

INTERNATIONAL MONEY LAUNDERING AND U.S. LAW: A NEED TO "KNOW-YOUR-PARTNER"

Marian Hagler*

I. INTRODUCTION

Every day, U.S. businesses enter into international transactions with new partners in the form of joint ventures, financings, investments, licensing, supply, purchase, and other arrangements. What do they know about these new partners? In some instances, these new partners may be well-known companies, which are publicly-traded and watched by professional analysts and rating agencies. In many instances, little may be known about them. They may be small or newly-established. They also may be located in new markets, where there is limited experience or expertise.

During negotiations, significant attention is paid to the merits of the business relationship itself (price, capability, compatibility, synergy, competitive advantage, etc.). Questions of reputation and integrity are more difficult and awkward to investigate. Extensive background checks and investigative "due diligence" can also be costly, disruptive and, ultimately, unhelpful in unearthing criminal activity or association and other questions of reputation, ethics, and business practice.

Clearly, transactions with organizations engaged in criminal activity bring harm to one's reputation. They may also result in serious civil and criminal liability for organizations and individuals subject to U.S. money laundering laws. These laws seek to punish persons who do business with criminals and thereby help them utilize the proceeds of their unlawful activity. The money laundering laws of the United States are known to be the toughest in the world and call for stiff penalties, including fines, confinement, and asset forfeiture.¹

The problem of "knowing your partner" is perhaps most acute in emerging markets. There, accurate and unbiased information is usually difficult to find. Corruption may be commonplace, and standard business practices may include some violations of local law. Moreover, if the banking system and financial services industries in the emerging

* Adjunct Professor, Georgetown University Law Center, and a partner of Coudert Brothers LLP, 2001-2004. Professor Hagler may be reached at haglerm@att.net. The author would like to acknowledge the assistance of Lina Braude, Associate, Coudert Brothers LLP, Washington, D.C., for her extensive assistance in preparing this article.

1. 18 U.S.C. § 1956 (a)(1)(B)(ii), (2)(B)(ii) (2004).

market are not adequately regulated or monitored, they may become cozy homes for the transfer and laundering of funds by organized criminals and terrorists.

Such concerns inspired certain provisions of the USA PATRIOT Act ("Patriot Act").² In addition to increasing surveillance authority for law enforcement and imposing new internal compliance measures for banks and other financial institutions, the Patriot Act also expanded the money laundering laws in three key respects that affect international business transactions. As more fully described below, the Patriot Act: (1) clarified that "foreign persons" are subject to civil asset seizures and forfeitures;³ (2) expanded the law to cover money laundering transactions made through foreign banks;⁴ and (3) extended the list of predicate offenses to include, most notably, any foreign corruption,⁵ whereas previously such corruption had to amount to a violation of the Foreign Corrupt Practices Act ("FCPA").⁶

U.S. money laundering laws are themselves broad and, as the discussion below will illustrate, lacking some technical coherency. Many key issues relating to their scope are undefined, lack guidance from case law, and rest on artificial distinctions. Breadth and ambiguity makes circumvention of these laws difficult, thereby facilitating the efforts of the Department of Justice ("DOJ") to use them to fight international organized crime and terrorist financing. Moreover, the same concepts that are embodied in U.S. law are also included, or slated for inclusion, in the laws of other countries.⁷ The U.S. government also has had some success in its effort to bring about greater international enforcement. These efforts, together with developments in money laundering case law, demonstrate that the range of activities captured by money laundering legislation is likely to grow, both in the U.S. and abroad. In particular, recently, U.S. case law has established that foreign tax evasion may form the basis of wire fraud, a predicate

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, P.L. 107-56 (Oct. 26, 2001).

3. See 18 U.S.C. § 1956(b)(2) (2004).

4. See *id.* § 1956(c)(6)(B) (extending the term "financial institution" to include any "foreign bank").

5. See *id.* § 1956(c)(7)(B)(iv) ("...an offense against a foreign nation involving... bribery of a public official, or the misappropriation, theft or embezzlement of public funds by or for the benefit of a public official").

6. See generally 15 U.S.C. § 78dd (2004).

7. See Council of Europe Convention, No. 141, on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, Nov. 8, 1990, available at <http://conventions.coe.int/Treaty/En/Treaties/html/141.htm> (last visited Mar. 25, 2004).

offense for purposes of money laundering.⁸ In addition, U.S. money laundering laws may reach a U.S. citizen who transfers funds between two other countries even if he or she commits the offense while located offshore, or a foreign citizen who orders the transfer of funds into or out of the United States while abroad.⁹ Accordingly, while present law is technical in nature, little comfort should be drawn from any perceived gaps or safe harbors that such technicalities may create. Rather, the breadth and ambiguity of the law create risks for legitimate business seeking to explore new markets and new opportunities with new partners.

This article seeks to draw attention to the importance of understanding and mitigating the risks associated with the broad sweep of U.S. money laundering laws for persons pursuing new business relationships, such as new ventures in emerging markets. This article first examines the technical aspects of U.S. money laundering laws in the context of international transactions, and then provides recommendations for measured due diligence and other steps that work to reduce exposure to them by complying with the law's implicit "know your partner" requirement.

For purposes of illustration, this article uses the example of a company organized or based in the United States (the "U.S. parent") contemplating a foreign project (the "international project") with a new partner located in an emerging market (the "new foreign partner"). The U.S. parent may participate directly or through a company that it controls in Europe (the "European subsidiary"). The officers, directors, and employees of the U.S. parent, the European subsidiary, and the new foreign parent involved in the international project (the "employees") will include U.S. citizens, resident aliens, and others.

II. ANALYSIS

Generally speaking, liability under U.S. money laundering laws attaches if (a) an offense that is recognized as a predicate offense for money laundering in the United States is committed, (b) the proceeds of such offense are used in a transaction, and (c) the defendant participated in the transaction knowing, or being willfully blind to the fact, that such proceeds were derived from unlawful activity.¹⁰ To some degree, the

8. See *infra* text accompanying notes 76–102.

9. See *infra* text accompanying notes 24, 52–57.

10. See generally OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES (2003); Daniel H. April and Angelo M. Grasso, *Money Laundering*, 38 AM. CRIM. L. REV. 839 (2002); Christopher Boran, *Money*

extent to which the defendant also intended, or knew that the perpetrator of the offense intended, to use the transaction to disguise and conceal the source of the proceeds will also be relevant. Almost all felonies committed wholly or partly in the United States for money or other commercially-useable resource (such as murder-for-hire, drug trafficking, larceny, bribery, wire fraud, etc.) are recognized as predicate offenses for the purposes of money laundering.

There are several statutes that prohibit money laundering and related offenses under Title 18 of the United States Code. This article will focus on Sections 1956 (money laundering) and 1957 ("money spending," i.e., monetary transactions in property derived from unlawful activity), which are similar in content and application. In addition, some transactions may also run afoul of Sections 2314 (transportation of stolen money), and 1962 ("RICO"). There are also statutes criminalizing conspiracy to commit money laundering (Section 1956(h)), and aiding and abetting any of the foregoing crimes (Section 2). To the extent the defendant also committed, facilitated, or otherwise was involved in the predicate offense itself (e.g. mail or wire fraud or an FCPA violation), a prosecution for money laundering may include these charges as well.

Most U.S. money laundering indictments are brought against the same individual who perpetrated the underlying (predicate) crime (e.g., the drug dealer who attempts to launder the proceeds of his crime). In addition, there is a significant body of cases brought against persons who, in some way, wittingly helped the perpetrator utilize, dispose of, or launder his proceeds (e.g., the bank, the courier, the merchant, or the lawyer). Applying this principle to the illustration, if the new foreign partner contributes ill-gotten assets to the international project, there is potential money laundering liability not only for him, but also for any other person (individual or corporate entity) participating in the international project, such as the U.S. parent, the European subsidiary, and the employees, depending on what they knew.

Extraterritorial Jurisdiction of U.S. Money Laundering Statutes

Because most of the activity concerning the international project is likely to be conducted outside the United States, it is important to consider first, to what extent may U.S. money laundering laws be applied extraterritorially to non-U.S. persons (e.g., the foreign

Laundering, 40 AM. CRIM. L. REV. 847 (2003); William G. Phelps, *Validity, Construction and Application of 18 U.S.C.A. 1956, which Criminalizes Money Laundering*, 121 A.L.R. FED. 525 (2004).

employees, the new foreign partner, and the international project company), or to conduct by U.S. persons (e.g., the U.S. employees, the U.S. parent, and the European subsidiary) occurring abroad?

Generally, U.S. money laundering laws may be applied extraterritorially to actions of U.S. persons abroad and to actions of non-U.S. persons undertaken inside, or partially inside, the United States.¹¹ However, the U.S. has faced criticism for the extension of its criminal prosecutions to activities occurring principally abroad. Prior to commencing grand jury investigations or returning an indictment based solely on extraterritorial jurisdiction, prosecutors must receive approval of the Asset Forfeiture and Money Laundering Section of the criminal division of the DOJ.¹² The prosecutorial decision includes weighing the seriousness of the predicate crime committed, the degree of a defendant's involvement, the effect on, or connection to, the United States, and the availability of evidence.

Although applied similarly, Sections 1956 and 1957 have certain technical distinctions creating some ambiguity with respect to their coverage. Specifically, extraterritorial jurisdiction for Section 1956 depends on whether the defendant is a "U.S. citizen", whether conduct occurs at least "in part" in the United States and whether over \$10,000 is involved:

There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of transactions involved funds or monetary instruments of a value exceeding \$10,000.¹³

By contrast, extraterritorial jurisdiction under § 1957 depends on whether the defendant falls within a broad, but technical definition of a "U.S. person":

that the offense under this section takes place outside the United States and [the special maritime and territorial jurisdiction of the United States], but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in

11. In this context, "U.S. persons" are generally, U.S. citizens and residents, and companies organized within the United States and their foreign subsidiaries.

12. OBERMAIER & MORVILLO, *supra* note 10 § 2A.04[1] (citing DOJ MANUAL § 9-105.300).

13. 18 U.S.C. § 1956(f) (2004).

paragraph (2)(D) of such section).¹⁴

Section 3077 of Title 18 (excluding paragraph (2)(D)) defines "United States person" as:

- (A) a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act;
- (B) an alien lawfully admitted for permanent residence in the United States as defined in section 101(a)(20) of the Immigration and Nationality Act;
- (C) any person within the United States; . . .
- (E) a sole proprietorship, partnership, company, or association composed principally of nationals or permanent resident aliens of the United States; and
- (F) a corporation organized under the laws of the United States, any State, the District of Columbia, or any territory or possession of the United States, and a foreign subsidiary of such corporation.¹⁵

The term "foreign subsidiary" is undefined by statute or relevant case law. Consistent with the broad sweep of Section 3077(2), the DOJ and the courts may apply the term as liberally as necessary to prevent circumvention with a focus on whether the U.S. corporation effectively controlled the activities of the foreign entity. Accordingly, in our example, the European subsidiary should qualify, and the international project company may qualify, as a "U.S. person" for purposes of establishing jurisdiction over their actions taken outside the United States. In addition, under Section 3077(2)(E), foreign companies may qualify as U.S. persons if "composed principally of" U.S. nationals or residents.¹⁶

These differences create at least three noteworthy points of distinction.

Transactional Amount

First, Sections 1956 and 1957 specify \$10,000, as a threshold

14. 18 U.S.C. § 1957(d) (2004).

15. *Id.* § 3077(2). "The term 'national of the United States' means: (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2004). "The term lawfully admitted for permanent residence means: the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." *Id.* § 1101(a)(20).

16. 18 U.S.C. § 3077(2)(E) (2004).

transactional amount, but Section 1957 lacks specific reference to the possibility of aggregating a series of transactions in order to reach such threshold amount, as is expressly permitted by Section 1956.¹⁷ Courts have applied the principle of lenity to find that Section 1957 requires each transaction to be greater than \$10,000.¹⁸ Accordingly, in prosecuting offenders who have structured their business arrangements as a series of transactions under the \$10,000 threshold, prosecutors may rely on jurisdiction under Section 1956, although the DOJ continues to believe that there may be exceptions to the non-aggregation rule under Section 1957.¹⁹

Applicability of Criminal Liability to Foreign Legal Entities and Organizations

Second, while Sections 1956 and 1957 apply domestically to "whoever" commits the offense, be it an individual, corporation, or other organization, the extraterritorial subsection of Section 1956 (subsection (f)), refers only to "United States citizen" and "non-United States citizen" as within its ambit.²⁰ It is not clear whether the use of these terms was intended to suggest that the extraterritorial jurisdiction of Section 1956 should apply only to individuals, as opposed to corporations or other organizations.²¹ By contrast, Section 1957(d)

17. See 18 U.S.C. § 1957(a)(2004).

18. *United States v. Jenkins*, 58 F.3d 611, 613 (11th Cir. 1995); *accord* *United States v. Brown*, 1998 U.S. App. LEXIS 12310 at 11 (4th Cir. 1998) (following *Jenkins*, but finding that a lump sum payment for several automobiles each of which was valued at less than \$10,000 qualified as a single transaction).

19. See GREDD ET AL., MONEY LAUNDERING, § 2A.03[3], citing DOJ MANUAL § 9-105A.000 at 281-82 (suggesting that if "several transactions are so closely related as to constitute phases or divisions of a single transaction, the property may be aggregated for purposes of charging a single violation of § 1957, [t]he purchase of an automobile in installments totaling over \$10,000 [being] an obvious example of this"). *Id.*

20. See *United States v. Peterson*, 1999 U.S. App. LEXIS 20336 (6th Cir. 1999), citing *United States v. Carter*, 311 F.2d 934, 941-42 (6th Cir. 1963) and *Continental Baking Co. v. United States*, 281 F.2d 137, 149 (6th Cir. 1960). "[A] corporation, through the conduct of its agents and employees, may be convicted of a crime, including a crime involving knowledge and [willfulness]. . . [i]f its officer's or agent's illegal conduct be related to and done within the course of his employment and have some connection with the furtherance of the business of such corporation." *Peterson*, 1999 U.S. App. LEXIS 20336, at **12.

21. The term "United States citizen" is not defined in section 1956(f), but is encountered elsewhere in the United States Code, in contexts often (but not always) referring only to individuals. See, e.g., 5 U.S.C. § 552a; 8 U.S.C. § 1101; 10 U.S.C. § 1060a(g)(2); 15 U.S.C. § 713c-3; but see, e.g., 49 U.S.C. § 40102(15) (defining "citizen of the United States" as including certain legal entities, for purposes of carriers of air transportation); 46 U.S.C. § 802 (defining "citizen" of the United States as including certain legal entities, for purposes of shipping). According to legislative history, the purpose of § 1956(f) is to ensure that extraterritorial applications are limited to significant cases in

makes no reference to "citizen," and, for purposes of civil liability, Section 1956 (b) clearly applies to any "person" including foreign banks.²²

Interestingly, research reveals no reported cases applying extraterritorial jurisdiction under Sections 1956(f) or 1957(d) other than to individuals. Prosecution of legal entities organized and operating abroad would appear to be problematic for a variety of reasons (e.g., the availability of evidence). However, there is no legislative history, precedent, or apparent rationale for limiting the extraterritorial application of U.S. money laundering laws to individuals.

Sufficiency of Conduct Occurring Only Partly in the United States

Third, Section 1956(f) requires that the conduct of a non-United States citizen occur at least "in part" in the United States.²³ This does not, however, mean that the defendant must have been physically present within U.S. borders at some point during the commission of the offense. In *United States v. Stein*, the district court found that a foreign citizen who causes or orders a transfer of proceeds from or to the United States by telephone or other means while abroad is deemed to have acted "in" the United States for purposes of Section 1956(f).²⁴ Similarly, with respect to civil liability, Section 1956(b)(2) focuses not

operating wholly abroad from U.S. laws. See generally *United States v. Stein*, 1994 U.S. Dist. LEXIS 8471 at 12-14 (E.D. La. 1994), citing S. Rep. No. 99-433 at 14; *Trujillo v. Banco Central del Ecuador*, 35 F.Supp. 2d 908 (S.D.Fl. 1998), citing S. Rep. No. 99-433, at 14. No mention is made of a desire to protect U.S. corporations from liability while operating abroad.

22. As a result of the Patriot Act, section 1956 now provides specifically for civil liability for foreign financial institutions and other "foreign persons" (see *infra* text accompanying notes 39-41 below). One may view this change in law as an effort by Congress either to close the apparent gap and, thus, reaffirming the applicability of section 1956 to foreign entities, or to clarify that foreign entities bear at least civil liability for their acts in violation of section 1956.

23. 18 U.S.C. § 1956(f) (2004).

24. *United States v. Stein*, No. 93-375-Sec. "N", 1994 U.S. Dist. LEXIS 8471, at *13-14 (E.D. La. 1994). "[S]ection 1956 was not intended to only apply when the defendant acts within the borders of this country. Rather it was intended to reach situations in which 'the transaction occurred in whole or in part in the United States,'" citing S. Rep. No. 99-433, at 14. "It is the entire transaction that forms the offense conduct, not merely its initiation or conclusion." *Id.* "If, as it is alleged in this case, a defendant, who never enters this country, initiates a transfer of funds from a place within the United States to place outside the United States, there will be extraterritorial jurisdiction, because a portion of the conduct occurred in this country." *Id.*; see also *United States v. Approximately \$25,829,681.80 in Funds*, No. 98 Civ. 2682, 1999 U.S. Dist. LEXIS 18499 (S.D.N.Y. 1999), *aff'd*, 2003 U.S. App. LEXIS 2994 (2d Cir. 2003) (following *Stein* and finding that wire transfers activated from abroad that caused a transfer of funds from the United States constitutes conduct "occurring in part in the United States" for purposes of § 1956(f)).

on whether any of defendant's "conduct" occurred in the United States, but rather whether any part of the "financial transaction" occurred in the United States.²⁵ Thus, a defendant may be convicted under Section 1956 when acting wholly abroad if he causes the transfer of funds or other property to or from the United States.

By contrast, Section 1957 focuses on whether the offense occurred "in" the United States (in which case, anyone is liable) or abroad (in which case, only "U.S. persons" are liable).²⁶ Again, no helpful case law on this point was found; therefore, what is meant by "in" the United States under Section 1957(d), as distinct from "in part" in the United States under Section 1957(f), is unclear. One might conclude that Stein's conduct would not be covered by Section 1957. Moreover, because Section 1957 requires the offense, arguably as a whole, to occur in the United States (as opposed to merely the conduct, constituting a component of the offense to occur at least partly in the United States), its application to non-U.S. persons with respect to conduct or a transaction occurring partly abroad may be more problematic.

Summary of Extraterritorial Jurisdiction

Based on the foregoing and despite certain limitations and uncertain distinctions, the extraterritorial jurisdiction of U.S. money laundering laws is potentially quite broad. Moreover, although heretofore relatively infrequently exercised, geopolitical mandates and circumstances are likely to inspire their greater use. A matrix of potential criminal liability is set forth as Table 1.

Table 1

DEFENDANT	PLACE OF CONDUCT	§ 1956 CRIMINAL LIABILITY?	§ 1957 CRIMINAL LIABILITY?
<i>An entity that is a "U.S. person," i.e., (1) an entity organized or operating within the United States, or (2) a foreign subsidiary of a corporation organized in the United States, or (3) an entity "composed principally of national or permanent resident aliens of the United States"</i>	in the United States	Yes	Yes
	partly in the United States	Unclear	Yes
	outside the United States	Unclear	Yes

25. 18 U.S.C. § 1956(b)(2).

26. 18 U.S.C. § 1957.

<i>any other entity or organization</i>	in the United States	Yes	Yes
	partly in the United States	Unclear	Unclear
	outside the United States	No	No
<i>an individual who is a U.S. citizen</i>	in the United States	Yes	Yes
	partly in the United States	Yes	Yes
	outside the United States	Yes	Yes
<i>an individual who is not a U.S. citizen but who is a resident alien or other U.S. person</i>	in the United States	Yes	Yes
	partly in the United States	Yes	Yes
	outside the United States	No	Yes
<i>an individual who is none of the above</i>	in the United States	Yes	Yes
	partly in the United States	Yes ²⁷	Unclear
	outside the United States	No	No

As Table 1 shows, in many instances, both Sections 1956 and 1957 capture extraterritorial conduct and, in some instances, where the applicability of Section 1956 extraterritorially is not available or unclear, Section 1957 is clearly applicable (e.g., conduct by entities constituting "U.S. persons" under Section 3077(2) of title 18, or conduct by resident aliens who are not U.S. citizens).²⁸ In short, the circumstances where there is clearly no liability under either statute are narrow:

27. See, e.g., *United States v. Tronson*, 2000 U.S. App. LEXIS 10786 at 5 (6th Cir. 2000) (holding that a money laundering conviction under section 1956 was proper against a foreign citizen defendant when it was shown that part of the conduct occurred in the United States); *United States v. Sadighi*, 1999 U.S. App. LEXIS 27994 (9th Cir. 1999) (holding that telephone calls to a co-conspirator U.S. citizen in the United States, as well as bank transfers from abroad to the United States was sufficient for extraterritorial jurisdiction over foreign citizen for conspiracy to commit money laundering under section 1956(h)).

28. 18 U.S.C. § 3077(2) (2004).

- A foreign entity that does not qualify as a "U.S. person" is not liable for conduct occurring *wholly abroad*.
- An individual who is neither a resident alien nor a citizen of the United States is not liable for conduct occurring *wholly abroad*.

At the same time, textual differences between Sections 1956 and 1957 create some uncertainty. Specifically,

- Extraterritorial liability under Section 1956 may apply only to individuals.²⁹
- Section 1957 does not clarify whether it applies to offenses occurring only "partly" in the United States.³⁰
- Section 1957 does not expressly permit aggregation of related transactions to reach the \$10,000 jurisdictional threshold.³¹
- Section 1957 only applies to transactions conducted through a financial institution.³²
- Section 1956 only applies to transactions involving "monetary instruments" and "funds."³³

These distinctions create the following unintended potential prosecutorial gaps:

- Prosecution of a foreign organization that is not a "U.S. person" for conduct occurring only partly in the United States;
- Prosecution of anyone (except a U.S. citizen) for an offense occurring wholly abroad and either (a) not involving a financial institution or (b) involving transactions less than \$10,000 each in value.
- Prosecution of a non-U.S. person for a transaction not involving monetary instruments or funds (e.g., a barter of goods) occurring only partly in the United States.

Although these and other nuances exist in the text of the law, one should be cautioned that they are not safe harbors, as there would appear to be no clear rationale, policy, or other basis for them.

29. See *supra* text accompanying notes 19--22.

30. See *supra* text accompanying notes 23--26.

31. See *supra* text accompanying notes 15--18.

32. See *infra* text accompanying notes 66--67.

33. See *supra* text accompanying note 13.

Penalties

Criminal Penalties

For each count of money laundering under Section 1956, the maximum penalties are significant – twenty years of confinement and a fine of \$500,000 or, if greater, up to twice the defendant's gross gain (or the victim's gross loss) if not unduly complicating the case.³⁴ Penalties under Section 1957 are similar – the maximum confinement period per count is ten years, and the same maximum fines apply.³⁵

Each instance of a defendant's participation in any transaction or transfer of tainted funds could constitute one count of money laundering, conspiracy to commit money laundering, or aiding and abetting money laundering. These counts could multiply quickly in an investment situation. By way of illustration, the U.S. parent or European subsidiary might participate in the initial investment by the new foreign partner through project and investment agreements. An employee might authorize or otherwise participate in the utilization of such funds in payments to third party contractors. Each transaction or other instance of participation could also trigger additional (non-multiplicitous) liability under other statutes. Thus, the penalties could add up, as numerous transactions and transfers occur.

Civil Penalties

A civil penalty of \$10,000 or the value of the funds involved (whichever is greater) may also be applied for each violation of Section 1956 or 1957.³⁶ In addition, the DOJ may commence a civil forfeiture proceeding against the illicit proceeds of a foreign legal entity involved in money laundering if such proceeds are in the United States.³⁷ In one such case, the assets of a Russian Bank (Sobinbank) were held in a civil forfeiture proceeding on the theory that Sobinbank was knowingly involved in a money laundering scheme in violation of Section 1956.³⁸ The Sobinbank case was apparently a rare instance of the DOJ proceeding against a foreign bank's correspondent account under a Section 1956 theory, and the first time it did so based on the predicate

34. 18 U.S.C. § 1956(a)(1)(B)(ii), (2)(B)(ii) (2004); *see also* 18 U.S.C. § 3571(d) (2004).

35. 18 U.S.C. § 1957(b)(2) (2004).

36. 18 U.S.C. § 1956(b)(1) (2004).

37. 18 U.S.C. § 981 (2004).

38. *United States v. \$15,270,885.69 Formerly on Deposit in Account No. 8900261137*, 2000 U.S. Dist. LEXIS 12602 (S.D.N.Y. 2000).

crime of wire fraud involving a scheme to defraud a foreign government of taxes.³⁹

In October 2001, Section 1956(b), providing a civil cause of action by the government against any person who commits a money laundering offense, was amended by Section 317 of the Patriot Act to give clearer long-arm jurisdiction over such foreign money launderers.⁴⁰ Section 1956(b) now permits the government to bring a civil suit against a foreign person, including a foreign bank, that committed a money laundering offense but could not be found in the United States. Further, the Section also provides that the court has jurisdiction if the money laundering offense occurred in part in the United States, or the foreign bank has a correspondent account in the United States.⁴¹

Specifically, Section 1956(b)(2) provides:

(2) Jurisdiction over foreign persons. For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and—

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.⁴²

Although the term "foreign person" is not defined, it clearly includes financial institutions. Accordingly, application to other foreign legal entities and organizations would appear contemplated (or, at least, the argument is stronger with respect to the term "foreign person" than the term "citizen" used in Section 1956(f)). In this respect, the activities of

39. See "Court Approves Use of Laundering Law to Attack Foreign Tax Evasion," *Money Laundering Alert*, Nov. 2000, at <http://www.moneylaundering.com/ArticleDisplay.aspx?id=1754> (requires subscription).

40. Patriot Act, *supra* note 2, § 317.

41. 18 U.S.C. § 1956(b)(2)(A), (C), as amended by Patriot Act, *supra* note 2, § 317.

42. 18 U.S.C. § 1956(b)(2) (2004) (emphasis added).

the European subsidiary, the international project company, and even foreign employees may be subject to civil penalty (even if they escape criminal liability under Section 1956(f)), if some aspect of the offending transaction occurred in the United States.

Elements of Offenses

Sections 1956 and 1957 of Title 18 of the United States Code prohibit various forms of money laundering. The potential offenses that are most relevant to business transactions with new partners are those offenses requiring only some form of knowledge as the requisite scienter.⁴³ These include

- Section 1956(a)(1)(B)(i) (“general laundering”),
- Section 1956(a)(2)(B)(i) (“cross-border money laundering”), and
- Section 1957(a) (“money spending”).

They are all similar in content, as shown in Table 2. There is considerable overlap between Sections 1956 and 1957, and indictments often include more than one money laundering offense and more than one theory of money laundering.

Table 2

Elements of Offense	General Money Laundering (§ 1956(a)(1)(B)(i))	Cross-Border Money Laundering (§ 1956(a)(2)(B)(i))	Money Spending (§ 1957(a))
1 Conduct	The defendant conducted or attempted to conduct	The defendant transmitted, transported or transferred, or attempted to transmit, transport, or transfer across the United States border	(similar to General Money Laundering) ⁴⁴
2 Transaction	a “financial transaction”	a “monetary instrument or funds”	a “monetary transaction”

43. Other forms of money laundering, not discussed in this article, focus on a defendant’s intent, on activity intended to evade federal reporting requirements, on the transportation of funds into and out of the United States, and on sting operations.

44. Section 1957 requires that the defendant “engages or attempts to engage in a monetary transaction.” 18 U.S.C. § 1957(a) (2004).

3 Criminal Proceeds	that "involves" the proceeds of "specified unlawful activity"	(same as General Money Laundering, arguably implied) ⁴⁵	(similar to General Money Laundering) ⁴⁶
4 Knowledge of Illegality	knowing that the funds were proceeds of "some form of unlawful activity"	(same as General Money Laundering)	(similar to General Money Laundering) ⁴⁷
5 Knowledge of Intent to Conceal	and knowing that the transaction was designed to "conceal or disguise the nature, the location, the source, the ownership or the	(same as General Money Laundering)	Not required

45. The requirement that the transaction actually involve proceeds of specified unlawful activity is generally viewed as implied. Section 1956(a)(2) requires either that the defendant acted "with the intent to promote the carrying on of specified unlawful activity" (subparagraph (A)) or that the defendant knew that the transfer was "designed in whole or in part . . . to conceal or disguise . . . the proceeds of specified unlawful activity" (subparagraph (B)(i)), subject to the exception that the latter knowledge test may be satisfied by a law enforcement sting operation. 18 U.S.C. § 1956(a)(2), (b)(i) (2004); *See also* OBERMAIER & MORVILLO, *supra* note 10, § 2A.02[2][d][ii] (2001) (noting that the DOJ recognizes that proof that the proceeds are from a specified unlawful activity is implicitly required, *citing* DOJ MANUAL § 9-105A.000 at 272). *But see id.* § 2A.02[2][d][i] (noting that because proof that the proceeds are from a specified unlawful activity is not expressly required, section 1956(a)(2) is available for sting operations, in addition to section 1956(a)(3)).

46. Section 1957 specifically requires that the monetary transaction be "in criminally derived property that is . . . derived from specified unlawful activity." 18 U.S.C. § 1957(a) (2004). Case law supports the view that this is similar to the criminal proceeds test under Section 1956(a). *See, e.g.,* *United States v. Savage*, 67 F.3d 1432 (9th Cir. 1995) (holding that "criminally derived property" under section 1957 is similar to "proceeds" under section 1956); *United States v. Cavin*, 38 F.3d 1299 (5th Cir. 1994) (holding that payments were proceeds of criminal activity is an essential elements of a section 1957(a) offense).

47. Section 1957 specifically requires that the defendant "knowingly" engaged or attempted to engage in a monetary transaction in criminally derived property, and defines "criminally derived property" as "property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2) (2004). Section 1957(c) further clarifies that the State need not show that the defendant "knew that the offense from which the criminally derived property was derived was specified unlawful activity." 18 U.S.C. § 1957(c) (2004). As with section 1956(a), this knowledge test focuses on the knowledge that the transaction involved proceeds of some form of unlawful activity. *See United States v. Hawkey*, 148 F.3d 920 (8th Cir. 1998).

	control of the proceeds ⁴⁸		
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In short, each statute is a slight variation on the same theme – the defendant in some way must participate in the transfer of assets that were the proceeds of a “specified unlawful activity,” knowing or believing that the assets were the proceeds of “some form of unlawful activity.” Section 1956 also requires that the defendant knew that the transfer was intended to conceal the source of the funds, while Section 1957 requires that the transaction be in excess of \$10,000. These elements and their differences are discussed in more detail below.

Conduct

Section 1956(a)(1) requires that a defendant “conducts or attempts to conduct” a transaction.⁴⁹ Similarly, and without apparent distinction, Section 1957 focuses on whether a defendant “engages or attempts to engage in” a transaction.⁵⁰ Section 1956(c)(2) defines “conduct” broadly as including “initiating, concluding, or participating in initiating, or concluding a transaction.”⁵¹ Thus, a defendant need not be a transferee or a recipient of the funds. Participation by the U.S. parent or the European subsidiary with the new foreign partner in the international project and the agreements forming the basis of the investment could constitute “conduct.” In addition, employees could bear liability for their involvement in effecting the transfer or use of tainted funds or assets.

In contrast to Sections 1956(a)(1) and 1957, Section 1956(a)(2) is limited to transfers and attempted transfers across a United States border. As a consequence, Section 1956(a)(2) sometimes is referred to as “international money laundering,” while the general money laundering statute, Section 1956(a)(1), is often referred to as “domestic money laundering.”⁵² However, these are misnomers. In actuality, Section 1956(a)(1) applies to generally to any money laundering, while Section 1956(a)(2) applies only to money laundering transactions that cross a U.S. border.

48. Alternatively, instead of knowledge of intent to conceal, the State may show that the defendant acted “with intent to promote the carrying on of the specified unlawful activity.” Compare 18 U.S.C. § 1956(a)(1)(B)(i) with 18 U.S.C. § 1956(a)(1)(A)(i).

49. 18 U.S.C. § 1956(a)(1) (2004).

50. 18 U.S.C. § 1957(a) (2004).

51. 18 U.S.C. § 1956(c)(2) (2004).

52. See, e.g., OBERMAIER & MORVILLO, *supra* note 10, § 2A.02 (2001).

This distinction was made clear in *United States v. Tarkoff*, where Section 1956(a)(1) was applied successfully to a transaction occurring wholly abroad (i.e., a transfer of funds from Curacao to Israel arranged by the defendant while in Israel).⁵³ The defendant attempted to rely on *United States v. Kramer*, where the court refused to apply Section 1956(a)(2) to a transfer of money between Switzerland and Luxembourg, since Section 1956(a)(2) required that the transfer cross a U.S. border.⁵⁴ In *Tarkoff*, the Eleventh Circuit clarified the difference between the two statutes:

Kramer does not control in this case, however, because Tarkoff was convicted under a different subsection of the money laundering statute (§ 1956(a)(1)(B)(i)) than the one at issue in *Kramer*. The difference between the two subsections is that violation of the subsection at issue in *Kramer* specifically requires a transfer of funds to or from the United States, see 18 U.S.C. § 1956(a)(2)(B)(i), whereas a violation of the subsection under which Tarkoff was convicted can occur so long as the defendant was involved in a "financial transaction."⁵⁵

Apparently, *Tarkoff* (decided in February 2001) is the first case to apply the United States money laundering statutes to transactions occurring wholly abroad (and, indeed, the Eleventh Circuit relies on no precedent).⁵⁶ It signals that the so-called "domestic money laundering" statute (§ 1956(a)(1)) is available for crimes committed anywhere, whether in the United States, offshore, or across a U.S. border. By doing so, the *Tarkoff* decision would appear to have rendered Section 1956(a)(2) somewhat superfluous.⁵⁷

Although not stated, it is possible that the *Tarkoff* court was influenced by the extent of contact with the United States: the predicate crime giving rise to money laundering was domestic (mail fraud based

53. *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001).

54. *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996).

55. *Tarkoff*, 242 F.3d at 994, n.2.

56. See Ian M. Comisky & Matthew D. Lee, *Targeting International Money Laundering (Part 2): A Jurisdictional Reach Too Far*, 12 J. INT'L TAX 18 (2001) (commenting that until *Tarkoff*, each case money laundering case involved a "substantial domestic nexus").

57. Section 1956(a)(1) has been used in other cases involving the transfer of funds to or from the United States. See, e.g., *United States v. Quintero*, 165 F.3d 831 (11th Cir.), cert. denied, 528 U.S. 963 (1999) (noting that count twenty-five was an indictment under section 1956(a)(1), but involved the transfer of funds between the United States and Switzerland); see also *United States v. Garcia*, 37 F.3d 1359 (9th Cir. 1994) (charging defendant under both sections 1956(a)(1) and (a)(2) for transfer of illegal proceeds from a Swiss bank to a California bank). Recall, though, as mentioned *supra* note 45, that section 1956(a)(2) may be useful to prosecutors in that it does not explicitly require proof that the funds were proceeds of a specified unlawful activity if requisite scienter may be shown otherwise.

on Medicare fraud). Originally, the funds were transferred to Curacao from Miami; Tarkoff was a United States citizen and a lawyer, who had lied to the DOJ about the existence of the funds, and flew from the United States to Israel to help his client make the transfer from Curacao to Israel (where Tarkoff himself also took a portion in payment).⁵⁸

It is unclear, therefore, whether a court would be equally eager to find jurisdiction if the case involved a less odious defendant, or a non-U.S. citizen whose conduct only partly occurred in the United States. Nonetheless, *Tarkoff* demonstrates the willingness of the DOJ and the courts to prosecute cases on the fringe of the statute – even if such citizens are neither the transferor nor the direct or primary recipient of the funds.

Transaction

Further evidence that the cross-border money laundering statute is now subsumed by the general money laundering statute is the fact that the term ‘monetary instrument’ means: (i) coin or currency of the United States or of any other country, travelers’ checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery.⁵⁹ By contrast, “financial transaction” is broadly defined in Section 1956(c)(4) to include monetary instruments and other types of property as well.⁶⁰

(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.⁶¹

“Transaction” is defined broadly in Section 1956(c)(3) and includes a disposition by any means.⁶² The requirement that the transaction “affects interstate or foreign commerce” is a fairly low threshold.⁶³ In *Tarkoff*, the court found “foreign commerce” to be affected, in part

58. See *Tarkoff*, 242 F.3d at 992.

59. 18 U.S.C. § 1956(c)(5) (2004).

60. See *United States v. Carr*, 25 F.3d 1194, 1204 (3d Cir. 1994) (noting that this is the “only distinction” between sections 1956(a)(1) and 1956(a)(2)).

61. 18 U.S.C. § 1956(c)(4) (2004).

62. *Id.* § 1956(c)(3).

63. *Id.*

because the Israeli bank had to make calls to a bank in the United States in order to arrange transfer from Curacao.⁶⁴ Finally, the term "financial institution" is also broadly defined to include not only banks and brokerages, but also travel agencies, car dealers, the U.S. Postal Service, and any other institution as the Secretary of the Treasury may determine.⁶⁵

Thus, it is not possible to escape liability under Section 1956(a)(1) merely by using a foreign bank or conducting the transaction wholly outside the United States or in non-U.S. currency or using certain non-monetary property (e.g., vehicles or real estate). The transfer or receipt of any funds, monetary instrument, real estate, vehicle, vessel, or aircraft in a transaction involving criminal proceeds qualifies.

Section 1957 uses the term "monetary transaction," which is also narrower than "financial transaction." "Monetary transaction" is defined as:

the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) *by, through, or to a financial institution* (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution.⁶⁶

In other words, a "monetary transaction" is a "financial transaction" that moves "by, through or to a financial institution."

Accordingly, prosecution under Section 1957 is available for transactions not involving a transfer through a bank or any other financial institution. As discussed above, this limitation could, in theory, preclude prosecution of anyone other than a U.S. citizen for such transaction occurring wholly outside the United States.⁶⁷

Criminal Proceeds

The crime of money laundering under Section 1956 or 1957 requires that the financial transaction "involve" the proceeds of a

64. *Tarkoff*, 242 F.2d at 995.

65. See 18 U.S.C. § 1956(c)(6) (2004) (discussing the incorporation of the definition of "financial institution" from 31 U.S.C. § 5312(a)(2), which in turn incorporates 31 C.F.R. § 103.11(n)).

66. 18 U.S.C. § 1957(f) (2004) (emphasis added).

67. See *supra* text accompanying notes 31–32.

“specified unlawful activity” (i.e., the predicate crime).⁶⁸ The term “specified unlawful activity” is defined broadly in Section 1956(c)(7) to include numerous offenses, including drug dealing, murder-for-hire, arson, kidnapping, foreign bribery and FCPA violations, smuggling, counterfeiting, and various forms of fraud.⁶⁹

The requirements for a “financial transaction” (discussed above) should not be confused with the requirements that the transaction involve criminal proceeds. Funds, monetary instruments, real property, vehicles, vessels, or aircraft must be involved for the transaction to qualify as a “financial transaction,” but need not themselves be criminally derived, if other items involved in the transaction (e.g., the items obtained in exchange for such funds) constitute proceeds of specified unlawful activity. In other words, a payment using legitimate funds made to, from, or within the United States may constitute money laundering if made in payment for weapons smuggled into a foreign country.⁷⁰ In this case, the weapons themselves would be viewed as the proceeds of specified unlawful activity (foreign smuggling) that are involved in a transaction that also involves a transfer of funds and, therefore, qualifies as a “financial transaction.”

Of particular concern to dealings in emerging markets is the potential that the assets of the new foreign partner that will be used in the international project may have derived from criminal activities, including activities which, in such a market, are commonplace and/or crimes that are not strictly enforced, but which constitute predicate offenses for purposes of U.S. money laundering nevertheless. Such potential offenses include smuggling, export control violations, corruption, tax evasion, and other forms of fraud.⁷¹ Recent successes in applying the statute to the proceeds of foreign bribery and foreign tax evasion, discussed next, have enhanced such concerns.

68. See *supra* text accompanying notes 45–46. This requirement is not explicit for Cross-Border Money Laundering, but is viewed as implicit. See note 46.

69. 18 U.S.C. § 1956(c)(7) (2004).

70. 18 U.S.C. § 1956(c)(7)(V) (2004). “The term specified unlawful activity means. . .with respect to any financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving. . .smuggling or export control violations involving. . .an item controlled on the United States Munitions List.” *Id.*

71. *Id.* § 1956(c)(7)(B). Foreign smuggling (i.e., smuggling in violation of the laws of another state) is a predicate offense to money laundering under sections 1956 and 1957 if the financial transaction constituting the money laundering occurs “in whole or in part in the United States.” *Id.*

Foreign Bribery

Foreign bribery became a predicate offense to money laundering with the addition, in 1992, of "a felony violation of the Foreign Corrupt Practices Act" to the list of predicate offenses for money laundering.⁷² Until 1998, an FCPA violation required the use of the mails or other means of interstate commerce. Despite its implicit breadth, the requirement seemed to invite circumvention through the careful orchestration of payment schemes offshore. In 1998, the FCPA was amended to expand its reach to conduct of U.S. persons occurring wholly abroad and to reach the actions of other persons taking place in the United States (regardless of whether the "means of interstate commerce" are used).⁷³ However, the FCPA was (and remains) limited to the specific conduct proscribed by its terms, which are largely independent of considerations of the anti-bribery laws of the foreign official's home country.⁷⁴ The Patriot Act expanded the foreign bribery predicate for money laundering beyond the limits of the FCPA, by amending Section 1956(c) to add the following to the list of "specified unlawful activities":

(B) with respect to any financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving— . . . (iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official. . . .⁷⁵

Unlike the FCPA, there is no requirement that the act of bribery be

72. *Id.* § 1956(c)(7)(D).

73. 15 U.S.C.A. §§ 78dd-1(g), 78dd-2(a), (i), & 78dd-3(a) (West 2004).

74. *Id.* § 78dd-1(a). Specifically, the FCPA proscribes any person within its scope (including in the case of a company, its officers, directors, employees, agents and stockholders acting on its behalf), from corruptly making "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift or promise to give, or authorization of the giving of anything of value to (i) any foreign official, political party, or candidate for foreign public office for purposes of (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality, in order to assist such [entity] in obtaining or retaining business for or with, or directing business to, any person, subject to certain affirmative defenses and other limitations." *Id.* The FCPA does not apply, however, to conduct specifically authorized by the home country law of the foreign official. *Id.* § 78dd-(b).

75. The legislative history of the Patriot Act makes clear that this language is intended to go beyond the FCPA and cover any foreign bribery. *See, e.g.*, Congressional Record, October 25, 2001 (Senate), S10990-S11060, at S11034. "For the first time, foreign corruption offenses such as bribery and misappropriation of funds by a public official will qualify as predicate offenses that can trigger a U.S. money laundering prosecution." *Id.*

committed either by a U.S. person or within the territory of the United States. Moreover, the new provision covers other forms of corruption (such as embezzlement).

This predicate does not apply, however, to transactions occurring wholly abroad, even if within the extraterritorial scope of Section 1956 and 1957. In other words, the broad foreign bribery predicate may not be used to prosecute financial transactions occurring wholly abroad, even if by U.S. persons, unless the foreign bribery qualifies as a violation of the FCPA. This exception is quite narrow. As *Stein* instructs, a transfer of funds across the U.S. border is considered to be "in part in the United States" even if the defendant ordered such transfer without setting foot in the United States.⁷⁶

As an illustration of what is now covered, suppose the new foreign partner bribed a public official in its home country to obtain a government license, concession, or property, which was then transferred to the international project. This offense would not be covered by the FCPA, unless the act of bribery (or related acts) had been conducted in the United States or the new foreign partner had securities listed on a U.S. exchange. This offense is, however, sufficient for the new foreign bribery provision of Section 1956 introduced by the Patriot Act. As a result, anyone having the requisite knowledge of the bribe (discussed below) and "conducting" or "engaged in" such transfer may be subject to prosecution. Depending on how the transaction was pursued and structured, potential defendants may include not only the new foreign partner, the international project company, and the foreign employees (if the relevant acts occurred at least in part in the United States), but also the U.S. parent, the European subsidiary, and the U.S. employees.

Foreign Tax Evasion

Another major concern for U.S. companies doing business with new partners in emerging markets relates to commonplace practices and structures that may be employed by such partners in reaction to home country taxes. Such practices may grow out of irrational tax regimes applying high rates of tax, incomplete regulation, and limited or selective means of domestic enforcement. In recent years, numerous cases have reviewed the question as to whether evasion of foreign tax constitutes a scheme to defraud for purposes of mail or wire fraud under U.S. laws and, therefore, whether such foreign tax evasion may form a

76. *Stein*, No. 93-375-Sec. "N", 1994 U.S. Dist. LEXIS 8471 (E.D. La. 1994). See *supra* text accompanying note 24.

predicate offense for money laundering.⁷⁷

"Wire fraud" (or its complement, mail fraud) is often a predicate crime for money laundering.⁷⁸ The elements of wire (or mail) fraud are two-fold: (a) the existence of a scheme to defraud, and (b) the use of the "mails" or the "wires" for the purpose of executing the scheme.⁷⁹ The term "wires" is construed broadly to include any telephone or electronic communication between the U.S. states or into or out of the U.S., and one case has gone so far as to include wire communications between two foreign cities (Montreal and Nassau) when made at the request of a U.S. citizen located in the United States.⁸⁰ The wire fraud statute also has been used to prosecute fraud that was perpetrated solely abroad (in Croatia).⁸¹ Telephone communication by means other than a "wire" is even covered.⁸²

Whether foreign tax evasion may constitute mail or wire fraud is a delicate question, as it implicates the common law "Revenue Rule," which generally prohibits the use of U.S. courts to enforce foreign tax laws.⁸³ Notwithstanding some resistance based on the Revenue Rule, courts have generally accepted the notion that foreign tax evasion is within the ambit of mail or wire fraud and, therefore, is an appropriate predicate for money laundering. As discussed in more detail below, while a 1996 First Circuit case takes the opposite view,⁸⁴ more recent cases in the Second and Fourth Circuits are supportive.⁸⁵ All of the cases involve smuggling of tobacco or alcohol to Canada in violation of Canadian tax and excise laws. Although these cases involve defendants

77. 18 U.S.C. §§ 1341, 1343 (2004).

78. See, e.g., *Cleveland v. United States*, 531 U.S. 12 (2000) (discussing mail fraud); *United States v. Morelli*, 169 F.3d 798, 806-07 (3d Cir. 1999), cert. denied, 528 U.S. 820 (1999) (discussing wire fraud); *United States v. Smith*, 44 F.3d 1259 (4th Cir. 1995) (discussing wire fraud); *United States v. Taylor*, 984 F.2d 298 (9th Cir. 1993) (discussing wire fraud).

79. See 18 U.S.C. §§ 1341, 1343 (2004).

80. See *United States v. Goldberg*, 830 F.2d 459, 464 (3d Cir. 1997) (one judge dissenting).

81. See *United States v. Kim*, 246 F.3d 186 (2d Cir. 2001). "There would seem to be no logical reason for holding that Congress intended to punish those who cause the violation of a law regulating and protecting foreign commerce only when they act within the borders of the United States or that Congress is powerless to protect foreign commerce and those who engage in foreign commerce from intentionally injurious acts, simply because those acts occur outside our borders" (citations omitted). *Id.* at 189.

82. See *United States v. Foley*, 683 F.2d 273, 280 (8th Cir. 1982).

83. See Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUSTON J. INT'L L. 265, 268-71 (2000).

84. See *infra* note 86.

85. See *infra* notes 87-100.

who themselves evaded taxes, they are instructive to potential liability for business partners of foreign tax evaders.

In 1996, the First Circuit Court of Appeals held in *United States v. Boots* that foreign tax and custom frauds are not schemes to defraud within the meaning of the wire fraud statute.⁸⁶ In reviewing a smuggling scheme involving transportation of tobacco from Maine to Canada, the court applied the Revenue Rule and reversed the wire fraud conviction.⁸⁷

In 1997, the Second Circuit Court of Appeals criticized *Boots* in *United States v. Trapilo*, stating "that a scheme to defraud the Canadian government of tax revenue is cognizable under the federal wire fraud statute."⁸⁸ As in *Boots*, the *Trapilo* case involves several defendants charged in connection with alleged smuggling of tobacco and liquor products to Canada across an Indian reservation in New York State.⁸⁹ In addition, the *Trapilo* opinion addressed money laundering charges with wire fraud as a predicate offense.⁹⁰ The Second Circuit focused on the plain language of the statute, and found that the prohibited conduct is a "scheme to defraud" utilizing the wires, regardless of the identity and location of the victim or the ultimate success of the scheme in violating Canadian law.⁹¹ By shifting the focus of the inquiry from the need to find an actual violation of Canadian law to a determination of the mere existence of a scheme to do so, the court relieved itself of the obligation to pass judgment on matters of Canadian law, with the result that the Revenue Rule was not implicated and the defendant's conduct was amenable to action under Section 1343.⁹² The court cited a number of cases that focused on the intent to defraud under United States laws, and defendants' convictions were upheld regardless of whether the

86. *United States v. Boots*, 80 F.3d 580, 588-89 (1st Cir. 1996), cert. denied 519 U.S. 905 (1996).

87. *Id.*

88. *United States v. Trapilo*, 130 F.3d 547, 553 (2d Cir. 1997), cert. denied 525 U.S. 812 (1998).

89. *Trapilo*, 130 F.3d at 549.

90. *Id.*

91. *Trapilo*, 130 F.3d at 553. "The simple fact that the scheme to defraud involves a foreign sovereign's revenue laws does not draw our inquiry into forbidden waters reserved exclusively to the legislative and the executive branches of our government. We concern ourselves only with what has been expressly forbidden by statute—the use of the wires in the scheme to defraud. Whether our decision today indirectly assists our Canadian neighbors in keeping smugglers at bay or assists them in the collection of taxes, is not our Court's concern. . . Our goal is simply to vindicate the intended purpose of the statute, that is, 'to prevent the use of [our telecommunications systems] in furtherance of fraudulent enterprises.'" *Id.*

92. *Trapilo*, 130 F. 3d at 552.

attempt to defraud was successful.⁹³ The court further cited cases in which wire fraud convictions were upheld in schemes to defraud foreign victims.⁹⁴ The Second Circuit mentioned the *Boots* analysis of the revenue ruling, but did not provide textual analysis on this point of the First Circuit's decision.⁹⁵ In addition, the widely-reported Bank of New York case involving Russian funds resulted in the filing of indictments against bank employees in February 2000 for money laundering predicated on wire fraud, alleging that the defendants engaged in a scheme to defraud the Russian Government of tax revenue.⁹⁶

More recently, on July 18, 2003, the Court of Appeals for the Fourth Circuit in *United States v. Pasquantino*, upon rehearing *en banc* rejected *Boots* and followed *Trapilo*.⁹⁷ *Pasquantino* involved a similar fact pattern, where several defendants were involved in the smuggling of alcohol to Canada in violation of Canadian tax and excise laws and were charged with wire fraud.⁹⁸ The Court in *Pasquantino* criticized *Boots* and rejected the argument that convictions for wire fraud would be equivalent to enforcing the tax laws of Canada in violation of the revenue rule. It stated that:

93. See *id.* In each of these cited cases, the object of the scheme to defraud was a clear violation of United States law. *Trapilo*, 130 F.3d at 552. The *Trapilo* court did not directly address the issue raised in *Boots* of determining whether the act committed as part of the alleged scheme was illegal under the law of a foreign country. *Id.* The cases cited in *Trapilo* include: *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (upholding convictions of mail and wire fraud notwithstanding that the prosecution failed to prove taxes were actually due because the court focused on the scheme, and not its success); *United States v. DeFiore*, 720 F.2d 757, 762 (2d Cir. 1983) (holding that the use of wires in furtherance of scheme to defraud New York of cigarette taxes falls within the federal wire fraud statute).

94. See *Trapilo*, 130 F.3d at 552, citing *United States v. Gilboe*, 684 F.2d 235 (2d Cir. 1982) (involving a scheme which defrauded a corporation owned by the People's Republic of China by fraudulent representation that non-existent ships would be available to transport grain) and *United States v. Goldberg*, 830 F.2d 459 (3d Cir. 1987) (involving wire transfers defrauding Canadians after stolen property passed from the United States to Canada).

95. *Trapilo*, 130 F.3d at 550, n. 4 (quoting the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483, REPORTERS NOTE at 613 (1987) that the rationale for not enforcing tax judgments is largely obsolete).

96. *United States v. Berlin, et al.*, 99 Cr. 914 (SWK). See *United States v. \$15,270,885.69 Formerly on Deposit in Account No. 89000261137*, 2000 U.S. Dist. LEXIS 12602 (S.D.N.Y. 2000) (discussing the indictment in an ensuing forfeiture proceeding). The defendants ended up pleading guilty to conspiracy charges in exchange for their cooperation. *Id.* See generally Larry Neumeister, *Ex-Bank of NY Exec Pleads Guilty*, ASSOCIATED PRESS, Feb. 16, 2000, available at 2000 WL 14320753.

97. *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (affirming *Boots* and holding that "a scheme to defraud a foreign government of tax revenues is not cognizable under the wire fraud statute." *Id.* at 295.

98. *Id.* at 292.

In making this argument, the Defendants, and the First Circuit in *Boots* for that matter, miss the critical point that prosecution for violation of the federal wire statute, even when the subject of the wire fraud scheme involved is certain tax revenue due a foreign sovereign, does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant. Neither does such prosecution enforce the revenue laws of the foreign sovereign involved. Rather, such prosecution seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our nation's interstate wire communications systems from being used in furtherance of criminal fraudulent enterprises.⁹⁹

The principles articulated in *Trapilo* and *Pasquantino* were echoed again in 2004 in *United States v. Fountain*.¹⁰⁰

In short, the *Trapilo*, *Fountain*, and *Pasquantino* cases establish a basis for concluding that if the new foreign partner contributes funds to the international project that are the proceeds of foreign tax evasion, all participants in the transaction and future transactions utilizing those same funds may be held liable if the new foreign partner utilized the U.S. mails or wires (broadly defined) in perpetrating tax evasion and if the participants acted with the requisite knowledge of unlawful activity.

The U.S. money laundering laws do not require a conviction of the predicate offense, but rather only evidence (even circumstantial evidence) that the transaction involves proceeds that derive from it.¹⁰¹ For example, a case may be built around the direct links between the unlawful activity of the new foreign partner and the assets contributed to the international project, such as the channeling of money from a concealed offshore account to the international project. In other respects, a prosecutor may attempt to rely on evidence that the new foreign partner was engaged in systematic tax evasion.

Moreover, the courts have held that, due to the fungibility of money, it is sufficient to prove that funds came from an account in which proceeds were commingled with other funds.¹⁰² This commingling rule has significant implications for dealings with new business partners. Once the tainted funds of the new foreign partner are commingled with clean funds earned by or contributed to the

99. *Pasquantino*, 336 F.3d at 299-300.

100. *Fountain v. United States*, 2004 U.S. App. LEXIS 1117 (2d Cir. 2004) (involving the same Canadian tax evasion scheme as *Trapilo*).

101. See generally the discussion of the evidentiary requirements in Chapter 2A; GREDD ET AL., MONEY LAUNDERING § 2A.02[1], at 2A-24.

102. *United States v. Garcia*, 37 F.3d 1359, 1365 (9th Cir. 1994).

international project company, all transactions involving the international project company's funds may be viewed as transactions involving the proceeds of specified unlawful activity.

Knowledge of Illegality

The foregoing analysis illustrates the breadth of potential liability for any person involved in the transaction that itself involves the tainted funds or other proceeds of specified unlawful activity. For criminal liability to attach, however, the defendant must have participated with requisite knowledge as discussed in this and subsequent sections. The knowledge elements are vital to mitigating liability.

U.S. money laundering laws require knowledge that the funds represent proceeds from an unlawful activity (not specifically a "specified unlawful activity," as described above). The statute defines this to mean: "the person knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal or foreign law . . ."¹⁰³ Foreign tax evasion, bribery, and other offenses may be considered "felonies" for this purpose if they are punishable by confinement of more than one year.¹⁰⁴ A defendant need not know that the crimes are indeed felonies.¹⁰⁵ Moreover, a defendant need not know the specific crimes from which the funds derive.¹⁰⁶

For corporate defendants, knowledge may be inferred, under the principle of "collective knowledge," from the totality of information learned by employees in the course of their employment.¹⁰⁷ The

103. 18 U.S.C. § 1956(c)(1) (2004) (emphasis added).

104. See U.S.S.G. § 2L1.2, 18 U.S.C. § 2L1.2 (2004) (defining a "felony" for purposes of sentencing); see, e.g., Russian Criminal Code, art. 199 (providing that tax evasion is punishable by confinement for up to 5 years); see *id.*, art. 193 (providing that capital flight is punishable by confinement for up to 3 years); see *id.*, art. 290 (providing that payment of a bribe is punishable by confinement for up to 5 years).

105. *United States v. Hill*, 167 F.3d 1055, 1066–68 (6th Cir.), *cert. denied*, 528 U.S. 827 (1999) (citing legislative history, rejecting the "I thought it was only a misdemeanor" defense in a case involving the laundering of gambling proceeds).

106. *United States v. Reiss*, 186 F.3d 149, 154 (2d Cir. 1999) (finding defendant guilty of money laundering though he did not know the specific criminal source of the funds); *United States v. Hawkey*, 148 F.3d 920, 925 (8th Cir. 1998); *United States v. Bornfield*, 145 F.3d 1123, 1132 (10th Cir. 1998) (holding in each case that the defendant only needs to know that property is "criminally derived" and not the specific criminal activity).

107. *United States v. Bank of New England, N.A.*, 821 F.2d 844, 855 (1st Cir. 1987) (finding proper an instruction to the jury that "the knowledge of [each] individual employee acting within the scope of their employment is imputed to the bank" in a case involving failure by bank to report withdrawals in excess of \$10,000); *United States v. Penagaricano-Soler*, 911 F.2d 833, 843 (1st Cir. 1990); see also, Tania Brief and Terrell McSweeney,

principle of "collective knowledge" effectively imposes upon a corporation (be it the U.S. parent, the European subsidiary, or the international project company) a duty to carefully collect and evaluate the totality of information and rumors learned by its employees about the new foreign partner's activities and sources of funds.

In addition, U.S. courts repeatedly have found circumstantial evidence sufficient to prove a defendant's subjective knowledge of the unlawful source of funds (e.g., when a defendant knew that the provider of the funds engaged in criminal activity).¹⁰⁸ While it is clear that showing a defendant "should have known" about the illegal source or acted in "reckless disregard" of same is insufficient, courts also have found knowledge to exist where a defendant was "willfully blind."¹⁰⁹ Simply put, willful blindness is deliberate ignorance -- the sense that "I do not want to know about this" and ignoring or not investigating certain "flags of suspicion."¹¹⁰ Under one formulation, a showing of willful blindness of an operative fact will suffice if: "the defendant was aware of a high probability of the existence of the fact, yet deliberately avoided learning whether the fact existed, with the conscious purpose of evading criminal liability, unless the defendant genuinely believed that the fact did not exist."¹¹¹

Corporate Criminal Liability, 40 AM. CRIM. L. REV. 337, 347 (2003). "The 'collective knowledge' doctrine imputes to a corporation the sum knowledge of all or some of its employees—aggregating individual employee's knowledge for the purpose of creating the necessary guilty intent for the corporation. Thus, a corporation may be liable even if there is no single employee at fault. In this way, the collective knowledge doctrine prevents corporations from evading liability by compartmentalizing and dividing employee duties." *Id.* [footnotes omitted].

108. *United States v. Heaps*, 39 F.3d 479, 484 (4th Cir. 1994) (finding circumstantial evidence that defendant should have known that the money wired to her was drug money because the defendant knew that the party wiring her money was a drug dealer); *United States v. Prince*, 214 F.3d 740, 760 (6th Cir. 2000) (holding that circumstantial evidence may be used to establish defendant's knowledge); *United States v. Smith*, 223 F.3d 554, 577 (7th Cir. 2000), *United States v. Wynn*, 61 F.3d 921, 926 (D.C. Cir. 1995), *United States v. Macko*, 994 F.2d 1526, 1533 (11th Cir. 1993), *United States v. Isabel*, 945 F.2d 1193, 1202 (1st Cir. 1991) (holding in each case that circumstantial evidence was sufficient to support a conviction).

109. See *United States v. Bader*, 956 F.2d 708, 710 (7th Cir. 1992); see also S. Rep. No. 99-433, at 6-8 (1986).

110. See *United States v. Smith*, 46 F.3d 1223, 1237 (1st Cir. 1999) (finding that the defendant was willfully blind when he left the room during a discussion of the scheme saying, "I don't want to hear this"); *United States v. Coviello*, 225 F.3d 54, 70 (1st Cir. 2000), *cert. denied*, 532 U.S. 1102 (2001).

111. *United States v. Ebert*, 178 F.3d 1287, *32-33 (4th Cir. 1999); see Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 Tex. L. Rev. 1351, 1413-18 (1992); cf., e.g., *United States v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996); *United States v. Cunningham*, 83 F.3d 218, 221 (8th Cir. 1996); *United States v. Whittington*, 26

This doctrine allows a jury to impute knowledge to a defendant who strongly suspects (but does not know for sure) the existence of the operative fact that makes his conduct unlawful and deliberately closes his eyes to the existence of that fact in an attempt to avoid criminal liability. Knowledge of "rumors" about potential criminal activity or associations with criminals and a failure to investigate them, may constitute willful blindness.¹¹² The doctrine of willful blindness applies equally to corporate defendants.¹¹³

Accordingly, knowledge of the illegal source of the new foreign partner's contributions to the international project may be inferred if there is sufficient circumstantial evidence that a defendant knew of such illegal source or if such defendant is found to have ignored and failed to investigate "red flags" or rumors, or knew that the new foreign partner engaged in criminal activity. Therefore, any information that comes to the U.S. parent, the European subsidiary, the international project company, or any of the employees or agents regarding potential tax evasion, bribery or other illegal conduct of the new foreign partner or their principals, associations with organized crime figures or with potentially corrupt government officials, should be promptly investigated.

Knowledge of Intent to Conceal

The final element in the analysis under Section 1956 is whether a defendant knew "that the transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."¹¹⁴ As noted in Table 2 above, this element is not required for violations of Section 1957. To satisfy this element, a defendant need not intend the concealment or disguise; he need only know that this was

F.3d 456, 461-62 (4th Cir. 1993); *United States v. Fingado*, 934 F.2d 1163, 1167 (10th Cir. 1991); *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990); *United States v. Mang Sun Wong*, 884 F.2d 1537, 1543 (2d Cir. 1989); *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985); *United States v. Restrepo-Granda*, 575 F.2d 524, 528 n.2 (5th Cir. 1978).

112. *United States v. Antzoulatos*, 962 F.2d 720, 727 (7th Cir. 1992) (finding that the defendant turned a blind eye to rumors of a friend's involvement with drug sales and close relationship with drug dealers).

113. *Brief & McSweeney*, *supra* note 107. "Corporations can be criminally liable for deliberately disregarding criminal activity. The 'willful blindness' doctrine is usually applied to situations where a corporate agent became suspicious of a criminal violation, but deliberately took no action to mitigate or investigate further in order to avoid culpability." *Id.* [footnotes omitted].

114. 18 U.S.C. § 1956(a)(1)(B)(i) (2004).

the intention of the perpetrator of the underlying crime. Such knowledge may also be proven circumstantially or from "willful blindness."¹¹⁵ One court has gone so far as to say that proof of knowledge of the intent to conceal or disguise the source of funds is obvious, if the first knowledge element is met, since any person knowingly using illegal proceeds would obviously know of the intent to conceal the source.¹¹⁶ However, some courts recognize this second knowledge element as distinguishing transactions in furtherance of the overall money laundering scheme from ordinary spending of tainted funds.¹¹⁷ According to this view, payment of ordinary business expenses with tainted funds does not constitute money laundering in violation of Section 1956; rather, it is a violation of the "money spending" proscribed by Section 1957.¹¹⁸

It is difficult to predict how this element of the money laundering offense will apply to a defendant. Liability would largely depend on how disbursements from the new foreign partner to the international project company, and onward disbursements, are made. The court in *United States v. Garcia-Emmanuel* suggested certain indicia that a court could consider to determine whether a scheme is designed to conceal or disguise.¹¹⁹ The elements the court mentioned include among others:

- unusual secrecy surrounding the transaction;
- structuring the transaction to avoid attention;
- depositing illegal profits in the bank account of a legitimate business;
- highly irregular features of the transaction;
- using third parties to conceal the real owners; and
- a series of unusual financial moves culminating in the transaction.¹²⁰

These indicia of intent to conceal and disguise may be overcome by avoiding complicated financial structures and through reasonable due diligence, investigation, and disclosure. (See recommendations in

115. *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992).

116. *United States v. Conley*, 833 F.Supp. 1121, 1146 n.17 (W.D. Pa. 1993), *vacated and remanded on other grounds*, 37 F.3d 970 (3d Cir. 1994).

117. See, e.g., *United States v. Brown*, 186 F.3d 661, 668 (5th Cir. 1999) (commenting that the money laundering statute, section 1956, should not have turned into section 1957, the money spending statute which does not require any intent or design to conceal and, therefore, captures any knowing spending of tainted funds, including paying legitimate business expenses).

118. *Brown*, 186 F.3d at 668.

119. *United States v. Garcia-Emmanuel*, 14 F.3d 1469, 1475-76 (10th Cir. 1994).

120. *Id.*

Section III below.)

Section 2314 (Transportation of Stolen Money)

In addition to indictments under Sections 1956 and 1957, a money laundering case may also proceed with an indictment under Section 2314 (transportation of stolen money) as a separate or predicate offense.¹²¹ Under Section 2314:

[W]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, or money, of value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud. . . shall be fined under this title or imprisoned not more than 10 years or both.¹²²

Under the statute, it is illegal to transport (or wire) fraudulently-obtained funds in foreign commerce (i.e., into or out of the United States). Therefore, if any part of the tainted funds of the new foreign partner moves through the United States, those persons responsible for such movement (and anyone conspiring with them or assisting them in such movement of funds) may be in violation of Section 2314, as long as they "knew" that the funds were the proceeds of foreign tax evasion or other fraud. Unlike Section 1956(a)(2), which similarly addresses transfers across U.S. borders, Section 2314 does not require knowledge of any intent to conceal and, therefore, is more akin to Section 1957. Moreover, Section 2314 captures transactions at a lower threshold (at least \$5,000 in value), as well as transfers that do not involve a financial institution.

Penalties under Section 2314 are similar to those under Section 1957. The maximum confinement penalty is like that of Section 1957 (ten years), half the maximum term prescribed by Section 1956. In addition, Section 2314 was amended in 1994 to substitute the outdated maximum fine (formerly, \$10,000) with the phrase "under this title."¹²³ The maximum fine is now \$250,000 (individual) or \$500,000 (organization) or, up to twice the defendant's gross gain (or the victim's gross loss) on the transaction, if such calculation does not unduly

121. See *United States v. Lovett*, 964 F.2d 1029, 1042 (10th Cir. 1992), cert. denied, 506 U.S. 857 (1992) (holding that because transportation of stolen money qualified as a predicate offense ("specified unlawful activity") for purposes of sections 1956 and 1957, it is clear that Congress intended them to be separate offenses).

122. 18 U.S.C. § 2314 (2004).

123. 18 U.S.C. § 2314 (2004); see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 330016, 108 Stat. 1796 (codified as amended 42 U.S.C. § 13701 (1994)).

complicate the proceeding.¹²⁴

Section 1962 (RICO)

Finally, if the new foreign partner is found to have engaged in a "pattern of racketeering activity," their investment and interest in the international project may be found to be in violation of Section 1962(a) or Section 1962(b), the Racketeer Influenced and Corrupt Organizations (RICO) statute. A "pattern of racketeering activity" may be established by as few as two counts of wire fraud or money laundering. A RICO violation may also form the basis for private civil liability, although it has been recently held that the courts will not entertain civil RICO actions brought by foreign governments for revenue lost from evasion of their tax laws.¹²⁵

III. RECOMMENDATIONS FOR MITIGATING RISK

The breadth of the U.S. money laundering laws indicates the importance of appropriate measures to mitigate the risk of violation, particularly for companies engaging in business transactions with new foreign partners, and particularly in emerging markets or elsewhere, where good business practices are not well-established and little is known about such partners and their activities. As discussed above, if a predicate offense was established, a defendant's risk of liability would turn on his knowledge of the new foreign partner's misdeeds. Such knowledge could be inferred from a failure by a defendant to investigate his suspicions, and his knowledge of any efforts to "conceal" the source of funds (e.g., via an unusually strict confidentiality agreement or a complicated financial structure). Accordingly, the risk of liability may be mitigated through due diligence and disclosure. As a starting point, a professional investigator should be employed to conduct a background check on the new foreign partner and its source of funds. If there is a basis for some suspicion, the investigation should seek detailed information as to, e.g.:

- the identity and background of the new foreign partner and any individuals beneficially owning or controlling the new foreign partner and the entities that the new foreign partner will designate for participation in the international project;

124. 18 U.S.C §§ 3571(b)(3), (c)(3), & (d) (2004).

125. See, e.g., *European Community v. RJR Nabisco, Inc.*, 2004 U.S. App. LEXIS 497 (2d Cir. 2004); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), cert. denied, 537 U.S. 1000, 154 L. Ed. 2d 394, 123 S. Ct. 513 (2002).

- the business purposes for inclusion of such individuals in the international project (i.e., the commercial value they add);
- the principal businesses of the participating entities;
- the sources of the funds in the account from which the funds for the international project are to be transferred; and
- the same information with respect to all affiliates that the new foreign partner plans to involve in the international project (contractors, purchasers, or suppliers).

Adequate due diligence will be of paramount importance in order for the U.S. parent to obtain reasonable comfort that the resources contributed by the new foreign partner are, in fact, clean. However, disclosures of this kind may prove difficult for the new foreign partner to accept, as they may view them as invasive and unusual. In such case, the U.S. parent and European subsidiary may agree to preserve the confidentiality regarding the sources and ownership of the new foreign partner's resources. To further allay discomfort, particularly if the new foreign partner and the U.S. parent are competitors, they may agree to appoint a neutral and trusted third party to review the necessary information and make certain certifications to the U.S. parent.

If the results of these inquiries are acceptable and the parties decide to proceed, then protective measures, tailored to the specifics of the international project and planned transfers of funds, should be adopted and implemented. Such measures may include the following:

- The international project agreements should include representations and warranties by the new foreign partner as to the identity of each of their principals, the scope of their business activities, and their sources of funds.
- Strict procedures should be established within the international project company to monitor outflows to ensure that they are for legitimate business expenses to reputable third parties.
- Particular scrutiny should be applied to payments to any entity affiliated with the new foreign partner.
- Should any rumors or other "flags of suspicion" regarding the activities of the new foreign partner come to the U.S. parent's attention, the U.S. parent would have the right to investigate them, and the new foreign partner would be under an obligation to cooperate.
- Corporate procedures should be established within the U.S. parent, the European subsidiary (and any other affiliate of

the U.S. parent involved in the international project) for reporting to the U.S. parent's management any information or rumor learned regarding any possible criminal activity of the new partner or any other investors, partners, suppliers, or contractors involved in the international project, and for investigating such information and rumors.

- The international project agreements should include escape/termination rights for the U.S. parent and the European subsidiary, should any investigation identify wrongdoing.
- Exclusions should be carved into any confidentiality agreements related to the international project, so that the U.S. parent and the European subsidiary may make disclosures regarding the source of funds as necessary or appropriate in connection with any government investigation or judicial proceeding.
- The business purposes for complicated transactional structuring should be clearly documented and supported by sound tax and/or commercial strategies.
- Payments to third parties should be made directly to the intended beneficiaries and not to intermediaries.