January, 2002

Money Laundering Has Gone Global

Stefan D Cassella

Money Laundering Has Gone Global: It's Time to Update the Federal Laws

Stefan D. Cassella[1]

Money laundering is the process by which criminals conceal or disguise the proceeds of their crimes, or convert those proceeds into goods and services. It allows criminals to infuse their ill-gotten money into the stream of commerce, thus corrupting financial institutions and the money supply, and giving criminals unwarranted economic power. And it fosters future criminal conduct by allowing past conduct to go undetected and unpunished, and by providing the criminal with the means to enjoy the fruits of that conduct while financing greater and more sinister schemes in the future.

There is also a new form of money laundering – some call it *reverse* money laundering – whereby a criminal moves "clean" money – *i.e.* money not derived from any prior criminal act – through a series of shadowy transactions so that it can be used to commit a criminal act, or an act of terrorism, without leaving a paper trail.

The United States was among the first nations to recognize the threat posed by money laundering if it is left unchecked. In the 1970's, when criminals were routinely depositing large quantities of cash into the banking system, Congress responded by enacting the first currency reporting statutes. Those laws, now part of the Bank Secrecy Act (31 U.S.C. 5311, et seq.), require banks and other financial institutions to file a report with the IRS on any cash transaction in excess of $10,000 – thus creating the paper trail that a criminal engaged in a cash-only business goes to great lengths to avoid.

When criminals reacted to the currency reporting laws by developing ever more sophisticated means of hiding and spending their money – e.g., by dividing it up into amounts under $10,000, or by commingling it with income from legitimate businesses or engaging in transactions in the names of third parties – Congress responded again, this time by making the act of money laundering itself a crime in 1986. *See* 18 U.S.C. §§ 1956-57.

Money laundering has gone global

Those anti-money laundering measures have worked well. There are hundreds of prosecutions under the money laundering laws every year, and hundreds of millions of dollars in laundered funds are seized under the parallel asset forfeiture provisions. *See* 18 U.S.C. §§ 981-86. But the laws passed in 1986 were enacted to address what was then almost entirely a domestic problem. Criminals in the United States laundered their money here; criminals elsewhere kept their money at home. Today it is very different: money laundering has gone global.

Criminals in the United States have once again reacted to the successful enforcement of the anti-money laundering laws by finding new ways to hide and spend their money. Increasingly, that means sending it overseas through a complex series of transactions involving shell corporations and off-shore banks operating in countries that do not have effective currency reporting or other money laundering laws. Millions of dollars in proceeds from a credit card fraud scheme in Los Angeles may be laundered through an off-shore bank in the Caribbean and another bank on the island nation of Vanuatu before being deposited in the name of a bogus corporation in Australia. Or millions of dollars in cash proceeds of drug sales in New York may be smuggled out of the United States and deposited into Mexican banks, or sold on the "black market" in Colombia, only to end up in the bank account of an Italian corporation in Milan.

At the same time, foreign criminals have discovered the ease with which they can place the proceeds of their crimes in the United States. Millions of dollars derived from organized crime in Russia have been discovered in major banks in New York. Millions more derived from an investment fraud scheme in Japan were found invested in Las Vegas. And terrorist funds from the HAMAS organization in the Middle East have turned up in Chicago. Millions more are invested in the United States indirectly when criminals deposit dollars into dollar-denominated accounts at foreign banks that in turn keep those funds in correspondent accounts held in their own names at the major financial institutions in this country.

Criminals – principally drug dealers, but as we now know, terrorists as well – who are engaged in all-cash operations, have also reacted to the successful enforcement of the currency reporting laws by keeping their money out of the banking system entirely. Instead, they engage a cadre of couriers to transport huge volumes of currency in boxes, suitcases, and the concealed compartments in vehicles, on the highways and through the airports, so that it may be smuggled out of the country and placed in a bank in a jurisdiction boasting of lax enforcement. Such bulk cash smuggling may be the most common form of money laundering today.

Perhaps most ominously, criminals and terrorists have learned to reverse the money laundering process. In a reverse money laundering operation, the minions of a terrorist cell transport large quantities of cash, or conduct intricate transactions through non-bank financial institutions that do not involve criminal proceeds at all, but money from legitimate sources that is moved from one bank account or location to another until it is ready to be used to acquire the instruments of terror and destruction.

It is obvious that unless the United States wants to become the world's repository for criminal proceeds, unless it wants to allow its most sophisticated and nefarious criminals and terrorists to continue to flout the money laundering laws and hide their money overseas, and to use foreign funds to finance acts of terrorism against the United States, the laws now on the books must be updated. But the statutes enacted in the 1970's and 1980's to address the then-domestic money laundering problem have not been revised in any significant way since 1992.

In September 2001, Attorney General John Ashcroft sent to Congress a comprehensive set of legislative proposals designed to bring the money laundering laws into the 21st Century. These provisions were intended to re-arm law enforcement in its struggle against criminals from abroad who would use our own technology – in this instance, our financial system – against us to hide their criminal proceeds or to conceal and disguise the funds they plan to use to commit atrocities against American citizens. The proposals also would make it doubly difficult for our home-grown criminals to launder their criminal proceeds through foreign banks, black markets, and the other avenues of international finance.

Some of these proposals where enacted in the wake of the September 11 attack when President Bush signed the USA PATRIOT Act into law on October 26, 2001. But a great deal more remains to be done. The balance of this article discusses some of the changes to federal law that have just been made, and still need to be made, to allow law enforcement to combat a problem that has now gone global.

Make it crime for foreign criminals to launder their money here

Every country's money laundering laws are different. Some make it an offense to launder the proceeds of any crime, foreign or domestic. Others are more restrictive, making it an offense to launder only certain kinds of criminal proceeds in certain situations. The federal money laundering statute that was enacted in 1986 is one of the more restrictive ones. It authorizes a prosecution for money laundering only if the crime that generated the money falls within a defined set of federal, state and foreign crimes called "specified unlawful activity." *See* 18 U.S.C. § 1956(c)(7). Unless the money being laundered came from an offense on the list of specified crimes, no money laundering prosecution is possible.

The list of "specified unlawful activities" is extensive: it contains over 200 separate offenses; but only a handful of those offenses are foreign crimes, including drug trafficking, bank fraud, public corruption and crimes of violence.. The great majority of other foreign crimes – crimes that routinely generate money that the criminal wants to hide or invest somewhere else, or that may be used to finance criminal acts in the United States – such as consumer fraud, theft, and tax evasion, to mention only a few -- are not on the list, making it very difficult for a prosecutor to use the money laundering laws to prevent the banks in the United States from being used to wash the proceeds of the crimes committed around the world.

This gaping hole in U.S. law makes it extraordinarily difficult for federal law enforcement to keep the proceeds of foreign crimes out of our financial institutions. The solution is to amend the money laundering statute so that foreign criminals and domestic criminals are placed on equal footing: laundering the proceeds of any serious crime, in the United States, should be a criminal offense, regardless of where the underlying crime was committed.

Correspondent bank accounts

Proceeds of foreign crimes – and proceeds of domestic crimes that have already been smuggled out of the country – enter (or re-enter) the U.S. in another way – through correspondent bank accounts. Here is how it works. A person with criminal proceeds in another country opens a bank account denominated in U.S. dollars at a local bank. This can be a full-fledged bank, but is very commonly a bank existing on paper only in an off-shore jurisdiction with ineffective banking laws. In any event, the bank accepts the criminal proceeds, depositing them, in turn, into the account that the bank itself maintains at a major bank in the U.S. The U.S. bank account is called a "correspondent account," and the account holder – i.e., the person who has control over the funds, is the foreign bank. The criminal, or his money launderer, remains off-shore, able to withdraw his funds from the foreign bank at any time, but secure in the knowledge that his money is safely invested in the United States in the name of the foreign bank.

In 2001, a Senate report documented numerous instances of money laundering through correspondent bank accounts, but pointed out that the existing law was entirely inadequate to stop it. *See Report on Correspondent Banking: A Gateway to Money Laundering,* Minority Staff of the U.S. Senate Permanent Subcommittee on Investigations (February 5, 2001). The problem was that even though law enforcement could trace the funds in the correspondent account to a specific crime, it could not seize the money because the law treated the foreign bank as the owner, and innocent owners of criminal proceeds are protected under the asset forfeiture laws. 18 U.S.C. § 983(d). Thus, a criminal could place his money in the correspondent account of a foreign bank secure in the knowledge that the bank's innocent owner defense would protect the money from seizure by U.S. law enforcement.

Happily, this is one problem that Congress has resolved. Under a new statute, 18 U.S.C. § 981(k), enacted by the USA PATRIOT Act, when a criminal deposits funds that are subject to forfeiture under U.S. law into a foreign bank account, the Government can seize an equal amount of money from the foreign bank's correspondent account, and can institute a forfeiture action in which the onus is on the depositor – who is considered to be the owner of the funds – to challenge the forfeiture action in the U.S. courts. If he is unsuccessful, the foreign bank will recover the funds taken from its correspondent account by debiting the foreign bank account of its unscrupulous customer.

The new law also makes it possible for law enforcement agencies in the United

States to obtain records from foreign banks regarding transactions that take place abroad. Under 31 U.S.C. § 5318(k), foreign banks are required, as a condition of opening a correspondent account in the United States, to designate a person in the U.S. authorized to accept a subpoena for bank records, and the Attorney General and Secretary of the Treasury are authorized to serve that person with a subpoena for records concerning transactions that took place in the foreign bank in the foreign country. Refusal to comply with such a subpoena constitutes grounds for closing the correspondent account.

Enforcing foreign confiscation orders.

Suppose a criminal in the United Kingdom hides his criminal proceeds in a bank account in Chicago, but British authorities get an order from a British court ordering the confiscation of those funds by the Crown. Can the Crown Prosecutor present that order at the Chicago bank and demand the funds? Unfortunately not. The British confiscation order, like the order of any foreign court, is meaningless unless it can be enforced by a court in the United States – in this case, the federal district court for the Northern District of Illinois.

For many years, there was no way to enforce such a foreign confiscation order; but under 28 U.S.C. § 2467, which was enacted as part of the Civil Asset Forfeiture Reform Act of 2000, that can now be done. Through an elaborate procedure that ensures that the foreign order was obtained pursuant to what we would consider due process, the United States can apply to the federal courts to enforce foreign confiscation orders. But as originally enacted, the new law lacked any mechanism for freezing the funds in place while the foreign authorities obtained their confiscation order and transmitted it to the United States, and the U.S. authorities obtained the necessary approval to enforce it. Criminals, it is sad to say, do not sit idly by while two sets of lawyers and judges on either side of the Atlantic tie ribbons and bows around official documents. What was badly needed was a provision authorizing a U.S. court to freeze funds from foreign sources that are found in the United States long enough to allow the provisions of Section 2467 to be applied.

Another provision of the USA PATRIOT Act does just that. New language in Section 2467(d)(3) authorizes a district court to "preserve the availability of property subject to a foreign forfeiture or confiscation judgment" by issuing a restraining order "at any time before or after" the Government receives a final judgment of forfeiture from the foreign court. Moreover, the new statute provides that in issuing the restraining order, the court may either (1) rely on an affidavit "describing the nature of the proceeding or investigation underway in the foreign country" and setting forth the basis for the restraint, or (2) "register and enforce" a foreign restraining order.

Most important, the new statute provides that no person may contest the issuance of the restraining order "on any ground that is the subject of parallel litigation involving the same property that is pending in a foreign court." This provision avoids the "two bites at the apple" problem that so often arises when one country asks another to restrain property that is located in the second country but is subject to forfeiture in the first. Almost invariably, the court that restrains the property will allow potential claimants to object to the restraining order on grounds—such as an innocent owner defense—that can also be raised in the court in the country where the forfeiture case is pending. . This gives the claimant the advantage of being able to attack the forfeiture twice on the same grounds—if he is unable to persuade the court that restrained the property to vacate the restraining order, he may file a claim in the court where the case is pending and assert the same defense all over again. Under new Section 2467(d)(3), the curtain has dropped on this charade.

U.S. criminal proceeds sent overseas

Those are some of the things that could be done and have been done to protect U.S. financial institutions from being used by foreign criminals to hide their dirty money in the United States. What about measures designed to stop our own criminals from laundering their money abroad?

It is already a crime for a person in the United States to send more than $10,000 in criminal proceeds abroad by means of any monetary transaction. *See* 18 U.S.C. § 1957. But criminals have found a way around this provision, simply by commingling their dirty money in a bank account. In one celebrated case, a California doctor deposited the proceeds of his health care fraud offense into a local bank where it was commingled with other funds. When the good doctor got wind of a criminal investigation (the FBI had just searched his office), he dispatched his wife to the bank to wire $7 million to the Isle of Man.

Prosecutors assumed that at least $10,000 of the criminal proceeds was included in the $7 million and charged the defendant with a violation of Section 1957. The jury agreed, but the Ninth Circuit Court of Appeals overturned the conviction. The problem was that the doctor and his wife had left enough money in the California bank to account for all of the dirty money. To the Government, it made no sense to assume that a defendant under criminal investigation would send his *clean* money to the Isle of Man while leaving his criminal proceeds in California where federal agents could find it. But the law, according to the Ninth Circuit, is to the contrary: a criminal is entitled to the presumption that his dirty money stays in a commingled bank account until all clean funds are withdrawn. *See United States v. Rutgard*, 116 F.3d 1270, 1292 (9th Cir. 1997).

The upshot of *Rutgard* and a similar holding in the Fifth Circuit is that all a criminal has to do to evade sanctions under Section 1957 is to have his victim deposit the criminal proceeds in a bank account containing an equivalent amount of untainted money. When the defendant withdraws that amount the next day and sends it to France, the law presumes that he is sending the clean money, so there is no money laundering offense for which the defendant may be prosecuted. The solution, of course, is to amend the money laundering statute to make it clear that any transaction involving commingled funds meets the $10,000 threshold if there was at least $10,000 in dirty funds deposited into the account before the transaction took place.

Is money fungible?

Another problem involving commingled bank accounts limits the ability of the Government to confiscate laundered money under the asset forfeiture laws. Suppose a drug dealer contrives to get a million dollars in drug proceeds into a bank account – either foreign or domestic; and suppose law enforcement eventually discovers the account and finds that a million dollars is still there. Can the Government seize it? It depends. The civil forfeiture laws require that the property being seized be directly traceable to the property that was generated by the criminal act. So isn't the million dollars in the drug dealer's account traceable to the drug proceeds he put in there? Not if the balance in the bank account went down and up again between the time of the deposit and the time the Government discovered the money. Placing money in a volatile bank account, in other words, destroys the link between the initial deposit and the eventual seizure. *See United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986).

But, you may say, money is fungible – particularly electronic funds in a bank account. One dollar is the same as another. True enough, but current law says that money is fungible for purposes of the forfeiture laws for only one year. 18 U.S.C. § 984. If the criminal puts his money in a Bahamian bank in January and the Government discovers it in November, it is considered the same money and can be recovered. But if the money remains undetected until the next year, and the account was volatile, the money has, for all practical purposes, been washed.

It has happened – on far too many occasions – that Government agents, posing as money launderers in undercover operations, have deposited drug proceeds in a U.S. or foreign bank account on behalf of drug dealers, planning all along to recover the money when the case is over, but are frustrated in their ability to do so by the fact that most undercover operations run for at least 18 months. By that time, the money deposited during the first 6 months of the operation is no longer considered fungible and cannot be recovered, even though the proof is positive beyond peradventure that drug money was deposited into the bank account.

The solution is simple: in money laundering cases, there should be no limit on how long money is considered fungible. Any other rule only encourages the shell game involving electronic funds that the money laundering laws were intended to avoid. The world's money launderers will be inconvenienced by this new rule, to be sure; the rest of us, including victims of frauds who would like to recover their money, will be pleased.

Getting laundered money back from foreign countries

Suppose a criminal mastermind, operating in the United States, is caught, and there is reason to believe that he has sent his criminal proceeds overseas. Can the U.S. get it back? Yes, but first the Government has to find it.

The criminal forfeiture laws contain a mechanism for conducting post-conviction investigations to locate the proceeds of the crime for which the defendant has been convicted. *See* 21 U.S.C. § 853(m). Among other things, the Government can take the depositions of witnesses who might know where the defendant has hidden his dirty money. (In one case it was literally dirty: he'd buried it in his mother's backyard.) But the statute contains a serious flaw: it requires that the defendant (who has by now been convicted of the offense) be present at any post-conviction deposition. That means that any time the Government wants to question an accountant, banker or former criminal associate of the defendant under oath regarding the location of the defendant's money, the Government has to arrange to transport the defendant from the penitentiary where he is housed so that he may glare across the table at the witness being questioned. *United States v. Saccoccia*, 913 F. Supp. 129 (D.R.I. 1996).

That procedure is totally unnecessary. The defendant, having been convicted, no longer has any interest in the proceeds of the crime. A simple amendment to Section 853(m) – stating that a convicted defendant has no right to be present at a post-conviction deposition – would deprive convicted criminals of this obvious means of intimidating witnesses in the hope of holding on to their money until their jail term has expired.

Money transferred to third parties

Another common device employed by criminals bent on preventing the Government from ever recovering their criminal proceeds is to transfer the money to a third party, such as a family member, girlfriend, corporation or attorney. Can the Government recover the money from that person? Sometimes. The criminal forfeiture laws say that a transaction transferring criminal proceeds to a third party is void, unless the third party is a bona fide purchaser. So if the criminal spends his money on a car, the car dealer gets to keep the money; but if he gives it to his ne'er-do-well girlfriend, she does not. *See* 21 U.S.C. § 853(c).

So far, so good. But what if the third party has spent the money? Or what if the Government just can't find it? In one case, a drug dealer paid his lawyer with $100,000 in cash drug proceeds stuffed inside a cracker box. The lawyer claimed to be a bona fide purchaser and said he was entitled to keep the money, but the court said he was not, and ordered him to turn the money over to the Government. At that point, the lawyer revealed that he had already spent the money. What remedy did the Government have? Sue him, the court said, for converting Government property to his own use. *United States v. Moffitt, Zwerling & Kemler, PC*, 83 F.3d 660 (4th Cir. 1996). That holding should be made part of the money laundering statutes. It should be clear that the Government has the remedy of filing a civil lawsuit in any case in which a defendant has transferred his property to a third party (who is not a bona fide purchaser) and the money then "goes missing."

Making the defendant liable for the "missing money"

The other remedy for the "missing money" problem is to make the defendant himself liable if he has caused his criminal proceeds to disappear. There is a device in the law for doing that: it's called the forfeiture of "substitute assets." 21 U.S.C. § 853(p). It works like this: Suppose the defendant stole $500,000 from an elderly widow in a fraud scheme and then dissipated the money or transferred it overseas. By the time the defendant is convicted of the fraud offense, the actual proceeds are no longer around to be confiscated and returned to the victim. But under the "substitute assets" theory, the court may order the defendant to forfeit property of equal value to the Government, which can then use that money for restitution to the victim.

The problem with the substitute assets theory is that it presumes that a defendant under indictment for fraud or any other offense will keep his untainted assets lying around during the trial so that they are available to be forfeited as substitute assets once he is convicted. Few defendants are so accommodating. Some, in fact, may be inclined to dispose of their assets – clean and dirty – while the case is pending, just to make sure that there is nothing left to be recovered for the benefit of the victim.

In a number of cases, the Government has tried to forestall this result by asking the court for a pre-trial order restraining the defendant's property so that it doesn't go anywhere before the trial is over. But most courts have held that because of the way the forfeiture statute is drafted, *see* 21 U.S.C. § 853(e), the court may restrain actual criminal proceeds pre-trial, but not substitute assets. The most recent case to go that way involved New York mobster John Gotti. *See United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998).

Clearly this creates an enormous incentive for fraudsters, drug dealers, money launderers and others to get their money out of town as quickly as possible once they are indicted, leaving the Government with no remedy by the time the defendant is convicted. The solution? A simple one-line amendment to Section 853(e) permitting pre-trial restraint of criminal proceeds *or substitute assets*, once the defendant is indicted.

Bulk cash smuggling

One problem regarding the laundering of criminal proceeds overseas that Congress did address in 2001 was the growing problem of bulk cash smuggling. Ironically, handling all of the cash generated by street-level drug sales is one of the biggest problems that a drug dealer has. If kept as "street money" – i.e., equal numbers of 5, 10 and 20 dollar bills – the cash generated from the sale of a kilo of cocaine will weigh 4 ½ times as much as the cocaine itself. Obviously, the cash is much bulkier and harder to conceal than the cocaine is. It presents the drug dealer with a serious logistical problem, and exposes him to the loss of his entire profit – not just the loss of easily replaced raw material – if the money is discovered and confiscated.

In the "old days," – i.e., the 1980's – a drug dealer would solve this problem by getting rid of the cash as quickly as possible by putting it in a bank. The process of breaking large quantities of money up into amounts under $10,000 to avoid having the bank file any Currency Transaction Reports, *see* 31 U.S.C. § 5313, is called "structuring," and it used to be a popular form of money laundering. But structuring is now illegal, *see* 31 U.S.C. § 5324(a), and enforcement of the Currency Transaction Reporting requirements of the Bank Secrecy Act has become so tight that criminals can no longer resort to the banking system to move their money. The Bank Secrecy Act is in fact one of the great success stories of the Government's anti-money laundering program.

As a result of this success, criminals no longer handle their own cash proceeds. Instead, they contract with professional money launderers whose job is to pick up the money at a "stash house," transport it down the highway or through the airport to the border, smuggle it out of the country, and deposit it into a foreign bank or sell it on the " black market." *See* Testimony of Assistant Attorney General James Robinson, House Crime Subcommittee, February 10, 2000, text available at http://www.house.gov/judiciary/robi0210.htm. When money is laundered that way, it doesn't hit the banking system until it is safely in a foreign bank.

Prior to the enactment of the USA PATRIOT Act in 2001, the existing laws against bulk cash smuggling were wholly inadequate. The Government's only real alternatives were 1) to confiscate the cash and to prosecute the courier for failing to declare that he is taking more than $10,000 out of the country on a Customs form, *see* 31 U.S.C. § 5316, or 2) to confiscate the money from the courier on the ground that it represented the proceeds of a criminal offense, *see* 18 U.S.C. § 981(a)(1)(C). The former was a weak weapon at best, and several years ago the Supreme Court undermined whatever force it had as a deterrent to currency smuggling by holding that the statutory penalty – confiscation of the unreported money – is "grossly disproportional to the gravity of the offense." *United States v. Bajakajian*, 118 S. Ct. 2028 (1998). In other words, the Court held that failing to file a Customs form was too minor a crime to justify so harsh a penalty as confiscation of the unreported money; yet that was precisely the penalty that was needed to deter a money launderer from using bulk cash smuggling as the means of getting criminal proceeds into the banking system so they can be transferred anywhere in the world.

The Government's second alternative – seizing the currency from the courier – is a useful tool when the Government can prove that the money is criminal proceeds; and recent case law has enhanced this option by holding that the Government may rely on a positive alert from a trained drug dog to establish that a quantity of currency, concealed in the luggage or on the person of a courier, is in fact drug proceeds. *See United States v. $22,474 in U.S. Currency*, 246 F.3d 1212 (9th Cir. 2001). Seizing the currency from the courier, of course, interrupts the cycle in which drugs flow north from South America and money flows south to be used to purchase more drugs, pay for lavish lifestyles, and perpetuate the scheme into the future. But this alternative is of no use in a "reverse money laundering" situation where the money is not the proceeds of any crime at all, but is being smuggled so that it can be used to finance a criminal act at another place and time.

Moreover, simply seizing the money does nothing to the courier. Wouldn't it be better if instead of seizing the cash and letting the courier go on his way the Government could charge the courier with a criminal offense? Unfortunately, simply transporting criminal proceeds from one place to another does not violate the money laundering laws. *See United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994). In fact, it is not a crime at all. But is should be.

In the USA PATRIOT Act, Congress addressed half of this problem by making bulk cash smuggling a crime. Under 31 U.S.C. § 5332, it is now an offense to smuggle more than $10,000 into or out of the United States with the intent to evade the Customs laws. Moreover, Congress specifically provided that the penalty for the offense includes the confiscation of the smuggled cash. After all, if smuggling diamonds or firearms are crimes serious enough to justify the seizure of the smuggled goods, which they certainly are, why shouldn't the smuggling of criminal proceeds in bulk cash form be considered equally serious? Congress clearly thought it should be.

What Congress failed to address, however, was the act of transporting cash in excess of $10,000 from one place to another. Transporting such a large quantity of cash – on a highway, in an airport or on a train or bus – should be an offense as well, if the courier knows the money is criminal proceeds, or that it is intended to be used for an unlawful purpose. We now know from press reports that at least some of the terrorists involved in the attacks of September 11 were engaged in moving quantities of currency from place to place in the United States, using public transportation and other facilities of interstate commerce, and clearly intending that the money be used to commit one of the greatest criminal acts ever perpetrated on American soil. Nothing could more dramatically underscore the need to make the clandestine movement of large quantities of cash that is intended for a criminal purpose a serious offense under federal law.

Reverse money laundering and hawalas

Finally, Congress needs to address the most serious new money laundering problems to emerge from the September 11 attack: reverse money laundering through financial institutions, and the laundering of money through the informal money exchangers called hawalas.

First, we need to change the way we think about money laundering. For more than a decade, money laundering enforcement has looked backward, asking what was the source of the laundered money, and how has the bad guy tried to hide it? In the new age, we must look forward: what is the bad guy planning to do with the money that he is going to such great lengths to conceal?

Aside from the currency smuggling statute, only one existing money laundering statute does not require proof that the money being laundered is the proceeds of another crime. Section 1956(a)(2)(A) of title 18 makes it a crime to transfer money – *any* money – into or out of the United States with the intent to promote a criminal offense. What we need is a domestic version of that offense: a statute that makes it a crime to conduct financial transactions with the intent to promote or to commit another crime. The State of Florida already has such a law, *see* Florida Statutes, Section 896.101(b); the federal Government should have one as well.

Second, we need to address the laundering of supposedly "clean" money through informal money exchange businesses such as money remitters and hawalas. Here is a common problem that arises in such informal transactions. It might be called the "left-pocket, right-pocket" problem.

Suppose a wrongdoer has money that he wants to transfer to a confederate in another place, but he doesn't want to deal with the confederate directly, and doesn't want to create a paper trail connecting himself with the confederate. What he needs, in other words, is a middle man with two pockets. Our wrongdoer approaches the middle man and puts money into his left pocket, and gives him instructions on whom to pay. The middle man, being well-heeled, already has an equal amount of money in his right pocket, which he proceeds to deliver to the wrongdoer's confederate, leaving the money in his left pocket right where it is, ready to be sent to some unrelated person as part of a wholly separate transaction.

This scenario obviously poses an investigative nightmare for the law enforcement agent who is trying to link the wrongdoer to his confederate through the financial transaction, particularly if the "left pocket" is a bank account in one country and the "right pocket" is another account in another name in another country. Much can be done to require such non-traditional money brokers to keep records, file currency transaction reports, and comply with licensing requirements that will make the task of the investigator less daunting. But more than that, even if the connection is made, there is a question under current law as to whether the second half of the transaction even constitutes a criminal offense.

To be a violation of the current money laundering laws, each financial transaction must involve criminal proceeds. Even if the money placed in the middle man's left pocket is such proceeds, can we say with confidence that the later transfer from his right pocket involves proceeds as well? If the wrongdoer puts criminal proceeds in the middle man's "left pocket" in Pakistan, is the middle man's transfer of funds from his "right pocket" in the United States a money laundering offense? To be sure, this scenario has " money laundering" written all over it. But is there a loophole in the law?

Maybe not. Some cases involving such parallel transaction have resulted in criminal convictions. *See United States v. Covey,* 232 F.3d 641 (8th Cir. 2000). But a simple change in the law would remove all doubt – an amendment that says if a financial transaction involves criminal proceeds, then any parallel transaction, or transaction that completes or complements that transaction involves proceeds as well. Closing this potential loophole would nip a major international money laundering problem in the bud.

Conclusion

Money laundering is now a global problem. Correspondent banking, the ease of sending money and opening an account over the internet, the ubiquity of money remitters in the major cities, and bulk cash smuggling have all made it so. But the tools available to federal law enforcement were designed to address a domestic problem. We cannot fight a global law enforcement problem with domestic tools any more that our country could fight a war against terrorism without recognizing the global reach of its adversary. The laws now in effect are simply out-of-date, and should be rewritten to allow us to bring to a criminal to justice whether he hides his dirty money in Albany or Antigua. For Congress, this should be the first major law enforcement initiative of the 21st Century.

[1] The author is the Assistant Chief of the Asset Forfeiture and Money Laundering Section of the United States Department of Justice. The views expressed in this article, however, are the personal views of the author and do not necessarily represent the views or policies of the Department of Justice.