Extraterritorial US banking regulation and international terrorism: The Patriot Act and the international response

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ABSTRACT

This paper addresses the extraterritorial legal controls of recent US legislation and regulations aimed at the financing of international terrorism. Specifically, US Executive Order 13224, issued on 24th September, 2001, imposes extraterritorial jurisdiction on foreign banks, companies and individuals who conduct, facilitate or assist transactions involving US-designated terrorist organisations. Title III of the US Patriot Act contains a comprehensive statutory framework that creates significant new reporting requirements and due diligence standards for US and foreign financial institutions designed to combat international money laundering and to interdict terrorist financing. The Patriot Act also requires increased cooperation with foreign regulators and supervisors and enhances the role of the Financial Action Task Force. Although the primary focus of this paper is to examine the new US legislation that applies to money laundering and terrorist financing, recent international and European Community efforts to interdict terrorist financing are relevant for understanding the international context in which the US legislation will be interpreted and enforced. Of particular relevance at the international level are the Special Recommendations of the Financial Action Task Force and a recent European Community Regulation that requires Member States to prohibit the financing of terrorism, with special focus on the role of banks and financial service firms.

INTRODUCTION

The attack on the USA of 11th September has raised the issue of international terrorism and its financial aspects to a level of primary concern for the international community. To this end, the US Government has adopted extraterritorial financial controls on foreign banking and financial institutions that facilitate transactions with, or assist, designated terrorist groups. President Bush issued an Executive Order on 24th September, 2001 that imposed extraterritorial financial sanctions on banks, financial institutions and any person or business entity (US or foreign) that provides material support for designated individuals or groups involved in international terrorism. In addition, the US Congress responded by

Journal of International Banking Regulation, Vol. 3, No. 4, 2002, pp. 307–326
Henry Stewart Publications, 1465–4830

enacting on 26th October, 2001 legislation entitled 'the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism' (the Patriot Act 2001).[1] The Patriot Act contains sweeping provisions that, *inter alia,* expand the predicate offence for money laundering to include acts of terrorism and any act that provides material support for individuals, groups, or entities involved in terrorism (Title III, s. 376). The Act also expands US supervisory control over the global activities of foreign banks that maintain correspondent accounts with US banks or that use the inter-bank payment system with a US bank. This legislation and its regulations enhance extraterritorial prescriptive jurisdiction over the activities of foreign third parties, such as banks and professional advisers, who are deemed by US regulators as providing material assistance to terrorists. Moreover, the legislation has the effect of integrating US international money-laundering policy with that of interdicting the financing of terrorism. US efforts to impose increased extraterritorial controls to interdict terrorist financing have provided the impetus for the Financial Action Task Force and the European Union to adopt stricter standards and rules for their members to impose asset freezes and other financial sanctions against terrorist organisations.

The paper begins by providing a general background summary of the importance of US financial sanctions as a tool of US foreign policy and the statutory framework that provides the legal basis for such sanctions. It will then examine the recent Executive Order imposing extraterritorial financial controls on foreign persons and financial institutions. The main part of the paper will address the extraterritorial provisions that apply to banks and other financial institutions under Title III of the Patriot Act. This section suggests that the Patriot Act's requirements that foreign banks and regulators comply with international standards set by the Financial Action Task Force raises the profile of FATF in setting international norms that influence states in adopting restrictions on the financing of international terrorism. This paper will also examine recent international efforts to combat terrorist financing, such as United Nations Security Council Resolution 1373 and the 1999 UN Convention on the Suppression of Financing of Terrorism. Moreover, the European Community and UK initiatives in these areas will be discussed.

Background

A major instrument of US foreign policy has been the use of extraterritorial economic sanctions that target certain states and entities for undertaking acts in breach of international law and which threaten US national security interests.[2] These trade embargo and economic sanctions programmes have broad extraterritorial effect by prohibiting 'any person subject to the jurisdiction of the United States' from trading or conducting any type of financial or commercial transaction with targeted states and their nationals. A 'person subject to the jurisdiction of the United States' is defined broadly to include US citizens and residents, foreign persons in the USA, corporations and business entities organised under US law, and any foreign person located outside the USA who is subject to the control of a US person.[3] The US Treasury Department's Office of Foreign Assets Control (OFAC) promulgates and administers these economic sanctions regulations, which impose financial controls on US banks and financial institutions and their overseas branches and, in some cases, their foreign subsidiaries by restricting their commercial conduct with targeted states and designated persons. These financial sanctions also create extraterritorial third party liability for non-US banks and professional advisers who materially assist,

or provide financial or technological support for, persons or entities involved in narcotics trafficking, money laundering or terrorism.[4] Throughout the 1990s, extraterritorial US economic sanctions became an increasingly important component of US foreign policy, and reflect the perceived need of US policy makers to seek to control and influence events in international finance and commerce that affect US national interests.[5] The use of extraterritorial financial sanctions has become especially important for US national security and foreign policy in the aftermath of the attacks of 11th September, 2001, as the USA has made the financing of international terrorism a prime objective in its extraterritorial sanctions policy.[6]

Statutory framework

The International Emergency Economic Powers Act of 1977 (IEEPA),[7] the United Nations Participation Act,[8] the International Security and Development Cooperation Act,[9] and the Anti-Terrorism and Effective Death Penalty Act (ADEPA),[10] provide statutory authority in periods of undeclared war for the president to impose controls on financial transactions and any property in which a targeted state and its nationals, or designated terrorists and narcotics traffickers, have an interest.[11] Since the late 1970s, US presidents have usually relied on IEEPA as statutory authority to impose financial sanctions against targeted states and entities and against those foreign third parties whose exercise of these powers is conditional on the president declaring a peacetime national emergency, notifying Congress, and making certain findings of fact. The congressional intent behind IEEPA was that the president should have an effective policy instrument to restrict private international financial transactions with US-targeted states and persons during periods when the USA was not in a declared war. Specifically, the president has broad authority to prohibit or restrict trade, investment or any other transaction undertaken or facilitated by US financial institutions, their foreign branches, and in some circumstances US-controlled foreign subsidiaries, with targeted states. The prohibition also covers any transaction whatsoever in connection with any property or interest in property belonging to a US-targeted state or person.[12]

Under the IEEPA, Congress has authorised the president to adopt financial sanctions regulations to promote US foreign policy and national security interests and to uphold certain principles of international law. Pursuant to this power, the president has delegated the authority to develop and issue embargo and foreign asset control regulations to the Secretary of the Treasury.[13] The Treasury Department's Office of Foreign Assets Control (OFAC) administers sanctions and embargo programmes directed against several countries, including Cuba, Iran, Iraq, Libya, North Korea, Sudan, Burma (Myanmar) and Syria. These sanctions programmes prohibit all US citizens or residents, US business entities, and, in some cases, US-controlled foreign business entities from doing business or financing transactions with targeted states and their nationals and business entities. In addition, OFAC has designated individuals or entities operating in third countries (non-targeted states) as specially designated nationals or organisations who are acting on behalf of or are subject to the control of targeted states or their nationals. These economic sanctions programmes typically fall into two broad categories: financial sanctions and assets freezes; and trade and commercial embargoes. Asset freezes prohibit transfers of assets belonging to targeted states or entities which are in the possession of US persons or US-controlled foreign persons.[14] Frozen assets cannot be paid off, withdrawn, set off, or

transferred in any manner without a Treasury licence. Financial sanctions may also take the form of bank lending or account maintenance. Moreover, commercial embargoes may cover contract performance, travel and transportation prohibitions. OFAC may rely on some or all of these options combined to effect a comprehensive sanctions programme against specific states and individuals.

In the early 1990s, OFAC began to administer foreign assets control regulations against specially designated individuals or organisations that had been identified by the US Government as being involved in or supporting terrorist activity or narcotics trafficking.[15] These sanctions regulations were significant because it was the first time OFAC had imposed foreign assets controls on persons or entities regardless of their nationality or territorial connection. In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act[16] that required the Secretary of State to designate a list of states that support terrorism and to subject them to economic sanctions administered by OFAC and to a limitation on sovereign immunity in US courts for civil damage claims by the victims of state-sponsored terrorism.

THE AFTERMATH OF 11TH SEPTEMBER, 2001: EXECUTIVE ORDER 13224

President Bush issued Executive Order 13224 entitled 'Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism'. This Executive Order expanded the list of designated terrorist organisations to include over 30 individuals and organisations that have allegedly committed, or been involved in, acts of terrorism.[17] All persons subject to US jurisdiction are required to block or freeze any assets being held on behalf of such persons and to notify OFAC accordingly. The Order also prohibits all foreign third parties from assisting or providing material support for, or associating with, designated terrorists. The Order observes that the global reach of terrorist financing made it necessary to impose extraterritorial financial sanctions against all 'foreign persons that support or otherwise associate with these foreign terrorists'.[18]

The Order provides a broad definition of terrorism that provides:

— an activity that —
— involves a violent act or an act dangerous to human life, property, or infrastructure; and
— appears to be intended —
— to intimidate or coerce a civilian population ; or
— to influence the policy of a government by intimidation or coercion; or
— to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

Such a broad definition of terrorism could reasonably be interpreted to apply to the activities of some states in recent years who have relied on 'violent acts' or 'acts dangerous to human life, property or infrastructure' to accomplish state objectives that necessarily involved the coercion of a civilian population or sought 'to influence the policy of a government by intimidation or coercion'.[19]

Section 1 of the Order blocks indefinitely any obligation to perform a contract entered into before the effective date of the Order with a designated terrorist entity or person listed in the Order, and requires all property or interests in property to be blocked of such designated persons that are located in the USA or that hereafter come within the USA, or that come within the possession or control of a US person. The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, has authority to determine

which 'foreign persons' have committed or pose a significant threat of committing 'acts of terrorism that threaten the security of US nationals or the national security, foreign policy, or economy of the United States' (s. 1(b)). Moreover, the Secretary of the Treasury may make determinations that certain foreign persons in third countries are 'owned or controlled by', or 'act for or on behalf of' foreign persons designated by the US to be terrorists (s. 1(c)). Moreover, s. 1(d) of the Order expressly creates extraterritorial third party liability by authorising the Secretary of the Treasury, after consulting with other US government officials and with 'foreign authorities, if any,' to designate foreign persons who 'assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed' to be terrorists. All US trade, commerce or transactions with such third party persons would be prohibited unless a licence is obtained from OFAC, and they would be subject to civil and criminal sanctions under US law if they have a constitutional presence in the USA.

The Order also prohibits any transaction or dealing by US persons, or by foreign persons within the USA, in property or interests in property blocked pursuant to this Order, including but not limited to 'the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed' as terrorists in the Order (s. 2(a)). This provision prohibits the right of US persons to make contributions of any type or to perform any type of service on behalf of a listed terrorist or a person or entity operating in a foreign country which the USA has decreed to be owned or controlled by a listed terrorist. Moreover, any effort by a US person (or by a non-US person within the USA) to undertake a transaction to restructure the ownership or control of property or a business entity in order to evade or avoid restrictions under the Order is prohibited and may attract both civil and criminal liability not only for financial institutions or companies holding property on behalf of listed terrorists but also for the professionals advising such transactions (s. 2(b)). Moreover, any conspiracy formed to violate any of the prohibitions in the Order is prohibited and has extraterritorial effect through the Federal Conspiracy statute (s. 1(c)).[20]

Section 6 states the importance of US cooperation with foreign governments in implementing the Order by providing that the Secretary of State and the Secretary of the Treasury and other government agencies 'shall make all relevant efforts to cooperate and coordinate with other countries' and may invoke existing bilateral and multilateral agreements and arrangements to achieve the objectives of the Order. This would include the prevention or suppression of acts of terrorism, and the denial of financing and financial services to terrorists and terrorist organisations, and the sharing of intelligence regarding funding activities in support of terrorist groups. It should be noted that the principle of 'cooperation and coordination' in s. 6 appears to be mandatory only to the extent that US government officials may determine what efforts at cooperation and coordination are 'relevant efforts' to achieve the objectives of the Order. Essentially, the US Government will not be precluded from acting unilaterally whenever it perceives that it is necessary to do so.

The Order departs slightly from other US sanctions programmes by defining the term 'United States person' to mean any US citizen, permanent resident alien, entity organised under the laws of the USA (including foreign branches), or any person in the USA. In an extraterritorial sense, this is a less sweeping definition than those adopted under the Cuban and North

Korean Sanctions Programmes that define US person more broadly to include any foreign person deemed by the US government to be controlled by a US citizen, resident or US business entity. Under these programmes, a US person could be defined as a company incorporated under the laws of a foreign state whose shares are subject to significant US ownership or control.[21]

The Executive Order is a significant extension of extraterritorial third party liability for foreign banks, companies and individuals who conduct, facilitate or assist transactions involving US-designated terrorist organisations. OFAC is expected in the near future to issue regulations that describe in more detail how the Order will be applied and enforced.

THE PATRIOT ACT: INTERNATIONAL MONEY LAUNDERING ABATEMENT AND ANTI-TERRORIST FINANCING ACT OF 2001

Title III of the Patriot Act is entitled the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001. Title III contains the key provisions that apply to US and foreign banks and financial institutions. It amends, *inter alia*, certain provisions of the Bank Secrecy Act of 1970 and the Money Laundering Control Act of 1986. The Bank Secrecy Act has enhanced transparency for US financial institutions by preventing them from keeping opaque records and requiring them to maintain standardised transaction records and to report large currency transactions and suspicious transactions. Some of its provisions apply not only to financial institutions but also require any individual to report the movement of more than $10,000 in currency into and out of the country. The Money Laundering Control Act creates the criminal offence of laundering the proceeds of crime and allows the criminal and civil forfeiture of the proceeds or property derived from crime. Moreover, Title III contains, among other provisions, authority to take targeted action against countries, institutions, transactions, or types of accounts that the Secretary of the Treasury finds to be of prime money-laundering concern. It also contains high standards of due diligence for inter-bank correspondent accounts and payable-through accounts opened at US financial institutions by foreign offshore banks and banks in jurisdictions that have failed to comply with international anti-money-laundering standards.

Statutory provisions

Section 311 adds a new s. 5318A to the Bank Secrecy Act to give the Treasury Secretary discretionary authority to impose one or more of five new 'special measures against foreign jurisdictions', foreign financial institutions, transactions involving such jurisdictions or institutions, or one or more types of accounts (including foreign accounts), that the Secretary determines to pose a 'primary money laundering concern' to the USA. The special measures include: requiring additional record-keeping or reporting for particular transactions; requiring identification of the foreign beneficial owners of accounts at US financial institutions; requiring foreign banks to identify any of their customers who use (ie transfer of funds) an inter-bank payable-through account opened by that foreign bank at a US bank; requiring foreign banks to identify any of their customers who use an inter-bank correspondent account opened by that foreign bank at a US bank; and after consultation with the Federal Reserve Board, the Secretary of State and Attorney General, to restrict or prohibit the opening or maintaining of certain inter-bank correspondent or payable-through accounts. The Treasury Department has already issued some regulations regarding record keeping and the level of disclosure, and will issue further regulations in the coming months.

Although foreign banks will not have to disclose such information directly to US authorities, US financial institutions will be required to collect this information from foreign banks and if necessary to report this information to US regulatory authorities. The objective of these measures is to establish enhanced due diligence and record keeping requirements for foreign banks that hold private banking accounts with US financial institutions. The effect of the legislation will be to require foreign persons (business entities and individuals) who are the owners or beneficial owners of private banking accounts with a foreign bank that also maintains certain accounts with a US bank to disclose the nature of its wealth or commercial affairs with its foreign banker. The US bank will then collect this material and make it available for inspection by US authorities. These requirements will apply only to foreign banks operating under a licence from either an offshore jurisdiction that has not complied with recognised international standards or any other jurisdiction designated by the Financial Action Task Force as having failed to comply with its minimum international standards.

If a foreign bank decides that it wants to opt out of these US regulatory controls, it must terminate all its correspondent, payable-through and other accounts with US financial institutions. This will be a difficult option, however, for many foreign banks derive a significant amount of their business from transfers and transactions involving the US inter-bank payment system. Indeed, the international reach of the US banking system is demonstrated in part by the need of most non-US financial institutions to have access to US currency via a US bank in order to participate in the foreign exchange market. This type of link to the US euro-dollar market will attract extraterritorial jurisdiction for a foreign bank under the Patriot Act. It remains to be seen whether the benefits for a foreign bank of maintaining inter-bank payment links with US financial institutions exceeds the costs (including lost business) of complying with the new legislation.

Correspondent accounts

The typical correspondent bank account involves a smaller bank entering into an agreement with a larger bank to process and complete transactions on behalf of the smaller bank's customers or the smaller bank itself.[22] Many US banks have earned substantial fees from serving as correspondent banks for many foreign banks that operate in poorly-supervised jurisdictions. US-designated terrorist groups and money launderers have used the correspondent banking system to clear US dollar funds to finance their illicit activities. US regulators have warned US banks regarding the risks that these activities pose to the safety and soundness of the US banking system because of the potential of reputational risk for US banks.

The legislation recognises that transactions involving offshore jurisdictions make it difficult for US authorities to follow the money earned by organised crime groups and global terrorist organisations. One way in which money is laundered is through correspondent banking and payment facilities, which are often manipulated by foreign banks to permit the laundering of funds by hiding the true identities of the parties involved in the transactions. To this end, s. 312 creates special disclosure requirements for foreign banks that maintain correspondent accounts[23] and other private banking accounts at US financial institutions by adding a new subsection (i) to the Bank Secrecy Act[24] which requires US financial institutions to establish 'appropriate', and, if necessary, enhanced due diligence procedures to detect and report instances of money laundering. New and enhanced due diligence standards

are required for US financial institutions that enter into correspondent banking relationships with foreign banks that operate under *either* an offshore banking licence,[25] or a banking licence issued by states that have been either designated as non-cooperative with international anti-money-laundering standards issued by an international body (ie FATF) with the concurrence of the US representative to that body, or subject to special measures set forth under s. 311 (see above). Similarly, s. 312 also creates new minimum due diligence standards for maintenance of private banking accounts by US financial institutions. These new standards will become effective 270 days after the date of enactment (around 1st August, 2002), and the Treasury Secretary is required to issue regulations, in consultation with the relevant federal functional regulators, within 180 days of enactment (around 1st May, 2001) that further specify the requirements of this subsection. The statute, however, shall take effect regardless of whether or not such regulations have been issued, and will be enforceable by the relevant officials.[26]

Section 313(a) prohibits certain covered financial institutions[27] from establishing, maintaining, administering or managing correspondent accounts with 'shell banks', which are defined as a foreign bank that has no physical presence in any jurisdiction.[28] This provision also requires covered financial institutions to take 'reasonable steps' to ensure that correspondent accounts provided to foreign banks are not being used indirectly to provide financial services to foreign shell banks. In addition, s. 319 (b) requires that covered financial institutions which provide correspondent accounts to a foreign bank to maintain records of the owners of the foreign bank and the designated agent in the USA to accept service of legal process.

An exception exists, however, to permit a covered financial institution to maintain correspondent accounts with foreign shell banks that are affiliated with a depository institution, credit union, or foreign bank that maintains a physical presence in the USA or in another jurisdiction, and the shell bank must be subject to supervision by the banking authority that regulates the affiliated entity.[29] The broad definition of 'covered financial institution' means that non-bank institutions, such as brokers and dealers in securities that operate in the USA, will be prohibited from establishing, maintaining, administering or managing an account for a foreign shell bank that is not a regulated affiliate.[30] To qualify as a regulated affiliate, the affiliated depository institution must demonstrate that it is regulated by a financial authority whose standards comply with generally accepted international norms as set forth by international bodies (ie. Financial Action Task Force).[31]

The Secretary of Treasury is required to issue regulations[32] to foster cooperation among financial institutions, regulators and law enforcement agencies by permitting the sharing of information between regulators and law enforcement authorities regarding the activities of persons suspected, based on credible evidence, of engaging in money-laundering activity or terrorist acts.[33] This section also allows banks to share information with other banks, without violating confidentiality laws, regarding suspicious accounts or transactions involving possible terrorist or money-laundering activity. It also requires the Treasury Secretary to publish a semi-annual report with a detailed analysis of patterns of suspicious activity and other investigative insights gathered from investigations and bank reporting.

Under s. 315, bribery and other foreign corruption offences become 'specified unlawful activities' for purposes of the crime of money laundering. The section also makes several other existing federal crimes serve as predicate offences for the

crime of money laundering, including certain export control violations,[34] firearms violations, and certain computer fraud offences, and felony offences under the Foreign Agents Registration Act of 1938. US courts are granted 'long-arm jurisdiction' over foreign persons who commit money-laundering offences under US law (s. 317). This extraterritorial jurisdiction also applies to foreign banks opening US bank accounts, and to foreign persons who convert assets ordered confiscated by a US court. A federal court will have the authority to issue *ex parte* pre-trial restraining orders or to take other necessary action to preserve property in the United States to satisfy a possible future judgment. A federal court may appoint a receiver to collect and take custody of a defendant's assets to satisfy a criminal or civil money-laundering or forfeiture judgment (s. 317).

The definition of 'financial institution' for the purposes of ss. 1956 and 1957 of the Money Laundering Control Act 1986 is expanded to include foreign banks or other financial institutions operating outside the USA. Financial institutions subject to anti-money-laundering laws will be determined according to regulations issued by the Department of Treasury and will apply to foreign banks as defined under US law.[35] Moreover, concentration accounts at financial institutions will be more heavily regulated, as the Secretary of Treasury will be authorised to issue regulations concerning the maintenance of concentration accounts by US depository institutions in order to prevent an institution's customers from anonymously directing funds into or through such accounts.[36] This is designed to prevent the blocking of the identification of a customer with the movement of funds of which the customer is the direct or beneficial owner. The provision also prohibits financial institutions and their employees from informing customers of the existence of, or the means of identifying, concentration accounts at the institution. Regarding identity verification, s. 326 requires the Treasury Secretary to issue regulations (jointly with each US functional regulator) that prescribe minimum standards for financial institutions and their customers regarding the identity of the customers that shall apply as part of the application to open a bank account. These minimum standards shall require financial institutions to implement, and customers who have received adequate notice to comply with procedures concerning verification of customer identity, maintenance of records of identity verification, and consultation at account opening of lists of known or suspected terrorists provided to the financial institution by the US Government.

Section 316 sets forth the procedural defences that a financial institution may take to defend against any government action to confiscate or forfeit property allegedly derived from terrorist activity or money laundering. Any owner of property that is confiscated under any provision of law relating to the confiscation of assets belonging to suspected international terrorists may contest that confiscation by following the established procedures set forth in the Federal Rules of Civil Procedure[37] and by asserting an affirmative defence based on one of the following: that the property is not subject to confiscation under such provision of law; or that the owner complies with the 'innocent owners defense' under federal law.[38] An owner of property will also have the right to contest the confiscation of assets of suspected international terrorists under the US Constitution and relevant provisions of the Administrative Procedure Act. Moreover, a US federal court may suspend the federal rules of evidence in certain circumstances where a party to the proceedings seeks to admit evidence that would otherwise be inadmissible under the federal rules, but the

court must make a finding that the evidence is reliable and that complying with the federal rules of evidence will jeopardise the national security interests of the USA (s. 316(b)). Many US judges are often reluctant to deny a US Government motion to suspend the federal rules of evidence on the grounds of national security if the government can provide a reasonable explanation for why disclosure of an evidentiary source might jeopardise national security.

Payable-through accounts

Section 311 (e) defines a 'payable-through account' 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 sub-account, in banking activities usual in connection with the business of banking in the United States.' Payable-through accounts are offered by US banking entities to foreign banks. It involves the US banking entity opening a checking account for the foreign bank. The foreign bank then solicits customers that reside outside the USA who, for a fee, are provided with the means to conduct banking transactions in the US payment system through the foreign bank's account at the US banking entity. Ordinarily, the foreign bank will provide its customers, commonly referred to as sub-account holders, with checks that enable the sub-account holder to draw on the foreign bank's account at the US banking entity. The group of sub-account holders may become signatories on the foreign bank's account at the US banking entity.

Section 319 of the Act amends the US Asset Confiscation and Forfeiture statute[39] to treat money deposited into an account of a foreign bank which has an inter-bank account with a US bank as having been deposited in the USA for purposes of the forfeiture rules. Enforcement of this provision would work by allowing any restraining order, seizure warrant, or arrest warrant regarding the funds to be served on the US bank, and the amount of the funds restrained or seized at the US bank can cover a value up to the value of the funds deposited into the account at the foreign bank (s. 319(a)(1)(A)). The US Government is not required to establish a direct link, or that the funds are directly traceable, to the funds that were deposited by the foreign defendant into the foreign bank (s. 319(a)(2)).

US regulators are now given broader powers to collect information from US financial institutions by requiring them to produce requested information within 120 hours of receipt of a request (s. 319(b)(1)(B)(2)). Foreign banks that maintain correspondent accounts with US banks are required to appoint agents within the US territory for service of process. The Attorney General and the Secretary of the Treasury can issue summons or subpoena records or documents, wherever located, relating to such correspondent accounts. US financial institutions will be required to sever their relationships with the foreign bank if it *either* fails to comply with the summons or subpoena *or* fails to contest the action in the relevant US court within 120 hours of it being served (s. 319(b)(3)(A)).

Requiring the identification of the 'foreign beneficial owners' of accounts with US financial institutions may create a disclosure obligation for many companies and trusts who are organised in foreign jurisdictions that might conflict with secrecy requirements under local law. Moreover, some jurisdictions make it a criminal offence to disclose information that identifies beneficial owners of shares in certain companies or the beneficiaries under certain trust arrangements. Section 319 takes account of this by vesting authority in the

Attorney General to suspend or terminate a forfeiture under this section if the Attorney General determines that a direct conflict of laws exists between the laws of the jurisdiction in which the foreign bank is located and the laws of the USA with respect to liabilities arising from the restraint, seizure, or arrest of such funds, and that such suspension or termination 'would be in the interest of justice and would not harm the national interests of the United States' (s. 319(a)(1)(B)).

The sweeping extraterritorial provisions discussed above may also work in favour of foreign regulators if they are seeking to obtain property located in the USA but which is derived from crimes committed in their countries. Section 320 permits the US Government to institute forfeiture proceedings against the real or personal property found in the USA that constitutes, or is derived from, an offence against a foreign nation, if either the offence involves the manufacture, distribution or sale of a controlled substance,[40] or the offence would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding one year, *and* would be punishable under US law by imprisonment for a term exceeding one year, if the act or activity constituting the offence had occurred within the USA. Moreover, s. 323 allows the US Government to seek a restraining order to preserve the availability of property subject to a foreign forfeiture order or confiscation judgment.

Prior to the Patriot Act, US banking law provided a narrow definition for the term 'financial institution' for purposes of the Bank Secrecy Act that excluded many financial firms from the requirements of reporting suspicious transactions. Section 321 amends this omission by defining the term 'financial institution' broadly to include credit unions, futures commission merchants, commodity trading advisers, securities brokers/dealers and commodity pool operators, who are now obligated to comply with the reporting requirements of the Bank Secrecy Act (s. 321(a)–(c)). Moreover, the Act pierces the veil of corporate personality by prohibiting any corporation (US or foreign) that seeks to maintain a forfeiture action in a US court from doing so if a controlling shareholder, or any person bringing the claim on behalf of the corporation, is a fugitive under US law (s. 322). This provision would also apply to restrict — and in some cases prohibit — a claim instituted by such a corporation to challenge a civil forfeiture action taken by the US Government.

Applications for bank mergers and acquisitions

Under the Act, the Federal Reserve Board and the Federal Deposit Insurance Corporation are required to take account of the anti-money-laundering records of any US or foreign bank or bank holding company that seeks to merge with, or acquire, a banking institution or bank holding company within the jurisdiction of these respective agencies. As part of such a review, the US regulators may request the records of all foreign branches or agencies of an applicant bank, or, in the case of a bank holding company, the records of its foreign subsidiaries.[41]

EFFORTS AT COOPERATION AND COORDINATION WITH FOREIGN REGULATORS

The Act requires the Treasury Secretary, the Secretary of State and the Attorney General to undertake 'reasonable steps' to encourage foreign governments to require the disclosure to US authorities of the names of a party who is the originator of wire transfer instructions sent to the USA, and to report annually to the relevant US congressional committees regarding any progress made with foreign regulators to accomplish this objective (s. 328). More-

over, Title III requires the president to direct these executive officials to coordinate their efforts with the Federal Reserve Board in negotiating with foreign supervisory authorities or foreign officials to ensure that non-US financial institutions maintain adequate records that relate to the accounts or transactions involving alleged terrorist organisations, or any person engaged in money laundering or other financial crimes (s. 330). US authorities should seek to obtain such records from foreign financial supervisors, and to make the records available to US law enforcement authorities and financial regulators where appropriate (s. 330). Congress has also stated an overall policy objective of encouraging US banking and securities regulators to institute negotiations with foreign supervisory authorities for the purpose of developing international norms and rules that would require national authorities to enhance regulatory disclosure standards and to coordinate with foreign authorities in the investigation of terrorist financing and money laundering (s. 330). The regulations that implement these statutory provisions are likely to grant authority to US financial regulators to negotiate bilateral agreements and other understandings with foreign regulators in order to facilitate the enforcement of financial sanctions on a transnational basis.

The mandatory language of the US Patriot Act indicates that US regulators will take a more assertive negotiating posture with other members of international bodies in order to achieve more precise and effective international standards and rules for the supervision and regulation of financial institutions with respect to financial crime and terrorist financing. Since the attacks of 11th September, the US Congress and the relevant US financial regulators have expanded the extraterritorial scope of US economic sanctions policy and have engaged foreign regulators to adopt more effective measures to identify the sources of suspicious financial transactions and to interdict terrorist financing.

Compliance implications for banks

Title III of the Patriot Act and the OFAC terrorist sanctions regulations together are a comprehensive anti-terrorist programme to attack the financing of international terrorism and to enhance existing anti-money-laundering and bank secrecy laws so that foreign banks that do business with the USA, and in particular utilise the US banking system and US currency, will be subject to high standards of due diligence and transparency. In particular, foreign banks must now identify the foreign beneficial owners of certain accounts at US financial institutions. The US Treasury Secretary will issue further regulations in the coming months to clarify these tough new restrictions on US and foreign banks. These extraterritorial provisions are likely to impose heavy compliance costs on foreign banks that have private banking relationships with US banks. Although this may lead some foreign banks to terminate their relationships with US financial institutions, most sophisticated banking companies need to maintain account relationships with US banks so that they may use the US inter-bank payment system, and therefore will have to comply with these stricter regulatory requirements. The congressional intent behind Title III is to prevent economic criminals and terrorists from using the US financial system to support their illicit activities.

International efforts to interdict terrorist financing

The recent US financial sanctions laws directed against terrorist financing cannot be fully appreciated without a brief discussion of the efforts of the United Nations and the Financial Action Task Force in setting international standards that require

states to prohibit the financing of terrorist activities. Moreover, the European Union adopted a Regulation on 27th December, 2001 that expands the list of designated terrorist groups and requires EU member states to prohibit commercial or financial transactions with persons or entities that may be supporting, or involved with, terrorist groups.

United Nations

The United Nations General Assembly has played an important role in devising resolutions and international conventions that address specific acts of terrorism, such as airline hijackings, unlawful seizure of aircraft or hostage taking, but did not address the issue of the financing of terrorism until the 1990s when a series of resolutions and a convention were adopted.[42] Indeed, although General Assembly Resolution 49/60 that was adopted in 1994 reaffirmed the UN 'condemnation of all acts, methods, practices of terrorism as criminal and unjustifiable', it also encouraged states to review urgently the scope of existing international legal provisions on the prevention and repression of terrorism in all its forms to ensure that all aspects of terrorism are covered. To this end, General Assembly Resolution 51/210 recognised the threat posed by so-called charitable and cultural organisations serving as fronts for terrorist fundraising and training, and called upon all states to take domestic measures to prevent and counteract the financing of terrorists and terrorist organisations.[43]

In addition, UN member states approved the International Convention for the Suppression of the Financing of Terrorism on 9th December, 1999.[44] The Convention recognises that the financing of terrorism is a matter of grave concern to the international community and requires states to adopt regulatory measures to prevent the flow of funds intended for terrorist purposes. Specifically, Art. 2(1) requires states to create an offence when a 'person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they should be used' to commit an act that constitutes a terrorist offence. Article 2 also defines an act as constituting a specific terrorist offence if it either (1) constitutes a specific offence within the scope of one of the nine UN Conventions listed in the Treaty Annex that address various types of terrorism, or (2) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not actively taking part in hostilities involving armed conflict act, when the purpose of such act was to intimidate a population, or to compel a government or international organisation to do or abstain from doing an act. It should be noted that the definition of a specific terrorist offence in (2) is much narrower than the definition issued by President Bush in his Executive Order discussed above, and will likely have legal implications for the conduct and prosecution of the war on international terrorism.

The Convention has not become effective, however, because as of 1st January, 2002 only 17 of its 129 signatories have ratified it. The UK adopted secondary legislation (SI No. 3365) to implement the Convention that prohibits any person from making 'any funds or financial (or related) services available directly or indirectly to or for the benefit of' a listed terrorist or organisation or company owned or controlled by a terrorist.'[45]

In the aftermath of 11th September, the UN Security Council adopted Resolution 1373 that requires states to prevent and suppress the financing of terrorist acts and to refrain from providing any type of support, active or passive, for terrorists and to deny safe haven to those who finance, plan or participate in terrorist acts (Art. 2(c)). Resolution 1373 emphasises the importance

of freezing the assets of companies and entities owned or controlled by listed terrorist groups. Specifically, Art. 1(b) requires states to create an offence for persons who wilfully provide or collect, by any means, directly or indirectly, funds with the knowledge that such funds be used to carry out terrorist acts. Article 1(c) requires states to freeze without delay funds, financial assets, or other economic resources belonging to, or controlled by, persons who commit, or attempt to commit, terrorist acts. Article 1(d) addresses the issue of third party financing by requiring states to prohibit 'nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts'.

Financial Action Task Force

The Financial Action Task Force (FATF) has also played a significant role in developing international standards to combat terrorist financing. FATF has emerged as a major player in setting international standards to combat financial crime.[46] FATF was established by the G7 Heads of State in 1989 at the G7 Summit. FATF is the only international body dedicated solely to fighting money laundering and other aspects of financial crime. The membership of FATF includes all the members of the Organisation for Economic Cooperation and Development (OECD).[47] In 1990, FATF issued a list of Forty Recommendations on money-laundering countermeasures intended to constitute an international 'minimal standard in the fight against money laundering'.[48] The Forty Recommendations prescribe a range of actions designed to improve national legal regimes, enhance the role of the financial system, and strengthen international cooperation against financial crime.

The Forty Recommendations are not legally binding under public international law. This is intended to give national authorities maximum flexibility and control in implementing international standards into national legal systems. The non-binding nature of FATF standards, however, has been called into question in recent years because FATF has on several occasions threatened to impose sanctions against states deemed by FATF as having failed to adopt national legislation to implement the Forty Recommendations. FATF's threat to use sanctions has in most cases resulted in targeted states and jurisdictions adopting the necessary legal measures to implement FATF standards.

Under intense US pressure and in response to the generally recognised threat of international terrorism, the Financial Action Task Force convened an extraordinary plenary meeting in Washington DC on 29th and 30th October, 2001 with the objective of expanding its mission beyond money laundering and financial crime to include the financing of international terrorist activity. At this meeting, the FATF President, Ms Clair Lo, the Director of the Hong Kong Securities and Futures Authority, called on all countries in the world to adopt and implement newly issued FATF 'Special Recommendations' intended to deny terrorists and their supporters access to the international financial system.[49] FATF members take the view that the 'Special recommendations' on terrorist financing, combined with the FATF Forty Recommendations on Money Laundering, establish the basic framework for detecting, preventing and suppressing the financing of terrorism and terrorist acts.

Special Recommendation I states that 'each country should take immediate steps to ratify and to implement' the 1999 United Nations International Convention

for the Suppression of the Financing of Terrorism and to implement immediately the UN resolutions relating to the prevention and suppression of the financing of terrorism, particularly the UN Security Council Resolution 1373 that was adopted on 28th September, 2001. Special Recommendation II urges each country to criminalise the financing of terrorism and associated money laundering.

Equally important, Special Recommendation III requires each country to implement measures to freeze funds without delay or other terrorist assets, and those intermediaries or other third parties who finance terrorism or terrorist organisations should be defined as such in accordance with the United Nations Resolutions relating to the prevention and suppression of the financing of terrorist acts. In addition to freezing assets, Recommendation III urges countries to adopt and implement measures (including legislative ones) that authorise the competent national authorities to seize and confiscate property defined as the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations. This provision appears to allow each country to define what property is considered to be the proceeds of terrorist activity. More important, the FATF Recommendations omit any definition of terrorism and appear to allow member states to adopt a definition under their local law.

Special Recommendation IV urges each country to adopt effective regulations that require financial institutions and other business entities subject to anti-money-laundering obligations to report promptly to national authorities any suspicious transactions or accounts that may be related to terrorism. The 'Special Recommendations' supplement and reinforce the measures already adopted by the UN and create a more comprehensive international regime for interdicting the financing and commercial support of terrorists and terrorist activities.

United Kingdom

Similarly, the UK Government has adopted financial controls and expansive principles of third party liability to combat the financing of terrorism. This was enacted in November 2001 and is known as the Anti-terrorism, Crime, and Security Amendments to the Terrorism Act 2000. Section 15 creates an offence for a person to solicit, or to receive, money or property on behalf of terrorists if the person knows or has reasonable cause to suspect that such money may be used for the purpose of terrorism. Similarly, a person is prohibited from providing money or other property if he knows, or has reasonable cause to suspect, that it will be used for the purpose of terrorism. Section 17 adopts the concept of the knowingly concerned person in creating an offence for a person who enters into, or becomes concerned in, an arrangement in which money or property is made available to another, and the person knows or has cause to suspect that it may be used for terrorism. Section 19 requires a person who becomes aware in the course of his employment or business of another person who has committed the offence of financing terrorism to disclose such information to a constable or a designated company officer. Section 21 covers all firms in the regulated sector by creating an offence for a person who fails to disclose knowledge or suspicions of another person (ie a client) who may be involved in the financing of terrorism. As in s. 19, the disclosure must be made to a constable or designated firm officer. These provisions appear to adopt a knowledge standard for third party liability that can be satisfied by *either* a subjective knowledge test or an objective reasonable person test. Moreover, regarding the issue of extraterritorial jurisdiction, the Terrorism Act 2000 creates new offences of inter-

national terrorism that allow UK courts to deal with terrorist acts and their planning, wherever in the world those acts are carried out. Regarding third party financing of such acts, however, the 2001 Amendments expressly state that freeze orders will not have extraterritorial effect on the foreign branches of UK-based companies or financial institutions. This would also seem to suggest that other third parties acting outside UK territory, either directly or indirectly in support of terrorism, will not be covered by the Act.

Despite some limitations in jurisdictional reach, the UK legislation is an important step in addressing the problem of third party financing and support of terrorist activity, but it does raise a number of questions that will have to be fleshed out in secondary legislation. For example, if aiding a terrorist is now a crime, it presupposes a criminal intention. Will every employee of firms in the regulated sector be informed/updated and kept abreast of persons on the terrorist list and the type of commercial activities and enterprises in which they are involved? An obvious defence might be that the person accused of aiding a terrorist had no reasonable grounds to suspect that he was dealing with a terrorist because of a change in identity or a switch in commercial activities. Other issues that may arise concern the burden of proof, and on whom it will fall. Does it fall on the prosecution or does it fall on the accused to prove that he did not know that the person named was a terrorist? US financial sanctions regulations have adopted a civil enforcement regime that shifts the burden of proof to the accused to demonstrate, on the balance of the probabilities, that its commercial activities or property was not involved with terrorist groups. Devising an effective enforcement regime will be one of the many challenges facing UK regulators and law enforcement authorities.

European Union

It should also be mentioned that the European Union has adopted two Regulations to comply with UN Security Council Resolutions requiring states to interdict the financing of terrorism. Regulation 467/2001 requires certain restrictive measures to be taken — including the freezing of assets — against the Taliban and Usama bin Laden and persons and entities associated with him, such as the Al Quaida organisation. This Regulation, however, does not expressly require states to take legal measures to restrict third parties from providing material support — either direct or indirect — to terrorists. To achieve this, the EU recently adopted on 27th December, 2001 a Council Regulation entitled 'specific restrictive measures directed against certain persons and entities with a view to combating terrorism'. The Regulation expands the list of designated terrorists beyond those affiliated with bin Laden to include many European terrorist groups (Real IRA and the Basque ETA).

The Regulation's Common Position states in Art. 3 that the European Community will act within its competence to adopt financial sanctions at the Community level that will ensure that funds, financial assets, economic resources or other related services will not be made available to designated terrorists. The Regulation expressly requires member states to adopt broad principles of liability to be applied to natural or legal persons who assist in the funding of terrorism. Article 2 of the Regulation prohibits, except where a member state grants a licence, any person or entity from providing 'financial services to, or for the benefit of, a natural or legal person, group or entity' that is designated as a terrorist. Article 3 prohibits the knowing or intentional participation in activities, which have the object or effect of circumventing the restrictions set forth in Art. 2. Article 4 provides a list of disclosure obligations for

banks and other financial institutions, including insurance companies, regarding suspicious accounts and the amount held or controlled by suspect persons and to cooperate with other EC member authorities and the Commission in ensuring that these requirements are effectively enforced. Article 9 allows member states to determine the precise scope of sanctions (civil and/or criminal) to be imposed where provisions of the Regulation are infringed. Sanctions must be 'effective, proportionate and dissuasive'.

CONCLUSION

The tragic events of 11th September provided the impetus for the US Government to adopt far-reaching legislation and regulations that impose minimum standards of disclosure and transparency on foreign financial institutions and firms that utilise the US banking system. The Executive Order of 24th September expressly prohibits foreign banking institutions and other parties from providing financial assistance or commercial services to international terrorists designated by the US Government. Moreover, Title III of the Patriot Act imposes sweeping extraterritorial measures that create additional requirements for record keeping, specific transaction reporting, and disclosure obligations that apply to foreign banks and companies that do business in the USA or which maintain private banking or correspondent accounts with US financial institutions. Foreign banks must now identify the foreign beneficial owners of certain accounts at US financial institutions. US banks may not hold correspondent accounts for offshore shell banks which have no physical presence or employees anywhere and that are not part of a regulated and recognised banking company. US regulators are now expressly encouraged to coordinate efforts with foreign regulators and supervisory authorities in establishing minimum international standards of disclosure and due diligence for financial institutions. The Department of Treasury will be issuing regulations that add more clarification to the statutory provisions in the near future, and legal advisers and compliance officers for financial institutions — in whatever jurisdiction they may be located — should stay abreast of these developments.

In many ways, the US legislation complements the resolutions and conventions adopted by the UN in the area of terrorist financing. The UN measures were adopted, however, with a view that states would adopt anti-terrorist legislation that created offences for terrorism and acts that provide commercial and financial support for terrorism that occur within the state's territorial jurisdiction, and do not have express extraterritorial effect. By contrast, the US legislation has express extraterritorial effect, which will likely create tensions with foreign authorities in coordinating enforcement efforts. Overall, there is a general recognition that the financing of international terrorism threatens international peace and stability, and nations must take effective domestic legislative measures to impose civil and criminal sanctions for such conduct. To that end, devising effective international standards should be the responsibility of specialist international bodies such as the FATF that will complement the work of international organisations such as the UN. Whether this strategy will be effective in controlling international financial crime and terrorism remains to be seen, but what is certain is that the attacks of 11th September have resulted in more specific and stricter international standards for financial institutions and regulators to control the threat of money laundering and the financing of terrorism.

REFERENCES

(1) Pub. L. 107–56, 115 Stat. 272 (26th October, 2001). For Congressional debate, see

Congressional Record, Vol. 147, S10990-02.

(2) Alexander, K. (2001) 'Extra-territorial US economic sanctions and third party liability for non-US banks and companies', *Journal of International Banking and Financial Law* (May and June) Vol. 16, Nos. 5 and 6.

(3) See Cuban Assets Control Regulations 31 CFR §515.329(a)-(d); and North Korean Regulations 31 CFR §500.329(a)–(d).

(4) See Office of Foreign Assets Control, 'What you need to know about US sanctions against drug traffickers — an overview of the Foreign Narcotics Kingpin Designation Act (21 USC §§1901–1908)' (3 Oct. 2001). See also the Terrorism Sanctions Regulations, 31 CFR §595; Foreign Terrorist Organisations, 31 CFR §596 (2000).

(5) See Alexander, K. (2002) 'Extra-territorial Legal Framework of United States Financial Sanctions: US Power in the Twenty-First Century', Butterworths, forthcoming.

(6) See Statement of President George W. Bush (23rd September, 2001): 'We have developed the international financial equivalent of law enforcement's most wanted list and it puts the financial world on notice. If you do business with terrorists, if you support or sponsor them, you will not do business with the United States.'

(7) 50 USC §1701 *et seq.*

(8) 22 USC §287c.

(9) 22 USC §2349 aa-8 and 9.

(10) The AEDPA enacted amendments to 8 USC §219, 18 USC 2332d, and 18 USC §2339B. The AEDPA authorises the Secretary of State to designate state sponsors of terrorism which would be subject to US economic and financial sanctions. To date, the designated state-sponsors of terrorism are: Cuba, Iran, Iraq, Libya, Syria, North Korea and, until 17th November, 2001, Afghanistan.

(11) The president may invoke the 'Trading with the Enemy Act of 1917' during times of war. See, as amended, 50 USC app s. 5 (2000).

(12) As amended Pub. L. 100-418, Title II, § 2502(b)(1)(23rd August, 1988), 102 Stat. 1371, codified at 50 USC §1702(a)(1)(A) and (B). It states in relevant part: (a)(1) '[T]he President may, under such regulations as he may prescribe, by means of instructions, licenses ... investigate, regulate, or prohibit ... '

(13) See *Welch v. Kennedy* 319 F. Supp. 945, 948 (D.D.C. 1970)(upholding such delegated authority).

(14) See Cuban Assets Control Regulations, 31 CFR §515.329(a)-(d)(2000). See also Iranian Transaction Regulations, 31 CFR §560.329(a)-(d)(2000).

(15) See Terrorism Sanctions Regulations, 31 CFR §595 *et seq.*; Foreign Terrorist Organisations Regulations, 31 CFR §597.100 *et seq.*; and Narcotics Trafficking Sanctions Regulations (NTSRs) 31 CFR §536.100.

(16) This statute is a series of amendments to other legislation. See 8 USC §219, 18 USC 2332d, and 18 USC §2339B (2000)(*as amended*). The AEDPA authorises the Secretary of State to designate state sponsors of terrorism and for OFAC to impose economic sanctions against these states. See Terrorism List Government Sanctions Regulations, 31 CFR §596.100 *et seq.* At present, the designated states are: Cuba, Iran, Iraq, Libya, North Korea Sudan and Syria.

(17) Some of the groups and individuals designated include the Al Qaida/Islamic Army organisation and Usama bin Laden. See Executive Order 13224 (23rd September, 2001), Annex.

(18) Executive Order 13224, preamble (24th September, 2001).

(19) In the 1980s, the Nicaraguan Government accused the USA of conduct that might reasonably fall within this definition of terrorism (*Nicaragua v. United States,* ICJ Reports 1986, p. 14). The ICJ decided, *inter alia*, 'that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to

use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce' (para. 292 (6)).

(20) See, as amended, 18 USC §371 (2000); see also *United States v. Inco Bank & Trust Corpn.*, 845 F. 2d 919, 923–24 (11th Cir. 1988).

(21) 31 CFR §515. 329(a)-(d)(Cuban Asset Controls)(2000); 31 CFR §500.329(a)–(d) (2000).

(22) See SR 95–10, Letter to each Chief Executive Officer of a State Member Bank, Edge Corporation, and US Branch and Agency of a Foreign Bank (Sept. 1997).

(23) Section 311 defines 'correspondent account' with respect to banking institutions 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'. This amends 31 USC §5318A (e)(1)(B).

(24) See 31 USC §5318 (i)(as amended).

(25) An offshore banking licence is defined as a licence to conduct banking business, where a condition of the licence is that the bank may not offer banking services to citizens of, or in the local currency of, the jurisdiction issuing the licence. See Supervisory Letter SR 01-29, Board of Governors of the Federal Reserve System. (26th November, 2001).

(26) The provision of the subsection goes on to state that the 'failure to issue final regulations shall in no way affect the enforceability of s. 5318(i)'.

(27) 31 USC §5318(j) defines 'covered financial institution' as: any insured bank (as defined in s. 3(h) of the Federal Deposit Insurance Act (12 USC §1813(h)); a commercial bank or trust company; a private banker; an agency or branch of a foreign bank; a credit union; a broker or dealer registered with the Securities and Exchange Commission under the Securities and Exchange Act of 1934 (15 USC §78a *et seq.*)

(28) s. 313(a) codified at 31 USC §5318(j)(effective date 25th December, 2001). A physical presence is a place of business that is maintained by a foreign bank and is located at a fixed address, other than solely an electronic address, in a country in which the foreign bank is authorised to conduct banking activities.

(29) The Act defines 'affiliate' as a foreign bank that is controlled by or under common control with another institution.

(30) s. 313(a) codified and amended at 31 USC §5318(j).

(31) This section took effect 60 days from the date of enactment (around 1st January, 2002).

(32) s. 314 requires to be issued within 120 days of enactment.

(33) *Ibid.*

(34) These violations fall under both Arms Export Control Act's Munitions List (22 USC §2778), and the Export Administration Act's Regulations (15 CFR parts 730–744) regarding export controls of goods and services that may be re-exported or re-sold from a third country to a targeted country or terrorist group or criminal organisation.

(35) s. 1 of the International Banking Act of 1978 (12 USC 3101(7)).

(36) s. 326 (amending 31 USC §5318(h).

(37) In circumstances where the confiscated property is on board a maritime vessel or in a customs house, the Supplemental Rules for Certain Admiralty and Maritime Claims must be followed.

(38) s. 316 (a) (1) and (2).

(39) 18 USC §981 (2000).

(40) See the definition of controlled substance under s. 413 of the Controlled Substances Act and any other conduct described in s. 18 USC §1956(c)(7)(B).

(41) s. 327 (amends s. 3(c) of the Bank Holding Company Act of 1956, and s. 18(c) of the Federal Deposit Insurance Corporation Act of 1991). The regulators subject to this would be the Federal Reserve Board and the Federal Deposit Insurance Corporation.

(42) See GA Res. 49/60 (9th December, 1994) and Annex on the Declaration on Measures to Eliminate Terrorism.

(43) GA Res. 51/210 (17th December, 1996), paras. 3(a)–(f).

(44) GA Res. 54/109, 4th Sess. (9th December, 1999).

(45) SI No 3365 (March 2001). UK law imposes further restrictions on terrorist financing in the Anti-Crime, Terrorism and Security Amendments to the Terrorist Act 2000 c 11.

(46) See Alexander, K. (2000) 'Multi-national efforts to combat financial crime and the role of the Financial Action Task Force', *Journal of International Financial Markets* (October).

(47) The FATF Secretariat is located at the OECD.

(48) See Directorate for Financial, Fiscal and Enterprise Affairs, Organization for Economic Cooperation and Development, FATF VII Report on Money Laundering Typologies 2–3 (1996). See also OECD website: www.oecd.org

(49) See 'FATF cracks down on terrorist financing', 31st October, 2001, http://www.oecd.org/o/0,3371,EN-document (visited 27th November, 2001).