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9-101.000 THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970—II

9-101.100 PROCEDURES RELATING TO EXPUNGEMENT OF CRIMINAL RECORDS PURSUANT TO 21 U.S.C. § 844(b)

Section 844(b) of Title 21 permits the court to sentence certain first-time drug offenders to a probationary term without a formal adjudication of guilt. Upon the successful completion of the probationary term, the court must discharge all proceedings against the offender and dismiss the action. If the discharged offender was under 21 years of age at the time of the offense, the offender may ask the court for an order expunging all official records of the case, with the exception of a nonpublic record designed to prevent an offender's disposition under 21 U.S.C. § 844(b) more than once.

Please refer to DOJ Order 2710, and Forms OBD-160 and DOJ-329.

9-101.200 REFERRAL OF CONTROLLED SUBSTANCE CASES TO STATE OR LOCAL PROSECUTORS

The following factors should be considered in deciding whether controlled substance cases should be charged in federal court or referred to state or local prosecutors for action: (1) sufficiency of the evidence; (2) degree of federal involvement; (3) effectiveness of state and local prosecutors; (4) willingness of state or local authorities to prosecute cases investigated primarily by federal agents; (5) amount of controlled substances involved; (6) violator's background; (7) possibility that prosecution will lead to disclosure of violations committed by other persons; and (8) the district court's backlog of cases.

A. Declination of federal prosecution on evidentiary grounds is understandable and justified. However, absent unusual circumstances, declination should not be based solely on any of the other factors. The amount involved is only one of several factors which should be considered before deciding whether to prosecute in federal court. In considering the amount involved attention should be paid to the purity of the controlled substance and the method of packaging.

B. When a U.S. Attorney declines to prosecute a controlled substance case and thereafter a state or local prosecutor also declines prosecution, the Drug Enforcement Administration should be afforded an opportunity to request federal prosecutive consideration and such cases should be accepted unless it is not in the public interest to do so. Federal prosecution might not be warranted, for example, where the violator qualifies for processing under a deferred prosecution plan.

C. In appraising the effectiveness of nonfederal authorities, consideration should be given to the professional competence of local and state prosecutors and the length of time it takes to try a case in local and state

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courts. Consideration should also be given to the penalties provided by local or state law, the sentencing practices of local and state judges and the applicable parole eligibility standards of nonfederal jurisdictions.

D. In assessing the background of a violator, consideration should be given to the offender's age, degree of culpability, and prior criminal record. The prosecutor should also consider whether significant mitigating circumstances exist, whether the offender has cooperated with the government, and whether the offender is dependent on drugs. For example, if an offender is young, has no previous record, is a narcotic addict, and was arrested for possession for the offender's personal use, it may be appropriate to defer prosecution conditioned upon the offender's enrollment in a drug treatment program.

E. Serious consideration should always be given to the question of whether an offender would, if federally charged, cooperate and furnish evidence of narcotic violations committed by the offender's confederates or by others.

F. U.S. Attorneys are urged to cooperate fully with state and local prosecutors and investigators and to encourage them in actively combating drug trafficking. There will be instances where state or local prosecution of controlled substance offenders would be warranted even when there has been significant federal involvement in the case. However, since the federal government has significant responsibilities in the area of drug law enforcement, care should be taken in deciding which is the most appropriate judicial forum in which to prosecute a controlled substance case.

G. U.S. Attorneys should confer with special agents in charge of DEA field offices in their districts regarding standards and procedures to be utilized in determining whether controlled substance cases should be prosecuted federally or referred to state or local prosecutors.

H. Periodically, U.S. Attorneys should meet or confer with state and local prosecutors in connection with referral of federal cases for prosecution.

9-101.300 CONTROLLED SUBSTANCE DESTRUCTION PROCEDURES

Each United States Attorney's Office should designate a drug evidence destruction coordinator. This coordinator should preferably be an attorney familiar with the prosecution of narcotics cases and related evidentiary issues. The coordinator will work closely with DEA and FBI counterparts to ensure that the evidentiary value of the drug evidence is preserved for later use in court. In addition, the coordinator will be responsible for monitoring legal problems, providing advice, and ensuring that the FBI and DEA 60-day notices are forwarded to the appropriate attorney.

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When the United States Attorneys' Offices receive the 60-day Notice, it should be forwarded to the attorney assigned to the case (and to the Drug Evidence Destruction Coordinator) to determine the appropriate response. The prosecutor may want to contact the DEA/FBI agent in charge of the case to get the agent's assurance that sufficient photographic documentation of the evidence is or will be available prior to destruction. Furthermore, if the evidence is marijuana, the prosecutor is encouraged to consult with the case agent to make sure that the evidence was accurately weighed and the weighing method was adequately documented for use in court proceedings. Once the appropriate reviews and consultations are complete, the prosecutor may take one of the following actions:

1. Send a written response to the case agent before the 60-day time period elapses permitting sampling and destruction to proceed. [*NOTE: The Department encourages prosecutors to do this as soon as possible for cases where there is no basis for an exception request.* This will permit DEA/FBI to begin the sampling and destruction process in less than 60 days, providing laboratory analyses are completed.]; or.

2. Permit the 60-day time period to elapse, at which point the DEA/FBI case agent will authorize sampling and destruction *with no further notice to the United States Attorneys' Offices* once laboratory analyses are completed; or.

3. Determine that an exception request is warranted, and forward such a written request, signed personally by the U.S. Attorney, to the DEA/FBI SAC. It must be received before the expiration date of the 60-day time period. [*NOTE: The use of exception requests should be severely limited.* In any case in which the U.S. Attorney requests an exception from the SAC, the burden will be *on the prosecutor* to show the particular circumstances or factors that would adversely affect the government's case. Since the sample retained under the standard procedure will be large—twice the amount required for maximum mandatory minimum penalties under the Anti-Drug Abuse Act for all substances other than marijuana—prosecutors are strongly discouraged from filing an exception request on the grounds that the full seizure is needed for jury appeal or other purely strategical purposes.

If the SAC denies the exception request, the U.S. Attorney will be so notified in writing. The U.S. Attorney may then choose to abide by the SAC's decision or may appeal the decision to the Assistant Attorney General, Criminal Division, as discussed below. In the event that the DEA/FBI SAC denies the U.S. Attorney's request to preserve the evidence, the exhibit will be retained for 30 days from the day of the denial notice before sampling and destruction are authorized. If an appeal is made, the evidence will be maintained intact until the appeal is decided, provided

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that the DEA/FBI SAC is notified of the appeal within 30 days of the denial notice. It shall be the U.S. Attorney's responsibility to provide the DEA/FBI SAC with a copy of the appeal letter.

United States Attorney's Office Action

If the DEA/FBI SAC denies the exception request, the U.S. Attorney may either let the decision stand or may choose to appeal the decision to the Assistant Attorney General, Criminal Division. Should the U.S. Attorney choose to appeal, a letter documenting the reasons for the appeal should be sent to:

Chief, Narcotic and Dangerous Drug Section
Criminal Division
U.S. Department of Justice
Bond Building—11th Floor
1400 New York Avenue N.W.
Washington, D.C. 20530

A copy of the appeal request should be sent to the SAC and *must be received before the 30-day appeal period has elapsed.*

9-101.400 DOMESTIC OPERATION GUIDELINES FOR THE DRUG ENFORCEMENT ADMINISTRATION: COMMENTS ON SELECTED PROVISIONS

On December 28, 1976, the Attorney General issued domestic operations guidelines for the Drug Enforcement Administration. The guidelines are designed to increase efficiency in the operations of the Drug Enforcement Administration and various branches of the Department of Justice.

Copies of the Drug Enforcement Administration's Domestic Operations Guidelines have been distributed to U.S. Attorneys' offices throughout the country. The Attorney General intends that the U.S. Attorney in each district will be responsible in large measure for insuring compliance by the Drug Enforcement Administration. Any disagreement as to their interpretation should be referred to the Investigation Review Unit for resolution.

Most of the Drug Enforcement Administration guidelines are self-explanatory. However, certain of the guidelines dealing with coordination of investigative and prosecutive efforts by Drug Enforcement Administration agents and U.S. Attorneys seem worthy of a few words of explanation. Those guidelines, together with pertinent comments about them, are as follows:

A. Drug Enforcement Administration agents must notify U.S. Attorneys about any investigation as soon as there is probable cause to make an arrest, even though an arrest is not actually contemplated. When an investigation involves a major drug trafficking organization, the U.S. Attorney is to be informed as soon as the Drug Enforcement Administration determines

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that the subjects are part of a major trafficking group. Notification of any investigation involving the systematic gathering of intelligence about specific individuals or groups must be made to the U.S. Attorney about investigations which have been reported to him/her. Also submit periodic progress reports about such investigations to him/her. (*See* DEA Guidelines, Sec. I, D, par. 1.)

Comment: The intent of this guideline is that each U.S. Attorney is to play a meaningful role during the investigative stage of Drug Enforcement Administration cases and particularly in major investigations. Each U.S. Attorney, after consultation with the local Drug Enforcement Administration office, should determine in what form he/she wishes reports about ongoing investigations to be submitted to him/her. It is recommended that consideration be given to requiring that such reports be in written form, although this is a matter within the U.S. Attorney's discretion. Whenever a U.S. Attorney requires a written report from the Drug Enforcement Administration regarding an investigation (or other matters covered by the guidelines), he/she should specify what form the report should take, and the frequency with which it should be sent to him/her. Periodic furnishing of copies of standard investigative reports (DEA 6's) should normally satisfy this requirement. Each U.S. Attorney should also inform the local Drug Enforcement Administration office as to when and how often he/she or members of his/her staff are to be consulted about important developments in ongoing investigations. Procedures should be developed for the furnishing of legal assistance to Drug Enforcement Administration agents regarding knotty legal problems which arise in the course of investigations. U.S. Attorneys should consider delegating at least one experienced Assistant U.S. Attorney as a liaison officer to monitor major ongoing Drug Enforcement Administration investigations. The designated liaison officer should review all investigative reports relating to major investigations and should furnish directly or through other Assistant U.S. Attorneys whatever advice or assistance that may be required to fully develop such investigations.

B. Consistent with Department of Justice guidelines, U.S. Attorneys are directed to develop policy relating both to declination of prosecution and to referral of cases to state and local authorities. (*See* DEA Guidelines, Sec. I, D, par. 3.)

Comment: Each U.S. Attorney should establish prosecutive policy regarding the types of controlled substance cases which will be accepted for prosecution. In this connection, consid-

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eration should be given, *inter alia*, to such factors as: (a) the seriousness of the offense; (b) the kind and amount of drug involved; (c) the need to provide a deterrent to similar offenses; (d) the strength of the government's case; (e) the offender's degree of culpability as well as his/her past criminal history, if any; (f) the offender's circumstances; (g) the probable sentence which would follow on conviction; (h) the possibility of civil, administrative, or other proceedings in lieu of prosecution, and (i) the availability of prosecutive and judicial resources. Each U.S. Attorney should also develop policies and procedures for referring cases to state or local prosecutors. In this connection, factors such as the following should be considered: (1) the sufficiency of the evidence; (2) the degree of federal involvement; (3) the effectiveness of state and local prosecutors; (4) the willingness of state or local authorities to prosecute cases investigated primarily by federal agents; (5) the amount and type of controlled substance involved; (6) the violator's background; (7) the possibility that prosecution will lead to disclosure of evidence of controlled substance violations committed by other persons; (8) the types of sentences being imposed in state and local courts, and (9) the district court's backlog of cases. (Regarding referral of controlled substance cases to state and local prosecutors, *see* USAM 9-101.300).

C. Except in exigent circumstances and in cases which are referrable to state or local authorities, U.S. Attorneys are to be consulted prior to arrest. Further consultation should occur immediately after the arrest of a defendant. A written report must be furnished to the U.S. Attorney no later than five working days after the arrest. (*See* DEA Guidelines, Sec. I, D, par. 4.)

Comment: Each U.S. Attorney should confer with the local Drug Enforcement Administration office about arrest consultation procedures. Such procedures will probably vary from district to district. (Note that, where exigent circumstances exist or where a case is of the type which, under the U.S. Attorney's guidelines for prosecution, is referrable to state or local authorities, the Drug Enforcement Administration need not consult the U.S. Attorney immediately before and after the arrest.) *Inter alia*, it should be determined how much advance notification each U.S. Attorney wishes regarding an arrest. Also, a U.S. Attorney may want to delegate selected Assistant U.S. Attorneys to receive notification in his/her place. The written arrest report should set forth the probable cause for the arrest, the appearance before the magistrate, and the result of any interview with the defendant. The five-day re-

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quirement for the arrest report is designed to preclude any difficulties which might arise should a defendant request a preliminary hearing within the brief time periods set out in 18 U.S.C. § 3060(b). Reports relating to any warrantless arrest should show that the arrest was within the scope of the Drug Enforcement Administration's arrest power as set forth in 21 U.S.C. § 878(3). U.S. Attorneys should designate an experienced Assistant U.S. Attorney to advise Drug Enforcement Administration agents on questions of law and to assist agents in preparing complaints, search warrant affidavits, and warrants. At least one additional Assistant U.S. Attorney should also be appointed to act in the place of the primary Assistant whenever that Assistant is unavailable for consultation by Drug Enforcement Administration agents.

D. Any seizure made without a warrant which is not incident to an arrest must be reported in writing to the U.S. Attorney within 10 working days after the seizure. (*See* DEA Guidelines, Sec. I, D, par. 5.)

Comment: The seizure report should set forth relevant details about the seizure. If it appears for any reason that the seizure may be held legally defective, the U.S. Attorney or prosecutor assigned to the case should confer with the local Drug Enforcement Administration office. A determination can then be made regarding further action in the case.

E. Prior to trial, the Drug Enforcement Administration shall inform the U.S. Attorney whether an informant or defendant-informant has been compensated in any way and whether any type of electronic surveillance was used in the investigation. (*See* DEA Guidelines, Sec. I, D, par. 6.)

Comment: Each U.S. Attorney should determine how much advance pretrial notice he/she desires and the form it should take regarding informant compensation and electronic surveillance. He/she or a delegated Assistant U.S. Attorney, should then confer with the local Drug Enforcement Administration office with a view to establishing appropriate notification procedures. The mere offering of compensation for activities leading to the arrest of an offender is not, of itself, improper. *See United States v. Ladley*, 517 F.2d 1190, 1193 (9th Cir.1975). However, the fact that an informant is being compensated is the type of information which should be disclosed to the defense or complications may ensue, *see United States v. Morell*, 524 F.2d 550 (2d Cir.1975). Regarding the Drug Enforcement Administration's use of electronic surveillance of any kind in an investigation, the report to the U.S. Attorney should detail all the circumstances involved, particularly the kind of device(s) used.

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F. On request, any U.S. Attorney will have the right to review all relevant Drug Enforcement Administration files and manuals. Procedures are to be devised by U.S. Attorneys to ensure the security and confidentiality of such materials. (*See* DEA Guidelines, Sec. I, D, par. 7.)

Comment: Each U.S. Attorney should confer with the local Drug Enforcement Administration office with a view to adopting procedures designed to ensure the prompt delivery of Drug Enforcement Administration case files and manuals to the U.S. Attorney or prosecutors who have need of them. U.S. Attorneys should adopt appropriate procedures to maintain the security and confidentiality of such materials. Prosecutors who have custody of these materials for purposes of pretrial or trial preparation should be particularly careful about protecting them against unauthorized disclosure.

G. In extraordinary circumstances and upon appropriate notification to the U.S. Attorney before institution of prosecutive proceedings, the Drug Enforcement Administration may assure an informant or defendant-informant that he/she will not have to testify as a witness and that his/her identity will not be disclosed in court proceedings. (*See* DEA Guidelines, Sec. II, A, par. 6.)

Comment: U.S. Attorneys should confer with local Drug Enforcement Administration offices about this important matter and determine how much advance notification they require and what form the notification is to take. Notification should be made prior to the arrest of an offender whenever possible. It is settled, of course, that the government has a privilege of refusing to disclose the identity of an informant at trial. *See McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. United States*, 353 U.S. 53 (1957). The privilege is not an absolute one and, where the defendant can show that disclosure is required to insure a ''fair trial,'' the informant's identity must be revealed. *Roviaro*, 353 U.S. at 60-61. When a demand is made by the defense to reveal an informant's identity, if the government intends to assert the privilege and resist the demand, this should be made clear promptly to prevent any misunderstanding and prejudice. *See United States v. Truesdale*, 400 F.2d 620, 623 (2d Cir.1968). In order to compel disclosure, the defendant must show that the informant's testimony would probably be material to a substantial issue in the case. *See Encinas-Sierras v. United States*, 401 F.2d 228 (9th Cir.1968). In view of these considerations, it is clear that non-disclosure of an informant's identity can at times hamper or even fatally injure the government's case. Accordingly, the Drug Enforcement Administration should not make any commitments about non-

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disclosure to informants absent the most compelling circumstances, and then only with the appropriate level of supervisory approval.

H. The Drug Enforcement Administration may not seek the cooperation of or utilize a defendant-informant without the U.S. Attorney's prior approval. (*See* DEA Guidelines, Sec. II, C, par. 2.)

Comment: Procedures should be agreed upon between the U.S. Attorney and the local Drug Enforcement Administration office concerning consultation about possible use of a defendant-informant. Particular attention should be given to situations in which the prospective defendant-informant is represented by counsel but does not wish to have his/her counsel informed of his/her cooperation with the government because of a possible conflict of interest on the part of such counsel. The fact that a defendant has an attorney does not mean that law enforcement officials cannot obtain information from him/her without prior notice to and without the prior consent of his/her attorney. The right to counsel can be waived in this situation although a higher standard is imposed to show waiver once counsel has been appointed. *United States v. Cobbs*, 481 F.2d 196, 199 (3d Cir. 1973); *Williams v. Brewer*, 509 F.2d 227, 233 (8th Cir.1974). *See also United States v. Woods*, 544 F.2d 242, 254-255 (6th Cir.1976); *United States v. Satterfield*, 417 F.Supp. 293 (S.D.N.Y.1976), *aff'd*, 558 F.2d 655 (2d Cir.1976); *Brewer v. Williams*, 467 U.S. 431 (1977). The Drug Enforcement Administration will use defendant-informants being prosecuted in state courts only with the approval of the state prosecutor. The U.S. Attorney will be informed of the status of any such informant should the informant's cooperation result in the case being forwarded for federal prosecution.

I. The Drug Enforcement Administration may advise a defendant-informant that his/her cooperation will be made known to the U.S. Attorney but must make no further representation to the informant without express written approval of the Drug Enforcement Administration Special Agent in Charge (SAC). (*See* DEA Guidelines, Sec. II, C, par. 3.)

Comment: This guideline restricts the Drug Enforcement Administration's authority to make promises regarding disposition of pending cases. The mere fact that a law enforcement officer indicates to an offender that his/her cooperation will be called to the attention of the U.S. Attorney is not improper, *see United States v. Glasgow*, 451 F.2d 557 (9th Cir.1971). Of course, the question of whether a defendant-informant is to receive special consideration in return for his/her cooperation is a decision which is reserved for the U.S. Attorney. This guideline is not intended to authorize Drug Enforcement

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Administration Regional Directors to make representations regarding disposition of a case or the penalties which will be imposed.

J. The U.S. Attorney must be notified whenever the Drug Enforcement Administration has reason to believe that an informant or defendant-informant has committed a serious crime. If the Drug Enforcement Administration wishes to continue using such an informant, it must notify the U.S. Attorney who will make decision after consulting the Chief of the Narcotic and Dangerous Drug Section of the Criminal Division. (*See* DEA Guidelines, Sec. II, D, pars. 3 and 5.)

Comment: Procedures should be agreed upon between each U.S. Attorney and the local Drug Enforcement Administration office regarding prompt notification and the manner in which such notification is to be transmitted. When the Drug Enforcement Administration wishes to continue using an informant who apparently has committed a serious offense, the U.S. Attorney should contact the Chief of the Narcotic and Dangerous Drug Section so that the concerned Section of the Criminal Division can make a prompt recommendation about further use of the informant and thus contribute to a speedy resolution of the problem.

K. During undercover investigations, the Drug Enforcement Administration may furnish an item necessary to the commission of an offense (*e.g.*, a legal chemical), other than a controlled substance, with the approval of the Drug Enforcement Administration Special Agent in Charge after consultation with the U.S. Attorney and Drug Enforcement Administration headquarters. In extraordinary cases, after consultation with the U.S. Attorney and with the approval of the Administrator of the Drug Enforcement Administration, the Drug Enforcement Administration may furnish a controlled substance to an offender during an undercover investigation. (*See* DEA Guidelines, Sec. II, subsections D and E.)

Comment: Consultation procedures should be agreed upon by each U.S. Attorney and the local Drug Enforcement Administration office. In investigations involving the proposed furnishing of a controlled substance to a suspect, details about the extraordinary nature of the case should be promptly transmitted to the U.S. Attorney. After considering the information submitted to him/her, the U.S. Attorney should make his/her views known to Drug Enforcement Administration officials as quickly as possible so that the issue may be speedily resolved.

L. It is recommended that all Drug Enforcement Administration reports submitted to a U.S. Attorney be promptly reviewed by him/her or by a member of his/her staff and that regular contact be maintained between his/her office and the Drug Enforcement Administration. To the extent possible, an

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Assistant U.S. Attorney assigned to an investigation or prosecution should continue in that assignment and every effort should be made to avoid shifting particular cases among various Assistants. Further, the Drug Enforcement Administration case agent or his/her supervisor should be consulted by U.S. Attorneys or their Assistants on all questions relating to plea bargaining, as well as to the granting of formal or informal immunity, before the government is committed to a particular course of action.

M. Controlled Substance Units

In U.S. Attorneys' offices which have Controlled Substance Units, the U.S. Attorney may wish to delegate prosecutors from such units to perform many of the functions discussed above. However, such units should not be used as a substitute for a complaint and warrant unit. Prosecutors in Controlled Substance Units should have a minimum of one year of criminal jury trial experience, which includes trial of a substantial number of controlled substance cases. The units are responsible for developing major narcotic cases, primarily narcotic conspiracy prosecutions. The units are intended to work closely with Drug Enforcement Administration agents on a full-time basis in developing and prosecuting major controlled substance cases. Prosecutors in the units routinely make themselves available for periodic briefings by Drug Enforcement Administration officials. The Drug Enforcement Administration guidelines discussed above should result in smoother coordination of the prosecutive and investigative efforts of the Controlled Substance Units and Drug Enforcement Administration agents and should make for increased efficiency in the operations of these groups.

N. State and Local Task Forces

Ordinarily, the guidelines set forth in Subsection D of Section I of the Drug Enforcement Administration guidelines will not apply to Task Force investigations. The guidelines in Subsection D deal with reports to U.S. Attorneys about investigations of major drug trafficking organizations, reports about intelligence gathering activities, requirements that the Drug Enforcement Administration consult with a U.S. Attorney before and after a defendant's arrest, the furnishing of U.S. Attorneys with written arrest reports, and the submission to U.S. Attorneys of written reports about warrantless seizures. Task Force investigations frequently relate to lower levels of drug trafficking and prosecution of cases resulting therefrom is often in state courts. Clearly, application of the foregoing guidelines to investigations of this kind would serve no useful purpose. However, whenever it appears to the U.S. Attorney that a Task Force investigation is likely to result in a case which will be prosecuted in a federal court, Drug Enforcement Administration agents from the Task Force should comply with the requirements of Subsection I-D of the Drug Enforcement Administration Guidelines. This provision does not apply to the Attorney General's Organized Crime Drug Enforcement Task Forces.

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9-102.000 NARCOTIC ADDICT REHABILITATION ACT OF 1966

9-102.001 Generally

The Narcotic Addict Rehabilitation Act (Pub.L. No. 89-793) recognizes the fact that narcotic addicts, including those who violate federal criminal laws, are medical problems and should receive treatment rather than mere punishment. The Narcotic Addict Rehabilitation Act established several different but related types of commitment procedures, all of which contain both institutional and aftercare provisions. Although this act remains in effect, it is not utilized to the extent to which it was in the years immediately following its enactment in light of other programs which are available to defendants who are sentenced under regular sentencing provisions.

9-102.010 Title I

Under Title I of the Narcotic Rehabilitation Act (28 U.S.C. §§ 2901 to 2906), certain narcotic addicts charged with a federal offense may be eligible for civil commitment in lieu of criminal prosecution. If the court finds such addicts proper subjects for rehabilitation, they are committed to the custody of the Surgeon General for a period not to exceed 36 months. The pending criminal charge is held in abeyance during treatment and is dismissed if the addict successfully completes the program. However, prosecution is resumed if the patient is unsuccessful in the rehabilitation program.

9-102.020 Note on Title I

Title I is not often utilized. However, this is probably not of great consequence since the federal prison system now has adequate facilities to treat addicts who are convicted of violating federal criminal laws and who are sentenced to prison. Thus, such addicts can be afforded proper treatment within the federal system even though they have not resorted to the procedures set forth in Title I of the Narcotic Addict Rehabilitation Act. The fact that a convicted person is a narcotic addict will ordinarily appear in the pre-sentence report. Arrangements can thereafter be made by prison authorities to make treatment facilities available to the addict within the prison system.

9-102.030 Title III

Title III of the Narcotic Addict Rehabilitation Act (42 U.S.C. §§ 3411 to 3426) deals with the voluntary and involuntary civil commitment of addicts who are not charged with or convicted of any state or federal criminal offense. Title III provides for a diagnostic examination which is followed by a judicial hearing. If the court finds that the patient is a narcotic

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addict who is likely to be rehabilitated through treatment, it must commit him/her to the institutional custody of the Surgeon General.

Note on Title III

A narcotic addict may qualify for treatment under Title III only if ''appropriate State or other facilities are not available to such person'' (42 U.S.C. § 3412(b)). The Surgeon General has certified that there are adequate state or local narcotic addiction treatment facilities in every state except Louisiana, Virginia, and Kansas City, Missouri. In any jurisdiction where adequate state or local treatment facilities exist, those who request Title III commitment should be referred to the appropriate local or state authorities for treatment. Where state and local treatment facilities are inadequate (*i.e.*, Louisiana, Virginia, and Kansas City, Missouri), Title III may be used. Addicts who qualify for Title III treatment in this latter situation are committed to privately operated regional treatment facilities with which the federal government has contracts for treatment of Title III patients.

9-102.040 Confidentiality of Patient Records

Records of patients undergoing treatment for drug or alcohol abuse are confidential. *See* 42 U.S.C. § 290ee-3 and 42 U.S.C. § 290dd-3. The confidentiality requirements extend to all alcohol and drug abuse programs conducted, regulated, or directly or indirectly assisted by the federal government. *See* 42 U.S.C. § 290ee-3, 42 U.S.C. § 290dd-3 and 42 C.F.R. § 2.

The confidentiality statutes and regulations specify the manner in which requests should be made by law enforcement officials for patient records and other patient information for investigative or prosecutive purposes. Patient records and similar information cannot be released to law enforcement officers until a court order has been obtained by the officers authorizing such release. *See* 42 U.S.C. § 290ee-3(2)(c), 42 U.S.C. § 290dd-3(2)(c), and 42 C.F.R. § 2.61 *et seq.*

Regarding the strict manner in which the confidentiality requirements are construed, *see United States v. Graham,* 548 F.2d 1302, 1314 (8th Cir.1977).

The responsibility of U.S. Attorneys in patient confidentiality matters is as follows. Most alcohol and drug abuse programs are conducted by state or local treatment personnel, with appropriate federal financial assistance. Personnel of such programs seem to be merely private individuals who manage programs which are funded by the federal government. The fact that such programs are federally funded would not seem to make them federal, or even quasi-federal, programs. *See generally, Pope v. Commissioner of Internal Revenue,* 138 F.2d 1006, 1009 (6th Cir.1943); *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 331 U.S. 416, 429 (1947); 67 C.J.S. Officers § 3. The Attorney General may not provide legal repre-

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sentation solely to vindicate private rights or to redress private grievances in which the public has no vital interest. *Allen v. County School Board of Prince Edward County,* 28 F.R.D. 358 (E.D.Va.1961). The Attorney General may authorize a U.S. Attorney to represent a non-government party in a civil case where the interests of the United States are meaningfully involved. *See Brawer v. Horowitz,* 535 F.2d 830 (3d Cir.1976); 28 U.S.C. § 517. *See also In re Debs,* 158 U.S. 564, 586 (1895). However, it is doubtful that cases involving attempts by law enforcement officers to obtain drug patient records could be said to involve federal interests to such an extent as to warrant legal representation of alcohol or drug abuse program personnel by U.S. Attorneys or members of their legal staff. In short, U.S. Attorneys appear to have no obligation to act as legal representatives for program personnel when requests are made of such personnel by law enforcement officers for patient records or other patient information. It would seem that representation in such cases would have to be furnished by the attorney who represents the institution of which the drug program is a part.

Although U.S. Attorneys have no obligation to represent program personnel in confidentiality matters, nevertheless, when any such matter comes to the attention of a U.S. Attorney at an early stage, he/she should endeavor, acting as an *amicus curiae*, to advise the appropriate court in an informal manner of the requirements of the confidentiality statutes and regulations.

U.S. Attorneys are responsible for prosecuting cases involving unauthorized or improper disclosure of patient records. The sanctions for such violations are the fines set forth in 42 U.S.C. § 290ee-3(f) and 42 U.S.C. § 290dd-3(f). The prosecutive obligation is based on the Department's responsibility to enforce all federal criminal statutes, 28 U.S.C. § 516. *See United States v. Tonry,* 445 F.Supp. 620 (E.D.La.1977). When a report of an alleged confidentiality violation is received by a U.S. Attorney, the matter should be carefully reviewed to determine whether the facts and the nature of the violation warrant prosecutive action. Should any difficulties arise in this regard, the U.S. Attorney should consult the Narcotic and Dangerous Drug Section of the Criminal Division.

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9-103.100 CONTROLLED SUBSTANCE REGISTRANT PROTECTION ACT OF 1984

9-103.110 Overview

The Controlled Substance Registrant Protection Act of 1984, Pub.L. No. 98-305, 98 Stat. 221 (1984), which is codified at 18 U.S.C. § 2118, provides criminal penalties for certain theft offenses *(e.g.*, robbery, attempted robbery, burglary, attempted burglary, and conspiracy to commit robbery or burglary) directed against persons or establishments registered with the Drug Enforcement Administration under Section 302 of the Controlled Substances Act (21 U.S.C. § 822). The act was signed on May 31, 1984, and applies to all acts and violations occurring after the date of enactment.

The act is intended to combat the large number of burglaries and robberies directed against Drug Enforcement Administration registrants by authorizing federal participation in the investigation and prosecution of such offenses. At the same time, however, the legislative history indicates that Congress recognized that these crimes are primarily state and local concerns. Federal jurisdiction has been limited, therefore, to only the most serious cases, and such federal involvement is intended to supplement, and not to supplant, state and local efforts.

Investigative and prosecutive guidelines (*see* USAM 9-103.130, *infra*) have been issued which also serve to limit the involvement of federal authorities in these matters. It is also made clear in these guidelines that it is the responsibility of local law enforcement authorities to respond to the scene of an offense covered under the act, and that only after notification from the responding local law enforcement agency will the Federal Bureau of Investigation become involved in the matter.

9-103.120 Analysis and Discussion

9-103.121 Taking or Attempted Taking of a Controlled Substance

Subsection (a) of the act prohibits the taking or attempted taking by force, violence or intimidation of any material or compound that contains a controlled substance belonging to or which is in the care, custody, control, or possession of a Drug Enforcement Administration registrant. Federal jurisdiction attaches whenever:

A. The replacement cost of the material or compound is not less than $500,

B. The offender traveled in interstate or foreign commerce or used a facility in interstate or foreign commerce to facilitate the taking or attempted taking; or

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C. A person other than the offender was killed or suffered significant bodily injury as a result of the taking or attempted taking.

Persons convicted under this provision can be imprisoned for not more than 20 years, fined not more than $25,000, or both, unless they qualify for enhanced punishment under the provisions of subsection (c), discussed *infra*.

9-103.122 Entering, Attempted Entry, or Remaining on the Premises

Subsection (b) of the act prohibits the unauthorized act of entering, attempting to enter, or remaining in the business premises or property (including conveyances and storage facilities) of a Drug Enforcement Administration registrant with the intent to steal a material or compound containing a controlled substance. Federal jurisdiction attaches whenever:

A. The replacement cost of the controlled substance is not less than $500;

B. The offender traveled in interstate or foreign commerce or used a facility in interstate or foreign commerce to facilitate the burglary; or

C. A person other than the offender was killed or suffered significant bodily injury as a result of the entry or attempt.

Persons convicted under this provision may be imprisoned not more than 20 years, fined not more than $25,000, or both, unless they qualify for enhanced punishment under subsection (c), discussed *infra*.

9-103.123 Enhanced Penalties for Use of Deadly Weapon or Where Death Results

Subsection (c)(1) of the act provides for enhanced penalties whenever in the course of violating subsections (a) or (b) the perpetrator uses a deadly weapon or device to assault any person or to place any person's life in jeopardy. Offenders can be imprisoned for not more than 25 years, fined not more than $25,000, or both.

Similarly, subsection (c)(2) provides for enhanced penalties whenever in the course of violating subsections (a) or (b) the perpetrator kills any person. Offenders can be imprisoned for any term of years or life, fined not more than $50,000, or both.

9-103.124 Conspiracy

Subsection (d) of the act proscribes the conspiring between two or more persons to violate subsections (a) or (b) whenever one or more of the conspirators commits any overt act to effect the object of the conspiracy. Offenders can be imprisoned not more than 10 years, fined not more than

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$25,000, or both. These penalties are considerably greater than the penalties available for violation of the general conspiracy statute (18 U.S.C. § 371).

9-103.130 Investigative and Prosecutive Guidelines

The following investigative and prosecutive guidelines for the Controlled Substance Registrant Protection Act of 1984 have been adopted by the Department of Justice.

9-103.131 Investigative Guidelines

In cases where there is dual federal and state jurisdiction, the Federal Bureau of Investigation will investigate or otherwise assist local law enforcement agencies in the following situations:

A. When death or significant bodily injury occurs or there is a significant possibility that death or serious bodily injury could occur;

B. When large quantities of controlled substances are involved, in accordance with local quantity or monetary criteria for federal investigation of other controlled substance offenses;

C. When a suspect is a Class 1 or 2 Drug Enforcement Administration violator or other federal target;

D. When the facility burglarized or robbed is a manufacturing or distribution center (*e.g.*, a warehouse); or

E. When interstate activity is involved.

It will be the responsibility of the local law enforcement agency to respond to the scene of an offense covered under the act and to conduct the preliminary investigation. The local law enforcement agency will then notify the Federal Bureau of Investigation as to the existence of any of these situations.

In cases of mutual interest to the Federal Bureau of Investigation and the Drug Enforcement Administration, these agencies will exchange information and ensure that investigative efforts are coordinated.

9-103.132 Prosecutive Guidelines

United States Attorneys are required to obtain the approval of the Assistant Attorney General of the Criminal Division prior to seeking an indictment or filing an information in the case of an offense proscribed under the Controlled Substances Registrant Protection Act of 1984 if the state or local prosecutor with responsibility for prosecuting a state charge for the underlying pharmacy robbery or burglary objects to a federal prosecution. The views of the local prosecutor must be solicited and

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recorded in the file prior to the return of any indictment or filing of an information in any case brought under the Act. Where approval is required because of an objection, the failure to obtain the required approval of the Assistant Attorney General prior to indictment will not affect the continuation of the prosecution of any matter unless the Department so orders.

Questions concerning the authorization of prosecutions under the Act, or any other questions concerning the prosecution of offenses under the Act, should be directed to the Narcotic and Dangerous Drug Section, FTS 724-7123.

9-103.140 Criminal Division Approval

In deciding whether to prosecute a pharmacy robbery or burglary case in federal as opposed to state court, the following factors should be considered:

A. The most suitable forum for prosecution due to the available penalties, rules on the admissibility of evidence, and relative availability of resources;

B. Whether there are any other outstanding state or federal charges;

C. The interstate nexus, if any;

D. Information as to the significance of the violator(s)—including whether the principal defendant is a Class 1 or 2 DEA violator or other federal target—and whether a large-scale drug-trafficking operation is involved;

E. The quantity, type, and dollar value (*viz.*, replacement cost) of the controlled substances involved;

F. Any prior state or federal arrest/conviction record of the defendant(s);

G. Whether injury or death to the registrant is involved;

H. The relative potential punishment for the offense(s) in state and federal court;

I. The attitude of the state or local prosecutor toward the proposed federal prosecution of the defendant(s) (*see* USAM 9-103.132);

J. The point at which the Federal Bureau of Investigation became involved in the case, and the percentage of the investigation which is federal and the percentage which is state or local.

Requests for approval will be processed through the Narcotic and Dangerous Drug Section of the Criminal Division, P.O. Box 521, Ben Franklin Station, Washington, D.C. 20044-0521.

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As the Act contains a congressional reporting requirement, United States Attorneys shall continue to notify the Department of Justice as to the initiation and completion of all prosecutions under the Act (*e.g.*, indictments, convictions, sentences). Such information is to be sent to the Narcotic and Dangerous Drug Section, P.O. Box 521, Ben Franklin Station, Washington, D.C. 20044-0521.]

9-103.200 AVIATION DRUG-TRAFFICKING CONTROL ACT OF 1984 AND THE ANTI-DRUG ABUSE ACT OF 1986

9-103.210 Overview

The Aviation Drug-Trafficking Control Act of 1984 and the Anti-Drug Abuse Act of 1986 amend the Federal Aviation Act of 1958 and the Independent Safety Board Act of 1974 to:

A. Require an aircraft operator to make the aircraft's certificate of registration available upon request to any law enforcement officer;

B. Require that the Federal Aviation Administration revoke the airman certificates of persons who utilize aircraft in the commission of or to facilitate the commission of a state or federal felony controlled substance violation;

C. Require that the Federal Aviation Administration revoke an owner's aircraft registration certificate if such aircraft has been used with the owner's permission or knowledge to carry out an activity, that is, a state or federal felony controlled substance violation;

D. Create a criminal penalty when a person serves in any capacity as an airman without an airman certificate in connection with the aircraft transportation of any illicit controlled substance;

E. Exempt states from any limitations in establishing their own penalties, including forfeiture for violations relating to aircraft registration certificates or aircraft markings;

F. Expand the provision concerning forgery or alteration of aviation-related certificates to make the proscription applicable to anyone who ''sells, uses, attempts to use, or possesses with the intent to use'' such fraudulent certificate;

G. Increase the penalty for forgery or alteration of certificates, or the sale, use, attempted use, or possession with intent to use such certificate, as well as the false or misleading marking of an aircraft, or unauthorized installation or modification of a fuel tank or system, or to knowingly or willfully operate an aircraft improperly displaying navigation or anti-collision lights where such violation involves a federal or state controlled substance felony; and

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H. Require notification to the Secretary of the Treasury for any sale, transfer, or conveyance of any ownership in an aircraft for which the Federal Aviation Administration has issued a certificate of registration.

These provisions are not applicable to the simple possession of a controlled substance.

The act of 1984, Pub.L. No. 98-499, 98 Stat. 2312, was signed on October 19, 1984, and applies to all acts and violations occurring after the date of enactment. The act of 1986, Pub.L. No. 99-570, 100 Stat. 3207, was signed on October 27, 1986, and applies to all acts and violations pertaining to aviation occurring after the date of enactment.

9-103.220 Policy Considerations

To effectuate the intent of Congress, all aircraft-related drug convictions of persons who hold certificates should be brought to the attention of the Federal Aviation Administration for further administrative action. If criminal charges are not contemplated or where, as stated in the legislative history, ''an airman is not convicted because of technicalities which apply to criminal proceedings but not to administrative proceedings,'' prosecutors should also refer the matter to the Federal Aviation Administration. Such matters should be referred to either: Manager or Special Agent, Investigations and Security Division, ACS 300, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591. Both can also be reached at FTS 267-8768.

Questions concerning aviation drug-trafficking should be directed to the Narcotic and Dangerous Drug Section, FTS 786-4707.

9-103.230 Analysis

The Aviation Drug-Trafficking Control Act strengthens in several ways the ability of the Federal Aviation Administration to deal with persons who utilize aircraft in the commission of a felony offense which is ''punishable by death or imprisonment for a term exceeding one year under a state or federal law relating to a controlled substance (other than a law relating to simple possession of a controlled substance).'' The Anti-Drug Abuse Act further strengthens federal and state authority to prevent the use of aviation resources for illegal drug-trafficking. The act enhances penalties and provides more control over aircraft registration, modification, and ownership.

9-103.231 Controlled Substance Related Penalties

Violations involving aircraft transportation of controlled substances subject the violator to a fine not exceeding $25,000, or imprisonment not exceeding 5 years, or both (49 U.S.C. § 1472(q)(3)). The broad definition

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of ''airman'' (49 U.S.C. § 1307(7)) touches almost anyone connected with a flight. Fraudulent, forged, or altered aircraft or airman certificates also subject the aircraft-using controlled substance felony violator to the same penalties (49 U.S.C. § 1472(b)(2)(A)(B)).

9-103.232 Fuel Tank Modification Presumption

Modifications to or installation of an aircraft fuel system without having the certificate on board the aircraft which authorizes such modification or installation shall create a presumption of a violation by the aircraft operator. Such violation subjects the violator to a fine not exceeding $25,000, or imprisonment not exceeding 5 years, or both, and subjects the aircraft to seizure and forfeiture (49 U.S.C. § 1472(q)(4)(5)).

9-103.233 Automatic Lien

Violation of entry or clearance regulations or violation of immigration regulations when by the owner, operator, or commander of an aircraft subject the violator to a $5,000 civil penalty, which penalty shall be a lien against the aircraft (49 U.S.C. § 1474(a)).

9-103.234 Customs or Public-Health Laws or Regulations

Violations of customs or public-health laws or regulations made applicable to aircraft by regulation subject any aircraft so involved to seizure and forfeiture as provided for in such customs law (49 U.S.C. § 1474(a)).

9-103.300 MAIL ORDER DRUG PARAPHERNALIA CONTROL ACT

9-103.310 Offense and Penalties

Section 857 of Title 21, United States Code, was enacted as Section 1822 of Subtitle O of the Anti-Drug Abuse Act of 1986. By its terms, 21 U.S.C. § 857 provides an offense by which it is unlawful for persons: ''(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia; (2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or (3) to import or export drug paraphernalia.'' Violations of this provision carry a maximum penalty of 3 years in prison and a fine of not more than $100,000.

9-103.320 Definition of ''Drug Paraphernalia''

Congress, in subsection (d) of the statute, has provided a broad definition of ''drug paraphernalia'': ''any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing,

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injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act. . . .'' Such a list includes items ''primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body.'' Because neither the statute nor the legislative history provide a definition of ''primarily intended or designed'' as used in subsection (d), the Department believes that this phrase should be given its plain, common sense reading.

9-103.330 Examples of ''Drug Paraphernalia''; Guidance

Subsection (d) of 21 U.S.C. § 857 continues with a lengthy list of examples of ''drug paraphernalia'': ''(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; (2) water pipies; (3) carburetion tubes and devices; (4) smoking and carburetion masks; (5) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand; (6) miniature spoons with level capacities of one-tenth cubic centimeter or less; (7) chamber pipes; (8) carburetor pipes; (9) electric pipes; (10) air-driven pipes; (11) chillums; (12) bongs; (13) ice pipes or chillers; (14) wired cigarette papers; or (15) cocaine freebase kits.''

Subsection (e) of 21 U.S.C. § 857 provides guidance for determining whether something should be considered ''drug paraphernalia'' under the act. Pursuant to that subsection, all logically relevant factors may be considered, including: ''(1) instructions, oral or written, provided with the item concerning its use; (2) descriptive materials accompanying the item which explain or depict its use; (3) national and local advertising concerning its use; (4) the manner in which the item is displayed for sale; (5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products; (6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise; (7) the existence and scope of legitimate uses of the item in the community; and (8) expert testimony concerning its use.''

9-103.340 Exceptions From Coverage

Specifically excluded from coverage of this statute are any persons authorized by local, state, or federal law to manufacture, possess, or distribute such items, as well as any item that, in the normal lawful course of business, is primarily intended for use with tobacco products, including any pipe, paper, or accessory.

There has been some concern expressed that the exception to the statute's proscription for conduct authorized by any local, state, or federal

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law would allow persons in states without drug paraphernalia laws to engage in the conduct otherwise proscribed by 21 U.S.C. § 857. The Department does not accept the view that conduct which is *permitted* under any of these laws is to be considered *authorized* for purposes of this statute. Therefore, unless an affirmative authorization has been granted by a law in any of these jurisdictions to a person or company to engage in the acts covered by this statute, no exception from the coverage of this statute shall be deemed to exist and prosecution under 21 U.S.C. § 857 shall not be barred thereby.

9-103.350 Seizure and Forfeiture

Subsection (c) of the statute provides that drug paraphernalia involved in any violation of subsection (a) shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any property so forfeited is to be delivered to the General Services Administration which shall determine whether such items shall be destroyed or used for law enforcement or educational purposes by federal, state, or local authorities.

9-103.360 Background and Intent of Legislation

In the late 1970s, the availability of drug paraphernalia, with its inherent encouragement of drug abuse, became more widespread. In response, the Drug Enforcement Administration drafted a model drug paraphernalia statute to assist state and local governments in addressing the problem of so-called ''head shops.'' These shops were sending a message to young persons—both through the availability of such devices and through blatant advertisements and displays attached thereto—that drugs were okay. Those states and communities which enacted and enforced this law, or variations of it, were able to decrease the availability of such products, thereby addressing drug paraphernalia's inherent, and incorrect, message of drug acceptability. Still, several states were unwilling to enact or enforce laws that would address this problem.

The planned effect of the paraphernalia provision is to ensure that the availability of drug paraphernalia in a state or community which has not chosen to proscribe such items within its borders does not create a problem which will ''spill over'' into a community or state which has so acted. By proscribing use of the mails or any interstate attempt to sell drug paraphernalia, the mail-order drug paraphernalia industry should be substantially curtailed, with hard-core drug paraphernalia (*e.g.*, bongs, cocaine freebase kits, carburetion masks) becoming increasingly harder to acquire.

9-103.370 Effective Date

All of the provisions of Subtitle O of the Anti-Drug Abuse Act had a delayed effective date of 90 days after the date of enactment of the act

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(October 27, 1986). Therefore, offenses committed on or after January 25, 1987, should be covered.

9-103.380 Consultation Requirement

The Assistant Attorney General of the Criminal Division has determined that consultation with the Narcotic and Dangerous Drug Section of the Criminal Division is required to take place prior to charging a violation of this statute. Any prosecutor who contemplates the prosecution of a ''head shop'' as an aider and abettor of a violation of this statute should likewise consult the Narcotic and Dangerous Drug Section prior to the initiation of the charging process.

Further information concerning this statute may be found in the *Handbook on the Anti-Drug Abuse Act of 1986* (March, 1987).

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U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

August 4, 1993

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TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

John C. Keeney
Acting Assistant Attorney General
Criminal Division

RE: Money Laundering Prosecutions and Forfeitures:
18 U.S.C. §§ 1956-57 and 981-982; 31 U.S.C. § 5322

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected section.

AFFECTS: USAM 9-105.000

PURPOSE: This bluesheet supersedes the October 1, 1992, bluesheet and implements new consultation and reporting requirements for certain money laundering prosecutions brought under 18 U.S.C. §§ 1956-57 and 31 U.S.C. § 5322, and forfeiture cases brought under 18 U.S.C. §§ 981-982.

On October 1, 1992, a bluesheet was issued which reviewed and reiterated the existing requirements for Criminal Division approval of certain cases brought under the money laundering statutes (18 U.S.C. §§ 1956 and 1957), as well as money laundering forfeiture actions brought under 18 U.S.C. §§ 981 and 982, and added new approval, consultation and reporting requirements. This bluesheet supersedes the October 1, 1992, bluesheet in that it maintains the requirements set forth in that document and amends the bluesheet in the following three ways:

1. A fourth category of cases is added to the class of money laundering prosecutions and forfeitures which requires prior consultation with the Criminal Division. This new consultation requirement is set forth in § II(B)(4), below.

2. A new reporting requirement is set forth, based on the statutory mandate of the Annunzio-Wylie Anti-Money Laundering Act of 1992, which requires that the Money Laundering Section be notified when any financial institution, or any officer, director, or employee of any financial institution has been found guilty of an offense under §§ 1956, 1957 or 1960 of Title 18, or § 5322 of Title 31.

3. A revised version of the Money Laundering Case Report is attached as Appendix A. This Case Report, which can be used to transmit filed indictments and complaints to the Money Laundering Section, has been revised in order to incorporate the statutory changes enacted in the Annunzio-Wylie Anti-Money Laundering Act of 1992.

I. Explanation of Consultation and Reporting Requirements

The Money Laundering Section was established in the Criminal Division, in part, to ensure consistency in certain types of prosecutions and to assist prosecutors in the formulation and prosecution of money laundering cases. Prosecutors should avail themselves of the Section's expertise in order to enhance their understanding of the complex issues involved in such cases, and to ensure consistency in the application of the relevant statutes.

The problems in applying the money laundering statutes are greater than the problems that ordinarily arise when a new criminal statute is applied for the first time. This is because both the criminal provisions and the civil forfeiture statute are broad. While they may have been intended primarily to address the laundering of drug money they, in fact, apply to the movement of funds derived from most serious federal crimes and a large number of state crimes, as well. "Money laundering" thus applies to everything from the international transfer by wire of hundreds of millions of dollars in drug proceeds to the purchase of an automobile with funds robbed from a bank.

Moreover, the civil forfeiture statute for money laundering, 18 U.S.C. § 981, gives the government a means to forfeit property involved in a wide range of offenses for which forfeiture is not otherwise provided. That is, the law does not generally provide for forfeiture in cases of fraud, environmental crime, or public corruption. By alleging that the proceeds of such crimes were subsequently laundered, however, the government can obtain

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forfeiture of the subject property--and any property used to facilitate the laundering offense--under the money laundering forfeiture statutes. We must use these powerful weapons carefully.

Consultation with the Money Laundering Section will provide a means to ensure the orderly development of the case law and to assist prosecutors in applying these statutes at a time when the case law in this area is developing very fast. The Money Laundering Section will perform an important service in providing reference to recently decided cases on critical issues and the legislative history of the numerous amendments made by Congress since these statutes were first enacted.

The reporting requirement is intended to serve two additional purposes. First, providing copies of all indictments and complaints will continue to make the Money Laundering Section a central repository of sample pleadings that are an invaluable resource to prosecutors in the field. This is particularly important in the next few years when many United States Attorneys will be using the money laundering statutes for the first time. Moreover, the reporting requirement will enable the Criminal Division to respond to the frequent requests from Congress and federal agencies for statistics regarding the application of the money laundering statutes.

II. Review and Authorization Requirements

The addition of the new notification and consultation guidelines to the already existing requirements for Criminal Division authorization of money laundering prosecutions under certain circumstances creates a three-tier level of communication between the United States Attorneys' Offices, other Divisions and the Criminal Division. These three tiers break down into the following classes.

A. Requirements for Criminal Division Approval

There are four categories of cases which require prior authorization from the Criminal Division. Chapter 9-105 of the United States Attorneys' Manual presently provides for Justice Department review and approval of three classes of money laundering prosecutions.[1] The fourth category is new.

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[1] It should be noted that, prior to the establishment of the Money Laundering Section, requests for Criminal Division approval in these three categories of cases were directed to the Narcotic and Dangerous Drug Section. All such requests should now be directed to the Money Laundering Section.

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1. Extraterritorial Jurisdiction: Section 9-105.100 requires Criminal Division approval 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: Section 9-105.100 requires Tax Division authorization of 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. See Supplement to 9-105.100 issued by Assistant Attorney General Edward S.G. Dennis, Jr., on August 16, 1989.[2]

3. Prosecutions of Attorneys: Sections 9-105.100, 9-105.300, and 9-105.600 require Criminal Division approval of prosecutions of attorneys (under either § 1956 or § 1957) where the financial transaction is one involving attorneys' fees. This approval is required regardless of whether the fee was received in a criminal or civil case. However, prosecutions are specifically barred only with respect to "bona fide fees" received in connection with "representation in a criminal matter." § 9-105.600.

4. Prosecution of a Financial Institution: In 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, Criminal Division approval is required before any indictment or complaint is filed.[3]

The review and approval function for §§ 1956 and 1957 prosecutions involving these four categories of cases has been centralized within the Money Laundering Section. In the case of any prosecution requiring Criminal Division approval under these provisions, a copy of the proposed indictment and a prosecutive memorandum should be sent as soon as possible before the anticipated date of indictment to the Chief of the Money Laundering Section. The preferred method of transmittal is by overnight

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[2] With respect to prosecutions under § 1956(a)(1)(A)(ii), which relate to tax offenses, prosecutors are reminded of the importance of obtaining copies of relevant tax returns early in the investigation.

[3] In cases where the financial institution involved is a "non-bank financial institution," such as a check-cashing service or a casa de cambio, which is a stand-alone business and not a branch of a larger institution, the requirement does not apply. However, where such institutions are part of a larger business or a branch of an international institution, Criminal Division approval is required.

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carrier. Attorneys are encouraged to seek guidance from the Money Laundering Section prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review.

B. Consultation Requirement in Certain Cases

In the following instances, the United States Attorney's Office must consult with the Money Laundering Section prior to the filing of an indictment or complaint. Written notice should be sent to the Money Laundering Section at least 2 weeks before the proposed action. Notice should consist of a draft indictment or complaint and a memorandum to the Chief of the Money Laundering Section summarizing the evidence and the proposed prosecution.

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, no forfeiture action, either criminal or civil, may be filed without prior consultation with the Money Laundering Section and the Asset Forfeiture Office.

2. Cases Filed Under § 1956(b): Section 1956(b) provides for the imposition of a civil penalty (of not greater than $10,000 or the value of the property, funds, or monetary instruments involved in the transaction) against anyone who violates the criminal provisions of § 1956(a)(1) and (a)(2). In any case where a civil action under § 1956(b) is going to be brought against a business entity, no complaint may be filed without prior consultation with the Money Laundering Section.

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, no indictment or complaint may be filed without prior consultation with the Money Laundering Section.

Explanation: Sections 1956 and 1957 both require that the property involved in the money laundering transaction be the proceeds of specified unlawful activity at the time that the transaction occurs. The statute does not define when property becomes "proceeds," but the context implies that the property will have been derived from an already completed offense, or a completed phase of an ongoing offense, before it is laundered. Therefore, as a general rule, neither § 1956 nor § 1957 should be used where the same financial transaction represents both the money laundering offense and a part of the specified unlawful activity generating the proceeds being laundered.

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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, no indictment or complaint may be filed without prior consultation with the Money Laundering Section.

Explanation: During the 1992-93 amendment cycle, the United States Sentencing Commission proposed an amendment to §§ 2S1.1 and 2S1.2 (the sections relating to §§ 1956 and 1957, respectively) which would have significantly reduced the punishment imposed for non-narcotic and white collar money laundering offenses. One of the concerns of the Commissioners, in considering such an amendment, was a class of money laundering cases often referred to as "receipt and deposit" cases. "Receipt and deposit" cases are those kinds of cases where a person obtains proceeds from specified unlawful activity, which that person committed, and then deposits the proceeds into a bank account that is clearly identifiable as belonging to that person. In that type of transaction, there is generally no concealment involved and the transaction is conducted so that the person can use or enjoy the proceeds of the specified unlawful activity.

There was sentiment at the Sentencing Commission that "receipt and deposit" cases should not be sentenced as severely as money laundering cases involving more active forms of concealment or promotion because the Commission staff believed that the money laundering activity in "receipt and deposit" cases creates little or no additional harm to society above that which was caused by the commission of the underlying offense and, in some case, merely constituted the completion of the underlying offense. The Department of Justice vigorously opposed this amendment and the proposal was not adopted. However, the Sentencing Commission has indicated its continuing interest in this area and we anticipate another effort to weaken the money laundering sentencing guidelines during the next amendment cycle.

While §§ 1956 and 1957 apply to "receipt and deposit" transactions, for reasons of policy it may be advisable to consider charging the "receipt and deposit" transaction only where there is an attempt to conceal or disguise the illegal proceeds, where a financial transaction is conducted to promote further unlawful activity, or where the transaction is designed to avoid a transaction reporting requirement, or in the case of a charge under § 1957, for transactions involving the movement or expenditure of funds subsequent to the initial deposit.

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In order to be prepared to address the use of the money laundering statutes in such cases in the future, the Criminal Division is promulgating this new consultation requirement. Consultation with the Money Laundering Section will give the Section an opportunity to provide guidance as to whether the proposed "receipt and deposit" transaction should be charged.

C. Notification of the Money Laundering Section and Asset Forfeiture Office: Reporting Requirement

In light of the scope of the money laundering statutes, it is essential that the Money Laundering Section be kept abreast of the way the statutes are being used. While prior review and approval of all § 1956 and § 1957 prosecutions are not required, it is necessary that the Money Laundering Section be advised of all prosecutions under those statutes. Therefore, the following notification requirement is being implemented:

> In all criminal cases involving charges under § 1956 or § 1957, or forfeiture cases involving § 981 or § 982, the United States Attorney's Office or Department component handling the case must notify the Money Laundering Section by sending a copy of the indictment or complaint to the Money Laundering Section as soon as possible after the return of the indictment or the serving of the complaint. Attached to this memorandum is a form which can be used to transmit the indictment or complaint to the Money Laundering Section. Following sentencing, the Assistant United States Attorney or Department attorney should inform the Money Laundering Section of the nature of the disposition.

Prosecutors are encouraged to consult the Money Laundering Section prior to bringing charges under § 1956 or § 1957, either by telephone, or by submitting a draft indictment or complaint to the Section in advance of the date of filing. Similarly, prior to the filing of a complaint in any civil forfeiture case under § 981 (a)(1)(A) where no related criminal indictment under § 1956 or § 1957 will be returned, the prosecutor handling the case is encouraged to consult with the Asset Forfeiture Office.

If the proposed criminal indictment contains a § 982 criminal forfeiture count or if a related § 981 civil forfeiture action will be filed, the Assistant United States Attorney handling the case should consult with the Money Laundering Section and the Asset Forfeiture Office. The Money Laundering Section will be responsible for issues regarding the legal theory and evidence supporting the money laundering allegation(s). The Asset Forfeiture Office will be responsible for issues relating to the propriety and nature of the forfeiture, and any procedural issues relating to the forfeiture. To the extent that issues on which consultation is sought overlap both areas of responsibility, prosecutors should initially consult the Money Laundering Section.

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III. Reporting Requirements Pertaining to Financial Institutions

Section 1504(c) of the Annunzio-Wylie Anti-Money Laundering Act, which was signed and became effective on October 28, 1992 (except as provided otherwise in the bill), added the following subsection to § 1956:[4]

> (g) NOTICE OF CONVICTION OF FINANCIAL INSTITUTIONS.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

In order to implement this requirement, all United States Attorneys Offices or Department components must notify the Money Laundering Section of such convictions. Attached to the notification letter must be a certified copy of the order of conviction from the court rendering the decision. See § 1502(a)-(c) and § 1503(a)-(b) of the Annunzio-Wylie Act. In addition, the notification should include a file-stamped copy of the indictment, the name of the Assistant U.S. Attorney who handled the case, and the name of the primary investigative agency involved.

With regard to this notification requirement, three factors should be noted:

First, since this provision was added to § 1956, the relevant definition of the term "financial institution" is that set forth in § 1956(c)(6), which is very broad and includes numerous kinds of businesses other than depository institutions. Based on the prior history of this provision and the context in which it was enacted, it is the position of the Criminal Division that the notification requirement in § 1956(g) be limited to national banks, federal savings associations, federal credit unions, federally insured State depository institutions and federally insured State credit unions.

Second, this requirement will apply to persons who were officers, directors or employees of a financial institution either at the time of the offense or at the time of the conviction (i.e., if the

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[4] It should be noted that § 1530 of the bill also created a new subsection 1956(g), which raised the penalty for conspiring to violate § 1956 or § 1957 from 5 years (under § 371) to whatever the penalty would be for the substantive violation of § 1956 or § 1957. Consequently, there are two subsections denominated as 1956(g). This error will be rectified as soon as possible.

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offense was committed prior to the defendant's employment at the financial institution).

Third, it should be noted that § 5322 of Title 31 is the penalty provision for violations of other sections of subchapter II of chapter 53 of Title 18 (i.e., §§ 5311-5328); § 5322 does not set out an offense which can be committed. However, we will interpret this provision to include violations of other sections of Title 31 which are punishable under § 5322.

Notifications pursuant to this provision should be sent to:

Chief, Money Laundering Section
Criminal Division
United States Department of Justice
P.O. Box 28159
Central Station
Washington, D.C. 20038

Attached at Appendix B is a format which can be used for this notification.

Attachments

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APPENDIX A

MONEY LAUNDERING CASE REPORT

The following form should be filed with the Money Laundering Section, P.O. Box 28159, Central Station, Washington, D.C. 20038, as soon as possible after the filing of an indictment or civil complaint involving the money laundering statutes. Please attach a copy of the indictment or complaint.

Case Name:_____ **District** _____

AUSA: _____ **Phone (FTS):** _____

Type: **Criminal / Civil** (Circle One)

No. of defendants: _____ (Criminal only)

Date Filed: _____

Money Laundering Statutes (Check all that apply):

§1956(a)(1)(A)(i)	_____	§1956(a)(3)(A)	_____	§5324(a)(1)	_____
(a)(1)(A)(ii)	_____	(a)(3)(B)	_____	(a)(2)	_____
(a)(1)(B)(i)	_____	(a)(3)(C)	_____	(a)(3)	_____
(a)(1)(B)(ii)	_____	§1957	_____	§5324(b)(1)	_____
(a)(2)(A)	_____	§5313	_____	(b)(2)	_____
(a)(2)(B)(i)	_____	§5314	_____	(b)(3)	_____
(a)(2)(B)(ii)	_____	§5316	_____	§6050I	_____
				§6050I(f)	_____

Forfeiture Statutes (if applicable):

§981(a)(1)(A)	_____	§981(a)(1)(B)	_____
§982	_____	§5317	_____

Specified Unlawful Activity (SUA):

Drugs: _____ **Other** (cite statutes if federal):

_____ _____

_____ _____

Fact Pattern (select one):

Drugs	_____	Fraud/Financial Instn	_____
Fraud/Other	_____	Terrorism	_____
Organized Crime	_____	Street Crime	_____
Environmental	_____	Other (specify)	_____

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APPENDIX B

Theodore S. Greenberg
Chief, Money Laundering Section
Criminal Division
United States Department of Justice
P.O. Box 28159
Central Station
Washington, D.C. 20038

Dear Mr. Greenberg:

This letter will serve as a notification pursuant to the requirements of Title 18, U.S.C., § 1956(g). The following [financial institution/officer, director, employee] was convicted of a money laundering offense as described below:

Financial Institution _____

Defendant _____

Defendant's Position _____

Dates of Employment _____

Date of Conviction _____

Offense(s) of Conviction _____

_____

Sentence _____

Prosecutor _____

Phone Number _____

Investigative Agency _____

Enclosed are a certified copy of the order of conviction and a file stamped copy of the indictment.

Sincerely,

United States Attorney

_____
Assistant United States Attorney

Enclosures

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9-105.000 MONEY LAUNDERING

9-105.100 OFFENSES UNDER 18 U.S.C. §§ 1956, 1957

The Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, created the new offense of ''money laundering.'' Money laundering is defined in three alternative ways but the first two ways each have two sub-parts.

The first type of money laundering can be termed ''financial transaction'' money laundering. There is an offense if a person engages in a certain type of ''financial transaction'' either: (1) with the *intent to promote* a ''specified unlawful activity,'' *or*; (2) with *knowledge* that the transaction is *designed* in whole or in part either to: (a) conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity or, (b) to avoid a state or federal transaction reporting requirement. This offense is chargeable as a violation of 18 U.S.C. § 1956(a)(1).

The financial transaction itself need not involve a financial institution. Nor must the particular defendant have knowledge that the transaction involve the proceeds of a particular offense; just that it be some offense under federal, state, or even foreign law. *However*, the proceeds must in fact be the proceeds from a ''specified unlawful activity.'' The list of covered predicate offenses is long but basically includes all federal offenses which are currently RICO predicates (other than Title 31 violations), all federal felony drug offenses, all foreign felony drug offenses, and an assorted list of miscellaneous bribery, white collar, export control, and espionage offenses which are set forth in the act.

The financial transaction must involve the movement of funds by wire or other means or one or more monetary instruments, and there must be an effect on interstate or foreign commerce unless a financial institution is involved.

It should be noted that the first sub-part will require proof that proceeds from prior ''specified unlawful activity'' were laundered for the purpose of being used to promote subsequent ''specified unlawful activity.''

For either sub-part, however, the important point to remember is that the particular defendant need not share the criminal's intent to promote further unlawful activity, or to conceal the source or ownership of the unlawful proceeds, or to avoid a transaction reporting requirement. He or she simply must be aware of the criminal's design or purpose. This awareness can be proved by direct or circumstantial evidence. The monograph will elaborate on this point in greater detail.

The second type of money laundering can be termed ''*transportation*'' money laundering. It is exactly the same as the first type of money laundering except that instead of a ''financial transaction'' being in-

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volved, transportation of funds or a monetary instrument to or from the United States must occur. The same knowledge and intent requirements apply. This type of money laundering will be charged as a violation of 18 U.S.C. § 1956(a)(2).

Both of these types of money laundering have a maximum potential twenty year prison sentence and $500,000 fine or twice the amount involved in the transaction. There is also a civil penalty of not more than the greater of $10,000 or the value of the funds involved in the transaction. Criteria for use of the civil penalty in lieu of criminal prosecution will be developed.

There is extraterritorial jurisdiction for these two types of money laundering if: (1) the transaction or related transactions exceed $10,000; and (2) the laundering is by a United States citizen, or, if by a foreign national, the laundering occurs in part in the United States.

Due to the potential international sensitivities, as well as proof problems, involved in utilization of this extraterritorial provision, no grand jury investigation may be commenced, indictment returned, or complaint filed without the prior written approval of the assistant attorney general in charge of the criminal division when jurisdiction to prosecute this offense exists only because of this extraterritorial provision. If you anticipate a possible ''extraterritorial case,'' please consult the narcotic section immediately.

The third type of money laundering can be termed ''*financial institution*'' money laundering. A person is guilty of this offense if he: (1) engages in a ''monetary transaction''; (2) at a financial institution; (3) with knowledge that the transaction involves proceeds of some unlawful activity; (4) which in fact is from ''specified unlawful activity''; and (5) over $10,000. There is no requirement that the transaction be designed for any particular purpose. A deposit, withdrawal, transfer, or exchange is sufficient. However, the transaction must be shown to have an effect on interstate or foreign commerce. (Such an effect is not required for Section 1956 laundering at a financial institution.) This offense is indictable as a violation of 18 U.S.C. § 1957(a). It carries a maximum penalty of ten years in prison and maximum fine of $250,000 or twice the value of the transaction. There is no civil penalty provision. There is extraterritorial jurisdiction for United States citizens.

This third offense is really a ''receiving and depositing proceeds'' offense and should be utilized with caution where bona fide payments for personal services are simply being deposited into a bank. Proof of knowledge should be absolutely clear.

Approval by the assistant attorney general of the criminal division is required for this or any section 1956 charge if the defendant is an attorney and the proceeds represent attorneys' fees.

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Investigative jurisdiction for these offenses lies with whatever DOJ components are designated by the Attorney General. Treasury agencies can also investigate subject to a Memorandum of Understanding which must be negotiated between the Secretary of the Treasury and the Attorney General.

These three offenses include ''attempts'' as well as completed offenses. Conspiracies are indictable under 18 U.S.C. § 371. However, conspiracy to commit money laundering may not be used as a predicate for a money laundering charge itself.

9-105.110 Amendment § 7201 (attempted tax evasion) or § 7206 (false tax return)

The Anti-Drug Abuse Act of 1988 (Pub.L. 100-690) amended the money laundering provisions of 18 U.S.C. § 1956 by adding a provision which makes it a crime to conduct or attempt to conduct a financial transaction involving the proceeds of criminal activity with the intent to violate § 7201 (attempted tax evasion) or § 7206 (false tax return) of the Internal Revenue Code of 1986 (26 U.S.C.).

Thus, § 6471 of the Act amends § 1956(a)(1) as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified criminal activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> *(ii) with intent to engage in conduct constituting a violation of* § 7201 or § 7206 of the Internal Revenue Code of 1986; . . .

According to the legislative history of the amendment (134 Cong.Rec. S17367 (daily ed. November 10, 1988)):

> [The provision] is vital to the effective use of the money laundering statute and would allow the Internal Revenue Service with its expertise in investigating financial transactions to participate in developing cases under § 1956. Under this provision any person who conducts a financial transaction that in whole or in part involves property derived from unlawful activity, intending to engage in conduct that constitutes a violation of the tax laws, would be guilty of a money laundering offense.

This amendment was intended to facilitate and enhance the prosecution of money launderers. It was not intended to provide a substitute for tradi-

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tional Title 18 and Title 26 charges related to tax evasion, filing of false returns, including the aiding and abetting thereof, or tax fraud conspiracy. Consequently, appropriate tax-related Title 18 and Title 26 charges are to be utilized when the evidence warrants their use.

The use of the specific intent language set forth in 18 U.S.C. § 1956(a)(1)(A)(ii) in a proposed indictment for a violation of 18 U.S.C. § 1956 requires Tax Division authorization: (1) when the indictment also contains charges for which Tax Division authorization is required, including allegations of tax fraud (e.g., *Klein*-type) conspiracy; or (2) when the intent to engage in conduct constituting a violation of 26 U.S.C. § 7201 or 26 U.S.C. § 7206 is the sole or principal purpose of the financial transaction which is the subject of the money laundering count. Such authorization would be preceded by IRS Regional Counsel review in accordance with normal review procedures, except in Organized Crime Drug Enforcement Task Force (OCDETF) cases. (*See*, USAM 6-4.125 and 6-4.127).[1] Tax Division authorization is not required for use of such language in a money laundering indictment that does not fall in either of the above two categories. It is assumed in situations where Tax Division authorization is not requested that: (1) the principal purpose of the financial transaction was to accomplish some other covered purpose, such as carrying on some specified unlawful activity like drug trafficking; (2) the circumstances do not warrant the filing of substantive tax or tax fraud conspiracy charges; and (3) the existence of a secondary tax evasion or false return motivation for the transaction is one that is readily apparent from the nature of the money laundering transaction itself.

9-105.200 POLICY WITH REGARD TO PROSECUTIONS UNDER 18 U.S.C. § 1957

Section 1957 creates an offense entitled ''engaging in monetary transactions in property derived from specified unlawful activity.'' The elements of this offense are: (1) an individual must ''knowingly'' engage or attempt to engage in a ''monetary transaction'' in ''criminally derived property''; (2) ''the value of the property must be greater than $10,000''; and (3) the property must in fact be derived from ''specified unlawful activity.''

9-105.300 DIVISION APPROVAL

Approval of the Assistant Attorney General of the Criminal Division is required before an indictment charging a violation of 18 U.S.C. § 1957 is presented if the potential defendant is an attorney and the criminally derived property is or purports to be attorneys' fees paid to the attorney for providing representation to a client in a criminal or civil matter.

1 The statute also directs that the authority to investigate money laundering violations is controlled by a Memorandum of Understanding which has been entered into by the Departments of Justice and Treasury and the Postal Service. 18 U.S.C. § 1956(e). Prosecutors should be aware of the provisions of this Memorandum and do nothing to cause its abrogation.

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Such approval shall be given in accordance with the prosecution policies set forth in USAM 9-105.500 and 9-105.600.

9-105.400 ''KNOWINGLY'' AS AN ELEMENT OF PROOF IN 18 U.S.C. § 1957 PROSECUTIONS

Although subsection 1957(a) requires proof that the property involved is in fact derived from ''specified unlawful activity,'' subsection 1957(c) specifically states that ''the government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.'' Thus, Section 1957 requires proof only that the defendant knew the property came from *some* illegal activity, whether it be a felony or misdemeanor offense.

A defendant may be proven to have knowledge that property is criminally derived by proof that he/she either (1) knows that the property is criminally derived or (2) is willfully blind to this fact—*i.e.*, he/she has his/her suspicions definitely aroused and refuses to investigate for fear he/she will discover that the property is criminally derived. *See, e.g., United States v. Jewell,* 532 F.2d 697 (9th Cir.) (en banc), *cert. denied,* 426 U.S. 951 (1976).

The relevant time for determining whether the requisite knowledge exists is the time at which the individual engages in a transaction within the ambit of Section 1957. Lack of knowledge at the time of the property's receipt is not critical if there is a gap between the receipt of the property and the monetary transaction. Thus, if property is received without knowledge of its criminal derivation, but the individual subsequently gains knowledge of its criminal origin before engaging in a monetary transaction, he/she can be held liable. The clarity of the criminality of the underlying conduct (*e.g.*, drug dealing as opposed to a potentially criminal tax shelter scheme) will, of course, be a factor in determining whether knowledge exists.

In evaluating whether a defendant actually knew or was willfully blind to the fact that the property was criminally derived, all of the circumstances surrounding the receipt or transfer of the property should be considered. In most cases it is expected that there will be evidence that the defendant was told of the source of the property either by the person who gave it to him/her or by some third party. However, such evidence is not always required. The following list, though not intended to be all-inclusive, is representative of the type of behavior which, alone or in combination, may support a decision to investigate or prosecute:

1. Acceptance of a commission when general industry practice does not provide for commissions.

2. Acceptance of a commission above market rates.

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3. Use of false names to purchase goods and/or services.

4. Numerous and unjustified transfers of title to others or sham transfers of title.

5. Failure to provide accurate identification or use of suspicious identification.

6. Use of cash in large denominations.

7. Knowledge that legitimate livelihood of purchaser is insufficient to allow purchaser to afford the goods and/or services to be purchased.

8. Grossly inadequate or grossly inflated purchase/sale price.

9. Seller's obligation to break or bend company rules to consummate the deal.

10. Conducting business under odd circumstances, at irregular hours, or in unusual locations by industry standards.

9-105.500 GENERAL PROSECUTION STANDARDS

With respect to transactions between possessors of criminally derived property and sellers of goods and/or services, other than attorneys who receive such property as *bona fide* fees for representation in a criminal matter, a prosecution for violation of Section 1957 may be instituted if there is evidence to establish that the defendant had actual knowledge of the illegal origin of the property *or* that the defendant was ''willfully blind'' to such fact. In sum, such persons should be accorded no special consideration and may be prosecuted to the full extent allowed under the statutes. Of course, there must be sufficient evidence to prove the actual knowledge or willful blindness beyond a reasonable doubt.

9-105.600 PROSECUTION STANDARDS—*BONA FIDE* FEES PAID TO ATTORNEYS FOR REPRESENTATION IN A CRIMINAL MATTER

There is no statutory prohibition upon the application of Section 1957 to transactions involving *bona fide* fees paid to attorneys for representation in a criminal matter. However, the Department recognizes that attorneys in such situations, unlike all others who may deal with criminal defendants, may be required to investigate and pursue matters which will provide them with knowledge of the illicit source of the property they receive. Indeed, the failure to investigate such matters may be a breach of ethical standards or may result in a lack of effective assistance to the client.

Because the Department firmly believes that attorneys representing clients in criminal matters must not be hampered in their ability to

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effectively and ethically represent their clients within the bounds of the law, the Department, as a matter of policy, will not prosecute attorneys under Section 1957 based upon the receipt of property constituting *bona fide* fees for the legitimate representation in a criminal matter, except if (1) there is proof beyond a reasonable doubt that the attorney had *actual knowledge* of the illegal origin of the specific property received and (2) such evidence *does not consist* of (a) confidential communications made by the client preliminary to and with regard to undertaking representation in the criminal matter; or (b) confidential communications made during the course of representation in the criminal matter; or (c) other information obtained by the attorney during the course of the representation and in furtherance of the obligation to effectively represent the client.

What constitutes ''representation in a criminal matter'' depends on the facts and circumstances of the particular case. In deciding if representation in different but related proceedings constitutes ''representation in a single matter,'' consideration will be given to whether the proceedings relate to investigations or cases arising out of the same facts or transactions, for example, a civil RICO case which arises out of a criminal RICO prosecution.

This prosecution standard applies only to fees received for legal ''representation in a criminal matter.'' Attorneys who receive criminally derived property in exchange for carrying out or engaging in other commercial transactions unrelated to the representation of a client in a criminal matter or for representing a client in a civil matter should be treated the same as any other person under the policy in USAM 9-105.300.

Proper application of this policy requires examination of three issues: (1) what constitutes *bona fide* fees; (2) what constitutes actual knowledge; and (3) what evidence may be relied upon to meet the knowledge requirement of the policy.

9-105.610 Bona Fide Fees

This prosecution policy applies only to property transferred to an attorney as a *bona fide* fee for representation in a criminal matter. The question whether a fee is *bona fide* will have to be answered on a case-by-case basis; however, the fundamental inquiry is whether the fee was paid in good faith without fraud or deceit for representation concerning the defendant's personal criminal liability.

Thus, for example, if a defendant's legal fees are paid by another in an effort to protect that other person's identity or legal interests or any other interests of the overall criminal venture, such payments may not be *bona fide*. However, fee payments by third parties, standing alone, do not create any presumption of lack of *bona fides*, so long as the attorney's

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loyalty and obligation remains to the client and the third-party payment does not create any conflicting obligation to the payor.

Similarly, if there is a reasonable basis to believe that the fee transaction was a fraudulent or sham transaction designed to shield the property from forfeiture, hide its existence from governmental investigative agencies, or was conducted for any purpose other than for legitimate legal representation, the fee would not be *bona fide*. Generally, a transaction is a sham or fraud if there is evidence that a scheme or plan existed to maintain the client's or any other person's or corporation's interest in the asset or the ability to use it beneficially. This may be established, for example, by proof that the value of the property transferred far exceeded the value of the services rendered and that there was an agreement by the attorney to transfer the asset or some portion of it back to the client, a third party or any other legal entity. There need not be proof that the attorney was a participant in the criminal activity giving rise to the property or that he otherwise violated the law. Quite obviously, however, proof that an attorney knowingly acted in a manner as to aid and abet or serve as an accessory after the fact to a money laundering transaction or otherwise to facilitate criminal conduct would lead to the conclusion that the property was not a *bona fide* fee.

9-105.620 Actual Knowledge as Applied to Bona Fide Fees

As applied to *bona fide* fees received for representation in a criminal matter, the Department's policy *precludes prosecution if there is evidence only of willful blindness*. Thus, prosecution will not be authorized solely on evidence that the attorney consciously avoided learning the true nature of the property.

The existence of actual knowledge will be determined on a case-by-case basis, taking into consideration all available facts and circumstances. However, a prosecutor seeking to indict an attorney for a violation of Section 1957 based on a monetary transaction arising from the payment of *bona fide* fees for representation in a criminal matter should be very circumspect in seeking authority to proceed. The prosecutor must first possess proof beyond a reasonable doubt that the *specific property* involved in the monetary transaction was derived from ''specified unlawful activity'' as defined in Section 1957(f)(3). Second, the prosecutor must possess proof beyond a reasonable doubt that the attorney *actually knew* that the specific property was criminally derived.

Because this actual knowledge requirement is a matter of policy and not a statutory mandate, proof beyond a reasonable doubt of ''willful blindness'' remains a sufficient basis upon which to present a case to a jury and sustain a conviction. In other words, while the Department will not authorize prosecution absent proof beyond a reasonable doubt of actual knowledge, once authorization has been obtained, this policy does not preclude

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the government from relying on a ''willful blindness'' instruction at trial. However, it is expected that this will only occur in extraordinary cases, and that cases normally will be submitted to the trier of fact on an actual knowledge theory.

9-105.630 Evidence of Actual Knowledge

Another aspect of the Department's policy is that the actual knowledge predicate must be met *without* relying upon any of the following three categories of evidence: (1) confidential communications made by the client preliminary to and with regard to whether the attorney will undertake the representation; (2) confidential communications made by the client during the course of the representation; and (3) information obtained by the attorney during the course of the representation and in furtherance of the obligation to effectively represent the client.

This means that actual knowledge may not be established by evidence that the attorney learned from his/her client during the course of the representation that the fee was paid from criminally derived funds. Thus, a client's voluntary testimony at trial or a client's voluntary disclosure of communications with his or her attorney—disclosed, for example, in an attempt to ''make a deal'' by implicating the attorney in criminal misconduct—may not, as a threshold matter, be used to meet the policy requirement of actual knowledge. However, if there exists other evidence, independent of the attorney-client relationship, that establishes beyond a reasonable doubt that the attorney had actual knowledge, client communications may be used at trial to prove the requisite knowledge.

As a practical matter, this limitation means that in most cases there will be proof beyond a reasonable doubt of actual knowledge that *pre-existed* representation on the particular matter. For example, if an attorney is functioning as ''in house'' counsel for a criminal enterprise and knows from personal observation or non-privileged communication with the criminal entrepreneurs that certain property is criminally derived, then the subsequent receipt of that property by the attorney as payment for legal representation on a particular criminal matter may be subject to prosecution.

Similarly, if an attorney personally hears an individual boasting of lucrative criminal activities (before any attorney-client relationship was established or contemplated), and if that individual, having no known legitimate source of income, later retains that attorney and pays the attorney's fee with cash, a prosecution under Section 1957 may be appropriate.

On the other hand, the fact that an attorney has a long-term attorney-client relationship with an individual who is in chronic trouble with the law, or has represented more than one member of a suspected criminal

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enterprise, is not sufficient evidence by itself to establish actual knowledge.

Similarly, if an attorney accepts a *bona fide* fee from a client to provide legal representation in connection with a then-existing legal problem, and the attorney has no information that the specific funds used to pay the fee may be criminally derived other than widespread press reports that the client's only source of income is narcotics trafficking, prosecution under Section 1957 would not be authorized. The fact of extensive pre-representation publicity concerning an individual's reputed criminal activities is never sufficient by itself to establish actual knowledge.

The limitation upon the type of evidence that may be relied upon to meet the requirement of actual knowledge is imposed as a matter of policy. It is intended to enable attorneys to explore and inquire freely into all facts relevant to the defense of a client in a criminal matter without fear of prosecution based solely on information learned as a result of carrying out that responsibility. This policy should not, however, be read to authorize or condone conduct on the part of any attorney which, in fact, constitutes a violation of 18 U.S.C. § 1957 or any other law.

9-105.700 PROHIBITION ON GIVING NOTICE OF THE CRIMINAL DERIVATION OF PROPERTY

No Department attorney shall, either orally or in writing, inform an attorney who is legitimately representing a client in a criminal matter that the property the attorney is receiving is or may be criminally derived solely for purpose of meeting the requirements of knowledge imposed by this prosecution policy or by the statute.

This policy statement is not intended to create or confer any rights, privileges, or benefits on prospective or actual witnesses or defendants. Nor is it intended to have the force of law or of a United States Department of Justice directive. *See United States v. Caceres,* 440 U.S. 741 (1979).

9-105.800 CIVIL AND CRIMINAL FORFEITURES

Sections 981 and 982 of Title 18 authorize both civil and criminal forfeitures relating to money laundering offenses under Title 18.

Section 981(a)(1) describes three types of property forfeitable to the United States: (1) Subsection 981(a)(1)(A) makes forfeitable any property, real or personal, which represents the gross receipts a person obtains, directly or indirectly, as a result of a violation of section 1956 or 1957 of Title 18, or which is traceable to such gross receipts; (2) Subsection 981(a)(1)(B) makes forfeitable any property within the jurisdiction of the United States which represents the proceeds of any offense against a foreign nation involving the manufacture, importation, sale, or distribu-

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tion of a controlled substance, within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States; (3) Subsection 981(a)(1)(C) makes forfeitable any coin, currency, or any other monetary instrument as the Secretary of the Treasury may prescribe, or any interest in other property, including any deposit in a financial institution, traceable to such coin and currency involved in a transaction or attempted transaction in violation of sections 5313(a) or 5324 of Title 31.

For an interim period, consultation with the asset forfeiture office is required prior to filing a civil action to forfeit the proceeds of foreign drug violations pursuant to subsection 981(a)(1)(B).

Subsection 981(a)(2) sets forth an innocent owner exception already contained in several civil forfeiture statutes. *See, e.g.*, 21 U.S.C. § 881(a)(6) and (7). The subsection explicitly includes lien holders under its protections.

Sections 981(b) through 981(h) set forth, with a few minor modifications, the familiar civil forfeiture provisions contained in 21 U.S.C. § 881.

Section 981(i) sets forth additional provisions applicable only to property forfeited under subsection 981(a)(1)(B), and only to the extent provided by treaty. Subsection 981(i)(1) allows the Attorney General, under certain circumstances, and with the concurrence of the Secretary of State, to equitably share forfeited property with foreign countries. Subsections 981(i)(3) and 981(i)(4) create rebuttable presumptions when an order or judgment of forfeiture or conviction by a foreign court concerning the property or the violation giving rise to forfeiture is admitted into evidence. Such certified orders or judgments and any recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such orders or judgments are expressly made admissible concerning forfeiture of property of the type described in subsection 981(a)(1)(B). Subsection 981(i)(5) makes it clear that these provisions are not intended to limit the admissibility of any other evidence otherwise admissible in forfeiture proceedings.

Section 982 sets forth criminal forfeiture provisions by providing that a court, in imposing sentence on a person convicted of an offense under section 1956 or 1957 of Title 18, shall order that the person forfeit to the United States any property, real or personal, which represents the gross receipts the person obtained, directly or indirectly, as a result of such offense, or which is traceable to such gross receipts. Section 982(b) incorporates the familiar criminal forfeiture provisions contained at 21

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U.S.C. § 853, to forfeiture under section 982 to the extent they are not inconsistent with the section.

9-105.900 MONEY LAUNDERING AMENDMENTS

9-105.910 Amendments to 18 U.S.C. § 1956

The Anti-Drug Abuse Act of 1988 significantly amended the Federal laws relating to the broad range of criminal activities generically referred to as ''money laundering''. The effect of the 1988 amendments was, in most instances, to increase significantly the substantive and jurisdictional reach of these laws and to enhance Federal law enforcement capabilities in investigating and prosecuting money laundering crimes.

9-105.911 Section 6465: Undercover ''Sting'' Operations Authorized

Section 6465 creates an entirely new money laundering offense which may only be committed as part of a government ''sting'' operation. It does this by adding the following new subparagraph to 18 U.S.C. § 1956(a):

> (3) Whoever, with the intent—
>
> (A) to promote the carrying on of specified unlawful activity;
>
> (B) to conceal or disguise the nature, location, source, ownership or control of property believed to be the proceeds of specified unlawful activity; or
>
> (C) to avoid a transaction reporting requirement under State or Federal law,
>
> conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both.

The term ''represented'' is defined as meaning any representation made by either a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of 18 U.S.C. § 1956. *See* 18 U.S.C. § 1956(a)(3).

Practice Comment:

> Prior to the enactment of Section 1956(a)(3), federal prosecutors had to prove both that the defendant *knew* that the property involved in a ''financial transaction'' represented the proceeds of some form, though not necessarily which form, of felonious criminal activity under State or Federal law *and* that the property was, in fact, the proceeds of specified un-

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lawful activity. These requirements posed enormous problems of proof for federal investigators and prosecutors and precluded any possibility of conducting a ''sting'' operation. These burdensome requirements of proof largely account for the relatively small number of federal prosecutions brought under Section 1956 between 1986 and 1988. However, these problems of proof may now be avoided in a large number of cases—particularly cases involving professional money launderers who typically launder money for anyone in exchange for a ''commission'' or percentage of all moneys laundered—through use of a ''sting'' operation. As a consequence of this amendment, it is anticipated that there will be a substantial increase in the number of prosecutions brought under Section 1956.

9-105.912 Section 6466: Additional ''Specified Unlawful Activities''

Section 6466 adds the following federal offenses to the list of ''specified unlawful activities'' under 18 U.S.C. § 1956(c)(7)(D):

18 U.S.C. § 542: relating to entry of goods by means of false statements;
18 U.S.C. § 549: relating to removing goods from Customs' custody;
18 U.S.C. § 2319: relating to copyright infringement;
19 U.S.C. § 1590: relating to aviation smuggling;
21 U.S.C. § 830: relating to precursor and essential chemicals; and
21 U.S.C. § 857: relating to transportation of drug paraphernalia.

9-105.913 Section 6469. Authorization of Postal Service to Investigate Money Laundering Offenses

Section 6469(a) of the 1988 Act amends the ''investigatory jurisdiction'' provisions of 18 U.S.C. § 1956(e) by authorizing the United States Postal Service to investigate violations of Section 1956 involving use of the mails or which otherwise fall within the investigatory jurisdiction of the USPS.

9-105.914 Section 6471(a): Insertion of ''Income Tax'' Scienter Element

Section 6471(a) of the 1988 Act adds a new alternative scienter element to 18 U.S.C. § 1956(a)(1)(A). Previously, Subsection (A) of Section 1956(a)(1) could be violated only by committing a ''financial transaction'' offense ''with the intent to promote the carrying on of specified unlawful activity''. Under the 1988 amendments, however, a ''financial transaction'' offense under Subsection (A) may now be committed either (i) with the intent to promote the carrying on of a specified unlawful activity

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or (ii) ''with [the] intent to engage in conduct constituting a violation of section 7201 and 7206 of the Internal Revenue Code of 1986.''

Practice Comment:

The addition of this alternative ''income tax'' scienter element makes possible the prosecution of those who knowingly engage in a ''financial transaction'', involving proceeds of a specified unlawful activity, with the intent of promoting the carrying on of either a tax evasion scheme prohibited by 26 U.S.C. § 7201 or a tax fraud scheme prohibited by 26 U.S.C. § 7206. Thus, those who derive substantial profits from ''specified unlawful activities'' will be subject to prosecution under Section 1956(a)(1)(A) if they engage in a ''financial transaction'' with the intent of concealing their criminally derived income from federal taxing authorities through tax fraud or tax evasion. It is even conceivable that a single ''financial transaction'' could support two separate counts if it was undertaken in part to promote the carrying on of a specified unlawful activity (e.g., mail or wire fraud) and in part to commit tax fraud or tax evasion.

9-105.915 Section 6471(b): Addition of ''Transmissions'' and ''Transfers'' to ''Monetary Transportation'' Offenses Under 18 U.S.C. § 1956(a)(2)

Prior to the 1988 amendments, Section 1956(a)(2) proscribed ''monetary transportation'' offenses using the operative term ''transports or attempts to transport''. The term ''transport'' was undefined and the Department of Justice concluded that the term encompassed all means of transporting funds or monetary instruments including wire transmissions, electronic fund transfers, and the like. *See Handbook on the Anti-Drug Abuse Act of 1986*, at 71 n. 59 (Mar. 1987). This conclusion was reinforced by the fact that the statute proscribed the transportation of ''funds'' in addition to ''monetary instruments'' and left the term ''funds'' undefined. Thus, the transportation of ''funds'' could arguably include electronic fund transfers and other forms of non-paper financial transfers.

Section 6471(b) clarifies the scope of activity by amending the former operative language—''transports or attempts to transport''—to read ''transports, transmits, or transfers, or attempts to transport, transmit, or transfer''. The Department of Justice continues to adhere to its previous interpretation of the term ''transport'' as including all manner of financial transfers including those which involve the physical transfer of monetary instruments.

9-105.920 Amendments to 18 U.S.C. § 1957

The Anti-Drug Abuse Act of 1986 created a third money laundering offense in addition to the two offenses codified at 18 U.S.C. §§ 1956(a)(1) and

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(a)(2). This third offense—codified at 18 U.S.C. § 1957—prohibited persons from knowingly engaging in ''monetary transactions'' involving ''criminally derived property'' [2] of a value in excess of $10,000 which was, in fact, the proceeds of a ''specified unlawful activity.'' The term ''monetary transaction'', as originally defined, included:

> the deposit, withdrawal, transfer or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument ... by, through, or to a financial institution [as defined in 31 U.S.C. § 5312(a)(2)].

18 U.S.C. § 1957(f)(1). Section 1957 lacks any of the alternative ''intent'' or ''knowledge'' elements specified in 18 U.S.C. § 1956(a).

Practice Comment:

> The government commonly refers to Section 1957 as the ''*receive and deposit*'' statute because it was designed, in part, to allow prosecution of persons who provide goods or services to drug traffickers or other criminal elements and knowingly accept criminally derived proceeds or property as payment for such goods or services. A ''receive and deposit'' offense is completed when the recipient deposits the criminally derived proceeds into or through a financial institution affecting interstate or foreign commerce. The term ''receive and deposit'' is, however, something of a misnomer because the statute is far broader in scope than that term connotes. Indeed, it applies to anyone who *withdraws, deposits, exchanges* or *transfers* criminally derived property of a value over $10,000 (which is, in fact, the proceeds of a specified unlawful activity) by, through or to a financial institution so as to affect interstate or foreign commerce. For example, the statute would apply to both the person who *withdraws* tainted funds to pay for goods or services and to the payee who ''*receives and deposits*'' the tainted funds assuming, of course, that all other elements of Section 1957 are satisfied.

9-105.921 Section 6182: Exemption of Attorney's Fees Transactions

Section 1957, as originally enacted, granted no exemptions based upon the kind of trade or business engaged in by a potential defendant or the purpose for which a particular ''monetary transaction'' was undertaken. Thus, the statute, on its face, would have allowed the prosecution a defense attorney who knowingly received and deposited more than $10,000 in criminally derived funds as legal fees for representation of a client in a criminal case. To allay the concerns of the defense bar and several members

2 The term ''criminally derived property'' is defined as ''any property constituting, or derived from, proceeds obtained from a criminal offense.'' *See* 18 U.S.C. § 1957(f)(2).

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of Congress, while retaining the ability to prosecute defense attorneys in certain particularly deserving circumstances, the Department of Justice adopted a formal ''prosecution policy'' to govern all potential ''attorney fee'' cases under Section 1957. This policy, found at USAM, Section 9.105-400, provided that prosecutions of defense attorneys under Section 1957 for receipt of criminally derived funds as legal fees in a criminal case would be undertaken only with the approval of the Assistant Attorney General of the Criminal Division. The policy further provides that such approval will not be granted in any case in which the defense attorney received the tainted property as *bona fide* fees for representation of the client/payor in a criminal matter unless (1) the defense attorney had *actual knowledge* of the criminal derivation of the property and (2) the defense attorney acquired such actual knowledge from a source other than confidential attorney-client communications or his own efforts in providing effective representation for the client/payor in the criminal case. (No prosecution of a defense attorney was ever brought or even submitted for consideration—by the Department of Justice under this policy.)

Section 6182 of the 1988 Act which added the following language at the end of the definition of ''monetary transaction'' in Section 1957(f)(1):

> but such term does not include any transaction *necessary* to preserve a person's right to representation as guaranteed by the Sixth Amendment of the Constitution.

As the legislative history to this section makes clear, the statutory exemption, like the prosecution policy, allows criminal prosecution of defense attorneys who knowingly ''receive and deposit'' tainted funds either as part of a sham or fraudulent transaction or as legal fees for representation of a client in any *non-criminal* matter. Both the DOJ policy and this statutory provision would also appear to permit prosecution of a defense attorney who ''receives and deposits'' tainted funds from a third-party payor as legal fees for representation of a client in a criminal case if such third-party payments for the protection of the identity of the third-party payor (i.e., buying the silence of the actual defendant).

The Supreme Court will soon rule on the issue of whether the Sixth Amendment protects any right to use criminally derived property to retain counsel of choice in a criminal case. *See In re Forfeiture Hearing as to Caplin & Drysdale,* 837 F.2d 637 (4th Cir.), *cert. granted,* 109 S.Ct. 363 (1988) (*en banc*) and *United States v. Monsanto,* 852 F.2d 1400 (2d Cir.) (*en banc*), *cert. granted,* 109 S.Ct. 363 (1988). If a majority of the Supreme Court affirms the holding of the panel decision that ''there is no established Sixth Amendment right to pay an attorney with the illicit proceeds of drug transactions'', the new statutory exemption for ''attorney fee'' transactions may be entirely vitiated. Defense counsel will thereafter be subject to prosecution under Section 1957—the same as anyone else—whenever they knowingly ''receive and deposit'' more than $10,000 in criminally

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derived property which is, in fact, the proceeds of a specified unlawful activity. If the Supreme Court reverses, this section will take on new significance and its scope will most likely be determined on a case by case basis.

9-105.922 Section 6184: Expanded Definition of ''Monetary Instrument''

Section 1957 proscribes ''monetary transactions'' involving ''funds'' or a ''monetary instrument''. *See* 18 U.S.C. § 1957(f)(1). The term ''funds'' is undefined. The term ''monetary instrument'', in Section 1957 as originally enacted, was given the same definition as under 31 U.S.C. § 5312(a)(3) and 31 C.F.R. § 103.11(k). This definition includes United States currency and all negotiable instruments that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes immediately upon delivery.

Section 6184 amends 18 U.S.C. § 1957(f)(1) to specify that the term ''monetary instrument'' shall have the same definition as in 18 U.S.C. § 1956(c)(5). The definition under the latter subsection is considerably broader than the Title 31 definition, to wit:

> coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments bearer form or otherwise in such form that title thereto passes upon delivery.

Practice Comment:

> The unusual juxtapositioning of the phrase ''in bearer form or otherwise in such form that title thereto passes upon delivery'' at each of the two places it appears in this definition indicates that it modifies only the terms ''investment securities'' and ''negotiable instruments''. Thus, travelers' checks, personal checks, and money orders need not be in bearer form to constitute ''monetary instruments'' under this definition. (A technical amendment which would clarify this point has been submitted to Congress by the Department of Justice).

9-105.923 Section 6469(a)(2): Authorization of Postal Service to Investigate Money Laundering Offenses

Section 6469(a)(2) of the 1988 Act amends the ''investigatory jurisdiction'' provisions of 18 U.S.C. § 1957(e) by authorizing the United States Postal Service to investigate violations of Section 1957 involving use of the mails or which otherwise fall within the investigatory jurisdiction of the USPS.

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9-105.930 Amendments to Title 31

Title 31, United States Code, contains several reporting provisions which form the basis for numerous criminal prosecutions of money launderers who engage or attempt to engage in large-scale transactions or transportations of currency or monetary instruments without causing the filing of required reports or by causing the filing of a false report. These provisions include the Currency Transaction Reporting requirements under 31 U.S.C. § 5313 and the reports required to be filed upon importing or exporting currency or monetary instruments in excess of $10,000 to or from the United States under 31 U.S.C. § 5316. Violations of these reporting requirements may be criminally prosecuted under 31 U.S.C. § 5322 or 5324.

9-105.931 Section 6185(a): Expanded Definition of ''Financial Institution''

Section 6185 of the 1988 Act significantly expands the definition of ''financial institution'' under 31 U.S.C. § 5312(a)(2) by striking former subparagraphs (T) and (U) and replacing them with the following:

(T) a business engaged in vehicle sales, including automobile, airplane, and boat sales;

(U) persons involved in real estate closings and settlements;

(V) the United States Postal Service;

(W) an agency of the United States government or of a State or local government carrying out a duty or power of a business described [elsewhere in Section 5312(a)(2)];

(X) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in [Section 5312(a)(2)] is authorized to engage; *or*

(Y) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

Practice Comment:

The expansion of this definition is important because such ''financial institutions'' may, by regulation, be made subject to the currency transaction reporting requirements of 31 U.S.C. § 5313 and 31 C.F.R. Part 103. They also constitute ''financial institutions'' for purposes of defining an offense under 18 U.S.C. §§ 1956 and 1957.

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9-105.940 Amendments to Money Laundering Forfeiture Provisions: 18 U.S.C. §§ 981 and 982

The civil forfeiture statute applicable to money laundering offenses under 18 U.S.C. §§ 1956 and 1957 and 31 U.S.C. §§ 5313 and 5324 was enacted in 1986 and is codified at 18 U.S.C. § 981. The criminal forfeiture statute applicable to offenses under 18 U.S.C. §§ 1956 and 1957 also was enacted in 1986 and is codified at 18 U.S.C. § 982. The scope of forfeiture under these original statutes was quite narrow.

Sections 981 and 982 originally authorized only the forfeiture of ''[a]ny property, real or personal, which represents the *gross receipts* a person obtains, directly or indirectly, as a result of a violation of [18 U.S.C. §§ 1956 or 1957], or which is traceable to such *gross receipts.*'' 18 U.S.C. § 981(a)(1)(A) (emphasis supplied). The legislative history for these provisions states that the term ''gross receipts'' means the profits or commissions that the defendant earned as a result of the money laundering violations. *See* S.Rep. No. 433, 99th Cong., 2d Sess. 23 (1986). The term apparently did not include the corpus of the money laundered or any other real or personal property involved in the money laundering offense. The forfeiture provisions relating to violations of the currency transaction reporting requirements under 31 U.S.C. §§ 5313 and 5324 were considerably broader and authorized the forfeiture of any coin or currency involved in the violation or any interest in other property traceable to such coin or currency. *See* 18 U.S.C. § 981(a)(1)(C). Even here, however, the moneys involved in such transactions were rarely available for forfeiture when the money launderers were apprehended and there was no provision in either Section 981 or 982 for forfeiture of ''substitute assets'' whenever the original assets are no longer available for forfeiture. The following provisions remedied these deficiencies in these forfeiture provisions.

9-105.941 Section 6463(a): Civil Forfeiture Amendments

Section 6463(a) of the 1988 Act considerably expanded the scope of the civil forfeiture provisions of 18 U.S.C. § 981. It did this by deleting former subsections (A) and (C) of 18 U.S.C. § 981(a)(1) and replacing them with new subsection (A) which provides for the civil forfeiture of:

> Any property, real or personal, involved in a transaction or attempted transaction in violation of [31 U.S.C. §§ 5313 or 5324], or of [18 U.S.C. §§ 1956 or 1957], or any property traceable to such property.[3]

This new forfeiture provision eliminates the former restrictions which limited forfeiture to the ''*gross receipts*'' of an offense under 18 U.S.C.

3 The new provision also exempts from forfeiture property involved in a violation of 31 U.S.C. § 5313 committed by either a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission, or by any partner, director or employee thereof.

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§§ 1956 or 1957 or the coin and currency involved in transactions in violation of 31 U.S.C. §§ 5313 or 5324. Instead, it authorizes forfeiture of *all property*, real or personal, involved in such violations and any property traceable thereto. This includes the corpus of the money laundered as a result of the transaction, any other property involved in the transaction, and perhaps any property facilitating, or having a substantial connection to, the violation.

9-105.942 Section 6463(c): Criminal Forfeiture Amendments

Section 6463(c) substantially broadens the criminal forfeiture provisions of 18 U.S.C. § 982, which previously applied only to property involved in violations of 18 U.S.C. §§ 1956 and 1957. First, the provisions now apply to offenses under 31 U.S.C. §§ 5313 and 5324 as well as offenses under Sections 1956 and 1957. Second, Section 6463(c) deletes former subsection (a) of Section 982 and replaces it with the following new subsection (a):

> The court, in imposing sentence on a person convicted of an offense [under 31 U.S.C. §§ 5313 or 5324] or [under 18 U.S.C. §§ 1956 or 1957], shall order that the person forfeit ... any property, real or personal, involved in such offense, or any property traceable to such property.[4]

This provision, which is mandatory upon the court in sentencing a defendant convicted of an offense under 18 U.S.C. §§ 1956 or 1957 or 31 U.S.C. §§ 5313 or 5324, is as broad as the previously described civil forfeiture provision under amended 18 U.S.C. § 981(a)(1)(A).

9-105.943 Section 6464: "Substitute Assets" Amendment

As noted earlier, the original provisions of 18 U.S.C. §§ 981 and 982 failed to authorize the forfeiture of "substitute assets" when the original assets involved in a money laundering offense were found to be unavailable for forfeiture. Section 6464 of the 1988 Act partially corrects this deficiency by incorporating into 18 U.S.C. § 982(b) the "substitute assets" provisions of 21 U.S.C. § 853(p). The latter provision reads as follows:

> If any of the property [subject to forfeiture under 18 U.S.C. § 982(a)], as a result of any act or omission of the defendant
>
> (1) cannot be located upon the exercise of due diligence;

4 This new provision, like its civil forfeiture counterpart, exempts from forfeiture property involved in a violation of 31 U.S.C. § 5313 committed by either a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission, or by any partner, director or employee thereof.

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(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Section 6464 adds the following sentence to this provision:

> However, the substitution of assets provisions of [21 U.S.C. § 853(p)] shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense.

Practice Comment:

> The adoption of all these sections enormously enhances the reach of civil and criminal forfeiture under 981 and 982. With these provisions, prosecutors will now be able to reach the corpus of the money actually laundered regardless of whether it technically ''belonged'' to the launderer or was simply being held by him for the benefit of another. Further, the substitute assets provisions are of critical significance to money laundering prosecutors because the crime of money laundering is uniquely susceptible to the quick disposal of assets that would otherwise be subject to forfeiture. With the addition of the substitute assets provision the fluid nature of cash is less problematic with respect to the ultimate forfeitability of the res. The scope of the exception for ''intermediaries'' is troublesome to prosecutors but beneficial to financial institutions inasmuch as ''professional'' money launderers, who service drug traffickers and organized crime on a commission basis, typically do not retain the ''actual property laundered'' but instead pass it on to their clients through the use of financial institutions.

9-105.950 Amendments to Title 26

Section 6050I of Title 26, United States Code, requires any person engaged in a trade or business to file a report, called a Form 8300, with the Internal Revenue Service upon engaging in a transaction, or a related series of transactions, involving more than $10,000 in currency. Prior to

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the enactment of the 1988 amendments, the failure to file such a report was punishable only as a misdemeanor.

9-105.951 Section 7601(a): Anti-Structuring Provision

Section 7601(a) of the 1988 Act adds new subsection (f) to 26 U.S.C. § 6050I. This provision mirrors the ''anti-structuring'' statute under Title 31 (31 U.S.C. § 5324) by providing that anyone who (1) willfully causes or attempts to cause a trade or business to fail to file a Form 8300 or to file a Form 8300 containing a material misstatement or omission of fact or (2) who willfully structures or attempts to structure a currency transaction with a trade or business so as to avoid the Form 8300 filing requirement shall be subject to a term of imprisonment of up to five years.[5]

Practice Comment:

> Under the terms of this provision, all persons who are obligated to file Form 8300 will be subject to felony prosecution for their willful failure to file. Further, those trades or businesses which encourage or sanction ''installment'' payments as a means of defeating the 8300 reporting obligations, will be likewise subject to prosecution in the same manner as are ''smurfs'' who artificially structure financial transactions to avoid the CTR reporting requirements.

9-105.952 Section 7601(b): Information Sharing

Section 7601(b) of the 1988 Act adds new subsection (8) to 26 U.S.C. § 6103(i) to authorize the Secretary of Treasury to disclose, upon written request, Forms 8300 to the officers or employees of any Federal agency charged with the administration of non-tax criminal statutes.

Practice Comment:

> Previously, the FBI and DEA had no ready access to 8300 forms. They were protected in the same manner as were tax returns. Under the terms of this amendment, other law enforcement agencies will have ready access to these forms for use as evidence in narcotics and money laundering prosecutions.

9-105.960 Amendments to Right to Financial Privacy Act

9-105.961 Section 6185(d): Enhanced Civil Penalties

Section 6185(d) of the 1988 Act amends 12 U.S.C. §§ 1730d and 1829b to provide for enhanced civil penalties of up to $10,000 for any covered

5 Section 7601(a) amends 26 U.S.C. § 7203 to raise the maximum term of imprisonment available thereunder from one to five years. This amendment applies only to willful violations of 26 U.S.C. § 6050I. It also creates a special alternative penalty under 26 U.S.C. § 6721 for violations of Section 6050I which are due to ''intentional disregard'' of the filing requirement.

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institution and/or any director, officer, or employee thereof who willfully or through gross negligence violates any regulatory provision prescribed thereunder. It also provides that a separate violation of 12 U.S.C. §§ 1730d or 1829b occurs for each day the violation continues and at each office, branch, or place of business at which such a violation occurs. Finally, it provides that any penalty imposed under either 12 U.S.C. § 1730d or 1829b shall be assessed, mitigated and collected in the manner provided in 31 U.S.C. § 5321(b) and (c).

9-105.962 Section 6185(d)(3): Regulatory Authority Under 12 U.S.C. § 1953(b)

Section 6185(d)(3) of the 1988 Act extends the regulatory authority of the Secretary of Treasury under 12 U.S.C. § 1953(b) to all ''financial institutions'' under 31 U.S.C. § 5312(a)(2) and any partner, officer, director, or employee of such financial institutions. It exempts only insured banks under Section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. § 1813(h)) and insured institutions under Section 401(a) of the National Housing Act (12 U.S.C. § 1724(a)).

9-105.963 Section 6186(b): Transfer of RFPA-Protected Records to Attorney General

Section 6186(b) amends Section 1112 of the Right to Financial Privacy Act, 12 U.S.C. § 3412, by adding a new subsection (f) which authorizes Federal bank supervisory and regulatory agencies to disclose or transfer RFPA-protected financial records to the Attorney General upon certification by a supervisory level official of the transferring agency (1) that there is reason to believe that the records may be relevant to a violation of Federal criminal law and (2) that the records were obtained in the exercise of the agency's supervisory or regulatory functions. It further provides that such records may be used by the Department of Justice only for criminal investigative or prosecutive purposes and must be returned to the transferring agency upon completion of the investigation or prosecution, including any appeal.

Practice Comment:

This ''liberal'' disclosure authority will significantly enhance Federal law enforcement capabilities in the same way that disclosure of Form 8300 will assist money laundering and narcotics prosecutors.

9-105.964 Section 6186(c) and (d): Transfer of RFPA-Protected Records of ''Insiders'' to Law Enforcement Authorities

Section 6186(c) of the 1988 Act amends Section 1113 of the Right to Financial Privacy Act, 12 U.S.C. § 3413, by adding new subsection (l) which provides that nothing in Title 12 shall apply when a financial institution

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or supervisory agency provides any financial record of any officer, director, employee or controlling shareholder of such institution, or of any major borrower of such institution as to whom there is reason to believe that he/she may be acting in concert with any such officer, director, employee, to the Attorney General of the United States, to a State law enforcement agency, or, in the case of a possible violation of 31 U.S.C. §§ 5311-5326, to the Secretary of Treasury, if there is reason to believe that such record is relevant to a possible violation by such person of either 31 U.S.C. §§ 5311-5326 or of any law relating to crimes against financial institutions or supervisory agencies by directors, officers, employees or controlling shareholders of, or by borrowers from, financial institutions.

Sections 6186(d) of the 1988 Act amends Section 1117(c) of the Right to Financial Privacy Act, 12 U.S.C. § 3417(c), to provide a ''good faith'' defense from liability for disclosure of financial records of insiders pursuant to 12 U.S.C. § 3413(1). It also clarifies the scope of the good faith defense under Section 3417(c) by specifying that it constitutes a defense to any action under Title 12, any State constitution, or any law or regulation of a State or political subdivision thereof.

9-105.1000 MONEY LAUNDERING CASE LIST

CTR Cases

U.S. Supreme Court

California Bankers Assn. v. Schultz, 416 U.S. 21 (1974)

(Title I of Bank Secrecy Act (1) does not violate due process by imposing unreasonable burdens on banks or by making banks ''agents'' of the government (2) does not violate 4th Amendment rights of banks or their customers because Title I records are not disclosed to government without separate process (3) does not violate 5th Amendment privilege against self-incrimination as to banks or bank customers; Title II's foreign transaction reporting requirements do not violate 4th Amendment and are within the plenary power of Congress over interstate and foreign commerce; Title II's domestic reporting requirements, as implemented, do not violate 4th Amendment rights of bank)

Court of Appeals

U.S. v. Scanio, 900 F.2d 485 (2nd Cir.1990)

(defendant willfully structured a currency transaction for the purpose of evading the bank's CTR filing requirement; Government was not required to prove that defendant actually knew structuring was unlawful. Jury instruction on 5324(3) included in the opinion)

U.S. v. Blackman, 897 F.2d 309 (8th Cir.1990)

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(court upheld District Court's denial of defendant's motion for acquittal on the money laundering counts in the indictment; found that transaction, carried out by defendant with an auto sales firm, fits within the purview of 18 U.S.C. § 1956 and is of the type that Congress intended to criminalize. Testimony from an expert witness which explained to jury, drug dealers' practice of use of wire services to conduct business and their preference in using vehicles encumbered by liens to protect from seizure, deemed permissible)

U.S. v. Lora, 895 F.2d 878 (2nd Cir.1990)

(during guilty plea colloquy defendant acknowledged in the trial court that he *should have known* the money involved in the financial transaction was derived from illegal activity and the transaction was designed to conceal the identity of the parties involved in the transaction. Defendant thereafter sought to set aside the plea on this basis. 2nd Circuit ruled that defendant should have understood his guilty plea; that he was fully informed by the trial court of all of his rights; knowing, voluntary waivers of these rights were obtained)

U.S. v. Mcaffe, No. 88-5145 (4th Cir. Feb. 9, 1990) (unpublished decision)

(defendant, an attorney, was charged in two counts with (1001) and (5313) for advising his clients to structure cash transactions by purchasing cashier's checks under $10,000 from different banks to avoid filing CTR's. Defendants argued these two counts merged. Fourth Circuit found no merit to appellant's claims)

U.S. v. Casamento, 887 F.2d 1141 (2nd Cir.1989)

(circumstantial evidence sufficient to prove defendants' participation in the money laundering operations of ''Pizza Connection'' narcotics operation. See opinion pages 1162, 63 and 1166, 67)

U.S. v. Lee, 866 F.2d 998 (8th Cir. Sept. 18, 1989)

(defining financial transaction as a transfer of cash. Unclear from opinion whether transfer was simply between two individuals or whether a financial institution was involved)

U.S. v. Corona, 885 F.2d 776 (11th Cir. Sept. 29, 1989)

(§ 1952 (ITAR) conviction of bank officer based on imputing knowledge of drug trafficking based on ''objective factors'' analysis. Defines facilitation for ITAR purposes as ''to make easy or less difficult.'' (Note: 1956 is based on ITAR facilitation theories)

U.S. v. Alamo Bank of Texas, 880 F.2d 828 (5th Cir. Aug. 7, 1989)

(successor bank criminally liable for CTR offenses committed by predecessor bank)

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U.S. v. Donahue, 885 F.2d 45 (3rd Cir.1989)

(defendant could be convicted of conspiring to willfully and knowingly avoid filing Currency Transactions Reports on basis of his agreement with bank branch manager to willfully violate bank's duty to file those reports or by aiding and abetting that violation, even though he himself could not have been held liable for failure to file those reports, and (2) venue on count relating to transportation of currency to Grand Cayman Island without filing requisite Currency and Monetary Instrument Reports was proper in district where offense ''began''—i.e., where defendant with currency boarded first of successive flights which later left country)

U.S. v. Restrepo, 884 F.2d 1381 (2nd Cir.1989)

(in a three page order upholding defendant's conviction under 18 U.S.C. § 1956, the Second Circuit held that § 1956 is neither vague on its face nor as applied)

U.S. v. Ponce Federal Bank, F.S.B., 883 F.2d 1 (1st Cir.1989)

(upholding authority of District Court to disregard prosecutor's recommendation for a lesser fine as part of a plea bargain; fine imposed exceeded recommended fine by 1 million dollars)

U.S. v. Alamo Bank of Texas, 880 F.2d 828 (5th Cir.1989)

(successor bank criminally liable for CTR offenses committed by predecessor bank)

U.S. v. St. Michael's Credit Union, 880 F.2d 579 (1st Cir.1989)

(appeal of conviction of credit union and one of its employees; *aff'd in part and rev'd in part;* opinion discusses: (1) willfull blindness jury instructions deemed appropriate; (2) pattern of transactions exceeding $100,000 proven by chronic and consistent non-filing by credit union; (3) improper introduction of irrelevant evidence tainted § 1001 conviction thereby requiring reversal; and (4) aggregation of multiple transactions conducted on a single day but at different times violates Fifth Amendment notice—(5313 charge—not 5324(3))

U.S. v. American Investors of Pittsburgh, 879 F.2d 1087 (3rd Cir.1989)

(corporate defendant and three principle officers convicted of structuring violations under 31 U.S.C. 5313 and 18 U.S.C. 2; convictions upheld; aggregation rules discussed; criminal liability of bank officers and customers fully explained; *Mastronardo* distinguished)

U.S. v. Eaves, 877 F.2d 943 (11th Cir.1989)

(movement of money in interstate commerce satisfied jurisdictional prerequisites of Hobbs Act; analogous to movement of money in interstate commerce clause of 18 U.S.C. § 1956)

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U.S. v. Bucey, 876 F.2d 1297 (7th Cir.1989)

(defendant did not violate CTR statutes; defendant did not qualify as ''financial institution''; defendant did not unlawfully fail to disclose identity of true source of funds on Parts I and II of CTR form; but evidence supported convictions for mail fraud and conspiracy)

U.S. v. Kingston, 875 F.2d 1091 (5th Cir.1989), *reh'g denied*, 878 F.2d 815 (5th Cir.1989)

(CTR offenses by bank employees; elements of proof; sufficiency of evidence; evidence that CTR violations committed in connection with violation of other federal law)

U.S. Alverez-Morena, 874 F.2d 1402 (11th Cir.1989)

(holding drug money laundering violations sufficient to support the ''series of three violations'' requirement for C.C.E. conviction. Each separate money laundering transaction held to be a distinct violation)

U.S. v. Rigdon, 874 F.2d 774 (11th Cir.1989)

(individual defendant's exchanging currency for cashier's checks for fee qualified him as ''financial institution'', but did not involve ''trick, scheme or device'' to conceal transaction)

U.S. v. Jerkins, 871 F.2d 508 (6th Cir.1989)

(§ 371 conspiracy; overt acts in conspiracy to avoid CTR requirement need not themselves be illegal; defendant attorney's laundering scheme aimed in part at thwarting IRS identification of revenue and collection of taxes subject to criminal conspiracy conviction)

U.S. v. Meros, 866 F.2d 1304 (11th Cir.1989)

(where customer makes multiple cash transactions under $10,000 at different branches of same bank on same day, he can be the proximate cause of a bank's failure to file a CTR, and thus liable under 18 U.S.C. §§ 1001 and 2)

U.S. v. Reitano, 862 F.2d 982 (2nd Cir.1988)

(defining term ''gross revenue'' in 18 U.S.C. § 1955; analogous to ''gross receipts'' language of pre-amendment 18 U.S.C. § 981(a)(1)(A))

Pilla v. U.S., 861 F.2d 1078 (8th Cir.1988)

(defendant had duty to report acting in capacity as advisor to bank officer)

U.S. v. Camarena, No. 88-1314 (5th Cir. Dec. 6, 1988) (unpublished decision)

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(knowledge that ''structuring'' is illegal not required under § 5324; § 5324 is not vague; the word ''structure'' has no peculiar, exotic or legal meaning as used in this statute)

U.S. v. Zingaro, 858 F.2d 94 (2nd Cir.1988)

(evidence was a constructive amendment of RICO conspiracy indictment in violation of grand jury clause of Fifth Amendment)

U.S. v. Ashley Transfer & Storage Co., 858 F.2d 221 (4th Cir.1988), *cert. denied*, 109 S.Ct. 1932 (1989)

(counts charging defendants with conspiracy to fix prices and conspiracy to defraud U.S. were not multiplicitous)

U.S. v. Lizotte, 856 F.2d 341 (1st Cir.1988)

(jury instruction on ''willful blindness''; defendant attorney may not take refuge in willful blindness; drug money was willingly laundered)

U.S. v. Hawley, 855 F.2d 595 (8th Cir.1988), *cert. denied*, 109 S.Ct. 1141 (1989), *reh'g denied*, 109 S.Ct. 1772 (1989)

(husband and wife team engaged in ''warehouse banking'' services constitutes ''financial institution'')

U.S. v. Pieper, 854 F.2d 1020 (7th Cir.1988)

(kickbacks, false income tax returns and conducting affairs of employee benefit fund through pattern of racketeering activity resulted in conviction of RICO violation and counts were not multiplicitous)

U.S. v. Segal, 852 F.2d 1152 (9th Cir.1988)

(liability of bank customer who conspired with bank officer to avoid filing CTRs; aiding and abetting a failure to file currency transaction reports; conspiracy to defraud)

U.S. v. Mastronardo, 849 F.2d 799 (3rd Cir.1988)

(pre-1986 statutes and regulations did not afford ''fair notice'' to bank customer that ''structuring'' violates law; defendants engaged in a multimillion dollar bookmaking and money laundering operation were charged with structuring currency transactions to avoid having financial institutions file CTRs)

U.S. v. Cuevas, 847 F.2d 1417 (9th Cir.1988), *cert. denied*, 109 S.Ct. 1122 (1989)

(money launderer conspired to aid and abet drug offense; extensive money laundering operation with several international offices constitutes

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a ''financial institution''; transfers between branches and offices of operation subject to CTR requirement)

U.S. v. Risk, 843 F.2d 1059 (7th Cir.1988)

(bank had no legal duty to report structured transactions since statute and regulations in existence at time did not require aggregation of multiple transactions)

U.S. v. Petit, 841 F.2d 1546 (11th Cir.1988), *cert. denied*, 109 S.Ct. 2906 (1988)

(''sting operation''; conspiracy to receive stolen goods; goods provided by FBI agent do not need to be stolen; crime of conspiracy is complete once the conspirators, having formed the intent to commit a crime, take any step in preparation)

U.S. v. Polychron, 841 F.2d 833 (8th Cir.1988), *cert. denied*, 109 S.Ct. 135 (1988)

(indictment against bank president charged with intentionally structuring transactions in order to avoid filing CTRs alleged crime against U.S. under 18 U.S.C. § 371; 18 U.S.C. § 1001; and 31 U.S.C. § 5313 and 18 U.S.C. § 2)

U.S. v. Shannon, 836 F.2d 1125 (8th Cir.1988), *cert. denied*, 108 S.Ct. 2830 (1988)

(bank officer guilty of avoiding CTR requirement by causing personal funds to be deposited into bank's account at correspondent bank; sustaining obstruction of justice conviction based upon defendant's advice to former bank teller, who was prospective grand jury witness, that it would be ''in her best interest'' to forget about any large currency transactions which she had processed)

U.S. v. Lamarie, 833 F.2d 1468 (11th Cir.1987), *cert. denied*, 108 S.Ct. 2015 (1988)

(''structured'' transactions exceeding total of $10,000 at same bank, or different branches of same bank, on same day; customers have duty to report cash transactions and could be held criminally liable for failure to file report)

U.S. v. Robinson, 832 F.2d 1165 (9th Cir.1987)

(bank teller, who was acting as a private individual and was not charged with operating a currency exchange business, was not a financial institution within currency laws; no duty to file CTRs)

U.S. v. Gimbel III, 830 F.2d 621 (7th Cir.1987)

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(defendant, who was a lawyer, structured currency transactions, had no duty to file a CTR reflecting structured nature of transactions; regulation in effect at time did not require aggregation of multiple transactions; individual cannot be charged as a ''financial institution'')

U.S. v. Hayes, 827 F.2d 469 (9th Cir.1987)

(bank customer conspired with bank officer to avoid CTR requirement customer liable for conspiracy to fail to file CTRs on transactions exceeding $10,000 on showing of complicity with bank vice president)

U.S. v. Abner, 825 F.2d 835 (5th Cir.1987)

(a transaction over $10,000, even if split between two or more branches of same bank, constitutes a transaction requiring a CTR)

U.S. v. Herron II, 825 F.2d 50 (5th Cir.1987)

(defendants not guilty of wire fraud violation for conspiring and scheming to launder money by failing to file CTRs in absence of allegation that defendants conspired to deprive U.S. of income taxes; conspiracy to violate CMIR requirement upheld)

U.S. v. Richeson, 825 F.2d 17 (4th Cir.1987)

(conviction under 18 U.S.C. §§ 1001 and 2; defendant structured daily bank deposits so as to cause bank not to file required CTRs; CTR form required aggregation of transactions)

U.S. v. Nersesian, 824 F.2d 1294 (2d Cir.1987), *cert. denied,* 108 S.Ct. 355 (1989)

(bank customer structuring transactions may be convicted under 18 U.S.C. § 371 and 18 U.S.C. §§ 1001 and 2 even though customer had no legal duty to file a CTR himself)

U.S. v. Bank of New England, 821 F.2d 844 (1st Cir.1987), *cert. denied,* 108 S.Ct. 328 (1987)

(bank criminally liable; simultaneous transfer of over $10,000, same teller window, multiple instruments; definition of ''pattern of illegal activity'')

U.S. v. Montalvo, 820 F.2d 686 (5th Cir.1987)

(conviction under § 371; purpose of money laundering conspiracy through foreign corporation was to impede and obstruct the IRS in collection of revenue)

U.S. v. DiTommaso, 817 F.2d 201 (2d Cir.1987)

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(defendants were convicted of drug smuggling; some defendants participated in drug conspiracy by laundering money through multinational shoe business)

U.S. v. Herron, 816 F.2d 1036 (5th Cir.1987), *vacated*, 825 F.2d 50 (1987)

(scheme designed to facilitate cash deposits in domestic banking system without triggering reporting requirements constituted violation of wire fraud statute)

U.S. v. Murphy, 809 F.2d 1427 (9th Cir.1987)

(court held that the law did not clearly impose a duty on the defendant to disclose the source of the funds in Part II of CTR Form 4789)

U.S. v. Williams, 809 F.2d 1072 (5th Cir.1987), *cert. denied*, 108 S.Ct. 228 (1987)

(RICO violations, conspiracy to evade currency transaction reporting requirements, conspiracy to file false tax returns)

U.S. v. Cure, 804 F.2d 625 (11th Cir.1986)

(bank customer guilty under § 371 of conspiring with bank not to file CTRs; guilty under §§ 1001 and 2 of causing bank to fail to file CTRs; multiple subtransactions at same bank, or different branches of same bank, on same day)

U.S. v. Hernando Ospina, 798 F.2d 1570 (11th Cir.1986)

(defendant providing money laundering service exchanged $1.3 of Colombian pesos into cashier's checks for commission deemed ''financial institution''; fact that undercover government agents conducted transactions did not negate bank's duty to file CTRs where agents acted at direction of defendants; conviction of conspiracy to violate Travel Act to facilitate narcotics trafficking upheld on basis of cocaine residue on currency)

U.S. v. Larson, 796 F.2d 244 (8th Cir.1986)

(the Act imposed no duty to defendant to disclose to bank that his multiple currency transactions aggregated over $10,000, thus defendant not guilty of concealing such information from government; statute and regulations failed to afford ''fair notice'' to defendants)

U.S. v. Heyman, 794 F.2d 788 (2d Cir.1986), *cert. denied*, 479 U.S. 989 (1986)

(defendant employee of financial institution convicted of causing institution to fail to file CTRs, although defendant had no legal duty to file CTRs himself; liable under § 5313; conviction sustained)

U.S. v. Reinis, 794 F.2d 506 (9th Cir.1986)

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(bank customer had no duty to report, thus no concealment and could not aid or abet a bank's failure to report CTRs; no duty on banks to aggregate multiple transactions each under $10,000)

U.S. v. Nahoom, 791 F.2d 841 (11th Cir.1986)

(conviction of former AUSA for conspiracy to import and possess marijuana affirmed; evidence of defendant's involvement in money laundering scheme admissible on issue of intent; acquitted on RICO count)

U.S. v. Sanchez, 790 F.2d 1561 (11th Cir.1986)

(bank officer guilty of conspiracy to defraud the U.S. by impeding investigation of large currency transactions of circumventing currency reporting requirements by referring customers to investment firm for purpose of avoiding CTR requirement)

U.S. v. Mouzin, 785 F.2d 682 (9th Cir.1986), *cert. denied*, 479 U.S. 985 (1986)

(court held defendant qualified as ''financial institution'' as both ''currency exchange'' and ''transmitter of funds'' by virtue of role in transferring currency across the country and overseas)

U.S. v. Giancola, 783 F.2d 1549 (11th Cir.1986), *cert. denied*, 479 U.S. 1018 (1986)

(same day, different branches of same bank; customer can be proximate cause of a bank's failure to file a CTR, and thus liable)

U.S. v. Dela Espriella, 781 F.2d 1432 (9th Cir.1986)

(multiple subtransactions, each under $10,000 and each at a different bank, do not trigger duty to file CTR; however, one defendant, a kingpin of an intricate money laundering operation who delivered cash in excess of $10,000 to his couriers, qualified as a ''financial institution'' (i.e. a ''currency exchange'') with a duty to file CTRs)

U.S. v. Varbel, 780 F.2d 758 (9th Cir.1986)

(defendants engaged in money laundering had no duty to report currency transactions to or through the bank; customer not liable under § 1001 & § 371 where each subtransaction conducted at different bank)

U.S. v. Denemark, 779 F.2d 1559 (11th Cir.1986)

(no duty to file where each subtransaction at different bank)

U.S. v. Eirin, 778 F.2d 722 (11th Cir.1986)

(money laundering case in which more than $57,000,000 passed through one bank in a ten month period; no CTRs were filed; evidence of defendant's participation in similar money laundering scheme admissible)

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U.S. v. Anzalone, 766 F.2d 676 (1st Cir.1985)

(application of reporting requirements to financial institutions only, customer had no duty to disclose information and therefore not liable under § 5313 & § 1001; court treated case as involving multiple subtransactions each on different day)

U.S. v. Valdes-Guerra, 758 F.2d 1411 (11th Cir.1985)

(''Operation Greenback'': conspiracy and money laundering scheme; each reporting violation is a separate felony and a separate unit of ''pattern of illegal activity'' over 12 months)

U.S. v. Goldberg, 756 F.2d 949 (2d Cir.1985), *cert. denied*, 472 U.S. 1009 (1985)

(court held three defendants engaged in money laundering, including two bank officers, constituted a ''financial institution'', namely a partnership or joint venture engaged in business of dealing in currency)

U.S. v. So, 755 F.2d 1350 (9th Cir.1985)

(''sting operation''; no evidence of entrapment or ''outrageous government conduct''; individual currency misdemeanors aggregating to more than $100,000 amount to separate felonies each time violation in a pattern adds to total exceeding $100,000 over 12 month period)

U.S. v. Cook, 745 F.2d 1311 (10th Cir.1984), *cert. denied*, 469 U.S. 1220 (1985)

(customer liable under the bank reporting law for giving false information on report rather than for failure to file a report)

U.S. v. Orozco-Prada, 732 F.2d 1076 (2d Cir.1984)

(money laundering operation integral to success of drug scheme and money launderers may be prosecuted for aiding and abetting drug offense)

U.S. v. Eisenstein, 731 F.2d 1540 (11th Cir.1984)

(ignorance of the reporting requirement constitutes a valid defense)

U.S. v. Sans, 731 F.2d 1521 (11th Cir.1984), *cert. denied*, 469 U.S. 1111 (1984)

(bank officials; evidence of non-filing by other officials irrelevant; conspiracy to defraud; failure to file CTRs; falsifying facts in a matter under jurisdiction of IRS)

U.S. v. Puerto, 730 F.2d 627 (11th Cir.1984), *cert. denied*, 469 U.S. 847 (1984)

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(customer liable for failure to file and false filing of CTRs under § 5313, § 1001 & § 371)

U.S. v. Browning, 723 F.2d 1544 (11th Cir.1984)

(court affirmed conviction of participants in money laundering scheme of conspiring to defraud U.S. by impairing, obstructing, and defeating IRS in its lawful function of identifying revenue and collecting tax due and owing on such revenue)

U.S. v. Tobon-Builes, 706 F.2d 1092 (11th Cir.1983)

(defendant and companion together bought two $9,000 cashier's checks at each of ten banks during a six-hour period; actions by a customer that cause a financial institution to abrogate its duty to file a CTR are criminal under 18 U.S.C. §§ 1001 and 1002)

U.S. v. Kattan-Kassin, 696 F.2d 893 (11th Cir.1983)

(use of ''violation'' and ''part of'' in § 1059 makes clear that each reporting violation can be separately prosecuted as felony and as separate unit of ''pattern of illegal activity'' over 12 month period)

U.S. v. Enstam, 622 F.2d 857 (5th Cir.1980), *cert. denied*, 450 U.S. 912 (1981)

(defendants, who participated in money laundering scheme to disguise drug proceeds, are guilty of conspiracy to obstruct the IRS' tax collecting function and can be prosecuted for criminal conspiracy)

U.S. v. Thompson, 603 F.2d 1200 (5th Cir.1979)

(actions by a bank officer that cause a financial institution to abrogate its duty to file a CTR are criminal)

U.S. v. Beusch, 596 F.2d 871 (9th Cir.1979)

(corporate currency exchange guilty of failing to file CTRs; each reporting violation may be separate unit in ''pattern of illegal activity'' over 12 months and therefore prosecuted as felony)

District Court

U.S. v. Hoyland, 903 F.2d 1288 (9th Cir.1990)

(defendant convicted of willfully structuring cash transactions to cause bank's failure to file CTR's; neither criminal bad purpose to violate nor knowledge of statute is required—general intent to evade reporting requirement is all that is required to be proven)

U.S. v. Awan, No. 88-330-Cr-T-BB (M.D.Fla. Dec. 5, 1989)

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(rejecting vagueness challenge to § 1956; indictment not duplicitous because each financial transaction encompassing a deposit, withdrawal and transfer could have been charged in separate counts; conspiracy objectives to aid and abet § 846 violation and money laundering (§ 1956) not multiplicitous (although court implied that it would grant a Rule 29 Motion as to § 846 charge if the only evidence presented was that defendants laundered drug money). Rejects charge of conspiracy to attempt; proceeds of an SUA did not cease being proceeds because they passed through the hands of undercover agents; and transportation as it originally appeared in § 1956(a)(2) encompassed electronic funds transfers)

U.S. v. LaFrance, 729 F.Supp. 7 (D.Mass.1989)

(court rejected defendant's vagueness challenge to § 5324(1) ''Structuring'' has plain meaning and is easily understood and scienter requirements of statute limits reach of statute)

U.S. v. 316 Units of Municipal Securities, 725 F.Supp. 172 (S.D.N.Y.1989)

(defendant's acquittal of criminal money laundering charges does not serve to collaterally estop government from pursuing civil forfeiture; knowledge of antistructuring provisions (§ 5324) not required for criminal prosecution or civil forfeiture under § 981; knowledge of reporting requirements may be proven by circumstantial evidence and; innocent owner defense requires proof of lack of knowledge of the illegal transactions not lack of knowledge of the transactions' illegality)

U.S. v. Thakkar, 721 F.Supp. 1030 (S.D.Ind.1989)

(defendant moved to dismiss § 5324 indictment on grounds it failed to state a punishable offense and for vagueness. Court held (1) statute makes it illegal to structure regardless of the underlying purpose of structuring. No purpose of concealing criminal activity is required and (2) § 5324 not unconstitutionally vague)

U.S. v. McKinney, Cr. No. 89-60021-RE (D.Or.1989) (unpublished decision)

(defendant charged with § 5324(3) structuring violations moved to dismiss indictment; held: (1) reporting requirements do not violate Fifth Amendment self-incrimination rights; (2) terms ''structure'' and ''transaction'' are not vague)

U.S. v. Russell K. Baker, No. 89-83-Cr-T-15B (M.D.Fla.1989) (unpublished decision)

(rejecting vagueness and overbreadth challenge to 18 U.S.C. § 1957)

U.S. v. Kimball, 711 F.Supp. 1031 (D.Nev.1989)

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(reporting requirements of §§ 5313 and 5324 do not violate Fifth Amendment privilege against self-incrimination; 18 U.S.C. § 1956 not void for vagueness)

U.S. v. Palma, Crim. No. H-88-201 (S.D.Tex.1989) (unpublished decision)

(Part II of CTR form requires naming of the individual or organization for whom transaction is completed)

U.S. v. Paris, 706 F.Supp. 184 (E.D.N.Y.1988)

(subtransactions at different branches of same bank on same day; bank customers can be charged with conspiracy to avoid CTR reporting requirements and causing banks to fail to file CTRs)

U.S. v. Scanio, 705 F.Supp. 768 (W.D.N.Y.1988)

(word ''structure'' in statute did not render statute unconstitutionally vague nor does statute violate 5th amendment)

U.S. v. Bara, Crim. No. H-87-9 (S.D.Tex.1988) (unpublished decision)

(conspiracy to defraud the IRS; intentionally causing a financial institution to file a false CTR and falsifying material facts)

U.S. v. Central National Bank, 705 F.Supp. 336 (S.D.Tex.1988) *aff'd sub nom. U.S. v. Alamo Bank of Texas*, No. 88-6112 (5th Cir. Aug. 7, 1988)

(successor bank liable for predecessor's CTR violations which occurred three years prior to merger)

U.S. v. Torres Lebron, et al., 704 F.Supp. 332 (D.P.R.1989)

(bank customers were not required to file CTRs, but could be held criminally liable for conspiring with bank employees to avoid filing of CTRs in multi-step transaction involving cash)

U.S. v. Kraselnick, 702 F.Supp. 480 (D.N.J.1988)

(regulations afforded ''fair notice'' to bank employees that they could not structure transactions so as to avoid reporting requirements; conspiracy to defraud; three accounts, three day period)

U.S. v. Mainieri, 691 F.Supp. 1394 (S.D.Fla.1988)

(18 U.S.C. § 1956 not void for vagueness; language in indictment clearly tracked statute and counts were not multiplicious in violation of 5th amendment)

U.S. Maria Dolores Camarena, No. EP-87-Cr-133 (W.D.Tex. Apr. 7, 1988) (unpublished decision), *aff'd*, No. 88-1314 (5th Cir. Dec. 6, 1988) (unpublished opinion), *cert. denied*, 109 S.Ct. 3158 (1989)

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(§ 5324 not void for vagueness; money involved in CTR violation need not be criminally derived)

U.S. v. Bucey, 691 F.Supp. 1077 (N.D.Ill.1988), *aff'd in part and rev'd in part*, 876 F.2d 1297 (7th Cir.1986)

(defendant's motion to strike various charges in indictment of money laundering and violation of currency reporting statutes was denied)

U.S. v. Tota, 672 F.Supp. 716 (S.D.N.Y.1987), *aff'd*, 841 F.2d 836 (2nd Cir.1988), *cert. denied*, 109 S.Ct. 218 (1988)

(employees of brokerage firm criminally liable; physical transfer of currency from brokerage firm customer to broker on single occasion and in amount exceeding $10,000 was in violation of the Currency and Foreign Transactions Reporting Act)

U.S. v. Risk, 672 F.Supp. 346 (S.D.Ind.1987)

(pre-1986 amendments; bank customer had no duty to report multiple subtransactions at different branches of same bank on same day, no duty to aggregate at time, therefore customer not liable)

U.S. v. Riky, 669 F.Supp. 196 (N.D.Ill.1987)

(court held because defendant not an ''agency'', ''branch'', or ''office'' of a person, he was not a ''financial institution'' under 31 C.F.R. § 103.11(e))

U.S. v. Perlmutter, 675 F.Supp. 782 (S.D.N.Y.1987), *aff'd mem.*, 835 F.2d 1430 (2nd Cir.1988), *cert. denied*, 108 S.Ct. 1110 (1988)

(second superseding indictment: individual attorney guilty of knowingly and intentionally causing a bank, by the device of splitting up a $12,000 transaction into amounts less than $10,000, to fail to file a CTR)

U.S. v. Shearson Lehman Brothers, Inc., 650 F.Supp. 490 (E.D.Pa.1986) *But See U.S. v. Mastronardo*, 849 F.2d 799 (3rd Cir.1988) (reversing convictions of individual defendants)

(denying motion to dismiss indictment; structuring financial transactions less than $10,000 is not unlawful per se; scheme became criminal when used to intentionally cause financial institution to fail to fulfill duty to file CTR)

U.S. v. Bank of New England, 640 F.Supp. 36 (D.Mass.1986)

(bank can be charged with failure to file ''structured'' transaction even where customer had no duty under *Anzalone*; bank also properly charged under § 1001)

U.S. v. Cogswell, 637 F.Supp. 295 (N.D.Cal.1985)

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(indictment dismissed which charged bank customer with causing failure to file CTR where each subtransaction at a different bank)

U.S. v. Perlmutter, 636 F.Supp. 219 (S.D.N.Y.1986) *But See U.S. v. Perlmutter, supra*.

(defendant attorney did not have notice that her restructuring transactions to avoid banks' reporting requirements and failing to disclose were criminal; indictment dismissed)

U.S. v. Gimbel (I), 632 F.Supp. 748 (E.D.Wis.1985), *rev'd* 830 F.2d 621 (7th Cir.1987)

(indictment, which charged defendant (attorney) with money laundering scheme in attempt to conceal from IRS clients' true income, stated offenses under § 1001 and under mail and wire fraud statutes)

U.S. v. Gimbel (II), 632 F.Supp. 713 (E.D.Wis.1984)

(district court held that the law did not require the defendant, an attorney engaged in money laundering, to disclose on Part II of CTR form the real parties in interest to transaction)

U.S. v. Richter, 610 F.Supp. 480 (N.D.Ill.1985), *aff'd*, 785 F.2d 312 (7th Cir.1985), *cert. denied*, 479 U.S. 855 (1986)

(individual defendant properly charged under § 371 and §§ 1001 and 2 based on ''structuring'' of currency deposits)

U.S. v. Konefal, 566 F.Supp. 698 (N.D.N.Y.1983)

(individual defendant can be charged with causing failure to file CTR; single count of indictment charging defendant with numerous transactions in order to satisfy ''pattern of unlawful activity'' requirement not multiplicitous)

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9-110.000 ORGANIZED CRIME AND RACKETEERING

9-110.100 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO)

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. §§ 1961-1968), commonly referred to as the ''RICO'' statute. The purpose of the RICO statute is ''the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.'' S.Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). However, the statute is sufficiently broad to encompass any illegitimate enterprise affecting interstate or foreign commerce.

A monograph of the law applicable to prosecutions under this statute is available on JURIS.

9-110.101 Division Approval

No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division. See RICO Guidelines at USAM 9-110.200, infra.

9-110.102 Investigative Jurisdiction

Section 1961(10) of Title 18 provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. § 1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in 18 U.S.C. § 1961.

9-110.200 RICO GUIDELINES PREFACE

The decision to institute a federal criminal prosecution involves a balancing process, in which the interests of society for effective law enforcement are weighed against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned.

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Despite the broad statutory language of RICO and the legislative intent that the statute ''. . . shall be liberally construed to effectuate it remedial purpose,'' it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve ''imaginative'' prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. Stated another way, a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances case, will not be added to an indictment unless it serves some special RICO purpose as enumerated herein.

Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose, rather than to attack the activity which Congress most directly addressed--the infiltration of organized crime into the nation's economy.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

9-110.210 Authorization of Prosecution: The Review Process

The review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section. To commence the review process, a final draft of the proposed indictment and a prosecutive memorandum shall be forwarded to Organized Crime and Racketeering Section, Room 2515, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20350. The guidelines provide detailed guidance for the use of RICO charges in criminal investigations and prosecutions, as well as in all civil applications of RICO. Attorneys are, however, encouraged to seek guidance from the Organized Crime and Racketeering Section, telephonically or by letter, prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review. Communication with the Organized Crime and Racketeering Section well in advance of indictment may result in the resolution of problems with a proposed RICO indictment and effect an expeditious review.

The submitting attorney must anticipate that the RICO review process, which is handled on a first-in-first-out basis, is a time-consuming process, in which the reviewer has no control over the number of cases submitted for review during a given time frame. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. Unless there is a

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backlog, 15 working days is usually sufficient. The review process will not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the clerk of the court shall be forwarded to Organized Crime and Racketeering Section, Room 2513, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecutive memorandum at a later date.

9-110.211 Duties of the Submitting Attorney

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the grand jury, the Section shall be notified in writing of any significant rulings which have an impact upon the RICO statute—for example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the U.S. Attorney as well as the defense should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The government's briefs and motions will provide assistance to other U.S. Attorneys' offices handling similar RICO matters.

Once a verdict has been obtained, the U.S. Attorney should forward the following information to the Organized Crime and Racketeering Section for retention: (a) the verdict on each count of the indictment; (b) a copy of the judgment of forfeiture; (c) estimated value of the forfeiture; and (d) judgment and sentence(s) received by each RICO defendant.

9-110.300 RICO SPECIFIC GUIDELINES

9-110.310 Considerations Prior to Seeking Indictment

Except as hereafter provided, the attorney for the government should seek authorization for an indictment charging a RICO violation only if in his judgment those charges:

A. Are necessary to ensure that the indictment:

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1. Adequately reflects the nature and extent of the criminal conduct involved; and

2. Provides the basis for an appropriate sentence under all the circumstances of the case; or

B. Are necessary for a successful prosecution of the government's case against the defendant or a codefendant; or

C. Provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct.

9-110.311 Commentary

All-encompassing examples are difficult, if not impossible, to formulate when discussing RICO; however, by way of illustration only:

A. When a diversified course of criminal conduct involving division of labor and functional responsibilities exists, for which other conspiracy statutes are inadequate, charging a RICO conspiracy may be appropriate;

B. When the course of criminal conduct has aspects which aggravate the seriousness of the crime (including prior criminal activity by a RICO defendant) which realistically can be foreseen as grounds for the sentencing judge imposing a heavier sentence under RICO than for the underlying acts, a RICO count may be appropriate;

C. When, subject to all of the guidelines, an essential portion of the evidence of the criminal conduct in a pattern of racketeering activity can be shown to be admissible only under RICO, and not under other evidentiary theories (such as: prior similar acts, continuing crime or conspiracy), a RICO count may be appropriate; and

D. When a substantial prosecutive interest will be served by forfeiting an individual's interest in or source of influence over the enterprise which he/she has acquired, maintained, operated or conducted in violation of 18 U.S.C. § 1962, RICO may be appropriate.

9-110.320 Approval of Organized Crime and Racketeering Section Necessary

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division.

9-110.321 Commentary

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal Division having supervisory responsibility for this statute. A RICO prosecutive memorandum and draft indictment, felony information, civil complaint, or

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civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section, Criminal Division, Room 2515, 10th and Pennsylvania Avenue, N.W. Washington, D.C. 20530, at least 15 working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire, and authorizations based on oral presentations will not be given.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the sole criteria by which the Department of Justice will determine whether to approve the indictment, felony information, civil complaint, or civil investigative demand. As in the past, the fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. § 1962 is not required.

In addition to the above considerations, the use of RICO in a prosecution is also governed by the *Principles of Federal Prosecution* (available on JURIS). Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the *Principles of Federal Prosecution*.

9-110.330 Charging RICO Counts

A RICO count of an indictment will not be charged where the predicate acts consist solely and only of state offenses except in the following circumstances:

A. Cases where local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the federal government has significant interest;

B. Cases in which significant organized crime involvement exists; or

C. Cases in which the prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.400 RICO PROSECUTIVE (PROS) MEMO FORMAT

9-110.401 Preface

A well written, carefully organized pros memo is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. This

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section sets out the criteria by which a RICO pros memo is evaluated by the Organized Crime and Racketeering Section. Close attention by attorneys to the comments below will ensure that delays and declinations are kept to a minimum.

9-110.402 Purpose

The purpose of standardizing the format for RICO prosecutive memoranda is threefold:

A. To ensure compliance with the policy of the RICO guidelines;

B. To ensure legally sufficient indictments and theories of prosecution; and

C. To provide a manageable means of conveying sufficient information for the timely review of RICO indictments.

9-110.403 General Requirements

A RICO pros memo shall be an accurate, candid and thorough analysis of the strengths and weaknesses of the proposed prosecution. In the interests of uniformity, a RICO pros memo should be divided into the following categories:

A. Identification of the Defendant(s)

B. A Statement of Proposed Charges

C. A Summary of the Case

D. A Statement of the Law

E. A Statement of the Facts

F. Anticipated Defenses/Special Problems or Considerations

G. Forfeiture Section

H. RICO Policy Section

I. Conclusion

J. Final Draft of Proposed Indictment

9-110.404 Specific Requirements

Identification of the Defendants

This section should identify each proposed defendant by name and aliases, date and place of birth (if known), criminal arrests and convictions, current employment and major business or labor interests (if any), and connection to or membership in an organized crime family, corrupt union or

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other criminal organization. If relevant, the defendant's health, age and potential for flight to avoid prosecution should be noted as factors in determining whether he/she will actually stand trial or receive incarceration. The memo should also indicate whether a defendant's current incarceration is likely to diminish the merit of the proposed charges.

9-110.405 A Statement of Proposed Charges

Since the pros memo will not receive final approval until the proposed indictment is reviewed, it is required that the memo provide a schematic of the proposed charges, such as:

Defendant	Charge	Indictment
Smith	Hobbs Act	Counts 3, 4, 5
	Taft-Hartley	Counts 6-10
	RICO	Counts 1 and 2
Jones	Taft-Hartley	Counts 6-10
	Tax Evasion	Count 11
	RICO	Counts 1 and 2

9-110.406 Summary of the Case

This section summarizes the significant highlights of the evidence in the case and the prosecutive theory upon which it is based. The summary should marshal the evidence in a manner likely to provide a clear understanding of the nature and strength of the evidence. While the Summary section covers the same ground as the Statement of Facts, the latter section requires greater detail and witness attribution.

Because the Summary is a narrative outline of the Facts section, which in turn is to be based strictly on admissible evidence, neither section should contain informant information, general intelligence data or interesting but inadmissible hearsay. It is not the function of the Summary, once the case reaches the pros memo stage, to establish the significance of the prosecution beyond that suggested by the evidence itself. The strength of the case becomes blurred, not enhanced, by resorting to irrelevant references (from an evidentiary standpoint) to organized crime's involvement or similar allegations. The Summary is essentially equivalent to the government's summation; the Facts section is comparable to a trial brief; neither should stray into areas which the court at trial would not likely permit.

9-110.407 Statement of the Law

This section should state the legal elements of proof for each of the crimes alleged, to include the relevant case law (particularly from the appropriate circuit) governing those elements. Even though the reviewer has undoubtedly seen these elements and cases many times before, the Law section serves the important role of establishing that the writer is

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knowledgeable of his/her burden and has prepared the memo accordingly. Except in unusual cases the *Statement of Law should precede the Statement of Facts*; this sequence provides the reviewer with the legal standards against which the evidence is to be evaluated.

The Statement of Law section relates only to the elements of proof and relevant case law in that area. Legal problems and solutions which relate to other areas, such as the Federal Rules of Evidence, anticipated attacks against wiretaps, photo spreads, or joinder of offenses, to name but a few should be discussed in the Anticipated/Defenses/Special Problems section.

The Statement of Law must provide the following information:

A. The precise formulation of the RICO enterprise.

B. The relevant case law of the circuit which supports that formulation of the enterprise.

C. Any case law, regardless of the circuit it originated in, which would preclude this prosecution.

D. How the enterprise's affairs were conducted through the pattern of racketeering activity.

E. How the enterprise was engaged in or its activities affected interstate commerce.

F. If applicable, the elements and theory of any conspiracy to violate 18 U.S.C. § 1962.

9-110.408 Statement of Facts—Proof of the Offense

As the title suggests, this section should state facts, not opinions, hearsay, information or colorful asides. The facts must be recited concisely, accurately, and logically—if for no other reason than that the time within which a pros memo is approved is in inverse proportion to the accuracy and quality of the Facts section. Obviously not every fact unearthed during the investigation should be included and a pros memo which contains needless or peripheral detail has no better chance for prompt approval than one that contains too little. Accordingly, pros memos which merely incorporate by reference investigative reports or grand jury material, or which boiler plate extensive portions of investigative reports within the Statement of Facts section, are not sufficient.

The *recommended* format for the Facts section is to set out the relevant gist of each key witness' anticipated testimony, individually and in chronological sequence. Not all cases are best articulated in this manner but there should be good reason to depart from the general format. Although it is usually more convenient to write up the case in a single narrative which combines the testimony of several witnesses, do not do so. For many of the

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reasons set out below, and based on past experience, such narratives are to be discouraged. The Summary section, if done well, will be sufficient to put each witness' testimony in correct context. Where there are groups of witnesses who will merely authenticate documents or who will testify to essentially the same recurring events, their testimony need not be individually summarized.

Before the substance of a particular witness' testimony is set out, the writer must indicate whether the witness has been immunized or promised any considerations and, if so, the details thereof. The witness' past criminal record should be stated. And, importantly, the writer should note whether the witness has already testified in the grand jury; if not, an explanation should be supplied together with the basis for believing that the testimony will be available at trial.

The prospective testimony should be specific on all major points, providing, where possible, the names, dates and places of key events and conversations to the extent the witness has and can do so. For example, where two government witnesses have attended a conspiratorial meeting with two proposed defendants, the description of each witness' testimony of that meeting should cover the areas of when, where and who said what. Key meetings or conversations must not be summarized to the point where it is unclear to the reader what was said and by whom. A phrase such as ''It was then suggested and agreed by the defendants that they would pay the kickback to 'A' '' is unacceptable; because, upon close analysis, it is uncertain whether each defendant specifically and verbally ''agreed'' to something or whether ''agreement'' was simply inferred by the witness. And the passage also suggests that the defendants agreed specifically to a ''kickback,'' which would be a significant inculpatory admission, when in fact the testimony may only allege that they agreed to a make a ''payment'' which arguably constituted a kickback. Avoid such characterizations and/or generalizations of this type. If the evidence results from a wiretapped or recorded conversation, the key remarks of a defendant should be quoted verbatim. If the evidence was not recorded, the correct procedure is to set forth, as precisely as recalled by the witness, what was said. For example, ''A'' will testify that ''B'' showed a loan application to the group and complained that ''C,'' a union trustee, was balking at processing the loan. ''D'' responded, ''Let's pay 'C,' two points as a fee.'' ''B'' said, ''Good idea, I'll tell him.'' Although this recitation doesn't explicitly indicate that the ''fee'' was intended to be a kickback, it is obvious from the content that it was, especially since ''C,'' as a fiduciary of the fund, could not legally receive a fee for processing the loan application. In the Anticipated Defenses section the writer would, of course, anticipate the claim that the defendants intended only to pay a legal fee. The writer would then refute the claim both on its factual incredulity and by citing the case law and union constitution (if applicable) which prohibit such a conflict of interest.

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A frequent defect in a pros memo, for which the above hypothetical also serves as an example, is for the writer to gloss over, or fail to recognize, inconsistencies or weaknesses in the case. If two or more government witnesses participated in an event or conversation which is critical to the case, the extent to which the witnesses are consistent or contradictory on any key point is also critical. The pros memo should supply, in the example above, ''E's'' account of the same meeting with ''A,'' ''B'' and ''D.'' A general statement, often made in pros memos, that ''E'' corroborates ''A's'' testimony that the meeting with ''B'' and ''D'' occurred is unacceptable. The critical questions are: Does ''E'' attribute the same responses to ''B?'' If not, were ''A'' and ''E'' asked to cover the same ground in the grand jury and, if not, why not? It is not unusual for one government witness to corroborate another government witness on some points while being in dispute on others. The writer must recognize and discuss those points which are critical and indicate the extent of the problem. Not all differences in recollection warrant discussion in the pros memo, but material differences do. A pros memo should also alert the reviewer if a government witness has contradicted himself/herself in past statements on major points.

The Statement of Facts should not contain conjecture or opinion, except as allowed by the Rules of Evidence (*e.g.*, state of mind). Frequently pros memos include assumptions or conclusions drawn by a witness based on extrinsic events. For the most part, objections to testimony along these lines will be sustained as hearsay. The writer must also avoid asserting his/her own subjective opinions as if they are fact. For example, ''Immediately after his meeting with 'E' and 'A,' according to airline records and cancelled checks, defendant 'D' flew to Chicago and discussed the kickback with 'C,' the union trustee.'' In fact, the airline records and checks may only establish that ''D'' flew to Chicago, from which the inference is drawn that a meeting occurred.

9-110.409 Anticipated Defenses/Special Problems of Considerations

The Defense section should cover the factual and evidentiary weaknesses in the case and the likely legal defenses or theories. It would be impossible here to list all of the recurring defenses encountered in RICO prosecutions. In any event, each case is unique. It is the writer's job to recognize, based upon a thorough review of the grand jury transcripts, investigative reports, court papers, etc., which potential defenses merit discussion. For illustrative purposes, the writer should always consider the following:

A. If a search warrant was involved, is there a probable cause issue? Was there proper inventory served? Has the writer personally reviewed the warrant and affidavit and been satisfied that the search will pass muster

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at a suppression hearing? If the search is questionable, how will the loss of its fruits affect the case; how difficult is the taint problem?

B. If a wiretap was involved, was there proper minimization; prompt service of inventory; adequate voice identification; accurate transcriptions made; are key conversations audible; were the original tapes properly sealed and stored; were 18 U.S.C. § 2517(5) orders obtained for use of recorded conversations in unrelated prosecutions, etc.?

C. If a defendant's prior sworn testimony, confession, or inculpatory admissions are relevant, what will be his defense: failure to warn; failure to comply with Department regulations; earlier promise of immunity or non-prosecution?

D. Does the case involve an unusual application of a federal statute, such as the applicability of the Travel Act to a particular state's commercial bribery statute? If so, what is the prevailing case law in the circuit? How unique is the enterprise that is alleged; what is the prosecutive theory of each defendant's participation in a pattern or racketeering acts; is the theory of participation against one defendant different than as against another?

E. If the indictment contains a RICO conspiracy charge, how does the proof *aliunde* stack up against each defendant? What is the test and procedural technique in the district of prosecution for proving a conspiracy? How serious will be the spill-over prejudice if the court strikes the evidence against a particular defendant?

F. Are there problems involving:

1. Statute of limitations and pre-indictment delay;

2. Prosecutorial vindictiveness;

3. Tax disclosures;

4. Pre-indictment publicity; Federal Rules of Criminal Procedure 6(e) violations;

5. Chain of custody and authenticity questions for key prosecution documents; and

6. Alibis; entrapment; *Bruton*.

In addition to the selected category above and/or whatever unique problems exist in the case, the writer should make every effort to convey the seriousness of a potential problem instead of skirting it. If a key government witness, upon whom part or all of the prosecution rests, has been convicted of perjury or fraud or has testified in a series of acquittals, it would not be enough to note that his/her credibility will be severely tested, which states the obvious. In such a case, the pros memo

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should indicate why the witness' testimony, despite these handicaps, will be credible.

Obviously, it is not necessary to address every conceivable defense nor is it required that the writer negate a defense that would be inapplicable simply to show that an effort was made to anticipate defenses. On the other hand, it ought to be a rare case where a defendant raises a substantial issue at trial which was not discussed in the pros memo but the existence of which was or should have been anticipated.

Special problems should also be anticipated. Examples include recordings of poor audibility, the exercise of a privilege (marital or constitutional), the need to depose gravely ill witnesses, and the availability of protected witnesses in multi-district prosecutions.

9-110.410 Forfeiture

The purpose of this section is to set forth the proof by defendant when the indictment charges that interests of that defendant are subject to forfeiture pursuant to 18 U.S.C. § 1963. This section must deal with the following issues:

A. The identity of the interest(s) sought.

B. The proof that those interests are exclusively owned by the defendant.

C. The theory upon which forfeiture is predicated (*i.e.*, interest acquired/maintained or interest affording a source of influence over the enterprise).

D. The identity of third parties who have a claim to the property sought to be forfeited (*e.g.*, victims of extortion, lien holders, bona fide purchasers for value) or third parties whose property rights will be substantially affected by a forfeiture of the defendant's interest (*e.g.*, minority stockholders in a closely held corporation, partners, individuals with an undivided interest in the property).

E. How the submitting attorney plans to preserve the interests of the United States *and* innocent third parties in the property during the interval between the entry of the judgment of forfeiture and the time when the government may seize and dispose of the property.

F. What the ultimate disposition of the property should be (*e.g.*, is it commercially feasible to sell it, should it be returned to third parties, should it be destroyed, etc.).

G. Is the forfeiture sought disproportionate to the criminal conduct charged?

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As the foregoing questions illustrate, there are many troublesome issues surrounding RICO forfeitures which will surface after the property has been forfeited. It is the submitting attorney's responsibility to anticipate these problems and develop a forfeiture plan before the indictment is returned.

9-110.411 RICO Policy Section

In this section of the pros memo the submitting attorney must explain how the facts in this case relate to the RICO Guidelines. The submitting attorney must do more than restate the guidelines in a conclusory fashion; he/she must explain ''why'' RICO is appropriate. In addition, the RICO Guidelines must be read as a whole. In other words, to be approved, a proposed RICO must not only evidence those principles which justify RICO's use, but also must not be contrary to those principles which weigh against its use. For example, where a proposed RICO prosecution would be prohibited under one guideline, prosecution will not necessarily be authorized simply because it does fit within one of the other guidelines.

9-110.412 Conclusion

This section is self-explanatory. It can also be used to indicate miscellaneous items such as anticipated length of trial, the date by which the indictment must be returned, and other matters.

9-110.413 Proposed Indictment—Final Draft

A pros memo will not receive final action unless the final draft of the proposed indictment is simultaneously submitted for review. It goes without saying that indictments must be proofread carefully. While the section's review will pick up the more obvious errors in pleading, other errors involving allegations of fact, time, or place will only be caught by the trial attorney's personal familiarity with the evidence. All statutory citations, particularly of state statutes, should be double-checked for typographic errors. Review by the Organized Crime and Racketeering Section of all proposed RICO cases is not a substitute for the necessary first line review at the field level *before* the case is submitted to the Criminal Division.

One of the principal reasons RICO reviews take longer than anticipated is that the case either has not been reviewed at the originating office by a supervisor, or the draft indictment is incomplete and/or unaccompanied by a pros memo. Another recurring problem is the submission by the submitting attorney of a ''final'' draft indictment which the author continues to modify without informing the reviewer, or simultaneously submits for review within the originating office. In any event, the indictment being reviewed turns out not to be the same indictment ultimately submitted for approval. Therefore in order to avoid wasted effort, the submitting attor-

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ney must not forward as a final draft indictment one which he/she has not in fact finalized or which has not been approved by the originating office.

Further, it is the responsibility of the submitting attorney after the indictment has been returned to forward a copy bearing the seal of the clerk of court, to the Organized Crime and Racketeering Section.

9-110.414 Temporary Restraining Orders

Under 18 U.S.C. § 1963(d), the government may seek a temporary restraining order (TRO) upon the filing of a RICO indictment, in order to preserve all forfeitable assets until the trial is completed and judgment entered. Such orders can have a wide-ranging impact on third parties who do business with the defendants, including clients, vendors, banks, investors, creditors, dependents, and others. Some highly publicized cases involving RICO TROs have been the subject of considerable criticism in the press, because of a perception that pre-trial freezing of assets is tantamount to a seizure of property without due process. In order to ensure that the rights of all interested parties are protected, the Criminal Division has instituted the following requirements to control the use of TROs in RICO prosecutions. (It should be noted that these requirements are in addition to any other existing requirements, such as review by the Asset Forfeiture Office.):

1. As part of the approval process for RICO prosecutions, the prosecutor must submit any proposed forfeiture TRO for review by the Organized Crime and Racketeering Section. The prosecutor must show that less-intrusive remedies (such as bonds) are not likely to preserve the assets for forfeiture in the event of a conviction.

2. In seeking approval of a TRO, the prosecutor must articulate any anticipated impact that forfeiture and the TRO would have on innocent third parties, balanced against the government's need to preserve the assets.

3. In deciding whether forfeiture (and, hence, a TRO) is appropriate, the Section will consider the nature and severity of the offense; the government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime.

4. When a RICO TRO is being sought, the prosecutor is required, at the earliest appropriate time, to state publicly that the government's request for a TRO, and eventual forfeiture, is made in full recognition of the rights of third parties—that is, in requesting the TRO, the government will not seek to disrupt the normal, legitimate business activities of the defendant; will not seek through use of the relation-back doctrine to take from third parties assets legitimately transferred to them; will not seek to vitiate legitimate business transac-

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tions occurring between the defendant and third parties; and will, in all other respects, assist the court in ensuring that the rights of third parties are protected, through proceedings under 18 U.S.C. § 1963(1) and otherwise.

The Division expects that the prosecutor will announce these principles either at the time the indictment is returned or, at the latest, at the first proceeding before the court concerning the TRO.

9-110.600 SYNDICATED GAMBLING

Sections 801-811 of the Organized Crime Control Act of 1970, which amend Title 18, United States Code, by adding Sections 1511 and 1955, are designed to combat ''illegal gambling business'' or syndicated gambling. 18 U.S.C. § 1511 is directed at the political and police corruption which makes widespread illegal gambling possible, while 18 U.S.C. § 1955 is directed at the illegal gambling itself.

A short monograph of this law's general usage is available on JURIS.

9-110.601 Basis for Federal Jurisdiction

Congress enacted this legislation pursuant to its power to regulate interstate commerce. In so doing, Congress made the finding that illegal gambling does involve widespread use of and does have an effect upon interstate commerce. Hence, the Federal Government has jurisdiction to initiate investigations and prosecutions of persons conducting large scale illegal gambling businesses without showing that the proscribed activity has affected interstate commerce. *Perez v. United States*, 402 U.S. 146 (1971); *United States v. Harris*, 460 F.2d 1041, 1048 (5th Cir.), *cert. denied*, 409 U.S. 877 (1972); *Schneider v. United States*, 459 F.2d 540 (8th Cir.), *rehearing denied*, 478 F.2d 1403, *cert. denied*, 409 U.S. 877 (1972).

9-110.602 Scope of Federal Jurisdiction

Congress did not intend to occupy the field of illegal gambling exclusively nor to relieve local law enforcement bodies of their obligations to enforce local gambling provisions. The syndicated gambling laws are directed only at those individuals who operate gambling businesses of major proportions: selection of targets for investigation and prosecution should be made on that basis. *See United States v. Riehl*, 460 F.2d 454, 458 (3d Cir.1972).

9-110.603 Investigative or Supervisory Jurisdiction

Investigative jurisdiction for violations of the syndicated gambling provisions is vested in the Federal Bureau of Investigation. In investi-

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gating, the FBI is authorized under 18 U.S.C. § 2516 to intercept wire or oral communications pursuant to court order. *See* USAM 9-7.000 (Electronic Surveillance). The services of the FBI laboratory are available both to analyze any physical evidence seized and to support expert testimony at the time of trial.

Supervision of prosecutions under these statutes, including investigations and service of warrants, is vested in the Organized Crime and Racketeering Section.

9-110.700 LOANSHARKING

Chapter 42 (Sections 891 to 896) of Title 18, United States Code, is designed principally to bring the resources of federal law enforcement to bear on the loansharking of criminal organizations. While it is desirable that some manifestation of organized crime involvement be present (*see* ''Use of Chapter 42,'' in the JURIS monograph on this statute), that fact is not a necessary element of the offense and need be neither pleaded nor proved.

9-110.800 MURDER-FOR-HIRE AND VIOLENT CRIMES IN AID OF RACKETEERING ACTIVITY

The Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, Ch. X, Part A (Oct. 12, 1984), added two new offenses to Title 18, now codified at 18 U.S.C. §§ 1958 and 1959. Section 1958 makes it a crime to travel or use facilities in interstate or foreign commerce with intent that a murder in violation of state or federal law be committed for money or other pecuniary compensation. The maximum penalty varies with the severity of the conduct: $10,000 and/or ten years for any violation; $20,000 and/or twenty years if personal injury results; life imprisonment and/or $50,000 if death results.

Section 1959 makes it a crime to commit any of a list of violent crimes in return for pecuniary compensation from an enterprise engaged in racketeering activity, or for the purpose of joining, remaining with, or advancing in such an enterprise. The listed violent crimes are murder, kidnapping, maiming, assault with a dangerous weapon, assault resulting in serious bodily injury, and threatening to commit a ''crime of violence,'' as defined in 18 U.S.C. § 16, newly added by this legislation. The listed crimes may be violations of state or federal law. In addition, attempts and conspiracies to commit the listed crimes are covered. The maximum penalty varies with the particular violent crime involved, ranging from $3,000 and/or three years for attempting or conspiring to commit one of the lesser offenses, to $50,000 and/or life imprisonment for murder or kidnapping. The definitions of ''racketeering activity'' and ''enterprise'' are based on the definitions in the RICO statute, 18 U.S.C. § 1961.

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9-110.801 Division Approval

Criminal prosecutions under Section 1958 may not be initiated by indictment or information without the prior approval of the Assistant Attorney General, Criminal Division, if a state or local prosecutor with jurisdiction over the offense objects to federal prosecution, or if the views of the appropriate state or local authorities have not been solicited.

No criminal prosecution under Section 1959 shall be initiated by indictment or information without the prior approval of the Assistant Attorney General.

See approval guidelines at USAM 9-110.810, *infra*.

9-110.802 Murder-for-Hire

The substance of section 1958 is patterned after the [illegible] statute, 18 U.S.C. § 1952, and the case law under that provision may be applicable with respect to some issues. However, the new statute has some novel features. First, according to the legislative history, the murder must be ''performed or planned as consideration for the receipt of 'anything of pecuniary value.''' *See* S.Rep. No. 225, 98th Cong., 1st Sess. 306 (1983) (hereinafter cited as Senate Report). ''Anything of pecuniary value'' is defined to mean money, a negotiable instrument, a commercial interest, or ''anything else the primary significance of which is economic advantage.'' As examples that clearly come within the definition, the Senate Report mentions an ''option to purchase'' and a ''promise of future payment,'' even if either such contract is unenforceable as contrary to public policy. *Ibid.*

The term ''facility in interstate commerce'' is defined to expressly include ''means of transportation and communication.'' This definition includes interstate telephone calls within its scope, as is the case under Section 1952. *See United States v. Villano*, 529 F.2d 1046 (10th Cir.), *cert. denied*, 426 U.S. 953 (1976). The definition is as broad as the corresponding definition in Section 1952 of ''any facility in interstate or foreign commerce.'' Senate Report at 306 n. 5. The legislative history also makes it clear that Section 1958 covers both the ''hit man'' and the person who ordered the murder, under the theory that the order-giver causes the hit man to travel or use facilities in interstate commerce. *Id.* at 306. Finally, the Senate Report states that, because the essence of the offense is the interstate element coupled with the requisite intent, the violation is complete whether or not the murder is carried out or even attempted. *Ibid.*

9-110.803 Violent Crimes in Aid of Racketeering Activity

The substance of this offense is similar in some ways to that of the murder-for-hire provision. For example, the term ''anything of pecuniary

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value'' has the same meaning in both statutes. Senate Report at 306 n. 5. Also, Section 1959, in conjunction with 18 U.S.C. § 2, covers both the hit man and the order-giver. *Id.* at 307. One major difference between the two offenses is that the interstate commerce element in Section 1959 is not based on travel or the use of interstate facilities; rather, the nexus is based on connection of the violent crime to an ''enterprise engaged in racketeering activity.'' The terms ''enterprise'' and ''racketeering activity'' are essentially borrowed from the definitions of those terms in the RICO statute, 18 U.S.C. § 1961, and have the same scope as the corresponding RICO terms. The interstate nexus for Section 1959 is supplied in the definition of ''enterprise,'' which, unlike the corresponding RICO definition, contains the interstate requirement as part of the definition. It should also be noted that the definition in Section 1959 does not include ''individual,'' as the RICO definition does.

The violent crimes covered by Section 1959 include not only the specific offenses listed, but any ''crime of violence.'' The latter term is defined in new Section 16 of Title 18, which is also added by Chapter X, Part A, of the new legislation. The legislative history notes that this definition includes a threatened or attempted simple assault or battery, and also includes burglary, because, under new Section 16(b), burglary is a felony that, by its nature, involves a substantial risk that physical force against person or property may be used in the commission of the offense. Senate Report at 307.

9-110.810 Approval Guidelines

The following guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Section 1958

Section 1958 is a broad and powerful statute that reaches conduct within the jurisdiction of state and local authorities. Because of the need to avoid encroaching on the authority of state and local law enforcement authorities, approval by the Assistant Attorney General, Criminal Division, is required if the United States Attorney believes that any state or local prosecutor with responsibility for prosecuting a state murder charge for the same basic offense objects to a federal prosecution under section 1958, or if the views of the appropriate prosecutors have not been solicited. The views of the state or local prosecutor who apparently has jurisdiction over the conduct in question must be solicited in every case proposed to be brought under Section 1958, unless a compelling reason, such as local corruption, dictates otherwise. These views, or the reason for

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not soliciting them, must be recorded in the file. The failure to obtain approval of the Assistant Attorney General prior to initiation of prosecution will not affect the continuation of the prosecution unless the Department so orders.

Requests for approval should be in accordance with the guidelines at USAM 9-110.811, *infra*.

Section 1959

Section 1959 also reaches conduct within state and local jurisdiction. In addition, Section 1959 incorporates two important terms defined in the RICO statute, 18 U.S.C. §§ 1961 to 1968—namely, ''enterprise'' and ''racketeering activity.'' Because of the need to maintain consistent applications and interpretations of the elements of RICO, in addition to the need to avoid encroaching on state and local law enforcement authority, all proposed prosecutions under Section 1959 must be submitted to the Assistant Attorney General, Criminal Division, for approval in accordance with the following guidelines.

9-110.811 The Review Process for Authorization

The review process for authorization of prosecutions under Section 1958 when a conflict arises between federal and state or local authority and for authorization required in any case under Section 1959 is similar to that for RICO prosecutions under 18 U.S.C. § 1961 to 1968. *See* USAM 9-100.200, *et seq*. However, approval of prosecutions under these two new statutes is at the Division level, rather than at the Section level. To commence the formal review process, submit a final draft of the proposed indictment and a prosecutive memorandum to the Assistant Attorney General, Criminal Division, Room 2107, 10th and Pennsylvania Avenue, N.W., Department of Justice, Washington, D.C. 20530. Before the formal review process begins, however, prosecuting attorneys are encouraged to consult by telephone with the Terrorism and Violent Crime Section for violations of 18 U.S.C. § 1958 and the Organized Crime and Racketeering Section for violations of 18 U.S.C. § 1959 in order to obtain preliminary guidance and suggestions.

The review process can be time-consuming, because of the likelihood that modifications will have to be made to the indictment, and because of the heavy workload of the reviewing attorneys. Therefore, unless extraordinary circumstances justify a shorter time frame, a period of 15 working days must be allowed for the review process.

9-110.812 General Guidelines: Sections 1958 and 1959

In deciding whether to approve a prosecution under Section 1958 or 1959, the Assistant Attorney General will analyze the prosecution memorandum and proposed indictment to determine whether there is a legitimate reason why

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the offense cannot or should not be prosecuted by state or local authorities. For example, federal prosecution may be appropriate where local authorities do not have the resources to prosecute, where local authorities are reasonably believed to be corrupt, where local authorities have requested federal participation, or where the offense is closely related to a federal investigation or prosecution. A prosecution will not be authorized over the objection of local authorities in the absence of a compelling reason. Accordingly, every prosecution memorandum must state the views of local authorities with respect to the proposed prosecution or the reasons for not soliciting them. In addition, the specific factors set forth in the following sections will be considered with respect to all proposed prosecutions.

9-110.813 Specific Guidelines: Section 1958

According to the legislative history, the murder-for-hire provision was enacted to combat the activities of the professional contract killer, or ''hit-man,'' employed by organized criminal elements. *See Organized Crime and the Use of Violence: Hearings Before the Permanent Subcommittee of Investigations of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess. 44, 50 (1980).* Therefore, unless unusual circumstances are present, a prosecution under Section 1958 should not be instituted where the intended murder concerns a domestic situation between family members, or a private dispute between two individuals, and there is no connection to or allegation of any other serious criminal activity in the investigation.

9-110.814 Specific Guidelines: Section 1959

A. Section 1959 was enacted to combat ''contract murders and other violent crimes by organized crime figures.'' *See* Senate Report at 306. The statutory language is extremely broad, in that it covers such conduct as a threat to commit an assault, and other relatively minor conduct normally prosecuted by local authorities. Thus, although the involvement of traditional organized crime will not be a requirement for approval of proposed prosecutions, a prosecution will not be authorized unless the violent crimes involved are substantial because of the seriousness of injuries, the number of incidents, or other aggravating factors.

B. The statutory definition of ''enterprise'' also is very broad; it is closely related to the definition of the same term in the RICO statute, 18 U.S.C. § 1961(4). (However, it should be noted that the definition in Section 1959, unlike the RICO definition, includes a requirement of an effect on interstate commerce as part of the definition, and does not include an ''individual'' within the definition.) No prosecution under Section 1959 will be approved unless the enterprise has an identifiable structure and purpose apart from the racketeering activity and crimes of

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violence it is engaged in, and otherwise meets the standards for a RICO prosecution.

C. The term ''racketeering activity'' is borrowed directly from the RICO statute, 18 U.S.C. § 1961(1). It will be construed in the same way under Section 1959 as it is under RICO, for purposes of approval. *See* USAM 9-110.100, *et seq.* The requirement in Section 1959 that the enterprise be ''engaged in'' racketeering activity will be construed to mean that the enterprise, or persons employed by or associated with it, committed two or more separate acts of racketeering activity before the commission of the violent crimes charged under Section 1959. This requirement will be similar to the requirement of proof of a ''pattern of racketeering activity'' under RICO, 18 U.S.C. § 1961(5). *See* USAM 9-110.121, *supra*.

9-110.815 Prosecution Memorandum

Every request for approval of a proposed prosecution under Section 1958 or 1959 must be accompanied by a final draft of a proposed indictment and by a thorough prosecution memorandum. The prosecution memorandum should generally conform to the standards outlined for RICO prosecutions. *See* USAM 9-110.400, *et seq.* It is especially important that the memorandum contain a concise summary of the facts, a statement of the applicable law, a discussion of anticipated defenses and unusual legal issues, and a statement of justification for using Section 1958 or Section 1959. For cases under Section 1959, submission of a thorough memorandum is particularly important, because of the complexity of the issues involved and because of the statute's similarity to RICO. While the memorandum in support of a Section 1958 indictment ordinarily need not be very detailed, the memorandum for a Section 1958 case must meet the strict standards for a RICO prosecution memorandum in every respect.

9-110.816 Post-Indictment Duties

Once the indictment or information has been approved and filed, it is the duty of the prosecuting attorney to submit to the Criminal Division a copy bearing the seal of the clerk of the court. In addition, the attorney should keep the Criminal Division informed of any unusual legal problems that arise in the course of the case, so those problems can be considered in providing guidance to other prosecutors.

9-110.900 THE GAMBLING SHIP ACT (18 U.S.C. §§ 1081, *ET SEQ.*)

Section 1081 defines ''gambling ship'' to mean a vessel used principally for the operation of one or more gambling establishments.

In making a prosecutorial determination whether a particular ship is a gambling ship within the meaning of this definition, it will be presumed that a ship which operates one or more gambling establishments on board is a

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''gambling ship'', unless it cruises for a minimum of 24 hours with meals and lodging provided for all passengers, or unless it docks at a foreign port. The fact that the presumption applies or does not apply in a given situation, however, is not ultimately determinative of compliance with Section 1081, *et seq.*, but merely provides guidance to United States Attorneys in exercising their prosecutorial discretion under the pertinent statutes.

An explanation of this Act and related statutes applicable to cruise ship gambling is available from the Organized Crime and Racketeering Section in the Criminal Division.

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9-111.100 FORFEITURE UNDER RICO (18 U.S.C. § 1963) AND DRUG FELONY STATUTES (21 U.S.C. § 853)

The Comprehensive Crime Control Act of 1984 [1] extensively revised criminal forfeiture law and procedure. New 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) provide that criminal forfeitures under sections 1963(a) and 853(a), respectively, ''relate back'' to the commission of the act which gives rise to the forfeiture. Thus, the interest of the United States in the property vests at that time and is not extinguished simply because a defendant subsequently transfers the property to another person. As explained in the Senate Report: ''[a]bsent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction.'' [2] S.Rep. No. 98-225, 98th Cong., 1st Sess. at 200 (footnote omitted). More specifically, the report notes that ''[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length transactions.'' *Id.* at 200-201.

As an equitable measure, 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) both provide that forfeiture shall not be ordered if a transferee establishes, at a hearing pursuant to sections 1963(m) or 853(n), that he/she was a *bona fide* purchaser *and* was reasonably without cause to believe that the property was subject to forfeiture.

9-111.200 APPLICATION OF FORFEITURE PROVISIONS TO ASSETS TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

As a result of the amendments to the forfeiture provisions, assets transferred by a defendant to an attorney for payment of legal fees may be subject to forfeiture if the government proves that the fee was paid from assets that are forfeitable. An attorney would be entitled to keep the assets only if he/she could prove at a post-forfeiture proceeding that he/she was a *bona fide* purchaser *and* was reasonably without cause to know the asset was subject to forfeiture.

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1 Pub.L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984).

2 The Senate Report also noted that the 18 U.S.C. § 1963(c) codified ''the 'taint' theory which has long been recognized in forfeiture cases.'' Indeed, under most civil forfeiture statutes, the forfeiture relates back to the time of the acts which give rise to it. *See, e.g., United States v. Stowell,* 133 U.S. 1 (1980); *United States v. $84,000 in U.S. Currency,* 717 F.2d 1090 (7th Cir.1983), *cert. denied,* 469 U.S. 836, 105 S.Ct. 131 (1984). The Seventh Circuit, however, twice rejected the government's argument that the ''relation back'' doctrine was applicable to criminal forfeitures. *See United States v. Alexander,* 741 F.2d 962 (7th Cir. 1984); *United States v. McManigal,* 708 F.2d 276 (7th Cir.), *reaff'd in pertinent part,* 723 F.2d 580 (7th Cir.1983). Thus, the new legislation effectively reverses the Seventh Circuit's holding in *Alexander and McManigal.*

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9-111.210 Sixth Amendment Considerations

The Sixth Amendment guarantees a defendant the absolute right to counsel in federal criminal prosecutions that may result in imprisonment. *See Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Arsinger v. Hamlin*, 407 U.S. 25, 37 (1972) (defendant may not be imprisoned unless afforded the right to counsel). Accordingly, a defendant who establishes indigency is entitled to the assistance of court-appointed counsel at each critical stage of the proceedings, including the first appeal as of right. *See, e.g.*, 18 U.S.C. § 3006A; Fed.R.Crim.P. 44(a). Additionally, a solvent defendant is entitled to retain counsel of choice. But this guarantee of the right to *counsel of choice* is neither absolute nor unqualified. A court may restrict a defendant's choice when there is a significant countervailing public interest.[3]

Some district court's have held that the third party forfeiture provisions interfere with a defendant's Sixth Amendment rights when they are applied to legitimately paid attorney fees. *See, e.g., United States v. Rogers*, 602 F.Supp. 1332 (D.Colo.1985); *United States v. Badalamenti*, 84 Cr. 236 (PNL) (S.D.N.Y. July 10, 1985); *United States v. Ianiello*, S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985). As a result they have reasoned, the statutes must be construed to exempt legitimate attorney fees from forfeiture to avoid unconstitutionality. The Department believes, however, that these decisions are incorrect.

The application of the third party forfeiture provisions to attorney fees impacts only the *qualified* right to counsel of choice and not a defendant's absolute right to be represented at all critical stages. A defendant who is effectively rendered indigent by their potential application is entitled to appointed counsel. *Cf., United States v. Bello*, 470 F.Supp. 723, 725 (S.D.Cal.1979) (''the ... restraining order does not deprive [the defendant] of counsel, but only of the attorney of his choice. [He] will still be entitled to court-appointed counsel, if he has no means to hire an attorney.''); *see also United States v. Brodson*, 241 F.2d 107 (7th Cir.) *cert. denied*, 354 U.S. 911 (1957).

The impact of the third party forfeiture provisions upon the ability to obtain counsel of choice in any event has been severely overstated and does not amount to an unconstitutional interference. The third party forfeiture provisions do not prohibit a defendant from paying attorney fees with assets which have not been generated or obtained from criminal activity. Additionally, if prior to conviction a defendant voluntarily restrains sufficient property to satisfy the judgment of forfeiture, it will not be necessary for the government to void any third party transfers. The same

3 *See, e.g., United States v. Brown*, 591 F.2d 307, 310 (5th Cir.1979), *cert. denied*, 442 U.S. 913 (1979); *United States v. Burton*, 584 F.2d 485, 489 (D.C.Cir.1978), *cert. denied*, 439 U.S. 1069 (1979); *United States v. Gary*, 565 F.2d 881, 887 (5th Cir.1978), *cert. denied*, 435 U.S. 955 (1978); *United States v. Robinson*, 553 F.2d 429, 430 (5th Cir.1977), *cert. denied*, 434 U.S. 1016 (1978).

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may be true even in the absence of a pretrial restraint if the defendant has sufficient funds at the time of the judgment of forfeiture to satisfy it.[4] Also, a defendant who is indigent by virtue of a restraining order may have counsel of choice appointed, provided counsel is willing to accept appointment under the Criminal Justice Act. Finally, if a defendant transfers forfeitable assets to an attorney and has no assets to satisfy a forfeiture judgment, an attorney still can retain the fee if he/she was an unwitting participant and can establish by a preponderance of the evidence that he/she was reasonably without cause to believe the property was subject to forfeiture.

In view of the foregoing, the argument that the forfeiture provisions are constitutional only if they exempt attorney fees is an extreme and unwarranted interpretation of the Sixth Amendment. It amounts to arguing that the qualified right to counsel of choice includes the right to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity. The Sixth Amendment does not incorporate any such guarantee. Perhaps the most elementary qualification on the right to counsel of choice is economic. A defendant if entitled only to counsel of choice who he/she can afford. *See United States v. Rogers*, 471 F.Supp. 847, 851 (E.D.N.Y.1979) (''Economic realities impose one obvious limitation on the defendant's right to be represented by a particular attorney.'') If a defendant cannot afford a particular attorney, he/she is not entitled to have the government provide funds to pay that attorney. But that is what would happen if forfeitable assets transferred to an attorney were exempt from the third party forfeiture provisions.[5]

Most courts have not directly confronted the question of whether the subsequent forfeiture of assets transferred to an attorney for legitimate fees violates the qualified right to counsel of choice. Several courts, however, have held that a defendant can be prevented from using assets which are subject to forfeiture to pay counsel of choice. *See, e.g., United*

4 After obtaining a forfeiture judgment, the government may be entitled to satisfy the judgment from any funds in the hands of the defendant even if it cannot trace those funds. In *United States v. Conner*, 752 F.2d 566 (11th Cir.1985), the court held that the government has no duty to trace cash proceeds of racketeering to specific assets owned by the defendant at the time of the forfeiture verdict in order to forfeit such assets. Presumably, the government may collect the forfeited sum from any assets owned by the defendant. As the court noted, ''money is a fungible item. It matters not that the government received the identical money which the defendants received as long as the amount that was received in violation of the racketeering statute is known. The forfeiture in this case is for a specific amount of money. It is *in personam* and is money judgment against the defendant for the same amount of money which came into his hands illegally in violation of Title 18, Section 1963(a)(1) [RICO].'' *Id.* at 576.

5 Upon conviction, a defendant is divested of any title to forfeitable assets, and title passes to the United States as of the date of the offense. In the case of the forfeitable proceeds generated by the crime itself (*e.g.*, proceeds of drug trafficking, loan sharking, bribery), operation of the relation back doctrine means that a convicted defendant is not just divested of any interest but that he/she never acquires any interest in such property. Unquestionably, to argue that such property may be used to pay counsel is to argue that the government must subsidize the payment of counsel of choice. But the Sixth Amendment only requires that counsel be appointed if a defendant cannot afford counsel, and the appointee does not have to be counsel of choice.

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States v. Raimondo, 721 F.2d 476, 478 (4th Cir.1983), *cert. denied*, 105 S.Ct. 133 (1984); *United States v. Long*, 654 F.2d 911, 915-17 (3d Cir. 1981); *United States v. Bello*, 470 F.Supp. 723, 725 (S.D.Cal.1979). The only cases to actually consider application of the third party forfeiture provisions to attorney fees are *United States v. Rogers*, 602 F.Supp. 1332 (D.Colo.1985) and *United States v. Ianniello*, S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985).[6]

As noted above, these courts held that any ''legitimate'' attorneys' fees and costs are immune from forfeiture, apparently even if the attorney knows they are being paid with forfeitable assets. The holdings, however, were based principally upon the courts' reading of congressional intent and only secondarily on constitutional grounds. The courts surmised that Congress intended the third party forfeiture provisions to apply only to sham transactions and not to transfers for legitimate fees. As discussed below, the Department believes that the courts' conclusion concerning Congressional intent is erroneous.

9-111.220 Congressional Intent

There is very little from which to conclude that Congress intended to create an exemption for attorney's fees from the operation of the third party forfeiture provisions. Indeed, such a conclusion effectively would render meaningless the ''reason to know'' requirement for equitable relief. More significantly, however, it is facially contrary to the plain language and history of the legislation.

The statutes themselves do not contain any language exempting from their operation property which an attorney accepts as payment for legal services and which he/she has reasonable cause to know is subject to forfeiture. In subsections (c) both statutes simply state that property subject to forfeiture becomes so at the time of the offense and in subsections (a) they define the types of property subject to forfeiture. None of the subsections contain any exception for property transferred to attorneys for legal fees.

The legislative history indicates that Congress explicitly rejected the notion that attorney fees are exempt from forfeiture. The Senate Report cited with approval *United States v. Long*, 654 F.2d 911 (3d Cir.1981), which it characterized as ''holding that property derived from a violation of 21 U.S.C. § 848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction and that an order restraining the attorney from transferring or selling the property was properly entered.'' S.Rep., *supra*, at 200 n. 28.

Exemption of attorney fees also would undermine substantially the purpose of the third party forfeiture provisions. As the district court in *In*

6 *Badalamenti, supra*, discussed the issue in *dicta* in considering a motion to quash a subpoena to an attorney.

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Re Grand Jury Subpoena, (Simels), No. M-11-188 (DNE) (S.D.N.Y., March 11, 1985) *rev'd on other grounds*, No. 85-6066 (2d Cir. June 27, 1985) stated: ''[f]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds.... To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power.'' Slip Op. at 18, n. 14. It is hard to overestimate how significantly Congress' intent could be undermined by excluding attorney fees. A defendant could take full advantage of his/her ill-gotten gain by intentionally transferring tainted assets in payment of attorney fees and retaining only legitimate assets.[7]

9-111.230 Policy Limitations on Application of Forfeiture Provisions to Attorney Fees

While there are no constitutional or statutory prohibitions to application of the third party forfeiture provisions to attorneys fees, the Department recognizes that attorneys, who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to meet the requirements for equitable relief without hampering their ability to represent their clients. In particular, requiring an attorney to bear the burden of proving he/she was reasonably without cause to believe that an asset was subject to forfeiture may prevent the free and open exchange of information between an attorney and a client. The Department recognizes that the proper exercise of prosecutorial discretion dictates that this be taken into consideration in applying the third party forfeiture provision to attorney fees. Accordingly, it is the policy of the Department that application of the forfeiture provisions to attorney fees be carefully reviewed and that they be uniformly and fairly applied.

9-111.300 DIVISION APPROVAL

No forfeiture proceedings under 18 U.S.C. § 1963 or 21 U.S.C. § 853 may be instituted to forfeit an asset transferred to an attorney as fees for legal

7 The conclusion that attorney fees constitutionally can be forfeited upon conviction also dispenses with the additional argument that the *threat* that attorney fees may be forfeited unconstitutionally interferes with the right to counsel of choice. It is axiomatic that if forfeiture of fees upon conviction does not violate the right to counsel of choice, then the threat that forfeiture might occur also does not violate that right. Moreover, in the absence of a restraining order, the inability to retain counsel when forfeiture is alleged is due solely to counsel's desire to be guaranteed payment of his/her fee. In this regard, the third party forfeiture provisions are not unlike other economic limitations. They mean only that the government's claim to forfeitable assets is superior to any other claims arising after commission of the offense, including counsel's claim to a fee. This does not interfere with a defendant's ability to retain counsel any more than a prior mortgage or tax lien which may encumber a defendant's assets. If counsel refuses to represent a prospective client because he/she believes that the client does not have the financial ability to pay as a result of these prior encumbrances there is no interference with the right to counsel of choice. Likewise, the forfeiture provisions do not impermissibly deny a defendant his/her counsel of choice.

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services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No civil forfeiture proceedings under any statute may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No formal or informal, written or oral, agreements may be made to exempt an asset transferred to an attorney as fees for legal services from forfeiture under 18 U.S.C. § 1963 or 21 U.S.C. § 853 or any civil forfeiture statute without the prior approval of the Assistant Attorney General, Criminal Division. *See* USAM 9-111.700, *infra*.

9-111.400 ATTORNEY FEE FORFEITURE GUIDELINES

The purpose of these guidelines is twofold. First, it is to insure that any forfeiture of assets transferred to attorneys as fees for legal services has been reviewed carefully. Second, it is to insure that the public's interest that those convicted of certain offenses do not realize any economic benefit from their illegal activity is pursued fairly and with due consideration for the individual's right to counsel in a criminal matter.

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

9-111.410 Forfeiture of Assets Transferred to an Attorney in a Fraudulent or Sham Transaction

Forfeiture of an asset transferred to an attorney as fees for legal services may be pursued where there are reasonable grounds to believe the transfer was a fraudulent or sham transaction designed to shield from forfeiture assets which otherwise are forfeitable.

The mere fact that an attorney has received a forfeitable asset as payment for legal fees by itself does not provide reasonable grounds to believe the transfer was a fraudulent or sham transaction. There must be reasonable cause to believe the asset was transferred for the purpose of impeding or defeating the government's ability to forfeit it. Generally, there should be some proof that a scheme existed to maintain the client's interest in the asset or ability to use it to his/her benefit. This may be shown, for example, by proof that the value of services actually rendered and that there was agreement by the attorney to transfer the asset or some portion of it back to the client. In other situations there may be evidence that the attorney agreed to transfer the asset to another third party for

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the benefit of the client or to an account or corporation that is controlled by the client. The evidence, however, need not establish that the attorney was a participant in the criminal activity giving rise to the forfeiture or that he/she otherwise violated any law.

9-111.420 Forfeiture of Assets Transferred to an Attorney for Representation in a Civil Matter

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a civil matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, when there are reasonable grounds to believe that the attorney had reasonable cause to know that the asset was subject to forfeiture at the time of the transfer. *See* USAM 9-111.500, *infra*.

9-111.430 Forfeiture of Assets Transferred to an Attorney for Representation in a Criminal Matter

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a criminal matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, where there are reasonable grounds to believe that the attorney had actual knowledge that the asset was subject to forfeiture at the time of the transfer. However, such reasonable grounds must be based on facts and information other than compelled disclosures of confidential communications made during the course of the representation. *See* USAM 9-111.512 and 9-111.610, *infra*.

9-111.500 DISCUSSION OF ACTUAL KNOWLEDGE AND/OR REASONABLE CAUSE TO KNOW

The principal issue to be addressed in the application of these guidelines is what constitutes ''actual knowledge'' or ''reasonable cause to know'' that an asset is subject to forfeiture ''at the time of the transfer.'' This issue must be resolved on a case-by-case basis. However, the following principles shall be applied in determining whether the prerequisite of actual knowledge or reasonable cause to know exists in a particular case.

9-111.501 At the Time of the Transfer

For purposes of these guidelines, a transfer occurs at the time an attorney becomes entitled to the asset free from any claim by the defendant or others. For example, if an asset is transferred to an attorney to be held in trust for the defendant, with the understanding that the attorney shall be entitled to a portion of the asset for legal services rendered, the time of the transfer will be the time at which the attorney renders the services and becomes entitled to the asset. If he/she has the requisite knowledge at that time, the asset may be subject to forfeiture.

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9-111.510 Actual Knowledge of Forfeitability

For purposes of these guidelines, actual knowledge refers not simply to knowledge that some of a client's assets are either subject to forfeiture or from criminal misconduct. Rather, an attorney must have actual knowledge that the *particular* asset he/she received was subject to forfeiture. The guidelines require that there be reasonable grounds to believe that actual knowledge exists.

Reasonable grounds exist for believing that an attorney has actual knowledge that an asset is subject to forfeiture when there is evidence that it was *known to the attorney* at the time of the transfer either: (a) that the government had asserted that the particular asset is subject to forfeiture or (b) that the particular asset in fact is from criminal misconduct. *See* USAM 9-111.530, *infra*.

9-111.511 Knowledge that the Government has Asserted that a Particular Asset is Subject to Forfeiture

Generally an attorney will have actual knowledge that the government has asserted a claim that an asset is subject to forfeiture based upon some proceedings instituted by the government. Normally the government will do this by initiating civil forfeiture proceedings against the asset, or by applying for pre-indictment or pre-conviction restraining orders under 18 U.S.C. § 1963 or 21 U.S.C. § 853, or by obtaining an indictment containing a forfeiture count.

A civil forfeiture proceeding, if known to an attorney, will establish actual knowledge of the forfeitability of any assets which are the subject of the proceeding since such assets must be specifically identified in the complaint.[8] For the same reason an attorney has actual knowledge of the forfeitability of any asset which he/she knows is subject to a restraining order based upon a forfeiture allegation in a criminal proceeding. However, when the government asserts a claim only by including a forfeiture count in an indictment and no assets have been restrained, the return of the indictment by itself will not necessarily establish actual knowledge that a particular asset is forfeitable. It will depend upon how specifically the asset is described in the forfeiture allegation.

There are essentially three means by which an indictment can describe property that is alleged to be subject to forfeiture. It may specifically describe the property, such as ''ten shares of stock in XYZ Corp. certificate nos. 1-10, purchased on January 1, 1985'' or ''account 12345 at First

8 This is because in a civil forfeiture proceeding the *res* is the defendant and it must be sufficiently identified to allow seizure. A defendant, in most cases, will not be able to transfer an asset which is the subject of a civil forfeiture action to an attorney because the asset is actually seized as soon as the proceeding is instituted. However, in the rare case where a transfer takes place after the suit is initiated but before the seizure occurs, an attorney who has knowledge of the civil forfeiture action has actual knowledge that the particular asset is subject to forfeiture.

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National Bank, Downtown Branch in the name of the defendant.'' It can set forth a generic description of certain property by amount and/or type, such as ''ten shares of stock in XYZ Corp.'' or simply ''$200,000.'' Finally, it can allege a broad all-inclusive description of property subject to forfeiture by incorporating statutory language, such as ''any and all proceeds or profits of the criminal enterprise.''

If property is specifically described, an attorney undoubtedly has actual knowledge of its forfeitability if he/she is aware of the contents of the indictment. However, if property is included in the forfeiture count only under a generic description or by the inclusion of the all-inclusive statutory language, an attorney does not have actual knowledge based on that fact alone that any particular asset is forfeitable. Instead, reasonable grounds to believe that an attorney has actual knowledge that the asset is subject to forfeiture would have to be based on evidence that the attorney knew the asset in fact was from criminal misconduct. Of course, the fact that an all-inclusive forfeiture allegation or a generic description was included in the indictment would be relevant evidence to establish such knowledge. *See* USAM 9-111.512, *infra*.

9-111.512 Knowledge that the Asset in Fact is from Criminal Misconduct

Regardless of whether any criminal or civil proceedings have been instituted or whether a forfeiture count specifically describes an asset, an attorney may have actual knowledge that an asset in fact is from criminal misconduct. Evidence that the attorney learned from the client or another involved in the criminal activity that the asset was from an illegitimate source would be compelling proof of the attorney's knowledge. Except when the use of such communications involves compelled disclosure of a confidential communications made during the course of representation, such communications may be relied upon to establish actual knowledge that the asset came from criminal misconduct. *See* USAM 9-111.430, *supra*. For example, a client's testimony at trial or voluntary disclosure of his/her communications with his/her attorney may be relied upon to establish actual knowledge. *See* USAM 9-111.610, *infra*.

While generic or all-inclusive descriptions of property alleged to be forfeitable by themselves do not establish actual knowledge that a particular asset has been alleged to be forfeitable, such descriptions are probative and relevant evidence to prove that an attorney had actual knowledge that an asset was from criminal misconduct. Also relevant is evidence of the method of manner of payment and the attorney's knowledge of the client's means of livelihood, so long as it is based on information other than compelled disclosure of confidential communications during the course of the representation. *See* USAM 9-111.610, *infra*. Additionally, the presence or absence of an order restraining assets is relevant.

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The existence of actual knowledge that an asset is from criminal misconduct will have to be determined on a case-by-case basis, taking into consideration all of the relevant evidence. For example, if an indictment alleges that ''all profits and proceeds, including $200,000'' are subject to forfeiture and $200,000 has been restrained, there would have to be other evidence of an attorney's knowledge of the source of his/her fee to prove that he/she had actual knowledge that other cash he/she received is from the criminal misconduct.[9] On the other hand, if there were no order restraining a sufficient amount of cash and the fee was paid in cash, circumstantial evidence may establish that the attorney had actual knowledge that the fee was paid from the proceeds of criminal misconduct. For example, actual knowledge might be established if a forfeiture count was based on a drug felony charge, the fee was paid in a manner suggesting that it was the proceeds of drug trafficking and there was evidence—other than from confidential communications—that the attorney knew the client had no legitimate source of income. This latter evidence might exist where a pauper's petition was filed by the attorney for the client in other proceedings, and the client had not been gainfully employed since that time.

9-111.520 Reasonable Cause to Know that an Asset is Subject to Forfeiture

''Reasonable cause to know that an asset is subject to forfeiture'' means that there is information known to an attorney which if known to a reasonably prudent person would cause such person to believe that the asset is forfeitable.[10] Just as with actual knowledge, the starting point for deciding if an attorney has reasonable cause is an examination of the evidence of the attorney's knowledge of any legal proceedings instituted by the government for forfeiture of assets.

If civil proceedings have been instituted by the government to forfeit a particular asset or if a particular asset has been restrained, as discussed above, an attorney who has knowledge of the proceedings has actual knowledge of forfeitability. *See* USAM 9-111.511, *supra*. The same is true if the asset is specifically described in an indictment and the attorney knows the contents of the indictment. In these situations, any requirement under these guidelines that there be reasonable cause to know that an asset is forfeitable is met.

9 In any event, if the government sought to forfeit a fee in such a case without direct evidence of the attorney's knowledge, the attorney could probably obtain equitable relief. He may be able to rely on the fact that sufficient cash was restrained to establish that he/she reasonably was without cause to believe that other cash is not subject to forfeiture.

10 The standards set forth herein concerning proof of reasonable cause to know express no opinion concerning the Department's position as to what proof constitutes that a third party was ''reasonably without cause to believe that the property was subject to forfeiture.'' Rather, the standards herein apply only to the Department's policy of not seeking forfeiture in certain cases unless there is evidence that an attorney had reasonable cause to know. *See* USAM 9-111.420, *supra*.

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In other situations, all of the facts known to the attorney will have to be considered. The quantum of evidence required to establish reasonable cause to know will be substantially less than that needed to establish actual knowledge. However, the mere fact that an indictment alleges that ''all profits or proceeds of the criminal activity'' are subject to forfeiture will not meet the level of proof required to demonstrate reason to know. Similarly, forfeiture allegations which describe assets generically are sufficient to put an attorney notice that any assets of the type described potentially are subject to forfeiture, but they are not sufficient by themselves to establish reasonable cause to know. An attorney who accepts any such assets acts at his or her peril, and circumstantial evidence may establish that there was reasonable cause to know. Perhaps the only fact that *prima facie* would negate reasonable cause is the presence of a restraining order. For example, if an indictment alleges that $200,000 is subject to forfeiture, the existence of a restraining order applying to that same amount of cash could negate reasonable cause to believe that other money is forfeitable. See note 9, *supra*.

9-111.530 Policy Concerning Issuance of Notification Letters to Attorneys

There may be cases where there are reasonable grounds to believe that all of a defendant's assets are subject to forfeiture. Under these guidelines, however, the only assets which an attorney conclusively would be held to have actual knowledge of forfeitability are those specifically named in the indictment or subject to a restraining order or civil forfeiture proceeding. There would have to be some evidence in addition to the forfeiture allegations to establish actual knowledge of the forfeitability of those assets which are not specifically described or subject to restraint. *See* USAM 9-111.510, *supra*. As a result, it may be extremely difficult in cases where all of a defendant's illegitimate assets have not been discovered to prove actual knowledge, even though there are grounds to believe no legitimate assets exist. Although this may limit the cases in which actual knowledge may be established, the Department believes it is inappropriate to give written notice to an attorney that a particular asset or that all assets belonging to a defendant are from an illegitimate source or subject to forfeiture simply to meet the requirement of actual knowledge imposed by these guidelines.

Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice. The argument could be made that if the notice is not based upon a probable cause determination that the assets are subject to forfeiture, it was sent only to harass the attorney or cause him/her to abandon the case and not because the asset legitimately is subject to forfeiture. Thus, the government may be sidetracked into prolonged litigation which is only ancillary to the criminal charges. Additionally, if there is probable cause that a particular asset or all of a defendants assets are forfeitable, the written

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notice is unnecessary. The assets which are known to the government at the time of indictment can be specifically described in the forfeiture count.[11] Additional assets discovered after return of the indictment can be included in a superseding indictment or can be subjected to a restraining order by making an appropriate showing to the court. Therefore, actual knowledge will be established by the restraining order or the specific description in the indictment.[12]

Another reason cautioning against written notice is that if it is not routinely and uniformly given, it will be argued that the government is targeting certain attorneys and attempting to prevent them from representing criminal defendants in certain cases. The Department does not have or endorse such a policy and believes it is unwise to create even an appearance that such a policy exists.

The limitation herein does not apply to written notice of the government's intent to seek forfeiture of an asset when it has been concluded that an attorney has actual knowledge—based on facts and information other than that contained in the written notice—that the asset is subject to forfeiture. However, where the criminal case giving rise to the forfeiture has not been concluded, such notice should be given only in extraordinary cases and may not be given without the approval of the Assistant Attorney General, Criminal Division.

9-111.600 DISCOVERY OF INFORMATION CONCERNING AN ASSET TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

Proceedings to forfeit an asset transferred to an attorney may be instituted only after the requirements of these guidelines and the approval of the Assistant Attorney General, Criminal Division have been obtained. Of course, this requires that a certain amount of information concerning the transfer of the asset be known. The discovery of information concerning the payment of a fee may be carried out as set forth herein.

9-111.610 Compelled Disclosure of Confidential Communications During the Course of the Representation

As set forth above, actual knowledge of the forfeitability of an asset, cannot be established by compelled disclosure of confidential communica-

11 Including the assets in the indictment would not only have the benefit of establishing knowledge, but also would allow a restraining order to be obtained without a further showing.

12 Perhaps the only situation in which some forfeitable assets would not be covered in this manner is when there is evidence that all assets belonging to a defendant are from criminal activity, but the government has not been able to locate all of them. In such cases, if there is probable cause to establish that all of the defendant's assets acquired after a particular date were from the criminal misconduct, the evidence could be presented to the grand jury and an allegation to that effect could be included in the forfeiture count. This allegation would be relevant and probative to prove that an attorney had actual knowledge that an asset he/she received was forfeitable. *See* USAM 9-111.510, *supra*. Actual knowledge could be established by evidence, from sources other than confidential communications, that the attorney knew the asset he/she received was obtained by the defendant after the date alleged in the indictment.

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tions made during the course of the representation. *See* USAM 9-111.430, *supra*. This limitation upon compelled disclosure of confidential communications does not preclude the use of these confidential communications when they are voluntarily disclosed. For example, the testimony of the defendant at trial may be relied upon. This limitation also does not preclude the use of a subpoena to obtain non-privileged fee information, such as the amount, source and method of payment. *See* USAM 9-111.620, *infra*. But the subpoena may not seek to obtain any confidential communications.

This limitation on compelled disclosures does not recognize or imply that all confidential communications between a client and an attorney are protected either by that attorney-client privilege or the constitutional right to counsel. Only those confidential communications which meet all the requirements for privilege or which relate to defense preparation are protected. *See, e.g., United States v. Melvin*, 650 F.2d 641, 645 (5th Cir.1981); *United States v. King*, 536 F.Supp. 253, 264-65 (C.D.Cal.1982). The Department imposes this limitation in recognition of the fact that the need for clients to make full and free disclosure to their attorneys outweighs the detriment of placing limitation on the use of some non-privileged communications in certain limited situations.

9-111.620 Subpoenas Issued to Attorneys to Obtain Fee Information

The Department requires that any grand jury or trial subpoenas to an attorney for information relating to the representation of a client must be authorized by the Assistant Attorney General, Criminal Division. *See* USAM 9-2.161(a). Information concerning the amount, source and method of payment of a fee paid to an attorney is information ''concerning the representation of a client.'' Consequently, before a subpoena may be issued for such information, each of the requirements of that policy must be met. Most of these requirements should be easily met when issuing a subpoena to an attorney for fee information.

The requirements that the information be non-privileged and relevant can be satisfied when the subpoena calls for fee information. Generally, courts have held that fee information is not privileged. *See, e.g., In re Shargel*, 742 F.2d 61 (2d Cir.1984); *In re Ousterhoudt*, 722 F.2d 591 (9th Cir.1985); *In re Special Grand Jury (Harvey)*, 676 F.2d 1005 (4th Cir.) *vacated and withdrawn*, 697 F.2d 112 (1982) (*en banc*). *In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258 (11th Cir.1982); *In re Grand Jury Proceedings, United States v. Jones*, 517 F.2d 666 (5th Cir. *cert. denied*, 449 U.S. 1083 (1981); *United States v. Strahl*, 590 F.2d 10 (1st Cir.1978, *cert. denied*, 440 U.S. 918 (1979); *United States v. Haddad*, 527 F.2d 537 (6th Cir.1975) *cert. denied*, 425 U.S. 974 (1976). They also have recognized that fee information may be relevant to a criminal case or investigation. It may prove unexplained wealth which is relevant to show that a

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defendant obtained substantial income from his/her illegal activities. It may show that the fee for one or more alleged conspirators was paid by another co-conspirator which is relevant to prove ''association in fact'' or may lead to the discovery of other co-conspirators. Finally, it may show the disposition of forfeitable assets or lead to the discovery of forfeitable assets which have been hidden by a defendant. The requirement that reasonable attempts to obtain the information from alternative sources must be exhausted will have to be considered on the facts of each case, but it should pose no special problem. The remaining two requirements, however, do involve some special considerations.

The requirement that there be ''reasonable grounds to believe ... that the information sought is reasonably needed'' is straight-forward when the fee information is sought to prove association in fact or unexplained income. But where the purpose of a subpoena is solely or principally to obtain evidence relevant to a forfeiture count, this requirement translates into reasonable grounds to believe that the fee information is evidence of or will lead to evidence either of the disposition of forfeitable assets or the existence of hidden assets. This means that there must be a basis to conclude that there are assets subject to forfeiture which have not been identified or located. This may exist, for example, if there is evidence that a defendant either had no legitimate income or derived all of his/her income from an illegitimate source at the time the fee was paid. It may also exist if there is evidence that a defendant derived a certain and substantial amount of income from his/her illegal activity, the disposition or whereabouts of which are unknown, and he/she had no substantial legitimate income at the time the fee was paid.

The final requirement is that the need for the information must outweigh the potential adverse effects on the attorney-client relationship. If the fee information is sought solely or principally to obtain evidence concerning a forfeiture count, the availability of post-judgment discovery may mean that the need to subpoena the information, particularly at trial, does not outweigh the potential for disqualification. *See* USAM 9-111.630, *infra*.

9-111.630 Post-Judgment Discovery Proceedings Under 18 U.S.C. § 1963 and 21 U.S.C. § 853

Both the RICO and drug felony forfeiture statutes provide that the court may order that depositions be taken or that records be produced after an order of forfeiture is entered in order to identify and locate property declared forfeited. *See* 18 U.S.C. § 1963(1); 21 U.S.C. § 853(m). Consequently, if an order of forfeiture is entered covering property which is described generically or by incorporation of the statutory language, the government may make application to the court to obtain records, documents or testimony concerning the identity and location of that property. When an application is made for the deposition of an attorney or the production

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of records by an attorney concerning the transfer of assets for legal services, the requirement set forth in USAM 9-111.620, *supra*, that there be reasonable grounds to believe that the fee information will be evidence either of the disposition of forfeited assets or lead to the discovery of forfeited assets shall apply.

It should be noted that since these statutory proceedings will occur after trial, the likelihood for any adverse impact upon the attorney-client relationship will be diminished substantially. In particular, the potential for disqualification of the attorney from representation of the client because of the need to testify at trial should not arise. Therefore, when fee information is sought solely for purposes of forfeiture and it is feasible, the discovery of such information should be deferred to the post-trial proceedings rather than proceeding by way of grand jury or trial subpoena.

9-111.700 AGREEMENTS TO EXEMPT FROM FORFEITURE AN ASSET TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

Agreements may be entered into to exempt from forfeiture an asset transferred to an attorney as fees for legal services, but only with the prior approval of the Assistant Attorney General, Criminal Division. *See* USAM 9-111.300, *supra*. Agreements may be approved only if: (1) there are reasonable grounds to believe that the particular asset is not subject to forfeiture; and (2) the asset is transferred in payment of legitimate fees for legal services actually rendered or to be rendered.

Efforts should be made to assist in identifying the assets, if any, belonging to a defendant which are not subject to forfeiture. In this regard, any proffer of evidence by an attorney as to the source of the assets may be relied upon. However, an agreement to exempt fees based on such a proffer must contain an express condition that the agreement is not binding if full and accurate disclosure has not been made or if the proffer is false or misleading.

In determining whether an asset is being transferred in payment of a legitimate fee, the amount of the fee may be taken into consideration. However, the focus should not be on whether the fee is reasonable. The focus must be on whether it is a legitimate transaction or a sham transaction designed to shield assets from forfeiture. If the transaction is legitimate, the fee, even if it appears exorbitant, may be exempted if it is paid from a source that meets the first requirement. Conversely, a fee, even if reasonable, may not be exempted from forfeiture by agreement if the first requirement is not met. Any agreement to exempt a fee from forfeiture, however, may be limited to specific amount if there is basis to believe that only assets in that amount are not subject to forfeiture.

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9-130.000 LABOR STATUTES GENERALLY

9-130.100 INVESTIGATIVE JURISDICTION GENERALLY

Criminal matters within USAM 9-130.000 through USAM 9-139.000 are investigated by the Federal Bureau of Investigation and other agencies as indicated in each chapter. The following statutes, however, are primarily investigated by the agencies named below:

A. 29 U.S.C. § 1131: Pension and Welfare Benefits Administration, United States Department of Labor. *See* USAM 9-135.010.

B. 29 U.S.C. § 439: Office of Labor-Management Standards, United States Department of Labor. *See* USAM 9-136.010.

C. 29 U.S.C. § 216(a): Wage and Hour Division, United States Department of Labor. *See* USAM 9-139.201.

D. 29 U.S.C. § 461 and § 463: Office of Labor-Management Standards, United States Department of Labor. *See* USAM 9-139.610.

E. 29 U.S.C. § 502: Office of Labor-Management Standards, United States Department of Labor. *See* USAM 9-139.711.

F. 29 U.S.C. § 503(a) and § 503(b) [labor organization portion]: Office of Labor-Management Standards, United States Department of Labor. *See* USAM 9-139.721.

G. 18 U.S.C. § 844(i): Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury. See USAM 9-139.401.

9-130.200 SUPERVISORY JURISDICTION

Questions concerning the statutes included in this title should be referred to the Labor-Management Unit of the Organized Crime and Racketeering Section of the Criminal Division with the following exceptions:

A. 18 U.S.C. § 1951: Extortion under color of official right or extortion by a public official through misuse of his/her office is supervised by the Public Integrity Section, Criminal Division.

B. 18 U.S.C. § 1951: Robbery, kidnapping, and airplane hijacking charged in connection with 18 U.S.C. § 1951 are supervised by the General Litigation and Legal Advice Section, Criminal Division.

9-130.300 CONSULTATION FOR USAM 9-131.000 TO 9-139.000

Consultation with the Criminal Division is required (*see* USAM 9-2.133) prior to initiating criminal prosecution in the following matters:

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A. 18 U.S.C. § 1951: Extortion under color of official right or extortion by a public official through misuse of his/her office. *See* USAM 9-131.030.

B. 18 U.S.C. § 1951: Cases arising out of labor disputes. *See* USAM 9-131.030.

C. 18 U.S.C. § 1951: Robbery (if the local prosecutor has stated an objection to a federal filing). *See* USAM 9-131.030.

D. 29 U.S.C. § 504: Prohibited Service with Labor Unions and Employer Associations. *See* USAM 9-138.030.

E. 29 U.S.C. § 1111: Prohibited Service with Employee Benefit Plans. *See* USAM 9-138.030.

F. 45 U.S.C. § 152, Tenth and § 180: Labor Disputes in the Railway and Airline Industries. *See* USAM 9-139.103.

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9-131.000 18 U.S.C. § 1951: THE HOBBS ACT

A monograph of the law applicable to prosecutions under this statute is available on JURIS.

9-131.010 Investigative Jurisdiction

Investigative jurisdiction of offenses under 18 U.S.C. § 1951 is in the FBI.

9-131.020 Supervisory Jurisdiction

Supervisory jurisdiction over 18 U.S.C. § 1951 generally is exercised by the Organized Crime and Racketeering Section (Labor-Management Unit), Criminal Division, with the following exceptions: Extortion under color of official right or extortion by a public official through misuse of his/her office is supervised by the Public Integrity Section, Criminal Division. Questions concerning the use of 18 U.S.C. § 1951 in connection with robbery, bank extortion, airplane hijacking, and kidnaping should be directed to the Terrorism and Violent Crime Section, Criminal Division.

9-131.030 Consultation Prior to Prosecution

Consultation with the Criminal Division which is required prior to the commencement of prosecution under 18 U.S.C. § 1951 will be limited to the circumstances listed below. In the following circumstances prior to the return of an indictment or the filing of an information consultation should be made with the appropriate Section of the Criminal Division indicated below and as set forth in USAM 9-2.133.

A. Extortion ''under color of official right'' or otherwise involving a public official's misuse of his/her office—Public Integrity Section;

B. Cases arising out of labor disputes—Organized Crime and Racketeering Section (Labor-Management Unit); and

C. Cases where written approval by the Assistant Attorney General of the Criminal Division is required before filing a count charging violation of the Hobbs Act by robbery. Such approval is required if the U.S. Attorney believes that the local prosecutor with responsibility for prosecuting a state robbery charge for the same basic offense objects to a federal prosecution of a defendant for Hobbs Act robbery because of a pending or imminent state prosecution. The views of the local prosecutor must be solicited and recorded in the file. The failure to obtain approval of the Assistant Attorney General prior to indictment will not affect the continuation of the prosecution unless the Department so orders. Requests for approval are to be processed through the Terrorism and Violent Crime Section.

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Criminal Division attorneys may be consulted at any stage during the investigation process. In this connection it should be noted that when requests are made by the United States Attorneys for FBI investigation of a possible Hobbs Act violation, the FBI field offices will in certain cases notify Washington and FBI headquarters may consult with the appropriate Section of the Criminal Division before investigation is concluded. Any delay or other difficulties arising out of this procedure may be obviated by discussing the matter with the appropriate Sections of the Criminal Division.

9-131.040 Departmental Policy

The robbery provision of the statute is to be utilized only in instances involving organized crime, gang activity, or wide-ranging schemes. The appropriate section of the Criminal Division should be consulted before prosecution is initiated.

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9-132.000 29 U.S.C. § 186: LABOR MANAGEMENT RELATIONS ACT

The maximum criminal penalty for prohibited payments by employers and persons acting in the interest of employers whose labor-management relations are governed by the Taft-Hartley Act (29 U.S.C. § 141, *et seq.*) to labor union officials, labor organizations, and employee representatives is imprisonment for five (5) years and a fine of $15,000 for each violation occurring after October 12, 1984, in which the amount of money or thing of value involved in the violation exceeds $1,000. For prohibited transactions of $1,000 and below the maximum penalty is imprisonment for one (1) year and a $10,000 fine. *See* 29 U.S.C. § 186(d), as amended (1984). Violations of the statute which occurred before October 12, 1984, are subject only to the misdemeanor penalty without regard to the amount of value involved in the transaction.

For prohibited transfers of value made, requested, or agreed to be made after October 12, 1984, to labor union officials and individual employee representatives, criminal prosecution continues to require only proof of a general intent that the defendant acted ''willfully'' in violation of 29 U.S.C. § 186(d)(2). Therefore, proscribed employer payments which are made directly or indirectly to individuals described in the statute and which do not satisfy the statutory exceptions described in 29 U.S.C. § 186(c) are subject to criminal prosecution without proof of any corruption purpose underlying the transaction.

However, in the case of transactions involving the improper withholding and payment by employers of employees' membership dues or equivalent fees to a labor organization, employer contributions to employee benefit plan trusts on behalf of employees, or an employer's funding of labor-management cooperation committees, criminal prosecution requires proof of a ''willful'' violation *and* the defendant's specific intention ''to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections [186](c)(4) through (c)(9) . . . .'' *See* 29 U.S.C. § 186(d)(1). Accordingly, transactions occurring after October 12, 1984, in which employer payments to the described organizations are prohibited because the parties to the transaction have failed to comply with the structural and procedural requirements of the statute are subject to criminal prosecution only where the specific statutory intent or a corrupt purpose underlying the transaction can be demonstrated. Absent such a purpose or intent, the prohibited payments are subject to the civil injunctive provisions of the statute at 29 U.S.C. § 186(e).

A monograph of the law applicable to prosecutions under this statute is available on JURIS.

9-132.010 Investigative Jurisdiction

Investigative jurisdiction is with the Federal Bureau of Investigation.

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9-132.020 Supervisory Jurisdiction

Supervisory jurisdiction over the statute is with the Labor-Management Unit of the Organized Crime and Racketeering Section, Criminal Division.

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9-133.000 29 U.S.C. § 501(c): EMBEZZLEMENT AND THEFT FROM LABOR UNIONS IN THE PRIVATE SECTOR; 18 U.S.C. § 664: EMBEZZLEMENT AND THEFT FROM EMPLOYEE BENEFIT PLANS IN THE PRIVATE SECTOR

A monograph of the law applicable to prosecutions under these statutes is available on JURIS.

9-133.010 Policy—Concurrent Federal-State Jurisdiction

In any matter which is a violation of 29 U.S.C. § 501(c) or 18 U.S.C. § 664 as well as a violation of state criminal law, the U.S. Attorney is authorized to determine after investigation whether the matter should be referred to local authorities for prosecution or whether it warrants federal prosecution. When such matters are referred to local authorities, the Federal Bureau of Investigation or the U.S. Department of Labor should be advised of the referral and requested to determine the status of the local prosecution 90 days after referral. In the event local authorities fail to take any action upon such a referral within 90 days, the U.S. Attorney should then initiate federal prosecution.

9-133.020 Investigative Jurisdiction: 29 U.S.C. § 501(c) and 18 U.S.C. § 664

By a Memorandum of Understanding dated February 16, 1960, between the Secretary of Labor and the Attorney General, criminal matters arising under 29 U.S.C. § 501(c) are investigated by the Federal Bureau of Investigation. The Memorandum permits different arrangements to be made by the Departments of Justice and Labor on a case-by-case basis. A similar Memorandum of Understanding of February 9, 1975, makes the same delegation with respect to criminal matters arising under 18 U.S.C. § 664.

However, effective October 12, 1984, the Labor Department may also investigate criminal violations related to the regulation of employee pension and welfare plans which are subject to Title I of the Employee Retirement Income Security Act (29 U.S.C. §§ 1001 to 1145) without further delegation of investigative authority by the Justice Department. *See* 29 U.S.C. § 1136, as amended by the Comprehensive Crime Control Act of 1984, Section 805. Therefore, Labor Department investigators now have the statutory authority to investigate violations of 18 U.S.C. § 664 which they formerly exercised on a case-by-case basis under the 1975 Memorandum of Understanding. Because the FBI and the Department of Labor have concurrent jurisdiction in these cases, each investigative agency should notify the appropriate U.S. Attorney's Office or the Organized Crime and Racketeering Section Strike Force at the earliest possible stage of an investigation. Such investigations should be closely monitored to avoid duplication of investigative effort.

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9-133.030 Supervisory Jurisdiction

Questions in regard to the labor union and employee benefit plan embezzlement statutes should be directed to the Organized Crime and Racketeering Section, Criminal Division, (FTS) 633-3666.

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9-134.000 18 U.S.C. § 1954: EMPLOYEE BENEFIT PLAN KICKBACKS

A monograph of the law applicable to prosecutions under this statute is available on JURIS.

9-134.010 Investigative Jurisdiction

By a Memorandum of Understanding dated February 9, 1975, between the Secretary of Labor and the Attorney General, criminal matters arising under 18 U.S.C. § 1954 are investigated by the Federal Bureau of Investigation. The Memorandum permits different arrangements to be made by the Department of Justice and Labor on a case-by-case basis.

However, effective October 12, 1984, the Labor Department may also investigate criminal violations related to the regulation of employee pension and welfare plans which are subject to Title I of the Employee Retirement Income Security Act (29 U.S.C. §§ 1001 to 1144) without further delegation of investigative authority by the Justice Department. 29 U.S.C. § 1136, as amended by the Comprehensive Crime Control Act of 1984, § 805. Therefore, Labor Department investigators now have the statutory authority to investigate violations of 18 U.S.C. § 1954 which they formerly exercised on a case-by-case basis under the 1975 Memorandum of Understanding. Because the FBI and the Department of Labor have concurrent jurisdiction in these cases, each investigative agency should notify the appropriate United States Attorney's Office or Organized Crime and Racketeering Section Strike Force at the earliest possible stage of an investigation. Such investigations should be closely monitored to avoid duplication of investigative effort.

9-134.020 Supervisory Jurisdiction

Questions concerning 18 U.S.C. § 1954 should be directed to the Labor-Management Unit of the Organized Crime and Racketeering Section, Criminal Division.

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9-135.000 29 U.S.C. § 1001 ET SEQ.: EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

This statute, enacted on September 4, 1974, is a comprehensive codification of Federal law pertaining to employee pension and welfare benefit plans. Title I of the Act, as administered by the Department of Labor, deals with reporting and disclosure, participation and vesting, fiduciary standards, and provisions for criminal and civil enforcement of these requirements. Title I provides the jurisdictional basis for benefit plan transactions subject to prosecution under 18 U.S.C. §§ 664, 1027 and 1954 with respect to violations of those statutes which occurred after January 1, 1975. *See* USAM 9-133.000, 9-134.000 and 9-136.000.

A monograph of the law applicable to prosecutions under this statute is available on JURIS.

9-135.010 Investigative Jurisdiction

Investigative jurisdiction for criminal violations under the Act is assigned to the Department of Labor and the Federal Bureau of Investigation. Pursuant to a Memorandum of Understanding entered into between the Departments of Justice and Labor, the Federal Bureau of Investigation will investigate violations of 29 U.S.C. § 1111 (prohibition against holding office in or being employed by a benefit plan after conviction of certain crimes) and 29 U.S.C. § 1141 (use of fraud or force to interfere with benefit plan rights). The Department of Labor will investigate violations of 29 U.S.C. § 1131 (benefit plan reporting, disclosure, and retention of records by benefit plans) and has jurisdiction to investigate all civil violations.

9-135.020 Supervisory Jurisdiction

Supervisory jurisdiction over ERISA violations rests with the Labor-Management Unit, Organized Crime and Racketeering Section.

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9-136.000 29 U.S.C. § 439 AND 18 U.S.C. § 1027: LABOR AND PENSION-WELFARE REPORTING AND RECORD KEEPING

A monograph of the law applicable to prosecutions under these statutes is available on JURIS.

9-136.010 Investigative Jurisdiction: 29 U.S.C. § 439

Pursuant to the Memorandum of Understanding of February 16, 1960, between the Secretary of Labor and the Attorney General, investigative authority with respect to labor reporting provisions (29 U.S.C. §§ 431 to 441) remains with the United States Department of Labor. *See* 29 U.S.C. § 521. The Memorandum permits different investigative arrangements to be made by the two Departments on a case-by-case basis. While the Labor Department may use this authority in order to maintain civil actions for injunctive and other appropriate relief with respect to reporting violations (29 U.S.C. § 440), evidence gathered during the course of such investigations and which warrant consideration for criminal prosecution under the Act *or other Federal law* must be furnished to the Department of Justice. *See* 29 U.S.C. § 527.

Where a Labor Department investigation which has been conducted to discover whether a reporting or record-keeping violation has occurred simultaneously develops an embezzlement based on the same factual situation, reinvestigation of the embezzlement by the Federal Bureau of Investigation can result in unnecessary expense and duplication of function. This situation may also result in practical difficulties with respect to the production of witness statements under 18 U.S.C. § 3500 and in regard to admissions and confessions by the accused. Depending on the facts of a given case and the stage of a particular investigation, therefore, the U.S. Attorney should determine the best method of achieving successful completion of the case. For example, if the parallel embezzlement case has been substantially completed as the result of the reporting investigation, the Department of Labor may be authorized to complete the embezzlement investigation. On the other hand, if fresh investigation which does not parallel the reporting violation is necessary, the Federal Bureau of Investigation should be assigned to the embezzlement matter.

9-136.020 Investigative Jurisdiction—18 U.S.C. § 1027

By a Memorandum of Understanding dated February 9, 1975, between the Secretary of Labor and the Attorney General, criminal matters arising under 18 U.S.C. § 1027 are investigated by the Federal Bureau of Investigation. The Memorandum permits different arrangements to be made by the Department of Justice and Labor on a case-by-case basis.

However, effective October 12, 1984, the Labor Department may also investigate criminal violations related to the regulation of employee

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pension and welfare plans which are subject to Title I of the Employee Retirement Income Security Act (29 U.S.C. §§ 1001 to 1144) without further delegation of investigative authority by the Justice Department. *See* 29 U.S.C. § 1136, as amended by the Comprehensive Crime Control Act of 1984, § 805. Therefore, Labor Department investigators now have the statutory authority to investigate violations of 18 U.S.C. § 1027 which they formerly exercised on a case-by-case basis under the 1975 Memorandum of Understanding. Because the FBI and the Department of Labor have concurrent jurisdiction in these cases, each investigative agency should notify the appropriate U.S. Attorney's Office or Organized Crime and Racketeering Section Strike Force at the earliest possible stage of an investigation. Such investigations should be closely monitored to avoid duplication of investigative effort.

9-136.030 Supervisory Jurisdiction

Questions in regard to the labor and pension-welfare reporting and record-keeping statutes should be directed to the Labor-Management Unit of the Organized Crime and Racketeering Section, Criminal Division.

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9-137.000 29 U.S.C. § 530—DEPRIVATION OF RIGHTS BY VIOLENCE

Section 530 of Title 29 provides for the protection of the rights granted to union members and reads as follows:

> It shall be unlawful for any person through the use of force or violence or threat of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

A monograph of the law applicable to prosecutions under this statute is available on JURIS.

9-137.010 Investigative Jurisdiction

The Federal Bureau of Investigation has primary investigative jurisdiction with respect to violations of this statute pursuant to Memorandum of Understanding between the Departments of Justice and Labor dated February 16, 1960. The Memorandum permits different arrangements to be made by the Departments of Justice and Labor on a case-by-case basis.

9-137.020 Supervisory Authority

Questions regarding criminal violations of this statute should be referred to the Labor-Management Unit, Organized Crime and Racketeering Section.

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9-138.000 29 U.S.C. §§ 504 AND 1111 PROHIBITION AGAINST CERTAIN PERSONS HOLDING OFFICE AND EMPLOYMENT WITH LABOR ORGANIZATIONS, EMPLOYER ASSOCIATIONS, EMPLOYEE PENSION AND WELFARE PLANS, AND AS LABOR RELATIONS CONSULTANTS

Both 29 U.S.C. §§ 504 and 1111 are similar in providing that a person who has been convicted of specified crimes is prohibited from serving in specified capacities following conviction, or the end of imprisonment for such conviction, for a maximum period of thirteen (13) years in the case of a judgment of conviction entered *after* October 12, 1984, and a maximum period of five (5) years in the case of a judgment of conviction *on or before* October 12, 1984. Both sections give the convicted person similar means of obtaining relief from the disabilities imposed, namely, an exemption following a hearing, a full restoration of citizenship rights revoked as a result of the conviction, or in the case of judgments of conviction entered after October 12, 1984, a reduction by the sentencing court of the period of disability from the maximum of thirteen (13) years to a shorter period which may not be less than three (3) years. Both sections carry identical penalties for violations arising from prohibited service: 1) for judgments of conviction entered *after* October 12, 1984, a maximum of five (5) years' imprisonment and fine; 2) for judgments of conviction entered on or before October 12, 1984, a maximum of one (1) year's imprisonment and fine.

Differences between the disability imposed by reason of judgments of conviction entered before and after October 12, 1984, arise because of amendments to both statutes which are contained in the Comprehensive Crime Control Act of 1984, §§ 802 to 804; Pub.L. No. 98-473, October 12, 1984. New categories of disqualifying convictions and prohibited positions which were added by the 1984 amendments and therefore apply only in the case of judgments of conviction entered after October 12, 1984, are noted throughout a JURIS monograph of the law applicable to prosecutions under these statutes.

9-138.010 Investigative Jurisdiction

By a Memorandum of Understanding dated February 16, 1960, between the Secretary of Labor and the Attorney General, criminal matters arising under 29 U.S.C. § 504 are investigated by the Federal Bureau of Investigation. The Memorandum permits different arrangements to be made by the two Departments on a case-by-case basis. A similar Memorandum of Understanding of February 9, 1975, makes the same delegation with respect to criminal matters arising under 29 U.S.C. § 1111.

In regard to issues concerning the appropriateness of a grant of a certificate of exemption under 29 U.S.C. §§ 504 or 1111, investigation is conducted by Labor Department investigators under the supervision of the Solicitor of Labor, Washington, D.C.

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9-138.020 Supervisory Jurisdiction

Questions concerning 29 U.S.C. §§ 504 and 1111 should be directed to the Labor-Management Unit of the Organized Crime and Racketeering Section, Criminal Division. In connection with exemption proceedings before the United States Parole Commission, where the prosecuting attorney or other representative of the U.S. Attorney's Office is unable to appear in person before the Commission, the prosecuting office may appear through the Labor-Management Unit, Organized Crime and Racketeering Section, as its representative.

9-138.030 Consultation Prior to Prosecution

Prior to instituting grand jury proceedings, as well as seeking an indictment, or filing an information, under either 29 U.S.C. § 504 or 29 U.S.C. § 1111, consultation is required with the Criminal Division through the Labor-Management Unit of the Organized Crime and Racketeering Section. Because the underlying purpose is to eliminate undesirable persons from the labor movement in the case of 29 U.S.C. § 504 or from access to or management of the assets of an employee benefit plan in the case of 29 U.S.C. § 1111, a procedure of notification prior to proceeding with criminal prosecution has been adopted by the Criminal Division in certain cases. In the absence of a clear demonstration of a knowing and intentional violation of either statute, the disqualified person and the responsible person(s) who permit(s) the disqualified person to serve in violation of either statute are notified and given the opportunity to vacate the prohibited position and avoid prosecution. This policy furthers the remedial purposes of the statute and has generally resulted in compliance by the affected individuals. Following consultation with the Criminal Division, the procedure need not be used where available evidence indicates that the affected individuals were aware that the disqualified person's service was prohibited by reason of conviction at the time such service was rendered.

With respect to a convicted officer or disqualified employee of a labor organization, labor consultant firm, or employer association, etc., in the case of 29 U.S.C. § 504, or a convicted benefit plan officer, employee, fiduciary, or consultant, etc., in the case of 29 U.S.C. § 1111, the Criminal Division gives notice of the disqualification by delivery through the case investigator or by certified mail. In the case of 29 U.S.C. § 504, the individual in violation and the chief executive officer or his/her business firm, or local and international labor organizations, respectively, are notified of the violation and advised that prosecution will be initiated unless the prohibited relationship is terminated. In the case of 29 U.S.C. § 1111, the individual in violation and the benefit plan administrator/trustees or the chief executive officer of the affected business firm are given similar notice and advice.

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In order to effectuate this procedure, all U.S. Attorneys and Strike Forces are requested to forward to the Labor-Management Unit, Organized Crime and Racketeering Section, copies of the judgment and sentence for any officer, fiduciary, or employee of a labor organization, employee benefit plan, labor relations consultant firm, or employer association, etc., who is convicted in their district. The following information should also be furnished: address of the convicted individual, the name of the chief executive officer of the affected organization and the organization's address, and the name of the benefit plan administrator, trustee, etc., and his/her address.

9-138.040 Consultation Prior To Relief of Convicted Individuals From Labor-Management and Pension-Welfare Position Disqualification

The Labor-Management Unit of the Organized Crime and Racketeering Section (FTS 368-3666) recommends that it be consulted by telephone whenever a United States Attorney's Office learns that a convicted individual seeks relief from the employment or office holding disqualifications of 29 U.S.C. §§ 504 or 1111. The Secretary of Labor's statutory rights to notice and representation in these relief proceedings may not be waived or negotiated away as a part of plea or sentencing bargains. The Labor-Management Unit can advise you of the procedures to be followed in such proceedings and assist in the coordination of these matters with the Labor Department. The Labor-Management Unit can assist you whenever a convicted individual files in district court (for disqualifying crimes committed after November 1, 1987) an application for exemption from disqualification in a particular position, moves a sentencing court for a reduction of the period of disqualification under the statutes, or whenever such relief is contemplated for inclusion in a plea or sentencing agreement. See Policy Statement § 5J1.1, *United States Sentencing Commission Guidelines Manual* (June 15, 1988).

9-138.100 REDUCTION AND EXEMPTION PROCEEDINGS UNDER 29 U.S.C. § 504 and 29 U.S.C. § 1111

9-138.110 Relief by Reduction of the Length of Disability

Disqualified individuals convicted after October 12, 1984, may petition the federal or state sentencing court to reduce the statutory length of disability (thirteen years after date of sentencing or end of imprisonment, whichever is later) to a lesser period which may not be less than three years after such conviction or end of imprisonment, whichever is later. Because a reduction of the length of disability has the same general ameliorative effect following the reduced period of disability as an exemption from disability in a particular prohibited position or full restoration of citizenship rights by pardon or its equivalent, it is the policy of the Department of Justice that the methods of relief be viewed similarly in terms of the burden of persuasion on the person seeking relief notwithstanding the absence of any articulated statutory requirement for granting

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a reduction of the length of disability. Therefore, the Government should argue that the convicted petitioner bears the burden of demonstrating that he or she has been rehabilitated at the time of the application and can be trusted to not endanger the organization in which he or she seeks a position. *See Nass v. Local 348, Warehouse Production, Sales and Services Employees,* 503 F.Supp. 217 (E.D.N.Y.1980), *aff'd without opinion,* 657 F.2d 264 (2d Cir.1981) (relief from the disqualification by full restoration of citizenship rights requires a finding of prior rehabilitation before the disability will be lifted).

The 1984 statutory amendment is silent as to the timing of a motion for reduction of the length of disability addressed to the ''sentencing court.'' In contrast, each statute states that relief by exemption or full restoration of citizenship rights may be considered at any time ''prior to the end of such period'' of disability. Although this statutory construction appears to support the position that a reduction of the length of disability may be granted only at the time of sentencing, the legislative history suggests that a disqualified person should be permitted to apply for a reduction of the length of disability at any time during the period of disqualification, especially where a person is convicted of a disabling offense prior to the commencement of service in a prohibited capacity and is without notice of the disability. The legislative history also indicates that relief by reduction of the length of disability which is sought after sentencing would be available only in rare circumstances.

The former Chairman of the Senate Committee on Labor and Human Resources explained that while the amendment increased the period of disqualification, relief by reduction of the length of disability was

> included to accommodate the rare occasions where a [thirteen] year ban might be considered too harsh. For example, at the time of his conviction of a disqualifying crime, an individual might not be a union member or might not have given any thought to the ramifications of his act with regard to holding office in a union or with a benefit plan. If he were to serve his sentence and subsequently obtain a job which would lead to election to union office, a [thirteen] year ban might be unnecessarily rigid. In such rare circumstances, the judge is given the discretion to reduce the disqualification period to no less than [three] years.

Remarks of Senator Orrin Hatch, 128 Cong.Rec. 32446 (1982); material in brackets added.

9-138.120 Relief by Exemption from Disability in a Particular Prohibited Position

An individual convicted of a *disqualifying crime committed on or after November 1, 1987,* may file with a United States district court a petition

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for exemption from prohibited service in a particular capacity. If the petitioner was convicted of a disqualifying federal offense, the petition is directed to the sentencing judge. If the petitioner was convicted of a disqualifying state or local offense, the petition is directed to the United States district court for the district in which the offense was committed. In the case of an individual convicted of a *disqualifying crime committed before November 1, 1987,* the United States Parole Commission will continue to process such exemption applications of convicted individuals. Unlike relief by reduction of the length of disability, there is no three-year waiting period for an exemption from disability in a particular prohibited position.

Before an exemption from disqualification in a particular prohibited capacity may be granted, the district court (or Parole Commission) must make a statutory determination, following a hearing upon notice to the Secretary of Labor and the appropriate state or federal prosecuting official in the jurisdiction(s) where the individual was convicted, that the convicted individual's service in a particular prohibited position is not contrary to the purposes of the Labor-Management Reporting and Disclosure Act (LMRDA) for petitions under 29 U.S.C. § 504 or Title I of the Employee Retirement Income Security Act (ERISA) for petitions under 29 U.S.C. § 1111. The Sentencing Commission has adopted the United States Parole Commission's criteria for relief for use by the district courts. *Relief from the Disability Pertaining to Convicted Persons Prohibited from Holding Certain Positions,* Policy Statement § 5J1.1, *United States Sentencing Commission Guidelines Manual* (June 15, 1988). Accordingly, relief shall not be given to aid rehabilitation, but may be granted only following a clear demonstration by the convicted individual that he or she has been rehabilitated since commission of the disqualifying crime and can therefore be trusted not to endanger the organization in the position for which he or she seeks the exemption from disability.

9-138.130 Coordination with the Department of Labor

In accordance with memoranda of understanding between the Secretary of Labor and the Attorney General, the Department of Labor is responsible for conducting the investigation concerning the appropriateness of granting an application for exemption under both statutes. Moreover, because it is the policy of the Department of Justice to treat motions for reduction of the period of disability similarly to applications for exemption, any investigation concerning the appropriateness of a reduction of the length of disability should also be conducted in cooperation with the appropriate office of the Department of Labor.

Therefore, when either a motion for reduction of the length of disability or a petition for exemption from the disqualification is filed by the convicted individual in federal district court, it ordinarily will be

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necessary to seek a continuance of the proceeding in order to allow the Department of Justice and the Department of Labor an adequate opportunity to coordinate their litigative positions and to provide sufficient time for any necessary investigation by the Office of Labor—Management Standards (29 U.S.C. § 504) or the Pension and Welfare Benefits Administration (29 U.S.C. § 1111) of the Department of Labor. At the time of sentencing a continuance may be sought on the grounds that neither statutory disability is a part of the sentence and, therefore, relief may be considered in a separate and subsequent proceeding.

When relief by way of exemption or reduction of the disability is considered as part of a plea or sentence agreement, coordination with the Department of Labor furthers the statutory scheme which is intended to ensure that the disability not be set aside for purposes which are inconsistent with the federal laws governing the internal affairs of labor unions and the operation of employee benefit plans. The federal prosecutor should consider carefully the effect which the convicted offender's continued employment in regard to a labor union, employee benefit plan or employer association will have on the organization's members and participants. This effect should be outweighed by the benefits of obtaining the plea or sentence agreement.

9-138.140 Litigating Authority Before the U.S. Parole Commission

With respect to disqualifying crimes *committed before November 1, 1987,* exemption proceedings under both statutes are held before the United States Parole Commission where the Department of Labor attorneys and the federal or state prosecutor have standing to appear, present evidence, and cross-examine witnesses pursuant to 28 C.F.R. § 4.11(b). Pursuant to memoranda of understanding between the Secretary of Labor and the Attorney General, the Department of Labor is primarily responsible for appearing on behalf of the Federal Government in proceedings for exemptions before the United States Parole Commission.

9-138.150 Litigating Authority of Department of Labor Attorneys in District Court Proceedings Under ERISA (29 U.S.C. § 1111)

With respect to *disqualifying crimes committed on or after November 1, 1987,* the Department of Labor has litigating authority in district court proceedings pertaining to relief from disqualification imposed by 29 U.S.C. § 1111. ERISA Section 502(j) [29 U.S.C. § 1132(j)] provides that ''in all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary ... but all such litigation is subject to the direction and control of the Attorney General.'' An application for relief is viewed as a civil action because it involves a separate proceeding from the criminal prosecution and because the statutory prohibition is

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remedial rather than punitive in nature. *See DeVeau v. Braisted,* 363 U.S. 144 (1960).

Therefore, in relief proceedings arising under 29 U.S.C. § 1132, attorneys from the office of the Solicitor of Labor may be designated by the Secretary to appear on his behalf. Supervision of such litigation by the Attorney General is exercised by each United States Attorney for the judicial district where the proceeding for relief will be held in consultation with the Assistant Attorney General, Criminal Division, pursuant to 28 C.F.R. § 0.55(i).

9-138.160 Special Appointment of Department of Labor Attorneys in District Court Proceedings Under LMRDA (29 U.S.C. § 504)

With respect to *disqualifying crimes committed on or after November 1, 1987,* the Department of Labor has no litigating authority under the LMRDA with respect to relief proceedings under 29 U.S.C. § 504. As a result, attorneys from the Office of the Solicitor of Labor must be specially appointed by the Department of Justice in order to appear on behalf of the Secretary of Labor. These appointments should be made upon the recommendation of the United States Attorney for the judicial district where the proceeding for relief will be held on a case-by-case basis pursuant to 28 U.S.C. § 543.

9-138.170 Delegation of United States Attorney's Responsibility To Appear on Behalf of Federal Prosecuting Officials

A United States Attorney's responsibility to appear in federal district court on behalf of federal prosecuting officials who have standing to participate in relief proceedings may be delegated to those Department of Labor attorneys who are given special appointments pursuant to 29 U.S.C. § 543 or Department of Justice attorneys designated by the Assistant Attorney General, Criminal Division. However, with respect to district court proceedings for relief under ERISA, attorneys appointed by the Secretary of Labor pursuant to ERISA and 29 U.S.C. § 1132(j) are authorized to represent only the Secretary of Labor.

9-138.180 Conflict Resolution

Any conflict with respect to litigation strategy among representatives of the Secretary of Labor and the federal prosecutors should be submitted to the Assistant Attorney General, Criminal Division, for review and recommended resolution. It is the policy of the Department of Justice that, in the absence of exceptional circumstances, each party to these relief proceedings be permitted to present to the district court its views *on the merits for or against* relief without regard to which agency represents that party.

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9-138.200 CIVIL ACTIONS

A civil action to remove a fiduciary of an employee benefit plan for violation of 29 U.S.C. § 1111 may be brought by the United States Department of Labor, or by a benefit plan participant, beneficiary or fiduciary. See 29 U.S.C. §§ 1109(a) and 1132(a)(2). Civil actions litigated by the Department of Labor are subject to the direction and control of the Civil Division, U.S. Department of Justice. *See* 29 U.S.C. § 1132(j).

Civil actions against the Department of Justice for declaratory judgment, injunction, etc. with respect to 29 U.S.C. §§ 504 and 1111 are coordinated with the Labor-Management Unit of the Organized Crime and Racketeering Section, Criminal Division.

9-138.300 ALTERNATIVE RELIEF TO 29 U.S.C. §§ 504, 1111

A significant practical application of 29 U.S.C. § 504 occurred in connection with the prosecution in *United States v. Scaccia*, 514 F.Supp. 1353 (N.D.N.Y.1981) where a union business manager was convicted in 1975 for embezzlement and was imprisoned for two months and placed on probation for 58 months. One of the conditions of probation was to ''refrain from violation of any law.'' Subsequent investigation determined that the defendant was performing the duties of union business manager in violation of 29 U.S.C. § 504. Rather than pursuing prosecution under 29 U.S.C. § 504, probation was revoked upon a finding that the probationer's violation of 29 U.S.C. § 504 was a violation of the above probation condition.

There is also authority for imposing specific conditions of probation that an individual not hold union office. *See United States v. Barraso*, 372 F.2d 136 (3d Cir.1967), *Berra v. United States*, 221 F.2d 590 (8th Cir. 1955), *aff'd on other grounds*, 351 U.S. 131 (1956) (pre-29 U.S.C. § 504 case).

Removal from union office also has been effected under the RICO forfeiture statute and pursuant to civil injunctive relief. *See* 18 U.S.C. § 1963; *United States v. Rubin*, 559 F.2d 975, 990-993 (5th Cir.1977); 18 U.S.C. § 1964; *United States v. Teamsters Local 560*, 581 F.Supp. 279 (D.N.J.), *aff'd*, 780 F.2d 267 (3rd Cir.1985).

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9-139.000 MISCELLANEOUS LABOR STATUTES

9-139.010 Investigative Jurisdiction

Unless otherwise indicated, investigative jurisdiction for the following miscellaneous labor statutes rests with the Federal Bureau of Investigation.

9-139.020 Supervisory Jurisdiction

The Labor-Management Unit of the Organized Crime and Racketeering Section has supervisory jurisdiction concerning criminal enforcement of the miscellaneous labor statutes.

9-139.100 45 U.S.C. § 151, *ET SEQ.*—THE RAILWAY LABOR ACT (RLA)

The Railway Labor Act (RLA) provides for criminal prosecution with respect to the willful failure or refusal of a railway or airline carrier, or its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, and eighth paragraphs of 45 U.S.C. § 152, Tenth, which deal with labor-management relations in the railway and airline industries. The statute provides that each offense may result in imprisonment up to six (6) months and/or $20,000 fine for each day during which such carrier, officer, or agent willfully fails or refuses to comply with obligations under Section 152, Tenth. Section 152, Tenth, also provides that:

> It shall be the duty of any United States Attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof. . .

The reference to ''all necessary proceedings for the enforcement of'' that section has been interpreted to give the United States standing to bring civil proceedings to enjoin violations of the Act. *Florida East Coast Ry. Co. v. United States,* 348 F.2d 682, 685 (5th Cir.1965), *aff'd sub nom., Railway Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 242 n. 4 (1966). However, as one court noted: ''This provision cannot be construed as burdening the Department of Justice with the duty of representing every employee, or group of employees, who may assert rights under the Act.'' *Cepero v. Pan American Airways,* 195 F.2d 453, 459 (1st Cir.1952), *cert. denied,* 359 U.S. 1005 (1959). If it is determined that a matter merits civil enforcement under 45 U.S.C. § 152, Tenth, the Civil Division should be contacted before any action is taken.

A monograph of the law applicable to prosecutions under this statute is available on JURIS.

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9-139.101 Investigative Jurisdiction

Where criminal violations of the RLA are suspected, investigative jurisdiction rests with the Federal Bureau of Investigation.

9-139.102 Supervisory Jurisdiction

Supervisory jurisdiction concerning criminal enforcement of the RLA rests in the Labor-Management Unit of the Organized Crime and Racketeering Section.

Supervisory jurisdiction concerning civil enforcement under the RLA rests in the Civil Division of this Department.

9-139.103 Authorization for Criminal Prosecution

As a matter of policy, prosecutions as well as requests for investigation concerning violations of 45 U.S.C. § 152, Tenth should be declined unless they contain allegations of egregious carrier interference with employee rights tantamount to actual or threatened violence, or involve prohibited payments to employee representatives. This policy is instituted primarily as a result of *United States v. Winston,* 558 F.2d 105 (2d Cir.1977), wherein the Second Circuit reversed a conviction under 45 U.S.C. § 152, Tenth.

In *Winston*, defendants, owners and operators of a small airline charter service, were charged with conspiracy to violate the Railway Labor Act by conduct which would have been at most an unfair labor practice in an industry other than the railway or airline industries under federal law. Accordingly, under this prosecution policy, the mere commission of an unfair labor practice is insufficient to justify criminal prosecution under the Railway Labor Act, absent the presence of one or more of the aggravating factors described above.

This policy change has the effect of treating the parties to airline and railway labor disputes for purposes of criminal prosecution in the same manner as parties in labor disputes in other federally regulated industries.

This policy does not apply to civil litigation under 45 U.S.C. 152, Tenth as supervised by the Civil Division.

9-139.104 Declinations of Criminal Prosecution

In declining prosecution with respect to complaints alleging violations of 45 U.S.C. § 152, Tenth, it may be appropriate to advise the complainant that redress may be available to him through private civil litigation. Alleged violations of the RLA have generally been litigated by either labor

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organizations on behalf of their members, *see Virginia Ry. Co. v. System Federation No. 40*, 84 F.2d 641 (4th Cir.1936), *aff'd* 300 U.S. 515 (1937); *Texas and N.O.R.R. Co. v. Railway Clerks*, 33 F.2d 13 (5th Cir.1929), *aff'd* 281 U.S. 548 (1929); *contra, I.A.M. Lodge 2201 v. Air Indies Corp.*, 73 Lab.Cas. 14,467, 86 L.R.R.M. 2076 (D.P.R.1973); or by the employees themselves as private individuals. *See Brady v. TWA, Inc.*, 223 F.Supp. 361, 365 (D.Del.1963), *aff'd* 401 F.2d 87, *cert. denied*, 393 U.S. 1048; *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir.1970); *Griffin v. Piedmont Aviation, Inc.*, 384 F.Supp. 1070 (N.D.Ga.1974).

9-139.200 29 U.S.C. §§ 201 TO 219—FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) provides a national minimum hourly wage (29 U.S.C. § 206), mandatory overtime compensation (29 U.S.C. § 207), and restrictions on the employment of minors (29 U.S.C. § 212). The FLSA also requires employers to maintain accurate employee records in accordance with the Act's provisions (29 U.S.C. § 211). To ensure employer compliance with these requirements, both civil and criminal sanctions were provided. Section 215 of Title 29, United States Code, lists the prohibited acts under the FLSA. Section 216(a) of Title 29, United States Code, provides a criminal misdemeanor penalty for willful violations of 29 U.S.C. § 215. Imprisonment up to six (6) months for each offense may be imposed only upon a second or subsequent conviction for an offense under the Act.

Section 216(b) of Title 29 provides for an employer's civil liability for violations of 29 U.S.C. § 215. Broad injuctive relief to curtail any practice which would constitute a violation of 29 U.S.C. § 215 or to obtain remedial action is available under Section 217 of Title 29, United States Code. Due to the generally minor nature of most FLSA complaints filed, it is recommended that 29 U.S.C. § 217 be employed routinely through the Labor Department.

Where an employer consistently violates a decree or consent judgment, or where the FLSA violations are sufficiently aggravated, criminal sanctions can be pursued under 18 U.S.C. § 401 or 29 U.S.C. § 216. Following conviction under 29 U.S.C. § 216(a) for a *monetary* violation, every effort should be made to secure restitution as a condition of sentence.

A short monograph of this law's general usage is available on JURIS.

9-139.201 Investigative Jurisdiction

Investigations or criminal cases arising under 29 U.S.C. § 216(a) are conducted by the Wage and Hour Division of the Department of Labor. Complaints of violations of the Act should be referred to the Administrator of the Wage and Hour Division of the Department of Labor.

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9-139.202 Supervisory Jurisdiction

The Labor-Management Unit of the Organized Crime and Racketeering Section has supervisory jurisdiction over criminal cases arising under the Act. The current practice of the U.S. Department of Labor is to refer criminal violations directly to United States Attorneys' offices in most cases.

9-139.300 29 U.S.C. § 162—INTERFERENCE WITH NATIONAL LABOR RELATIONS BOARD AGENT

The National Labor Relations Board (NLRB) is the agency of the United States entrusted with primary oversight in the area of labor-management relations. *See* 29 U.S.C. § 141, *et seq.* Under 29 U.S.C. § 162, it is a misdemeanor to willfully resist, prevent, impede or interfere with any member of ''the Board'' or any of its agents or agencies in the performance of their statutory duties. Any obstruction of the investigative or adjudicative processes of the NLRB at any stage of the proceedings is covered by the provisions of 18 U.S.C. §§ 1505 and 1512 to 1515 which pertain to the obstruction of proceedings before Federal departments and agencies. *See Rice v. United States*, 356 F.2d 709 (8th Cir. 1966). The officers and agents of the NLRB are not covered by the general statutes pertaining to assaults on Federal officers. *See* 18 U.S.C. §§ 111, 1111 to 1114.

A short monograph of this law's general usage is available on JURIS.

9-139.400 18 U.S.C. § 844—USE OF EXPLOSIVES WHEN A LABOR DISPUTE IS INVOLVED

Title XI of the Organized Crime Control Act of 1970 amended Title 18, United States Code, by adding Chapter 40 containing sections 841 through 848 governing the importation, manufacture, distribution and storage of explosive materials and creating certain Federal offenses pertaining to the unlawful use of explosives. Title XI greatly broadens federal authority pertaining to explosives-connected offenses. At the same time, Congress has expressly disclaimed any intent to occupy the field to the exclusion of state law on the same subject matter.

In 1982 18 U.S.C. § 844 was amended to further broaden federal authority by prohibiting the *use of fire* to achieve certain unlawful objectives already set forth in the statute with respect to explosives. Prior to the amendment, the use of explosives or an explosive device had to be involved for a 28 U.S.C. § 844 violation to have occurred. Anti-Arson Act of 1982, Pub. L. No. 97-298 (effective October 12, 1982). *See* H.R. REP. No. 97-678, 97th Cong., 2d Sess.

A short monograph of this law's general usage in labor-related cases is available on JURIS.

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9-139.401 Investigative Jurisdiction

Investigative jurisdiction lies with the Bureau of Alcohol, Tobacco & Firearms, U.S. Department of the Treasury.

9-139.500 15 U.S.C. § 1281 AND § 1282—DESTRUCTION OR DAMAGE TO PROPERTY IN INTERSTATE COMMERCE

This statute specifically forbids the actual or attempted willful destruction or injury to property moving in interstate or foreign commerce while such property is in the control of a common or contract carrier. The law is limited to rail, motor vehicle, and air carriers. Water transport is not included since offenses involving cargo aboard certain vessels are already proscribed by 18 U.S.C. §§ 2271 to 2279.

A judgment of conviction or acquittal on the merits in any state or federal court is a statutory bar to prosecution for the same act(s). *See* 18 U.S.C. § 1282. A monograph of the law applicable to prosecution under these statutes is available on JURIS.

9-139.600 29 U.S.C. § 461 AND § 463—LABOR ORGANIZATION UNDER TRUSTEESHIP

These statutes, which apply to situations where a subordinate body of a labor organization is placed in trusteeship, provide that delegates from the organization under trusteeship (e.g., a local) to any convention or election (e.g., by an international union) must be democratically elected by all eligible members by secret ballot. Any other method of delegate selection renders their votes a nullity. It also provides that funds of the organization under trusteeship may not be transferred to the international or other level of the labor organization. Exceptions are that normal per capita tax and assessments payable by organizations not under trusteeship may continue to be collected by superior levels of the labor organization, and the assets of the organization under trusteeship may be distributed in accordance with that organization's constitution and bylaws upon dissolution. A willful violation of 29 U.S.C. § 463 may result in imprisonment for one year and/or $10,000 fine.

A willful failure to file reports in regard to such trusteeships with the Department of Labor or the willful failure to keep records supporting such reports, the knowing falsification of such reports, or the willful falsification or destruction of the supporting records, may also result in imprisonment for one year and/or a fine of $10,000. *See* 29 U.S.C. §§ 461(c) and 461(d).

9-139.610 Investigative Jurisdiction

Violations of the trusteeship statutes are investigated primarily by the Branch of Elections and Trusteeships, Office of Labor-Management Standards, U.S. Department of Labor.

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9-139.700 OTHER

9-139.710 29 U.S.C. § 502—Bonding of Officers and Employees of Labor Organizations

The statute requires that all officers, employees and certain representatives of a labor organization (except those whose property and annual receipts do not exceed $5,000) or of a trust in which a labor organization is interested be bonded to provide protection against loss by reason of acts of fraud or dishonesty on their part directly or through connivance with others, *if they handle funds or other property of the organization*. Any person who is not bonded shall not be permitted to exercise control over a union's assets. While no designation is made as to who is responsible for *permitting* an unbonded individual to handle assets, the fiduciary standards imposed in 29 U.S.C. § 501(a) indicate that officers, agents and ship stewards and others, regardless of title, in a position of authority may be liable. Willful violations are punishable by up to one year and $10,000.

9-139.711 Investigative Jurisdiction

Violations are investigated by the Office of Labor-Management Standards, U.S. Department of Labor.

9-139.720 29 U.S.C. § 503—Loans to Union Officers and Payment of Fines

Section 503(a) prohibits labor organizations regulated by the Labor-Management Reporting and Disclosure Act (LMRDA) from making loans to any one officer or employee which result in a total indebtedness in excess of $2,000. Section 503(b) prohibits a labor organization *or an employer* regulated by the LMRDA from paying, directly or indirectly, a criminal fine imposed on an officer or employee convicted of a willful violation of the LMRDA. A willful violation of Section 503(a) or 503(b) can result in imprisonment of one year and/or $5,000 fine.

9-139.721 Investigative Jurisdiction

Violations of Section 503(a) are investigated by the Office of Labor-Management Standards, U.S. Department of Labor. Pursuant to a Memorandum of Understanding between the Departments of Justice and Labor dated February 1960 the Federal Bureau of Investigation investigates employer payments in violation of Section 503(b).

9-139.730 18 U.S.C. § 1231—Transportation of Strikebreakers

This provision prohibits any person from:

(1) Willfully transporting any person in interstate or foreign commerce who is employed or will be employed to obstruct or interfere by

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force or threats with peaceful labor picketing by employees, or employees' exercise of organizational or collective bargaining rights; or

(2) Traveling or knowingly being transported in interstate or foreign commerce for the purpose of obstructing or interfering by force or threats with any of the above-enumerated employee activities.

The legislative history makes clear that 18 U.S.C. § 1231 was enacted to deal with professional strikebreakers who were hired by employers to physically interfere with pickets and other lawful labor activity by employees. Common carriers are specifically exempted from the application of this statute.

The penalties for violating this statute are a fine of not more than than $5,000 and/or imprisonment for not more than two years. For copies of materials used in *United States v. Marzilli*, Cr. 84-02[illegible] (D.R.I.), the first known conviction under the statute, the Labor-Management Unit, Organized Crime and Racketeering Section may be consulted.

A monograph of the law applicable to prosecutions under this statute is available on JURIS.

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4 C.F.R. Part 101	9-42.010
4 C.F.R. §§ 101-105	9-76.340
4 C.F.R. § 102.2	9-76.340
5 C.F.R. §§ 9.1-9.5	9-3.510
5 C.F.R. § 735.104	9-85.205
5 C.F.R. § 735.105	9-85.203
5 C.F.R. § 737.1 et seq.	9-85.203
5 C.F.R. § 738.201 et seq.	9-85.204
5 C.F.R. § 738.301 et seq.	9-85.204
5 C.F.R. § 831	9-42.010
8 C.F.R. § 215.2	9-73.140
8 C.F.R. § 215.3	9-73.140
8 C.F.R. § 274a.1	9-73.130
15 C.F.R. §§ 368-399	9-90.610
19 C.F.R. § 192	9-61.762
21 C.F.R. Part 1311	9-100.560
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21 C.F.R. § 1312.31	9-100.530
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22 C.F.R. Part 51	9-73.600
22 C.F.R. Part 120-Part 130	9-2.135
22 C.F.R. § 2.3	9-65.806
22 C.F.R. § 2.3	9-65.811
22 C.F.R. §§ 121-130	9-90.620
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26 C.F.R. § 301.6103	9-15.213
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28 C.F.R. Part 59	9-4.000
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28 C.F.R. § 0.55	9-3.100
28 C.F.R. § 0.57	9-3.512
28 C.F.R. § 0.57	9-8.110
28 C.F.R. § 0.58	9-3.512
28 C.F.R. § 0.59	9-11.310
28 C.F.R. § 0.61	9-2.132
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28 C.F.R. § 0.64-1	9-3.512
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31 C.F.R. § 500.101	9-90.630	47 C.F.R. § 2.701	9-60.283
41 C.F.R. § 101-19.3	9-65.461	47 C.F.R. § 15.11	9-60.283
41 C.F.R. § 101-20.313	9-20.113	49 C.F.R. Pts. 390-397	9-76.200
42 C.F.R. § 2	9-102.040	49 C.F.R. § 541	9-61.741
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2 U.S.C. §§ 167a-167g	9-4.112
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