



Commerce & Compliance

LAW ENFORCEMENT
BEYOND U.S. BORDERS

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Foreword

When the first edition of this monograph was published in the fall of 2000, our focus was on the expanding role of the laws of the United States in the globalization of trade and finance. Following the terrorist attacks of September 11, 2001, the influence of U.S. law and law enforcement agencies in the international arena has accelerated in ways that could not have been imagined.

Before September 11, the extension of U.S. law beyond our borders was part of a larger effort to combat narcotics trafficking, organized crime and public corruption in the international marketplace. While these goals remain, the fight against international terrorism has prompted the enactment of aggressive new laws intended to broadly influence commercial and financial activity outside the United States. In addition to sweeping new legislation, most notably including the USA PATRIOT Act, the months since September 11 have also seen unprecedented regulatory activity that has led to fundamental change in how international financial institutions do their business. All of this has taken place in an environment of aggressive enforcement actions in the international arena by agencies at all levels of the U.S. government.

For better or worse, the enforcement of U.S. criminal law and associated regulation is now a key factor in international commercial life. The risk faced by those who choose to ignore this reality, while competing for business across borders, is great. This monograph is intended to aid competitors in navigating this complex legal environment. I am proud to have it appear under our law firm's name.



Robert S. Strauss
January 2005
Washington, D.C.

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Introduction

[I]t is proper you should understand what I deem the essential principles of our Government, and consequently those which ought to shape its Administration. Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations...the preservation of the General Government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad.

—Thomas Jefferson
First Inaugural Address
March 4, 1801

When Thomas Jefferson spoke these words, in a partially constructed Capitol building, the young United States faced a grave threat to its safety and the security of its citizens. A radical group had arisen in the Middle East — the Barbary warlords — and was engaged in a campaign of terror, kidnapping and murder, seizing American trading vessels and threatening the sovereignty of the new nation. In the two centuries between the fall of the Barbary pirates in North Africa and the appearance of al-Qaeda, international commerce has changed in every conceivable way. But the challenge of maintaining security at home, while preserving the freedom to trade and travel abroad, remains at the heart of the law and policy of the United States.

Since the terrorist attacks of September 11, 2001, a key component of U.S. policy in the fight against terrorism has been the expanded use of criminal laws beyond our national borders. However, the use of laws enacted in the United States to investigate, prosecute and punish criminal conduct around the world began to emerge many years before September 11. This doctrine of extraterritorial jurisdiction has been applied by the United States for decades in the prosecution of individuals and organizations engaged in narcotics trafficking, money laundering, financial fraud and tax-related crimes.

In the wake of the September 11 attacks, extraterritorial enforcement of U.S. criminal laws has emerged as a critical tool in the fight against global terrorism. In particular, the USA PATRIOT Act, signed into law in October 2001, has received much attention — and some criticism — for expanding the reach of U.S. law enforcement into the international marketplace. Economic sanction programs, heightened regulation of international financial transactions, and the application of U.S. anti-money laundering laws in prosecuting public corruption outside the United States have also been used more broadly as tools of federal policy.

Our aim in preparing this monograph is to provide a practical and concise tool for understanding the role of U.S. criminal laws in cross-border commerce. While not intended as an exhaustive treatment of the subject, this monograph is intended to assist managers, compliance officers and non-specialist lawyers in dealing with the growing presence of U.S. law and law enforcement in the international marketplace.

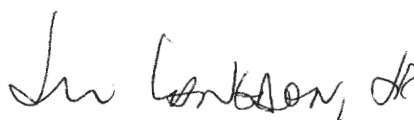
The first three chapters of this monograph deal with the international financial sector — including money laundering (Chapter 1), bank secrecy (Chapter 2) and financial institution fraud (Chapter 3). The investigation and prosecution of money laundering, in particular, has become a critical tool in the United States' effort to use criminal laws to limit the flow of money to individuals and groups that support terrorism. The USA PATRIOT Act has dramatically expanded the capacity of the departments of Justice and Treasury, as well as the principal U.S. bank regulatory agencies, to investigate allegations of money laundering and to block financial activity believed to be associated with money laundering. Extraterritorial enforcement of money laundering laws by the United States is now heavily focused on banks and other financial intermediaries located in offshore financial centers where business confidentiality laws are used to shield financial activity associated with criminal conduct.

Chapters 4 and 5 describe areas where U.S. law enforcement seeks to shape international economic activity through the economic sanctions regimes enforced by the Department of the Treasury. This set of laws punishes individuals and businesses based in the United States or, in many instances, foreign entities with U.S. ties, for engaging in commercial transactions with designated individuals, groups, organizations or nations. These include designated terrorists, narcotics traffickers, nationals of states identified as promoting terrorism and designated “narcotics kingpins.” Like the federal criminal laws dealing with international financial transactions, the reach of economic sanctions programs was expanded by the USA PATRIOT Act and is now a key component of U.S. anti-terrorism policy.

Criminal activity in the zone where commercial interests confront government is the focus of Chapters 6, 7, 8 and 9. These laws range from the registration requirements imposed on foreign agents operating in the United States to the strict limitations placed on the role foreign interests may play in U.S. elections. Of particular importance are the criminal laws that prohibit corrupt payments to public officials outside the United States (Chapter 7) and payments of bribes and gratuities to U.S. government officials (Chapter 8). The fight against corruption on the part of public officials in developing nations — even where U.S. citizens or businesses are not directly involved — has become an important aspect of extraterritorial law enforcement efforts in the past decade.

This monograph concludes with a treatment of the Economic Espionage Act (Chapter 10) — a relatively new federal law that may have a serious impact on certain aspects of international trade — and the powerful tools available to U.S. prosecutors in causing the forfeiture of foreign assets in both civil and criminal proceedings (Chapter 11).

The application of U.S. criminal law outside the United States, particularly in the fight against terrorism, is much more than a transitory policy initiative. A single, immutable fact is that any commercial enterprise conducting business beyond its own national boundaries is certain — particularly in the financial sector — to cross the economic borders of the United States in some fashion. We hope that this monograph will be a useful source of immediate information to anyone competing in the international marketplace, where the impact of the laws and enforcement agencies of the United States cannot be ignored.



James C. Langdon Jr.
January 2005
Washington, D.C.

A Note on the USA PATRIOT Act

The most significant legal consequence of the terrorist attacks on the United States of September 11, 2001, is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.”¹ This legislation — commonly cited as the USA PATRIOT Act — was signed into law by the President on October 26, 2001, and has since attracted both controversy and confusion.

Title II of the USA PATRIOT Act, captioned “Enhanced Surveillance Procedures” expands the powers of U.S. government agencies to gather evidence and intelligence and has been the source of most of the public and political concern surrounding the Act. In particular, the use of “sneak and peak” or delayed notice search warrants, “roving” wiretaps, national security letters used to obtain personal records, and the issuance of nationwide search warrants, among others, have been questioned by groups advocating individual rights and liberties across the political spectrum. In expanding the surveillance and intelligence gathering tools available to law enforcement agencies, however, Congress also included “sunset” provisions, which will cause much of Title II to expire on December 31, 2005. At the same time, a handful of federal courts have declared unconstitutional certain aspects of the new surveillance powers granted to the government under the USA PATRIOT Act. The combination of the sunset provisions and the regular flow of court challenges to the legislation will almost certainly change the complexion of the enhanced surveillance provisions of Title II of the Act.

While the surveillance and intelligence gathering provisions of the USA PATRIOT Act have had little direct effect on commerce, Title III of the legislation — captioned the “International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001” — has had a major impact on international as well as domestic financial transactions. The fundamental premise of Title III appears to be a recognition of the fact that few financial exchanges can take place today without some contact with a U.S. banking institution. This has been reflected in the USA PATRIOT Act by, among other things, the grant of broad powers to the U.S. Department of Treasury to ban individual financial institutions, or all of the banks in an entire country, from doing business in the United States. Additional federal regulatory and enforcement powers created under Title III include the expansion of the money laundering laws to permit prosecution of transactions that have only a transitory relationship to the United States, enactment of new laws to fight foreign political corruption, and the imposition of significant additional obligations on U.S. banks to report unusual activity and understand each customer’s business.

In preparing this new edition of the monograph, we have integrated the discussion of Title III of the USA PATRIOT Act into each chapter dealing with specific areas of U.S. law enforcement in cross-border commerce. In so doing, we have intentionally avoided the preparation of a separate treatment of the USA PATRIOT Act as a unitary piece of legislation. Instead, the chapters dealing with the federal money laundering laws, the Bank Secrecy Act, the Foreign Agents Registration Act, the Foreign Corrupt Practices Act, the economic sanctions program, and others, each include a discussion of the extent to which Title III has changed existing law and expanded federal enforcement powers. Our purpose in using this integrated approach to the USA PATRIOT Act is to provide an immediate reference tool for corporate decision-makers and their counsel in responding to the rapidly growing role of U.S. law enforcement in the international marketplace.



Mark J. MacDougall
 Washington D.C.
 January 2005

1 P.L. 107-56, 115 Stat. 272 (2001).