ASEAN Free Trade Area in Asia,<sup>32</sup> and the Cotonou Agreement in Africa<sup>33</sup> are all intended to increase trade opportunities between countries that are parties to those agreements.<sup>34</sup> Based on initial analyses of international trade statistics, many are indeed having the intended result.<sup>35</sup> Unfortunately, according to one analyst, "Ironically, one group that has not made . . . adjustments has been international lawyers."<sup>36</sup>

Despite the disappointing results from the Doha Round of the WTO,<sup>37</sup> or perhaps because of it,<sup>38</sup> regional relationships are on the increase. With each additional agreement, the need for legal advice and representation has

---

<sup>31</sup> Mercosur, or Mercosul in Portuguese, is a Regional Trade Agreement between Brazil, Argentina, Uruguay, Venezuela, and Paraguay. It was originally signed in 1991 as the Treaty of Asunción and has been amended and updated by the Treaty of Ouro Preto, 1994.

<sup>32</sup> ASEAN, or Association of Southeast Asian Nations, consists of 10 members including Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand, Vietnam, Laos, Myanmar and Cambodia. <http://www.aseansec.org/4736.htm> (2007).

<sup>33</sup> The Cotonou Agreement, available at <http://www.acpsec.org/en/conventions/cotonou/accord1.htm>, signed in June 2000 as a successor to the Lome Convention, is a regional trade agreement among the African, Caribbean and Pacific (ACP), and the European Union (EU). It was signed in June 2000 as a successor to the Lome Convention.

<sup>34</sup> In the United States, an effort is underway to create a category of legal practitioners to be known as foreign legal consultants who are able to practice in the United States, but are limited to advising only on the law of the country in which they are licensed to practice law. For example, a foreign-licensed attorney from Brazil can be a "foreign legal consultant" in Florida without running the risk of an accusation of "unauthorized practice of law." See Rule 16-1 Rules Regulating the Florida Bar, Foreign Legal Consultancy Rule.

<sup>35</sup> Statistics from the World Trade Organization, available at <http://stat.wto.org/>, indicate that international exports worldwide more than doubled in the 10-year period, 1995-2005.

<sup>36</sup> Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309, 310 (2005).

<sup>37</sup> For a discussion of the status of the Doha Round, visit the World Trade Organization website at [http://www.wto.org/English/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/English/tratop_e/dda_e/dda_e.htm) (last visited November 22, 2006).

<sup>38</sup> With the failure of the multitudes of members of the WTO to come to a meeting of minds at the Doha Round, many members have chosen to find suitable trading partners within their own continents or regions, with whom they, presumably, have more in common, and with whom they also already have existing trade needs and arrangements. The streamlining of bilateral and regional trade arrangements have proven quite valuable in the continued development of some so-called "third world" countries around the world.

increased as well. Newly formed regulations, changed laws, amended procedures, and other changes have legal ramifications which require legal representation. Though many of these agreements include provisions which allow cross-border practice of certain professions,<sup>39</sup> there remains a practical limitation on cross-border legal practice that requires attorneys from one jurisdiction to affiliate or associate with local counsel in the foreign country.<sup>40</sup> In these instances, it is critically important for the attorney on each side of the border to understand the requirements, mandates, and limitations on the attorney's actions in representing the client.

As trade agreements have increased, the opportunities for greater numbers in imports and exports between and among treaty countries have also grown. A principal aim of these agreements has been to provide a uniform set of rules for the participant investors from the respective member countries. In doing so, the intent is to create a more equitable atmosphere in which to do business, while also increasing trade, creating opportunities for jobs across-borders, giving incentive to the creation of new businesses, and providing a positive relationship between and among the parties. While making it easier for legitimate business, it also makes it easier for illegitimate business as well.

The lofty goals of these myriad trade agreements are often couched in terms of the well-intentioned aspirations of each agreement. As an example, the Preamble of the NAFTA states:

The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

- STRENGTHEN the special bonds of friendship and cooperation among their nations;
- CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;
- CREATE an expanded and secure market for the goods and services produced in their territories;
- REDUCE distortions to trade;
- ESTABLISH clear and mutually advantageous rules governing their trade;

---

<sup>39</sup> See, e.g., the NAFTA Chapter 12 Annex 1210.05, Professional Services Section B Foreign Legal Consultants.

<sup>40</sup> See generally, Lauren R. Frank, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957 (2000).



- ENSURE a predictable commercial framework for business planning and investment;
- BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;
- ENHANCE the competitiveness of their firms in global markets;
- FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;
- CREATE new employment opportunities and improve working conditions and living standards in their respective territories;
- UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
- PRESERVE their flexibility to safeguard the public welfare;
- PROMOTE sustainable development;
- STRENGTHEN the development and enforcement of environmental laws and regulations; and
- PROTECT, enhance and enforce basic workers' rights;

HAVE AGREED as follows: . . .<sup>41</sup>

Unfortunately, goals such as these are not always as easily, nor as swiftly, attained as their drafters may have intended. Reservations contained in the agreements or documents and existing legislation that is incorporated by reference, or specific limitations within the agreements themselves, create challenges to the effective cross-border representation of clients.<sup>42</sup>

A recent example of these challenges is contained in the North America Free Trade Agreement.<sup>43</sup> In Chapter 21, the NAFTA creates a specific exception for National Security.<sup>44</sup> Through this reference, the

<sup>41</sup> North American Free Trade Agreement, *available at* [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=79](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=79) (last visited Nov. 20, 2006).

<sup>42</sup> *See* Vienna Convention on the Law of Treaties art. 19-23, Jan. 27, 1980, 8 I.L.M. 679.

<sup>43</sup> NAFTA, *supra* note 28.

<sup>44</sup> North American Free Trade Agreement, Ch. 21, art. 2102, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

countries agreed that its provisions would not limit the ability of each party state to develop legislation intended to protect its citizens and to provide for the national security of the country. Such an act is the USA PATRIOT Act. Its enactment, specifically provided for in the text of the NAFTA, explicitly requires a variety of disclosures and reports to be made to the U.S. federal government. In doing so, an attorney in a NAFTA-based transaction has the potential to be placed in the awkward position of having to disclose confidential information of the client. It is this anomaly which will be discussed throughout these pages.

### BACKGROUND ON THE ADOPTION OF THE USA PATRIOT ACT

Christened the "USA PATRIOT Act," the acronym stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."<sup>45</sup> The Act attempts to provide a variety of means for fighting terrorism in areas that include banking, financing, counterfeiting, money-laundering, law enforcement, hazmat (hazardous materials) licenses, electronic communications, cyber-terrorism, and intelligence surveillance. It was rapidly adopted amidst a swirl of security concerns following the September 11, 2001 attacks in New York, Pennsylvania, and the Pentagon. For an Act that covered so many diverse provisions, it may have seemed that the six-week time frame from introduction, through debate, to adoption, to final signature, was inadequate. Yet, many of the provisions proposed and adopted had been on the table for quite some time prior to the debate.<sup>46</sup> Many provisions, in particular those involving money laundering, had been recognized as needed and were considered previously.<sup>47</sup> The circumstances in the country and the atmosphere in Congress in the fall of 2001 led to the adoption of many of those measures.

When first debated, the flurry of discussion focused on a common theme—the concern over the balance between safety and freedom. Sen. John Edwards (D-NC) stated at the time, "In the aftermath of September 11, we face two difficult and delicate tasks: to strengthen our security in order to prevent future terrorist attacks, and at the same time, to safeguard the individual liberties that make America a beacon of freedom to all the world."<sup>48</sup> Sen. Maria Cantwell (D-WA) expressed concerns, but ultimately stated:

---

<sup>45</sup> Patriot Act, note 1, § 1.

<sup>46</sup> Opening Statement of Rep. James A. Leach, Chairman, House Banking and Financial Services Committee Markup of H.R. 3886, June 8, 2002, *available at* <http://financialservices.house.gov/banking/68001ea.htm>.

<sup>47</sup> *Id.*

<sup>48</sup> 107 CONG. REC. S10589 (daily ed. Oct. 11, 2001) (statement of Sen. Edwards, N.C.).

We can all agree that the events on September 11 have focused America on the fight against terrorism, and we applaud the efforts of the administration in the weeks since that tragic day. Clearly, there were failures in our investigative network, and this legislation will help avoid such failures in the future, allowing greater sharing of information that could foil terrorists before they carry out their brutal schemes against innocent civilians.<sup>46</sup>

Sen. Patrick Leahy (D-VT) agreed, saying:

In negotiations with the Administration, I did my best to strike a reasonable balance between the need to address the threat of terrorism, which we all keenly feel at the present time, and the need to protect our constitutional freedoms. Despite my misgivings, I acquiesced in some of the Administration's proposals to move the legislative process forward. That progress has been rewarded by a bill we have been able to improve further during discussions over the last two weeks.<sup>47</sup>

It was through these discussions and as a result of these debates that many of the concerns were addressed and sufficiently allayed so that the end product passed overwhelmingly in both the U.S. House of Representatives and the U.S. Senate, and was signed into law on October 26, 2001. One area of interest that was discussed at length throughout the debates involved the provisions of the Act that permitted the sharing of information between law enforcement and intelligence agencies. Title II of the Act deals extensively with "Enhanced Surveillance Procedures," creating new authority on the part of criminal investigative agencies to share information, including Grand Jury information,<sup>48</sup> Foreign Intelligence information,<sup>49</sup> and certain wire, oral, and electronic communications.<sup>50</sup>

This original USA PATRIOT Act adopted in 2001 added or amended nearly 240 sections and acts of the US Code.<sup>51</sup> Amended sections can be found

---

<sup>46</sup> 107 CONG. REC. S11029 (daily ed. Oct. 25, 2001) (statement of Sen. Cantwell, Wash.).

<sup>47</sup> 107 CONG. REC. S10990 (daily ed. Oct. 25, 2001) (statement by Sen. Leahy, VT).

<sup>48</sup> USA PATRIOT Act, tit. 2, § 203.

<sup>49</sup> *Id.*

<sup>50</sup> USA PATRIOT Act, tit. 2.

<sup>51</sup> *Id.*

in the Antiterrorism and Effective Death Penalty Act of 1996,<sup>52</sup> the Foreign Intelligence Surveillance Act of 1978,<sup>53</sup> the Controlled Substances Act,<sup>54</sup> the Bank Holding Company Act of 1956,<sup>55</sup> the Federal Deposit Insurance Act,<sup>56</sup> the Right to Financial Privacy Act,<sup>57</sup> the Federal Reserve Act,<sup>58</sup> the Immigration and Nationality Act,<sup>59</sup> the DNA Analysis Backlog Elimination Act of 2000,<sup>60</sup> the Fair Credit Reporting Act,<sup>61</sup> the National Education Statistics Act of 1994,<sup>62</sup> the Omnibus Crime Control and Safe Streets Act of 1968,<sup>63</sup> the Victims of Crime Act of 1984,<sup>64</sup> the National Security Act of 1947,<sup>65</sup> and the Crime Identification Technology Act of 1998,<sup>66</sup> as well as many others, including significant amendments to Title 18 of the U.S. Code dealing with Crimes.<sup>67</sup>

It also added new Acts, including the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001,<sup>68</sup> the First Responders Assistance Act,<sup>69</sup> and the Crimes Against Charitable Americans Act of 2001.<sup>70</sup>

Many of these sections and acts were subject to sunset provisions incorporated into the original text. In 2005, the sunset provisions were addressed and many of these were made permanent and even more provisions

<sup>52</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>53</sup> 50 U.S.C. § 1801 (2007).

<sup>54</sup> 21 U.S.C. § 853 (2006).

<sup>55</sup> 12 U.S.C. § 1842 (2007).

<sup>56</sup> 12 U.S.C. § 1828 (2007).

<sup>57</sup> 12 U.S.C. § 3401 et seq. (2007).

<sup>58</sup> 12 U.S.C. § 248 (2007).

<sup>59</sup> 8 U.S.C. § 1101 et. seq. (2007).

<sup>60</sup> 42 U.S.C. § 14135a(d)(2) (2007).

<sup>61</sup> 15 U.S.C. § 1681u (2007).

<sup>62</sup> 20 U.S.C. § 9007, *repealed by* Pub. L. No. 107-279, 116 Stat. 1985 (2002).

<sup>63</sup> 42 U.S.C. § 3796 (2007).

<sup>64</sup> 42 U.S.C. § 10601(b) (2007).

<sup>65</sup> 50 U.S.C. § 401 (2007).

<sup>66</sup> 42 U.S.C. § 14601 (2007).

<sup>67</sup> 18 U.S.C. §§ 7, 81, 119, 121, 175, 470-474, 474(a)-(b), 476-484, 493, 516(1), 930(c), 981, 981(a)(1)(A)-(a)(1)(B), 982(a)(1), 1029-1030, 1362-1363, 1366, 1956, 1960- 1961(a), 1992-1993, 2155(a), 2331-2332, 2339, 2340A, 2466, 2510-2511, 2516(1)(c), 2520, 2702-2703, 2707, 2709(b), 3077(1), 3103a, 3121(c), 3123(b)(1), 3123(d)(2), 3127, 3286, 3583 (2007).

<sup>68</sup> 31 U.S.C. § 5301 et. seq. (2006) (also amending the Bank Secrecy Act, 31 U.S.C. § 5311 (2006)).

<sup>69</sup> 28 U.S.C. § 509 (2006).

<sup>70</sup> 15 U.S.C. § 6101 (2007).

were added.<sup>71</sup> On March 9, 2006, President Bush signed into law the "USA PATRIOT Improvement and Reauthorization Act of 2005."<sup>72</sup> Sunset provisions of the original USA PATRIOT Act were extended in January 2006<sup>73</sup> and then again in March 2006.<sup>74</sup> Section 224 of the original Act, a primary sunset provision, was expressly repealed by the new PATRIOT Act.<sup>75</sup>

The interconnectedness of terrorism with this and other criminal or civil rules continues to be found. Immigration issues found in the Immigration and Nationality Act are a fertile ground for these connections. An area of particular concern has involved the necessity of protecting the border. Title IV of the USA PATRIOT Act deals specifically with this issue.<sup>76</sup> Looking also to the northern border, the Act authorizes a significant increase in funding for Immigration and Nationality personnel on the northern border with Canada, tripling the number of Border Patrol personnel over the previously authorized number.<sup>77</sup>

Data sharing is also critically important when enhancing national security. The Act specifically authorizes access to "criminal history record information contained in the National Crime Information Center's Interstate Identification Index (NCIC-III), Wanted Persons File, and to any other files maintained by the National Crime Information Center . . . for the purpose of determining whether or not a visa applicant or applicant for admission has a criminal history record indexed in any such file."<sup>78</sup> The information is provided in the form of an extract and is not the complete record. Periodic updates of these extracts are required to be provided by the Federal Bureau of Investigation to the Department of State and the U.S. Citizenship and Immigration Services (USCIS).<sup>79</sup> As a condition of receiving the information, the Department of State was required to implement safeguards regarding the

---

<sup>71</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat 192 (2006); H.R. 3199, 109<sup>th</sup> Cong. (2006) (enacted).

<sup>72</sup> *Id.*

<sup>73</sup> H.R. 4659, 109th Cong. (2006). Extension of Certain Provisions of the USA PATRIOT Act seeks to amend the USA Patriot Act by proposing "Section 224(a) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Public Law 107-56; 115 Stat. 295) is amended by striking 'February 3, 2006' and inserting 'March 10, 2006'.[sic]" adopted by Congress on January 3, 2006, signed into law by President Bush on February 3, 2006.

<sup>74</sup> *Infra* note 74.

<sup>75</sup> *Id.* § 102(a).

<sup>76</sup> *Supra* note 1, tit. 4.

<sup>77</sup> *Id.* § 402.

<sup>78</sup> *Id.* § 403(b)(1).

<sup>79</sup> *Id.* § 403(b)(3).

conditions for use of the extracts received. These safeguards are intended “(A) to limit the dissemination of such information; (B) to ensure that such information is used solely to determine whether or not to issue a visa to an alien or to admit an alien to the United States; (C) to ensure the security, confidentiality, and destruction of such information; and (D) to protect any privacy rights of individuals who are subjects of such information.”<sup>80</sup>

These safeguards are only one of many incorporated in the Act. It was the inclusion of this and other safeguards that led to the relative ease in passing the Act so quickly in 2001. Senator John Edwards expressed his concerns at the time, saying, “For example, the act says that under specified conditions, the FBI may share wiretap and grand jury information related to foreign- and counter-intelligence. I appreciate concerns that this information-sharing authority could be abused. Like Chairman Leahy, I would have preferred to see greater judicial oversight of these data exchanges. But I also believe we simply cannot prevail in the battle against terrorism if the right hand of our government has no idea what the left hand is doing.”<sup>81</sup> As noted by U.S. Attorney General Gonzales, “there is extensive judicial and congressional oversight of the tools provided by the Act – not to mention the rigorous protections provided by the Justice Department’s own binding procedures and policies.”<sup>82</sup> Despite this confidence expressed by the executive branch, the 9/11 Commission cautioned that, “while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This enhanced shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.”<sup>83</sup>

In the 2003 *Center for Nat’l Sec. Studies v. U.S. Dep’t of Justice* case, various interest groups brought a Freedom of Information Act (FOIA) action against the Department of Justice seeking release of information regarding post-September 11 detainees.<sup>84</sup> The Center sought release of the information, including names, citizenship status, location of arrest, place of detention, date of detention/arrest/charging/release, and additional identifying information

---

<sup>80</sup> *Id.* § 403(d)(2).

<sup>81</sup> *Uniting and Strengthening America Act: Hearing on S. 10547*, 107th Cong. S10589-90 (2001) (statement by Sen. John Edwards-N.C.).

<sup>82</sup> Gonzales, *supra* note 21.

<sup>83</sup> NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *The 9/11 Commission Report: Final Report of the Nat’l Comm’n on Terrorist Attacks Upon the United States* 394 (2004) [hereinafter 9/11 Commission Report], available at <http://www.9-11commission.gov/report/911report.pdf>.

<sup>84</sup> *Center for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

about the detainees. The purpose of the request was to verify “press reports about mistreatment of the detainees.”<sup>85</sup> The court denied the request, upholding the right of the Department of Justice to withhold the requested information. In doing so, the court stated that it was “reasonable” for the government to expect that “disclosure of the detainees’ names would enable Al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it.”<sup>86</sup> The court further rejected “any attempt to artificially limit the long-recognized deference to the executive on national security issues.”<sup>87</sup>

With regard to the FOIA, “[t]he courts must defer to the executive on decisions of national security.”<sup>88</sup> Further, under the FOIA, the names of detainees and their lawyers were protected from disclosure, as were the information about “dates and locations of arrest, detention, and release” for each detainee.<sup>89</sup>

The court reiterated the rule from *Houchins v. KQED, Inc.*<sup>90</sup> that the First Amendment does not “mandate[] a right of access to government information or sources for information within the government’s control.”<sup>91</sup> The court then examined the exception to the *Houchins* rule, found in *Richmond Newspapers, Inc. v. West Virginia*.<sup>92</sup> It applied the “experience and logic” test of *Richmond Newspapers* to assess the accessibility of the information. In further finding for the Justice Department, the court stated, “We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power – the investigation and prevention of terrorism.”<sup>93</sup>

The court even addressed a common law claim by the Center seeking the disclosure, stating:

[i]t would make no sense for Congress to have enacted the balanced scheme of disclosure and exemption, and for the [C]ourt to carefully apply that statutory scheme, and then

---

<sup>85</sup> *Id.* at 992.

<sup>86</sup> *Id.* at 928.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 932.

<sup>89</sup> *Id.* at 933.

<sup>90</sup> *Houchins v. KQED*, 438 U.S. 1 (1978)

<sup>91</sup> Center for Nat’l Sec. Studies, 331 F.3d at 934 (citing *Houchins*, 438 U.S. at 15).

<sup>92</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>93</sup> Center for Nat’l Sec. Studies, 331 F.3d at 918.

to turn and determine that the statute had no effect on a preexisting common law right of access. Congress has provided a carefully calibrated statutory scheme, balancing the benefits and harms of disclosure. That scheme preempts any preexisting common law right.<sup>94</sup>

Curiously, the dissent by Judge Tatel identifies “uniquely compelling governmental interests [are] . . . at stake: the government’s need to respond to the September 11 attacks—unquestionably the worst ever acts of terrorism on American soil—and its ability to defend the nation against future acts of terrorism.”<sup>95</sup> He goes on to say that “although this court overlooks it, there is another compelling interest at stake in this case: the public’s interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation.”<sup>96</sup> The allusion to the equal protection strict scrutiny test and its compelling state interest prong is an intriguing reference, particularly in matters of national security. Holding to this higher level of scrutiny will certainly provide greater protection for individual rights, yet it may erode the ability of the government to give societal protection from terrorist harm. This is the critical balance that cannot be easily reached.

The sections most relevant to these discussions are found, generally, in Title III of the original USA PATRIOT Act and affect, primarily, Titles 31 and 18 of the United States Code.

The “Findings and Purposes” section of the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001<sup>97</sup> set forth the foundation of the actions taken by Congress in its enactment.<sup>98</sup> Outlining the consequences of money laundering, it identifies the goals it intends to reach and the challenges it intends to overcome. It specifically refers to the challenges of dealing with transnational financial transactions in the context of money laundering. In part, the section states, “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.”<sup>99</sup> Several provisions of Title III of the USA PATRIOT Act attempt to address this lack of transparency through additional requirements of

---

<sup>94</sup> *Id.* at 937.

<sup>95</sup> *Id.* at 937 (Tatel, J., dissenting).

<sup>96</sup> *Id.*

<sup>97</sup> International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Pub. L. No. 107-56, § 302 (2001).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, § 302(a)(2).



disclosure. Prior to the enactment of the USA PATRIOT Act, disclosure was already required.<sup>100</sup> Financial institutions were required to submit "Suspicious Activity Reports," known as "SARs," to the Financial Crimes Enforcement Network of the Department of the Treasury, or FinCEN.<sup>101</sup>

The USA PATRIOT Act expanded the application of this mandate, subjecting additional institutions to the requirement.<sup>102</sup> Further, Section 5318 of the Bank Secrecy Act was amended to require disclosure of "information relating to beneficial ownership."<sup>103</sup> The new section, titled, "International Counter Money Laundering and Related Measures," outlines a series of special measures that the Secretary can impose if it finds that "reasonable grounds exist for concluding that a jurisdiction outside of the United States ... is of primary money laundering concern."<sup>104</sup> Special measures will include additional extensive recordkeeping and reporting.<sup>105</sup>

Congress has made efforts to address some of the privacy concerns relating to financial records. In *United States v. Miller*<sup>106</sup> in 1976, the U.S. Supreme Court pronounced that a customer's financial records belonged not to the customer but to the financial institution, making the information more readily accessible. Congress, in response, enacted the Right to Financial Privacy Act,<sup>107</sup> effectively overruling the decision in *Miller*. As a result, the Act provided at least some protection for the financial information held by financial institutions on behalf of their customers. The Right to Financial Privacy Act, however, is not all-inclusive. Information which is not protected under the RFPA, and which can be required to be reported on a SAR includes:

- (1) names of any individuals or corporate entities involved in a suspicious transaction;
- (2) account numbers;
- (3) home and business addresses;
- (4) social security numbers;
- (5) interest paid on accounts;
- (6) location of the branch or office where the suspicious transaction occurred;

---

<sup>100</sup> Bank Secrecy Act, 31 U.S.C. 5301 *et seq.* (1982).

<sup>101</sup> 12 C.F.R. § 21.11 (2007); 12 C.F.R. § 208.62 (2007).

<sup>102</sup> 31 U.S.C. § 5312(c) (2006). The new provisions now apply to credit unions, futures commission merchants, commodity trading advisors, and commodity pool operators.

<sup>103</sup> 31 U.S.C. § 5318 (1982), amended by 31 U.S.C. § 5318A (2006).

<sup>104</sup> 31 U.S.C. § 5318A(a)(1).

<sup>105</sup> § 5318A(b)-(d).

<sup>106</sup> *United States v. Miller*, 425 U.S. 435 (1976).

<sup>107</sup> Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (2006).

- (7) specification of the offense that the financial institution believes has been committed; and
- (8) a description of the activities that give rise to the financial institution's suspicion.<sup>108</sup>

When submitted on a SAR, this information is confidential as between the financial institution and the FinCEN. It is not subject to disclosure. However, that restriction is not absolute. In the *BizCapital* case, decided in October 2006, BizCapital sought the disclosure from the Office of the Controller of the Currency of the United States ("OCC") of SARs that had been filed with the OCC by Union Planters National Bank.<sup>109</sup> The OCC, in an administrative decision, denied BizCapital's request for disclosure of the SAR, stating that the SAR was absolutely privileged. BizCapital appealed to the U.S. District Court for the Eastern District of Louisiana who ordered disclosure of the SAR, granting summary judgment in favor of the plaintiff, BizCapital. In so doing, it expressly rejected the OCC's finding of "absolute privilege." On appeal, the 5<sup>th</sup> Circuit U.S. Court of Appeals vacated the District Court's summary judgment and remanded the case for review based on the regulations. It is unclear at this writing what the District Court may have done, however, the decision of the Court of Appeals gave it much direction. The court cited 12 C.F.R. §4.33(a)(3), which describes the method by which a party to an adversarial matter may request information held by the OCC. Therefore, if the information is in the hands of the OCC, as it is following the submission of a SAR, then it can be requested. The regulation specifically requires the requester to:

- (A) Show that the information is relevant to the purpose for which it is sought;
- (B) Show that other evidence reasonably suited to the requester's needs is not available from any other source;
- (C) Show that the need for the information outweighs the public interest considerations in maintaining the confidentiality of the OCC information and outweighs the burden on the OCC to produce the information,
- (D) Explain how the issues in the case and the status of the case warrant that the OCC allow disclosure; and
- (E) Identify any other issue that may bear on the question of waiver of privilege by the OCC.<sup>110</sup>

---

<sup>108</sup> *Id.*

<sup>109</sup> *Bizcapital Bus. & Indus. Dev. Corp. v. Office of the Comptroller of the Currency of the United States*, 406 F. Supp. 2d 688 (E.D. La. 2005), *vacated in part, remanded*, 467 F.3d 871 (5th Cir. 2006).

<sup>110</sup> *BizCapital*, 467 F.3d at 874 (citing 12 C.F.R. § 4.33(a)(3)).

This specificity leaves room for the lower court to still determine that the SAR should not be disclosed. However, it is not an automatic or absolute privilege relating to any information contained in the document. The appellate court did make clear to whom an absolute prohibition would apply, stating:

[t]he Court recognizes that the Bank Secrecy Act, the OCC's regulations, and case law establish an absolute prohibition on financial institutions from disclosing to third parties information about the filing of a SAR. Thus, plaintiff is prohibited from asking [the bank] about any SARs it might have filed.<sup>111</sup>

This does not, however, provide any real protection of the information, since it can be accessed directly from the agency to which it was submitted if the regulatory requirements are met.

In *Wuliger*,<sup>112</sup> the court addressed the accessibility of SARs in the context of a receivership. The plaintiff, Wuliger, was the receiver for Viatical Escrow Services and its escrow agent, Capwill. Wuliger sued the Office of the Comptroller of Currency (OCC) seeking access to non-public information contained in SARs that had been filed with the OCC by the banks in which Capwill and Viatical Escrow Services held its funds. The court, in discussing the SARs requirements, noted the mandatory requirements of filing and the penalties to which a non-complying financial institution would be subject if it failed to file the necessary reports.<sup>113</sup> The court further quoted from the regulations, stating that "SARs are confidential. Any national bank or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR shall decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared to or filed."<sup>114</sup>

However, even acknowledging this confidentiality as between the filing financial institution and any person, the regulations left open the question of accessibility of the SARs while in the hands of the agency.<sup>115</sup>

These cases and others referenced herein share a common thread. All in one way or another involve money laundering.

---

<sup>111</sup> *Id.* at 873.

<sup>112</sup> *Wuliger v. Office of the Comptroller of Currency*, 394 F.Supp.2d 1009 (N.D. Ohio 2005).

<sup>113</sup> *Id.* at 1013 (citing USA PATRIOT Act, § 505).

<sup>114</sup> *Id.* at 1014 (quoting 12 C.F.R. §12.11(k)).

<sup>115</sup> 12 C.F.R. § 4.33 (2007). See *BizCapital supra* note 111.

### DEFINING MONEY LAUNDERING

Defining money laundering is much like defining pornography – you know it when you see it, but if you have to describe it, the explanation becomes quite long and involved. Unfortunately, this is inadequate in addressing the problem of money laundering. Essentially, it involves moving money through financial transactions in an effort to disguise its origin.

According to the Financial Action Task Force:

[t]here are three main methods by which criminal organizations and terrorist financiers move money for the purpose of disguising its origins and integrating it into the formal economy. The first is through the use of the financial system; the second involves the physical movement of money (e.g. through the use of cash couriers); and the third is through the physical movement of goods through the trade system.<sup>116</sup>

The federal statutes take the approach of defining the crime by its result and its methodology rather than its description. The official definition is found in 18 U.S.C. §1976 (2007), which outlines in detail what a person can and cannot do, before, during, and after a financial transaction, and if done or not done, will result in a violation. Limitations, explanations, and incorporated references to other statutes make the statute unwieldy, awkward, and challenging to comprehend. It is further complicated by the extremely lengthy definition of “specified unlawful activity” included in the statute.<sup>117</sup> The statute states, in part:

- (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
  - (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
  - (ii)[section omitted]
- (B) knowing that the transaction is designed in whole or in part –

---

<sup>116</sup> FATF•GAFI, TRADE BASED MONEY LAUNDERING 5 (2006) (providing a lengthy and graphic depiction of money laundering).

<sup>117</sup> 18 U.S.C. § 1976(c)(7) (2007).

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or  
(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.<sup>118</sup>

This portion of the statute describes the traditional meaning of “money laundering,” – that money knowingly derived from illicit activity that a party attempts to place into legitimate accounts, in an effort to either conceal its source or to continue to promote the illicit activity, is conducting “money laundering” activities. This traditional view focuses on the source of the money, and the attempt to conceal or hide that source.

The statute doesn’t end with this explanation, however. It goes on to provide a much broader application of the term, “money laundering,” when it states:

- (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –  
(A) with the intent to promote the carrying on of specified unlawful activity; or  
(B) [section omitted]

This section provides a much broader definition of money laundering. It, in fact, takes legitimate activity and makes it illicit based on its intended use, not its source. The provision is further complicated when the Act incorporates references to intended uses by terrorist organizations.<sup>119</sup>

---

<sup>118</sup> 18 U.S.C. § 1956(a)(A) (2006), *amended by* Pub. L. 109-177 (2006).

<sup>119</sup> 18 U.S.C. § 1956(c)(7) (2006).

### DEFINING TERRORISM

To apply the provisions of the money laundering prohibitions, it is essential to understand how the term is defined throughout the relevant statutes. The USA PATRIOT Act and the USA PATRIOT Improvement and Reauthorization Act implemented vast changes in existing rules and created a wide range of new rules. Most relevant to the discussion here are the sections which deal specifically with money-laundering and disclosure requirements as they relate to the requirements of attorneys. The primary focus here will be on the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 which, in addition to creating new requirements, also added sweeping amendments to the Bank Secrecy Act.<sup>120</sup>

An initial challenge of the USA PATRIOT Act was to make an effort to define "terrorism." In order to establish its parameters and reach, it was necessary for Congress to define terrorism for purposes of the Act and its provisions. The existing definition of "international terrorism" is found in Title 18 of the U.S. Code which states, in part:

- (1) the term "international terrorism" means activities that -
  - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
  - (B) appear to be intended -
    - (i) to intimidate or coerce a civilian population;
    - (ii) to influence the policy of a government by intimidation or coercion; or
    - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
  - (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce,

---

<sup>120</sup> 31 U.S.C. §§ 5311 - 5330 (2001).

or the locale in which their perpetrators operate or seek asylum;<sup>121</sup>

The USA PATRIOT Act provided a slight modification, seen in section (1)(B)(iii) above.<sup>122</sup> Congress wanted to assure that conduct involving "mass destruction" was also a specific available criteria in the definition. This added precision clarified that the acts of September 11, 2001 clearly came within the ambit of the definition.

As for statistical purposes, the U.S. Code defines terrorism to mean, "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."<sup>123</sup> Premeditation requires an existing intent at the time of the act.<sup>124</sup> The element of political motivation excludes acts taken purely for "monetary gain or personal vengeance."<sup>125</sup> Though ordinary crimes may be perpetrated by terrorists, when committed solely for non-political purposes, they do not come within the meaning of the term. This definition requires that the targets be "noncombatants," or, simply put, civilians who are not engaged in combat. The final element of this statistical definition indicates that a single person acting alone cannot be a terrorist. Without reference to a group or an agency, the lone actor in a "premeditated politically motivated" act of "violence perpetrated against noncombatant targets" does not qualify as terrorism for statistical purposes.

The difficulty of identifying an appropriate and relevant definition of "terrorism" is further complicated by the lack of a universal definition of the term. Searching for a definition of terrorism has been called a "quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed."<sup>126</sup> Unfortunately, a universal definition of terrorism has proven just as elusive as the finding of the Grail.

The United Nations in 2004 listed forty-one individual treaties, protocols, conventions, declarations, and resolutions dealing with various

---

<sup>121</sup> 18 U.S.C. § 2331 (2001).

<sup>122</sup> 18 U.S.C. § 2331(1)(B)(iii) (2001), *amended by* USA PATRIOT Act, tit. 8, sec. 802.

<sup>123</sup> 22 U.S.C. § 2656f (c)(2)(d)(1) (2004).

<sup>124</sup> PAUL R. PILLAR, *TERRORISM AND U.S. FOREIGN POLICY* (Brookings Institution Press 2001).

<sup>125</sup> *Id.* at 13.

<sup>126</sup> Geoffrey Levitt, *Is "Terrorism" Worth Defining?*, 13 OHIO N.U.L.REV. 97, 97 (1986).

aspects of terrorism.<sup>127</sup> Many of these instruments focused on specific acts related to terrorism such as airline hijackings and piracy,<sup>128</sup> nuclear weapons,<sup>129</sup> hostage-taking,<sup>130</sup> maritime acts,<sup>131</sup> explosives and bombings,<sup>132</sup> and the treatment of persons affected by armed conflicts.<sup>133</sup> Other instruments speak more generally about terrorism and offer their own definitions. Though similar in many ways, the continuing debate about an exact definition for the term remains.<sup>134</sup>

Unfortunately, the lack of a universal definition does not lessen the responsibility of lawyers and other actors in the legal system to abide by the

---

<sup>127</sup> U.N DEPT. OF POLITICAL AFFAIRS, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (2d ed. 2004).

<sup>128</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1988 U.S.T. LEXIS 199.

<sup>129</sup> Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. 11080.

<sup>130</sup> International Convention against the Taking of Hostages, Dec. 18, 1979, T.I.A.S. 11081; Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U.S.T. 1975; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949.

<sup>131</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and The Accompanying Protocol For The Suppression Of Unlawful Acts Against The Safety of Fixed Platforms Located On The Continental Shelf, Mar. 10, 1988, 1988 U.S.T. LEXIS 198.

<sup>132</sup> Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 1991 U.S.T. LEXIS 175; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 1998 U.S.T. LEXIS 204.

<sup>133</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (often referred to as the Geneva Conventions).

<sup>134</sup> For further discussions on the challenges of defining terrorism, see, e.g., Ben Golder & George Williams, *What is 'Terrorism'? Problems of Definition*, 27 U. NEW SOUTH WALES L. J. 270 (2004); Alex Schmid, *Terrorism – The Definitional Problem*, 36 CASE W. RES. J. INT'L LAW 375 (2004); Sami Zeidan, *Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post 9/11 World*, 29 HASTINGS INT'L & COMP. L. REV. 215 (2006).



requirements imposed by provisions such as those implemented in the USA PATRIOT Act. It is incumbent on the affected party to use the definition as set forth in the Act until an opportunity to litigate the definition appears. At this time, no government, court, world organization, or other entity has chosen to take on the task of shaping a universal definition, leaving the application of an imperfect definition as the only recourse. Further, it is well beyond the scope of this article to attempt any such task.

Especially when dealing with international clients, it is incumbent on the U.S. attorney to distinguish and clarify for him- or herself that the transaction with which they are assisting their client does not fall within the boundaries of the definition found in the money laundering statutes.<sup>135</sup> Other definitions, though interesting academically, will not be applicable.<sup>136</sup>

### CONFLICTING REQUIREMENTS

To become an attorney in nearly every jurisdiction in the United States, in addition to passing the requisite state bar exam, an aspiring lawyer must take and pass the Multi-State Professional Ethics exam, or MPRE.<sup>137</sup> The test focuses on the American Bar Association's Model Rules of Professional Conduct<sup>138</sup> which are the foundation for most rules of professional conduct or

---

<sup>135</sup> 18 U.S.C. §1956 (2006).

<sup>136</sup> For further information relating to confidentiality, see Jill M. Troxel, *Note, Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship*, 24 REV. LITIG. 637 (2005).

<sup>137</sup> All but three US state jurisdictions (Washington, Maryland, and Wisconsin) require bar applicants to take the Multistate Professional Responsibility Exam. See National Conference of Bar Examiners, <http://www.ncbex.org> (follow "MPRE" hyperlink; then follow "Jurisdictions using MPRE" hyperlink) (last visited Nov. 10, 2007).

<sup>138</sup> According to the American Bar Association website, "[t]he ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most states. Before the adoption of the Model Rules, the ABA model was the 1969 Model Code of Professional Responsibility," [www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) (last visited Nov. 10, 2007). The most recent revision of the rules, approved in 2002, has been the source of the recent changes to the Florida Bar Rules of Professional Responsibility. According to the website of the MPRE, "[t]he law governing the conduct of lawyers is based on the disciplinary rules of professional conduct currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct, and the ABA Model Code of Judicial Conduct, as well as controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules." *Supra* National Conference of Bar Examiners, note 140, (follow "MPRE" hyperlink; then follow "Descriptions of MPRE" hyperlink).

professional responsibility in place in nearly every state in the United States. It is in these rules where the requirement for client confidentiality can be found.

Rule 1.6 of the ABA Model Rules states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."<sup>139</sup> The mandatory language of the rule indicates that the requirement cannot be violated except in very specific circumstances. And, even when those circumstances exist, the disclosure is permissible, not required, and is permitted only "to the extent the lawyer reasonably believes" it to be necessary.<sup>140</sup> The exceptions include the following:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.<sup>141</sup>

This confidentiality is a cornerstone of the attorney-client relationship. In the comment to Rule 1.6, American Bar Association Model Rules of Professional Conduct, the ABA states:

---

<sup>139</sup> MODEL CODE OF PROF'L CONDUCT R. 1.6(a) (2002).

<sup>140</sup> MODEL CODE OF PROF'L CONDUCT R. 1.6(b) (2002).

<sup>141</sup> *Id.*

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.... This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.<sup>142</sup>

The attorney-client relationship can arise inadvertently and it is possible to create an attorney-client relationship (with all the attendant rights and responsibilities) without your knowledge or approval. Proof is in the eye of the beholder – did the client believe that such a relationship was formed? Were confidences divulged? Was any work performed or agreed to be performed? Regardless of the existence of a written document or the payment (or non-payment) of a fee, such a relationship may be created.<sup>143</sup> Once the relationship is created, confidentiality is required.<sup>144</sup>

Confidentiality is the broad concept applied to the relationship between attorney and client, and the communications that take place between them. Within this category of “confidential information” is found a narrower category of protected communications, that which is covered by the attorney-client privilege.

---

<sup>142</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

<sup>143</sup> See, e.g., *U.S. v. Austin*, 416 F.3d 1016 (9th Cir. 2005) (quoting *U.S. v. Henke*, 222 F. 3d 633, 637) (stating that “[a] joint defense agreement establishes an implied attorney-client relationship with the co-defendant”).

<sup>144</sup> See, e.g., *Old Tampa Bay Enter., Inc. v. Gen. Elec. Co.*, 745 So.2d 517 (Ct. App. Fla. 1999) (the question of whether or not an attorney who represented one defendant in an action is subject to disqualification in a later case, involving the same matter. The court held that, while the lawyer was not disqualified, he had to maintain the confidentiality of all information disclosed during joint defense sessions that related to joint defenses). See also *Potomac Elec. Power Co. v. Leavitt*, 142 F. Appx. 154, 2005 U.S. App LEXIS 14897 (4th Cir. 2005) (discussing confidentiality in the context of an implied attorney-client relationship).

The critically important rule of confidentiality incorporates the related, but far narrower, evidentiary rule—the attorney-client privilege.<sup>145</sup> The Federal Rules of Evidence do not specifically adopt the attorney-client privilege but leave the application of such a privilege within the purview of the courts. The rule states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.<sup>146</sup>

As early as 1888, the U.S. Supreme Court recognized the privilege, stating:

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.<sup>147</sup>

The U.S. Supreme Court has found the attorney-client privilege to be so important that it even survives the death of the client.<sup>148</sup>

With the advent of the USA PATRIOT Act amendments to the Bank Secrecy Act, some of the requirements of confidentiality and privilege may be strained, and a requirement to breach an ethical obligation may be

---

<sup>145</sup> FED. R. EVID. 501.

<sup>146</sup> *Id.*

<sup>147</sup> *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

<sup>148</sup> *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

presented.<sup>149</sup> These competing requirements or obligations can be easily addressed by simply blindly following the letter of the law, while ignoring the underlying purpose of the rule. The amendments further impose a responsibility on attorneys to become watchdogs rather than advocates, and a responsibility on financial officers to be policemen instead of bankers.<sup>150</sup>

Specifically, the amendments require an attorney who is either establishing an account on behalf of his client or is assisting with other financial matters for the client to provide information to a financial institution regarding his client, for example as it pertains to the beneficial ownership of the account.<sup>151</sup>

The financial institution may in turn disclose this information to a governmental agency if it has suspicion that the transaction may fit within the definitions set forth by the USA PATRIOT Act or other relevant guidelines.<sup>152</sup> This uncertainty regarding the confidentiality of information passing through the hands of the attorney should give every attorney pause.

The apparent paradox of these conflicting duties creates a problem for the attorney. Should the attorney breach the confidentiality of the attorney-client relationship, forfeiting the confidence and good will that should exist between the two? Or, should the attorney not disclose, risking a criminal charge for failing to comply with the requirements of the act and being tainted with the assumption of having provided assistance to a terrorist? Neither choice, phrased in this fashion, is a good one. Yet, the choice is one that many attorneys may face in the coming months and years as increased international trade creates a corresponding need for legal representation on a global basis, since the applicability of the rules do not stop at the borders.

### EXTRATERRITORIALITY

Throughout the USA PATRIOT Act and its amendments to the Bank Secrecy Act there are explicit references to the mandatory extraterritorial application of the provisions of the Act.<sup>153</sup> This explicitly represents the recognition of Congress that money laundering is a global problem and that

---

<sup>149</sup> For a perspective on the criminal applications of attorneys' ethics rules, see James M. McCauley, *The War on Terrorism and its Impact on the Ethical Representation of Clients*, 4 RICH. J. GLOBAL L. & BUS. 37 (2004).

<sup>150</sup> Darhiana Mateo, *It's a New World for Banks, Too: They Have to Beware of Terrorists and Money Laundering*, 15 A.B.A. SEC. BUS. L. 49 (2006).

<sup>151</sup> 31 U.S.C. § 5318 (1982) (amended by 31 U.S.C. § 5318A(b)(2) (2006), "Information Relating to Beneficial Ownership").

<sup>152</sup> Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2006).

<sup>153</sup> USA PATRIOT Act, tit. 3.

the laws to combat it must not allow boundaries and borders to prevent the successful investigations and prosecutions of these crimes.<sup>154</sup>

The 2001 USA PATRIOT Act contained numerous references indicating its intent to have jurisdictional application beyond the borders of the United States. Title III focuses on the international implications of terrorism, and specifically on money laundering. The 2006 reauthorization adds a section addressing means to combat the financing of terrorism and an explanatory provision regarding the extent of extraterritorial jurisdiction.<sup>155</sup>

Among the stated purposes of the Act is the intent to “strengthen the provisions put into place by the Money Laundering Control Act of 1986 [citation omitted], especially with respect to crimes by *non-United States nationals and foreign financial institutions*” [emphasis added].<sup>156</sup> It further states that it is intended to “provide a clear national mandate for subjecting to special scrutiny *those foreign jurisdictions, financial institutions operating outside of the United States, and classes of international transactions or types of accounts that pose particular identifiable opportunities for criminal abuse*” [emphasis added].<sup>157</sup> This same section authorizes the Secretary of the Treasury “with broad discretion ... to take measures tailored to the particular money laundering problems presented by *specific foreign jurisdictions, financial institutions operating outside of the United States, and classes of international transactions or types of accounts*” [emphasis added].<sup>158</sup>

The original USA PATRIOT Act specifically established long arm jurisdiction over foreign money launderers through its amendment of 18 U.S.C. § 1956,<sup>159</sup> stating:

- (2) Jurisdiction over foreign persons. – For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure of the laws of the country in which the foreign person is found, and

---

<sup>154</sup> *Id.* tit. 3, § 302(b).

<sup>155</sup> *Id.* tit. 3.

<sup>156</sup> *Id.* § 302(b)(3).

<sup>157</sup> *Id.* § 302(b)(4).

<sup>158</sup> *Id.* § 302(b)(5).

<sup>159</sup> *Id.* § 317.

- (A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;
- (B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or
- (C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.<sup>160</sup>

The section goes on to authorize issuance of restraining orders and to “take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment” under the section.<sup>161</sup>

Section 377 further expands the notion of extraterritoriality by amending 18 U.S.C. § 1029:

- (h) Any person who, outside the jurisdiction of the United States, engages in any act that, if committed within the jurisdiction of the United States, would constitute an offense under subsection (a) or (b) of this section, shall be subject to the fines, penalties, imprisonment, and forfeiture provided in this title if –
  - (1) the offense involves an access device issued, owned, managed, or controlled by a financial institution, account issuer, credit card system member, or other entity within the jurisdiction of the United States; and
  - (2) the person transports, delivers, conveys, transfers to or through, or otherwise stores, secrets or holds within the jurisdiction of the United States, any article used to assist in the commission of the offense of the proceeds of such offense or property derived therefrom.<sup>162</sup>

---

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* § 377.

Extraterritoriality is not absolute. It is still subject to a variety of restrictions, one of which is the revenue rule, which says that "courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns."<sup>163</sup> In a series of cases decided in the 11<sup>th</sup> and 2<sup>nd</sup> Circuit U.S. Courts of Appeals, including an appeal to the U.S. Supreme Court, the applicability of the revenue rule through the USA PATRIOT Act has been addressed and, for now, put to rest. The revenue rule applies, regardless of the existence of a USA PATRIOT Act claim to the contrary, though its applicability otherwise is not absolute.<sup>164</sup>

The *European Community* case began in the U.S. District Court for the Eastern District of New York and involved three combined claims, two by the European Community and one from the Department of Amazonas.<sup>165</sup> Defendants were three tobacco companies, Japan Tobacco, Inc., RJR Nabisco, Inc., and Philip Morris Companies. Since the allegations, damages sought, and legal theories presented were substantially the same, the court treated the plaintiffs' claims as related.<sup>166</sup> In the cases, the plaintiffs accused the defendants of smuggling cigarettes to avoid paying taxes. The plaintiffs acknowledged that the RICO provisions under which their claims were presented did not provide a means to abrogate the revenue rule.<sup>167</sup> Their primary argument was through the USA PATRIOT Act, to abrogate the rule by way of "congressional intent."<sup>168</sup> However, the courts were not convinced.

The case had begun in the Eastern District of New York<sup>169</sup> where the court dismissed it. Consequently, the plaintiffs appealed to the 2<sup>nd</sup> Circuit Court of Appeals,<sup>170</sup> which affirmed the lower court's judgments regarding the RJR Nabisco and the Philip Morris claims,<sup>171</sup> but vacated and remanded the judgment regarding the Japan Tobacco claim.<sup>172</sup> Plaintiffs appealed to the U.S. Supreme Court who vacated the judgment of the 2<sup>nd</sup> Circuit and remanded for further consideration in light of an interim decision of the US Supreme Court

---

<sup>163</sup> *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings*, 268 F.3d 103, 109 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002).

<sup>164</sup> *European Cmty v. RJR Nabisco, Inc.*, 544 U.S. 1012, 1031 (2005).

<sup>165</sup> *European Cmty v. RJR Nabisco, Inc.*, 186 F. Supp. 2d 231 (E.D.N.Y. 2002).

<sup>166</sup> *European Cmty v. RJR Nabisco, Inc.*, 424 F.3d 175, 178 (2d Cir. 2005).

<sup>167</sup> *Id.* at 179.

<sup>168</sup> *European Community*, 186 F. Supp. 2d at 238.

<sup>169</sup> *Id.* at 245.

<sup>170</sup> *European Cmty v. RJR Nabisco, Inc.*, 355 F.3d 123, 127 (2d Cir. 2004).

<sup>171</sup> *Id.* at 139.

<sup>172</sup> *Id.* (making the dismissal premature, the third claim had been correctly joined with the original claim at a later date and defendants had not been given time to respond prior to the action by the court).



in the case of *Pasquantino v. United States*.<sup>173</sup> On remand, the 2<sup>nd</sup> Circuit determined that *Pasquantino* did not apply, and reinstated its prior ruling, that the revenue rule was not applicable through the USA PATRIOT Act and the plaintiffs could not recover lost tax revenue as a result of alleged money laundering operations conducted by the defendants.

The 11<sup>th</sup> Circuit addressed a similar concern in the case of *Republic of Honduras v. Philip Morris Companies, Inc.*<sup>174</sup>. It held, as did the *European Community* court, that “the Patriot Act had no effect on the revenue rule’s applicability to civil RICO actions,”<sup>175</sup> and found the plaintiffs argument “without merit.”<sup>176</sup>

This very narrow limitation on the extraterritorial impact of the USA PATRIOT Act’s money laundering provisions deals only with the revenue rule. Any further extraterritorial application should be addressed specifically in the terms of the Act itself and should be expected to apply in other non-revenue rule cases.

Prior to the USA PATRIOT Act, extraterritorial application of provisions related to money laundering and bank secrecy had already been found.

Under pre-existing money-laundering rules, there had been express provisions for limited extraterritorial jurisdiction over prohibited conduct, if “(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.”<sup>177</sup>

The 11<sup>th</sup> Circuit further addressed the extraterritorial applicability of the money laundering statutes in the case of *United States v. Tarkoff*.<sup>178</sup> This case involved a criminal defense attorney, Tarkoff, who had been representing clients in a Medicare scam in which the clients were accused of fraudulently billing Medicare \$120 million in a two and a half year period. The case began

---

<sup>173</sup> *Pasquantino v. United States*, 544 U.S. 349,(2005).

<sup>174</sup> *Republic of Honduras v. Philip Morris Companies, Inc.*, 341 F.3d 1253 (11th Cir. 2003).

<sup>175</sup> *Id.* at 1261.

<sup>176</sup> *Id.* For an extended discussion regarding extraterritoriality and its application in RICO-related USA PATRIOT Act claims, *see also* *Kensington Int’l Ltd. v. Societe Nationale des Petroles du Congo*, 2006 WL 846351 (S.D.N.Y. 2006).

<sup>177</sup> *United States v. Stein*, 1994 WL 285020 (E.D.La. 1994) (quoting 18 U.S.C. §1956 (1988)).

<sup>178</sup> *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001).

in 1995, well before the adoption of the USA PATRIOT Act.<sup>179</sup> Tarkoff's secretary testified at the time that Tarkoff had discussed the need to move the client's funds "in order to hide it from the United States government."<sup>180</sup> A series of wire transfers by Tarkoff to a bank in Curacao then routed to Tel Aviv were made in an apparent attempt to obscure the source of the funds.<sup>181</sup> These transactions, which were the substantive basis for the case against Tarkoff, took place wholly outside the United States. In affirming Tarkoff's conviction, the court cited a section of the statute which defined "financial transaction," in part, as one "which in any way or degree affects interstate or foreign commerce."<sup>182</sup>

### DISCLOSURE OF INFORMATION

Recognizing the importance that Congress has placed on the prevention, investigation, and prosecution of money laundering as a tool of terrorists, and further recognizing the growing role of attorneys in the conduct of international trade and business, another major consideration is the imposition of requirements for disclosing information under these new requirements.

The USA PATRIOT Act added new standards for customer identification and record keeping.<sup>183</sup> It further provided a means to verify the identification of foreign customers.<sup>184</sup> It encouraged financial institutions to share information about suspected money laundering activities with law enforcement agencies,<sup>185</sup> and mandated that they establish comprehensive anti-money laundering programs.<sup>186</sup>

The apparent government goal is greater transparency for financial institutions, while individual and industry concerns remain privacy and secrecy.

---

<sup>179</sup> *Id.* at 992.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 993.

<sup>182</sup> *Id.* at 994 (citing 18 U.S.C. § 1956(a)(1)(B)(i)); *cf.* United States v. Swiss American Bank, 191 F.3d 30 (1st Cir. 1999) (vacating a lower court dismissal and remanding for reconsideration of the extension of personal jurisdiction over the bank, where a foreign corporation had been brought before a U.S. court in a forfeiture action to recover assets that had been deposited into the foreign corporation's account).

<sup>183</sup> USA PATRIOT Act, tit. 3, § 311.

<sup>184</sup> *Id.* §§ 312-313.

<sup>185</sup> *Id.* § 314.

<sup>186</sup> *Id.*

A further contradiction or inconsistent purpose appears when dealing with the NAFTA. Article 2105 of the treaty specifically exempts from disclosure any information that is not subject to disclosure under a member party's home laws. It states;

Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.<sup>187</sup>

For a U.S. attorney dealing with a Canadian client, this can cause confusion and may pose an ethical dilemma for the attorney. If a provision of the USA PATRIOT Act requires disclosure, then the Article 2102 "National Security" exception would appear to apply and mandate disclosure. However, if the Canadian law does not permit the disclosure, then the Article 2105 exemption ought to apply. If an attorney is faced with a requirement under the USA PATRIOT Act to disclose information to a banking institution pursuant to a concern regarding national security, that attorney must look back to the Rules of Professional Responsibility on "Confidentiality" to determine whether or not the disclosure is permissible. Rule 1.6(b) states that the attorney "may" disclose, not that they "must" or "shall" disclose.

When disclosed via a SAR, the information remains confidential as between the reporting institution and the FinCEN or the receiving agency. The Safe Harbor provisions<sup>188</sup> of the Bank Secrecy Act assure that the financial institution is not liable for supplying information to the agency pursuant to the Act's requirements. But this "confidentiality" doesn't help the attorney who may be involved in facilitating a transaction for his or her client. In fact, it puts the responsibility for "confidentiality" in the hands of the financial institution and the FinCEN or the OCC, taking it out of the hands of the attorney, in whose hands the client had entrusted the information. It is the financial institutions that are intended to be protected by the safe harbor provisions of the Bank Secrecy Act,<sup>189</sup> a part of the USA PATRIOT Act, and not the attorney or the client.<sup>190</sup>

---

<sup>187</sup> North American Free Trade Agreement, U.S.-Can.-Mex., chp. 21, art. 2105, Dec. 17, 1992 [hereinafter NAFTA].

<sup>188</sup> 31 U.S.C. § 5318 (g)(3)(A) (2006).

<sup>189</sup> *Id.*

<sup>190</sup> See, e.g., *Stout v. Banco Popular de Puerto Rico*, 320 F.3d 26 (1st Cir. 2003) and *Lopez v. First Union National Bank of Florida*, (11th Cir. 1997).

Disclosure alone is not the only concern. What might happen if an attorney is required to make a disclosure on behalf of a client that directly connects the client with an organization designated by the U.S. State Department as a terrorist organization? What might be the consequences for the client? Some direction might be found in examining the case of *United States v. Hammoud*.<sup>191</sup>

#### THE CASE OF UNITED STATES V. HAMMOUD

Beginning in or about March 1996, and continuing until July 21, 2000, within the Western District of North Carolina, and elsewhere,

MOHAMAD YOUSSEF HAMMOUD, a/k/a Ali A. A. Abousaleh, a/k/a Ali A. A. Albousaleh [and] CHAWKI YOUSSEF HAMMOUD, a/k/a Ali Darwiche Hussein [and] NABIL E. ISMAIL, a/k/a Nabil Ishmail, a/k/a Nabil Ismael, a/k/a Nabil Labeled Ismail

did combine, conspire, confederate and agree with each other and others, including Bassam Youssef Hamood, Mohamad Atef Darwiche, Ali Hussein Darwiche, Ali Fayez Darwiche, Said Mohamad Harb, Angela Georgia Tsioumas, Mehdi Hachem Moussaoui, and Samuel Chahrour, to commit certain offenses against the United States as follows:

(a) knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, to conduct and attempt to conduct such a financial transaction with the intent to promote the carrying on of specified unlawful activity in violation of 18 U.S.C. 1956(a)(1)(A)(i); and

(b) knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, to conduct and attempt to conduct such a financial transaction with intent to engage in conduct constituting a violation of 7201 or 7206 of the Internal Revenue Code of 1986 in violation of 18 U.S.C. 1956(a)(1)(A)(ii); and

---

<sup>191</sup> *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004).

(c) knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, to conduct and attempt to conduct such a financial transaction knowing that the transaction was designed in whole or in part to conceal and disguise the nature, the location, the source, the ownership and the control of the proceeds of specified unlawful activity in violation of 18 U.S.C. 1956(a)(1)(B)(i); and

(d) knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, to conduct and attempt to conduct such a financial transaction to avoid a transaction reporting requirement under federal law, in violation of 18 U.S.C. 1956(a)(1)(B)(ii); and

(e) knowingly to engage in a monetary transaction in criminally derived property that was of a value greater than \$10,000, in violation of 18 U.S.C. 1957.

All in violation of Title 18, United States Code, Section 1956(h).<sup>192</sup>

So read count 36 of the indictment of Mohammad Youssef Hammoud. In *Hammoud*, the question before the court involved an examination of money laundering and the definition of a foreign terrorist organization (FTO), in this case, Hizbollah.<sup>193</sup> Though the money laundering charges were dismissed, Mr. Hammoud was convicted on fourteen different counts, including "conspiracy to provide material support to a designated FTO and with providing material support to a designated FTO, both in violation of 18 U.S.C. § 2339B."<sup>194</sup> Hizbollah was founded after the 1982 Israeli invasion of Lebanon.<sup>195</sup> The organization provides humanitarian aid to Shi'a Muslims in Lebanon, but is "also a strong opponent of Western presence in the Middle East, and it advocates the use of terrorism in support of its agenda."<sup>196</sup>

---

<sup>192</sup> United States v. Hammoud, 2000 WL 34016204, at \*6 (W.D.N.C. July 31, 2000).

<sup>193</sup> *Hammoud*, 381 F.3d at 316 (showing that though the organization is known by a variety of spellings, this court chose to spell its name as Hizbollah; therefore, it is presented here using that spelling. Transliteration of Arabic words and names continues to challenge translations into English.)

<sup>194</sup> *Hammoud*, 381 F.3d at 326.

<sup>195</sup> USA PATRIOT Act, § 325.

<sup>196</sup> *Hammoud*, 381 F.3d at 326.

Although the Court dismissed the counts, the underlying basis for the convictions included activities involving money laundering.

According to the USA PATRIOT Act:

[M]oney launderers subvert legitimate financial mechanisms and banking relationships by using them as protective covering for the movement of criminal proceeds and the financing of crime and terrorism, and, by so doing, can threaten the safety of United States citizens and undermine the integrity of United States financial institutions and of the global financial and trading systems upon which prosperity and growth depend.<sup>197</sup>

In this case, Hammoud was accused of money laundering by providing funding to a foreign terrorist organization through a scheme of cigarette smuggling.<sup>198</sup> Because of his taking of funds and transmitting them, or attempting to transmit them, to a place outside the United States "with the intent to promote the carrying on of specified unlawful activity," Hammoud was "specifically charged with providing material support in the form of currency."<sup>199</sup>

The appeal before the court focused on the sentencing enhancement that the lower court had imposed on Hammoud. Other existing rules interact with the USA PATRIOT Act, including references to sentencing guidelines and enhancement of sentences for terrorist activities. The United States Court of Appeals for the Fourth Circuit addressed this issue at length when it decided *Hammoud*.<sup>200</sup> The facts briefly showed that Mr. Hammoud had provided support to a FTO, Hizballah.<sup>201</sup> To be designated as a foreign terrorist organization, the organization must meet the following criteria: (1) it must be

---

<sup>197</sup> USA PATRIOT Act § 302(a)(3).

<sup>198</sup> *Hammoud*, 381 F.3d at 326.

<sup>199</sup> *Id.* at 330.

<sup>200</sup> *Hammoud*, 381 F.3d at 359-360.

<sup>201</sup> See generally U.S. Dept. of State Website, <http://www.state.gov/s/ct/rls/rpt/fto/> (last visited Nov. 17, 2007) ("Foreign Terrorist Organizations" [report] is compiled every two years by the Office of the Coordinator for Counterterrorism. Under the statute, this report is subject to judicial review. The Secretary of State makes designations following an exhaustive interagency effort. The designations expire in two years unless renewed. The law also allows groups to be added at any time following a decision by the Secretary, in consultation with the Attorney General and the Secretary of the Treasury. Designations can also be revoked if the Secretary determines that there are grounds for doing so and notifies Congress. Congress can also pass legislation to revoke designations.")

foreign, (2) it must engage in terrorist activity as defined in Section 212 (a)(3)(B) of the Immigration and Nationality Act., and (3) its activities must threaten the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States.<sup>202</sup> Mr. Hammoud claimed that, though identified as a foreign terrorist organization, Hizbollah also “provides humanitarian aid to citizens of Lebanon.”<sup>203</sup> The court vehemently disagreed with Mr. Hammoud, referring to Congress’ finding that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>204</sup>

Part of the court’s analysis focused on Congress’ power to restrict some expressive conduct, in apparent contravention of the First Amendment. The court stated that a statute is valid if:

It is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.<sup>205</sup>

Though analyzed as a First Amendment consideration, the application goes beyond the determination of support for a purported terrorist organization disguised as a charity. The funds channeled to the organization were earned as a result of the alleged cigarette smuggling operation in which the defendants were accused of participating. It was this underlying money laundering investigation which led to the downfall of this defendant Hammoud and his ability to fund a designated foreign terrorist organization.

The importance of the money laundering statutes, particularly as they relate to investigation, apprehension, and prosecution of terrorists, has not been ignored by Congress in its enactment of the USA PATRIOT Act. In *Hammoud*, though the money laundering charges were dismissed, the initial investigation led to a result likely envisioned by the drafters of the statute.

---

<sup>202</sup> U.S. Dept. of State, Office of Counterterrorism, Fact Sheet, <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited Nov. 17, 2007).

<sup>203</sup> *Hammoud*, 2000 WL 34016204 at \*12.

<sup>204</sup> *Id.* at \*15 (citing the Antiterrorism and Effective Death Penalty Act § 301(a)(7) (1996)).

<sup>205</sup> *Hammoud*, 381 F.3d at 329 (citing *United States v. O’Brien*, 391 U.S. 367(1968)).

The case of *Hammoud* failed to reach any definitive conclusions regarding money laundering or raise any burning questions regarding the involvement of attorneys. It does, however, provide a background against which future cases involving modern cases of money laundering will be addressed.

### FINANCIAL ACTION TASK FORCE

Though in existence since early 1989, the Financial Action Task Force (FATF) has sought to "counter the use of the financial system by criminals."<sup>206</sup> The G-7 Summit, held in Paris in 1989, established the FATF when it recognized "the threat posed to the banking system and to financial system" by these crimes.<sup>207</sup> In the years since its inception, this broad coalition of thirty-three members has worked to address the growing global problem of money laundering.<sup>208</sup> As a result of its efforts, it developed "40 Recommendations" which "provide a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system, and its regulation, and international cooperation."<sup>209</sup>

Within these "40 Recommendations" are a number of measures that have caused quite a concern with the American Bar Association and others. The FATF urges the adoption of its recommendations as a means of creating common rules for fighting money laundering and related financial crimes.<sup>210</sup> Recommendations five, six, eight, and eleven outline disclosures and due diligence methodologies that should be undertaken by financial institutions. Data recommended to be collected and verified includes customer identity, beneficial ownership, and the purpose for which an account is established.<sup>211</sup> These recommendations have already been implemented through changes addressed in the USA PATRIOT Act and discussed previously. Recommendation 16 has raised concerns within the legal community. It states that "[l]awyers . . . should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to

---

<sup>206</sup> Financial Action Task Force, <http://www.fatf-gafi.org> (last visited Nov. 17, 2007) [hereinafter FATF].

<sup>207</sup> *Id.*

<sup>208</sup> FATF, *FATF Members and Observers*, <http://www.fatf-gafi.org> (follow "Member Countries and Organisations FAQ hyperlink; then follow "List of Member Countries and Organisations" hyperlink) (last visited Nov. 17, 2007).

<sup>209</sup> FATF, *The 40 Recommendations*, <http://www.fatf-gafi.org> (follow "40 Recs" hyperlink) (last visited Nov. 17, 2007).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*



the activities described in Recommendation 12(d).”<sup>212</sup> On its face, the recommendation appears to require a breach of the attorney-client privilege and the confidentiality requirement. But, what the recommendation requires with its first paragraph, it takes away with its second, where it further states, “[l]awyers . . . are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.”<sup>213</sup>

The FATF goes on to provide, within its Essential Criteria, the following recommendation related to attorneys and other professionals:

Note on legal professional privilege or legal professional secrecy.

Lawyers notaries, other independent legal professionals, and accountants as independent legal professionals are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to legal professional privilege or legal professional secrecy.

It is for each jurisdiction to determine the matters that would fall under legal professional privilege or legal professional secrecy. This would normally cover information lawyers, notaries, or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings. Where accountants are subject to the same obligations of secrecy or privilege, then they are also not required to report suspicious transactions.<sup>214</sup>

Though apparently intended to allay the fears of attorneys and other professionals who are subject to confidentiality rules, the notes and explanations have not had the desired effect. The American Bar Association has been actively following the developments related to both the FATF and the

---

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, METHODOLOGY FOR ASSESSING COMPLIANCE WITH THE FATF 40 RECOMMENDATIONS AND THE FATF 9 SPECIAL RECOMMENDATIONS (2004), <http://www.fatf-gafi.org/dataoecd/45/15/34864111.pdf>.

provisions of the USA PATRIOT Act that track its recommendations. In fact, the ABA Task Force on Gatekeeper Regulation and the Profession recommended to the ABA House of Delegates in 2003 that it should oppose any law or regulation that required the disclosure of confidential information.<sup>215</sup> Concerns over the potential harm to the client has been at the forefront in their efforts.<sup>216</sup>

### CONCLUSION

There is no mistaking the importance of addressing national security in the wake of the September 11, 2001 terrorist attacks and continued incidents of terrorist activity worldwide. Congress has rightly identified money laundering as a means used internationally to fund terrorist efforts around the globe. The USA PATRIOT Act attempts to balance the competing interests of privacy and intelligence-gathering, while seeking to address the concerns of terrorism both internally and externally. The foundation of the United States rests on these fundamental concepts of individual freedom and privacy. Infringing on these rights, even for such laudable goals as the protection of our security, must be done cautiously, with vigilance and care. Sacrificing personal rights and freedoms may indeed be necessary for the good of the nation and the protection of its people. But, changing or even eliminating such basic concepts underlying our legal system as confidentiality and the attorney client privilege may also change the foundation on which the United States was created.

Congress acted swiftly and wisely in addressing the nation's security following September 11. Over the subsequent years, the implementation of the provisions of the Act have been monitored, reported, evaluated, and scrutinized. Challenges have been made, modifications have been implemented, amendments have been proposed, debate has been scheduled, and the review continues. But concerns remain.

As noted in the preceding pages, the challenges to be faced include concerns over the interaction of the USA PATRIOT Act with other rules, laws, and requirements. Those charged with compliance in the realm of money laundering are also charged with competing obligations. When viewed through

---

<sup>215</sup> AMERICAN BAR ASSOCIATION, TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, TASK FORCE REPORT (February 2003), <http://www.abanet.org/crimjust/taskforce/actions.html> (follow "Task Force Report" hyperlink) (discussing the ABA's response to FATF's Recommendation 16 on disclosing of confidential information).

<sup>216</sup> Rhonda McMillion, *Gatekeeper's Burden: Money Laundering Proposals Raise Concerns About Attorney Client Privilege*, 88 A.B.A. J. 72 (2002).

the lens of international laws and norms, these responsibilities and obligations become even more complex.

Terrorism is going to be with us for some time to come. As long as there are people in the world who believe they can accomplish their ends by harming others, terrorism will flourish. Reasonable men and women must address the likelihood of another attack, perhaps on the scale of the September 11 attacks, and be prepared. The fight against terrorism must include a fight against the means to fund it. Whether we are prepared to fight terrorism, or are simply resigned to accept it, we must be willing to acknowledge its existence and its impact, and develop a reasonable and balanced response to the conflicting responsibilities that have emerged.



