

SAN DIEGO

The Daily Transcript

THURSDAY, MAY 6, 2004

The Future of the Patriot Act

by **FRANK J. POLEK**

Sheppard, Mullin, Richter & Hampton LLP

Most people reading this article have regular attorneys for their businesses. Often, these lawyers do their duty and drone on and on about what you should or should not be doing. If your eyes glaze over and all you hear from your lawyer is “blah blah blah,” you’re likely not alone. But, should you hear the phrase, “anti-money laundering program” or a reference to the Patriot Act, try to wake up and pay attention.

The USA Patriot Act was passed shortly after the terrorist attacks of Sept. 11, 2001. The title is a contrived acronym for “United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.” Rammed through Congress in about six weeks after Sept. 11, 2001, it was quickly signed by President Bush. Lawyers and businesses have been trying to figure out what it means ever since.

The bulk of the act includes provisions to assist law enforcement in investigating and prosecuting terrorists and other criminals. But, a substantial portion affects businesses directly. Significantly, in order to prevent criminals from

laundering money, and to prevent legitimately earned money from being used to fund criminal activities, the act puts the onus on “financial institutions” to develop and enforce policies designed to detect and prevent money laundering. Thus is born the Anti-Money Laundering Program (AMLPL).

Money laundering isn’t limited to drug dealers. Broadly used, the term “money laundering” generally refers to a wide array of financial transactions involving the fruits of certain specified crimes. For example, a person who lies on a loan application and thereafter deposits the loan check, could be guilty of money laundering. And the punishment is harsh, often as harsh as the underlying crime.

Think this doesn’t affect you because you’re not a “financial institution?” Think again. Although intuitively you might not be a financial institution, the definition is extremely broad. Are you a bank? That’s an easy one. Are you a stockbroker? You made the list. So have insurance companies. Casinos, travel agents and jewelers, too. Escrow companies also qualify. The lat-

est buzz at the Department of the Treasury is whether or not automobile dealers are “financial institutions” under its regulations.

Are you a financial institution about to do a deal with another financial institution? Or maybe you’re not a financial institution, but your loan documents are peppered with references to the Act and to AMLPLs. Your counter-party is just trying to ensure that the funds are not the proceeds of crime, or that they will not be used to finance illegal acts. With the passage of the Patriot Act, the concept of “know the customer” got much broader.

The act is controversial, mainly for the provisions not directly affecting businesses. Civil liberties groups and privacy advocates are crying foul. Many, although not all,



Frank Polek is an attorney in the San Diego office of Sheppard, Mullin, Richter & Hampton LLP. He practices in the areas of white-collar criminal defense and commercial litigation.

Republicans favor it, citing vague references to successes in fighting crime. While campaigning, Bush is calling for a “renewal” of the Patriot Act. And, Attorney General Ashcroft has touted even tougher laws in the form of what is frequently called Patriot II, sponsored in Congress by Sen. Orrin Hatch, R-Utah. Given that some Republicans are uneasy about certain provisions of the Patriot Act, many political pundits give a harsher law little chance of passing.

Regardless of which side of the political spectrum you prefer, you

must acknowledge that the current administration has at least a decent chance of being kicked out by the Democrats. Thus, when the more controversial provisions of the act expire (through built-in expiration dates, called “sunset provisions”), they may not be renewed.

The parts of the act regarding money laundering don’t have a sunset provision per se, but they do call for a review period and specify a procedure to repeal them. Of course, Congress could repeal the act anytime it wanted — it doesn’t need any

specialized mechanism to get rid of it. A majority of both houses and a signature by the president is all that is necessary. Regardless, if Congress chooses to abolish these provisions via the act’s procedures, it will likely happen at the time specified: by the beginning of the Fiscal Year in 2005. Our government’s fiscal year begins Oct. 1.

So, in the interim, try to humor your lawyer by pretending to pay attention. Once in a while he or she might actually say something important.