Anti-Money Laundering Regulations: A Burden on Financial Institutions

Duncan E. Alford

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: https://scholarship.law.unc.edu/ncilj/vol19/iss3/2

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Anti-Money Laundering Regulations:  
A Burden on Financial Institutions

Duncan E. Alford†

I. Introduction

Drug trafficking has become an increasingly international crime problem. Out of a total annual world drug trade estimated to be over $500 billion, an estimated $100 billion is laundered each year by drug traffickers in the United States alone.¹ Money laundering renders the underlying crime of drug trafficking lucrative by making the proceeds of the drug sale available for use in legitimate business. Both domestic and international efforts to criminalize money laundering have placed increased regulatory burdens on commercial banks and other financial institutions, which are then passed on to customers through higher fees or lower interest rates.

Money laundering is the “process by which one conceals the existence, illegal source or illegal application of income, and then disguises that income to make it appear legitimate.”² Money laundering is an essential part of a drug operation because it allows criminals to use the funds generated by drug sales in legitimate business.³

Law enforcement authorities have focused on prohibiting and prosecuting money launderers as a method of decreasing the overall amount of drug trade and trafficking. An increasing number of nations have passed laws prohibiting the laundering of drug money.⁴ As

† Associate, Kilpatrick & Cody, Atlanta, Georgia; University of North Carolina, J.D. with Honors, 1991; University of Virginia, B.A., 1985.
drug trafficking and money laundering have become international problems, nations have collaborated in international efforts to control and criminalize money laundering.5

Bank officials in the United States are required to monitor all transactions with the bank for those suspected to be related to money laundering and to report the details to law enforcement authorities. To complicate matters, bank officials, at the same time, must be careful not to violate the duty of confidentiality that they owe to their customers.6

This Article explores the increasing regulatory burden on banks, in particular, U.S. banks, due to enhanced law enforcement efforts to combat money laundering. In Part II, the Article will briefly describe money laundering techniques, and then, in Part III, it will analyze several international agreements aimed at combating money laundering—the 1988 United Nations Convention,7 the Basle Committee principles, and the report of the G-7 Task Force.8 The European Convention9 and the Money Laundering Directive of the European Community10 are discussed in Part IV, and Part V examines model legislation adopted by the Organization of American States.11 The Article in Part VI will then briefly describe the principal anti-money laundering statutes in the United States and will analyze the recently enacted Annunzio-Wylie Anti-Money Laundering Act which raises the stakes for banks that are convicted of money laundering violations. This section will also include a discussion of the particular difficulties when dealing with wire transfers. In Part VII, the Article concludes that the increased regulatory burden and costs borne by banks (and, ultimately, bank customers) may not outweigh the benefits of hindering money laundering and decreasing the amount of drug trafficking.

7 European Convention, supra note 5.
9 European Convention, supra note 5.
11 Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses, OEA/ser. L./XIV.2/CICAD/INF.58/92 (May 23, 1992) [hereinafter Model Regulations].
II. Money Laundering—Definition and Techniques

Successful money laundering is an essential part of drug trafficking and other criminal operations because it hides the illicit source of criminal proceeds and frees the funds for use in the legitimate economy. Money laundering essentially consists of three stages: (1) the placement of money, (2) the layering of money, and (3) the integration of money. The placement of money refers to the physical disposal of cash into a financial institution. The layering of money refers to the transfer of money through several accounts or institutions in order to separate the money from its original illegal source. The integration of money refers to the shifting of funds to a legitimate business. The money laundering process is most vulnerable to detection by law enforcement authorities during the placement stage when the money is first deposited in a financial institution. It is at this initial stage that U.S. law enforcement authorities have focused their efforts by requiring banks to make currency transaction reports (CTRs) when cash is deposited at a bank.

Money launderers use various techniques to hide the illegal source of funds. The simple method of changing small denominations of bills into larger denominations eases the physical transport of the money. Because U.S. banks must report currency transactions over $10,000, money launderers use wire transfers to hide the source of illicit funds. Bank-to-bank wire transfers of legitimate funds are nearly impossible to distinguish from transfers of illegal funds. Additionally, international wire transfers of large amounts of funds through fictitious offshore entities are often used to hide the original source of the funds. Real estate transactions and real estate developments provide another means by which money launderers can repatriate funds from abroad.

Money launderers on occasion organize smaller boutique banks to launder drug money, which in turn deal with correspondent banks and, at the direction of money launderers, wire money through several

---

12 Meltzer, supra note 3, at 231.
13 Id.
14 A financial institution includes commercial banks, savings and loans, credit unions, and savings banks.
15 Meltzer, supra note 3, at 231.
16 Id.
17 Id.
19 CASH CONNECTION, supra note 2, at 8.
20 Bank Secrecy Act, 31 U.S.C. § 5313(a) (1988); Meltzer, supra note 3, at 246. Banks must report most currency transactions greater than $10,000 unless the customer is exempt from the reporting requirements. 31 C.F.R. § 103.22(a)(1) (1992).
22 Id.
23 Id. at 6.
different accounts to avoid detection by law enforcement authorities.24

Another money laundering technique is the use of front companies, especially companies that are exempt from the currency reporting requirements,25 to take in funds from drug sales and intermingle them with funds from legitimate businesses.26 Money launderers' use of companies exempt from the CTR requirement has allowed banks to be unwitting accomplices to money laundering. Eliminating exemptions for certain businesses from the CTR requirement is unrealistic, however, given that the U.S. government already receives over 600,000 CTRs per month.27

Money launderers also use other various vehicles to launder money.28 A person wishing to hide his identity as owner of funds may open numbered accounts in certain foreign jurisdictions. The depositor's only contact with the bank is with his account manager, and all correspondence refers to the account number, not the account name.29 Depositors may set up a trust with only the trustee's identity known to the bank. In addition, depositors can set up a corporation that issues bearer shares.30 Only the attorney creating the corporation would know the true identity of the owner of the shares.31

III. International Agreements on Money Laundering

In the past, drug traffickers used domestic banks to launder their drug proceeds. As drug trafficking and the corresponding amount of cash to be laundered grew, drug traffickers began to use international banks as vehicles for money laundering because domestic banks could not handle the volume of cash without being detected by law enforcement authorities.32 The internationalization of drug trafficking is a recent phenomenon aided by improved technology, particularly in telecommunications, and the increased mobility of persons.33

The international money laundering process is more complicated than a purely domestic operation. First, a drug trafficker must move

25 Bank Secrecy Act, 31 U.S.C. § 5312 (1988). Certain types of businesses, predominantly retail businesses, handling large amounts of currency (such as retail stores, coin laundries, and restaurants), may obtain exemptions from the reporting requirements.
26 O'Brien, supra note 24, at 669.
27 Id.
29 Id.
30 Bearer shares are shares of capital stock that are not registered in the shareholder's name, but rather can be redeemed or sold by the bearer with no further owner identification.
31 Gagnon, supra note 28, at 661-66.
the drug proceeds from the United States to a foreign bank account.\textsuperscript{34} The drug trafficker can do this by smuggling the cash abroad, sending it via courier, or sending it by electronic funds transfer. Next, the drug trafficker must legitimize the money by depositing it in a foreign bank account or securities account, or by investing it in a dummy corporation.\textsuperscript{35} Money launderers are more frequently using financial institutions in jurisdictions with strong bank secrecy laws such as Hong Kong, Luxembourg, and Austria, in order to avoid detection by law enforcement authorities from other jurisdictions.\textsuperscript{36} Finally, the money must be repatriated to the United States to complete the operation. This repatriation can be accomplished by wire transfer.\textsuperscript{37}

As international money laundering increases and nations begin to cooperate in combating money laundering, money launderers will move to nations outside the cooperative scheme. As a result, money laundering operations will be forced to centralize and thus will be more susceptible to detection.\textsuperscript{38} Eastern Europe has been mentioned as an attractive money laundering center as those countries develop a financial system and move toward currency convertibility.\textsuperscript{39}

\section{A. United Nations Convention}

Nations have joined forces in several international efforts to combat drug trafficking by criminalizing money laundering. The first such cooperative effort was the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was adopted at a United Nations conference held in Vienna from November 25 to December 20, 1988. The agreement specifically focused on money laundering in drug trafficking operations.\textsuperscript{40}

The U.N. Convention evolved from two previous multilateral agreements: the Single Convention on Narcotic Drugs adopted in 1961\textsuperscript{41} and the Convention on Psychotropic Substances adopted in 1971.\textsuperscript{42} These two conventions focused "primarily on limiting the supply of narcotic drugs and psychotropic substances to amounts required by states for scientific and medical purposes so as to prevent their di-

\begin{itemize}
\item \textsuperscript{34} Webster & McCamG Campbell, supra note 21, at 3-4.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Global Rules, supra note 1, at 582. Bank secrecy laws generally prohibit banks from disclosing information on a customer's account to anyone, including law enforcement authorities, without the customer's specific permission.
\item \textsuperscript{37} Webster & McCamG Campbell, supra note 21, at 3-4.
\item \textsuperscript{38} O'Brien, supra note 24, at 676.
\item \textsuperscript{39} Experts at International Conference Warn About Money Laundering Threat in Eastern Europe, Banking Rep. (BNA) No. 59, at 488 (Oct. 5, 1992) [hereinafter Experts Warn].
\item \textsuperscript{40} U.N. Convention, supra note 5.
\end{itemize}
version into illicit traffic."43 Because they were primarily regulatory in nature and did not provide for punishment of drug traffickers, these conventions were not effective against the drug problem in the 1980s.44

As a result of the weaknesses in these two prior conventions, the United Nations held a conference in Vienna in the fall of 1988 to explore ways to combat the problem of international money laundering. The result of the conference was the U.N. Convention. One hundred and six nations adopted the U.N. Convention at the end of the Vienna Conference on December 20, 1988.45 As of April 1993, seventy-five nations and the European Community had ratified the U.N. Convention.46

Under the U.N. Convention, each Party State agrees to make the laundering of drug proceeds a criminal offense;47 however, the U.N. Convention primarily applies to international offenses.48 Therefore, its provisions would not apply to a case of purely domestic money laundering. Specifically, each State agrees to make the following acts criminal offenses: the management or financing of the cultivation or manufacture of psychotropic substances,49 the conversion or transfer of property derived from drug trafficking,50 and the concealment or disguise of the true nature of property derived from drug trafficking.51 The U.N. Convention's criminalization provisions are based upon U.S. statutes criminalizing money laundering.52

The criminalization of money laundering under the U.N. Convention is subject to the constitutional and basic legal framework of each

43 Sproule & St-Denis, supra note 42, at 265.
44 David P. Stewart, Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 18 DENY. J. INT'L L. & POL'Y 387, 390 (1990).
46 The European Community signed the U.N. Convention on June 8, 1989, in New York. North-South Cooperation in the Fight Against Drugs, BULL. E.C. 84 (Oct. 1985). In addition, the following nations have adopted the U.N. Convention as of April 1993: Afghanistan, Australia, Bahamas, Bahrain, Bangladesh, Barbados, Bhutan, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Byelorussia SSR, Cameroon, Canada, Chile, China, Costa Rica, Cote d'Ivoire, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, Fiji, France, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Honduras, India, Iran, Italy, Japan, Jordan, Kenya, Luxembourg, Madagascar, Mexico, Monaco, Morocco, Myanmar, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Paraguay, Peru, Portugal, Qatar, Romania, Saudi Arabia, Senegal, Seychelles, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Syrian Arab Republic, Togo, Tunisia, Uganda, Ukraine SSR, the former Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom, United States, Venezuela, and Yugoslavia. UN Money Laundering Convention Gains Continued Support, MONEY LAUNDERING ALERT, Apr. 1993, available in LEXIS, Banks Library, MLA File.
47 Sproule & St-Denis, supra note 42, at 269.
48 Stewart, supra note 44, at 394.
49 U.N. Convention, supra note 5, art. 3(a)(i).
50 U.N. Convention, supra note 5, art. 3(b)(i).
51 U.N. Convention, supra note 5, art. 3.
Party State. This provision could potentially undermine the effectiveness of the Convention. At the Vienna Conference, some nations insisted on this limitation because of the lack of discretion in prosecuting criminal offenses in some Party States.

Article 5 of the U.N. Convention requires Party States to empower their courts to order the seizure of financial records in a money laundering investigation. Bank secrecy laws cannot be an impediment to this seizure. Additionally, each Party State must adopt measures that will enable it to confiscate the proceeds of drug trafficking offenses. Article 5 also creates a procedure by which one nation can ask another nation for assistance in confiscating the proceeds of drug offenses. One nation may ask the competent authorities of another nation in which the illegal proceeds are located to confiscate the proceeds. If the competent authorities grant the request, the confiscating nation shall enforce it under the U.N. Convention. Each nation shall furnish the U.N. Secretary-General with copies of laws giving effect to this confiscation procedure. The removal of bank secrecy laws as a defense to confiscation and the seizure of financial records prevents governments from ignoring money laundering with an easy excuse. Moreover, even if drug proceeds are intermingled with legitimate funds, they are still subject to confiscation under the U.N. Convention. Thus, money launderers cannot protect drug proceeds by mixing them with legitimate funds.

Article 7 of the U.N. Convention is, in essence, a mutual legal assistance treaty. This provision states that the Party States shall provide the widest possible assistance to other states in enforcing drug trafficking laws and that the bank secrecy laws shall not hinder this rendering of assistance. Mutual legal assistance includes providing originals of bank records and identifying or tracing drug proceeds. Similarly, a Party State may not rely on its bank secrecy laws as grounds for declining to give mutual legal assistance to another Party State. Additionally, the State requesting legal assistance can ask the re-

53 U.N. Convention, supra note 5, art. 3(c)(2); Stewart, supra note 44, at 392.
54 Stewart, supra note 44, at 392.
55 U.N. Convention, supra note 5, art. 5(3); Sproule & St-Denis, supra note 42, at 281.
56 Sproule & St-Denis, supra note 42, at 281.
57 U.N. Convention, supra note 5, art. 5(1).
58 U.N. Convention, supra note 5, art. 5(4).
59 U.N. Convention, supra note 5, art. 5(4)(f).
60 U.N. Convention, supra note 5, art. 5(4)(f).
61 Sproule & St-Denis, supra note 42, at 282.
62 U.N. Convention, supra note 5, art. 5(6)(b)-(c); Sproule & St-Denis, supra note 42, at 283-84.
63 Sproule & St-Denis, supra note 42, at 283-84.
64 Id. at 285.
65 Id. at 285-86.
66 U.N. Convention, supra note 5, art. 7(2).
67 U.N. Convention, supra note 5, art. 7(5); Stewart, supra note 44, at 395.
quested State to keep the assistance secret from the entity or individual being investigated to the extent necessary to execute the request.68

The U.N. Convention also provides for the extradition of persons accused of drug trafficking offenses.69 The nation that apprehends the alleged perpetrator may prosecute the offender if the nation where the offense occurred declines to extradite or prosecute.70

Other important provisions of the Convention include Article 20 which requires Party States to supply copies of statutes that implement the provisions of the U.N. Convention to the U.N. Secretary General.71 Also, the Commission of Narcotic Drugs of the Economic and Social Council of the United Nations can make recommendations for improvement of the effectiveness of the U.N. Convention.

The U.N. Convention, along with mutual legal assistance treaties, will significantly aid the United States in prosecuting money laundering. The U.N. Convention may indirectly discourage foreign investment in nations that have ratified the Convention because it removes bank secrecy laws as a method of protection for money launderers.73 As more nations adopt the U.N. Convention and enact implementing legislation, the distortion of foreign investment flows will diminish.

B. Basle Committee Principles

At the December 1988 meeting of the Basle Committee on Banking Supervision, the Committee adopted a Statement of Principles regarding money laundering.74 The Committee stated that although a bank supervisor's main responsibility is not to ensure that every bank-

68 U.N. Convention, supra note 5, art. 7(14).
70 Zagaris, supra note 69, at 524.
71 U.N. Convention, supra note 5, art. 20. The International Narcotics Control Board is responsible for supervising the U.N. Convention and must prepare an annual report for the U.N. General Assembly.
72 Zagaris, supra note 69, at 526.
73 Stewart, supra note 44, at 404.
74 See National Banks Alerted to Statement of Principles on Money Laundering, reprinted in 1 Fed. Banking L. Rep. (CCH) ¶ 87,606 (Jan. 9, 1989); Duncan Alford, Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI, 26 GEO. WASH. J. INT’L L. & ECON. 241 (1992). The Basle Committee on Banking Supervision is a group of twelve nations whose banking regulatory authorities meet periodically to discuss banking supervision. These authorities have reached regulatory agreements in the past. The bank regulatory authorities of the following twelve nations are members of the Committee: Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States. The Bank for International Settlements (BIS) provides staff support for the Basle Committee. The BIS is an organization of central banks that serves as both a forum where central bankers meet to discuss current financial issues and as an international financial institution. See generally James V. Hackney & Kim L. Shafer, The Regulation of International Banking: An Assessment of International Institutions, 11 N.C. J. INT’L L. & COM. REG. 474 (1986).
If a banking transaction is legitimate, bank supervisors cannot be indifferent to the criminal use of the banking system.\textsuperscript{75} If banks are involved in money laundering, public confidence in the banking system will be weakened. Any association with criminals, whether through negligence or a bank officer’s direct involvement, will undermine confidence in the soundness and integrity of the banking system.\textsuperscript{76}

The Statement, like other Basle Committee documents, is not a binding legal agreement; rather, it is a statement of best practice agreed to by bank regulators.\textsuperscript{77} The implementation of the Statement of Principles depends on the actions of domestic banking regulators.\textsuperscript{78} Additionally, the Statement notes that if a nation has more stringent requirements than those in the Statement, the more stringent requirements control.\textsuperscript{79}

According to the Statement, a bank should make reasonable efforts “to determine the true identity of” its customers,\textsuperscript{80} commonly referred to as the know-your-customer rule. A bank should explicitly state that it will not conduct significant business with that customer without adequate identification.\textsuperscript{81} In addition, banks should cooperate fully with law enforcement officials to the extent allowed by local confidentiality rules.\textsuperscript{82} When banks believe that deposits are the proceeds of criminal activity, they should take appropriate measures such as severing relations with that customer or closing or freezing the affected accounts.\textsuperscript{83} Furthermore, banks should adopt formal policies implementing the Statement of Principles.\textsuperscript{84}

The know-your-customer rule discourages the use of banks by money launderers.\textsuperscript{85} Because banks require evidence of the true identity of customers, depositors of illicit proceeds will look elsewhere to launder their money. Unfortunately, the Statement’s recognition of banks’ need to adhere to local confidentiality rules weakens the aid banks can give in jurisdictions with such rules. However, the removal of the protection of bank secrecy laws by the U.N. Convention\textsuperscript{86} and the European Convention\textsuperscript{87} will, to a certain degree, counteract this

\textsuperscript{76} Id.
\textsuperscript{77} Id. Best practice generally means the standards and procedures that are regarded as the most effective by industry peers.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Meltzer, supra note 3, at 238.
\textsuperscript{86} See supra notes 56-67 and accompanying text.
\textsuperscript{87} See infra notes 117-22 and accompanying text.
limitation in the Basle Committee’s Statement of Principles.\textsuperscript{88}

C. G-7 Task Force

In the summit communique at the 1989 Economic Summit held in Paris, the world’s seven largest industrialized nations (the G-7) created a task force to make recommendations on combating money laundering.\textsuperscript{89} In the communique, the G-7\textsuperscript{90} also urged that all nations ratify the U.N. Convention.\textsuperscript{91}

The G-7 task force issued its first report in April 1990 making forty separate recommendations.\textsuperscript{92} The aim of the task force was not to make banks into police officers, but to recommend ways to protect banks from civil and criminal liability for disclosure of customer information to law enforcement authorities.\textsuperscript{93} The task force concluded that banks should be able to report suspicious transactions to law enforcement authorities without the fear of violating bank secrecy laws.\textsuperscript{94} Additionally, the task force recommended that nations should consider creating a central system for reporting all large monetary transactions.\textsuperscript{95}

The report urged all nations to ratify the U.N. Convention that criminalizes money laundering of drug proceeds and, in addition, to criminalize laundering proceeds from all criminal activity.\textsuperscript{96} According to the 1990 G-7 report, money laundering at that time was a criminal offense in Australia, Canada, France, Italy, Luxembourg, the United Kingdom, and the United States.\textsuperscript{97} Belgium, Germany, Sweden, and Switzerland were considering criminalizing money laundering, but money laundering was not a criminal offense in Spain, Austria, or Japan.\textsuperscript{98}

The April 1990 report also urged all nations to enact seizure and

\textsuperscript{88} See supra notes 74-84 and accompanying text.
\textsuperscript{90} See infra note 92.
\textsuperscript{91} See infra note 92.
\textsuperscript{92} Treasury Releases G-7 Report Calling for Cooperation Against Money Laundering, Banking Rep. (BNA) No. 54, at 703 (Apr. 23, 1990) [hereinafter Treasury Releases]. Bank regulators and law enforcement officials of the industrialized nations, but no private bank officials, served on the task force. Pilecki, supra note 8, at 97. Nations who sent representatives to the task force included the G-7: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. In addition, Australia, Austria, Belgium, Luxembourg, the Netherlands, Spain, Sweden and Switzerland sent representatives. Treasury Official Cites International Progress Toward Curbing Money Laundering, Banking Rep. (BNA) No. 54, at 796 (May 7, 1990).
\textsuperscript{94} Treasury Releases, supra note 92, at 703.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
forfeiture laws with respect to laundered money.\textsuperscript{99} It recognized the need for a network among law enforcement officials and bank regulators to cooperate in combating money laundering,\textsuperscript{100} and it urged nations to cooperate at all stages of the investigation and prosecution of money laundering.\textsuperscript{101}

The G-7 task force recommended that all financial institutions follow the Basle Committee Statement of Principles regarding money laundering, particularly the know-your-customer rule.\textsuperscript{102} In addition, financial institutions should maintain records of transactions for at least five years and should train their employees to detect money laundering.\textsuperscript{103} The task force, recognizing that money launderers use various institutions to launder drug proceeds, stated that its recommendations should apply to all financial institutions, not just commercial banks.\textsuperscript{104}

In its April 1990 report, the task force failed to address the problem of wire transfers because the members could not agree on the need for a central reporting system like that which exists in the United States.\textsuperscript{105}

Each year, the G-7 task force monitors a group of nations for compliance with its recommendations on money laundering enforcement. In its latest report, issued in the summer of 1993, the task force examined eight nations—Austria, Belgium, Canada, Denmark, Italy, Luxembourg, Switzerland, and the United States—and made recommendations for improvement.\textsuperscript{106} This is an ongoing process.

\section*{IV. European Regulations}

\subsection*{A. Council of Europe Convention}

On September 12, 1990, the Council of Europe followed the lead of the United Nations and the G-7 industrialized nations in combating international money laundering by adopting the Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (European Convention).\textsuperscript{107} Twelve nations signed the European

\begin{thebibliography}{99}
\item \textsuperscript{99} Pilecki, supra note 8, at 98.
\item \textsuperscript{100} Treasury Releases, supra note 92, at 703.
\item \textsuperscript{101} Pilecki, supra note 8, at 98.
\item \textsuperscript{102} Id. See supra notes 80-88 and accompanying text.
\item \textsuperscript{103} Pilecki, supra note 8, at 98.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id.
\item \textsuperscript{107} Nilsson, supra note 33, at 421. The Council of Europe was founded in 1949 as the first European political association. Twenty-two nations are members of the Council. See generally Germain's \textit{Transnational Law Research: A Guide for Attorneys} (1992).
\end{thebibliography}
Convention in 1990, and ultimately eighteen nations signed it.

The European Convention seeks to provide a complete set of rules dealing with cooperative efforts among European nations in combating money laundering and prosecuting money launderers. The European Convention deals with the initial investigation of money laundering, the securing of evidence, the confiscation of criminal proceeds, and international law enforcement cooperation.

Chapter II, Article 2 of the European Convention suggests that nations adopt legislation to enable them to confiscate proceeds of crime. A nation is allowed to set out reservations to the types of crimes that are subject to the Convention's provisions and, thus, nations can tailor the scope of applicability of the European Convention within their borders. Article 6 mandates that money laundering be made a criminal offense by each signatory nation. This Article also allows nations to criminalize negligent money laundering by financial institutions. Thus, banks that inadvertently aid in the laundering of money may be subject to criminal prosecution.

The European Convention provides nations with the ability to identify and trace criminal proceeds. Law enforcement authorities can seize bank records. Financial institutions, however, cannot use bank secrecy laws as an excuse not to provide records to law enforcement authorities.

The European Convention encourages international cooperation among law enforcement authorities at all stages of the enforcement process from the investigation of criminal activity to the freezing of criminal proceeds. Also, during or after adjudication, authorities are required to cooperate in the enforcement of confiscation orders. Bank secrecy is not a ground for refusal to cooperate in the enforcement of confiscation orders. In addition, if banks are asked

---

108 These twelve nations were Belgium, Cyprus, Denmark, Germany, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. Twelve Council of Europe Members Sign Pact to Crack Down on Money Laundering, Banking Rep. (BNA) No. 55, at 838 (Nov. 19, 1990). France, Finland, Ireland, and Switzerland signed later. Id.

109 These nations were Austria, Belgium, Cyprus, Denmark, France, Germany, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, Luxembourg, Bulgaria, Greece, and Australia. The United Kingdom was the first nation to ratify the European Convention in September 1992. Experts Warn, supra note 39, at 489.


111 Id.

112 European Convention, supra note 5, ch. II, art. 2.

113 European Convention, supra note 5, ch. II, arts. 2, 6.

114 European Convention, supra note 5, ch. II, art. 6.

115 European Convention, supra note 5, ch. II, art. 6(3)(a).

116 European Convention, supra note 5, ch. II, arts. 3, 4.

117 Nilsson, supra note 33, at 430.

118 Id. at 433.

119 Id.

120 European Convention, supra note 5, ch. III, art. 18(6)-(7); Nilsson, supra, note 33, at 437-38.
to assist in the investigation of a crime, signatory nations must pass laws that prohibit banks from informing their customers of any ongoing criminal investigation.\textsuperscript{121} Furthermore, all information requests between governments must be kept confidential.\textsuperscript{122}

The European Convention is nearly identical to the U.N. Convention; however, there are two significant differences between the agreements. First, the U.N. Convention outlaws participation in money laundering. In contrast, the European Convention does not outlaw participation. Second, the European Convention applies to money laundering of \textit{all} criminal proceeds, not just the proceeds from illicit drug trafficking as the U.N. Convention does.\textsuperscript{123} Thus, because of its larger scope, the European Convention has a greater potential than the U.N. Convention as a tool for the control of money laundering.

\textbf{B. European Community Directive on Money Laundering}

The European Community (EC) has also taken steps to combat money laundering. EC leaders face a dilemma in implementing the Europe 1992 program.\textsuperscript{124} On one hand, the Europe 1992 program aims to liberalize capital flows within the EC.\textsuperscript{125} On the other hand, the liberalization of capital flows may allow drug traffickers to more easily launder the proceeds of their drug activities, thus undermining the stability of the European financial system.\textsuperscript{126} In 1991, the EC Council of Ministers adopted the Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering (the Directive).\textsuperscript{127} The purpose of the Directive was to prevent the laundering of drug proceeds while encouraging the liberalization of capital flows within the EC. EC officials also believe that the Directive will aid in preventing criminals from taking advantage of the open borders that will result from the Europe 1992 program.\textsuperscript{128}

To further strengthen its anti-money laundering effort, the European Commission proposed a directive on money laundering on Feb-

\textsuperscript{121} European Convention, \textit{supra} note 5, ch. III, art. 33.
\textsuperscript{122} European Convention, \textit{supra} note 5, ch. III, art. 33.
\textsuperscript{124} Europe 1992 is a program whereby member nations of the EC will remove most trade barriers among themselves. The European Council of Ministers passes directives that in turn must be implemented by member States through enabling legislation. \textit{See generally P.S.R.F. Mathijsen, A GUIDE TO EUROPEAN COMMUNITY LAW} (1990). The Maastricht Treaty, which became effective on November 1, 1993, provides that the European Community be renamed the European Union. \textit{See Maastricht Treaty on Political Union, Feb. 7, 1992, 31 I.L.M. 247, 255 (entered into force Nov. 1, 1993)}.
\textsuperscript{125} \textit{See generally P.S.R.F. Mathijsen, A GUIDE TO EUROPEAN COMMUNITY LAW} (1990).
\textsuperscript{127} Directive, \textit{supra} note 10, at 77.
\textsuperscript{128} Magliveras, \textit{supra} note 123, at 169.
The proposal directly resulted from the adoption of the U.N. Convention and the European Convention. The proposed money laundering directive had three aims: (1) to prohibit money laundering in all Member States, (2) to require credit and financial institutions to facilitate the criminal investigation of money laundering by reporting suspicious transactions, and (3) to regulate all professions that handle cash transactions, such as foreign exchange operations and casinos.

The Council of Ministers adopted the final version of the Directive on June 10, 1991. At that time only five Member States had criminal money laundering statutes.

In its preamble, the Directive refers specifically to the U.N. Convention and the European Convention and states that it is designed to implement the policies behind the two Conventions. The preamble also states that the Directive applies to the proceeds of all criminal activity, not just drug trafficking offenses.

Article 1 states that the Directive applies to credit and financial institutions, both of which are broadly defined in the Second Banking Directive. Furthermore, the Directive applies to professions whose activities include:

1. Acceptance of deposits and other repayable funds from the public.
2. Lending.
3. Financial leasing.
4. Money transmission services.
5. Issuing and administering means of payment (e.g., credit cards, travellers’ cheques and bankers’ drafts).
7. Trading for own account or on account of customers in:
   (a) money market instruments (cheques, bills, CDs, etc.);
   (b) foreign exchange;
   (c) financial futures and options;
   (d) exchange and interest rate instruments;
   (e) transferable securities.
8. Participation in share issues and the provision of services related to such issues.
9. Advice to undertakings on capital structure, industrial strategy and related questions, and advice and services relating to mergers and the purchase of undertakings.
10. Money brokering.
activities are likely to further or aid money laundering, and to insurance companies and branches of non-EC based financial institutions.

Article 2 requires Member States to prohibit money laundering. The definition of money laundering in the Directive is based upon the definition in the U.N. Convention, but the Directive’s definition is expanded to include the proceeds of any crime, not just drug trafficking. The Directive allows each State, when it implements the Directive, to define the “serious crime[s]” that fall within the ambit of the Directive. Thus, in its implementing legislation defining “serious crime[s],” a Member State may list fewer crimes than other states, thereby narrowing the coverage of the Directive.

This prohibition against money laundering has created legal problems because the Treaty of Rome does not provide for the harmonization of criminal laws among Member States and does not grant the EC jurisdiction in criminal matters. The Member States debated whether the Directive could require Member States to make money laundering a criminal offense. To resolve this question, rather than stating that the Member States must make money laundering a crime, the proposed directive stated that money laundering shall be prohibited. Therefore, rather than making money laundering a crime by action of the EC, the Member States agreed among themselves to criminalize money laundering.

The Directive, in Article 3, mandates that financial institutions obtain identification of customers when they open certain types of accounts or safe deposit boxes. Financial institutions are required to obtain the true identity of customers in a transaction consisting of more than 15,000 ECUs or when they suspect money laundering. Banks must retain records documenting these transactions for five years.

---

11. Portfolio management and advice.
12. Safekeeping and administration of securities.
13. Credit reference services.
14. Safe custody services.

137 Directive, supra note 10, art. 12 (e.g., attorneys and title agents).
138 European Update, supra note 132, at 199.
139 Directive, supra note 10, art. 2.
140 Proposal, supra note 129, at 312.
141 Id.
142 See id.
144 Proposal, supra note 129, at 312.
145 Id.
146 Directive, supra note 10, art. 3.
147 Id.
148 Directive, supra note 10, art. 3(6).
149 Directive, supra note 10, art. 4.
This exemption may create a loophole for money launderers by allowing them to launder money through interbank transfers. Of course, the money launderer first must convince a bank to accept the initial deposits of drug proceeds. In essence, therefore, Article 3 implements the know-your-customer principle expressed in the Basle Statement.

Article 7 of the Directive, moreover, requires banks to refuse to complete transactions that they suspect are money laundering-related until the bank has an opportunity to inform law enforcement officials. Bank employees are generally required to cooperate with law enforcement officials. Employees and officers of banks must on their own initiative inform law enforcement officials of any facts indicating that money laundering has occurred in their institution, but they may not tell a customer about an ongoing criminal investigation. Bank employees, however, are immune from liability for a good faith disclosure of confidential customer information. Law enforcement officials can use information given by bank officers only in money laundering investigations and must share this information and other information obtained during bank examinations with their counterparts in other Member States. The Directive purposely avoided a currency transaction reporting system like that in the United States because the transaction reporting system does not distinguish between normal and suspect transactions. Finally, the European Commission must draft a report on the implementation of the Directive by January 1, 1994, and during each three year period thereafter.

There is a tension between the Directive’s increased regulatory burden on banks and the free movement of capital under the Europe 1992 program. The Directive places a significant burden on banks to detect money laundering. Article 5 requires financial institutions to scrutinize suspicious transactions. This investigatory burden and the resulting increased costs may dampen the competitiveness of Euro-

---

150 Directive, supra note 10, art. 3(7).
151 See supra notes 80-88 and accompanying text.
152 Directive, supra note 10, art. 7.
154 Smith, supra note 3, at 132.
155 Directive, supra note 10, art. 8.
156 Directive, supra note 10, art. 9.
157 Directive, supra note 10, art. 6(3); Magliveras, supra note 123, at 173.
158 Magliveras, supra note 123, at 175.
159 European Update, supra note 132, at 70.
161 Smith, supra note 3, at 135.
162 Id.
163 Directive, supra note 10, art. 5.
pean banks relative to banks of other nations that do not impose the same costs on banks located in those nations. Implementation of the know-your-customer principle will likely increase customer fees or decrease interest paid on customer accounts. The five-year document retention requirement likewise will increase bank costs. The identification requirement of bank customers may discourage customers' business, even legitimate business, because customers may be uncomfortable revealing information which, until now, was not required. The Directive attacks secrecy barriers in the EC by granting bank officials immunity from liability pursuant to the good faith disclosure of confidential customer information.

Opposition by a Member State to the Directive's provisions or a weak implementation of the provisions by a Member State may disrupt the European financial system and direct capital flows to the nation with the most lax regulation. Money launderers will seek to deal with financial institutions in nations with the weakest anti-money laundering laws. Under the Directive, Member States have flexibility in defining "serious crime" and can thus broaden or narrow the scope of the Directive by including or excluding certain crimes from the definition. To counter this flexibility and potential weakening of the Directive, Member States must verify that fellow members are implementing the Directive in the spirit in which it was proposed to ensure that money launderers do not find a safe haven within the EC.

V. Model Regulations Concerning Laundering Offenses of the Organization of American States

Like the EC, the Organization of American States (OAS) has encouraged its members to outlaw money laundering. The Inter-American Drug Abuse Control Commission (CICAD) of the OAS approved the Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses in March 1992. The General Assembly of the OAS adopted the Model Regulations in May 1992 in order to implement previous regional resolutions on money laundering and the U.N. Convention. The General Assem-

164 Smith, supra note 3, at 132.
165 Id.
166 Id. at 131.
167 Directive, supra note 10, art. 9.
168 Smith, supra note 3, at 136. Luxembourg, which has become an important financial center in Europe, apparently opposed some of the Directive's provisions.
169 The spirit of the U.N. Convention and the Europe Convention are also relevant.
170 See Model Regulations, supra note 11.
171 The Organizations of American States is an international body consisting of governments in the Western Hemisphere and headquartered in Washington, D.C. See generally GERMAN'S TRANSNATIONAL LAW RESEARCH: A GUIDE FOR ATTORNEYS (1992).
173 See, e.g., Caribbean States Meet, Issue Laundering Declaration, MONEY LAUNDERING ALERT,
bly urged member governments in turn to adopt and implement the Model Regulations. The Model Regulations have no legal force themselves; rather, member governments must enact domestic legislation implementing its provisions in order to create legally binding obligations.

The Model Regulations apply to the laundering of the proceeds obtained from drug trafficking and incorporate the U.N. Convention's definition of drug trafficking. The Model Regulations criminalize the laundering of proceeds of illicit drug trafficking. Laundering offenses can include the conversion or transfer of property, the use of property, and the concealment of the true origin of property. The Model Regulations also provide for the seizure, forfeiture, and disposition of illicit drug traffic proceeds.

The Model Regulations place additional regulatory burdens on financial institutions. Under the Model Regulations, the definition of a financial institution includes commercial banks, savings banks, thrifts, securities brokers and dealers, currency dealers, check cashing services, and funds transmitters. In addition, member governments may extend application of the Model Regulations to sellers of real estate and luxury items, casinos, and providers of professional services.

A financial institution must maintain accounts in the name of the account holder and cannot open anonymous accounts. The financial institutions must identify their customers and generally follow the know-your-customer rule. Financial institutions must maintain customer records for five years to show compliance with the Model Regulations.

The Model Regulations require financial institutions to provide information to law enforcement authorities when requested, but do not allow the financial institutions to notify the customer of the inquiry. Bank secrecy or confidentiality laws cannot prohibit the bank's disclosure of information to law enforcement authorities.

available in LEXIS, Banks Library, MLA File (describing the adoption of the Kingston Declaration on Money Laundering).

174 Model Regulations, supra note 11, art. 1(4).
175 Model Regulations, supra note 11, art. 2. Illicit traffic is defined as the offenses criminalized by the U.N. Convention.
176 Id.
177 Model Regulations, supra note 11, art. 4.
178 Model Regulations, supra note 11, art. 5.
179 Model Regulations, supra note 11, arts. 6-8.
180 Model Regulations, supra note 11, art. 9.
181 Model Regulations, supra note 11, art. 16.
182 Model Regulations, supra note 11, art. 10.
183 Id. See supra notes 80-88 and accompanying text for discussions of the know-your-customer rule.
184 Model Regulations, supra note 11, art. 10.
185 Model Regulations, supra note 11, art. 11(1).
186 Id.
187 Model Regulations, supra note 11, art. 11(4).
BANKING AND MONEY LAUNDERING

The OAS also created a currency transaction reporting system under the Model Regulations. The Model Regulations specify the contents of the currency reports that financial institutions must file. Again, bank secrecy laws cannot prohibit the filing of these reports.

Financial institutions must report suspicious transactions to law enforcement authorities. Financial institutions must "pay special attention to all complex, unusual or large transactions, whether completed or not, and to all unusual patterns of transactions." The good faith disclosure of a suspicious transaction exempts the financial institution and its employees from civil, administrative, and criminal liability for the disclosure.

Any financial institution intentionally involved in money laundering is subject to severe sanctions, including suspension of its charter or revocation of its license. The Model Regulations require financial institutions to implement compliance programs for the detection of money laundering. These programs must include know-your-customer programs and designate a compliance officer who will oversee the program.

Under the Model Regulations, each member government has the obligation to enforce the provisions of the Model Regulations, to supervise and regulate financial institutions, and to share information with law enforcement authorities and regulators of other member governments. Generally, member governments are required to cooperate among themselves in the enforcement of the Model Regulations.

Thus, the Model Regulations are a detailed set of provisions aimed at decreasing money laundering of drug proceeds in the Western Hemisphere. The Model Regulations apply to financial institutions, broadly defined to include almost any entity that deals with large amounts of cash. Financial institutions can no longer open anonymous accounts and must require true identification of all customers, particularly corporate customers. This prohibition against anonymous accounts is a significant change in the typical banking practices of several OAS member nations.

---

188 Model Regulations, supra note 11, art. 12.
189 Model Regulations, supra note 11, art. 12(2).
190 Model Regulations, supra note 11, art. 12(9).
191 Model Regulations, supra note 11, art. 13(2).
192 Model Regulations, supra note 11, art. 13(1).
193 Model Regulations, supra note 11, art. 13(4).
194 Model Regulations, supra note 11, art. 14(2).
195 Model Regulations, supra note 11, art. 15.
196 These provisions are similar to the those enacted in the Annunzio-Wylie Anti-Money Laundering Act. See infra notes 239-79 and accompanying text.
197 Model Regulations, supra note 11, art. 17.
198 Model Regulations, supra note 11, arts. 17-18.
199 Model Regulations, supra note 11, art. 9.
200 Certain South American countries allow financial institutions to open customer ac-
The Model Regulations follow the U.S. lead by implementing a currency transaction reporting system. The European Convention and the EC Directive decided against taking this approach. The Model Regulations, however, ignore the increasingly prevalent use of wire transfers by money launderers. The requirement of reporting suspicious transactions may be one way to regulate some of these wire transfers that are otherwise not subject to the currency transaction reporting requirement.

The Model Regulations make clear that bank secrecy and confidentiality laws can not prohibit compliance with its provisions. The removal of the bank secrecy defense is specifically referred to in Articles 11 and 12 and is referred to generally in Article 19.

The Model Regulations set out detailed provisions aimed at prohibiting money laundering. It remains to be seen how many and to what extent governments will accept these provisions. Current U.S. money laundering statutes implement nearly all of the provisions of the Model Regulations.

VI. U.S. Money Laundering Statutes

A. The Bank Secrecy Act and the Money Laundering Control Act

In the 1980s, the United States led the world in passing legislation to combat money laundering. The Bank Secrecy Act (BSA) and its various amendments are the cornerstone of U.S. efforts to combat money laundering. The BSA applies to financial institutions only.


See supra notes 107-23, 159 and accompanying text.

Article 11 of the Model Regulations deals with the availability of the records of a financial institution, Model Regulations, supra note 11, art. 11. Article 12 deals with the currency reporting system. Id. art. 12.

Id. art. 19 (general prohibition against bank secrecy laws).


A. an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));
B. a commercial bank or trust company;
C. a private banker;
D. an agency or branch of a foreign bank in the United States;
E. an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1742(a)));
F. a thrift institution;
G. a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);
H. a broker or dealer in securities or commodities;
I. an investment banker or investment company;
and requires them to report currency transactions in amounts greater than $10,000.\textsuperscript{206} This reporting requirement is also part of a bank's general regulatory examination.\textsuperscript{207} This reporting system has proven to be expensive; since 1970, over 30 million currency transaction reports (CTRs) have been filed, with each CTR taking approximately twenty minutes to complete.\textsuperscript{208}

The other important U.S. money laundering statute is the Money Laundering Control Act of 1986 (MLCA).\textsuperscript{209} This Act created three criminal offenses: (1) a prohibition against the financial transactions involving the proceeds of specified unlawful activities, (2) a prohibition against the international transportation of criminal proceeds, and (3) a prohibition against monetary transactions in property constituting or deriving from proceeds obtained from criminal offenses.\textsuperscript{210} With respect to the first offense, the statute defines "specified unlawful activity" by reference to specific criminal statutes, generally involving organized crime, drug trafficking, and financial misconduct.\textsuperscript{211} The second offense reaches acts that would not be financial transaction offenses or which are committed outside the United States.\textsuperscript{212} In passing

\begin{itemize}
  \item J. a currency exchange;
  \item K. an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;
  \item L. an operator of a credit card system;
  \item M. an insurance company;
  \item N. a dealer in precious metals, stones, or jewels;
  \item O. a pawnbroker;
  \item P. a loan or finance company;
  \item Q. a travel agency;
  \item R. a licensed sender of money;
  \item S. a telegraph company
  \item T. a business engaged in vehicle sales, including automobile, airplane, and boat sales;
  \item U. persons involved in real estate closings and settlements;
  \item V. the United States Postal Service;
  \item 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 in this paragraph;
  \item 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 this paragraph is authorized to engage; or
  \item Y. any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.
\end{itemize}

\textit{Id.}

\textsuperscript{208} Current Trends in Money Laundering: Hearing Before the Permanent Subcommittee on Investigation of the Senate Committee on Governmental Affairs, 102d Cong., 2d Sess. 344 (1992) [hereinafter \textit{Current Trends}], 7.6 million Form 4789s were filed in 1991. 66,573 Form 8300s were filed in 1991. \textit{Id.} at 349.
\textsuperscript{210} Harmon, supra note 209, at 9-10.
this Act, especially the third offense, Congress intended to make the proceeds of drug crimes worthless by imposing criminal liability on any person dealing with drug proceeds.213

These new criminal offenses are broad enough to apply to any person assisting money launderers.214 Courts, however, have read a scienter requirement of "knowing" the source of the property or proceeds into this statute.215 Knowing blindness or intentional disregard by banks meets this standard and may subject them to liability.216 Mere suspicion will not meet this standard.217 A defendant will be found guilty under Section 1956 or Section 1957 if he knows that the subject property was derived from some criminal activity; however, the defendant need not know the specific offense.218 Thus, any person who transacts business with a drug dealer may be criminally liable for violation of these anti-money laundering statutes.

In addition, the MLCA prohibits the structuring of transactions to avoid the CTR requirement.219 This practice, known as "smurfing," has severely hampered the implementation of Congressional policy to detect suspected money laundering transactions.220 Smurfing is the practice whereby a depositor will make a deposit in an amount slightly less than $10,000 to avoid the reporting of the cash transaction. A drug operation may make several deposits at different branches of a bank in one day in amounts less than $10,000 in an effort to launder the money without triggering the CTR requirement. Bank personnel, therefore, must be very careful in giving any advice to customers that may be interpreted as aiding the avoidance of the CTR requirement.221

Furthermore, banks face the dilemma of either investigating a customer's transaction to ensure that the source of the money is legal or facing liability under Section 1957. If the bank reports the suspicious transaction and it turns out to be incorrect about its suspicion, the bank may be liable under tort law.222 Banks may, however, voluntarily inform law enforcement authorities of suspicious activity. The Right to

---

214 Id. at 2-3.
217 Id.
220 Short, supra note 219, at 52.
Financial Privacy Act grants banks some immunity for the disclosure of customer information when banks suspect money laundering activity. Nevertheless, the bank may be liable for wrongful disclosure. A bank, however, can disclose suspected criminal activity and the following customer information: customer name, account number, and the nature of the illegal activity. Banks may take advantage of a limited defense for the good faith disclosure of this information. However, these disclosure provisions appear to contradict the reporting requirements of the Bank Secrecy Act. Banks, therefore, cannot aid in the laundering of money; yet, if they disclose too much information, they may be subject to a defamation claim by their customer.

A court can also order a bank not to inform a customer that the customer’s bank records have been subpoenaed or that customer information has been disclosed to a grand jury.

In addition, money laundering is also included within the definition of racketeering in the Racketeering Influence Corrupt Organization (RICO) statute, and a bank suspected of money laundering may be subject to prosecution under that statute.

The 1988 Money Laundering Prosecution Improvement Act imposed additional liability on accomplices of money launderers. Bank officials are subject to civil fines for willful or grossly negligent violations of the CTR requirements. The definition of financial institutions was expanded to include sellers of vehicles and persons handling real estate closings, so that they now must report cash transactions. Section 4702 of this statute allows the U.S. government to negotiate accords with other nations which would allow nations to track and to report large dollar transactions to U.S. law enforcement authorities.

As banks are required to take on more responsibilities for the detection of money laundering, money launderers are switching to non-bank financial institutions as vehicles for legitimizing criminal pro-

---

224 Id.
225 Id.; Plombeck, supra note 216, at 96-97.
226 Plombeck, supra note 216, at 96-97.
227 Meltzer, supra note 3, at 254.
228 Id.
230 Short, supra note 219, at 62.
232 Short, supra note 219, at 63-64.
233 Id.
ceeds. Non-banks are generally not subject to these anti-money laundering statutes and, unlike banks, are not examined on a regular basis. Therefore, efforts to regulate non-banks to prohibit money laundering are increasing. The federal government is considering subjecting these non-banks to the same money laundering statutes and currency reporting requirements that presently apply to banks. State governments are considering adopting uniform licensing requirements for non-bank financial institutions.

B. Annunzio-Wylie Anti-Money Laundering Act

As part of the Housing and Community Development Act of 1992, the U.S. Congress passed the Annunzio-Wylie Anti-Money Laundering Act (Annunzio-Wylie Act). The Act implements many of the recommendations of the G-7 Task Force. The principal motivations behind the passage of the Act were the failure of the Bank of Credit and Commerce International (BCCI) and the discovery that the federal government lacked the authority to close BCCI's offices in the United States, despite BCCI's conviction on money laundering charges.

The Annunzio-Wylie Act raises the stakes for banks used in money laundering. If an agency or branch of a foreign bank is convicted of money laundering, the Federal Reserve Board must begin termination proceedings against the bank. The foreign bank may lose its license to operate in the United States. If a domestic bank headquartered in the United States is convicted of money laundering, the appropriate domestic bank regulator must hold a hearing to determine if the bank should lose its charter or deposit insurance. Thus, these "death penalty" provisions—loss of a bank charter or loss of deposit insurance—discourage banks from inadvertently becoming involved in money laundering. In addition to revoking a bank's charter, a conservator may be appointed to take over a bank convicted of money laun-

---

236 Current Trends, supra note 208, at 350.
238 Id. at 841.
241 Id. at 9; see generally 138 CONG. REC. S17,912 (daily ed. Oct. 8, 1992).
243 Id.
The Act also imposes greater liability on individual bank officials. A bank officer may be banned from the industry if he is convicted of money laundering or Bank Secrecy Act violations. The Act also expanded the list of crimes that constitute "specified unlawful activity" under the money laundering statutes. They now include mail theft, food stamp fraud, kidnapping, robbery, extortion, and violations of the Foreign Corrupt Practices Act.

The Annunzio-Wylie Act allows the Secretary of the Treasury to require all financial institutions, not just depository institutions, to report cash transactions over $10,000 to the Internal Revenue Service on Form 8300. The Act gives the Department of the Treasury authority to promulgate know-your-customer rules which will be used in bank examinations and to require financial institutions to report suspicious transactions. Banks must require identification of all customers and financial institutions with which they conduct business, whether or not they have an account at the bank.

The Annunzio-Wylie Act also requires the Department of the Treasury to issue regulations by January 1, 1994, that identify which non-bank institutions come within the definition of financial institution, and that specify the information that financial institutions must submit to the federal government about their customers. All financial institutions must use their best efforts to prevent money laundering from occurring.

---

255 Annunzio-Wylie Act § 1511, 31 U.S.C. § 5327(a) (Supp. IV 1992); see Rudnick & Schwarz, supra note 240, at 12. Final regulations have not been issued. Regulations were
cial institutions, not just banks, must institute compliance programs that educate bank personnel on money laundering.256 Each program must include: internal anti-money laundering policies and procedures, employment of a compliance officer, employee training, and an independent audit function to test the effectiveness of the program.257

As directed by the Annunzio-Wylie Act, several federal government agencies collaborated on the development of a Uniform Criminal Referral Form.258 The purpose of the form is to standardize data reported to the government and to facilitate the automation of the data.259 Banks must file this Criminal Referral Form when they suspect the occurrence of criminal activity.260 These forms require detailed information and require banks to investigate, to a certain degree, the suspected criminal activity.261

The Act requires the Department of the Treasury and the Federal Reserve Board to jointly promulgate regulations relating to fund transfers by January 1, 1994.262 Under these regulations, insured banks must keep records of both domestic and international wire transfers and non-banks must keep records of international transfers.263 Earlier, the Treasury had proposed regulations on wire transfers, but they were never issued in final form because of bank opposition and be-

---

256 Annunzio-Wylie Act § 1517(b), 31 U.S.C. § 5314(a) (Supp. IV 1992); see Rudnick & Schwarz, supra note 240, at 11.
258 58 Fed. Reg. 3235-39 (1993) (to be codified at 12 C.F.R. pts. 208, 211, & 225) (proposed Jan. 8, 1993). The Interagency Bank Fraud Working Group prepared this form. Id. This Group consists of twelve federal agencies including the Office of the Comptroller of the Currency, the Federal Reserve, the FDIC, the Office of Thrift Supervision, the National Credit Union Administration, the FBI, the U.S. Secret Service, the Department of the Treasury, and the Department of Justice.
259 Id.
260 Id.
cause of questions about the regulation's effectiveness in relation to its cost.\footnote{Arend, \textit{supra} note 252, at 69.} Since the Federal Reserve has a better understanding of wire transfers, its involvement in drafting these new regulations should significantly improve the regulations on wire transfers.\footnote{Id. The Federal Reserve Board of Governors, along with the Department of Treasury, have proposed a version of these regulations. 58 Fed. Reg. 46,014 (1993) (to be codified at 31 C.F.R. § 103). Final regulations have not yet been promulgated.}

Under the Annunzio-Wylie Act, financial institutions, not just banks, are required to report suspicious transactions to law enforcement authorities.\footnote{Annunzio-Wylie Act § 1517, 12 U.S.C. § 5344 (Supp. IV 1992); Gay, \textit{supra} note 247, at 5.} As in the MLCA, banks face a dilemma when reporting suspicious transactions. If they report too much information, customers can file suit against banks for breach of the duty of confidentiality.\footnote{Robert J. Anello & Catherine M. Foti, \textit{Banks Still Face Risks Despite New BSA Safe Harbor}, \textit{Money Laundering Alert}, Mar. 1993, available in LEXIS, Banks Library, MLA File [hereinafter Anello & Foti, \textit{Banks Still Face Risks}].} If the banks report too little, the federal government can allege violation of the Bank Secrecy Act and collaboration with money launderers.\footnote{Id.} With the death penalty provisions of the Act (revocation of a bank's charter or loss of deposit insurance), the bank's dilemma is accentuated. The Act prohibits banks from notifying possible suspects of the existence of a grand jury subpoena for bank records in money laundering or narcotics cases.\footnote{Id.}

To complicate matters, several states have recognized a bank's duty to maintain customer confidentiality.\footnote{Id.} In \textit{Young v. Chemical Bank}, a New York state court recognized a bank's duty of confidentiality to its customers and a cause of action for breach of this duty.\footnote{Rudnick & Schwarz, \textit{supra} note 240, at 12.} The court did note an exception to this duty of confidentiality where the breach was justified.\footnote{Anello & Foti, \textit{Banks Still Face Risks}, \textit{supra} note 267, at 3. Florida, Indiana, Maryland, Idaho, and New York have recognized this duty.} Justification included the issuance of a government subpoena or the commission of a crime against the bank, such as fraud.\footnote{\textit{Id.} at 11.} In a reargument of \textit{Young}, a different judge on the Supreme Court of New York County dismissed the plaintiff's complaint and ruled that any damages suffered flowed from the criminal proceedings, not from the bank's disclosure.\footnote{\textit{Id.} at 11.} This second decision limited the development of a bank's duty of confidentiality.

The Annunzio-Wylie Act eliminates some of the banks' concerns regarding liability for disclosure of customer information. The statute states that banks shall not be liable under federal or state law for disclo-
sure of customer information to law enforcement authorities. This safe harbor provision does not protect the bank from criminal liability, only civil liability. Nevertheless, this provision is not all encompassing and banks should consider the extent of their tort liability before disclosing customer information. This protection, however, exceeds that which was previously provided in the Right to Financial Privacy Act, which merely provided a good faith defense to bank officials for disclosure of limited information. This provision removes liability for disclosure of any information to law enforcement authorities. Therefore, while the Act raises the stakes of involvement in money laundering, it also provides banks some protection for compliance with the reporting requirements of the law.

C. Wire Transfers

Wire transfers present a particularly difficult problem for law enforcement officials. Wire transfers are sent over three primary payment systems: CHIPS, Fedwire, and SWIFT. Payment orders rarely identify the originating customer because of space limitations on the system. Thus, the order will merely state "our good customer." As a result, money launderers find funds transfers very useful because the identity of the originating customer can be easily hidden.

Another reason money launderers are using wire transfers more frequently is because law enforcement authorities have concentrated on cash transactions to a greater degree than wire transfers. The funds wire system's technical limitations prevent complete information on the nature of the transaction to be passed to every bank involved in the transfer. If the transfer passes through several banks, the last bank in the sequence may have no information at all on the originating customer. In order to investigate a transaction, law enforce-

277 Arend, supra note 252, at 69.
278 Anello & Foti, Banks Still Face Risks, supra note 267, at 3.
280 Fedwire is managed by the Federal Reserve. CHIPS is the Clearing House of International Payment System. SWIFT is the Society for Worldwide International Financial Telecommunications. Fedwire and CHIPS settle payments. SWIFT is primarily a message system that authorizes payments that are later settled on Fedwire or CHIPS. See Meltzer, supra note 3, at 246.
281 Id. at 247-48.
282 Id.
285 Id.
ment agencies must collect records from each bank involved in the transaction, and these banks may be located in different jurisdictions. The formats of the orders between banks may vary, and the orders use special codes that require training to interpret.\textsuperscript{286} To make matters even more difficult, wire transfers are settled very quickly, unlike checks.\textsuperscript{287} The money launderers also may send the transfer through jurisdictions with strict bank secrecy laws in order to make detection of the true source of funds even more difficult.\textsuperscript{288}

Many smaller banks use correspondent banks to complete customers' wire transfers. If a bank is not directly connected to a wire system, the use of a correspondent bank adds another step to the transfer and another level of complexity for law enforcement authorities to investigate. As a result of the increased use of wire transfers by money launderers and the difficulty of detecting suspect transactions, the Annunzio-Wylie Act requires the promulgation of regulations dealing with the reporting of wire transfers.\textsuperscript{289} The Act left the details of dealing with money laundering by wire transfer to bank regulators, who must issue regulations by January 1994.\textsuperscript{290} These new reporting requirements may make the United States an unattractive place for foreign investment even by legitimate investors.\textsuperscript{291}

While these new regulations are being prepared, the Federal Reserve has issued a policy statement on large value funds transfers that may constitute money laundering.\textsuperscript{292} The Federal Reserve's policy statement implemented some of the recommendations of the G-7 Task Force and focused on large funds transfers over Fedwire, CHIPS, and SWIFT.\textsuperscript{293} The statement recommends that each payment order contain the following information: name of customer, address of customer, account number, identity of the originating bank, and the account number of the initiator of the transaction.\textsuperscript{294} SWIFT, CHIPS and the Bank of England recommended that each payment order contain the information recommended by the G-7 Task Force.\textsuperscript{295} The Federal Reserve's policy statement recognizes that the Fedwire system is more limited in the amount of information its payment orders can contain and that banks must give priority to the information necessary to complete the transaction.\textsuperscript{296} Nevertheless, the statement urges
banks to use all the fields in the payment order to record information about the originator or initiator of the transaction.\textsuperscript{297} The Federal Reserve is studying changes to the Fedwire system that would allow banks to comply more fully with the policies behind the statement by including information on the initiator of the transaction.\textsuperscript{298}

The Federal Reserve supports a regulatory approach to maintaining wire transfer records.\textsuperscript{299} Because the wire transfer system continues to evolve as technology develops, regulations, rather than statutes, will be more responsive to the competing aims of law enforcement and the system's efficiency.

VII. Conclusion

The new money laundering statutes have forced banks to become more aware of the money laundering problem and to take steps to combat it. For example, the Puget Sound Bank headquartered in Tacoma, Washington, and purchased by Keycorp in 1992, runs a model money laundering prevention program.\textsuperscript{300} The bank's board of directors approved a written know-your-customer policy.\textsuperscript{301} The policy requires bank employees to make reasonable efforts to identify loan and deposit customers, to make a reasonable effort to identify users of other services, such as wire transfers and money orders, and to refuse to conduct business with customers without proper identification.\textsuperscript{302}

Banks generally have adopted new business policies to prevent and detect money laundering. These new practices include knowing-you-customer and the source of his funds, reporting suspicious transactions, and strictly complying with money laundering statutes and regulations.\textsuperscript{303}

The U.S. government, both domestically through the Annunzio-Wylie Act and internationally through the U.N. Convention, has placed a heavier regulatory burden on banks in order to detect and prevent money laundering. The question arises whether the cost of the new regulations and the resulting changes in bank operations are worth the improved prevention of money laundering and drug trafficking. The answer is not clear.

These new laws and regulations require banks to bear an investigatory burden that they are not equipped to handle. For a particular transaction, a bank must determine if it is assisting in money launder-

\textsuperscript{297} Id.
\textsuperscript{300} Arend, \textit{supra} note 252, at 70.
\textsuperscript{301} Id. at 71.
\textsuperscript{302} Id.
\textsuperscript{303} Powis, \textit{supra} note 221, at xiii.
ing. The bank acting as judge and jury faces conflicting goals. The bank wishes to serve customers quickly and efficiently, but at the same time it does not want to be used as a vehicle for drug traffickers to launder their profits in violation of the law. 304 Therefore, the prudent action is for the bank to complete the transaction and then report it to the law enforcement authorities. 305 Reporting, however, increases the bank's costs which are in turn passed on to its customers.

International payment systems currently are not set up to enable banks to investigate all transactions. The technical aspects of payment systems limit the amount of information in any payment order. Furthermore, most banks are not members of a payment system and instead use correspondent banks to wire money for their customers. Use of correspondent banks prevents banks along the chain of the transaction from obtaining information on the originating customer. 306 Thus, as banks are being required to investigate the nature of transactions more fully and money launderers are increasingly taking advantage of the international payment system, the technological limits of the system itself does not allow for an adequate investigation.

Because the Annunzio-Wylie Act has raised the stakes for banks, either the payment system must be changed to accommodate banks' new needs, or banks' responsibilities must be reasonably configured to take into account the realities of investigating transactions. Banks should not be subject to the "death penalty" 307 unless they are given the tools to avoid conviction. Banks must be given time to develop a more sophisticated payment system that will allow information on the originating customer to pass through each step of the transaction. Banks' civil immunity for the disclosure of customer information to law enforcement authorities should be broad enough to allow banks to meet the added burdens of the anti-money laundering statutes and regulations. Money laundering statutes should take into account the realities of a bank's operations.

Finally, banks must wrestle with the conflicting goals of law enforcement and customer privacy. The government's objective is to prevent money laundering as a way to enforce drug trafficking laws. The banks' goal is to protect the confidentiality of their customers' financial information. The money laundering statutes and regulations have placed banks in the uncomfortable position of weighing these two goals and determining on a case-by-case basis whether a customer's de-

304 The G-7 task force pointed out that banks generally lack the expertise to determine the source of funds, especially in the short period of time within which the bank must accept or reject the transaction. 135 CONG. REC. S5,557 (1989).
306 Meltzer, supra note 3, at 247.
307 See supra notes 242-46 and accompanying text.
sire and right for privacy should succumb to the government’s policy to prevent crime. Without adequate guidance and protection, banks will not be able to make these decisions effectively. The immunity from liability provision in the Annunzio-Wylie Act aids banks in this regard.\textsuperscript{308} The new regulations authorized by the Act will provide banks with additional guidance in making these decisions. Whether this guidance will be adequate remains to be seen.

Law enforcement’s focus on banks is misguided because money launderers are increasingly using non-bank institutions as vehicles to launder drug proceeds. As nations have stepped up the policing of international money laundering, money launderers have switched to non-bank financial institutions as vehicles to launder drug proceeds.\textsuperscript{309} Law enforcement authorities should distribute their efforts on the various conduits of laundering drug proceeds in proportion to the volume of money laundering occurring through that conduit. The future challenge of regulators and law enforcement authorities is to combat money laundering in those traditionally unregulated entities and to tailor money laundering regulations applicable to commercial banks to ensure that the increased regulatory burden and associated costs produce an effective decrease in money laundering and drug trafficking, not in bank profitability.

\textsuperscript{309} Non-Bank Firms, supra note 237, at 840. See generally Current Trends, supra note 208.

This report focuses on the use of non-bank financial institutions in money laundering.