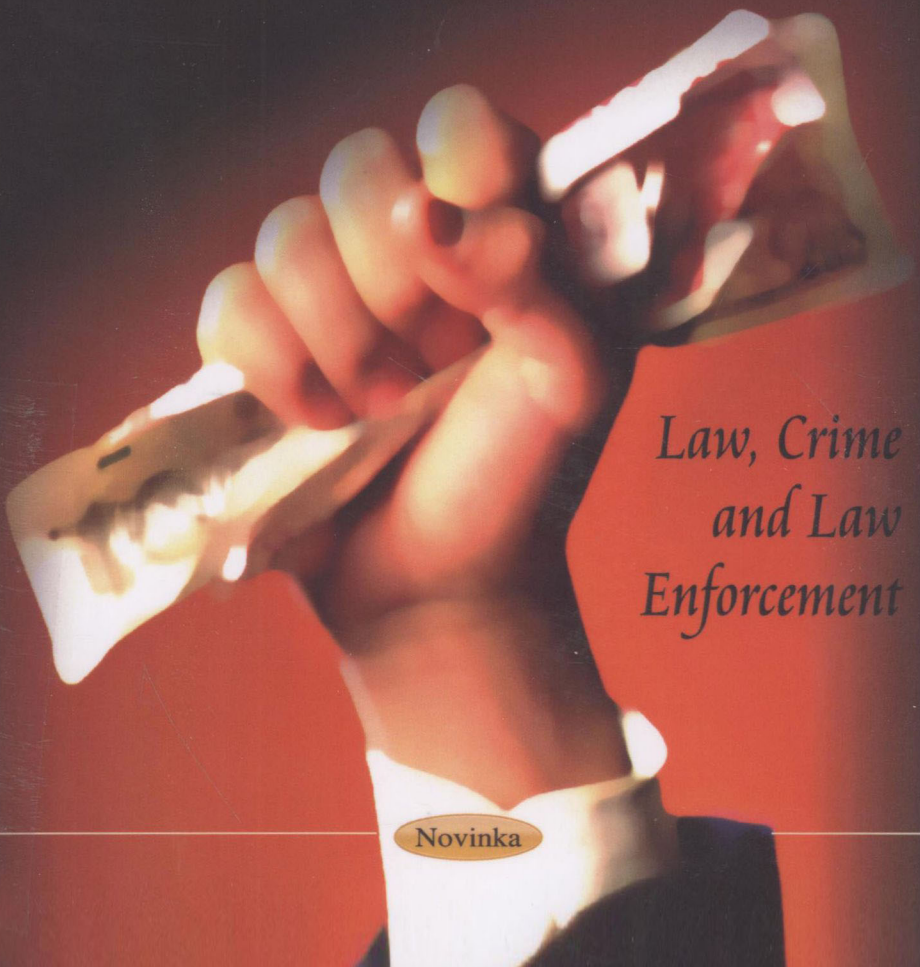
Carlyle M. Bennett • Carlson D. Turner
Editors

MONEY LAUNDERING

AN ANALYSIS OF FEDERAL LAW



Law, Crime and Law Enforcement

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LAW, CRIME AND LAW ENFORCEMENT

MONEY LAUNDERING

AN ANALYSIS OF FEDERAL LAW

CARLYLE M. BENNETT
AND
CARLSON D. TURNER
EDITORS

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PREFACE

Money laundering is commonly understood as the process of cleansing the taint from the proceeds of crime. In federal criminal law, however, it is more. In the principal federal criminal money laundering statutes, 18 U.S.C. 1956 and 1957, and to varying degrees in several other federal criminal statutes, money laundering involved the flow of resources to and from several hundred other federal, state, and foreign crimes. Money laundering in some forms is severely punished, sometimes more severely than the underlying crime with which it is associated. The penalties frequently include not only long prison terms, but the confiscation of the property laundered, involved in the laundering, or traceable to the laundering. In this book, an overview of the elements and other legal attributes and consequences of a violation of Sections 1956 and 1957 are discussed, as are select related federal criminal statutes.

Chapter 1 - This is an overview of the elements of federal criminal money laundering statutes and the sanctions imposed for their violation. The most prominent is 18 U.S.C. 1956. Section 1956 outlaws four kinds of money laundering—promotional, concealment, structuring, and tax evasion laundering of the proceeds generated by designated federal, state, and foreign underlying crimes (predicate offenses)—committed or attempted under one or more of three jurisdictional conditions (i.e., laundering involving certain financial transactions, laundering involving international transfers, and stings). Its companion, 18 U.S.C. 1957, prohibits depositing or spending more than $10,000 of the proceeds from a Section 1956 predicate offense. Violations of Section 1956 are punishable by imprisonment for not more than 20 years; Section 1957 carries a maximum penalty of imprisonment for 10 years. Property involved in either case is subject to confiscation. Misconduct which implicates Sections 1956 and 1957 may implicate other federal criminal statutes as well. Federal racketeer influenced and corrupt organization (RICO)

provisions outlaw acquiring or conducting the affairs of an enterprise (whose activities affect interstate or foreign commerce) through the patterned commission of a series of underlying federal or state crimes. RICO violations are also 20-year felonies. Every RICO predicate offense, including each "federal crime of terrorism," is automatically a Section 1956 money laundering predicate offense. A second related statute, the Travel Act (18 U.S.C. 1952), punishes interstate or foreign travel, or the use of interstate or foreign facilities, conducted with the intent to distribute the proceeds of a more modest list of predicate offenses or to promote or carry on such offenses when an overt act is committed in furtherance of that intent. Such misconduct is punishable by imprisonment for not more than five years. Other federal statutes proscribe, with varying sanctions, bulk cash smuggling, layering bank deposits to avoid reporting requirements, failure to comply with federal anti-money laundering provisions, or conducting an unlawful money transmission business. The Supreme Court has held that the Section 1956 ban on attempted international transportation of tainted proceeds for the purpose of concealing their ownership, source, nature, or ultimate location is limited to instances where concealment is a purpose rather than an attribute of the transportation (simple smuggling is not proscribed as such), *United States v. Cuellar*, 553 US 550 (2008). In a second case, the Court indicated that for purposes of Section 1956 the "proceeds" of a predicate offense often referred to the profits rather than the gross receipts realized from the offense, *United States v. Santos*, 553 US 507 (2008). Congress responded by defining "proceeds" for purposes of Sections 1956 and 1957 as the property obtained or retained as a consequence of a predicate offense, including gross receipts, P.L. 111-21, 123 Stat. 1618 (2009)(S. 386)(111th Cong.). The text of the statutes discussed, citations of state money laundering and money transmission statutes, a list of Section 1956 federal predicate offenses and their accompanying maximum terms of imprisonment, and a bibliography appear at the end of the report.

Chapter 2 - On June 2, 2008, the U. S. Supreme Court, in *United States v. Santos* (No. 06-1005), vacated convictions of the operator of an illegal lottery and one of his runners who had been charged with conducting financial transactions involving the "proceeds" of an illegal gaming business in violation of 18 U.S.C. § 1956. The ruling is that "proceeds," as used in this money laundering statute, means "profits" rather than "gross receipts" of the underlying unlawful activity. The decision combines a plurality opinion interpreting the word "proceeds" in the statute to mean "profits" and a concurring opinion, necessary for a majority ruling, that leaves room for interpreting "proceeds" as "gross receipts" in other circumstances. A strong

dissenting opinion emphasized the constraints the ruling will place on prosecutors. The interpretation rests on two principles of statutory construction: the rule of lenity and the merger doctrine. Under the rule of lenity, ambiguities in criminal statutes are construed in favor of the defendant. Application of the merger doctrine avoids the prospect that a defendant would receive two punishments under different statutes for what is essentially a single offense. On February 5, 2009, Senator Leahy introduced S. 386, the Fraud Enforcement and Recovery Act of 2009, which was reported favorably by the Senate Committee on the Judiciary on March 23, 2009, S.Rept. 111-10. On April 28, the bill, as amended, was passed by the Senate. On May 7, an amended version of the bill was passed by the House. It was returned to the Senate, amended, and passed; thereafter, on May 18, it was passed by the House for presentation to the President. The bill includes provisions amending the definition of "proceeds" under the anti-money laundering criminal statutes, 18 U.S.C. § 1956(c)(8) and 1957(c), to specify that the term includes the "gross receipts" of the underlying criminal activity. As passed by the House, the bill also includes a provision addressing the possibility of a merger problem in money laundering prosecutions for predicate offenses closely connected with the elements of the money laundering offense. Other legislation with provisions to cover "gross receipts" includes S. 378 and H.R. 1793.

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Chapter 1

MONEY LAUNDERING: AN OVERVIEW OF 18 U.S.C. 1956 AND RELATED FEDERAL CRIMINAL LAW*

Charles Doyle

SUMMARY

This is an overview of the elements of federal criminal money laundering statutes and the sanctions imposed for their violation. The most prominent is 18 U.S.C. 1956. Section 1956 outlaws four kinds of money laundering—promotional, concealment, structuring, and tax evasion laundering of the proceeds generated by designated federal, state, and foreign underlying crimes (predicate offenses)—committed or attempted under one or more of three jurisdictional conditions (i.e., laundering involving certain financial transactions, laundering involving international transfers, and stings). Its companion, 18 U.S.C. 1957, prohibits depositing or spending more than $10,000 of the proceeds from a Section 1956 predicate offense. Violations of Section 1956 are punishable by imprisonment for not more than 20 years; Section 1957 carries a maximum penalty of imprisonment for 10 years.

Property involved in either case is subject to confiscation. Misconduct which implicates Sections 1956 and 1957 may implicate other federal criminal statutes as well. Federal racketeer influenced and

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corrupt organization (RICO) provisions outlaw acquiring or conducting the affairs of an enterprise (whose activities affect interstate or foreign commerce) through the patterned commission of a series of underlying federal or state crimes. RICO violations are also 20-year felonies. Every RICO predicate offense, including each "federal crime of terrorism," is automatically a Section 1956 money laundering predicate offense.

A second related statute, the Travel Act (18 U.S.C. 1952), punishes interstate or foreign travel, or the use of interstate or foreign facilities, conducted with the intent to distribute the proceeds of a more modest list of predicate offenses or to promote or carry on such offenses when an overt act is committed in furtherance of that intent. Such misconduct is punishable by imprisonment for not more than five years.

Other federal statutes proscribe, with varying sanctions, bulk cash smuggling, layering bank deposits to avoid reporting requirements, failure to comply with federal anti-money laundering provisions, or conducting an unlawful money transmission business.

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In a second case, the Court indicated that for purposes of Section 1956 the "proceeds" of a predicate offense often referred to the profits rather than the gross receipts realized from the offense, *United States v. Santos*, 553 US. 507 (2008).

Congress responded by defining "proceeds" for purposes of Sections 1956 and 1957 as the property obtained or retained as a consequence of a predicate offense, including gross receipts, P.L. 111-21, 123 Stat. 1618 (2009)(S. 386)(111th Cong.).

The text of the statutes discussed, citations of state money laundering and money transmission statutes, a list of Section 1956 federal predicate offenses and their accompanying maximum terms of imprisonment, and a bibliography appear at the end of the report.

INTRODUCTION

Money laundering is commonly understood as the process of cleansing the taint from the proceeds of crime.[1] In federal criminal law, however, it is more. In the principal federal criminal money laundering statutes, 18 U.S.C. 1956 and 1957, and to varying degrees in several other federal criminal statutes,

money laundering involves the flow of resources to and from several hundred other federal, state, and foreign crimes.[2] It consists of:

- engaging in a *financial transaction* involving the proceeds of certain crimes in order *to conceal* the nature, source, or ownership of proceeds they produced;[3]
- engaging in a *financial transaction* involving the proceeds of certain crimes in order *to promote* further offenses;[4]
- *transporting* funds generated by certain criminal activities into, out of, or through the United States in order *to promote* further criminal activities, *or to conceal* the nature, source, or ownership of the criminal proceeds, *or to evade reporting* requirements;[5]
- engaging in a *financial transaction* involving criminal proceeds in order *to evade taxes* on the income produced by the illicit activity;[6]
- *structuring financial transactions* in order to evade reporting requirements;[7]
- *spending more than $10,000* of the proceeds of certain criminal activities;[8]
- *traveling* in, or use of the facilities of, interstate or foreign commerce in order *to distribute* the proceeds of certain criminal activities;[9]
- *traveling* in, or use of the facilities of, interstate or foreign commerce in order to promote certain criminal activities;[10]
- transmitting the proceeds of, or funds to promote, criminal activity in the course of a money transmitting business;[11]
- *transmitting funds* in the course of an unlawful money transmitting business;[12]
- *smuggling* unreported *cash* across a US border;[13] or
- *failing to comply* with the Treasury Department's anti-money laundering provisions.[14]

Money laundering in some forms is severely punished, sometimes more severely than the underlying crime with which it is associated.

The penalties frequently include not only long prison terms, but the confiscation of the property laundered, involved in the laundering, or traceable to the laundering.

This is an overview of the elements and other legal attributes and consequences of a violation of Sections 1956 and 1957, as well as selected related federal criminal statutes.

18 U.S.C. 1956

Section 1956 outlaws four kinds of laundering—promotional, concealment, structuring, and tax evasion—committed or attempted under one or more of three jurisdictional conditions (i.e., laundering involving certain financial transactions, laundering involving international transfers, and stings). More precisely, Section 1956(a)(1)[15] outlaws financial transactions involving the proceeds of other certain crimes—predicate offenses referred to as "specified unlawful activities" (sometimes known as SUA)—committed or attempted (1) with the intent to promote further predicate offenses; (2) with the intent to evade taxation; (3) knowing the transaction is designed to conceal laundering of the proceeds; or (4) knowing the transaction is designed to avoid anti-laundering reporting requirements.

Section 1956(a)(2) outlaws the international transportation or transmission (or attempted transportation or transmission) of funds (1) with the intent to promote a predicate offense; (2) knowing that the purpose is to conceal laundering of the funds and knowing that the funds are the proceeds of a predicate offense; or (3) knowing that the purpose is to avoid reporting requirements and knowing that the funds are the proceeds of a predicate offense. Section 1956(a)(3) is a sting section that covers undercover investigations. It outlaws financial transactions (or attempted transactions) that the defendant believes involve the proceeds of a predicate offense and that are intended to (1) promote a predicate offense, (2) conceal the source or ownership of the proceeds, or (3) avoid reporting requirements.

Promotion

Financial Transactions

Of the three promotional offenses, only the Section 1956(a)(1)(A)(i) financial transaction offense requires use of the proceeds of a predicate offense to promote a predicate offense; the Section 1956 international and sting offenses require only a purpose to promote a predicate offense regardless of the source of the proceeds. Section 1956(a)(1)(A)(i) applies to anyone who:

1. knowing
   A. that the property involved in a financial transaction,
   B. represents the proceeds of some form of unlawful activity,
2. A. conducts or
   B. attempts to conduct such a financial transaction

3 which in fact involves the proceeds of specified unlawful activity
4. with the intent to promote the carrying on of specified unlawful activity.[16]

The knowledge element is the subject of a specific definition which allows a conviction without the necessity of proving that the defendant knew the exact particulars of the underlying offense or even its nature; it is enough that he knew that the property came from some sort of criminal activity and that the property in fact constitutes the proceeds of a predicate offense.[17] The knowledge element cannot be negated by turning a blind eye to reality. Here and throughout Section 1956, knowledge may be inferred from facts indicating that criminal activity is particularly likely.[18]

Throughout Section 1956, a defendant "conducts" a financial transaction when he initiates, concludes, or participates in initiating, or concluding a transaction.[19] The "financial transaction" element has two obvious components. It must be a transaction and it must be financial. Both components are defined by statute. Qualifying "transactions" may take virtually any shape that involves the disposition of something constituting the proceeds of an underlying crime,[20] including disposition as informal as handing cash over to someone else.[21] The "financial" component supplies the jurisdiction foundation for a Section 1956(a)(1)(A)(ii) crime and each of the other crimes in Section 1956(a)(1). Qualifying transactions must either involve the movement of funds in a manner that affects interstate or foreign commerce or involve a financial institution engaged in, or whose activities affect, interstate or foreign commerce.[22] In either case, the effect on interstate or foreign commerce need be no more than de minimis to satisfy the jurisdictional requirement.[23]

The "proceeds" involved in the transaction may consist of "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity,"[24] be the property tangible or intangible (*e.g.*, cash or debt), things of value, or things with no intrinsic value (*e.g.*, checks written on depleted accounts).[25]

All but 2 of the 10 Section 1956 crimes are related in one way or another to the commission or purported commission of at least one of a list of predicate offenses, "specified unlawful activities."[26] In the case of the financial institution promotional offense, one of these predicate offenses must be the source of the proceeds used to promote a predicate offense.[27] The predicate offenses come in three varieties: state crimes, foreign crimes, and federal crimes. The list of state crimes is relatively short and consists of any state

crime that is a RICO predicate offense,[28] that is, "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under state law and punishable by imprisonment for more than one year."[29]

The list of foreign crimes recognized as Section 1956 predicate offenses is very much the same— violations of the laws of another country involving murder, kidnapping, bribery, drug trafficking, and the like—but it only applies in cases involving a financial transaction occurring in whole or in part in this country.[30]

The list of federal predicate offenses is considerably longer if for no other reason than it is both specific and generic.[31] For instance, instead of listing "kidnapping in violation of federal law," it lists several of the federal statutes that outlaw kidnapping—interstate kidnapping, kidnapping a Member of Congress, kidnapping the President, and so forth.[32] On the other hand, it also lists "any act or activity constituting an offense involving a federal health care offense."[33] Moreover, it encompasses not only the RICO state predicate offenses but also the RICO federal predicate offenses.[34] The inventory of RICO predicates contains a substantial number of specifically identified federal crimes and any of the federal crimes of terrorism cataloged in 18 U.S.C. 2333b(g)(5)(B).[35]

The courts have struggled with the precise meaning of the interwoven "proceeds" and "promotional " elements of the promotional transaction offense. Under some circumstances, it is difficult to say when the fruits of a crime have been used for further criminal purposes or when the activity is merely part and parcel of the predicate offense. In the Supreme Court's *Santos* case, for instance, the defendant was convicted of running an illegal gambling business in violation of 18 U.S.C. 1955. Section 1955 requires the government to prove that the defendant has conducted a gambling operation either conducted over a 30-day period or one which produced gross revenues of at least $2,000 on any given day. Santos was also convicted of promotional money laundering under Section 1956, based upon evidence that during the course of operations he had paid off his winning customers and paid his employees from the revenue generated by the enterprise.[36] The Court of Appeals decided that these were expenses associated with the commission of the gambling offense, not profits. Proceeds, they reasoned based on their earlier decisions, meant profits, net revenues, not gross revenues (profits and expenses).[37]

Complicating the issue before the Supreme Court was the sentencing disparity between operating a gambling business (a maximum of 5 years imprisonment) and for money laundering (a maximum of 20 years imprisonment). The issue splintered the Court. Four Justices agreed that "proceeds" meant "profits"; four concluded that it meant "gross receipts." The ninth Justice sided with the four "gross receipt" Justices for purposes of the result, but suggested that sometimes proceeds means profits and sometimes it means gross receipts.

Justice Scalia, in the plurality opinion for the Court, noted that the Congress had not at the time explicitly define "proceeds" as the term was used in the money laundering statute.[38] In the absence of a statutory definition, words are thought to have their ordinary meaning. In common parlance, proceeds can mean either profits or gross receipts.[39] When the words of a criminal statute can be read in either of two ways, the rule of lenity requires them to be construed in the manner most favorable to the accused.[40] Recourse to the rule avoids the so-called merger problem:

> Since few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries, 18 U.S.C. 1955, would "merge" with the money laundering statute. Congress evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment, §1955(a), but as a result of merger they would face an additional 20 years [under the money laundering statute], §1956(a)(1).... The merger problem is not limited to lottery operators... Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which the participant passes receipts on to someone else, would merge with money laundering.[41]

Justice Stevens concurred in the result, but not the rationale, of the plurality opinion.[42] He agreed with the dissent at least to the extent that "the legislative history of §1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involved in such sales."[43] Yet, he found the results of inevitable merger too extraordinary to believe Congress intended them in all instances:

> The revenue generated by a gambling business that is used to pay the essential expenses of operating that business is not "proceeds" within the meaning of the money laundering statute. As the plurality notes, there is "no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately

> punished elsewhere in the Criminal Code, to radically increase the sentence for that crime."... Congress could not have intended the perverse result that would obtain in this case under Justice Alito's opinion.[44]

Consequently, he would presume that Congress intended the word "proceeds" to mean "gross receipts," except in those cases, like *Santos*, where the results would be too "perverse" to support such a presumption.[45]

Speaking for the four dissenters, Justice Alito argued that treating proceeds to mean profits contradicted what Congress probably understood the term to mean.[46] Moreover, since the term applies to both the promotional and concealment offenses, the plurality's result would make it more difficult to prosecute professional money launderers who ordinarily could not be shown to know whether they were laundering gross receipts or only profits.[47] Justice Breyer agreed and added separate dissent contending that the merger problem might better be addressed through the sentencing guidelines or through interpretation of the "promotional" element of the offense.[48]

So what did *Santos* mean? Some courts concluded that its "proceeds means profits" assessment only applied in gambling cases.[49] Others held that it did not apply to cases involving the sale of contraband.[50] Most reasoned that it only applied when there was a risk of merger, a risk that a transaction that was part of the predicate offense would be charged additionally as a money laundering offense.[51]

Congress resolved the issue by adding an explicit definition of proceeds to Section 1956: "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, *including the gross receipts of such activities*."[52] The definition answers both the profits v. gross receipts question and several others as well. It makes it clear, for example, that the term includes proceeds from a lawful source, retained through the commission of a predicate offense.[53] It does not necessarily invalidate, however, that line of lower court decisions which holds that proceeds must be "derived from an already competed offense, or a completed phase of an ongoing offense, before they can be laundered."[54]

As for the promotional element, some of the lower courts have concluded that it "may be met by transactions that promote the continued prosperity of the underlying offense."[55] One circuit has declared, however, that "the 'promotion' element of money laundering promotion cannot be met simply by demonstrating that the unlawfully earned monies were used to promote the continued functioning of an 'otherwise legitimate business enterprise.' For instance, paying the bills (payroll, rent, taxes) of a health care provider or