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Matthew S. Morgan

At the Fiftieth Anniversary of the United Nations on October 22, 1995, President Clinton outlined the initiatives of Presidential Decision Directive No. 42, aimed at combating transnational crime. In his speech, the President asserted: "I directed our government to identify and put on notice nations that tolerate money laundering. Criminal enterprises are moving vast sums of ill-gotten gains through the international financial system with absolute impunity. We must not allow them to wash the blood off profits from the sale of drugs, from terror or organized crime." President Clinton further urged members of the United Nations to: "join in negotiating and endorsing a declaration on international crime and citizen safety, a declaration which would first include a no-sanctuary pledge, so that we could say together to organized criminals, terrorists, drug traffickers and smugglers, you have nowhere to run and nowhere to hide." Perhaps indicative of the President's ability to say the right thing at the right time, this statement adequately captures the urgency with which the United States is treating organized crime and the international character that such activities (notably, money laundering) have assumed.

The United States anxiety over the illegal narcotics trade and money laundering is appropriate. Not only is the United States primarily responsible for the behemoth that is the drug trade, the U.S. dollar has become the preferred currency of the industry and is inextricably intertwined with money laundering activities. Estimates are that global money laundering activities yield upwards of US $500 billion annually. Federal law enforcement officials in the

1. Matthew S. Morgan, Research Fellow, London Institute of International Banking, Finance and Development Law, Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London.
3. Id.
4. Id.
United States calculate that between $100 billion and $300 billion in U.S. currency is involved in money laundering each year.6 In the cash societies of some of the Lesser Developed Countries, the U.S. dollar, and not the drugs, has become the commodity of choice.7 The vast amounts of dollars flowing through the international pipeline, as well as the dramatic increase in U.S. currency counterfeiting, have created an omnipresence for the U.S. dollar that the Federal Reserve and the U.S. Treasury could never have anticipated or desired.8

In addition, the United States represents the single largest consumer market for illegal narcotics.9 Estimates are that 65 percent of the world's production of illegal drugs is used by U.S. consumers.10 In 1991 the Drug Enforcement Agency found U.S. citizens expended more on drugs and drug prevention, rehabilitation, and education than on national defense.11 The American appetite for illegal drugs is fed primarily from foreign countries, with an estimated 95 percent of the supply coming from abroad.12 Thus, to wage a successful attack on money laundering and drug trafficking, domestic measures are just not enough. An international effort is needed to address the problem,13

With both the incentive to implement a widely-recognized legal regime on money laundering and the experience of drafting illegal narcotics legislation (gained during its long-standing War Against Drugs), the United States has been instrumental in pushing forward international initiatives. One of the earliest multilateral agreements joined by the United States was the Vienna Convention Against Illicit Traffic in Narcotic Drugs and

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7. David P. Stewart, Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 18 DENV. J. INT'L. L. & POLY 387, 404 n.3 (1990).
8. Id.
9. Id.
10. Id.
12. Id.
13. The U.S. interests in waging an international attack on money laundering are probably two-dimensional. From a strictly domestic standpoint, the United States has an interest in developing an international anti-money laundering framework to deny the drug trade a realization of its profits, thereby removing an incentive for production. In addition, the United States also believes money laundering is a threat to the stability and economic development of its neighbors and trading partners. To this point, the Financial Crimes Enforcement Network (FinCEN) has stated:

Criminal Activities, without restraint, fundamentally destabilize political and economic reform. As history demonstrates again and again, political stability, democracy and free markets depend on solvent, stable, and honest financial, commercial, and trade systems. . . As organized crime develops economic power, it corrupts democratic institutions and undermines free enterprise. Money laundering is now being viewed as the central dilemma in dealing with all forms of international organized crime because financial gain means power. Organized crime is assuming an increasingly significant role that threatens the safety and security of peoples, states and democratic institutions.

Psychotropic Substances of 1988 (Vienna Convention). 14 Coming into force on November 1, 1990, this treaty attempted to establish a flexible foundation upon which a consensus condemning money laundering could be built. 15 Importantly, the Vienna Convention obligated the signatories to criminalize the laundering of drug money under their respective domestic laws, provided for the confiscation (i.e., freezing, seizing, and forfeiting) of property involved in or derived from such offenses, established drug money laundering as grounds for extradition among countries, and initiated a process for mutual legal assistance among countries in order to facilitate the investigation and prosecution of those involved in laundering the proceeds of the drug trade. 16 

Unique in its novelty (as well as in its substance), the Vienna Convention served as the basis for subsequent intergovernmental initiatives -- such as the G-7 Financial Action Task Force (FATF) and the model legislation adopted by the Inter-American Drug Abuse Control Commission of the Organization of American States (OAS). 17 Important for the purposes of this article, the United States was active in the negotiation of the Vienna Convention and, accordingly, the money laundering legislation in the United States is largely reflected not only in the Convention, but also in its progeny. 18 This article's premise is that an understanding of the international framework for combating money laundering begins with a review of U.S. law, including its current mandates, its foundations, and its future. An analysis of the application of U.S. money laundering law to foreigners will follow, with a comparison of U.S. law to the initiatives of the FATF and the OAS rounding out the article.


The inception of U.S. legislative efforts to address money laundering activities can be traced to the enactment of the Bank Records and Foreign Transactions Act in 1970. 19 Titles I and II of this legislation, commonly referred to as the Bank Secrecy Act (BSA), provided the foundation upon which subsequent U.S. money laundering legislation was constructed and, as such, effectively represent the cornerstone of the American effort to thwart these types of activities. 20 Over the past twenty-six years, the BSA continuously evolved to address the advancements in money laundering sophistication, financial innovation, and


15. Id.


17. Id.

18. Id. at 388.


20. See id.
technological knowledge. Indeed, a historical review of money laundering in the United States reveals a chess game pitting those seeking to launder illicit monies against those seeking to stop them.

The stated purpose of the BSA is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." The statute does not impose the reporting and recording requirements itself, however. Rather, the statute serves as an enabling device explicitly authorizing the Secretary of the Treasury to fashion appropriate regulatory measures to meet the ends set forth by the BSA. As noted by the U.S. Supreme Court, the BSA's "civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary [of the Treasury]; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone."

The most important provisions of the BSA's original reporting requirements, as promulgated through U.S. Treasury regulations, are the mandatory filings of Currency Transaction Reports (CTRs) and Reports of International Transportation of Currency or Monetary Instruments (CMIRs). In short, these two filings respectively cover transactions and transports in amounts exceeding US $10,000.

A. THE CURRENCY TRANSACTION REPORT (CTR).

A financial institution (other than a casino or the Postal Service) is required to file a CTR, or an I.R.S. Form 4789, for "each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency if more than $10,000."

Among the entities included on the definitional laundry list of "financial institution[s]", and thus affected by the reporting requirements, are insured banks, private bankers, agencies or branches of foreign banks in the United States, insurance companies, pawnbrokers, travel agencies, and dealers in precious stones. The CTR filing period afforded these financial institutions is fifteen days upon the completion of the transaction.

21. Whether the evolution of the money launderer has been a product of legislative attack or simply reflective of the age of technology in which we live (or both) is a matter for debate.
22. Cite
23. 31 U.S.C. § 5311. In drafting the BSA, Congress was concerned with two major issues as they related to the enforcement of the U.S. regulatory, tax, and criminal laws. The first issue was the maintenance of accurate and adequate records and the reporting of especially suspect monetary transactions by domestic financial institutions. In addition, the legislators were perplexed over the widespread use of foreign financial institutions in countries with strict secrecy laws for the purpose of evading U.S. laws. See California Bankers Ass'n. v. Shultz, 416 U.S. 21, 26-27 (1974).
25. See 31 U.S.C. § 5311 (1995). Other filings required under the BSA include the Currency Transaction Report by Casinos or an I.R.S. Form 8362, which essentially imposes the requirements of the CTR on a casino constituency, 31 C.F.R. § 103.22(a)(2) (1995), and the Foreign Bank and Financial Accounts (FBAR) filing for U.S. persons or entities holding bank accounts abroad, 31 C.F.R. § 103.27(c)(1989), providing that if a foreign bank account maintained by a U.S. person or business exceeds US $10,000 at any time, a filing of a FBAR or a U.S. Treasury Department Form TDF 90-22.1 must be made by the following June 30th. Id.
B. THE REPORT OF INTERNATIONAL TRANSPORTATION OF CURRENCY OR MONETARY INSTRUMENTS (CMIR).

The other major reporting requirement under the BSA is the CMIR or a Customs Form 4790.29 The CMIR must be filed by one who: (i) "physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, . . . currency or other monetary instruments in an aggregate amount exceeding $10,000 at any one time" from or to any place within the United States30 or (ii) receives currency or other monetary instruments "in an aggregate amount exceeding $10,000 at one time . . . from any place outside the United States with respect to which a report has not been filed."31 Treasury regulations define currency as including coin and paper money from any country.32 Monetary instruments encompass travelers' checks, negotiable instruments, investment securities, money orders, and other similar instruments.33 Finally, "at one time" is defined as including not only those transportations occurring on a single calendar day, but also those occurring over a period of one or more days if the transportation was intentionally drawn out to avoid the applicable reporting requirements.34 At the latest, CMIRs must be filed within fifteen days either of transportation into or out of the United States or of the receipt of the currency or other monetary instrument.35


The effect of the BSA in the first decade and a half of its enactment was minimal. The Act's failings, however, did not lie primarily in its objective or approach; the principal reason for the Act's ineffectiveness was in its application. Quite simply, the U.S. Treasury had not placed enough emphasis on the enforcement of the BSA reporting requirements.36

30. 31 C.F.R. § 103.23(a) (1995).
31. 31 C.F.R. § 103.23(b) (1995).
32. 31 C.F.R. § 103.11(e) (1995).
33. 31 U.S.C. § 5312(a)(3) (1995); See also 31 C.F.R. § 103.11(u)(1). Specifically not included within the definition are warehouse receipts or bills of lading. See id. at § 103.11(u)(2).
35. Id. at § 103.27(b)(1)-(2).
36. Quoting General Accounting Office testimony, Senator Joseph Biden, Jr. stated in a 1985 Senate Judiciary Committee hearing that the Treasury:

    [g]ave relatively low priority to Bank Secrecy Act compliance when applying examination resources, being concerned primarily with other mission-related objectives; lacked detailed procedures, or applied existing procedures inconsistently; failed to adequately document the work performed, so that often neither we nor they could ascertain how well examiners were performing the compliance examinations, and failed to designate examiners with a wide range of experience and training to assure compliance with the Act, and could better communicate and coordinate with one another and thereby enhance the overall compliance.

In February 1985 the U.S. Treasury abandoned its previous ambivalence toward enforcement, heralding a new era of diligence with the Bank of Boston case. The U.S. Treasury fined the Bank of Boston $500,000 for failing to report more than 1100 different transactions totaling over US $1.6 billion, thereby effectively placing the rest of the banking industry on notice that compliance with the BSA had gained new importance. As other fines were levied, the American public became increasingly more suspicious about banking industry practices. The public clamor, sparked in large measure by the ambitiousness of the American press in reporting the shortcomings of the banking industry, piqued the interest of U.S. lawmakers. In the ensuing Congressional hearings, it became evident the requirements of the BSA were not effectively putting an end to money laundering through financial institutions in the United States, thereby inciting federal lawmakers to take their efforts a step further: the criminalization of the act of money laundering the criminalization of the act of laundering money. The result was Subtitle H of the Anti-Drug Abuse Act of 1986, otherwise known as the Money Laundering Control Act of 1986 (MLCA). The MLCA made it illegal to actively engage in the laundering of money, to willingly accept monies that are the fruits of criminal activity, or to structure transac-


In the aftermath of Bank of Boston, it became apparent... that there had been widespread intention to Bank Secrecy Act compliance by the financial community at large and inadequate attention by the supervision agencies charged with examination for Bank Secrecy Act compliance. As a result, countless financial institutions reassessed their compliance program and audited their compliance history.

Id.


39. Money Laundering Control Act, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 18 U.S.C. §§ 1956-57, 31 U.S.C. §§ 5324-26). In addition to the new crimes and forfeiture provisions, the MLCA also amended Section 1961 of the Racketeer Influenced and Corrupt Organizations Act (RICO) to include violations of the money laundering statutes within the definition of "racketeering". See Lara W. Short et al., The Liability of Financial Institutions For Money Laundering, 109 BANKING L. J. 46, 61-62 (1992). This greatly increases the liability of any party engaged in money laundering. In addition to the criminal conviction for the money-laundering offense, defendants now face separate RICO convictions if the money laundering is part of a pattern of unlawful conduct. Furthermore, a private individual may now bring an action for treble damages if a pattern of money-laundering activity is established. Finally, RICO provisions for the seizure of assets are more extensive than those which otherwise apply. Id.


tions for the purpose of evading reporting requirements. In addition, the Act imposed stiff new civil and criminal forfeiture laws on money launderers and the financial institutions who assist them in plying their trade.

A. SECTION 1956 OF THE MLCA.

The core MLCA provision is 18 U.S.C. § 1956, which attacks those who actively engage in money laundering from three different fronts. First, section 1956(a)(1) takes aim at money laundering activities involving financial transactions (much like section 5313 of the BSA's CTR and CTRC reporting requirements). Second, section 1956(a)(2) criminalizes the actual or attempted movement of monetary instruments into or out of the United States in connection with unlawful activities (similar to the emphasis of section 5316 of the BSA). Third, section 1956(a)(3) specifically addresses criminal sting operations directed at money laundering, making it a crime to attempt to promote unlawful activity with, conceal the origin of, or avoid a transactional reporting requirement under state or federal law involving monies held out by law enforcement officials to be criminally derived.


A violation of section 1956(a)(1) may result in a fine amounting to the greater of $500,000 or twice the value of the property involved in the transaction and/or imprisonment for twenty years. To establish a violation of subsection (a)(1), the government must prove four elements: (i) the existence of funds derived from a specified unlawful activity; (ii) knowledge of the origin of the funds; (iii) the use of a financial transaction; and (iv) culpable intent.

First, the government must demonstrate the involvement of "proceeds of [a] specified unlawful activity." Such specified unlawful activities are defined in the statute through a laundry list of over 100 different offenses. Obviously, more than drug trafficking offenses are included, as the list also encompasses most crimes typically tied to organized crime and financial mischief. To connect the proceeds to specified unlawful activity, the government must do more than merely show the defendant lacks a legitimate source of...
The government is not required to directly trace the proceeds to an unlawful activity, however, and may create an inference that the funds were the fruits of illegality through circumstantial evidence, as long as enough evidence exists to prove this fact beyond a reasonable doubt. For example, in United States v. Massac, a money laundering conviction was sustained when the government created an inference that the monies involved were from a specified unlawful activity by presenting evidence that the defendant was involved in drug trafficking and had made a wire transfer of cash to an offshore destination (Haiti).

Moreover, the monies involved in the financial transaction giving rise to the infraction need not be derived exclusively from a specified unlawful activity. The commingling of funds that are the product of illegality with those of a lawful source will not prevent the government from succeeding on this element. As stated by the Seventh Circuit in United States v. Jackson, "we cannot believe that Congress intended that participants in unlawful activities could prevent their own convictions under the money laundering statute simply by commingling funds derived from both 'specified unlawful activities' and other activities."

Second, the government must show under subsection (a)(1) that the defendant knew the funds involved were derived from "some form of unlawful activity". The government need not prove the defendant knew the exact crime that produced the funds or even that the monies generated from a specific unlawful activity; the government need only show the defendant knew "the funds [were] the proceeds of some kind of crime that is a felony under Federal or State law." To make this showing, the government must demonstrate the defendant had actual subjective knowledge of the illegal source of the funds. However, persons cannot avoid being convicted under section 1956 by deliberately closing their eyes -- by being willfully blind to the illegal source of the funds.

The concept of willful blindness is, to say the least, open to wide interpretation. Courts and commentators, though unsuccessful in arriving at a generally applicable stan-

53. United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990), reh'g denied, 1990 U.S. App. LEXIS 14536 (1990). See also United States v. Torres, 53 F.3d 1129, 1137 (10th Cir. 1995) (government agent's testimony that defendant had no legal source of income and that the money underlying the wire transfers to him was not from any legal source of income was not by itself sufficient to support a money laundering conviction under Section 1956, but that the agent's testimony coupled with the testimony of another witness tying the defendant to drug trafficking was sufficient to uphold the conviction.)
54. United States v. Turner, 975 F.2d 490, 497 (1992). "Although the government did not directly prove that the money [the defendant] used ... came from drug sales, it was reasonable for the jury to infer this from the evidence." Id. citing Blackman, 904 F.2d at 1257.
57. Id. "[S]ection 1956(a)(1)(A)(i) and (a)(1)(B)(i) allow for convictions were the funds involved in the transaction are derived only in part from 'specified unlawful activities'" Id.
58. Id.
59. United States v. Isabel, 945 F.2d 1193, 1201 (1st Cir. 1991). "This will eviscerate the defense that a defendant knew the funds came from a crime, but thought the crime involved was a crime not on the list of 'specified' crimes in section (c)(7)." Id.
dard, have provided some guidance. A mere suspicion will certainly not suffice. Willful blindness has been defined as "where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted . . . to be able to deny knowledge." In interpreting the knowledge requirement for the purposes of section 1956(a), the Fourth Circuit held in United States v. Campbell that the government must show "the defendant purposely and deliberately contrived to avoid learning all the facts."

The recent Fifth Circuit case of United States v. Giraldi offers some light to this issue. In Giraldi, the defendant claimed the prosecution failed to prove that he possessed the requisite knowledge to be convicted under the MLCA. At most, the defendant argued the government had shown he should have known (a negligence standard) the money involved in the transaction was tainted. The Fifth Circuit felt that even though it was a "close case," for a jury to conclude a private banker either knew or was willfully blind to the fact that the source of his client's funds was illegal was reasonable. Factors swaying the court's decision included: (i) the banker's failure to follow the bank's "know-your-client" procedures when opening the account and later lying about this fact; (ii) the banker's duty to investigate his clients and his failure to do so; (iii) false statements made or ignored by the banker about the source of his client's funds in bank records; (iv) the banker's failure to properly document transactions on the client's account; and (v) the banker's attempts to control the damage once the federal authorities began to investigate his client's holdings.

The third element the government must prove under section 1956(a)(1) is that the defendant conducted or attempted to conduct a financial transaction with the tainted funds. As defined in section 1956(c)(4), a financial transaction is a transaction "involving the movement of funds by wire or other means or involving one or more monetary instruments, or involving the transfer of title to any real property, vehicle, vessel, or aircraft, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." A [transaction] includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition.

64. United States v. Giraldi, 86 F.3d 1368, 1372 (5th Cir. 1996).
65. Id.
66. Id.
67. Id.
68. Id. at 1373. The defendant explained the condemning evidence against him as the product of "memory lapses, misstatements, sloppiness, carelessness, [his] failure . . . to be aware of the falsity of [the] statements, both oral and written, and . . . certain practices, such as vague purpose statements on loan applications, [which] were 'standard procedure' in international banking." Id. at 1374.
69. Id.
71. Id. at § 1956(c)(3).
The broad definition of a financial transaction was crafted to encompass almost any activity having the slightest relation to interstate commerce. Acts such as merely writing a check drawn on a financial institution involved in interstate commerce, giving a gift in the form of a money order, and making use of the U.S. mail have all been held to involve a sufficient nexus with interstate commerce and, therefore, can subject a person to the weight of the MLCA's penalties.

Nonetheless, the courts have refused to rubber stamp every activity as a financial transaction for purposes of the statute. Obviously, the mere possession of the proceeds from unlawful activity cannot be characterized as involving a financial transaction. The transportation of cash also falls outside the scope of the definition of a financial transaction. Defendants may be convicted under section 1956, however, if their actions are considered constituting a delivery of the funds, which is considered a financial transaction. Indeed, a fine line exists between the transportation and the delivery of funds, with courts seemingly relying upon the defendant's control over the funds in making the distinction.

Finally, the government must prove the defendant acted with the requisite intent. Specifically, the government must show the defendant intended to: (i) "promote the carrying on of [a] specified unlawful activity"; (ii) evade his or her tax liability under the laws of the United States; (iii) cloak "the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity"; or (iv) avoid a reporting requirement mandated by federal or state law.

Courts have held an intent to promote the carrying on of unlawful activity may exist even in situations when the actual unlawful act has been completed. In United States v. Paramo, the Third Circuit held "a defendant can engage in financial transactions that promote not only ongoing or future unlawful activity, but also prior unlawful activity." In Paramo, the defendant's cashing of embezzled checks was deemed to be performed with the intent to promote the underlying unlawful activity because the defendant believed doing so was necessary to realize the profits of his mail fraud scheme that had technically been comm-
The court opined a defendant need not have "funneled back" the proceeds into the operation in order to possess an intent to promote the underlying criminal activity.85

In analyzing the intent to conceal the character of funds from an illegal source, the Tenth Circuit in United States v. Sanders reversed the conviction of a couple who had conspicuously purchased two automobiles with the proceeds of illegal drug transactions they had conducted.86 In emphasizing the apparent lack of effort to conceal or disguise the purchase, the court stated that to apply the money laundering statutes to such "ordinary commercial transactions" would "turn the money laundering statute into a 'money spending’ statute," contradicting the intent of Congress.87


Section 1956(a)(2) makes it a criminal offense for a person who transports, transmits, or transfers a monetary instrument or funds (or attempts to do so) across U.S. borders:

a. intending to promote the carrying on of specified unlawful activity;

or

b. knowing the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing such transportation is designed in whole or in part:

(i) to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under state or federal law, either with the intent to promote a specified unlawful activity or with the knowledge the funds were generated from a specified unlawful activity and with the intent to conceal this fact or to avoid a state or federal reporting requirement.88

84. Paramo, 998 F.2d at 1217. See also United States v. Marbella, 73 F.3d 1508 (9th Cir. 1996) (lawyers convicted of laundering proceeds of fraudulent personal injury claims in which secret referral fees to cappers were deemed to promote the underlying mail fraud activity by encouraging the cappers to bring them future cases).
85. Paramo, 998 F.2d at 1217.
86. United States v. Sanders, 929 F.2d 1466 (10th Cir. 1991), cert denied, 116 L. Ed.2d 109, 112 S. Ct. 142 (1991). Note the intent to conceal or disguise the nature of the proceeds need not be present in every party involved in the transaction. In United States v. Campbell, 977 F.2d 854, 857 858 (4th Cir. 1992), the court upheld the conviction of a real estate agent who had sold a house to a drug dealer despite the fact that her only motivation in the sale was to earn a commission. See also United States v. Wynn, 61 F.3d 921, 929 (D.C. 1995) (court finding intent to conceal when only motivation of clothing store owner in selling to drug dealers was to realize a profit).
87. Sanders, 929 F.2d at 1471-72. See also United States v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994) (defendant used drug money to pay his mortgage and to make personal expenditures such as the purchase of a watch, a horse, and a trailer).
The penalties for a violation of section 1956(a)(2) are similar to those provided in section 1956(a)(1). Under section 1956(a)(2)(A), the government must only demonstrate the defendant transported, transmitted, or transferred funds across U.S. borders with the intention of promoting a specified unlawful activity. Unlike in section 1956(a)(1), the government does not have to show the funds derived from such an activity or the defendant knew of the monies' criminal origins. These elements do have to be proven, however if the government is to succeed under section 1956(a)(2)(B). Additionally, the government must show the defendant possessed an intent to either disguise the character of the funds or to avoid a reporting requirement to succeed under section 1956(a)(1)(B).


Section 1956(a)(3) makes it unlawful for a person to conduct or to make an attempt to conduct a financial transaction involving property represented by law enforcement agents to be either the product of a specified unlawful activity or used to conduct or facilitate such an activity. In addition to proving the actual act or attempt as described above, the government must also demonstrate that the defendant possessed the intent to: (i) promote a specified unlawful activity; (ii) cloak the character of the property believed to be from a specified unlawful activity; or (iii) avoid reporting the transaction under state or federal law. If found guilty of violating Section 1956(a)(3), a person "shall be fined under this title or imprisoned for not more than 20 years, or both."

B. Section 1957 of the MLCA.

Section 1957 criminalizes the knowing acceptance of tainted funds. Under this section, a person can be fined or imprisoned for up to ten years for participating in a monetary transaction involving property derived from a specified unlawful activity and of a value greater than US $10,000. The government must prove the defendant knew the property was criminally derived, but it need not demonstrate the defendant had knowledge the crime involved was a specified unlawful activity. A section 1957 violation is

89. Id.; see also id. at § 1956(a)(1).
90. Id. at § 1956(a)(2)(A). Courts have broadly interpreted "transport, transmit, or transfer" in subsection (a)(2) to include activities from wire transfers, United States v. Salazar, 958 F.2d 1285, 1296 (5th Cir. 1992), to actual smuggling of cash across the U.S. border, United States v. Ortiz, 738 F.Supp 1394 (S.D. Fla. 1990).
91. Id.
92. 18 U.S.C. § 1956(a)(2)(B) & (a)(1)(B) (1995); see supra, notes 60 through 68 on proving the funds were derived from a specified unlawful activity and the requisite knowledge of the defendant.
93. 18 U.S.C. § 1956(a)(3). Section 1956(a)(3) defines "represented" as "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section." Id.
94. Id. Note also that, as with subsection (a)(2), the intent to avoid U.S. tax laws is not an actionable violation of subsection (a)(3). Id. at § 1956(a)(3).
96. Id. at § 1957.
97. Id. at § 1957(c).
generally easier for the government to prove because such violation does not require the defendant knew of an intent to conceal the nature of the transaction, or even that anyone had such an intent. In short, section 1957 does not require the defendant had an intent to promote money laundering activities; that the defendant accepted the money knowing it represented ill-gotten gains is enough.

C. THE MLCA ANTI-STRUCTURING PROVISIONS.

Money launderers in the 1970s and early 1980s were able to avoid making the required BSA filings and to escape regulatory scrutiny by unbundling financial transactions into dollar amounts below $10,000. The practice of structuring financial transactions in amounts below the $10,000 floor of the BSA reporting requirements is commonly referred to as structuring, or smurfing. Attempts by the government to prosecute those engaging in structuring were met with disparate results. While some federal courts allowed the multiple transactions to be aggregated for the purposes of meeting the $10,000 threshold, others held the BSA did not contain the duty to report such structured transactions and that to impose such a requirement would be violative of the notice requirement of the Due Process Clause. Congress eventually decided to address this judicial split in the MLCA by enacting the anti-structuring provisions of sections 5322 and 5324 of Title 31 of the U.S. Code.

Section 5324 criminalizes the act of structuring, making it illegal to cause or to attempt to cause a domestic financial institution to: (i) fail to file a CTR; (ii) file a CTR with material misstatements or omissions; or (iii) perform or assist in the performance of structuring a transaction designed to avoid CMIR filing requirements. Section 5322 sets the penalties for a section 5324 violation. As originally drafted, the repercussions of

98. See United States v. Wynn, 61 F.3d 921, 926-27 (D.C. Cir. 1995). "Due to the omission of a 'design to conceal' element, section 1957 prohibits a wider range of activity than money laundering, as traditionally understood." Id.
101. See, e.g., United States v. Tobon-Builes, 706 F.2d 1092 (8th Cir. 1983).
102. See, e.g., United States v. Varbel, 780 F.2d 758 (9th Cir. 1986).
104. 31 U.S.C. § 5324 (1995). The language of section 5316 already contains an anti-structuring rule. The section makes it unlawful for a person to transport more than U.S. $10,000 across the U.S. borders at one time. Id. § 5316. The regulations have defined at one time to mean in one calendar day or over the period of two or more days where the intent is to avoid the reporting requirements. 31 C.F.R. § 103.11(a)(1)-(6)(ii) (1992).
section 5322(a) hinged on finding the defendant willfully violated section 5324.105
Judicial uncertainty as to the correct reading of the provisions developed, as the federal
courts were split on the correct interpretation of willfulness in relation to the statute. In
1994 the U.S. Supreme Court, in a five to four decision, seemingly resolved the issue in
Ratzlaf v. United States, by holding that in order to sustain a conviction under the anti-
structuring provisions of the BSA, the government must demonstrate the defendant not
only structured financial transactions to avoid invoking the reporting requirements, but
also did so knowing his conduct was unlawful.106
In Ratzlaf, the defendant was a regular gambler who lost $160,000 at the blackjack
tables at a Reno, Nevada casino in 1988. At the end of the week the casino gave Mr. Ratzlaf
to pay off his debt, he and his wife returned with a $100,000 partial payment in cash. When Mr. Ratzlaf requested the casino not fill out any written report on the transaction, the casino’s management refused to accept the payment with this condition and informed Mr. Ratzlaf of the casino’s CTRC filing requirement. The management suggested the casino could accept a single cashier’s check for the full amount without triggering the reporting requirements, however, and provided Mr. Ratzlaf a limousine and a driver to go to a bank for this purpose. Upon learning banks had similar $10,000 transaction reporting requirements, Mr. Ratzlaf decided to purchase a series of cashier’s checks from different banks, all below the $10,000 reporting threshold. Thereafter, Mr. Ratzlaf delivered the checks to the casino. Over the following weeks, Mr. Ratzlaf purchased or arranged for the purchase through others of several more such cashier’s checks, with which he finally paid the balance of the debt he owed to the casino. Ultimately, Mr. Ratzlaf was indicted and convicted of structuring transactions in violation of section 5324.
After the Ninth Circuit upheld his conviction, Mr. Ratzlaf applied for and was granted
certiorari before the U.S. Supreme Court. In oral arguments, counsel for Mr. Ratzlaf
focused his argument around the meaning of willfully as found in section 5322, asserting
that in order to convict a person under the anti-structuring laws, the government must
prove the defendant knew what he was doing was a prohibited activity.107 In response, the
government asserted ignorance of the law is never an excuse and the inclusion of the anti-
structuring provisions within the BSA was intended to prevent the use of such a
defense.108 The U.S. Supreme Court, through the pen of Justice Ruth Bader Ginsburg, dis-
agreed with the government’s argument and sided with Mr. Ratzlaf. In so doing, the Court
held that to establish a defendant willfully violated the antistructuring law, the government
must prove the defendant acted with the knowledge that his conduct was unlawful.109

105. 31 U.S.C. § 5322(a). The original section 5322 read: "A person willfully violating this subchapter
or a regulation prescribed under this subchapter (except section 5315 or 5324 of this title or a
regulation prescribed under section 5315 or 5324) shall be fined not more than $250,000, or
imprisoned for not more than five years, or both." Id. (emphasis added).
108. Id.
109. Ratzlaf, 510 U.S. at 138. For a general discussion on the Ratzlaf decision, see Rachael Simonoff,
Ratzlaf v. United States: The Meaning of "Willful" and the Demands of Due Process, 28 COLUM J. L.
Justice Ginsburg's opinion did not, however, stand the test of time. In fact, in an uncharacteristically quick response, Congress repealed *Ratzlaf* in a provision included in the Money Laundering Suppression Act of 1994 (MLSA). As amended, section 5324 establishes that whoever violates its edict will be subject to criminal penalties, thereby circumventing the willfulness requirement set out in section 5322. Congress struck the word willful from section 5322 and legislatively circumvented the Supreme Court's decision in *Ratzlaf*. As a result, the government need only prove the defendant knowingly acted with the intent to evade the BSA's reporting requirements in order to sustain a successful conviction under the anti-structuring provisions of sections 5322 and 5324.

D. THE MLCA FORFEITURE PROVISIONS.

In addition to criminalizing money laundering activities, the MLCA also gives law enforcement officials the powerful weapon of forfeiture to mount an aggressive assault on the revenues of drug traffickers. These MLCA provisions allow for civil and criminal forfeitures, respectively.

Section 981 enables the government to seek the forfeiture of property involved in or produced from transgressions of the MLCA's money laundering crimes (18 U.S.C. §§ 1596-1597), of the MLCA's anti-structuring provision (31 U.S.C. § 5324), or of the CTR transactional filing requirements (31 U.S.C. § 5313(a)). In addition, section 981 provides for the forfeiture of any property located in the United States representing proceeds of illegal drug activities in a foreign country either punishable in that State by more than a year in jail or so punishable if committed in the United States.

The civil forfeiture provisions of section 981 allow the government to seize tainted property subject to lawful searches or arrests and to obtain warrants for such seizures. Once the property has been seized, the government can seek to have it forfeited in a forfeiture suit instituted against the property itself (an in rem action). To succeed, the government must demonstrate a substantial connection between the underlying crime and

110. *Id.*


114. *Id.*

115. *Id.* at § 981(a)(1)(B).

116. *Id.* at § 981(b)(1) & (2).

117. Section 981's venue provision states such a lawsuit can be brought "in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought." *Id.* at § 981(h).
the property sought to be forfeited. This connection does not necessarily imply, however, that the suspect property must be directly traced to a specific offense; rather, the government need only establish an inference that the property represents the product of such an offense. However, the statute does contain measures to protect innocent owners, who had no knowledge of the laundering activity, from having their property forfeited. Persons able to successfully shoulder the burden of establishing they were not involved in the underlying criminal activity can escape forfeiture. Once property is deemed to have been forfeited, section 981 provides for the division of the spoils among state and federal law enforcement agencies of the United States and similar agencies from participating foreign countries.

The criminal forfeiture provision of section 982 directs upon a conviction of a MLCA money laundering offense the forfeiture of any property representing or traceable to the gross receipts obtained through the commission of the offense. The burden shouldered by the government in such forfeiture actions is predicated on a mere preponderance of the evidence standard. In addition, the government may obtain a warrant, based on probable cause, to seize property prior to the trial of the defendant on money laundering charges. In such cases, courts may enter preliminary orders of forfeiture allowing the government to assert a claim to the property.

118. The substantial connection test seems to represent the majority view among the Federal Circuit Courts. The First, Fourth, Fifth, and Eighth Circuits explicitly require the property to be forfeited to have a substantial connection to the illegal activity. See, e.g., United States v. 5709 Hillingon Road, Charlotte, N.C., 919 F. Supp. 863 (W.D.N.C. 1996); United States v. One Parcel Property Located at 427 and 429 Hall Street, Montgomery, Montgomery County, Alabama, 842 F.Supp. 1421 (M.D. Ala., N.D. 1994) (providing a summary of the differing views among the Federal Circuit Courts); U.S. v. One 1988 Prevost Liberty Motor Home, 952 F. Supp. 1180 (S.D.Tex 1996). However, the substantial connection test has been rejected in other circuits, namely the Second and Seventh, in favor of a lesser standard. For instance, the Second Circuit merely requires the government to show a nexus between the illegal activity and the property to be forfeited. See, e.g., United States v. One 1990 Mercedes Benz, 1996 WL 252659 (N.D.N.Y. 1996).


120. 18 U.S.C. § 981(a)(2) (1995). "No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder." Id. For cases involving the innocent owner defense, see United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483 (2d Cir. 1995); United States v. 1980 Lear Jet, Model 35A, Serial Number 277, 25 F.3d 793 (9th Cir. 1994) (discussing similar concept of innocent lienholder); United States v. One 1973 Rolls Royce, V.I.N. SRH-16266, 43 F.3d 794 (3rd Cir. 1994) (applying innocent owner defense to 21 U.S.C. § 881 that prescribes the forfeiture of proceeds of illegal narcotics transactions).


122. Id. at § 981(i)(1).

123. Id. at § 982(a).


126. Id. at § 853(g). Upon such an order, the government must give public notice so that any person with a legal claim to the property can be allowed to come forward to contest the forfeiture. Id. at § 853(n).
III. 1988 Amendments to the BSA.

In 1988 Congress added two new provisions to the BSA: 31 U.S.C. §§ 5325 & 5326.\(^{127}\) These two sections differ in their approach toward money laundering activities, yet both similarly broaden the U.S. Treasury's authority and impose additional requirements upon financial institutions.\(^{128}\)

A. THE $3000 RECORDKEEPING REQUIREMENT.

Section 5325 imposes new verification and recordkeeping requirements on financial institutions selling bank checks, cashier's checks, traveler's checks, or money orders in amounts exceeding US $3,000.\(^{129}\) As implemented by Treasury regulation, financial institutions cannot sell such instruments in amounts of $3,000 to $10,000 unless they properly verify the purchaser and record certain facts about the transaction.\(^{130}\)

The requirements differ between purchasers who are account holders and those who are not. For account-holding purchasers, the financial institution can first verify the purchaser's identity by a signature card or other file or record it has maintained on the account holder, or, if such identification is not possible, the financial institution can make use of another type of document commonly used for identification for the purpose of "cashing checks for nondepositors and which contains the name and address of the purchaser."\(^{131}\) For purchasers not holding an account with the institution, the solution to verification is, quite obviously, to make use of the latter alternative, requiring the purchaser to provide, for example, a driver's license.\(^{132}\)

After proper verification of the purchaser is obtained by the financial institution, certain facts about the transaction must be recorded and maintained by the financial institution. For purchases by account holders, a record must be made of the purchaser's name, the date of the transaction, and the types, serial numbers, and amounts of the respective instruments purchased.\(^{133}\) For purchases made by nonaccount holders, in addition to the information required on account holders the financial institution must also include in the record the address and social security or alien identification number of the purchaser.\(^{134}\) Records on both types of purchasers must be kept by the financial institution for a period of five years, and they must be made available to the Treasury upon request.\(^{135}\)

As a final note on the $3,000 recordkeeping requirement, an anti structuring provision is contained within 31 C.F.R. § 103.29 similar to the provision found in 31 U.S.C. § 5316. In subsection 103.29(b), the regulation provides contemporaneous purchases and

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128. Id.
129. Id. at § 5325(a). The floor for section 5325 was set at $3000 because structured transactions were often performed in $3000 increments. John J. Byrne, *The Bank Secrecy Act: Do Reporting Requirements Really Assist the Government?*, 44 ALA. L. Rev. 801 n.36 (1993) (referencing CLIFF E. COOK, BANK SECRECY 56 (1991)).
131. Id. at § 103.29(a)(1).
132. Id. at § 103.29(a)(2).
133. Id. at § 103.29(a)(1)(i)(A)-(E).
134. Id. at § 103.29(a)(2)(i)(A)-(G).
135. Id. at § 103.29(c).
multiple purchases over the period of a single day are to be treated as one purchase for purposes of the recording requirement.\textsuperscript{136}

B. \textsc{Geographical Targeting Orders.}

Section 5326 authorizes the Treasury to target specific financial institutions or groups of financial institutions in a certain locality and to require them to maintain additional records and to submit additional reportings.\textsuperscript{137} To utilize section 5326, the Treasury must only demonstrate "reasonable grounds exist for concluding that additional recordkeeping and reporting requirements are necessary to carry out the purposes of [the money laundering laws and regulations] and prevent" persons from evading the reporting/recordkeeping requirements.\textsuperscript{138} The Secretary of the Treasury is given broad discretion to structure these orders, which may: (i) be issued to "any domestic financial institution or group of domestic financial institutions in a geographic area"; (ii) target any such "monetary instruments as the Secretary may describe"; and (iii) set the threshold amount for purposes of making reports and maintaining records at any level consistent with the finding.\textsuperscript{139} The Treasury must limit the duration of an additional reporting requirement issued under section 5326 to sixty days, however, unless a renewal of the order is granted.\textsuperscript{140} Finally, a later statutory enactment inserted a strict confidentiality provision into section 5326, preventing the financial institution from disclosing the terms or even the existence of a targeting order.\textsuperscript{141}


Partially as a legislative response to the Bank of Credit and Commerce International (BCCI) debacle,\textsuperscript{142} Congress again amended the BSA by enacting the Annunzio-Wylie Anti-Money Laundering Act (Annunzio-Wylie Act) as part of the Housing and Community Development Act of 1992.\textsuperscript{143} The Annunzio-Wylie Act could be seen as sig-

\textsuperscript{136} Id. at § 103.29(b).
\textsuperscript{138} Id. at § 5326(a); see also 31 C.F.R. § 103.26(a).
\textsuperscript{139} Steven C. Tabackman, \textit{Tips on What To Do About Those Geographical Targeting Orders}, 7 NO. 2 \textsc{Money Laundering L. Rep.} 1, 6 (1996). Section 103.26(c) of the Federal Regulations implementing section 5326 of the BSA requires seven different items be included within a GTO, such as: (i) the dollar amount of the suspect transactions; (ii) the types of the transactions concerned; (iii) the form to be used for reporting the transactions; (iv) the address to which the reports must be sent; (v) the beginning and ending dates for the reports; (vi) a contact person within the Treasury; and (vii) the period for which the financial institution is required to maintain the particular records. Id.
\textsuperscript{142} Amy G. Rudnick and James M. Schwartz, \textit{Banks Must Gear Up for Comprehensive New Money Laundering Law}, \textsc{Banking Pol'y Rep.}, Dec. 21, 1992, at 2. A principal motivation behind the enactment of the Annunzio-Wylie Act was the federal government's frustration in not being able to shut down the offices of the BCCI even after it had been convicted of money laundering. Id.
\textsuperscript{143} Annunzio-Wylie Anti-Money Laundering Act §5312.
nifying a shift in U.S. money laundering policy, as the focus of regulation began to swing more toward the financial institutions themselves and away from central bureaucratic supervision. The changes the Act introduced can be categorized into three separate, albeit inter-related, areas: (i) a significant increase in the penalties attached with violations of the money laundering laws; (ii) a broadening of the scope of the BSA; and (iii) an endowment of regulatory responsibility under the BSA to the financial institutions.

The first category of changes brought about by the Annunzio-Wylie Act increased the government’s ability to punish money launderers, effectively raising the stakes associated with this type of activity. First, the Act created the death penalty for violations of the MLCA money laundering crimes (18 U.S.C. §§ 1956-1957) and of criminal (willful) violations of the BSA (31 U.S.C. § 5322).144 If convicted of violating MLCA sections 1956 or 1957, the Comptroller of the Currency (OCC) is required to institute termination proceedings.145 If the financial institution is convicted of criminally violating the BSA, the OCC has the option of instituting termination proceedings.146 The factors influencing the OCC termination decisions include the knowledge or involvement by directors or senior executives in the violation, the prevention policies implemented by the institution before the violation and after the conviction, the cooperation of the institution with law enforcement officials, and the negative effect the termination of the institution would have on the local community.147 Along similar lines, the Annunzio-Wylie Act makes it possible for individual bank officials to be banned from the industry if they are convicted of money laundering.148

As a complement to the death penalty termination provisions, the Annunzio-Wylie Act also increased the civil liability for BSA violations. Section 1561 of the Act introduced a negligence standard into the formula for determining civil liability under 31 U.S.C. § 5321.149 Section 5321 of the BSA now provides a financial institution may be fined up to $500 for negligent violations of the BSA.150 If the Treasury establishes a pattern of negligent activity regarding the BSA, the financial institution may be fined up to $50,000.151

The final provision in the punishment category relates not to the government’s ability to prosecute and to punish, but to the latitude the government may enjoy in seeking to have assets involved in and produced by BSA violations forfeited. The Annunzio-Wylie Act made it unnecessary for the U.S. government to identify the specific property involved in the offense for the purposes of forfeiture,152 and further did away with the defense that “the property involved in . . . an offense ha[d] been removed and replaced by identical

144. See id. at §§ 1502-1503. The Act makes the death penalty provisions applicable not only to banks, but also to other institutions such as federal savings associations, credit unions, and state depository institutions. Id.

145. See id. at § 1502(a)(1)(A)(ii) (relating to the violation of a national bank of the MLCA).

146. See id. at § 1502(a)(1)(B) (relating to the criminal violation of a national bank of the BSA).

147. See id. at § 1502(a)(2)(A)-(E) (relating to termination proceedings instituted against a national bank).

148. Id. at § 1504.

149. Id. at §1561.

150. Id.

151. Id.

152. Id. at §1522 (codified as 18 U.S.C. § 984 (1992)).
property.\textsuperscript{153} The new 18 U.S.C. § 984 civil forfeiture of fungible property provision can be used by the government in connection with any offense of sections 1956, 1957, or 1960 (prohibiting illegal money transmitting businesses, as well as violations of the MLCA’s anti-structuring provisions housed at 31 U.S.C. §§ 5322 and 5324.\textsuperscript{154} Section 984’s reach has even been expanded to catch funds in interbank accounts, though in order for the government to effect forfeiture of these monies it must show the financial institution knowingly engaged in the offense.\textsuperscript{155}

The second category of changes in U.S. money laundering law brought about by the Annunzio-Wylie Act relate to an expansion of the law’s scope. First, the Annunzio-Wylie Act enlarged the definition of financial transaction to include the “transfer of title to any real property, vehicle, vessel, or aircraft”.\textsuperscript{156}

Second, section 1956’s coverage was amended to include additional domestic and foreign crimes within the MLCA’s definition of specified unlawful activity.\textsuperscript{157} The domestic crimes added to the laundry list include food stamp fraud in violation of the Food Stamp Act of 1977 exceeding $5,000, and any felony violation of the Foreign Corrupt Practices Act.\textsuperscript{158} The foreign crimes are included in the definition of specified unlawful activity are kidnapping, robbery, extortion against a foreign state, or fraud on a foreign bank.\textsuperscript{159} As a result, individuals or entities either using in a financial transaction or transporting across the borders of the United States the proceeds of these foreign crimes are now subject to the criminal and civil penalties, as well as the forfeiture provisions, established by the MLCA.\textsuperscript{160}

Third, the Annunzio-Wylie Act expanded the breadth of the MLCA’s anti structuring provisions to include international monetary instrument transactions. For a person to fail to file or to file with a material misstatement or omission, or to cause another to do so, a CMIR report required by 31 U.S.C. § 5316, or to structure the importation or exportation of monetary instruments to come below the $10,000 reporting requirement, is now a crime.\textsuperscript{161}

Fourth, the operation of an illegal money transmitting business was criminalized.\textsuperscript{162} By adding section 1960 to Title 18 of the U.S. Code, the Annunzio-Wylie Act established a maximum penalty of a five-year prison sentence and/or a $250,000 fine for whoever knowingly "conducts, controls, manages, supervises, directs, or owns" a money transmit-

\begin{itemize}
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.; United States v. $814,254.76, 51 F.3d 207 (9th Cir. 1995). One of the first reported cases under section 984, United States v. $814,254.76 shows the vulnerability of interbank accounts to this new fungible property forfeiture provision if the government can demonstrate an employee of the bank knew the particular account had been used to launder money. Gordon Greenberg & Thomas M. Brown, \textit{Banks Beware: \$984 Increases Money Laundering Liability}, 5 NO. 10 \textit{MONEY LAUNDERING L. REP.} 1 (1995).
\item \textsuperscript{156} Annunzio-Wylie Anti-Money Laundering Act § 1527
\item \textsuperscript{157} Id. at §1536.
\item \textsuperscript{158} Id. at §1534.
\item \textsuperscript{159} Id.
\item \textsuperscript{161} Annunzio-Wylie Anti-Money Laundering Act § 1525.
\end{itemize}
ting business without the appropriate state license when such operation constitutes a felony or a misdemeanor under the law of that state.\textsuperscript{163} As defined by section 1960, money transmitting includes "transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile or courier."\textsuperscript{164}

The final provision in the second category addresses wire transfers. The Annunzio-Wylie Act directs the Secretary of the Treasury and the Federal Reserve Board to jointly draft regulations governing the recordkeeping of wire transfers.\textsuperscript{165} The crux of the regulations, as set out in the amendment, is the establishment of recordkeeping requirements for both domestic wire transfers (to which insured banks will be subject) and international wire transfers (to which insured banks and nonbank financial institutions will be subject).\textsuperscript{166} Banks accepting payment orders for wire transfers must maintain either the original or a copy of the payment order or information relating to such payment order, depending upon their role in the transaction.\textsuperscript{167} The regulation does contain certain exemptions, however, allowing transmittals involving such entities as the United States, state governments, banks, and securities brokers or dealers to escape the recordkeeping requirements.\textsuperscript{168}

The third category of changes brought about by the Annunzio-Wylie Act involved an endowment of regulatory responsibility under the BSA to the financial institutions. One can most clearly view the shift in regulatory approach from a central bureaucracy toward the financial institutions themselves in this category.

The Annunzio-Wylie Act added section 5327 to the BSA, requiring depository institutions to identify their customers and financial institutions with which they do business, even if the latter do not hold accounts with the bank, and to file reports on and about such parties to and upon direction by the Treasury.\textsuperscript{169} In addition, the Treasury was authorized to require all financial institutions (not just depository institutions) to report cash transactions in excess of $10,000 on an I.R.S. Form 8300.\textsuperscript{170} The Act also broadened the accessibility of the BSA reports filed by financial institutions. Section 5319 now allows the Treasury to make information included in BSA reports filed under sections 5313, 5314, and 5316 available to state financial supervisory agencies.\textsuperscript{171}

Perhaps the most significant area of expansion by the Annunzio-Wylie Act was the authorization it extended to the Treasury to require financial institutions to file Suspicious

\textsuperscript{163} Annunzio-Wylie Anti-Money Laundering Act § 1512
\textsuperscript{164} Id.
\textsuperscript{165} Id. at §1515.
\textsuperscript{166} Id.
\textsuperscript{167} 31 CFR § 103.33(e)(1996).
\textsuperscript{168} Id. at § 103.33(e)(6).
\textsuperscript{169} Annunzio-Wylie Anti-Money Laundering Act § 1511.
\textsuperscript{171} Annunzio-Wylie Anti-Money Laundering Act §1506.
Activity Reports (SARs) and to develop internal anti-money laundering programs. The Act authorizes the Treasury to require financial institutions to file SARs when they believe such filings would be "relevant to a possible violation of law or regulation." Supplanting the Criminal Referral Form, the SAR is intended to be easier to fill out and quicker to file. As implemented by Treasury Regulation, the Final Rule on the SAR Reporting Requirements became effective on April 1, 1996. A financial institution is required to report suspicious transactions involving more than $5,000 if it can identify the suspect, but the institution must only file an SAR in situations in which discerning the party to whom the suspicious activity is attributable is difficult when the amount in question exceeds $25,000. A transaction is to be reported (considered suspicious) if the financial institution "knows, suspects, or has reason to suspect" it: (i) involves or is an attempt to disguise proceeds from illegal activity; (ii) is designed to evade the requirements of the BSA; or (iii) appears to have no business or apparent lawful purpose. The Treasury has conceded banks are required to apply their judgment to the relevant facts and circumstances to determine whether a SAR needs to be filed; the Treasury has, however, indicated some fact patterns will clearly give rise to the need to file. The contents of the SAR include information on the reporting financial institution, the suspicious activity and actor(s), witnesses to the event, and the person who prepared the SAR. Lastly, the financial institution has thirty days from the initial detection of the facts giving cause to file a SAR within which to make such a filing, but an addi-

172. Id. at § 1517. In an August 1996 Advisory, FinCEN provided a brief sketch of the focus of the SARs and, indeed, the readjusted focus of the U.S. money laundering laws in general:

The Congress and the Treasury have carefully crafted anti-money laundering laws and regulations to focus on the reporting of suspicious transactions by financial institutions. That focus recognizes that it is representatives of financial institutions, rather than law enforcement, who see the money launderers first; illicit proceeds are almost always moved through some form of financial institution. The focus also recognizes that the commercial precautions and expertise financial institutions use to protect themselves from fraud, theft, and misuse, equips those institutions to recognize what is or is not suspicious.

Court Interprets 'Safe Harbor' Provision, FINCEN ADVISORY (FINCEN, VIENNA, VA), Aug. 1996.


174. 31 U.S.C. § 5314(g).

175. See Suspicious Activity Report, 6 BANKERS' HOTLINE 1 (1995) (stating that the estimated time for completing the SAR will be only forty minutes). See 31 C.F.R. § 103.20 et seq. (providing instructions for the completion of the SAR).


179. Amendment to the Bank Secrecy Act Regulations: Requirement To Report Suspicious Transactions, 61 Fed. Reg. 4326, 4329 (1996). Examples of fact patterns clearly giving rise to the need to file a SAR would be when there has been a series of withdrawals or payments made below the $10,000 threshold or a refusal to provide the bank with information necessary for its recordkeeping/reporting requirements. Id.
tional thirty days is provided if no suspect can be readily identified. In addition, banks must make a phone call to the appropriate law enforcement officials without delay if the violation requires immediate attention.

The actual filing of SARs is a rather simple process and was intended to serve as an improvement on its predecessor, the Criminal Referral Form. The SAR form is relatively quick to complete and need only be filed with a single institution -- the Financial Crimes Enforcement Network (FinCEN). In addition, no supporting documentation need be sent with the SAR, though the bank is required to keep such documents and a copy of the SAR on file for a period of five years.

Coupled with the SAR filing provisions are both an admonishment prohibiting the filing institutions from notifying the customers on whom they have filed SARs and an incentive for financial institutions to make such filings by means of a safe harbor provision immunizing them from liability that could stem from the SARs. The safe harbor serves as a haven from liability not only for the financial institutions, but also extends to directors, officers, employees and agents. As an added incentive, the Act provides whistleblower protections for employees notifying the authorities about violations of the BSA.

This provision provides a whistleblower subsequently discharged by a financial institution

180. Hall, supra note 177
182. Warren L. Dennis & Jeremy R. Feinberg, The Evolving Standard of Care in Bank Officer and Director Liability Cases, 935 PRACTISING L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 741, 775 (1996). A situation would be deemed as requiring immediate attention, for example, if the reportable violation is ongoing. Id.
183. Before, banks were required to file multiple copies of the Criminal Referral Form with their respective federal regulators and law enforcement agencies and were supposed to indicate on the CTR forms whether a particular transaction was suspicious. U.S. Dep't. of Treasury, Simplified Reporting System Benefits Bankers and Law Enforcement (Feb. 5, 1996) <http://www.ustreas.gov/treasury/bureaus/fincen/020496.html>.
184. Amendment to the Bank Secrecy Act Regulations: Requirement to Report Suspicious Transactions, 61 Fed. Reg. 4326 (1996). FinCEN has gauged the completion time of a SAR at a single hour. Id. at 4331. As it expects to receive around 15,000 of these forms annually, this translates into 15,000 work hours per year spent filling out these forms. Id.
185. Annunzio-Wylie Anti-Money Laundering Act § 1517(b).
186. Id. at § 1517(b) (1992). In a recent case, a U.S. District Court supported the sanctity of section 5318's safe harbor. Merrill Lynch v. Green, 936 F. Supp. 942 (S.D. Fla. 1996). On June 14, 1996, the court made permanent a preliminary injunction staying arbitration proceedings sought by the customer to resolve his claim for damages claimed as a result of the SAR filed by Merrill Lynch without his knowledge. See Court Interprets 'Safe Harbor' Provision, FINCEN ADVISORY (FINCEN, VIENNA, VA), Aug. 1996. See also U.S. Steps in to Uphold 'Safe Harbor' Shield for Firm that Filed SAR, MONEY LAUNDERING ALERT, May 1996, at 3 (containing statement from Miami U.S. Attorney's office in support of Merrill Lynch's stance on the safe harbor provision).
187. Dennis & Feinberg, supra note 182, at 775.
188. Annunzio-Wylie Anti-Money Laundering Act § 1563.
with a battery of remedies, including reinstatement and compensatory damages.189

As a final matter, the Annunzio-Wylie Act may require financial institutions to establish internal anti-money laundering programs.190 At a minimum, these programs must: (i) facilitate the development of internal policies, procedures, and controls; (ii) designate a compliance officer; (iii) institute an ongoing employee training program; and (iv) incorporate an independent audit function to test programs.191

An extension of these internal programs are the know-your-customer (KYC) programs. The Treasury, via the FinCEN, has been expected to issue regulations establishing mandatory KYC programs for quite some time. Until such regulations are forthcoming, banks are being encouraged to establish adequate KYC programs on their own. As stated by the OCC, "KYC policies increase the likelihood that the bank will be in compliance with all statutes and regulations relating to the BSA and that it is adhering to safe and sound banking practices".192 An effective KYC program should be expected to compel bank personnel to: (i) take reasonable care to ascertain the identity of all customers; (ii) be able to identify the true owners of accounts; (iii) obtain adequate identification information on all new customers; (iv) acquire evidence of identity on all persons seeking to conduct significant business transactions, such as wire transfers; and (v) note any unusual deviations from a customer's normal banking activities.193 Establishing such a program is in the best interest of the bank, as the program will merely formalize a necessary procedure under the other requirements of the BSA, e.g., the suspicious transaction reporting.


In 1994 Congress enacted the latest amendment to the BSA with the Money Laundering Suppression Act of 1994 (MLSA).194 The accomplishments of the MLSA can essentially be divided into three different categories: (i) promoting a transformation of currency transaction reporting under the BSA; (ii) making amendments to effect closer scrutiny of money transmitting businesses; and (iii) exerting a new emphasis on structuring by augmenting the civil penalties and adding criminal penalties attendant to such activity.195

189. Id. Note also that 31 U.S.C. §5323 provides for rewards up to U.S. $150,000 for information leading to a criminal fine, civil penalty, or forfeiture of more than U.S. $50,000 in connection with a BSA violation. U.S. Lures Laundering Whistleblowers With Rewards, Protection, Money Laundering Alert, June 1, 1995, at 3. In addition, 28 U.S.C. § 524(c)(1)(B) allows whistleblowers to be rewarded out of the Justice Department's asset forfeiture fund if they provide information "relating to violation" of the money laundering, cash reporting, and structuring laws. Id.
191. Id.
193. Id. at 7-8.
195. In § 409, the MLSA also brings Indian gaming operations within the purview of BSA scrutiny. Money Laundering Suppression Act § 409.
First and foremost, the MLSA embodies an attempt by Congress to redefine its approach at assailing money laundering with an injection of efficiency and common sense. Arriving at the realization that the most effective watchdog on money laundering is not a detached central agency but the financial institutions themselves, Congress used the MLSA to streamline its attack by both giving the regulated entities more responsibility to detect money laundering activities and by allowing them to economize the reporting they have to make. The new approach is capacitated by the revision of the way currency transactions are reported under the BSA.

The stated objectives of the transformation of CTR filings are to: (i) reduce the burden involved with filing; (ii) limit the requirement for CTRs to transactions in which the benefit from the reporting outweighs the burdens involved; (iii) concentrate the currency transaction reporting system on transactions of interest to law enforcement and regulators; and (iv) create a workable exemption system. In the MLSA, these objectives are addressed through a reform of the exemptions from CTR filing requirements and a simplification of the CTR forms that must be filed.

Section 402 of the MLSA provides new exemptions for CTR filings by depository institutions. The Act not only provides for the mandatory exemption of certain transactions in section 5313(d), it also extends a level of freedom to depository institutions by allowing them discretionary exemptions under section 5313(e). Under section 5313(d), depository institutions no longer need to file a CTR for a transaction conducted with: (i) other depository institutions; (ii) governmental departments or agencies or entities exercising authority on behalf of a government; or (iii) any businesses for which a CTR filing would "have little or no value for law enforcement purposes". The relevant Interim Rule issued by the FinCEN limits the mandatory exemptions to corporations whose

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197. Money Laundering Suppression Act § 402. As defined in 31 U.S.C. § 5313(g) (1995), a depository institution includes: (i) any branch, agency, or commercial lending company; (ii) any corporation chartered under section 25A of the Federal Reserve Act; and (iii) any corporation having an agreement or undertaking with the Board of Governors of the Federal Reserve System under section 25 of the Federal Reserve Act.
198. The Interim Rule governing these exemptions refers to banks rather than depository institutions. *Interim Rule*, 61 Fed. Reg. at 18206. This reference is because FinCEN has decided the bank officials who work with the BSA are more likely to understand the term bank and that since bank as defined by 31 C.F.R. § 301.11(c) includes all the categories of institutions falling within the definition of depository institution the distinction between the two terms is really one of preference. *Id.* In addition, the exemption is limited to U.S. banks, and a transfer of currency between a foreign bank and domestic bank still necessitates the filing of a CTR. *Id.* at n.3.
200. FinCEN is a Treasury Department agency established in 1990 and designated as a primary organization to "formulate, oversee and implement policies to prevent and detect money laundering, serving as the link between the law enforcement, financial and regulatory communities." *FINCEN, THE GLOBAL FIGHT AGAINST MONEY LAUNDERING* 3 (199?). Furthermore, FinCEN has been in charge of the Office of Financial Enforcement as of November 1994. Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 181-182 (1995).
common stock: (i) is listed on the New York Stock Exchange or the American Stock Exchange (but not including stock listed on the Emerging Company Marketplace of the American Stock Exchange) or (ii) is designated as a Nasdaq National Market Security listed on the Nasdaq Stock Market (but not including stock listed under the separate "Nasdaq Small-Cap Issues" category.) In effect, these mandatory exemptions help eliminate superfluous reporting on transactions likely to be otherwise reported or not likely to be, vehicles for money laundering activities.

In addition, discretionary exemptions are available for transactions between depository institutions and "a qualified business customer of the institution on the basis of information submitted to the Secretary [of the Treasury] by the institution in accordance with procedures [and guidelines established by Treasury regulation]." For purposes of this discretionary exemption, a qualified business customer is an entity which: (i) maintains a transaction account; (ii) frequently engages in transactions requiring a CTR filing; and (iii) meets the Treasury's criteria for the exemption.

Importantly, depository institutions are provided with a safe harbor preventing them from being liable for failing to file under the mandatory or discretionary exemptions unless they knowingly file false or incomplete information or have reason to believe the transaction did not fall within the exemption. This provision is intended to allow banks the security necessary to ensure a workable exemption system upon which they can rely.

The relationship the MLSA's exemptions share with the suspicious activity reporting mandated by the Annunzio-Wylie Act is useful to note. The exemptions in the MLSA do not apply to the filing of SARs; suspect transactions must be reported regardless of the entity involved. The correlation between the two provisions is best described by FinCEN itself: The substitution of suspicious transaction reporting for routine reporting of all currency transactions by exempt persons in effect defines what a routine transaction for an exempt person is. A routine currency transaction, in the case of an exempt person, is a transaction not triggering the suspicious transaction reporting requirements, because the transaction does not, for example, give the bank a reason to suspect money laundering, a violation of a reporting requirement, or the absence of a business purpose.

In addition, the MLSA simplifies the actual CTR form itself. The statute directs the Treasury to take measures to "redesign the format of the reports . . . to eliminate the need to report information which has little or no value for law enforcement purposes" and to "reduce the time and effort required to prepare such report[s] for filing by any such financial institution....." Effective October 1, 1995, the new CTR form requires only the most basic information, such as who conducted the transaction, for whom the transaction was conducted, where the transaction occurred, and a description of and the amount of the transac-

204. Id. at § 5313(e)(2).
205. Id. at § 5313(f).
207. See Money Laundering Suppression Act, § 402(c).
208. Id.
The new form represents a 30 percent reduction in the information required to be reported. As many as six data fields were removed from the form, allowing the reporting financial institutions to save thousands of work hours filling out the CTRs.

Complementing the aforementioned provisions effectively transforming the CTR filing procedure, the MLSA provides for the improvement of federal banking regulatory agency money laundering identification schemes. This provision serves to open the lines of cooperation between depository institutions and law enforcement agencies and to establish a public private partnership in identifying money laundering operations. The provision encourages depository institutions to develop better methods of detecting and reporting money launderers and instructs regulators to ensure the periodic distribution of informational updates on money laundering strategies and operations to the banking industry.

Second, the MLSA further amends the BSA by bringing closer scrutiny upon money transmitting businesses. With the addition of section 5330, all money transmitting businesses are now required to register with the U.S. Treasury. Although the form and manner of registration is provided by Treasury regulation, the statute does specify the registration forms must contain: (i) the name and address of the money transmitting business, of those who direct the business, and of the depository institution where the business maintains a transaction account; (ii) estimates of the volume of business expected to be conducted by the particular institution within the following year; and (iii) any other information the Treasury might prescribe.

Supporting the registration requirements is a civil penalty of $5000 for each failure to file a registration form. As every day a business does not file is considered another violation,

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210. Id.
211. Id.
214. Id.
215. Id. at § 408. The purpose of this section is "to establish a registration requirement for businesses engaged in providing check cashing, currency exchange, or money transmitting or remittance services, or issuing or redeeming money orders, travelers' checks, and other similar instruments to assist the Secretary of the Treasury, the Attorney General, and other supervisory and law enforcement agencies to effectively enforce the criminal, tax, and regulatory laws and prevent such money transmitting businesses from engaging in illegal activities." Id. at § 408(a)(2).
216. 31 U.S.C. § 5330 (1995). As defined in section 5330(d), a "money transmitting business" includes any business (other than the U.S. Post Office) that:
   (A) provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments;
   (B) is required to file reports under section 5313; and
   (C) is not a depository institution (as defined in section 5313(g)).
Id. at § 5330(d).
217. Id. at § 5330(b).
218. Id. at § 5330(e). Filing false or materially incomplete information on the registration form is considered a failure to file. Id. at § 5330(a)(4).
the civil fines may become quite substantial in a relatively short period of time.\textsuperscript{219} Furthermore, violators of the provision may also be subject to a criminal penalty of up to five years imprisonment, in addition to the accompanying criminal forfeiture consequences.\textsuperscript{220}

In addition, the MLSA incorporates a note into section 5311 advocating the states adopt a uniform law to combat money laundering.\textsuperscript{221} Included within the proposed Model Statute are licensing requirements and standards for money transmitting businesses, reporting requirements for such businesses, procedures for ensuring compliance with the federal cash transaction reporting requirements, and criminal penalties for operating a money transmitting business without a license.\textsuperscript{222}

Third, the MLSA reforms and strengthens the penalties for structuring transactions to avoid the BSA reporting requirements. The MLSA adds a criminal penalty for structuring to section 5324 providing for a fine and up to five years imprisonment for a violation.\textsuperscript{223} These penalties are doubled for individuals or institutions convicted of structuring in connection with another illegal activity or for whom a pattern of any illegal activity involving over $100,000 and lasting for more than a year can be established.\textsuperscript{224}

Congress also implemented provisions in the MLSA to address issues raised by the U.S. Supreme Court in its opinion in \textit{Ratzlaf}.\textsuperscript{225} Congress eliminated the word willfully from the civil penalty provisions of 31 U.S.C. § 5321(a)(4)(A), which serves to ease the burden on prosecutors presented with violations of the BSA anti-structuring provisions in particular and violations of the BSA reporting requirements in general.\textsuperscript{226} The government need now only demonstrate the defendant acted knowingly and with the intent to evade the reporting requirements of the BSA in order to obtain a sustainable conviction under the anti-structuring provisions.\textsuperscript{227}

\section*{VI. Conclusion.}

The United States' goal of combatting international money laundering will be best served through cooperation efforts with the governments of foreign countries. Some recent unilateral measures taken by the United States, however, may prove fruitful. For example, in February 1995 President Clinton certified certain countries that have, in the past, been the source of much of the illicit drug traffic in the United States, but which recently have been improving. These were countries that either: (i) cooperated fully with

\begin{thebibliography}{99}
\bibitem{219} See \textit{id.} at § 5330(e)(2).
\bibitem{220} \textit{Id.}
\bibitem{221} See \textit{id.} at § 5311.
\bibitem{222} \textit{Id.}
\bibitem{223} Money Laundering Suppression Act § 411(a).
\bibitem{224} \textit{Id.}
\bibitem{225} \textit{Ratzlaf} v. United States, 114 S.Ct. 655 (1994) (holding a conviction under the anti-structuring law requires a showing the defendant not only intentionally structured transactions to avoid reporting requirements, but also did so knowing this activity was illegal).
\bibitem{226} \textit{See id.}
\bibitem{227} \textit{See id.}
\end{thebibliography}
the United States or took adequate steps on their own to achieve full compliance with the
goals and objectives of the 1988 Vienna Convention; and (ii) that were determined to be in
the vital national interests of the United States to receive U.S. monetary aid to combat drug
trafficking and money laundering. The President also disclosed those countries not meet-
ing the standards for such certification: Afghanistan, Burma, Iran, Syria and Nigeria. In
addition, when President Clinton issued the 1996 certification, Colombia had been
notably placed on the black list of those countries not meeting U.S. standards. Perhaps
discovering a carrot is sometimes more effective than a stick, the U.S. Government is
attempting to see whether a dangling aid package can serve as an added incentive for cer-
tain developing countries to begin to address such issues as drug trafficking and money
laundering.

228. See Certifications for Major Narcotics Producing and Transit Countries, 60 Fed. Reg. 12, 859
(1995). For a review and assessment of the certification program under the Foreign Assistance
Act of 1961, as amended, see Assessment of U.S. Counternarcotics Efforts in Asia, 6 U.S. Dept. of
State Dispatch 619 (Aug. 7, 1995); International Narcotics Control Efforts in the Western
Hemisphere, 6 U.S. Dept. of State Dispatch 337 (Apr. 17, 1995).

229. See Certification For Major Narcotics Producing and Transit Countries, 61 Fed. Reg. 9, 891
(1996) (determining that Afghanistan, Burma, Colombia, Iran, Nigeria, and Syria are major pro-
ducing and/or major transit countries not meeting the Foreign Assistance standards).