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AN INDEPTH ANALYSIS OF THE NEW MONEY LAUNDERING STATUTES

by

PETER J. KACARAB

INTRODUCTION

It can be argued very strongly that the major motivation behind the criminal organizations and, for that matter, most criminal activity is that of the "almighty dollar". An analysis of the drug trade and its promise of quick wealth is a case in point. Historically, Congress, along with the fifty states, in line with the cannons of Western criminal law, have passed statutes proscribing the specific illegal activity. The current crime situation, evidenced by the current war on drugs, shows that this approach has not been terribly successful in deterring criminals and the rise of sophisticated criminal organizations.

However, Congress, in acknowledging the situation, has, for the first time (notwithstanding possibly the RICO statutes and application of the tax laws) passed statutes which do not specifically proscribe the criminal's activity; i.e., narcotics distribution, but criminalize financial transactions conducted by the criminal with the proceeds he has derived from the illegal activity. In short, these statutes target the criminal and his cronies' "Achilles heel"; i.e., the money earned from the illegal activity. These new statutes basically criminalize any transaction in which the criminal spends his illgotten gains in promoting his illegal activity, or which amounts to an act consistent with tax evasion, or which involves falsification of his tax return, or concealing or disguising the nature, location, or source of the illegal income. In fact, one of the statutes does not even require him to conduct a transaction for a bad purpose. If the criminal takes some of his illegal income and buys a car, jewelry, stocks, or any other luxury item whose price is greater than $10,000, the criminal has committed a felony. Under these new statutes he can be prosecuted for substantial felonies, consisting of maximum penalties ranging from ten to twenty years in prison per transaction. In addition, Federal government can use these new laws to seize all the assets he has acquired with his illegal income. In promulgating these new statutes, Congress went one step further and included within the ambit of these statutes anyone who deals in any financial transaction with the criminal, knowing the money involved in the transaction came from the criminal's illegal activity.

* The author is a special agent with the IRS Criminal Investigation Division. This article does not represent the position of the IRS Criminal Investigation Division, the Treasury Department, or the Department of Justice. This article represents solely the author's own interpretation of the money laundering statutes, and in no way reflects any official position of the above-named agencies and departments of the United States Government. The article was written in December, 1990.
This article will analyze in depth the elements, application, and limitation of these statutes. It is the author’s intent that the reader, after digesting the following pages, will come away with an understanding of the statutes and have an appreciation that these laws, although not a panacea, can be a powerful new tool for the Federal government in its war against crime.

A BRIEF OVERVIEW OF THE NEW MONEY LAUNDERING STATUTES

Money laundering is the process whereby illegally obtained monies are “washed” so as to give the appearance of legitimately obtained income. It can be accomplished in a myriad of ways. The Money Laundering Controls Act of 1986 created offenses which heretofore never existed.1 Crimes which were previously described as “money laundering” were violations of the currency transaction reporting requirements. Previous laws criminalized schemes to circumvent the currency transaction reporting requirements, which require cash transactions in excess of $10,000 conducted with financial institutions or casinos, or the transportation of cash into or out of the United States to be reported to the Secretary of the Treasury.2 The new offenses created by the Money Laundering Control Act of 1986 are entirely different from the currency transaction reporting requirements.3 They cover a greater variety of transactions and are not limited to cash transactions as are the CTR (currency transaction report) requirements. The new money laundering statutes are aimed to hurt the criminal, with the greatest impact, by hitting the criminal in his pocketbook.

Not only do the new offenses provide stiff penalties -- a maximum of ten to twenty years imprisonment per violation along with substantial fines -- they contain forfeiture provisions which enable the government to seize assets acquired through proceeds derived from certain illegal activities.4 In addition to the statutes providing

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4 18 U.S.C.S. § 1956(a)(1)-(a)(2) (Law. Co-op 1990). These subsections provide that any one convicted under this statute “shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than 20 years or both.” 18 U.S.C. § 1956(a)(3) provides that a person may be fined under this Title setting a specific limit as to the fine.
stiff penalties, fines, and forfeiture provisions for the criminal, the new money laundering statutes also apply to persons who assist the criminal in continuing his illegal activity by accepting money from criminal which that person knows to be derived from an illegal activity, in exchange for goods or services. In short, these offenses are intended to make the criminal’s profits worthless by putting other persons on notice that if they knowingly conduct transactions with the criminal by accepting “dirty money” from him, they may be just as liable as the criminal himself. In short, by these statutes, Congress wanted to create a Federal offense against the laundering of illegal income which would authorize the government to forfeit assets and profits of criminals and professional money launderers, to give Federal law enforcement greater tools to investigate organized crime which requires the use of professional money launderers, and to promote stiffer penalties so as to deter the number of persons willing to engage in money laundering.

The overall intent of Congress in passing the Money Laundering Control Acts of 1986 can clearly be shown by the following statement:

The subcommittee is aware that every person who does business with a drug trafficker, or any other criminal does so at some substantial risk if that person knows they are being paid with the proceeds of a crime and then uses that money in a financial transactions. As argued by Mr. Shaw, “I am concerned about a broker who might take a quarter million dollars of cash down to Fort Lauderdale taking that as payment. I am concerned about a realtor who is going to make a $50,000 to $100,000 commission on a deal by knowingly doing it. I am sick and tired of watching people sit back and say, “I am not part of the problem, I am not committing the crime, and therefore, my hands are clean even though I know the money is dirty that I am handling. The only way we will get at this problem is to let the whole community, the whole

18 U.S.C. §§ 981-82 (1990). These statutes provides for the civil and criminal forfeitures relating to but not necessarily involving money laundering. Subsection 981(a)(1)(A) makes civilly forfeitable any real or personal property that represents the gross receipts a person obtained, directly or indirectly as a result of a violation of 18 U.S.C. § 1956 or 1957 or which is traceable thereto. Subsection 981(a)(1)(B) provides that the United States may civilly forfeit property in the United States which represents the proceeds of a violation of a foreign drug law, and such violation would be a U.S. felony and such felony occurred within the jurisdiction of the United States. Subsection 981(a)(1)(C) makes forfeitable any coin or currency or other monetary instrument described by the Secretary of the Treasury, or property traceable thereto, involved in a transaction or an attempted transaction in violation of 31 U.S.C.S. § 5313(a) (currency transaction reporting requirement) or § 5324 (prohibiting the structuring of financial transactions. Forfeitures are not allowed if the violation giving rise to the forfeiture is by certain regulated banks or brokerage firms.


population, know they are part of the problem and they could very well be convicted of it if they knowingly take these funds. If we can make a drug dealers money worthless, then we have really struck a chord, and we have hit him where he bruises, and that is right in the pocketbook... You have outstanding business people who are otherwise totally moral who are accepting these funds and profiting greatly from drug trafficking that is going on throughout this country, and this will put a stop to it.

Because these are new Federal offenses, we do not have the luxury of an established body of case law to assist in analyzing their provisions. We must look to legislative history, as well as related case law and statutes, and analyze those few cases which have tested the law, to assist in interpreting the new money laundering statutes. The remainder of this section is a brief overview of the new money laundering statutes.

18 U.S.C. § 1956 criminalizes almost any dealings a person might have with the proceeds of a wide range of "specified unlawful activities" on the concealing or disguising of the source, ownership, location, or nature of the proceeds of such activity. Sections 1956(a)(1) and (a)(2) are the core of the provision. Subsection (a)(1) discusses laundering violations of illegal proceeds within a domestic context. Subsection (a)(2) discusses laundering violation of proceeds from a specific illegal activity when such proceeds are transported between the U.S. and other foreign countries or vice-versa. Section 1956(a)(3) was added in 1988 to provide for "sting" operations by government agents. Prior to this amendment, sting operations involving government money could not be brought under § 1956 because of § 1956(a)(1), which requires the proceeds be "in fact" from a specified illegal activity.

Section 1956(b) provides for a civil penalty and will be only briefly discussed in this paper. Sections 1956(c) sets forth many of the definitional terms of § 1956 and must be referred to in interpreting § 1956(a)(1), (2), and (3). Sections 1956(d), (e), and (f) address the effects of other statutes, agency investigative responsibilities, and extraterritorial jurisdiction, respectively.
18 U.S.C. § 1957 criminalizes any "known" monetary transaction or attempted monetary transaction in criminally derived property when the following three factors exist: 1) the amount of the transaction is over $10,000; 2) a "financial institution is involved at some point, and; 3) the property is derived from a "specified" unlawful activity. Section 1957 does not require that the property be used for any additional criminal purpose or that Government prove the defendant knew that the offenses from which the criminally derived property was from a specified unlawful activity. \(^{15}\)

Subsections (c), (d), and (e) amplify and refine the basic premise of § 1957(a).\(^{16}\) Section 1957(f) sets forth definitional terms and must be referred to in interpreting § 1957(a).\(^{17}\)

**AN ANALYSIS OF THE ELEMENTS OF THE MONEY LAUNDERING OFFENSES**

**The Four Core Elements of § 1956(a)(1): The Laundering of Domestic Transactions**

1. The First Element: Knowledge

The first element that must be proven by the government in order for it to obtain a conviction for money laundering § 1956 is that the defendant had the requisite knowledge; i.e., he knew the property involved in a financial transaction represented the proceeds of some form of unlawful activity. The government must prove beyond a reasonable doubt that the person conducting one end of the transaction knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity.\(^{18}\)

The question is, what standard should be used for defining "knowledge", in the sense that the defendant "knew" the money involved in the transaction came from or represents the proceeds of an unlawful activity? Congress debated this issue at some length and settled on the standard of scienter rather than a "reason to know" standard or a "reckless disregard" standard.\(^{19}\) However, the scienter requirement that Congress adopted is broad enough to include actions of "willful blindness."\(^{20}\) For example, if a real estate agent participates in selling a house to a person whom he knows is reputed to be a drug dealer, and the dealer gives the agent his commission in cash and pays for the home at the time of closing with a suitcase full of cash, the agent would not be able to escape conviction for money laundering by simply saying he did not "know" for sure that the cash came from a crime. It should also be noted


\(^{16}\) 18 U.S.C.S. § 1957(c), (d), (e) (Law. Co-op 1990).


\(^{20}\) S. REP. No. 433, supra note 6, at 9-10. The Senate Report commented at length regarding the scienter
that the drug dealer himself could be convicted for money laundering since he knew better than anyone else that the cash used to purchase the home was the proceeds from

standard. The following is an excerpt of that discussion:

Section 1956(a)(1)--employs a scienter standard of "knowing" rather than "reason to know" or reckless disregard. In fact, it has two "knowing" requirements in order to prove a violation of the offense, the government must show not only that the defendant knew the property involved in a transaction was the proceeds of a crime but also that the defendant intended to facilitate a crime or knew that the transaction designed to conceal the proceeds of a crime.

The "knowing" scienter requirements are intended to be construed, like existing "knowing" scienter requirement to include instances of "willful blindness." See United States v. Jewel, 532 F.2d 697 (9th Cir. 1976), cert. denied, 428 U.S. 951 (1976). Thus, a currency exchanger who participates in a transaction with a known drug dealer involving handlers of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction from the first tier offense, simply by claiming that he did not know for sure that the currency involved in the transaction was derived from crime. On the other hand, an automobile car dealer who sells a car at market rates to a person whom he merely suspects of involvement in crime, cannot be convicted of this offense in the absence of a showing that he knew something more about the transaction or circumstances surrounding it. Similarly, the "intent to facilitate" language of the section is intended to encompass situations like those prosecuted. The aiding and abetting statute in which a defendant knowingly furnishes substantial assistance to a person whom he or she is aware will use that assistance to commit a crime. See, e.g., Backun v. United States, 112 F.2d 635 (4th Cir. 1940).

See also H.R. Rep. No. 855, supra note 7 at 13-14. The House Judiciary Committee also debated the knowledge standard at length. The following comment reveals how the House Judiciary Committee thought the knowledge standard should be interpreted. The following is an excerpt from the committee report pertaining to the knowledge standard:

The corner grocer in a small community is aware of the reputation of a person who is the local drug trafficker. That person comes to the store and buys five pounds of hamburger. The grocer takes the cash and deposits it in his bank account with the other receipts. The financial transaction is the act of the grocer depositing his days receipts in his bank account. The question is whether the grocer is guilty of violating this branch of the offense.

As Mr. McCollum observed, "You [the grocer] have to know what he is coming into buy groceries with is indeed the money derived from a particular designated crimes and to get to that point, you would have to prove to a jury [that the grocer knew that] the fellow had no other source of income or that [if] he had - the grocer had some more direct knowledge that this fellow had no other source of income or that [if] he had - the grocer had some more direct knowledge that this fellow was just standing outside on that street corner before he came in peddling drugs, like the grocer say him doing it. [Under those circumstances] I don't have any problem whatsoever holding the grocer accountable if he sees the guy [the trafficker] outside dealing in drugs and takes cash and walks into his store.

Mr. Lundgren stated his understanding of the committee's use of the term "knowingly, it is a "knowing" standard. It think it is repetitive of what Mr. McCollum said, but I think it is extremely important. It is not, "should have known, might have known, a reasonable person would have know, it is this person know the source of the income." Mr. Lundgren, in reiterating the importance of this branch of offense said, "It is time for us to tell the local trafficker and everyone else, "If you know a person is a trafficker and has this income derived from the offense, you better beware of dealing with that person.

See also U.S. v. Jewel, 532 F.2d 697 (9th Cir. 1976), cert. denied, 426 U.S. 951 (1976).
an unlawful activity.\textsuperscript{21} This example should be contrasted with a person who merely "suspects" that the person with whom he is transacting business is involved in a criminal conduct. This person cannot be convicted of money laundering without the government showing that he "knew" about the nature or purpose of the transaction.\textsuperscript{22}

Section 1956(c)(1) defines "knowing" in such a manner as to prevent a defendant from raising the defense that he of she did not know that the proceeds involved in the transaction were from a "specified unlawful activity" as defined by § 1956(c)(7), or that the defendant thought it was from a different illegal source or a source not made illegal by the term "specified unlawful activity" as defined by § 1956(c)(7). All the government is required to show is that the defendant knew that proceeds involved in the transaction were from some form of unlawful activity. The government is not required to show that defendant knew the specific form of unlawful activity from which the proceeds involved in the transaction were derived.\textsuperscript{23}

2. The Second Element: The Conduct or Attempt to Conduct a Transaction

The second element to be considered under § 1956(a)(1) is that the defendant "conducts or attempts to conduct such a financial transaction."\textsuperscript{24} Section 1956(c)(2) defines the term "conducts or attempts to conduct" to include initiating, concluding, or participating in initiating or concluding a transaction.\textsuperscript{25} From this language it is apparent that Congress intended the statute to apply not only to the "initiator" of a transaction, who usually knows that the money involved in the transaction came from an unlawful activity, (it should be noted that the initiator of such transactions is very often the drug dealer or principal criminal himself), but also to the other participant in the financial transaction, pursuant to the requirement that he also know the property involved in the transaction represents proceeds from an unlawful activity.\textsuperscript{26} This construction by Congress of the meaning of "conducts or attempts to conduct" through § 1956(c)(7) includes virtually any person involved in the financial transaction, knowing that the funds involved are "dirty", i.e. came from an unlawful activity.

It should also be noted that Congress intended the new money laundering offense to include inchoate offenses by incorporating into § 1956(a)(1) the language "attempts to conduct."\textsuperscript{27} An example of an inchoate offense under § 1956 might be

\textsuperscript{21} S. Rep. No. 433, supra note, at 10.
\textsuperscript{22} Id. at 10.
\textsuperscript{23} 18 U.S.C.S. § 1956(c)(1) (Law. Co-op 1990). Subsection (c)(1) defines the term "knowingly that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" to mean that the person knew the property involved in the transaction represented proceeds from some form, of activity that constitutes a felony under State of Federal law, regardless of whether or not such activity is a "specified unlawful activity" as defined by Subsection 1956(c)(7). See also 18 U.S.C.S. Section 1956(c)(2)(Law Co-op 1990); S. Rep. No. 433, supra note 6, at 11.
\textsuperscript{26} S. Rep. No. 433, supra note 6, at 12. See also H. Rep. No. 855, supra note 7, at 13-14.
where the government, through an undercover operation, obtains evidence that a jeweler or other businessman has agreed with a drug dealer to launder drug profits through his business. Suppose the actual laundering of drug profits never occurs, due to the drug dealer being arrested or the government shutting down the undercover operation through sufficient evidence to bring substantive narcotics and money laundering charges against the drug dealer and various other persons. Even though the businessman never "laundered" any money for the drug dealer, he may, through the "attempt" language of the statute, be charged with money laundering under § 1956(a)(1).

3. The Third Element: Financial Transaction

The third element of §1956(a)(1) is the term "financial transaction." Section 1956(c)(4) defines the term "financial transaction" very broadly. It includes transactions which involve: 1) the movement of funds by wire or other means; 2) one or more monetary instruments which in any way or degree affects interstate or foreign commerce; or 3) a transaction involving the use of a financial institution which affects interstate or foreign commerce in any way. A close reading of subsection (c)(4), defining "financial transaction," informs one that within it are many terms which must first be understood so as to fully understand its meaning and relation to § 1956(a)(1). The several definitional terms which must be analyzed are funds, monetary instruments, affecting interstate or foreign commerce in any way or degree, financial institution, and transaction. Section 1956(c)(4) has as one of its definitions of a financial transaction the, "movement of funds by wire or other means". The meaning of funds is not defined at all by Congress, or in the legislative history of the Money Laundering Control Act of 1986.

Although not stated in the legislative history, one may assume by the construction of the sub-definition that "movement of funds" was intended to cover all forms of wire or other electronic transfers. The remaining subpart of this definition of financial transaction, "or other means", would therefore refer to movement of funds only by other than wire or electronic means or transfers.

Section 1956(c)(5) defines the term "monetary instruments", to include any coin or currency of the United State or any other country, along with almost any other kind of negotiable instrument, such as personal, bank, and traveler's checks, money

28 18 U.S.C.S. § 1956(c)(4) (Law. Co-op 1990). Subsection (c)(4) states: The term financial "transaction" means a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way shape or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in or the activities which affect, interstate or foreign commerce in any way or degree.


31 Id. at 63-64.
orders, and bearer and nonbearer investment securities, and other negotiable
instruments. Monetary instruments are intended as a subset of the term property
as used in § 1956(a)(1) and must be construed liberally to encompass any form of
tangible or intangible assets.

Section 1956(c)(4) requires as part of its definition of a “financial transaction”
that a transaction, monetary instrument or wire or other transfer of funds, “affect
interstate or foreign commerce in any way or degree.” This requirement of
affecting interstate or foreign commerce is taken from the Hobbs Act, Title 18 U.S.C.
Section 1951. This term under § 1951 is intended to reflect the full force, exercise,
and reach of Congress’ powers as provided under the Commerce Clause of the
United States Constitution. For example, if proceeds from an unlawful activity
were used to purchase a residence, such a transaction would be covered under the
term, “affect interstate or foreign commerce in any way or degree”, if it could be
shown that any of the materials from which the house was built can be shown to have
come from out of state. Section 1956(c)(6) defines “financial institution as having
the same meaning as defined in 31 U.S.C. § 5312 and regulations promulgated
thereunder. Section 5312(a)(2) and its interpretive regulations define a financial
institute very broadly to include a Federally insured bank, a pawn broker or single
individual. Such a broad definition was intended in order to reach professional
money launderers.

Section 1956(c)(3) defines the term, “transaction” to include all manner of
dealing which encompass such ordinary occurrences as a purchase, sale, loan,
pledge, gift, transfer, delivery, or other disposition. It also defines a “transaction”
with respect to a financial institution as an ordinary transaction in which one would
engage in with a financial institution, such as a deposit, withdrawal, transfer of
money between accounts, exchange of currency, loan, extension of credit or
purchase of securities through a financial institution, as well as a number of other

Delaware 1980), stating the “affect of interstate commerce” is judged by examining the overall activity of
the parties involved in commerce” is judged by examining the overall activity of the parties involved in the
transactions; United States v. Phillips, 577 F.2d 495 (9th Cir. 1978), only a de minimus effect on interstate
commerce is necessary to invoke jurisdiction under the Hobbs Act, and the effect need only be probably and
potential, not actual.
36 U.S. Const. art. I § 8, cl. 3. See Perez v. United States, 402 U.S. 146 (1971) stating that when Congress
exercises its authority under the Commerce Clause, it has made a determination that activities regulated
affect interstate commerce.
v. Critchley, 333 F.2d 338 (3d Cir. 1963); United States v. Stasznuk, 502 F.2d 875 (7th Cir. 1974), cert.
103.11 (1989).
miscellaneous transactions one may have with a financial institution.\textsuperscript{40}

It is interesting to note the above definition of "transaction" by § 1956(c)(3) defines "transaction" to mean transaction in conjunction with a financial institution and also as a transaction not involved with a financial institution. Congress did this intentionally so as to include almost any conceivable type of transaction known within the ambit of this statute. Section 1956(c)(3), defines the term "financial transaction" as not limited to transactions simple involving financial institutions. A financial transaction includes all forms of commercial activity with the only requirement being that the transaction must "affect interstate or foreign commerce or be conducted through or by a financial institution which is engaged in or the activities of which affect interstate or foreign commerce in any way or degree.\textsuperscript{41} Therefore, the important requirement in regard to a "financial transaction" is that the transaction, whether through a financial institution or not must affect interstate commerce in any way or degree.

This definition of financial transaction shows the extent and reach Congress intended the money laundering statutes to have. Under these definitions of financial transaction and transactions, if an individual merely transfers illegally derived money to another individual, whether or not that money ever finds its way into a financial institution, the person may have engaged in a "transaction" as defined by § 1956(c)(3) and which would comply with the first requirement of § 1956(a)(1). If all other requisite elements of that section are met, that person may be convicted of money laundering under § 1956.\textsuperscript{42} It should also be noted that each transaction involving dirty money is intended to be a separate offense, no matter what the dollar amount of the transaction, so long as the other requisite elements of § 1956(a)(1) are met.\textsuperscript{43}

\textsuperscript{40} 18 U.S.C.S. § 1956(c)(3) (Law. Co-op 1990). The term "transaction" is defined by subsection (c)(3) as follows: "The term 'transaction' includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition. . . . ." Subsection (c)(3) also states: "That the term 'transaction' includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected. . . . ."

\textsuperscript{41} S. REP. No. 433, supra note 6, at 13. See also 18 U.S.C.S. § 1951 (Law Co-op 1990).


\textsuperscript{43} U.S. B. Kattan-Kassin, 696 F. 2d 893 (11th Cir. 1983) regarding indicting the defendant on separate counts for each transaction. See also S. REP. No. 433, supra note 6, at 12-13. The following is an example as to each transaction being a separate offense: "It should be noted that each transaction involving dirty money is intended to be a separate offense. For example a drug dealer who takes his $1 million in cash from a drug sale and divides the money into smaller amounts and deposits it in 10 different banks (or in 10 different branches of the same bank) has created 10 district violations of the new statute. If he then withdraws some of the money and uses it to purchase a boat or condominium he will have committed two more violations, one for the withdrawal and one for the purchase of the boat or condominium."
4. The Fourth Element: Proceeds In Fact of Specified Unlawful Activity

The fourth element of § 1956(a)(1) is the requirement that the government prove that the proceeds which were involved in the transaction were "in fact the proceeds of a specified unlawful activity." This element will be the limiting factor in the application of § 1956 to drug dealers, other criminal activity, and money laundering organizations, for three reasons. First, definition of a "specified unlawful activity", does not encompass all unlawful activity. Second, there is a jurisdictional limitation, and third is the requirement that the Government prove that the funds are "in fact the proceeds of a specified unlawful activity."

To understand the fourth element of § 1956(a)(1), we must first analyze exactly what a specified unlawful activity is. Section 1956(c)(7) defines the term "specified unlawful activity" to include: 1) any RICO predicate offense as defined by 18 U.S.C. § 1961(1) except for acts indictable under the Currency and Foreign Transactions Reporting Act; 2) any foreign narcotics violations; 3) any act or acts constituting a criminal enterprise, as defined by 21 U.S.C. § 848; and 4) any of the enumerated criminal activities listed under § 1956(c)(7)(D).

45 18 U.S.C.S. § 1956 (c)(7) (1990). This subsection reads as follows:

the term "specified unlawful activity" means

(A) any act or activity constituting an offense sisted in indictable under the Currency and Foreign Transactions Reporting Act;
(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);
(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848); or
(D) an offense under § 152 (relating to concealment of assets; false oaths and claims; bribery), § 215 (relating to commissions or gifts for procuring loans), any of §§ 500 through 503 (relating to certain counterfeiting offense), § 513 (relating to securities of States and private entities), § 542 (relating to entry of goods by means of false statements), § 545 (relating to smuggling goods into the United States), § 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), § 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), § 657 (relating to lending, credit, and insurance institutions), § 658 (relating to property mortgaged or pledged to farm credit agencies), § 666 (relating to theft or bribery concerning programs receiving Federal funds), § 793, 794, or 798 (relating to espionage), § 875 (relating to interstate communications), § 1201 (relating to kidnapping), § 1203 (relating to hostage taking), section 1344 (relating to bank fraud), or § 2113 or 2114 (relating to bank and postal robbery and theft) of this title, § 2319 (relating to copyright infringement), § 310 of the Controlled Substances Act (21 U.S.C. 830) (relating to precursor and essential chemicals), § 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), § 1822 of the Mail Order Drug Paraphernalia Control Act (100 Stat. 3207-51; 21 U.S.C. 857) (relating to transportation of drug paraphernalia), § 38(c) (relating to criminal violations) of the Arms Export Control Act (22 U.S.C. § 2778(c)), § 11 (relating to violations of the Export Administration Act of 1979 [50 USC Appx. 5205(c)])
Even upon a cursory reading of 18 U.S.C. § 1961(1), and subparagraph (D) of § 1956(c)(7), one can see that Congress meant for these money laundering statutes to encompass almost any conceivable type of criminal activity which is proscribed by Federal law. The criminal activities which will equate with a “specified unlawful activity” include murder, gambling, prostitution, bank fraud, bribery, welfare fraud, securities fraud, and narcotics trafficking, just to name a few.46 The only major criminal activities conspicuously absent are tax evasion and the currency and foreign transaction reporting violations. The reason for these exceptions is that there are no identifiable proceeds under either 31 U.S.C. §§ 5311 through 5326 or the income tax law violations under 26 U.S.C. § 7201 and the following sections following it.

§ 2410], § 206 (relating to penalties) of the International Emergency Economic Powers Act [50 USCS § 1705], or section 16 (relating to offenses and punishment) of the Trading with the Enemy Act [50 USCS Appx. § 16].]


(1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code [18 USCS § 1 et seq.]: § 201 (relating to bribery), § 224 (relating to sports bribery), § 471, 472, and 473 (relating to counterfeiting), § 659 (relating to theft from interstate shipment) if the act indictable under § 659 is felonious, § 664 (relating to embezzlement from pension and welfare funds), §§ 891-894 (relating to extortionate credit transactions), § 1029 (relating to fraud and related activity in connection with access devices), § 1084 (relating to the transmission of gambling information), § 1341 (relating to mail fraud), § 1343 (relating to wire fraud), § 1344 (relating to financial institution fraud), §§ 1461-1465 (relating to obscene matter), § 1503 (relating to obstruction of justice), § 1510 (relating to obstruction of criminal investigations), § 1511 (relating to the obstruction of State or local law enforcement), § 1512 (relating to tampering with a witness, victim, or an informant), § 1513 (relating to tampering with a witness, victim, or an informant), § 1951 (relating to interference with commerce, robbery, or extortion), § 1952 (relating to racketeering), § 1953 (relating to interstate transportation of wagering paraphernalia), § 1954 (relating to unlawful welfare fund payments), § 1955 (relating to the prohibition of illegal gambling businesses), § 1956 (relating to the laundering of monetary instruments), § 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), § 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), §§ 2251-2252 (relating to sexual exploitation of children), §§ 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), §§ 2314 and 2315 (relating to interstate transportation of stolen property), § 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), §§ 2341-2346 (relating to trafficking in contraband cigarettes), §§ 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, § 186 (dealing with restrictions on payments and loans to labor organizations) or § 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities of the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transaction Reporting Act;”

See also S. Rep. No. 433, supra note 6, at 14.
as there are under all the criminal activities included in § 1956(c)(D). The underlying theme of §§1956 and 1957 is to proscribe financial transactions conducted by the criminal with his illegally derived income, which benefit either the criminal, his criminal activity, or those who knowingly conduct business with the criminal. However, Congress did not include the tax and currency transaction report (CTR) violations, feeling such felonies were more appropriately covered by giving such violations separate inclusion as predicate offenses in § 1956(a) (1), discussed infra. The definition of a specified unlawful activity, although fairly broad — encompassing the racketeering offenses defined in 18 U.S.C. § 1961(1), in addition to other offenses — does not include all criminal activity. Therefore, this definition, in and of itself, will be a limiting factor in the application of this statute.

Secondly, § 1956 (c)(7)(b), in order to prevent jurisdictional conflicts, clarifies that in relation to a financial transaction, the specified offense enumerated in § 1956 (c) (7) (A), (C), and (D) must occur in whole or in part within the United States, or be directed at the United States government. The singular exception is foreign drug offenses against the law of a foreign nation. Such offenses involve the manufacture, importation, sale, or distribution of a controlled substances act. Since these offenses are part of an international crackdown on drug trafficking, they are appropriately covered here.

Having analyzed the meaning of a specified unlawful activity and its jurisdictional limitations, we must next look at the requirement that the Government prove the proceeds in the transaction were “in fact” from a specified unlawful activity. This along with the knowledge requirement, will be the biggest hurdle for the government in bringing § 1956 violation actions. Recall that the government, under § 1956 (a) (1), need only establish that a defendant knew that the property was derived from some form of felonious activity under State or Federal law. The defendant does not have to know the specific unlawful activity from which the proceeds or property involved or the transaction was derived. As stated previously, this construction was deliberate so that a defendant could not escape conviction simply by saying he or she thought the property involved were proceeds not covered by the term “specified unlawful activity” or that the proceeds were from a different crime from which the proceeds were actually derived. However, § 1956 (a) (1) requires the government to prove that the proceeds were in fact derived from one of the specified unlawful activities under § 1956(c) (7). Proving the proceeds “in fact” were derived from a specified unlawful activity may be a much heavier burden than showing, usually through circumstantial evidence, that the defendant knew, or was willfully blind to the fact, that the proceeds or property were from some unlawful activity. The

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requirement that the government must show that the proceeds were, in fact, derived from a "specified unlawful activity" will be a limiting factor in the application of the statute to money laundering organizations for several reasons.

First, money laundering organizations have traditionally taken great care not to learn or know about the illegal activity or source which produces the currency which they are "washing." Even though the laundering operation is closely connected with the criminal organization producing the illegal proceeds, the laundering operations have very little direct involvement with the criminal organization, so much so that only individuals within the criminal organization producing the dirty money, or intelligence about the criminal organization could provide proof that the proceeds the laundering operation is washing are from a specified unlawful activity, as required by § 1956(a)(1) and defined by § 1956(c)(7). For example, the IRS discovers that a large retail business, a jeweler, auto dealer, or grocer, is washing large amounts of currency for a 10 percent fee by falsifying inventory figures or invoices and purchase orders to hide the additional currency it washes by depositing it and then writing a check to a fictitious overseas corporation, say, in the Cayman Islands. Due to the Cayman Islands Bank secrecy laws which protect the identity and banking confidentiality of the fictitious corporation, the paper trail ends in the Cayman Islands. The money trail may also end when the government is unable to discover how or by whom the currency which is to be "washed" by the launderer is delivered to the launderer, prior to making its way to the Cayman Islands, thereby, cutting the trail off early. Therefore, in light of the above facts, the government is unable to show that the proceeds are derived from a specified unlawful activity as required by § 1956(a)(1) and defined by § 1956(c)(7). The government will not succeed in bringing a § 1956 charge against the launderers. However, the government may have a good case under 26 U.S.C. § 7206(1), subscribing to a false tax return charge against the launderer due to the launderer having to overstate its actual costs on account of the surplus cash it is running through its bank accounts.

If the above facts are changed slightly to a less sophisticated scheme, a totally different outcome will occur. Let's say the launderer obviously knowing that the currency is derived from some unlawful activity, writes checks to phony domestic corporations which are controlled by the principals of the illegal money producing activity. By tracing the launderer's checks, the phony domestic corporation may be identified and the owners of the sham corporations revealed through listing of officers with the Secretary of the State in which the phony corporations are incorporated. The bank records of the phony corporations may then be obtained, thereby tracing the money from the launderer to the phony corporations to the owners of the sham corporations. Let's say one individual owns the sham corporations, and an analysis shows the checks of these corporations going back to the owner for payment.

of fictitious loans given by the owner to the sham corporations, thereby giving the owner a tax free source of income. Let’s further say that the owner is a reputed drug dealer and, through investigative means, the government can show that the money “washed” by the money laundering operation came from the sale of cocaine. Here, the government may be able to prove that the launderer knew that the money was from an unlawful activity, meeting the knowledge requirement of § 1956(a)(1). The writing of checks also meets the financial transaction requirement of § 1956(a)(1) as defined by § 1956(c)(3) and (4). The launderer’s actions meet the § 1956(a)(1) requirement of conducting a financial transaction as defined by § 1956(c)(2). Most importantly, the government, since it has proof that the currency which was “laundered” was all proceeds of cocaine sales, has met the requirement that the financial transactions, in fact, involved the proceeds of a specified unlawful activity as required by § 1956(a)(1) and defined by § 1956(c)(7).

It should be noted that once the government shows that the financial transaction “in fact” involved the proceeds of a specified unlawful activity, it can bring money laundering charges against the dope dealer and the launderer. The language of § 1956(a)(1), “whoever knowing...conducts or attempts to conduct a transaction with proceeds from a specified unlawful activity”, includes the dope dealer and the launderer. The dope dealer is the initiator and the launderer is a participant of the transaction. It should be no problem for the government to show the dope dealer knew the proceeds were from an unlawful source since he sold the narcotics which produced the money which was laundered. The launderer, through circumstantial evidence or direct knowledge, can also be shown to have knowledge that the cash came from some unlawful source, although what unlawful source he may not know. Therefore, once the government can show that the proceeds involved in the transaction is from a specified unlawful activity and can, “trace” such proceeds, then all persons who participated in laundering such transactions with such proceeds knowing the proceeds to be from an unlawful activity can be conceivably charged with money laundering for each and every transaction with such proceeds. If there are ten laundering persons who knew the proceeds to be from an unlawful source, but not specifically what unlawful activity, and if the government can track such proceeds to all the launderers, the government can indict the dope dealer and all ten launderers under § 1956(a)(1). Thus, the above examples show how the language of § 1956(a)(1), which requires the proceeds of a transaction to be, “in fact” from a specified unlawful activity, will be a significant limiting factor to the government in its application of the statute against various criminals and criminal activity.

The "in fact" requirement may also be the part of the new statute which has been and will continue to be litigated the most. The question is, what does the statute mean by requiring the proceeds to be "in fact" derived from a specified unlawful activity? Does the statute require the government show that the exact currency or monetary instruments involved in a transaction were the same identical monies that the dope dealer received from his customers when he sold them the narcotics? The legislative history of the money laundering statutes does not provide any specific discussion regarding the requirement that the proceeds in the transaction must be the very same currency which was derived, say, from the sale of 2 kilos of cocaine. However, the legislative history as to the knowledge standard for §1956 does give some examples as to what Congress may have intended by the, "in fact" requirement of §1956(a)(1). The following, Although discussing the knowledge requirement sheds some light as to the requirement that the monies involved in the transaction are in fact from a specified unlawful activity.

"You [the grocer] have to know what he [the drug dealer] is coming in to buy groceries with is indeed the money derived from the particular designated crimes and to get to that point, you would have to prove to a jury [that the grocer knew that] the fellow had no other source of income or that [if] he had another source of income - the grocer had some more direct knowledge this fellow was just standing outside on the street corner before he came in peddling drugs, like if [the grocer] saw him doing it."

This excerpt indicates two possible ways in which the government could prove the proceeds are, in fact, from a specified unlawful activity. One is that the government, by showing that the drug dealer with whom the grocer is dealing had no other legitimate source of income and that the grocer knew this fact. The second method is to prove that the proceeds are the very same currency generated by a single or multiple transactions of a specified unlawful activity. This is the "direct tracing" method, that is, to prove that the monies involved in the transaction were the very same as directly derived from a specified unlawful activity. This example cited above was that the grocer actually saw the person selling drugs on the street corner, then came into his store and used the money to buy groceries. This tracing method is obviously a more restrictive method of proof and may only be feasible in situations where the government might have a confidential informant, undercover agent, or member of the money laundering or criminal organization who "flips" and agree to cooperate with the government, giving the government detailed information about financial transactions which could further be proven through corroboration of a paper trail.


Recent case law has been supportive of a broad or flexible interpretation of the requirement that the proceeds be, in fact, derived from a specified unlawful activity. In *U.S. v. Blackman*,61 the Eighth Circuit Court of Appeals stated that § 1956 does not require the government to directly trace the proceeds involved in a transaction to a particular sale of narcotics. In Blackman, the defendant was charged with five counts of money laundering in violation of 18 U.S.C. § 1956. Four of the counts were under § 1956(a)(1)(A)(i) for wire transfers of currency ($11,000 in total) from Kansas City, Missouri to Los Angeles, California. The fifth charge was for violation of § 1956(a)(1)(B)(i), for purchase of a truck with illegal proceeds. The defendant was a high level cocaine dealer who was found to be in possession of a large amount of cocaine. The interesting point in this case was that all five transactions which made up the money laundering counts all took place a year prior to the defendant being found in possession of the narcotics. In this case the government’s evidence consisted of the defendant’s involvement in drug trafficking and his lack of any legitimate source of income as proof that the proceeds used in these transactions were derived from drug trafficking. Although the individual owned a small business, this fact was not sufficient to raise the inference that the money wired on four separate occasions from Kansas City, Missouri to Los Angeles, California, and the money paid to the car dealer, represented legitimately earned income to rebut the government’s contention that the proceeds were derived from narcotics trafficking.62

The Eighth Circuit Court of Appeals said that although the government could not point to a specific drug sale that produced the money used in the transactions, the Court did not believe that the government’s evidence failed to make out a claim of money laundering under § 1956. The Court did not read the statute to require the government to trace the proceeds to particular narcotics sale or sales. It did state, however, that the government in bringing a charge of money laundering under § 1956, could not rely exclusively on proof that a defendant charged with a transaction utilizing the proceeds from a specified unlawful activity has no legitimate source of income.63 In short, *Blackman* holds that the government must, in order to bring a charge of money laundering under § 1956, in a case where the defendant had no legitimate source of income, present sufficient evidence to prove to the jury that the money, in all likelihood, came from a specified unlawful activity.

The court in *Blackman* also noted that in *U.S. v. Massac*,64 the Third Circuit noted that evidence of a defendants use of a wire service to transfer cash to Haiti, combined with evidence of a defendant’s drug trafficking, is sufficient to sustain a conviction of money laundering under § 1956(a)(1)(B)(i). In *United States v.*

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61 United States v. Blackman, 904 F.2d 1250 (8th Cir. 1990).
62 Id. at 1256-1257.
63 Id. at 1257.
64 United States v. Massac, 867 F.2d 174 (3d Cir. 1989).
it was held that large sums of unexplained currency and wealth may be circumstantial evidence of cocaine trafficking and intent to distribute cocaine. The rulings in Blackman and Massac go to the sufficiency of the nature of the evidence required under § 1956(a)(1) to prove that the proceeds were, "in fact" derived from a specified unlawful activity. It is important to note several points regarding these new statutes and the above court decisions.

First, as discussed in Blackman, in order for the government to prove the source of the monies involved in the unlawful transaction, the statute does not require the government to prove a case against the defendant of his substantive illegal activity, i.e. narcotics trafficking, to show that such property involved in the indictable transaction under § 1956 was directly derived from a specified unlawful activity. For the statute to operate in any other manner would render it almost useless. As discussed in Blackman, the government's burden on a particular element of an offense may be satisfied by circumstantial evidence as long as it is sufficient to prove the element beyond a reasonable doubt. Indeed, Congress did not mean for this law to be a "tag along" charge to the substantive charge. Congress' intent in passing this statute was to provide an indirect means for the government to investigate such criminal activity and organizations by criminalizing certain transactions conducted with the proceeds from their illegal activities. Sections 1956 and 1957 are "racketeering" statutes under Chapter 95 of Title 18. This showing of the substantive crime is consistent with other racketeering violations.

Secondly, although this is a criminal statute and the proof required for conviction under it must be beyond a reasonable doubt, it appears from Blackman that the evidence required to meet the "in fact" element need not be especially strong. Recall that in Blackman, the money laundering transactions of which he was convicted occurred a year before he was found in possession of narcotics. Accordingly, the statutes may, indeed, provide for the government a useful tool against sophisticated drug dealers who go to great lengths to insulate themselves from their illegal activity, but are not always as careful as to how they use their ill gotten income. These statutes may generally be applied effectively against criminal activity by which the government may be able to reconstruct or trace the financial transactions of the criminal activity or uses of income derived therefrom.

For example, say X is an upper level drug dealer and he has purchased several legitimate going concerns with narcotics proceeds, in order to give himself a legitimate source of income. Although X is well insulated from the purchase and distribution of narcotics, the government may be able to get sufficient evidence that X is an upper level dealer. In addition, the government may also be able, through the net worth method of computing X's income, to show that X has substantially understated his income, even though he reports substantial amounts from his

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65 United States v. Matra, 841 F.2d 837, 841 (8th Cir. 1988).
legitimate activities. However, the government can prove that X acquired certain large assets and purchased such businesses with large amounts of cash which was not consistent with what X reported on his tax return at the time he made such acquisitions. Therefore, the government may be able to show that these large transactions could not have been financed through any legitimate source of X's income. According to Blackman and Massac, this evidence, coupled with the government's evidence of X's drug activity, may be sufficient to convict X of money laundering for those transactions which cannot be proven to have been conducted with legitimate sources. It also opens up the assets to civil forfeiture under 18 U.S.C. § 981, the applicability and elements of which are explained infra. Therefore, in the preceding example, the government, with the passage of § 1956, can bring substantive money laundering changes, which carry a maximum of twenty years imprisonment per count, coupled with the threat of forfeiture against X. This is a highly potent tool for the government. Prior to the passage of the Money Laundering Control Act of 1986, the government might only have been able to bring tax charges under 26 U.S.C. §§ 7201 or 7206, which carry only a five or three maximum prison term per violation, respectively, and have no forfeiture provisions.

It should be noted that § 1956 criminalizes certain financial transactions which are conducted for a "bad purpose". ("Bad purposes" are discussed infra.) For example, if an assistant of X conducts transactions to help X in his business, such as depositing cash in a nominee bank account or buying a car, and such individual knew that the money involved in the transaction (no matter in what form, cash, personal check, or cashier's check) came from some unlawful source, and that unlawful source can be shown to be a specified unlawful activity as defined by § 1956(c)(7), then that individual is subject to a maximum of twenty years in prison per count, plus a maximum fine or $500,000 or twice the value of the property involved in the transaction in addition to forfeiture of the asset. Due to its transactional nature and its emphasis on following a money trail and explaining a defendant's sources of legitimate and illegitimate income, this statute may become a favored charge to be brought by Federal agents, especially by the IRS Criminal Division, and by Assistant United States Attorneys, against criminal organizations and white collar criminals.

The Four Distinct Alternatives Embodied in the Fifth Element of Proof Required by § 1956(a)(1)

In addition to the four elements of § 1956(a)(1) already discussed, the fifth and final element of this statute consists of four alternative choices from which the

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67 26 U.S.C.S. § 7201 (Law. Co-op 1990). Evasion of federal income taxes carries a maximum of 5 years imprisonment and a maximum fine of $100,000 for individual or $500,000 for corporation, along with the costs of prosecution. 26 U.S.C.S. § 7206(1) (Law. Co-op 1990). This statute prescribes the subscribing to a false income tax return which carries a maximum of 3 years imprisonment and a $100,000 for an individual or $500,000 for corporation, along with the costs of prosecution.
government may chose in order to fit the facts of a case so as to bring a charge under § 1956(a)(1). More precisely § 1956(a)(1) requires the government to prove all of the four previously discussed elements, in addition to one of the four distinctive alternative elements spelled out in the four subparagraphs of § 1956(a)(1): (A)(i), (A)(ii), (B)(i), or (B)(ii). The aforementioned will be discussed in their respective order.

1. Section 1956(a)(1)(A)(i) states:

"Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of a specified unlawful activity -

(A)(i) with the intent to promote the carrying on of specified unlawful activity."^68

The element added by subparagraph (A)(1) is that the defendant must knowingly conduct of attempt to conduct a financial transaction with proceeds from some unlawful activity, "with the intent to promote the continuation of specified unlawful activity." The, "intent to promote" language is very similar to that used in 18 U.S.C. § 1952(a)(3).^69 Case law interpreting § 1952(a)(3) has held that the government is not required to prove that the defendant intended to violate a specific statute, only that the defendant intended to promote, facilitate, or further an activity which the defendant knew that the activity was illegal.^70 Reference to State and Federal law is then made to determine the type of activity which is unlawful.^71 Other case law interpreting § 1952(a)(3) has stated that the substantive, underlying crime does not have to be actually committed or fully completed, because § 1952 proscribes the use of interstate of foreign travel facilities even to further unlawful

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(a) "Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to -

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further and unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carry on, of any unlawful activity..." and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

activity. It does not require that actual violations of the law occur. An example of the application of this new element might be where X, a drug dealer, would take funds or profits derived from his drug activity to purchase additional narcotics, or to purchase an automobile to transport the narcotics, or to do any other act or attempt any act which would further or facilitate the unlawful activity, would meet this element. If the other four elements or § 1956(a)(1) are met, then X could be convicted under § 1956(a)(1)(a)(i).

If someone, say Y, is acting as a conduit for X’s narcotics profits, and Y buys a car or boat for X but had no knowledge that the boat or car was to aid in X’s narcotics trafficking, then Y could not be convicted of intending to promote X’s unlawful activity of narcotics trafficking. However, if Y intended to promote X’s illegal activity by buying a boat or car with money Y knew to be proceeds of X’s narcotics trafficking to further violate the drug laws, then it would be unnecessary to show that Y knew, for example, that the car or boat was to be used to import or transport illegal drugs. This predicate element will be especially helpful to the government in attacking the principal criminal and those individuals who closely assist him in cases where financial transactions can be clearly documented to promote the criminal activity, but where the government has been unable to bring the substantive criminal charge against the persons. It should be noted that transactions which help in the "promotion" of the illegal activity can be interpreted very broadly. For example, a marijuana dealer who is buying bales of marijuana and then repackaging the marijuana to facilitate distribution into kilo quantities wrapped in plastic could be convicted under this section for the transactions in which he purchases the plastic wrap with the proceeds from the sale of the marijuana.

2. Section 1956(a)(1)(A)(ii) provides:

Whoever knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or

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(a) "Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to -

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further and unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carry on, of any unlawful activity . . ." and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

See also United States v. Griggs, 700 F.2d 408, 417 (7th Cir. 1982), cert. denied, 103 S. Ct. 2129 (1983); McIntosh v. United States, 385 F.2d 274, 277, (8th Cir. 1967) (attempt to extort sufficient for travel act conviction); United States v. Loucas, 629 F.2d 989 (4th Cir. 1980) (intent to violate, not actual violation of gambling laws, was sufficient for conviction). See also United States v. Davanzo, 699 F.2d 1097 (11th Cir. 1983), and United States v. Griffin, 699 F.2d 1102 (11th Cir. 1983).
attempts to conduct such a financial transaction which, in fact, involves the proceeds or specified unlawful activity -

(A) (ii) with intent to engage in conduct constituting a violation of § 7201 or 7206 of the Internal Revenue code of 1986 [26 U.S.C. § 7201 or 7206].

The element added by subparagraph (A) (ii) is that the defendant must be shown by the government to have knowingly conducted or attempted to conduct a financial transaction involving the proceeds of a specified unlawful activity with the intent to engage in conduct constituting a violation of 26 U.S.C. §§ 7201 or 7206(1). Subparagraph (A) (ii) was not part of the Money Laundering Control Act of 1986, even though it had been part of Senate Judiciary Committee’s draft. It was amended by the Anti-Drug Abuse Act of 1988. The reason for adding the new paragraph was two-fold. One reason was to close a loophole. The other was to effectively bring under the ambit of the new statutes third party money launderers.

The loophole was that § 1956 prohibited transactions which were designed to conceal the proceeds of a specified unlawful activity. However, proof of intent to conceal the underlying specified unlawful activity is essential to obtain a conviction under § 1956(a) (1) (B) (i). The big problem is that even if the drug dealer actually did intend to conceal his illicit source of income, proof of such intent may be impossible to obtain. Keep in mind that § 1956 as originally enacted required the government, at a minimum, to prove a defendant’s knowledge that funds represent the “proceeds of some form of unlawful activity.” However, tax crimes, such as tax evasion (26 U.S.C. § 7201) or filing of a false return (26 U.S.C. § 7206), unlike other


Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in case of a corporation) or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C.S. Section 7206 (Law. Co-op 1990). Subsections (1) and (2) provide that:

Any person who-

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or (2) Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or...

75 S. REP. No. 433, supra note 6, at 11-12.
crimes, have no identifiable "proceeds." Therefore, the government is unable to use the originally enacted § 1956(a) (1) (B) (i) to prosecute individuals who launder illegal proceeds for the purpose of tax evasion. 78

This "intent" loophole of § 1956(a) (1) (B) (i) was addressed by Congress and subsequently amended by the Anti-Drug Abuse Act of 1988 by the passage of § 1956(a)(1)(A)(ii). The following paragraph illustrates this "intent" loophole lurking in § 1956(a)(1)(B)(i) and how the passage of § 1956(a)(1)(A)(ii) closes this loophole.

A drug dealer will place assets, such as real estate, bank accounts, autos, restaurants, and bars, in nominee names so as disguise their true ownership from the Internal Revenue Service. Therefore, the drug dealer, through such actions, is promoting the crime of income tax evasion. However, the government is required to establish proof of intent to conceal the underlying specified unlawful activity in order to bring a charge under § 1956(a) (1) (B) (i). Such proof may be very difficult to obtain, even if the drug dealer did intend to conceal his illicit source of income, especially as in many cases, the drug dealer is counseled by his financial advisor, accountant or attorney to own a legitimate business to create a source of appearance of a legitimate source of income. In addition, the high level drug dealer is insulated from the crime he finances by layers of subordinates including street dealers and money launderers, which makes it even more difficult to prove that he intended to conceal his illicit source. Therefore, proof that the individual laundered money with the intent to conceal his or her unreported income (which is why he would go to such trouble of putting assets into nominee names) from the IRS may be the only knowledge element provable. 79

It should be noted that this new offense could not be used against ordinary taxpayers who evade taxes or legitimately earned income. The government is still required to prove under § 1956(a)(1) that the source of funds, in fact, represents the proceeds of a specified unlawful activity. 80 The garden variety tax evasion or a false tax return violation by one who skims proceeds or writes off personal expenditures does not fit the definition of a specified unlawful activity, nor are they the type of violation which produce or generate illegal income. In fact, they are just the opposite. In short, what this provision proscribes is the "hiding" of illegally and legally generated income.

The second reason for adding this subsection was to include third party money

80 Id.
laundering within the ambit of § 1956. Professional money launderers go to great lengths to avoid knowledge of the actual illegal source of the cash that they launder. However, such launderers have been known to be very careless in knowing that their services facilitate tax evasion. Indeed, that is what their services provide. Money launderers will in rendering their services, provide their customers with documents such as false loan statements, set up false corporations of other fictitious entities to give the appearance that the source of funds are “clean” or nontaxable, such as loan proceeds. A launderer who knowingly provides such services facilitates the crimes of tax evasion and filing of false income returns, but ignores the actual illegal source of funds, should bear the risk that the money may be from a “specified unlawful activity.” Therefore if the funds are from a specified unlawful activity, the launderer should be subject to the money laundering charges in addition to the conventional tax and conspiracy charges. 81

A third reason, and corollary to the first reason, is that without this new subsection describing transactions which would be violation of 26 U.S.C. §§ 7201 and 7206, a drug dealer charged with an offense under § 1956(a)(1)(B)(i) could be provided with a defense that he laundered the money with the intent to conceal it from the IRS, i.e. promote a tax crime and not with intent to hide the proceeds of a specified unlawful activity. Without such a provision the professional money launderer and drug dealer might escape prosecution under Section 1956. 82

This subsection will be a particularly powerful tool for the IRS Criminal Investigation Division to use in its criminal tax investigations. The following is illustrative of how the IRS Criminal Division might use this provision in its Grand Jury and administrative investigations: X is a high level drug dealer. He has been a dealer for the better part of ten years. X has been advised by accountants and attorneys to how launder his illegal proceeds and avoid the currency transaction report (CTR) filing requirements under 31 U.S.C. § 5313. 83 X has amassed a considerable fortune, amounting to several million dollars, through the operation of his narcotics organization. X has quite an elaborate organizational structure with many individuals who are loyal to him, which has allowed him to operate without interruption by the local, State, or Federal drug authorities. X has also obtained the advice and services of an accountant who sets up various entities to give X an apparent legitimate source of income, along with shifting of assets to nominees so as not to alert the IRS. The IRS, however, can prove through the net worth method that X has substantially understated his income for several years prior to and after the passage of § 1956.

Prior to the new statutes the government might only be successful in bringing charges of tax evasion (26 U.S.C. § 7201) or subscribing to a false income tax return

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81 Id. at 33.
82 Id. at 34.
(26 U.S.C. § 7206(1). With these charges, X might end up serving a maximum of five years in prison for the several counts of tax evasion, along with some fines and an order to pay over a certain amount of the tax. The investigation of X would have most likely been conducted under the auspices of a Federal Grand Jury. If this is the manner of investigation, the IRS Civil Examination and Collection divisions would have had to wait until the entire criminal process took its course before it could civilly assess additional tax and then attempt to collect that tax. During this time X might have been able to keep the bulk of his assets, by shifting and hiding it so as to frustrate the civil function of the IRS in collection such tax. At the very least, X most likely still have a good portion of his wealth intact when he completes his prison term.

In contrast to the above example, under § 1956(a)(1)(A)(ii), the IRS may be able to prove that X has no legitimate source of income, and as stated above, recompute his income through the net worth method to show that X has substantially understated his income. Let’s say, for example, the government has been able to acquire evidence to prove the four elements of § 1956(a)(1), that is X knowingly conducted myriads of financial transactions with the proceeds of his narcotics activity which, in fact, involved the proceeds from a specified unlawful activity, X’s narcotics trafficking. In fact, the government has proof against X’s accountant and attorney who helped him launder his drug profits, that they knew the money was from an unlawful source. Thus, they too are subject to indictment under § 1956(a)(1)(A)(ii). The government may bring not only the conventional tax evasion (26 U.S.C. § 7201) and or filing of false returns (26 U.S.C. § 7206(1) charges against X, it may bring numerous money laundering counts against X under § 1956 (a)(1)(A)(ii), for engaging in transactions with the intent to engage in conduct constituting violations of 26 U.S.C. § 7206. In addition, much of X’s wealth is subject to forfeiture under 18 U.S.C. §§ 981 and 982.

X’s attorney and accountant may also be indicted, again, not only on the traditional counts of filing false returns and conspiracy (26 U.S.C. § 7206(2), and 18 U.S.C. § 371), but also on money laundering charges under § 1956(a)(1)(A)(ii). X and his financial advisors will not be facing short prison terms, since each money laundering count carries with it a maximum of twenty years imprisonment. This example shows with stark clarity the powerful tool § 1956(a)(1)(A)(ii) may become for the government, especially to the IRS Criminal Division, in investigations of individuals involved in narcotics or any other specified unlawful activity.

Although the above examples have concentrated on the advantage of coupling § 1956(a)(1)(A)(11) with an ordinary tax investigation utilizing the net worth method of calculating the drug dealers income, it should be noted that § 1956(a)(1)(A)(11) only require one transaction or attempted transaction which would constitute a violation of 26 U.S.C. §§ 7201 or 7206. For example, transactions using nominee names to hide bank accounts or property purchased by X with the illegal profits would constitute conduct that would be in violation of § 7201 for
tax evasion. It is much easier and less time consuming for the IRS Criminal Division to document one transaction constituting conduct of tax evasion or subscribing to a false tax return. The new money laundering statutes may enable the IRS Criminal Division to bring many more convictions in the same amount of time, in addition to increasing the amount of forfeitures, utilizing 18, U.S.C. §§ 981 and 982. For example, in the course of a tax investigation involving any individual involved in a specified unlawful activity, all the IRS must do is to find transactions which constitute conduct violative of §§ 7201 and 7206, develop the requisite evidence to show the individual derives his income, or a majority of his income from the specified unlawful activity (to meet the elements of Blackman, discussed supra), and show that the proceeds involved in the transactions which are violative of §§ 7201 or 7206 are derived from a specified unlawful activity. If this can be accomplished then the IRS has required proof to meet the elements of § 1956(a)(1)(A)(ii) and can prosecute the individual under this provision, in addition to civilly forfeiting the asset involved in the transaction under 18 U.S.C. § 981. In fact, the Government may even get X to plead guilty to one or more tax evasion or false return charges in a plea bargain agreement. X will probably agree to such a plea due to the significant prison on terms of the money laundering statute.

Conviction under the money laundering statutes contains a minimal jail term which is about five time greater than that of tax evasion and, in all probability, the defendant most likely will not have to serve any additional time for the tax charge since the judge will more than likely order the period of incarceration for the tax offense to be served concurrently with the period of incarceration for money laundering.84 Although §§ 1956 and 1957, specifically § 1956(a)(1)(A)(ii), will not terminate the IRS Criminal Division's mission of working pure tax investigations for the tax deterrence effect, it will definitely have an effect on how the Division will prioritize and evaluate its investigations and as to which charge it will recommend to the Department of Justice for prosecution.

3. Section 1956(a)(1)(B)(i) states:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conduct or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -

(B) Knowing that the transaction is designed in whole or in part-

(i) To conceal or disguise the nature, the location, the source, the own-

ership, or the control of the proceeds of specified unlawful activity.85

The element this subsection added is that the defendant must have conducted or attempted to conduct a financial transaction "knowing that the transaction was designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." Close attention to the language of this subsection, as with § 1956(a)(1)(A)(i), reveals that the government is not required to prove that the defendant have knowledge that the concealment or disguise was with proceeds of a specified unlawful activity. Rather, the government is only required to prove the defendant knew that the transaction was designed to conceal the nature, location, source, or ownership, or control of the proceeds of specified unlawful activity. The government is still required to show that the proceeds were, in fact, from a specified unlawful activity.

This subsection has been said to encompass the essence to the crime of money laundering. This subsection would make it an offense to engage in a commercial transaction (which includes financial transactions, purchases or sales of property, or the creation of debts) knowing that the transaction is part of a scheme to conceal criminally derived property or to disguise the source, ownership, or control over the criminally derived property.

The subsection proscribes, for example, the actions of a lawyer who deposits funds or exchanges stock in the course of creating a dummy corporation for the purchase or sale of property, or aids in the sale of property, knowing that such actions are part of someone's scheme to conceal the proceeds of a crime could be charged with money laundering. This means that stock brokers, real estate agents, auto dealers, jewelers, precious metals dealers and so forth, who make sales or engage in transactions that they know are part of a scheme to conceal the nature of the property, or to disguise the source or ownership of or control over criminally derived property, are guilty of money laundering.86

This subsection and newly created § 1956(a)(1)(A)(ii) may often dovetail each other, depending upon the facts and circumstances and the purpose behind the transaction. Although one may conjure up a myriad of examples which may be indictable through the language of this subsection, the following illustrates only one examples: Drug dealer X puts substantial proceeds of drug sales in his father’s accounts. X’s father, F, alone has signatory control over the accounts. As to X, there should be no difficulty in showing that he had the knowledge that the funds were derived from a specified unlawful activity. As to F, if F does not know that the purpose for putting the money in his name was to disguise the ownership, control, source, etc., of the funds, (hardly unlikely) F could not be prosecuted under this subsection section. However, if F knew the money was put in his name to disguise

the nature, location, control, or source of the proceeds of the unlawful activity, even if F did not know the specific unlawful activity which generated the funds, F could still be prosecuted under § 1956(a)(1)(B)(i).

4. Section 1956(a)(1)(B)(ii) provides:

Whoever knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which, in fact, involves the proceeds of specified unlawful activity-

(B) Knowing that the transaction is designed in whole or in part -

(ii) To avoid a transaction reporting requirement under State or Federal law.\(^7\)

This subsection was directed generally, although not exclusively, toward the professional money launderer and his "smurfs," in violating the currency transaction reporting (CTR) requirements under 31 U.S.C. §§ 5313 and 5324. It can also be used against merchants and other individuals required to file form 8300 under 26 U.S.C. § 6050I, (relating to cash transactions over $10,000 received in a trade or business). Again, under this subsection, as with §§ 1956(a)(1)(B)(i) and 1956(a)(1)(A)(i), there is no requirement for the government to prove that the defendant knew that the money involved in the financial transaction was in any way derived from, or connected to, a specific unlawful activity. This means that a money launderer and his "smurfs" (those who go to banks depositing cash into accounts in amounts under $10,000, or buying bank checks or money orders for similar amounts to avoid the filing or currency transaction report) will be violation of this subsection. The government does not have to show that they knew that the funds were derived from some unlawful activity as defined in § 1956(c)(7). Although the defendant may be unaware that the funds were actually derived from one or more specified unlawful activities, the government must still show that the money involved in the transaction was \textit{in fact} derived from some specified unlawful activity.

Although the intricacies of 31 U.S.C. §§ 5313, 5316, 5322, and 5324 (the currency transaction reporting (CTR) requirements for cash transaction in excess of $10,000) and 26 U.S.C. § 6050I (which requires IRS form 8300 to be filed when more than $10,000 cash is received by the provider in exchange for those goods or services) are beyond the scope of this article, it should be noted that these statutes and Section 1956 and 1957 will complement each other in attacking criminal activity in that, among all of the statutes, almost \textit{every type} of financial transaction conceivable is covered. In addition, §§ 1956 and 1957 increase the maximum jail sentence


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from 5 years to 20 and 10 years, respectively, for transactions which would violate Title 31, since Title 31 violations are predicate acts under § 1956. In addition, a person can still be charge with a both a CTR violation and a money laundering count pursuant to § 1956(d) for the same activity, if the property involved in the transaction is derived from a specified unlawful activity. Additionally, both the CTR’s and money laundering statutes subject a defendant to the forfeiture provisions of 18 U.S.C. §§ 981 and 982. In short, these statutes taken together present the government’s law enforcement agencies with effective tools by which to indirectly investigate substantive Federal crimes.

The Prohibition Against the International Transportation of Monetary Instruments

Section 1956(a)(2), in contrast to § (a)(1), criminalizes the transportation of monetary instruments into or out of the United States, thereby proscribing international money laundering transactions. Subsection 1956(a)(2) states:

Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law. 8

This subsection covers such transactions as when a person transports or attempts to transport monetary instruments or funds out of or into the United States for illegal purposes. 8

Similar to § 1956(a)(1) with its four alternative predicate offenses upon which a violation can occur, § 1956(a)(2) has only three bases upon which the government can charge a violation. Again, similar to § 1956(a)(1), all three alternatives have the

9 18 U.S.C.S. § 1956(c)(3) (Law. Co-op 1990) (defining monetary instruments). See discussion of monetary instruments in Section A, supra. Subsection 1956(a)(2) uses the term “funds.” Although not defines by the statute, the context in which it is used would indicate that the term apply to wire transfers or any other electronic fund transfers. See discussion on fund in Section A, supra notes 29-32.
same common "root" or basic element. That is, there must be a transportation, transfer, or transmittal, or attempted transportation, transfer, or transmittal of a monetary instrument or funds out of or into the United States.\footnote{S. REP. No. 433, \textit{supra} note 6, at 13. The Senate Judiciary Committee explained the definition of monetary instrument as follows: \begin{quote} Section 1956(c)(5) defines the term "monetary instruments" to include coin or currency of the United States or of any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in such form that little thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery. The definition would also include cashier's checks. The phrase "coin or currency" is also intended to include gold or other precious metal coins, which are the legal tender of a country but which do not normally circulate as such, or whose value is determined by the worth of their metallic content rather than by the operation or normal currency exchange markets. "Monetary instruments" are a subset of the term "property" as used in section (a), a term that is intended to be construed liberally to encompass any form of tangible or intangible assets. \end{quote}}

Once a transportation or attempted transportation of a monetary instrument or funds in or out of the United States has been established by the government, then one of the three following alternative elements must be proven. These alternatives are spelled out in the three subparagraphs of § 1956(a)(2): (A), (B)(i), and (B)(ii). These three alternatives elements will be analyzed in their respective order.

1. Section 1956(a)(A) states:

Whoever transports, transmits, or transfers or attempts to transport, transmit, or transfers monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States -

(A) With the intent to promote the carrying on of a specified unlawful activity.\footnote{18 U.S.C.S. § 1956(a)(2)(A) (Law. Co-op 1990).}

This first of the three alternative elements requires that the transportation, transmission, or transfer, of attempted transportation, transmission, or transfer be carried out with the intent to promote the carrying on of a specified unlawful activity. Note that subparagraph (A) \textit{does not}, unlike § 1956(a)(1)(A), require that the monetary instrument or funds be the product of an unlawful activity.\footnote{This is because Subsection 1956(a)(2) lacks the language of Subsection 1956 (a)(1). That requires the person conducting the transaction know the property involved in the transaction represents the proceeds of some form of unlawful activity.} The government must only establish that the funds which the defendant transported, transmitted, or transferred, or attempted to transport, transmit, or transfer were intended to promote the carrying on of a specified unlawful activity.\footnote{18 U.S.C.S. § 1956(a)(2)(A) (Law. Co-op 1990). \textit{See also supra} Section III, Part A, for a discussion on Subsection 1956(a)(1)(A).}
The fact that the government does not have to show that the funds or monetary instrument involved are from specified unlawful activities is very advantageous for several reasons. First, this provision will be a very useful tool in working very large or high echelon drug dealers. Secondly, it may be used against the couriers of professional money launderers or the money launderers themselves. For example, X, a high level drug dealer may be so well insulated, through multiple layers of street dealers and other individuals, as to be virtually untouchable, so that the government could not bring substantive drug charges against X. In addition, X has a profitable, legitimate business to explain his wealth and source of income in addition to structuring his assets and finances so that the IRS would probably be precluded from bringing tax charges against X. However, the government has obtained evidence, say through a wire tap and other investigative means and it finds that X is wiring money from the accounts of these legitimate businesses, to offshore banks and then to the supplier of the narcotics, say, in Columbia. If the government is able to corroborate these transactions and their purpose, even though the money cannot be determined to be from a specified unlawful activity, then X may be indicted under § 1956(a)(2)(A) because the government can show a transmission of funds from a place in the United States to a place out of the United States, i.e. Columbia. The evidence which the government has regarding the wiring of funds and their alleged purpose to buy narcotics in Columbia, along with evidence from individuals testifying as to X’s drug business and drug shipments coming from Columbia, should fulfill the requirement that such funds were intended to promote the carrying on a specified unlawful activity.  

The absence of a requirement upon the government to prove that the monetary instruments or funds are the proceeds of an unlawful activity may allow for the use of government “sting operations” with Federal undercover agents. Secondly, if an individual or domestic money laundering organization was willing to launder its “customers’” illegal proceeds by transporting currency out of the country, transmitting the funds through wire or other electronic transmission out of the country, or transferring funds through other means out of the United States, or any attempt at transporting, transmitting, or transferring, the government would not be precluded from bringing a viable § 1956(a)(2)(A) charge if the government can prove that the purpose of the transportation, transfer, or transmission of the currency provided by the government in the sting operation was expressly to promote the carrying on of the specified unlawful activity as defined by § 1956(c)(7).

2. Section 1956(a)(2)(B)(i) provides:

Whoever transports, transmits, or transfers or attempts to transport, transmit or transfer a monetary instrument or funds from a place in the

United States to or through a place outside the United States from or through a place outside the United States -

(B) Knowing that the monetary instruments or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part -

(i) To conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of a specified unlawful activity. 95

This subsection differs from § 1956(a)(2)(A) by adding to it two elements of proof which the government must establish in order to bring a conviction under it. The first additional element requires that the monetary instrument or funds involved in the transportation, transmission, or transfer, or attempted transportation, transmission, to transfer, represent the proceeds of some form of unlawful activity, and that the defendant have knowledge that the monetary instrument or funds involved were from an unlawful activity. 96 The analysis which is done for § 1956(a)(1) prosecutions applies with equal force to § 1956(a)(2)(B)(i), and should therefore be utilized and applied for all § 1956(a)(2)(B)(i) prosecutions.

The second element added to § 1956(a)(2)(B)(i) is that, as under § 1956(a)(1)(B)(i), it must be proven that the transportation, transmission, or transfer, or attempted transportation, transmission, or transfer was designed in whole or in part to "conceal or disguise the nature, the location, the source, the ownership, or control of the proceeds of a specified unlawful activity." 97 The Senate Judiciary Committee commented that the knowledge and proof requirements under § 1956(a)(2)(B)(i) are identical to its counterparts in § 1956(a)(1)(B)(i). 98

The requirement that the completed or attempted transportation, transmission, or transfer be undertaken to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity may be most easily proven by an event which calls for the filing of a CMIR report (Report of International Transportation of Currency or Monetary Instrument). 99 Generally,

As with the prior section, the knowledge requirement of this section should be construed to encompass instances of "willful blindness"; and the "intent to facilitate" language should also be construed in accord with Backun v. United States, supra.

96 18 U.S.C.S. § 1956(a)(1) (Law. Co-op 1990). See supra Section III, Part A, for discussion on Subsection 1956(a)(1) requiring proof that the property involved in a transaction were the proceeds of a specified unlawful activity.
98 S. REP. No. 433, supra note 6, at 11. The applicable commentary form the Judiciary Committee Report reads as follows:

As with the prior section, the knowledge requirement of this section should be construed to encompass instances of "willful blindness"; and the "intent to facilitate" language should also be construed in accord with Backun v. United States, supra.

a CMIR (Customs Form 4790) must be filed by an individual with the United States Customs Service when he is transporting more than $10,000 in cash into or out of the United States. Drug dealers and money launderers employ great care and ingenuity in devising myriads of ways to get cash out of this country undetected by the Customs Service and into offshore banks in tax havens or for payment for drugs.

Obviously, the drug dealer is not going to file a CMIR each time he transports over $10,000 in cash out of the U.S. Indeed, he wants to avoid this requirement at all costs. Therefore, each time such an individual fails to file a CMIR, that person has, by a fortiori, concealed the location of the monetary instrument, as defined by § 1956(c)(5).\textsuperscript{100} As one can see from this example, this subsection will provide the government with a flexible tool to prosecute those money launderers whose schemes and illegal activity include the international transportation of currency. The application of this section will be limited only by the myriad of schemes professional money launderers can concoct to get drug profits out of this country and the government’s activity to uncover such schemes.

3. Section 1956(a)(2)(B)(ii) states:

Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transport a monetary instrument or funds from a place in the United States to a place outside the United States or to a place in the United States from or through a place outside the United States -

(B) Knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part -

(ii) To avoid a transaction reporting requirement under state or Federal law.\textsuperscript{101}

This subsection, like § 1956(a)(2)(B)(i), requires evidence that the monetary instrument or funds involved in the completed or attempted transportation, transfer, or transmission represents the proceeds or attempted transportation, transfer, or transmission represents the proceeds or some form of an unlawful activity.\textsuperscript{102} Although this section does require the defendant to have knowledge that the monetary instrument or funds involved are derived from some unlawful activity, there is no requirement that the funds or monetary instruments be the profits or proceeds of a specified unlawful activity, as required by §§ 1956(a)(1) and (a)(2)(B)(i). In addition to this requirement that the defendant have knowledge of

\textsuperscript{102} See supra Section III, Part A, for a discussion of Subsection 1956(a)(1) and the knowledge requirement relating to "unlawful activity."
the proceeds coming from some unlawful activity, the government must prove that the “transaction” was designed in whole or in part, “to avoid a transaction reporting requirement under State or Federal law.”

The prior example illustrating § 1956(a)(2)(B)(i), in which an individual transports currency in or out of the United States, fits § 1956(a)(2)(B)(ii), perhaps even better than it fits § 1956(a)(2)(B)(i). Therefore, all that has to be proven under this section is that there was a completed or attempted transportation, transmission, or transfer by the defendant, and in addition (1) that the defendant knew that the monetary instrument or funds consisted of the proceeds of some unlawful activity and (2) that the movement of such funds or monetary instruments in or out of the country was to avoid a reporting requirement under State or Federal law. In reality, this section takes a violation of 31 U.S.C. §§ 5313, 5316, or 5324 and adds the requirement that the government prove the defendant knew that the funds or monetary instruments in the transaction were derived from some form of unlawful activity. The defendant, instead of facing a maximum of five years per count under § 5316, now faces a maximum of twenty years per count under § 1956(a)(2)(B)(ii). In fact according to § 1956(d) the defendant could still be charged with a violation of Section 5316 in addition to the § 1956(a)(2)(B)(ii) violation.


(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly:

(1) transports or has transported monetary instruments of more than $10,000 at one time-
(A) from a place in the United States to or through a place outside the United States; or
(B) to a place in the United States from or through a place outside the United States; or

(2) received monetary instruments of more than $5,000 at one time transported into the United States from or through a place outside the United States.

(b) A report under this section shall be filled at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:

(1) the legal capacity in which the person filing the report is acting.
(2) the origin, destination, and route of the monetary instruments.
(3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.
(4) the amount and kind of monetary instruments transported.
(5) additional information.

106 18 U.S.C.S. § 1956(d) (Law. Co-op 1990). § 1956(d) provides that, “Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.
Section 1956(d) does not supersede any provision of Federal or State law imposing criminal or civil penalties in addition to those provided in § 1956(d). Therefore, a person can be charged with any violation under § 1956 along with narcotics violations and/or a violation of the tax laws under 26 U.S.C. §§ 7201 or 7206 for evasion of Federal income taxes or for subscribing to a false tax return, respectively, or a violation of the Bank Secrecy Act for causing a financial institution to file a currency transaction report (CTR). 107

The Sting Provision

Section 1956(a)(3) creates a sting provision where by the government can introduce a Federal agent or person controlled by a Federal agent in an undercover capacity to a professional money launderer who will then “wash” the alleged “drug profits” for the undercover agent, thereby violating § 1956(a)(3). 108 This subsection was not part of § 1956 as it was originally created by the Money Laundering Control Act of 1986. Subsection (a)(3) was not added until 1988, when Congress passed the Anti-Drug Abuse Act of 1988. 109 In short, the reason for the passage by Congress of this subsection was due to the language of § 1956(a)(1) requiring that the property involved in the transaction must “in fact” involve the proceeds of a specified unlawful activity. 110 This requirement of § 1956(a)(1) effectively precluded the government from having its agents pose as drug dealers so they could approach professional money launderers to wash their “drug profits” were not “in fact” from a specified unlawful activity but were government funds allocated for such undercover operations, and in no way was the money “in fact” dirty money. Therefore, in such undercover operators the only charges that could possibly be brought against

107 31 C.F.R. § 103.11 defines financial institution fairly broadly. The definition of financial institution follows. Note especially section (i)(3) which has been used by the Governments and interpreted by the courts to include professional money launderers:

(5)(g) Financial institution. Each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed below.

(1) A bank (except bank credit card systems);
(2) A broker or dealer in securities;
(3) A currency dealer or exchanger, including a personal engaged in the business of a check casher;
(4) An issuer, seller, or redeemer of traveler’s checks or money orders, except as a selling agent exclusively who does not sell more than $150,000 of such instruments within any given 30-day period;
(5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds;
(6) A telegraph company;
(7)(i) A casino or gambling casino licensed as a casino or gambling casino by a State or local government and having gross annual gaming revenue in excess of $1,000,000.
(ii) A casino or gambling casino includes the principal headquarters and any branch or place of business of the casino or gambling casino.
(8) A person subject to supervision by any state or federal bank supervisory;
(9) The United States Postal Service with respect to the sale of money orders.

such individuals would have been tax violations or violation of 31 U.S.C. § 5324, for "structuring" the alleged dope profits so as to avoid the CTR requirements when the launderer was cleaning the money so as to bring it back to the drug dealer as "clean money."\(^{111}\) 31 U.S.C. § 5324 only carries with it a maximum of five years imprisonment (which can be elevated to ten years under certain circumstances), versus a maximum of twenty for a § 1956 violation.

Congressional recognition of this problem, which subsequently resulted in the addition of § 1956(a)(3), can be seen in the following passage:

First, 18 U.S.C. Section 1956(a)(1) makes it an offense to conduct a financial transaction which "in fact" involves the proceeds of specified unlawful activity. The "in fact" language precludes use of government "sting" operations to investigate this offense. A sting operation would involve a government agent posing as a criminal -- a narcotics trafficker, for example -- and giving government money to a money launderer for the purpose of conducting a financial transaction. Such an investigative technique cannot be used because the money would not "in fact" be the proceeds of unlawful activity.\(^ {112}\)

Section 1956(a)(3) provides:

Whoever, with the intent-

(A) To promote the carrying on of specified unlawful activity;

\(^{111}\) 31 U.S.C.S. § 5324 (1990). Section 5324 provides:

No person shall for the purpose of evading the reporting requirements of § 5313(a) with respect to such transaction-

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under § 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact;

or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 C.F.R. 103.11(p) defines structuring as:

Structure (structuring). For purposes of section 103.53, a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transaction in currency, in any amount, at one or more financial institutions, on one or more day, in any manner, for the purpose of evading the reporting requirements under § 103.22 of this Part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

\(^{112}\) H.R. REP. No. 864, Section 100th Cong. 2d. Sess. 9 (1988).
(B) To conceal or disguise the nature, location, source, ownership, or control of the property believed to be the proceeds of specified unlawful activity;

(C) To avoid a transaction reporting requirement under state or federal law;

conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph, the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.113

Again, we have the core requirement of the entire statute, that is, a financial transaction, being coupled with three alternative predicate offenses to form the basis of this subsection. However, there are some interesting differences in § 1956(a)(3). First, this subsection uses the term "intent" instead of "knowledge" for the measurement of mens rea. The choice by Congress of the word "intent" appears to indicate that Congress deliberately wanted to make this sting provision applicable to a specific intent crime to be limited to the three familiar alternative predicates which have been discussed supra, and are listed in subparagraphs (A), (B), and (C) of § 1956(a)(3). Subparagraph (A) deals with those individuals who have the specific intent to promote the carrying on of specified unlawful activity. Subparagraph (B) deals with those individuals who intend to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity. Subparagraph (C) deals with those individuals intending to avoid a transaction reporting requirement under State or Federal law.114 The only difference between these alternative predicate offenses as used in § 1956(a)(1) is the language toward the end of subsection (a)(3)(B) as compared with that of § 1956(a)(1)(B)(i). This wording in subparagraph (B), "... or control of property believed to be the proceeds or specified unlawful activity..." is necessary to get around the original reason why § 1956(a)(1) could not be used in a sting operation because the property involved in the transaction was not, "in fact" proceeds of a specified unlawful activity. In a government sting operation, the defendant must be shown to have acted with the specific intent required, that is, believing the property to be proceeds of specified unlawful activity.115

114 18 U.S.C.S. § 1956(a)(3)(A), (B), and (C) (1990). See supra Section III, Part A for a discussion of subparagraphs (A), (B), and (C).
The remaining part of § 1956(a)(3) requires that the defendant conduct or attempt to conduct a financial transaction in either of two ways: (1) the defendant conducts or attempts to conduct financial transaction with property which has been represented by a law enforcement officer to be the proceeds of specified unlawful activity, or (2) the defendant conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to conduct or facilitate a specified unlawful activity.

Section 1956(a)(3) defines the term "represented" as meaning any representation made to the defendant by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of § 1956. Therefore, the person making the representation to the defendant can be a Federal agent, State law enforcement officer, or confidential or controlled informant.

One additional interesting note is that Congress did not include in § 1956(a)(3) the language of § 1956(a)(1)(A)(ii), that is, conduct or financial transactions which constitute tax evasion or subscribing to a false income tax return. One would think that such a provision would be natural for sting operations by the IRS. For example, the IRS Criminal Division may be able, through investigative means, to determine whether a certain CPA, attorney, or accountant prepares or is preparing the tax returns for locally reputed organized crime figures or alleged drug dealers. An undercover agent could pose as a drug dealer "shopping" the tax preparer for advice in hiding his money from the IRS, getting the preparer's assistance in setting up a scheme to assist the "drug dealer" in hiding his assets, or even in the preparation of the undercover agent's tax return. Any number of scenarios could be imagined. However, although § 1956(a)(3) was put into law the same time § 1956(a)(1)(A)(ii) was enacted, there was no discussion by Congress of an extension of § 1956(a)(3). Thus, Congress must not have felt it was necessary to add the language of subparagraph (A) (ii) to § 1956(a)(3).

Throughout the legislative history of the Anti Drug Abuse Act of 1988, there was no discussion as to the addition of the language of § 1956(a)(1)(A)(ii) to § 1956(a)(3). Apparently, Congress must have felt that the language of § 1956(a)(3)(B), that is, to conceal or disguise the nature, location etc., of the proceeds of a specified unlawful activity, was sufficient for sting operations of professional money launderers and those who assist the criminals in hiding their ill

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gotten gains. Perhaps Congress did not want the statute to extend to such investigations, or such an extension of § 1956(a)(3) was an oversight by Congress. In fact, failure by Congress to include the language of § 1956(a)(1)(A)(ii) may give a professional money launderer a defense through the "loophole" of the language of § 1956(a)(1)(B)(i) discussed supra, in that the launderer could say his intent was to avoid payment of tax to IRS, rather than to conceal, disguise, etc.


The criminal penalty for violating either § 1956(a)(1), (a)(2), or (a)(3) is a maximum sentence of twenty years in prison for each count. Sections 1956(a)(1) and (a)(2) also carry a maximum fine of $500,000 or twice the value the property involved in the transaction, whichever is the greater.\(^{122}\) Section 1956(a)(3) does not specifically state that the fine shall be $500,000 or twice the value of the property involved, whichever is greater, only that the individual shall be fined under title 18, for which the standard fine is $250,000, or imprisoned for twenty years, or both.\(^{123}\) Presumably, this is because the currency or funds involved in § 1956(a)(3) violations is government money, not proceeds from a specified unlawful activity. Thus, it would be incongruent for this section to contain language as to the fine being a certain figure or twice the value of the of the property involved in the transaction.\(^{124}\)

Section 1956(b) provides for violations of §§ (a)(1), (a)(2), or (a)(3) to also be liable to the United States for a civil penalty of not more than the greater of the value of the property, funds or monetary instruments involved in the transaction, or $10,000.\(^{125}\) The Senate Judiciary Committee intended that such civil penalty under § 1956(b) is to be imposed in addition to the fine imposed for the criminal offense.\(^{126}\) The forcoming paragraph clearly expresses the Senate Judiciary Committee is clearly expressed its intent that double monetary penalties should be assessed for violations of § 1956:

Thus, a person who violates Section 1956 by laundering $250,000 might have the funds civilly forfeited, be subject to a fine of another $250,000 if convicted of the criminal offense, and pay a civil penalty of another $250,000 for payment of the criminal fine and civil penalty, the

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\(^{125}\) 18 U.S.C.S. § 1956(b) (1990). Section (b) states: "Whoever conducts or attempts to conduct a transaction described in Subsection (a) (1), on a transportation described in Subsection (a) (2), is liable to the United States for a civil penalty of not more than the greater of 1) the value of the property, fund, or monetary instruments involved in the transaction; or 2) $10,000." It should be noted that although "or transportation" does not follow "transaction" in subparagraph (1) as it does in subsection (b), fines should still be able to be imposed relating to the property, etc., involved in subsection 1956(a) (2) international transportation violations and should not be limited to a maximum of a $10,000 fine.
\(^{126}\) S. REP. No. 433, supra note 6, at 12.
government may look to other assets of the defendant not involved in the offense.127

Therefore, the time honored plea for mitigation of fines to be assessed against the defendant at sentencing, based upon the theory that the Internal Revenue Service will sufficiently punish the defendant through assessment of civil tax, fines, and possibly jeopardy assessment, should not hold true for the defendant, since Congress clearly intended to "double whammy" the defendant through the possible assessment of double monetary penalties. Note also that, in addition to the possible assessment of criminal and civil fines under § 1956, the forfeiture provisions of 18 U.S.C. §§ 981 and 982 may also applied.128

**Extraterritorial Jurisdiction**

Section 1956(f) defines the jurisdiction of acts extraterritorial to the United States which fall within the scope of § 1956. The two preconditions for extraterritorial jurisdiction are:

1. the conduct was committed by a U.S. citizen or, in the case of the defendant who is not a United States citizen, the conduct must have occurred in part in the United States, and
2. the transaction or series of related transactions involves funds or monetary instruments of a value in excess of $10,000.129

The following excerpt from a Senate report describes the jurisdiction reach Congress intended for this statute:

Section 1956(f) is intended to clarify the jurisdiction of U.S. courts over extraterritorial acts that could be constructed to fall within the scope of Section 1956. It is not the committee's intention to impose a duty on foreign citizens operating wholly outside of the United States to become aware of U.S. laws. Section (f) avoids this by limiting extraterritorial jurisdiction over the offense to situations in which the interests of the United States are involved, either because the defendant is a U.S. citizen or because the transaction occurred in whole or in part in the United States. An example of the latter is a situation in which a person transfers by wire the proceeds of a drug transaction from a bank in the United States to a bank in a foreign country; another example is a situation in which a person telephones instructions from the United States to one foreign bank to transfer such proceeds to another foreign bank. The section also specifies that there will only be extraterritorial jurisdiction...

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127 Id. at 12.
over a transaction or series of related transactions involving more than $10,000, thus ensuring that Federal extraterritorial jurisdiction is confined to significant cases. (emphasis added)

The Senate made it clear in the foregoing statement that an individual, whether or not is a U.S. citizen, will be subject to the jurisdiction of § 1956 if he or she conducts business within the United States.

A question which is not clearly addressed, however, by § 1956(f) and its legislative history, is whether a foreign financial institution or other foreign entity is subject to the United States’ jurisdiction under this statute if the prescribed conduct was transacted through such foreign institution. The language of this section appears broad enough to encompass such situations and subject the foreign institution to United States jurisdiction if such institutions have sufficient contact with the United States. However, it is equally apparent that Congress would not have been so presumptuous as to expect foreign institutions to become aware of the United States’ currency and banking laws as well as its criminal statutes regarding money laundering.

The bottom line is that the Department of Justice could use the section to confer jurisdiction of the United States over foreign institutions which participate in whole or in part in proscribed conduct occurring in the United States. However, decisions on whether to exercise such jurisdiction would probably be made on a case-by-case basis, and take into consideration such factors as the nature of the defendant’s contact with the United States, the defendant’s role in the underlying criminal conduct, whether the defendant can be prosecuted in the foreign country and sufficiency of proof, aggressiveness of the criminal activity, etc. It is certain that the Department of Justice will use this subsection to prosecute in such situations as it feels it has a more than adequate case.

Constitutionality of 18 U.S.C. § 1956

To date, there have been no reported appellate opinions which analyze § 1956. Various district courts have held, however, that the statute is constitutional, in that the term “proceeds” set forth in the statute is not vague, and the language of the statute provides individuals with adequate notice as to the proscribed conduct delineated in the statute. 3

In United States v. Kimball the Court ruled that the provisions of §§ 1956(a)(1)(B)(ii) and (a)(2)(B)(ii) are not unconstitutionally vague despite use of

the word "avoid" instead of "evade" in the statute, which prohibits the avoidance of financial transaction reporting requirements (the filing of CTR’s). The Court said that, "avoid" and, "evade" are synonymous. The Court also said the statute relates specific intent and other elements of a crime in a manner affording law enforcement personnel sufficient minimal guidelines so as to prevent arbitrary enforcement.

ENGAGING IN MONETARY TRANSACTIONS IN PROPERTY DERIVED FROM SPECIFIED UNLAWFUL ACTIVITIES - 18 U.S.C. §1957

Section 1957 creates a new offense which proscribes engaging in monetary transactions with property which has been derived from a specified unlawful activity. Section 1957(a)(1) contains the actual prohibition, which states:

Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is a value greater than $10,000 and is derived from specified unlawful activity.133

The elements of § 1957(a)(1) are: (1) an individual must "knowingly engage in or attempt to engage in a monetary transaction in criminally derived property, which at some point involves a financial institution as defined by 31 U.S.C. § 5312 and CFR 103.11; (2) the value of the property involved in the transaction must be greater than $10,000; and (3) the property must, in fact, be proven to be derived from a specified unlawful activity.134

Analysis of § 1957 requires reference to its subsection (f). Section 1957(f)(1) defines the term "monetary transaction" as a deposit, withdrawal, transfer, or exchange, of "funds" or "monetary instrument" by, through, or to a financial institution which affects interstate or foreign commerce.135 The term financial institution is to be defined by 31 U.S.C. § 5312 and 31 CFR 103.11. Section 5312 and its interpretive regulations give the term "financial institution a broad definition, which is specifically intended to encompass individuals acting in certain currency transactions.136

134 18 U.S.C.S. § 1957 (a) and (f) (1990).
135 18 U.S.C.S. § 1957(f)(1) (1990). This subsection defines monetary transaction as:
   (1) the term, "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in § 1956(c)(5) of this title) by, through, or to a financial institution (as defined in § 5312 of title 31), but such term does not includ any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution;
136 18 U.S.C.S. § 1957(f)(1) (1990). See also 31 U.S.C.S. § 5312(a)(2) (1990) and 31 C.F.R. 103.11 (1989). § 5312 in conjunction with its regulations defines a financial institution very broadly. For example a person who engaged in transferring currency between a foreign country and the United States was found to be a "financial institution under § 5312 and C.F.R. 103.11, since the statute, regulation and the legislative history make it clear that a single individual conducting activities may be deemed a "financial institution", even
“Interstate and foreign commerce or transactions affecting interstate or foreign commerce” is given the same wide ranging definition as discussed under 18 U.S.C. § 1956.137

Section 1957(f)(1) defines “monetary instrument” as having the same meaning given in by § 1956(c)(5) Section 1956(c)(5) defines “monetary instruments” as coin or currency of the United States or any other country, Traveler’s, personal, or bank checks, money orders, securities in bearer form, and negotiable instruments in bearer or other form.138 Section 1957(f)(2) defines the term “criminally derived property” as “any property constituting or derived from, proceeds obtained from a criminal offense.”139

The legislative history does not define what is meant by the term “criminally derived property,” other than its definition in § 1957(f)(2). The definition in § 1957(f)(2) does not appear to require that the funds be derived from any particular kind of crime, or indeed, that the funds be derived from a felony or misdemeanor. The only requirement is that it be property or proceeds from a “criminal offense.”140

Does this mean that a person who skims cash receipts from his business or materially overstates his deductions, thereby committing tax evasion or subscribing to a false tax return, can be convicted under this statute if conducts the transaction with proceeds he skimmed from his business, so long as it is greater than $10,000? Is tax evasion a “criminal offense” as envisioned by Congress? One could argue that tax crimes do not fit the contemplated criminal offense since tax crimes do not have, as a general rule, any identifiable proceeds. In addition, the statute requires that the proceeds of the transaction which must be greater than $10,000 be derived from a “specified unlawful activity.”

Section 1957(f)(3) defines the term “specified unlawful activity” as having the same meaning as given in Section 1956(c)(7).141 Basically, specified unlawful activities are defined by subsection (c)(7) as: (1) any RICO predicate offense as defined by 18 U.S.C. § 1961(1), except Title 31 currency transaction reporting offenses; (2) foreign narcotics violations; (3) any continuing criminal enterprise offenses (C.C.E., as defined in 21 U.S.C. § 848); and (4) the laundry list of offenses under § 1956(c)(7)(d). In all of four of these definitions, tax crimes are not

though the transactions were not with commercial banks, thus defendant was not entitled to the non-bank exemption for financial institutions in filing currency transaction reports (CTR’s) for cash transactions she handled in excess of $10,000. United States v. Mouzin, 785 F. 2d 682 (9th Cir. 1986). See also United States v. Hawley, 855 F.2d 595 (8th Cir. 1988).


enumerated. In addition, the Senate Judiciary Committee specifically prohibited the application of these money laundering statutes to, as it stated, the "run of the mill" tax evasion by inflation or deductions or skimming or legitimate income. 142 Therefore, a person could not be convicted under § 1957 for a transaction which exceeded $10,000 where property involved in the transaction was derived from proceeds skimmed from a legitimate activity.

The knowledge requirement contained in § 1957(a)(1) is only that the individual know that the money involved in the transaction exceeding $10,000 is derived from some kind of criminal activity. There is no requirement of knowledge that the funds are derived from any particular kind of crime or, indeed, that the funds were derived from a felony rather than a misdemeanor. In fact, § 1957(c) states that, "in a prosecution for an offense under this section, the government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was a specified unlawful activity." 143

Although there is a requirement under § 1957(a) that the government prove the money or funds involved in the transaction exceeding $10,000 came from a specified unlawful activity, this is not a knowledge requirement on the part of the defendant, but an evidentiary burden on the government. 144 In short, § 1957(a) effectively proscribes any knowing receipt of criminally derived funds or monies when the amount of those funds involved exceeds $10,000 and a financial institution (as it is defined broadly defined by 31 U.S.C. § 5312 and 31 CFR 103.11) is utilized at some point. The statue does not require that these funds be used for any additional criminal purpose, as does § 1956.

A comparison of the two money laundering statutes reveals that the difference between §§ 1956 and 1957 are:

1) Section 1956 does not require for a conviction any threshold dollar amount of the transaction, whereas § 1957 does require the transaction to be in excess of $10,000. 145

2) The knowledge requirement of the defendant that he knew that the proceeds involved in the transaction are criminally derived under § 1957 is less than the standard under § 1956 which requires that the defendant know proceeds were derived from some form of unlawful activity. This is due to the fact that "some unlawful activity" is defined as being any felony under State or Federal law, whereas "criminally

144 18 U.S.C.S. § 1957(a) and (c) (1990).
derived property" can include any particular kind of crime or misdemeanor.146

3) Section 1956 requires that the defendant intend or attempt that the funds be used for an additional criminal purpose whereas under § 1957 there is no such requirement that the funds involved in the transaction be used for any additional criminal purpose. The one overriding similarity between § 1956 and 1957 is that the government must prove that the funds involved in the transaction are derived from a specified unlawful activity.147

An example of the operation of § 1957 would be the deposit in a bank of the proceeds of a house sale by a seller (or the deposit by a real estate agent of his commission, which exceeds $10,000) who knows that these proceeds were funds derived from narcotics trafficking. Such a transaction would constitute a violation of § 1957. It should be noted that the facts of this example are sufficient for a conviction under § 1957, but the facts are not sufficient to sustain a conviction under § 1956. This is because under § 1957 it is not necessary to show the funds be used for an additional criminal purpose, whereas under § 1956 it is required to show additional criminal purpose or attempted additional criminal purpose. 148

The legislative history shows that it was the intent of Congress that this statute by used to proscribe the criminal's purchase of large ticket luxury items, thereby keeping the criminal from enjoying his ill gotten gains. Although this was one of the intentions of this statute, the following discussion as to the requisite knowledge of a person who is guilty under these statutes was included in the House Judiciary Committee Report as a guide to the types of offenses and offenders Congress contemplated in passing these money laundering statutes, and to emphasize that it was the intent of Congress to ensure that any individual who knowingly conducts financial transactions (not just large luxury items) with the proceeds from an illegal activity may be subject to prosecution under these statutes. The excerpt is as follows:

The corner grocer in a small community is aware of the reputation of a person who is the local drug trafficker. That person comes to the store and buys five pounds of hamburger. The grocer takes the cash and deposits it in his/her bank account with his/her other receipts. The financial transaction is the act of the grocer depositing his day's receipts in his/her bank account. The question is whether the grocer is guilty of violating this branch of the offense. As Mr. McCollum observed, "You [the grocer] have to know what he is coming in to buy groceries with is indeed the money derived from the particular designated crimes; and to

146 18 U.S.C.S. § 1957(a) and (f)(2) compared with 18 U.S.C.S. § 1956(a), (1), (2), or (3) (Law. Co-op 1990).
get to that point, you would have to prove to a jury (that the grocer knew
that) the fellow had no other source of income or that [if] he had-- the
grocer had some more direct knowledge this fellow was just standing
outside on that street corner before he came in peddling drugs, like if [the
grocer] saw him doing it. [Under those circumstances] I don’t have any
problem whatsoever holding the grocer accountable if he sees the guy
[the trafficker] outside dealing in drugs and takes cash and walks into
his store... .

Mr. Lungren, in reiterating the importance of this branch of the offense
said, “It is time for us to tell the local trafficker and everyone else, ‘If
you know that person is a trafficker and has this income derived from
the offense, you better beware of dealing with that person.”149

It is obvious that the key aspect in determining the viability of an indictment
of an individual for prosecution under § 1957 is the knowledge of the individual as
to the proceeds involved in the transaction. If the evidence is substantial that an
individual knowingly engaged in a transaction with proceeds he knew to be criminally derived,
and if the government can prove the proceeds involved in the
transaction came from a specified unlawful activity, then an indictment is certainly
warranted.

The penalty for violation of § 1957 is a maximum of ten years imprisonment
and/or a fine as provided for under Title 18 of the United States Code, or an
alternative fine that may be imposed by the court, of not more than twice the amount
of the criminally derived property involved in the transaction.150 The language of
§ 1957 (b)(1) states, “the punishment for an offense under this subsection is a fine
under Title 18 of the United States Code,” referring to 18 U.S.C.S. § 3623 and the
$250,000 fine imposed thereunder.151

Jurisdiction over a § 1957 offense is based upon the offense taking place in the
United States or the special maritime and territorial jurisdiction of the United States.
Jurisdiction over § 1957 offenses also extends to offenses occurring outside the
United States if the defendant is a United States person as defined by 18 U.S.C.
§ 3077, except for those persons who are employees or contractors of the United
States, regardless of nationality, who are victims or intended victims of an act of ter-
rorism by virtue of their employment with the United States.152 Although § 1957 has
a broader extraterritorial reach than does § 1956, there is no explanation for this in
any of either statute’s legislative history.

In 1988, § 1957 was amended to provide that the term "monetary transaction", as defined by § 1957(f)(1), was not to include certain transactions between a defendant and his attorney. Specifically, the amendment reads, "but such term [monetary transaction] does not include any transaction necessary to preserve a person’s right to representation as guaranteed by the Sixth Amendment to the Constitution." Although the intricacies and breadth of the issues raised by § 1957 and this amendment’s impact upon defendants’ right to representation and the attorney-client privilege are beyond the scope of this article, a few comments are warranted. During the legislative history of the Money Laundering Control Act of 1986, the House Judiciary Committee and subsequently the House version of the money laundering bill adopted a resolution limiting §§ 1956 and 1957 to exclude financial transactions involving bona fide attorneys fees accepted by an attorney for representing a client in a criminal investigation. The discussion of the provision was included in the section on knowledge, presumably the Committee’s intention was that such a provision would apply to violations of both §§ 1956 and 1957. However, the provision was not followed by the Senate, and was not made part of the Money Laundering Control Act of 1986.

The Anti-Drug Abuse Act of 1988, however, amended § 1957(f)(1) to include the present provision cited above. It is interesting to note that the 1988 amendment was included only in § 1957 and was not also included in section 1956. A possible explanation for this is that § 1956 requires the transaction which includes the proceeds of a specified unlawful activity to be for bad purpose. To include an

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155 H.R. REP. No. 855, supra note 7, at 14. The language of the Subcommittee on Crime of H.R. 5077, Moneylaundering Control Act of 1986, July 16, 1986, was adopted by the House Judiciary Committee. The Subcommittee’s discussion was as follows:

The Subcommittee adopted an amendment limiting this offense in one very important regard:

This paragraph does not apply to financial transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom.

The Subcommittee was aware of a potential impact upon the exercise of the sixth amendment right to the effective assistance of counsel in the event of application of this offense to bona fide fees received by attorneys. An attorney representing a person facing criminal investigation or prosecution, in order to carry out the professional obligation to fully represent their clients, must inquire into many aspects of a client’s personal lives and financial circumstances and thus may learn that part of the fee with which the attorney has been paid was derived from a designated offense. The Subcommittee was very concerned that, in the absence of this provision, the potential for such discovery might have had the effect of inhibiting the attorney’s complete investigation of the client’s case (to avoid learning any information which could have triggered this offense) and would thus have interfered with the client’s sixth amendment right to effective assistance of counsel.

156 Id. at 14.
exemption for bona fide attorney fees in § 1956 would thus be incongruent with the statute's purpose of criminalizing bad purpose transactions conducted with dirty money, for payment of one's attorney, even with illegally derived proceeds, is not a transaction with an inherent bad purpose. Since § 1957 does not require the transaction with proceeds from a specified unlawful activity to be for a bad purpose, the provision was included within its language. It should be noted that although § 1957 now provides that the term "monetary" transaction does not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the United States Constitution, it does not exempt all other non-bona fide attorney fee payments or transactions between the defendant and his attorney. The legislative history of the provision makes very clear that the statute only exempts transactions between a defendant and his attorney which relate to the defendant's right to representation as guaranteed by the Sixth Amendment. Although not stated explicitly in the exemption contained in § 1957(f)(1), such exemption would presumably not only apply to the defendant, but also to his counsel.

Upon a reading of the House Judiciary Committees's discussion of this exemption, this conclusion becomes fairly evident. The discussion provides:

The Subcommittee adopted an amendment limiting this offense in one very important regard:

This paragraph does not apply to financial transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom.

This Sub committee was aware of a potential impact upon the exercise of the sixth amendment right to the effective assistance of counsel in the event of application of this offense to bona fide fees received by attorneys. An attorney representing a person facing criminal investigation or prosecution, in order to carry out the professional obligation to fully represent their clients, must inquire into many aspects of a client's personal lives and financial circumstances and thus may learn that part of the fee with which the attorney has been paid was derived from a designated offense. The Subcommittee was very concerned that, in the absence of this provision, the potential for such discovery might have had the effect of inhibiting the attorney's complete investigation of the client's case (to avoid learning any information which could have triggered this offense) and would thus have interfered with the client's sixth amendment right to effective assistance of counsel.

It would follow that this exemption also precludes the forfeiture of such fees pursuant to 18 U.S.C. § 981.¹⁵⁸

MONEY LAUNDERING STATUTES

The constitutionality of § 1957 may be argued by some defendants to be questionable, due to the lack of an "intent element." That is, there is no required intent that the transaction be for a "bad purpose," only that the defendant intend to enter into the transaction (any legal transaction greater than $10,000 should suffice as long as it, at some point, involves a financial institution) with proceeds he knows are from a "criminal activity," and which are in reality from a specified unlawful activity. However, to date there are no reported appellate decisions which analyze § 1957, and few district court cases which even address § 1957.

In conclusion, § 1957 allows the government to convict an individual who conducts any transaction which at some point involves a financial institution, and the amount of which exceeds $10,000, when the individual knows the proceeds involved in the transaction are from some criminal activity, and the government can show the criminal activity from which the proceeds are derived in a specified unlawful activity. Since the government does not have to show a "bad purpose" behind the transaction, this statute has the potential to be the basis of a favorite charge of the government. Not only can this statute be easily applied to the principals of illegal organizations, but it also applies to those who assist the principals, i.e. professional money launders and "smurfs," along with anyone who knowingly handles illegally derived proceeds in amounts over $10,000 which the government can show came from specified unlawful activity.

This statute should be particularly useful, as intended, in reaching the criminals who use their ill gotten gains in purchasing the large ticket items of which they are so fond. Note how the application of this statute works a double whammy upon the criminal in these transactions. First, he may run afoul of § 1957 in his purchase of a luxury item, thereby facing a ten year felony in addition to a substantial

While there is no statutory prohibition upon the application of § 1957 to transactions involving bona fide fees paid to attorney for representation in a criminal matter, the Department recognizes that attorneys in such situations, unlike others who may deal with criminal wrongdoers, may be required to investigate and pursue matters which will provide them with knowledge of the illicit source of the property they receive. Indeed, the failure to investigate such matters may be a breach of ethical standards or may result in a lack of effective assistance of counsel to the client.

Because the Department firmly believes that attorneys representing clients in criminal matters must not be hampered in their ability to effectively and ethically represent their clients within the bounds of the law, it is the proposed policy of the Department that prosecutions under § 1957 will not be brought against attorneys based upon the receipt of property constituting bona fide fees for the legitimate representation in a criminal matter, except if there is actual knowledge of the illegal origin of the specific property received and such evidence does not consist of confidential communications or other information obtained by the attorney during the representation and in furtherance of the obligation to effectively represent the client.

This proposed prosecution standard applies only to fees for legal services actually rendered in a criminal matter. Attorneys who engage in other commercial transactions unrelated to the representation of a client in a criminal matter or who represent clients in civil matters should be treated as any other.
fine of a maximum of $250,000 or twice the amount of the property involved, and he may also lose the beloved large ticket item he just purchased through the forfeiture provisions of 18 U.S.C. §§ 981 or 982, discussed infra.

THE FORFEITURE PROVISIONS OF MONEY LAUNDERING CONTROL ACT OF 1986

Section 1366 of the Money Laundering Control Act of 1986 added a new Chapter 46 to Title 18 of the United States Code. This new chapter authorizes the government to make both civil and criminal forfeitures relating to, but not necessarily involving traditional money laundering. The new provisions consist of 18 U.S.C. §§ 981 and 982. Section 981 prescribes the civil forfeitures and Section 982 prescribes the criminal forfeitures.


Section 981(a)(1), as originally passed by the Money Laundering Control Act of 1986 described three types of property forfeitable to the Federal government.\(^{159}\) Section 981(a)(1)(A) made forfeitable any real or personal property that represents the gross receipts of a person obtained either directly or indirectly as a result of a violation of §§ 1956 or 1957, or which are traceable to such violations. The term "gross receipts" was specifically intended by Congress and enunciated by the Senate Judiciary Committee to mean that only the commission earned by the money launderer is subject to forfeiture and not the corpus or proceeds itself which is laundered.\(^{160}\) Although a step in the right direction, § 981(a)(1)(A) was very limited, allowing the government to forfeit only the money launderer’s commission. It could not touch the illegal proceeds of the criminal which were derived from the specified unlawful activity, as defined by § 1956(c)(7).\(^{161}\)

For example, X, a drug dealer buys a $500,000 home through a real estate agent with proceeds X has derived from his narcotics trafficking. The real estate agent who is to make a $50,000 commission on the sale of the home knows the money X is using to buy the home is illegally derived income, in fact, the home is put in X’s mother’s name to conceal true ownership and source of funds. Under this example only the commission of the real estate agent could be seized and X gets to keep his home. In fact, this situation is not totally in line with the heart and soul of the substantive statutes, §§ 1956 and 1957 which are aimed at both the principal criminal himself and those who assist him in carrying on his illegal activity and to

\(^{159}\) The three types are real property, personal property, and coin or currency. 18 U.S.C.S. §§ 981(a)(1)(A) and (C) (Law. Co-op 1987).

\(^{160}\) S. REP. No. 433, supra note 6, at 23.

prevent the criminal himself from enjoying the fruits of his criminal labors.

On November 18, 1988, with the passage of the Anti-Drug Abuse Act of 1988, Congress amended the language of § 981(a)(1)(A) and deleted § 981(a)(1)(C) as it was originally written. Prior to the November 18, 1988, amendment, § 981(a)(1)(C) provided that the government could force forfeiture of property in relation to:

Any coin and currency (or other monetary instrument as the Secretary of the Treasury may prescribe) or any interest in other property, including any deposit in a financial institution, traceable to such coin or currency involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31 may be seized and forfeited to the United States Government. No property or interest in property shall be seized or forfeited if the violation is by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, officer, or employee thereof.

Section 981(a)(1)(C) as initially promulgated did not contain the limiting language of "gross receipts" as did § 981(a)(1)(A). Therefore the government could, under § 981(a)(1)(C), forfeit the entire amounts involved in or traceable to violations of 31 U.S.C. §§ 5313 or 5324. Under § 981(a)(1)(C), if an individual structures $100,000 of cash into a bank account in violating 31 U.S.C. Section 5324, then uses this money to buy a house for $100,000, the house is forfeitable under § 981(a)(1)(C), because the purchase of the house is traceable to the currency which was involved in the transactions which violated § 5324. Note also that if the individual left the $100,000 in the bank account after the structured transactions, the entire $100,000 of currency could also be seized.

What Congress did in amending §§ 981(a)(1)(C) in November of 1988 was to effectively combine the best parts of both subsections while dropping the "gross receipts" limitation of subsection (a)(1)(A). The result was an amended § 981(a)(1)(A) which provides that:

"Any property, real or personal, involved in or traceable to violations of Title 18 U.S.C. Sections 1956 or 1957, or Title 31 U.S.C. Sections 5313 (a) or 5324."
This language allows the government to civilly force forfeiture of any property, real or personal, which the government can show, was involved in or traceable to a transaction, where the proceeds of that transaction were derived from a specified unlawful activity (as required by §§ 1956 and 1957), and the transaction was for a bad purpose (§ 1956) or for greater than $10,000 (§ 1957), or the property was involved in a transaction which violated the CRT requirements under 31 U.S.C. §§ 5313(a) or 5324. The legislative history of the amendment to § 981 contained in the Anti-Drug Abuse Act of 1988 makes it very clear that the phrase "property...involved in..." includes all facilitating property as well as proceeds.166 This provision may become useful to the government in forcing forfeiture of assets used in violation of many of the white collar criminal activities which heretofore have escaped forfeiture.

Section 981(a)(1)(B) provides that the government may civilly force forfeiture of property in the United States that represents the proceeds of a violation of a foreign drug law. The offense must also be a felony drug violation under United States law if such offense would have occurred within the jurisdiction of the United States. This provision will allow the government to forfeit the proceeds of a foreign drug violation and any property derived from the activity. However, the provision does not authorize the United States to forfeit property that was used or intended to be used in the violation of the foreign drug law, which differs from 21 U.S.C. § 881.167

Section 981(a)(1)(C) provides for the forfeiture of any property traceable, real or personal, which represents the proceeds of or is derived from the proceeds traceable to various violations involving individuals and financial institutions, such as 18 U.S.C. § 215 (commissions or gifts for procuring loans), § 656 (relating to theft, embezzlement, or misapplication by bank employees), § 657 (relating to leading, credit, and insurance institutions), and §§ 1005, 1006, 1007, 1014, and 1344. Note, again, however that this section does not authorize forfeiture of property used or intended to be used commission of the violations.168

Section 981(b) provides that property subject to forfeiture under §§ 981(a)(1)(A) through 981(a)(1)(C) may be seized by the Attorney General. In a situation in which property is involved in violations of §§ 1956 and 1957 or 31 U.S.C. §§ 5313(a) or 5324, and such violations are being investigated by the Secretary of the Treasury, then such property may be seized by the Secretary of the Treasury.169 Section 981(j) provides that this forfeiture authority vested in the Attorney General and Secretary of the Treasury may be delegated by them to the proper parties.170

166 Hearings, supra note 169, at 18-19 (testimony of William F. Weld).
Section 981(b) also indicates when property is subject to forfeiture, the
procedure for forfeiture, when the property may be taken with or with out process,
and the appropriate measures which must be taken.\footnote{171} For property to be seized
without process, § 981(b)(2) follows the recent amendments to 21 U.S.C. § 881,
which allow the government to request the issuance of a seizure warrant authorizing
it to seize the property subject to forfeiture pursuant to the Federal Rules of Criminal
Procedure.\footnote{172} Rule 41 of the Federal Rules of Criminal Procedure sets forth the
specific procedures for obtaining search and seizure warrants. Subsection (c) of Fed.
R. Crim. p. 41 states that the threshold level for the granting of a seizure warrant is
a finding of probable cause.\footnote{173} The Senate Judiciary Committee stated that:

The procedural aspects of seizures and forfeitures under this section are
to be governed by the procedures for civil forfeitures under the Customs
law, as now employed under our drug laws (see 21 U.S.C. 881(d)), in
order that forfeitable property may be seized or a probable cause basis
prior to entry of the order of forfeiture.\footnote{174}

Although a discussion of probable cause is beyond the scope of this analysis
it suffices to note that probable cause has been defined as, . . . "those facts and
circumstances which would lead a reasonable cautious and prudent man to be-
lieve. . ." that such property is subject to seizure according to law.\footnote{175}

The other method set forth in § 981(b) in which the government can force
forfeiture of property without process is obviously when the seizure is pursuant to
a lawful arrest or search.\footnote{176}

The process by which property may be forfeited with process is defined in
§§ 981(b) and 981(d). The forfeitures with process are to be governed by the
procedures for civil forfeitures under the Customs law, specifically, pursuant to the
Supplemental Rules for Certain Admiralty and Maritime Claims.\footnote{177} However the
thrust of this article will deal with those forfeitures executed by the government
without notice, specifically those pursuant to the Federal Rules of Criminal
Procedure, for this is the provision which will most likely have the most profound

\footnote{172} 18 U.S.C.S. § 981(b), (1), (2) (Law. Co-op 1990). See also 21 U.S.C.S. § 881(b) (Law. Co-op 1990). This
Subsection’s procedures for forfeiture were virtually copied word for word into 18 U.S.C.S. § 981(b). Note
that both provisions are included in Subsection (b) or their respecting statutes. The only changes made were
those provisions relating to narcotics in 881(b) which obviously do not apply to 981(b).
\footnote{173} Fed. R. Crim. P. 41.
\footnote{174} S. REP. No. 433, supra note 6, at 24.
\footnote{175} Carroll v. United States, 267 U.S. 132 (1925).
Customs laws relating to the seizure, summary, and judicial forfeiture condemnation and disposition of
property, disposition of proceeds of sales of such property, remission and mitigation, and compromise of
claims.
effect in combating domestic criminal activity.

Section 981(a)(2) sets forth an "innocent owner" exception to property which is forfeitable under § 981(a)(1). Other Federal forfeiture statutes already contain similar provisions, especially 21 U.S.C. §§ 881(a)(6) and (7), explicitly including lienholders under their protections. The "innocent owner" exception has been judicially developed by the courts especially in regard to 21 U.S.C. § 881, of which § 981 is essentially a carbon copy. The courts have defined the "innocent owner" to include the following elements: (1) the individual must have a valid good faith interest in the seized property as the true owner, not just a nominee (who has "dominion and control" is often the issue in regard to this element); (2) the contesting party must not have had any knowledge of the asset being used or to be used in any illegal activity; (3) the alleged owner must not have knowledge of the particular violation in which the asset was used which subjects the asset to forfeiture; (4) the individual must have no knowledge that the user of the asset had previously been involved in criminal activity, especially the type which subjects the property to forfeiture; and (5) the petitioner must have taken all reasonable steps to prevent illegal use of the property.

In addition to the innocent owner and lien holder provisions, § 981(a)(1) provides that:

No property shall be seized or forfeited in the case of violations of § 5313(a) of Title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employer thereof.

It is interesting to note that Congress did not include violations of §§ 1956 or 1957 within the exception prohibiting forfeitures for violations of 31 U.S.C. §§ 5313(a) or 5324 when certain regulated banks or brokerage firms are involved in the violation. Presumably then, if such institutions are involved in violations of §§ 1956 or 1957, the forfeiture provisions of § 981 can be utilized. Even in cases where such regulated banks and brokerage firms are involved in violations of §§ 1956 or 1957, the government will presumably use great discretion prior to exercising its forfeiture power under § 981, due to the inherent myriad problems involved in such forfeitures and the interests of otherwise innocent depositors and investors. However, § 981 may be used against assets of a partner, director, or employee of such entities which was involved in or traceable to such violations. 181

Sections 981(c) and 981(d) relate to the custody and disposition of forfeited property, respectively, and, as previously stated, § 981(d) notes that the Customs laws are specifically incorporated by this section. Section 981(e) authorizes, and under certain conditions, the Attorney General or Secretary of the Treasury to transfer forfeited property to any other Federal agency, or to any State or local law enforcement agencies by the Attorney General or Secretary of the Treasury are not reviewable. The statute also authorizes the Attorney General or Secretary of the Treasury, upon certain conditions, to discontinue the forfeiture proceedings in favor of State of local proceedings. 182 Such property transfers are to be utilized solely by the State and local law enforcement agency participating in such investigations or seizures. The property may not be used by the State or local entity for any purposes other than law enforcement. The determination of what property or share of property may be used is determined by the percentage of the investigation conducted by the State or local agency.

Section 981(f) codifies the “relation back doctrine” by stating that all right, title, and interest in property described in § 981(a) shall vest in the United States upon the commission of the act giving rise to forfeiture under § 981. 183 Sections 981(g) and 981(h) deal with stays of forfeiture proceedings and venue, respectively. Section 981(g) provides that upon a filing of an indictment or information alleging a violation of Federal, State, or local law, which is also related to a forfeiture proceeding under § 981, shall, upon good cause shown, stay the forfeiture proceeding until the criminal action is disposed of. The significance and strategic use of this provision will be discussed in the following section of this article which discusses practical applications of the forfeiture provisions under §§ 981 and 982. 184

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property is found or in the judicial district in which the criminal prosecution is brought. This is in addition to venue as provided for in U.S.C. § 1395 or any other provision of law relating to venue.\textsuperscript{185}

Finally, section 981(i) sets forth additional provisions applicable only to property subject to forfeiture under violations of foreign drugs laws and equitable sharing with foreign nations in such situations. These provisions of § 981 will not be included in this analysis.\textsuperscript{186}


The Money Laundering Control Act of 1986 created, along with § 981, its counterpart in § 982. Section 982(a), which sets forth criminal forfeiture provisions, by provides that a court, “in imposing sentence on a person convicted of an offense under Section 1956 or 1957, shall order that person to forfeit to the United States any property, real or personal, which represents the gross receipts the person obtained, directly or indirectly, as result of such offense, or which is traceable to such gross receipts.”\textsuperscript{187} The use of the term “gross receipts,” as discussed previously in the analysis of § 981, was intended by Congress to represent only the commissions earned by the money launderer in laundering the illegal proceeds for another criminal or his criminal enterprise. As would be expected, the definition of “gross receipts” in this statute, as in § 981, greatly limited the scope of forfeitable property under this statute, and, therefore the effectiveness of this statute. Moreover, there was no “substitution asset” provision as under 21 U.S.C. § 853. Consequently, § 982 was never used prior to its amendment by the Anti-Drug Act of 1988.

Section 6463(c) of the Act deleted the entire language of § 982(a) described previously, and replaced it with a new subsection (a), which provides that:

The court, in imposing sentence of a person convicted of an offense in violation of 31 U.S.C. Section 5313(a) or 5324 or 18 U.S.C. Section 1956 or 1957, shall order that person to forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.\textsuperscript{188}

It should be noted that forfeiture is \textit{mandatory} upon the defendant’s conviction.\textsuperscript{189}

Section 6463(c) of the Anti-Drug Abuse Act of 1988 also created § 982(b).
which authorizes the criminal forfeiture of "substitute assets." Section 982(b)(1)(A) provides that property which is subject to forfeiture under § 982(a)(1), or any seizure disposition or administrative or judicial proceeding in relation to such forfeiture, shall be governed by subsections (c) and (e) through (h) of 21 U.S.C. § 853. The language of 21 U.S.C. 853(b), incorporated into § 982(b)(1)(A), provides that if any property otherwise forfeitable under § 982(a)(1), because of any act or omission of the defendant, either:

a) cannot be located upon the exercise of due diligence;
b) has been transferred or sold to, or deposited with a third party;
c) has been placed beyond the jurisdiction of the court;
d) has been substantially diminished in value; or
e) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of the otherwise forfeitable property. 190

This substitution of assets can have great applicability, as will be demonstrated in the next section, in reaching assets of the defendant who has been convicted of money laundering under §§ 1956 or 1957 or the CTR violations under 31 U.S.C. § 5313(a) or 5324. This is especially true when the nature, form, or character of the illegal proceeds have changed but such assets are still in the defendant's ownership but under a different but under a different form. However, § 646(d) of the Anti-Drug Abuse Act of 1988 also created § 982(b)(2) which states that the scope of the substitution of assets provision of § 982(b)(1)(A) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense. 191

This additional language is very puzzling and problematic as applied to the professional money launderer, as they never retain the money laundered, only a fee for their services. Indeed, it is the professional money launderers' job to almost immediately pass the illegal proceeds to their "clients" after its "cleansing" process. It is hard to believe or to suggest that Congress intended to exempt such professional money launderers who have grown wealthy "cleansing" the criminal's ill gotten gains from this "substitute assets" provision. Rather, it would seem more probable that Congress had in mind the employees ("smurfs") often utilized by the professional money launderer, when it drafted this exemption. Otherwise, the only person who may be able to be reached under the substitute assets provision of § 982(b)(1)(A) is the principal criminal himself, who retains the illegal proceeds after they have been washed.

However, according to this provision's legislative history, it appears a narrow reading should be given to § 982(b)(2). The legislative history of the Anti-Drug Abuse Act of 1988 appears to clarify this, in that the substitute assets provision is to apply to: (1) the principal criminal; (2) a defendant who initially or ultimately had control of the laundered property and who was not merely an intermediary in the money laundering transaction; and (3) the professional money launderer, but only to the extent of the money launderer's fee and any property he or she may have used to facilitate the offense. The substitute assets provision would not apply to the money launderer to the extent of the amount of illegal proceeds he might launder. The Senate discussion goes on to say that if the substitute asset provision would apply to the professional launder in all cases, it would permit a court to order a person who violated the money laundering statutes, by converting millions of dollars to some other form on behalf of another party, to forfeit substitute assets worth millions of dollars from the launderer, when in reality he only kept a portion of the illegal proceeds as his fee. Such would render an unduly harsh result upon the launderer.

It should also be noted that § 982(a)(1), like § 981(a)(1)(A), provides that no property shall be seized or forfeited in the case of a violation of 31 U.S.C. § 5313(a) by a certain regulated banks and brokerage firms. In addition, § 982(a)(2), like its counterpart § 981(a)(1)(C), provides that an individual convicted of a violation of 18 U.S.C. §§ 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344, (various violations dealing with financial institutions) shall be ordered to forfeit to the United States any property constituting or derived from, directly or indirectly, such violation. The substitute asset provision, through the language of § 982(b)(1)(B) incorporating within it the provisions of 21 U.S.C. 853(h), also applies to assets acquired through the above violations. Both §§ 981 and 982 may be useful to the government in reaching any ill gotten wealth acquired by individuals caught up in the savings and loan debacle.

Practical Applications of the Money Laundering and Forfeiture Statutes

The forfeiture provisions of §§ 981 and 982 provide the government with a powerful tool which heretofore never really existed, except to some degree in the RICO statutes and narcotics forfeiture statutes. The former provisions were limited in that they were substantive RICO charges or restricted to narcotics trafficking. The new forfeiture provisions allow for civil and criminal forfeiture of assets purchased in transaction utilizing proceeds derived from no only narcotics traffick-

ing but also the laundry list of racketeering activity defined by 18 U.S.C. § 1961(1) and other criminal activity defined in § 1956(c)(7)(D), in addition to violations of the CTR laws, under 31 U.S.C. §§ 5313 and 5324.

A good example of the power, and the almost Draconian effect, these forfeiture statutes can have can be illustrated through the following hypothetical situation. Let’s say Mary Doe is an elderly woman whose husband has died and left her with a substantial amount of cash in the bank. Mary Doe has heard about the CTR requirements of §§ 5313 and 5324 which require a currency transaction report to be filed for cash transactions of amounts greater than $10,000 which involved financial institutions. Mary Doe is along in years, and she wants to give some cash gifts to her three grandchildren, of $7,000 each. However, Mary, like many law abiding citizens, is wary of having the bank fill out a form and send it to the government to report her banking activities. Mary decides to break up her $21,000 cash withdrawal into three transactions of $7,000 each. So Mary goes to the bank three days in a row, each day to a different branch, and withdraws $7,000 each day. She then goes to the financial institution of each of her grandchildren and deposits the cash in an account in each of their names. None of these individual transactions of Mary Doe required the bank to file a CTR under 31 U.S.C. §§ 5313(a). However, under 31 U.S.C. §§ 5324, Mary Doe has violated subsection (3), which provides:

“No person shall for the purpose of evading the reporting requirements of Section 5313(a) with respect to structure or assist in structuring, or attempt to structure, or assist in structuring, any transaction with one or more domestic financial institutions.”

The bank, seeing that Mary has “structured” such transactions, files a CTR for the transactions and notifies the local IRS Criminal Division office of the suspicious transaction.

Based upon this information, the apparent violation of 31 U.S.C. § 5324 and the civil forfeiture provisions of § 981(a)(1), which specifically incorporates violations of 31 U.S.C. § 5324, these monies deposited by Mary Doe into her grandchildren’s accounts are technically subject to the civil forfeiture provision of § 981(a)(1).

198 Money Laundering Control Act of 1986, supra note 1, at § 1353. Section 1353 of the Money Laundering Control Act of 1986 amends the right to Financial Privacy Act of 1978 (Privacy Act), 12 U.S.C.S. § 3401 (1990) in two respects. One allows the financial institution to notify proper government authorities of information it has which may be relevant to a possible violation of statute or regulation affecting a financial institution. Specifically a financial institution can turn over to the Government without notice to the customer the following information relating to a suspected violation (1) the name or names of the individuals conducting the suspected transaction and other identifying information pertaining to such individuals; (2) the account number or other identifying account information; and (3) the nature of the suspected illegal activity. The second aspect of the charge has to do with grand jury subpoenas which is not relevant to this discussion. See also S. Rep. No. 433, supra note 6, at 14-19.
All the government must do to effectuate a forfeiture under § 981(a)(1) is to prepare a forfeiture affidavit and present it to the magistrate showing him a probable cause basis of a violation of § 5324, which in this situation should be no problem, since we have a prima facie violation of § 5324.\textsuperscript{199} The funds to be forfeited, i.e., the $7,000 in each of the three grandchildrens accounts, are directly traceable to the violations, putting them squarely within the purview of § 981(a). Once the forfeiture warrant is signed, the government then descends on the three bank accounts of Mary Doe’s grandchildren containing $7,000 each. Instead of making a nice gift to her three grandchildren, Mary doe has had the gifts seized and forfeited to the government, in addition to facing a possible indictment for violation of § 5324. Note that this example encompasses forfeiture of Mary Doe’s previously taxed income, and the money has no taint of illegal activity (although currency involved in violations of §§ 5313 and 5324 are not required to be from illegal activities).\textsuperscript{200} Obviously this example is an extreme theoretical case, but it illustrates the technical workings of the substantive and forfeiture provisions, and the power the forfeiture statutes give the government to go after assets in a civil forfeiture proceedings when it can show a probable violation of §§ 1956 or 1957 and §§ 5313 or 5324.

Although these statutes passed by Congress give the government substantial forfeiture power, it is inconceivable that Congress meant to include such situations as described in the above hypothetical within the purpose of these forfeiture statutes. Analysis of the legislative history of these forfeiture statutes do not reveal any specific policy laid down by Congress to which the application of the forfeiture statutes were to be subject. However, the legislative history of §§ 981 and 982 does provided some guideposts. These “guideposts” can be summarized as follows:

1. The hearings and debate which led to the passage of § 981 were focused on the laundering of monies derived from criminal activities with the most emphasis on drug violations.

2. The purpose of the addition of 31 U.S.C. §§ 5313 and 5324 violations to the forfeiture provisions of § 981 was to eliminate the need for law enforcement to show a connection between the monies involved in the §§ 5313 and 5324 violations and drug trafficking or other non-drug criminal activity in order to effectuate a forfeiture.

3. Congress also expressed a desire that actions involving amounts of $25,000 or less be taken sparingly and with good cause. Congress appreciated the fact that seizure and forfeiture of one’s assets is a drastic measure. It is an area where government agencies, who are given such authority, may in their zeal to crack down on criminal, may overstep the fine line of prudence and thereby cause great hardship to innocent individuals.\textsuperscript{201}

\textsuperscript{201} H.R. REP. No. 746, 99th Cong. 1st Sess. 20-28 (1986).
With the above "guideposts" in mind, and based upon the procedures laid out in some detail by Congress in § 981, the following policy or something similar to it, should probably be followed by the government in effectuating forfeitures relating to monies involved in violations of 31 U.S.C. §§ 5313(a) or 5324. (Remember, it is not a requirement under §§ 5313(a) or 5324 that the currency involved in the transaction be derived from any illegal activity.)

1. Probable cause, as required by § 981(b), must first be developed, showing that the monies to be forfeited have been involved in violations of 31 U.S.C. §§ 5313(a) or 5324. (If at all possible, facts should be presented which shed light on the fact that monies may be untaxed, i.e., by seeing if such amounts are commensurate with the individual transactor's income and lifestyle, or if the proceeds may have the taint of illegal income.)

2. An affidavit of forfeiture prepared in preparation of a seizure warrant to be obtained in compliance with the proper rules of criminal procedure, i.e., presentation of affidavit in support of the seizure warrant to a federal magistrate. Upon approval of the seizure warrant the property should be seized.

It should be noted that § 981(b) specifically grants the Attorney General or Secretary of the Treasury to authorize forfeitures of property involved in violation of §§ 5313(a) or 5324 or §§ 1956 or 1957. Section 981(j) allows the Attorney General and Secretary of the Treasury to delegate such authority. What this means in practical terms is that Federal agents of such agencies as the FBI, IRS, DEA, and Customs Service, in concert with the Attorney General or controlled by the Secretary of the Treasury, are through the procedures of § 981, can "administratively" forfeit property involved in the above mentioned statutes. Although administrative and judicial forfeitures are beyond the scope of this analysis, it should suffice to say that administrative forfeitures are those that are handled entirely by the executive agency, in compliance with the agencies own administrative guidelines, until the time the individual from whom the property has been seized does such an act, as prescribed by the agencies' guidelines, which converts the forfeiture into a judicial proceeding. This act is usually accomplished by the forfeiter filing a claim and cost bond of a prescribed amount with the seizing agency, thereby, causing the Attorney General's office to file a complaint in Federal district court against the seized property.

The following steps are in addition to the two previously set forth, which relate to administrative forfeitures and the steps which should be adopted to properly and

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fairly effectuate a forfeiture case, once the Federal Magistrate has authorized the seizure warrant:

3. If, after seizure, there is a continued reasonable belief that the property seized were derived from non-taxed or criminal activity, forfeiture proceedings should be instituted either administratively or judicially, depending upon the facts and circumstances and as provided by § 981(b). (This step will obviously overlap with step 1.)

4. If it becomes known through various investigative means or as represented by a reasonable non-self serving explanation by the individual from whom the property was seized that the property is not derived from criminal activity or that such property, although not criminally derived has been previously taxed, the property should be returned to the individual.

5. If the individual(s) from whom the property was seized is unable to articulate that the property was derived from a legitimate source or if he refuses to make a complete and truthful disclosure of all the facts relating to the property, then there is a reasonable belief that the property came from nontaxable sources or criminal activity and forfeiture proceedings should be continued. Again, it should be noted that at any time the person from whom the property was seized can do those things which are necessary (usually by filing a claim and cost bond) to make the forfeiture a judicial action to be heard in a federal district court.

The above policy is more restrictive on the government agencies empowered to effectuate such forfeitures than what can be gleaned by a literal reading of § 981. However, those Federal agencies empowered to effectuate forfeitures under the statute would do well to follow such a prudential policy, so as not to “kill the goose which laid the golden egg”, so to speak, and turn public sentiment against such forfeitures, so as to force Congress to repeal the measure.

It should be noted that such policy should only apply to forfeitures relating to §§ 5313(a) and 5324 and not to forfeitures under §§ 1956 and 1957. This is because, as stated previously, there is no requirement under §§ 5313(a) and 5324 that the property involved in such violation be derived from some illegal source; whereas, for violations of §§ 1956 and 1957, the government must show that the property involved in such violations is derived from a “specified unlawful activity” as defined by § 1956(c) (7). Therefore, such a policy should not be necessary, for, in order

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to effectuate administrative forfeitures, the Federal agency must make a probable cause showing to the United States Magistrate that the property to be seized has been derived from a specified unlawful activity, which is definitely a much harder proposition than showing a violation of §§ 5313(a) or 5324.208

As discussed previously, Section 1957 specifically states that any transaction necessary to preserve a person’s right to representation as guaranteed by the Sixth Amendment to the Constitution is exempt from its purview. This includes both the defendant and his counsel and also precludes forfeiture of the attorney’s fee.209 However, an interesting question arises when an attorney receives several cashier’s checks over a period of weeks or months in payment of his fee. If the checks were purchased as a part of a structuring violation of 31 U.S.C. § 5324, then pursuant to the apparent violation of § 5324 the attorney’s fee could be seized and forfeited pursuant to § 981(a)(1)(A). It might not be obvious to the attorney that the checks given to him for his fee was part of a structuring scheme. In fact, it will probably not be obvious to the attorney that such a structuring scheme was used, even if he or she knew all the relevant facts, due to the time period of the acts.210 A literal reading of § 981(a)(1)(A) would appear to provide for forfeiture in this situation, for neither § 5324 nor § 981 contains a provision exempting transactions dealing with an individuals’ sixth Amendment rights.

Another example might be where a defendant launders a substantial amount of cash, say, in excess of $100,000, by exchanging the cash at various financial institutions for many cashier’s checks, all in amounts less than $10,000. The defendant is indicted for the transactions. He retains counsel and gives the counsel two of the checks. Since the defendant is charged with a financial crime, under 31 U.S.C. § 5324, those cashiers checks are forfeitable under § 981. However, suppose the defendant is charged with a non-structuring violation, say, the carrying of a concealed weapon. Here the attorney might not be put on notice that his fee was at risk until it was too late.

In the above examples, where the attorney would not in any way have been reasonably put on notice that the fee paid him came from part of a structuring scheme, the provision § 981(a)(2), the “innocent owner defense” should be sufficient to keep the fee from ultimately bring forfeited.211 In addition, the House Report notes that, “the fact that the violation occurred without the knowledge of the owner could be raised as a defense to forfeiture.”212 In addition, the House Judiciary Committee bypassed its desire that the amounts under $25,000 be forfeited “sparingly” and with

"good cause."\textsuperscript{213} The statutory provision of § 981(a)(2) and the legislative history provided the attorney with some useful tools to ultimately keep the fee from being forfeited. However, with the statutory language of § 981 clearly shifting the burden of proof onto the defendant to establish lack of knowledge, such a procedure could pose a substantial problem for a defense attorney during the existence of the attorney-client privilege. It should be interesting to see the posture the Department of Justice will develop in regard to this issue, and how the courts will treat the same.\textsuperscript{214}

Up to now, we have discussed the practical applications of the civil forfeiture statute in conjunction with violations of 31 U.S.C. §§ 5313(a) and 5324. We will now turn our attention to the application of § 981 in conjunction with the money laundering statutes, §§ 1956 and 1957. The analysis will focus on two examples.

1. First Example

X is a high level narcotics dealer. X has operated as such for approximately fifteen to twenty years. X has amassed quite a fortune. He now owns many residential and commercial pieces of real estate with a value of approximately $2,000,000. He has stock and other investments with financial institutions amounting to close to $1,000,000. X owns various other passive investments. X enjoys a very nice lifestyle, has several luxury cars of his own in addition to buying several new cars for his family members. X makes a point to pay for as many things as he can in cash, so as to make it very hard for the IRS to document his expenditures. X is so well insulated from his narcotics operations that no Federal, State, or local law enforcement agency with narcotics jurisdiction has been able to successfully investigate X and indict him on narcotics violations. X has received some "financial advice" from a CPA and attorneys, whereby he sets up a sham corporation to launder some of his drug profits so as to give him a "legitimate" source of income, sufficient to cover his annual living expenses.

Subsequently, due to X's unexplained wealth and alleged reputation as a high level drug dealer, the IRS Criminal Division initiates a Grand Jury investigation of X. Remember that under § 981, it was not until after November 18, 1988, that the government was empowered to seize the entire asset when it could demonstrate based upon probable cause that the asset to be seized was involved in or traceable to a transaction or attempted transaction occurring after November 18, 1988, in violation of §§ 1956 or 1957.\textsuperscript{215} This transactional requirement of §§ 1956 and 1957 in conjunction with the effective date of the provision in § 981(a)(1), allowing the government to seize assets upon violations of the money laundering statutes poses

\textsuperscript{213} Id. at 21.
\textsuperscript{214} See Cassens, "ABA Backs Defense Attorneys" 72 A.B.A.J. Oct. 1986, 40. See also Treasury Department Declines to Adopt Suggested Exemption for Attorney's Fees, 39 CRIM. L. REP. (BNA) 2462 (Sept. 17, 1986).
\textsuperscript{215} Supra note 173. The effective date of the Anti-Drug Abuse Act of 1988, P.L.-100 690 was November 18, 1988.
an interesting issue as to whether the government can: (a) force forfeiture of assets of X purchased prior to the effective date of § 981; and (b) whether the government can force forfeiture under § 981, of those assets purchased prior to November 18, 1988, but subsequently liquidated, with the proceeds of the previously acquired asset being involved in a financial transaction occurring after November 18, 1988.

As to the question posed in (a), the government will not be able to force forfeiture of X's assets under § 981 which he purchased prior to November 18, 1988, and which stayed in that same form after the effective date of § 981. However, since X is a narcotics trafficker and based upon the substantial evidence of X's narcotics trafficking and the fact that X has had no legitimate source of income for the last twenty years, the government may be able to forfeit those assets which X acquired with illegal proceeds prior to November 18, 1988, under 21 U.S.C. § 881. Although the IRS does not have jurisdiction under 21 U.S.C. § 881, in all likelihood, the investigation of X will be conducted through a Grand Jury investigation, and an agency with jurisdiction of the narcotics statutes, such as the FBI or DEA, will be asked to participate in the Grand Jury investigation, so as to effectuate the forfeitures under 21 U.S.C. § 881, with the assistance of the IRS.

As stated previously, the IRS Criminal Division initiates a Grand Jury investigation of X based upon the above information. Through the course of its investigation, the IRS is able to recompute X's income for the past five years, using the net worth method, to show X has substantially understated his income, in addition to showing he did not have sufficient legitimate income to obtain the wealth he now has. In addition, during the course of the investigation the IRS has been able to document substantial evidence of X's drug activity, so much so that the government will be able to prove that X has not earned a single penny of legitimate income, other than what his investments from his illegal income have produced. The government plans to go forward and indict X and several others with tax violations and violations of §§ 1956 and 1957. It also intends to force forfeiture of as many of X's assets as it can. However, in doing so, the government must be cognizant of the dates such assets were acquired by X.

As stated in question (a) above, in order to force forfeiture assets purchased by X prior to November 18, 1988, the government must make and prepare the necessary forfeiture affidavits for the seizure warrants and effectuate the forfeiture of those assets pursuant to 21 U.S.C. § 881 for X's assets purchased prior to November 18, 1988, which retain such form. However, as to those assets which the government can show were purchased by X in transactions occurring after November 18, 1988, with proceeds derived from a specified unlawful activity, (here narcotics trafficking) in violation of §§ 1956 or 1957 or traceable thereto, the government can force forfeiture under § 981.

However, the interesting question is can the government force forfeiture of any asset of X which he bought with the proceeds of narcotics trafficking prior to § 981’s effective date, but which he later liquidates or sells, conducting another transaction after November 18, 1988, with the proceeds of the sale of the asset. Can the government force forfeiture of the funds from the sale if X merely deposits the proceeds in one of his many bank accounts, the funds deposited representing the proceeds of an illegal activity which X earned prior to the passage of either §§ 1956, 1957, or 981? It can be argued very strongly that such asset should be forfeitable under § 981 as long as the government can show a probable cause basis that the transaction in which the property was involved was conducted with proceeds from a specified unlawful activity and such transaction violated either § 1956 or 1957.

Such forfeiture would be based on the following reasons. First, Congress specifically incorporated into the provision of § 981 the “relation back doctrine.” That doctrine states that the right, title, and interest in property illegally obtained shall vest in the United States upon commission of the illegal act which gives rise to the forfeiture, i.e. narcotics trafficking and here a transaction involving proceeds from a specified unlawful activity. Sections 1956, 1957, and 981 were passed in October 27, 1986, and amended on November 18, 1988. Indeed one can infer that, by inclusion of the explicit codification of the relation back doctrine into § 981, Congress intended to reach all assets which were purchased with illegal proceeds in transactions after the effective date of these statutes, if such transactions had the defined bad purpose or in which the criminal purchased large ticket luxury items with his illegally acquired income.

Sections 1956 and 1957 do not proscribe transactions conducted with the proceeds of illegal activity earned after the dates of their passage. These statutes proscribe the conducting of transactions by individuals who know the proceeds involved in their transaction are derived from a specified unlawful activity. If Congress intended for §§ 1956 and 1957 to apply only to illegal proceeds earned after their effective dates, then Congress would have built into the statute an almost unbeatable defense for the defendant. For, any time one would be indicted under this statute, all the defendant would merely have to do is say the money involved in the transaction was earned prior to the effective date of §§ 1956 and 1957, thereby evading conviction and precluding forfeiture of the proceeds or asset involved in the transaction. Although Congress did not explicitly debate this issue when promulgating these statutes, a reading of the legislative history clearly gives a reader the impression that Congress specifically did not contemplate §§ 1956, 1957, and 981 to apply to illegal income earned after their effective date. Indeed Congress called money laundering “the lifeblood of the drug trade and other criminal organiza-

218 Supra, notes 1 and 152, respectively, the effective dates of the Money Laundering Control Act of 1986 was October 27, 1986. The effective date of the Anti-Drug Abuse Act of 1988 was November 18, 1988.
Time and again in the testimony included in the various committee reports, examples are used which reveal that it is not a period or date when the illegal income was earned which is the controlling factor of this legislation, but the type and occurrence of a transaction of illegal income which allowed the criminal to carry on his illegal activities and enjoy the fruits of his labor.

Finally, the application of the Ex Post Facto doctrine to these statutes really relates to the transactions in which the criminal might engage with his illegally gotten income and not with the production of the illegal income, which is result of committing the illegal act which is already proscribed by the substantive crimes outlined in § 1956(c)(7) defining what a specified unlawful activity is. Therefore, for the above reasons, the assets of X which are purchased by him prior to November 18, 1988, with the proceeds from a specified unlawful activity, but sold after November 18, 1988, and those proceeds used in a transaction which would be a violation of §§ 1956 or 1957, should be forfeitable. However, if the asset purchased by X prior to November 18, 1988, is never sold by him or used in a violation of §§ 1956 or 1957, that asset is beyond the reach of § 981 for the purpose of its forfeiture.

Another interesting aspect of forfeiture under § 981 is the timing of when the forfeitures should be effected. Usually in facts similar to the above example, forfeitures of the assets will not be effectuated until the defendant has been indicted or if there is a possibility that such assets might disappear. In our above example, let's say the government has reason to believe X may be initiating a plan to hide his assets from the government. The government may seize the assets of X under either exigent circumstances or pursuant to the procedures laid out in § 981, during the course of the criminal investigation. Although the seizures were effectuated during the criminal investigation, it should not have a disastrous effect on the criminal investigation, even though much of the evidence obtained in the criminal investigation will be open to discovery pursuant to the Federal Rules of Civil Procedure upon X contesting the forfeitures in Federal district court. This is because the government has two factors in its favor. First, § 981(g) allows for a stay of the civil forfeiture action by the government, upon a showing of good cause, when an indictment or information is filed alleging a violation of Federal, State, or local law, which is related to the forfeiture proceeding under § 981. Second, although under the very liberal discovery rules under the Federal Rules of Civil Procedure the "governments' files relating to the investigation are open to the person from whom the assets were seized, such liberal discovery rules also open up discovery for the government as to almost anything related to the person under investigation or the assets forfeited. This the forfeite (or person under investigation) is almost never willing to do until the criminal action has run its course, for such discovery will almost always be more harmful to the individual(s) than it would be to the government.

219 S. REP. No. 433, supra note 6, at 4.
It should be pointed out here, although it should be fairly obvious, that the person contesting a civil forfeiture action by the government effectuated under § 981 has the burden of proof in the subsequent judicial proceeding, pursuant to the Federal Rules of Civil Procedure. This fact also has an impact on the person contesting the forfeiture, as to whether he will continue the civil action. Again, the contesting party usually postpones the action until after the disposition of the criminal matter.

2. Second Example

The substitute asset provision of § 982, the criminal forfeiture provision, can be employed in situations where an individual may have substantial assets and a good deal of legitimate income, but there is no way to trace the illegal income or show that certain assets were purchased with the illegal income, although it can be shown how much illegal income was produced. For example, Doctor X is selling prescriptions and dispensing certain drugs for cash to his “patients.” State and Federal law require the medical professional to separately and accurately record the dispensing of such drugs, and forbid the sale of prescriptions and drugs in such a manner. Doctor X is not accurately recording the number of the drugs he is dispensing although he is recording each transaction. A medical professional is not required to record the prescriptions he writes (other than possibly in the patient’s file) as the prescription is recorded at the pharmacy. Through an investigation, the government is able to determine through the information contained in the above documents, the amount of money, which is substantial, which Doctor X had made by obtaining the drug dispensing records and the prescriptions (all the “patients” went to the same drug store since the pharmacist was given a “kickback” from Doctor X or for all the prescriptions he filled for Doctor X’s “patients.”

The government in this situation may bring charges for narcotics violation under 21 U.S.C. § 843, money laundering violations under § 1956(a)(1)(A)(i) and (ii) and tax violations -- after all, Doctor X did not go to all this trouble just to report all this income on his tax return. Note that the narcotics violations under 21 U.S.C. § 843 would be the specified unlawful activity for the money laundering violations. In proving the tax violations under 26 U.S.C. §§ 7201 or 7206, the predicate offense under § 1956(a)(1)(A)(ii) would be proven. Note, however, that the money Doctor X derived from this practice of drug distribution cannot be directly traced, since the transactions were all in cash and Doctor X was smart enough not to leave a money trail by depositing such proceeds in a bank. Although the government can show almost to the penny how much Doctor X earned from the sale of drugs and prescriptions, Doctor X also earned a great deal of legitimate income from his legitimate treatment of patients. This precludes the government from seizing Doctor X’s substantial assets either under 21 U.S.C. §§ 881 or 981.

However, the government can, along with the tax, narcotics, and money
laundering charges, force forfeiture of the money it can show Doctor X earned from his illegal practices. Upon conviction of the money laundering counts under § 1956, it would be mandatory, pursuant to § 982, that the court order Doctor X to turn over that amount of money which the government proved beyond a reasonable doubt he earned from the illegal drug practices. It should be noted that, in regard to this fact situation and those situations similar to it, the civil forfeiture provision of § 981, although it carries a much less stringent burden of proof (that of probable cause) could not be utilized in this situation because there was insufficient nexus to link the proceeds of the illegal activity to the identifiable assets. It should be apparent, however, that both statutes provide flexible tools to hinder the criminal from enjoying the fruits of his labor.

Although the above examples and, indeed, the majority of examples in this analysis have dealt with the specified unlawful activity being that of narcotics violations, such was the choice for ease of presentation of the subject matter. It should be strongly noted, however, that §§ 1956, 1957, 981, and 982 deal with any of the specified unlawful activities and the proceeds derived therefrom as defined by § 1956(c)(7), which range from interstate murder for hire, gambling, prostitution, securities fraud, bank fraud, and embezzlement, to almost anything in between. However, a small caveat may be proper in regard to the forfeiture of assets in some of these specified unlawful activities. For example, in bank fraud and securities fraud, the assets which are eventually seized from those convicted under such statutes, or such activities are used as the specified unlawful activity for a §§ 1956 or 1957 charge, are usually bank depositors' or investors' money. Therefore, care should be taken by the government, for there may be competing interests, such as private rights of action for which the payment may be made from those very assets which are targeted for forfeiture. However, § 981(e) grants the Attorney General, Secretary of the Treasury, or Postal Service authority:

To transfer such forfeited property or such terms and conditions as he may determine to any another Federal agency...to the affected financial institution in receivership or liquidation, or any Federal financial institution regulatory agency: (A) reimburse the agency for payments to claimants or creditors of the institution; and (B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation. . . 220

One final note must be briefly stated in regard to forfeited property. The question arises as to the taxable status of forfeited. The recent court cases have held that money and other property earned from illegal activities constitute taxable income, despite being forfeited to the government. The cases also hold that no deduction is allowed to offset this seeming double benefit to the government. 221

Therefore, in conclusion to this forfeiture analysis, not only do §§ 1956 and 1957 provide for substantial criminal penalties (the greater of $500,000 and $250,000 respectively, or twice the value of the property) and substantial civil penalties for § 1956 (which, as emphatically stated by Congress, is to be imposed in addition to the criminal penalty), they provide substantial jail time of twenty years and ten years, respectively, for §§ 1956 and 1957. In addition, there are the forfeitures provisions to go along with these severe financial and incarceration penalties. On top of all this, that which is taken is taxable to the defendant. The prospects for one who runs afoul of these statutes is not very bright.

CONCLUSION

Money laundering has been called the "lifeblood" of criminals and criminal organizations. Recognizing this fact, Congress passed §§ 1956 and 1957, along with their companion forfeiture statutes, §§ 981 and 982, with the intent to make the criminal's ill gotten gains worthless.222

Sections 1956 and 1957 effectively criminalize almost any transaction conducted with the proceeds of specified unlawful activities. The statutes apply to anyone who participates in such transactions. The only real limitation in application of these statutes is that of the government must show: (1) the person knew the proceeds involved in the transaction were from some illegal source; and (2) the proceeds did, in fact, come from a specified unlawful activity. Based upon recent court cases such as Blackman, evidence required to prove element (2) is not overwhelming.

It appears that Congress made this law one to which the criminal community should stand up and pay attention, by providing that any violation of these statutes carries with it a maximum of twenty years for § 1956 and ten years for § 1957. In addition to the substantial incarceration periods, Congress included substantial civil and criminal penalties, which it made very clear are both to be assessed. On top of all this, those assets traceable to or used in violation of §§ 1956 and 1957 are forfeitable, and such items are still taxable in light of forfeiture.

Although not a panacea, these statutes should provide the government with a formidable tool in fighting the narcotics trade and other illegal activities. Prior to the passage of these statutes, criminals could be prosecuted for: (a) violations of the substantive criminal statute; and (b) failure to report the ill gotten income. Now, with these new money laundering statutes, the criminal and those who assist him can be prosecuted for merely handling and using their illegal proceeds. In addition, the government can take virtually any assets the criminal has acquired with his ill gotten gains.

222 S. REP. No. 433, supra note 6, at 4.
The statutes should have an impact in the way the government conducts its criminal investigations. Criminals, in operating their trade and organizations, have become very good at insulating themselves from the actual illegal activity. Accordingly, it is often difficult to bring substantive charges against these individuals for their proscribed activities. This is where these new money laundering statutes should have their greatest impact, especially in situations where the criminal is well insulated and his only source of income is from the illegal activity. Likewise, it should also be useful to the IRS' Criminal Division in its tax investigations which involve the laundering or production of illegal income.

The forfeiture provisions of § 981 may especially by valuable to the government in conducting its criminal investigations. First, it is very conceivable that through the civil forfeitures, the government could take a great deal of the criminal's assets with or without indicting or convicting him. The more forfeitures, the less assets the criminal has to continue his illegal activity. Second, much of these forfeited assets will go directly to Federal, State, and local law enforcement agencies, to be used in their fight against crimes. Third, the effectiveness of such forfeiture and substantive statutes may prompt States to legislate similar statutes so as to allow the State and local law enforcement agencies to take the assets of these who violate their statutes. This would also alleviate the time and burden on Federal law enforcement agencies adopting the seizures to effectuate the forfeiture for State and local agencies, since such statutes are not on the books of most states.

This new legislation is definitely a step in the right direction by Congress. However, Congress, the Treasury, and the IRS should realize that combating complex organized crime and its sophisticated money laundering schemes, especially in relation to the drug problem in this country, is such an enormous problem at this point that a concerted effort must be ongoing, and provisions such as these must be the norm and not the exception. The government must allocate a greater amount of resources and personnel in this problem, as it still takes considerable resources to uncover and investigate such money laundering schemes and their underlying criminal activity. These statutes, however, are a start, and represent a needed tool in the government's arsenal to put a dent in the multi-billion dollar economy of the narcotics trade and other lucrative criminal enterprises.