



Proposals to Reform the Federal Money Laundering Statutes

NACDL Money Laundering Task Force

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EXECUTIVE SUMMARY

Money laundering, commonly understood to involve the transfer of criminally derived money into legitimate channels, occurs in almost every crime in which there is a financial motive. Notwithstanding this broad definition, federal money laundering laws were enacted with a narrow purpose in mind: to take the profit out of drug trafficking and organized crime.

Over the years, the Congress has enacted several laws to prevent drug traffickers and crime syndicates from spending their money. With the Bank Secrecy Act of 1970, which imposes a duty on financial institutions to file a Currency Transaction Report (CTR) whenever a customer conducts a financial transaction in cash exceeding \$10,000, banks and financial institutions became the first line of defense. In 1984, Congress broadened the reporting requirements to include businesses by passing 26 U.S.C. § 6050I, part of the Internal Revenue Code. The first law to criminalize money laundering *per se* was the Money Laundering Control Act of 1986. This law not only criminalizes the movement of money and wealth derived from specified unlawful activities but assists in the seizing of the assets and profits of the specified unlawful activity.

The past fifteen years have witnessed an alarming expansion of the money laundering statutes — principally 18 U.S.C. §§ 1956 and 1957 — by the courts, the Department of Justice and the Congress. Once a tool for drug or racketeering cases, these laws are now applied to a wide range of activities, including routine business transactions.¹ During the same time, courts have minimized and

¹ An argument can be made that Congress did not intend that the money laundering statutes be used to combat offenses other than those associated with drug trafficking and organized crime. Teresa E. Adams, Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 Ga. St. U. L. Rev. 531, 549-58 (2000). Nonetheless, the underlying crimes that serve as predicates for money laundering offenses, called “specified unlawful activities,” include virtually all alleged white collar crimes, including federal environmental crimes and copyright infringement. See 18 U.S.C. § 1956(c)(7). See Money

blurred the evidentiary requirements for establishing money laundering. As interpreted and applied, the current law is a cruel trap for unwary individuals and businesses that inflicts felony convictions, draconian and inflexible prison sentences², and ruinous asset forfeiture.³

As Deputy Attorney General Larry Thompson stated,

The Anti-Money Laundering Statutes are overly broad because they potentially reach many legitimate business transactions. The result is that businesses are subject to overreaching investigations and prosecutions for conduct unrelated to drug trafficking or organized crime. These investigations and prosecutions are extremely disruptive for business and expensive to defend.

Elizabeth Johnson & Larry Thompson, Money Laundering: Business Beware, 44 Ala. L. Rev. 703, 719 (1993).

Laundering Campaign Hits New Targets, 3 No. 3 DOJ Alert 4, March 1993 (describing increased money laundering exposure of otherwise legitimate businesses, especially leasing companies, real estate brokers, and retailers).

² Section 1956 provides for a sentence of up to twenty years, and a fine of the greater of \$500,000 or twice the value of the property involved in the transaction. Section 1957 provides for a sentence of up to ten years, and includes the potential imposition of substantial fines as well. Both sections trigger severe sentences under the United States Sentencing Guidelines.

³ Money laundering offenses trigger the broad forfeiture provisions of 18 U.S.C. § 982, which gives prosecutors the authority to seize any property “involved in” or “traceable” to the alleged offense. This means that prosecutors can seize an entire business, bank account or other asset with little regard for the nature or magnitude of the money laundering activity. A money laundering prosecution also gives prosecutors the power to use seizure warrants, seek protective orders and confiscate substitute assets.

Cases of unfair application of the money laundering laws are legion. Individuals and businesses who handle dirty money with no actual knowledge of the underlying offense are branded money launderers.⁴ This is because courts have interpreted the knowledge requirement to include the concept of “willful blindness” or “conscious avoidance.” Some courts have gone so far as to hold that willful blindness is shown where the defendant has suspicions and does not take action to confirm or disprove their truth; thus, the burden is on the defendant to investigate a suspicious situation, or be judged criminally culpable for her failure to inquire into the source of the funds.⁵

Compounding the statutes’ over-breadth is the prosecutorial practice of piling on money laundering charges that are incidental to or virtually indistinguishable from the underlying offense. For example, prosecutors have charged money laundering where the defendant has done no more than deposit the proceeds of some “specified unlawful activity” (see footnote 1) into his bank account, even though the bank account is clearly identifiable as belonging to him.⁶ Spending illegal proceeds, even without any attempt to obfuscate their source, likewise may trigger money laundering charges — against the drug dealer and the unfortunate merchant who knowingly accepts his money.

Piling on money laundering charges to an alleged crime other than drug trafficking often results in a sentence almost four times what would ordinarily be incurred.⁷ In white collar criminal

⁴ Federal law permits juries to infer guilty knowledge from a combination of suspicion and indifference to the truth. See, e.g., United States v. Campbell, 977 F.2d 854, 856-59 (4th Cir. 1992) (reinstating the money laundering conviction of a real estate agent based upon the agent’s “willful blindness” that her client was a drug dealer attempting to conceal proceeds by buying a house, when the client drove a Porsche, used a cellular telephone, and paid \$60,000 in cash under the table).

⁵ See United States v. Kaufman, 985 F.2d 884 (7th Cir. 1993) (upholding car dealer’s money laundering conviction based on willful blindness theory, even though the undercover agents in the sting operation never told the defendant that the car purchase money was drug proceeds).

⁶ Such “receipt and deposit” cases may be prosecuted under 18 U.S.C. § 1956 based on the contrived theory that the defendant “concealed” the proceeds. See, e.g., United States v. Sutera, 933 F.2d 641 (8th Cir. 1991) (holding that deposit of three checks identified as gambling proceeds into business bank account, which bore the name of its owner, constituted concealment).

⁷ Teresa E. Adams, Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 Ga. St. U. L. Rev. 531, 558-59 (2000).

cases, in particular, this allows prosecutors to obtain easy plea bargains and forfeitures that may not be in the interest of justice.

The following proposals are designed to address the money laundering statutes' most serious flaws:

1. The promotion prong of 18 U.S.C. § 1956, which has been subject to absurd application and conflicting interpretations, serves no purpose and should be repealed;
2. The concealment prong of 18 U.S.C. § 1956 should be expressly limited to financial transactions designed by the defendant with the intent to create the appearance of legitimate wealth; and
3. Congress should amend 18 U.S.C. § 1957, which broadly prohibits transactions involving illegal proceeds of a value greater than \$10,000, to focus on professional money launderers, rather than one-time offenders. The monetary threshold should be raised and, unless the defendant engaged in a pattern of illegal transactions, the offense should be a misdemeanor.

Additionally, NACDL is proposing amendment to 18 U.S.C. § 1957(f), which excludes "any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution." This proposal adopts the original statutory language, approved by the House on three separate occasions in 1986 and 1988, and is consistent with congressional intent to give full accord to the necessity of pre-indictment (not just post-indictment) representation.

Fifteen years of experience with the Money Laundering Control Act has led to the inescapable conclusion that the Department of Justice and the courts are incapable of controlling this blunderbuss.⁸ The proposals in this report are not only necessary to bring rationality and fairness to the laws but are

⁸ See United States Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses, Including Comments on Department of Justice Report 6-7 (1997) (concluding that money laundering sentences are still being sought and imposed "where the money laundering conduct is so attenuated as to be virtually unrecognizable as the type of conduct for which the money laundering sentencing guidelines were drafted.").

consistent with the aims of legitimate law enforcement. The proposed amendments would simplify and clarify current law, facilitate compliance efforts by individuals and businesses, and focus federal law enforcement on serious misconduct.

Proposal #1: Repeal promotion money laundering.

Far less drastic than it sounds, repealing the so-called promotion prong of 18 U.S.C. § 1956 serves the worthwhile goal of simplifying the federal criminal code — without creating a gap in federal law enforcement.

Before passage of the federal money laundering statutes, prosecutors sometimes charged — and in almost all circumstances could charge — money launderers with conspiracy to commit the underlying offense.⁹ The promotion prong of 18 U.S.C. § 1956 requires, by definition, that the financial transactions were conducted “with the intent to promote the carrying on of a specified unlawful activity.” Facially, one who intends to promote the underlying criminal activity and who participates in the commission of a financial transaction, the object of which is to further the underlying crime, is axiomatically liable as either a conspirator or an aider and abettor of the underlying crime itself. There is simply no void in the law of criminal liability requiring the creation or application of the promotion prong of § 1956.

⁹ See, e.g., United States v. Herrero, 893 F.2d 1512, 1535 (7th Cir. 1990); United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir. 1984).

Instead, the promotion prong, with its twenty-year statutory maximum and its severe sentencing guidelines, is an unnecessary addition to a federal prosecutor's arsenal — an arsenal that is already filled with a panoply of statutes prohibiting the underlying crimes themselves. There is no social harm (in addition to the harm of the underlying crime itself) that warrants a separate twenty-year statute for participating in a financial transaction that is intended to promote the alleged criminal activity that itself is already prohibited and subject to punishment.

Aside from not serving any legitimate purpose, the promotion prong has fostered confusion, inconsistency and unfairness. Far removed from true "laundering," so-called promotion money laundering was intended to prevent the use of funds to expand a criminal enterprise.¹⁰ However, prosecutors have applied the offense to conduct outside this narrow purpose, and the courts have permitted this unwarranted expansion.

Two areas, which have generated conflicting opinions, illustrate how the promotion prong has been stretched far beyond its thin rationale:

- In some circuits, one can be convicted of promotion money laundering where past, as opposed to future conduct, was involved.¹¹ Other circuits have recognized that one

¹⁰ Jimmy Gurule, The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?, 32 Am. Crim. L. Rev. 823, 844 (1995).

¹¹ See United States v. Montoya, 945 F.2d 1069 (9th Cir. 1991) (upholding defendant's conviction for promotion money laundering where he deposited check received as a bribe in bank

cannot promote the carrying on of an already completed act.¹²

account); United States v. Paramo, 998 F.2d 1212 (3d Cir. 1993) (cashing of fraudulently obtained IRS refund check constituted “promotion” because spending proceeds of check promoted the antecedent fraud), cert. denied, 510 U.S. 1121 (1994). Accord United States v. Reed, 167 F.3d 984 (6th Cir. 1999); United States v. Manarite, 44 F.3d 1407 (9th Cir.), cert. denied, 515 U.S. 1138 (1995); United States v. Cavalier, 17 F.3d 90 (5th Cir. 1994).

¹² See United States v. Jolivet, 224 F.3d 902 (8th Cir. 2000) (antecedent financial transaction did not establish promotion); United States v. Calderon, 169 F.3d 718 (11th Cir. 1999) (same); United States v. Heaps, 39 F.3d 479 (4th Cir. 1994) (same); United States v. Jackson, 935 F.2d 832, 841 (7th Cir. 1991) (same).

- The spending of any funds in an existing business, as opposed to an expansion of the alleged criminal conduct, has been held to constitute promotion by some courts.¹³ Others demand greater proof that the transaction in question promoted the business' illegal activities.¹⁴

Ultimately, the statutory language is extremely difficult to work with and is subject to different interpretations, producing dramatically different results, from circuit to circuit, and case to case.¹⁵

Because of these problems — and because one who commits promotion is liable as an aider and abettor or co-conspirator in the underlying offense — this prong of § 1956 should be repealed.

¹³ See, e.g., United States v. Morelli, 169 F.3d 798 (3d Cir. 1999); United States v. Savage, 67 F.3d 1435 (9th Cir. 1995) (funds transfer, which provided defendant with travel resources and “aura” of legitimacy, promoted scheme).

¹⁴ See United States v. Jackson, 935 F.2d 832 (7th Cir. 1991) (where defendant was both a drug dealer and a preacher, checks written for beepers, cellular phones and rent may have helped the defendant's “life style” but did not establish an intent to promote); United States v. Brown, 186 F.3d 661 (5th Cir. 1999) (funds that paid for parts, floor plans, software, used cars and other materials did not promote the fraud but supported the car dealership's legitimate activities); United States v. Olaniyi-Oke, 199 F.3d 767 (5th Cir. 1999) (no promotion where proceeds of illegal credit card scheme were used to purchase computers at two different businesses not involved in the scheme).

¹⁵ See generally Jimmy Gurule, The Money Laundering Control Act of 1986: Creating a New Federal Offense of Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?, 32 Am. Crim. L. Rev. 823 (1995).

Proposal #2: Define and narrow the term “to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.”

In contrast to promotion, the concealment prong of 18 U.S.C. § 1956 encompasses the conduct commonly understood to constitute money laundering. It proscribes the conducting of a transaction “knowing that the transaction 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.” Unfortunately, some courts have broadly interpreted the term “to conceal or disguise” to include virtually all transactions which involve the proceeds of unlawful activity.

Contrary to Congressional intent, this “turn[s] the money laundering statute into a ‘money spending statute.’”¹⁶ Spending money from a specified unlawful activity is already punished by another money laundering statute, § 1957 — but only if the money exceeds \$10,000. And even when this monetary threshold is satisfied, § 1957 caps the penalty at ten years’ imprisonment, compared to the twenty-year maximum sentence authorized for concealment money laundering. Clearly, Congress intended more deliberate concealment efforts to trigger the higher maximum sentence. By the same token, Congress did not intend that conduct incidental to the underlying

¹⁶ United States v. Sanders, 928 F.2d 940, 946 (10th Cir. 1991) (quoting portions of the statute’s legislative history that suggest that Congress did not intend to criminalize every transaction involving illegally obtained money).

unlawful activity (e.g., spending a fraudulently obtained tax refund) trigger disproportionately harsh penalties far in excess of those prescribed for the underlying offense.

Some courts have adopted a limitation worthy of codification. The Tenth Circuit, in United States v. Garcia-Emanuel, held that “[i]f transactions are engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute.”¹⁷ According to the Tenth Circuit, “the requirement that the transaction be ‘designed’ to conceal requires more than a trivial motivation to conceal,” and must be “based on substantial evidence, not mere suspicion.”

The Second, Sixth, and Eleventh Circuits have endorsed the reasoning in Garcia-Emanuel, holding that to convict under the concealment prong of § 1956, the government must establish that the transaction was engaged in to create the appearance of legitimate wealth, not for present personal benefit.¹⁸

¹⁷ 14 F.3d 1469, 1474 (10th Cir. 1994).

¹⁸ United States v. Stephenson, 183 F.3d 110 (2d Cir. 1999); United States v. Marshall, 248 F.3d 525 (6th Cir. 2001); United States v. Majors, 196 F.3d 1206 (11th Cir. 1999).

Although the Tenth Circuit, in Garcia-Emanuel, elaborately described the type and quantum of evidence necessary to support a conviction for money laundering, that circuit, in United States v. Salcido, nonetheless failed to apply its own test. See United States v. Salcido, 33 F.3d 1244 (10th Cir. 1994) (holding that evidence was sufficient to support conviction for money laundering where defendant merely proposed that alleged drug proceeds be converted into large bills that could more easily be transported). This demonstrates that, unless Congress includes sufficient guidelines for courts to follow in determining what evidence is sufficient to support a finding of intent to conceal, the courts will continue to apply different standards, and, thus, reach inconsistent results. In order to assure uniformity among the circuits, and to confine “concealment” prosecutions to true acts of money laundering, the money laundering statute should be amended to reflect the well-reasoned analysis of the Tenth Circuit in Garcia-Emanuel.

Proposal #3: Amend § 1957 to target significant third-party money laundering.

Section 1957 is essentially the same as § 1956 stripped of any requirement of promotion, concealment, or avoiding a transaction reporting requirement. Thus, § 1957 is not a money laundering statute, but rather a law against the depositing or withdrawal of more than \$10,000 at one time if you know it is the proceeds of crime.¹⁹ No social purpose is served by criminalizing such conduct. If a businessman commits a fraud, and his secretary knowingly deposits a check representing \$10,000 of the fraud proceeds in a bank account in the business' true name, with no attempt to conceal anything, the secretary has committed a § 1957 offense that is punished much more severely than the underlying fraud committed by her boss. Why? The act of depositing the fraud proceeds in a bank harms no one. Would society be better off if the proceeds were hidden under the fraudster's mattress?²⁰

One ostensible purpose of § 1957 is to keep dirty money out of the U.S. banking system. That sounds good as a slogan but accomplishes nothing. Once dirty money enters the banking system it becomes visible to the authorities and can be seized or taxed. If the money remains under

¹⁹ For many years the Department of Justice barely used § 1957, reflecting the government's doubts about the rationale and fairness of the provision. G. Richard Strafer, Money Laundering: The Crime of the '90's, 27 Am. Crim. L. Rev. 149, 161 (1989) (noting the small number of prosecutions commenced under § 1957 by 1989).

²⁰ The Sentencing Guidelines treat the § 1957 offense as *far more serious than the fraud offense*.

the criminal's mattress or buried underground no one benefits.

A second purpose § 1957 may serve is to prevent third parties such as merchants from accepting dirty money in trade. This *theoretically* makes it more difficult for the criminal to spend his money and thus enjoy the fruits of his crimes.²¹ The Justice Department's prosecution guidelines for § 1957 seem to target third parties who accept dirty money, not criminals who deposit or withdraw it.²² That would reflect a sensible judgment about the appropriate use of the statute.

²¹ However, in practice, § 1957 does not effectively prevent criminals from spending their ill-gotten gains. It is easy for the criminal to turn his cash into some less suspicious monetary instrument, and it is easy for the criminal to find a merchant who will accept cash, no questions asked. Because § 1957 imposes no duty of inquiry on the merchant, he can safely accept cash except in the most extreme circumstances.

²² See United States Attorney's Manual §9-105.400.

If § 1957 is not simply eliminated, Congress should at least codify that Justice Department policy so that § 1957 can only be used to prosecute the “money launderer” and not the criminal who is the source of the money. This would prevent the misuse of the statute to go after the criminal who generates the proceeds and who is already subject to penalties for the commission of the underlying crime. Congress should also require that the proscribed “monetary transaction” be part of a suitably defined “pattern” of similar transactions adding up to a high dollar threshold in order to incur felony liability.²³ If it is not part of a pattern or does not exceed some high dollar threshold, the merchant should, at most, face a misdemeanor penalty. There may be some social utility (albeit minimal) in prosecuting merchants such as car dealers who *regularly* cater to the drug trade.²⁴ But there is no social utility in making a felon out of a merchant who engages in one such transaction.

Congress could also make § 1957 more rational and less of a blunderbuss if it raised the dollar threshold from \$10,000 to \$25,000.

²³ See, e.g., 31 U.S.C. § 5322(b) (pattern of illegal activity involving more than \$100,000 in a 12-month period); 31 U.S.C. § 5321(a)(6)(B) (pattern of negligent violations by a financial institution).

²⁴ Remember, if the merchant does anything to help conceal the source of the money or the ownership of the vehicle he can be prosecuted under § 1956.

Proposal #4: 18 U.S.C. § 1957(f) should be amended to clarify the Sixth Amendment exemption in accordance with congressional intent.

In 1988, Congress amended 18 U.S.C. § 1957(f), to include a “Sixth Amendment” exception, which 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 Constitution.”

The potential problems for criminal defense attorneys had been recognized early in the legislative process by Members of Congress who participated in developing the Money Laundering Control Act. Rep. Bill McCollum (R-FL), one of the cosponsors of the House bill, proposed an amendment during the July 16, 1986, markup of the bill, which would have exempted transfers of bona fide criminal defense fees from criminal sanctions. That amendment read succinctly:

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 McCollum amendment was included in the Act which passed the House on two occasions.

The House Report accompanying that bill explains:

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.²⁵

The amendment was omitted from the final version of the Act during last-minute conference deliberations, but only, according to both Reps. McCollum and William Hughes (D-NJ), "because of an agreement that it is unnecessary because the offense could not be applied in these circumstances."²⁶

He continued:

I think that last night most of us working on this issue recognized that the risk that the Department of Justice would prosecute an attorney in this circumstance was really so very remote that a special statutory exception was really not necessary.

Rep. Hughes, the Subcommittee Chairman, submitted similar remarks explaining the legislative history into the *Congressional Record*.²⁷

It quickly became clear that the Department of Justice interpreted the new statute to permit prosecution of attorneys for receipt and deposit of bona fide legal fees, and the issue of an exemption for bona fide fees in criminal representation was revisited in the next session of Congress.

Once again, the 1986 provision which exempted "bona fide fees an attorney accepts for

²⁵ See H.R. Rep. No. 99-855, at 14 (1986).

²⁶ 132 Cong. Rec. E3822 (daily ed. Nov. 6, 1986) (statement of Rep. McCollum).

²⁷ Id. at E3828.

representing a client in a criminal investigation or any proceeding arising therefrom," passed the House²⁸, but the House-Senate conference resulted in a change in the amendment's language to that reflected in the current provision of § 1957(f)(1).

²⁸ See H.R. 5210, 100th Cong. § 6113 (1988).

The legislative history makes clear, however, that the change in the final language was not intended to change the substantive intent of the original provision. As Rep. Hughes said on the floor of the House on October 21, 1988:

The original House provision applied to all representation and not just the trial phase. The term “right to representation as guaranteed by the sixth amendment” **goes beyond the bare right to counsel at trial** and applies at the investigative or grand jury phases of a criminal proceeding — phases which, particularly in RICO, CCE or money laundering cases, can be far more lengthy, complex, and critical than the trial itself.

With respect to the kinds of transactions Congress intended to include within the exemption, Rep. Hughes stated:

Finally, I would note my intention that a transaction is “necessary” to protect sixth amendment rights, within the terms of the amendment, when it involves a **bona fide fee paid in good faith for legitimate legal representation**. This concept of “bona fide fees,” as developed recently by the Justice Department in its guidelines governing section 1957, does not include a fraudulent or sham transaction designed to shield the property from forfeiture or hide its existence from governmental investigative agencies. Generally, **a transaction is a sham or fraud if there is a scheme or plan to maintain the client's interest (or that of any other person or corporation associated with the client) in the asset or the ability to use it beneficially.**

Senator Ted Kennedy, who had been one of the Senate conferees, provided similar clarification.²⁹

²⁹ See 134 Cong. Rec. S17360-01 (Nov. 10, 1988).

Notwithstanding the enactment of § 1957(f)(1), the Department of Justice has maintained the position that it could prosecute lawyers for receiving and depositing bona fide legal fees.³⁰ Moreover, after noting that the Supreme Court, in *civil forfeiture* cases, had found no Sixth Amendment right to use criminally derived property to retain counsel of choice³¹, the authors of the Manual opined that “there may be no case in which the payment of legal fees with tainted property may said to be necessary to preserve the client's right to representation of counsel” and that, therefore, “the statutory exemption for ‘attorney fee’ transactions in essence has been vitiated.” Whatever the Department's misguided belief about its legal authority to prosecute attorneys under § 1957, it brought no such cases until very recently.³²

The Department’s apparent willingness to charge honest criminal defense lawyers with serious felony offenses for the receipt and deposit of bona fide legal fees — for arms-length, legitimate and ethical representation — threatens the very fabric of the adversary system of criminal justice, and requires clarification of the statute.

The amendment we suggest would return to the original statutory language approved on three

³⁰ See United States Department of Justice, *Money Laundering: Federal Prosecution Manual*, Ch. 3, p. R88 (1994).

³¹ See Caplin & Drysdale v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989).

³² See United States v. Ferguson, 142 F. Supp. 1350 (S.D. Fla. 2000).

separate occasions in 1986 and 1988 by the House, and would make it clear that the protections of the exception extend to pre-indictment representation.

APPENDIX A

§ 1956. Laundering of monetary instruments

(a)(1) 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—

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

~~(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or~~

(B) ~~knowing~~ **with the intent** that the transaction ~~is~~ **be** 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 **for the purpose of creating the appearance of legitimate wealth;** or

(ii) to avoid a transaction reporting requirement under State or Federal law,

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 twenty years, or both.

(2) 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, transmission, or transfer represent the proceeds of some form of unlawful activity and ~~knowing~~ **with the intent** that such transportation, transmission, or transfer ~~is~~ **be** designed in whole or in part—

~~(i)~~ **(A)** to conceal ~~or disguise~~ the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity **for the purpose of creating the appearance of legitimate wealth;** or

~~(ii)~~ **(B)** to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in ~~subparagraph (B)~~ **this subsection**, the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in ~~subparagraph (B)~~ **this subsection** as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

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

~~(B)~~ to conceal ~~or disguise~~ the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity **for the purpose creating the appearance of legitimate wealth;** or

~~(C)~~ **(B)** to avoid a transaction reporting requirement under state or federal law,

conducts or attempts to conduct a financial transaction involving property represented 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 and paragraph (2), 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.

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(8) the term "to conceal the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity for the purpose of creating the appearance of legitimate wealth" means the taking of affirmative actions with the intent of legitimizing the proceeds of specified unlawful activity so that it appears to third parties that the proceeds are derived from legal sources.

APPENDIX B

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, **other than a person who was involved in the specified unlawful activity**, in any of the circumstances set forth in subsection ~~(d)~~ **(c)**, ~~knowingly~~ engages or attempts to engage in a monetary transaction in ~~criminally derived~~ property of a value greater than \$10,000 **\$25,000**, and **knowing that the property is derived from some form of unlawful activity, which property in fact is derived from specified unlawful activity as defined in section 1956(c)(7)**, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ~~ten years~~ **one year** or both.

~~(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.~~

(2) If the defendant engages in a pattern of three or more violations of this section involving more than \$500,000 within a 12-month period, the punishment is a fine under title 18, United States Code, or imprisonment for not more than five years or both.

~~(c) 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 specified unlawful activity.~~

~~(d)~~ **(c)** The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

~~(c)~~ (d) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

~~(f)~~ (e) As used in this section—

(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 section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction ~~necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution~~ **involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom.**

~~(2) the term “criminally derived property” means any property constituting, or derived from, proceeds obtained from a criminal offense; and~~

~~(3) the term “specified unlawful activity” has the meaning given that term in section 1956 of this title.~~