



**Written Statement of
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on behalf of the

National Association of Criminal Defense Lawyers

**Before the
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security**

**Re: "Combating Transnational Organized Crime:
International Money Laundering as a Threat to our Financial Systems"**

February 8, 2012

Mr. Chairman and Distinguished Members of the Committee:

I am honored to have this opportunity to appear before you today to give my views on the federal money laundering enforcement as well as recommended and opposed changes to those laws. I am a practicing criminal defense attorney specializing in federal criminal cases and, in particular, money laundering and federal forfeiture cases. I am the author of the leading two-volume treatise, *Prosecution and Defense of Forfeiture Cases* (Matthew Bender 2011), which also covers related aspects of money laundering law. I helped the House and Senate Judiciary Committees draft the Civil Asset Forfeiture Reform Act of 2000, an Act that brought about long-needed reforms of our civil forfeiture laws.

I began my legal career with the Department of Justice and served for a time as deputy chief of the Asset Forfeiture Office of the Criminal Division at Main Justice in the Reagan Administration. I have served for two decades as co-chair of the Forfeiture Committee of the National Association of Criminal Defense Lawyers (NACDL). I am currently serving on NACDL's Board of Directors as well. I previously testified before this Subcommittee on the subject of money laundering reform legislation in 2000 and a Senate-passed restitution bill in 2008.

Money laundering, commonly understood to involve the transfer of criminally derived money into legitimate channels, occurs in almost every crime in which there is a financial motive. Although federal money laundering laws were enacted with a narrow purpose in mind--to take the profit out of drug trafficking and organized crime—the laws were written incredibly broadly so that they cover many transactions that do not fit the common understanding of money laundering, since they conceal nothing and in some cases even apply to transactions with “clean” money. Many of these transactions are routine and innocent in nature and do not increase the

social harm from the underlying “predicate” crimes. Thus, no purpose was served by criminalizing them.

The last two decades have witnessed an alarming further expansion of the money laundering statutes — principally 18 U.S.C. §§ 1956 and 1957 — by the Department of Justice and the Congress. Once a tool primarily intended for drug or racketeering cases, these laws are now applied to almost every federal felony offense. The list of predicate offenses has been expanded year after year. During the same time, courts have minimized the evidentiary requirements for proving money laundering. As interpreted and applied, the current law is often a cruel trap for unwary individuals and businesses that inflicts felony convictions, harsh prison sentences,¹ and ruinous asset forfeiture.²

As former Deputy Attorney General Larry Thompson stated,

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

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

¹ Section 1956 provides for a sentence of up to twenty years, and a fine of the greater of \$500,000 or twice the value of the property involved in the transaction. Section 1957 provides for a sentence of up to ten years, and includes the potential imposition of substantial fines as well. Both sections trigger severe sentences under the United States Sentencing Guidelines.

² Money laundering offenses trigger the broad forfeiture provisions of 18 U.S.C. § 981 and 982, which give prosecutors the authority to seize any property “involved in” or “traceable” to the alleged offense. This means that prosecutors can seize an entire business, bank account or other asset with little regard for the nature or magnitude of the money laundering activity. Prosecutors like to charge money laundering because of the exceptionally broad and harsh forfeiture provisions, which go beyond what is available under other forfeiture statutes.

Cases of unfair application of the money laundering laws are legion. Individuals and businesses who handle dirty money with no actual knowledge of the underlying offense are branded money launderers.³ This is because courts have interpreted the knowledge requirement to include the concept of “willful blindness” or “conscious avoidance.” Some courts have gone so far as to hold that willful blindness is shown where the defendant has suspicions and does not take action to confirm or disprove their truth; thus, the burden is on the defendant to investigate a suspicious situation, or be judged criminally culpable for her failure to inquire into the source of the funds.⁴

Compounding the statutes’ over-breadth is the prosecutorial practice of piling on money laundering charges that are incidental to or virtually indistinguishable from the underlying offense. For example, prosecutors have charged money laundering where the defendant has done no more than deposit the proceeds of some “specified unlawful activity” into his bank account, even though the bank account is clearly identifiable as belonging to him.⁵ This is usually done under the misconceived “promotion” prong of section 1956(a)(1), which serves no purpose except to increase the penalties for the underlying (“predicate”) felony. “Promotion”

³ Federal law permits juries to infer guilty knowledge from a combination of suspicion and indifference to the truth. *See, e.g., United States v. Campbell*, 977 F.2d 854, 856-59 (4th Cir. 1992) (reinstating the money laundering conviction of a real estate agent based upon the agent’s “willful blindness” that her client was a drug dealer attempting to conceal proceeds by buying a house, when the client drove a Porsche, used a cellular telephone, and paid \$60,000 in cash under the table).

⁴ *See United States v. Kaufman*, 985 F.2d 884 (7th Cir. 1993) (upholding car dealer’s money laundering conviction based on willful blindness theory, even though the undercover agents in the sting operation never told the defendant that the car purchase money was drug proceeds).

⁵ Such “receipt and deposit” cases may be prosecuted under 18 U.S.C. § 1956 based on the contrived theory that the defendant “concealed” the proceeds. Some courts have found “concealment” to be proven when there was in fact no concealment whatsoever. *See, e.g., United States v. Sutura*, 933 F.2d 641 (8th Cir. 1991) (holding that deposit of three checks identified as gambling proceeds into business bank account, which bore the name of its owner, constituted concealment).

offenses are not really money laundering at all and do not increase the social harm from the underlying felony offense.

Given this unfortunate landscape, Congress should exercise extreme caution when considering proposals to further expand the vastly overbroad money laundering laws. While we recognize the serious challenges of combatting transnational crime, Congress should view skeptically claims that the extremely broad existing laws are insufficient and it should insist that any proposed expansion of those laws are narrowly tailored to the purported gap.

To reform the over broad and sometimes redundant money laundering laws that were implemented without this showing, NACDL has proposed several measures that would bring rationality and greater fairness to this area of federal law enforcement. To address the money laundering statutes' most serious flaws:

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

Twenty-five years of experience with the Money Laundering Control Act has led to the conclusion that the Department of Justice and the courts are incapable of controlling this blunderbuss.⁶ These proposed reforms are not only necessary to bring rationality and fairness to

⁶ See United States Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses, Including Comments on Department of Justice Report 6-7 (1997)

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

Proposal #1: Repeal promotion money laundering.

Far less drastic than it sounds, repealing the so-called promotion prong of 18 U.S.C. § 1956 serves the worthwhile goal of simplifying the federal criminal code — without creating a gap in federal law enforcement. The promotion prong of 18 U.S.C. § 1956 requires that the financial transactions were conducted “with the intent to promote the carrying on of a specified unlawful activity.” One who intends to promote the underlying criminal activity and who participates in the commission of a financial transaction, the object of which is to further the underlying crime, is liable as either a conspirator or an aider and abettor of the underlying crime itself. There is simply no void in the law of criminal liability requiring the creation or application of the promotion prong of § 1956. There is no social harm (in addition to the harm of the underlying crime itself) that warrants a separate twenty-year sentence for participating in a financial transaction that is intended to promote the alleged criminal activity that itself is already prohibited and subject to punishment.

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

In contrast to promotion, the concealment prong of 18 U.S.C. § 1956 encompasses the conduct commonly understood to constitute money laundering. It proscribes the conducting of a transaction “knowing that the transaction is designed in whole or in part-(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of

(concluding that money laundering sentences are still being sought and imposed “where the money laundering conduct is so attenuated as to be virtually unrecognizable as the type of conduct for which the money laundering sentencing guidelines were drafted.”).

specified unlawful activity.” Unfortunately, some courts have broadly interpreted the term “to conceal or disguise” to include virtually all transactions which involve the proceeds of unlawful activity.

Contrary to congressional intent, this “turn[s] the money laundering statute into a ‘money spending statute.’”⁷ Spending money from a specified unlawful activity is already punished by another money laundering statute, § 1957 — but only if the money exceeds \$10,000. And even when this monetary threshold is satisfied, § 1957 caps the penalty at ten years’ imprisonment, compared to the twenty-year maximum sentence authorized for concealment money laundering. Clearly, Congress intended more deliberate concealment efforts to trigger the higher maximum sentence.

Some courts have held that to convict under the concealment prong of § 1956, the government must establish that the transaction was engaged in to create the appearance of legitimate wealth.⁸ In order to assure uniformity among the circuits, and to confine “concealment” prosecutions to true acts of money laundering, the money laundering statute should be amended to codify this limitation.

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

Section 1957 is essentially the same as § 1956 stripped of any requirement of promotion, concealment, or avoiding a transaction reporting requirement. Thus, § 1957 is not a money laundering statute, but rather a law against the depositing or withdrawal of more than \$10,000 at

⁷ United States v. Sanders, 928 F.2d 940, 946 (10th Cir. 1991) (quoting portions of the statute’s legislative history that suggest that Congress did not intend to criminalize every transaction involving illegally obtained money).

⁸ United States v. Stephenson, 183 F.3d 110 (2^d Cir. 1999); United States v. Marshall, 248 F.3d 525 (6th Cir. 2001); United States v. Majors, 196 F.3d 1206 (11th Cir. 1999).

one time if you know it is the proceeds of crime.⁹ The sole legitimate basis for such a law is to prevent third parties such as merchants from accepting dirty money in trade. This *theoretically* makes it more difficult for the criminal to spend his money and thus enjoy the fruits of his crimes.¹⁰ The Justice Department's prosecution guidelines for § 1957 seem to target third parties who accept dirty money, not criminals who deposit or withdraw it.¹¹ That would reflect a sensible judgment about the appropriate use of the statute. But the reality is that 99% of the prosecutions brought under § 1957 are against the criminals who generated the dirty money, not third parties who accept their dirty money as payment.

If § 1957 is not simply eliminated, Congress should at least codify Justice Department policy so that § 1957 can only be used to prosecute the "money launderer" and not the criminal who is the source of the money. This would prevent the misuse of the statute to go after the criminal who generates the proceeds and who is already subject to penalties for the commission of the underlying crime. Congress should also require that the proscribed "monetary transaction" be part of a suitably defined "pattern" of similar transactions adding up to a high dollar threshold in order to incur felony liability.¹² If it is not part of a pattern or does not exceed some high dollar threshold, the merchant should, at most, face a misdemeanor penalty. There may be some

⁹ For many years the Department of Justice barely used § 1957, reflecting the government's doubts about the rationale and fairness of the provision. G. Richard Strafer, Money Laundering: The Crime of the '90's, 27 Am. Crim. L. Rev. 149, 161 (1989) (noting the small number of prosecutions commenced under § 1957 by 1989).

¹⁰ However, in practice, § 1957 does not effectively prevent criminals from spending their ill-gotten gains. It is easy for the criminal to turn his cash into some less suspicious monetary instrument, and it is easy for the criminal to find a merchant who will accept cash, no questions asked. Because § 1957 imposes no duty of inquiry on the merchant, he can safely accept cash except in the most extreme circumstances.

¹¹ See United States Attorney's Manual §9-105.400.

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

social utility in prosecuting merchants such as car dealers who *regularly* cater to the drug trade.¹³ But there is no social utility in making a felon out of a merchant who engages in one such transaction. Further, Congress could make § 1957 more rational and less of a blunderbuss if it raised the dollar threshold from \$10,000 to \$25,000.

Proposals put forward and defended by the Justice Department and gaining the attention of some members of this committee are a giant leap in the wrong direction. I will address the most problematic of these proposals in turn.

Specified Unlawful Activity. An argument can be made that Congress did not intend that the money laundering statutes be used to combat offenses other than those associated with drug trafficking and organized crime. Teresa E. Adams, Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 Ga. St. U. L. Rev. 531, 549-58 (2000). Nonetheless, the underlying crimes that serve as predicates for money laundering offenses, called “specified unlawful activities,” have been expanded throughout the years to include everything from federal environmental crimes to copyright infringement. See 18 U.S.C. § 1956(c)(7). One Justice Department proposal on the table "simplifies the predicate offenses that give rise to money laundering offenses" by the expedient of including *all* federal felonies and some misdemeanors as predicates. If anything, the list of specified unlawful activities should be drastically condensed to conform to the statutes’ original purposes.

Knowledge Requirement. Another Justice Department proposal would reverse the Supreme Court’s unanimous decision in *Cuellar v. United States*, 128 S. Ct. 1994 (2008). At issue is the money laundering provision that prohibits international transportation of money

¹³ Remember, if the merchant does anything to help conceal the source of the money or the ownership of the vehicle he can be prosecuted under § 1956.

designed to conceal the nature, location or ownership of criminal proceeds (18 U.S.C. § 1956(a)(2)(B)(i)). In *Cuellar*, the defendant was caught hiding drug proceeds in his vehicle while en route to Mexico. The Court held that secretive transportation is insufficient for conviction; the government must prove that the *purpose* of the transportation was to conceal the nature, location or ownership of criminal proceeds. This provision would reverse *Cuellar* so that a money laundering conviction could rest solely on evidence that the defendant concealed ill-gotten money during international transportation. NACDL believes that increasing the statute's scope to encompass mere money hiding casts the net far too wide. Given that the government can charge the underlying conduct and perhaps one of the numerous other money laundering, cash-reporting or anti-smuggling statutes, there is simply no justification for this.¹⁴

Illegal Money Transmitting Business. Proposed changes to 18 U.S.C. § 1960, the statute that makes it illegal to operate an unlicensed “money transmitting business,” would vastly expand the statute’s coverage to all sorts of check cashing and cambio businesses while eliminating whatever may be left of the government’s burden to demonstrate that business owner knew he was required to have both state and federal licenses to operate his business.

The proposal would expand the current definition of “money transmitting business” to include any business that provides “check cashing, currency exchange, money transmitting or remittance services, or issues, sells or redeems money orders, travelers’ checks, prepaid access devices, digital currencies, or other similar instruments or any other person or association of persons...engaging as a business in transporting, transferring, exchanging or transmitting currency, means to access funds or the value of funds, or funds in any form...” This would

¹⁴ For example, defendant *Cuellar* might have been charged with bulk cash smuggling, 31 U.S.C. § 5332, because he intended to transport cash in excess of \$10,000 across an international border without reporting it.

eliminate thousands of small businesses and the hundreds of thousands of jobs they provide by putting check cashing, currency exchange and other such services out of business. These businesses are essential for many workers who are among the tens of millions of hard-working Americans without bank accounts. They would be reclassified, absurdly, as “money transmitting businesses” under 18 U.S.C. 1960(b)(2) even though they do not “transmit” money to anyone. They should not be required to obtain both federal and state licenses to continue to operate. Such licenses would be denied to the vast majority of these businesses because they cannot afford to establish elaborate anti-money laundering programs – unlike large financial institutions.

Any small business, such as a check cashing service that continued to operate without the required dual licenses would be subject to draconian criminal and forfeiture penalties. This sweeping definition, combined with the fact that ignorance of the federal licensing requirements would not be a defense, would compound the statute’s already overly expansive language and convert licensing violations (usually a state misdemeanor) into major federal crimes. Congress should amend section 1960 to require that a money transmitting business be given a clear written warning regarding the consequences of its failure to obtain the dual licenses before the business can be prosecuted or its assets seized.

Another DoJ proposal would eliminate any remaining mens rea requirement from the illegal money transmitting business statute, making it essentially a strict liability offense. Failure to comply with money transmitting business registration requirements or regulations would constitute a serious felony “whether or not the defendant knew that the operation was required to comply with such registration requirements or regulations.” See *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, Heritage Foundation and National Association of Criminal Defense Lawyers (2010) (available online at

<http://nacdl.org/withoutintent>) (discussing how criminal laws with inadequate mens rea, or guilty mind, requirements endanger the innocent and undermine federal criminal justice system and the danger of relying upon regulations, promulgated by unelected officials, to trigger criminal punishment).

Bulk Cash Smuggling. This proposal would double the maximum penalty for bulk cash smuggling, the undeclared movement of more than \$10,000 across U.S. borders, to 10 years without justification. It would also drastically raise the fines applicable to the offense. Bulk cash smuggling is not a money laundering offense; it applies to *clean* money that is not reported to Customs when leaving or entering the country. Nor is there any requirement that the person carrying the money have any criminal purpose. The bulk cash smuggling statute already includes broad authority to forfeit the clean money and any property or conveyances in cases involved in currency reporting violations. The Justice Department's primary purpose in requesting this doubling of the sentence and the drastic fines is to demonstrate to the courts that the offense is sufficiently "serious" to warrant draconian forfeitures and thus defeat any 8th Amendment claims that certain forfeitures are "excessive fines" (i.e., grossly disproportionate to the seriousness of the offense). This is hardly a justification for these drastic increases in penalties. Indeed, even the current penalties for bulk cash smuggling are too severe and they were enacted for exactly the same reason: to improperly defeat 8th Amendment excessive fine claims based on violations of 31 U.S.C. 5316-5317, the statutes involved in United States v. Bajakajian, 524 U.S.321, 118 S. Ct. 2028 (1998).

Making The International Money Laundering Statute Apply To Tax Evasion. Tax evasion through offshore banking and similar means would be a money-laundering predicate, subject to a twenty-year sentence of imprisonment and forfeiture. In the past, Congress has been

careful to exclude tax evasion from the list of money laundering predicates because of the unfairness that would result. Tax evasion is already a crime and doesn't need to be further punished by piling "money laundering" charges on top of tax charges.

Promotional Money Laundering. There is no justification for expanding 18 U.S.C. § 1957, as has been proposed, to add the completely gratuitous offense of engaging in a monetary transaction of more than \$10,000 while carrying out a specified unlawful activity. While this offense is not money laundering – it applies to clean money – it would trigger the serious forfeiture consequences that should be reserved for actual money laundering offenses. The monetary transaction in the proposed offense adds no real societal harm to the specified unlawful activity, and it suffices to prosecute the individual for that offense. The underlying offenses all have their own, less draconian, forfeiture penalties. Because monetary transactions over \$10,000 with clean money are common, this new offense could be gratuitously charged in almost any case.

Section 1957 Violations Involving Commingled Funds And Aggregated Transactions. Under this proposal, small transactions would be aggregated to trigger the harsh sentences and forfeitures authorized under 18 U.S.C. § 1957 (strict liability money laundering). This provision would also expand § 1957 (and forfeitures predicated on that conduct) to cases involving commingled funds in ways that are not justified. Section 1957, which does not require an intent to conceal dirty money or promote an illegal enterprise, is a trap for law-abiding persons and businesses that accept dirty money in otherwise legitimate transactions. As discussed earlier, this money laundering statute encompasses far too much conduct, results in unjust prosecutions and sentences, and should be abolished, not expanded.¹⁵

¹⁵ We understand the Justice Department claims that without this provision it is unable to prosecute § 1957 violations when dirty money has been commingled with clean money. That is simply

Subpoenas in Money Laundering and Forfeiture Cases. One final proposal would authorize the government, under 18 U.S.C. § 986, to subpoena records from any (very broadly defined) "financial institution" **before the filing of a civil forfeiture complaint.** The government would not have to show any reason to think that the bank records would lead to the filing of a forfeiture action or that the government has any reason to believe that the account holder has committed a crime. This provision would invite endless government fishing expeditions in which it rummages through the bank records of innocent individuals and companies and burdens financial institutions with document production demands.

We have similar concerns about the Justice Department's proposal to allow the use of administrative subpoenas under 18 U.S.C. § 3486 for money laundering, § 1960 and certain Title 31 investigations. These subpoenas would be issued by law enforcement agencies rather than by prosecutors, and there would be no court involvement either. Again, such a provision invites abusive fishing expeditions and burdens the institutions and individuals who are required to produce the documents, in as little as 24 hours, and come testify to their production and authenticity. Subpoenas under § 3486 are not limited to financial institution documents; they may be sent to anyone at any time. The government should continue to obtain such documents through the traditional route of a grand jury or trial subpoena.

In conclusion, we urge you to view any proposals to expand federal money laundering laws in light of the subcommittee's demonstrated interest in simplifying the federal criminal code. While the Justice Department's amendments would exacerbate the complexity and

not true. Even if there is a problem with the commingling analysis in some cases, there is a much narrower "fix" for that problem than the proposed vast expansion of section § 1957.

redundancy of the criminal code, NACDL's recommendations to streamline the expansive and frequently duplicative money laundering laws are in line with the subcommittee's goals.