COMMENTS

MONEY LAUNDERING: AN INTERNATIONAL CHALLENGE

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I. INTRODUCTION

In the words of South American drug barons, "dirty money is best passed through clean hands."[1] Money laundering is often defined as "the process by which one conceals the existence, illegal source or illegal application of income, and then disguises that income to make it appear legitimate."[2] More specifically, it is "the process of converting quantities of cash—generally currency that has been tainted in some way—to a form that can be used more conveniently in commerce and ideally conceals the origin of converted funds."[3] Despite the fact that the use of banks and other legitimate financial institutions is often the primary means by which launderers clean otherwise dirty money,[4] money laundering has also come to touch virtually every aspect of society. Money laundering has clearly become endemic to our social,

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1. Robert Graham, *Clean Hands Speed Dirty Money*, FIN. TIMES, Oct. 12, 1988, at I8.

2. PRESIDENTIAL COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS AND MONEY LAUNDERING 20 (1984) [hereinafter THE CASH CONNECTION]. "More than 95% of all money launderers identified by the federal government in the last few years have used at least one of roughly a dozen methods." Andrew P. Doppelt, *The Telltale Signs of Money Laundering*, 69 J. ACCT. 1 (1990). Businesses should look for the following warning signs: (1) "structuring accounts" by making repeated deposits to avoid the $10,000 reporting requirement; (2) a series of deposits into a single account by several individuals within a short period of time; (3) transfers from accounts located at the same bank to a single account in another financial institution; (4) the transfer of funds to "suspect" locations (Cayman Islands, the Netherlands Antilles, Hong Kong, Luxembourg, Switzerland, and Central American and Caribbean offshore banks); (5) multiple transfers in or out of accounts held in trust by accountants or attorneys; (6) obviously suspicious names used to open accounts; (7) names of associations often used as front companies such as "Import/Export Limited," "Investment Company," "Trading Company," "S.A.," "Ltd.," or "GmbH;" (8) very large deposits by small businesses; (9) unusual "spikes" in accounts that are otherwise exempted from reporting requirements; and (10) false social security numbers. *Id*.

3. HERBERT E. ALEXANDER & GERALD E. CAIDEN, THE POLITICS AND ECONOMICS OF ORGANIZED CRIME 39 (1985).

4. *Id.*

economic, and political frameworks; it ultimately affects and often subverts not only banking and other financial institutions but also both small businesses and multinational corporations, legislators and law enforcement officers, lawyers and judges, politicians and high-ranking government officials, as well as newspaper and television media. In addition, money laundering erodes the income tax base of many nations, thereby creating fiscal policy problems. [5]

Despite the existence of current domestic and international anti-money laundering initiatives, money laundering continues to expand across the globe[6] simply because it remains to be a lucrative endeavor; according to the United Nations (UN), money laundering businesses have an estimated world-wide turnover of between $120 and $500 billion each year,[7] while penalties for money laundering are insignificant in light of the profits generated from money laundering networks.[8] The historical success of money launderers can be attributed not only to the profitability of money laundering but also to other factors such as the "very nature of open economies, . . . the sheer instantaneity of financial transactions,"[9] the interdependence of the global economy,[10] the sophistication and flexibility of money

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5. INGO WALTER, SECRET MONEY 39 (1985). Confidential sources reported that profits from the drug trade have been invested in European banks, insurance companies, newspapers, television stations, and transportation operations. *World Drug Cash Said to be Pouring into Europe; Nigeria Becomes a Laundering Haven; OAS Nears Final Draft of Laws*, 3 MONEY LAUNDERING ALERT 4, 7 (1992).

6. Mark J. Biros & Bradley L. Kelly, *Global Reach for Ill-Gotten Gains: US Anti-Money Laundering Laws Extend Beyond our Borders*, 8 CRIM. JUST. 8, 9 (1994) ("A major trend affecting money laundering is the internationalization of money laundering networks, whose operations involve an even larger number of countries and territories.").

7. *See* Konstantin D. Magliveras, *Defeating the Money Launderer—The International and European Framework*, 1992 J. BUS. L. 161 (1992).

8. For example, "$0.0062 out of every illegally earned dollar from narcotics traffic is subject to the initiation of some type of government removal action." Such a figure coupled with the facts that the government recovers only half of the funds implicated in seizure and forfeiture actions and that the IRS only recovers two percent of IRS jeopardy and termination assessments point to the conclusion that "the value of asset removal strategies is highly questionable." ALEXANDER & CAIDEN, *supra* note 3, at 40.

9. Bruce Zagaris & Scott B. MacDonald, *Money Laundering, Financial Fraud, and Technology: The Perils of an Instantaneous Economy*, 26 GEO. WASH. J. INT'L L. & ECON. 62, 63 (1992).

10. Along with the interdependence of the "financial technology, electronic markets, [and] payment and settlements systems . . . [there is the] increas[ing] danger of financial instability being transmitted from institution to institution and from country to country." John C. Pattison, *The Management of Regulatory Risk in Banking: An International Perspective*, 1992 G-7 REP. 45, 57 (1992). For example, in the Bank of Commerce and Credit International scandal, money laundering

launderers, as well as their ability to exploit the advanced technology associated with modern banking systems.[11] Most agree that this overwhelming success clearly threatens not only the integrity of the international financial system but also the viability of the legitimate sector of the domestic and international economies.[12]

The purpose of this Article is first to describe the money laundering process and the types of economic, social, and political problems associated therewith, then to explore current international agreements organizations and domestic legislative enactments, and finally to elucidate the problems associated with the policing, investigation, and enforcement of anti-money laundering laws and agreements.

II. THE PURPOSES OF MONEY LAUNDERING—ILLEGITIMATE AND LEGITIMATE

Money laundering clearly serves illegitimate purposes: it (1) keeps organized[13] and "white-collar" crime[14] afloat by maintaining their appearance of legitimacy and by reducing the likelihood of detection, (2) funds terrorist organizations and buys their arms and supplies,[15] (3) helps to make the drug trade a profitable endeavor,[16]

"spread like a virus" from bank to bank, "raising questions about the safety and soundness of local institutions." Zagaris & MacDonald, *supra* note 9, at 77.

11. "For those who conduct serious crimes, such as drug trafficking, arms smuggling, [credit card fraud, insider trading], and terrorism, technological breakthroughs offer more sophisticated variations of the traditional means to launder ill-gotten proceeds." *Id.* at 63.

12. When banks and bankers are somehow associated with money laundering and criminal activity, "Public confidence in banks, and hence their stability, can be undermined by adverse publicity . . . [and] banks may lay themselves open to direct losses from fraud, either through negligence in screening undesirable customers or where the integrity of their own officers has been undermined through association with criminals." THE CASH CONNECTION, *supra* note 2, at 20.

13. Money laundering is often associated with criminal syndicates involved in gambling and loansharking operations. *Id.* at 7.

14. White collar crimes include insider dealing and other types of securities fraud, each of which reduces investor confidence in the securities market. *See* Peter A. Millspaugh, *Global Securities Trading: The Question of a Watchdog*, 26 GEO. WASH. J. INT'L & ECON. 355 (1992).

15. Money laundering is an integral part of any terrorist organization. For example, a member of the IRA admitted at trial in the United States that the Irish Northern Aid Committee of New York had funneled $2-3 million from the United States to a relief organization in Ireland, that most of this money went to the IRA, and that over half of the $2-3 million was used to purchase weapons from the United States. WALTER, *supra* note 5, at 88.

16. The drug trade earns approximately $500 billion each year. Magliveras, *supra* note 7, at 161. *See also Global Money Laundering Rules Seen as Needed to Reduce Drug Profit Flows*,

(4) cleans and obscures the source of money gained via bribery, corruption, smuggling, fraud, as well as through the sale of contraband merchandise and financial instruments,[17] and (5) shields large funds from taxation.[18]

The need for secret money, however, does not always further illegal or immoral endeavors. Money laundering can also serve legitimate purposes. For example, businesses and individuals will often want complete confidentiality in order to ward off "the erosion of asset values through unwanted disclosure"[19] and will sometimes maintain "slush" funds from which legitimate businesses will pay bribes.[20] In addition, laundered money is often necessary to ensure success in both governmental undercover operations and intelligence activities.[21]

III. THE MONEY LAUNDERING PROCESS

> Generally, money laundering includes a variety of different processes, all of which involve . . . [the] putting [of] illegally earned (or "dirty" money)[22] into a financial system where it is exchanged, or 'laundered,' by conversion into an instrument or other asset, from which it finally exits in a form that appears to be free from the original taint and is "clean."[23]

Banking Rep. (BNA) No. 12, at 581 (Mar. 25, 1991) [hereinafter *Global Money Laundering Rules*].

17. WALTER, *supra* note 5, at 39.

18. *Id.*

19. *Id.*

20. *Id*. Sometimes it may make more economic sense for companies and individuals to pay a bribe than to risk unfavorable, although false, "leaks" of improprieties to the press. *Id*.

21. *Id*. at 40. In order to further "national interests," clean money is often used to fund terrorist organizations; foreign governments (who would otherwise be embarrassed by the financial support or who are trying to survive a state of civil unrest); other opposition groups (to finance their activities, to pay their operatives, and to buy weapons); and mercenaries. *Id*. at 40, 85.

22. Examples of "dirty" money include that which is earned from the drug trade, casinos, bribery/extortion, loansharking, prostitution, and other businesses run by organized crime. WALTER, *supra* note 5, at 40.

23. ALEXANDER & CAIDEN, *supra* note 3, at 39. In general, there is no one technique used to launder money: "The techniques of money laundering are innumerable, diverse, complex, subtle and secret." U.S. DEP'T OF STATE, INT'L NARCOTICS CONTROL STRATEGY REP. 46 (1988).

There are, however, two types of money laundering processes that are usually employed. The first is one in which illegally-earned funds are exchanged for a negotiable instrument that, by obscuring the source used to purchase the asset, can be used in the legitimate sector of the economy. This type of laundering is often employed by lower-level criminals who want to be able to quickly

The goal is to enter into a web of transactions to reduce the likelihood of detection by obscuring the source of the money. According to the Financial Action Task Force (FATF)[24] Report of February 6, 1990,[25] there exist four common factors present in all money laundering schemes: cash intensiveness, roles of both formal and informal financial institutions,[26] cash shipments abroad, and corporate techniques.[27]

In an archetypal money laundering scheme, the illegally-gained funds are first consolidated into small denominations.[28] Money is often consolidated by filtering it through high-turnover otherwise legitimate

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access the funds and who are not well versed in making investments. ALEXANDER & CAIDEN, *supra* note 3, at 40.

The second type of money laundering involves putting funds through a series of "discrete steps that begin essentially where the currency conversion process leaves off." *Id.* Here, the launderers acquire assets "so that [they] may both account for and enjoy wealth while remaining immune to successful probes into the tainted origin of the wealth." *Id*. More specifically, the launderer will engage in simple, numerous transactions so that "it becomes difficult for investigators to reconstruct facts surrounding each laundering transaction and to move from that point toward the allegedly illegal origin of the funds in question." *Id*. To further this end, banks located out of the jurisdiction in which the illegal funds were generated are especially useful. This second process is the most popular money laundering method. *Id*.

24. For an explanation of the FATF, *see infra*, at notes 54-55 and accompanying text.

25. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING REP. (Feb. 6, 1990) [hereinafter FATF REP.], *reprinted in* INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING 4 *et seq.* (Dr. W.C. Gilmore ed., 1992) [hereinafter INTERNATIONAL EFFORTS].

26. FATF REP., *supra* note 25, at 7-9. Formal financial institutions serve as the conduit through which money launderers transfer and clean their money. In jurisdictions with cash reporting transaction requirements, criminals will often engage in "smurfing." Smurfing occurs where the depositor, in order to circumvent the reporting of their deposits, will break up the large sums of cash generated into smaller deposits that fall below the reporting threshold. Even when smurfing is not successful and the transaction is reported, the money launderer can still escape detection by registering the deposit in the name of a company located in a country in which the laws which do not require that the names of the owners of the company be disclosed. This problem is further compounded by the existence of corrupt bank tellers and foreign automatic tellers, both of which may serve to conceal the true identity of the customer. *Id*. at 7-8. Informal institutions such as Bureaux de Change and the Asian Hawalla and Chop systems can also complicate the detection of money launderers. *Id*. at 8.

27. *Id*. at 8-9.

28. *Id*. at 7. As for cash intensiveness, the FATF Report states that profits from the drug trade usually comes in the form of large volumes of mixed denomination notes. Thus, "[t]he form of the money obtained through drug trafficking must be changed in order to shrink the huge volumes of cash generated." *Id*. In fact, as the FATF Report points out, "[I]n the case of heroin and cocaine, the physical volume of notes received from street dealing is much larger than the volume of the drugs themselves." *Id*.

businesses.[29] What happens next in the process depends on whether the money laundering operation is international or domestic in nature.

In a typical international money laundering scheme, the consolidated money is then removed from the jurisdiction in which it was generated via electronic transfers or physical transport.[30] Next, money is deposited in a "haven" jurisdiction such as the Bahamas, Bermuda, the Cayman Islands, Costa Rica, Hong Kong, the Netherlands, Switzerland, or Panama.[31] Money launderers prefer to deposit their dirty funds into stable haven jurisdictions because to do otherwise, may result in the loss of their illegally gotten gains.[32]

Usually, a lawyer, using "boilerplate" documentation, will set up a shell corporation in the haven jurisdiction that is merely a "letter box."[33] The lawyer will then deposit the transferred funds in a local bank or other financial institution in the shell corporation's name.[34] Next, the money is transferred from the local bank to a respectable, international bank branch located in the haven jurisdiction.[35]

Once money is clean, it is usually wired from the local international branch to a legitimate bank in Europe. The cleaned money

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29. THE CASH CONNECTION, *supra* note 2, at 8. Examples of otherwise legitimate (often, Mafia-owned) businesses include casinos and restaurants. *See id.*

30. When removed by persons possessing (forged) diplomatic passports, it is next to impossible for officials to stop the transportation of illicit funds because of possession of diplomatic documentation. *See id.*

31. John Turro, *The "War on Drugs" is Causing U.S. to Increase Investigations of Tax Evasion Through Tax Havens*, 37 TAX NOTES INT'L 12 (1990). "Haven" jurisdictions are ones in which bank secrecy laws in effect shelter the dirty money from taxation and conceal the identity of depositors. Their laws also make it easy to set up "shell" corporations, including the creation of financial institutions, and provide little, if any, surveillance on the businesses or banks once they are created. The establishment of a financial industry is often attractive to countries because of the funds generated by the sale of banking licensing and employment it brings to the nation. FATF REP., *supra* note 25, at 8. For more on haven jurisdictions, *see infra* notes 168-172 and accompanying text.

32. *Global Money Laundering Rules*, *supra* note 16, at 581.

33. FATF REP., *supra* note 25, at 8. A "letter box" corporation simply means that the company is merely a mail box located in a haven jurisdiction. *Id.*

34. WALTER, *supra* note 5, at 80, 81. Lawyers will often charge a fee for setting up the shell company and depositing money into a local bank. *Id.* at 80. Often, the shell corporation, using the deposits in the international bank as security, will then take out loans, the money of which can be used in any country, even the country from which the illegally-generated funds originated, for any purpose. *Id.* at 81. In addition, loans can be issued by the shell corporation and then used to buy businesses in the originating jurisdiction so that "in effect [the money launderer] is borrowing their own money and paying it back as if it were a legitimate loan." FATF REP., *supra* note 25, at 9.

35. WALTER, *supra* note 5, at 81. Also, the shell corporation is often issued credit cards by the local haven banks which it then uses to purchase goods throughout the world. *Id.*

is finally transferred from the reputable European bank back to the United States.[36]

Similar to international money laundering operations, dirty money in domestic money laundering schemes will first be filtered through otherwise legitimate, high-turnover businesses. However, unlike an international money laundering operation, a domestic money laundering operation will deposit the funds in a domestic rather than a foreign bank. Next, the bank typically will issue a cashier's check with the bank's name, rather than that of the depositor, on the check. The check can then be used to purchase arms or drugs. The bank which floated the check often charges a 1 to 3 percent fee for the service. When banks regularly engage in such transactions, it can "generally be regarded as a sure sign of money laundering."[37]

IV. MONEY LAUNDERING AND THE DRUG TRADE

The concern over money laundering first arose in the 1980s with the growing success of the international drug trade. Amazingly, $100 billion of the $500 billion earned each year in the drug trade is being laundered by drug traffickers.[38] Profits from the drug trade can be used to both (1) purchase sophisticated equipment such as long-range aircraft and high-powered boats and (2) bribe and corrupt governments as well as their legislative and executive officials.[39] Many U.S. legislators have consequently adopted the view that the best way to combat the illicit drug trade is to go after and seize the money associated with drug trafficking not only because it (1) thereby removes traffickers' incentive (i.e., their profits), their ability to purchase equipment, and the means by which to corrupt government officials, but also because it (2) enables enforcement agencies to reach the king-pins who, although they may distance themselves from the drugs themselves, eventually come into contact with the proceeds generated by the sale of illicit substances.[40]

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36. European banks are not guilty on a macro-level, but perhaps they are guilty on a micro-level. *See* Doppelt, *supra* note 2, at 3-5 (explaining that other ways to get cleaned money back into a jurisdiction include: (1) setting up shell companies which sell bogus shares in those companies, giving the appearance of a legitimate transaction and (2) false accounting).

37. WALTER, *supra* note 5, at 80.

38. $50 million of drug trade profits are also laundered through London's financial institutions each year. *Global Money Laundering Rules*, *supra* note 16, at 581.

39. Magliveras, *supra* note 7, at 160.

40. E. Nadelmann, *Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions*, 18 INTER-AMER. L. R. 33, 34 (1986).

Accordingly, legislators have sought to attach criminal penalties to those engaged in the drug trade and, at the same time, have turned to financial institutions to help detect and prevent the laundering of the proceeds of crime.

Unfortunately, the war against drugs is far from over. Since it is clear countries are unable to unilaterally stop the drug trade,[41] greater international cooperation is essential. In the words of the current Assistant Secretary for International Narcotics Matters:

> [T]he international narcotics trade is extremely volatile and continues to pose a grave danger to our foreign and domestic interests. They are diversifying into other . . . criminal activities and are expanding their operations and markets to regions where political control is weak. We need greater international cooperation to overcome this threat. There are opportunities for advancing this objective, but current levels of cooperation and commitment are uneven at best.[42]

Because "[i]t is now more and more difficult to differentiate between drug-related money laundering and other forms of illegal money movements such as financial crimes, securities fraud, bankruptcy fraud, and illegal telemarketing, all of which are fertile

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41. Phyllis Soloman, *Are Money Launderers All Washed Up in the Western Hemisphere? The OAS Model Regulations*, 17 HASTINGS INT'L & COMP. L. REV. 433, 441 (1994).

42. Robert S. Gelbard, Combating International Narcotics Trafficking, Address Before the House Foreign Affairs Committee (June 22, 1994), *in* 5 DEP'T ST. DISPATCH 26, June 27, 1994, at 440. The fact that the so-called War on Drugs has to date not been successful is further evidenced by the U.S. State Department's 1993 International Narcotics Report of April 12 which states that "[d]espite stepped-up programs, hundreds of tons of cocaine and heroin continue to flow to the United States and to Europe, while consumption rises in Latin America." Summary of April 1993 International Narcotics Control Report, *in* 4 DEP'T ST. DISPATCH 15, April 12, 1993, at 235 [hereinafter 1993 Int'l Narcotics Control Rep.]. The failure of U.S. anti-drug policies inevitably means that the number of opportunities for money launderers will increase and that drug traffickers will continue to expand their operations. *See* RACHEL EHRENFELD, DIRTY MONEY 247 (1992). *See also* Gelbard, *supra*. As the State Department has pointed out:

> In Europe and Central Asia, the breakup of the old Soviet Empire has opened new frontiers. . . . [A]s the free market economy offers the potential of new drug markets in the former Soviet States, . . . there are reports that ethnically based smuggling rings from the Baltics to Kazakhstan are gearing up to cash in on the heroin flowing abundantly from Southeast and Southwest Asia. 1993 Int'l Narcotics Control Rep., *supra* at 235.

ground for money laundering,"[43] the fight against money launderers has expanded to include virtually all types of economic crimes.

V. LEGISLATION

By 1988, most enforcement officials admitted that "they can, in the last resort, still only discourage, and not prevent, money laundering."[44] It was evident that "[t]raditional instruments of power cannot deal with these new underworld threats to international political stability."[45] In order to more effectively deal with the problems associated with money laundering, countries have not only enacted domestic laws that criminalize the laundering of money and but have also entered into bilateral[46] and international agreements which seek to coordinate enforcement efforts. With money laundering having reached international proportions, enforcement of anti-money legislation[47] has

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43. Biros & Kelly, *supra* note 6, at 9 (citing U.S. DEP'T ST., INT'L NARCOTICS STRATEGY REP. (1993)).

44. Graham, *supra* note 1, at I8.

45. Bruce Zagaris & Sheila M. Castilla, *Construction of International Financial Enforcement Subregime: The Implementation of Anti-Money Laundering Policy*, 19 BROOK. J. INT'L L. 871, 880 (1993).

46. The U.S. Securities and Exchange Commission has entered into bilateral agreements with Canada, Japan, the United Kingdom, Brazil, France, the Netherlands, Mexico, Switzerland, and Panama to assist one another in conducting investigations and collecting evidence abroad. *See* Treaty on Mutual Assistance in Criminal Matters Between the United States and Switzerland, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019, 12 I.L.M. 916; *Trying to Catch Up with Global Markets*, FIN. TIMES, FINANCIAL REGULATION REPORT (May 1991) [hereinafter FINANCIAL REGULATION REP.]. For an example of a bilateral agreement, see Agreement Between the United States of America and the Republic of Venezuela Regarding Cooperation in the Prevention and Control of Money Laundering Arising from Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, Nov. 5, 1990, U.S.-Venez., *reprinted in* INTERNATIONAL EFFORTS, *supra* note 25, at 309 *et seq*. The effectiveness of all bilateral agreements is however limited because most money laundering outfits operate in more than two jurisdictions at the same time. FINANCIAL REGULATION REP., *supra*. In such situations, the effectiveness of bilateral agreements is clearly limited thereby rendering such agreements more of a policy statement than an effectual anti-money laundering weapon.

47. Enforcement officials have traditionally adopted a two-prong strategy in order to take the profit and success out of the money laundering process. First, enforcers have tried to "remove the economic incentives of crime by stripping violators of the monetary and other tangible fruits of their activities." *See* ALEXANDER & CAIDEN, *supra* note 3, at 38. "[T]he federal government's approach has been to attach the underlying crime, seize the proceeds and mechanisms of criminal activity, and prosecute transactions that involve criminal proceeds." Biros & Kelly, *supra* note 43, at 9. Second, they have attempted to "trace wealth than cannot be accounted for from legitimate sources back to its origin, in the expectation that this exercise will lead to evidence of illegal activities that produced the income." ALEXANDER & CAIDEN, *supra* note 3, at 38. Although "law enforcement efforts to curtail money laundering activities have [historically] focused on the identification and documentation of currency-based transactions . . . recent investigations have

become an international phenomenon requiring that nations cooperate in enforcement of such legislation.

A typical international cooperation system includes "rules among governments and international organizations that requires cooperation in the investigation, prosecution and adjudication, and execution of judgments in criminal matters."[48] Domestic legislation to combat money laundering, although it contains many similarities, remains inconsistent with regard to the organization of their respective legal systems, their procedures, and their substantive laws, including definitions of what constitutes money laundering.[49]

A. International Initiatives and Organizations

1. UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Under Article 3(1) of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN Convention),[50] parties are required to criminalize the offense of intentional drug-related money laundering as part of their domestic laws, including the knowing conversion, transfer, participation in the conversion or transfer of

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focused on the use of funds transfer systems." *Policy Statement on Money Laundering*, Mar. 4, 1993, *available in* 1993 FDIC Enf. Ced. LEXIS 26, Bankng Library, Allfdi File, at *1 [hereinafter *1993 Policy Statement on Money Laundering*].

One theory behind the current strategies is the fact that "criminals want to enjoy their wealth without arousing too much suspicion." ALEXANDER & CAIDEN, *supra* note 12, at 38. Accordingly, they attempt to covertly integrate their illegally-gained profits into the legitimate economy. Legitimization of the proceeds of crime requires either that the illicit origin of the money is veiled behind a cloak of legitimacy or that the source, amount, or spending of the dirty money is not traceable. *Id.*

48. Zagaris & Castilla, *supra* note 45, at 873.

49. *Id.* at 874, 875. Such inconsistencies can be attributed to differences such as those between the civil and common law systems, social norms and customs, and economic stature in the global economy. *Id.* at 874.

50. U.N. ESCOR, 6th plen. mtg., U.N. Doc. E/CONF. 82/15 (1988), *reprinted in* 28 I.L.M. 493 (1989) [hereinafter U.N. Convention]. As of July 1994, thirty-one nations have ratified the Convention: Brunei Darussalam, Germany, Sudan (33 I.L.M. 1062 (July, 1994)), Argentina, Bulgaria, Iran, Malaysia, Mauritania, Morocco, Suriname, Zambia (32 I.L.M. 1688 (Nov. 1993)), Côte D'Ivoire, Honduras (31 I.L.M. 997 (July 1992), Cameroon, Pakistan (31 I.L.M. 763 (May 1992)), Czechoslovakia, Ukrainian Soviet Socialist Republic (31 I.L.M. 243 (Jan. 1992)), Brazil, Sweden, Venezuela, the United Kingdom (30 I.L.M. 1450 (Sept. 1991)), Yugoslavia, Costa Rica, Guatemala (30 I.L.M. 1146 (July 1991)), USSR, Egypt (30 I.L.M. 867 (May 1991)), China, Nigeria, Senegal (29 I.L.M. 1337 (Sept. 1990)), the United States (29 I.L.M. 463 (Mar. 1990)), and the Bahamas (*Treasury Releases G-7 Report Calling for Cooperation Against Money Laundering*, Banking Rep. (BNA) No. 16, at 703 (Apr. 23, 1990)).

property derived from the illicit drug trade for the purpose of concealing the illegal source, location, disposition, movement, or ownership of such property.[51] The drafters of the Convention, by adopting this criminalization requirement, have "ensured that co-operation in respect of confiscation, mutual legal assistance and extradition will be forthcoming."[52]

The Convention addresses actions to be taken at both the domestic and international levels. Under Article 5, signatories can themselves seize assets or request that other parties seize and forfeit assets generated from the drug trade and money laundering associated therewith. In addition, the UN Convention, in Article 5(4)(g), encourages the promulgation of bilateral and multilateral agreements that further enforce the ability to seize drug-trade-generated assets.

Finally, Article 7(1) of the UN Convention provides for the creation of Mutual Legal Assistance Treaties (MLATs) that serve to ease "investigations, prosecutions, and judicial proceedings in relation to criminal offenses established in accordance with Article 3, paragraph 1." More specifically, pursuant to Article 7(3), such mutual assistance is to include the gathering of evidence and testimony, service of process, searches and seizures, and the provision of information (including records of businesses, banks, and other financial institutions) and evidence.

Modeled after U.S. anti-money laundering laws, the UN Convention was an important first step in effectively combating international money laundering schemes. Despite this achievement, the UN Convention's viability as an effective weapon in the anti-money laundering arsenal is marginal. Although of great political and ideological significance, the Convention's effectiveness is limited in various ways. For example, the Convention only applies to international offenses and is subject to constitutional constraints of each Party State.[53]

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51. U.N. Convention, *supra* note 50, art. 3(1)(a), (b).

52. INTERNATIONAL EFFORTS, *supra* note 25, at xii. Thus, signatories, by criminalizing money laundering in their domestic laws, avoid the problem of dual criminality, and thereby eliminate what has traditionally served as a barrier to admissibility of evidence gathered in foreign jurisdictions. *See id.*

53. Article 3(1)(c)(i) provides that parties to the Convention must criminalize the "acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from an offence or offences" established under article 3(1)(a) "subject to its constitutional

Still, the Convention is a ground-breaking document in that it has (1) resulted in the elimination of bank secrecy laws in some countries; (2) motivated the formulation of domestic legislation, MLATs, and bilateral agreements; (3) encouraged the formation of international organizations the purpose of which is to eradicate money laundering operations; and (4) provided a more effective framework within which law enforcement officers can operate.

2. Financial Action Task Force Efforts

The Financial Action Task Force (FATF) was first formed at the Group of Seven Paris Summit in 1989.[54] The FATF's primary purpose is to monitor and to coordinate international enforcement of anti-money laundering laws. More specifically, the FATF is "to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance."[55]

At its first meeting in February of 1990, the FATF, building on UN Convention principles,[56] issued a series of recommendations to combat money laundering. The FATF suggested that: (1) the UN Convention be fully implemented, including the ability of enforcement officials to confiscate the proceeds of crime; (2) all countries criminalize the laundering of money for all crimes that generate a large

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principles and the basic concepts of its legal system." U.N. Convention, *supra* note 50, art. 3(1)(a), (c)(i). For more limitations, see Duncan E. Alford, *Anti-Money Laundering Regulations: A Burden on Financial Institutions*, 19 NC J. INT'L L. & COM. REG. 427 (1994).

54. G-7 Task Force to Make Recommendations on Curbing Money Laundering—Paris Economic Summit: Economic Declaration July 16, 1989, *reprinted in* 28 I.L.M. 1293, 1299 (1989) [hereinafter Paris Economic Summit]. The G-7 nations (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States) along with Australia, Austria, Belgium, Luxembourg, the Netherlands, Spain, Sweden, and Switzerland were at the summit. By May of 1991, membership in FATF had expanded to include Denmark, Finland, Ireland, New Zealand, Norway, Portugal, Turkey, and Hong Kong. Countries such as Singapore, the Gulf nations, and Eastern Europe were encouraged to join the FATF. *See* 1990-1991 FATF REP. (MAY 13, 1991), *reprinted in* INTERNATIONAL EFFORTS, *supra* note 25, at 44, 46.

55. *Id.*

56. Like the U.N. Convention, the FATF recommendations also provided that bank secrecy laws should not be used to inhibit enforcement of anti-money laundering laws, and that countries should enter into more MLATs to ease investigations, prosecution, and extradition. FATF REP., *supra* note 25, at 14-24.

amount of proceeds, not just for drug-related laundering; (3) all recommendations apply to banks and non-banks; (4) banks be required to identify their customers; (5) records of clientele and transactions should be maintained for five years; (6) financial institutions and their employees be permitted or required to report suspicious transactions without the fear of liability being imposed on them for breach of any law or administrative procedure; (7) financial institutions develop internal policies and procedures, institute proper screening controls when hiring employees, and create ongoing training programs and audit functions to test the system;[57] and finally (8) international cooperation

57. A similar role of financial institution officials in detecting money laundering was previously addressed by the Basle Committee on Banking Regulations and Supervisory Practice. Basle Committee on Banking Regulations and Supervisory Practice Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering (Dec. 1988) [hereinafter Basle Committee], *reprinted in* INTERNATIONAL EFFORTS, *supra* note 25, at 273 *et seq*.

The Basle Committee was comprised of representatives of the central banks and supervisory authorities of the Group of Ten. The Group of Ten was comprised of Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom, the United States, and Luxembourg. "Criminals and their associates use the financial system to make payments and transfers of funds form one account to another; to hide the source and beneficial ownership of money; and to provide storage for bank-notes through a safe-deposit facility." *Id.* at 273. In order to both curb the use of the legitimate financial system by money launderers and to ensure public confidence and thus the stability of the international banking system, the Committee supported the use of banking supervisors "to encourage ethical standards of professional conduct among banks and other financial institutions" along with the promulgation of an international "Statement of Principles to which financial institutions should be expected to adhere." *Id*. at 273-74.

According to the Committee, in order to prevent the use of financial institutions as intermediaries for the transfer of illicitly-gained funds and to aid enforcement officials in their efforts to combat both domestic and international money laundering, (1) "banks should make reasonable efforts to determine the true identity of all customers requesting the institution's services," (2) bank managers "should ensure that . . . laws and regulations pertaining to financial transactions are adhered to," (3) "[b]anks should co-operate fully with national law enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality," and (4) "[w]here banks become aware of facts which lead to the reasonable presumption that money deposited derives from criminal activity . . . appropriate measures, consistent with the law, should be taken, for example, to deny assistance, sever relations with the customer or close and freeze accounts." *Id*. at 275-77. Despite this seemingly powerful tool in the fight to curb the illegal laundering of money, its effectiveness is however limited by the fact that the Statement is not a legal document and by the existence of bank secrecy laws in some countries. *Id*. at 277. With regard to bank secrecy laws, the Statement specifically provides that "[b]anks should co-operate fully with national law enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality." *Id.*

Although not legally binding on any nation ("its implementation will depend on national practice and law"), many countries have adopted some version of the aforementioned preventative measures. For example, Austria, Italy, and Switzerland have entered into a "formal agreement among banks that commits them explicitly," while France and the United Kingdom have formally indicated that administrative sanctions will be applied to bank regulators who do not comply with

be increased with regard to the exchange of information relating to suspicious transactions, the seizure and confiscation of the proceeds of crime, and the coordination of money laundering prosecutions.[58]

3. The Inter-American Drug Abuse Control Commission of the Organization of American States

The Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses (Model Regulations)[59] were adopted by both the Inter-American Drug Abuse Control Commission (CICAD) on March 10-13, 1992 and by the Organization of American States (OAS) General Assembly on May 18-23, 1992. Like the FATF Recommendations, the Model Regulations are not legally-binding; instead, they are to be implemented via domestic legislation enacted by Member governments.[60] Like the UN Convention, the Model Regulations: (1) only address money laundering associated with drug trafficking; (2) seek to encourage members to criminalize the laundering of proceeds of drug trafficking;[61] and (3) provide that a crime is committed whenever anyone transfers, converts, acquires, possesses, uses, and conceals or disguises the nature, source, location, disposition, movement, rights, or ownership of property that he or she knows or should have known is the proceeds of an illicit traffic offense or an offense related thereto.[62] Thus, the Model Regulations apply to virtually all types of financial

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the Basle Principles, and Luxembourg has "legally binding texts with reference to these principles." FATF REP., *supra* note 25, at 11. With regard to countries that have enacted stricter banking regulations than those provided in the Statement, the Basle Committee's Statement "is not intended to replace or diminish those requirements." Basle Committee, *supra*, at 275. "Whatever the legal position in different countries, the Committee considers that the first and most important safeguard against money-laundering is the integrity of banks' own managements and their vigilant determination to prevent their institutions becoming associated with criminals or being used as a channel for money-laundering. The Statement is intended to reinforce those standards of conduct." *Id.*

58. FATF Rep., *supra* note 25, at 14-24.

59. Initiative by the Organization of American States to Prepare Model Regulations on the Laundering of Property and Proceeds Related to Drug Trafficking: Articles Considered by the Inter-American Group of Experts, Dec. 9-13, 1991, OEA/Ser.L/XIV.4.4, CICAD/GT. LAVEX/doc. 20/19 [hereinafter Model Regulations], *reprinted in* INTERNATIONAL EFFORTS, *supra* note 25, at 322 *et seq*.

60. *Id.* pmbl.

61. *Id.* art. 2.

62. *Id.*

institutions.[63] Furthermore, the Regulations also make it a crime to conspire, attempt, facilitate, or aid in the commission of the above-mentioned violations[64] and provide for the seizure and forfeiture of property acquired through the drug trade.[65]

Finally, like other domestic and international initiatives, the Model Regulations call for "know your customer" policies and recordation of the true identity of clients for at least five years in order that such information may be shared with investigators.[66] The Regulations also serve to remove the investigatory problems associated with money laundering in that, under the Regulations, bank secrecy laws cannot prohibit local banks from reporting requirements.[67]

4. The International Criminal Police Organization

The International Criminal Police Organization (Interpol) is an international organization that serves to coordinate enforcement efforts and provides vital technical assistance and training in the detection of money laundering.[68] Interpol operates by creating various working groups divided according to geographical regions such as the Caribbean and Latin America. These working groups conduct investigations, gather information, and study criminal activities in order to facilitate coordination of enforcement activities of independent nations.[69] Interpol has adopted a body of anti-money laundering rules and encourages their adoption by non-Interpol members.[70]

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63. For the purpose of the Model Regulations, financial institutions include commercial bank, trust company, savings and loans, credit union, thrift institutions, securities brokers, currency exchanger, a systematic cashing of checks or money orders, a substantial transmitting of funds, and any other activity subject to government or to financial institutions supervisory authorities. *Id*. art. 9.

64. Model Regulations, *supra* note 59, art. 2(4).

65. *Id*. art. 7.

66. *Id*. arts. 10, 11. Countries such as the European Union, Canada, Japan, and the United States have "know your customer" legislation in place. *See infra* part V.C.

67. *Id*. art. 12(9).

68. Zagaris & Castilla, *supra* note 45, at 884.

69. *Id*. at 884-85.

70. *Id*. at 885-86. In its Resolution on Money Laundering, Interpol recognized the need to increase cooperation among nations and their law enforcement agencies to curb money laundering activities by drug traffickers and other criminals. The Resolution proposed the formation of a global group to study and develop systems to gather and share financial information (including suspicious and large currency transactions). ICPO-Interpol General Assembly Resolution on Money Laundering and Related Matters (Nov. 1989), *reprinted in* INTERNATIONAL EFFORTS, *supra* note 25, at 278. In addition, the Assembly recommended that the creation of an Interpol data base

B. Regional Initiatives—European Union

1. Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime

The EC Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (EC Convention)[71] is different from the UN Convention in that the EC Convention criminalizes money laundering not only as it relates to drug trafficking, but also to the proceeds of other criminal activities.[72] With an eye on the UN Convention, the EC Convention addresses money laundering on a larger scale:

> One of the purposes of the Convention is to facilitate international co-operation as regards investigative assistance, search, seizure and confiscation of the proceeds of all types of criminality, especially serious crimes, and in particular drug offences, arms dealing, terrorist offences, trafficking in children and young women, . . . and other offences which generate large profits.[73]

Under Article 2(1), parties to the EC Convention are to enact legislation enabling them to confiscate the proceeds of crime.[74] Signatories may, however, limit the scope of application of Article 2(1) to certain categories of offenses.[75] Like the UN Convention, Article 6 of the Council's Convention requires that each party adopt domestic legislation criminalizing the knowing: (1) conversion and transfer of

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containing information such as the identity of persons engaged in large currency transactions, the accounts involved with such transactions, as well as details of the charges being investigated and the amount seized and confiscated (if appropriate). *Id*. at 279-80. By sharing such information, Interpol seeks to better track and uncover money laundering operations.

71. Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime, Sept. 12, 1990, Europ. T.S. No. 141, *reprinted in* 30 I.L.M. 148 (1991) [hereinafter EC Convention].

72. Council of Europe Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, pmbl. [hereinafter Explanatory Report], *reprinted in* INTERNATIONAL EFFORTS, *supra* note 25, at 192 *et seq.*

73. *Id.* "Sometimes—particularly in the laundering sphere and in the case of organised crime groups—the same people are involved in drug trafficking, fraud and terrorism." M. Levi, *Regulating Money Laundering: The Death Mark of Bank Secrecy in the UK*, 31 BRIT. J. OF CRIMINOLOGY 109, 115 (1991).

74. EC Convention, *supra* note 71, art. 2(1).

75. *Id.* art. 2(2).

the proceeds of crime, or assisting a person in such conversion or transfer; (2) concealment of the nature, source, location, movement, or ownership of such property; (3) acquisition, possession, or use of illicitly-gained proceeds; and (4) participation in, facilitation of, counseling of, or conspiracy to commit or attempt to commit the above offenses. Also, like the UN Convention, the EC Convention calls for international cooperation in investigating, confiscating, and complying with requests for the confiscation of the proceeds of crime, for assistance in investigations, and for information with regard to the tracing of illegally-gained property, the security of evidence, as well as the location, movement, nature, legal status, or value of such property.[76]

Despite the overwhelming degree of cooperation and assistance provided for in the EC Convention, limits to cooperation do exist. For example, as with the constitutional limitations of the UN Convention, under Article 6 of the EC Convention, parties may refuse to criminalize money laundering if, in so doing, a party would be acting contrary to constitutional principles or basic concepts of its legal system.[77] However, "To the extent that criminalisation of the act is not contrary to such principles of concepts, the state is under an obligation to criminalise" money laundering.[78] In addition, a state's postponement or refusal to cooperate is legitimate if the request would prejudice sovereignty or security of a party or if the request would constitute a political or fiscal offense.[79]

2. Council Directive 91/308/EEC, On Prevention of the Use of the Financial System for the Purpose of Money Laundering

Council Directive 91/308/EEC, On Prevention of the Use of the Financial System for the Purpose of Money Laundering[80] places the burden of the detection of money launderers on financial institutions.[81] Like the UN Convention and the Council Convention, Directive 91/308 recognizes the threat money laundering poses to the integrity, safety, and soundness of the financial system, that one of the best ways to

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76. *Id.* arts. 7, 8, 13.
77. Explanatory Report, *supra* note 72, art. 6.
78. *Id.*
79. EC Convention, *supra* note 71, art. 18. For more grounds upon which cooperation may be refused, see *id*., art. 18.
80. 1991 OJ (L166) 77 [hereinafter Council Directive 91/308].
81. For a discussion on the burden borne by financial institutions, *see infra* part V.C.

combat criminal activity is to curb the activities of money launderers, and that international coordination and cooperation is essential in order to ensure success.[82] In addition, like the EC Convention, the Directive provides that Member States should extend application of the directive to money laundering "not only in relation to the proceeds of drug-related offences but also in relation to the proceeds of other criminal activities (such as organized crime and terrorism)."[83] Accordingly, Article 2 of the Council Directive requires Member States to prohibit the laundering of criminal proceeds.[84]

Unlike other domestic laws that criminalize money laundering, the Council Directive provides that Member States may themselves determine the penalties to be applied to money launderers.[85]

Adhering to the Basle Principles, the Council Directive states:

> Member States shall ensure that [insurance companies as well as][86] credit and financial institutions[87] require identification of their customers ("know your customer") by means of supporting evidence when entering into business relations . . . [and such] identification requirement shall also apply for any transactions . . . involving a sum amounting to ECU 15 000 or more, whether the transaction is carried out in a

82. Council Directive 91/308, *supra* note 80, pmbl.
83. *Id.*
84. *Id.* art. 2.
85. *Id.* art. 14.
86. *Id.* art. 1.
87. Credit institutions are those which accept deposits and other repayable funds from the public. Financial institutions for the purposes of Directive 91/308 are broadly defined in the Second Banking Directive 89/646/EEC to include those institutions which engage in (1) safe custody services; (2) lending (including consumer credit, mortgage credit, and the financing of commercial transactions); (3) financial leasing; (4) money transmission services; (5) issuing and administering means of payment (credit cards, travelers' checks, and bankers' drafts); (6) guarantees and commitments; (7) trading for own account or for that of their customers in money market instruments, foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities; (8) participating in share issues; (9) advice to undertakings on capital structure, industrial strategy and related issues such as mergers and the purchase of undertakings; (10) money broking; (11) portfolio management and advice; and (12) safekeeping and administration of securities. Second Banking Directive 89/646/EEC, art. 18, annex, 1989 OJ (L386) 9-10, 13. Under article 1, "branches located in the Community of financial institutions whose head offices are outside the Community" also fall under the ambit of the Directive. *Id.*

> single operation or in several operations which seem to be linked.[88]

Where a financial institution is suspicious that the transaction requested involved a money laundering scheme, credit and financial institutions are required to identify the customer, even when the amount involves falls under the ECU 15 000 threshold.[89]

In order to aid investigations, financial institutions, pursuant to Article 4, are required to maintain records regarding the identification of a customer (or, a "know your customer" policy) and the transaction for a five year period.[90]

In addition, Member States are to make sure that financial institutions and their officers and employees inform authorities of suspect transactions and supply authorities with any requested information.[91] Such a disclosure of information to authorities will not constitute a breach of any legislative or administrative provision and as such cannot result in liability for the person reporting the suspected impropriety.[92] Finally, the Council Directive imposes a requirement that Member States extend its application to "professions and to categories of undertakings, other than credit and financial institutions . . . which engage in activities which are particularly likely to be used for money-laundering purposes."[93]

Loopholes in the Directive that may serve as means by which launderers can circumvent its applications include Article 3(7) which exempts bank-to-bank transactions from the identification requirements. As such, once a launderer is successful in depositing her illicitly gotten gains into the financial system, detection is unlikely.[94] Moreover, the

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88. Council Directive 91/308, *supra* note 80, art. 3(1)-(2).
89. *Id.* art. 3(6).
90. *Id.* art. 4.
91. *Id.* art. 6.
92. *Id.* art. 9.
93. Council Directive 91/308, *supra* note 80, art. 12. Attorneys serve as an example of persons whose professional activities are likely to be associated with money laundering. Non-formal financial institutions which are likely to be associated with money laundering include casinos, money changers, and bureaux de change. Commission of the European Communities: Proposal for a Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering (Mar. 23, 1990), *reprinted in* INTERNATIONAL EFFORTS, *supra* note 25, at 244.
94. FATF REP., supra note 25, at 9.

fact that the Directive does not require the criminalization of money laundering likewise limits its effectiveness.[95]

C. U.S. Domestic Legislation

Money laundering is currently a crime in countries such as the United States, the United Kingdom,[96] France,[97] Italy, Spain,[98] Belgium,[99] Luxembourg,[100] Switzerland,[101] Australia, Canada, the

95. *See* Council Directive 91/308, *supra* note 80, art. 2.

96. The United Kingdom has used various statutes to curb money laundering. For example, under the Drug Trafficking Offences Act (DTOA), anyone who knows or suspects that another is engaged in money laundering and fails to report such information to a constable has violated the DTOA. Drug Trafficking Offences Act, S.I. 1986, No. 1757, § 26B(1) (Eng.) (put into force Apr. 1, 1994). The attorney-client privilege is exempted from the DTOA. *Id.* § 26B(2). Persons disclosing such information are not to be held liable for any statutory breach. *Id.* § 26B(5)-(6). Second, the United Kingdom enacted the Money Laundering Regulations of 1993 which are very similar to U.S. domestic legislation in that they provide for the maintenance of identification and record-keeping procedures as well as the training of employees in the recognition of money laundering transactions. Money Laundering Regulations, S.I. 1993, No. 1933, § 5(1) (Eng.) (put into force April 1, 1994). Third, under the Criminal Justice Act of 1988, it is a crime for any person who enters into or is otherwise concerned in criminal arrangement, who facilitates the retention or control of the proceeds of crime by or on the behalf of another, and who either knows or suspects that the other person either has been engaged in or has benefited from criminal activity. Criminal Justice Act of 1988, S.I. 1994, No. 1759, § 93(A)(1) (Eng.) (put into force Apr. 1, 1994).

97. France has enacted legislation punishing those who assist in the laundering of profits generated from drug sales and calling for the confiscation of such assets in a delineated number of circumstances. *See* Loi No. 90-1010 of Nov. 14, 1990, portant adaption de la législation française aux dispositions de l'article 5 de la convention des Nations Unies contre le traffic illicite de stupéfiants [Regarding the Adaptation of French Legislation to the Provisions of Article 5 of the U.N. Convention Against Illicit Drug Trafficking], 1990 J.O 14055, 1990 J.C.P. 64288 (Fr.); Loi No. 90-614, relative à la participation des organismes financiers à la lutte contre le blanchiment des capitaux provenant du traffic des stupéfiants [Relating to the Participation of Financial Enterprises in the Fight Against the Laundering of Money Derived from Drug Trafficking], 1990 J.O. 8329, 1990 D.S.L. 334 (Fr.). The French Finance Ministry created a special department called "Tractin" which "centralizes information on the financial circuits involved, coordinates the action of other services in this area, and coordinates with other French and international government agencies." *Task Force Adopts Proposals to Fight Drug-Money Laundering*, 54 Banking Rep. (BNA) No. 7, at 312 (Feb. 19, 1990).

98. Spanish laws call for international cooperation to curb transnational money laundering, criminalize the laundering of money, and provide for the confiscation of assets gained by those involved in the drug trade. Magliveras, *supra* note 7, at 174 (citing Institutional Act 1/1988 of Mar. 24, 1988, 1980 B.O.E. 74, 9498 (Spain)).

99. Belgium's 1990 law amended its penal code, criminalizing the intentional and negligent laundering of the proceeds of crime. Magliveras, *supra* note 7, at 174 (citing Loi of July 17, 1990, modifiant les articles 42, 43, et 505 du Code penal et inserant un article 43bis dans ce même Code [Modifying Article 42, 43, and 505 of the Penal Code and Inserting Article 43bis in the Same Code], *reprinted* in 1990 MONITEUR BELGE 15886 (Belg.)).

100. Luxembourg has likewise criminalized money laundering and imposed a five-year prison term and a 50 million franc fine limitation for laundering drug proceeds. Under the

Luxembourg laws, knowingly assisting a drug trafficking operation in investing or concealing proceeds derived therefrom is prohibited. Magliveras, *supra* note 7, at 173-74 (citing Loi of July 7, 1989, portant modification de la loi du Février 19, 1973, concernant la vente de substances medica menteuses et la lutte contre la toxmanie [Relating to the Modification of the Law of February 19, 1973, Concerning the Sale of Drugs and the Fight Against Drug Addiction], *reprinted in* 1989 MEMORIAL A-50, 923 (Lux.); Act of Aug. 7, 1987 *reprinted in* 1987 OFFICIAL GAZETTE A., 144 (Lux.)).

101. The very nature of anti-money laundering legislation clearly conflicts with basic Swiss legal principles as contained in Swiss banking and criminal laws. Under the Swiss Federal Act Concerning Banks and Savings Banks, where a client does not consent to disclosure of their identity, banks cannot make such information available to regulators or law enforcers. Bundesgesetz uber die Banken und Sparkassen [Federal Act Concerning Banks and Savings Banks] of Nov. 8, 1934 , SR 952.0, art. 47(I)-(II) (Switz.) [hereinafter BankG]. Under the Swiss Penal Code, identity information may be given only in "crisis" situations. SCHWEIZERISCHES STRAFGESETZBUCH [StGB] art. 34 (Switz.). Moreover, under the Penal Code, lawyers and notaries cannot disclose information about their clients to third parties absent limited circumstances such as express consent from the client. *Id.* art. 321(I). As such, lawyers who open accounts or engage in transactions on their clients' behalf are generally forbidden from revealing information about their clients' business activities or even their clients' identity to investigators or bank officials. The penalty for unwarranted disclosure is up to three years of incarceration and/or a fine not exceeding 40,000 Swiss francs. *Id*. arts. 36, 48 (I)(1), 106(I), 321(I)(1).

The Swiss, bending to political pressures emanating from abroad and following the anti-money laundering trend, have adopted various laws that have been used to combat money laundering. For example, under the Swiss Penal Code, any person who attempts to obscure the origin, discovery, or forfeiture of assets (including cash, currency, economic interests, pecuniary advantages, securities, claims, metals, precious stones, and property rights (Franco Taisch, *Swiss Statutes Concerning Money Laundering*, 26 INT'L LAW 695, 699 (1992))) that she knew or must have known were in fact proceeds of crime (not every asset that is derived from criminal activity qualifies as an asset under article 305*bis* of the Swiss Penal Code unless it is a serious crime). StGB arts. 9(1), 35. For example, tax fraud is not considered to be a serious crime in Switzerland and as such does not fall under article 305*bis* of the Swiss Penal Code's anti-money laundering provisions. *Id*. art. 305*bis*(I). Principle offenses that are committed abroad also fall under the Code as long as the principle offense is also a crime in the foreign country. Magliveras, *supra* note 7, at 177. Usually, under Swiss law, in order for Switzerland to exercise jurisdiction, the crime must have been committed within Swiss borders. StGB art. 3. However, the Penal Code makes an exception for money laundering offenses, permitting Swiss authorities to prosecute money launderers whose criminal offense was committed outside of Switzerland. *Id.* art. 305*ter*. If the principle offense occurs in Switzerland and the money generated from the criminal activity is laundered abroad, Swiss officials may only prosecute the principle offense. The punishment is imposition of a fine and/or imprisonment. *Id.* arts. 35, 36, 39. When the criminal acted with profit-seeking motives, there is no monetary limitation that a judge may impose. *Id*. art. 18(I).

Many argue that the anti-money laundering sections of the Swiss Penal Code were an immediate response to political pressures rather than an effective anti-money laundering tool. Rebecca G. Peters, *Money Laundering and Its Current Status In Switzerland: New Disincentives for Financial Tourism*, 11 J. INT'L L. BUS. 104, 133 (1990). For example, the level of criminal intent required, that of knowing or operating under the assumption that the funds in question were generated by criminal activity, is rather high. In order to violate the Code, persons must have knowledge or be acting under the assumption that the assets involved were criminal proceeds. *See* StGB, *supra*, art. 305*bis* (I). Thus, criminal liability under the Code does not attach in instances of negligence or gross negligence. Taisch, *supra*, at 700. As such, reckless behavior exists where a person could "foresee the criminal consequences of his conduct and has made allowances for

Bahamas, Ecuador, Japan, and Hong Kong.[102] These domestic laws vary in their effectiveness and in their provisions. The United States will be used as an example of a fairly comprehensive, cutting-edge anti-money laundering regime. Because the U.S. framework imposes various reporting requirements on the domestic banking system, some argue that such enactments have unfairly burdened our financial institutions in the plight to curtail the laundering of money.[103]

1. General Goals

The impetus for U.S. anti-money laundering legislation was the same for international initiatives—curtailing the drug trade. Congress had found that the laundering of the proceeds from drug trafficking,

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them." *Id*. Criminal intent exists when the accused is not sure whether or not the assets were illicitly-gained as long as the person considered that the assets may have been generated by criminal activity and then engages in one of the behaviors prescribed under the Penal Code. *Id*.

According to commentators, "[I]t would be illogical and unfair to punish recklessness in connection with the laundering of money stemming from a crime where commission of the underlying crime itself required a higher standard of criminal intent." Peters, *supra*, at 134. Furthermore, commentators have noted that a recklessness standard for money laundering would be "conceptually difficult for courts to apply, would lead to arbitrary verdicts because of the standard's necessarily case-by-case application and, ultimately, would cause massive legal uncertainty in the handling of third party assets." *Id*. Critics also point to the facts that (1) because proof as to the criminal nature of the funds in question must be found in order to find a person guilty of money laundering of illicit funds, a "judge's determination of recklessness would be unduly guided by his after-the-fact knowledge" that such assets were gained illegally; and (2) because evidence located abroad would not always be available, arbitrary verdicts would result. *Id*. Finally, many critics believe that in enacting measures such as contained in the Swiss Penal Code, Swiss legislators have ignored practical considerations including that of enforcement. *Id*. at 136. Moreover, unlike the United States, Japan, and the European Union, the fact that the new Swiss money laundering legislation does not require bankers or professionals who deal in third party assets to report a wider range of transactions serves to severely limit its effectiveness. *Id*. at 137.

In short, despite the various limitations to the effectiveness of Swiss anti-money laundering legislation, it at the same time serves to aid other countries in their investigation and prosecution of money launderers. On an international level, Swiss laws provide that domestic authorities may reveal otherwise confidential information to assist foreign judiciaries, but only if the act would be a crime had it been committed in Switzerland. *Id.* at 137-38.

102. FATF REP., *supra* note 25, at 12. Despite the fact that Hong Kong has enacted anti-money laundering laws, it is in effect "toothless." Dilwyn Griffiths, FATF secretary, has stated that in his opinion, Hong Kong, Australia, Japan, and Singapore have the only effective anti-money laundering laws in Asia. *Money Laundering Clampdown Seen Good for Business*, REUTER EUR. BUS. REP. (May 13, 1994). For example, in order to gain access to bank account information, "officials must have a precise reason to seek the information, and a precise crime that has been committed." *Global Money Laundering Rules*, *supra* note 16, at 581. Given the profoundly covert nature of money laundering and of the crimes which it funds, such requirements often serve to emasculate the enforcement of anti-money laundering legislation. *Id.*.

103. *See* Alford, *supra* note 53, at 427.

especially when it involves U.S. currency, threatens the national security of the United States.[104] To allay this concern and to eliminate "bank haven loopholes through which money launderers can escape,"[105] Congress called for international negotiations to both expand access to information on transaction involving large amounts of U.S. currency[106] and the formation of international agreements to ensure that foreign financial institutions maintain and share information contained in records of transactions involving large amounts of U.S. dollars.[107] Such multilateral cooperation included the initiation of domestic anti-money laundering policies, including reporting requirements and a general "know your customer" approach.[108]

2. Reporting Requirements

Under the Bank Secrecy Act (BSA) and its subsequent amendments,[109] domestic financial institutions are required to report cash transactions exceeding $10,000 to the Secretary of the Treasury[110]

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104. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 4702(a), 102 Stat. 4290 (1988) (current version at 18 U.S.C. §§ 1956, 1957, 31 U.S.C. §§ 5325, 5326 (1988 & Supp. IV 1992)).

105. *Id.* § 4701(a).

106. *Id.* § 4702(b).

107. *Id.* § 4702(c)(2).

108. In an advisory letter, the U.S. Office of the Comptroller of Currency (OCC) "encourage[d] banks to adopt a 'know your customer' standard to ensure compliance" with anti-money laundering legislation. Money Laundering Through Wire Transfers, 1477 Fed. Banking L. Rep. (CCH) § 11,781 (Jan. 8, 1993) [hereinafter Money Laundering Through Wire Transfers].

109. Bank Secrecy Act, Pub. L. No. 91-598, 84 Stat. 1114-1124, 31 U.S.C. §§ 5311-5344 (1988 & Supp. V 1995) [hereinafter BSA]; Annuzio-Wylie Anti-Money Laundering Act of October 28, 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified in scattered section of 12 U.S.C., 18 U.S.C., & 31 U.S.C. (Supp. IV 1992)) [hereinafter the Annuzio-Wylie Act]; Money Laundering Control Act, Pub. L. 99-570, 100 Stat. 3207, 18 U.S.C. 1956, 1957, 31 U.S.C. 5324-5326 (1988 & Supp. V 1994) [hereinafter MLCA]; Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, 18 U.S.C. §§ 1956, 1957, 31 U.S.C. §§ 5325, 5326 (1988 & Supp. V 1994).

110. BSA § 5313(a); 31 C.F.R. 103.22 (1992). In response to the fact that money launderers were switching to non-bank financial institutions to launder their money because such institutions were traditionally not subjected to anti-money laundering laws, the BSA provides that reporting requirements may be extended to all financial institutions, including both banks and non-banks. Under the BSA, a "financial institutions" means: (1) an insured bank; (2) a commercial bank or trust company; (3) a private banker; (4) an agency or branch of a foreign bank in the U.S.; (5) an insured institution; (6) a thrift institution; (7) a broker or dealer registered with the SEC; (8) a broker or dealer in securities or commodities; (9) an investment banker or investment company; (10) a currency exchange; (11) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments; (12) an operator of a credit card system; (13) an insurance company; (14) a dealer in precious metals, stones, or jewels; (15) a pawnbroker; (16) a loan or finance company;

while U.S. residents or citizens doing business with foreign financial institutions must also keep records of the identity of interested parties and a description of all transactions totaling more than $10,000.[111] In addition, the BSA requires that a person or her agent/bailee file a report when knowingly transporting a monetary instrument in excess of $10,000 to, from, or through the United States.[112] Under the Annuzio-Wylie Anti-Money Laundering Act (Annuzio-Wylie Act), all financial institutions, not just banks, are to not only develop anti-money laundering programs but also may be required to report suspicious transactions, those suspected of criminal activity, and the identity of non-bank financial institutions.[113]

3. Other Offenses

The structuring of transactions in order to avoid the $10,000 reporting requirement is also prohibited.[114] Under the Money Laundering Control Act (MLCA),[115] it is unlawful to intentionally promote such avoidance of reporting requirements, usually referred to as "smurfing."[116] The MLCA also provides that it is unlawful for anyone to promote the concealment of criminal profits. More specifically, such concealment may occur by anyone who "conducts,

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(17) a travel agency; (18) a licensed sender of money; (19) a telegraph company; (20) a business engaged in car, airplane or boat sales; (21) persons involved in real estate closings or settlements; (22) the U.S. Postal Service; (23) an agency of the U.S., state, or local government carrying out a duty or power of a business described in § 5312(a)(2); (24) any business that the Secretary of the Treasury determines is an activity under § 5312(a)(2); (25) or any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters. *Id.* § 5312(a)(2).

111. *Id*. § 5314(a).

112. *Id*. § 5316(a).

113. Annuzio-Wylie Act, 12 U.S.C. § 5344.

114. BSA § 5324.

115. Because the MLCA applies even to non-U.S. citizens located outside of the United States as long as the conduct occurs "in part" inside U.S. borders, its reach is far indeed. MLCA, 18 U.S.C. § 1956(f). According to the Department of Justice Manual, the MLCA will apply pursuant to section 1956 as long as "the process is begun in the United States." JAMES D. HARMON, JR., FEDERAL ANTI-MONEY LAUNDERING STATUTES, 9A U.S. DEP'T JUSTICE MANUAL 2128.2 (Supp. I 1992).

116. MLCA, 18 U.S.C. § 1957 (a)(3). "'Smurfing' is the practice whereby a depositor will make a deposit in an amount slightly less than $10,000 to avoid the reporting of the cash transaction. A drug operation may make several deposits at different branches of a bank in one day in amounts less than $10,000 in an effort to launder money without triggering the CTR [Currency Transaction Report] requirement." Alford, *supra* note 53, at IV(A).

controls, manages, supervises, directs, or owns all or part of a business, knowing that the business is an illegal money transmitting business."[117]

4. Penalties

Violators of the BSA may be subject to either civil (an injunction, restraining order, or monetary penalty "not more than the greater of the amount (not to exceed $100,000) involved in the transaction (if any) or $25,000")[118] and/or criminal (not to exceed $250,000 or five years in prison) penalties.[119]

The MLCA provides that anyone who knowingly conducts or attempts to conduct any financial transaction of a value greater than $10,000[120] involving the proceeds of an unlawful activity with the intent to: (1) promote the carrying on of the illegal activity; (2) violate Sections 7201 or 7206 of the Internal Revenue Code;[121] (3) conceal the nature, location, source, ownership, or control of the proceeds of a crime;[122] or (4) avoid transaction reporting requirements[123] shall not be fined more than $500,000 or twice the value of the property involved, whichever is greater, or imprisoned for not more than twenty years or both.[124] In addition, anyone who intentionally promotes the

117. MLCA, 18 U.S.C. § 1960.

118. *Id*. §§ 5320, 5321. Also, financial institutions that negligently violates the Act may be required to pay civil money penalties not to exceed $500. *Id*. § 5321(a)(6). The MLCA, a subsequent amendment to the BSA attached penalties for institution that engage in a pattern of negligent violations in the amount of not more than $50,000. *Id*. § 5321(a)(6)(B). Finally, under the Act, civil penalties will be imposed on individuals who violates the act, not to exceed $10,000 per day for each day during which report remains unfiled to misstatement of fact goes uncorrected. *Id*. § 5321(a)(7).

119. *Id*. § 5322(a). When a person willfully violates the act and simultaneously violates another U.S. law "as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, [she] shall be fined not more than $500,000, imprisoned for not more than 10 years or both." *Id*. § 5322(b).

The willfulness requirement under section 5322 means that the person must have specific intent to violate the BSA. Purposeful circumvention of the reporting requirement is not enough. The person must also have knowledge "that the structuring he or she undertook was unlawful." U.S. v. Ratzlaf, 114 S. Ct. 655 (1994).

120. MLCA, 18 U.S.C. § 1957.

121. *Id*. § 1956 (criminalizing the evasion of taxes).

122. *Id.*

123. *Id.*

124. *Id.* § 1957.

concealment of criminal profits "shall be fined . . . or not imprisoned for more than five years."[125]

Finally, under the Annuzio-Wylie Act, the penalty attached to a money laundering conviction depends on whether the bank is foreign or domestic; domestic banks may have their charters or deposit insurance revoked[126] while foreign banks may have their U.S. licenses nullified.[127] Branches of foreign banks located in the United States that are convicted of money laundering are subject to termination proceedings.[128]

Many argue that "[b]anks should not be subject to the [above-mentioned] 'death penalty' [provisions] unless they are given the tools to avoid conviction" which, at present, do not exist.[129] Banks need to develop a more sophisticated payments system with the capacity to hold more information, including customer identification and the banks through which the transaction passed.[130]

5. Monitoring Electronic Fund Transfers to Bolster Compliance with Anti-Money Laundering Legislation

The OCC has consistently encouraged financial institutions to report suspicious wire transfers to the IRS or U.S. Customs Office.[131]

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125. MLCA, 18 U.S.C. § 1960.

126. Annuzio-Wylie Act, 12 U.S.C. §§ 93(c), 1818 (Supp. IV 1992).

127. *Id.* § 3105.

128. *Id.*

129. Alford, *supra* note 53, at VII.

130. *Id.*

131. Money Laundering Through Wire Transfers, *supra* note 108. Gerald L. Hilsher, Deputy Assistance Secretary (Law Enforcement) also issued an advisory memorandum concerning wire transfers to the Chief National Bank Examiner, Donald G. Coonley. *Id.* In the memorandum, Hilsher offered examples of suspicious wire transfers such as: (1) large and frequent international fund transfers to or from domestic customer accounts in amount that are not consistent with the customer's known business activities; (2) the receipt of multiple cashier's checks, money orders, traveler's checks, bank checks or personal checks below the $10,000 reporting threshold embodied in the Bank Secrecy Act; and (3) out of the ordinary international fund transfer requests which, for example, change the source of the funds. *Id*.

Currently, there are three wire transfer systems in place: (1) Clearing House Interbank Payments System (CHIPS) (CHIPS connects New York Clearing House Members and monitors transfers made in New York between major banks, which includes foreign exchange settlements and the Eurodollar); (2) Fedwire (Fedwire is a system that monitors both domestic and international funds transfers and is overseen by the Federal Reserve Board); and (3) Society Worldwide Interbank Financial Telecommunication (SWIFT) (the SWIFT network provides the means by

Financial institutions have, however, questioned the effectiveness of wire transfer detection systems on various grounds. First, they point to the daily volume of wire transfers that the systems are required to process.[132] Second, they purport that the costs of creating wire transfer systems that could effectively police electronic transactions would serve to "eliminate the chief attractions of wire transfers as inexpensive, speedy, efficient payment mechanisms."[133] The overwhelming cost and volume of filing currency transaction reports (CTRs) feared by financial institutions are indeed a reality; since 1970, over 30 million CTRs have been completed, each of which takes approximately twenty minutes to fill out.[134] Third, banking experts believe that the burden that domestic legislation places on financial institutions is unfair and that it is not likely that the records that financial officers required to keep under current legislation will be effective in enforcement proceedings.[135]

Those who oppose the use of funds transfer systems as a policing method also argue that there are other limitations to their effectiveness such as the nonuniformity of the systems and the restrictions that are imposed on them.[136] They further point to the ability of those who actually own the funds to easily hide their identities and transaction details via repetitive fund transfers outside the United States, especially in countries that have bank secrecy laws.[137] Finally, other critics of the BSA regime point to potential problems such as the "risks posed to domestic banks in terms of loss of income from customers currently using funds transfers as a large-dollar payment

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which information is exchanged between branches and correspondent banks located in different countries). *See* Zagaris & MacDonald, *supra* note 9, at 76 n.68.

132. Sarah Jane Hughes, *Policing Money Laundering Through Funds Transfers: A Critique of Regulation Under the Bank Secrecy Act*, 67 IND. L.J. 283, 284 (1992). According to the Federal Reserve Board, Fedwire and CHIPS process approximately 350,000 funds transfers per day with an aggregate worth of approximately $1 trillion. *Id*. at 285. *See* 55 Fed. Reg. 40,791 (1990) (final rule amending 12 C.F.R. § 210, adopting U.C.C. article 4(A) for funds transfers through Fedwire). In 1990, CHIPS monitored 148,801 transfers totaling $885.5 billion and handled transfers worth over $1.25 trillion each day. Hughes, *supra*, at 289 n.27. In 1990, Fedwire processed approximately 63.7 million transfers totaling $199 trillion. *Id*. at 289 n.25.

133. *Id*. at 284, 285.

134. Alford, *supra* note 53, at IV(A). Other sources estimate that electronic wire transfer systems process over one trillion dollars worth of transactions and billions of cross border transfers on a daily basis. Zagaris & MacDonald, *supra* note 9, at 76.

135. Hughes, *supra* note 132, at 285.

136. *Id*. at 287.

137. *Id.*

mechanism, . . . the danger to the country's currency position, . . . [and the] likelihood of increasing off-shore netting and clearing agreements."[138]

Due to the complications associated with the use of the CHIPS, Fedwire, and SWIFT systems, under U.S. domestic legislation, some have suggested that law enforcement officials should instead rely on other methods of detection such as "know your customer" policies combined with targeting regulations.[139] Still others recommend that "[b]ecause the wire transfer system continues to evolve as technology develops, regulations, rather than statutes, will be more responsive to the competing aims of law enforcement and the system's efficiency."[140]

Still, in a policy statement in March of 1993, the FDIC continued to encourage the use of funds transfer systems to detect money laundering operations.[141] The FDIC also recommended that financial institutions adopt FATF recommendations with regard to the use of CHIPS, Fedwire, and SWIFT. To the extent possible, the FDIC encouraged the inclusion of the identity of transferor, whether it be a non-bank, originator, or beneficiary within the Fedwire transfer itself.[142]

6. Recent Developments—The 1994 Money Laundering Suppression Act[143]

Congress finally responded to the concerns voiced by banking experts and by opponents of reporting requirements "that excessive paperwork is not the way to go" with its passage of the Money Laundering Suppression Act of 1994 (MLSA).[144] The Treasury Department clearly was likewise concerned with the ramifications of the U.S. regime, as evidenced by the fact that the Treasury Department as of April, 1994 had not issued any regulations pursuant to the

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138. *Id.* at 325.

139. Laura M. L. Maroldy, *Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers is Not the Answer*, 66 NOTRE DAME L. REV. 863, 865 (1991).

140. Alford, *supra* note 53, at VI(C).

141. *1991 Policy Statement of Money Laundering*, *supra* note 47, at *1.

142. *Id.* at *4, *5.

143. Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (1994) [hereinafter MLSA].

144. *Clinton to Sign New Law After Easy Passage*, 5 MONEY LAUNDERING ALERT 1 (1994) [hereinafter *Clinton to Sign New Law*].

Annuzio-Wylie Act.[145] Other concerns with U.S. anti-money laundering legislation included the apparent contradictions between the BSA and the MLCA; the protections provided under the MLCA appeared to contradict the disclosure requirements under the BSA.[146] More specifically, "[B]anks [were] face[d] [with] the dilemma of either investigating a customer's transaction to ensure that the source of the money is legal or facing liability under section 1957. . . . If the bank reports the suspicious transaction and it turns out to be incorrect about is suspicion, the bank may be liable under tort law."[147] Under the MLCA, banks may give information including the customer's name, their account number, and the nature of the suspected illegal activity, thereby conflicting with the BSA.[148] But, if they disclose too much, they may be liable for defamation.[149] Section 5318(g)(3) of the Annuzio-Wylie Act attempted to protect financial institutions from such liability; however, this safe harbor provision protected banks from only civil, not criminal, liability.[150] Thus, even with the immunity for disclosure of otherwise confidential customer financial records granted under the Right to Financial Privacy Act[151] and extended under the Annuzio-Wylie Act, banks could, however, still be found criminally liable for wrongful disclosure.[152]

In response to these and other concerns, Congress adopted the MLSA. The MLSA serves to both "soften" and to better reconcile the BSA and the MLCA with the Right to Privacy Act; under the MLSA, the Treasury Department is seeking to reconcile the enforcement of anti-money laundering laws with the interests of the financial services industry.[153] Under the MLSA, various "monetary transmitting

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145. *Laundering Efforts to Get Greater Visibility at Treasury: Treasury's Noble to be Elevated to New Enforcement Undersecretary*, 5 MONEY LAUNDERING ALERT 7, 8 (1994). The Annuzio-Wylie Act had established a January 1994 deadline for the issuance of regulations (1) identifying the non-bank institutions that qualify as financial institutions for the purposes of the Act and (2) specifying what kinds of customer information must be revealed to the federal government. Annuzio-Wylie Act, 31 U.S.C. § 5327(a) (Supp. IV 1992).

146. Alford, *supra* note 53, at IV(A).

147. *Id.*

148. *Id.*

149. *Id.*

150. Annuzio-Wylie Act, 31 U.S.C. § 5318(g)(3) (Supp. IV 1992).

151. Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (codified as amended at 12 U.S.C. §§ 3401-3422 (1982 & Supp. IV 1986)).

152. Alford, *supra* note 53, at IV(A).

153. *Clinton to Sign New Law*, *supra* note 144, at 1.

businesses" (including casinos) with a yearly revenue of more than $1 million and other non-bank institutions must register with the Treasury.[154] More importantly, the bill provides for a thirty percent reduction in the number of CTRs in three years and for a streamlining of some of the forms.[155] Furthermore, the MLSA creates two types of exemptions for banks: "mandatory" and "discretionary" exemptions. Mandatory exemptions from BSA cash reporting requirements are those that occur "between depository institutions, with federal and state agencies and with businesses whose reports have no enforcement value."[156] Discretionary exemptions are those transactions between depository institutions and "qualified business customers" who consistently engage in transactions involving large sums of money.[157] Finally, the MLSA eliminates the need to prove willfulness under the BSA, responding to Supreme Court case *Ratzlaf v. U.S.*[158]

According to Ronald K. Noble, Undersecretary of the Treasury for Enforcement:

> This legislation serves several important purposes . . . First, it will further the growing partnership between the banking industry and law enforcement. Second, it will keep our feet to the fire on the efforts we have underway to reduce nonessential paperwork burdens on the private sector. And third, it gives us new tools to combat the challenging dimensions of the money laundering problems.[159]

Perhaps such a relaxation of anti-money laundering legislation is attributable to the realization that banks are currently not equipped to bear the brunt of application of U.S. anti-money laundering laws and that the costs that such legislation puts on U.S. banking institutions may, in the long run, do more economic harm than good to the U.S. financial system. Not only are banks required to carry the investigatory

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154. MLSA §§ 408(a)(1)-(2), 409 (a)(2)(X) (amending 31 U.S.C. § 5312(a)(2)).

155. *Id.* § 402(b)(1) (amending 31 U.S.C. § 5313(g)).

156. *Id.* §402(a)(d) (amending 31 U.S.C. § 5313)(d)). The Treasury is to publish a more specific list of institutions that get mandatory exemptions in the Federal Register. *Id.* § 402(a)(d)(2).

157. *Id.* § 402(a)(e)(1), (2). A "qualified business customer" is defined by the Act as a transaction accountholder who "frequently engages in transactions with the depository institution . . . subject to . . . reporting requirements . . . and [who] meets criteria [set by] the Treasury." *Id.* § 402(a)(e)(2), (3).

158. *Id.* § 411(b) (amending 31 U.S.C. § 5324(c)); Ratzlaf, 114 S. Ct. at 655.

159. *Clinton to Sign New Law*, *supra* note 144, at 1.

burden, but they are also being forced to further law enforcement policies at the expense of a customer's right to privacy. Perhaps U.S. legislators have likewise realized that such a right is essential and was nearing extinction under the previous anti-money laundering regime.

VI. MONEY LAUNDERERS ARE RARELY PROSECUTED

According to Dilwyn Griffiths, Secretary of the FATF:

> The money laundering problem has certainly grown more complex, if not actually worse, since . . . 1989. In part this reflects the fact that our knowledge of the problem is now much better. So evidence of the increasing incidence of laundering is only to be expected and . . . is a good thing.[160]

Clearly, the gathering of intelligence on money laundering techniques is essential. However, despite recent efforts to compile such data, "Law enforcement inquiries are relatively rare events compared with the frequency of laundering transactions . . . [because the more that funds appear to have a] legal origin, the less likely it is that probing questions regarding the origin will be asked."[161] Accordingly, money laundering-related crimes are rarely prosecuted. The number of successful prosecutions are negligible in light of the number of launderers who either go undetected or who, even if prosecuted, are required to pay fines that shadow in comparison to their profits. As a practical matter, anti-money laundering prosecutions have on the whole proven to be unsuccessful. Even "[a] droit use of laundering techniques has succeeded in frustrating modest federal efforts to date in employing . . . remedial tools."[162] With detection unlikely and prosecution even more doubtful, money laundering remains to be a relatively low-risk, high-profit endeavor.[163] Such limited use can be attributed to various factors.

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160. Dilwyn Griffiths, *International Efforts to Combat Money Laundering: Developments and Prospects*, 19 COMMONWEALTH LAW BULLETIN 1824 (1993). "If you want to take effective measures to combat the crime, you need to have a good idea of where, how and to what extent it is carried out. . . . So evidence of the increasing incidence of laundering is only to be expected and, in its way, is a good thing." *Id.*

161. ALEXANDER & CAIDEN, *supra* note 3, at 39.

162. *Id.*

163. "Underworld profits continue to grow despite special-emphasis programs, such as the accelerated use of electronic surveillance, interagency strike forces to attack both organized crime

The first factor is the complexity of money laundering operations. Money launderers attempt to put as much distance as possible between themselves and the money being laundered by entering into a web of transactions, often involving various "shell" companies,[164] bearer bonds,[165] jewelry and gold brokerage firms, retail shops, import-export companies,[166] and wire transfers of funds. This level of complexity means that investigations are often too expensive to fund.[167]

Second are problems of proof and of the admissibility of vital evidence. Even where evidence is obtained, it will not be admissible if it is illegally-gained; that is, if money laundering is not a crime in the foreign jurisdiction, then it cannot be admitted in U.S. courts. Corrupt officials and haven jurisdictions often function to make evidence even more inaccessible.

Haven jurisdictions present a third problem.[168] Such jurisdictions serve to block the gathering of evidence not only because of interference from government officials who derive personal profits from money laundering activities, but also by the presence of laws, such

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and drug trafficking, substantial increases in enforcement personnel, and innovative legal approaches to racketeering, such as the Racketeer Influenced and Corrupt organizations (RICO) and the Continuing Criminal Enterprise (CCE) statutes." *Id.* at 37.

164. *Global Money Laundering Rules*, *supra* note 16, at 581. The use of "shell" companies to hide the illegally-obtained proceeds is very popular among money launderers. *Id.* "Front" companies that are exempt from transaction reporting requirements are even more attractive. Alford, *supra* note 53, at II. The Secretary of the Treasury can grant exemptions to reporting requirements pursuant to section 5312 of the BSA. BSA § 5312 (1988). Businesses that are normally exempt from reporting requirements are those which deal in large amounts of currency such as retail store, laundromats, and restaurants. Hughes, *supra* note 132, at 437 n.25. On the average, the U.S. government receives over 600,000 CTRs per month. *Id.* at 437 n.27. As such, the volume of reports further decreases the possibility that a money launderer will be detected.

165. Bearer shares are "shares of capital stock that are not registered in the shareholder's name, but rather can be redeemed or sold by the bearer with no further owner identification." Alford, *supra* note 53, at II n.30.

When an attorney located in a foreign country sets up a company for which bearer shares are issued, the identity of the holders of the shares would be concealed as would the identity of the trustee for whom a bank creates a trust. *Id.* at II. As such, only the lawyer and the bank would know the identity of the shareholder or depositor. *Id.*

166. Griffiths, *supra* note 160, at 1824.

167. Because a successful investigation requires that investigators be sent abroad, usually to more than one country, most enforcement agencies do not have the personnel or resources to fund over-seas investigations. Graham, *supra* note 1, at I8.

168. *See infra* note 31.

as bank secrecy legislation, which are friendly to money launderers.[169] Typically, haven jurisdictions often serve as "tax havens."[170] With the

169. For example, the dearth of financial controls and the growing inflow of foreign capital into Eastern Europe makes the Eastern European market an attractive one for money launderers. According to Tom Sherman, president of FATF, although Eastern Europe had not yet become a money laundering "hot spot," "several banking systems in the region have already been used to launder drug proceeds, and as their currencies move towards convertibility, they will inevitably become increasingly attractive to money launderers." *Experts at International Conference Warn About Money Laundering Threat in Eastern Europe*, Banking Rep. (BNA) No. 59, at 488 (Oct. 5, 1992) [hereinafter *Money Laundering Threat in Eastern Europe*]. For example, it has been alleged that German companies have been supplying chemicals to Polish amphetamine manufacturers and receiving payments for their products through electronic wire transfers from Polish banks. Zagaris & MacDonald, *supra* note 9, at 77. It has been asserted that Poland supplies twenty percent of the EU's illegal amphetamines. *Id.* Also, many believe that the money gained from the sale of the chemicals was converted into assets in the former GDR and Eastern Europe. *Id*. Furthermore, drug use is still legal in such countries as Poland, the Russian Federation, Slovakia. Rensselaer W. Lee III & Scott B. MacDonald, *Drugs in the East; Eastern Europe*, 90 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (FOREIGN POLICY) 89 (1993).

In response to such concerns, Hungary has passed the 1991 Financial Institutions Act which prohibits money laundering via financial institutions. Valentin Dobrev, Bulgaria's deputy minister for foreign affairs, voiced concerns different than those regarding Hungary. According to Dobrev, the greatest threat from money launderers does not emanate from without Eastern Europe, but from former communist officials located inside Eastern Europe. Dobrev stated that former Bulgarian communist leaders were transferring illegally-obtained domestic funds to joint ventures located overseas via the conversion of property from public to private. "The fact is that while most of these companies are bankrupt, their managers have accumulated enormous amounts of money." *Money Laundering Threat in Eastern Europe*, *supra* at 488. Dobrev, to prove his point, pointed to the $2 to $3 billion currently missing from state funds. Dobrev attributed the missing funds to the lack of any anti-money laundering legislation and to the inability to currently monitor financial transactions. Dobrev accordingly proposed both ratification of the Council of Europe's Convention on Money Laundering and more in-depth monitoring of joint ventures and of financial transactions. *Id.*

Despite Polish legislation outlawing the trafficking of amphetamines, no one had been convicted or imprisoned under the law between 1985 and the beginning of 1992. According to one Polish Interpol official, "Fighting drugs is a low priority for us. Prosecutors, judges, and even police regard this crime in the same category as petty theft. They do not recognize that trafficking poses a threat or danger to society." Lee & MacDonald, *supra*, at 89. As such, "The post communist states . . . make an inviting target for criminals seeking a place to stash their narcotics earnings." *Id*. Even in Eastern European countries such as Hungary and former Czechoslovakia that have enacted anti-money laundering laws, successful implementation of such legislation is limited due to inexperience with accounting procedures and with financial investigations. *Id*. With domestic and international anti-money laundering regulations in place in other countries, the Eastern European market and financial institutions will become even that much more attractive to money launderers and organized crime as one in which laws and attitudes towards money laundering are comparatively very relaxed, investigators are both inexperienced and few in number, and thus detection more than unlikely. *Id.*

170. "The amassing of substantial and largely untaxed wealth by the underworld is a phenomenon that has persisted since prohibition. Recent interest in the tax evasion and the role of the underground economy highlights untaxed wealth as a serious obstacle to the goal of tax equity." ALEXANDER & CAIDEN, *supra* note 3, at 37.

ever-watchful eye of investigators on tax haven jurisdictions,[171] even the nondrug related tax evader is exposed to detection.[172]

A fourth factor is that of bank secrecy laws[173] present in such places as the Cayman Islands, Hong Kong, Luxembourg, and Austria. The secrecy provisions of Austrian and Swiss laws, as of 1991, continued to be a barrier which served to shelter and protect money launderers from detection. Such bank secrecy laws coupled with the structuring of transactions below the $10,000 reporting threshold made detection next to impossible.[174]

Tax evasion convictions have traditionally served as a means by which to reach organized crime king-pins and more recently, the vehicle by which the U.S. government is currently seeking to catch drug traffickers. Turro, *supra* note 31, at 12.

In general, the international community sought to coordinate its efforts to more effectively detect tax evaders. Accordingly, the United States has entered into a series of bilateral treaties, some of which provide for routine and automatic exchanges of information, other of which provide for the sporadic exchanges of information. *Id.* The United States has negotiated bilateral agreements with countries such as Jamaica, Grenada, Bermuda, Mexico, Peru, and Costa Rica. *Id*. Finally, the United States has also entered into MLATs that provide for the exchange of information such as the testimony of witnesses, production of documents, location of persons, and the service of subpoenas. *Id.* The United States has entered into MLATs with the likes of Switzerland, Turkey, the Netherlands, and Italy. *Id*. This serves to circumvent bank secrecy laws and to "ensure the admissibility of the evidence obtained." *Id*.

171. Tax havens "generally are countries that have low or zero tax rates and provide investors with a minimal level of financial secrecy." Turro, *supra* note 31, at 12. According to the IRS, the Justice Department, and the Treasury Department, tax havens usually can be characterized as countries with low taxes, secrecy, importance of banking relative to the rest of the economy, availability of modern communications, aggressive self-promotion as a tax haven, lack of currency controls, and lack of tax treaty network. *Id*. Countries such as Costa Rica, Hong Kong, and Panama exempt income generated abroad from taxes while nations such as Luxembourg, the Netherlands, and Switzerland offer privileges for holding companies and Jersey, Guernsey, and the Isle of Man give special treatment to "corporation tax companies." *Id*.

172. *Id*.

173. Factors impeding the disclosure of customer information by banks to law enforcers include: (1) tradition of the promotion of customer confidentiality by bank employees; (2) bankers' interests and customer expectations; (3) the transmission of legal rules regarding disclosure of financial information to enforcement officials; (4) investigators' confusion over usual innerbank communication networks; (5) poor interpersonal relationships. Michael Levi, *Regulating Money Laundering: The Death of Bank Secrecy in the UK*, 31 BRIT. J. OF CRIMINOLOGY 2, 109, 111-12 (1991).

174. *Global Money Laundering Rules*, *supra* note 16, at 581. The Swiss have in fact relaxed their bank secrecy provisions. *See generally supra* note 101. Domestic legislation, such as that of the United States, has specifically addressed the problem of the structuring of transactions below a given threshold. *See supra* part V.C. (the BSA and the MLCA) for examples of legislation dealing with such structuring. As for international legislation, in order to circumvent the bank secrecy laws, article 5(3) provides that signatories to the U.N. Convention cannot deny other parties to the Convention access to bank and other financial records on the grounds that so doing would be a violation of domestic bank secrecy laws. U.N. Convention, *supra* note 50, art. 5(3).

A fifth consideration is corporate secrecy. For example, on the island of Aruba, "businesses can be set up for a small amount of money and [then] enjoy a large degree of [corporate] secrecy."[175]

Sixth is the problem of the sophistication of money launderers.[176] The financial power of organized crime is efficient at keeping one step ahead of anti-money laundering laws and enforcement officials.[177] For example, due to recent monitoring of traditional banking institutions for suspicious transactions, money launderers have turned to other financial institutions and haven jurisdictions with bank secrecy laws located in the Caribbean, Hong Kong, Luxembourg, Austria, and Switzerland.[178] In order to circumvent the $10,000 transaction reporting minimum, launderers began to engage in "smurfing" techniques and to recruit "bent" bankers. Also, money launderers began to use offshore banks to avoid detection by enforcement officials and to remove illicitly gained funds outside of enforcement officials' jurisdiction.[179] Furthermore, with the focus of most anti-money laundering laws being on the detection of money launderers via their use of legitimate banks, many money launderers began to use non-bank financial institutions such as check cashing services and casa de cambio.[180] In addition, money launderers in the "La Mina" scheme were still able to conduct their operations, even after having complied with all reporting requirements.[181] Money launderers have also been able to conceal their identity by using wire transfer systems because of the ease with which the identity of the customer can be concealed and because of legislation's traditional focus on cash transactions.[182] Finally, the fact that international financial institutions

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175. *Global Money Laundering Rules*, *supra* note 16, at 581.

176. In fact, "the professional money launderers are as adept as anyone in the legitimate financial sector in seeking out opportunities and switching their money around the world." *Id.*

177. *Id.*

178. *Id.*

179. Graham, *supra* note 1, at I8.

180. Alford, *supra* note 53, at IV(A) n.235. The U.S. government has thus considered legislation that would subject non-bank institutions to the same constraints (CTRs and uniform licensing requirements) as banks. *Id*. at IV(A).

181. For more on the "La Mina" scheme, *see* Maroldy, *supra* note 139.

182. Alford, *supra* note 53, at VI(C). "Payment orders rarely identify the originating customer because of space limitations on the system. Thus, the order will simply state 'our good customer.'" *Id*. Such technical limitations mean that information on the wire transfers with regard to not only customer identification but also details of the transaction is incomplete. The problem is magnified when more than one bank is involved in the transaction and is in turn further exaggerated when the banks are located in different jurisdictions. When sent through countries with strict bank

are no longer easily compartmentalized combined with both improvements in technology have created an "instantaneous economy"[183] and the increasing number of markets emerging on the international scene,[184] means increased ability of money launderers to confound their pursuers and increased opportunities to not only to more aptly obscure their trails but also to further expand their illicit enterprises.[185]

The seventh factors are the protections provided by the attorney-client privilege.[186] Such exemptions, for example, still exist under the current British anti-money laundering law. They often serve to emasculate effective investigation and discovery.

The fact that application of criminal penalties has clearly not worked is the eighth major problem. Even when they are caught, money launderers and their accomplices still get away with millions. For example, in the Bank of Boston case,[187] apparently due to an "error of judgment," the bank was fined merely $500,000 for its failure to report $1.2 billion in transactions to nine foreign banks.[188] Another example is the Crocker National Bank case[189] in which the bank was fined $2.25 million for failing to report $4 billion in transactions over four year period.[190] In light of this fact, civil actions such as those initiated for insider dealing have proven more successful.

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secrecy laws, investigation of money laundering nears impossible. In addition, with transactions occurring in matters of seconds and with a non-uniform set of bank codes that must be interpreted by experts, enforcement officials' efforts are, more often than not, frustrated. Finally, because transactions involving smaller banks often engage the use of correspondent banks, the complexity of investigated is further confounded. *Id*. In response to these and other problems associated with the use of wire transfer systems, the Annuzio-Wylie Act was enacted. *Id.*

183. The sheer "volume of electronic wire transfers, their instantaneity, and the significance of this financial medium to international trade combine to make it a difficult area to police." Zagaris & MacDonald, *supra* note 7, at 77. With the proliferation internal bank networks and with the growth of the telecommunications market, the main transfer networks are losing business. As the telecommunications networks become more diffuse, detection of money laundering becomes a more burdensome problem, requiring that more resources be directed towards supervision. *Id*. at 78.

184. Examples of emerging markets include those of Africa, Latin America, and Eastern Europe.

185. Zagaris & MacDonald, *supra* note 7, at 77.

186. *See* WALTER, *supra* note 5, at 83.

187. Graham, *supra* note 1, at I8.

188. *Id.*

189. *Id.*

190. *Id.*

A ninth problem is that "[m]any of the current difficulties in international cooperation in drug money laundering cases are directly or indirectly linked with . . . the fact that, in many countries, money laundering is not today an offense, and with insufficiencies in multilateral cooperation and mutual legal assistance."[191] Indeed, another problem with creating an effective international anti-money laundering is that not all governments believe that money laundering is a crime. In fact, in many countries, "Money laundering has come to be considered not only legitimate but respectable."[192] With such attitudes still in place, haven jurisdictions are likely to continue in the near future. Money laundering in countries that lack industry and natural resources will continue to provide protection for money launderers because of the business, jobs, and revenue they bring with them. Absent international pressure to change their laws, there is no reason why they would want to criminalize money laundering or aid investigators from other countries.

Finally, with regard to Lesser Developed Countries (LDCs) and their cash societies, bankers in LDCs who would like to bend to international pressure to criminalize money laundering, "claim that it is exceptionally difficult to detect counterfeit dollars, harder yet to control their circulation because theirs are 'cash societies,' where anyone can 'come in and make cash deposits of $200,000 or $800,000,' with no questions asked."[193] They recognize, then, that

> the U.S. dollar, and not drugs, ha[s] become the commodity of choice. The vast amounts of dollars flowing through the international pipeline, as well as the dramatic increase in U.S. currency counterfeiting, particularly in Southeast Asia, Africa, Eastern Europe, and Latin America, have created an omnipresence for the U.S. dollar that the Federal Reserve and the U.S. Treasury could never have anticipated or desired.[194]

191. FATF REP., *supra* note 25, at 14.
192. EHRENFELD, *supra* note 42, at 246.
193. *Id.*
194. *Id*. at 245-46.

VII. CONCLUSION

Since money laundering is primarily accomplished through financial institutions, "splash" detection has proven to be the most effective means of catching money launderers. Splash detection entails catching the launderer before the money enters—or splashes—into the financial system. Once in the cycle, detection is rarely possible.[195] Various factors, however, such as the instantanaeity of cross-border transactions, the fundamentally covert nature of money laundering, the legitimate needs for bank secrecy and clean money, and the creation of new types of instruments such as junk bonds, new types of securities credit instruments, and non-bank institutions, makes keeping pace with such transformations in and of itself an extremely difficult task. Money laundering has simply become a fact of life that threatens the integrity of our economic and social existence and, at the same time, serves legitimate purposes. Complete eradication is not only unlikely given the covert and insidious nature of money laundering and the costs and complications associated with policing money launderers, but it is also not practical.

The evolution of anti-money laundering policies, as embodied in both domestic and international initiatives and organizations, has quickly responded to the threats posed by money laundering to the global financial system. Nations have aptly adjusted to this fairly recently perceived threat and are still in the process of fine-tuning their anti-money laundering policies. Despite the various above-mentioned impediments to effective anti-money laundering regime, the United States continues to pursue an anti-money laundering posture and is encouraging other countries to adopt anti-money laundering policies.[196]

Clearly, (1) further development of anti-money laundering detection systems; (2) increased regulation of non-bank institutions;

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195. According to a FATF Report, other vulnerable points in the process that make detection more likely are where the money is sent abroad to a haven jurisdiction or where the cleaned money is repatriated to the jurisdiction in which the funds were originally generated. FATF REP., *supra* note 25, at 9. According to Dilwyn Griffiths, "controlled delivery"—that is, "allowing shipments of or transactions involving suspect funds to proceed under the surveillance of the authorities to identify and gather evidence against as many as possible of the criminals involved"—is another effective enforcement technique. Griffiths, *supra* note 160, at 1825.

196. For example, in a meeting with Panamanian President-elect Perez Balladares, President Clinton offered U.S. technical assistance in the curbing of drug-related money laundering. Dee Dee Myers, Press Secretary, Meeting with Panamanian President-elect Perez Balladares (July 20, 1994) *in* 5 DEP'T ST. DISPATCH 31, Aug. 1, 1994, at 525.

(3) more intergovernmental cooperation in the sharing of information and in the investigation of alleged money launderers; (4) criminalization of money laundering and the erosion of bank secrecy laws by a greater number of countries; (5) continued freezing and seizure of assets and the improvement of the enforcement of domestic legislation; (6) continued use of "know your customer," "reporting of suspicious transaction" policies, and expanded use of computerized transaction reporting systems to scrutinize financial transfers; as well as (7) a greater allocation of resources and enforcement officials to the investigation of money laundering operations both at home and abroad would be needed in order to more successfully curb the money laundering activities. Future success in the curbing of money laundering will depend on the ability of nations to both unify their anti-money laundering legislation and increase international cooperation in the sharing of information and in the investigation of money laundering schemes.