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Abstract

This Comment discusses the effect that international organized crime and foreign government corruption has upon money laundering and the resultant need for the FMLDA. Part I discusses the basic elements of money laundering and the criminal actors who launder internationally, and anlyzes existing U.S. legislation designed to combat laundering and problems in the current legislation. Part II explains the legislative history, purpose, and proposed provisions of the FMLDA. Part III advocates adoption of this Act, and argues that the United States should no longer be complicit in the corruption and degradation of foreign governments via U.S. financial institutions.

COMMENT

ATTACKING THE TOOLS OF CORRUPTION: THE FOREIGN MONEY LAUNDERING DETERRENCE AND ANTICORRUPTION ACT OF 1999

*Julie Fendo**

INTRODUCTION

On August 19, 1999, the U.S. Federal Bureau of Investigation ("FBI") publicly announced its examination of alleged Russian money laundering[1] through the Bank of New York.[2] Commentators noted that the Bank of New York scandal was possibly the largest money laundering operation that criminals had ever executed in the United States.[3] Approximately US$10 billion were laundered through Bank of New York accounts,[4] as well as

* J.D. Candidate, 2001, Fordham University School of Law. I would like to thank the members of the *Fordham International Law Journal*, particularly Serge Pavlyuk, Sanu Thomas, Robin Gise, Joshua Warmund, Ian Goldrich, and Eugene Solomonov for all of their help. I would also like to thank my parents for their continuous support, and Thomas for keeping me company. This Comment is dedicated to my grandmother, Florence Oakley.

1. *See* Duncan E. Alford, *Anti-Money Laundering Regulations: A Burden on Financial Institutions*, 19 N.C. J. INT'L LAW & COM. REG. 437, 437 (1994) (defining money laundering as "process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate."). This definition is identical to the one proposed by the President's Commission on Organized Crime. *See* PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984) (asserting that criminals use money laundering as tool to enable enjoyment of illicit profits).

2. *See Russian Organized Crime Without Punishment*, ECONOMIST, Aug. 28, 1999, at 17 (noting that Bank of New York exposed investigation by affirming that bank had cooperated with U.S. Federal Bureau of Investigation ("FBI")).

3. *See id.* (reporting International Monetary Fund's (or "IMF") belief that criminals may launder between US$500 billion and US$1.5 trillion annually); *see also* Robert O'Harrow Jr., *Couple Admit Role in Laundering Billions out of Russia*, WASH. POST, Feb. 18, 2000, at 7 (noting that couple executed over 160,000 electronic banking transactions, worth at least US$7 billion, through Bank of New York (or "BONY") and banks in Russia and other countries).

4. *Compare Russian Organized Crime Without Punishment*, *supra* note 2, at 17 (characterizing Russia as "the world's leading kleptocracy") with Raymond Bonner & Timothy L. O'Brien, *Bank Called Long Unaware of Big, Suspicious Transfers*, N.Y. TIMES, Aug. 27, 1999, at A12 (claiming that more than US$4.2 billion was tied to organized crime and laundered through Bank of New York accounts).

other foreign and offshore banks.[5] Investigators believe that a large portion of the funds originated from the illegal activities of Russian organized crime groups and corrupt Russian government officials.[6]

The Bank of New York case represents a global concern for international organized crime groups and money laundering.[7] These crime syndicates are exploiting an increasingly international financial services industry in order to launder the proceeds from illegal activity.[8] Russia is a prime example of a country marred by organized crime and government corruption.[9] Countries such as Russia serve as a bastion for organized criminal activity[10] and are increasingly utilizing Western financial in-

5. *See Russian Organized Crime Without Punishment, supra* note 2, at 17 (asserting that "[t]he paper-trail has touched several European banks too, all of which are said to have helped, over the past year, to move $4 billion from Russia to BONY's London office."); *see also* Greg B. Smith, *2 Plead Guilty in Banking Scheme,* N.Y. DAILY NEWS, Feb. 16, 2000, at 12 (noting that hundreds of Russian deposits were made into Bank of New York accounts between 1996 and July 1999).

6. *See Russian Organized Crime Without Punishment, supra* note 2, at 18 (detailing extent of Russian organized crime and stating that Russian Interior Ministry estimated that organized criminal groups control at least 40% of Russian economy); *see also* Sharon LaFraniere & Robert O' Harrow Jr., *No Open-and-Shut Case; Unfolding Bank of New York Probes Have Multiple Leads, Confusing Plots,* WASH. POST, Oct. 3, 1999, at H01 (providing that FBI, Manhattan District Attorney's Office, Swiss, and British prosecutors are performing overlapping investigations into alleged Bank of New York money-laundering scandal). *But see* Timothy L. O'Brien, *Bank of New York Ex-Employee Charged in Russian Case,* N.Y. TIMES, Dec. 1, 1999, at A8 (explaining that as of December 1, 1999, federal prosecutors had not yet filed actual U.S. money laundering charges).

7. *See Prepared Testimony Before the House Comm. on International Relations,* Oct. 7, 1999, available *in* LEXIS, Legis Library, Hearing File [hereinafter *Hearings I*] (testimony of Prof. Keith Henderson) (commenting on relationship between Bank of New York scandal and international Russian organized crime). It has been noted that, "[w]hatever the facts and findings in the Bank of New York money laundering case, it is representative of larger, inter-related global problems: Weak, non-transparent, global and country financial systems, poor oversight and accountability, strong transnational criminal networks and official and corporate corruption." *Id.*

8. *Id.*

9. *See id.* (explaining that Russia has long history of *de facto* rule by organized crime groups); *see also* Eugene Solomonov, Comment, *U.S.-Russian Mutual Legal Assistance Treaty: Is There a Way To Control Russian Organized Crime,* 23 FORDHAM INT'L L.J. 165, 170-71 (1999) (claiming that organized crime has plagued Russia since 17th century). Since the dissolution of the Soviet Union in 1991, Russian organized crime expanded and gained momentum due to the opportunities to exploit the new Russian marketplace. Solomonov, *supra,* at 171. These modern crime syndicates are "composed primarily of former government officials, secret Soviet marketers, and common criminals." *Id.*

10. *See* Foreign Money Laundering Deterrence and Anticorruption Act, H.R. 2896, 106th Cong. (1999) [hereinafter FMLDA] (finding that countries, such as Colombia,

stitutions to launder money gained from illicit activity.[11]

Experts have shown that money laundering threatens the authority of national governments, corrupts government officials, harms the economic stability of host nations as well as global markets, and frustrates U.S. foreign policy.[12] For these reasons, the Foreign Money Laundering Deterrence and Anticorruption Act of 1999 ("FMLDA") has been introduced to Congress.[13] As the name suggests, this bill is designed to prevent and deter international money laundering by organized criminals, as well as money laundering by corrupt government officials.[14]

This Comment discusses the effect that international organized crime and foreign government corruption has upon money laundering, and the resultant need for the FMLDA. Part I of this Comment discusses the basic elements of money laundering and the criminal actors who launder money internationally. Part I also analyzes existing U.S. legislation designed to combat money laundering and the problems in the current legislation due to the globalization of international organized crime groups and government corruption. Part II explains the legislative history, purpose, and proposed provisions of the FMLDA. Part III advocates adoption of this Act. This part argues that the United

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Mexico, and Russia have sophisticated organized criminal enterprises, which are difficult for U.S. law enforcement officials to monitor).

11. *See* FMLDA, H.R. 2896, 106th Cong., § 2 (1)-(2) (explaining that Foreign Money Laundering Deterrence and Anticorruption Act ("FMLDA") was drafted specifically to deal with international money laundering). Section 2(1) states:

> Money laundering enables international organized crime groups to control and legitimize proceeds from a wide variety of illegal activities including theft, racketeering, terrorism, tax evasion, fraud, insider trading, and traffic in narcotics, arms, and other contraband. In many instances, these activities impact United States citizens and territory and frustrate United States foreign policy.

Id.

12. *See id.* § 2 (noting Congressional findings of fact relating to causes and effects of international money laundering). Section 2(2) states:

> Money laundering by international criminal enterprises challenges the legitimate authority of national governments, corrupts officials and professionals, endangers the financial and economic stability of nations, diminishes the efficiency of global interest rate markets, and routinely violates legal norms, property rights, and human rights.

Id.

13. *Id.*

14. *See id.* (finding that international organized criminals and corrupt government officials have been laundering illicit funds through U.S. financial institutions).

States should no longer be complicit in the corruption and degradation of foreign governments via U.S. financial institutions. This Comment concludes that the rise of the laundering of funds derived from international organized crime and corruption requires the adoption of legislation typified by the FMLDA, which is designed to deal explicitly with international financial entities.

I. *INTERNATIONAL MONEY LAUNDERING AND U.S. STATUTORY FRAMEWORK*

Money laundering is the process criminals use to hide the existence, source, and use of illegal income in a manner that allows this income to appear legitimate in the open economic market.[15] International organized crime groups[16] and corrupt government officials use money laundering to conceal the origins of money from such illegal activities as fraud, tax evasion, embezzlement, theft, racketeering, terrorism, insider trading, and traffic in narcotics, arms, and other contraband.[17] The money laundering process permits the proceeds of such underlying crimes to appear as though they were legally obtained.[18] Although current U.S. anti-money laundering statutes prove effective tools for apprehending criminals who launder money domestically,[19] experts urge the adoption of legislation designed to

15. *See* Alford, *supra* note 1, at 437 (asserting that drug traffickers in United States alone launder US$100 billion per annum). U.S. law enforcement agents concentrate on deterring and prosecuting money launderers as a means of curtailing the drug trade. *Id.* Increasingly more nations are adopting money laundering statutes and collaborating with other states to prosecute drug traffickers. *Id.*

16. *See* U.S. Department of Justice, *The International Crime Control Strategy*, (visited Oct. 2, 1999) <http://www.usdoj.gov/criminal/press/presltr.htm> [hereinafter Department of Justice] (on file with the *Fordham International Law Journal*) (Statement of Robert E. Rubin, Secretary of the Treasury) (stating that money laundering "is the 'life blood' of organized crime"). Mr. Rubin, however, further stated that money laundering "is also the 'Achilles heel,' as it gives us a way to attack the leaders of criminal organizations. While drug kingpins and other bosses of organized crime may be able to separate themselves from street-level criminal activity, they cannot separate themselves from the profits of that activity." *Id.*

17. *See* FMLDA, H.R. 2896, 106th Cong., § 2(1) (explaining that money laundering allows criminals to make their illegal proceeds appear legitimate).

18. *See* Alford, *supra* note 1, at 439 (describing money laundering methods). For instance, changing smaller bills into larger ones eases the transportation of illegal proceeds. *Id.*

19. *See* Scott Sultzur, Note, *Money Laundering: The Scope of the Problem and Attempts To Combat It*, 63 TENN. L. REV. 143, 151 (1995) (noting that U.S. legislation has discour-

prosecute criminals who launder money internationally.[20]

A. *Money Laundering Techniques and Practices*

Criminals typically employ several techniques to launder money both domestically and internationally.[21] Often these techniques involve transferring funds from one bank to another in order to avoid detection.[22] As the financial services industry becomes increasingly globalized,[23] international money launderers are using wire and on-line transfers to shift illicit funds from country to country.[24] Generally, the further away illegal proceeds get from U.S. law enforcement agents, the more difficult it is to prosecute international money launderers under the current U.S. anti-money laundering statutory framework.[25]

1. The Elements and Methods of Money Laundering

Criminals launder money in three stages: the placement stage, the layering stage, and the integration stage.[26] During the placement stage, money launderers physically deposit illicit

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aged money launderers from depositing illicit funds into mainstream U.S. bank accounts).

20. *See, e.g.*, Department of Justice, *supra* note 16 (quoting U.S. Attorney General Janet Reno as saying "[w]e need new tools to target money launderers, including international drug merchants").

21. *See* Alford, *supra* note 1, at 439 (noting that drug traffickers rely on money laundering to enjoy their profits); *see also* Peter E. Meltzer, *Keeping Drug Money from Reaching the Wash Cycle: A Guide to the Bank Secrecy Act*, 108 BANKING L.J. 230, 245-49 (1991) (claiming that criminals often launder money through wire transfers from one bank to another).

22. *Id.*

23. *See Hearing Before the Senate Comm. on Finance and International Trade*, 104th Cong. 1 (1996) [hereinafter *Hearings II*] (arguing that "[w]ith the growth in international free trade and ever improving electronic fund transfer technologies, the drug trade has found new and improved methods of securing the fruits of their ill gotten gains.").

24. *See* FMLDA, H.R. 2896, 106th Cong., § 2(7). Section 2(7) states:

> Recent advances in communications and information technology, particularly in the field of online transactions, have meant that offshore financial centers, originally concentrated near the "onshore" nations whose rules they circumvented, are being established in increasingly remote locations that are difficult and costly for law enforcement and supervisory authorities to monitor and visit.

Id.

25. *Id.*

26. *See* Meltzer, *supra* note 21, at 231 (describing three phases of money laundering); *see also* Sultzur, *supra* note 19, at 148 (commenting that money laundering allows criminals to avoid having illicit proceeds confiscated and to escape arrest).

money, gained from the illegal activities, into a financial institution.[27] Next, these criminals layer money by transferring it several times to different accounts or institutions in order to obscure its original source.[28] Finally, during the integration stage, money launderers transfer the money into a legitimate business or use it for some other legal purpose.[29] By the time the money launderers complete this process, it is virtually impossible to trace the money back to its original illicit source.[30]

Commentators note that the money laundering process is most susceptible to detection by law enforcement officials during the placement phase because the money is still close enough to its original source to be traced fairly easily.[31] For this reason, legislators have focused most of their enforcement and preventative efforts on the placement phase.[32] For instance, the Bank Secrecy Act[33] ("BSA") requires U.S. banks to file currency transaction reports[34] ("CTR") whenever US$10,000 or more is withdrawn from or deposited into one account during a single day.[35]

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27. *See* Meltzer, *supra* note 21, at 231 (noting that money launderers often deposit illegal funds in several different bank accounts).

28. *Id.*

29. *Id.*

30. *See* Sultzur, *supra* note 19, at 150 (commenting that layering stage is extremely difficult for U.S. law enforcement officials to trace). Often money launderers will layer money using elaborate schemes such as "counterbalancing loan schemes" to divert law enforcement officials. *Id.* Counterbalancing loan schemes entail using the value of accounts comprised of illegal funds as collateral for a loan in another country. *Id.*

31. *See* Lawrence L.C. Lee, *Combating Illicit Narcotics Traffic in Taiwan: The Proposed Money Laundering Control Act*, 4 TUL. J. INT'L & COMP. L 189, 210 (1996) (explaining investigative methods of tracking down sources of illegal funds); *see also* Meltzer, *supra* note 21, at 232 (describing how law enforcement officials focus on placement stage because U.S. banks must follow statutory reporting requirements).

32. Meltzer, *supra* note 21, at 232.

33. Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311-5314, 5316-5325 (1994); *see also* Daniel Mulligan, Comment, *Know Your Customer Regulations and the International Banking System: Towards a General Self-Regulatory Regime*, 22 FORDHAM INT'L L.J. 2324, 2334-35 (1999) (commenting that Currency and Foreign Transactions Reporting Act was referred to as Bank Secrecy Act ("BSA") by financial community). U.S. Banks often complain that the Bank Secrecy Act places heavy administrative and financial burdens on their businesses. Mulligan, *supra*, at 2340.

34. *See* 31 U.S.C. § 5313(a) (1994) (giving U.S. Secretary of Treasury power to set reporting limits on currency transaction).

35. *Id.* §§ 5311-14; *see* 31 C.F.R. § 103.22 (1992) (describing currency transaction reporting ("CTR") requirement form, alternatively referred to as IRS Form 4789). Title 31 C.F.R. § 103.22(a)(1) states:

> Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or

As legislative precautions become more stringent,[36] criminals simply create more intricate techniques to circumvent the CTR requirement.[37]

Money launderers use a variety of methods to avoid transaction reporting requirements.[38] For example, money launderers will sometimes set up front companies.[39] Often, money launderers will choose a type of business, like a restaurant, that is exempt from the CTR requirement.[40] Money launderers combine proceeds from the illegal activity with the legitimate proceeds, however minimal, from the front company and deposit the funds into one bank account.[41] The bank is not required to file a CTR, and it is difficult to trace the origins of the illicit money even if foul play is suspected.[42] Scholars note that because the government already receives over 600,000 CTRs per month, it is not administratably feasible to get rid of these exemptions.[43]

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transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Transactions in currency by exempt persons with banks are not subject to this requirement to the extent provided in paragraph (h) of this section. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

Id.

36. *See, e.g.*, Money Laundering Control Act of 1986, 18 U.S.C. § 1956-57 (1994); 31 U.S.C. § 5313-5326 (1994)) (criminalizing structuring of transactions in order to dodge CTR requirement. Structured transactions are multiple transactions made by one person, or by multiple persons on behalf of the individual account owner, totaling US$10,000 or more in one day. 31 U.S.C. § 5316 (1994).

37. *See generally* Alford, *supra* note 1, at 439-40 (describing ways in which money launderers have taken advantage of technological advances in communications industry).

38. *See id.* at 440 (explaining, for example, that money launderers often engage in real estate transactions in order to avoid CTR requirement); *see also* Sultzer, *supra* note 19, at 149 (offering jewelry stores and cash checking businesses as other examples of front companies).

39. *See* Alford, *supra* note 1, at 440 (noting, for example, that these front companies often mix drug sale proceeds with money from legitimate businesses).

40. *Id.; see also* 31 U.S.C. § 5312 (1994) (listing other exempt businesses, such as retail stores and coin laundries).

41. *See* Alford, *supra* note 1, at 440 (commenting that money launderers often mix illegitimate proceeds with illicit proceeds in order to hide criminal profits).

42. *Id.*

43. *See id.* (stating that exempted businesses are usually retail oriented, and thus would regularly require filing of CTR).

2. Using U.S. Financial Institutions as Tools of Money Laundering

Money launderers often use wire transfers from one bank to another in order to mask the origin of their money.[44] Commentators note that it is difficult for law enforcement officials to distinguish illegitimate from legitimate wire transfers, especially when wired internationally into U.S. banks.[45] Some money launderers set up small boutique banks in which they deposit illegal money.[46] These boutique banks then deal with larger correspondent banks, which wire the money through several different accounts.[47]

Some money launderers choose to transfer funds into currency-exchange businesses and other non-bank financial institutions.[48] These institutions generally contain more relaxed regulatory and reporting requirements than banks.[49] This method is another way for money launderers to prevent the filing of a CTR.[50]

An increasingly popular method for international criminals and organized crime groups to layer money through U.S. banks is by utilizing payable through accounts ("PTA").[51] A PTA is an account that an international banking institution opens at a U.S.

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44. *See* BARBARA WEBSTER & MICHAEL S. MCCAMPBELL, U.S. DEP'T OF JUSTICE, INTERNATIONAL MONEY LAUNDERING: RESEARCH AND INVESTIGATION JOIN FORCES 5 (1992) (setting out description of difficulties encountered by law enforcement officials when investigating wire transfers).

45. *Id.* at 5; *see* Nicholas Clark, *The Impact of Recent Money Laundering Legislation on Financial Intermediaries*, 14 DICK. J. INT'L L. 467, 469-70 (1996) (commenting that "web of transaction" is difficult for U.S. law enforcement officials to follow).

46. *See* Alford, *supra* note 1, at 440 (explaining that these boutique banks do business with correspondent banks and wire money through different accounts in order to hide original illicit source of money).

47. *Id.*

48. *See* Mulligan, *supra* note 33, at 2333-34 (asserting that in March 1995, Federal Deposit Insurance Company ("FDIC") created guidelines for U.S. banks to consider when issuing payable-through accounts (or "PTA") to international clients).

49. *See* Kirk W. Munroe, *Surviving the Solution, The Extraterritorial Reach of the United States*, 14 DICK J. INT'L L. 505, 506 (1996) (commenting that these non-bank financial institutions have lax reporting requirements, making them ideal shelters for illicit funds).

50. *Id.*

51. *See* Mulligan, *supra* note 33, at 2333 (noting that PTAs became popular with international banks as U.S. banking regulations became stricter, approving less international banks for operation in United States).

depository institution.[52] The international banking institution allows its customers to perform the normal banking activities that U.S. customers are able to perform with U.S. bank accounts.[53] Thus, international money launderers, acting as direct customers of a U.S. bank, can launder money by wire transfers and checks that are issued at their own bank, yet payable through the U.S. bank.[54] By conducting financial transactions at their own national bank first, international money launderers evade U.S. Know Your Customer ("KYC") policies designed to prevent money laundering.[55] The U.S. financial institution that houses the PTA has no independent way of knowing the identity of their PTA customers.[56]

Law enforcement officials are also deeply concerned about the use of offshore banking institutions[57] to launder money.[58]

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52. *See* FMLDA, H.R. 2896, 106th Cong., § 5(d)(B)(7) (defining PTA). This section states:

> The term 'payable-through account' means an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign banking institution by means of which the foreign banking institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

Id.

53. *See id.* (noting that international banks enable their customers to "engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States").

54. *See* Mulligan, *supra* note 33, at 2333 (describing benefits PTAs offer for international money launderers).

55. *See Guidelines for Monitoring Bank Secrecy Act Compliance, available in* 1996 WL 271924, at *9 (explaining that Know Your Customer ("KYC") policies require U.S. banks to keep reports maintaining specified information on each customer). The FDIC encourages banks to use "reasonable efforts" to discover the true identity of each customer and to ascertain the stated business purpose of each commercial customer. *Id.* The FDIC issued its own guidelines to ensure that banks comply with Section 326.8 of the FDIC's Rules and Regulations, which mandates inter-bank procedures designed to ensure compliance with U.S. Department of Treasury rules. *Id.* at *1. *See also* Mulligan, *supra* note 33, at 2326 (noting that KYC policies are partially codified in BSA).

56. *See Warning, Guidelines Issued To Protect Against Improper or Illegal Use of "Payable Through" Accounts*, Apr. 7, 1995, *available in* 1995 WL 480501 (setting out list of PTA guidelines). These guidelines recommend, for instance, that U.S. banks terminate payable-through arrangements with international banks when they cannot obtain adequate information about the actual users of such PTAs. *Id.*

57. *See* FMLDA, H.R. 2896, 106th Cong., § 2(6) (defining offshore financial centers as "nations, regions, zones, and cities that in many instances have virtually impenetrable financial secrecy laws and weak financial regulatory and reporting regimes, which are tailored to violate or circumvent the laws of other nations").

58. *See* Douglas Farah, *Caribbean Cash Havens Arouse U.S. Suspicions; Critics Say Island*

Offshore financial centers are foreign nations or zones that prioritize the ability of their customers to bank in secrecy and specifically design their financial institutions to evade the banking laws of other nations.[59] As a result, U.S. law enforcement officials have encountered difficulties monitoring these jurisdictions.[60] Even when the FBI or other U.S. law enforcement agencies find evidence of money laundering transactions, it is difficult for them to obtain corroborating information from offshore jurisdictions because of stringent secrecy laws.[61]

Offshore banking jurisdictions often offer the customer complete financial privacy by mandating criminal penalties for disclosing the customer's identity and other financial information.[62] These secrecy laws even prohibit banks from releasing information to law enforcement authorities without the customer's permission.[63] Money launderers attempting to hide the connection between their names and their bank accounts can open accounts in virtual anonominity.[64] The customer interacts

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Banks Shelter Criminal Funds, WASH. POST, Oct. 11, 1999, at A1 (noting that recent IMF study estimated that amount of money in offshore havens totaled US$4.8 trillion in 1997); *see also* Joshua Warmund, Comment, *Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic*, 22 FORDHAM INT'L L.J. 2373, 2413 (1999) (revealing that criminals launder over US$1 billion from United States through financial institutions in Dominican Republic every year).

59. *See* FMLDA, H.R. 2896, 106th Cong., § 2(6) (noting that as older, traditional offshore havens have begun to conform to internationally acceptable banking standards, new havens are quickly taking their place).

60. *Id.*; *see also* Alford, *supra* note 1, at 441 (noting that offshore financial institutions with strict bank secrecy laws in 1994 included Austria, Hong Kong, and Luxembourg). *But see* Farah, *supra* note 58, at A1 (stating that majority of offshore banking havens have been recently established in Caribbean islands). As more traditional offshore banking jurisdictions have succumbed to international pressures to regulate their banks and weaken their secrecy laws, many offshore banking havens have been established in increasingly remote places, such as the Caribbean islands. Farah, *supra.* These Caribbean offshore centers include Anguilla, Antigua, Barbados, Barbuda, the British Virgin Islands, the Cayman Islands, Dominica, Grenada, the Grenadines, Montserrat, the Netherlands Antilles, St. Kitts and Nevis, St. Lucia, the Turks and Caicos Islands, and St. Vincent. *Id.*; *see also* Warmund, *supra* note 58, at 2413 (asserting that Dominican banks encourage money launderers by implementing relaxed banking procedures). Dominican banks also established branches in distant locations, such as Thailand. Warmund, *supra.*

61. *See* GLOBAL MONEY LAUNDERING RULES SEEN NEEDED TO REDUCE DRUG PROFIT FLOWS, Banking Rep. (BNA) No. 56, at 582 (Mar. 25, 1991) (asserting that secrecy laws often forbid banks from releasing information about customer accounts).

62. *Id.*

63. *Id.*

64. *See* Alford, *supra* note 1, at 443 (showing other ways depositors can keep their identities secret within offshore jurisdictions). Trusts may also be set up where only the

only with the account manager, who utilizes the account number, rather than the customer's name, during all transactions.[65]

B. *Agents of Money Laundering*

International crime groups increasingly are disregarding national borders and creating multi-national crime syndicates.[66] Members of international organized crime groups and corrupt government officials launder the proceeds from illegal activities and money embezzled from domestic governments through U.S. banks and other financial institutions.[67] The recent Bank of New York case illustrates the ways in which organized crime, government corruption, and money laundering have combined to become what experts consider a global nightmare.[68]

1. Organized Crime

U.S. legislators believe that international organized crime groups have exploited the effects of globalization in the communication and transportation industries in order to expand the scope of their illegal activities.[69] These criminals now threaten both national and international security.[70] In some countries, like Colombia, Mexico,[71] and Russia, organized crime groups

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bank knows the identity of the trustee. *Id.* Corporations issuing bearer shares, which are sold without reference to identity, can be created. *Id.* An attorney creating the corporation would be the only person to know the name of the original owner. *Id.*

65. *Id.*

66. *See* Department of Justice, *supra* note 16 (noting that globalization of organized crime requires multi-layered law enforcement approach).

67. *Id.*

68. *See Hearings I, supra* note 7 (testimony of Prof. Keith Henderson) (urging international cooperation by law enforcement officials). The Bank of New York case illustrates the need for international law enforcement officials to concentrate on the financial sector and corporate governance. *Id.*; *see also* Jeff Leeds, *Indictment Issued in N.Y. Bank Probe; Finance: Former Bank Exec, Two Businessmen Targeted in Russia Money-Laundering Case. More Charges Likely*, L.A. TIMES, Oct. 6, 1999, at A1 (commenting that Russia's government and economy is subsumed in organized crime and corruption).

69. *See Russian Corruption and Money Laundering, 1999: Congressional Testimony by Federal Document Clearing House* (last visited May 15, 2000) <http://www.house.gov/banking/92299.rob.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Hearings III*] (testimony of James K. Robinson) (focusing on Russia while explaining immediate importance of combating money laundering).

70. *Id.*

71. *See generally, H.R. 4005—Money Laundering Deterrence Act of 1998 And H.R. 1756—Money Laundering And Financial Crimes Strategy Act of 1997: Hearings Before the House Comm. on Banking & Financial Services*, 105th Cong. 10 (1998) (testimony of Rep-

hold as much wealth and power as the governments themselves.[72] These criminal groups often use their power to influence and corrupt domestic government officials.[73]

International organized crime syndicates conduct a variety of illegal activities in the United States and then launder the proceeds through domestic and international financial institutions.[74] For example, international traffickers smuggle drugs like heroin and cocaine into the country.[75] Some members of international crime groups concentrate on fraud, deceiving the U.S. public, especially the elderly, into investing in illegitimate moneymaking schemes.[76] Others create fake charitable organizations and embezzle the funds.[77] Still others penetrate U.S.

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resentative Spencer Bachus). Representative Bachus stated, "It['s] simply not realistic to expect Mexico to clean up its financial institutions in the near term, even if one assumes that Mexico is somehow able to reverse its legendary corruption problem." "The bottom line, Mexico is a money-laundering black hole, and remains so for the foreseeable future." *Id.*

72. *See* FMLDA, H.R. 2896, 106th Cong., § 2(3) (finding criminals in these countries rival their national governments for power).

73. *See, e.g., Hearings III, supra* note 69 (testimony of James K. Robinson) (listing Russian corruption as example of government infiltrated by organized crime and grand corruption); *see also* Stanislaw Pomorski, *Reflections on the First Criminal Code of Post-Communist Russia*, 46 AM. J. COMP. L. 375, 376 n.6 (1998) (listing other countries with high levels of government corruption, such as Bolivia, Colombia, India, Indonesia, Mexico, Nigeria, Pakistan, Venezuela, and Vietnam).

74. *See* Sultzer, *supra* note 19, at 147 (noting that new class of criminals has emerged due to money laundering). The majority of people who launder money for organized crime syndicates are professionals, such as lawyers, bankers, and accountants, who have expertise in business. *Id.* These individuals are often separate from those who commit the underlying crimes that produce the illegal funds. *Id.*

75. *See generally* Sharon A. Gardner, Comment, *A Global Initiative To Deter Drug Trafficking: Will Internationalizing the Drug War Work?*, 7 TEMP. INT'L & COMP. L.J. 287 (1993) (noting ways in which drug trafficking has become international problem).

76. *See* Department of Justice, *supra* note 16 (commenting that as nations come closer together through use of revolutions in technology and communications, criminals use same technological revolutions to exploit people internationally); *see, e.g.*, Shirish Date, *Dropout Bilks Millions from Entrepreneurs; 'Bull Gator' Pulls Off Huge Money-Laundering Scam*, PALM BEACH POST, FL, May 8, 1998, at 1A (describing Operation Risky Business, one of largest non-drug-related money laundering scams). Four people in Gainesville, Florida were indicted in 1997 for masterminding a fraudulent investment scam. Date, *supra.* The culprits offered venture capital loans to entrepreneurs in exchange for "processing fees" of between US$40,000 to US$2,000,000. *Id.* Investors never received their loans, and the scammers laundered the fees through wire transfers and Federal Express to the Caribbean American Bank in Antigua. *Id.* at A2. In total, the money launderers swindled at least US$60,000,000 out of investors before they were apprehended. *Id.*

77. *See* Department of Justice, *supra* note 16 (asserting international criminals also "steal and modify luxury cars for resale in other countries").

companies and steal business secrets in order to sell them abroad.[78] International criminal organizations then launder the money gained through these fraudulent schemes in order to disguise the source of their profits.[79]

2. Government Officials

Government officials of various countries often embezzle money from their administrations and launder the funds internationally.[80] When government officials are linked with organized crime, corruption thwarts legitimate government efforts towards social justice.[81] Corruption hinders governmental efforts to provide better living standards and economic growth.[82] For instance, Russian organized crime groups infiltrate the Russian government and corrupt officials and judges,[83] preventing meaningful steps towards democracy, as well as the formation of a strong capitalist market.[84] Similar situations occur in other developing countries with high organized crime rates.[85]

Although such government corruption hurts all nations through its effects on the global economy, it has a disproportionate impact upon developing countries.[86] Money laundering by

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78. *See id.* (noting that international criminals "move vast sums of money through international financial system—dwarfing the combined economies of many nations.").

79. *See id.* at VI(A) (listing other international financial crimes, such as counterfeiting, international securities fraud, and credit card fraud).

80. *See Hearings III, supra* note 69 (testimony of James K. Robinson) (claiming, for example, that "Russian organized crime groups provide corrupt businessmen and government officials with protection, muscle, assassination teams and lines of communication to other groups of criminals, government officials and businessmen).

81. *See* Department of Justice, *supra* note 16 ("In some nations in crisis, in transition from authoritarian to democratic rule, or in the midst of a substantial privatization process, criminals are able to thrive to such degree that they pose a threat to the rule of law and the survivability of democracy.").

82. *See Hearings I, supra* note 7 (testimony of Prof. Keith Henderson) (arguing that international officials treat corruption like global AIDs epidemic—with silence and mere rhetoric).

83. *See id.* (explaining that many corrupt Russian government officials bribe judges, making Russian legal system useless).

84. *See id.* (commenting that Russia still has weak civil society that cannot impede government action).

85. *See id.* (labeling public and private "grand" corruption as one of largest threats to economic growth and political stability).

86. *See id.* (noting that "many development specialists of all disciplines . . . now believe that systemic corruption in developing and/or transition countries, such as Russia, makes long-term sustainable economic and political development virtually unachievable.").

corrupt government officials weakens the financial institutions and economies of developing countries by hiding illicit funds from law enforcement officials and helping to evade national tax laws.[87] Often, embezzlement of government funds combined with powerful organized crime groups prevent the formation of a viable middle class.[88] Presumably, the wealthy include only the corrupt government elite and members of crime syndicates.[89] This upper class exploits the poor and makes upward social mobility virtually impossible.[90] Furthermore, the U.S. Congress has found that corrupt government officials routinely violate legal norms, property rights, and human rights.[91]

Additionally, according to some commentators, when U.S. banks allow elite and corrupt government officials in underdeveloped countries to hide their wealth, these banks undercut efforts by Western governments and entities to help these countries.[92] One example is the International Monetary Fund ("IMF"), which regularly lends money, derived in part from U.S. taxpayers, to developing countries.[93] More than US$100 billion is laundered out of poorer countries every year.[94] The result is that U.S. taxpayers, as well as citizens of other IMF member countries, are donating their money to other nations, and U.S. banks are financially benefiting from allowing this money to be embezzled from underdeveloped countries and laundered

87. *See Hearings III, supra* note 69 (testimony of James K. Robinson) (noting that money laundering often enables international criminals to evade paying income tax in other countries).

88. *See Hearings I, supra* note 7 (testimony of Prof. Keith Henderson) (noting that public trust in democratic free markets has been shaken in Russia).

89. *See id.* (noting need in Russia for democratic pluralism, system of checks and balances, and independent media and judiciary).

90. *Id.*

91. *See* FMLDA, H.R. 2896, 106th Cong., § 2 (finding that money laundering is detrimental to nations with corrupt governments).

92. *See* Jeff Gerth, *Hearings Offer View into Private Banking; Secret Accounts Under Scrutiny as Foreign Wealth Moves Abroad*, N.Y. TIMES, Nov. 8, 1999, at A6 (interviewing Mr. Raymond Baker, guest scholar at Brookings Institution).

93. *Id.; see also Russian Organized Crime Without Punishment, supra* note 2, at 17 (noting that United States pressured IMF to lend Russia more money than originally intended, hoping that Russia would form workable democracy and exploitable market). Yet, since the Bank of New York scandal, the IMF is concerned that some of its funds were embezzled and laundered through the Bank of New York. *Id.* The IMF has since refused to supply Russia with promised funds on their scheduled deadline. *Id.*

94. *See* Gerth, *supra* note 92, at A6 (commenting that Western banks often serve to aid criminals in moving money out of other nations).

through U.S. accounts.[95]

3. The Bank of New York Case

The Bank of New York case serves as an example of how international money launderers use U.S. banks as repositories for illicit funds.[96] On February 14, 2000, Lucy Edwards[97] and Peter Berlin,[98] the married Russian couple who served as an early target for the investigation,[99] pleaded guilty to federal money laundering charges for laundering funds through the Bank of New York.[100] The couple laundered approximately

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95. *Id.*

96. *See Hearings I, supra* note 7 (testimony of Prof. Keith Henderson) (noting that Bank of New York case highlights global anti-money laundering law enforcement problems as well as rising problem of government corruption).

97. *See* Leeds, *supra* note 68, at A1 (asserting that Ms. Lucy Edwards was London-based Vice President at Bank of New York who supervised Eastern European accounts); *see also Russian Organized Crime Without Punishment, supra* note 2, at 17 (stating that Ms. Edwards was Russian-born Bank of New York executive and was originally named Lyudmila Pritzker). Ms. Edwards was suspended from the bank along with another Russian executive, Natasha Kagalovsky. *Russian Organized Crime Without Punishment, supra.* Mrs. Kagalovsky is married to Konstantin Kagalovsky, who was Russia's IMF representative in the early 1990s. *Id.*

98. *See* Leeds, *supra* note 68, at A1 (asserting that Mr. Peter Berlin opened two separate accounts at Bank of New York, through which funds were laundered). The accounts were in the names of Mr. Berlin's companies, Benex and Becs International. *Id.* Federal law enforcement officers are investigating possible ties between Benex International Co. and YBM Magnex Inc., a Philadelphia based firm that pleaded guilty to conspiracy to commit securities fraud. *Id.* U.S. officials believe that YBM Magnex Inc. is partially owned by Semyon Mogilevitch, a notorious Russian mobster. *Id.*; *see also* Smith, *supra* note 5, at 12 (noting that Mr. Berlin's companies were based in office suite in Forest Hills, Queens, New York).

99. *See Russian Organized Crime Without Punishment, supra* note 2, at 17 (stating that U.S. law enforcement officials were also originally investigating Bruce Rappaport). Mr. Rappaport is a Swiss banker serving as the ambassador to Moscow for Antigua, a famous Caribbean tax haven. *Id.*

100. *See* Raymond Bonner & Timothy L. O'Brien, *Guilty Pleas Seen in the Laundering of Russian Money*, N.Y. TIMES, Feb. 15, 2000, at A1 (asserting that Ms. Edwards and Mr. Berlin agreed to plea guilty to numerous U.S. criminal charges, including conspiracy to commit money laundering, visa fraud, wire fraud, and bribery of bank official); *see also* Smith, *supra* note 5, at 12 (stating that Ms. Edwards and Mr. Berlin flew to New York from London, where they were living since they were indicted in October 1999). The couple were taken into custody by the FBI and appeared before Manhattan Federal Judge Shirley Wohl Kram. Smith, *supra.*; *see also* Liz Moyer, *Couple Plead Guilty in $7B Laundering Case at Bank of N.Y.*, AM. BANKER, Feb. 17, 2000, at 18 (noting that couple entered pleas in U.S. District Court in Manhattan). The two could face up to 10 years in prison. Moyer, *supra.* They are expected, however, to bargain with the U.S. Attorney, exchanging testimony implicating other Bank of New York employees for a possible place in the federal witness protection program. *Id.*

US$7 billion between 1996 and 1999 through Bank of New York accounts.[101] The majority of the funds originated in Russia and passed through Bank of New York accounts to third parties around the world.[102] Although officials have established that a large portion of the funds were laundered in order to evade Russian tax laws,[103] commentators believe that some of the money derived from illegal activities, possibly of Russian organized crime groups.[104]

The U.S. investigation, of the Bank of New York, headed by the FBI and the U.S. Attorney's Office, began in the fall of 1998.[105] Lucy Edwards and Peter Berlin were indicted on September 16, 1999.[106] According to the indictment, the couple orchestrated hundreds of daily wire transfers in and out of two

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101. *See* Moyer, *supra* note 100, at 18 (commenting that during this time, Ms. Edwards and Ms. Berlin transferred funds from two Russian banks, Depozitarno-Kliringovy Bank and Commercial Bank Flamingo, through Bank of New York and other international banks.

102. *See* Smith, *supra* note 5, at 12 (claiming that once illicit funds were transferred into Bank of New York accounts, money was internationally wired to accounts within days or sometimes hours).

103. *See* Moyer, *supra* note 100, at 18 (explaining that Mary Jo White, U.S. Attorney for the Southern District of New York, stated that laundering scheme was designed primarily to facilitate Russian tax evasion). Ms. White also asserted that the money laundering network was used to carry on other types of criminal activities. *Id.*; *see also Hearings III*, *supra* note 69 (testimony of James K. Robinson) (noting that Russian organized crime groups may help Russian businessmen to evade national tax laws by laundering their assets out of Russia). Evading Russian law enforcement and tax officials serves to weaken the authority of and respect for the law in Russia as well as to corrupt financial institutions and markets. *Hearings III*, *supra* (testimony of James K. Robinson).

104. *See* Moyer, *supra* note 100, at 18 (reporting that funds involved in Bank of New York scandal included US$300,000 ransom payment to kidnappers of Russian businessman); *see also* Smith, *supra* note 5, at 12 (relating that U.S. investigators are still inquiring as to whether portion of money derived from Russian organized crime); Timothy L. O'Brien & Raymond Bonner, *Senior Bank Official Took Bribe, U.S. Says*, N.Y. TIMES, Feb. 16, 2000, at A8 (explaining that Ms. Edwards and Mr. Berlin are not being charged with laundering criminal proceeds for third parties). Federal law enforcement officials, however, believe that at least some of the laundered money derived from illegal activities. O'Brien & Bonner, *supra.*; Timothy O'Brien, *Regulators Take Action Against Bank of New York*, N.Y. TIMES, Feb. 9, 2000, at C2 (noting that investigators are inquiring whether some of funds came from corporate theft, political graft, or racketeering).

105. *See* Bonner & O'Brien, *supra* note 100, at A1 (noting that U.K. and U.S. officials found that billions of U.S. dollars were transferred through several accounts at Bank of New York).

106. *See* Leeds, *supra* note 68, at A1 (noting that Russian businessman, Aleksey Volkov, was also indicted for conspiracy to transmit and receive illegal funds); *see also* O'Brien & Bonner, *supra* note 100, at A1 (noting that couple was indicted for series of charges, including transferring money without license, but falling short of formal U.S. money laundering charges). Approximately US$8 million was seized from Edward's

accounts at the Bank of New York.[107] The accounts were registered under the names of Berlin's companies, Benex and Becs International.[108]

Although the exact nature of Edward's and Berlin's money laundering pleas have not been revealed, commentators suspect that the U.S. Attorney's Office will attempt to implicate higher ranking officials in the money laundering scheme.[109] The Bank of New York may also be exposed to money laundering charges.[110] Since the Bank of New York case came to light, a variety of related suits have been filed concerning the scandal.[111]

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and Berlin's accounts when they were indicted. Bonner & O'Brien, *supra*. As part of their plea negotiations, Edwards and Berlin agreed to forfeit the seized assets. *Id.*

107. *See* Leeds, *supra* note 68, at A1 (commenting that Torfinex Co., operated by Aleskey Volkov, was responsible for executing transfers as ordered from individuals in Russia).

108. *See id.* (explaining that Berlin and Edwards were signatories on Becs International's account). Volkov, also indicted, was a co-signer with Berlin on the Benex account. *Id.* Given the degree of organized crime and government corruption associated with Russia, investigators question how the Bank of New York could have overlooked the suspicious transactions. *Id.*

109. *See* Bonner & O'Brien, *supra* note 100, at A1 (asserting that in January 2000, U.S. prosecutors indicted Svetlana Kudryavtsev on charges of making false statements to investigators during Bank of New York inquiry). Ms. Kudryavtsev allegedly lied to investigators when she claimed that she had no knowledge of the couple's business activities and that she never received money from them. *Id.* According to the indictment, Kudryavtsev actually received approximately US$30,000 from Edwards and Berlin. *Id.*

110. *See id.* (commenting that "[l]awyers with expertise in banking law said that whenever a senior bank officer admits to such charges, questions arise about the bank's own culpability."). The Federal Reserve and New York State Banking Department formally sanctioned the Bank of New York for deficiencies in its supervision of overseas accounts. *Id.*; *see also* O'Brien & Bonner, *supra* note 104, at A8 (noting that couple may establish that Berlin's accounts remained open because some bank employees purposely chose to ignore suspicious activity).

111. *See, e.g.*, *Some Shareholders Sue Bank of New York*, N.Y. TIMES, Sept. 25, 1999, at C4 (detailing shareholder's lawsuit that was filed against Bank of New York and its directors). The shareholder derivative suit was filed in the U.S. Southern District of New York in Manhattan and accused the Bank of New York of reckless mismanagement. *Id.* The shareholders believe that the company allowed Russian organized criminals to launder billions of U.S. dollars through the bank. *Id.* The suit was filed as a class action, but the designation is subject to approval by a federal judge. *Id.*; *see also Bank of New York Official Sues Bank*, UNITED PRESS INT'L (Moscow), Feb. 29, 2000 (reporting that Natalia Gurfinkel Kagalovsky, who was forced to resign from position of vice president of Bank of New York, is suing bank in Russian court). Kagalovsky is seeking US$270 million in damages for harming her business reputation by suspending her and linking her to the money laundering scandal. *Bank of New York Official Sues Bank, supra.* She is also considering filing suits in U.K. and U.S. courts. *Id.*

C. *U.S. Anti-Money Laundering Legislative Responses*

The United States combats money laundering through three primary statutory weapons: Sections 1956 and 1957 of Title 18 of the U.S. Code,[112] the Bank Secrecy Act,[113] and Section 5324 of Title 31 of the U.S. Code.[114] These acts primarily attack money that is laundered domestically[115] or by international drug traffickers.[116] Recently, however, as international organized crime groups have expanded their scope,[117] proceeds from other illegal activities, such as fraud, embezzlement, and tax evasion, have been laundered through U.S. financial institutions.[118] Furthermore, globalization of the financial services industry has made money laundering more difficult for law enforcement officers to investigate and detect.[119] Consequently, many experts believe that the U.S. anti-money laundering legislative scheme is inadequate to deal with the increase in funds laundered from international organized criminals or corrupt government officials.[120] Legislators responded to these concerns by drafting the

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112. *See* 18 U.S.C. §§ 1956-57 (1994) (rendering act of money laundering criminal offense).

113. 31 U.S.C. §§ 5311-14, 5316-25 (1994); *see* Mulligan, *supra* note 33, at 2334-35 (explaining that BSA was originally entitled Currency and Foreign Transactions Reporting Act and has been labeled BSA by banking community).

114. *See* Money Laundering Control Act, 31 U.S.C. § 5324 (1986) (mandating criminal penalties for structuring of transactions in order to avoid CTR requirement).

115. *See Hearings III*, *supra* note 69 (testimony of James K. Robinson) (explaining that many international crimes do not fall under current U.S. anti-money laundering legislation).

116. *See* Mulligan, *supra* note 33, at 2328 (referring to U.S. legislators who placed heavy emphasis upon fighting war against drugs via anti-money laundering statutes).

117. *See Hearings III*, *supra* note 69 (testimony of James K. Robinson) (listing many crimes from which international money launderers derive their funds).

118. *See* FMLDA, H.R. 2896, 106th Cong., § 2 (finding that other international organized crime activities include racketeering and insider trading); *see also Hearings III*, *supra* note 69 (testimony of James K. Robinson) (commenting that Russian organized crime groups traditionally operated locally but are now expanding internationally).

119. FMLDA, H.R. 2896, 106th Cong., § 2(4). Section 2(4) states:

> Organized criminal enterprises, such as the Colombian and Mexican cartels, the Russian 'mayfiya', Sicilian crime families, and Chinese gangs, are highly resistant to conventional law enforcement techniques, and the financial management and organizational infrastructure of such enterprises are highly sophisticated and difficult to track because of the globalization of the financial services industry.

Id.

120. *See Hearings III*, *supra* note 69 (testimony of James K. Robinson) (arguing that current statutes are powerful tools for combating money laundering taking place within United States but are not as effective internationally).

Money Laundering Act of 1998.[121] This act, however, was never ratified.[122]

1. Current U.S. Statutes

The existing U.S. statutes used to combat money laundering include 18 U.S.C. §§ 1956-57, the BSA, and the Money Laundering Control Act of 1986.[123] These statutes primarily allow U.S. prosecutors to prosecute criminals who launder money domestically[124] and to enlist the help of U.S. banks to alert law enforcement agents about suspicious transactions.[125] Scholars argue, however, that the current U.S. statutory framework is not broad enough to allow for the prosecution of international money launderers.[126]

a. 18 U.S.C. §§ 1956-57, Crimes and Criminal Procedure: Laundering of Monetary Instruments

Money launderers in the United States are prosecuted primarily under sections 1956 and 1957 of the U.S. Code.[127] In order to prove the crime of money laundering, the government

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121. *See* Justice Department Submits Legislation to Combat International Money Laundering, Press Release for the Department of Justice, Mar. 3, 1998 [hereinafter Press Release] (noting that Money Laundering Act of 1988 was part of overall effort by U.S. Department of Justice to attack international money laundering).

122. *See* 1998 BILL TRACKING H.R. 3745, 105th Cong., last visited Nov. 19, 1999 (stating that Money Laundering Act of 1998 is still in committee).

123. *See Hearings III, supra* note 69 (testimony of James K. Robinson) (noting that U.S. Department of Justice has prosecuted over 2000 defendants per year under existing anti-money laundering statutes). One half of these prosecutions involved proceeds from drug trafficking. *Id.* The other half involved proceeds from white collar crimes, such as health care fraud, and organized crime, such as prostitution, gambling, extortion, and interstate transportation of stolen property. *Id.*

124. *See id.* (maintaining that International Crime Control Strategy was initiated partially in response to problems prosecuting international money launderers).

125. *Id.*

126. *See* Department of Justice, *supra* note 16, at VI(B)(1) (arguing that United States needs comprehensive plan to fight money laundering, including improved prosecutorial tools); *see also Hearings III, supra* note 69 (testimony of James K. Robinson) (noting importance of adding numerous international crimes to list of permissible Specified Unlawful Activities ("SUAs")).

127. 18 U.S.C. §§ 1956-57 (1994). Section 1956(a)(1), for example, states:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity-
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or

must show that laundered money originated from one of the crimes, or Specified Unlawful Activities ("SUAs"), enumerated in 18 U.S.C. § 1956.[128] Therefore, U.S. prosecutors must prove beyond a reasonable doubt both that an underlying SUA occurred and that the perpetrators of the SUA laundered the illicit proceeds.[129] U.S. prosecutors encounter problems when either the illegal proceeds arise from a crime not listed as one of the SUAs, or when they cannot prove that the suspect committed the underlying SUA.[130]

The list of SUAs includes only a limited number of offenses that occur outside of the United States.[131] These offenses are fraud against a foreign bank,[132] kidnapping,[133] narcotics trafficking,[134] robbery,[135] extortion,[136] destruction of property by means of explosives, and murder.[137] International organized criminal enterprises, however, launder money from a variety of illegal activities, such as fraud, which 18 U.S.C. § 1956 does not list as a

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

(B) knowing that the transaction is designed in whole or in part-

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

Id.

128. *See* 18 U.S.C. § 1956 (c)(7) (1994) (listing SUAs); *see also Hearings III, supra* note 69 (testimony of James K. Robinson) (explaining difficulties faced by U.S. Department of Justice in prosecuting money laundering offenses).

129. *See Hearings III, supra* note 69 (testimony of James K. Robinson) (noting that when U.S. Department of Justice is precluded from bringing money laundering charges, it brings other federal charges, such as interstate transportation of stolen property).

130. *See id.* (urging U.S. Congress to adopt additional anti-money laundering legislation).

131. *Id.*

132. 18 U.S.C. § 1956(c)(7)(B)(iii) (1994).

133. *Id.* § 1956(c)(7)(B)(ii).

134. *Id.* § 1956(c)(7)(B)(i). Section 1956(c)(7)(B)(i) lists: "the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act)." *Id.*

135. *Id.* § 1956(c)(7)(B)(ii).

136. *Id.*

137. *See Hearings III, supra* note 69 (testimony of James K. Robinson) (commenting that limited number of foreign offenses qualify as SUA).

SUA.[138] Therefore, these criminals cannot be prosecuted under the federal money laundering statutes.[139] Likewise, a corrupt governmental official of another country cannot be prosecuted for embezzling funds from his own government and laundering them through U.S. financial institutions.[140]

Furthermore, U.S. law enforcement agents often encounter problems obtaining evidence that laundered money was derived from a foreign SUA because they must often rely on cooperation from law enforcement officials of other countries.[141] Some commentators argue that the most corrupt countries, such as Colombia, Mexico, and Russia, from which a majority of international money laundering offenses originate, are the least cooperative.[142] Similarly, U.S. law enforcement officials are often de-

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138. *Id.*

139. *Id.*

140. *Id.; see also* Gerth, *supra* note 92, at A6 (noting that United States may be unable to prosecute President Omar Bongo of Gabon for allegedly laundering money derived from government corruption through Citibank accounts). The U.S. Senate Permanent Subcommittee on Investigations is examining President Bongo's Citibank account, in which over US$50 million was deposited and derived from unidentified sources. Gerth, *supra.* Officials believe that much of the money was embezzled from the Gabon government. *Id.* The Subcommittee's investigation is part of a larger effort to scrutinize the connection between private banking and money laundering. *Id.*

141. *See Hearings III, supra* note 69 (testimony of James K. Robinson) (listing three ways to acquire legal assistance from foreign nations: mutual legal assistance treaties ("MLATs"), executive agreements, and formal requests pursuant to letters rogatory). The most effective means of obtaining information from foreign countries is through an MLAT. *Id.* MLATs are usually bilateral treaties and require the signatories to assist each other in investigations, prosecutions, and other criminal proceedings. *Id.* The United States currently has 26 MLATs in force with other countries. *Id.; see also* Solomonov, *supra* note 9, at 198-99 (noting that United States utilizes MLATs with Hungary, Israel, and Italy to prosecute jointly members of transnational organized crime groups). An MLAT between the United States and the Russian Federation is not currently in effect. Solomonov, *supra,* at 211. Russia and the United States do, however, have a Mutual Legal Assistance Agreement that provides for legal cooperation between the two countries in criminal matters. *Id.* This Mutual Legal Assistance Agreement is narrower in scope than an MLAT and does not provide that Russia must extradite its citizens who commit crimes in the Untied States. *Id.* at 211-15. Moreover, scholars believe that Russian law enforcement officials must battle serious domestic problems that prevent them from obtaining evidence in organized crime cases. *Id.* at 211. Russian law enforcement officials must conquer these problems before a plan of mutual legal assistance with the United States can be effective. *Id.*

142. *See* Department of Justice, *supra* note 16 (commenting that because government officials from corrupt nations are often taking part in illegal activities themselves, it is difficult for U.S. law enforcement officials to obtain reliable information from those governments). *But see Hearings III, supra* note 69 (testimony of James K. Robinson) (stating that United States signed MLAT with Russia on June 17, 1999, although it has yet to take force).

nied access to foreign bank records that are essential in proving money laundering.[143]

b. Currency and Foreign Transactions Reporting Act: The Bank Secrecy Act

The BSA, although originally designed to deter tax evasion,[144] has been a primary tool in money laundering investigations since the 1980s.[145] The BSA mandates U.S. financial institutions to keep records and reports concerning customers' accounts.[146] These paper trails aid law enforcement officials in investigating possible money laundering and tax evasion schemes.[147] The BSA imposes civil penalties upon U.S. banks that do not comply with the BSA.[148] These penalties functionally hold banks liable for facilitating money laundering by failing to keep proper records.[149]

Under the BSA, U.S. banks are required to keep CTRs and to report suspicious activity within customer accounts.[150] U.S. banks must file CTRs when transactions adding up to US$10,000 or more occur for one account during a single day.[151] These

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143. *See* Farah, *supra* note 58, at A1 (stating that offshore banking institutions often do not cooperate with U.S. banks).

144. *See* Mulligan, *supra* note 33, at 2335 (explaining that BSA was enacted primarily to regulate foreign transactions made by U.S. citizens in effort to curtail their usage of offshore banking havens as illegal tax shelters).

145. *Id.*

146. *Id.*

147. *Id.*

148. *See* H.R. REP. No. 101-446, at 29-35 (1990) (explaining that BSA mandates fines and other civil penalties for U.S. banks that do not properly file CTRs).

149. *See* Mulligan, *supra* note 33, at 2335 (claiming that Congress chose to burden banks unduly with BSA requirements).

150. *See id.* at 2340 (arguing that these reports are burdensome for banks).

151. *See* 31 U.S.C. § 5313 (1994); 31 C.F.R. § 103.22 (a)(1) (1998) (mandating CTR requirement). 31 C.F.R. § 103.22 (a)(1) states:

> Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Transactions in currency by exempt persons with banks are not subject to this requirement to the extent provided in paragraph (h) of this section. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

Id.

reports must disclose the identity of the customer keeping the account and the customer's source of funds, as well as other account information.[152] Banks are also obligated to report suspicious or abnormal[153] account activity, in order to flag possible money laundering offenses.[154] Furthermore, Section 5318 (g)(2) of Title 31 prohibits U.S. banks from notifying any person involved in the suspicious transaction that the transaction has been reported.[155] This prohibition of notification allows law enforcement officials to investigate alleged laundering activities without the suspect having knowledge of the potential investigation.[156]

Many KYC principles are codified in the BSA.[157] Aside from the CTR requirement, U.S. banks must also use due diligence in maintaining records of other types of customer information.[158] Often, this required information includes the kinds of relationships the customer keeps in the course of his or her business, the type of business the customer operates, and the duration of time for which the business has been maintained.[159] U.S. banks, however, have complained that these KYC principles impose heavy burdens.[160]

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152. *See* Alford, *supra* note 1, at 461 (noting that such reports of suspicious activity lay heavy financial burdens upon U.S. banks). In 1989, U.S. banks spent approximately US$129 million to comply with these reporting requirements. *Id.*

153. *See* John E. Shockey, *Bank Regulatory and Enforcement After Barings and Daiwa*, 935 PRAC. L. INST.: CORP. L. & PRAC. COURSE HANDBOOK SERIES, 681, 717 (1986) (noting that KYC policies dictate that banks should be alert to irregular transactions and report transactions that appear criminal in nature to authorities).

154. *See id.* (noting that by reporting suspicious activities, banks can protect themselves from allowing criminal transactions to take place through their institutions).

155. 31 U.S.C. § 5318 (g)(2) (1994). Section 5318(g)(2), entitled Notification Prohibited, states that:

> A financial institution, and a director, officer, employee, or agent of any financial institution, who voluntarily reports a suspicious transaction, or that reports a suspicious transaction pursuant to this section or any other authority, may not notify any person involved in the transaction that the transaction has been reported.

Id.

156. *Id.*

157. *See* Mulligan, *supra* note 33, at 2326 (noting that KYC principles are imbedded within U.S. money laundering statutory regime).

158. *See Guidelines for Monitoring Bank Secrecy Act Compliance, available in* 1996 WL 271924, at *9 (F.D.I.C.) (Financial Institution Letter) (noting that banks must take reasonable care to ascertain information about customers).

159. *Id.*

160. *See* John J. Byrne, *The Bank Secrecy Act: Do Reporting Requirements Really Assist the*

Another often cited criticism of the BSA is that it potentially violates the customer's right to privacy.[161] When the BSA was proposed, financial institutions tangentially were concerned about potential civil suits brought by customers for invading financial privacy.[162] Thus, the BSA includes a "Liability for Disclosures" section designed to prevent customers from suing U.S. banks for complying with the BSA.[163]

c. The Money Laundering Control Act of 1986

Although technically part of the BSA, Section 5324 of Title 31 of the U.S. Code was enacted as the Money Laundering Control Act of 1986 ("MLCA").[164] The MLCA imposes either criminal fines or prison sentences upon those who structure, or attempt to structure, transactions in a manner designed to avoid the filing of a CTR.[165] Structured transactions during the course of money laundering, or smurfing, include multiple transactions made by or on behalf of an individual that total at least US$10,000 over the course of one day.[166]

2. The Proposed Money Laundering Act of 1998

An anti-money-laundering bill, similar to the FMLDA, was first promogulated in 1998 as part of President Bill Clinton's In-

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Government?, 44 ALA. L. REV. 801, 802 (1993) (stating that BSA requirements place huge financial burdens upon banks).

161. *See* Mulligan, *supra* note 33, at 2337-38 (stating that during debate over ratifying BSA, many members of U.S. Congress were concerned that BSA would violate financial privacy of customers).

162. *Id.*

163. *See* 31 U.S.C. § 5318(g)(3) (1994). Section 5318(g)(3), entitled Liability for Disclosures, states:

> Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution, shall not be liable to any person under any law or regulation of the United States or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

Id.

164. *See* Mulligan, *supra* note 33, at 2341 (explaining that Money Laundering Control Act of 1986 imposes criminal liability upon those who structure transactions).

165. *Id.*

166. *Id.*; *see also* Mathew P. Harrington & Eric A. Lustig, *Article: IRS Form 8300: The Attorney-Client Privilege and Tax Policy Become Casualties in the War Against Money Laundering*, 24 HOFSTRA L. REV. 623, 629 (1996) (defining smurfing as practice of "having one or more couriers make deposits to numerous banks of less than $10,000 each.").

ternational Crime Control Strategy.[167] Characterizing international crime as a threat to U.S. security,[168] President Clinton issued Presidential Decision Directive 42 on October 21, 1995.[169] This directive ordered U.S. Government agencies, including the Departments of Justice, State, and the Treasury, to develop a concerted plan to fight international crime.[170] These agencies then created the International Crime Control Strategy, which declared countering international financial crime, including money laundering, as one of its eight main goals.[171] The result was the introduction of the Money Laundering Act of 1998,[172] which was submitted to Congress by the U.S. Department of Justice on March 3, 1998.[173]

The Money Laundering Act of 1998 included several goals similar in nature to those of the FMLDA.[174] This act extended existing U.S. money laundering statutes to encompass transactions made in international banks.[175] It also included provisions to allow federal prosecutors access to foreign bank records.[176] Furthermore, similar to the FMLDA, the bill augmented the list of SUAs to include additional foreign crimes, including fraud and corruption.[177] Additional foreign SUAs would allow U.S.

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167. *See* Department of Justice, *supra* note 16 (explaining history of President Clinton's proposed strategy).

168. *Id.*

169. *Id.*

170. *Id.*

171. *See id.* (describing International Crime Control Strategy as "innovative action plan that will serve as a roadmap for coordinated, effective, long-term attack on international crime."). The strategy establishes eight broad goals. *Id.* One of these goals is to combat the laundering of money by international criminals through U.S. banks, as well as to fight other international financial crime. *Id.*

172. *See id.* (noting that other efforts, besides Money Laundering Act of 1988, were put into effect under International Crime Control Strategy). For instance, Geographic Targeting Orders ("GTOs") were used in 1996 and 1997 in New York City and Puerto Rico respectively, to fight money laundering. *Id.* GTOs are orders provided by the BSA. *Id.* Under the BSA, the Secretary of the Treasury of the United States can require financial institutions in a specified geographical area to report all transactions in any amount designated by the Secretary. *Id.* This means that the Secretary can require reporting requirements for transactions that are less than the standard US$10,000 threshold established by the BSA. *Id.*

173. *See* Press Release, *supra* note 121 (noting that legislators designed Money Laundering Act of 1988 to address international laundering of criminal proceeds).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*; *see* FMLDA, H.R. 2896, 106th Cong., § 6 (implying corruption by listing

prosecutors to bring money laundering charges against criminals who commit crimes in other countries and launder the proceeds through U.S. financial institutions.[178] The Money Laundering Act of 1998, however, was never ratified.[179] The Act is still in committee.[180]

One reason that Congress has not yet passed the Money Laundering Act of 1998 is that, unlike the FMLDA, the Money Laundering Act of 1998 includes a civil forfeiture provision.[181] This forfeiture provision allows U.S. prosecutors to seize temporarily the U.S.-based assets of international criminals arrested overseas for money laundering or other SUAs.[182] The provision would also allow U.S. prosecutors to restrain the domestic assets of a foreign bank that is engaged in money laundering in violation of U.S. law.[183] The House Judiciary Committee never voted on the Money Laundering Act of 1998 because it opposed the civil forfeiture provision.[184]

Chairman Henry Hyde of the House Judiciary Committee, as well as many others who oppose federal civil forfeiture laws, said that he did not wish to augment an already abusive civil forfeiture problem by extending federal laws.[185] Critics of the federal civil forfeiture statutes claim that these laws violate the Constitution by taking private property without due process.[186] Chairman Hyde also recommended that the Senate Judiciary Committee vote against the Money Laundering Act of 1998.[187]

"bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official").

178. *See* Press Release, *supra* note 121 (advocating for adoption of additional anti-money laundering legislation).

179. *See* Bill Tracking, H.R. 3745, 105th Cong. (1998) (last visited Nov. 19, 1999) (showing that Money Laundering Act of 1998 has been stuck in committee).

180. *Id.*

181. *See* Money Laundering Act of 1998, H.R. 3745, 105th Cong. § 3(a) (amending Section 981(A)(1)(A) of U.S. Code).

182. *Id.*

183. *Id.*

184. *See* Julie Fields, *Gridlock Scuttles Anti-Laundering Bill; Forfeiture Reform Has Higher Priority*, RECORD (Bergen County, N.J.), Oct. 10, 1998, at A02 (commenting on ongoing debate over constitutionality of federal civil forfeiture laws).

185. *Id.*

186. *Id.*

187. *Id.*

II. *THE PROPOSED FOREIGN MONEY LAUNDERING DETERRENCE AND ANTICORRUPTION ACT OF 1999*

Legislators introduced the FMLDA to the U.S. House of Representatives on September 21, 1999.[188] Designed as a tool to combat money laundering,[189] the FMLDA broadens the scope of existing U.S. anti-money laundering legislation to facilitate U.S. prosecution of international money launderers.[190] Through the FMLDA's provisions, legislators intend to make it easier for U.S. prosecutors to bring U.S. money laundering charges against international organized crime groups and government officials who embezzle money from their countries.[191]

A. *Legislative History*

The legislators' stated goal in drafting the FMLDA was to fight money laundering.[192] The bill was designed specifically to combat money laundering by international organized crime groups and corrupt government officials, as evidenced by congressional findings of fact.[193] The FMDLA has since been referred to the Committee on Banking and Financial Services and the Committee on the Judiciary.[194] These committees will consider the legality of each provision of the FMDLA that falls

188. *See* FMLDA, H.R. 2896, 106th Cong., at Title page (stating that bill was sponsored by James Leach, Republican from Iowa). Cosponsors include the following: Spencer T. Bachus III (Republican-Alabama), Richard Hugh Baker (Republican-Louisiana), Douglas K. Bereuter (Republican-Nevada), Michael N. Castle (Republican-Delaware), Michael Forbes (Democrat-New York), Peter T. King (Republican-New York), John J. Lafalce (Democrat-New York), Rich Lazio (Republican-New York), Bill McCollum (Republican-Florida), Dennis Moore (Democrat-Kansas), Marge Roukema (Republican-New Jersey), and Maxine Waters (Democrat-California). *Id.*

189. *Id.*

190. *See, e.g.*, FMLDA H.R. 2896, 106th Cong., § 6 (adding international crimes to list of SUAs in Section 1956(c)(7) of Title 18 of U.S. Code).

191. *Id.* § 2 (outlining need for more effective money laundering prosecutorial tools).

192. *Id.* at Title page (stating that FMLDA is designed "to combat money laundering and protect the United States financial system, and for other purposes.").

193. *See id.* § 2 (listing seven broad factual findings concerning effects of money laundering by international organized crime groups and global effects of government corruption). For example, "[m]oney laundering by international criminal enterprises challenges the legitimate authority of national governments, corrupts officials and professionals, endangers the financial and economic stability of nations, diminishes the efficiency of global interest rate markets, and routinely violates legal norms, property rights, and human rights." *Id.*

194. *See id.* at Title page (stating that Speaker of House of Representatives shall determine length of time that FMLDA shall stay in committee).

within their requisite competencies.[195]

B. *Provisions of the FMLDA*

The FMLDA both amends existing provisions of U.S. anti-money laundering legislation and adds new ones.[196] These provisions will expand the number of international SUAs that prosecutors can use to bring money laundering charges,[197] enable U.S. law enforcement officials to obtain information about money laundering suspects who are customers of international banks,[198] and prevent suspects from being notified that they are being investigated.[199] Additionally, the FMLDA is designed to deter government officials from embezzling money from their countries and encourage those officials to fight domestic corruption.[200]

1. Amendments to Prior Legislation

The proposed FMDLA will amend portions of existing U.S. anti-money laundering legislation in three ways.[201] First, the FMLDA will amend Section 1956(c)(7) of Title 18 of the U.S. Code to include additional permissible foreign SUAs.[202] Second, the FMLDA will revise the Civil Liability for Disclosures section of the BSA.[203] Finally, the FMLDA will modify Section

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195. *Id.*

196. *Id.* §§ 3-7.

197. *See id.* § 6(1)(A) (adding "any conduct constituting a crime of violence" to list of SUAs).

198. *See id.* § 3(a) (adding Section 5331, entitled "Requirements Relating to Transactions and Accounts with or on Behalf of Foreign Entities" to Subchapter II of Chapter 53 of Title 31 of U.S. Code).

199. *See id.* § 5(b) (prohibiting government actors from notifying individuals that they are under investigation for money laundering).

200. *See id.* § 4 (emphasizing necessity that United States address money laundering and corruption problems with other countries).

201. *See id.* §§ 5-6 (amending portions of existing acts).

202. *See id.* § 6 (adding, for example, "any conduct constituting a crime of violence").

203. *Id.* § 5(a). Section 5(a) states in part:

> (a) Amendment Relating to Civil Liability Immunity for Disclosures. Section 5318(g)(3) of title 31, United States Code, is amended to read as follows:
> (3) Liability for disclosures.
> (A) In general. Notwithstanding any other provision of law-
> (i) any financial institution that–
> (I) makes a disclosure of any possible violation of law or regulation to an appropriate government agency; or

5318(g)(2) of the BSA, which prohibits notification disclosures.[204]

a. Amendment to 18 U.S.C. 1956

The FMLDA will amend Section 1956(c)(7) of Title 18 of the U.S. Code to include additional permissible foreign SUAs.[205] The list includes fraud against a foreign government, bribery of a public official, embezzlement of public funds, crimes of violence, the misuse of IMF funds, smuggling, computer fraud, and several others.[206] Furthermore, the list encompasses acts that are illegal in foreign countries and that would require extradition if the perpetrator were found in the United States under a multilateral treaty.[207] The FMLDA also adds to the list any fed-

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(II) makes a disclosure pursuant to this subsection or any other authority,

(ii) any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure; and

(iii) any independent public accountant who audits any such financial institution and makes a disclosure described in clause (i), shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision thereof, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to notify the person who is the subject of such disclosure or any other person identified in the disclosure.

Id.

204. *Id.* § 5(b). Section 5(b) states:

(b) Prohibition on Notification of Disclosures. Section 5318(g)(2) of title 31, United States Code, is amended to read as follows:

(2) Notification prohibited.

(A) In general. If a financial institution, any director, officer, employee, or agent of (i) the financial institution, director, officer, employee, agent, or accountant may not notify any person involved in the transaction that the transaction has been reported and may not disclose any information included in the report to any such person; and

(ii) any other person, including any officer or employee of any government, who has any knowledge that such report was made may not disclose to any person involved in the transaction that the transaction has been reported or any information included in the report.

Id.

205. *See id.* § 6 (adding, for example, fraud against foreign government).

206. *Id.*

207. *See id.* (naming as included in list of SUAs "an offense with respect to which the United States would be obligated by a multilateral treaty either to extradite the

eral offense consisting of the failure to report the ownership or control of a foreign corporation, financial account, or beneficial interest in a foreign trust.[208] Legislators intended the augmentation of the list of permissible SUAs to allow federal law enforcement officials to prosecute many more international criminals than possible under the existing money laundering statutes.[209]

b. Amendments to the Currency and Foreign Transactions Reporting Act

The FMLDA will amend the Civil Liability for Disclosures section of the BSA.[210] Immunity from civil suits, including suits for invasion of privacy, will extend to foreign banks conducting business in the United States.[211] Congress intends that the immunity provision encourage foreign banks to assist law enforcement officials and government agencies by disclosing customer and account information concerning possible violations of laws or regulations.[212]

Additionally, Section 5318(g)(2) of the BSA, which prohibits notification disclosures, will be amended to forbid any person from notifying those involved in the transaction that the transaction is being reported.[213] Thus, when a CTR is filed, no one is permitted to notify the account holder.[214] Law enforcement officials often track suspicious accounts in order to gather evidence of money laundering or other financial crimes.[215] Notification of a CTR may tip the alleged criminal and harm the investigation.[216] Legislators designed this additional prohibition to

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alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States.").

208. *Id.* § 6(4).

209. *See* Fields, *supra* note 184, at A2 (commenting generally that federal prosecutors need broader range of SUAs in order to apprehend international money launderers).

210. *See* FMLDA, H.R. 2896, 106th Cong., § 5(a) (relieving, for example, public accountants from liability for disclosing possible violations of law to appropriate government agency).

211. *Id.* § 5 (a)(i)(1).

212. *Id.*

213. *See id.* § 5 (b)(2)(A)(ii) (stating that amendment will prohibit "any other person," including "*or any officer employee of any government*" from notifying any person involved in transaction that transaction is being reported) (emphasis added).

214. *Id.*

215. *See* Shockey, *supra* note 153, at 717-19 (noting that Federal Reserve often issues bulletins alerting banks to current schemes).

216. *Id.*

dissuade non-U.S. citizens from interfering in money laundering investigations.[217]

2. New Provisions

The proposed FMLDA will add a new section to Subchapter II of Chapter 53 of Title 31 of the U.S. Code entitled Requirements Relating to Transactions and Accounts with or on Behalf of Foreign Entities.[218] Section 3(a) of the FMLDA will prohibit unidentified foreign owners from opening or maintaining accounts.[219] This provision effectively extends KYC rules to foreign entities.[220] If an unidentified foreign account already exists, then the identity of the owner must be obtained no later than six months after the enactment of the FMLDA.[221]

Section 3 (d)(B)(2) of the FMLDA will prohibit the opening or maintaining of correspondent accounts[222] or correspondent bank[223] relationships with foreign banks in certain jurisdictions.[224] These correspondent accounts will include those of virtually unregulated[225] institutions that are maintained in foreign jurisdictions and who choose not, or are not permitted, to offer

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217. *See* FMLDA, H.R. 2896, 106th Cong., § 5 (b)(2)(A)(ii) (changing existing legislation to prohibit any citizen of any country from notifying account holder that their transaction has been reported).

218. *See id.* § 3(a) (adding Section 5331 to BSA).

219. *See id.* (mandating that financial institution must identify direct and beneficial owners of account or require that shares of foreign entity are publicly traded).

220. *See id.* (requiring banks to keep similar information about customers as demanded by KYC principles); *see generally Hearings II*, *supra* note 23, at 2 (Statement of Chairman Grassley of the Senate Finance/International Trade Committee) (noting need for tougher economic policies to counter international money laundering). Chairman Grassley submitted that Congress should ensure that "[b]anking without borders does not become an opportunity for banking without conscience." *Hearings II*, *supra*.

221. *See* FMLDA, H.R. 2896, 106th Cong., § 3 (c) (setting time frame enactment of new provisions).

222. *See id.* § 3(d)(B)(2) (noting that correspondent accounts are "established to receive deposits from and make payments on behalf of a correspondent bank.").

223. *See id.* § 3(d)(B)(3) (noting that correspondent banks are depository institutions that accept "deposits from another financial institution" and provide "services on behalf of such other financial institution").

224. *See id.* § 3 (b)(1)(A)-(B) (prohibiting U.S. banks from opening or maintaining correspondent accounts with "certain foreign banks").

225. *See id.* (explaining that these institutions include those that are "not subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in such jurisdiction.").

banking services to the residents in their jurisdiction.[226] This provision effectively will prohibit U.S. banks from dealing with offshore financial centers, because these centers often do not offer services to the residents within their jurisdiction and are almost never regulated.[227]

Finally, Section 3 of the FMLDA will prohibit U.S. financial institutions from opening or maintaining PTAs for international banks,[228] unless the international institution identifies each customer who accesses the account under similar KYC standards that are used for U.S. customers of U.S. banks.[229] Legislators designed this section to thwart criminal efforts to circumvent the KYC regulations that are embodied within the BSA.[230] Regulating PTAs in this manner will make it more difficult to launder money through U.S. institutions via PTAs.[231]

Section 4 of the FMLDA is designed to prevent international financial institutions,[232] such as the IMF, from lending money to governments with high levels of corruption.[233] Under this section, if the Secretary of the Treasury finds that a country has high levels of corruption and does not take measures to com-

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226. *Id.*

227. *See* Farah, *supra* note 58, at A01 (stating that many Caribbean offshore banking havens are almost never regulated in compliance with internationally acceptable standards).

228. *See* FMLDA, H.R. 2896, 106th Cong., § 3(c) (mandating U.S. depository institutions to employ same standards for international customers as for domestic customers). Section 3(c) states:

> A depository institution may not open or maintain a payable-through account in the United States for a foreign banking institution, unless the depository institution is able—
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> (1) to identify each customer of the foreign banking institution who is permitted to use the account; and
>
> (2) with respect to each such customer, to obtain the same information about the customer that it obtains, in the ordinary course, with respect to a customer residing in the United States who opens or maintains an account through which they are authorized to conduct the same transactions as may be conducted through the payable-through account.

Id.

229. *Id.*

230. *See Hearings I*, *supra* note 7 (testimony of Prof. Keith Henderson) (explaining that Congress should recognize that KYC principles are imperative tools to combat money laundering).

231. *Id.*

232. *See* FMLDA, H.R. 2896, 106th Cong., § 4(b) (designating "international financial institutions" as defined in Section 1701(c) of International Financial Institutions Act).

233. *Id.*

bat it or to implement good governance, then the Secretary should order the U.S. executive directors of each international financial institution to vote against any loan, disbursement, or other utilization of institutional resources to the country in question.[234] The only exception is the donation of resources specifically targeted to meet basic human needs.[235] Withholding funds from corrupt countries will help ensure that criminals are not embezzling and laundering money from international financial institutions.[236] Legislators also drafted Section 4 of the FMLDA as a means of encouraging nations that rely on loans and donations to take measures to prevent local corruption.[237]

Additionally, the U.S. Secretary of the Treasury will be required to submit annual reports to the U.S. Congress concerning U.S. discussions about corruption and money laundering with other nations.[238] The reports shall include a description of the extent of corruption in each country mentioned in the report.[239] The reports will also describe the efforts undertaken by nations to prevent money laundering and corruption.[240] The

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234. *Id.* § 4(b). Section 4(b), entitled United States Votes in International Financial Institutions, states that:

> The Secretary of the Treasury shall instruct the United States Executive Directors of each international financial institution (as defined in section 1701(c) of the International Financial Institutions Act) to oppose any loan, disbursement, or other utilization of resources by the international financial institution, other than to address basic human needs, for any country that the Secretary of Treasury determines—
>
> (1) has a high level of corruption;
>
> (2) is not effectively implementing good governance and anticorruption measures; and
>
> (3) is not taking meaningful steps to improve good governance and reduce corruption.

Id.

235. *Id.*

236. *See id.* (implying that countries that do not attempt to combat local corruption will be harmed economically by having loans from international financial institutions withheld).

237. *Id.*

238. *See id.* § 4(c)(1) (explaining that this section of FMLDA calls for United States to encourage other countries to enact laws prohibiting money laundering and systematic corruption). During deliberations with foreign countries, the United States should also address the specific problem of governmental and elite corruption. *Id.*

239. *See id.* § 4(c)(2)(A) (requiring "an assessment by the Secretary of the extent of corruption in each country covered by the report").

240. *See id.* § 4(c)(2)(B) (demanding "an assessment by the Secretary of the extent to which such country maintains effective money laundering and corruption prevention measures or is implementing such measures.").

U.S. Congress will use these reports to help determine whether the United States should support the disbursement of loans from international financial institutions.[241]

III. *THE FMLDA IS APPROPRIATE AND NECESSARY TO AID LAW ENFORCEMENT OFFICIALS IN COMBATTING THE LAUNDERING OF PROCEEDS FROM INTERNATIONAL ORGANIZED CRIME AND CORRUPTION*

The U.S. Congress should approve the FMLDA. The dramatic increase in the laundering of profits from international organized crime and corruption because of the globalization of the financial services industry[242] demands legislative attention. U.S. prosecutors have been attempting to combat this problem without the necessary legal tools to aid their efforts.[243] The existing legislation is not designed to allow U.S. officials to detect and prosecute money laundering activities of international criminals.[244] The current statutory regime cannot reprimand foreign government officials who embezzle money from their countries and launder it through U.S. financial institutions.[245] International money laundering is becoming a costly and damaging domestic and international problem.[246] It harms people in the United States and abroad, the global economy, and the governments of other countries.[247] The United States should no longer comply with organized crime and government corruption

241. *See id.* § 4(b) (stating that U.S. Secretary of the Treasury must determine which countries have high levels of corruption).

242. *See supra* notes 7-11 and accompanying text (noting rise of organized criminal groups laundering money using advanced technology in financial services industry); *see also supra* notes 69-73 and accompanying text (stating that organized crime syndicates have used globalization to expand their criminal enterprises).

243. *See supra* note 20 and accompanying text (explaining that current U.S. anti-money laundering framework is effective tool for domestic money launderers, but ineffective for international money launderers); *see also supra* notes 45-65 and accompanying text (explaining methods used by international money launderers to circumvent BSA); *see also supra* notes 130-43 and accompanying text (detailing problems with Section 1956 of Title 18 of U.S. Code).

244. *See supra* notes 20, 45-65, 130-43, and accompanying text.

245. *See supra* note 140 and accompanying text (explaining that corrupt government officials, such as Omar Bongo, cannot be prosecuted in United States for embezzling money).

246. *See supra* notes 69-95 and accompanying text (detailing effects of organized crime and government corruption).

247. *Id.*

by allowing money to be laundered through its banks and other financial institutions.

A. *U.S. Money Laundering Legislation Should Comprehend the Entire Scope of Foreign SUAs Typically Employed by Organized Crime Groups*

U.S. federal prosecutors should not be precluded from bringing money laundering charges against foreign criminals who commit an underlying crime that is not listed in the money laundering statutes.[248] Legislators should extend the list of permissible SUAs to include crimes, such as fraud and embezzlement, which typically occur in countries with high levels of corruption.[249] Adoption of the FMLDA would enhance the list of permissible SUAs and thus broaden the scope of international criminals who could be prosecuted in the United States for money laundering.[250] U.S. prosecutors could use the extended list of SUAs as a tool to prosecute members of international organized crime syndicates who rely on money laundering to legitimize their illicit profits.[251]

For example, in the Bank of New York case, the original indictment against Edwards and Berlin fell short of federal money laundering charges.[252] Since U.S. prosecutors could not show that the money the couple transmitted derived from one of the SUAs listed in Section 1986 of Title 18 of the U.S. Code, the prosecutors had to charge them with the lesser offense of transmitting money without a license.[253] Prosecutors had established, however, that the money was laundered in a manner designed to evade Russian tax law.[254] Under the FMDLA, if the crime of tax evasion had allowed Russia to extradite the couple and thus qualified as an SUA,[255] then U.S. prosecutors could have imme-

248. *See supra* notes 128-31 and accompanying text (explaining elements that prosecutors must prove in order to bring money laundering charges).

249. *See supra* notes 130-43 and accompanying text (noting that many crimes typically committed by international money launderers, such as embezzlement, are not listed as SUAs).

250. *See supra* notes 205-09 and accompanying text (describing FMLDA amendment to Section 1956 of Title 18 of U.S. Code).

251. *Id.*

252. *See supra* notes 96-108 and accompanying text (summarizing Bank of New York case).

253. *See supra* note 106 and accompanying text (detailing indictments of Lucy Edwards and Peter Berlin in Bank of New York scandal).

254. *See id.* (explaining motive for Bank of New York money laundering).

255. *See supra* note 207 and accompanying text (claiming that FMLDA would allow

diately charged them with money laundering.

B. *International Bank Customers Should Be Scrutinized Under the Same KYC Standards as U.S. Customers*

U.S. banks should not be able to profit from international customers—who may be laundering money through U.S. accounts—by not applying the same due diligence standards as employed in acquiring information about U.S. customers. Banks and other financial institutions in the United States should not be allowed to hide behind the excuse of protecting international customers's financial privacy,[256] when the same protections have been curtailed for U.S. customers by BSA requirements.[257] International customers of U.S. banks should be subjected to the same level of scrutiny under KYC standards as U.S. customers.[258] Furthermore, U.S. banks engaged in international banking should be obliged to operate their facilities to minimize the possibility of money laundering by international criminals.[259] Adoption of the FMLDA will make the BSA standards applicable to international customers of U.S. banks.[260] The imposition of such standards will aid law enforcement officials greatly in their ability to detect transnational money laundering.

C. *The United States Should Encourage Other Countries To Create and Implement Money Laundering and Anticorruption Legislation*

International organized crime and government corruption is a global problem that necessitates a concerted action by all countries.[261] Adoption of the FMLDA will mandate that efforts are taken to encourage other countries to adopt money launder-

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U.S. prosecutors to charge international criminals who launder profits of crimes for which they would be extradited with money laundering).

256. *See supra* note 161-62 and accompanying text (noting U.S. banks' concern about being held liable for invading customer's privacy).

257. *See supra* notes 156-63 and accompanying text (detailing CTR requirements and KYC principles applied to U.S. customers through BSA).

258. *See supra* notes 51-56 and accompanying text (noting that PTA customers are not currently subject to U.S. KYC principles).

259. *See supra* note 220 and accompanying text (arguing that even banks that practice internationally should engage in conscientious banking practices).

260. *See supra* notes 229-31 and accompanying text (asserting ways in which FMLDA will mandate that banks use KYC standards for international customers).

261. *See supra* notes 69-95 and accompanying text (noting extent of global problems caused by organized crime and government corruption).

ing and anticorruption legislation.[262] Furthermore, the FMLDA places a duty upon the U.S. Secretary of Treasury to monitor corrupt countries in order to ensure that the adopted legislation is enforced.[263]

Additionally, the FMDLA will reinforce U.S. foreign policy by obligating U.S. representatives of international financial institutions to vote against loans for corrupt foreign governments.[264] U.S. taxpayers should not be obligated to contribute money to international financial institutions if that money is going to be embezzled by foreign government officials.[265] Because organizations like the IMF have virtually no way of monitoring how their money is utilized, the U.S. money laundering statutory regime should preempt corrupt government officials from embezzling IMF funds.[266] The FMLDA will mandate such preventative measures.[267]

CONCLUSION

It is imperative that the U.S. Congress adopt the FMLDA. The U.S. money laundering statutory framework is currently unable to comprehend changes in money laundering techniques due to the globalization of organized crime and corruption. In order to protect the safety of U.S. citizens, the integrity of foreign governments, and the international market, the United States must take measures to fight this expanding problem. Adoption of the FMLDA will provide federal law enforcement officials and prosecutors with the proper weapons to combat international money laundering.

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262. *See supra* notes 232-41 and accompanying text (explaining that Section 4 of FMLDA will force U.S. government to encourage other countries to end domestic corruption).

263. *Id.*

264. *See supra* notes 233-34 and accompanying text (detailing process through which FMLDA will prevent U.S. representatives of international financial institutions from voting to donate money to corrupt countries).

265. *See supra* notes 92-105 and accompanying text (asserting that corrupt government officials often embezzle money from organizations, like IMF, that loan or donate money to their countries).

266. *Id.*

267. *See supra* notes 233-34 and accompanying text (noting FMLDA's proscribed procedure for preventing international government corruption).