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THE USA PATRIOT ACT How it impacts you

Drafted in the days following the tragedies of September 11, 2001, the Patriot Act swept through Congress and into legislation with almost no dissenting voices. Now, years removed from its passage, some people have actually gotten around to reading the Act. While numerous state and local governments, along with several civil liberties groups, are actively fighting to limit the breadth of the Act in many areas pertaining to civil liberties, the Patriot Act continues to generate actual hardship for the average American in numerous aspects of business and banking.

The purpose of this article is to identify and briefly outline portions of this voluminous Act, as well as draw your attention to real world examples of how this Act may impact you and your business dealings both in the U.S. and abroad. The coverage of the USA Patriot Act in the article should by no means be considered exhaustive, as we are only focusing on the more relevant sections.

SURVEILLANCE

One major portion of the Patriot Act addresses federal surveillance laws. In fact, Title II of the Act is entitled "Enhanced Surveillance Procedures". These laws govern the capture and tracking of suspected terrorists' communications within the United States, making a variety of e-mail and phone surveillance techniques used against a suspect more easily authorized. They also reduce or eliminate warrant requirements for gathering certain communications records and stored e-mails. Other sections of Title II address issues such as increasing the scope of subpoenas for electronic communications records, seizing voice-mail messages, nationwide service of search warrants for electronic evidence, and creating a greater ability to share criminal investigative information amongst law enforcement.

While broad in scope, many of these new laws would not be of much concern to the average citizen; however one Section under Title II has attracted a great deal of negative attention, Section 215:

Access to records and other items under the Foreign Intelligence Surveillance Act

What this Section does is modify rules on record searches so that third-party holders of financial, library, travel, video rental, phone, medical, church, synagogue, and mosque records can be searched without your knowledge or consent so long as the government says it is doing so to protect against terrorism. This means they don't even have to suspect you are a terrorist to access your records, just so long as it is related to protecting against terrorism. While this set of laws stirs up concern and outrage in the general public more than any other aspect of the Patriot Act, the actual effect is undetermined. Law enforcement officials are not required to release details of when or even how often searches and surveillance are done under these rules.

FOREIGN INTELLIGENCE INVESTIGATIONS

Another major piece of the Act deals specifically with Foreign Intelligence Investigations. These are investigations into other countries and their citizens, and are not limited to criminal activity. The Foreign Intelligence Surveillance Act ("FISA") has been the legislation governing such investigations since the 1970's. This part of the Patriot Act loosens numerous restrictions in place under FISA and grants broader surveillance options. In addition, the Act has language which encourages third party cooperation, including immunization from civil liability for any assistance given to authorities involved with a Foreign Intelligence Investigation.

This piece of the Patriot Act receives less attention as it pertains directly to non-US citizens and entities. While the surveillance and information gathering rules allow for a great deal of unchecked freedom to the investigative government agencies, the lack of any direct impact on U.S. citizen's rights relegates this part of legislation to the backburner of concerns.

MONEY LAUNDERING

The part of the Patriot Act that has the greatest direct effect on most Americans is found in the sections that deal with money laundering. The Patriot Act expands the authority of the Secretary of the Treasury to cover various reporting requirements, including the drafting of regulations that direct securities brokers/dealers, commodity merchants, advisors and financial institutions to file Suspicious Activity Reports ("SAR's"). With this expanded requirement to report suspicious financial activities, the Act also increased the scope of the prohibition against tipping off any participants in a suspicious transaction.

Section 312 of the Patriot Act is the root of reflex actions by most financial institutions and investment companies, actions that have impacted Americans more than any other piece of the Act. Section 312 places demands on all U.S. financial institutions to have policies and procedures in place to identify instances where correspondent and/or private bank accounts with foreign account holders may be used for money laundering. This translates into escalated due diligence requirements for any corresponding accounts in money laundering or tax haven jurisdictions. The U.S. banks must use reasonable efforts to identify ownership of such institutions, monitor account activities, and hold these corresponding banks to the same standards which apply to the U.S. financial institutions.

Many people ask how the Patriot Act, a piece of legislation passed in the U.S., can possibly effect their efforts to open a bank account or make investments through an International Business Company outside of U.S. jurisdiction. Section 312 is the answer to that question. Any U.S. citizen who wishes to conduct business or investments outside the U.S. needs a bank account. This bank account may be in the individual's name or the name of a non-U.S. company. To fund this account, and to make distributions to a U.S. beneficial owner, this bank account must be able to send and receive wire transfers from U.S. financial institutions ("corresponding banks"). As noted in the previous paragraph, U.S. banks can only conduct transactions with foreign banks that operate under the same standards as those imposed under the Patriot Act. In support of this concept, Section 328 speaks directly to International Cooperation. The language of this Section requires U.S. regulatory authorities to take all reasonable steps to encourage foreign jurisdictions to require identification of the originator of any foreign wire transfers into the U.S.

Should the Secretary of the Treasury or other regulatory authorities determine that a particular institution, jurisdiction, type of account or transaction poses a money laundering concern, Section 311 imposes even stricter requirements. In the face of such concerns, a U.S. financial institution can face additional "due diligence" requirements, beneficial ownership information requests, tougher "know-you-client" rules enforcement, and other requirements where a foreign element of the transaction exists. Section 313 adds a final obstacle to the use of offshore accounts by prohibiting U.S. financial institutions from maintaining correspondent relationships with any foreign shell bank (no physical place of business) which is not subject to any regulatory supervision of its banking activities.

Unfortunately, despite the aggressiveness of these regulations, no specific requirements are provided, thereby leaving the implicated institutions having to guess as to what amount of due diligence and collected information is sufficient to satisfy any inquiry. Applications for any foreign account that is directly or indirectly owned by a U.S. citizen, as well as applications for U.S. accounts owned by foreigners have become vastly more complicated and cumbersome. Without specific guidance regarding what information is necessary to ascertain, banks and other institutions are erring on the side of caution. Compliance officers are constantly updating their requirements and generating longer and more complicated applications as a form of paranoia over meeting a threshold never defined by the Patriot Act or the agencies that enforce it. Unfortunately the requirements and information requests have swelled to staggering proportions as demands grow for more and more irrelevant information. Sense and reasoning with regard to preparing an appropriate application for financial accounts have been discarded in the face of actual fear over not meeting an undefined threshold of due diligence. This is what the average American impacted by the Patriot Act faces today.

For these reasons, international business is not as simple as it once was. Any U.S. to foreign or foreign to U.S. activity, even the simple act of opening a checking account, has become much more difficult, more time consuming and more expensive. Areas of the Patriot Act that one usually hears about revolve around the government's expanded surveillance powers or the new laws and penalties relating to terrorist activity. However, it is the seemingly innocuous documentation requirements that impact the majority of Americans who actually run afoul of this Act in their daily lives.

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