THE IMPACT OF THE USA PATRIOT ACT OF 2001 ON NON-U.S. BANKS

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I. BACKGROUND

On October 26, 2001, President George W. Bush signed into law the USA PATRIOT Act of 2001[2], a comprehensive anti-terrorism law that implements a broad array of measures aimed at increasing national security, improving surveillance of terrorist activities, easing information sharing, and combating money laundering. The focus of this paper, as the title suggests, is the impact that the provisions of the USA PATRIOT Act are likely to have on non-U.S. banks and other non-U.S. persons. In order to understand that impact, however, it is necessary first to discuss the direct effects of the Act on U.S. banks and financial institutions, because the impact on others is largely derivative of those.

A. HISTORY OF LEGISLATION

Before examining the provisions of the USA PATRIOT Act, it is worth spending a few minutes reviewing the history of its enactment. This is important for two reasons: first, it demonstrates the haste with which this massive piece of legislation moved through Congress; second, it shows the overwhelming emotional and political support that caused the legislation to move so quickly.

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[2] USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

On September 17, 2001, shortly after the September 11th attacks, the Bush Administration submitted to members of Congress proposed legislation, entitled the Mobilization Against Terrorism Act, which sought to enhance the government's ability to eliminate terrorist organizations, prevent terrorist attacks, and punish terrorists. The proposed legislation included provisions that would expand the intelligence community's ability to conduct roving searches of individuals suspected of terrorism and to detain those suspected of being involved with terrorism. The legislation also included provisions dealing with money laundering, immigration, expanding U.S. jurisdiction to seize and forfeit assets connected with terrorism, and related matters.

The Administration's proposed legislation served as the starting point for Senate Bill S.1510, entitled the "Uniting and Strengthening America (USA) Act of 2001," which was introduced in the U.S. Senate by Senator Thomas Daschle on October 4, 2001.[3] The USA Act was subject to limited debate, was never marked up in committee and, on October 12, 2001, was approved by a vote of 96-1. In the meantime, on October 2, 2001, Representative James F. Sensenbrenner had introduced the "Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001" (H.R. 2975) in the U.S. House of Representatives. Under pressure from the Bush administration, Republican leaders of the House replaced the original language of H.R. 2975 with language closer to that contained in S. 1510. On October 13, 2001, the House of Representatives approved an amended version of the PATRIOT Act by a vote of 337-79.

Rather than follow the normal procedure of holding a formal conference to resolve differences between the House and Senate legislation, key leaders of both chambers met

[3] The description of legislative history contained in this and the following paragraph is based principally on a summary prepared by the Congressional Quarterly. (CQ Weekly, December 22, 2001, p. 3044.)

with administration officials to reach agreement on about a dozen items and then introduced a "clean bill" (H.R. 3162). One part of the agreed-upon resolution by Congressional leaders was to preserve the names of the two respective pieces of legislation by combining them into one title that would encompass the whole, consolidated legislation. The result was the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (the "USA PATRIOT Act of 2001").

The consolidated USA PATRIOT Act of 2001 was passed by the House of Representatives on October 24, 2001, and by the Senate on October 25, 2001, after a brief debate. The legislation was then signed by President Bush on October 26, 2001. It has been the subject of public debate and controversy since its enactment.

B. SCOPE OF LEGISLATION

The USA PATRIOT Act contains ten separate Titles and, depending on the printing format that is used, it is between 130 and 160 pages in length. To get a sense of the scope of the legislation, it is useful to list the Titles of the provisions contained in the Act:

Title I --	Enhancing Domestic Security Against Terrorism
Title II --	Enhanced Surveillance Procedures
Title III --	International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001
Title IV --	Protecting the Border
Title V --	Removing Obstacles to Investigating Terrorism
Title VI --	Providing for Victims of Terrorism, Public Safety Officers, and Their Families
Title VII --	Increased Information Sharing For Critical Infrastructure Protection
Title VIII --	Strengthening the Criminal Laws Against Terrorism

Title IX -- Improved Intelligence

Title X -- Miscellaneous

Most of the provisions that are relevant to this paper are contained in Title III, and they will receive the greatest attention. However, some provisions from Titles II and VIII are also relevant and will be discussed.

II. PRINCIPAL EFFECTS OF THE USA PATRIOT ACT ON NON-U.S. BANKS

There is much that is notable about the USA PATRIOT Act, but in the area of anti-money laundering, the Act creates a number of "firsts" for U.S. financial institutions. Among the "firsts" are the requirements that all U.S. financial institutions, not just banks, but others, such as securities firms, insurance companies and businesses that transfer funds or engage in large cash transactions, exercise due diligence before allowing a non-U.S. financial institution to open a correspondent account with them and thereby gain entry into the U.S. financial system. Also, for the first time, all U.S. financial institutions are required to have anti-money laundering programs, including verifying the identity of their customers. In addition, for the first time, U.S. banks and securities firms are barred from opening accounts for non-U.S. shell banks that have no physical presence anywhere and no affiliation with another bank. Finally, and perhaps most significantly, the U.S. Secretary of the Treasury and the U.S. Attorney General have unprecedented authority to demand and obtain information from U.S. financial institutions that relates to correspondent accounts maintained for non-U.S. banks and other non-U.S. persons.

In addition to these regulatory firsts, the USA PATRIOT Act also amends the U.S. Federal Rules of Criminal Procedure to allow government prosecutors, without advance notice to the courts or anyone else, to share confidential information produced to federal grand juries that relates to non-U.S. governments, businesses or persons with any U.S. law enforcement agency

for any law enforcement purpose. The Act also expands U.S. jurisdiction over non-U.S. persons, including the ability to seize and forfeit assets held in U.S. accounts by non-U.S. persons.

These and other aspects of the USA PATRIOT Act are discussed in some detail below.

A. Additional Information Necessary in Order to Have Accounts and to Do Business in the United States

1. Basic Requirements for U.S. "Financial Institutions"

Title III of the Act amends the Bank Secrecy Act ("BSA")[4] and, thus, incorporates the definition of "financial institutions" contained in the BSA. It also adds certain additional institutions to the pre-existing definition. Specifically, the pre-Title III definition of "financial institution" included the following: FDIC-insured depository institutions, trust companies, SEC-registered broker-dealers, insurance companies, private bankers, agencies and branches, investment banks, investment companies, currency exchanges, licensed money transmitters, credit card systems operators, dealers in precious metals and jewels, pawnbrokers, finance lenders, travel agencies, telegraph companies, real estate agents, the United States Postal Service, certain casinos, and automobile, airplane and boat dealers.[5] Title III of the Act added the following institutions to the prior definition of "financial institution": credit unions, futures commission merchants, commodity and trading advisors, and commodity pool operators.[6]

Section 312 of the Act requires U.S. financial institutions that maintain private banking accounts[7] or correspondent accounts for any non-U.S. persons or institutions to

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[4] Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1305 (1970), codified in sections of Titles 12, 15 and 31 of the U.S. Code.

[5] 31 U.S.C. § 5312(a)(2) (2000 & Supp. I 2001).

[6] USA PATRIOT Act, § 321.

[7] "Private banking account" is defined as an account (or any combination of accounts) that (i) requires a minimum aggregate deposit of funds or other assets of not less than $1,000,000; (ii) is established on behalf of one or more individuals who have a direct or beneficial ownership interest in the account; and (iii) is assigned to, or is administered or managed by, in whole or in

"establish appropriate, specific and, if necessary, enhanced due diligence policies, procedures and controls that are reasonably designed to detect and report instances of money laundering through these accounts." On April 24, 2002, the Secretary of the Treasury issued anti-money laundering compliance regulations for many U.S. "financial institutions" and indicated that other types of financial institutions are being studied by the Treasury Department and that additional regulations with respect to these institutions will be issued on or before October 24, 2002.[8]

Section 312 provides further requirements for U.S. financial institutions that desire to maintain a correspondent account for a foreign bank operating under an offshore banking license[9] or under a banking license issued by a country deemed to be uncooperative with "international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a member [i.e., the Financial Action Task Force], with which designation the United States representative to the group or organization concurs." For such accounts, enhanced due diligence procedures apply and a U.S. financial institution must: (i) determine the identity and ownership interest of owners of the foreign bank; (ii) conduct enhanced scrutiny of the account; and (iii) determine whether such foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and "related due diligence."

In addition, Section 312 requires that U.S. financial institutions holding a private banking account for a non-U.S. person: (i) ascertain the identity of the nominal and beneficial

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part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account. USA PATRIOT Act, § 312 (a)(i)(4)(B).

[8] 67 Fed. Reg. 82, pp. 21110-21127 (April 29, 2002); 31 C.F.R. Part 103.

[9] "Offshore banking license" is defined as a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license. USA PATRIOT

owners of, and the source of funds deposited into, such account; (ii) report any suspicious transactions with respect to such account; and (iii) conduct enhanced scrutiny of any account requested or maintained by, or on behalf of, a senior foreign political figure reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.

2. Potential Enhanced Requirements for U.S. Financial Institutions

In addition to the basic due diligence, information-keeping requirements outlined above, the USA PATRIOT Act (Section 311) gives the Secretary of the Treasury, in cooperation with the Secretary of State and the Attorney General, the authority to designate a non-U.S. jurisdiction, non-U.S. financial institution, or class of international transactions or accounts, as being of "primary money laundering concern." Section 311 lists certain factors that the Secretary of the Treasury may consider in determining that non-U.S. jurisdictions, financial institutions or transactions are of primary money laundering concern, but the Secretary is allowed to consider "such information as [he] determines to be relevant."[10]

If there is such a designation, then the Secretary is authorized to impose any or all of the following five types of "special measures" on domestic financial institutions, including branches and agencies of non-U.S. banks, relating to the designated jurisdictions, financial institutions or transactions:

a. Additional recordkeeping and reporting procedures concerning the aggregate amount of transactions or each transaction with respect to the problematic jurisdictions, institutions or types of accounts;

b. Obtaining and maintaining information concerning the identities and addresses of the beneficial owners of any accounts opened in the United States by a non-U.S. person that involves the designated area of concern;

Act, § 312, 31 U.S.C. § 5318(i)(4)(A).

[10] USA PATRIOT Act, § 311, 31 U.S.C. § 5318A(c)(2).

c. Identifying and obtaining additional information on customers of non-U.S. financial institutions that open interbank, "payable-through accounts"[11] for their customers at U.S. financial institutions;

d. Identifying and obtaining the same type of information on customers of non-U.S. financial institutions that open interbank, "correspondent accounts"[12] for their customers at U.S. financial institutions; and

e. After consultation with appropriate U.S. regulators, the Secretary of the Treasury may prohibit, or impose conditions on, the opening of a correspondent account or a payable-through account by a domestic financial institution for a non-U.S. financial institution.[13]

There are some procedural restrictions on how the Treasury Department must proceed in invoking these special measures. For the first four measures listed above (a.-d.), the Secretary can impose them by means of an order, which can remain in effect for 120 days and must be accompanied by a notice of rulemaking.[14] These special measures cannot remain in effect for more than 120 days, unless a regulation implementing them is issued on or before the end of the 120-day period.[15] The fifth special measure (e.) can only be imposed by means of a formal rulemaking, which involves notice and a comment period.[16]

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[11] "Account" is defined as a formal banking or business relationship established to provide regular services, dealings, and other financial transactions and includes a demand deposit, savings deposit, or other transaction or asset account and a credit account or other extension of credit. Id., § 311, 31 U.S.C. § 5318A(e)(1). "Payable-through account" is defined as an account, including a transaction account, opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States. Id.

[12] "Correspondent account" is defined as an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution. Id.

[13] Id., § 311, 31 U.S.C. § 5318A(b).

[14] Id., § 311, 31 U.S.C. § 5318A(a).

[15] Id.

[16] Id.

3. Additional Obligations for "Covered Financial Institutions"

The USA PATRIOT Act creates a subset of "Covered Financial Institutions" that are subject to certain obligations in addition to those imposed on "Financial Institutions."[17] "Covered Financial Institutions" include: insured depository institutions, trust companies, private bankers, branches and agencies of non-U.S. banks, and SEC-registered broker-dealers.[18]

Section 313 of the Act prohibits covered financial institutions from establishing, maintaining, administering, or managing a correspondent account in the United States for a non-U.S. bank that does not maintain a physical presence[19] in any country (i.e., a "shell bank"). This section also requires that covered financial institutions take "reasonable steps to ensure" that any correspondent account established and maintained for a non-U.S. bank is not being used by that non-U.S. bank to indirectly provide banking services to a shell bank.[20] The Secretary of the Treasury is directed to issue regulations delineating the reasonable steps necessary to comply with the statute.

Section 313 provides an exception to the general prohibition against maintaining accounts for shell banks: if the non-U.S. bank that has no physical presence is an affiliate of a U.S. or non-U.S. financial institution and is subject to supervision by a banking authority in the jurisdiction that regulates its affiliated financial institution.[21] The intent of this exception is to allow U.S. financial institutions to do business with shell branches of large, established banks on

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[17] See USA PATRIOT Act, § 313(a).

[18] Id.

[19] "Physical presence" is defined as a place of business that: (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank (a) employs one or more individuals on a full-time basis; (b) maintains operating records related to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities. Id.

[20] Id.

the assumption that the bank regulator of the large, established bank will also supervise the established bank's branch offices worldwide, including any shell branch.

Finally, Section 319 of the Act requires covered financial institutions to maintain certain records regarding the non-U.S. banks for which they provide correspondent accounts. The required records must identify: (i) the owner(s) of the non-U.S. bank; and (ii) the name and address of a U.S. resident who is authorized by the non-U.S. bank to accept service of legal process for records regarding its correspondent account.[22]

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The effects of these new requirements imposed on U.S. financial institutions, and their corresponding effects on non-U.S. banks and the information that must be provided to U.S. financial institutions in order to maintain accounts in the U.S., are pretty straightforward. What is probably of greater concern for non-U.S. banks, however, is the unprecedented access to that information and other information regarding non-U.S. banks that the USA PATRIOT Act gives to U.S. regulatory and law enforcement authorities.

B. Enhanced Access to Information Regarding Non-U.S. Banks Having Accounts With U.S. Financial Institutions

Title III of the USA PATRIOT Act has two provisions that give the Treasury Department and other Federal banking agencies, in one instance, and the Secretary of the Treasury and the Attorney General, in the other instance, virtually unfettered access to certain information regarding accounts maintained in covered financial institutions. Section 319 (b) (2) provides as follows:

> "Not later than 120 hours after receiving a request by an appropriate Federal banking agency for information related to anti-money laundering compliance by a covered financial institution or a customer of such institution, a covered financial institution shall

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[21] Id.

[22] USA PATRIOT Act, § 319(b).

provide . . . information and account documentation for any account opened, maintained, administered or managed in the United States by the covered financial institution."[23]

The term "appropriate Federal banking agency" includes the Federal Reserve, the Federal Deposit Insurance Corporation, the Comptroller of the Currency and the Office of Thrift Supervision.[24] While the "120-hour Rule" seems to be limited to "information related to anti-money laundering compliance," it is not clear how much of a limitation that constitutes. The remainder of the section makes it clear that the request may reach not only the covered financial institution but also its customers, and it does not include any clear limitations on the type of "information and account documentation" that the requested institution may be compelled to produce within 120 hours.

Even more troubling in its unlimited scope is that part of Section 319 (b) which is entitled "Foreign Bank Records," and which amends Section 5318 of Title 31 of the U.S. Code to read, in relevant part, as follows:

> "The Secretary of the Treasury or the Attorney General may issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank."[25]

This section also provides that the covered financial institution must provide the information requested to the requesting federal law enforcement officer within 7 days of receipt of the request.[26] In addition, it provides that the covered financial institution "shall terminate any correspondent relationship with a foreign bank not later than 10 business days after receipt of written notice from the Secretary or the Attorney General . . . that the foreign bank has failed –

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[23] Id., 31 U.S.C. § 5318(k)(2).
[24] See 12 U.S.C. § 1813.
[25] USA PATRIOT Act, § 319(b), 31 U.S.C. § 5318(k)(3).
[26] Id., 31 U.S.C. § 5318(k)(3)(B)(ii).

(I) to comply with a summons or subpoena issued under [this provision]; or (II) to initiate proceedings in a United States court contesting such summons or subpoena."[27] The failure to terminate the correspondent relationship in accordance with this provision "shall render" the covered financial institution liable for a civil penalty of up to $10,000 per day until the correspondent relationship is so terminated.[28]

The summons/subpoena provision in Section 319 is notable for a number of reasons. First, what limits are there on the authority of the Secretary of the Treasury and the Attorney General to issue and enforce subpoenas? None appear in the legislation, unlike pre-existing summons authority, so it would appear that such subpoenas can be issued for any arguable law enforcement or regulatory purpose, not just money laundering or anti-terrorism enforcement.

Secondly, the provision suggests that there can be a challenge to the summons or subpoena in U.S. courts by the non-U.S. bank, but what would be the grounds for challenging it and what standards would the U.S. court apply? The USA PATRIOT Act is likely to be construed as a piece of "national security" legislation and, as such, U.S. courts are likely to give greater than normal deference to the government agencies that seek to enforce it. Presumably, if the facts support them, foreign banks could assert burden or relevance arguments in challenging summonses, but it is not clear what other arguments would be available.

In this regard, the relevant provision states that the Secretary or the Attorney General may seek all records relating to correspondent accounts, "including records maintained outside the United States relating to the deposit of funds into the foreign bank."[29] This explicit

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[27] Id., 31 U.S.C. § 5318(k)(3)(C)(i).
[28] Id., 31 U.S.C. § 5318(k)(3)(C)(iii).
[29] Id., 31 U.S.C. § 5318(k)(3)(A)(i).

authorization of "extra-territorial reach" by U.S. government law enforcement agencies is unprecedented. Under pre-existing law, if a U.S. government agency served a summons or subpoena on a U.S. bank seeking the production of not only records kept in the United States, but also records outside the United States, the recipient of the subpoena could resist producing offshore records on a number of grounds, including lack of possession, custody and control and the fact, if true, that production of those records from an offshore jurisdiction would violate the domestic confidentiality laws of the offshore jurisdiction and constitute a criminal violation there. The U.S. courts would then typically engage in a balancing test of the interests of the U.S. government and those of the foreign government, as well as looking at other legal issues, and determine whether the offshore aspect of the subpoena should be enforced.[30] Given the language of Section 319, it is not clear whether a U.S. court would entertain these types of arguments in the context of a challenge of a Section 319 subpoena by a U.S. or a non-U.S. bank. Time will tell.

C. Expanded Use of Information Provided to U.S. Grand Juries Regarding "Foreign Persons"

In addition to the provisions of Title III discussed above, mandating the collection by U.S. financial institutions of certain information regarding non-U.S. banks and account holders, and then giving broad authority to the Treasury and Justice Department to obtain that information, Title II of the USA PATRIOT Act contains a provision that would allow unprecedented use of information relating to "foreign persons" presented to a U.S. federal grand jury for any law enforcement purpose. Section 203 of the Act provides, in relevant part, as follows:

"Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows:

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[30] See Rest. 3rd, Restatement of the Foreign Relations Law of the United States § 442 (2002).

(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made --

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(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving the information in the performance of his official duties.

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(iii) Any Federal official to whom information is disclosed pursuant to clause (I)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made."[31]

What is the significance of this provision? It is of great, if not staggering, significance. First, prior to Section 203, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure and existing case law, all information presented to federal grand juries, with very limited exceptions, was kept confidential and could be used by the government and the grand jury only for purposes of the specific investigation being conducted by the grand jury. Specifically, government attorneys, grand jurors, and court officials, such as stenographers, were prohibited from disclosing any matters occurring before the grand jury.[32] Section 203 changes that, in a potentially dramatic way.

In order to understand the scope of the information before a grand jury that may be disclosed, first, it is necessary to look at the definitions of "foreign intelligence or counterintelligence" referenced in Section 203. "Foreign intelligence" under the relevant statute means "information relating to the capabilities, intentions, or activities of foreign governments or

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[31] USA PATRIOT Act, § 203(a)(1).

[32] See Rule 6(e)(2) of the Federal Rules of Criminal Procedure.

elements thereof, foreign organizations, or foreign persons." (emphasis added).[33] "Counterintelligence" means "information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities."[34]

An examination of these definitions, particularly the one for "foreign intelligence," indicates that a federal government prosecutor conducting a grand jury investigation for a potential criminal violation of Statute A by Persons 1, 2 and 3, may take any information relating to a foreign government, foreign organization or foreign person that comes before the grand jury and give it to any federal law enforcement official for any "law enforcement" purpose, including the investigation of potential criminal violations of Statutes B and C by Persons 4, 5, and 6. In other words, information provided to a grand jury pursuant to a grand jury subpoena for one purpose can be used by the U.S. government for an entirely different law enforcement purpose, as long as the information relates to a non-U.S. person or entity. There is broad, if not unfettered, discretion given to government attorneys concerning what information may be shared and with whom: the government attorney does not need advance notice or approval from a court to share such information, but must only report, after the fact, what information was shared and to whom it was given.

Two other aspects of Section 203 deserve mention. First, who are the potential recipients of information regarding non-U.S. persons or entities that is presented to a grand jury? The provision states that information may be given to "any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to

[33] 50 U.S.C. § 401a(2).

assist the official receiving that information in the performance of his official duties."[35] There is no definition of "Federal law enforcement official" in the USA PATRIOT Act, and I have been unable to find one elsewhere in the U.S. federal statutes, but it is clear that the term is understood to include a wide range of federal agencies, including not just the obvious ones – the Federal Bureau of Investigation, Secret Service, Postal Inspection Service, the Bureau of Alcohol, Tobacco and Firearms – but also agencies such as the Internal Revenue Service, the Immigration and Naturalization Service, the Office of Foreign Assets Control, and many others.

A second aspect of the new grand jury disclosure provision is that the entity or individual that supplied the information to the grand jury, who formerly could be confident that the information would only be used for the work of that grand jury for a particular investigation, no longer has that assurance. Information that is provided to grand juries going forward, that falls within the broad definition of "foreign intelligence," can now not only be shared with a wide array of federal agencies, but the person who supplied that information will have no notice that the information has been so shared.

In sum, the provisions of Section 203 significantly change the ground rules for grand jury investigations being conducted by the U.S. government, particularly for non-U.S. persons. The full implications and effects of these changes are yet to be known. They will be determined, in large part, by the judgment and discretion of U.S. federal prosecutors and perhaps by the intervention of U.S. courts.

D. Expanded U.S. Jurisdiction and Ability to Seize and Forfeit Assets Held in U.S. Accounts by Non-U.S. Persons

There are several provisions of the USA PATRIOT Act that expand the jurisdiction of U.S. courts over non-U.S. persons and their accounts or other assets. Section 317

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[34] 50 U.S.C. § 401a(3).

gives U.S. courts so-called "long-arm jurisdiction" over non-U.S. persons committing money laundering offenses in the United States, over non-U.S. banks opening U.S. bank accounts, and over non-U.S. persons who convert assets ordered forfeited by a U.S. court.[36] This section also permits a U.S. federal court to "issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the [non-U.S.] defendant in the United States is available to satisfy a judgment" under the newly-created jurisdiction.[37] Section 317 also authorizes the appointment by a federal court of a receiver to collect and take custody of assets of a defendant to satisfy forfeiture judgments.[38]

A second provision that could be of great significance to non-U.S. banks and persons is that part of Section 319 that allows U.S. courts seize funds in a U.S. account if those funds are held for a non-U.S. bank and the non-U.S. bank has received the proceeds of unlawful activity in its accounts outside the United States. Specifically, the new provision states:

> "For the purpose of forfeiture under this section and under [the narcotics laws], if funds are deposited into an account at a foreign bank, and that foreign bank has an interbank account in the United States with a covered financial institution . . ., the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign bank, may be restrained, seized, or arrested."[39]

Finally, with respect to the forfeiture of assets, Section 806 of the USA PATRIOT Act expands the prior forfeiture law to allow the government to seize and forfeit all assets, foreign or domestic, of any individual, entity or organization engaged in planning or perpetrating any act of domestic or international terrorism against the United States or its citizens or residents,

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35 USA PATRIOT Act, § 203(a)(1).
36 Id., § 317.
37 Id.
38 Id.
39 Id., § 319, 18 U.S.C. § 981(k)(1)(A).

or assets acquired with the intent and for the purpose of supporting, planning, conducting or concealing any act of terrorism, or derived from, involved in, or intended to be used in such act.[40] Prior law had allowed forfeiture only of the proceeds of murder, arson and a limited number of terrorist acts. The new law also recognizes that most terrorism offenses do not produce "proceeds" as that term is traditionally used.

As with other provisions, the actual effect of these jurisdictional and asset forfeiture provisions on non-U.S. banks and persons will only be known in the coming months and years.

III. CONCLUSION

What conclusions can we draw regarding the aspects of the USA PATRIOT Act discussed in this paper? There are many, but I would suggest that the following may be the most significant:

First, the Act is very broad in nature. While U.S. financial institutions and persons are directly affected, the Act has significant impacts on non-U.S. banks and persons. The Act creates broad new information-gathering obligations for U.S. financial institutions, which have an indirect effect on non-U.S. financial institutions, and which create significant new costs for all those affected. The Act also creates new and unprecedented investigative and law enforcement authority for U.S. government officials, not just with respect to terrorist activities, but for money laundering and a wide range of other crimes.

Second, the Act is a work in progress. It contains many provisions that are ambiguous or subject to great discretion in their application by U.S. government officials. Some of those uncertainties will be resolved by regulations and other guidance issued by the Department of

[40] Id., § 806, 18 U.S.C. § 981(a)(1)(G).

Treasury and other Executive Branch agencies. Other ambiguities will have to be ultimately resolved by U.S. courts or perhaps by clarifying legislation from the Congress.

In the meantime, those affected by the Act must be diligent in attempting to comply with its provisions, but also vigilant to make certain that the Act is implemented in a manner that is fair and consistent with fundamental rights. The government officials charged with exercising the new authority given them under the Act hopefully understand that their authority must be carried out in a fair and responsible manner. To do otherwise would be self-defeating, not only for the immediate tasks at hand, but also for the fundamental liberties and the principles that the USA PATRIOT Act was designed to protect.

BIOGRAPHICAL SKETCH OF
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JOSEPH B. TOMPKINS, JR. is a Partner in the Washington, D.C. office of Sidley Austin Brown & Wood LLP. Mr. Tompkins' experience includes service with the Criminal Division of the United States Department of Justice from 1979-1982, where he served as Deputy Chief of the Fraud Section from 1980-82. He also has served as Chairman of the American Bar Association Task Force on Computer Crime. Mr. Tompkins' practice includes a variety of civil and white collar criminal litigation matters. Mr. Tompkins has also represented corporate and individual clients in international law enforcement matters, including Customs and money-laundering proceedings, and economic sanctions and Foreign Corrupt Practices Act investigations. He has also drafted and negotiated international agreements between the United States and foreign entities. In recent years, Mr. Tompkins has represented corporate and individual clients in connection with complex internal investigations, Securities and Exchange Commission investigations, Inspector General investigations and federal grand jury investigations concerning alleged fraud, corruption and other criminal violations.

Mr. Tompkins has also represented a number of major financial institutions that have been the victims of fraud and corrupt activity, including the World Bank. He has handled major civil litigation matters in federal and state courts, and before regulatory agencies, on behalf of clients such as General Electric, Bank of America, MasterCard International, Lockheed Martin, Canadian Imperial Bank of Commerce, Equity Office Properties Trust and the government of the Cayman Islands.

Mr. Tompkins is a graduate of Harvard Law School (J.D.), the John F. Kennedy School of Government at Harvard (M.P.P.), and Washington & Lee University (B.A.). He is admitted to practice in the United States Supreme Court, most U.S. Circuit Courts of Appeal, the U.S. Court of International Trade, the Commonwealth of Virginia and the District of Columbia.