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Money Laundering

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Letter from the Editor

The money laundering statutes are excellent tools to expose, punish, and dismantle organized criminal activity. As the statutes are relatively new, and some of the Treasury regulations are even more recent, this is an appropriate time to publish an issue of the *United States Attorneys' Bulletin* dedicated to money laundering enforcement efforts.

We thank Asset Forfeiture & Money Laundering Section (AFMLS) Assistant Chief Les Joseph for helping us put this issue of the Bulletin together. This issue includes a number of substantive law articles. For example, Stef Cassella's two articles are blueprints for building money laundering crime cases and employing the asset forfeiture remedy. Sentencing, which is always a hotly contested issue in money laundering cases, is discussed comprehensively by Les Joseph.

Accompanying the substantive legal discussions are articles about the world of money laundering and various enforcement efforts. Our interview with AFMLS Chief Gerald McDowell provides background information on the Department's money laundering strategy, legislative issues, and international forfeiture. The international sharing article lays the groundwork for successful international forfeitures. We thank the folks at FinCEN for providing a great deal of helpful information and for permitting use to reprint their materials in the *Follow the Money* article. Finally, we thank AUSA Marion Percell for her article on using suspicious activity reports in task force operations.

Many thanks to all of you who continue to give us your comments and suggestions for the *Bulletin* and our publications program. Please feel free to call me at (340) 773-3920, or e-mail AVIC01(DNISSMAN)

David Marshall Nissman

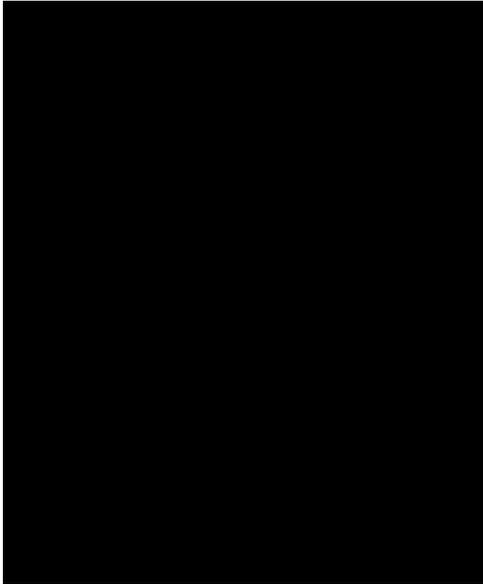
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Interview with Gerald E. McDowell



Gerald E. McDowell

Gerald E. McDowell has served as the Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, since 1994. He graduated from the University of Virginia School of Law in 1967, and joined the United States Department of Justice, Criminal Division that same year. From 1971 to 1973 he served as the Attorney-In-Charge of the St. Louis Organized Crime Strike Force and, from 1973 to 1979 he served as the Attorney-In-Charge of the Boston Organized Crime Strike Force. In 1979 he was appointed Deputy Chief of the Organized Crime and Racketeering Section. In 1980 he was appointed Chief of the Public Integrity Section. From 1991 to 1994 he served as the Chief of the Fraud Section. He is a charter member of the Federal Bureau of Investigation's Undercover Operations Review Committee.

Mr. McDowell (GM) was interviewed by Assistant United States Attorney (AUSA) David M. Nissman (DN), Editor in Chief of the *United States Attorneys' Bulletin*.

DN: Asset Forfeiture used to be in the Deputy Attorney General's Office, while money laundering was a separate section in the Criminal Division. Now there is one combined section in the Criminal Division. How did that develop?

GM: The Deputy Attorney General at the time, Jamie Gorelick, was very conscious of the fact that it was probably not the best management posture to have operational activities taking place out of her office, since she should be reviewing the management of the Department. She reasoned that she should be presiding over people whose full time job is managing, not managing operations herself. She moved the policy and operational activities to the Asset Forfeiture Office in the Criminal Division.

Ms. Gorelick, and then Criminal Division AAG JoAnn Harris, decided to combine money laundering and asset forfeiture into one section in 1995 because the duties of the attorneys are so closely entwined. While money laundering is a crime, and forfeiture is a remedy, people who are doing money laundering cases should be almost always looking at forfeiture. People who are interested in forfeiture are often looking to see if there is money laundering in the crimes they are investigating to support the forfeiture. With the combined strengths of a litigation, policy, and large teaching unit, money laundering and forfeiture could draw on each other's strengths. In large measure, it has worked out that way.

DN: Why is it important to focus on money laundering?

GM: When you start focusing on money laundering and crime, you realize that the major criminals we confront are lawless and immoral people whose business is crime. If we only focus on the clanging of the jail door, we miss a major motivation that criminals have—making money. If we zero in on their finances and take their

money and businesses, we reduce the incentive to be criminal.

For example, we were just talking to some AUSAs about a criminal defendant who was investing drug proceeds in a particular kind of business that generated cash to hide his drug proceeds. He was so successful at the legal business that he started to diminish his drug dealing. The case is almost out of the economics textbook. Here is a fellow with capital and he is making a lot of money by dealing drugs in the neighborhood, but it is a high-risk business. Suddenly, he finds a way to make money with less risk and he devotes more time to it. If we look at criminal enterprises as businesses, we can attack them from both the financial side and from the traditional law enforcement side.

DN: What is the best way to address and prevent money laundering?

GM: There are a lot of tools, both regulatory and enforcement, available to us to identify and attack money laundering. The currency reporting laws and the Treasury Department's ability to impose geographical targeting orders certainly help to identify and prevent money laundering, as do Suspicious Activity Reports (SARs). SARs are a terrific tool to detect money laundering and other financial crimes. Every United States Attorney's office has access to SARs, and I encourage them to review these reports on an interagency basis to develop targets in their districts. Undercover operations and electronic surveillance also have proven very useful in bringing money laundering organizations to light. And our money laundering and forfeiture statutes provide very effective tools for attacking these organizations. Our agents and prosecutors must recognize that taking the economic incentive out of crime, using the forfeiture remedy, and building cases to attack the profits of crime, can dismantle criminal organizations.

DN: Is money laundering an international security threat?

GM: In the smaller and poorer countries, yes. A lot of poor countries do not recognize the threat facing them. They see the capital coming in. They see the buildings going up. Yet, they know that behind the building is a dangerous gangster and behind the money the bank is lending there may be another dangerous gangster or a cartel of gangsters. They see the immediate benefits and not the danger to their economic system. Soon their banking system is controlled by shadowy underworld figures and the corruption it brings. The international community, led in large part by the United States, has hammered home the message worldwide that you cannot have a "gangsterocracy" running your economy.

Money laundering can present a threat to political stability, which is not just a criminal problem. Some smaller countries without military forces have only their local police forces facing well-armed drug cartels. They are not just concerned about criminal prosecutions; they are fighting for their political survival. Also, money laundering can undermine the legitimate economies of these countries. The honest businessman is always behind the eight ball against the fellow whose criminal proceeds are funding the seemingly "legitimate activities." The honest people just can't compete. That serves to corrupt the adherence to the rule of law by people who would otherwise be law-abiding citizens.

DN: What specifically can AUSAs do to focus on money laundering when we are working on, for example, a drug investigation?

GM: I think that AUSAs can energize the agents to produce a good case by showing enthusiasm from the outset for pursuing the financial side of the investigation. The money laundering statutes should not be viewed as sentence enhancers. Instead, they can be used to attack the criminal infrastructure. Such enthusiasm is infectious; agents respond in kind. If the agents have a prosecutor who is enthusiastic, they will work to produce a good money laundering case. AUSAs can also help guide the investigators to what is

relevant and what is important to a money laundering and forfeiture case. Finally, AUSAs should insist that the agents debrief all witnesses on financial matters. Often, we see a case that is very thoroughly investigated concerning, for example, where the drugs came from. The agents prove it from A to Z. Unfortunately, we do not always focus on where the money went. Did the criminals use banks? What banks did they use? Where did they keep the cash? Is it still being kept some place?

These questions aren't always asked. We are trying to get the investigative agencies to make that a routine part of their investigation, but if the impetus for a financial investigation comes from the AUSA, it would have much more power and strength than just another bulletin coming out of Washington.

From the outset of an investigation it is important to trace the movement of the money and seize it as early as practicable. It is our experience that, if you wait until the end of the case, it is extraordinarily difficult to do a financial investigation. By that time, the money has probably been moved to some country beyond our reach. If you start at the beginning, you wind up with a good money laundering case and a good forfeiture action. You have something tangible you can seize and hold because you will know when and where to strike. The AUSA can have much more control over the shaping of the case if he or she is involved at the planning stage.

DN: What is the Department's money laundering strategy?

GM: We are working with the Treasury Department to develop a money laundering strategy which will better coordinate the use of our resources. We recognize that the gathering and coordinated sharing of investigative information is a critical component to money laundering cases. Information is currently kept too compartmentalized. We need to improve our information sharing efforts.

Also, I am convinced that there is a white collar underworld of professional money launderers. If we focused on them, we would reap a great harvest of criminal intelligence information. Routinely, we need to ask our informants and cooperating witnesses who the professional money launderers are and how they operate their businesses. Right now, we catch a lot of white collar money laundering because the criminal is laundering his or her own money and we find it in the course of investigating the underlying crime. But, we should also focus on the professionals, the lawyers, the accountants, and other skilled people who are willing to break the law because of the hefty profits and low risk of apprehension.

For example, in Providence, Rhode Island, the United States Attorney's office and the FBI found an individual who started as a petty criminal, went big time and laundered money for the drug cartels. This person did this very effectively using the gold industry as a front to turn tons of \$20 narcotics bills into gold and then turn the gold into clean money. The money went into bank accounts abroad. He was a professional money launderer. Are there law and accounting firms in the major cities who have partners that very skillfully launder funds for criminal clients? Do we ask the right questions to find out who these people are? If we ever focus on and prosecute them, we would not only disrupt this network of money launderers, but we would also find out for whom they were laundering money.

DN: Describe recent legislative efforts.

GM: This has been a particularly difficult time for us in Congress. Congress has looked at a few cases from the early 1990s as horror stories in the asset forfeiture area and extrapolated them as if they were the norm. These cases are exceptions to the way that forfeiture is currently being practiced. As part of our duties at the Asset Forfeiture Money Laundering Section (AFMLS), we look to see if abuses of citizens' rights, failures to investigate thoroughly, or just plain misjudgments occur. The training that we give in the Department of Justice

emphasizes ethics. The high caliber of AUSAs, the training provided to agents, and the information we receive from completed cases all point to a well-run forfeiture program. I came to the program in 1994. After reading Chairman Hyde's book on forfeiture and listening to Congressional criticism, I am sensitized to look for these abuses. I just do not see them except as very rare, random examples, certainly nothing compared to what Congress has focused on. But we are faced with a contrary perception in the House Judiciary Committee.

We have been trying to get through an administration forfeiture bill since 1993 that would reform and expand, in a rational sense, criminal and civil forfeiture. There is an enormous amount of opposition to any expansion of civil forfeiture. We largely have to depend on our allies in the law enforcement community (especially the local police, sheriffs, and prosecutors) to join with us and our Office of Legislative Affairs, to work with Congress and present our position. Currently, there is a stalemate where no legislation has passed. The good news is that the stalemate has prevented some pretty bad legislation from becoming law. An unfortunate side effect has been the death of some excellent money laundering bills.

DN: Is AFMLS satisfied with the international forfeiture statutes?

GM: No. Two important improvements come to mind. We should be able to honor foreign requests to freeze assets and we should be able to enforce foreign judgments. We generally have the ability to service the needs of countries who want to cooperate with us. We are the absolute world leader in fostering a notion of sharing, which has worked so well for us domestically.

DN: Do you find that asset-sharing works in the international forum?

GM: Yes. We use it very similarly to the way we deal with our local police and prosecutive agencies. In the short run, the United States foregoes keeping

the entire proceeds of any particular forfeiture. Sharing with our foreign law enforcement partners increases the enthusiasm and motivation that other countries have to enforce the law. This will ultimately make for many more forfeitures that impact on international criminals. So much of our major crime is international. It really is an eye-opener when we find out how many criminals in Atlanta or Ft. Lauderdale have bank accounts in Hong Kong or Switzerland. It is not always the Cali cartel you are looking at. It is the criminal that operates in your downtown. If we can hurt criminals affecting us in the United States by seizing their bank accounts in Switzerland or Hong Kong, then we have fostered law enforcement interests of the United States.

Fortunately, the President has declared money laundering to be an international problem and the Treasury and Justice Departments have put it on the forefront of international policy.

DN: With which countries have we had success?

GM: We have had some success with Switzerland, Cayman Islands, Canada, and recently with Hong Kong. The United Kingdom does not always reciprocate our efforts at sharing assets. We had a major conference in Costa Rica last September where we were trying to get the Spanish-speaking countries of Latin America to share their common experiences and learn from each other's legal systems. We encouraged passing more aggressive forfeiture and money laundering laws. We also urged countries to share information and assets.

DN: Do AUSAs participate in these conferences?

GM: We find direct AUSA participation and assistance to be valuable when we put on international conferences. We invite the AUSAs who have major cases pending with the countries attending the conference. The AUSAs participate as speakers and are provided with an opportunity to meet with their foreign counterparts to advance their cases.

DN: Isn't Panama a country that has changed dramatically in the last ten years?

GM: Yes. Panama has taken some major steps to fight money laundering. It has significant problems with the drug dealers in neighboring Colombia and the Colon Free Trade Zone still provides opportunities for money laundering. At the same time, the Panamanian police and prosecutors at the conference invited police and prosecutors from countries that do not have legislation to Panama to see how anti-money laundering law enforcement works in a very similar country and environment.

DN: Aren't bank secrecy laws a big factor in the ability to succeed in foreign countries?

GM: Bank secrecy laws still present obstacles to enforcement in a number of jurisdictions, but that number is shrinking, thanks to our international efforts. A lot of countries, the United States included, have found that you can close off the banking system to money launderers to a remarkable degree by routine reporting of suspicious circumstances. More and more, countries are instituting requirements for the reporting of suspicious transactions; this is a very significant step in breaking down the barriers of bank secrecy.

DN: Why is the Sentencing Commission so concerned about the guidelines in money laundering cases?

GM: That issue has occupied a lot of time with people in the Section for years, even predating the formation of this Section. The Sentencing Commission has looked at the money laundering guidelines from the wrong direction. They note that, if we bring a case against con men and fraud artists, there is a relatively low-level sentencing option. If the prosecutor finds that there is money laundering going on, and we bring appropriate money laundering charges, the sentencing stakes are hiked up significantly. The Commission sees that as an abuse. The real problem with the

Sentencing Guidelines, however, is that the fraud guidelines are too low. The Commission has not always shared that opinion and, not unlike our problems in Asset Forfeiture, they focused on a couple of cases that are not consistent with the reality of money laundering prosecution practices currently going on around the country. The Commission tried to ratchet down the guidelines for money laundering, but it did not find favor in Congress.

The issue has remained somewhat dormant since that time. I cannot say with any confidence that it will not erupt again given the right circumstances. The important thing is to bring good money laundering cases and to be consistent with our case selections. I can easily compare American results to foreign results because we go to the Financial Action Task Force (FATF) meetings. The United States files more than 2,000 money laundering cases each year, one-fourth of which involve international money launderers. We also look at the work product of AUSAs, by looking at the indictments the USAOs provide to the Section and we talk constantly to Assistants who spot problems in cases, and call for advice or guidance. The number of cases we see that raise problems is minuscule. Nor are we seeing abuses in the published reports. This is a big country, bringing thousands of cases a year, and I just do not see a systemic abuse of the statute to justify ratcheting down the Guidelines.

What I do see are AUSAs who want to bring righteous cases, and who want to make an impact on criminal behavior. If the Sentencing Commission takes an objective look at what we are actually doing, I think they would agree the present guidelines are right and that they ought to be looking at the fraud guidelines instead.

DN: Are you satisfied with the job AUSAs are doing with money laundering cases?

GM: Yes. The caliber of the AUSAs and the quality of their work is good, which is a key factor that makes the United States a world leader in the enforcement of money laundering laws. By the

way, the Attorney General has asked each USAO to designate a money laundering contact person, and I am eager to finish this important list. You can call, write, or e-mail me to designate a contact point for us.

DN: What message, if any, would you like to send out to AUSAs and United States Attorneys across the country.

GM: I think that we have a marvelous tool in forfeiture. Congress has given us the ability to prosecute money laundering that we did not have when I started my career. We did not even think about these possibilities, and we missed decades of opportunities against the mafia and other criminal gangs. We should be grateful for these statutes, because they provide the USAOs with the opportunity to go after criminal gangs and their associates. It is hard work, but, at the end of the day, it is so rewarding to know that you have taken the profits away from the criminal and put the criminal in jail. If there are victims to be helped, we can help them by seizing assets to pay the victims' losses. We can help law enforcement fund important programs, and we can put criminals, their enterprises, and their organizations out of business.

DID YOU KNOW?

' In February 1999 the Office of Legal Education published a training manual called *Federal Narcotics Prosecutions*. This manual contains many chapters that apply in non-narcotics cases, including chapters on witness preparation, expert witnesses, and money laundering.

The Money Laundering Statutes (18 U.S.C. §§ 1956 and 1957)

*Stefan D. Cassella, Assistant Chief
Asset Forfeiture and Money Laundering Section
Criminal Division*

The first money laundering statutes were the currency reporting offenses set forth in the Bank Secrecy Act, 31 U.S.C. § 5311 et seq. Sections 5313 and 5324(a), for example, make it an offense to fail to file a currency transaction report (CTR) on cash transactions involving more than \$10,000, to file a false report, or to structure a transaction to evade the reporting requirement. Sections 5316 and 5324(b) do the same for currency and monetary instrument reports (CMIR) filed with the U.S. Customs Service at border crossings.

Throughout the 1970s and most of the 1980s, these were the only statutes available to prosecute money laundering offenses. For a variety of reasons, they proved inadequate. So in 1986, Congress made money laundering itself a crime in 18 U.S.C. §§ 1956 and 1957.

Section 1956 consists of three provisions dealing with domestic money laundering, international money laundering, and undercover "sting" cases, respectively. *See* 18 U.S.C. §§ 1956(a)(1), (a)(2), and (a)(3). Section 1957 makes it an offense simply to conduct any monetary transaction in criminal proceeds involving more than \$10,000. This article will focus first on the elements of the domestic money laundering statute, § 1956(a)(1), and then will point out the similarities and differences between this statute and the other three.

Section 1956(a)(1)

A domestic money laundering offense under Section 1956(a)(1) is committed if the defendant:

1. Knowing that certain property represents the proceeds of some form of unlawful activity; and
2. Intending to
 - a. promote the carrying on of the specified unlawful activity, or
 - b. engage in conduct that violates 26 U.S.C. §§7201 or 7206, or
 - c. conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity, or
 - d. avoid a transaction reporting requirement;
3. Uses the property, which is in fact the proceeds of a specified unlawful activity (SUA);
4. To conduct or attempt to conduct a financial transaction affecting interstate commerce.

The *actus reus* of the crime is the financial transaction. The remaining elements are mental states (knowledge and intent) or factual predicates (the property must be SUA proceeds; the transaction must affect interstate commerce) that must be present at the time of the financial transaction. Thus, in any money laundering case, it is best for the prosecutor to focus first on which financial transaction will serve as the basis for the money laundering.

Elements of Money Laundering—18 U.S.C. §§ 1956 and 1957

§ 1956(a)(1)	§ 1956(a)(2)	§ 1956(a)(3)	§ 1957
financial transaction	transportation	financial transaction	monetary transaction (\$10,000 through a financial institution)
knowledge	knowledge [intents (c) and (d) only]	representation	knowledge
proceeds	proceeds [intent (c) only as object of concealment]		proceeds
intent (a) to promote (b) tax evasion (c) to conceal or disguise (d) to evade currency reports	intent (a) to promote (b) ----- (c) to conceal or disguise (d) to evade currency reports	intent (a) to promote (b) ----- (c) to conceal or disguise (d) to evade currency reports	intentionally blank

Financial transaction

The terms "transaction" and "financial transaction" are defined in § 1956(c)(3) and (4). In short, virtually anything that can be done with money is a financial transaction—whether it involves a financial institution, another kind of business, or even private individuals. Thus, the simple transfer of cash from one person to another may constitute a money laundering offense. *See United States v. Otis*, 127 F.3d 829 (9th Cir. 1997) (drug dealer's delivery of cash to a money launderer is a financial transaction). Other examples abound in the case law. *See United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (wire transfer through Western Union is a financial transaction); *United States v. Rounsavall*, 115 F.3d 561 (8th Cir. 1997) (writing check to purchase cashiers checks is financial transaction); *United States v. Brown*, 31 F.3d 484, 489 n.4 (7th Cir. 1994) (processing credit card charges involves "payment, transfer, or delivery by, through or to a financial institution").

Note that the transaction does not need to involve money or other monetary instruments. Simply transferring title to certain kinds of property, such as land or vehicles, falls within the statutory definition of a financial transaction. *See United States v. Westbrook*, 119 F.3d 1176 (5th Cir. 1997) (purchase of a vehicle is a financial transaction because it involves transfer of title); 18 U.S.C. § 1956(c)(4)(A)(iii).

The only serious limitation in the case law is that the simple transportation of cash from point A to point B by a single individual may not be a financial transaction. There has to be a transfer or disposition of the cash between two people. *See United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994) (transporting drug proceeds from Florida to Texas was *not* a "transaction" absent evidence of disposition once cash arrived at a destination).

This limitation aside, finding a financial transaction that will satisfy the statutory definition is generally not difficult for the prosecutor. Indeed, the typical crime, conducted for profit, will involve

a whole series of financial transactions. The issue for the prosecutor, therefore, is choosing which financial transaction to use as the basis for the criminal charge.

This choice is critical for many reasons. First, most courts hold that each financial transaction is a separate offense. Because the unit of prosecution is the financial transaction, and because charging multiple transactions as a continuing course of conduct in a single count is duplicitous, the prosecutor is forced to choose one financial transaction for each count in the indictment. *See United States v. Prescott*, 42 F.3d 1165 (8th Cir. 1994); *United States v. Conley*, 826 F. Supp. 1536 (W.D. Pa. 1993) (dismissing duplicitous charge with leave to refile); *cf. United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996) ("transfer" under § 1956(a)(2) is not a continuing offense; each transfer is a separate offense); *but see United States v. Gordon*, 990 F. Supp. 171 (E.D.N.Y. 1998) (single money laundering count charging multiple financial transactions *not* duplicitous where all transactions were part of single continuous scheme; applying *United States v. Margiotta*, 646 F.2d 729 (2d Cir. 1981) (multiple mailings may be charged in single mail fraud count)).

Moreover, the choice of the financial transaction fixes the time at which the other elements apply. That is, the defendant must have the requisite knowledge and intent, and the property must represent SUA proceeds, *at the time the financial transaction takes place*.

The financial transaction also determines venue, *see United States v. Cabrales*, 524 U.S. 1 (1998) (venue for money laundering lies where the financial transaction occurred), and it determines the timing of the money laundering offense for statute of limitations purposes. Finally, the choice of the financial transaction determines what property is going to be subject to forfeiture. *See* 18 U.S.C. §§ 981 and 982 (only property "involved in" the financial transaction is subject to forfeiture).

Interstate Commerce

After some debate, the courts have concluded that the effect on interstate commerce is an element of the offense that the government must:

' allege in the indictment—*see United States v. Goodwin*, 141 F.3d 394 (2d Cir. 1997) (effect on interstate commerce should be alleged in the indictment, but failure to do so is not ground for reversal where such effect is implied in allegations that are set forth); *United States v. Kunzman*, 54 F.3d 1522 (10th Cir. 1995) (statement that defendant conducted financial transaction affecting interstate commerce is sufficient to allege interstate commerce nexus; no need to allege manner in which commerce was affected); and

' prove beyond a reasonable doubt—*see United States v. Ladum*, 141 F.3d 1328 (9th Cir. 1998) (interstate commerce is both jurisdictional and an essential element of the offense); *United States v. Goodwin*, 141 F.3d 394 (2d Cir. 1997) (proof of a nexus with interstate commerce is an essential element of money laundering); *United States v. Allen*, 129 F.3d 1159 (10th Cir. 1997) (In a section 1957 case, the interstate commerce requirement is both jurisdictional and an essential element of the offense. These elements must be decided by a jury); *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (interstate commerce nexus is an essential element of § 1957 offense, which the government must prove beyond a reasonable doubt); *United States v. Wilkinson*, 137 F.3d 214 (4th Cir. 1998) (same for § 1956); *United States v. Leslie*, 103 F.3d 1093 (2d Cir. 1997) (interstate commerce nexus is essential to confer jurisdiction on a federal court and requires proof beyond a reasonable doubt); *see also United States v. Van Brocklin*, 115 F.3d 587 (8th Cir. 1997) (noting split in the circuits—before the Tenth Circuit's decision in *Allen*—but leaving unresolved whether interstate commerce is an element of the offense).

Showing a small impact is, however, sufficient. Very frequently, the government will simply show that the transaction:

' involved an FDIC-insured bank—see *United States v. Peay*, 972 F.2d 71 (4th Cir. 1992) (transaction involving funds on deposit at a financial institution insured by FDIC affects interstate commerce); *United States v. Kunzman*, 54 F.3d 1522 (10th Cir. 1995) (same); *United States v. Trammell*, 133 F.3d 1343 (10th Cir. 1998) (depositing checks drawn on FDIC-insured bank and wiring money from bank in one state to bank in another affects interstate commerce); *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991) (transaction involving check drawn on a bank implicates interstate commerce); but see *United States v. Leslie*, 103 F.3d 1093 (2d Cir. 1997) (check drawn on bank with the word "federal" in its name implicates interstate commerce, but as to other banks, government must present evidence that bank engages in interstate commerce, such as FDIC insurance); or

' that the transaction was commercial in nature—see *United States v. Ripinsky*, 109 F.3d 1436, *opinion amended on denial of reh'g*, 129 F.3d 518 (9th Cir. 1997) (if the transaction is commercial in nature, government need only prove that it had a minimal effect on interstate commerce that, through repetition by others, could have a substantial effect), *cert. denied*, 118 S. Ct. 870 (1998); *United States v. Goodwin*, 141 F.3d 394 (2d Cir. 1997) (same); *United States v. Leslie*, 103 F.3d 1093 (2d Cir. 1997) (use of check drawn on account of a real estate business implicates interstate commerce because of the nature of real estate markets); *United States v. Lucas*, 932 F.2d 1210 (8th Cir. 1991) (investment in construction of shopping mall inevitably implicates interstate commerce).

Knowledge

The government must show that, *at the time the financial transaction occurred*, the money launderer knew that the property in the financial transaction was dirty money. Specifically, he must know that the property represented the proceeds of "some form" of unlawful activity, but he does not

need to know precisely what unlawful activity this was. See 18 U.S.C. § 1956(c)(1). In other words, it is not a defense for the defendant to say, "I did not know it was drug money, I thought it was the proceeds of insurance fraud." See *United States v. Marzano*, — F.3d —, 1998 WL 787230 (7th Cir., Nov. 12, 1998).

The question most prosecutors face is how to prove a defendant knew the money he was laundering for someone else was illegally derived? As with other issues involving a mental state, the proof is usually circumstantial and the case law provides many examples.

For instance, in *United States v. Golb*, 69 F.3d 1417 (9th Cir. 1995), the court held that the jury could infer that the defendant, who brokered an airplane sale, (1) knew that the purchase money was illegally derived because the money came as multiple, anonymous wire transfers and bundles of checks, (2) made statements about the purchaser's involvement in drug trafficking, and (3) made threats of violence, showing he knew he was not representing a legitimate business person. See *United States v. Otis*, 127 F.3d 829 (9th Cir. 1997) (defendant's "pager contacts, associations, and criminal history" sufficient to show that defendant knew the \$60,000 he turned over to third-party in parking lot was criminal proceeds); *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (even underlings who never dealt with drug dealers knew that money they were laundering was drug proceeds because no other cash-generating business would require the laundering of such huge quantities of cash); *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992) (real estate agent willfully blind to client's use of drug proceeds to purchase house); *United States v. Long*, 977 F.2d 1264, 1270-71 (8th Cir. 1992) (car dealer willfully blind to use of drug proceeds to purchase car); *United States v. Antzoulatos*, 962 F.2d 720, 724-25 (7th Cir. 1992) (same).

Similarly, in *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998), the Tenth Circuit held that an accountant had actual knowledge that his client's cash came from drug dealing because the

accountant (1) prepared the drug dealer's tax returns, (2) knew he sold drugs, and (3) knew he had insufficient legitimate income.

Proceeds

With the exception of a § 1956(a)(3) case, the third element of money laundering is that the property in the financial transaction must *in fact* be the proceeds of an offense constituting "specified unlawful activity," or SUA. The offenses listed in Section 1956(c)(7), and all of the RICO predicates listed in 18 U.S.C.

§ 1961(1), qualify as SUAs.

Proving the property is SUA proceeds is easy, if the prosecutor can trace the money to a particular offense. It is not, however, necessary to do this. The courts unanimously hold that showing the specified unlawful activity generated the money or other property without identifying the date and place of the offense is sufficient. For example, in *United States v. Golb*, 69 F.3d 1417 (9th Cir. 1995), evidence that the money came from an account used by professional money launderers to launder drug proceeds was sufficient to establish the "proceeds" element. Similarly, in *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990), the government proved that the property in the financial transaction was drug proceeds by showing that the defendant was engaged in the drug business and was using wire services to move a lot of cash. The government also called an expert witness to testify that these transactions were typical of what drug dealers do with drug money. *See also United States v. Hardwell*, 80 F.3d 1471 (10th Cir. 1996) (evidence that the defendant was engaged in drug trafficking and had insufficient legitimate income to produce the money used in the financial transaction was sufficient); *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (same); *United States v. Eastman*, 149 F.3d 802 (8th Cir. 1998) (following *Blackman*; no need to trace proceeds to particular drug sale; government may rely on defendant's involvement in drug trade and lack of legitimate income to prove wired money was drug proceeds); *United States v. Habhab*, 132 F.3d 410 (8th Cir.

1997) (evidence that defendant was engaged in fraudulent activity and had received fraud proceeds prior to date of financial transaction charged as money laundering was sufficient to establish money was SUA proceeds).

As these cases illustrate, prosecutors commonly establish proof that the property is SUA proceeds with circumstantial evidence. *See United States v. Misher*, 99 F.3d 664 (5th Cir. 1996) (when defendant, who is connected to drug trafficking, pays for a car with suitcase full of cash, there is sufficient evidence that the money is SUA proceeds); *United States v. Saccoccia*, 58 F.3d 1129 (1st Cir. 1995) (totality of circumstances entitling jury to find laundered money was drug proceeds included dog sniff, transfer of huge sums to Colombia, huge quantities of cash in small worn bills, and expert testimony); *United States v. Wynn*, 61 F.3d 921 (D.C. Cir. 1995) (convoluted method of payment for car, including attempt to disguise purchaser's identity, implied that purchase money was drug proceeds).

Note that only part of the money involved in the financial transaction needs to be SUA proceeds. As the Ninth Circuit has held that proving "that the funds in question came from an account in which tainted proceeds were commingled with other funds is sufficient." *United States v. Garcia*, 37 F.3d 1359, 1365 (9th Cir. 1994). In the Ninth Circuit at least, once SUA proceeds are commingled in an account, any withdrawal from that account involves proceeds, even if the balance in the account drops to zero between the time the proceeds are deposited and the time of the withdrawal. *United States v. Marbella*, 73 F.3d 1508 (9th Cir. 1996)); *see also United States v. Rutgard*, 108 F.3d 1041 (9th Cir. 1997) ("if § 1956 required tracing of specific funds, commingling could wholly frustrate it).

So, for example, if the defendant puts \$1,000 in SUA proceeds into an account, commingles it with other money, and takes out \$17,000 to buy a car, the withdrawal and purchase involve SUA proceeds for purposes of § 1956. *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248 (E.D. Va. 1993); *see also United States v.*

Wilkinson, 137 F.3d 214 (4th Cir. 1998) (where money is drawn on a commingled account, the government is entitled to presume that funds "up to the full amount originally derived from crime" were involved in the transaction); *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997) (where defendant deposited \$451,000 in fraud proceeds and \$2.2 million in other funds into accounts, subsequent transfers from those accounts 'involved' SUA proceeds); *United States v. Habhab*, 132 F.3d 410 (8th Cir. 1997) (check written on account into which fraud proceeds were deposited involved SUA proceeds); *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995) (government met burden of showing check drawn on account involved SUA proceeds by showing that \$80,000 in proceeds were deposited into the account and commingled with other funds; strict tracing not required); *United States v. Suba*, 132 F.3d 662 (11th Cir. 1998) (following *Cancelliere*; transfer of \$1.7M involved SUA proceeds even though defendant had obtained only \$1.4M in fraud proceeds).

Merger Issue

The most troublesome issue involving the proceeds element is the requirement that the property be SUA proceeds *at the time the financial transaction takes place*. If the financial transaction constituting the underlying crime and the money laundering offense take place simultaneously, the two offenses are said to "merge." In this instance, the money laundering prosecution fails because no separate money laundering offense occurred. For example, if a drug sale takes place on a street corner, there is clearly a financial transaction, but the transaction does not involve SUA proceeds at the time it takes place because the seller does not receive proceeds until the sale is complete. Thus, the government cannot prosecute a simple drug sale as a money laundering offense unless, at the time of the sale, the purchase money was the proceeds of some earlier offense. See *United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994) (drug deal is not a transaction involving SUA proceeds because

money exchanged for drugs is not proceeds at the time the exchange takes place); *United States v. Gaytan*, 74 F.3d 545 (5th Cir. 1996) (same). For there to be a money laundering offense, a subsequent, "downstream" transaction, such as the deposit of the sale proceeds into a bank account, must occur.

Similarly, the property the defendant intends to use to commit an SUA offense in the future is not proceeds. For example, in *United States v. LaBrunerie*, 914 F. Supp. 340 (W.D. Mo. 1995), a money laundering prosecution failed because the financial transaction involved clean money intended to be paid as a bribe. The district court held that though the agreement to pay the bribe was a completed bribery offense, the money did not constitute SUA proceeds for purposes of the money laundering statute until the bribe was actually paid.

The merger of the money laundering transaction and the underlying SUA is a big problem in fraud cases where it is often unclear whether the transaction is simply part of the fraud, or is a "downstream" transaction constituting a separate money laundering offense. As a general principle, prosecutors should only charge money laundering where the fraud scheme has matured to the point where it has yielded proceeds that fall, directly or indirectly, within the defendant's control, and the defendant then conducts a separate "downstream" transaction. See *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992) (where a defendant fraudulently induces a victim to wire transfer funds directly to the defendant's account, such transfer *does not* constitute money laundering, because funds were not "criminally derived" at the time the transfer took place; if, however, the transaction involved two steps—with defendant first obtaining money from victim and then making deposit—the second step would be a § 1957 violation); *United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995) (wire transfer out of bank account constitutes § 1957 violation where defendant had control over the account at the time the transfer was made, even though it was not in his name; distinguishing *Johnson* where defendant did not have control over victim's money until the transfer

was complete); *United States v. Leahy*, 82 F.3d 624 (5th Cir. 1996) (money is "proceeds" when it is taken from victim and placed in an escrow account that defendant controls; subsequent transfer from escrow to defendant's account is § 1957 violation); *United States v. Estacio*, 64 F.3d 477 (9th Cir. 1995) (no violation of merger rule where proceeds of earlier phase of check kiting scheme were used to continue the scheme); *but see United States v. Christo*, 129 F.3d 578 (11th Cir. 1997) (distinguishing *Estacio*; if transaction is the first and only step in a check kiting scheme, it does not involve SUA proceeds because no bank has yet lost any money).

In other words, it is not necessary that the fraud scheme be complete. The money laundering offense may constitute one step in the scheme, but the scheme must have reached a point where it has yielded proceeds before the defendant can be guilty of committing a money laundering offense. *See United States v. Pretty*, 98 F.3d 1213 (10th Cir. 1996) (act of concealing proceeds of the scheme is punishable as a money laundering offense, even if the transaction simultaneously constitutes a new SUA offense); *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995) (wire transfer as second step in scheme constitutes § 1957 offense, even though the transfer is part of the scheme).

Inconsistent Verdicts; Acquittal on the SUA

Recently, there have been a number of cases where the defendant was acquitted on the underlying SUA offense but convicted of money laundering. Of course, nothing is wrong with this if the defendant is convicted of laundering the proceeds of an offense committed by someone else. Nevertheless, if the government charges the defendant with laundering the proceeds of his own illegal conduct, whether such inconsistent verdicts will be upheld depends on how the indictment is drafted.

If the indictment charges the defendant with laundering the proceeds of a fraud scheme, but does not refer to specific counts in the indictment,

the defendant may be convicted of money laundering, even though he is acquitted on specific fraud counts. In this instance, the jury could have found that the property being laundered was the proceeds of other parts of the fraud scheme that the government did not charge in the indictment. *See United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997); *see also United States v. Whatley*, 133 F.3d 601 (8th Cir. 1998) (money laundering conviction affirmed notwithstanding jury's acquittal on underlying fraud SUA, as long as there was sufficient evidence to support finding that laundered funds were SUA proceeds).

Where, however, the money laundering count alleges that the defendant laundered the proceeds of specific counts in the indictment, and the conviction on those counts is reversed, the money laundering conviction must be vacated as well. *United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998). Therefore, prosecutors should be careful to draft money laundering counts charging the defendant with laundering the proceeds of an offense or scheme generally, *e.g.*, the property was the proceeds of specified unlawful activity, to wit: a scheme to defraud in violation of 18 U.S.C. § 1343 — and *not* the proceeds of specific counts.

Specific Intent

At the time of the financial transaction, the defendant must act with one of four specific intents. These are alternative mental intents that the government may allege in the conjunctive in the indictment and in the disjunctive in the jury instructions. *See United States v. Navarro*, 145 F.3d 580 (3d Cir. 1998) (alternative intents should be charged in the conjunctive and the jury instructed in the disjunctive; no unanimity instruction required); *United States v. Holmes*, 44 F.3d 1150 (2d Cir. 1995) (it is multiplicitous to charge defendant in multiple counts with violations of different subsections of § 1956(a)(1) based on same financial transaction).

1. Intent to promote

The defendant violates the money laundering statute if he conducts a financial transaction with the intent to promote any specified unlawful activity. *See* 18 U.S.C. § 1956(a)(1)(A)(i). Most commonly, prosecutors satisfy this element by showing that the defendant reinvested the proceeds of his offense to keep the scheme going. The case law is filled with examples of this so-called "plowing back" the proceeds. *See United States v. Marbella*, 73 F.3d 1508 (9th Cir. 1996) (using fraud proceeds to pay commissions to persons who brought in more victims promoted SUA); *United States v. Olson*, 76 F.3d 393 (10th Cir. 1995) (unpublished) (using proceeds to pay the business expenses of the company used to promote the scheme and to pay brokers who brought in new victims, promoted continuation of the scheme); *United States v. Cole*, 988 F.2d 681 (7th Cir. 1993) (payment of "interest" to defrauded investors keeps scheme going); *United States v. Estacio*, 64 F.3d 477 (9th Cir. 1995) (deposit of check drawn on insufficient funds promotes continuation of check kiting scheme); *United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995) (money transfers provided defendant with resources to travel and continue contacting victims; it also provided him with an aura of legitimacy, thus promoting the fraud scheme).

Courts have also found the "promotion" element satisfied where the defendant used SUA proceeds to lull new victims into his scheme or to avoid detection. *See United States v. Ismoila*, 100 F.3d 380 (5th Cir. 1996) (defendant promoted scheme to defraud credit card issuers by depositing credit card receipts into business bank account because it gave appearance that defendant was operating a legitimate business that accepted credit card payments for merchandise); *United States v. Hand*, 76 F.3d 393 (10th Cir. 1995) (unpublished) (using proceeds to create "aura of legitimacy" for benefit of victims promotes fraud scheme); *United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995) (transferring money to Europe lent "aura of legitimacy" to defendant's fraudulent claim that he was investing victim's money in European investment business); *United States v. Johnson*,

971 F.2d 562 (10th Cir. 1992) (using proceeds to pay off mortgage on house and to buy expensive car, where house and car were used to impress prospective victims with defendant's business acumen); *United States v. Allen*, 76 F.3d 1348 (5th Cir. 1996) (actions taken to avoid detection and to lull victims promote the fraud scheme); *United States v. Pretty*, 98 F.3d 1213 (10th Cir. 1996) (using proceeds of scheme to buy house from co-defendant as means of paying kickback promotes the scheme). Of course, it is also an offense to use the proceeds of one crime to commit an entirely separate crime.

2. *Intent to evade income taxes*

The second intent alternative is to prove that the defendant laundered the SUA proceeds with the intent to evade income taxes. *See* 18 U.S.C. § 1956(a)(1)(A)(ii); *United States v. Suba*, 132 F.3d 662 (11th Cir. 1998) (defendant's failure to report three checks on his income tax return is evidence that he laundered them with intent to evade taxes).

3. *Intent to conceal or disguise*

The most commonly alleged money laundering offense is the one that involves a financial transaction conducted with the intent to conceal or disguise the nature, source, location, ownership, or control of the SUA proceeds. *See* 18 U.S.C. § 1956(a)(1)(B)(i). Naturally, the prosecutor will generally have to prove intent to conceal or disguise by circumstantial evidence.

One way this is done is to show that the defendant engaged in unusual or convoluted transactions that would make no sense unless his purpose was to conceal or disguise. For example, in *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997), the Fifth Circuit held that depositing proceeds into geographically distant bank accounts, sending the proceeds (commingled with untainted funds) to a mail drop address, and trying to convert all of the proceeds to cash as investigators closed

in, all indicated an intent to conceal, although the defendant conducted the transactions in his own name. *See also United States v. Wolny*, 133 F.3d 758 (10th Cir. 1998); *United States v. Golb*, 69 F.3d 1417 (9th Cir. 1995) (purchasing airplane with funds in the form of multiple, anonymous wire transfers from banks in Panama and bundles of checks drawn on different accounts indicates intent to conceal or disguise source of funds); *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (so many subdividings and re-deposits that laundering was the only plausible explanation).

Intent to conceal or disguise can also be shown by evidence that the defendant conducted the transaction in the name of a third-party or legitimate business. *See United States v. Ladum*, 141 F.3d 1328 (9th Cir. 1998) (having tenants pay rent checks to nominee conceals true ownership of property on which rent is paid); *United States v. Suba*, 132 F.3d 662 (11th Cir. 1998) (defendant invested fraud proceeds in securities and real estate through children's trust fund after forging trustee's name); *United States v. Nattier*, 127 F.3d 655 (8th Cir. 1997) (placing embezzled funds in account of legitimate real estate business disguised nature and source of SUA proceeds); *United States v. Rounsavall*, 115 F.3d 561 (8th Cir. 1997) (depositing drug proceeds in account of fine art business conceals nature of funds); *United States v. Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994) (putting money in third-party's name or in the name of a business); *United States v. Chesney*, 10 F.3d 641 (9th Cir. 1993) (depositing SUA proceeds in one bank account and then moving funds to other accounts in different names).

Likewise, intent to conceal or disguise can be shown by evidence that the defendant intentionally commingled the SUA proceeds with other funds. *See United States v. Griffith*, 85 F.3d 284 (7th Cir. 1996) (commingling funds from legitimate and illegal businesses and funneling proceeds of illegal activities through legitimate financial channels shows intent to conceal); *United States v. Posters N Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 114 S. Ct. 1747 (1994) (commingling dirty money with revenue from

legitimate business in common account); *United States v. Rutgard*, 108 F.3d 1041 (9th Cir. 1997) (dicta) (commingling criminally derived cash with innocently derived funds can show intent to conceal or disguise identity of tainted money).

In some cases, courts have held that simply converting SUA proceeds into goods and services violated the "conceal or disguise" prong of the statute. For example, in *United States v. Norman*, 143 F.3d 375 (8th Cir. 1998), the Eighth Circuit held that the purchase of a car constituted a violation of § 1956(a)(1)(B)(i), because it concealed what happened to the SUA proceeds. In other words, converting the money from one form to another, e.g., bank deposits into consumer goods, may constitute a money laundering offense, if the transaction is designed to conceal or disguise the SUA proceeds. *See United States v. Heater*, 63 F.3d 311 (4th Cir. 1995) (use of large quantities of cash to buy vehicles and real property, using third-party names and addresses, showed intent to conceal or disguise drug proceeds by purchasing merchandise); *United States v. Misher*, 99 F.3d 664 (5th Cir. 1996) (same; buying car with cash); *United States v. Cisneros*, 112 F.3d 1272 (5th Cir. 1997) (same); *United States v. Wynn*, 61 F.3d 921 (D.C. Cir. 1995) (drug dealer who spent hundreds of thousands of dollars on expensive clothes with cooperation of merchant who recorded sales in false names intended to conceal or disguise drug money by converting it to goods).

In other cases, however, where the defendant simply spent the SUA proceeds and made no effort to conceal or disguise either his identity or the source of the funds, the evidence was insufficient to establish a violation of this prong of § 1956(a)(1)(B)(i). See *United States v. Sanders*, 929 F.2d 1466 (10th Cir. 1991) (buying a car in own name or daughter's name with drug proceeds is not violation of (a)(1)(B)(i); Section 1956 is not a "money spending" statute); *United States v. Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994) (simply buying horse and watch with drug proceeds and using drug proceeds to make mortgage payments insufficient to show intent to conceal or disguise); *United States v. Dobbs*, 63 F.3d 391 (5th Cir. 1995) (where SUA proceeds were deposited into wife's bank account and used for family expenses, there was insufficient evidence of intent to conceal or disguise); *United States v. Rockelman*, 49 F.3d 418, 422 (8th Cir. 1995) (defendant purchased cabin with cash and titled it in name of business, but made no attempt to hide his identity or the source of the funds). The government should prosecute transactions in which the defendant simply spends the illegally obtained proceeds as violations of § 1957.

4. *Intent to avoid transaction reporting requirement*

Finally, it is an offense to conduct a financial transaction involving SUA proceeds if the purpose is to evade a currency transaction reporting requirement. See 18 U.S.C. § 1956(a)(1)(B)(ii). If, for example, a defendant evades both the CTR requirement (involving \$10,000 cash transactions at financial institutions) and the IRS Form 8300 requirement (involving reports that a trade or business receiving more than \$10,000 in cash must file) by using a \$9,000 cashier's check and \$9,000 in cash to buy a car, he commits a violation of § 1956(a)(1)(B)(ii). See *United States v. Nelson*, 66 F.3d 1036 (9th Cir. 1995) (car dealer's suggestion that customer buy another car to trade-in to avoid paying more than \$10,000 cash for new car shows intent to evade Form 8300); *United States v.*

Patino-Rojas, 974 F.2d 94 (8th Cir. 1992) (buying cashier's check for \$9,000 and giving check and \$9,000 cash to car dealer for \$18,000 car).

Section 1956(a)(2)

The elements of § 1956(a)(2) — the international money laundering statute—are almost the same as the elements of subsection (a)(1), with two important exceptions. First, instead of a "financial transaction," the government must show that the defendant engaged in the transportation, transfer, or transmission of property into or out of the United States. Second, § 1956(a)(2)(A) does not contain a "proceeds" element.

A defendant violates § 1956(a)(2)(A) if he sends money into or out of the United States to promote an SUA offense, *regardless of whether the money is itself the proceeds of any unlawful activity*. For example, it is an offense under subsection (a)(2)(A) to send money into or out of the United States to commit bank fraud or to violate the Arms Export/Import Act or to support terrorism, even if the money is not traceable to any predicate offense. See *United States v. Piervinanzi*, 23 F.3d 670 (2d Cir. 1994) (because (a)(2)(A) contains no proceeds requirement, there is no "merger" problem when the defendant wires money out of the United States to promote fraud against a bank, and the wire transfer constitutes both the money laundering offense and the bank fraud); *United States v. Hamilton*, 931 F.2d 1046, 1052 (5th Cir. 1991) (dicta) (foreign drug cartel could violate (a)(2)(A) by sending proceeds of legitimate business into the United States for the purpose of providing necessary capital to expand cartel's United States-based drug business); *United States v. Li*, 973 F. Supp. 567 (E.D. Va. 1997) (money wire transferred into United States for purpose of violating Arms Import/Export Act).

Similarly, it is a violation of § 1956(a)(2)(B)(i) to send money into or out of the United States for the purpose of concealing or disguising SUA proceeds, even though the money being transported, transmitted, or transferred is not itself the proceeds of any criminal offense. Thus, it

would be an offense under subsection (a)(2)(B)(i) to conduct a "peso exchange" transaction whereby "clean" money (purchased from a money broker in South America) is sent to the United States as part of an elaborate scheme to use the black market to dispose of drug proceeds smuggled out of the United States as bulk cash on an earlier occasion.

Section 1956(a)(3)

Section 1956(a)(3) was added to the money laundering statute in 1988 to make it possible to prosecute persons who engage in the laundering of "sting money," i.e., money that is not really criminal proceeds but represented to be such by a law enforcement officer or a person acting at his or her direction. In § 1956(a)(3) cases, the law enforcement officer's "representation" replaces the knowledge and proceeds elements.

Most of the litigation in sting cases involves the nature of the representation. The courts hold that what the undercover agent says to the target must convey enough information to make a reasonable person aware that the property was criminal proceeds. *See United States v. Kaufmann*, 985 F.2d 884 (7th Cir. 1993) (the representation is sufficient if the law enforcement officer makes defendant "aware of circumstances from which a reasonable person would infer that the property was drug proceeds"); *United States v. Castaneda-Cantu*, 20 F.3d 1325 (5th Cir. 1994); *United States v. Starke*, 62 F.3d 1374 (11th Cir. 1995) (same); *United States v. McLamb*, 985 F.2d 1284 (4th Cir. 1993) (representation made to car dealer sufficient where "any person of ordinary intelligence would have recognized it").

In other words, the agent does not have to come right out and say, "I'm giving you drug money to launder for me." Instead, he can imply that the money was derived from an illegal source in the vernacular of the drug trade. For example, in *United States v. Leslie*, 103 F.3d 1093 (2d Cir. 1997), the Second Circuit held that the undercover agent's statement—the cash he was giving the target was "powder-type money" that should not be brought over the border—was sufficient to allow

the government to convict the target of laundering the sting money. *See also United States v. Fuller*, 974 F.2d 1474 (5th Cir. 1992) (recorded conversation in which agent describes consequences from "Colombians" if money is lost was sufficient to establish necessary representation; deliberate ignorance may satisfy knowledge requirement); *United States v. Wydermyer*, 51 F.3d 319 (2d Cir. 1995) (statement that funds to be laundered came from sale of arms smuggled into the country was sufficient to represent that property was the proceeds of a violation of the Arms Export Control Act).

Section 1957

Section 1957 makes it an offense for any person to conduct any monetary transaction involving more than \$10,000 in "criminally derived property." Its purpose is to make it difficult for wrongdoers to spend their ill-gotten gains, or to place them in the banking system, by making it a criminal offense for a third-party to do business with him or her. *See United States v. Rutgard*, 108 F.3d 1041 (9th Cir. 1997) (Section 1957 is designed to freeze criminal proceeds out of the banking system); *United States v. Allen*, 129 F.3d 1159 (10th Cir. 1997) (Congress's primary concern in enacting § 1957 may have been with third-parties who give criminals the opportunity to spend ill-gotten gains. Nevertheless, the statute reaches the conduct of wrongdoers who conduct transactions with the fruits of their own criminal acts).

The government must show that more than \$10,000 in SUA proceeds was involved in the transaction and that the defendant knew that the property represented the proceeds of some form of criminal activity. The government does not have to prove that the defendant acted with any specific intent. *See United States v. Allen*, 129 F.3d 1159 (10th Cir. 1997) (Section 1957 proscribes a wider range of conduct than § 1956 and contains no conceal or disguise element. Thus, § 1957 applies to the most open, above-board transactions); *United States v. Wynn*, 61 F.3d 921 (D.C. Cir.

1995) (unreported) (Section 1957 offense is easier to prove than § 1956 because it lacks specific intent element); *United States v. Ferrouillet*, 1996 WL 684461 (E.D. La. 1996) (Section 1957 is a money spending statute; distinguishing § 1956 cases where government failed to prove intent to conceal or disguise).

Section 1957 may be used to prosecute someone for using SUA proceeds to buy a car, to invest in securities, or simply to make a deposit into a bank. *See United States v. Hawkey*, 148 F.3d 920 (8th Cir. 1998) (use of funds misappropriated from charitable organization to buy vehicles for personal use constituted § 1957 violation); *United States v. Kelley*, 929 F.2d 582, 585 (10th Cir. 1991) (defendant used proceeds of fraudulently obtained loan to buy car); *United States v. Taylor*, 984 F.2d 298 (9th Cir. 1993) (defendant pleads guilty to spending proceeds of wire fraud); *United States v. Cole*, 988 F.2d 681 (7th Cir. 1993) (withdrawals from account containing proceeds of investment fraud scheme for personal expenses exceeding \$10,000); *United States v. Hollis*, 971 F.2d 1441 (10th Cir. 1992) (deposit of checks representing proceeds of insurance fraud scheme is a § 1957 violation); *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248 (E.D. Va. 1993) (purchase of car with check drawn on account into which extortion proceeds had previously been deposited).

Despite some difference in wording, the knowledge element in § 1957 is the same as it is for a § 1956 offense: the defendant must know that the property was derived from some form of unlawful activity. *See United States v. Turman*, 122 F.3d 1167 (9th Cir. 1997) (government must prove the defendant knew property was criminally derived but does not have to prove the defendant knew money laundering itself was illegal); *United States v. Sokolow*, 81 F.3d 397 (3d Cir. 1996) (defendant does not need to know that the monetary transaction constitutes a criminal offense); *United States v. Smith*, 44 F.3d 1259 (4th Cir. 1995) (knowledge that the property is criminally derived is all that is required; defendant need not know that the transaction was part of a larger scheme to

conceal or disguise anything); *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992) (merchant doing business with drug dealer can be convicted under § 1957, if the merchant knows of, or is willfully blind to, customer's source of funds); *United States v. Wynn*, 61 F.3d 921 (D.C. Cir. 1995) (same for merchant selling clothes to drug dealer).

In § 1957, the phrase "criminally derived property" means the same thing as § 1956's "proceeds of specified unlawful activity": the property must be the proceeds of an SUA at the time the transaction takes place. *See United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995). The important limitations in § 1957 are that the transaction must be conducted by, to, or through a financial institution, and it must involve more than \$10,000 in SUA proceeds.

In most cases, the financial institution requirement is easily met because the term "financial institution" includes not only banks and other traditional institutions, but also any other type of entity listed in 31 U.S.C. § 5312 or the regulations promulgated thereunder. Thus, the definition of "financial institution" is very broad and includes car dealers, jewelers, attorneys handling real estate closings, and even individuals, if they handle currency on a regular basis to provide services to others. *See United States v. Tannenbaum*, 934 F.2d 8 (2d Cir. 1991) (an individual can be a financial institution); *United States v. Gollott*, 939 F.2d 255 (5th Cir. 1991) (group of individuals laundering cash for undercover agent were required to file CTRs as a financial institution); *United States v. Schmidt*, 947 F.2d 362 (9th Cir. 1991) (individual exchanging checks for cash required to file CTRs as a financial institution); *United States v. Levy*, 969 F.2d 136, 140 (5th Cir. 1992) (Secretary of Treasury has authority to define "financial institution" broadly); *United States v. Clines*, 958 F.2d 578, 582 (4th Cir. 1992) (investment company that receives clients' funds and invests them is financial institution under, *inter alia*, 31 U.S.C. § 5312(a)(2)(I)).

The key issue in most § 1957 cases is the \$10,000 threshold requirement. Because each monetary transaction is a separate offense, it is generally not possible to aggregate separate transactions to reach the \$10,000 threshold. Multiple purchases from the same vendor on the same day, or installment payments on the same item, may, however, constitute a single transaction in some circumstances. The question seems to be one for the jury to decide. *See United States v. Brown*, 139 F.3d 893 (4th Cir. 1998) (Table Case) (whether purchase of several automobiles on same day from same vendor constituted single monetary transaction exceeding \$10,000 was question for jury).

A related issue arises when the defendant commingles the SUA proceeds in a bank account and then makes a withdrawal that the government wants to charge as a violation of § 1957. The government generally takes the view that as long as more than \$10,000 in SUA proceeds was deposited into the account, any subsequent withdrawal of more than \$10,000 may be said to involve the requisite amount of tainted funds. In *United States v. Rutgard*, 108 F.3d 1041 (9th Cir. 1997), however, the court held that the defendant is entitled to a presumption that the tainted money remains in a bank account until the last withdrawal. Thus, if the defendant puts \$50,000 in illegal proceeds into a bank account containing \$10,000 in "clean" money, and then makes a \$15,000 withdrawal, the Ninth Circuit would likely hold that this does not satisfy the threshold requirement for § 1957. Because of the "last out" rule, courts in the Ninth Circuit must presume that the \$15,000 withdrawal consisted primarily of the clean money, while the "dirty" money remained in the bank account. *See also United States v. Adams*, 74 F.3d 1093 (11th Cir. 1996) (at least \$10,000 of the property involved in the monetary transaction must be traceable to SUA proceeds); *United States v. Mills*, 1996 WL 634207 (S.D. Ga. 1996) (transaction must include at least \$10,000 in dirty money (following *Adams*); government may not presume that transaction involves \$10,000, even if more than \$10,000 in

dirty money was deposited into an account, if the ratio of clean to dirty money in the account is 800:1); *but see United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992) (in the context of a withdrawal, government not required to prove that no untainted funds were commingled with the unlawful proceeds for § 1957 purposes); *United States v. Sokolow*, 81 F.3d 397 (3d Cir. 1996) (where \$20,000 in dirty money was commingled, government was not required to prove that all money involved in the transaction was dirty; following *Johnson*); *United States v. Wilkinson*, 137 F.3d 214 (4th Cir. 1998) (Section 1956 case stating, in *dicta*, that rule allowing government to presume that any withdrawal from commingled account involves SUA proceeds, up to the amount of the proceeds originally deposited into the account, applies to § 1957 cases under *United States v. Moore*, 27 F.3d 969, 976 (4th Cir. 1994)).

Conspiracy

Section 1956 and 1957 offenses may be alleged as objects of a conspiracy under 18 U.S.C. § 371. *See United States v. Pena-Rodriguez*, 110 F.3d 1120, 1125 (5th Cir. 1997) (elements of § 371 conspiracy to launder money with intent to promote are: 1) an agreement; 2) a financial transaction constituting an overt act; 3) the financial transaction involves SUA proceeds; 4) the person conducting transaction had intent to promote; and 5) transaction affected interstate commerce); *United States v. Blackwell*, 954 F. Supp. 944 (D.N.J. 1997) (setting forth elements of § 371 conspiracy to commit money laundering); *United States v. Awan*, 966 F.2d 1415 (11th Cir. 1992) (knowledge that funds are proceeds of unlawful activity is "the essential aspect of the conspiracy charge"). Indeed, the government frequently charges money laundering along with other offenses in a § 371 count alleging a multi-object conspiracy. The Eighth Circuit recently upheld this practice, but noted that the court must instruct the jury that it must be unanimous as to which offense(s) were the object of the conspiracy.

See United States v. Nattier, 127 F.3d 655 (8th Cir. 1997).

Most courts hold that the maximum penalty for a § 371 conspiracy is five years, even if money laundering is alleged as an object. *See United States v. Nattier*, 127 F.3d 655 (8th Cir. 1997) (maximum penalty for § 371 conspiracy is 5 years, even if money laundering is alleged as an object). The Fifth Circuit, however, has held that the maximum penalty for a § 371 conspiracy is 20 years, if a § 1956 violation is charged as an object of the conspiracy. *See United States v. Coscarelli*, 105 F.3d 984 (5th Cir.) (vacating district court's opinion on Rule 11 notification grounds), *reh'g en banc granted*, 111 F.3d 376 (5th Cir. 1997).

In 1992 Congress enacted 18 U.S.C. § 1956(h), which is a separate conspiracy statute for § 1956 and § 1957 offenses. Several significant advantages to charging a conspiracy under this statute exist.

First, there is no overt act requirement under § 1956(h) because it is modeled on 21 U.S.C. § 846, which does not require proof of an overt act. *See Congressional Record* (daily ed. Aug. 2, 1991) S12241 (money laundering conspiracy statute is modeled on § 846); H.Rep. 102-28, 102nd Cong., 1st Sess. (1991) at 49 (same); *United States v. Shabani*, 513 U.S. 10 (1994) (Section 846 does not require proof of overt act). But the case law regarding proof of an overt act under § 1956(h) is mixed. *See United States v. Abrego*, 141 F.3d 142 (5th Cir. 1998) (finding it unnecessary to decide if § 1956(h) requires proof of an overt act because proof of the substantive offenses was sufficient to prove overt acts if such requirement exists; noting § 1956(h) is identical to § 846, which does not require overt acts); *United States v. Pacella*, 1996 WL 288479 (E.D.N.Y. 1996) (unreported order) (under § 1956(h) there is no requirement of an overt act); *but see United States v. Emerson*, 128 F.3d 557 (7th Cir. 1997) (dicta) (Section 1956(h) requires proof of an overt act); *United States v. Navarro*, 145 F.3d 580 (3d Cir. 1998) (listing elements of § 1956(h) conspiracy as including overt acts).

Second, the maximum penalty for a § 1956(h) conspiracy is the same as the penalty for the offense that is the object of the conspiracy, i.e., 20 years for a § 1956 offense, and 10 years for a § 1957 offense. *See United States v. Abrego*, 141 F.3d 142 (5th Cir. 1998) (higher penalty under § 1956(h) applies to "straddle" conspiracies; no violation of *ex post facto* clause); *United States v. Tokars*, 95 F.3d 1520 (11th Cir. 1996) (rejecting, without discussion, argument that § 1956[h] applies only to conspiracies that begin after Oct. 28, 1992). This contrasts with the 5-year maximum penalty for § 371 conspiracies outside of the Fifth Circuit. Lastly, unlike § 371 prosecutions, property involved in a § 1956(h) conspiracy is subject to forfeiture under 18 U.S.C. § 982(a)(1).

Resources

AFMLS publishes an annual collection of all relevant federal cases in a bound volume entitled "Federal Money Laundering Cases." Copies are available to United States Attorneys' offices. Simply call the AFMLS on (202) 514-1263, to request copies. Finally, AFMLS maintains AF Online, a computer-based legal resource from which we can access a collection of cases, form indictments and jury instructions, and other materials. Contact Morenike Soremekum at (202) 307-0265, for help accessing AF Online. ~

ABOUT THE AUTHOR

Stefan D. Cassella is an Assistant Chief in the Asset Forfeiture and Money Laundering Section (AFMLS). He has been a prosecutor since 1979. He came to the Department of Justice in 1985 and has been involved in forfeiture and money laundering issues since 1989. He handles civil and criminal forfeiture cases, lectures at training conferences on many aspects of money laundering and forfeiture law, and is responsible for legal advice, policy, and legislative issues for the Department. He handled the criminal forfeiture of the assets of Bank of Credit and Commerce International, for which he received the John Marshall Award. He has published four law review articles on forfeiture and is the editor of *Quick Release*, the Department's forfeiture newsletter. From 1987-89, he served as Senior Counsel to the U.S. Senate Judiciary Committee, working directly for the committee Chairman, Senator Joseph Biden, Jr. He received his Bachelor of Science degree from Cornell University and his law degree from Georgetown University. a

Using Suspicious Activity Reports: A Task Force Approach

*Marion Percell
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Suspicious activity reports (SARs) can be extremely valuable leads for both criminal and civil investigations. In New Jersey, a task force evaluates each SAR that concerns possible Bank Secrecy Act violations (almost 40 percent of all SARs), and contains a New Jersey zip code (whether the account holder's or the bank branch's). The SAR database also allows searches by district, which is important in states with more than one district.

New Jersey's Financial Investigations Task Force (the Task Force) includes representatives from six investigative agencies: the Internal Revenue Service-Criminal Investigation Division (IRS-CID); the Federal Bureau of Investigation (FBI); the Drug Enforcement Administration (DEA); the U.S. Customs Service (Customs); the U.S. Secret Service (USSS); and the U.S. Postal Service (Postal Service). An Assistant United States Attorney (AUSA) chairs this task force. The Attorney in Charge of the United States Attorney's Office (USAO) Asset Forfeiture Unit and an IRS District Counsel attorney attend the meetings. The only agency obligations are to conduct preliminary checks on every SAR, attend meetings, and refrain from initiating any overt investigative steps without a group consensus.

The Task Force meets once a month. Agency representatives receive a list of the newly filed SARs shortly before each meeting, which they use to check the names and identifying information in the databases available to them, such as NADDIS, and they come to the meeting prepared to discuss each SAR.

At each meeting, the USAO distributes a complete list of pending matters to each participant and everyone discusses potential targets. If further investigation appears unjustified, the target is "closed" by the Task Force. In many instances, these matters are referred to the IRS Examination Division for possible civil tax investigation. In other cases, Task Force members discuss which agencies are interested in conducting additional investigation and what investigative steps appear appropriate.

With surprising frequency, an agency will have a record of the target that provides clues to the nature of the underlying crime. For example, the FBI might have a closed fraud case involving the account holder listed in the SAR, or the DEA might report a NADDIS hit. This kind of information is very valuable in determining whether further investigation is warranted.

No agency is ever obligated to work on a particular matter. Each agency decides the allocation of its resources. If more than one agency is interested in a particular case, they work together.

Each agency brings something uniquely valuable to the table. For example, Customs has access to information about exports and about travel out of the country. The IRS, under certain circumstances, can access tax return information, which helps determine whether the money in question has a lawful or unlawful source. Disclosures of this information are, of course, governed by 26 U.S.C. § 6103. The Postal Service can provide mail covers, identify the holder of a post office box, track money orders, or even ask the mail carrier what he or she has observed when delivering mail to target locations. Everyone contributes, and the whole is indisputably greater than the sum of the parts.

The SAR itself rarely telegraphs the nature of the underlying crime, if any; all that is really

known is that suspicious monetary transactions occurred. Based upon the SAR alone, it is unlikely that an investigative agency would have enough information to determine whether an investigation by that agency would be appropriate. That is the beauty of the Task Force approach: if there is a good case to be made, chances are that it is an appropriate case for someone sitting at the table.

Occasionally, the agency most likely to be interested in investigating the target is not a member of the Task Force. In those instances, the Task Force refers the matter to the appropriate authority. For example, if the target appears to be illegally importing aliens, the Task Force will refer the matter to the Immigration and Naturalization Service. If the target appears to be running a prostitution business, the Task Force will refer the matter to local prosecutors. If the target appears to be engaged in check cashing without the required state license, the Task Force will refer the matter to the State Department of Banking, which licenses check cashers.

The Task Force has been enormously successful. Many significant prosecutions have arisen from Task Force cases, including a series of major Medicaid fraud cases and several significant narcotics money laundering cases. Task Force investigations generated from SARs have also resulted in civil seizures of many millions of dollars. Conducting investigations through a multiagency task force brings more resources, data, and experience to the analysis and investigation of suspicious activities reported by financial institutions. In short, task forces can be gold mines. ~

ABOUT THE AUTHOR

" **Marion Percell** has been an Assistant United States Attorney in the District of New Jersey since late 1985. She specializes in money laundering investigations and prosecutions and serves as the district's Money Laundering Coordinator. She has lectured concerning money laundering at Office of Legal Education seminars and to bank examiners and federal, state, and local law enforcement groups. **a**

Follow the Money¹

The Financial Crimes Enforcement Network (FinCEN) was established by the Department of the Treasury in April 1990 to provide a government-wide, multi-source intelligence and analytical network to support the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes by federal, state, local, and foreign law enforcement agencies. To fulfill this mission, FinCEN maintains a database of reports of large currency or otherwise suspicious transactions. This information is available to state and local law enforcement agencies through designated coordinators in each state, the District of Columbia, and Puerto Rico.

Why Follow the Money?

Most crimes have some type of financial gain as the primary motive. Curtailing or eliminating the proceeds of criminal activity can have a substantial impact on reducing crime overall. Simply put, the harder it is for criminals to spend the money made from some illegal act, e.g., drugs, prostitution, embezzlement, and illegal gambling, the less incentive there is to continue the activity. Taking the profit out of crime is also an important step in eliminating the operating capital needed to fund ongoing criminal activity. Finally, examining the financial aspects of criminal activity very often results in more thorough investigations and more successful prosecutions. It is nearly impossible for a drug dealer to deny he is running a major operation if the government can show he routinely deposits large amounts of cash in the bank.

Currency and Suspicious Transaction Data

Many criminals face a common problem—how to dispose of cash without drawing attention to themselves. To take advantage of this vulnerability, federal law requires banks, casinos,

merchants, money transmitters, and certain other types of financial institutions to report large currency transactions to the Department of the Treasury. These forms are described in the chart on page 29.

In addition to these reports, banks and other financial institutions are required to file Suspicious Activity Reports (SARs) to alert regulators and law enforcement personnel of possible criminal activity affecting or conducted through the institution. SARs help identify credit card and loan fraud, embezzlement, and check kiting. These reports also highlight potential money laundering activity by customers, such as attempts to avoid reporting requirements or other transactions that might be considered abnormal for an account. Of the more than 7,000 SARs filed each month, approximately 40 percent involve possible attempts to hide dirty money.

Using the Information

Information from the reports described above can be used three ways:

- ' Reactively, to determine if the subject of an ongoing criminal investigation or prosecution has been involved in a large currency or otherwise suspicious transaction;
- ' Proactively, to determine if the funds used in a large currency or suspicious transaction were legitimately obtained; and
- ' To identify, investigate, and prosecute money laundering operations.

Accessing the Information

Assistant United States Attorneys (AUSAs) can call Jim Hathaway at (703) 905-3503, for access to national FinCEN information. Requests for international information (discussed later in this

¹*This article was developed from a group of materials collected by FinCEN*

article) may be directed to Charlotte Hatfield at (703) 905-3688. Finally, FinCEN maintains a website at <http://www.treas.gov/fincen>.

Financial Intelligence Units

AUSAs and federal investigators frequently ask how to acquire financial information from outside the United States. The international community is becoming more aware of the dangers posed by money laundering and alliances have been formed to share information. The following is a description of one vehicle now in place to help us acquire this information.

A growing number of countries recognize the corrosive danger that unchecked financial crime poses to their economic and political systems. To address this threat, a number of specialized governmental agencies have been created. These entities are commonly referred to as financial intelligence units (FIUs), which offer United States law enforcement an important new avenue for exchanging information.

Recognizing the benefits inherent in the development of FIU networks, in 1995, FinCEN, in cooperation with its Belgian counterpart, brought together a group of FIUs at the Palais d'Egmont-Arenberg in Brussels. Now known as the Egmont Group, these FIUs meet regularly to find ways to cooperate, especially in the areas of information exchange and sharing expertise.

One of the most significant accomplishments of the group's efforts has been the creation of a secure Internet web site. Egmont's International Secure Web System—developed primarily by FinCEN—permits members of the Egmont Group to communicate with one another via secure e-mail, posting and accessing information regarding trends, analytical tools, and technological developments. In other words, this system provides the ability to facilitate practical, rapid exchanges of information that could enhance the efforts of our federal, state, and local law enforcement in fighting money laundering.

How FIUs Can Assist United States Law Enforcement

FIUs maintain databases of information on disclosures of suspicious financial transactions. Often these FIUs are restricted from providing this information to agencies other than their own national prosecutorial authorities or to their foreign counterpart FIUs. Many FIUs can also provide other government administrative data, as well as public record information.

FinCEN deals directly with these FIUs and can usually obtain available financial intelligence relatively rapidly through these sources. While this approach does not replace the usual avenues that must be used for obtaining evidentiary information, it can provide law enforcement with confirming information regarding the viability of leads and other pertinent information.

Procedure for Requesting Information from Foreign FIUs

United States law enforcement agencies may request information from a foreign FIU by forwarding an official request either to the appropriate agency liaison officer at FinCEN or directly to FinCEN's Office of Investigative Support-International Cases at (703) 905-3688. Requests should include the following: full identification of the requester and the requesting agency, a description of the criminal matter under investigation and a summary of the relevant facts of the case, the purpose of the request and the nature of the assistance being sought, and as much identifying information on the subject(s) as possible. Alternatively, the requester may submit a FinCEN Request for Research form as used for domestic requests. The requester should also specify the country or countries to which the request should be directed.

FinCEN will advise the requester immediately if the request cannot be honored, e.g., if the country does not have an FIU or if the FIU does not generally share disclosure information. The response time for submitted requests to foreign FIUs will vary according to the workload of the individual FIU and the information to which it has access. FinCEN will follow up on the requests and forward the results to the requester upon receipt. ~

Operational Units Meeting the Egmont Definition Status as of 1 July 1998

Aruba (MOT-Aruba), Australia (AUSTRAC), Austria (EDOK Meldestelle), Belgium (CTIF-CFI), Chile (CDE/Departamento de Control de Trafico Ilícito de Estupefacientes), Croatia (Financijska Policija/Ured za Sprjecavanje Pranja Novca), Cyprus (MO.K.A.S.), Czech Republic (Financní analyticky útvar), Denmark (SOK/Hvidvasksekretariatet), Finland (Keskusrikospoliisi/Rahanpesun selvittelykeskus), France (TRACFIN), Greece (Committee of Article 7 of Law 2331/1995), Guernsey (Joint Police & Customs Financial Investigation Unit), Hong Kong (H.K. Customs & Excise Department/Financial Investigation Group), Hungary (ORFK/Pénzmosás Elleni Alosztály), Iceland (Ríkissaksóknari), Ireland (An Garda Síochána/Bureau of Fraud Investigation), Isle of Man (Isle of Man Constabulary/Fraud Squad FIU), Italy (UIC (S.A.R.)), Jersey (Joint Police & Customs Financial Investigation Unit), Luxembourg (Parquet de Luxembourg/Service Anti-Blanchiment), Mexico (DGAIO/UIF), Monaco (SICCFIN), Netherlands (MOT), New Zealand (NZ Police Financial Intelligence Unit), NL Antilles (MOT-Nederlandse Antillen), Norway (OKOKRIM/Hvitvaskingsenheten), Panama (Unidad de Análisis Financiero), Paraguay (Unidad de Análisis Financiero - Paraguay), Slovakia (OFiS UFP), Slovenia (MF-UPPD), Spain (SEPBLAC), Sweden (Finanspolisen), Switzerland (Money Laundering Reporting Office), Taiwan (Money Laundering Prevention Center), Turkey (MSK), United Kingdom (NCIS/ECU), United States(FinCEN).

Sources of FinCEN Information

Commercial Databases

*International Corporate Financial Records, *Public Records, * Corporate Financial Information, *Social Security Numbers, *Real Estate Information, *Latin American Publications, *Business Information, *Stock Market Insider Transactions, *Court Cases, Tax Liens/Judgments, *Names, Addresses, Phone Numbers
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The Law Enforcement and Regulatory Databases

*Automated Commercial System (ACS), *Non-immigrant Student Database (NISD), *Currency & Banking Retrieval System (CBRS), *INTERPOL Case Tracking Systems (ICTS), *Postal Inspection Service, *INS Central Index, *Treasury Direct Securities System, *National Association of Securities Dealers (NASD), *Narcotics and Dangerous Drugs Information (NADDIS), *Treasury Enforcement Communications System

Using the Bank Secrecy Act "Paper Trail" to Develop Financial Investigations¹

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Financial data required by the Currency and Foreign Transaction Reporting Act (31 U.S.C. § 5311 et seq.), more commonly known as the Bank Secrecy Act (BSA), can provide law enforcement and prosecutors with a constructive tool with which to develop financial investigations. This article examines various ways to utilize BSA data. Essentially, the data is contained in the four reports listed in the chart on page 30.

The data in these reports is currently available to designated local coordinators in each of the fifty states through direct on-line access to the Detroit Computing Center of the IRS. The information sharing project, referred to as "Project Gateway," was developed by the United States Treasury Department's Financial Crimes Enforcement Network (FinCEN).

BSA data can be of assistance on either a reactive or proactive basis. The applications discussed herein illustrate this point. BSA reports can be a font of valuable leads. For example, a CTR or a CTFC contains data identifying the person depositing, withdrawing, or exchanging currency from the financial institution, as well as, that person's date of birth, social security number, address, and occupation. Such individual, if not a subject of the investigation, may become a witness who can, in turn, furnish information as to who directed the reported transaction, the source of the funds, and

other details pertaining to the reported transaction.

A CTR and a CTFC can identify the person on whose behalf the reported transaction was conducted. This can disclose individuals and businesses not otherwise known to be associated with the subject of an investigation, thereby uncovering a secret owner or investor.

BSA reports create an investigative "paper trail" that can expose suspicious activities and unusual transactions that are inconsistent with sound business practices. This is the single most telling indicia of a money laundering operation. The existence of peculiar transactions can raise questions as to the legitimacy of a business, or expose a business which merely serves as a "front" for illegal activities. Such suspicious activities are not merely limited to detection of a series of structured transactions in an effort to avoid a currency reporting requirement. They can also reveal currency transactions by a business that does not usually deal in large amounts of cash or, conversely, a business that needs large amounts of cash, like a check casher, but does not make withdrawals of cash against deposited checks.

BSA data can furnish probative evidence needed to establish an element of a crime. For example, the frequency with which an individual appears in connection with a reported transaction, his/her association with a particular business named in the reports, or his/her familiarity with its peculiar business practices may assist in establishing the necessary *mens rea*. Of course the data may simply place a subject in a particular geographical location, or establish that the subject has regular contact with a certain financial establishment, or reveal inconsistent

¹ The views expressed in this article are those of the author and not necessarily those of the New York County District Attorney's Office. This article has been reprinted in part, with permission from the National Association of Attorneys General.

representations made by an individual on several reports, all of which can help build a criminal case.

BSA reports can expose tax fraud activity. For example, the subject of an investigation is an individual with an annual income of \$30,000 as a W-2 wage earner. However, an examination of several CTRs, containing the subject's Social Security number, filed during a particular tax year, reveal numerous large cash transactions, some of which appear to be structured transactions. A further review of CMIRs for the same period, discloses that the subject travels internationally with large amounts of currency. Notably, these transactions well exceed the subject's reported income for the tax year in question. An analysis of BSA data suggests that the subject is failing to report income on his/her personal income tax return. Even if the subject's ownership of the monies reflected on the CTRs and CMIRs comes into question at a later stage of the investigation, the data may indicate that the subject is facilitating a money laundering operation.

BSA data can confirm information acquired through other sources. This may provide the needed corroboration of an accomplice's testimony, which can be crucial in states such as New York because of its accomplice corroboration requirement.

On the other hand, a BSA data inquiry may reveal that no reports were filed. The absence of information can be significant. For example, if a BSA check of a cash business reveals no CTR filings, this can alert the prosecution that traditional banking institutions are not being utilized and redirect the focus to non-bank financial institutions, or raise the possibility of currency smuggling. It may prompt law enforcement to inquire as to whether the particular cash business is exempt from BSA filings and whether such exemption is properly administered.

BSA data can be of assistance in tracing, analyzing and identifying illicit proceeds for future payments of restitution, criminal fines, as well as seizure and forfeiture of assets. Some obvious examples include the disclosure of a foreign bank account on an FBAR, large winnings on a CTRC, or bank accounts and business entities on a CTR.

Lastly, BSA data can be a source of proactive targeting. Analytical programs can massage BSA data to create profiles and establish links between transactions, exposing money laundering operations. It can also serve as an intelligence mechanism for detecting unusual financial activities in a given geographical area, thereby highlighting trends and patterns, or assisting in conducting a threat assessment evaluation.

Eventually the capability for such proactive analysis may be available to state and local coordinators through an expansion of FinCEN's Project Gateway. In the interim, several states, who have a memorandum of understanding with the Treasury Department, receive BSA data on magnetic tapes and have developed systems for analyzing this data. Texas and Arizona have made great strides in this area.

Form 8300s

A fifth report that can be effective in developing a financial investigation is IRS Form 8300, enacted in 1984 pursuant to section 6050I of the Internal Revenue Code. This report is required to be filed by any person engaged in a trade or business who receives over \$10,000 in cash payments in a single transaction or a series of related transactions.

A Form 8300 is a critical weapon in fighting dirty money and may be the most significant of the required reports. Much of the same information requested on a CTR is required on the Form 8300. However, the Form 8300 is a tax return, and, therefore subject to certain confidentiality rules.

At one time, under the terms of Section 6103(I)(8) of the Internal Revenue Code, the Form 8300 could be disclosed by the Secretary of the Treasury to federal law enforcement agencies for purposes not related to tax administration. However, this authority expired in November 1992. Congress is currently considering several proposed amendments to IRC Section 6103 which would authorize the disclosure of information contained on these forms to federal and state law enforcement agencies for purposes other than tax administration.

There is a heightened need for access to the Form 8300. With the successful regulation of cash transactions in the banking industry, money launderers have moved away from the traditional financial institutions and into the retail and trade sector to cleanse their illicit income. High dollar retail and cash businesses, such as jewelers and auto dealerships, are particularly vulnerable to misuse by money launderers. This was acknowledged by President Clinton in his address to the United Nations General Assembly on October 22, 1995, whereby he announced that he has "directed our government to identify the front companies and to freeze the assets of the largest drug ring in the world — the Cali cartel — to cut off its economic lifelines and stop our own people from dealing unknowingly with its companies."

The information contained on a Form 8300 can be used to trace cash movements into retail sectors of the economy and link abnormal uses of cash to purchase goods or services with possible illicit sources of that cash. A comparison of Form 8300 data with other documentation has exposed businesses which do not report the use of currency for the payment of a product, and revealed large disparities between cash bank deposits and cash receipts reported on Form 8300s.

Conclusion

There are significant advantages to be had by applying BSA data during the investigatory state. The utility of the data is limited only by the level of the user's creativity. ~

CURRENCY TRANSACTION FORMS

NAME OF FORM	PURPOSE OF FORM
IRS Form 4789 (Currency Transaction Report)	For each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to such institution that involves a transaction in currency of more than \$10,000, a financial institution must file this form. <i>See</i> 31 C.F.R. § 103.22(a)(1).
IRS Form 8362 (Currency Transaction Report by Casino)	Required to be filed for each currency transaction in excess of \$10,000 by any licensed casino operating in the United States with gross annual gaming revenues in excess of \$1 million. <i>See</i> 31 C.F.R. § 103.22(a)(2).
Customs Form 4790 (Report of International Transportation of Currency or Monetary Instruments)	Required to be filed at the time of transporting currency or monetary instruments over \$10,000 from or into the United States. <i>See</i> 31 C.F.R. § 103.23.
Treasury Form 90-22.1 (Report of Foreign Bank and Financial Accounts (FBAR))	Required to be filed annually by persons who have a financial interest in or signature authority over bank accounts, securities accounts, or other financial accounts in a foreign country with a combined value in excess of \$10,000. <i>See</i> 31 C.F.R. § 103.24.
IRS Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business)	Required to be filed by any person engaged in a trade or business who receives more than \$10,000 in cash payments in a single transaction or series of related transactions.

The Colombia Black Market Peso Exchange

*David Marshall Nissman
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With an estimated 57 billion dollars in drug street sales in the United States annually, a labyrinth of multinational distribution systems, an inability to extradite traffickers from certain countries, and a seemingly insatiable domestic appetite for more controlled substances, American prosecutors wage an uphill battle. At times, we lose sight of the fact that traffickers have three major weaknesses that law enforcement can exploit.

The first is in the transportation of their goods. They are going to have to move their drugs to market by planes, trains, cars, trucks, or boats, and when they move, there is always an opportunity to intercept the drugs.

The second is in their choice of personnel and our ability to infiltrate the narcotics rings. Former Miami Drug Enforcement Administration Special Agent in Charge Billy Mitchell used to ask his troops "what are the three most important tools to a DEA agent?" He would answer, "informants, informants, informants." As law enforcement agencies have seen time and again, informants can wreak havoc on the best organized drug enterprises.

The third major weakness that traffickers have is in the repatriation of their profits. This article explores one part of that problem and one of the techniques Colombian traffickers are currently using.

As we read stories of the lavish lifestyles of cartel leaders in Colombia, recognize that these lifestyles cost a lot of money. Here is something not immediately associated with that image. Lavish lifestyles, and the support of business empires in

Colombia, cannot be maintained with U.S. dollars because they are not readily useable in Colombia. The traffickers must find a way to convert dollars into pesos, which cannot be done effectively on street corners. Necessity, being the root of both invention and opportunity, produces a new player in this drama: the money broker.

American goods are sought after by legitimate consumers in Colombia. These goods include American made cars, clothing, farm and industrial equipment, liquor, bicycles, stereo equipment, and just about every imaginable product except coffee. American companies prefer to be paid in dollars for obvious reasons. This also applies to other foreign goods sought by the Colombians. For example, when European companies sell goods to Colombia, they also prefer to be paid in dollars. Colombian merchants must then convert their pesos into dollars.

Colombian importers go to the Colombian central bank to convert pesos into dollars. Before the bank will process the request, the importer must produce a certification that all required import permits have been acquired. In order to get the permits, the Colombian importer must first pay the taxes and import duties. These taxes and duties are a very important source of revenue for the Colombian government. In legitimate transactions, they amount to about 20 percent of the purchase price of goods.

The Money Broker

The new player in this international trade, the money broker, performs a service for everyone, except the Colombian government. First, the broker buys dollars from the drug traffickers. Second, the broker buys pesos (with those dollars) from the legitimate Colombian business people, who want to import American goods. Next, the broker helps to arrange the purchase of the

American goods with dollars. Then, the American companies get dollars. Finally, the Colombian businesses get American made goods without paying the 20 percent taxes and duties. And, the traffickers get Colombian pesos. The broker makes money on each of these transactions and the Colombian government gets nothing.

On October 22, 1997, a Colombian woman, cooperating with federal agents, testified before a Congressional committee. She testified from behind a partition, to conceal her identity. The transcript of her testimony identifies her as "Ms. Doe." An edited excerpt of her testimony follows:

I practiced civil and criminal law in my native country, Colombia. With this background, I was able to learn the peso brokering business very quickly, and I experienced the international money laundering operations of the Colombian cartels from several different vantage points. Money brokers provide the cartels an easy avenue for obtaining their drug profits. As a money broker in Colombia, I established accounts in U.S. banks where drug money was deposited. From these accounts, I arranged payments to U.S. exporters on behalf of Colombian businesses. To facilitate my brokering activities, I utilized accounts in many prominent Colombian, U.S. and international banks. I cannot say that these banks were aware that I and other money brokers were using their accounts for money laundering, but, without their services, we could not have brokered drug profits. In my experience, however, Colombian bankers protect the money launderers. On three separate occasions, I was forewarned by three different banks of potential Government investigations into unlawful enrichment.

As a money broker, I arranged payments to many large U.S. and international companies, on behalf of Colombian importers. These companies were paid with U.S. currency generated by narcotics trafficking. They may not have been aware of the source of this money. However, they accepted payments from me without ever questioning who I was, or the source of the money.

Upon my introduction to the business, I was amazed at the large number of brokers. In Colombia, brokers often operated in what can best be described as a flea market atmosphere. In Medellin, a shopping mall housed dozens of small offices, each occupied by a money broker. Importers shopped for U.S. dollars at the mall, traveling from office to office to get the best black market exchange rate.

Financial representatives of the cartel, commonly known as "Duros" (the hard ones), would be contacted daily by the brokers, in order to ascertain the amount of U.S. dollars available in the U.S. for brokering on the Colombian black market. The broker would ask who got "crowned" that day. This term is from the game of checkers, where a piece moves across the board, gets crowned, and starts moving back to his own side. This represents the narcotics going across the board, being sold in the U.S., and the profits being returned to Colombia. Brokers wanted to know who "crowned," or who owned the money, so that they would know who in the cartel would be responsible to in the event of loss or seizure. Often, the broker would be told who crowned the deal, whether or not they asked, to instill the fear of reprisal into the broker, so they would not steal or misappropriate the funds.

Ms. Doe's testimony before the *Subcommittee on General Oversight and Investigations, Committee on Banking and Financial Services, U.S. House of Representatives*, October 22, 1997.

One of the more important services that the broker may perform for the cartels is to take the bulk cash (while it is still in the United States), and move it through the United States' banking system. The Internal Revenue Service, FinCEN, and the United States Customs Service estimate that as much as 30 to 40 percent of drug proceeds are laundered using this system or variations thereof. Currency reporting laws give United States law enforcement authorities their best opportunity to unravel the black market peso exchange.

Money Remitters

Another growing industry used by the money broker to put bulk cash into the United States' banking system is the money remitter business. It works like this: A money broker in the United States sets up a licensed money transmitter business, which allows individuals in this country to wire money to family members, businesses, etc., in other places, including foreign destinations. "Mules," working for foreign drug cartels, deliver bulk cash to the wire service business. The money broker sets up a second business checking account to deposit the narcotics dollars. Since large sums of money enter the banking system, the appropriate Currency Transaction Reports (CTRs), and IRS Forms 8300, are generated; but, since these funds are represented as proceeds of individuals, legitimately wiring dollars to family members and businesses, they may not arouse suspicion.

These cash deposits are representative of how the legitimate part of the money transmitter business operates. For the narcotics traffickers and their money brokers, it saves them a step; it is like smurfing without the necessity of smurfs. The dirty money broker is provided a list of beneficiary accounts to wire the narcotics dollars. These accounts may include individuals, manufacturing and export companies, credit card companies, security brokers, and real or fictitious charitable organizations.

Ms. Doe testified that she ran such a business and wired money to accounts located in Panama, Colombia, Spain, Germany, Italy, and the United States. Her United States bank provided her with 1) the computer software to conduct her own wire transfers, 2) a list of ABA (bank routing) numbers of other financial institutions, and 3) personalized instruction from bank employees.

Colombia is not the only country that receives of these peso for dollar exchanges. There are cases where the money has gone to the Dominican Republic (DR), in exchange for Dominican pesos. Sometimes, the remitter company has gone even farther in trying to create a record, which would make cash drop-offs appear as part of the legitimate remitter business. For example, a narcotics trafficker may receive a drop-off of a large sum of cash, say \$250,000. Then, the trafficker (or the trafficker's agent) deposits these

funds into the money remitter company's bank accounts over a period of days. Soon thereafter, the money remitter's headquarters communicates with their branch offices the amount of phony remittances that they wanted created each day. The branch offices make up remittances with fictitious names, fictitious addresses, and fictitious amounts (well under \$10,000), and then forwards a list of these remittances to the headquarters. This way, the headquarters can keep track of them, and also see that remittances are not actually individually paid out in the DR. This process continues until phony remittances in the amount of \$250,000 are created. Anyone looking at the books would think that the deposits resulted from numerous, genuine remittances.

Geographical Targeting Orders (GTO)

Many different efforts have been launched to attack the peso exchange, one of which is the use of Geographical Targeting Orders (GTO). The Department of the Treasury has the authority to issue regulatory orders that impose additional record keeping obligations on targeted businesses. Pursuant to 31 U.S.C. § 5326, and 31 C.F.R. 103.25, the Secretary of the Treasury (or designee) must find that "reasonable grounds exist for concluding that additional record keeping and reporting requirements are necessary to carry out the purposes . . . and prevent evasions of the Bank Secrecy Act." The GTO may target financial institutions without notice, and comment within a designated geographical area.

GTOs can be particularly effective when dealing with money remitter businesses. In August, 1996, a GTO was placed into effect that required approximately 2,200 agents of specific named money remitters to report, on a daily basis for 60 days, information about the identity of the sender and recipient of each transfer to Colombia over \$750.

Suspicious Activity Reports (SARs)

The SARs, generated by astute bank employees, can also help law enforcement uncover

uses of the banking system to launder narcotics dollars. Federal prosecutors and agents are encouraged to meet regularly with the banking community to educate them about these techniques and what they can do to bring laundering schemes to law enforcement attention. In the case of the money remitter business above, for example, if a bank official saw large cash deposits being made, the bank official would ask the following questions:

- ' What do I know about the nature of this particular business?
- ' Do these deposits generally come in the form of checks (from, for example, migrant workers who cash their pay checks and wire the proceeds to family members), or are they strictly cash deposits?
- ' Have the cash deposits increased dramatically?
- ' Are the stream of deposits fairly steady, with predictable peaks (like Mondays or paydays), or are there wide and unexplainable variations in the deposits?
- ' Are the wire proceeds (or checks written by the business) all going to a particular location, or to a series of suspicious locations?
- ' Are there plausible and obvious explanations?

After going through an analysis similar to this and finding no plausible explanation for the banking activity, the banking officials should be encouraged to file a SAR with federal law enforcement.

FinCEN Advisory: Potential Indicators of Colombian Black Market Peso Exchange for Banks and Depository Institutions

- C Structured currency deposits to multiple, individual checking accounts, at the same branch, with multiple, daily deposits.
- C Consumer checking accounts which are used for a period of time but then become dormant.
- C Multiple accounts opened on the same day, or held by the same foreign nationals at various banks.
- C Increases in the frequency or amounts of currency deposits made by United States business account holders who export to Colombia.

*Source: United States Department of the Treasury, Financial Crimes Enforcement Network, FinCEN Advisory, Subject: Colombian Black Market Peso Exchange, November, 1997, Issue #9.

Conclusion

Because the black market peso exchange robs Colombia of its tax dollars and helps to corrupt otherwise legitimate businessmen, Colombia is anxious to cooperate with United States law enforcement efforts to shut these laundering operations down. To that end, information sharing and training has served to build important coalitions. For example, the Asset Forfeiture Money Laundering Section recently conducted a two- week money laundering course for Colombian prosecutors.

As the black market peso exchange scheme illustrates, traffickers and their money brokers are constantly innovating solutions to one of their greatest problems: how to convert dollars to pesos. Together, we can turn this problem into their greatest nightmare: using the proceeds from their crimes to fund the law enforcement efforts that ultimately lead to their arrests and convictions. ~

Did you know that:

The weight of money from cocaine street sales is 6 to 10 times greater than the weight of the drugs, depending on the denomination of the bills.

Street sales of all drugs are estimated to generate 13-15 million pounds of cash.

The preferred denominations of bills for bulk shipment of cash by traffickers are the \$20 and \$100 bills.

One dollar bills create such a management problem for drug traffickers that law enforcement agents have noted during the execution of search warrants that some traffickers burn them, while others sell them at a discount in exchange for larger denominations

Bulk shipments of cash leaving the United States may simply return to the United States and never reach a drug source country. When the cash returns to the United States, the only obligation of the carrier is to file a CMIR. There is then no reporting violation, and it is very difficult to prove the specified unlawful activity.

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Money Laundering and the Sentencing Guidelines

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One of the most controversial aspects of the use of the money laundering statutes over the last several years has been the issue of sentencing guidelines, especially in white collar cases. This controversy is primarily the result of the disparity between the sentencing guidelines for money laundering and the guidelines for the underlying fraud offense in certain cases. This disparity has resulted in criticism from the defense bar and from judges. It has also led the United States Sentencing Commission to propose amendments to the sentencing guidelines for money laundering offenses over the past several years, which would have reduced the guidelines for violations of the money laundering statutes. The Department of Justice opposed these amendments and they have not gone into effect. In order to monitor the use of the money laundering statutes, and to promote uniform use of these statutes, the Department has instituted approval, consultation, and notification requirements with respect to money laundering prosecutions.

This article will review the sentencing guidelines for money laundering offenses and attendant legal issues, as well as the policy issues raised by money laundering prosecutions and the Department's position with respect to the use of the statutes.

Applying 2S1.1 and 2S1.2

Section 2S1.1 is the sentencing guideline for violations of 18 U.S.C. § 1956. A violation of § 1956 is subject to a maximum sentence of 20 years' imprisonment. If a defendant is convicted of

a subsection of the statute which involves the intent to promote specified unlawful activity, the base offense level is 23. For other violations of § 1956, the base offense level is 20.

There are also two specific offense characteristics for violations of § 1956. First, there is a 3-level increase if the defendant knew or believed that the funds were the proceeds of unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances. Second, there are incremental increases of up to 13 levels based on the value of the funds involved in the offense.

Section 2S1.2 is the sentencing guideline for violations of 18 U.S.C. § 1957. A violation of § 1957 is subject to a maximum sentence of 10 years' imprisonment. The base offense level for this offense is 17. There are also two specific offense characteristics in this section. The first depends on the source of the criminally-derived funds. There is a 5-level increase if the defendant knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation or distribution of narcotics or other controlled substances. There is a 2-level increase if the defendant knew that the funds were proceeds of any other specified unlawful activity.

The second specific offense characteristic is based on the value of the funds. As with § 2S1.1, there are increases up to 13 levels depending on the value of the funds involved in the offense.

Conspiracies to violate §§ 1956 and 1957

In October 1992 Congress amended § 1956 to provide that a conspiracy to commit an offense defined in the money laundering statutes (§§ 1956 and 1957) would be subject to the same penalties as those prescribed for the offense which was the object of the conspiracy. *See* 18 U.S.C. § 1956(h).

Prior to the enactment of this subsection, a conspiracy to violate § 1956 or § 1957 could only be charged under 18 U.S.C. § 371, under which the maximum sentence is five years' imprisonment. Thus, money laundering conspiracies were punishable by less severe maximum sentences than substantive money laundering offenses. Section 1956(h) rectified this situation. This is consistent with § 2X1.1 of the sentencing guidelines, which states that a conspiracy is punished in the same manner as is the underlying substantive offense.

While the law does not appear to require that a money laundering conspiracy be charged under § 1956(h), it is recommended that § 1956(h) be used to charge conspiracies to violate § 1956 or 1957. Failure to do so can result in possible confusion, as occurred in the case of *United States v. Coscarelli*, 149 F.3d 342 (5th Cir. 1998), (en banc) [panel opinion at 105 F.3d 984 (5th Cir. 1997)].

Legal Issues

A. Value of the funds

The value of the funds involved in the money laundering offense is a specific offense characteristic, which can have a substantial effect on the sentence. Clearly, the value of the funds includes the amount of funds involved in the charged financial transactions which resulted in convictions. Thus, the calculation of the value of the funds is important in determining the offense level, potentially increasing the offense level by up to 13 levels. In addition, where there are multiple § 1956 and 1957 convictions, the amounts involved in both sets of counts is aggregated and the guideline that produces the higher offense level applies. *United States v. Cole*, 988 F.2d 681 (7th Cir. 1993).

Under the provisions for relevant conduct in the sentencing guidelines (§ 1B1.3), the value of the funds is not limited to charged conduct. Thus, the value of the funds can also include all amounts laundered, charged or uncharged. See *United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995); *United States v. Rose*, 20 F.3d 367 (9th Cir. 1994) (amount involved includes uncharged money

laundering offenses; where the defendant obtained \$2 million in fraud proceeds, laundered all of it, but was charged only with laundering \$275,000; all \$2 million properly considered in computing offense level). In addition, because the preponderance standard applies to sentencing, the value of the funds can include amounts involved in money laundering counts on which the defendant was acquitted. *United States v. Zagari*, 111 F.3d 307 (2d Cir. 1997); *United States v. Agunloye*, 999 F. Supp. 1182 (N.D. Ill. 1998) (court may include amount involved in count for which defendant was acquitted when computing base offense level for conspiracy).

The next important issue is whether the value of the funds is limited to the amount of money actually laundered or should include additional proceeds of the specified unlawful activity (SUA) which were not laundered. To some extent, this issue may rest upon the rules for grouping, which are discussed below. Several cases, however, hold that the value of the funds for money laundering offenses may include funds that were not actually laundered. The rationale in these cases is that the SUA proceeds were intended to be laundered. For example, in *United States v. Tansley*, 986 F.2d 880 (5th Cir. 1993), the defendants were convicted of operating a fraudulent telemarketing scheme. The fraud proceeds were deposited into a bank account with the intent that they be laundered, but only a fraction of the proceeds were withdrawn. The Fifth Circuit based the sentence on the amount of money involved in the scheme, finding that the intention of laundering the entire amount is enough for sentencing purposes: "Funds under negotiation in a laundering transaction are properly considered in the calculation of a sentence." See also *United States v. Sokolow*, 81 F.3d 397 (3d Cir. 1996) (amount involved in the money laundering offense includes the amount derived from the entire fraud scheme, not just the amount charged in the money laundering counts), *opinion vacated on denial of reh'g*, 91 F.3d 396 (3d Cir. 1996) (vacated for entry of a new restitution order), *cert. denied*, 117 S. Ct. 960 (1997); *United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995) (where money laundering and SUA offenses were properly grouped under 3D1.2(d), the total amount involved

in the SUA may be used as the amount intended to be laundered).

B. Grouping

United States Sentencing Guideline § 3D1.2 states that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." This includes (a) counts that involve the same victim and the same act or transaction; (b) counts involving the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan; and (c) situations in which one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts. Subsection 3D1.2(d) states that counts should be grouped "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." Offenses covered by §§ 2S1.1 and 2S1.2 are cited as examples of offenses which should be grouped under this subsection.

Thus, multiple violations of §§ 1956 or 1957 should be grouped together pursuant to § 3D1.2. *See, e.g., United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995) (when defendant is convicted of §§ 1956 and 1957 counts, offenses are grouped and higher level applies); *United States v. Nattier*, 127 F.3d 655 (8th Cir. 1997) (substantive money laundering and § 371 conspiracy properly grouped together).

The more difficult question is whether money laundering counts should be grouped with counts involving the SUA. On this issue, there is a split among the circuits and, in some cases, even within circuits. The grouping issue is important, of course, because where money laundering and SUA counts are not grouped together but form separate groups, the group with the highest offense level may be increased by up to five offense levels. *See* U.S.S.G. § 3D1.4. Also, different rules may apply

depending on whether the SUA involves fraud or other offenses. Moreover, there may be different considerations in grouping counts pursuant to subsections 3D1.2(a-c) and subsection 3D1.2(d), which affects grouping for purposes of calculating the value of the funds. *See, e.g., United States v. Wilson*, 131 F.3d 1250 (7th Cir. 1997) (if money laundering and SUA are grouped under § 3D1.2(d), the entire amount taken from victims in the underlying fraud scheme is "relevant conduct" and may be used in computing the sentence for money laundering. In *Wilson*, however, the case was remanded back to the trial court for resentencing with instructions to group the money laundering and fraud counts. On remand, the court held that government had waived its argument that the total loss from the acts of mail fraud should be used in determining the value of the funds under the money laundering guideline).

With respect to fraud offenses, the Third, Fifth, Seventh, and Eleventh Circuits appear to have taken the position that money laundering and fraud offenses should be grouped. The rationale for these decisions is that the fraud offense and the money laundering offense harm the same victim. In many cases, the money laundering conduct at issue involves promotion under § 1956(a)(1)(A)(i). *See, e.g., United States v. Cusumano*, 943 F.2d 305 (3d Cir. 1991) (Third Circuit affirmed the district court's decision to group money laundering with other offenses where the evidence demonstrated that the SUA offenses and the money laundering were all part of one scheme to obtain money from an employee benefit fund); *United States v. Leonard*, 61 F.3d 1181 (5th Cir. 1995) (appellate court found that the money laundering and fraud constituted part of the same continuing criminal endeavor to obtain money from elderly victims and to use that money to facilitate the continuance of the scam); *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996) (appellate court reversed and remanded the sentence of a Ponzi scheme operator on the ground that his convictions for money laundering and mail fraud should have been grouped); *United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995) (the Eleventh Circuit held that in a Ponzi scheme money laundering and fraud

convictions should be grouped together because they are closely related).

The First, Eighth, Ninth, and Tenth Circuits have held that fraud and money laundering offenses should not be grouped. These courts have determined that the fraud offenses and the money laundering offenses do not involve the same victims because the victim of a fraud is the person defrauded, while the victim of money laundering is society. *United States v. Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993). In reversing the district court's decision to group the SUA and money laundering counts, the Eighth Circuit eloquently stated this distinction in *United States v. O'Kane*, 155 F.3d 969, (8th Cir. 1998):

Fraud clearly harms the defrauded. But money laundering harms society's interest in discovering and deterring criminal conduct because, by laundering the proceeds of crime, the criminal vests that money with the appearance of legitimacy. The interest of the law-abiding general public in preventing the criminals among us from profiting from their crimes is invaded when criminally derived funds are laundered to allow the criminal unfettered, unashamed and camouflaged access to the fruits of those ill-gotten gains.

155 F.3d at 972-73; *see also United States v. Taylor*, 984 F. 2d 298 (9th Cir. 1993) (Ninth Circuit concluded that the money laundering and underlying wire fraud offenses do not group because they measure harm differently); *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992) (the Tenth Circuit held that money laundering and wire fraud should not be grouped because the harm is measured differently and because the victims are different).

The Fourth Circuit, in *United States v. Walker*, 112 F.3d 163 (4th Cir. 1997), held that the district court properly grouped the defendant's mail fraud and money laundering offenses in a case involving the diversion of funds from lump-sum annuities into his own personal bank account. The court's decision rested, in part, upon the fact that the defendant pleaded guilty under the "promotion" prong of § 1956. In a recent unpublished decision,

United States v. McMahon, 133 F.3d 918 (4th Cir. 1997) (Table Case), the Fourth Circuit expanded upon its decision in *Walker* by stating that U.S.S.G. § 3D1.2(d) neither categorically required nor categorically prohibited grouping the offenses. Instead, "grouping is a case-by-case determination dependent upon whether the offenses involved were part of an ongoing or continuous scheme." *McMahon* involved a fraud scheme whereby the defendant diverted partnership funds for his personal benefit. Noting that the defendant was convicted under the "concealment" prong of § 1956(a)(1), the Fourth Circuit affirmed the district court's decision not to group the fraud and money laundering offenses. The Fourth Circuit found that, in this case, the defendant's money laundering did not serve to perpetuate the fraud; the defendant simply used the laundered money to indulge his personal whims.

C. Departures

Perhaps the most contentious legal issue in money laundering cases is the issue of departures in sentencing. Because of the disparity between the sentencing guidelines for money laundering and the guidelines for the underlying predicate activity in certain white collar crime cases, some judges have departed downwards to reduce the money laundering guidelines pursuant to U.S.S.G. § 5K2.0. Under this section, courts may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *See* 18 U.S.C. § 3553(b).

Departures based on this provision are often referred to as "heartland" departures. *See, e.g., United States v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998). The term "heartland" is derived from the guidelines, which state:

The Commission intends the sentencing courts to treat each guideline as carving out a "heartland,"

a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

U.S.S.G. ch.1, pt. A, intro. comment. 4(b). In this way, the heartland departure enables courts to avoid rigid application of the guidelines, provided they articulate reasons why they deem the case atypical. As noted in *Hemmingson*, the difficulty lies in identifying which factors a court may consider in evaluating atypicality. 157 F.3d 347. In *United States v. Koon*, 518 U.S. 81 (1996), the Supreme Court directed sentencing courts to ask four questions, the first of which is, "[w]hat features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a special or unusual case?" 518 U.S. at 95.

The issue of what constitutes the heartland of a money laundering offense has been vigorously debated in cases where trial courts have departed downward. These departures have met with varied results in the appellate courts. In several cases, the appellate courts have considered and rejected arguments for downward departure on the basis that a crime was outside of the heartland of money laundering. In *United States v. Adams*, 74 F.3d 1093 (11th Cir. 1996), the Eleventh Circuit reversed a trial court's departure from money laundering guidelines and application of the fraud guidelines, which was inconsistent with the defendants' convictions under § 1956 and the recommendations of the Presentence Report. The defendants in *Adams* were convicted of submitting false bills and invoices to a federal agency. The defendants deposited \$11,798 in proceeds from the fraud into one bank account and withdrew a cashier's check in that amount for deposit in a second bank. When the second bank refused and returned the cashier's check because of an improper endorsement, the defendants deposited the cashier's check into a different account at the first bank and wrote a new check which was successfully deposited into the second bank.

The district court in *Adams* departed downward from the guidelines for money

laundering based upon defendants' argument that the "gravamen" of their scheme was fraud and misapplication of federal funds, not money laundering. The Eleventh Circuit reversed the sentence imposed by the trial court and remanded the case for re-sentencing. In doing so, the Eleventh Circuit concluded that while the legislative history of the money laundering statutes is sparse and defines only a few "classic" money laundering cases, the "plain language of the act itself prohibits a much broader range of conduct than just the 'classic' example of money laundering." *Adams*, 74 F.3d at 1102. The Eleventh Circuit further stated that "Congress intended to criminalize a broad array of money laundering activity . . . [t]herefore, a departure that completely negates the effect of [defendants'] money laundering convictions is clearly erroneous and an incorrect application of the Guidelines." 74 F.3d at 1102. A district court should not order a "departure that completely nullifies the effect of the jury finding the [defendants] guilty of money laundering." 74 F.3d at 1103.

The "heartland" basis for a departure was also rejected in *United States v. LeBlanc*, 24 F.3d 340 (1st Cir. 1994). The defendants in *LeBlanc* were involved in small gambling operations where they accepted payments through either cash or checks made out to fictitious payees. Deposits by one of the defendants were made in a manner which would avoid the filing of Currency Transaction Reports. The defendants argued that although they technically fit within the statute prohibiting money laundering, their real crime was only bookmaking and gambling. Because the district court held that defendants' laundering was a secondary corollary to their "real" crime (bookmaking), and because the court could not conceive of a manner by which the defendants could conduct bookmaking activities without laundering money, it labeled the defendants' crimes as outside the "heartland" for money laundering. *United States v. LeBlanc*, 825 F. Supp. 422, 423 (D. Mass. 1993).

The First Circuit reversed the departure, stating that "[t]he language of the statute, in conjunction with the definitions provided in 18 U.S.C. §1956(c), indicates that Congress intended to criminalize a broad array of transactions

designed to facilitate numerous federal crimes." 24 F.3d at 346. The *LeBlanc* court concluded:

the court [below] failed to recognize that defendants had committed two offenses; gambling, followed by money laundering. Its statement that it was 'difficult . . . to conceive of gambling being conducted or transacted in any form other than by money or monetary instruments,' and that sentencing for money laundering 'would present an inequity' misses the point. There was no inequity. [Defendants] did not have to act in a manner that patently violated 18 U.S.C. § 1956.

24 F.3d at 347.

In *United States v. Morris*, 18 F.3d 562 (8th Cir. 1994), the Eighth Circuit vacated a district court decision to depart downward from the guidelines for money laundering in a bank fraud and false books and records case perpetrated by officers and directors of a bank. The district court had "determined that the money laundering offense was the same as the bank fraud offenses and that neither Congress nor the Sentencing Commission intended the former to be punished more severely than the latter" and departed to the guidelines for bank fraud. 18 F.3d at 569. The Eighth Circuit rejected the decision to depart on that basis, stating that "courts have held that [18 U.S.C. §1956] applies to the prosecution of financial transactions arising from the specified unlawful activities designated in the statute. . . . In enacting 18 U.S.C. §1956(d), Congress intended cumulative punishment for the specified unlawful activities and the money laundering violations. 18 F.3d at 539.

Nonetheless, several appellate courts have endorsed departures in money laundering cases based on the "heartland" rationale. In *United States v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998), the Fifth Circuit affirmed the trial court's downward departures for the defendants, who were involved in a scheme to funnel an illegal \$20,000 corporate campaign contribution to help Henry Espy pay off a campaign debt resulting from his unsuccessful campaign for Congress. The specified unlawful activity in this case was interstate

transportation of stolen property (18 U.S.C. § 2314). The trial court departed downward from the money laundering sentencing guidelines because it found the case atypical and therefore outside of the heartland. The trial court determined that the money laundering guideline primarily targets large-scale money laundering, which often involves the proceeds of drug trafficking or other types of organized crime. The trial court distinguished the defendants' conduct from that which ordinarily warrants sentencing under § 2S1.1—namely, large-scale laundering of the fruits of organized crime.

In *Hemmingson*, the government argued that these factors were already taken into account by the guideline and therefore could not serve as a basis for departure. To support its argument, the government pointed out that the guideline provides for a 3-level increase if the defendant knew or believed the funds were the proceeds of drug trafficking. The Fifth Circuit rejected the government's arguments and affirmed the trial court's departure, finding that the trial court articulated "relevant facts and valid reasons why the circumstances of this case were . . . sufficient to take it outside of the heartland of relevant cases." 157 F.3d at 363.

Another case where a downward departure was affirmed is *United States v. Caba*, 911 F. Supp. 630 (E.D.N.Y.), *aff'd*, 104 F.3d 354 (2d Cir. 1996) (unpublished). *Caba* involved a food stamp-for-cash scheme. The district court in *Caba* concluded that "[t]he money laundering computations are derived from the guideline's relationship to drug crimes; it is that relationship which drives the high guideline level and would in this case produce a custodial range that grossly exaggerates the seriousness of the actual conduct." 911 F. Supp. at 636. The *Caba* rationale, however, was recently rejected by the Seventh Circuit in *United States v. Watford*, 165 F.3d 34 (7th Cir. 1998). Watford, who pled guilty to food stamp and money laundering violations, was sentenced pursuant to the money laundering guidelines. He appealed his sentence on the ground that the trial court refused to depart downward as the court did in *Caba*. The Seventh Circuit found the reasoning

in *Caba* unpersuasive and affirmed the district court's sentence.

One further case, which stretches the "heartland" doctrine to the breaking point, is *United States v. Blarek*, 7 F. Supp. 2d 192 (E.D.N.Y. 1998). *Blarek* involved two interior decorators who worked for Jose Santacruz Londono, a major Cali cartel drug trafficker. Over a twelve year period, the defendants designed and decorated a number of offices and living spaces for Santacruz, his wife, his mistresses, and his children. According to the Presentence Reports, the defendants' offense conduct after 1986 involved at least \$5.5 million, approximately half of which was paid in cash. The defendants traveled to Miami, New York City, and other locations to receive large sums of money from Santacruz's couriers. Payments ran as high as \$1 million. The defendants were convicted at trial of racketeering conspiracy and money laundering conspiracy (18 U.S.C. § 1956(h)). The Presentence Reports assessed the defendants' offense levels at 33 (135-168 months' imprisonment).

Notwithstanding this egregious example of mainstream money laundering for a major member of the Cali cartel, the trial court found that this case was outside of the heartland of racketeering and money laundering conspiracy cases contemplated by the Guidelines. The trial court also found that "[u]nlike those in most prosecutions in drug money laundering cases, the acts of these defendants were not ones of pure personal greed or avarice. While their manner of living did greatly improve with the receipt of their drug-tainted income, their state of mind was one that was much more complicated—driven largely by excessive artistic pride." 7 F. Supp. 2d at 211. Consequently, the trial court held:

The unique motivations behind their crimes do make defendants' acts somewhat different from those in the mainstream of criminality. While still morally culpable, the state of mind of these defendants must be taken into account when considering the various rationales behind criminal penalties. Because this and other factors "distinguishes the case from the 'heartland' cases covered by the guidelines in a way that is

important to the statutory purposes of sentencing," departure is encouraged. U.S.S.G. § 5K2.0.

7 F. Supp. 2d at 211. After adjusting the offense levels for other factors, the trial court departed downward 6 levels for each defendant, resulting in an offense level of 26 for defendant Blarek (sentence of 68 months' incarceration) and an offense level of 23 for defendant Pellecchia (sentence of 48 months' incarceration). After this case, it is difficult to determine whether there are any limits to the "heartland" analysis.

Policy Issues—The Department of Justice and the Sentencing Commission

As the discussion of the "heartland" concept indicates, there is considerable disagreement as to what the appropriate sentences should be in cases including money laundering charges. The Sentencing Commission, as well as the defense bar and certain members of the judiciary, believes that there is too great a disparity between the sentencing guidelines for money laundering and the guidelines for underlying fraud offenses. Consequently, during the 1992-93 amendment cycle, the Sentencing Commission first proposed an amendment to §§ 2S1.1 and 2S1.2 which was intended to reduce the offense level for many money laundering offenses to a level equivalent to, or slightly above, the level applicable to a fraud offense involving the amount of money laundered.

The Department of Justice opposed this amendment. The Department, however, acknowledged that a modification of the current sentencing guidelines might be appropriate to address a certain limited class of cases referred to as "receipt and deposit" cases, which the Department agreed created minimal additional harm. "Receipt and deposit" cases involve a person who obtains proceeds, generally in the form of a check, from a specified unlawful activity, and deposits the proceeds into his or her own bank account without any attempt to conceal the nature, source, or ownership of the funds. The Department forwarded to the Commission a proposed alternative amendment which would have lowered

the sentencing guidelines for "receipt and deposit" transactions.

Although the Sentencing Commission did not act on the amendment, the Department addressed "receipt and deposit" cases by instituting a requirement that prosecutors consult with the Criminal Division prior to filing any money laundering charges based on "receipt and deposit" transactions. Essentially, the Department reviews these cases for prosecutive merit and to attempt to identify more serious money laundering activity. This requirement is now included in the approval and consultation requirements for money laundering cases in the *United States Attorneys' Manual (USAM)* at § 9-105.

Despite the Department's institution of the consultation requirement for "receipt and deposit" cases, the Sentencing Commission proposed the same amendment again in 1993 and 1994. In 1993 the amendment was opposed by the Department and failed to garner the votes of four Commissioners. During the 1994-95 amendment cycle, the Department attempted to construct a counterproposal that would address the Commission's concerns. The Commission did not, however, adopt the Department's changes. Rather, it voted to adopt its own amendment.

In May 1995 the Department asked Congress to disapprove the Commission's amendment to the money laundering sentencing guidelines and, in October 1995, Congress did so. The 1995 amendment required the Department of Justice to submit a report to the House and Senate Judiciary Committees on its prosecutorial policies with respect to the money laundering statutes. The Department's report was sent to Congress in May 1996 and set out the Department's position on the significance and the use of the money laundering statutes. With respect to the significance of the statutes, the Report states:

There are three notable features of these money laundering statutes. First, they apply not only to those who generate the unlawful proceeds, but also to those who launder the proceeds but are not involved in the predicate activity. And, indeed, the Department uses these statutes to prosecute both those who provide the funds to be laundered

and those who launder the funds. Second, the money laundering statutes apply not only to transactions involving drug proceeds, but to transactions involving the proceeds of most serious criminal offenses, including offenses committed in other countries. Third, Congress, in recognition of the serious threat posed by transactions in criminal proceeds, provided high sentences for all money laundering offenses.

Report for the Senate and House Judiciary Committees on the Charging and Plea Practices of Federal Prosecutors with Respect to the Offense of Money Laundering, U.S. Department of Justice (June 17, 1996) ("DOJ Report").

The Report describes the Department's charging policies which are set out in the "Principles of Federal Prosecution," contained in *USAM* § 9-27. With respect to the use of the money laundering statutes, the Report states:

In general, the money laundering statutes are to be used to identify and prosecute the financial component of for-profit criminal activity, including attempts to conceal or reinvest criminal proceeds. They should not be used in cases where the money laundering activity is minimal or incidental to the underlying crime, or in novel or creative ways where there is insignificant prosecutive benefit. The money laundering statutes should be used only where they reflect the nature and extent of the criminal conduct involved, provide a basis for an appropriate sentence under all of the circumstances of the case, or provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct.

DOJ Report at p.14.

The Report also describes the specific policies which have been instituted with respect to money laundering prosecutions in order to promote uniformity and consistency in the use of the statutes. These policies include approval, consultation, and reporting requirements for certain kinds of money laundering prosecutions. In addition to these requirements, there is an extensive program of communication between the United States Attorneys' offices and the Criminal Division on the use of the money laundering statutes, which helps to promote consistency in the application of the money laundering statutes among the United States Attorneys' offices. As a result of these policies, the Report concludes:

[b]y fostering an extensive program of communication between the United States Attorneys' offices and the Criminal Division on the use of these statutes through the approval, consultation and reporting requirements, which included Criminal Division review of more than 1,000 indictments over a three-year period, the Department believes that it has responded to concerns expressed to the Sentencing Commission, and has, at the same time, struck the proper balance between Department oversight and the prosecutorial discretion of the United States Attorneys.

* * * * *

We must continue to move forward in the fight against money laundering. And because we can demonstrate that the Department of Justice uses the money laundering statutes effectively, fairly and judiciously, we will continue to oppose attempts to weaken our enforcement efforts, including those that seek to lower sentences for these very serious offenses.

DOJ Report at p. 17.

Conclusion

The money laundering statutes are an important and powerful weapon in the arsenal of federal prosecutors. As with all powerful weapons, it is important that they only be employed when their use is justified. Otherwise, critics of the

Department's use of the statutes will continue to attempt to reduce their potency.

We encourage prosecutors to call the Asset Forfeiture and Money Laundering Section, (202) 514-1263, prior to charging money laundering offenses, even if such consultation is not required under *USAM* § 9-105. This will provide the Section's attorneys an opportunity to discuss policy issues that may be implicated by the proposed money laundering charges, as well as to provide legal advice about issues that may arise in these prosecutions. ~

ABOUT THE AUTHOR

Lester M. Joseph has been an Assistant Chief in the Asset Forfeiture and Money Laundering Section (AFMLS) of the Criminal Division since October 1991. He is responsible for coordinating policy with respect to the application of the money laundering statutes by federal prosecutors. Before working in AFMLS, he worked for seven years in the Organized Crime and Racketeering Section. From 1981-1984 he was an Assistant State's Attorney in Cook County (Chicago), Illinois. He received his Bachelor of Arts from the University of Michigan in 1971 and his Juris Doctor from The John Marshall Law School in 1980. He is an Adjunct Professor at The George Washington University where he teaches Criminal Justice in the Department of Sociology. **a**

International Forfeiture Cooperation and Sharing of Confiscated Assets—The United States’ Perspective

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Major drug traffickers and other organized criminals often hide their illicitly generated proceeds outside the country where they commit the crimes. Thus, one country's forfeiture efforts, however effective and comprehensive, may not be enough to take the profit out of international crime. For forfeiture laws to work effectively, the United States and its international partners must apply and enforce their domestic confiscation measures in increasingly multinational settings.

The United States Department of Justice (DOJ) has placed the development of international forfeiture cooperation among its top priorities. The paramount objective is to take the profit out of crime. Secondly, DOJ's domestic efforts have shown us that forfeited wealth, when shared with cooperating law enforcement agencies, serves to enhance interagency cooperation.

This concept is equally true in the international setting. While law enforcement is always the prime objective, the sharing of forfeited assets among participating nations also creates an incentive for future cooperation and provides the means to carry out such costly efforts.

Bilateral Treaties, Executive Agreements, and Letters Rogatory

Recent bilateral and multinational agreements, providing for mutual forfeiture assistance, attest to the emergence of forfeiture as an international law enforcement sanction. Currently, the United States has ratified mutual

legal assistance treaties (MLATs) with 24 jurisdictions. A chart listing these jurisdictions follows this article.

In addition, the United States and the Kingdom of the Netherlands (consisting of the Kingdom in Europe, Aruba, and the Netherlands Antilles) are parties to an executive agreement that supplements the United States-Netherlands MLAT to provide a basis for forfeiture cooperation and asset sharing. The United States and Russia are parties to an agreement on cooperation in criminal law in forfeiture proceedings. The United States has also entered into executive agreements on asset sharing with Anguilla, British Virgin Islands, Canada, the Cayman Islands, Colombia, Ecuador, Mexico, Montserrat and the Turks and Caicos Islands.

Letters rogatory are a more time-consuming, but traditional, means of obtaining assistance from a foreign court. Thus, where an MLAT or executive agreement is not in place, letters rogatory remain available for use in cases where the United States and the foreign jurisdiction in question are not parties to a forfeiture-related bilateral treaty or agreement.

Bilateral MLATs and executive agreements help to regularize international forfeiture cooperation between treaty partners. However, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, more commonly referred to as the Vienna Convention, is perhaps the single most important development in international forfeiture cooperation to date.

The Vienna Convention

The Vienna Convention, which went into effect on November 11, 1990, has been ratified by over 150 countries. The United States was eighth among the first 20 countries to ratify and bring the Convention into force.

Article V of the Vienna Convention details the obligations of the parties to seek the forfeiture of (or, in the term used in the Convention, confiscate) drug trafficking and money laundering proceeds, as well as the instrumentalities used to commit such offenses. It mandates each signatory country to

enact laws with domestic and international forfeiture application.

For example, Article V requires each signatory country to enact domestic forfeiture legislation enabling the country in question to locate, freeze, and forfeit all manner of property derived from, or used in, drug trafficking or drug money laundering. Article V also requires each signatory country to identify, trace, seize, freeze, or forfeit property or proceeds located in the requested country, which were derived from, or used in, drug trafficking or drug money laundering in violation of the laws of the requesting country. Article V explicitly provides that bank secrecy laws must not serve as a barrier to domestic and international asset forfeiture investigations.

Recognizing the diversity of legal systems among nations, the Vienna Convention provides that a requested country may seek the forfeiture of property at the request of another country in one, or both, of two ways. The requested country may initiate its own forfeiture proceedings against the property in question using the evidence provided by the requesting country. Alternatively, the requested country may give full faith and credit to a forfeiture judgment rendered by the competent authorities of the requesting country.

The United States has adopted the first approach in complying with the Vienna Convention. In the case of drug violations committed wholly in violation of foreign law, the United States can, under 18 U.S.C. § 981(a)(1)(B), file a civil forfeiture action against the foreign drug proceeds found in the United States. Because § 981(a)(1)(B) is an *in rem* action against the property itself, the Government may seek to confiscate the property in question regardless of whether the property's owner is dead, a fugitive, or incarcerated in another country.

Requests by the United States

One of the first steps in the international forfeiture process is to identify and locate assets beyond our borders that may be forfeitable. Typically, this involves making requests under a treaty, convention, executive agreement, or letter

rogatory for bank records that may reveal the movement or location of forfeitable wealth.¹ The United States may then request that the country issue a freeze or restraining order. The request can be based upon contemplated or actual forfeiture proceedings in the United States or in the requested country.²

Once assets forfeitable under United States laws have been traced overseas, the United States must consider how to advance the forfeiture process and comply with the legal requirements of the country where the assets are located. United States forfeiture laws focus both on the property (*in rem* civil actions) or on the owner (*in personam* criminal actions).

In both civil and criminal forfeiture cases, the United States will often seek to repatriate the property for forfeiture. Repatriations can be accomplished through the cooperation of the property's owner or a defendant who agrees to forfeit the property as part of a plea agreement. However, if the property in question has been frozen or restrained by the foreign authority, it cannot be returned to the United States unless the competent foreign authorities agree to lift the freeze for the purpose of repatriation. Such a

¹Formal means for forfeiture cooperation, such as treaties and multinational conventions, do not replace the day-to-day cooperation among law enforcement agencies to different countries. Such cooperation, although fully sanctioned by the governments in question, is often requested and provided outside diplomatic channels. For example, at the request of their foreign counterparts, one country's law enforcement representatives may be able to provide investigative leads to a forfeiture matter pending in the other jurisdiction (e.g., assist in locating the forfeitable property or evidence or identifying potential witnesses and claimants). Officers from different countries may also work together in task force efforts, requiring even more extensive cooperation among them.

²In instances where the forfeiture can best be accomplished under the laws of the foreign jurisdiction where the assets are located, the United States, of course, will make every reasonable effort to furnish the foreign jurisdiction with the relevant evidence in its possession.

request may occur in connection with the criminal case, a civil forfeiture case related to the criminal investigation, or as part of an extradition where property (e.g., cash, weapons) was found within the immediate control of the subject at the time of his detention.

Where foreign-based property has been forfeited under United States law as a result of a criminal conviction or a civil forfeiture action, the United States may also request that the foreign government either repatriate the assets to the United States or share the forfeited assets with all countries that assisted in the forfeiture.

Civil Forfeiture

Pursuant to 28 U.S.C. § 1355(b)(2), United States district courts are vested with extraterritorial jurisdiction and venue over assets located abroad that are subject to civil forfeiture under United States law. Section 1355(b)(2) enhances the United States' ability to lend international forfeiture assistance. This provision is particularly useful in cases where the foreign country cannot forfeit the property under its own laws, but may be able to take other steps that assist the United States' forfeiture effort (e.g., seize the property, enforce a United States forfeiture judgment, or repatriate the assets). Once the assets have been civilly forfeited in the United States,³ we can transmit the final civil forfeiture judgment to the foreign country for enforcement or repatriation of the assets.

The Department recognizes that cases brought under § 1355(b)(2) must be closely coordinated with the authorities of the foreign government

³In a § 1355(b)(2) action, the United States will require assistance from the foreign authorities to enable it to perfect the court's *in rem* jurisdiction over the property. Such assistance may include restraining the property, providing notice to the property and to other individuals and entities who may have an interest in the property, and arranging for publication of notice of the United States forfeiture action in a newspaper of general circulation where the property is located.

where the forfeitable assets are located. In both practical and legal terms, extraterritorial jurisdiction in civil forfeiture cases can be successful only with the cooperation of the foreign country. *See United States v. All Funds on deposit in the name of Meza, et al.*, 63 F.3d 148 (2d Cir. 1995).

Criminal Forfeiture

In the United States, the plea bargaining process is an important part of our criminal justice system. Through a plea agreement, a defendant can consent to the forfeiture of his or her property regardless of its location. A plea agreement may require the defendant to transfer title of foreign-based assets to the United States or to liquidate the property and transfer the proceeds to the United States. In such cases, the United States may request assistance from the foreign government in repatriating the property for forfeiture. Where repatriation is not possible, the plea agreement may be structured so that the defendant is required to cooperate with foreign authorities in their own law enforcement efforts.

Similarly, where explicit admissions regarding the illicit source of the property will enable a foreign country to obtain a forfeiture order, the plea agreement should also contain an explicit admission by the defendant. An increasing number of jurisdictions (e.g., Cayman Islands, Hong Kong, Luxembourg, Switzerland, United Kingdom) are able to enforce U.S. forfeiture judgments, particularly *in personam* criminal forfeiture orders.

Requests to the United States from Foreign Countries

Criminals often attempt to protect their illegal profits from their own countries' laws by transferring them elsewhere, including to the United States. In response, Congress enacted legislation, 18 U.S.C. § 981(a)(1)(B), authorizing the seizure and forfeiture of assets within our

borders that represent the proceeds of drug-related crimes committed abroad.

Section 981(a)(1)(B) permits the United States to forfeit assets, *even where there has been no violation of domestic law*. Generally, it provides for the civil forfeiture of property in the United States that is derived from, or traceable to, the violation of a foreign law involving the manufacture, importation, sale, or distribution of a controlled substance. In addition, the drug offense must be one which is punishable by in excess of one year's imprisonment in the country where it was committed, and would have been punishable for such a term in the United States.

One of the more notable features of § 981 is the provision's use of foreign forfeiture orders and foreign convictions to support a civil forfeiture action against foreign drug proceeds found in the United States. Under the statute, a certified copy of a foreign forfeiture judgment encompassing the subject property is admissible into evidence to establish the government's initial case in court. Similarly, the statute also authorizes the admission into evidence of a certified foreign judgment of conviction for a felony offense involving the manufacture, importation, sale, or distribution of a controlled substance. The certified foreign judgment of conviction creates a rebuttable presumption that the unlawful drug activity giving rise to the forfeiture has occurred.

As the result of legislation, it is now a violation of United States law to launder the proceeds of foreign fraud offenses committed by or against a foreign bank, and also foreign kidnapping, robbery, and extortion offenses. The proceeds, and the property that is used to facilitate their laundering, is now civilly (18 U.S.C. § 981(a)(1)(A)) and criminally (18 U.S.C. § 982(a)(1)) forfeitable. While the underlying offense may have violated only foreign law, the laundering offense must be shown to have occurred at least in part in the United States or to have involved a United States citizen.

Not all foreign requests will require judicial measures such as those available under § 981(a). For example, a foreign jurisdiction may ask us to help locate and identify forfeitable assets located in

the United States. Law enforcement agents would gather the evidence for transmittal to the requesting country through the appropriate channels.

In other cases, a foreign official may interview witnesses in the United States who are willing to cooperate with an investigation. Provided that the foreign government representatives have registered as foreign agents, as required by 18 U.S.C. § 951, there should be no problem interviewing willing witnesses in the United States.

In cases where a witness is not willing to submit voluntarily to a deposition or to produce records and other evidence, the United States may be able to secure such assistance through compulsory process under 28 U.S.C. § 1782. A United States district court will usually designate a federal prosecutor to serve as a commissioner charged with obtaining testimony and gathering evidence on behalf of the requesting foreign authority.

The United States may also provide assistance to foreign governments in recovering the proceeds of foreign fraud offenses that are located domestically. The United States can seek to forfeit such property relying on the interplay of, *inter alia*, 18 U.S.C. §§ 981 or 982 and 1956, and 18 U.S.C. §§ 2314 and 2315, which prohibit knowingly transmitting or receiving through foreign commerce the proceeds of theft, fraud, or conversion as the designated specified unlawful activity. Upon the forfeiture of foreign fraud proceeds, the United States will work with foreign officials to make restitution to the fraud victims.

Asset Sharing

It is the policy and practice of the United States, pursuant to statutory authority, to share the proceeds of successful forfeiture actions with countries that made possible or substantially facilitated the forfeiture of assets under United States law. As of October 1998, DOJ, with the concurrence of the Secretary of State, has transferred over \$66 million to 22 nations in recognition of their forfeiture assistance.

The United States does not view international asset sharing as the bartering or selling of law

enforcement cooperation among jurisdictions. To the contrary, it stands ready to cooperate with the forfeiture efforts of other nations whether or not there is asset sharing. At the same time, the United States encourages reciprocal sharing with and among its foreign law enforcement partners.

There are three statutory provisions in the United States Code, authorizing the Attorney General and/or the Secretary of the Treasury to transfer forfeited property to a foreign country: 18 U.S.C. § 981(i)(1), 31 U.S.C. § 9703(h)(1), and 21 U.S.C. § 881(e)(1)(E).

Title 18, United States Code, Section 981(i)(1) authorizes the Attorney General or the Secretary of the Treasury to transfer money laundering proceeds and instrumentalities forfeited under 18 U.S.C. §§ 981 and/or 982 to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property.⁴ Title 31, United States Code, Section 9703(h)(1) authorizes the Secretary of the Treasury to transfer forfeited property in recognition of foreign assistance to a forfeiture case under any law (other than section 7301 or 7302 of the Internal Revenue Code of 1986) enforced or administered by the Department of the Treasury. Title 21, United States Code, Section 881(e)(1)(E) authorizes the Attorney General to transfer forfeited assets to a foreign country that participated in the seizure or forfeiture under the federal drug laws.

Each provision conditions international sharing upon:

- (1) direct or indirect participation by the foreign government in the seizure and forfeiture of the property subsequently forfeited under United States law;

⁴Section 981(a)(1), which contains three subsections, provides for the civil forfeiture of (A) assets traceable to, or involved in, money laundering violations; (B) proceeds of foreign drug felonies; and (C) property constituting, or derived from, proceeds traceable to certain banking fraud violations. Section 982 provides for the criminal forfeiture of property involved in money laundering offenses and the criminal forfeiture of proceeds derived from financial fraud offenses.

- (2) authorization by the Attorney General or the Secretary of the Treasury to transfer all or a portion of the forfeited property to the cooperating foreign country;

- (3) approval by the Secretary of State of the transfer;

- (4) authorization in an international agreement (which may be a standing bilateral agreement, such as a mutual legal assistance treaty, or a case-specific agreement reached for the purpose of effecting the transfer) between the United States and the foreign country to which the property is to be transferred; and

- (5) if applicable, certification under 22 U.S.C. § 2291j(b) [Section 481(h) of the Foreign Assistance Act of 1961] of the foreign country in question.

The ultimate decision of whether and how much to share is made, subject to review by the Secretary of State, the Attorney General or the Secretary of the Treasury. No United States representative has the statutory authority to commit to asset sharing in any given case until an international forfeiture sharing agreement has been approved by the Departments of Justice (or Treasury) and State.

The amount to transfer in specific cases should reflect the contribution of the foreign government relative to the assistance provided by other foreign and domestic law enforcement participants. Generally, of course, the level or amount of sharing will be in direct relationship with the importance and degree of the foreign assistance. The United States opposes international sharing agreements that fix a specific percentage to be shared in future cases.

Cases that warrant the most sharing are those in which the foreign country takes action on our behalf that proves essential to the success of the forfeiture action in the United States. A second group of cases that warrant sharing are those in which the foreign country provides assistance that

is probably essential to the successful forfeiture action of the United States. Such assistance may include the enforcement of a United States forfeiture order with subsequent repatriation of the assets to the United States or the expenditure of substantial law enforcement resources to assist the United States.

Third, the United States would share assets in recognition of foreign assistance that materially facilitates a forfeiture in the United States. Such assistance includes furnishing important investigative leads, producing significant documents for trial, or facilitating the interview or depositions of a key witness.

The United States encourages foreign jurisdictions that confiscate assets under their laws with our assistance to recognize the United States' contribution through asset sharing. As mentioned previously, the United States has received a share of forfeited assets from Canada, Switzerland, Isle of Jersey, and the United Kingdom. Such shared proceeds are deposited into the Assets Forfeiture Fund and made available for law enforcement purposes consistent with United States law. ~

ABOUT THE AUTHORS

' **Linda M. Samuel** has served as one of two Special Counsels for International Forfeiture Matters at the Asset Forfeiture and Money Laundering Section, Criminal Division, United States Department of Justice, since 1990. Her duties include assisting U.S. prosecutors obtain the immobilization and repatriation to the United States of forfeitable assets located beyond U.S. borders, or, alternatively, requesting foreign governments to enforce U.S. forfeiture orders against such assets. She is also responsible for coordinating the international asset sharing program involving the Department of Justice Assets Forfeiture Fund. Prior to her present position, she was a trial attorney for six years in the Commercial Litigation Branch of the Department of Justice. Her educational background includes a Bachelor of Science degree from The Pennsylvania State University, a Juris Doctor from Catholic University Law School, and

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' **Juan C. Marrero** has been an Administrative Law Judge in New Orleans, Louisiana, since 1997. Prior to that, he served as one of two Special Counsels for International Forfeiture Matters at the Asset Forfeiture and Money Laundering Section, Criminal Division, United States Department of Justice. He also worked in the Narcotic and Dangerous Drug Section and the Internal Security Section of the Criminal Division. He received his undergraduate degree from Loyola University, New Orleans, and his law degree from Georgetown University Law Center. a

Table of MLAT Countries

Anguilla	Cayman Islands	Morocco	Switzerland	British Virgin Islands
Argentina	Hungary	Netherlands	Thailand	Mexico
Austria	Italy ⁵	Panama	Turkey	Spain
Bahamas	Jamaica	Philippines	Turks and Caicos Islands	United Kingdom
Canada	Montserrat	South Korea	Uruguay	*****

⁵The provision of the mutual legal assistance treaty between the United States and Italy dealing with forfeiture (Article 18), however, is not currently in effect.

Forfeiture for Money Laundering Offenses—18 U.S.C. §§ 981, 982, and 984

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The forfeiture statutes for money laundering offenses are very powerful law enforcement tools. All property, real or personal, "involved in" a money laundering offense is subject to both civil and criminal forfeiture. *See* 18 U.S.C. §§ 981-82.

This article discusses what can be forfeited in a money laundering case and summarizes the procedures that govern the forfeiture process. Making a seemingly obvious point is, however, important: the courts will not allow forfeiture under the money laundering statutes unless the government first establishes that someone has committed a money laundering offense.

In a criminal case, that means that forfeiture is available only if the defendant is convicted of at least one count of money laundering. If so, the court requires, as part of the defendant's sentence, forfeiture of the defendant's property involved in the offense. *See* 18 U.S.C. § 982(a)(1).

In a civil case, the government may bring an action directly against the property involved in the offense without having to obtain a criminal conviction. Moreover, civil forfeitures are not limited to the property interests of the person who committed the offense. Additionally, and subject to the applicable innocent owner defenses (as discussed *infra*, the forfeiture of third-party property in money laundering cases is limited by the innocent owner defense in 18 U.S.C. § 981(a)(2)), third-party property involved in the money laundering operation is subject to forfeiture. Nevertheless, the government still must establish that *someone committed a money laundering offense* before the property may be forfeited pursuant to 18 U.S.C. § 981(a)(1)(A).

Keeping these requirements in mind when deciding whether to seek the forfeiture of property under the money laundering statutes is important.

Obtaining a Criminal Forfeiture Order

Proving that someone committed a money laundering offense is, of course, only part of the process. In a criminal case, besides including a money laundering count in the indictment and obtaining a conviction for that offense, the prosecutor must also make sure that the indictment includes a separate forfeiture allegation tracking the language of § 982, and must obtain a special verdict of forfeiture from the jury at the conclusion of the criminal trial. *See* Fed. R. Crim. P. 7(c)(2), 31(e), and 32(d)(2).

A full discussion of criminal forfeiture procedure is beyond the scope of this article, but the prosecutor must be aware of at least the following key points. First, the forfeiture allegation must appear in the indictment. A prosecutor who forgets to include a forfeiture allegation in the indictment, but remembers it at the end of the trial, is out of luck. Despite the mandatory nature of the forfeiture statute, if no forfeiture allegation appears in the indictment, the court has no authority to order forfeiture as part of the sentence for money laundering. *See* Fed. R. Crim. P. 7(c)(2). Also, if the defendant enters a guilty plea, *the defendant has to plead to money laundering*. If, however, there is a plea to something else and the government drops the money laundering count, even if the indictment includes a forfeiture count and the defendant is willing to forfeit the property, the law allows no forfeiture. If the court does not convict the defendant of the money laundering offense, no jurisdiction for the forfeiture exists. *See United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (when substantive money laundering convictions are vacated, forfeitures related to those

counts must be vacated as well). The only thing the prosecutor can do then is to have the defendant agree as part of the plea not to contest a civil forfeiture complaint that the government will file separately.

Finally, the defendant has to be convicted of the money laundering offense that involves the property the government seeks to forfeit. The government cannot convict a person of laundering money out of account A, and then attempt to forfeit the money in account B. *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998) (because the defendant was convicted of using account A to commit the money laundering offense, it was error for the jury to return a special verdict forfeiting property in account B). If the money in account B is the object of the forfeiture, then the government must allege and convict the defendant of a money laundering offense involving the money in that account.

Property "Involved in" a Money Laundering Offense

The statutes governing what is forfeitable in a money laundering case are 18 U.S.C. § 981 (civil forfeiture) and § 982 (criminal forfeiture). When first enacted in 1986, these statutes permitted forfeiture only of the commissions earned by the money launderer. Nevertheless, they were revised in 1988 to permit forfeiture of all "property involved" in a money laundering case, and any property traceable to such property.

To appreciate the scope and breadth of these statutes, it is necessary only to contrast them with other forfeiture statutes that authorize forfeiture of "proceeds" or property used to "facilitate" the crime. *See, e.g., United States v. Hawkey*, 148 F.3d 920 (8th Cir. 1998) (when the defendant is convicted of fraud and money laundering, forfeiture is not limited to what may be forfeited under § 982(a)(2), i.e., fraud proceeds, but includes all property that may be forfeited under § 982(a)(1), i.e., property involved in money laundering).

Forfeiture for currency reporting violations

Forfeiture is available for any of the currency reporting offenses involving CTRs and CMIRs set forth in 31 U.S.C. §§ 5313, 5316, and 5324(a) and (b), respectively. Civil forfeiture for the CMIR offenses is authorized by 31 U.S.C. § 5317. Civil and criminal forfeiture for all of the other CTR and CMIR offenses is authorized by §§ 981 and 982, respectively. Presently no forfeiture for the Form 8300 offenses described in 26 U.S.C. § 6050I exists. However, Congress is considering legislation to close this gap. *See* S.2165, Section 8, 105th Congress, 2d Session (1998). In any event, for all of the Title 31 offenses, the statutes authorize the forfeiture of all property "involved in" the offense.

What property is "involved in" a currency reporting offense? The answer is obvious. For currency reporting offenses—including failure to report, filing false and incomplete reports, and structuring—the court may order the forfeiture of the undeclared or structured currency or any property traceable to it. For example, if someone structures the deposit of \$30,000 into a bank account to avoid the CTR requirement, the government can forfeit the \$30,000. If the money is used to buy a car, it can forfeit the car. *See United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (cars purchased with cashiers checks acquired in structured transaction forfeited); *United States v. Rogers*, 1996 WL 252659 (N.D.N.Y., May 8, 1996).

Application of the Excessive Fines Clause

Unfortunately, the inquiry does not end with the determination that the forfeiture is authorized by statute. Because of the Supreme Court's decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), all forfeitures in money laundering cases must now be read through the filter of the Excessive Fines Clause of the Eighth Amendment. In other words, even if §§ 981 or 982 authorize the forfeiture, the defendant may challenge it on the ground that the forfeiture would be "grossly disproportional to the gravity of the offense."

In *Bajakajian*, the Supreme Court held that full forfeiture of unreported currency in a CMIR case would be unconstitutional unless the currency was involved in another criminal activity. Because reporting violations are inherently less serious offenses, the simple failure to report the exportation of the currency on the CMIR form cannot justify the forfeiture of the full amount. 524 U.S. 321. The same reasoning is likely to apply to CTR cases where no report is filed, or the report is false or incomplete.

Whether *Bajakajian* applies to structuring cases is very much an open question. Good reasons to suggest that structuring be not simply a reporting violation exist: it involves careful planning and repeated conduct—often over a period of time—not a one-time failure to file a form. So it may be that the forfeiture of structured funds is *not* "grossly disproportional to the gravity of the offense," even if the money was untainted by other criminal activity.

But *Bajakajian* certainly applies to some currency reporting cases and, in those cases, the government will either have to establish that the property was involved in another crime, or be prepared to suggest how the court should mitigate the forfeiture to avoid the Eighth Amendment violation. The Supreme Court provided few clues on how much mitigation is necessary in a currency reporting case to make the forfeiture "proportional" to the offense. Where full forfeiture is authorized by statute, however, it seems reasonable that the court would be required to reduce the amount forfeited to the *maximum* amount allowable under the Eighth Amendment, and no further. Moreover, in determining what that amount might be, the court should look to aggravating factors, such as the defendant's efforts to conceal or structure the currency to evade the reporting requirements, his false statements to law enforcement agents and other efforts to obstruct justice, and any evidence that he is a repeat offender.

Property Involved in § 1956 and § 1957 Offenses

What property is involved in a violation of § 1956 or § 1957? The answer is a good deal more complicated than it is for currency reporting cases. At the very least, the term "property involved" includes what was forfeitable under the original statute: the commission earned by the money launderer. If the defendant is a professional money launderer, he may be required to forfeit the fee he or she was paid to launder money for someone else. Based on the legislative history, however, four appellate courts have held that "property involved" should be read broadly to include not just the commissions and fees, but the actual money laundered and any property used to facilitate the money laundering offense. *See United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997) (discussing legislative history of 1988 amendment at 134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988)); *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998) (following *Tencer*); *United States v. Hawkey*, 148 F.3d 920, 927-28 (8th Cir. 1998) (following *Bornfield* and *Tencer*); *United States v. Trost*, 152 F.3d 715 (7th Cir. 1998) (dicta) (legitimate funds may be forfeited if used to disguise illegitimate funds). The cases fall into the four categories described below.

1. The proceeds of the SUA offense

The first category involves the forfeiture of the laundered proceeds of the underlying "specified unlawful activity." For example, in *United States v. Trost*, 152 F.3d 715 (7th Cir. 1998), the defendant was convicted of laundering money stolen from an entity receiving federal funds, i.e., the SUA was a violation of 18 U.S.C. § 666. The defendant deposited at least \$57,000 of the stolen funds into a bank account, transferred \$23,000 of that money to another bank account, and used it for personal expenses. Allegedly the transfer of the \$23,000 to the second bank account was the money laundering offense. Thus, for forfeiture purposes, the property "involved in" the offense included, at a minimum, the \$23,000.

Why is this exciting? If this were a drug case, the forfeiture of the drug proceeds under the money laundering statute would be no big deal. Drug

proceeds, and property traceable to drug proceeds, are forfeitable under the drug forfeiture statutes. In other words, there is no need to go to the trouble of proving a money laundering offense to forfeit the criminal proceeds in that kind of case.

But this was not a drug case, and there is no forfeiture for violations of § 666, or for mail fraud, which was also charged in the indictment. By charging and proving a money laundering violation, however, the government could forfeit the proceeds of the underlying offense because that was the property being laundered. The case law contains many other examples of this use of the money laundering statutes. See *United States v. Ladum*, 141 F.3d 1328 (9th Cir. 1998) (property concealed from bankruptcy court was SUA proceeds and was forfeited as property involved in subsequent money laundering designed to conceal and disguise true ownership); *United States v. Hawkey*, 148 F.3d 920, 927-28 (8th Cir. 1998) (government entitled to a money judgment for the value of fraud proceeds that were subsequently used to buy consumer goods in violation of § 1957).

When considering your forfeiture options, do not forget about the SUA proceeds left behind. Returning to *Trost*, remember that the defendant put \$57,000 in a bank account and transferred \$23,000 somewhere else. The \$23,000 was the subject of the money laundering conviction, and is clearly involved in the offense. But what about the rest of the \$57,000 that the defendant put into the first bank account and left there; is that involved in the offense?

In *Trost*, the defendant objected to the forfeiture of any amount above \$23,000. He argued that the conviction consisted of laundering \$23,000, and not the money left behind in the first bank account. The Seventh Circuit, however, held that when a defendant puts his criminal proceeds in a bank account, and is convicted of laundering some of it by moving it out of that account, the money left behind is also involved in the offense, and therefore subject to forfeiture.

What happens to a forfeiture of the SUA proceeds in a money laundering case if we apply the Excessive Fines Clause? Generally, in Eighth

Amendment cases, the forfeiture of criminal proceeds is not found to be "grossly disproportional to the gravity of the offense." The issue usually arises in cases where we are forfeiting the proceeds directly under a "proceeds" statute. It also applies when we are forfeiting proceeds in a money laundering case. *Ladum*, 141 F.3d 1328 (forfeiture of laundered proceeds of bankruptcy fraud not excessive because forfeiture deprives defendant of property he had no right to retain anyway); *United States v. One 1988 Prevost Liberty Motor Home*, 952 F. Supp. 1180 (S.D. Tex. 1996) (forfeiture of criminal proceeds being laundered, or property traceable thereto, cannot be excessive); *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (forfeiture of entire amount laundered, even though defendant retained only a fraction as his commission, is not excessive because it is "quite rational based on a proportionality analysis").

What about the proceeds left behind in the bank account in *Trost*? That case did not address the Eighth Amendment issue, but it seems that since we are talking about the forfeiture of criminal proceeds, no Eighth Amendment violation occurred.

2. *Commingled money*

Trost says that dirty money left behind in a bank account is money involved in the money laundering offense for forfeiture purposes. What about *clean money* commingled in the bank account and transferred along with the dirty money when the financial transaction occurs?

It is well established that it is not necessary for all of the money involved in a transaction to be dirty money for the transaction to constitute a money laundering offense. See, e.g., *United States v. Rodriguez*, 53 F.3d 1439 (7th Cir. 1995) (purchase of house involved SUA proceeds even though only \$1,000 of \$17,000 payment was drug money); *United States v. Garcia*, 37 F.3d 1359 (9th Cir. 1994) ("it is sufficient to prove that the funds in question came from an account in which tainted proceeds were commingled with other funds"). So, for example, if the defendant puts

\$1,000 in drug money into an account with other money, and then transfers \$17,000 out of the account, the \$17,000 transfer would be a money laundering offense. Here, the property "involved in" the money laundering offense includes the entire \$17,000, not just the fraction that is traceable to the drug offense.

The point is that all "property" involved in the offense is forfeitable; not just all "proceeds" involved in the offense. Contrast this with the forfeiture of proceeds under the drug forfeiture statute, 21 U.S.C. § 853(a). In a drug case, the government may only forfeit the amount traceable to the drug offense. In a money laundering case, however, all property involved in the transaction, including commingled money, is subject to forfeiture.

Now, does the Eighth Amendment limit the scope of what the government can forfeit under this theory? It surely does. If \$1,000 is dirty money and \$16,000 is clean money, a court might find that forfeiture of the full \$17,000, while authorized by the statute, is "grossly disproportional" to the gravity of the offense. Or, it might not. There are cases where the forfeiture of commingled money under the facilitation theory (discussed below) was upheld against an Eighth Amendment challenge. See *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997) (forfeiture of both laundered proceeds and commingled "clean" money under facilitation theory not excessive in light of the amount laundered and duration of the offense). Nevertheless, this is clearly an issue to watch out for.

3. *Property exchanged in the transaction*

If the money laundering transaction is the exchange of SUA proceeds for another piece of property, the other property is "involved in the transaction" as well. So, if the financial transaction is the purchase of a car, a ranch, a motor home, or an airplane, the government can forfeit the purchased item. See *United States v. 657 Acres of Land in Park County*, 978 F. Supp. 999 (D. Wyo. 1997) (ranch purchased with drug proceeds forfeited under § 981 where defendant used cash to

make purchase in false name, thus committing violation of § 1956(a)(1)(B)(i)); *United States v. One 1988 Prevost Liberty Motor Home*, 952 F. Supp. 1180 (S.D. Tex. 1996) (motor home purchased with proceeds of bankruptcy fraud forfeited).

The best recent example of this is *United States v. Hawkey*, 148 F.3d 920 (8th Cir. 1998). In *Hawkey*, the defendant misappropriated \$140,450 in funds intended as charitable contributions and used the money to purchase a number of items for his personal use, including a motor home. He was convicted of mail fraud and money laundering (18 U.S.C. § 1957) and ordered to forfeit \$140,450 (in a money judgment) and the motor home.

The difference between *Hawkey* and *Trost* is that in *Trost*, the transfer of the money from one account to another was the financial transaction. It was a one-way transaction, so there was only one thing to forfeit: the money being transferred (setting aside the issue of the money left behind). In *Hawkey*, on the other hand, there is a two-way transaction: the \$140,450 being transferred as purchase money, and the thing *Hawkey* received in return—the motor home. Obviously, both the purchase money and the motor home were "involved in" the financial transaction.

Now, can the government forfeit either one? Yes, if the motor home has been trashed, has depreciated due to market conditions, or is no longer worth what it was at the time it was purchased, the government can get a money judgment for the full purchase price. As the panel held, the purchase price reflects the amount "involved in" the money laundering offense and is subject to forfeiture even if the defendant's investment turns out to have been unwise. If, however, the government would prefer to take the motor home, and not worry about the money judgment, it can because the motor home was also involved in the money laundering offense.

Suppose the motor home has appreciated in value, can the government forfeit the full value? Or, is the government entitled only to the value of the property when it was involved in the money laundering offense? In *Hawkey*, the Eighth Circuit held that the government was entitled to

appreciated value, with no consideration of whether the appreciation was due to wise investment, effort expended by the defendant, or the infusion of untainted funds. In other words, once the motor home is involved in the money laundering offense, the defendant must forfeit the motor home, not just the portion of the motorhome traceable to underlying SUA proceeds. *See also United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 252 (E.D. Va. 1993) (where § 1956 and § 1957 financial transaction is car payment, car is "involved in" the money laundering offense and is forfeitable in its entirety, even if legitimate funds are used to make other payments).

If the forfeiture were limited to the amount of money involved in the financial transaction, that amount would constitute a cap on the amount the government could forfeit. However, the statute is not limited to the *money* involved in the transaction; it says any "*property involved in*" the financial transaction is subject to forfeiture. When the financial transaction is a purchase or exchange, the property obtained in the exchange is also involved in the offense.

Again, contrast this with forfeiture under a "proceeds" theory. In *United States v. Real Property Located at 22 Santa Barbara Drive*, 1997 WL 420580 (9th Cir. 1997) (Table Case), the defendant committed a money laundering offense when he purchased real property with commingled funds. He was convicted of money laundering, but instead of using § 981 or § 982, the government pursued the forfeiture under the drug proceeds statute, 21 U.S.C. § 881(a)(6). For that reason, only the portion of the property traceable to the drug money was forfeitable. If the government had used the money laundering theory in that case, the entire house would have been subject to forfeiture because the money laundering offense was not dependent on all of the money in the transaction being tainted.

There is, however, an issue of double recovery. In a two-way transaction, if the purchase money is involved in the offense, and the thing being purchased is also involved in the offense, can the government forfeit both? *Hawkey* says no; forfeiting both the purchase money and the

property purchased *from the same defendant* would be double counting. The government can get a money judgment for the amount of SUA proceeds converted to consumer goods, or it can forfeit the property obtained in the exchange, but it cannot forfeit both without improperly doubling the punishment imposed on the defendant.

In other cases, defendants have attempted to make the opposite argument, contending that when they exchange money for goods they are not required to forfeit either, but only the *difference in value* that represents the profit on the exchange. That argument will not fly. For example, in *United States v. Hendrickson*, 22 F.3d 170 (7th Cir. 1994), the defendant gave approximately \$500,000 in legitimately derived gold bars in exchange for \$742,555 in drug proceeds. He argued that the forfeiture should be limited to the \$200,000 profit he made on the sale. The court, however, held that the property involved in the transaction was \$742,555, and the defendant was required to forfeit that amount, not just his profit on the transaction. Again, the defendant may not be forced to forfeit the same property twice, but he cannot protect a portion of the property involved in the offense from any forfeiture at all.

Hawkey would be a different case, of course, if both the buyer and the seller were convicted of money laundering. In that case, forfeiture of the purchase money from the seller and forfeiture of the goods from the buyer would not impose any double punishment on either defendant. The government would, in effect, recover twice, but there is nothing wrong with that as long as the punishments are imposed on different defendants. The point of forfeiture is not to make the government whole, but to make sure the money launderers do not retain any forfeitable property. So, if the effect of the money laundering is to multiply the property subject to forfeiture, it is appropriate to forfeit it all. *See United States v. Check No. 25128 in the Amount of \$58,654.11*, 122 F.3d 1263 (9th Cir. 1997) (Section 881(a)(6) case: government may forfeit the same money more than once if, through the laundering process, the amount subject to forfeiture has multiplied).

How does the Eighth Amendment apply to the forfeiture of the property obtained by a money launderer as part of a money laundering transaction? It seems that if we are talking about a straight swap of money for something of equal value, where all of the purchase money was criminal proceeds, there can be no excessiveness problem. If the forfeiture of the proceeds would not be grossly disproportional to the offense, the forfeiture of property of equal value that was exchanged for the proceeds in the money laundering transaction would not be grossly disproportional either.

If there was clean money commingled with the purchase money, of course, the same Eighth Amendment issues discussed above apply. Likewise, if the property obtained by the money launderer appreciates in value after the money laundering offense, there are Eighth Amendment issues as well.

For example, if the defendant commits a money laundering offense by using SUA proceeds to buy stock, and the stock appreciates 100 times in value, it will all be forfeitable as property traceable to the money laundering offense under *Hawkey*. Nonetheless, defense counsel will surely argue that the forfeiture would be grossly disproportional to the original offense. If the appreciation was due solely to market conditions, that argument would not be very strong. However, it would be significant if the appreciation was due to the defendant's efforts or additional infusions of cash from a legitimate source.

4. *Facilitating property*

So far, we have talked about three theories of forfeiture: 1) the forfeiture of the proceeds being laundered, 2) the forfeiture of commingled property, and 3) the forfeiture of property obtained as part of an exchange for SUA proceeds. Finally, the courts hold that "property involved in" a financial transaction includes property used to facilitate the transaction.

Facilitating property is generally defined as property that makes the offense easier to commit, or harder to detect, but it cannot be property that is tangentially or fortuitously connected to the crime. To the contrary, the courts hold that there must be a "substantial connection" between the property and the criminal offense.

In money laundering cases, prosecutors have run afoul of the substantial connection requirement when they have tried to forfeit property that was entirely external to the financial transaction (e.g., the car used to drive to the place where the money laundering offense was committed). Generally, this tactic will not work, because there is little or no connection between the property (the car) and the financial transaction being charged as money laundering. See *United States v. One 1989 Jaguar XJ6*, 1993 WL 157630 (N.D. Ill. 1993) (not reported in F. Supp.) (automobile used to drive to/from site of money laundering offense is not substantially connected).

The government has successfully forfeited facilitating property, however, where the defendant is charged with conducting a financial transaction with intent to "conceal or disguise" under § 1956, and the property helps the defendant to accomplish that aspect of the offense. In other words, unlike a car that is external to the money laundering offense, property that is used to accomplish one of the elements of the offense—intent to conceal or disguise—is much more substantially connected to the crime and can be forfeited as facilitating property.

The notion of forfeiting facilitating property comes from drug cases like *United States v. Rivera*, 884 F.2d 544 (11th Cir. 1989), where livestock on a ranch used as a cover for a drug

operation was forfeited because it facilitated the drug offense by making the ranch appear to be something that it was not. The same is true in money laundering cases—where the defendant conducts a transaction with intent to conceal or disguise, he often needs to use legitimate property to make the illegal property and the transaction appears to be something that it is not.

For example, if the defendant conceals or disguises the source, location, nature, ownership, or control of criminal proceeds by commingling dirty money with clean money, the clean money is "involved in" the money laundering offense and is subject to forfeiture. The leading case on this point is *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997), which held that the entire balance in a bank account was forfeitable, even though less than half the balance was criminal proceeds, if the purpose of depositing the fraud proceeds in that account was to conceal or disguise the proceeds among legitimate funds. Three other circuits have adopted this reasoning as it applies to bank accounts. See *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998) (forfeiture of legitimate and illegitimate funds commingled in an account is proper as long as the government demonstrates that the defendant pooled the funds to facilitate, i.e., disguise the nature and source of his scheme); *Hawkey*, 148 F.3d 920 (noting that in some instances it may be appropriate to order the forfeiture of an account containing commingled tainted and untainted funds); *Trost*, 152 F.3d 715 (dicta) (legitimate funds may be forfeited if used to disguise illegitimate funds). Other courts have applied it to other kinds of property, including personal property, real property, and businesses. See *United States v. All of the Inventories of the Businesses Known as Khalife Brothers Jewelry*, 806 F. Supp. 648, 650 (E.D. Mich. 1992) (if defendant conceals or disguises dirty money by exchanging it for inventory in his business, and commingling the dirty inventory with the clean inventory, the clean inventory is "involved in" the money laundering offense and is forfeitable); *Hawkey*, 148 F.3d 715 (if defendant had used a personal computer to facilitate the illegal monetary transaction in violation of § 1957, the computer would have been subject to forfeiture as facilitating

property); *United States v. Real Property in Mecklenburg County*, 814 F. Supp. 468, 479-80 (W.D.N.C. 1993) (if defendant hides SUA proceeds by using them to pay for the construction of a building, the building, and the land where it is located, is forfeitable as property involved in the money laundering offense, and the *entire parcel* is forfeitable, not just the portion traceable to the offense); *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 487 (2d Cir. 1995) (business used to sell stolen auto parts and launder proceeds forfeited under § 981).

In discussing the forfeiture of facilitating prop, we have focused on conceal and disguise cases. Can you use the same theory to forfeit "clean" property if the money laundering offense is a § 1957 violation, or a structuring violation? Generally, the answer is no. Clean money in the account into which structured deposits are made is "present at the scene of the crime," but it is hard to see how its presence makes the structuring offense any easier to commit or any harder to detect. So the courts generally hold that clean money in a structuring case is not "involved in" the offense and cannot be forfeited. See *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 447 (E.D.N.Y. 1992) (legitimate funds in bank account do not facilitate structuring; account itself is not subject to forfeiture; cases involving facilitation of § 1956 or § 1957 offenses distinguished).

The mistake we often make is to assume that a money laundering offense automatically taints all of the contents of any bank account involved in the offense. However, it is not the bank account that the government is trying to forfeit; it is *the money* in the account that is subject to forfeiture. A bank account is just an address or routing device. See *United States v. \$488,342.85*, 969 F.2d 474, 477 (7th Cir. 1992). Therefore, we must focus on the money in the account and show how it was involved in the money laundering offense. In a structuring case, when speaking of the "other money" that was simply present in the account when the structuring occurred, this is very difficult to do.

The same is true of § 1957 offenses. For example, if someone moves \$10,000 of dirty money from account A to account B, he has committed a § 1957 offense. Nevertheless, explaining how the clean money in account B when the transaction takes place was "involved in" that offense is difficult. Section 1957 has no "conceal or disguise" element, so the government will have a hard time arguing that the clean money made the § 1957 offense any easier to commit or harder to detect.

So in general, to forfeit facilitating property in a money laundering case, you have to be proceeding with a "conceal and disguise" theory under 1956, and the facilitating money must be "involved" in the concealment.

Obviously, when we talk about forfeiting facilitating property, we are going to have Eighth Amendment considerations. We do not know how *Bajakajian* will affect this analysis. However, before *Bajakajian*, the courts were developing a test that incorporated both a nexus test (taking into account the relationship of the facilitating property to the offense) and a proportionality analysis. In fact, in *Tencer* the court rejected an Eighth Amendment challenge to the forfeiture of facilitating property after taking into account the amount laundered and duration of the offense. In the end, it is likely that the same analysis that applies to facilitating property in drug cases under §§ 881(a)(4), (a)(6), and (a)(7) will apply to property forfeited under the facilitation theory in a money laundering case.

Jury instructions regarding the meaning of the term "property involved in" for purposes of §§ 981 and 982 are available on Asset Forfeiture Online. The leading case on jury instructions for § 982(a)(1) is *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998), which held that it is preferable for the court to define "involved in" as including the money being laundered, commissions retained by the launderer, and facilitating property, but that it is not reversible error if the court fails to do so.

Choosing the Right Transaction

In discussing the various forfeiture theories, I have used examples consisting of simple, single-step transactions. Nevertheless, suppose the defendant conducts a series of transactions, each of which constitutes a money laundering offense. How does the prosecutor decide which one to charge?

For example, a defendant may move the criminal proceeds from one account to another in a series of steps, thereby commingling the proceeds with clean money. At one stage, a business may be used as a cover for the transaction; at another stage, the proceeds may be pooled in a single, large account where they will be concealed among legitimate transactions. Every one of these transactions may constitute a separate money laundering offense, but unless the prosecutor wants an enormous indictment, he or she will need to choose among the various offenses.

Many considerations go into choosing the right transactions to charge as money laundering, and one of them should be to charge the transactions that maximize the amount subject to forfeiture. The government can only forfeit the property involved in the offense of conviction. See *United States v. Bornfield*, 145 F.3d 1123. Nevertheless, the government can take advantage of the rules about forfeiting commingled property and facilitating property in such cases.

Again, in the above example, suppose the defendant mixed in some money from an unknown source along the way, or ran the money through a business? By choosing the right transaction, the prosecutor can forfeit the money from the unknown source or the business and the SUA proceeds, either because he transferred the "clean" money along with the dirty money in a single transaction, or because the clean property was used to facilitate a particular step in the scheme.

Another way to ensure that the defendant forfeits all of the property involved in a money laundering scheme is to use the conspiracy statute, 18 U.S.C. § 1956(h). In other words, instead of bringing an indictment containing a hundred counts to make sure that all of the property involved in the scheme is forfeited, the prosecutor can forfeit all of the money that the defendant conspired to launder, and all the other property involved in the offense, if the defendant is convicted of a § 1956(h) conspiracy. That way, the government can forfeit all of the SUA proceeds, the commingled property, the exchange property, and the facilitating property without charging each offense as a separate count. Remember too, there is no forfeiture for conspiracies charged under 18 U.S.C. § 371.

How to Collect the Forfeiture Judgment in a Criminal Case

Suppose you have your forfeiture theory and you can prove the underlying money laundering offense. As a practical matter, how do you go about recovering the defendant's assets?

Money judgment

First, every money laundering indictment should include a § 982 count seeking a *money judgment* for an amount of money equal to the amount the defendant laundered. For example, in a three count indictment, the government may charge that the defendant laundered \$12,000 on July 1, \$30,000 on July 2, and \$18,000 on July 3. In that case, the § 982 allegation, if nothing else, should say "as a consequence of his conviction on counts 1-3, the defendant shall forfeit a sum of money equal to the number of dollars involved in each count." Also, on the special verdict form, the jury should find that the amount involved in those three offenses was \$60,000. Upon the return of that verdict, the court will enter a judgment in favor of the United States for \$60,000.

A money judgment is just that—a personal judgment against the defendant. It is not necessary for the government to trace the laundered funds to

any specific assets. If the defendant laundered \$60,000, he owes the government \$60,000, in addition to any fine and period of incarceration. *See United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996); *United States v. Sokolow*, 1995 WL 113079 (E.D. Pa. 1995).

The other good thing about money judgments is that they do not trigger any third-party rights, which come into play only when the court orders the forfeiture of specific assets. Because no specific assets are being forfeited in a money judgment, a third-party cannot object to the forfeiture order.

The disadvantage of money judgments is that they do not give the government the right to seize any particular property. Instead, the government can only levy against the defendant's property, or otherwise seek to enforce the judgment under the Federal Debt Collection Act. *See United States v. Voight*, 89 F.3d 1050 (property directly traceable to the offense and substitute assets can be seized, but money judgments do not allow the government to seize anything).

Directly forfeitable property and property traceable thereto

If you can identify and locate the actual property involved in the offense (proceeds, facilitating property), you can seize or restrain it pre-trial or have the Marshals seize it post-verdict. This includes property "traceable to" the actual property involved in the offense. So, if the defendant launders \$500,000 and keeps it in his house, the \$500,000 can be forfeited as property involved in the offense. If he keeps \$250,000, but spends the other \$250,000 to buy a boat, the remaining cash can be forfeited as property involved in the offense, and the boat as property traceable thereto.

Substitute assets

In criminal cases, if you cannot locate the property actually involved in the offense, you can forfeit specific assets up to the value of that property. So, in addition to getting a money

judgment against the defendant (which you have to enforce by levying against the property), you can ask the court to forfeit specific, *untainted* property in substitution for the laundered funds. Once the court orders the forfeiture of substitute assets, the government may seize them.

For example, in *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996), the defendant received \$1.6 million in fraud proceeds and laundered it by transferring the money from account A to account B. The defendant then commingled other money with the fraud proceeds in account B. Finally, the defendant withdrew the money from account B and used it to purchase jewelry. In the end, the defendant was charged and convicted of a money laundering offense based on the movement of the \$1.6 million from account A to account B. In *Voight*, the court's ensuing discussion of what the government was able to forfeit is the best explanation in the case law of the issues just discussed.

First, the court held that the government was entitled to a money judgment for the \$1.6 million. However, the court noted that a money judgment does not give the government the right to seize any particular asset. Second, the court held that the government could recover any directly forfeitable property, or property traceable thereto. If the jewelry were traceable to the laundered funds, it could be forfeited as property "traceable to" the property involved in the money laundering offense. Nonetheless, because of the commingling, the court held that the jewelry was *not* traceable to the money laundering offense. Finally, the court held that the jewelry was forfeitable as substitute assets.

Does it make a difference to the government whether the jewelry in *Voight* was forfeitable only under the substitute assets theory instead of the directly forfeitable theory? Yes. Most courts hold that the authority to restrain property pre-trial with a restraining order does not apply to substitute assets. See *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *In Re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995); *but*

see *In Re Billman*, 915 F.2d 916 (4th Cir. 1990) (pre-trial restraint of substitute assets permitted). Thus, if the jewelry in *Voight* was forfeitable only under a substitute assets theory, it could not be restrained pre-trial to make sure it remained available for forfeiture.

How else could this have been charged to make the jewelry directly subject to forfeiture? If the purchase of the jewelry had been charged as the § 1956 offense, instead of the transfer of the money from account A to account B, the jewelry would have been forfeitable as property obtained in an exchange. That is, it would have been directly forfeitable under the third theory discussed above.

Joint and several liability

Each defendant is jointly and severally liable for the entire amount laundered in each count of conviction. So if defendants A, B, and C are convicted of laundering \$60,000 in counts 1-3, each is liable to forfeit \$60,000. Likewise, if they are all convicted of an overarching conspiracy count, they are each liable for the full amount of the forfeiture. See *United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998) (each defendant is jointly and severally liable for all foreseeable proceeds of the scheme; the government is not required to prove the specific portion of proceeds for which each defendant is responsible; a RICO defendant cannot limit his liability to proceeds of the racketeering acts he was charged with committing personally); *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (government can collect the total amount subject to forfeiture only once, but, subject to that cap, it can collect from any defendant so much of that amount as was foreseeable to that defendant).

Although the government can only collect its money once, it can collect it from any defendant. The only limitation is foreseeability; a defendant cannot be made to forfeit property laundered in parts of the scheme that he or she did not know anything about. However, a defendant cannot be made to forfeit property involved in a substantive count with which the defendant was not charged, or on which the defendant was acquitted.

Note that an interesting issue regarding the application of the Excessive Fines Clause arises when defendants are held jointly and severally liable for forfeiture. The Eighth Amendment generally does not apply to the forfeiture of proceeds. When, however, minor participants are made to forfeit the entire amount realized by a scheme under the doctrine of joint and several liability, there may be an excessiveness issue. Compare *United States v. Van Brocklin*, 115 F.3d 587 (8th Cir. 1997) (money judgment equal to entire amount realized as proceeds of bank fraud scheme is excessive as applied to a minor participant who, unlike her co-defendants, reaped little benefit personally) with *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (holding minor participants, including low-level smurfs, liable for forfeiture of entire amount laundered not excessive because it is "quite rational based on a proportionality analysis").

Intermediaries

Do money judgments and substitute assets forfeitures apply to a person who does not actually retain the dirty money, but is simply laundering it for someone else? What about the smurf who takes dirty money to a bank to buy cashiers checks under \$10,000, and turns the checks over to someone else? Or the defendant who says "give me your dirty money, and I'll trade it for gold for a commission"?

Congress was concerned about the unfairness of applying the substitute assets provision to "intermediaries" who do not retain the money. For that reason, 18 U.S.C. § 982(b)(2) says that substitute assets may not be forfeited from an intermediary who "handled but did not retain" the dirty money, *unless the intermediary conducted three or more financial transactions involving \$100,000 in any 12-month period*. So, if an accountant launders money for a client by giving the client a check in exchange for cash drug proceeds, the accountant is probably a mere intermediary from whom substitute assets may not be forfeited. See *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998) (dicta). Conversely, a

smurf who takes sums of currency to various banks to structure more than \$100,000 in currency on multiple occasions is liable to forfeit substitute assets. See *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (money launderer is liable to forfeit substitute assets equal to the entire amount laundered, even though he held the money only temporarily and retained only a fraction for his fee); *United States v. Hendrickson*, 22 F.3d 170 (7th Cir. 1994) (gold dealer who retained only \$10,000 profit on sale of gold for \$742,555 in drug proceeds required to forfeit \$742,555 in substitute assets because intermediary exception not applicable); *United States v. Saccoccia*, 823 F. Supp. 994 (D.R.I. 1993) (exception not applicable where alleged intermediary was a smurf who was convicted under 31 U.S.C. § 5322(b) for having laundered more than \$100,000 in more than three transactions; leaders of professional money laundering operation are clearly not intermediaries).

Tracing Requirements in Civil Cases

What we have been talking about are things you can force a criminal defendant to forfeit to the government as part of a criminal case once there has been a conviction for money laundering. The other way to use money laundering forfeiture does not require an indictment or conviction at all.

Criminal forfeiture is an *in personam* action against the defendant, but civil forfeiture is an *in rem* action against the property. So, for criminal forfeiture the defendant property owner must be convicted. There is no such requirement in a civil forfeiture. Moreover, criminal forfeiture is limited to the assets of the defendant; the government cannot forfeit from the defendant property that belongs to someone else. In civil forfeiture, it does not matter who the owner is, or whether he or she committed the money laundering offense. Property belonging to a third person is subject to civil forfeiture, if it was involved in a money laundering offense.

Moreover, criminal forfeiture is limited to the offense of conviction. The defendant may have laundered \$100,000 in 10 transactions, but you

can only forfeit property involved in the transactions that result in convictions. Property involved in uncharged transactions can be forfeited civilly, however, because in a civil case you need only show that property was involved in money laundering generally. In civil forfeiture cases, it is not necessary to show that it was involved in a specific offense occurring at a specific time and place.

So you would use civil forfeiture where: 1) the money launderer is dead or is a fugitive; 2) property was involved in money laundering generally, but you cannot identify specific transactions, or you only convict the defendant of a representative sample of the offenses he committed; 3) the property belongs to a third-party (spouse, business partner, corporation) who knowingly allowed it to be used to launder money, or it belonged to a nominee and you are not confident you can prove he or she was only a nominee; or 4) the interests of justice do not require conviction (and higher) sentence for money laundering, but would be satisfied by money laundering forfeiture.

Disadvantages to civil forfeiture

There is a considerable downside to civil forfeitures. As mentioned, one of the great advantages of criminal forfeiture is that it allows you to get a money judgment against the defendant, or to forfeit substitute assets. However, money judgments and substitute assets are creatures of criminal forfeiture only. Because criminal forfeiture is a part of the punishment, and the punishment is *in personam*, the court can order the forfeiture of something other than the property that is directly traceable to the offense in a criminal case.

Because civil forfeitures are *in rem*, there is no logical way to seek the forfeiture of something of equivalent value if the property traceable to the offense is unavailable. The property is the defendant in the civil case, so substituting other property of equal value in a civil forfeiture case would be akin to prosecuting someone of equal value in a criminal case if the defendant were

unavailable. Generally then, in civil forfeiture cases, if you cannot identify the property directly involved in the money laundering offense, or property traceable thereto, you cannot do the forfeiture.

18 U.S.C. § 984

The distinctions between criminal and civil forfeiture lead to a problem: suppose \$10,000 in laundered funds are put in a bank account on Monday, and federal agents seize the account for civil forfeiture on Friday, when the balance is again \$10,000. In between, on Wednesday, the account balance dropped to zero. In general, in civil forfeiture cases, a court would hold that the \$10,000 you seized on Friday is not the same money as the laundered funds that were placed in the account on Monday. Therefore, you could not forfeit the \$10,000.

In 1992 Congress resolved this problem to some extent in money laundering cases by enacting § 984. That statute says that where fungible property (money in a bank account) is concerned, a dollar in a bank account today is considered the same as any dollar that was in the same bank account at any time in the past year. Therefore, if you seize the money in a bank account, you can forfeit an amount equal to the amount that would have been forfeitable from the same account under *any* money laundering theory in the past year, notwithstanding the fluctuating balance in the account. *See Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119 (2d Cir. 1993) (under 18 U.S.C. § 984, government need not satisfy tracing requirement in money laundering cases where bank account is seized within one year of date when laundering offense occurred); *United States v. United States Currency Deposited in Account No. 1115000763247*, 1998 WL 299420 (N.D. Ill. 1998) (once the government has established probable cause to believe that the amount of money laundered through a bank account in the past year exceeds the balance in the account at the time of seizure, the entire balance is subject to forfeiture under § 984).

For example, suppose \$100,000 in dirty money is laundered by depositing it in a bank account and commingling it with \$500,000 in clean money. Using the conceal or disguise theory, we could forfeit the \$100,000 plus the clean \$500,000 as property involved in the money laundering offense. Suppose, however, that by the time the government was ready to act, the balance in the account dropped to zero and then rose back up to \$600,000. Using § 984, we can forfeit any fungible property found in the account up to the amount that would have been forfeitable under any money laundering theory in the past year. So we could forfeit the entire \$600,000 under § 984.

Third-Party Objections to Money Laundering Forfeitures Standing

My final point concerns objections raised by third parties who claim that the laundered money belonged to them, not to the defendant. Often, money launderers are laundering someone else's money. If you convict the money launderer, does the third-party (the customer) have standing to object to the forfeiture?

Third-party rights come up in different ways in criminal and civil cases. In a civil case, the third-party simply contests the *in rem* forfeiture. In a criminal case, after you convict the money launderer and obtain a forfeiture judgment, the third-party can file a claim in the post-trial ancillary proceeding, and seek to have the forfeiture order amended or vacated. In both instances, the standing issue is the same: whose money are we forfeiting, the launderer's or his customer's?

The courts are presently divided on this complex topic. The majority hold that once a customer turns his money over to a money launderer, he no longer has title to the money and therefore cannot contest the forfeiture. *See United States v. All Funds on Deposit . . . in the Name of Kahn*, 955 F. Supp. 23 (E.D.N.Y. 1997) (customers who gave money transmitter money to transfer to relatives in Pakistan lack standing to contest forfeiture of transmitter's bank accounts under §§ 981 and 984, where transmitter was

using those accounts to launder drug money). One court has held that the money launderer is only a bailee and his customer, the bailor, has standing to object to the forfeiture while the launderer does not. *See United States v. All Funds on Deposit . . . Perusa, Inc.*, CV-96-3081 (E.D.N.Y., Jun. 18, 1997).

Innocent owner defense

There is one key difference between civil and criminal forfeitures regarding third-party rights. In criminal cases, the third-party only has to show a superior interest in the property. In civil cases, the claimant has to establish that he or she is an innocent owner. An innocent owner under § 981 is a person who lacks knowledge of the underlying criminal act. To defeat this defense, it is sufficient to show that the person knew the defendant was laundering money. *See United States v. Rogers*, 1996 WL 252659 (N.D.N.Y. 1996) (innocent owner defense rejected where claimant was present when defendant used structured cashiers checks to purchase car). The government does not have to show that the defendant knew money laundering was illegal. If, however, the claimant succeeds in showing lack of knowledge, that is enough. Unlike drug cases, § 981(a)(2) lacks a "consent" prong; therefore the claimant is not required to show he took all reasonable steps to prevent the use of his property in illegal activity. *See United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996).

Conclusion

The forfeiture statutes for money laundering offenses are very powerful law enforcement tools. If used judiciously, with careful attention to the legal and procedural requirements that apply, they can make it possible to strike a significant blow at the financial resources of criminals and their organizations. ~

ABOUT THE AUTHOR

' **Stefan D. Cassella** is an Assistant Chief in the Asset Forfeiture and Money Laundering Section (AFMLS). He has been a prosecutor since 1979. He came to the Department of Justice in 1985 and has been involved in forfeiture and money laundering issues since 1989. He handles civil and criminal forfeiture cases, lectures at training conferences on many aspects of money laundering and forfeiture law, and is responsible for legal advice, policy, and legislative issues for the Department. He handled the criminal forfeiture of the assets of Bank of Credit and Commerce International, for which he received the John Marshall Award. He has published four law review articles on forfeiture and is the editor of *Quick Release*, the Department's forfeiture newsletter. From 1987-89, he served as Senior Counsel to the U.S. Senate Judiciary Committee, working directly for the committee Chairman, Senator Joseph Biden, Jr. He received his Bachelor of Science degree from Cornell University and his law degree from Georgetown University. a

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