COMBATING MONEY LAUNDERING, TERRORIST FINANCING, AND COUNTERFEITING ACT OF 2019

Senators Chuck Grassley and Dianne Feinstein

Section-by-Section Summary

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This section designates the Act as the *Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2019.*

SECTION 2 – TRANSPORTATION OR TRANSHIPMENT OF BLANK CHECKS IN BEARER FORM

Current law requires an individual transporting monetary instruments with an aggregate value exceeding $10,000 into or out of the United States to file a report with Customs and Border Protection. However, the law does not specify how to value a check for reporting purposes when the dollar amount is left blank. Section 2 would make clear that monetary instruments with the dollar amount left blank are to be valued in excess of $10,000 for reporting purposes, if the instrument is drawn on an account containing more than $10,000.

SECTION 3 – INCREASING PENALTIES FOR BULK CASH SMUGGLING

Bulk cash smuggling is the knowing concealment of more than $10,000 in currency or monetary instruments from a place within the United States to a place outside the United States (or vice versa) for the purpose of evading the cross-border currency and monetary instrument reporting requirements. It is a widely used method for transporting illegal proceeds between the United States and Mexico. Under the bulk cash smuggling statute, 31 U.S.C. § 5332(b)(1), the maximum penalty for a violation of the statute is a term of imprisonment of five years. Section 3 is designed to further deter these crimes by increasing the maximum term of imprisonment to ten years.

In addition, Section 3 would add a criminal fine provision to the bulk cash smuggling statute that would bring it into conformity with other statutes supporting criminal enforcement of the currency reporting requirements. *See* 31 U.S.C. §§ 5322(a)-(b) & 5324(d). As such, Section 3 would provide for an enhanced fine in cases where the defendant violates another federal law in addition to the bulk cash smuggling statute, or engages in a pattern of unlawful activity.

SECTION 4 – SECTION 1957 VIOLATIONS INVOLVING COMMINGLED FUNDS AND AGGREGATED TRANSACTIONS

18 U.S.C. § 1957 is an important tool in combating money laundering because it applies to the transfer of criminal proceeds, or "dirty money," without the need to demonstrate an intent on the part of the defendant to conceal the money, promote criminal activity, or evade a reporting

requirement. However, ambiguity in two scenarios has enabled human and drug traffickers to evade prosecution. First, courts have disagreed over whether the statute applies to the withdrawal of money from an account in which both dirty and clean money are commingled. Second, it is also unclear under the statute whether the government may aggregate a series of closely related sub-$10,000 transactions to meet the $10,000 threshold when defendants structure their transactions to evade it.

Section 4 closes the first loophole by clarifying that the withdrawal of funds in excess of $10,000 from an account containing more than $10,000 in criminal proceeds commingled with other funds is a transaction involving more than $10,000 in criminally derived property. It closes the second loophole by allowing for the aggregation of individual transactions that are closely related in time, the identity of the parties, the nature of the transactions, or the manner in which they are conducted, to meet the $10,000 threshold.

The issue of commingled funds is especially problematic along the Southwest border, where human and drug traffickers are able to circumvent these money laundering laws by commingling illegal proceeds with the proceeds of legitimate businesses. The provisions in Section 4 ensure that international drug and human traffickers cannot evade the strictures of section 1957 in these ways.

SECTION 5 – CHARGING MONEY LAUNDERING AS A COURSE OF CONDUCT

Currently, in most federal judicial circuits, the government is not permitted to charge a defendant who engages in a series of related money laundering offenses with a single violation of the statute that encompasses the entire course of conduct; instead, each transaction must be charged as a separate count in the indictment. Section 5 would provide the government with the simpler and more practical option of charging a defendant with a single count, thereby allowing money laundering to be charged in the same manner as mail fraud under 18 U.S.C. § 1341. The section also would include conspiracies to violate 18 U.S.C. § 1960 (prohibition of unlicensed money transmitting businesses) as money laundering conspiracies under 18 U.S.C. § 1956(h).

SECTION 6 – ILLEGAL MONEY SERVICES BUSINESSES

Illegal money services businesses are entities used to send criminal proceeds abroad, as well as to send "clean" funds abroad to promote ongoing or future criminal activity there. Section 6 would make a conforming change to 18 U.S.C. § 1960(b)(1)(B) to clarify that the same general intent requirement found in 1960(b)(1)(A) applies to both of these provisions of the statute. Under both provisions, specific knowledge of the requirement to register is unnecessary.

SECTION 7 – CONCEALMENT MONEY LAUNDERING

A key strategy employed by many international drug organizations to move money illegally is to hire couriers, or mules, from outside the organization whose only job is to accept delivery of cash from a stranger, transport it across an international border, and deliver it to another stranger. The courier knows nothing about the drug organization and can provide little to

no information to law enforcement if intercepted before the border. However, the courier typically knows that he is transporting concealed drug proceeds and is playing an important role in money laundering.

Section 7 would address the Supreme Court's recent interpretation of a portion of the concealment money laundering statute, 18 U.S.C. § 1956(a)(2)(B)(i), that has effectively neutralized this law enforcement tool against couriers. In *Cuellar v. United States*, 553 U.S. 550 (2008), the Court construed the statute to require the government to prove not only that the defendant knew his cross-border transportation would have had the *effect* of concealing or disguising one of the five statutory attributes of criminal proceeds (nature, location, source, ownership or control), but also that he knew the transportation had been *specifically designed* for that effect. In other words, the Court held, under the statute the government could not rely on proof that the defendant knew the proceeds were transported clandestinely, it needed also to prove that the defendant knew *precisely why* the proceeds were so transported. This is knowledge that couriers typically do not possess.

The Court's analysis suggested that had the statute simply read "knowing that such transportation conceals or disguises," instead of "knowing that it was *designed* to conceal or disguise," the conviction would have been upheld. Therefore, Section 7 replaces the words "designed . . . to conceal or disguise" with "conceals or disguises."[1] Because identical language appears in 18 U.S.C. § 1956(a)(1)(B), the section amends that provision as well.

Section 7 also clarifies an internal inconsistency relating to a separate knowledge requirement in the statute. 18 U.S.C. § 1956(a)(2)(B), as informed by the definition in § 1956(c)(1), provides that a defendant must know that the property involved in the money laundering transaction is the proceeds of *some* form of unlawful activity, but not a specific form. However, 18 U.S.C. § 1956(a)(2)(B)(i) appears to require the government to prove more – that the defendant knew that the purpose of the transaction was to conceal or disguise the proceeds of "specified unlawful activity." Most courts hold that the former provision controls, but Section 7 removes the conflicting language, which also appears in § 1956(a)(1)(B)(i), as well.

Enactment of these reforms will restore a crucial weapon in combating the transportation of large amounts of criminally derived cash across our borders.

SECTION 8 – FREEZING BANK ACCOUNTS OF PERSONS ARRESTED FOR THE MOVEMENT OF MONEY ACROSS INTERNATIONAL BORDERS

Section 8 would address the problem of criminal proceeds being quickly removed from certain defendants' accounts following an arrest. This section would permit the government to obtain a 30-day order freezing any accounts held by a person arrested for offenses involving the movement of funds in or out of the United States. This temporary measure will allow the

[1] In addition, to demonstrate a violation of the statute, the government would continue to have to prove that a defendant (1) attempted or completed an international transfer of funds and (2) knew that the funds represented the proceeds of some form of unlawful activity.

government time to determine whether funds in those accounts are subject to forfeiture in connection with the criminal offenses at issue.

SECTION 9 – PROHIBITING MONEY LAUNDERING THROUGH HAWALAS, OTHER INFORMAL VALUE TRANSFER SYSTEMS, AND CLOSELY RELATED TRANSACTIONS

Under §§ 1956(a)(1) and 1957, a financial transaction or a monetary transaction constitutes a money laundering offense only if the funds involved in the transaction represent the proceeds of a criminal offense. There is some uncertainty, however, as to whether the proceeds element is satisfied as to all aspects of a money laundering scheme when two or more transactions are committed in parallel. For example, if A sends drug proceeds to B, who deposits the proceeds in Bank Account 1, and simultaneously, B takes an equal amount of money from Bank Account 2 and sends it to A or a person designated by A, there is some question about whether the second transaction meets the proceeds element. This question has become increasingly important, because parallel transactions are used to launder funds through hawalas and other informal systems often used by terrorists and international drug traffickers.

In 2006, Congress addressed this concern by clarifying that for purposes of § 1956, a financial transaction includes proceeds of specified unlawful activity if it is part of "a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement" that involves such proceeds. Section 9 would extend this clarification to monetary transactions under § 1957.

SECTION 10 – RESTORINGWIRETAP AUTHORITY FOR CERTAIN MONEY LAUNDERING AND COUNTERFEITING OFFENSES

Section 10 would eliminate a current gap in the Wiretap Act, 18 U.S.C. §§ 2510-2522, that was created by a legislative oversight. It would restore the government's ability to obtain wiretap authority for currency reporting, bulk cash smuggling, illegal money services businesses, and counterfeiting offenses.

SECTION 11 – APPLYING THE INTERNATIONAL MONEY LAUNDERING STATUTE TO TAX EVASION

The problem of individuals using foreign bank accounts to avoid paying U.S. taxes is well established. Section 11 would enable the government to target those individuals, including international drug dealers who seek to move funds to offshore banking centers, by making it a money laundering violation to transfer funds into or out of the United States with the intent to violate U.S. income tax laws.

SECTION 12 – CONDUCT IN AID OF COUNTERFEITING

Current law prohibits the possession of cover plates, stones, and other devices that may be used to counterfeit U.S. currency and securities. However, new technology has produced new security features, such as holograms, used to protect against counterfeiting. Section 12 would

update the current counterfeiting laws by including any materials, tools, or machinery that may be used to counterfeit U.S. or foreign money. It would also strengthen security features by making illegal the possession of material or other things similar to security features.

This section also addresses another common counterfeiting tactic known as bleaching. Bleaching involves removing images from lower denominations of currency allowing for the printing of higher denominations on genuine paper. This particular scheme is becoming international in scope, with the Secret Service identifying bleached operations in Columbia, Nigeria, Italy and North Korea. This section would prohibit the possession of any paper or security features, including bleached paper, often used to produce counterfeit U.S. money by criminals abroad.

SECTION 13 – ADMINISTRATIVE SUBPOENAS FOR MONEY LAUNDERING CASES

Section 13 would amend 18 U.S.C. § 3486 to expand the availability of administrative subpoenas for criminal investigations involving money laundering activities, activities of illegal money services businesses, and activities aimed at avoiding certain currency transaction reporting requirements (import or export of monetary instruments, structuring deposits, bulk cash smuggling, etc.). These records are typically obtained through the issuance of grand jury subpoenas, but law enforcement occasionally needs the speed and flexibility of administrative subpoenas. This section would also authorize administrative subpoenas for investigations which would constitute a money laundering offense against a foreign nation.

In addition, currently, a U.S. district court may issue a non-disclosure order for an administrative subpoena if such a disclosure would result in: (1) endangerment to the life or physical safety of a person; (2) flight to avoid prosecution; (3) destruction of or tampering with evidence; or (4) intimidation of potential witnesses. Section 14 also adds another scenario justifying a non-disclosure order: if disclosure would result in the destruction, transfer, damage or otherwise unavailability of property that may become subject to forfeiture or a foreign nation forfeiture judgment.

SECTION 14 – OBTAINING FOREIGN BANK RECORDS FROM BANKS WITH U.S. CORRESPONDENT ACCOUNTS

Foreign bank records can be critical evidence in money laundering prosecutions. Yet foreign bank secrecy laws often pose a major obstacle for U.S. investigators, even though under current international agreements and standards, this should not be the case. Under current U.S. law, the government can obtain bank or business records from foreign banks by serving subpoenas on branches of the bank or business with correspondent accounts located in the United States. *See* 31 U.S.C. § 5318(k). However, many foreign governments object to these subpoenas, and as a result, use of this authority is carefully weighed, and must be approved by the Department of Justice's Office of International Affairs.

Despite the existence of this authority, obtaining these records as legally admissible evidence in U.S. courts can still result in protracted negotiation and litigation. During a terrorism prosecution in which the government invoked this law to attempt to obtain bank records in the Kingdom of Saudi Arabia, numerous deficiencies with it were identified. Section 15 would alleviate many of these deficiencies by requiring that the foreign bank produce certified records so they can be used as evidence; prohibiting the foreign bank from disclosing the existence of the subpoena; authorizing the government to seek contempt for non-compliance with the subpoena; and allowing the government to seek civil penalties against a U.S. financial institution if it does not terminate its correspondent relationship with a foreign bank (as the law currently requires) if the foreign bank does not comply with or successfully challenge the subpoena.

In short, Section 14 would strengthen this existing investigative tool, and put foreign banks on notice that foreign secrecy or confidentiality laws may not be used to impede U.S. law enforcement efforts to investigate money laundering offenses for which the United States has jurisdiction.

SECTION 15 – DANGER PAY ALLOWANCE

Current law provides for danger pay allowance for agents of the Drug Enforcement Administration, Federal Bureau of Investigation, U.S. Marshals, and the Bureau of Alcohol, Tobacco, and Firearms who serve in designated dangerous posts abroad. Section 15 would expand the availability of danger pay allowance to agents employed by Immigration and Customs Enforcement, Customs and Border Protection, and the Secret Service, recognizing that agents of these law enforcement services within the Department of Homeland Security should be treated equally with law enforcement agents within the Department of Justice.

SECTION 16 – CLARIFICATION OF SECRET SERVICE AUTHORITY TO INVESTIGATE MONEY LAUNDERING

The Secret Service is authorized by 18 U.S.C. § 3056 to investigate a broad range of financial crimes. The Department of Justice has interpreted this statutory language as extending to money laundering investigations. Likewise, the Secretary of the Department of Homeland Security has specifically delegated the responsibility for investigating money laundering to the Secret Service. Section 16 would expressly clarify that the Secret Service has the jurisdiction to pursue money laundering investigations.

Additionally, Section 16 would permit the Secret Service to investigate unlawful activity against any financial institution as defined in the law, removing the previous qualifier that the institution be federally insured. This last change reflects the growing trend by criminals to facilitate money laundering through transactions by non-traditional financial institutions, such as check-cashing businesses.

SECTION 17 – PROHIBITION ON CONCEALMENT OF OWNERSHIP OF ACCOUNT

In order to gain access to the U.S. financial system, criminals, including foreign kleptocrats, will often conceal their identities from financial institutions when opening an

account. This can be done using third-party money launderers, gatekeepers, nominee owners, or corporate vehicles such as shell and front companies. Once established, criminals can use these accounts to conceal the source or nature of illicit funds or conduct transactions with few impediments and without detection by the financial institution. At the same time, concealing account ownership information prevents a financial institution from complying with "know your customer" requirements designed to combat money laundering and terrorist financing.

Currently, there is no criminal offense with which to prosecute an individual who opens an account under false pretenses but otherwise causes no direct financial harm to the financial institution. Section 17 would remedy that omission by making it an offense for an individual to knowingly conceal, falsify or misrepresent, from or to a financial institution, a fact concerning the ownership or control of an account or assets held in an account. The section narrowly defines a financial institution to include only those institutions that are under strong obligations to identify their customers pursuant to the Bank Secrecy Act. The offense would be consistent with and modeled on 31 U.S.C. §§ 5324 and 5332, which also make it an offense for an individual to evade certain Bank Secrecy Act obligations.

SECTION 18 – PROHIBITION ON CONCEALMENT OF SOURCE OF ASSETS IN MONETARY TRANSACTION

An entity identified as a "primary money laundering concern" under section 311 of the USA PATRIOT Act is one that the Department of Treasury has determined is a money laundering or terrorist financing risk to the U.S. financial system. A foreign "politically exposed person," or "PEP" is a foreign individual with a prominent public function who presents a risk for involvement in bribery and corruption because of their position and influence. Both 311 entities and foreign PEPs pose risks to U.S. financial institutions covered by the Bank Secrecy Act because of the potential for money laundering and other illicit financial activity. Following Department of Treasury requirements, U.S. financial institutions must use increased due diligence to stop 311 entities from accessing the U.S. financial system. In the case of foreign PEPs, the law obligates U.S. financial institutions to use enhanced due diligence to protect against misuse of the U.S. financial system to launder corrupt money. However, when facts concerning the involvement of a 311 entity or a foreign PEP in a monetary transaction are concealed, falsified, or misrepresented to a U.S. financial institution, it can prevent compliance with the Bank Secrecy Act and result in the institution unwittingly facilitating money laundering.

Prosecutors do not have an offense to charge against an individual who conceals, falsifies or misrepresents the involvement of a 311 entity or foreign PEP in a monetary transaction that is by, through, or to a U.S. financial institution. Section 18 closes this gap and would enable the government to pursue any such individuals and their assets. The proposed offense is consistent with and modeled on 31 U.S.C. §§ 5324 and 5332.

SECTION 19 – RULE OF CONSTRUCTION

Section 19 would clarify that nothing in the legislation shall be construed to apply to the authorized law enforcement, protective, or intelligence activities of the U.S. or of a U.S. intelligence agency.