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序

中国的文化传统，历来推崇学习。《论语》第一篇就是“学而第一”，被赞为“入道之门，积德之基”；《三字经》中开篇即提到“子不学，非所宜；幼不学，老何为”，提到“孟母择邻而处”等学习典故；《大学》与《中庸》中也一再强调修身，而修身的首要条件，就是要通过“格物致知”的学习，而后达到止于至善的境界。

党的十八大报告中也历史性地提出要建立“学习型”政党。回顾中国共产党的历史沿革，从党的建立，到革命时期、建设时期与改革时期，我们党始终立于不败之地的原因就在于通过不断的学习，汲取经验与教训，从而引领了中华民族的伟大复兴。

学习是一种精神、一种文化，这种精神文化会以“春雨润物细无声”的内敛，隐含在每个人的为人处事之中，成为一个人长久、健康发展的精神动力。因此，我们要以“如切如磋，如琢如磨”的态度对待学习，位庙堂之高可以治国，处江湖之远可以齐家。

对于当代中国人，特别是青年人来说，学习是时代赋予我们的要求，传统文化为我们奠定了学习的土壤，十八大报告为我们指明了学习的方向。在我国金融正与国际接轨的时代，在深化金融体制改革的基调中，金融领域特别需要我们去努力学习迎接挑战。金融是一国经济的核心，“百业兴则金融兴”，因此我们不但要从书本

中学习，而且要从实践中学习。

本书作者陈捷研究员，当年我在中国人民银行任职时，曾在我负责的单位工作，是一个学习勤奋、善于思考的青年。他注重理论与实践的结合，努力从国际化视角研究中国经济金融发展中的问题。“功崇惟志，业广为勤”，我赠送《尚书》中的这句话给他，希望其继续保持孜孜不倦的学习态度，不断取得新的进步。

广州市副市长　欧阳卫民

2013 年 7 月

摘 要

洗钱（Money Laundering）是经济全球化时代社会危害最大、影响范围最广、科技含量最高的犯罪之一，国际社会已将其列为非传统性安全问题。洗钱交织了政治、经济等多方面因素，除滋生了毒品、腐败等大量“上游犯罪”外，还“衍生”了一些新型犯罪和安全问题，如“恐怖主义融资”（terrorism financing）和“核扩散融资”（nuclear proliferation financing）等。因此，反洗钱工作不仅是为了打击上游犯罪，而且其政治性越来越强，逐渐成为一项重要的政治、金融工具或“武器”。国际反洗钱行动也渗透了各种政治、经济力量的博弈，各国政府和国际社会对反洗钱工作的重要性、复杂性、紧迫性和长期性的认识不断提高，在国际政治、金融和法律等层面采取了一系列应对措施。

同时，每个国家和组织都有自己的反洗钱核心目的和战略。各国在合作中的关注点上既有共性也有个性。以美国为代表的西方国家的反洗钱战略逐渐转向打击恐怖主义融资。我国的反洗钱工作在开展之初为打击金融犯罪和反腐倡廉工作做出了突出贡献，随着工作实践的不断深入，有学者正在研究其在打击“三股势力”、维护社会稳定领域发挥更大的功效的可行性。从这个层面上再反观反洗钱机制建设、反洗钱各项特殊措施以及国际反洗钱现状和趋势，将

给我们提供新视角、新思路，有利于反洗钱机制的完善，更有利于借助反洗钱工具维护国家安全、社会稳定，以及在国际上维护国家利益。

按照国际权威反洗钱组织——金融行动特别工作组（FATF, Financial Action Task Force）的标准，国家反洗钱工作和对策应该从以下 3 个方面进行完善：1. 法律体系建设；2. 机构体系建设与国内合作；3. 国际合作。借鉴国际标准，结合中国国情，本文主要分 5 章论述相关问题。

第 1 章主要介绍全球化时代洗钱问题的演变与反洗钱工作现状。洗钱犯罪发展到今天已经远远超出了其原始形态，其手段花样翻新、层出不穷，洗钱分子无孔不入，无所不用其极。作者在回顾洗钱犯罪发展演变历史的基础上，归纳了目前主要的洗钱和恐怖融资方法和渠道、金融领域和特定非金融领域的风险和漏洞，抽象出洗钱和恐怖融资的基本过程和主要类型，研究了洗钱与其“上游犯罪”和“衍生犯罪”的关系、渊源和趋势，总结了新形势下洗钱的危害和反洗钱工作的重点。同时针对国际反洗钱立法庞杂、标准不一、适用困难的情况，归纳总结出了 20 余部国际反洗钱立法的主要精神和原则，结合具有代表性的美国、英国等国家的立法实践，为我国反洗钱法律体系和机构体系的建设与完善提供重要参考。

第 2 章主要讨论中国反洗钱法律体系的建设与完善问题。作者认为，中国的反洗钱法律的制定和完善受到国际反洗钱立法和国内反洗钱实践两种因素的影响。其中，国际反洗钱立法对我国的影响比较大，外来因素大于内生因素，国际法的本土化是前提，移植和借鉴法律的实效是关注的重点。本章主要在回顾中国《刑法》洗钱类犯罪规定、《反洗钱法》和《金融机构反洗钱规定》等反洗钱规章的制定、修改和实践效果基础上，研究反洗钱法律体系的实效、

存在问题，并提出发展的建议。我国反洗钱立法虽然大体成型，但还存在很多缺陷，规定笼统，重要制度缺位，对非金融机构的反洗钱措施还远不到位，实践效果并不令人满意，各个层级的法律都还有继续完善的空间，这在某种程度上是照搬国际法而且缺乏前瞻性的结果。在这方面，最新国际标准、经验、案例和趋势是重要参考，中国反洗钱本土战略和亟待解决的问题才是着力点。应结合我国洗钱犯罪的现状和趋势、金融市场和特定非金融行业的发展状况和风险等级以及司法实践的情况，完善中国反洗钱法律体系。

第3章主要讨论洗钱罪本体问题和法律适用问题。鉴于《刑法》洗钱罪的规定在反洗钱整体战略制定和执行中具有极其重要地位，其直接影响《反洗钱法》等其他法律法规的制定，影响洗钱罪的司法认定，因此本章专门讨论洗钱罪的构成要件和司法实践中出现的问题。作者认为目前《刑法》洗钱类犯罪分别规定在第191条、第312条和第314条，这三个条款本质上都属于洗钱犯罪，分开规定是历史的产物，是我国立法和国际公约相协调过程中的过渡现象，虽然原则上适用“法条竞合”，但因三条规定相互交叉，又不能完全互补，实践中的适用比较混乱。另外对于“上游犯罪”、“犯罪的主观方面认定”、“具体的洗钱类型”、“自洗钱”等问题还存在较大争议，虽然最高人民法院适时出台了《关于审理洗钱等刑事案件具体应用法律若干问题的解释》，一定程度上为法律的适用提供了指引，但限于其“司法解释”的权限，还有很多重大问题没有解决，比如上游犯罪人“自洗钱”问题，司法实践中采取的上游犯罪“吸收”洗钱罪的处断原则是我国洗钱罪设立十余年来定罪的也不过20余起现状的重要原因。作者认为“牵连犯”理论更适合洗钱罪的司法认定。同时，与洗钱罪并列的“资助恐怖活动罪”的规定还不完善，司法解释有扩大解释之嫌，这些问题都需要通过将来立法予以解决。

第 4 章研究反洗钱机制体系建设与机构间的合作问题。本章首先研究国际法中机构体系建设的标准和具有典型性的国家反洗钱机构体系的特点。国际立法主要规定金融情报机构、执法机构和监管机构是反洗钱体系的主体，但各国在落实国际法的过程中都结合本国的实际情况进行机构设置，有的独立设置，有的设立综合性部门。本文研究了具有代表性的美国、马恩岛和新加坡的反洗钱机制，并深入分析了我国人民银行牵头的“反洗钱部际联席会议制度”的建设和完善。在此基础上，归纳总结出反洗钱机构体系的核心是反洗钱金融情报机构，进而在第 2 节中具体研究该项制度。作者认为金融情报机构是反洗钱领域的制度创新，在国家反洗钱机构体系中承担核心枢纽和信息交互平台的作用，新近的国际反洗钱立法都对此制度作了详细规定，全世界 100 多个国家和地区都建立了该机构。而且“陈水扁洗钱案”等一系列重大洗钱案件的侦破都显示了该机构的强大功能。在对比研究了该项制度的国际标准以及具有代表性的行政型、执法型、司法型和混合型的金融情报机构后，重新审视人民银行下属的中国反洗钱监测分析中心的职责履行情况，以及与国际标准的差距并提出发展建议。

第 5 章主要探讨反洗钱国际合作的问题。本章第 1 节主要研究国际主要的专业反洗钱组织——金融行动特别工作组、埃格蒙特集团等国际组织的产生，职能和发展方向，以及中国在相关国际组织中的角色。国际反洗钱合作交织了国际政治、经济等多方面因素，各国在参与国际合作时既有共同利益、也有集团利益和个别利益，因此很多国家都把国际反洗钱工作当成重要的政治和金融工具，如美国对于利用其金融情报机构——金融犯罪执法局（FinCEN），借用反洗钱和反恐怖融资的名义对不合作国家实施金融制裁，因此作者认为我国的国际合作在宏观上既要履行国际义务，也要利用好这

个平台保护国家利益。作者在第2节首先介绍了国际反洗钱执法和司法合作的国际标准和概况，重点回顾了我国在这些领域的工作现状。我国刚刚开展这个领域的国际合作，还很不成熟，根据我国国情，可借鉴的国际经验并不是很多，这仍需要积极探索。目前国际反洗钱合作的重点是金融情报的交流与合作，作者在该部分详细探讨了国际金融情报交流合作的程序、方式、内容、渠道、特点、发展趋势以及我国开展这项工作的关注点。

关键词：反洗钱 法律适用 法律体系 机构体系 国际合作

Abstract

In the era of economic globalization, money laundering, involving with high level of technology is one of the most serious crimes which have been classified as non-traditional security issues by the international community. Interweaving political, economic factors, money laundering provokes drugs issues, corruption and other kinds of "predicate offence" and breeds seeds of terrorism financing, nuclear proliferation financing, etc. Therefore, anti-money laundering becomes an important political and financial "weapon", not merely aiming at fighting criminals. International anti-money laundering activity is a game balancing by political and financial powers from different countries. Today, many countries and the international community become more and more aware of the importance, complexity, urgency and long-term duration of anti-money laundering and they adopt different counter-measurements from international political, financial and legal level.

At the same time, every country and organization has its own core purpose and strategy on anti-money laundering. During the cooperation, they share the common concerns as well as divergence. As the only remaining super power in western world, the United States inclines to

focusing on fighting against terrorism financing. In China, anti-money laundering action has made outstanding contributions to fighting against financial crime and anti-corruption work at first, however, with the continuous development of working practices, some scholars are now studying the feasibility of using it in combating with the "three forces" and maintaining social stability. From this perspective, when we look at the mechanisms, special measures and the status and trends of the international anti-money laundering, we will be provided with new and conducive ideas which will help us to improve the anti-money laundering system, safeguard national security, social stability and interests in the world.

According to the standards of the authoritative international anti-money laundering organizations - Financial Action Task Force (FATF, Financial Action Task Force), national anti-money laundering work and policies should improve from the next three aspects: 1. The construction of legal system; 2. Institution system and domestic cooperation; 3. international cooperation. Referring to international standards and national conditions of China, this paper mainly consists of five chapters on related issues.

Chapter 1 introduces the evolution of money-laundering issue and the present status of anti-money laundering work in the era of globalization. Nowadays, money-laundering crimes have far exceeded its original form. After reviewing the history of money-laundering crimes, this thesis concludes the major methods and channels of terrorist financing as well as the risks and vulnerabilities in the financial sector and specific non-financial sector, and then abstracts out the basic process and major

types of money laundering and terrorist financing. It also deals with the relationship between the "predicate crimes" and "derivative crimes" of money laundering under the new circumstances. At the mean time, due to the complication and multi-standard of the international legislation and principles, this thesis refines the main spirits of anti-money laundering after summarizing more than 20 pieces of different laws. Regarding the practice of United States, Britain and other countries, this thesis provides important references to improve our anti - money laundering legal system and the construction in China.

Chapter 2 focuses on the construction and improvement of Chinese anti-money laundering legal system. The author believes that the domestic legislation of anti-money laundering in China is influenced by the international anti-money laundering legislation. The influences internationally are stronger than those domestically. The localization of international law is premise and the effect of transplantation of international law is keystone. This chapter reviews the legislation and practice effects of "Anti-Money Laundering Law" and "anti-money laundering regulations of financial institutions" etc, concentrating the effectiveness and existence of anti-money laundering legal system while presenting some advices for further development.

Although the general frame of China's anti-money laundering legislation system has been built, there are many defects, such as the lack of critical principles and anti-money laundering measures for non-financial institutions, etc. The effects of practice are far from satisfactory. There is much room to promote the effectiveness of law from different layers of the system. This result may be caused by only copying the

international law without concerning the present circumstances in China. In this regard, the latest international standards, experience, case studies and trends are only important references for making domestic anti-money laundering strategies in China. The localization of domestic anti-money laundering strategies and problems are the main focus now. We should combine current status and trends of money laundering, financial markets, specific non-financial sector developments, risk rating as well as the judicial practice together in order to complete the our anti-money laundering law system.

Chapter 3 focuses on the legal application and ontology of money laundering crime. The Criminal Law has an extremely important impact on the overall strategy making and implement of anti-money laundering action, which directly influence the legislation of "Anti-Money Laundering Law" and other laws and regulations as well as the judicial determination. This chapter mainly deals with the constructional elements of the crime and the judicial practice problems. Current Criminal law states about money-laundering crimes in Article191, 312 and 314 separately. Separate provision is a product of history. It is a transitional phenomenon of the coordination between our country's legislation and international conventions. Although it fits the rule of "concurrence of the articles of law", the three legal provisions cross with each other without complementation. It may cause chaotic application in practice. In addition, "predicate offence", "subjective aspect of crime found," "a specific type of money-laundering", "self-laundering" and other issues still have contradictory questions. Though the new judicial interpretation issued by the Supreme People's Court provides some guidelines

for the practice of anti-money laundering action, many issues remain unsolved confined by the authority of judicial interpretation. For instance, concerning to the issue of self-laundering of predicate offence criminal, the principle of absorbable offense in the judicial practice cause that there are only about 20 cases convicted in the name of money-laundering since the offences is provided in the penal code. The author holds the opinion that implicated offence theory is more suitable for judicial determination of the money laundering crime. At the same time, "crime of financing of terrorist activities", apposing with money laundering, is not perfect. The judicial interpretations may have expanded too much. These issues need to be addressed through legislation in the future.

Chapter 4 studies the cooperation between the anti-money laundering system construction and the organization. This chapter first studies the standards of institutional system of international law and the typical characteristics of anti-money laundering institutional system. According to the main provisions of international legislation, financial intelligence agencies, law enforcement agencies and regulatory bodies are the main body of anti-money laundering system. However, different countries have their own institutional settings concerning with the actual situation in the implementation of the process of international law. Some of them set up independent sectors while others establish integrated ones. This thesis investigates the anti-money laundering mechanisms of the United States, the Isle of Man, and Singapore, analyzing the construction of "inter-ministerial joint conference on anti-money laundering regime" led by the People's Bank of China. Based on the results, this thesis concludes that the core of anti-money laundering institutional system is anti-money

laundering financial intelligence unit which will be further discussed in the second section of this chapter. The author holds the opinion that as an institutional innovation, anti-money laundering financial intelligence unit functions as the core hub and information cross-platform. Recent international anti-money laundering legislation all focus on this system and similar institution have been set up in more than 100 countries and regions around the world. A series of major money-laundering cases including the "Chen Shui-bian money-laundering case" certificate the effectiveness of this institution. In the comparative study of international standards and administrative, law enforcement, judicial and mixed types of financial intelligence unit, this thesis re-examines the action of Anti-Money Laundering Monitoring and Analysis Center under the People's Bank of China. At the same time, some productive advice is provided.

Chapter 5 mainly discusses the issue of international cooperation against money laundering. In the first section, the author mainly discuss the major international anti-money laundering organization - the Financial Action Task Force, the Egmont Group and other international organizations and their production, function and direction of development as well as China' s role in relevant international organizations. Since different countries participating in international cooperation have common interests, group interests and individual interests, many of them take anti-money laundering as important political and financial instruments. For example, the United States uses her financial intelligence unit - Financial Crimes Enforcement Agency (FinCEN) to implement financial sanctions on non-cooperative countries with the excuse of anti-money laundering and anti-terrorist financing. Therefore, this thesis

claims that in the macro level of international cooperation, we have to obey the international obligations and protect national interests while making good use of this opportunity. In section Two, the author first introduces the standards of international anti-money laundering law enforcement and judicial cooperation, and then focuses on reviewing the status of current situation. Based on our national conditions, there is not enough international experience for us to learn since China just launched international cooperation in this field. Currently, international anti-money laundering cooperation focuses on the exchange and cooperation of financial intelligence unit. This thesis discusses the cooperation procedures, methods, content, channel, characteristics, trends and the concerns of carrying out the work in China.

KEY WORDS：anti-money laundering, application of law, legal system, institutional system, international cooperation