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## *Foreign Narcotics Kingpin Designation Act*

### **Sweeping New Legislation Exposes International Businesses to Severe Civil and Criminal Sanctions**

Beginning June 1, 2000, any person or firm that does business with, or fails to block the assets of, persons identified by the President as “significant foreign narcotics traffickers” or persons and businesses that aid such traffickers, risk criminal penalties of up to ten years imprisonment and civil penalties of up to \$1 million for violations.<sup>1</sup> The penalties are authorized by extensive new legislation signed into law by President Clinton late last year.

On December 3, 1999, the President signed into law the “Foreign Narcotics Kingpin Designation Act,” which provides for the sanctioning of significant foreign narcotics traffickers. The Act represents an expansion of the International Emergency Economic Powers Act<sup>2</sup> (“IEEPA”), which was used to sanction four international narcotics traffickers and their organizations that operated from Colombia.<sup>3</sup> The Kingpin Designation Act, however, will apply worldwide. It requires the President to submit an annual report to Congress identifying publicly the “foreign persons” that the President determines are appropriate for sanctions as significant narcotics traffickers.<sup>4</sup> The designations may be based on classified information from law enforcement and intelligence agencies and

are *not* subject to judicial review. The first set of designations is due on June 1, 2000.<sup>5</sup>

In addition, the Secretary of the Treasury may add any foreign person or entity to the list that (1) “materially assists” or provides support, goods or services to a person on the list; (2) that is owned, controlled, directed by, or acting for someone on the list, or (3) who is “playing a significant role in international narcotics trafficking.”<sup>6</sup>

Once the President or the Secretary of the Treasury designates a person or entity, the Act makes them economically untouchable by *blocking* their property. Under the blocking provision, the assets are not actually forfeited to the U.S., but are merely frozen in place. No one can touch them without violating the Act. This blocking provision applies to all property and interests in property in the U.S., or within the possession or control of any U.S. person. A “U.S. person” includes U.S. citizens or nationals, permanent resident aliens, persons in the U.S. and any “entity organized under the laws of the U.S. (including its foreign branches).”<sup>7</sup>

The Act also bans all transactions within the U.S. or by U.S. persons, with any person

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<sup>1</sup> 21 U.S.C. § 1906(b)

<sup>2</sup> 50 U.S.C. § 1701 et seq.

<sup>3</sup> 21 U.S.C. § 1901(a)(3)

<sup>4</sup> 21 U.S.C. § 1903(b)(1)

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<sup>5</sup> 21 U.S.C. § 1903(b)

<sup>6</sup> 21 U.S.C. § 1904(b)

<sup>7</sup> 21 U.S.C. § 1907(6)

on the list.<sup>8</sup> Thus, transactions between two foreign persons or entities may trigger the Act if any part of the transaction occurs within the U.S. Conversely, even transactions abroad are subject to the Act so long as one of the parties is a “U.S. person.”

Several examples illustrate the reach of the Act:

- A U.S. domestic manufacturer enters into a contract with a supplier in Colombia after June 1. The supplier, however, is on the kingpin list. Since a prohibited transaction is defined as “any transaction or dealing ... in property or interests in property,”<sup>9</sup> *the contract violates the Act*. Even if the contract was entered into before June 1, any performance of the contract *still violates the Act*.<sup>10</sup>
- A financial institution located in Switzerland provides services to a Mexican mining company. A person or entity on the kingpin list owns a controlling stake in the mining company. As a result, *the financial institution is itself at risk that it will be added to the list on the theory that it is providing support, goods or services to a person on the list or who is owned, controlled, directed by, or acting for someone on the list*. If it is placed on the list, the decision is *not* subject to judicial review<sup>11</sup> and the Act bars any U.S. person or company from conducting business with it, and it may not conduct transactions in the U.S.
- The Moscow branch of a U.S. securities firm accepts funds for investment from a person or entity on the kingpin list. The transaction occurs entirely outside of the U.S. and management in the U.S. knows nothing about it. Nonetheless, *the*

*transaction violates the Act* because the Act applies to entities organized under U.S. laws *and* their foreign branches.

### **Know Your Business Associates**

The Act makes it imperative for firms engaged in international commerce to *learn about their business associates and customers*. Lack of due diligence may lead to severe consequences. The Act imposes criminal penalties of up to ten years imprisonment, plus fines, for any person who “willfully violates” the Act or “willfully neglects” the provisions of the Act.<sup>12</sup> Knowledge about the Act, but failure to comply with it, may constitute “willful neglect.” The Act also imposes civil penalties of up to \$1 million for violations,<sup>13</sup> regardless of whether or not it was known that a person involved in a transaction was on the kingpin list.

The Act does contain a “good faith provision” that provides that: “No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to, and in reliance on [the Act.]”<sup>14</sup> This provision apparently means that good faith attempts to comply with the Act will protect oneself against liability even if an inadvertent violation does occur.

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<sup>8</sup> 21 U.S.C. § 1904(c)

<sup>9</sup> 21 U.S.C. § 1904(c)

<sup>10</sup> 21 U.S.C. § 1904(c)

<sup>11</sup> 21 U.S.C. § 1904(f)

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<sup>12</sup> 21 U.S.C. § 1906(a)

<sup>13</sup> 21 U.S.C. § 1906(b)

<sup>14</sup> 21 U.S.C. § 1905(c)(2)