Summary of the Money Laundering and Forfeiture Provisions of the USA PATRIOT Act of 2001

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I. Property Subject to Forfeiture

A. 18 U.S.C. § 981(a)(1)(G): PowerPoint 2

This is a new statute is obviously a response to September 11.

--- it authorizes civil and criminal forfeiture of all assets of anyone engaged in terrorism, any property affording any person a "source of influence" over a terrorist organization, and any property derived from or used to commit a terrorist act.

— note: the "source of influence" language allows you to take the property of a person who is not himself a terrorist, but who has property that he uses to influence a terrorist organization

— this was necessary because the law previously had no forfeiture provisions tailored to terrorism

Relationship to IEEPA: **PowerPoint 3**

— Treasury has separate authority to freeze and confiscate terrorist assets under IEEPA

— all the stories in the newspaper about the President freezing bank accounts of terrorists since 9/11 have been IEEPA cases

— only OFAC can do an IEEPA freeze order or confiscation

— if you have a case where freezing an asset under IEEPA would be appropriate, you should contact OFAC; otherwise use Section 981(a)(1)(G)

B. 18 U.S.C. § 981(a)(1)(B): PowerPoint 4

Section 981(a)(1)(B) allows us to forfeit property found in the United States that is the proceeds of a foreign crime

— the Patriot Act expands it to include *facilitating property*

— more important, the statute used to be limited only to foreign drug crimes

— it has now been expanded to include any foreign offense that is one of the foreign money laundering predicates (the crimes listed in 1956(c)(7)(B))

C. 31 U.S.C. § 5317(c), 5324 and 5331:

Civil and criminal forfeiture authority for violations of the currency reporting requirements has been relocated to 31 U.S.C. § 5317(c).

--- the new statute includes, for the first time, authority to forfeit property involved in a *conspiracy* to commit the reporting violation.

Form 8300 forfeiture: **PowerPoint 5**

— once the Secretary of the Treasury issues regulations (and a typographical error in the statute is corrected), it will also include authority to forfeit property involved in a failure to file a Form 8300.

— how is that? Section 5317(c) doesn't say anything about Form 8300 or about the statute that requires that they be filed (31 U.S.C. § 5331)

— well, 31 U.S.C. § 5324(b) has been amended to make it a crime to cause a trade or business to fail to file a report on a $10,000 cash transaction

E. Civil Forfeiture for § 1960: **PowerPoint 6**

The civil forfeiture statute for violations of §§ 1956 and 1957 is amended to include civil forfeiture for § 1960 offenses.

— we'll come back and talk about even more significant amendments to Section 1960 in a moment

II. Money Laundering Enforcement

A. 18 U.S.C. § 2332b(g)(5)(B): **PowerPoint 7&8**

Section 2332b(g)(5)(B) contains a long list of federal crimes that have been made RICO predicates.

--- pursuant to 18 U.S.C. § 981(a)(1)(C), the proceeds of any of those offenses are now subject to civil and criminal forfeiture.

— that's interesting but not very exciting, because these offenses don't often produce proceeds

– but if you find the proceeds of any of these offense, you can commence administrative or civil judicial forfeiture

— and if you are indicting someone for one of these offenses, and the crime occurred after 10/26/01, you can forfeit the proceeds in the criminal case

Much more interesting is the fact that including the offenses listed in Section 2332b(g)(5)(B) as RICO predicates means that the laundering of the proceeds of any such offense is now a violation of §§ 1956(a)(1) and 1957,

--- and the transfer of *any funds* – not just the proceeds of an offense but *any funds* – into or out of the United States with the intent to promote any such offense is a violation of § 1956(a)(2)(A).

— so here's where we'll use this new authority: bad guy brings money not derived (as far as we know) from any criminal offense into the U.S., with the intent to use it to commit one of the acts of terrorism listed in 2332b(g)(5)(B)

— that is a 1956(a)(2)(A) violation, and the money is immediately subject to civil or criminal forfeiture because it was involved in a money laundering offense

B. <u>18 U.S.C. § 1956(c)(7)(B)</u>: **PowerPoint 9**

Section 1956(c)(7)(B) contains the list of foreign crimes that can be used as predicates for a money laundering offense

— previously, it included only certain crimes of violence, drug trafficking and bank fraud

– now it includes public corruption and *all* crimes of violence

--- I said before that we could forfeit all proceeds and property used to commit the crimes listed as foreign money laundering predicates

— that now includes public corruption and all crimes of violence

--- but the addition of those offense to § 1956(c)(7)(B) also means that the laundering of the proceeds of any such offense is now a violation of §§ 1956(a)(1) and 1957,

--- and the transfer of *any funds* into or out of the United States with the intent to promote any such offense is a violation of § 1956(a)(2)(A).

C. <u>18 U.S.C. § 1960</u>: **PowerPoint 10**

Section 1960 was enacted in 1992 to make it a crime to conduct a money transmitting business without a licence.

— it was little used because it was too hard to prove that the defendant knew that operating without a license was a crime

The statute has been amended to allow the prosecution of a money remitter in three situations

--- when he operates without a license, whether he knows that doing so is a crime or not

--- when he operates in violation of the soon-to-be-released Treasury regs on money transmitters

---- and when he transfers money knowing that the funds being transmitted are derived from a criminal offense, or are intended to be used for an unlawful purpose.

Note: the third alternative does not require proof that the business was unlicenced.

— someone who sends money for a living, knowing it came from a criminal act, or that it is intended for a future criminal act, is guilty

— this is a more powerful tool that Section 1957, because there is no $10,000 requirement

--- and its more powerful that Section 1956, because there no specific intent

requirement if the money constitutes criminal proceeds,

--- and no proceeds requirement if the money is intended to be used to commit an unlawful act

D. <u>31 U.S.C. § 5332</u>: **PowerPoint 11**

This new statute makes bulk cash smuggling a criminal offense.

— see the elements of the § 5332 offense

--- of course, it was already a crime to fail to file a CMIR report,

PowerPoint 12

--- the practical effect of § 5332 is to enhance the ability of the Government to forfeit the unreported currency and any facilitating property

E. <u>18 U.S.C. § 1956(i)</u>: **PowerPoint 13**

In *United States v. Cabrales*, the Supreme Court limited our ability to prosecute money laundering cases anywhere other than the district where the financial transaction took place

– this was a nuisance because often you want to prosecute the money laundering offense and the underlying SUA in the same place

The money laundering statute now includes a venue provision allowing money laundering offenses to be charged in the district where the underlying SUA occurred

--- if the financial transaction occurred there;

--- or an act in furtherance of a money laundering conspiracy occurred there

--- or if the defendant participated in the movement of the funds from that district to another district where the financial transaction took place.

Note: participating in the transfer includes being the recipient of a wire transfer

III. Procedural Tools

A. 18 U.S.C. § 981(k):

In cases where the Government can show that forfeitable property was deposited into an account at a foreign bank, the Government can now recover the property by filing a civil forfeiture action against the equivalent amount of money that is found in any correspondent account of the foreign bank that is located in the United States.

— It is not necessary to trace the money in the correspondent account to the foreign deposit; nor does the foreign bank have standing to object to the forfeiture action.

— this solves the problems that occur when a foreign bank objects to the forfeiture of funds in its correspondent account, claiming that the money belongs to it, not its customer, and raising the innocent owner defense

— forfeitures under § 981(k) require approval from Main Justice

B. 31 U.S.C. § 5318(k):

The Attorney General and the Secretary of the Treasury may subpoena foreign bank records, including records maintained overseas regarding a foreign bank transaction, by serving a subpoena on the U.S. representative of the foreign bank.

— in a way, this codifies the notion of a *Bank of Nova Scotia* subpoena

— if we want records of foreign transaction, all we have to do is to subpoena the representative in the U.S. that the foreign bank has to have appointed in order to be allowed to maintain a correspondent bank account
— but use of such subpoenas will be controversial, and so will require prior approval from Main Justice

C. 18 U.S.C. § 1956(b):

The Government can now file a civil lawsuit against a foreign person who violates § 1956 or § 1957, or against a foreign person who converts forfeited funds to his own use, and can obtain an order restraining the U.S. assets of the defendant to ensure that they are available to satisfy a judgment.

— this will be used when we have a money laundering offense committed in the U.S. by a person whom we cannot extradite to the U.S. for criminal prosecution, but against whom we would file a civil lawsuit to take the asset the person has in the U.S. as the penalty for committing the money laundering offense

— a good example would be a foreign bank

— the statute lets us restrain the assets of the foreign defendant pending trial in the civil case

D. 21 U.S.C. § 853(e)(4):

Courts are now authorized to order a defendant in a criminal case to repatriate assets to the U.S. from abroad so that they may be forfeited.

— the authority may be made part of a pre-trial restraining order or as part of the post-conviction order of forfeiture.

--- failure to comply with the order can result in an increased sentence under the sentencing guidelines.

E. 28 U.S.C. § 2467:

The district courts may now enforce foreign forfeiture orders (in civil and criminal cases) based on any crime that would give rise to a forfeiture order under federal law if the crime were committed in the United States.

--- the courts may also register and enforce foreign pre-trial restraining orders.

— most important, the person who is contesting the foreign forfeiture in a foreign court could not object to the U.S. restraining order on grounds that he could be asserting – or is asserting – in the foreign court

— for example, if the claimant says “that money should not be restrained; it’s really legitimate property,” the district court in the U.S. would tell him to “tell it to the judge” in the foreign court where the forfeiture action is pending

– the U.S. court is merely acting as the agent of the foreign court in restraining the assets at the foreign court’s request

F. 28 U.S.C. § 2466:

The fugitive disentitlement doctrine is extended to corporations controlled by the fugitive.

— so a fugitive cannot object to a pending civil forfeiture case in the U.S. by having a corporation that he controls file the claim instead of the fugitive himself