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Alternative Justice
Compromises?
6/10

Short version of § 2(f):

"(f) Jurisdiction over the conduct prohibited by this section exists when the transaction occurs in whole or in part in the United States and, in the case of a United States national or entity, when the transaction occurs entirely outside of the United States."

Analysis

Subsection (f) provides for extraterritorial jurisdiction over the new offense when it is committed by a United States national or entity subject to the jurisdiction of the United States overseas. The term "national" is borrowed from the Immigration and Nationality Act and is intended to include citizens and persons who, though not citizens, owe permanent allegiance to the United States. The term "entity" is intended to include organizations such as partnerships, corporations, and trusts organized under or subject to the jurisdiction of the United States or a State or territory thereof, (for example Guam or Puerto Rico) or of the District of Columbia.

At the same time subsection (f) makes it clear that jurisdiction would extend to foreign persons and organizations, such as foreign banks, only when some part of the transaction constituting the money laundering occurs in the United States. The new provision is not intended to impose any new duty on foreign persons to become familiar with United States law.

For example, there would be jurisdiction over a United States citizen or national who committed the offense anywhere in

the world by physically depositing money knowing it to be the proceeds of illegal activity in violation of United States law in a foreign bank. There would not, however, be jurisdiction over the foreign bank employees or the bank itself involved in such a transaction because it did not take place even partially in the United States. On the other hand, subsection (f) makes it clear that in a case where a person wire-transferred funds from a bank in the United States to a foreign bank, there would be jurisdiction over both the person in the United States and the foreign bank if an employee of the foreign bank involved in handling the transfer was aware of, or acted in reckless disregard of, the fact that the funds involved were the proceeds of a crime. However, again, it should be emphasized that the foreign persons involved are under no duty to familiarize themselves with United States law, and as a practical matter probably could only be prosecuted if it were shown they knew the funds involved were derived from universally recognized crimes such as narcotics trafficking, robbery and theft, tax evasion, and espionage type offenses entered into for money. In addition, prosecution of foreign persons would likely be limited to those cases involving very large amounts of money since our investigative and prosecutorial resources are limited.

Long version

"(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if:

"(1) the transaction was conducted or attempted with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, involving a violation of this title, a violation of title 26, a violation of the Controlled Substances Act (21 U.S.C.801 et seq.), a violation of the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), a violation of section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), a violation of section 601 of the National Security Act of 1947 (50 U.S.C. 421), a violation of section 4 of Title I of the Internal Security Act of 1950 (50 U.S.C. 783), a violation of section 2 of the Act of August 1, 1956 (P.L. 84-893, 50 U.S.C. 851), a violation of subsection 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)), or a violation of sections 224-227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274-2277); or with knowledge of the fact that the monetary instruments or funds involved in the offense represent the proceeds of, or are derived directly or indirectly from the proceeds of, any such unlawful activity;

"(2) the conduct occurs in part in the United States and;

"(3) the transaction constituting the offense involves funds or monetary instruments of a value exceeding \$10,000."

Subsection (f) is intended to limit extraterritorial jurisdiction over the offense to situations where the interests of the United States are substantially affected. Initially, and by contrast it should be noted that there is plenary jurisdiction over the offense with respect to any transaction conducted in the United States. Thus, a transaction involving funds or monetary instruments derived from or representing the proceeds of any federal or state felony, not just violations of title 18 or drug offenses, would be covered.

For offenses committed overseas, however, the jurisdiction is much more limited. First, the "unlawful activity" from which the funds or monetary instruments are derived (or which they are intended to facilitate) must involve a violation of title 18, a criminal violation of the Internal Revenue Code, a drug trafficking violation listed in title 21, or a violation of one of several listed espionage-type statutes.

Second, at least part of the conduct constituting the money laundering transaction, not the underlying crime that produced the "dirty money," must occur in the United States. For example, a situation in which a person transfers by wire the proceeds of a drug transaction from a bank in the United States to a bank in a foreign country would be covered, as would a situation in which a person telephones instructions to one foreign bank to transfer such proceeds to another foreign bank.

Third, it must be shown that the transaction was conducted or attempted with the intent to promote, manage, establish, carry on or facilitate one of the above described types of "unlawful

activities" or with actual knowledge that the funds or monetary instruments involved are derived from such "unlawful activity." Thus, the government prove that the defendant had actual knowledge of the unlawful activity which generated or which will be carried out by the funds involved in the transaction for offenses committed overseas. This scienter standard, which is to be contrasted with the different standard of either actual knowledge of the source of the funds or a reckless disregard for the fact that they may be the proceeds of any sort of illegal activity constituting a felony which applies to domestic transactions, is to make it perfectly clear that the new section 1956 is not intended to impose a duty on foreign persons to become aware of United States laws. Thus, in the above examples concerning wire transfers of funds from a bank in the United States to an overseas bank, or from one overseas bank or branch to another, only if it could be shown that the foreign bank personnel handling the transactions had actual knowledge of the fact that the funds they were receiving or handling were the proceeds of a drug transaction or other covered crime could they be prosecuted. ^{1/} Of course, if this knowledge could be proven

^{1/} It should be noted, however, that this limitation on extraterritorial jurisdiction is intended to apply only to foreign persons. United States citizens, Nationals and Permanent Resident Aliens would violate the new section if it could be shown that such a person conducted a transaction involving monetary instruments at an overseas bank with reckless disregard for the fact that the monetary instruments were derived from any illegal activity, not just those involving title 18 violations,

(Footnote Continued)

beyond a reasonable doubt their employing bank could also be prosecuted, since it, as well as the employee, participated in the transaction.

Finally, there would only be extraterritorial jurisdiction over transactions involving more than \$10,000, thereby assuring that federal extraterritorial jurisdiction is confined to significant cases.

(Footnote Continued)

tax violations, drug crimes, and espionage, provided it could be shown that the foreign bank had sufficient contacts with the United States so that the transaction affected interstate or foreign commerce.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO <u>John Roberts</u>	Take necessary action ☐
<u></u>	Approval or signature ☐
<u></u>	Comment ☐
<u></u>	Prepare reply ☐
<u></u>	Discuss with me ☐
<u></u>	For your information ☐
<u></u>	See remarks below ☐
FROM <u>John Cooney</u>	DATE <u>6/10</u>
REMARKS <u></u>	



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
June 3, 1985

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of the Treasury
Department of State
Federal Reserve System
Department of Commerce
Federal Home Loan Bank Board
Federal Deposit Insurance Corporation
Central Intelligence Agency
Administrative Office of the United States Courts

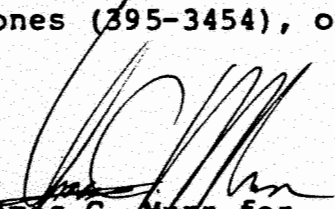
John

SUBJECT: Draft Justice Department bill on money laundering

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Circular A-19.

Please provide us with your views no later than 4 PM TODAY, Monday, June 3, 1985.

Direct your questions to Gregory Jones (395-3454), of this office.


James C. Morr for
Assistant Director for
Legislative Reference

Enclosures

cc: Frank Seidl
David Hunn
John Robinson
John Cooney
J. Gonzales

This Act may be cited as the "Money Laundering and Related Crimes Act of 1985."

Sec. 2.(a) Chapter 95 of title 18, United States Code, is amended by adding at the end thereof the following new section:
"§1956. Laundering of monetary instruments

"(a) Whoever conducts, causes to be conducted, or attempts to conduct a transaction involving the movement of funds by wire or other electronic means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or conducts, causes to be conducted, or attempts to conduct such a transaction through or by a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree --

Brady - Porez
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use of an instru-
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per se
"effects" system
Very broad
assertion of
jurisdiction

"(1) with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity; or

"(2) knowing or with reckless disregard of the fact that such monetary instruments or funds represent the proceeds of, or are derived directly or indirectly from the proceeds of, any unlawful activity

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shall be sentenced to a fine of not more than \$250,000 or twice the value of the monetary instruments or wire transferred funds, whichever is greater, or imprisonment for not more than 20 years, or both.

"(b) Whoever conducts, causes to be conducted, or attempts to conduct a transaction described in subsection (a) is liable to

the United States for a civil penalty of not more than the greater of --

(1) the value of the funds or monetary instrument or instruments involved in the transaction, or

(2) \$10,000.

"(c) As used in this section --

"(1) the term 'conducts' includes but is not limited to initiating, concluding, or participating in initiating, or concluding a transaction;

"(2) the term 'transaction' includes but is not limited to a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes but is not limited to a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

"(3) the term 'monetary instruments' means coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery;

"(4) the term 'financial institution' has the definition given that term in 31 U.S.C. 5312(a)(2) and the regulations promulgated thereunder;

"(5) the term 'unlawful activity' means any act or activity constituting an offense punishable by death or imprisonment for a term exceeding one year under the laws of the United States or any State of the United States in which the act or activity took place; and

"(6) the term 'reckless disregard' as used in paragraph (2) of subsection (a) means that the person is aware of a substantial risk that the monetary instruments or funds involved in the transaction represent the proceeds of, or are derived directly or indirectly from the proceeds of, any unlawful activity, but disregards the risk. A substantial risk means a risk (based on all the circumstances of the transaction including but not limited to the amount and type of funds or monetary instruments and the nature of the transaction) that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

"(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

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imprisonment?*

"(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, ~~and~~^{or} by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate.

*What is
should
either way*

"(f) There is extraterritorial jurisdiction over the conduct prohibited by this section."

*What does
it mean
jurisdiction
outside of
borders? No
effects test
Any balancing
of national interests*

(b) The table of sections at the beginning of chapter 95 of title 18 is amended by adding at the end the following new item:
"1956. Laundering of monetary instruments".

Sec. 3.(a) Section 1113 of The Right to Financial Privacy Act of 1978 (Title XI of Public Law 95-630, 12 U.S.C. 3413) is amended by adding at the end thereof the following:

"(1) Nothing in this title shall apply when a financial institution or supervisory agency, or any officer, employee, or agent of a financial institution or a supervisory agency, provides to an agency of the United States financial records which such financial institution or supervisory agency has reason to believe may be relevant:

(1) to a possible violation of any law relating to crimes by or against financial institutions or supervisory agencies,

(2) to a possible violation of the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or sections 1

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or 3 of the Act of September 15, 1980 (21 U.S.C. 955a and c), or

(3) to a possible violation of a provision contained in subchapter II of chapter 53 of title 31, United States Code, or of section 1956 of title 18, United States Code."

(b) Subsection 1112(a) of the Right to Financial Privacy Act of 1978, (Title XI of Public Law 95-630, 12 U.S.C. 3412(a)) is amended to read as follows:

"(a) Nothing in this title shall apply when financial records obtained by an agency or Department of the United States are transferred to another agency or department if there is reason to believe that the records may be relevant to a matter within the jurisdiction of the receiving agency or department."

(c) Subsection 1103(c) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3403(c)) is amended by adding at the end thereof the following: "Such information may include the name or names of and other identifying information concerning the individuals and accounts involved in and the nature of the suspected illegal activity."

(d) Subsection 1117(c) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3417(c)) is amended to read as follows:

"(c) Any financial institution, or officer, employee or agent thereof, making a disclosure of the financial records of a customer, or information contained in such records, pursuant to this chapter in good-faith reliance upon a certificate by any Government authority, or in good-faith belief that such records

or information may be relevant to a possible violation of law in accordance with subsection 3413(1) or section 3403(c) of this title, shall not be liable to the customer for such disclosure or for any failure to notify the customer of such disclosure."

(e) Subsections (b) and (c) of section 1112 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3412) are repealed and subsections (d) and (e) of that section are redesignated subsections (b) and (c), respectively.

(f) Section 1120 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3420) is amended by striking out paragraph (1) and redesignating paragraphs (2) through (4) and any reference thereto in such paragraphs as paragraphs (1) through (3), respectively.

(g) The Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq., is amended by adding at the end thereof the following new section 1123 (12 U.S.C. 3423):

"§3423. Preemption of State law

The provisions of this title and any regulations promulgated thereunder shall preempt any provision of any constitution, law, or regulation of any State or political subdivision thereof, as well as any administrative or judicial interpretation of such provision, [that is not identical to the provisions of this title and regulations thereunder,] and that is more restrictive of disclosure to a Government authority concerning a possible violation of any statute or regulation than the provisions of this title and regulations promulgated thereunder."

Sec. 4. Rule 17(c) of the Federal Rules of Criminal Procedure is amended by adding at the end thereof the following:

"An attorney for the government may apply to the court for an order commanding the person to whom the subpoena is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the subpoena. The court shall enter such an order if it determines that -- (1) there is reason to believe that the books, records, documents, or other objects designated in the subpoena are relevant to a legitimate law enforcement proceeding; and (2) there is reason to believe that notification of the existence of the subpoena will result in:

(A) endangering the life or physical safety of any individual;

(B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (D) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Sec. 5. (a) Section 5318 of title 31, United States Code, is amended to read as follows:

"§ 5318. Compliance, exemptions, and summons authority

"(a) The Secretary of the Treasury may (except under section 5315 of this title and regulations prescribed under section 5315)--

"(1) delegate duties and powers under this subchapter, to an appropriate supervising agency, except as provided in subsection (c);

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"(2) require a class of domestic financial institutions to maintain appropriate procedures to ensure compliance with this subchapter and regulations prescribed under this subchapter;

"(3) examine any books, papers, records, or other data of domestic financial institutions relevant to the record-keeping or reporting requirements of this subchapter;

"(4) summon a financial institution or an officer or employee of a financial institution, or a former officer or employee, or any person having possession, custody, or care of the reports and records required under this subchapter, to appear before the Secretary of the Treasury or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation described in subsection (c).

"(5) prescribe an appropriate exemption from a requirement under this subchapter and regulations prescribed under this subchapter. The Secretary may revoke an exemption by actually or constructively notifying the parties affected. A revocation is effective during judicial review.

"(b) The purposes for which the Secretary of the Treasury may take any action described in paragraph (3) of subsection (a), include the purpose of civil and criminal enforcement of the provisions of this subchapter, section 21 of the Federal Deposit

Insurance Act (12 U.S.C. 1829b), section 411 of the National Housing Act (12 U.S.C. 1730d), or chapter 2 of Public Law 91-508.

"(c) The purpose for which the Secretary of the Treasury may take any action described in paragraph (4) of subsection (a) is limited to investigating violations of this subchapter, violations of section 21 of the Federal Insurance Act (12 U.S.C. 1829b), violations of section 411 of the National Housing Act (12 U.S.C. 1730d), or violations of chapter 2 of Public Law 91-508 for the purpose solely of civil enforcement of these provisions or any regulation issued thereunder. A summons may be issued under paragraph (4) of subsection (a) only by, or with the approval of the Secretary of the Treasury or a supervisory level delegate of the Secretary of the Treasury.

"(d) A summons pursuant to this section may require that books, papers, records, or other data stored or maintained at any place be produced at any designated location in any State or in any territory or other place subject to the jurisdiction of the United States not more than 500 miles distant from any place where the financial institution operates or conducts business in the United States. Persons summoned under this section shall be paid the same fees and mileage for travel in the United States that are paid witnesses in the courts of the United States. The United States shall not be liable for any other expenses incurred, in connection with the production of books, papers, records, or other data pursuant to the provisions of this section.

"(e) Service of a summons issued under this section may be by registered mail or in such other manner calculated to give actual notice as the Secretary may provide by regulation.

"(f) In the case of contumacy by or refusal to obey a summons issued to any person under this section, the Secretary shall refer the matter to the Attorney General. The Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation which gave rise to the summons is being or has been carried on or of which the person summoned is an inhabitant, or in which he carries on business or may be found, to compel compliance with the summons. The court may issue an order requiring the person summoned to appear before the Secretary or his delegate to produce books, papers, records and other data, to give testimony as may be necessary to explain how such material was compiled and maintained, and to pay the costs of the proceeding. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

"(g) All final determinations, findings, and conclusions of the Secretary pertaining to a summons authorized by this section shall be final and conclusive decisions of the matters involved, except that any person aggrieved by such a final decision may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed

Summons
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with the court and delivered to the Secretary or his delegate within thirty days after notice of the decision. Findings of fact by the Secretary or his delegate, if supported by substantial evidence, shall be conclusive."

(c) Section 5319 of title 31, United States Code, is amended to read as follows:

"The Secretary is authorized to make information in a report filed under this subchapter available to a federal, state, or local agency on the agency's request. Such disclosure shall be on the terms and conditions set forth by the Secretary consistent with the purposes of this chapter. The Secretary is also authorized to make information in a report filed under this subchapter available to a federal agency when the Secretary has reason to believe such information may be relevant to a matter within the jurisdiction of the receiving agency. The Secretary is also authorized to make disclosure of information in a report filed under this subchapter for national security purposes. A report made available pursuant to this section and records of such reports are exempt from disclosure under section 552 of title 5."

(d) (1) The first paragraph of subsection 5321(a) of title 31 United States Code, is amended to read as follows:

"(a) (1) A domestic financial institution, and a partner, director, officer, or employee of a domestic financial institution, willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this

title or a regulation prescribed under section 5315), or any person causing such a violation, is liable to the United States Government for a civil penalty of not more than --

"(A) where the violation involves a failure to file a report or a material omission or misstatement in a required report a transaction reporting requirement, the amount of the transaction, but not more than \$1,000,000, or \$25,000, whichever is greater, or

"(B) for any other violation, \$10,000.

For a violation of section 5318(2) of this title, or a regulation prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at such office, branch, or place of business at which a violation occurs or continues."

(2) The second paragraph of subsection 5321(a) of title 31, United States code, to read as follows:

"(2) A civil penalty under paragraph (1) is reduced by an amount forfeited under subsection 5317(b)."

(3) New paragraphs (4), (5), and (6) are added at the end of subsection 5321(a) of title 31, United States Code, as follows:

"(4) A person willfully violating the provisions of section 5314 of this title or of a regulation prescribed under section 5314 is liable to the United States government for a civil penalty of not more than --

"(A) where the violation involves a transaction, the amount of the transaction or \$25,000 whichever is greater, or

"(B) where the violation involves the failure to report the existence of an account or any required identifying data pertaining to the account, the entire amount in the account ^{Sum} _{equivalent} during the reporting year or \$250,000, whichever is greater.

"(5) Any person or financial institution negligently violating any provision of this subchapter or a regulation prescribed under this subchapter is liable to the United States for a civil penalty of not more than \$10,000.

"(6) A civil penalty assessed pursuant to this section is in addition to any criminal penalty under section 5322 of this title based on the same transaction."

(e) Subsection 5321(b) of title 31 is amended to read as follows:

"(b) The Secretary may bring a civil action to recover an unpaid penalty under subsection (a) within six years from the date of the transaction on which the penalty is based."

(f) Subsection 5321(c) of title 31 is amended to read as follows:

"(c) The Secretary of the Treasury may remit any part of a forfeiture under subsection 5317(b) of this title or may mitigate any civil penalty under subsection (a) of this section."

(g) Subparagraph (3) (B) of subsection 5312(a) of title 31, United States Code, is amended by striking the period at the end thereof and inserting in lieu thereof: "whether or not in bearer form."

(h) Subsection 5322(b) of title 31, United States Code, is amended by striking out the words "pattern of illegal activity involving transactions of more than \$100,000" and inserting in lieu thereof "pattern of any illegal activity involving more than \$100,000", and by striking out the figure "5" and by replacing in lieu thereof the figure "10".

(i) Paragraph (5) of subsection 5312(a) of title 31, United States Code, is amended to read as follows:

"(5) 'United States' means the States of the United States, the District of Columbia, and, when the Secretary prescribes by regulation, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, any other territory or possession of the United States, or a military or diplomatic establishment."

Sec. 6. (a) Subsection (b) of section 1952 of title 18, United States Code, is amended by deleting the word "or" before the figure "(2)", and by deleting the period at the end thereof and replacing it with the following: ", or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 of this title."

(b) Subsection 1961(1) of title 18, United States Code, is amended by inserting the phrase "section 1956 (relating to the laundering of monetary instruments)," after the phrase "section 1955 (relating to the prohibition of illegal gambling businesses),".

(c) Subsection 2516(1) of title 18, United States Code, is amended in paragraph (c) by adding the phrase "section 1956 (laundering of monetary instruments)," after the phrase "section 1955 (prohibition of business enterprises of gambling),".

Sec. 7. Section 2 of title 18, United States Codes, is amended by adding the following subsection:

"(c) Whoever knowingly facilitates the commission by another person of an offense against the United States by providing assistance that in fact is substantial is punishable as a principal."

Sec. 8. (a) Chapter 113 of title 18, United States Code, is amended by adding at the end thereof the following new section:
"§2322. Receiving the proceeds of a crime

"Whoever receives, possesses, conceals, or disposes of, or attempts to receive, possess, conceal or dispose of, any money or other property which has been obtained in connection with a violation of any law of the United States for which the punishment may extend to imprisonment for more than one year; or which has been obtained in connection with a violation of any law of a foreign country concerning the manufacture, distribution, or other form of trafficking in any substance listed in the current

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schedules of controlled substances established pursuant to section 202 of the Controlled Substances Act (21 U.S.C. 812) for which the punishment under the law of the foreign country may extend to imprisonment for a period of more than one year, knowing or believing the same to be money or property which has been obtained in violation of law, shall be imprisoned for not more than ten years, or fined not more than \$250,000 or both."

(b) The table of sections at the beginning of chapter 113 of title 18 is amended by adding at the end thereof the following new item:

"2322. Receiving the proceeds of a crime".

Sec. 9(a) Title 18 of the United States Code is amended by adding a new Chapter 120 as follows:

"CHAPTER 120 -- Forfeiture

"Sec.

"2600. Civil Forfeiture.

"2601. Criminal Forfeiture.

"§ 2600. Civil forfeiture

"(a) Any funds or monetary instruments involved in a violation of section 1956, and any money or other property involved in a violation of section 2322 in connection with a violation of any law of the United States or of a foreign country concerning controlled substances, and any property, real or personal, which represents the proceeds of or which is traceable to such funds, monetary instruments or other property shall be subject to forfeiture to the United States.

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② criminal penalty
③ civil penalty*

"(b) Any property subject to forfeiture to the United States under this section may be seized by the Attorney General, and with respect to funds or monetary instruments involved in a violation of section 1956 by the Secretary of the Treasury, upon process issued pursuant to the Supplemental Rules for certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when --

"(1) the seizure is pursuant to a lawful arrest or search; or

"(2) the Attorney General or the Secretary of the Treasury, as the case may be, has probable cause to believe that the property is subject to forfeiture under this section, in which event proceedings under subsection (d) of this section shall be instituted promptly.

"(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General or the Secretary of the Treasury, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General or the Secretary of the Treasury, as the case may be, may --

"(1) place the property under seal;

"(2) remove the property to a place designated by him;

or

"(3) require that the General Services Administration

take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

"(d) For the purposes of this section the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions hereof, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General or the Secretary of the Treasury, as the case may be.

"(e) Notwithstanding any other provision of the law, the Attorney General or the Secretary of the Treasury, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine to--

"(1) any other Federal Agency; or

"(2) any State or local law enforcement agency which

participated directly in any of the acts which led to the seizure or forfeiture of the property.

The Attorney General or the Secretary of the Treasury, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General or the Secretary pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General or the Secretary of the Treasury may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or

local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials.

"(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

"(g) The filing of an indictment or information alleging a violation of law which is also related to a forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the forfeiture proceeding.

"(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

"§ 2601. Criminal forfeiture

"(a) A person who is convicted of an offense under section 1956 or section 2322 of this title shall forfeit to the United States any money or other property involved in such an offense and any money or other property, real or personal, which

represents the proceeds of or which is traceable to such money or property.

"(b) In any case in which money or property subject to forfeiture under subsection (a)

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"(1) cannot be located upon the exercise of due diligence;

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

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

"(4) has been substantially diminished in value; or

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

the person shall forfeit to the United States any other property up to the value of any property described in this section.

"(c) The court, in imposing sentence on a person for a conviction of an offense listed in subsection (a), shall order that the person forfeit to the United States all property described in subsection (a) or (b).

"(d) The provisions of subsections 413(c) and (e) through (o) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C 853(c) and (e)--(o)) shall apply to property subject to forfeiture under this section, to any seizure or disposition thereof, and to any administrative or judicial proceeding in relation thereto, if not inconsistent with this section."

(b) The chapter analysis of part I of title 18, United States Code, is amended by adding at the end thereof the following;

"120. Forfeiture.....2600".

Section one of the bill sets out its title, the "Money Laundering and Related Crimes Act of 1985."

Section two sets out a new money laundering offense by adding a new section 1956 to title 18. Unlike other provisions in federal law, such as the Bank Secrecy Act provisions in Title 31, that deal with the problem of money laundering only indirectly by requiring the filing of various reports and punishing the failure to do so, the new section 1956 directly proscribes certain types of transactions involving monetary instruments and wire transfers of funds to launder the funds generated by or derived from illegal activity. The new section is derived in part from recommendations of the President's Commission on Organized Crime and from S. 572 and H.R. 1367, bills introduced in the present Congress by Senator D'Amato and Congressman McCollum. However, the new section goes beyond these proposals in that they were confined to money laundering through financial institutions whereas section 1956 would cover any money laundering which affects interstate commerce. On the other hand, the new section 1956 rejects the approach of these other bills which would have imposed criminal liability on a person who merely had a "reason to know" that a transaction in which he took part involved monetary instruments which represent the proceeds of unlawful activity. Rather, criminal liability and civil sanctions under the new section may only be imposed if the government can show that the person had actual knowledge or acted with

reckless disregard of the fact that the monetary instruments represent the proceeds of an unlawful activity.

Subsection (a) sets out the new offense. It provides that one who conducts, causes to be conducted, or attempts to conduct a transaction involving either the wire transfer of funds or involving monetary instruments, which affects interstate or foreign commerce or which is conducted through or by a financial institution which is engaged in or the activities of which affect interstate or foreign commerce, is guilty of an offense provided the government can show either of the following: first that the person acted with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of any unlawful activity or, second, that the person knew or acted in reckless disregard of the fact that the monetary instruments or funds represent the proceeds of, or are derived directly or indirectly from the proceeds of, any unlawful activity. The punishment would extend to imprisonment for up to twenty years and a fine of up to the greater of \$250,000 or twice the value of the monetary instruments or wire-transferred funds involved in the transaction. In addition, section nine of the bill sets out new forfeiture provisions which will allow for either the civil or criminal forfeiture of funds and proceeds derived from the funds involved in a violation of the new section.

The term "conducts" is defined in subsection 1956(c) as including the initiating, concluding, or participating in a

transaction. Thus, the offense applies not only to the person who deposits cash representing the proceeds of an unlawful activity in a bank or uses such cash to buy an expensive car, but also to a bank employee and the car salesman who participated in the transaction by accepting the money if such persons could be shown to have known or to have acted in reckless disregard of the fact that the money presented was the proceeds of or was derived directly or indirectly from the proceeds of an unlawful activity. Moreover, the offense would be committed by the bank or the car dealership as an entity if it could be shown that its employees knew or acted with reckless disregard that the money was the proceeds of or was derived directly or indirectly from an unlawful activity.

The term "transaction" is also defined in subsection 1956(c) to include various activities involving financial institutions such as a deposit, an exchange of funds, a transfer between accounts, and purchases of stock or certificates of deposit. It is also defined in terms of activities not involving banks such as the purchase, sale, or other disposition of property of all kinds. It should be noted that each transaction involving "dirty money" is intended to be a separate offense. For example, a drug dealer who has \$1,000,000 in cash from a drug sale who divides the money into smaller lots and deposits it in ten different banks (or in ten different branches of the same bank) on the same day has committed ten distinct violations of the new statute. If he then withdrew some of the money and used

it to purchase a boat or condominium he would commit two more violations, one for the withdrawal and one for the purchase.

To constitute a violation of the section, the transaction must "affect interstate or foreign commerce" or be conducted through or by a financial institution which is engaged in or the activities of which affect interstate or foreign commerce, "in any way or degree." The term "affect commerce in any way or degree" is derived from the Hobbs Act, 18 U.S.C. 1951, and is intended to reflect the full exercise of Congress' powers under the Commerce Clause. Thus, for example, the use of the proceeds of unlawful activity to purchase a residence would be covered if any of the materials could be shown to have come from out-of-state.

The term "unlawful activity" is also defined in subsection 1956(c). It means any act or activity constituting an offense (whether or not the person has been charged with or convicted of the offense) that is punishable by imprisonment for more than one year under the laws of the United States or of any State in which the activity took place.

As indicated, the prosecution must show not only that the defendant entered into the transaction but also that he had a particular state of mind, either that he intended to promote, manage, establish, carry on, or facilitate any unlawful activity, or that he knew or acted with reckless disregard of the fact that the monetary instruments or funds represent the proceeds of or are derived directly or indirectly from an unlawful activity.

For example, a violation of 18 U.S.C. 1956(a)(1) would be established if it could be shown that a member of a drug smuggling ring, who had nothing to do with the actual handling of the drugs but who was aware of the ring's activities, deposited the money in various bank accounts from which it could later be transferred to or at the direction of other members of the drug trafficking operation. However, violations of subsection 1956(a)(1) are not limited to situations involving ongoing criminal activity such as a drug trafficking involving repeated dealings or a gambling operation taking in money over a long period of time. Rather, this subsection would be violated by one who conducted a transaction such as a purchase of property with the proceeds of a one-time offense such as a bank robbery since such a transaction would facilitate the unlawful activity.

The term "reckless disregard," which is used in subsection 1956(a)(2), is also defined in subsection 1956(c). It means that the person who engages in a transaction involving monetary instruments or wire-transferred funds is aware of a substantial risk that the funds represent the proceeds of or are directly or indirectly from an unlawful activity but disregards the risk. Thus, the required state of mind involves a consciousness of the substantial possibility that the funds are tainted and is far removed from the standard of mere negligence or "reason to know." The definition further explains that a "substantial risk" means a risk based on all the circumstances of the transaction such as the amount and type of funds involved and the nature of the

transaction that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise under the circumstances. For example, few businesses and fewer individuals bring thousands of dollars in small bills into banks for deposit, or purchase real estate with currency. A bank which accepts such a deposit from a person with no questions asked may be acting in reckless disregard of the fact that it is dealing with the proceeds of unlawful activity depending on all the circumstances, such as the bank's location in an area of heavy drug trafficking like south Florida, or the person's failure to offer a plausible explanation for such a deposit. In short, a bank or any other business that makes any sort of reasonable inquiry about the reason for an unusually large transaction involving cash or other monetary instruments frequently derived from criminal activity (like cashiers' checks) in an attempt to verify that they are not the proceeds of unlawful activity would not be acting recklessly so as to violate the statute. On the other hand, to make no inquiry about such funds or to make a calculatedly insufficient inquiry might indicate reckless disregard that the funds were the proceeds of crime.

Subsection 1956(b) sets out a civil penalty for violations of the offense under 1956(a)(1) or (a)(2). As with most civil provisions, the standard of proof is by a preponderance of the evidence. The amount of the penalty may extend to the greater of \$10,000 or the amount involved in the transaction. The civil penalty is in addition to any fine imposed for the criminal

offense. Moreover, it should be noted that the forfeiture provisions are in addition to the civil and criminal penalty. Thus, a person who violates section 1956 by laundering \$250,000 might have the funds civilly forfeited, be subjected to a fine of another \$250,000 if convicted of the criminal offense, and pay a civil penalty of another \$250,000. For payment of the criminal fine and civil penalty, the government could look to other assets of the defendant not involved in the offense.

Subsection 1956(c) contains definitions applicable to the section most of which have been discussed. The term financial institution has the definition given that term in 31 U.S.C. 5312(a)(2) and the regulations promulgated thereunder, and as they may be amended from time to time. The term "monetary instruments" is defined as coin or currency of the United States or of any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery. The definition would include cashier's checks. The phrase "coin or currency" is also intended to include gold or other precious metal coins such as Krugerrands which are the legal tender of a country but which do not normally circulate as such or whose value is determined by the worth of their metallic content rather than by the operation of normal currency exchange markets.

Subsection 1956(d) merely states that nothing in the new section supersedes any provision of federal or state law imposing

criminal penalties or affording civil remedies in addition to those provided for in this section. Thus, a person could be charged with both a violation of the new section 1956 and a violation of the Bank Secrecy Act provisions in Title 31 for causing a financial institution to fail to fill out the proper forms or to fill them out improperly.

Subsection 1956(e) states that violations of the section may be investigated by such components of the Department of Justice as the Attorney General may direct and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate. It is intended that the two Departments will enter into a memorandum of understanding or will enter into ad hoc agreements concerning which Department will investigate. In any event, the fact that one Department investigated a possible violation that by agreement or otherwise should have been investigated by the other, or that a third agency investigated a possible violation would not be a defense and would confer no rights on the defendant.

Subsection 1956(f) provides that there is extraterritorial jurisdiction over the conduct prohibited by this section. Thus, there would be jurisdiction if the offense was committed by a United States citizen or national anywhere in the world -- for example by depositing money knowing it to be the proceeds of unlawful activity in violation of United States law in a foreign bank -- or by a foreign national at an overseas branch of a United States financial institution -- for example by depositing money knowing it was the proceeds of a crime in the United States at the overseas branch.

Clearly so that there shall be no doubt, in the view of an implementing court, as to the scope of conduct Congress intended to reach.

~~This section states the intent of Congress that there is extraterritorial jurisdiction over the conduct prohibited by this section.~~

~~the offense~~
~~of the offense~~
~~scope of this provision.~~

Subsection 3 sets forth several amendments to the Right to Financial Privacy Act of 1978 (Title XI of Public Law 95-630) ("RFPA") these amendments define further the extent to which financial institutions may cooperate in and contribute to Federal law enforcement efforts without risking civil liability under the RFPA. Several of the amendments are variations of recommendations made by the President's Commission on Organized Crime which appear in Congressman McCollum's bill.

Subsection 3(a) amends subsection 1113 of the Right to Financial Privacy Act, 12 U.S.C. § 3413, to add a new exception provision. The new § 3413(1) provides that "nothing in the Act shall apply," when a financial institution provides financial records to an agency which it has reason to believe may be relevant to possible crimes against a financial institution or financial institution supervisory agency, possible Bank Secrecy Act violations or violations of the proposed money laundering offense, 18 U.S.C. § 1956, or enumerated drug-related crime provisions. This disclosure would include full disclosure of all such information within the possession of the financial institution including copies of possibly relevant documents, and could be made without any notice to the customer otherwise required by the RFPA. "Reason to believe" means reasonable suspicion and does not equate to probable cause.

Subsections 3(b) and (e) amend subsection 1112(a) of the

Right to Financial Privacy Act, 12 U.S.C. § 3412 to eliminate the requirement of certification and notice to the customer when an agency that has received financial records in accordance with the provisions of the RFPA transfers the records to another agency, as long as the transferring agency believes the records may be relevant to a matter within the jurisdiction of the receiving agency. The eliminated notice of further transfer provides little if any further privacy protection to the affected bank customers.

Subsection 3(c) amends subsection 1103(c) of the Right to Financial Privacy Act, 12 U.S.C. § 3403(c). Currently § 3403(c) provides that nothing in the Act shall preclude a financial institution from notifying a Government authority that the institution has information which may be relevant to a possible violation of any statute or regulation. The provision has created some confusion among financial institutions regarding how much information relating to the possible violation of law can be given to a Government authority without notice to the affected customers. While this provision clearly does not authorize wholesale disclosure of financial records, enough information about the nature of the possible violation and parties involved must be able to be given to the Government authority in order for that authority to proceed with a summons, subpoena or search warrant for additional information. Therefore, in order to alleviate concerns in the financial community, subsection 3(c) makes explicit the current rule that the information a financial

agency may provide includes the name or names and other identifying information concerning the individuals or account involved and the nature of the suspected illegal activity. The identifying information would include home and business addresses of the individuals and the type, number, and location of accounts.

Subsection (d) expands upon the current "good-faith" defense that a financial institution may raise under subsection 1117(c) of the Right to Financial Privacy Act, 12 U.S.C. 3417(c) in a civil suit under the RFPA. Section 3417(c) now states that if a financial institution provides information in good faith reliance upon the certification of a Government authority that has complied with the applicable provisions of the RFPA, the institution shall not be liable to the customer for such disclosure. The amendment adds that the financial institution will also have this good-faith defense if it provides records or information in the good faith belief that it is relevant to a possible violation of law in accordance with § 3413(1) or § 3403(c) discussed above.

Finally, subsection 3(f) deletes a provision in § 1120 of the Right to Financial Privacy Act in 12 U.S.C. § 3420 that provides that financial records obtained about a customer from a financial institution pursuant to a Federal grand jury subpoena must be returned and actually presented to the grand jury. This unique requirement for physical presentation of documents to the Grand Jury is burdensome and costly. The requirement serves no

legitimate privacy interest because other provisions in the RFPA regarding Grand Jury records and Rule 6 of the Federal Rules of Criminal Procedure adequately protect unauthorized use of the subpoenaed records.

Subsection 3(g) adds a new section 3423 to Title 12 to make explicit that the Right to Financial Privacy Act preempts any state financial privacy law or judicial interpretation that is more restrictive of disclosure to a Government authority concerning a possible violation of law. The RFPA would also preempt any state requirement for customer notice not required under the RFPA with respect to possible violations of law.

Section four is not related exclusively to money laundering but is included here because it is analogous to the amendment to the RFPA made in subsection 3(a) stating that nothing in that Act shall apply when a financial institution provides certain information from a customer's records to a federal agency. As discussed, this provision in section three has the effect not only of allowing a financial institution to provide records to law enforcement authorities, but also of rendering inapplicable the provisions in the RFPA which require notice to the customer whenever account information is given to a government agency.

Section four amends Rule 17(c) of the Federal Rules of Criminal Procedure to clarify the authority of the district courts to issue, and set standards for the issuance of, orders commanding a person to whom a subpoena duces tecum is directed, not to advise, for a specified period, any other person of the existence of the subpoena. Although the power exists to seek judicial orders precluding the giving of notice of the existence of a grand jury or court subpoena, many judges and magistrates are reluctant to grant applications for such orders in the absence of express authority in a statute or rule of procedure. Moreover, some courts have taken the position that because the RFPA includes specific provisions for the entry of orders delaying notice by financial institutions to customers of the issuance

of subpoenas seeking customer records, yet exempts grand jury subpoenas from the Act, this exemption carries the implication that the courts are without authority to issue "no notice" orders with respect to grand jury subpoenas directed to financial institutions. Accordingly, Rule 17(c) would be amended to allow the attorney for the government to seek and the court to issue an order not to tell anyone of the existence of the subpoena for a specified length of time if the court determines that there is reason to believe the material that is the object of the subpoena is the object of a legitimate law enforcement proceeding and there is also reason to believe that notification of the existence of the subpoena will result in endangering the safety of any person, flight from prosecution, destruction of evidence, intimidation of potential witnesses, or otherwise seriously impairing the investigation or trial.

This amendment to Rule 17(c) is not intended to deprive a person to whom a subpoena duces tecum is directed from exercising his Sixth Amendment rights to consult with counsel. In other words, the amendment would not give the court the authority to order the person not to consult with counsel. In this situation, however, the court would have the authority to order that the attorney not notify any other person of the existence of the subpoena for a specified length of time.

Section 5 sets forth several amendments of Title II of Public Law 91-508, "the Currency and Foreign Transactions Reporting Act" codified at 31 U.S.C. § 5311-5322 which together with Title I of Public Law 91-508 is commonly known as the Bank Secrecy Act. The need for strengthening the Department of the Treasury's ability to enforce effectively the Act with strong sanctions has become apparent in the wake of the Bank of Boston's recent plea of guilty to a numerous criminal violation of the Bank Secrecy Act. Following the publicity surrounding that case, several other banks have come forward to Treasury with information concerning failures to file reports required by the Act. The extent of non-compliance within the financial community is not as yet determined. Full, universal compliance with the recordkeeping and reporting requirements of the Act is critical to maximize the Act's purpose of providing information useful in "criminal, tax and regulatory matters," information that has proved especially helpful to detect laundering of the proceeds of crime.

Section 5(a) amends 31 U.S.C. § 5318 to give the Secretary new summons authority under the Bank Secrecy Act for both testimonial and documentary evidence. Summons authority was recommended by the President's Commission on Organized Crime and is contained in both Senator D'Amato and Congressman McCollum's bills. It is imperative to the effectiveness of the Bank Secrecy Act that the Secretary have the ability to summon witnesses and documents both to investigate violations of the Act and to assess

the appropriate level of civil penalties for violations of the Act.

The Secretary may summons _____ to give testimony under oath and bring documents relevant to any reporting or recordkeeping provision of the Bank Secrecy Act. The purpose of the summons is limited to civil enforcement of the Bank Secrecy Act.

A summons may be issued only by the Secretary or with his approval by "a supervisory level" official of an organization to which the Secretary has delegated Bank Secrecy Act enforcement authority, e.g., the Internal Revenue Service, the Comptroller of the Currency and the Customs Service. An agent or bank examiner in the field could not issue a summons on his or her own authority.

New sections (d) through (g) are added to § 5318 as summons housekeeping provisions relating to service, witness fees, summons enforcement actions and appeals of decisions by the Secretary pertaining to summons. Summoned parties will be reimbursed for the costs of compliance with the summons to the extent of fees and mileage for travel within the United States that are paid witnesses in courts of the United States. Other costs, such as costs of copying and transporting documents, will not be borne by the Government.

Section 5(b) amends subsection 5319 pertaining to the availability of

Bank Secrecy Act reports. Currently, under § 5319, the Secretary of the Treasury is required to make information filed under § 5313, 5314 or 5316 available to an agency, as defined in 31 U.S.C. § 101, upon the request of the head of the agency, for a purpose consistent with the purposes of those sections or a regulation prescribed thereunder. Those sections have the same general purposes as the Bank Secrecy Act, i.e., to generate data with "usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. 5311. Section 5319 does not prohibit additional disclosures to government agencies, but does not explicitly provide for any additional sharing of information.

The revised § 5319 would explicitly authorize the Secretary, within his discretion, to provide report information to state or local agencies upon request for purposes consistent with the purposes of the Act. The Secretary also would be authorized to provide report information to other federal agencies without a request if he has reason to believe that the information would be useful to a matter within the jurisdiction of the receiving agency. This would allow the Secretary to provide useful information consistent with the purposes of the Act to another agency even if the receiving agency were unaware that BSA information existed relevant to one of its areas of responsibility. "Reason to believe" means a reasonable suspicion and does not equate to probable cause.

The revised § 5319 also would authorize the Secretary to

provide report information to other federal agencies for national security purposes with or without a request. Such information could be useful to the intelligence community for analysis of currency flow patterns to corroborate or discover foreign government financial connections with individuals and businesses in the United States.

Subsection 5(c) contains several amendments to 31 U.S.C. § 5321, the civil penalty provision of the Bank Secrecy Act. Under current law, the civil penalty for willful violations of BSA reporting requirements is \$10,000 per violation, with an additional penalty for international transaction reporting violations. Subsection 5(c) provides for a new penalty of not more than the amount of the transaction up to \$1,000,000, or \$25,000, whichever is greater, for all reporting violations. For non-reporting violations, the penalty will continue to be up to \$10,000. A new paragraph (4) is added to 31 U.S.C. § 5321(a) providing for increased civil penalties for willful violations of 31 U.S.C. § 5314 or a regulation prescribed thereunder relating to records and reports of foreign financial agency accounts and transactions.

A new paragraph (5) is added to provide a penalty for negligent violations of the recordkeeping and reporting requirements. Currently, sanctions exist only for willful violations; however, negligent non-filing by banks similarly deprives the Government of important law enforcement information.

deprives the Government of important law enforcement information. The new paragraph (5) would provide a penalty of \$10,000 per violation in cases in which the facts do not support a finding of willfulness.

A new paragraph (6) is added to § 5321(a) to clarify that criminal penalties under § 5322 and civil penalties under § 5321 are cumulative. This provision makes explicit that if the Secretary of the Treasury assesses a civil penalty in a case and then refers the case to the Department of Justice for criminal prosecution, a court should impose criminal penalties without reference to whether a civil penalty has been imposed. Similarly, if a criminal conviction were to come before assessment of a civil penalty, the Secretary of the Treasury is free to impose the full measure of civil penalties available.

Subsection 5(d) establishes a six-year statute of limitations for actions to enforce civil penalties under the Bank Secrecy Act. Bank Secrecy Act civil penalty enforcement actions are now governed by the general five-year statute of limitations for all civil fines and penalties, 28 U.S.C. § 2462. This change is needed because civil penalty cases are frequently subject to corresponding criminal actions which may take many months to conclude. There may be a stay of the civil proceeding pending the criminal proceedings, or a decision to await assessment of a civil penalty until the conclusion of the criminal proceedings. If there is a six-year statute of limitations fewer transactions

on which civil penalties could be assessed will be precluded from civil action.

Subsection 5(e) amends 31 U.S.C. § 5321(c) to clarify the Secretary of the Treasury's authority to mitigate in his sole discretion all civil penalties authorized under § 5321(a).

Subsection 5(f) amends the definition of "monetary instrument" in 31 U.S.C. § 5312(a)(3)(B). The present definition contains a list that includes several bearer-type instruments and provides for the Secretary of the Treasury to designate as monetary instruments "similar material." This amendment, which makes explicit the Secretary's authority under current law, permits the Secretary to designate "similar material whether or not in bearer form." This modification eliminates any possibility that the current definition could be viewed as a bar to defining monetary instrument by regulation to include, for example, certain classes of cashier's checks and checks drawn to fictitious payees, which as a matter of commercial law are not bearer paper. See, e.g., Uniform Commercial Code 3-405 Comment 1. Experience has proven that cashier's checks and fictitious payee checks frequently are vehicles for money laundering and circumvention of the monetary instrument reporting requirements.

Subsection 5(g) amends 31 U.S.C. § 5322(b). Section 5322(b) provides for enhancement of the criminal penalty for violations of the Bank Secrecy Act that occur in conjunction with violations

of other laws of the United States or with other illegal activities involving more than \$100,000 in a 12-month period. The maximum term of imprisonment is raised from five to ten years. The language of the provision is also being changed to correct the problem of interpretation that arose in the case of United States v. Dickinson, 706 F.2d 88 (2d. Cir. 1983). In that case, the court held that the other illegal activities in excess of \$100,000 element referred only to reporting violations under the Bank Secrecy Act. It is now explicit that illegal activities involving more than \$100,000 are not restricted to violations under the Bank Secrecy Act itself, but to any illegal activity involving the requisite amount. Illegal activities mean activities constituting a legal offense whether or not the person has been charged with or convicted of the offense.

Subsection 5(h) amends the definition of United States in 31 U.S.C. § 5312(a)(5). The definition now refers to "territories and possessions" of the United States. The new definitions lists the territories, possessions, and the Trust Territory of the Pacific Islands. If pending legislation is enacted to change the status of the divisions of the Trust Territory of the Pacific Islands, this provision may no longer pertain to those jurisdictions. Under the legislation as proposed, laws enacted pursuant to the United States' authority as trustee will no longer be applicable to divisions of the Trust Territory other than the Northern Mariana Islands.

Subsection 6(a) of the bill makes the new money laundering offense in section 18 U.S.C. 1956, and violations of the provisions of the Currency and Foreign Transactions Reporting Act (subchapter II of chapter 53 of title 31) predicate offenses for the Interstate Travel in Aid of Racketeering, or ITAR, statute, 18 U.S.C. 1952.

Subsection 6(b) makes the new money laundering offense in section 1956 a predicate for the RICO Statute, 18 U.S.C. 1961. Violations of the Currency and Foreign Transactions Reporting Act are already RICO predicate offenses.

Subsection 6(c) makes the money laundering offense in section 1956 an offense for which a Title III wiretap may be employed by adding it to the list of such offenses in 18 U.S.C. 2516(1). Criminal violations of the CFTRA (31 U.S.C. 5322) are already on the list of offenses for which such investigative authority may be sought.

Section seven amends 18 U.S.C. 2 to provide for a criminal facilitation offense. It would not be limited just to money laundering but would be particularly applicable to money launderers. It adds a new subsection (c) to 18 U.S.C. 2 to provide that "whoever knowingly facilitates the commission by another person of an offense against the United States by providing assistance that in fact is substantial is punishable as a principal."

Current law is ambivalent on the question of culpability under 18 U.S.C. 2(a) for a person such as a money launderer who provides substantial assistance to another person as part of a criminal venture. Most courts and standard jury instructions follow the traditional test that the defendant must consciously

intend to make the criminal venture succeed. E.g., Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); United States v. Tijerina, 446 F. 2d 675, 678, n.1 (10th Cir. 1971). Some courts have held, however, when presented with a factual situation in which the defendant has knowingly furnished material assistance such as bribe money or goods to a person who he is aware intends to use them to commit a crime, that knowledge is sufficient scienter for criminal liability under 18 U.S.C. 2. E.g. Backun v. United States, 112 F. 2d 635, 637 (4th Cir. 1940); Malatkofski v. United States, 179 F. 2d 905, 916-917 (1st Cir. 1950). As noted by Judge Parker in the Backun case, supra:

Guilt as an accessory depends, not on "having a stake" in the outcome of crime ... but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them having a stake in the fruits of their enterprise. To say that sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who , sells a gun to another knowing that he is buying it to commit murder, would hardly escape conviction as an accessory to the murder by showing that he received full

price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felony.

The proposed amendment to 18 U.S.C. 2 is designed to adopt the reasoning set forth in the Backun case and others that a person who knowingly provides substantial assistance to another in the commission of an offense engages in reprehensible conduct deserving of criminal liability as a principal. Thus, a person who, for a small fee, takes small bills that he knows came from a drug sale to a bank and exchanges them for cashier's checks to give to the drug trafficker would be prosecutable under the new subsection (c) of 18 U.S.C. 2. The new subsection would also reach a bank employee who, for a fee, accepts for deposit money which he knows came from a drug sale, and a chemist who manufactures and sells a lawful but difficult to obtain ingredient to a person who he knows intends to use it to produce a controlled substance.

The phrase "facilitates the commission ... of an offense" is meant only to confirm that, in order for liability to attach, the other person must in fact complete the offense. The provision also requires that the assistance be in fact substantial. A showing that the assistance provided was not readily and lawfully available from others would be relevant to show that the assistance was substantial. The words "in fact" mean that no scienter is necessary with respect to the substantiality element.

The new subsection is not a revolutionary addition to federal law but rather would clarify the principle of accessorial liability and would be of particular value in situations involving the laundering of the money derived from narcotics trafficking. One who knowingly launders such money, even though he does not take part in the actual drug manufacturing or selling plays an integral part in the success of the criminal operation. The new provision is derived from the recommendation of the National Commission on Reform of Federal Criminal Laws (Final Report \$1002), which in turn was modeled on the approaches employed in both the California and New York penal codes. A similar provision was included in S. 1630 (\$401), the Federal Criminal Code revision bill approved by the Senate Judiciary Committee in the 97th Congress.

Section eight of the bill adds a new section 2322 to title 18 to proscribe the receiving of the proceeds of any felony in violation of federal law or the receiving of the proceeds of any violation of foreign law concerning narcotics trafficking for which the punishment extends to imprisonment for more than one year, if the person receiving the proceeds knows or believes that the money or property received has been obtained in violation of law. The punishment for a violation of this new section would extend to ten years' imprisonment and a \$250,000 fine. Like section seven, this provision would not be limited to money laundering but would be particularly helpful in combating money

launderers who receive the proceeds of drug and other serious criminal activities.

The new section 2322 sets out two distinct offenses. The first is receiving, possessing, concealing, or disposing of any money or other property which has been obtained in connection with a violation of any law of the United States for which the punishment may extend to imprisonment for more than one year. A similar receiving proceeds offense was included in S. 1630 in the 97th Congress (see §1311(a)(3)). It is intended that there be extraterritorial jurisdiction over this offense. In other words, so long as the money or property has been obtained in connection with a felony violation of federal law, this part of the statute is violated whether the money or property is received in the United States, in a foreign country, or at a place out of the jurisdiction of any country.

The second offense is receiving, possessing, concealing, or disposing of any money or other property which has been obtained in connection with a violation of any law of a foreign country concerning the manufacture, distribution, or other form of trafficking in any of the controlled substances listed in current schedules of controlled substances established pursuant to 21 U.S.C. 812 for which the punishment under the law of the foreign country may extend to imprisonment for more than one year. There would only be jurisdiction over this offense if the money or other property were received, possessed, concealed or disposed of in the United States. This offense is intended to guard against

the United States becoming a haven in which foreign drug traffickers can keep or invest their illegal profits.

Section nine sets out a new chapter 202 in Title 18 dealing specifically with forfeitures. It consists of sections 2600 and 2601 which deal with civil and criminal forfeitures, respectively.

Subsection 2600(a) provides for the civil forfeiture of all funds or monetary instruments involved in a violation of the new section 1956 (the new money laundering offense) and any real or personal property which represents the proceeds of or which is traceable to such funds and monetary instruments. It also provides for the civil forfeiture of any money or other property involved in a violation of the new section 2322 (the new section which proscribes the receiving or concealing the proceeds of a crime) if the violation is of a federal or foreign law pertaining to controlled substances, and any real or personal property which represents the proceeds of or is traceable to such money or property.

The procedures for accomplishing this civil forfeiture are patterned after the civil forfeiture provisions in Title 21. Subsection 2600(b) provides that property subject to forfeiture under subsection 2600(a) may be seized by the Attorney General and, in the case funds or monetary instruments involved in a violation of section 1956, also by the Secretary of The Treasury. This is because the Treasury Department is given investigative jurisdiction, concurrent with the Department of Justice, over

violations of section 1956. Treasury, however, does not have investigative jurisdiction over section 2322. Consequently, subsection (b) states that property subject to forfeiture may be seized pursuant to a lawful arrest or search or when "the Attorney General or the Secretary of the Treasury, as the case may be," has probable cause to believe the property is subject to forfeiture. The phrase "as the case may be," which also appears in other subsections of section 2600, is included to make it clear that either the Treasury Department or the Justice Department, or both if the case arises out of a joint investigation or if both Departments agree that they should act jointly, may take action with respect to a forfeiture arising from a violation of section 1956, but that the Treasury Department is to have no involvement in forfeitures arising out of violations of section 2322 due to its lack of jurisdiction over this offense.

Subsection 2601(a) provides for the criminal forfeiture of the money or other property involved in a violation of section 1956 or section 2322. Unlike the civil forfeiture provisions the criminal forfeiture provisions apply to any violation of section 2322, not just the receiving or concealing of money or property involved in drug crimes.

Subsection 2601(b) sets out a substitute assets provision which states that in cases where the money or property subject to forfeiture under subsection (a) cannot be located, has been transferred to a third party, has been placed beyond the jurisdiction of the court, has been diminished in value, or has been

commingled with other property the person shall forfeit any other property up to the value of that which would be forfeitable under subsection(a).

Subsection 2601(c) provides that the criminal forfeiture provisions are mandatory. In imposing sentence the judge must order the forfeiture of property described in subsection (a), or, if necessary, under subsection (b).

Subsection 2601(d) incorporates by reference all the procedures for criminal forfeitures set out in Title 21. These provisions were incorporated rather than the RICO provisions in Title 18 because Title 21 contains a useful provision (21 U.S.C. 853(f)) allowing the preindictment seizure of property subject to forfeiture whereas RICO does not.