REPORT FOR THE SENATE AND HOUSE JUDICIARY COMMITTEES

ON

THE CHARGING AND PLEA PRACTICES OF FEDERAL PROSECUTORS

WITH RESPECT TO THE OFFENSE OF MONEY LAUNDERING

INTRODUCTION

By letter dated May 1, 1995, the U.S. Sentencing Commission forwarded to the Congress amendments to the sentencing guidelines for money laundering offenses sentenced under §§ 2S1.1 and 2S1.2 of the Sentencing Guidelines. On October 30, 1995, President Clinton signed into law a bill which prevented the Sentencing Commission's proposed amendments to the money laundering sentencing guidelines from going into effect.[1] The legislation included the following provision:

> No later than May 1, 1996, the Department of Justice shall submit to the Judiciary Committees of the Senate and House of Representatives a report on the charging and plea practices of Federal prosecutors with respect to the offense of money laundering. Such study shall include an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute.

In accordance with this legislative mandate, the Department of Justice hereby submits the following report to the Judiciary Committees of the United States Senate and House of Representatives. The first section of this report provides background information which is essential for a full understanding of the overall issue of money laundering and the Department of Justice's response to this serious problem. The second section of the report addresses the specific questions contained in this mandate.

BACKGROUND

Money laundering is a crime which has reached alarming proportions on both the national and international level. Money laundering is the process by which criminally-derived proceeds are converted into other assets so that they can be reintroduced into legitimate commerce in order to conceal their true origin or ownership, or so that they can be used to finance additional criminal activity. Estimates indicate that as much as $300 billion in criminally-derived proceeds are laundered annually, worldwide. While drug trafficking is the most widely recognized criminal activity which is associated with money laundering,

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[1] Pub. L. 104-38, 109 Stat. 334 (1995).

money laundering sustains virtually every kind of criminal activity including white collar crimes such as health care fraud and insurance fraud. Money laundering is pernicious not only because it allows criminals to conceal the fruits of their crimes, avoid the payment of taxes, and finance legitimate businesses with dirty money, but also because it promotes additional criminal activity through the reinvestment of criminal proceeds into further illegal activity.

The process of money laundering is generally divided into three stages, although any one stage may constitute the crime of money laundering. The first stage is the placement stage, which is the stage where the proceeds of criminal activity originally enter the stream of legitimate commerce. The placement stage is the most critical stage in crimes which generate cash proceeds because it involves the initial deposit of the cash into the financial system. In both currency and non-currency cases, the placement stage is critical because it is the event in a series of transactions in which the criminal can effectively mask the criminally-derived funds, creating the opportunity for commingling with licit funds and the cloaking of the funds with an aura of legitimacy.

The second stage of money laundering is the layering stage. In this stage, attempts are made to distance the money from its illegal source through layers of financial transactions. The third stage of money laundering is the integration stage. This stage involves the re-introduction of the illegal proceeds into legitimate commerce by providing a legitimate-appearing explanation for the funds.

This laundering process is essential to the success of criminal organizations and individual criminals alike because it allows them to enjoy the fruits of their crimes and to reinvest these proceeds into further criminal activity. For this reason, Senator Thurmond has referred to money laundering as the lifeblood of the drug trade and other criminal organizations:

> Many call money laundering the lifeblood of organized crime. Illegal drugs, racketeering activities, and vice generate $150 billion annually, and it is only through increasingly complex laundering schemes that criminals are able to conceal the true source and nature of their ill-gotten gains.[2]

White collar criminals were "laundering" funds long before Congress created a separate offense. This partly explains the discomfort of defense practitioners over conduct which previously violated only fraud statutes but now violates both fraud <u>and</u>

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[2] <u>See</u> 132 Cong. Rec. 18,486-18,487 (1986).

money laundering statutes. Nevertheless, it was well within Congress' discretion to provide for additional punishment for white collar criminals who, having already succeeded in stealing, continue to churn their profits -- whether the churning is to cover their tracks, to create the opportunity for further fraud, or whether it is merely for the purpose of enjoying the luxury that their misdeeds provides. Congress sent a message to white collar criminals, too, that they may not use legitimate financial institutions to facilitate the enjoyment of criminal profit -- and while this may not be a new activity, it will generate a new and additional penalty.

While the concealment and reinvestment of the proceeds of drug trafficking, organized crime and white collar crime constitute a significant domestic law enforcement problem, the movement of criminal proceeds around the globe continues to grow as an international threat. These illegal proceeds not only enrich criminals, but also are used to corrupt government officials, distort the economies of less developed countries, and to sponsor and promote further criminal activity, including international terrorism. In a speech at the United Nations on October 22, 1995, President Clinton announced a major new initiative against transnational organized crime, and he recognized money laundering both as a significant international crime problem and as a focal point for attacking international organized crime. The President stated to the U.N.:

> Criminal enterprises are moving vast sums of ill-gotten gains through the international financial system with absolute impunity. We must not allow them to wash the blood off profits from the sale of drugs from terror or organized crimes. Nations should bring their banks and financial systems into conformity with the international anti-money laundering standards. We will work to help them do so. And if they refuse, we will consider appropriate sanctions.

International developments over the past few years have provided new challenges. The breakup of the Soviet Union has resulted in virtually unregulated financial institutions in the countries of Eastern Europe. Many governments lack the legal mechanism and enforcement apparatus to deal with money laundering and the opportunistic criminal organizations have not hesitated to take advantage of this vulnerability. This international threat is exacerbated by the emergence of a class of professional money launderers who launder the proceeds of all kinds of criminal activity. These professional launderers are well educated in financial affairs, have access to increasingly sophisticated computers and telecommunications equipment, and have contacts all around the world.

Indeed, the world's criminals and money launderers are forming international networks which allow them to exploit the

perceived weaknesses of law enforcement. Moreover, modern technological developments are allowing criminals to move their money faster and with fewer tracks than they have in the past. New electronic payment systems such as smart cards, DigiCash and CyberCash provide huge challenges for financial regulators and law enforcement. In order to meet these serious threats, it is necessary that we have a comprehensive set of anti-money laundering laws which are effectively and aggressively enforced.

The Federal Money Laundering Statutes

There are three notable features of these money laundering statutes. First, they apply not only to those who generate the unlawful proceeds, but also to those who launder the proceeds but are not involved in the predicate activity. And, indeed, the Department uses these statutes to prosecute both those who provide the funds to be laundered and those who launder the funds. Second, the money laundering statutes apply not only to transactions involving drug proceeds, but to transactions involving the proceeds of most serious criminal offenses, including offenses committed in other countries. Third, Congress, in recognition of the serious threat posed by transactions in criminal proceeds, provided high sentences for all money laundering offenses.

In order to address the increasing threat posed by money launderers and to employ a new weapon against all forms of proceeds-generating crimes, Congress enacted the Money Laundering Control Act of 1986.[3] This Act, which was included as part of the Anti-Drug Abuse Act of 1986, added sections 1956 and 1957 to the Criminal Code. Congress established an independent federal offense, punishable by prison sentences of up to 20 years, to eliminate the laundering of money gained from illegal activity.[4] Through this Act, Congress intended to render the money derived from illegal activities worthless and hit the criminal "where he bruises, and that is right in the pocketbook."[5] According to the Senate Report, the purposes of the Senate's version of the money laundering bill (S. 2683) were:

> To create a Federal offense against money laundering; to authorize forfeiture of the profits earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide Federal law enforcement agencies with

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[3] Pub. L. No. 99-570, Title I, Subtitle H, SS 1351-67, 100 Stat. 3207-18 and 3207-39 (1986).

[4] S. Rep. No. 433, 99th Cong., 2d Sess. 1 (1986).

[5] H.R. Rep. No. 855, 99th Cong., 2d Sess. 13 (1986).

additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering.[6]

Congress constructed these new money laundering statutes to apply not only to those who generate criminal proceeds but to all those who engage in a financial or monetary transactions with the requisite knowledge that the proceeds involved were derived from illicit profits. These statutes are intended to curb the flow of illicit profits back to the unlawful enterprises that created such proceeds. Thus, this process is designed to prevent the capitalization and expansion of criminal activity and to deflate the criminal's motivation for laundering money by targeting the criminal's point of vulnerability -- the need to have the money earned from the illegal activity marketable in the community.

Section 1956

Section 1956 includes three different types of money laundering offenses. Section 1956(a)(1) makes it an offense for someone knowingly to engage in a financial transaction with the proceeds of specified unlawful activity with the intent either to promote the carrying on of specified unlawful activity or to engage in conduct constituting a violation of §§ 7201 or 7206 of the Internal Revenue Code; or knowing that the transaction is designed in whole or in part to conceal or disguise the nature, source, location or ownership of the proceeds; or to avoid a transaction reporting requirement under state or federal law. Section 1956(a)(1) is the statute which is most frequently used for prosecuting money laundering.

The actual source of the funds involved in the financial transaction must be one of the specified forms of criminal activity identified by the statute, in 18 U.S.C. § 1956(c)(7), or those incorporated by reference from the RICO statute (18 U.S.C. § 1961(1)). This list of offenses consists of more than 100 federal and state criminal offenses, including drug offenses, fraud offenses, violent crimes and other offenses typical of organized crime.

Over time Congress has added to the list of non-narcotic specified unlawful activity, has never subtracted, and continues to seek ways to strengthen money laundering enforcement in the white collar area. Congress has added to the list of non-drug money laundering predicates in 1988, 1990, 1992 and 1996. For example, in 1992, Congress added food stamp fraud, violations of the Foreign Corrupt Practices Act, and theft from the mail to the list of specified unlawful activity, and also amended § 1956 (and by reference § 1957) to include transactions which involve the

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[6] S. Rep. No. 433, 99th Cong., 2d Sess. 1 (1986).

proceeds of kidnapping, robbery, extortion and bank fraud offenses which occur outside the United States. Just last month, several additional predicates were added to the money laundering statutes in the Antiterrorism Act.

The two most frequently used subsections of § 1956(a)(1) are the subsections involving concealment of criminal proceeds and the promotion of specified unlawful activity. Section 1956(a)(1)(B)(i) makes it an offense to conduct a financial transaction "knowing that the transaction was designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." This prong of the statute comprises activity that is most commonly associated with money laundering, for example, using drug proceeds to purchase stock in the name of a third party,[7] or purchasing and mistitling automobiles to conceal the ownership of drug dealers.[8]

The "intent to promote" language in § 1956(a)(1)(A)(i) is similar to the language in the Travel Act (18 U.S.C. § 1952) which makes it a crime to travel in interstate or foreign commerce with the intent to promote or carry on certain unlawful activity. A defendant may be convicted under this subsection if he/she conducts a financial transaction involving illegal proceeds with the intent to promote specified unlawful activity. Such transactions may include the purchase of telephone pagers by a drug organization to promote future illegal drug trafficking,[9] the payment of proceeds to fraud victims made for the purpose of enticing them to continue investing in a fraudulent scheme or to keep them quiet about an ongoing scheme,[10] or the payment of kickback fees to "cappers" who refer accident victims to corrupt attorneys in an insurance fraud scheme.[11]

Section 1956(a)(2) makes it an offense to transport, transmit or transfer a monetary instrument or funds into or out of the United States <u>either</u> with the intent to promote the carrying on of specified unlawful activity, <u>or</u> where the defendant knows that the funds represent the proceeds of some form of unlawful activity and that the transportation or transfer is designed to conceal or disguise the nature, location, source,

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[7] <u>United States v. Martin</u>, 933 F.2d 609 (8th Cir. 1991).

[8] <u>United States v. Antzoulatos</u>, 962 F.2d 720 (7th Cir. 1992).

[9] <u>United States v. Jackson</u>, 935 F.2d 832 (7th Cir. 1991).

[10] <u>United States v. Johnson</u>, 971 F.2d 562 (10th Cir. 1992).

[11] <u>United States v. Marbella</u>, 73 F.3d 1508 (9th Cir. 1996).

ownership or control of the proceeds of specified unlawful activity or to avoid a transaction reporting requirement.

Section 1956(a)(3) (the "sting" provision) is used in undercover money laundering investigations conducted by our law enforcement agencies. This subsection makes it a crime to engage in a financial transaction with property represented to be proceeds of specified unlawful activity. The proceeds in § 1956(a)(3) cases are not actually derived from a real crime; they are undercover funds supplied by the Government. The representation must be made by or authorized by a federal officer with authority to investigate or prosecute money laundering violations. This subsection parallels § 1956(a)(1) with respect to a showing that the defendant conducted the financial transaction with a specific intent, except that the intent to violate the tax laws is not included in this subsection.

Section 1957

Prosecution is brought under 18 U.S.C. § 1957 when the defendant knowingly conducts a monetary transaction in criminally derived property in an amount greater than $10,000, which is in fact proceeds of a specified unlawful activity. Section 1957 differs from § 1956 in three significant ways. First, § 1957 has a $10,000 threshold requirement for each transaction. Second, § 1957 has no specific intent requirement (while the prosecutor must prove that the defendant knew the property was derived from some criminal activity, the offense does not require a showing of specific intent to promote, to conceal, to engage in tax evasion or to avoid a reporting requirement). Third, § 1957 requires that the offense involve a transaction by, through or to a financial institution; § 1956 is not limited to such transactions.[12]

Sentencing Guidelines

Sections 1956 and 1957 provide for high sentences. The maximum sentence for a violation of § 1956 is 20 years' imprisonment; the maximum penalty for a violation of § 1957 is 10 years. In addition, both §§ 1956 and 1957 have attendant forfeiture provisions. Section 981 of Title 18 provides for the civil forfeiture of property involved in a violation of § 1956 or

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[12] It should be noted that the definition of "financial institution" for purposes of §§ 1956 and 1957 is taken from § 5312 of Title 31, United States Code, and the regulations promulgated thereunder, which definitions include not only banks and currency exchanges, but also securities brokers, insurance companies, dealers in precious metals, real estate brokers, casinos, and businesses which sell cars, boats and airplanes.

§ 1957, or property traceable to such property. Section 982 sets forth corresponding provisions for criminal forfeiture.

The sentencing guidelines for money laundering offenses are split into two subsections: sentencing guideline § 2S1.1 applies to 18 U.S.C. § 1956 and sentencing guideline § 2S1.2 applies to 18 U.S.C. § 1957. Under § 2S1.1, the base offense level for a violation of § 1956 is 20 (33-41 months). If the transaction was conducted with the intent to promote unlawful activity, the base offense level is 23 (46-57 months). In addition, there is a specific offense characteristic which provides for a 3-level increase if the defendant knew that the proceeds were derived from drug trafficking, and further increases are mandated if the value of the funds involved exceeds $100,000.

While the base offense level for a violation of § 1957 is 17 (24-30 months), due to specific offense characteristics, the effective base offense level is 22 (41-51 months) if the defendant knew that the proceeds were derived from drug trafficking and 19 (30-37 months) if the defendant knew that the proceeds were derived from any other specified unlawful activity.

Proposed Amendments to the Sentencing Guidelines

During each of the past four amendment cycles, the Sentencing Commission has proposed an amendment to §§ 2S1.1 and 2S1.2 which would have significantly reduced the sentencing guidelines for money laundering offenses.

The Department of Justice vigorously opposed this amendment, arguing that the high sentencing guidelines for money laundering are warranted by the serious nature of the offense and by the fact that Congress, in enacting and consistently strengthening these statutes, has evinced its desire to punish separately and severely the crime of engaging in financial transactions with the proceeds of a wide variety of illicit activities.

1992-93 Amendment Cycle

During the 1992-93 amendment cycle, the Sentencing Commission first proposed an amendment to §§ 2S1.1 and 2S1.2 which was intended to reduce the offense level for many money laundering offenses to a level equivalent to, or slightly above, the level applicable to a fraud offense involving the amount of money laundered.

The Department vigorously opposed this amendment, but acknowledged that a modification of the current sentencing guidelines might be appropriate to address a certain limited class of cases referred to as "receipt and deposit" cases -- identifiable bank deposits of white collar proceeds -- which the

Department agreed created minimal additional harm. "Receipt and deposit" cases are cases in which a person obtains proceeds, generally in the form of a check, from a specified unlawful activity and deposits the proceeds into his or her own bank account without any attempt to conceal the nature, source or ownership of the funds. The Department forwarded to the Commission a proposed alternative amendment which would have lowered the sentencing guidelines for "receipt and deposit" transactions.[13]

Although the Sentencing Commission did not act on the amendment, the Department addressed "receipt and deposit" cases by instituting a requirement that prosecutors consult with the Criminal Division prior to filing any money laundering charges based on "receipt and deposit" transactions, so that such cases could be reviewed for prosecutive merit and/or more fully investigated to identify more serious money laundering activity.

1993-94 Amendment Cycle

In 1993, the Sentencing Commission proposed the same amendment. The amendment was again opposed by the Department, and failed to garner the votes of four Commissioners.

1994-95 Amendment Cycle

During the 1994-95 amendment cycle, the Commission proposed virtually the same amendment. In its testimony before the Commission, the Department first pointed out that, to the extent that revision of the money laundering guidelines was prompted by a perceived disparity between these guidelines and the fraud guidelines, the Department recommended that the Commission review the fraud guidelines -- which the Department believes generally to be inadequate -- before weakening the money laundering guidelines. The Department urged the Commission to consider this entire area of the law comprehensively.

Again, however, the Department attempted to construct a counterproposal that would address the Commission's concerns.[14] This alternative -- which for the first time mirrored the format of the Commission's proposed amendment -- set the base offense levels at 16 and 12 (as opposed to the Commission's proposed

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[13] See Attachment 1 (Attachment to the Department's 1993 Testimony).

[14] See Attachment 2 (Statement of Jay P. McCloskey and Robert S. Litt Before the United States Sentencing Commission Concerning Proposed Sentencing Guideline Amendments, March 14, 1995).

levels of 12 and 8) and again carved out "receipt and deposit" cases. The effect of this proposal would have been to set a moderate base offense level in the ordinary money-laundering case, to reduce it where the money laundering activity was very limited (e.g., in "receipt and deposit" cases), and to enhance it where the money laundering activity was more aggravated. With the incorporation of these suggested changes, the Department would have supported amendment of the guideline. However, the Commission did not adopt the Department's changes and voted to adopt its own amendment.

In May 1995, the Department asked Congress to disapprove the Commission's amendment to the money laundering sentencing guidelines, and in October 1995, Congress did so.

1995-96 Amendment Cycle

In December 1995, the Sentencing Commission published the same amendment and the Department's proposed alternative for consideration during the 1995-96 amendment cycle. The Department worked closely with the Commission over a three-month period to develop a proposal which might address the concerns of the Commission yet still meet the needs of law enforcement. The Commission, however, did not adopt any amendments to the money laundering sentencing guidelines this year.

In sum, over the past four years, the Department has worked aggressively to protect the substantial sentencing guidelines for serious money laundering offenses, while, at the same time, attempting to respond to concerns expressed by the Sentencing Commission. With the help of Congress, we have maintained the substantial sentences which we continue to believe are warranted by this serious offense.

DEPARTMENT OF JUSTICE CHARGING POLICIES

While we have consistently maintained that the Sentencing Guidelines are appropriate for these very serious offenses, the Department of Justice has taken a series of steps to ensure consistent and appropriate use of the money laundering statutes. These steps begin with the "Principles of Federal Prosecution" which govern the charging practices of all federal prosecutors, and include a multi-layered process of oversight both by the Department and within the United States Attorneys' Offices. Most importantly, these steps include close communication between the Department's Criminal Division and the United States Attorneys' Offices to promote the uniform and consistent application of federal law.

General Charging Policies

All federal prosecutions are governed by the "Principles of Federal Prosecution" which are contained in chapter 27 of Title 9 of the United States Attorneys' Manual ("USAM"). Section 9-27.310 states:

> A. Except as hereafter provided, once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. The "most serious" offense is generally that which yields the highest range under the sentencing guidelines.

If a prosecution is to be concluded pursuant to a plea agreement, § 9-27.430 of the USAM states that the defendant should be required to plead guilty to a charge or charges:

> 1. That is the most serious readily provable charge consistent with the nature and extent of his/her criminal conduct;
>
> 2. That has an adequate factual basis;
>
> 3. That makes likely the imposition of an appropriate sentence and order of restitution, if appropriate, under all the circumstances of the case; and
>
> 4. That does not adversely affect the investigation or prosecution of others.

In October 1993, Attorney General Reno issued a "Bluesheet"[15] which further expanded upon the subject of charging policies and plea agreements in the context of the Sentencing Guidelines. This Bluesheet states, in part:

> It should be emphasized that charging decisions and plea agreements should reflect adherence to the Sentencing Guidelines. However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.

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[15] A "Bluesheet" is an addition to the USAM which has not yet been made part of the complete manual.

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To ensure consistency and accountability, charging and plea agreement decisions must be made at an appropriate level of responsibility and documented with an appropriate record of the factors applied.

Authority for these charging decisions is vested in the United States Attorneys, who, among other considerations, must address the needs and priorities of their districts within the context of the available resources. The broad range of offenses within the federal criminal code often provides the United States Attorneys with a range of charges which may be filed in order to address criminal activity in an appropriate manner.

Nonetheless, because of the sensitivity of certain legal issues, the need to promote uniformity with respect to the charging of certain criminal offenses, or the policy implications of charging certain criminal offenses, the Department of Justice has determined that oversight over the use of certain federal statutes is warranted. Such oversight is exercised through guidelines which require Departmental approval or review before defendants can be charged with violations of certain statutes. The money laundering statutes are among the federal statutes which have such specific requirements.

Prosecutive Policies on Money Laundering

Internal Department of Justice Guidelines

In order to promote consistency and uniformity among federal prosecutors in the use of the money laundering statutes, the Department has instituted approval, consultation and reporting requirements which are designed to promote communication between the Department's Criminal Division and the prosecutors in the United States Attorneys' Offices. Through this communication, the prosecutors in the field become aware of and sensitive to the policies and concerns of the Department in the use of the money laundering statutes. At the same time, the Department is in a position to monitor and review the use of the statutes by the United States Attorneys.

The Criminal Division also holds two or more money laundering conferences each year for federal prosecutors. Criminal Division attorneys also frequently speak at training conferences for the federal law enforcement agencies which are involved in money laundering investigations. The Criminal Division has published a manual for federal prosecutors on the use of the money laundering statutes and also publishes a newsletter to keep prosecutors in the field abreast of developments in the use of the money laundering statutes.

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Approval Requirements

The Department's approval, consultation and reporting requirements specific to the money laundering offenses are set forth in the August 4, 1993, Bluesheet addition to Chapter 9-105.000 of the USAM. The approval requirements require prior approval of money laundering prosecutions in four very sensitive classes of cases:

1. Extraterritorial Jurisdiction: Criminal Division approval is required before the commencement of any investigation where jurisdiction to prosecute is based solely on the extraterritorial jurisdiction provisions of §§ 1956 and 1957;

2. Tax Division Authorization: Tax Division authorization is required for any prosecution under § 1956(a)(1)(A)(ii) where the sole or principal purpose of the financial transaction was to evade the payment of taxes;

3. Prosecutions of Attorneys: Criminal Division approval is required for prosecutions of attorneys (under either § 1956 or § 1957) where the financial transaction is one involving attorneys' fees; and

4. Prosecution of a Financial Institution: Criminal Division approval is required for any criminal case in which a financial institution (as defined in 18 U.S.C. § 20 and 31 C.F.R. § 103.11) would be named as a defendant, or in which a financial institution would be named as an unindicted co-conspirator.

Consultation Requirements

The heart of the Department's effort to promote uniformity and consistency in the use of the money laundering statutes is the consultation process. The consultation process promotes frequent and extensive communication between the Criminal Division's Asset Forfeiture and Money Laundering Section ("AFMLS") and the United States Attorneys' Offices. In the following four classes of cases, the United States Attorneys' Offices must consult with the AFMLS prior to the filing of an indictment, information or complaint:

1. Forfeiture of Businesses: In any case where forfeiture of a business is sought under the theory that the business facilitated the money laundering offenses;

2. Cases Filed Under § 1956(b): In any case where a civil action under § 1956(b) is going to be brought against a business entity;

3. Cases Involving Financial Crimes: In any case where the conduct to be charged as "specified unlawful activity" under §§ 1956 and 1957 consists primarily of one or more financial or fraud offenses, and where the financial and money laundering offenses are so closely connected with each other that there is no clear delineation between the underlying financial crime and the money laundering offense;[16] and

4. Prosecutions in Deposit Cases: In any case where the conduct to be charged as money laundering under § 1956 or § 1957, or where the basis for a forfeiture action under § 981 consists of the deposit of proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity.

Through the consultation process, prosecutors who are considering filing money laundering charges in these classes of cases are required to contact one of the attorneys in the AFMLS. The Section's attorneys explain the Department's positions on the use of the statutes and the concerns about using the money laundering statutes in certain cases.

In general, the money laundering statutes are to be used to identify and prosecute the financial component of for-profit criminal activity, including attempts to conceal or reinvest criminal proceeds. They should not be used in cases where the money laundering activity is minimal or incidental to the underlying crime, or in novel or creative ways where there is insignificant prosecutive benefit. The money laundering statutes should be used only where they reflect the nature and extent of the criminal conduct involved, provide a basis for an appropriate sentence under all of the circumstances of the case, or provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct.

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16 For example, AFMLS can assist in identifying "merged" transactions that should not be charged as money laundering. When a transaction is "merged," the funds were not proceeds when the transaction took place, thus an element (i.e., proceeds) is missing. For example, in United States v. Johnson, 971 F.2d 562 (10th Cir. 1992), the defendant committed a classic investment fraud, in the course of which he directed his victims to wire transfer money to a designated bank account. The Government attempted to charge the wire transfer -- from victim to defendant -- as money laundering. The Tenth Circuit correctly held that this transaction -- the one which severed the victim from his money and transferred control of the funds to the defendant, cannot be money laundering, because the funds were not proceeds at the time of the transaction (i.e., the transaction itself transformed the funds into proceeds).

In most cases, prosecutors are able to satisfy the Section that proposed money laundering charges address these policies or have been declined. If a United States Attorney's Office should decide to proceed against the advice of the Section, the case may be taken to the Assistant Attorney General for further discussion. While on a rare occasion a United States Attorney has decided to proceed, notwithstanding the position of the Criminal Division, in the vast majority of cases the advice of the Criminal Division is followed.

The success of this consultation process is demonstrated by the fact that the number of "receipt and deposit" cases, which are the kind of money laundering prosecutions that have generated the most concern, has dropped. This is not to say that there is a categorical rule against charging money laundering based on a "receipt and deposit" transaction. Such transactions, in fact, fall squarely within the money laundering statutes and may be a valuable prosecutive tool in serious cases, for example, a case involving a major criminal figure or a terrorist where a money laundering charge might be the most serious provable offense which would subject such a defendant to an appropriate criminal penalty and deprive him of the profits of his crimes.

The number of approval requests and consultations for the last three fiscal years are indicated below:

Approvals Sought	Required Consultations	Voluntary Consultations
9	70	240

The category of "voluntary consultations" includes indictments[17] which are voluntarily submitted by prosecutors for comment and guidance prior to being presented to a grand jury. The number of formal approvals and required consultations may appear small, however, many of these cases are informally resolved during preliminary telephone calls. The Section fields more than 600 telephone calls per year from prosecutors in the field who have questions about money laundering cases. As a result of the extensive communication, prosecutors in the field understand what is likely to be endorsed or supported by the Criminal Division and draft their charges accordingly. This informal communication process results in fewer actual cases which are subjected to formal Criminal Division review or consultation. However, the number of voluntary consultations demonstrates how closely the prosecutors in the field work with the Section's attorneys to ensure the proper and judicious use of the statutes.

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[17] An indictment is counted individually, even though each indictment may contain numerous charged individuals.

Notification Requirements

In addition to the approval and consultation requirements, in August 1993 the Department instituted a new notification or reporting requirement for money laundering prosecutions. This requirement directs the United States Attorneys' Offices to send a copy of any money laundering indictment, which does not require prior approval or consultation, to the AFMLS after it is filed. The Section reviews those indictments when they are received in order to monitor how the statutes are being used. In cases where problems or concerns are raised, the Section contacts the prosecutor to obtain further information or to provide advice. Over the last three fiscal years, 699 indictments have been sent to the AFMLS pursuant to this notification requirement.

Policies of United States Attorneys' Offices

In addition to the approval, consultation and notification requirements which have been instituted at the Department level to promote consistent and appropriate charging of money laundering offenses, many United States Attorneys' Offices have additional policies and procedures for reviewing and approving money laundering charges and plea agreements within the office. A recent survey conducted by the Department indicated that 35 of the 94 United States Attorneys' Offices have instituted approval procedures or prosecutive guidelines specific to money laundering cases.

Although some of these guidelines merely set monetary thresholds for the initiation of federal charges, other guidelines impose procedural requirements with regard to approval procedures: sixteen U.S. Attorneys require approval at a higher level for money laundering prosecutions than is required for other prosecutions. Twenty offices require that any Assistant U.S. Attorney who is proposing a money laundering charge consult with AFMLS (even when such consultation is not required by the Department's guidelines) prior to submitting such charges for approval within the office. Eleven U.S. Attorneys' Offices have substantive policy guidelines. These guidelines -- which encourage "downstream" patterns of activity and discourage "receipt and deposit" and potentially merged cases -- reflect the additional efforts of the United States Attorneys to underscore and address concerns expressed to the Sentencing Commission and to ensure appropriate use of the money laundering statutes.

CONCLUSION

Congress has provided federal prosecutors with a broad array of tools to use in its continual fight against narcotics trafficking, white collar crime and organized crime. The

Department uses these tools judiciously and appropriately. This is especially true with respect to the money laundering statutes.

This survey of the measures the Department has taken to promote consistency and appropriateness in the use of the money laundering statutes demonstrates the Department's commitment to ensure the proper and judicious use of these powerful statutes. By fostering an extensive program of communication between the United States Attorneys' Offices and the Criminal Division on the use of these statutes through the approval, consultation and reporting requirements, which included Criminal Division review of more than 1,000 indictments over a three-year period, the Department believes that it has responded to concerns expressed to the Sentencing Commission, and has, at the same time, struck the proper balance between Department oversight and the prosecutorial discretion of the United States Attorneys.

The United States has been in the forefront of international efforts to establish a seamless web of anti-money laundering measures around the globe to prevent the flow of illegal funds. At a time when the threat posed by international money laundering is increasing, when international criminal cartels are learning to work together to launder funds around the world, when technology is advancing to allow the movement of illegal funds to flow around the world with ever-increasing speed, it is not appropriate to propose wholesale lowering of the sentencing guidelines for money laundering.

We must continue to move forward in the fight against money laundering. And because we can demonstrate that the Department of Justice uses the money laundering statutes effectively, fairly and judiciously, we will continue to oppose attempts to weaken our enforcement efforts, including those that seek to lower sentences for these very serious offenses.

ATTACHMENT 1

APPENDIX TO DOJ TESTIMONY ON 1993
SENTENCING GUIDELINE AMENDMENTS

APPENDIX

Money Laundering is an international crime which has reached epidemic proportions. In 1990, the G-7's Financial Action Task Force (FATF) estimated the United States' share of international drug proceeds to be $100 billion; other estimates put this figure at closer to $200 billion. The Federal Bureau of Investigation estimates that when drug money laundering is combined with other major types of money laundering, the figure for money laundered in the United States annually may be as high as $300 billion. The money laundering statutes were drafted with the intention of reaching the flow of proceeds from this whole spectrum of illegal activity, from narcotics offenses to white collar crime, to terrorism, organized crime and environmental crime.

Because this is the first time that the Commission has reviewed the money laundering guidelines, we believe that a full explanation of the consequences of the pending proposal is appropriate, in light of the drastic effect the proposal would have on sentences in money laundering prosecutions. The Commission's proposal (Amendment 20) would markedly reduce the base offense levels for laundering of white collar crime proceeds, in even its most pernicious forms, as well as for professional drug money launderers.[1]

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[1]While most of our discussion focuses on the non-narcotic area, it is important to note that the proposed amendment could significantly reduce sentences for some professional drug money launderers, who usually are not involved in the underlying drug offenses and therefore would not be sentenced under §2S1.1(a)(1) of the proposed amendment. This is the case in several of the recent Operation Polar Cap prosecutions. Such cases are the kind of offenses that § 1956 was aimed at, and are the cases which arguably should merit the strongest punishment under the guidelines.

The principal law enforcement agencies fighting money laundering -- the Federal Bureau of Investigation, the Drug Enforcement Administration, the Customs Service, the Internal Revenue Service, and the Postal Service, as well as the Financial Crimes Enforcement Network -- are in agreement that the United States has, proportionally, the worst money laundering problem in the world. The United States money laundering problem and response go beyond drugs to non-narcotic and white collar crime offenses.[2] Indeed, the United States leads the international law enforcement community in enforcement of all types of money laundering. Primarily through its participation in the FATF, the United States has emphasized to the domestic and international financial community the critical need for comprehensive money laundering enforcement, and has been in the forefront of an initiative to broaden the scope of anti-money laundering programs to include the proceeds of non-narcotic as well as narcotic offenses. Many other countries have anti-money laundering laws, but they often do not prohibit the laundering of proceeds of non-narcotic related crimes. Our initiative to broaden the scope of money laundering enforcement would be severely impacted by the message that our domestic enforcement aimed at white collar criminals is in retreat.

The Department of Justice strongly opposes Amendment 20. However, we acknowledge that a modification of the current

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[2]There are presently 103 predicate crimes constituting "specified unlawful activity." Of these, only ten are narcotic related.

guidelines may be appropriate to address a small class of money laundering cases popularly known as "receipt and deposit" cases, which seem to be the area of greatest concern under the current guidelines. Accordingly, the Department, by letter of March 2, 1993, forwarded to the Commission a proposed alternative amendment (also set forth as an attachment hereto), which we believe addresses this class of cases. We urge the Commission to adopt our alternative approach, rather than to completely rewrite the current guidelines, as proposed in Amendment 20.

The Department of Justice opposes the published proposal, drafted by the Commission Staff's Working Group on Money Laundering ("Staff"), on fundamental philosophical grounds. Our fundamental difference lies in the interpretation of the Congressional intent giving rise to the money laundering statutes. In our view, Congress created the money laundering statutes, set the maximum penalty at 20 years, and created the avenue of forfeiture, not merely to deal with what the Staff casts as "facilitating" activity, but to remedy <u>completely separate conduct requiring severe punishment</u>:

> The purposes of S. 2683, the Money Laundering Crimes Act of 1986, are: To create a Federal offense against money laundering; to authorize forfeiture of the profits earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide Federal law enforcement agencies with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering.

S. Rep. No. 433, 99th Cong., 2d Sess. 1 (1986). Congress said, in essence, that criminals are to be punished routinely for their

underlying criminal conduct, but if they further attempt to have use of their proceeds, they should expect to be punished even more severely, as a separate and distinct crime has been committed.

Moreover, contrary to the more lenient treatment for white collar criminals proposed in the Staff amendment, Congress did not create two money laundering statutes, one with harsh consequences for those who launder narcotic proceeds and one more lenient for white collar criminals. Congress created one statute, with penalties for the launderers of profit of specific white collar offenses as severe as those imposed on narcotic money launderers.[3] Over time Congress has added to the list of non-narcotic specified unlawful activity, has never subtracted, and continues to reach out for ways to strengthen money laundering enforcement in the white collar arena.[4] Indeed, this is in part a response to law enforcement reports which suggest that organized crime and drug trafficking organizations are inserting their narcotics proceeds into "legitimate" businesses

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[3]The present Sentencing Guidelines set the base offense level for § 1956 money laundering with the intent to promote specified unlawful activity at 23, and at 20 for all other intents. By contrast, the proposed amendment would drop the base offense level for non-narcotics related money laundering to 8 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds.

[4]As recently as October 1992, Congress added food stamp fraud, violations of the Foreign Corrupt Practices Act, and theft from the mail to the list of specified unlawful activity, and also amended § 1956 (and by reference, § 1957) to include transactions which involve the proceeds of kidnapping, robbery, extortion and bank fraud offenses which occur outside the United States.

and layering their assets with proceeds of subsequent white collar offenses, rendering the nature of the funds virtually indistinguishable as narcotics or non-narcotics related proceeds.

The theoretical basis for the Commission's proposed amendments was set forth in an October 1992 Staff Report, which stated that the Commission's initial decision to set high base offense levels for money laundering "was presumably based on the general conclusion that 18 U.S.C. §1956 would apply only to relatively serious offenses." See Staff of the Sentencing Commission, Report on Information Gathering and Initial Findings, at 17 (October 14, 1992) (Money Laundering Working Group) (hereinafter referred to as "Staff Report I"). According to the Staff report, the Commission, at that time "did not have the benefit of settled judicial interpretations of key terms because the applicable statutes had only recently been enacted . . . these statutes are very broad, and it appears they may be being applied somewhat differently than the Commission anticipated." Staff Report I at 16. Although the first part of this statement may be true, the now-settled judicial interpretations of the key terms, however broad, do not justify the arbitrary distinctions in money laundering conduct set forth in the proposed amendment nor the wholesale dismantling of the money laundering penalties to address anomalous fact patterns.[5]

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[5]Among the arbitrary distinctions drawn in the proposed amendment is the identification of "sophisticated" money laundering. The most pernicious forms of money laundering are accomplished by relatively unsophisticated means. For example, recent raids on the Cali Cartel, in Colombia, resulted in the

The Staff's philosophical view, evidenced by its use of language in Staff Report I, a subsequent report dated November 10, 1992, and in the Commentary to the proposed amendment, is that only §1956 concealment and promotion cast as reinvestment in future specified unlawful activity (SUA) are "actual" money laundering. All other statutory bases for prosecution are denigrated by the Staff proposal, which would provide little punishment beyond that imposed for the underlying offense.[6]

Indeed, in an ambitious attempt to merge the present §2S1.1 (which applies to §1956) and §2S1.2 (which applies to §1957), the proposal sets one level for money laundering and purports to provide enhancement for the §1956 intents. However, only two of the four §1956 intents are included -- promotion and concealment -- the rest of the 20-year offense is ignored.[7] In addition,

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discovery of bags full of postal money orders. Another seriously damaging method of money laundering is the use of electronic transfers. Neither of these methods can be said to be particularly "sophisticated." Moreover, we contend that the Commission Staff's attempt to define "sophisticated" will have to be modified in each amendment cycle.

[6]In addition, depending on the outcome of another proposed amendment -- to the fraud guideline (§2F1.1) -- which would delete the 2-point enhancement for "more than minimal planning" in favor of a new fraud table which factors in planning, the money laundering base offense levels may end up equal to an underlying fraud offense. If "more than minimal planning" is not incorporated into the table, "8 plus the number of offense levels from the table" is in many cases the same as the §2F1.1 fraud offense level, because as presently drafted, the 2-point enhancement is unavailable to the money laundering calculation.

[7]The four basic intents set forth in 18 U.S.C. § 1956 are:

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

the proposal enhances punishment for §1956(a)(2)(international transportation of illegal proceeds out of the country), but ignores the plain language or the statute which prohibits transportation in or out of the country.

The Department of Justice contends, therefore, that the proposal draws contours around §1956 -- with this and other distinctions that are merely arbitrary -- in a manner which Congress did not intend and which ignores the methodology of money laundering.

In our view, the basis for the Staff's conclusions is the flawed view that money laundering is "simply incidental" to the underlying offense which gives rise to the profit laundered. Staff Report I at 1. This view is based, we believe, on a misconstruction of the concept of "merger." By way of example, the classic merger problem is illustrated in United States v. Johnson, 971 F.2d 562 (10th Cir. 1992), a case in which money laundering charges were brought relating to the wire transfer of money from fraud victims to the defendant. The same wire transfers which gave rise to the money laundering charges also

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(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) 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 proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal Law.

formed the basis for wire fraud offenses which were charged substantively and as specified unlawful conduct. The Tenth Circuit held that the wire transfer of the money from victim to defendant was merely the completion of the underlying offense, and could not form the basis for money laundering charges, since the funds do not take on the character of "proceeds" until they are received by the defendant.[8]

It is our position that at the time the Staff reports were drafted, much of the charged conduct[9] which gave rise to its conclusion that money laundering is "incidental to" the underlying conduct consisted of "merged" transactions, which are now properly addressed in the case law and the Department of Justice prosecution guidelines. To the extent that we can agree that <u>any</u> financial transactions are "incidental to" the underlying offense, it is only in this category of "merged" transactions, which the case law makes clear do not constitute money laundering. To the extent that the Staff reports go further to suggest that <u>all</u> subsequent transactions in illegal proceeds are "incidental to" the underlying conduct, this conclusion is simply wrong.

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[8]The court in <u>Johnson</u> noted the distinction between the wire transfer scenario and the case where a defendant first obtained the funds and then deposited them himself. The court noted that the latter transaction would clearly have violated § 1957. This issue is discussed further, <u>infra</u>.

[9]The statistical, rather than analytical nature of the case analysis provided in the Staff reports does not reflect information necessary for proper analysis of the merger issue.

For example, Staff Report I cites three cases in support of its conclusion that the courts of appeals are interpreting the statutory requirement "intent to promote" in an overbroad manner. See Staff Report I at 9. One case cited, United States v. Johnson, is discussed above, and does not support the Staff's conclusion that judicial interpretation of "intent to promote" is overbroad. To the contrary, in finding that loan payments permitted the illegal enterprise to continue to maintain office space, the court also found, as discussed above, that only transactions subsequent to the crediting of wire transfers to the defendant's bank account could properly be charged as "reinvested" profit. 971 F.2d at 570.

Similarly, in United States v. Skinner, 946 F.2d 176 (2d Cir. 1991), another case cited in Staff Report I, the intent to promote was supported by defendant's transfer of drug proceeds to her supplier, in what amounted to payment on a line of credit. Although the facts of Skinner are somewhat anomalous, in that the defendant was paying for the very first in a series of contemplated shipments of drugs, it is clear that all later transfers of drug proceeds to her supplier for additional shipments would unquestionably qualify as reinvestment promotion in the manner contemplated by both Congress and the Commission.

The third and last case cited in Staff Report I, United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a case which is intended to fall within the exception the Department of Justice herein proposes. In Montoya, a California state senator

was charged with promoting his acceptance of bribes based on his deposit of a check into his personal bank account. The Ninth Circuit held that this deposit promoted the carrying on of specified unlawful activity -- the bribe -- because "Montoya could not have made use of the funds without depositing the check." 945 F.2d at 1076. No other indicia of money laundering activity were found to be present. By virtue of the Court's interpretation of the conduct as promotion, in this case, the defendant was subject to the harshest of the sentencing guidelines. As set forth below, the Department of Justice's alternative amendment proposes to draw an exception for promotion cases such as Montoya, as well as other types of fact patterns more typically charged under 18 U.S.C. §1957, where there are no further indicia of money laundering activity beyond the deposit of the proceeds and where certain other elements are present. The excepted group of cases is treated in the Department of Justice alternative proposal at the base offense level proposed by the Staff.

In our view, a large portion of the fact patterns which are the focus of the Staff's proposed amendment have, since the time of its initial study, already been addressed and remedied. That is to say, a portion of the fact patterns examined fall into the "merger" category addressed by cases such as United States v. Johnson, and these cases can no longer be charged as a matter of law.

To provide uniform application in charging transactions chronologically close to the underlying conduct, the Department of Justice instituted internal prosecution guidelines, which took effect on October 1, 1992. The guidelines state, in pertinent part:

> Cases Involving Financial Crimes: In any case where the conduct to be charged as "specified unlawful activity" under §§1956 and 1957 consists primarily of one or more financial or fraud offenses, and where the financial and money laundering offenses are so closely connected with each other that there is no clear delineation between the underlying financial crime and the money laundering offense, no indictment or complaint may be filed without prior consultation with the Money Laundering Section [of the Criminal Division].

U.S. Attorneys' Manual 9-105.000 (October 1, 1992).

We believe that the internal guidelines, and the developments in case law in the past year relating to white collar based money laundering, have already eliminated a large portion of the problems addressed by the Staff. However, the Staff reports also take issue with fact patterns commonly described as "receipt and deposit," as exemplified by the Montoya case.

In "receipt and deposit" cases, the funds received by the defendant arrive in the form of a check and once received are subsequently deposited into a bank account. This is a correct application of the money laundering statute. However, the Staff's analysis appears to take the view that such cases reflect transactions which are easier to trace and should not, therefore, be sentenced in the same category as other types of cases. This

conclusion is acceptable only in certain cases where no further indicia of money laundering are present, as explained below.

Most disturbing is the Staff's focus on the "receipt and deposit" fact patterns as justification for wholesale revision to the guidelines. We are willing to address "receipt and deposit" cases, by carving out an exception which leaves undisturbed the sentencing levels of "heartland" money laundering cases; we oppose most strongly the notion that all money laundering cases should be affected by what we believe to be a small subsection of fact patterns.

The Staff's position, briefly stated, is that "incidental" money laundering, including deposit of criminal profit into readily identifiable bank accounts, creates "little additional harm to society beyond that reflected in the underlying offense." Staff Report I at 1. The Department of Justice, joined by the Treasury Department, takes issue with this view, because the insertion of criminal profit into the banking stream, in and of itself, causes harm to society. Moreover, prosecution of offenses committed at what is in the law enforcement community referred to as "the placement stage" is critical, because the first placement of funds creates the most serious potential harm. Once money is inserted into the banking stream, it can be moved, concealed and/or reinvested with far less chance of detection.

The Treasury Department's Financial Crimes Enforcement Network (FinCEN), in a July 1992 report entitled "An Assessment of Narcotics Related Money Laundering" (hereinafter referred to

as the "FinCEN Report"), stated that the "placement stage" was the point at which the money laundering process is most vulnerable. Although the report focuses primarily on narcotics and currency, these observations have general application, including the emphasis placed on the danger of permitting launderers to move through the placement stage and into the "layering stage":

> In the layering stage, the launderer attempts to separate the proceeds from their illicit origin as much as possible by moving them through a complex series of financial transactions. The launderer hopes thereby to make the connection more difficult, if not impossible, to trace. With the placement stage completed successfully, the proceeds have been converted to a non-cash form and can therefore be more easily and rapidly manipulated. There are obviously a large number of options available for the launderer; however, the amount of layering used will usually depend on how quickly the profits need to return to their owner and on the "visibility" of original placement activity.

FinCEN Report at 23.

Among the options available to the launderer, once the illicit funds are placed into the banking stream, is use of the electronic communication network of banks to move the funds. This is the most serious danger in permitting the launderer -- whether his profit originates in narcotic-related or non-narcotic activity -- to insert his profit into the banking stream:

> The use of wire transfers is probably the most important technique used for layering illicit funds in terms of both the volume of money that can be moved and the extent to which transfers occur. The technique is preferred because launderers can get funds to their destination rapidly. Size of the transfer is usually not a constraint. The United States does not restrict the amounts that may be transferred electronically into or out of the country, nor does it require reporting of transactions between accounts or financial

> institutions. After the funds have been transferred several times, especially when done successively, tracing them back to the source is difficult. Transferring the funds through foreign countries electronically adds a further complication in that there are often no means for law enforcement to follow the trail quickly through the maze of foreign banking laws and regulations.

FinCEN Report at 24. None of this activity is possible until funds are inserted into the banking system. We contend, therefore, that dismissing the placement stage as "mere deposit" and concluding that deposit causes no harm to society is a serious mistake.

Even assuming, arguendo, that money laundering fact patterns demonstrate variant levels of conduct, we view it as illogical to set the level for all money laundering at the lowest possible level, as opposed to the approach in the present guideline, which focuses on high levels, in recognition of Congressional intent in the creation of a 20-year offense. The Staff justifies its recommendation to lower the levels on a statistical analysis of approximately 200 cases. Their analysis of this limited sample, even if accepted, reflects only 25 percent of the cases to be within the category it classifies as less serious cases. Lowering the base levels in all cases, based on 25 percent of the cases, is unjustified even on the assumption (which we dispute) that the Staff's statistical sampling is valid.

First, the statistical basis is questionable. The methodology for selection of cases is defendants actually sentenced under §2S1.1 and §2S1.2, in fiscal year 1991. However, in our view examination of reported cases or, for that matter,

indicted cases is insufficient. To be fair, the universe of cases under examination must include cases where plea negotiations resulted in pre-indictment resolution of these charging issues, as well as situations in which the early exercise of discretion (even at the investigative stage) reflects the recognition of the issues presented by the Staff.[10] Second, the 200 or so cases presented (in a statistical rather than analytical format) are not capable of interpretation of relevant facts. Both analyses must be performed to conclude that limits on the exercise of prosecutorial discretion are warranted.

Enforcement in the white collar money laundering area is relatively new, with many of the cases only now reaching the level of appellate review. However, the Criminal Division of the Justice Department has consulted in cases whose facts reveal that money laundering in white collar cases is no less pernicious nor unsophisticated than in the narcotic area.

In a case recently indicted in New England, the defendant set up an elaborate pyramid of fraudulent bank loans, constantly reinvesting the proceeds of successive false loan applications

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[10]We strongly take issue with the suggestion that <u>any</u> component of the Department of Justice has a policy of threatening money laundering prosecution in order to coerce pleas. Where the possibility of money laundering prosecution is discussed in the course of plea negotiations, all such discussions are grounded on the good faith belief that such prosecution has basis in fact and law. Department of Justice policy, under what is commonly called "The Thornburgh Memo," dictates charging decisions and plea bargaining practices consistent with the "most serious readily provable offense." <u>See</u> "Principles of Federal Prosecution," USAM 9-27.000. <u>See also</u> <u>Bordenkircher v. Hayes</u>, 434 U.S. 357 (1978).

into repayment on prior loans. The Government has charged money laundering under a promotion theory, alleging that the continuous reinvestment of proceeds permitted the defendant to build a larger and larger fund of illicit profit -- ultimately the defendant caused transfers totalling millions of dollars and seriously endangered the health of a savings bank -- and permitted him to keep increasing the fund with each successive loan, without detection, by satisfying the prior bad loans. Clearly this is a case requiring severe punishment, not merely based on the sum of all its pieces -- the fraudulent loans. Rather, the punishment should reflect the severity of the money laundering scheme which both nourished and obscured the operation.

Similarly, in a recently indicted case in the southwest, a real estate developer and his attorney are charged with defrauding the Federal Deposit Insurance Corporation (a judgment creditor by reason of the previous failure of a savings and loan) by transferring real estate belonging to the developer into his girlfriend's name, in anticipation of bankruptcy, and moving the funds through the use of various escrow accounts and cashier's checks to conceal its origin. Clearly, this activity, as well, goes well beyond the scope of activity "incidental to the underlying crime," and is activity Congress intended to reach with punishment beyond that of the underlying crime.

It is not true, therefore, that the money laundering statutes are "being applied somewhat differently than the

Commission anticipated" or to suggest that most white collar money laundering is merely a fragment of the underlying crime. Although the Staff may be able to cite anomalous fact patterns which reflect a variance of application, we believe that the recently promulgated money laundering guidelines evidence the Department's commitment to uniform application, particularly in the area of financial crimes.

In contrast to the pending proposal, the Department's alternative proposes to leave undisturbed the offense level for money laundering, except in certain cases defined by a strict set of parameters. The elements of the parameters are:

1) The specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, or a firearm or explosive: The lower guideline range is not available to defendants who launder the proceeds of these serious crimes. We do not view this limitation as controversial, in that it relates to a serious class of offenses.

2) The money laundering conduct was limited to deposit: We have drawn a bright line at the point of deposit, because we seek to address only that portion of the Staff's concerns which relates to fact patterns where the completion of the underlying offense and the commencement of money laundering are blurred -- no more, no less. That is to say, we do not agree with the Staff's suggestion that money laundering is a "facilitation"

crime or that it is merely a method for the final accomplishment of profit. Money laundering is a wholly separate crime.

This bright line approach also reflects our concern with a critical misunderstanding with respect to concealment. The defense bar has argued that any number of subsequent transfers should be given more lenient treatment, so long as they involve bank accounts which clearly relate to the defendant. This is more a tracing/ forfeiture concept, and ignores all but the "fictitious names" theory of concealment.

3) Deposit into an account which is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity: The Staff reports acknowledge that concealment, particularly through the use of fictitious names or nominee accounts, is the most egregious form of money laundering. There is insufficient recognition, however, of other pernicious forms of concealment employed by some defendants who use their own bank accounts. All forms of concealment must be ineligible for the exception. This issue is best explained by illustration:

In a recent case in the Northern District of Florida, the lead defendant pleaded guilty to concealing the movement of illegal proceeds through the fraudulent use of "consulting fees" to mask the transfer of the illegitimate profit. Co-defendants pleaded guilty to fraudulently obtaining public contracts (despite an earlier debarment of the lead defendant) through the use of nominee companies. The lead defendant received his profits from these contracts by creating a sham consulting

company in his wife's name and the fiction of "consulting fees." Although each transfer in the series could be traced to the defendant, the creation of the fictitious services was designed to conceal his ownership of the funds from the time they were received by companies covertly under his control and to provide a false "legitimate" cover for his illegal activities.

Similarly, in a case recently indicted in a midwestern district, the concealment charged relates to the creation of false "legitimate" business transactions to mask an illegal drug operation. In that case, the defendant had been enjoined from selling certain chemicals because the volume and manner in which he sold them indicated that they were being used for illicit purposes. He evaded the injunction and continued to sell the chemicals by fraudulently representing that his company had been sold to a family member. The fictitious "sale" of the business, and monthly payments made pursuant to the sham sale agreement, were designed to give an aura of legitimacy to payments of profit for illegally distributed precursor chemicals. The transactions were designed to conceal the defendant's ownership of the funds from the time they were received by the company covertly under his control.

In both cases, the defendants argue that there was no money laundering because the funds involved in the transactions in which the defendants engaged could be traced to their possession. This argument overlooks the case law which holds that concealment is not limited to the use of fictitious names and nominee

accounts. See, e.g., United States v. Lovett, 964 F.2d 1029 (10th Cir. 1992) (defendant's purchase of an automobile for the purpose of inducing his brother's silence was sufficient to establish concealment); United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991), cert. denied, 1992 U.S. LEXIS 4643 (1992) (son passes proceeds to father, who uses the funds to purchase land in his own name, then borrows against the property and passes loan proceeds back to son).

Thus, transferring money in the defendant's own name is not necessarily benign nor non-concealing, and the use of his own name should not open the door to an unlimited number of transfers. The exception we propose only extends to fact patterns where the first transfer after receipt (i.e., deposit) converts the funds to a more liquid form, completely available for use. The exception should only be available to defendants who: (1) deposit checks into the account of the person who committed the underlying offense, and (2) engage in no further transactions which constitute money laundering offenses.

4) Non-currency: We expect that some will take issue with our limitation of the exception to non-currency. It will be argued that the "mere deposit" of currency is the same as "mere deposit" of a check. Currency cases are different for the following reasons:

a) currency is the genesis of all money laundering enforcement, equivalent to the paramount concern with narcotics-related cases;

b) the problems relating to currency have induced the development of an entire body of statutes and regulations

which address the problem, prosecuted and administered with great vigor by the Departments of Justice and Treasury;

c) numerous studies on the public record (most notably the FinCEN Report, referenced above) discuss the critical nature of the "placement stage" of currency. The goal of laundering currency is to get it into the banking stream and financial community, both to make it appear legitimate and because once it is placed in the financial system, it is normally "gone" -- wire transferred to places unknown and untraceable as proceeds;

d) although the Department of Justice does not encourage charging concealment based solely on the use of currency, we do acknowledge the "self-concealing" nature of currency and the problems attendant thereto. Although bank records might otherwise permit tracing of the defendant's ownership of the funds (the Staff's purported concern), there is no ability to trace currency back to the specified unlawful activity; and

e) there can be no question of merger where currency has been received. Unlike checks, which must ultimately be negotiated at a financial institution before the underlying funds can be accessed, currency is already in a useable form, and any subsequent use of the currency is a completely separate transaction after it is received.

5) The use of a domestic financial institution: We believe, consistent with the Staff reports, that the use of foreign banks and foreign bank accounts is an offense characteristic undeserving of lenient treatment.

6) First-party money launderer: The exception is limited to offenders who deposit their own proceeds; it is not intended to extend to the "professional money launderer" (a third party).[11] Again, this is to ensure that the exception only

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[11]The Commentary to our proposed alternative discusses the third-party depositor, such as a spouse, who, knowing that the funds were derived from unlawful activity, willfully deposits the funds into the banking stream, but does so using an account identifiable as belonging to the person(s) who committed the specified unlawful activity. If the individual engages in no further money laundering conduct (i.e., all subsequent transactions

applies to the small-time offender who commits a crime (which, if all other elements of the exception are established, will likely be the gravamen of the offense) and puts the money in the bank. If the defendant induces a third party to deposit the money into an account not belonging to the defendant, a layer of concealment (a nominee account) has been added and the defendant should not be entitled to the exception. Moreover, the defendant has involved another individual in his scheme. However innocent the third party might be, this does not entitle the original offender to more lenient treatment. Similarly, the third party with knowledge sufficient to establish money laundering is not entitled to lenient treatment if that person knowingly agreed to lend his or her identity to unlawfully derived funds.

Put in terms of the Staff's expressed concerns, the exception is only available to those who deposit the funds "incidental to" the underlying offense. This, by definition, does not include the third party who, with knowledge sufficient to establish money laundering, joins in after the underlying offense is complete, for the purpose of giving his or her name to the proceeds.

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do not indicate an intent which would violate § 1956; are "for legitimate purposes" in amounts under $10,000, and therefore do not violate § 1957; and do not violate Title 31 currency reporting requirement) and all the other elements of the exception are present, such an individual is eligible for the lower offense level.

Similarly, in the corporate setting, an employee who, for the benefit of a corporate defendant, causes the corporation to deposit ill-gotten gains into an account clearly identifiable as belonging to the corporation, will be eligible for the exception.

In conclusion, therefore, if the Commission believes that there has been a sufficient showing to warrant a change in the guidelines to address the small category of cases identified as problematic, we believe that the Department's proposed amendment is far preferable to the pending proposal. Rather than a wholesale restructuring of the guidelines to address a limited number of cases, the Department's proposal addresses the problem directly by adding a special instruction to be followed in these cases. Further, our proposal retains the present guideline levels which properly reflect the serious nature of money laundering offenses, while allowing for a lower guideline level in the limited category of less egregious cases.

The Proposed Amendments to §§2S1.3, 2S1.4

Finally, we wish to address the proposed amendments to §2S1.3 and §2S1.4, relating to currency reporting requirements. Published along with the Commission's proposal is an alternative amendment previously submitted by the Department of Justice. The structures of the two proposals are similar with respect to harmonizing the guidelines treatment of violations involving various currency transaction reports required by law (i.e., the Currency Transaction Report (CTR), the Currency and Monetary Instrument Report (CMIR), and IRS Form 8300), because the three types of reports are similar in purpose, and comparable violations involving currency reporting should be treated similarly. The proposals disagree, however, on the issue of appropriate base offense levels.

Under the current guidelines, the base offense level is 13 for CTR (reports by financial institutions of currency transactions in excess of $10,000) and Form 8300 (reports filed by trades and businesses) violations, when either is coupled with structuring and/or misrepresentation (5 where there is no such additional act). The base offense level is 9 for CMIR offenses (reports of transportation of currency in excess of $10,000 in or out of the United States).[12] Section 2S1.4 was created in 1991 in order to treat CMIR offenses differently:

> [T]his amendment creates an additional offense guideline (§2S1.4) for offenses involving Currency and Monetary Instrument Reports (CMIR). Currently, such offenses are covered by §2S1.3, which deals with all currency transaction reporting requirements. CMIR violations are committed by individuals who, when entering or leaving the country, knowingly conceal $10,000 or more in cash or bearer instruments on their persons or in their personal effects and knowingly fail to file the report required by the U.S. Customs Service. Such criminal conduct is sufficiently different from the other offenses covered by §2S1.3 to merit treatment in a separate guideline.

However, the separate treatment was aimed at the following circumstance, which was deemed to be peculiar to border crossing offenses. At the time of the 1991 amendment, there was a split in the Circuits over how to apply §2S1.3 in the CMIR context, because the usual fact pattern involved a failure to file a CMIR and a negative response to the routine inquiry of the Customs official as to whether there was something to declare. Some of the Circuits held that the negative response was part and parcel

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[12]Both sections call for an enhancement of 4 levels where the defendant "knew or believed the funds were criminally derived."

of the non-filing (therefore, a base offense level of 5); other Circuits held that the negative response was a misrepresentation (therefore, a base offense level of 13). The amendment was intended to resolve the dispute by creating a separate guideline (§2S1.4) setting the base level at 9.

We have proposed that the CTR, Form 8300, and CMIR offenses be brought back under one heading in the Sentencing Guidelines (a proposed new guideline is attached hereto), setting the base offense level at 9 for willful failure to file, and preserving the base offense level of 13 for structuring or filing a form containing a material misrepresentation or false statement. An application note is proposed to resolve the CMIR issue, which sets the base level at 9 for the mere denial of reportable assets, in response to routine questioning at a border crossing. The level 5 would remain to cover all other willful violations of regulations (no change).

We believe that the Staff's proposal to lower the penalties overall signals a serious retreat in the area of currency enforcement -- an area too closely linked with narcotics trafficking to merit more lenient treatment at this time. Currency has traditionally been, and continues to be, the medium of narcotics profit. For all the reasons set forth above with respect to currency enforcement, we find the arguments put forth

by the Staff to be unpersuasive. Therefore, we respectfully oppose the Commission's proposed amendments.

Attachments

DEPARTMENT OF JUSTICE PROPOSAL

Section 2S1.1 is amended by redesignating subsection (c) as subsection (d) and inserting the following after subsection (b):

"(c) Special Instruction for Certain Forms of Money Laundering

(1) Notwithstanding subsections (a) and (b), the offense level shall be 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds if—

(A) the defendant was convicted under 18 U.S.C. §1956(a)(1)(A)(i), (a)(2)(A), or (a)(3)(A);

(B) the specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, a firearm, or an explosive; and

(C) the money laundering conduct was limited to the deposit of non-currency proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity."

The Commentary to §2S1.1 is amended by inserting the following at the end thereof:

"The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet the specified criteria. First, the count of conviction for money laundering must have been for a violation of 18 U.S.C. §1956(a)(1)(A)(i), (a)(2)(A), or (a)(3)(A), relating to an intent to promote specified unlawful activity. If the defendant was also convicted under one of the other provisions of section 1956 for the same conduct, the reduced offense level provided by subsection (c) does not apply. Next, the underlying unlawful activity must not have involved a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, firearm, or an explosive. Finally, the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account, and the account must be clearly identifiable as belonging to the person(s) who committed the specified unlawful activity. For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

The term "money laundering conduct" as used in subsection (c)(1)(C) is not limited to the conduct comprising the offense of conviction but includes transactions which are part of the same course of conduct or common scheme or plan as the offense of conviction and which themselves independently

establish any money laundering offense. The withdrawal of proceeds does not constitute money laundering conduct unless carried out in a manner that would violate a money laundering statute (see, e.g., 18 U.S.C. §1957 regarding withdrawals and other transactions in an amount over $10,000). Therefore, the withdrawal of the proceeds for legitimate purposes, such as the payment of living expenses, in a manner that does not constitute money laundering conduct is consistent with application of the reduced offense level of subsection (c). However, if there are indicia of further money laundering activity by the defendant involving the proceeds deposited into the account, the higher offense levels provided in subsections (a) and (b) apply."

Section 2S1.2 is amended by redesignating subsection (c) as subsection (d) and inserting the following after subsection (b):

"(c) Special Instruction for Certain Forms of Money Laundering

(1) Notwithstanding subsections (a) and (b), the offense level shall be 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds if—

(A) the specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a

controlled substance or precursor chemical, a firearm, or an explosive; and

(B) the money laundering conduct was limited to the deposit of non-currency proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity."

he Commentary to §2S1.2 is amended by inserting the following at he end thereof:

"The lower offense level provided by the special instruction n subsection (c) is reserved for offenses which meet the pecified criteria. First, the underlying unlawful activity must ot have involved a matter of national security or munitions ontrol, a risk of serious bodily injury or death, a crime of iolence, a controlled substance or precursor chemical, a irearm, or an explosive. Next, the money laundering conduct ust have been limited to the deposit of non-currency proceeds nto a domestic financial institution account, and the account ust be clearly identifiable as belonging to the person(s) who ommitted the specified unlawful activity. For example, a efendant who deposits a check constituting the proceeds of his r her spouse's specified unlawful activity into the spouse's

ccount would qualify for the reduced offense level of ubsection (c) if all the other limitations are present.

The term "money laundering conduct" as used in ubsection (c)(1)(B) is not limited to the conduct comprising the offense of conviction but includes transactions which are part of he same course of conduct or common scheme or plan as the ffense of conviction and which themselves independently stablish any money laundering offense. The withdrawal of roceeds does not constitute money laundering conduct unless arried out in a manner that would violate a money laundering tatute (see, e.g., 18 U.S.C. §1957 regarding withdrawals and ther transactions in an amount over $10,000). Therefore, the ithdrawal of the proceeds for legitimate purposes, such as the ayment of living expenses, in a manner that does not constitute oney laundering conduct is consistent with application of the educed offense level of subsection (c). However, if there are ndicia of further money laundering activity by the defendant nvolving the proceeds deposited into the account, the higher ffense levels provided in subsections (a) and (b) apply."

Proposed Guideline (Changes appear in bold.):

§2S1.3. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

(B) knowingly filed, or caused another to file, a report containing materially false statements; or

(2) 9, for a willful failure to file; or

(3) 5, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.

(2) **If the defendant knew or believed that the funds were intended to be used to promote criminal activity, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.**

(3) **If the base offense level is from (a)(1) or (a)(2) above and the value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).**

(c) Special Instruction for Fines -- Organizations

* * * * *

Commentary

Statutory Provisions: 26 U.S.C. §§ 7203 and 7206 (if a willful violation of 26 U.S.C. § 6050I or in connection with a return required under 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316,

5322, 5324. For additional statutory provision(s), see Appendix A (Statutory Index).

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Background:

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A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements or knowingly filed, or caused another to file, a report containing materially false statements. A base offense level of 9 is provided for willful failure to file the required reports, and for the mere denial of reportable assets in response to routine questioning at a border crossing. A lower alternative of 5 is provided in all other cases.

§2S1.4 IS DELETED

§2T1.3. Fraud and False Statements Under Penalty of Perjury

* * * * *

Statutory Provision: 26 U.S.C. § 7206(1), (3), (4), and (5) (except in connection with a return required under 26 U.S.C. § 6050I). For additional statutory provision(s), see Appendix A (Statutory Index).

§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

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Statutory Provision: 26 U.S.C. §7206(2) (except in connection with a return required under 26 U.S.C. § 6050I).

ATTACHMENT 2

U. S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

JAY P. MCCLOSKEY
UNITED STATES ATTORNEY
DISTRICT OF MAINE

CHAIRMAN,
SUBCOMMITTEE ON SENTENCING GUIDELINES
ATTORNEY GENERAL'S ADVISORY COMMITTEE OF
UNITED STATES ATTORNEYS

AND

ROBERT S. LITT
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

MARCH 14, 1995

MONEY LAUNDERING (Amendment 44)

The Commission has proposed a sweeping amendment of the money laundering guidelines, §§2S1.1 and 2S1.2. The amendments would substantially lower the penalties for many serious money laundering offenses even though Congress determined money laundering to be a significant offense and established 10- or 20-year penalties (depending upon the offender's intent). The Department opposes the amendment as proposed.

To the extent that revision of the money laundering guidelines is prompted by a perceived disparity between these guidelines and the fraud guidelines, we suggest the Commission review the fraud guidelines -- which we believe generally to be inadequate -- before weakening the money laundering guidelines. We urge the Commission to consider this entire area of the law comprehensively. However, if the Commission is intent upon proceeding now with a revision of the money laundering guidelines in isolation, we strongly suggest certain revisions to the proposed amendment, as set forth in Appendix B.

The proposed amendment of guideline §2S1.1 would reduce the offense level for many money laundering offenses to a level equivalent to, or slightly above, the level applicable to a fraud offense involving the amount of money laundered. This decrease would apply both to money laundering related to white collar

offenses and money laundering related to a myriad of other serious offenses, such as arms violations, murder for hire, other violent crimes and exploitation of children. In many cases the amendment would also reduce the offense level for money laundering related to drug trafficking, which now starts at level 23 or 26 under guideline §2S1.1, and 22 under guideline §2S1.2, and increases depending on the amount of funds laundered. The only cases generally spared from reduction are those in which the money launderer committed the underlying unlawful activity and the offense level for that activity is equal to or greater than the currently applicable money laundering offense level. We do not believe this reduction of sentences is appropriate.

The suggested change appears to respond to the class of money laundering cases in which the money laundering activity is not extensive, including "receipt and deposit" cases -- those in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a financial institution account identifiable to the person who committed the underlying offense. We agree that application of the current guideline to receipt-and-deposit cases, as well as to certain other cases that do not involve aggravated money laundering activity, can be problematic. We have taken steps internally to address these concerns through prosecution guidelines. In view of the Commission's continuing

concern, we believe it is not inappropriate to treat these non-aggravated cases separately in the guideline.

Nevertheless, we do not agree that past sentencing anomalies arising from this narrow class of cases requires an overall downward adjustment in the money laundering guidelines. We seek a middle ground. Attaining this middle ground is particularly imperative in view of the emergence of a class of professional money launderers, who commingle licit and illicit proceeds, drug and non drug-predicated.

To this end, we are submitting a proposed alternative -- based on the format of the proposed amendment -- that would:

1) set the base offense levels at 16 and 12 (as opposed to the proposed levels of 12 and 8);

2) add to the higher category (which currently only applies to offenses involving controlled substances) offenses involving a matter of national security or munitions control, a crime of violence, a firearm, an explosive, and exploitation of children; and

3) carve out "receipt and deposit" cases, to be sentenced at a level of 8 plus the amount established by the fraud table

in guideline §2F1.1 corresponding to the value of the funds.[2]

The effect of this scheme is to set a moderate base offense level in the ordinary money-laundering case, to decrease it where the money laundering activity is very limited, and to increase it where the money laundering activity is significant. A copy of our proposed alternative is attached.

In addition, our proposed alternative makes the following technical corrections:

- The proposed amendment applies the underlying offense level in cases where the defendant committed the underlying offense. Our proposed alternative adds two levels in order to ensure that a defendant who commits the underlying offense <u>and</u> launders the proceeds does not go unpunished for the laundering offense. Congress has determined that money laundering is a separate offense and the Commission should follow that determination.

- The proposed amendment contains a specific offense characteristic relating to two intents identified in §1956 (concealment and promotion), for which 2 levels are added.

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[2] The base level of 8 corresponds to the base level of 6 for fraud plus two levels for more than minimal planning, which is likely to be present in the vast majority of such cases.

Our proposed alternative provides an alternate enhancement of 1 level for the remaining §1956 intents (tax evasion and avoidance of currency reporting requirements).

- Our alternative includes as sophisticated money laundering the use of the services of an individual or organization engaged in the business of money laundering. Sophisticated money laundering would be subject to a two-level enhancement. This addition is intended to reach both the individual who solicits the services and the launderer, defined for these purposes as one who collects a commission (or other benefit). We believe that it is appropriate to impose a more severe punishment on those who launder for profit or engage professional money launderers.

We vigorously oppose certain portions of the proposed commentary:

- The note on "value of the funds" which limits the amount laundered to "the loss attributable to the offense" (i.e., the amount of a fraud less any amounts that can be recouped by the victim) is inappropriate. While this concept is arguably relevant to a fraud guideline, it has no relevance to an amount laundered. That is, if the defendant transfers all of the victim's money to his account in the Cayman Islands, he should not be credited for amounts that

ultimately can be repaid. The harm in money laundering is properly measured by the funds themselves.

- We oppose as confusing and unnecessary the note which makes reference to "actual money laundering." Money laundering is a term defined by statute.

- Finally, we propose to add commentary to clarify the use of the term "proceeds" in paragraph (a)(2) of the amendment. There is a small category of money laundering cases under section 1956 involving international transportation of currency to promote specified unlawful activity which does not have as an element of the offense that the funds be proceeds. Our proposed commentary makes clear that if otherwise appropriate, the base offense level set forth in subsection (a)(2) applies to these cases as well.

With the incorporation of these suggested changes, the Department would support amendment of the guideline if the Commission is intent upon moving forward now.

APPENDIX B

MONEY LAUNDERING

[The following indicates the Department of Justice's alterations of the proposed Sentencing Commission money laundering guideline, as published in Amendment 44, through shading of additional material and strike-out of material to be deleted.]

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the greatest):

(1) The offense level for the underlying offense from which the funds were derived plus 2 levels, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under §1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) ~~12~~ 16 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an offense involving a matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or the manufacture, importation, or distribution of a controlled substances ~~[or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism]~~; or

(3) ~~8~~ 12 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) Apply the greater:

(A) If the defendant knew or believed that (1) ~~(A)~~ the financial or monetary transactions, transfers, transportation,

or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (ii) ~~(B)~~ the funds were to be used to promote further criminal conduct, increase by 2 levels; or

(B) If the defendant (i) intended to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986, or (ii) knew or believed that the transactions were designed in whole or in part to avoid a transaction reporting requirement under State or Federal law, increase by 1 level.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form or money laundering, increase by 2 levels.

(c) Special Instruction for Receipt and Deposit Cases

The offense level is 8 plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds where all of the following are present:

1) the defendant's money laundering conduct is limited solely to the deposit of the unlawful proceeds into a domestic financial institution account that is readily identifiable as belonging to the person who committed the specified unlawful activity;

2) the offense was not intended or designed, either in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity, to violate section 7201 or 7206 of the Internal Revenue Code of 1986, or to avoid a transaction reporting requirement under State or Federal law; and

(3) the specified unlawful activity did not involve a matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or

the manufacture, importation, or distribution of a controlled substance.

Commentary

Statutory Provisions: 18 U.S.C. §§1956, 1957.

Application Notes:

1. "Value of the funds" means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant deposited $50,000 derived from a bribe together with $25,000 of legitimately derived funds, the value of the funds is $50,000, not $75,000.

Criminally derived funds are any funds that are derived from a criminal offense, e.g., in a drug trafficking offense, the total proceeds of the offense are criminally derived funds. In a case involving fraud, however, the loss attributable to the offense occasionally may be considerably less than the value of the criminally derived funds (e.g., the defendant fraudulently sells stock for $200,000 that is worth $120,000 and deposits the $200,000 in a bank; the value of the criminally derived funds is $200,000, but the loss is $80,000). ~~If the defendant is able to establish that the loss, as defined in §2F1.1 (Fraud and Deceit), was less than the value of the funds (or property) involved in the financial or monetary transactions, transfers, transportation, or transmissions, the loss from the offense shall be used as the 'value of the funds.'~~

Subsection (a)(2) applies even where the funds are not proceeds of unlawful activity, where the offense involves a financial or monetary transaction, transfer, transportation, or transmission from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of a specified unlawful activity described in that subsection.

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of §3D1.2 (Groups of Closely-Related Counts).

3. Subsection (b)(1)(A) is intended to provide an increase for those cases that involve ~~actual money laundering i.e.,~~ efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.

4. In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e., criminal conduct beyond the underlying acts from which the funds were derived.

5. Subsection (b)(2) is designed to provide an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the "layering" of transactions, i.e., the creation of two or more levels of transaction that were intended to appear legitimate, or if the offense involved the use of individuals or organizations engaged in the business of money laundering, i.e., those who receive payment or other benefit for conducting or assisting in the transaction.

6. The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet all the specified criteria. When these criteria are met, the offense level under this guideline is 8 plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds. The offense level under subsection (c) is not subject to enhancement under any other subsection of this guideline.

For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

* * *