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# Money Laundering: Business Beware

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# MONEY LAUNDERING: BUSINESS BEWARE

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## I. INTRODUCTION

The primary purpose of 18 U.S.C. §§ 1956 and 1957[1] ("Anti-Money Laundering Statutes") is to strengthen the government's arsenal in its war on drugs.[2] To this end, Congress drafted these statutes broadly to reach all those who enter into financial transactions with drug traffickers.[3] Despite their intended purpose, the Anti-Money Laundering Statutes actually reach a plethora of generic crimes, prompting some commentators to label money laundering as "the crime of the '90's" and "the new RICO."[4]

The similarities between the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO)[5] and the Anti-Money Laundering Statutes are indeed striking. The Anti-Money Laundering Statutes, like RICO, are broadly drafted, vexing both

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1. 18 U.S.C. § 1956 (1988 & Supp. III 1991); 18 U.S.C. § 1957 (1988 & Supp. III 1991).

2. The Money Laundering Control Act of 1986 was enacted as Subtitle H of the Anti-Drug Abuse Act of 1986; Pub. L. No. 99-570, 100 Stat. 3207 (to be codified in scattered sections of the U.S.C.).

3. *See* John K. Villa, *A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes*, 37 CATH. U. L. REV. 489, 501 n.82 (1988) (noting that Congress wanted to "make the drug dealers' money worthless" (quoting Rep. E. Clay Shaw, Jr., H.R. REP. No. 855, 99th Cong., 2d Sess., pt.1, at 13 (1986)); *see also* 3B UNITED STATES ATTORNEYS' MANUAL § 9-105.100A (Supp. 1992) [hereinafter ATTORNEYS' MANUAL] ("Some $5 billion to 15 billion dollars in illegal drug money earned in the United States probably moves into international financial channels each year.").

4. *See* G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 AM. CRIM. L. REV. 149 (1989); Elkan Abramowitz, *Money Laundering: The New RICO?*, N.Y. L.J., Sept. 1, 1992, at 3.

5. 18 U.S.C. §§ 1961-1968 (1988 & Supp. III 1991).

prosecutors and defense counsel.[6] The opponents of both statutes assert that the statutes' accommodating language exposes legitimate businesses to criminal liability.[7] These fears are well-founded.

RICO, which was designed primarily to curb organized crime such as mafioso activity,[8] has increasingly been applied against corporations not involved in the type of organized crime truly offensive to RICO.[9] Similarly, prosecutors increasingly apply the Anit-Money Laundering Statutes to nondrug-related cases, including routine business transactions.[10]

Because the Anti-Money Laundering Statutes have not yet generated the degree of criticism that RICO has,[11] prosecutors are now using the Anti-Money Laundering Statutes, rather than RICO, to prosecute allegations of business crime.[12] The Anti-

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6. *See* United States v. Jackson, 935 F.2d 832 (7th Cir. 1991) (containing an indictment and jury instructions which misstated the elements of § 1956(a)(1)(A)(i)); United States v. Smitherman, No. 90-00116 (S.D. Ala. Jan. 14, 1991) (dismissing the money laundering count because the prosecutor failed to prove an "essential element" of the specified unlawful activity relating to the money laundering count).

7. *See* MONEY LAUNDERING ALERT, Oct. 1989, at 1 ("This comprehensive assault on money laundering . . . will have a dramatic impact on legitimate businesses in the nation.").

8. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922; S. REP. No. 617, 91st Cong., 2nd Sess. 1, 1-2 (1969) (stating that the legislative objective of RICO was to prevent infiltration of legitimate business by organized crime), *reprinted in* 1970 U.S.C.C.A.N. 4007.

9. *See* McLendon v. Continental Group, Inc., 602 F. Supp. 1492 (D.N.J. 1985) (employee grievances); White v. Fosco, 599 F. Supp. 710 (D.D.C. 1984) (attorney-client conflicts); Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 700 (1990) ("Criminal RICO prosecutions have become more commonplace, and any major criminal prosecution is likely to include a RICO count regardless of the subject matter of the alleged wrongdoing.").

10. *See* United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991) (racketeering by former legislator); United States v. Lee, 937 F.2d 1388 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 977 (1992) (illegal acquisition, sale, and importation of salmon); United States v. Swank Corp., 797 F. Supp. 497 (E.D. Va. 1992) (conspiracy, mail fraud, bank fraud, and money laundering); United States v. Gleave, 786 F. Supp. 258 (W.D.N.Y. 1992) (bankruptcy fraud case); *see also* ATTORNEYS' MANUAL, *supra* note 3, § 9-105.100A ("The Act . . . appears to reach a broad variety of routine commercial transactions affecting commerce.")

11. See Symposium, *Reforming RICO: If, Why, and How?*, 43 VAND. L. REV. 621 (1990), for detailed discussions on the need for reforming RICO.

12. The head of the Justice Department's Asset Forfeiture Office stated: "Federal prosecutors see the future in 18 USC 1956 . . . . They don't see the future in RICO." *Prosecutors Will Rely More on Money Laundering Statutes, Less on Criminal RICO in the 1990s, Justice Department Official Tells ABA White Collar Crime Institute*, 4 Corp. Crime Rep. (BNA) No. 10, at 1 (March 12, 1990) (quoting Michael Zeldin); *see* OTTO G. OBERMAIER. REPORT OF THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW

Money Laundering Statutes also curry certain other advantages over RICO. For instance, under RICO, the government must allege an "enterprise" and a "pattern of racketeering activity," and set forth "predicate acts"—elements which are confusing and often difficult to prove.[13] The Anti-Money Laundering Statutes do not contain these elements and are thus easier to prosecute. Furthermore, while the prosecution in a RICO case must obtain approval from the Department of Justice, no such approval is required for the prosecution of all money laundering cases.[14] Also, the penalties for a conviction based on the Anti-Money Laundering Statutes are at least as severe as the penalties for a conviction based on RICO.[15]

This Article examines the constitutionality of the Anti-Money Laundering Statutes. Specifically, the Article stresses that the Anti-Money Laundering Statutes, like RICO, are unconstitutionally vague and overbroad when applied to routine business transactions.[16] Accordingly, Part II summarizes the void for vague-

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YORK: TOWARDS A SAFER NEW YORK (1991). In 1990, the Southern District of New York reported only one money laundering case, and it involved drugs. *Id.* at 38. In 1991, seven cases of money laundering were reported, only two of which involved drugs. OTTO G. OBERMAIER, REPORT OF THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK: A YEAR OF PROGRESS AND CHANGE 30-31 (1992). In addition, in January 1991 the Department of Justice created the Money Laundering Section of the Criminal Division to administer the Anti-Money Laundering Statutes.

13. 18 U.S.C. § 1962 (1988). Justice Stevens has noted that a "pattern of racketeering activity" has been compared with Justice Stewart's obscenity test—" 'I know it when I see it.' " Fort Wayne Books v. Indiana, 489 U.S. 46, 76 n.14 (1989) (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

14. *See* ATTORNEYS' MANUAL, *supra* note 3, §§ 9-110.101,-.320 (Supp. 1992). However, utilization of the extraterritorial provision in § 1956(a)(2) requires the prior written approval of the assistant attorney general in charge of the criminal division. *Id.* § 9-105.100 (1990). The provisions also require such approval "if the defendant is an attorney and the proceeds represent attorneys' fees." *Id.*

15. In RICO, forfeiture is an in personam action. As a result, forfeiture occurs only after a jury has determined the defendant's guilt and that the property was acquired, maintained, or operated in violation of § 1962. 18 U.S.C. § 1963 (1988 & Supp. III 1991); *see* United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987). In contrast, forfeiture based on a money laundering conviction is an in rem action. 18 U.S.C. § 982(a)(1) (Supp. III 1991); *see* United States v. All Monies ($477,048.62) in Acct. No. 90-3617-3, 754 F. Supp. 1467, 1473 (D. Haw. 1991). Thus, forfeiture is neither conditioned on the claimant's wrongdoing nor subject to the jury's whim. In addition, under the sentencing guidelines, the base level of a § 1956 conviction is greater than that of a RICO conviction. *Compare* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 2S1.1 (West 1993) (§ 1956 base level is 23 or 20) *with* § 2E1.1 (RICO base level is the greater of 19 or the base level of the underlying activity).

16. To date, all overbreadth and vagueness challenges to RICO and the Anti-Money Laundering Statutes have been rejected. *See* United States v. Jackson, 935 F.2d 832 (7th

ness and overbreadth doctrines. Part III sets forth the elements of the Anti-Money Laundering Statutes and then examines these elements under both doctrines. Part IV discusses how the lack of guidelines and, in some cases, the lack of prosecutorial discretion exacerbates the problems of vagueness and overbreadth. The Article concludes with the suggestion that guidelines similar to those adopted for RICO[17] are needed to prevent overzealous prosecutors from applying the Anti-Money Laundering Statutes beyond their intended purpose.

## II. The Void for Vagueness and Overbreadth Doctrines

### *A. Void for Vagueness Doctrine*

It is axiomatic that statutes which infringe on constitutional rights and individual freedoms require heavy judicial scrutiny. This is true not only for statutes whose content offends the United States Constitution, but also for statutes whose lack of content or clarity offends the Due Process Clause of the Fifth and Fourteenth Amendments. The void for vagueness doctrine enforces this constitutional requirement by invalidating penal statutes that fail to provide individuals with fair notice of what conduct is prohibited and that fail to provide prosecutors and law enforcement officials with minimal guidelines to prevent discriminatory enforcement.[18]

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Cir. 1991); United States v. Sierra-Garcia, 760 F. Supp. 252 (E.D.N.Y. 1991); United States v. Ortiz, 738 F. Supp. 1394 (S.D. Fla. 1990); United States v. Baker, No. 89-83-Cr-T-15B (M.D. Fla. July 28, 1989); United States v. Kimball, 711 F. Supp. 1031 (D. Nev. 1989); United States v. Restrepo, No. N-88-3, 1989 WL 4292 (D. Conn. Jan. 9, 1989), *aff'd*, 884 F.2d 1381 (2d Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990); United States v. Mainieri, 691 F. Supp. 1394 (S.D. Fla. 1988). Recently, however, the Supreme Court appears to be inviting vagueness challenges to RICO. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989); Fort Wayne Books v. Indiana, 489 U.S. 46, 76 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 494 (1985). In *H.J. Inc.*, Justice Scalia stated, "That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when [a vagueness] challenge is presented." *H.J. Inc.*, 492 U.S. at 256 (Scalia, J., concurring). With this invitation to renew vagueness challenges to RICO, perhaps the Supreme Court will also recognize that the Anti-Money Laundering Statutes suffer from the same problems.

17. Attorneys' Manual, *supra* note 3, §§ 9-110.200 to .321 (1990). These guidelines are not binding on the government. *Id.* § 9-110.200.

18. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."); *see* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) ("[A statute that] furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials,

The Supreme Court has held that the second concern—the establishment of minimal guidelines to govern law enforcement—is the more important consideration in determining whether a statute suffers from vagueness.[19]

*Lanzetta v. New Jersey*[20] illustrates the fair notice requirement. In that case, the challenged statute punished any person without a lawful occupation who had previously been convicted of a crime and was "known to be a member of any gang consisting of two or more persons."[21] The Supreme Court found the term "gang" to be unconstitutionally vague because it did not to provide notice of what conduct to avoid.[22]

*Kolender v. Lawson*[23] discusses statutes subject to arbitrary enforcement. In *Kolender*, the statute in question required an individual loitering on the street to "provide 'credible and reliable' identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* detention."[24] Failure to do so justified the individual's arrest. The Supreme Court held that the "credible and reliable" element contained no standard for determining what conduct was prohibited, and thus, "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute."[25] The Court rejected the government's argument that the

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against particular groups deemed to merit their displeasure' " does not pass constitutional muster. (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940))).

19. Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " (alteration in original) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974))). The Court noted that this concern dated back to United States v. Reese, where the Court stated that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Kolender*, 461 U.S. at 358 n.7 (quoting United States v. Reese, 92 U.S. 214, 221 (1875)).

20. 306 U.S. 451 (1939).

21. *Lanzetta*, 306 U.S. at 452 (citing Act of May 7, 1934, 1934 N.J. Laws 394).

22. *Id.* at 458 ("[T]he terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.").

23. 461 U.S. 352 (1983).

24. *Kolender*, 461 U.S. at 356. A *Terry* detention allows an officer to detain an individual without a warrant when the officer has reasonable suspicion that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1 (1968).

25. *Kolender*, 461 U.S. at 358.

need to combat a recent crime epidemic outweighed the constitutional requirements for definiteness and clarity.[26]

Not all statutes which are challenged for vagueness are reviewed under the same standard.[27] Because several factors must be considered in reviewing a statute, the analysis is necessarily case specific. The first factor is whether the statute is being challenged in toto or only as applied to a particular defendant. Facial challenges are reviewed under a stricter standard and generally are not successful unless the statute infringes on "a substantial amount of constitutionally protected conduct."[28] In contrast, when a statute is challenged only as it applies to a particular defendant, the standard of review is whether that defendant is given sufficient notice, regardless of whether the statute fails to provide fair notice to others.[29]

A second factor is whether the statute carries civil or criminal penalties. In addition, the severity of those penalties affects the analysis. Not surprisingly, penal statutes receive greater scrutiny than statutes which only impose fines because of the stigma associated with indictment and the potential for incarceration.[30] A third factor is whether the statute infringes on a constitutional right; such statutes are scrutinized more stringently than statutes which merely regulate economic or military affairs.[31] The final factor is whether the statute contains a scienter requirement. A scienter requirement may cure a vague statute which might otherwise fail constitutional scrutiny.[32]

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26. *Id.* at 361.

27. *See* Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498 (1982).

28. *Hoffman Estates*, 455 U.S. at 494. In addition, in a facial challenge, a federal court must consider any limiting construction or interpretation developed by a state court or agency. *Id.* at 494 n.5.

29. United States v. Mazurie, 419 U.S. 544, 550, 553 (1975).

30. *Hoffman Estates*, 455 U.S. at 498-99.

31. *Id.* at 498 (stating that "businesses . . . can be expected to consult relevant legislation in advance"); Parker v. Levy, 417 U.S. 733, 756 (1974) (ruling that Uniform Code of Military Justice provisions must be reviewed under same vagueness standard as criminal economic statutes); Nash v. United States, 229 U.S. 373, 376-78 (1913) (finding the criminal provisions of the Sherman Act to be constitutional).

32. *See, e.g.*, Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952) (holding that the government must prove that defendant knowingly violated safety regulation); Screws v. United States, 325 U.S. 91 (1945) (ruling that the government must prove defendant intended to deprive a person of his or her due process rights).

A good argument may be made that the Anti-Money Laundering Statutes are vague on their face.[33] However, they clearly are vague as applied to legitimate businesses engaged in routine business transactions. The Anti-Money Laundering Statutes were not intended to be used against garden variety corporate misconduct. Moreover, these broadly worded statutes carry severe penalties[34] and meaningless *mens rea* requirements. Regardless of what standard of review is applied, these statutes, at least when applied to routine business transactions, are unnecessarily, if not unconstitutionally, vague.

### *B. Overbreadth Doctrine*

The United States Constitution also condemns statutes which are overly broad. Overly broad statutes offend the Constitution because they chill conduct protected by the First Amendment. Unlike vague statutes, overly broad statutes by nature present facial challenges. They typically implicate the First Amendment by proscribing more conduct than was intended.[35] When a statute is challenged for overbreadth, the relevant inquiry is whether the statute's otherwise legitimate ends can be accomplished by less drastic means.[36]

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33. *See* Strafer, *supra* note 4, at 170-71.

34. Penalties for violating § 1956 include up to 20 years in prison and a fine of up to $500,000 or twice the value of the property, whichever is greater. 18 U.S.C. § 1956(a)(1)-(2) (1988 & Supp. III 1991). Penalties for violating § 1957 include up to 10 years in prison and a fine of up to twice the value of the transaction. 18 U.S.C. § 1957(b)(1)-(2) (1988). Property involved in or traceable to violations of either statute is subject to forfeiture. 18 U.S.C. § 981(a)(1)(A) (1988 & Supp. III 1991) (civil provision); 18 U.S.C. § 982(a)(1) (Supp. III 1991) (criminal provision). Moreover, a business through which laundered money is moved also is forfeitable under § 981. United States v. South Side Fin., 755 F. Supp. 791, 797-98 (N.D. Ill. 1991). In addition, even if only a portion of the property is used to facilitate the offense, the entire property is forfeitable. United States v. Swank Corp., 797 F. Supp. 497, 503 (E.D. Va. 1992). Section 982 also states that property subject to forfeiture is governed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 853 (1988)), which allows substitution of assets. § 982(b)(1)(A). The civil forfeiture provision is not subject to the same constitutional protections granted to criminal defendants under § 982.

35. Parker v. Levy, 417 U.S. 733, 759 (1974). The void for vagueness doctrine and the overbreadth doctrine overlap when the vagueness challenge is based on the concern that the statute fails to give adequate notice of what is prohibited, thereby "chilling" certain behavior. Zwickler v. Koota, 389 U.S. 241, 251-52 (1967).

36. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) (involving a government raid of suspected communist organization).

The Anti-Money Laundering Statutes are overly broad because they potentially reach many legitimate business transactions. The result is that businesses are subject to overreaching investigations and prosectutions for conduct clearly unrelated to drug trafficking or organized crime. These investigations and prosecutions are extremely disruptive for business and expensive to defend. They also unnecessarily interfere with a business entity's freedom of association as guaranteed by the First Amendment. Because the legitimate goal of deterring and prosecuting individuals and companies who launder drug money can be attained by less drastic measures, the Anti-Money Laundering Statutes, as explained more fully below, are overly broad.

## III. The Elements

### *A. Section 1956: Laundering of Monetary Instruments*

Section 1956 consists of two distinct offenses—a "transaction" offense set forth at section 1956(a)(1)(A) and (a)(1)(B) and a "transportation" offense set forth at section 1956(a)(2)(A) and (a)(2)(B).

*1. The Financial Transaction Offense.*—The transaction offense, set forth at section 1956(a)(1), can be violated in one of two ways. To prove either violation, the government must first prove the following four elements:

(1) that the defendant conducted or attempted to conduct
(2) a financial transaction
(3) involving property which, in fact, represents the proceeds[37] of "specified unlawful activity";[38] and

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37. The term "proceeds" is not defined in § 1956. However, the Criminal Division of the Department of Justice states that "the context implies that the property will have been derived from an already completed offense, . . . before it is laundered." Robert S. Mueller, III, U.S. Dep't of Justice, Money Laundering Prosecutions and Forfeitures, 18 U.S.C. Sections 1956-57 and 981-982, at 5 (1992). As a result, the failure to define "proceeds" permits an indictment to allege that the same "financial transaction" constitutes both the money laundering offense and the specified unlawful activity. *Id.* To prevent this result, Mueller cautions: "[A]s a general rule, neither § 1956 nor § 1957 should be used where the same financial transaction represents both the money laundering offense and a part of the specified unlawful activity generating the proceeds being laundered." *Id.*

38. "Specified unlawful activity" is defined in § 1956(c)(7) and includes virtually all white collar crimes, including federal environmental crimes. *See* § 1956(c)(7)(D)-(E) (Supp. III 1991).

penalties involved, clearly violates the void for vagueness doctrine. As discussed above, under the *mens rea* requirement in section 1956(a)(1)(A), the defendant only has to know that the proceeds were derived from some form of specified unlawful activity. This element fails to provide businesses with a standard to determine when their suspicions about a potential business transaction will rise to the level of knowledge. Thus, this provision fails the first prong of the vagueness doctrine because it fails to provide fair notice of what conduct is prohibited.

For the same reason, this provision also fails to satisfy the second and more important requirement that laws should not be susceptible to arbitrary enforcement. If there is no standard to determine when a defendant's suspicions will rise to the level of knowledge, prosecutors are free to make that determination based on their personal predilections. This element gives a prosecutor complete discretion to determine when a defendant should have known that the property involved in a financial transaction was the proceeds of some specified unlawful activity.

Moreover, the *mens rea* requirement in section 1956(a)(1)(B) also suffers from vagueness. Requiring the government to prove that the defendant knew someone else was trying to conceal the transaction transfers the intent of a third party to the defendant. In *Record Revolution No. 6 v. City of Parma*,[49] the Sixth Circuit Court of Appeals held that statutes which attempt to transfer the intent of a third party to a defendant violate due process. In that case, a statute designed to prohibit the sale of drug paraphernalia made it illegal to sell items " 'used, intended for use, or designed for use' " in the manufacture or ingestion of controlled substances.[50] Under this statute an individual, irrespective of his own intent, could be convicted for selling these items where the manufacturer designed the items for illegal use and where the buyer intended to use them illegally. The court held that transferring the intent of the manufacturer to the seller not only failed to give individuals fair notice of what items constitute drug paraphernalia, but also convicted defendants "for another person's intent or mis-

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*supra* note 3, § 9-105.100A; *see also* United States v. St. Michael's Credit Union, 880 F.2d 579 (1st Cir. 1989) (affirming willful blindness instruction); United States v. Lizotte, 856 F.2d 341 (1st Cir. 1988) (ruling lawyer was willfully blind).

49. 638 F.2d 916 (6th Cir. 1980), *vacated*, 456 U.S. 968 (1982).

50. *Record Revolution*, 638 F.2d at 920.

deeds."[51] Thus, the "designed for use" element was struck down as unconstitutionally vague.[52] The "intended for use" element, however, was upheld by construing it to only apply to the seller's intent.[53]

This transferred intent problem is readily apparent in section 1956(a)(1)(B). This provision clearly speaks of a third party's intent to conceal the financial transaction; the defendant need only know of the third party's intention. As noted in *Record Revolution*, however, a corporation's knowledge that a third party is trying to conceal a transaction should not entitle the government to transfer the intent of a third party to the corporation.

To be sure, there are circumstances where a business entity's involvement with a third party, coupled with knowledge that the third party is involved in a criminal activity, can support an inference that the business itself intends to promote the unlawful activity. The Supreme Court addressed this issue in two cases involving the conspiracy and aiding and abetting statutes. In *United States v. Falcone*,[54] the defendants were indicted for aiding and abetting a conspiracy to distill illegal alcohol in violation of the revenue laws. The defendants sold cans and sugar to a third party knowing that the goods would be used in the distillation of illicit spirits. The government argued that the defendants' knowledge, combined with their actions, evidenced their assistance in the conspiracy. The Supreme Court disagreed, holding that the defendants' knowledge that their goods would be used illegally, without more, did not create an inference that they aided a conspiracy even if their involvement furthered the object of the conspiracy. To allow such an inference, the Court added, would permit a conviction based on "vague and inconclusive" evidence.[55] However, the Court noted that it was not deciding whether a defendant's knowledge about the ultimate use of his goods could ever create an inference that he was a participant in the crime.[56]

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51. *Id.* at 928.

52. *Id.* at 930.

53. *Id.* at 929.

54. 311 U.S. 205 (1940).

55. *Falcone*, 311 U.S. at 210.

56. *Id.* at 208.

(4) the defendant knew that the property constituted proceeds of *some* unlawful activity.[39]

The government must also prove a fifth element, either the element set forth in section 1956(a)(1)(A) *or* the element set forth in section 1956(a)(1)(B).

The fifth element contained in section 1956(a)(1)(A) makes this provision a specific intent crime by requiring the government to prove that the defendant either *intended* "to promote the carrying on of specified unlawful activity" *or* intended to engage in conduct violating 26 U.S.C. § 7201[40] (attempting to evade or delegate tax) or 26 U.S.C. § 7206[41] (tax fraud and false statements).[42]

Thus, section 1956(a)(1)(A) contains two *mens rea* requirements. First, the defendant must *know* that the proceeds are derived from *some* form of specified unlawful activity. Second, the defendant must *intend* to promote the specified unlawful activity or to engage in conduct violative of the tax code. The term "*some* form of unlawful activity" was an intentional attempt by Congress to dilute the first *mens rea* requirement to prevent a defendant from claiming that the government had to prove that the defendant knew the proceeds came from a certain specified unlawful activity.[43]

If this diluted *mens rea* requirement were the only knowledge requirement contained in section 1956(a)(1), the section would be so vague as to provide no useful guidance to either businesses or to prosecutors. However, the specific intent requirement in section 1956(a)(1)(A) cures this vagueness by requiring the government to prove that the defendant intended to promote the specified unlawful activity. This requirement comports with the

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39. 18 U.S.C. § 1956(a)(1) (1988 & Supp. III 1991).

40. (1988).

41. (1988).

42. 18 U.S.C. § 1956(a)(1)(A)(i), (ii) (1988 & Supp. III 1991). Section 1956(a)(1)(A)(ii) was added by § 6471 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4379.

43. § 1956(a)(1) (emphasis added); § 1956(c)(1) (Supp. III 1991) (requiring that the defendant must know the property involved in the transaction represents proceeds from some form of unlawful activity, "though not necessarily which form"); Strafer, *supra* note 4, at 165-67.

well-settled rule in criminal law that there can be no crime absent a "vicious will."[44]

Sections 1956(a)(1)(B) and 1956(a)(2)(B), however, contain no such requirement. Rather, the fifth element of section 1956(a)(1)(B) adds a second *mens rea* element which requires the government to prove that the defendant:

> (B) [*knew*] that the transaction [was] 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.[45]

This knowledge element requires only that the defendant knew that *someone* designed the financial transaction in whole or in part to conceal or disguise the proceeds of specified unlawful activity or to avoid a transaction reporting requirement.[46] The defendant himself need not have had a role in designing the transaction so as to conceal the specified unlawful activity or to avoid a transaction reporting requirement. Thus, under this section, the government has to prove only that the defendant "knew" the property involved in the business transaction was derived from "some" unlawful activity to which he was not a party and had no intent to promote, and that someone was trying to conceal that fact. It is irrelevant that the defendant had no stake in the venture or, as the Supreme Court has stated, had no "vicious will."[47]

The effect of this diluted *mens rea* requirement creates a reckless disregard standard, despite the fact that such a standard was expressly rejected by the Senate.[48] This standard, considering the

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44. Morissette v. United States, 342 U.S. 246, 251 (1952) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *21).

45. § 1956(a)(1)(B)(i), (ii) (emphasis added). Section 1956(a)(1)(B)(ii) was enacted to overrule judicial decisions that had circumvented certain CTR requirements of the Bank Secrecy Act (BSA). Strafer, *supra* note 4, at 159-61.

46. *See* ATTORNEYS' MANUAL, *supra* note 3, § 9-105.100 (1990) ("[T]he particular defendant need not share the criminal's intent to promote further unlawful activity, or to conceal the source or ownership of the unlawful proceeds, or to avoid a transaction reporting requirement. He or she simply must be aware of the criminal's design or purpose.").

47. *Morissette*, 342 U.S. at 251.

48. *See* S. 572 (knowledge), S. 1335 (reckless disregard) & S. 1385 (knowledge), 99th Cong., 1st Sess. (1985). The House sought to impose a reckless disregard standard. H.R. 2786, 99th Cong., 1st Sess. (1985). The Senate report, however, equates knowledge with "willful blindness." S. REP. No. 433, 99th Cong., 2d Sess. 9-10 (1986); ATTORNEYS' MANUAL,

The Supreme Court revisited this issue in *Direct Sales Co. v. United States*[57] and came to a different conclusion. In that case, the defendant was a drug manufacturer who supplied large quantities of morphine to a physician who then dispensed the drugs illegally. The company was convicted for conspiring with the physician to violate the Harrison Drug Act.[58] The company admitted knowing that the physician was distributing the drugs illegally, but argued, relying on *Falcone*, that such knowledge did not make it a co-conspirator. The Supreme Court distinguished between articles of "free commerce," such as the sugar in *Falcone*, and heavily restricted goods, such as the drugs in *Direct Sales*.[59] The Court added that when a supplier works in "prolonged cooperation" with a buyer and supplies restricted commodities intended for illegal use, there is more than suspicion or knowledge—"[t]here is informed and interested cooperation, stimulation, instigation."[60]

Financial transactions, like the cans and sugar in *Falcone*, are not inherently suspicious. Moreover, while a financial transaction may promote an overall scheme to launder money, such a transaction does not evidence a business entity's intent to cooperate, stimulate, or instigate a scheme to launder money. Surely, more is required than mere knowledge that someone is trying to conceal a transaction before a business can be exposed to the stigma and penalties brought on by an indictment and conviction for money laundering.

2. *The Transportation Offense.*—The "transportation" offense set forth at 18 U.S.C. § 1956(a)(2)(A) and (a)(2)(B) may also be violated in one of two ways. Under both sections 1956(a)(2)(A) and (a)(2)(B), the government must prove the following:

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57. 319 U.S. 703 (1943).

58. *Direct Sales*, 319 U.S. at 704. Prior to the enactment of RICO and the Anti-Money Laundering Statutes, businesses providing services to criminals were often prosecuted under the conspiracy and aiding and abetting statutes. Although *Direct Sales* involved the conspiracy statute and *Falcone* involved the aiding and abetting statute, the Court noted that the holding in *Falcone* was applicable in *Direct Sales*. Because RICO and the Anti-Money Laundering Statutes have replaced conspiracy and aiding and abetting as the prosecutor's weapons of choice against corporate wrongdoing, these holdings also should be applicable to the Anti-Money Laundering Statutes.

59. *Id.* at 710.

60. *Id.* at 713.

(1) that the defendant "transport[ed], transmitt[ed], or transfer[red], or attempt[ed] to transport, transmit, or transfer"[61]
(2) a "monetary instrument or funds";
(3) "from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States."[62]

The government also must prove a fourth element, as set forth either in section 1956(a)(2)(A) *or* in section 1956(a)(2)(B). Like section 1956(a)(1)(A), the element contained in section 1956(a)(2)(A) requires the government to prove that the defendant "*inten[ded]* to promote the carrying on of specified unlawful activity."[63] Section 1956(a)(2)(A) differs from section 1956(a)(1)(A) in that the defendant does not have to know that "monetary instruments or funds" represent the proceeds of *some* form of unlawful activity; because it contains a specific intent requirement, it is constitutionally sound.

However, the fourth element in section 1956(a)(2)(B), like section 1956(a)(1)(B), contains no specific intent element. Instead, it also adds a second *mens rea* element which requires the government to prove that the defendant:

> [*knew*] that the monetary instrument or funds involved in the transportation represent[ed] the proceeds of *some* form of unlawful activity *and* [knew] that such transportation [was] 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.[64]

This provision suffers from the same vagueness problems as section 1956(a)(1)(B). First, the "*some* form of unlawful activity" element raises the same concerns discussed above. Again, the de-

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61. The 1988 amendments added "transmit" or "transfer" to this section. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6471(b), 102 Stat. 4181, 4378 (codified as amended at 18 U.S.C. § 1956(a)(2) (1988 & Supp. III 1991)).

62. 18 U.S.C. § 1956(a)(2) (1988 & Supp. III 1991). Section 1956(a)(2) was designed to prevent international money laundering. *See* U.S. DEP'T. OF JUSTICE, HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986, at 72-73 (1987).

63. § 1956(a)(2)(A) (emphasis added).

64. § 1956(a)(2)(B) (emphasis added).

fendant is not provided with fair notice of when his suspicions will be considered knowledge and expose him to criminal liability. Instead, the prosecution is allowed to determine when a business entity's suspicions constitute knowledge, in clear contradiction of the vagueness doctrine. Moreover, the second *mens rea* element requires only that the defendant know someone is trying to conceal the source of funds, raising the transferred intent and *Falcone* problems discussed above.

### *B. Section 1957: Engaging in Monetary Transactions*

Section 1957 is a transaction-oriented offense. To convict a defendant under section 1957, the government must prove the following elements:

> (1) that the defendant "knowingly engage[d] or attempt[ed] to engage"
> (2) "in a *monetary* transaction"
> (3) "in criminally derived property . . . value[d] greater than $10,000"
> (4) "derived from specified unlawful activity"; and
> (5) that the offense took place "in the United States or in the special maritime and territorial jurisdiction of the United States," or that the offense took place "outside the United States . . ., but the defendant is a United States person" as defined in 18 U.S.C. § 3077.[65]

This statute does not contain any specific intent requirement or any meaningful *mens rea* requirement. In fact, to be convicted under section 1957, the government must prove only that the defendant knowingly engaged in a monetary transaction which happens to involve property derived from a specified unlawful activity valued over $10,000. The defendant does not have to know that the property involved in the transaction is criminally derived nor does he have to have intended to promote any specified unlawful activity.[66]

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65. § 1957(a), (d) (1988) (emphasis added) (referring to 18 U.S.C. § 3077 (1988 & Supp. III 1991)). Section 1957(d)(2) provides for extraterritorial application.

66. § 1957(c). There is nothing in the statute to indicate when such property loses its criminal character. Thus, arguably a company could be exposed to criminal liability for engaging in a monetary transaction involving property that at one time passed through the hands of criminals. *See* ATTORNEYS' MANUAL, *supra* note 3, § 9-105.100A (Supp. 1992) ("Because the Act is transaction-oriented, it can follow the proceeds of crime throughout the world."). This result comports with the relation-back doctrine, which holds that title to

The Supreme Court has held that criminal statutes which have no *mens rea* requirement are disfavored.[67] In fact, statutes which contain no *mens rea* requirement, such as section 1957, have been upheld only after they were construed to include a *mens rea* requirement. For example, in *Morissette v. United States*,[68] a federal statute imposed criminal liability on a person who " 'embezzles, steals, purloins, or knowingly converts' government property."[69] The trial court and court of appeals held that this statute required only that the defendant know he was taking property into his possession. He did not have to know that the property belonged to the government or that he was stealing; criminal intent was presumed from the taking of the property. The Supreme Court reversed the defendant's conviction, holding that the "mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."[70] The Supreme Court further explained:

> A presumption [of intent] which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. *Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit.*[71]

Similarly, in *Liparota v. United States*,[72] a statute provided that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not

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property subject to forfeiture vests in the government at the time the crime is committed. This fiction voids the subsequent transfer of property unless the claimant can satisfy the innocent owner defense. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974).

67. Liparota v. United States, 471 U.S. 419, 426 (1985). The only exceptions are offenses which a reasonable person should know are subject to stringent public regulation or offenses which seriously threaten the community's health or safety. United States v. Freed, 401 U.S. 601 (1971) (hand grenades); United States v. Dotterweich, 320 U.S. 277 (1943) (adulterated drugs).

68. 342 U.S. 246 (1952).

69. *Morissette*, 342 U.S. at 248 (quoting 18 U.S.C. § 641 (1988)).

70. *Id.* at 263.

71. *Id.* at 275 (emphasis added) (footnote omitted).

72. 471 U.S. 419 (1985).

authorized by [the statute] or the regulations" was subject to criminal liability.[73] The trial court instructed the jury that a conviction could be based on the defendant's mere knowledge that he was acquiring or possessing food stamps if in fact that acquisition or possession were in a manner not authorized by statute or regulations. The defendant did not have to know that his acquisition and possession were not authorized by federal statute or regulations. The Supreme Court reversed, holding that despite the literal wording of the statute, the government had to prove that the defendant knew his conduct was unauthorized or illegal.[74]

As in *Liparota* and *Morissette*, a conviction under section 1957 rests entirely upon whether the money involved in the transaction happens to be criminally derived property regardless of whether the defendant knows that fact. Under this standard, all businesses who engage in monetary transactions are exposed to criminal liability. Thus, section 1957 is unconstitutionally vague because it fails to provide any standard to businesses or prosecutors for determining when engaging in such transactions constitutes a crime.

For the same reason, section 1957 also suffers from overbreadth. Both sections 1956 and 1957 could cause businesses to become overly cautious and forgo business dealings based on their suspicions either that someone could be a criminal or that money or property involved in the transaction is criminally derived. This result certainly creates the potential for a chilling effect on business relations and violates the First Amendment guarantee of freedom of association.

The chilling effect also exposes companies to tremendous civil liability, as demonstrated by *Ricci v. Key Bancshares*.[75] In *Ricci*, a financial institution terminated a customer's line of credit after receiving false information that the customer was a prominent member of an organized crime family. The customer brought suit, alleging, *inter alia*, defamation and intentional infliction of emotional stress. The jury awarded plaintiff $12,500,000 in exemplary

73. *Liparota*, 471 U.S. at 420 (alteration in original) (quoting 7 U.S.C. § 2024(b)(1) (1988) (amended 1990)).

74. *Id.* at 433-34.

75. 662 F. Supp. 1132 (D. Me. 1987).

damages and $10,000 in statutory punitive damages.[76] *Ricci* is a clear example of the tightrope on which businesses must walk to avoid criminal liability under the Anti-Money Laundering Statutes without incurring civil damages for refusing to deal with certain individuals or companies. That companies are even placed in such a dilemma is proof that the Anti-Money Laundering Statutes are overly inclusive and vague.[77]

## IV. Prosecutorial Discretion and the Need for Guidelines

Federal prosecutors have almost unfettered discretion in deciding whether to prosecute a particular case. This discretion is bolstered by prosecutorial control over grand jury proceedings and federal criminal investigations. To be sure, prosecutors are guided by the "Principles of Federal Prosecution"[78] in deciding whether to initiate or prosecute a particular case. These guidelines state that a prosecutor should decline prosecution if no substantial federal interest would be served by prosecution or if there exists an adequate noncriminal alternative to prosecution.[79] Nevertheless, there is no assurance that these guidelines will be followed by overzealous prosecutors who see high profile cases involving powerful businesses as too enticing to forgo.

Moreover, because the doctrine of vicarious liability exposes a business to criminal liability for the criminal acts of its employees,[80] statutes with little or no *mens rea* requirement are particularly troublesome in the corporate criminal context. This

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76. *Ricci*, 662 F. Supp. at 1136. The court set aside the exemplary damages award. *Id.* at 1138.

77. Even the enforcement authorities recognize this dilemma. "When illegal activity is only suspected, can a financial institution incur a charge of willful blindness by not disclosing the suspected illegal activity to enforcement authorities? The quandary for financial institutions is clear--how to avoid crossing the line between unreported suspicion and passive complicity." Attorneys' Manual, *supra* note 3, § 9-105.100A (Supp. 1992).

78. *Id.* §§ 9-27.000 to .760 (1990).

79. *Id.* § 9-27.220. Section 9-27.230 provides seven factors to consider in determining whether to decline prosecution.

80. United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); New York Cent. & H.R.R.R. v. United States, 212 U.S. 481 (1909). A corporation may also be held liable if its supervisory employees intentionally disregard the law or act with plain indifference. *Bank of New England*, 821 F.2d at 857; United States v. Demauro, 581 F.2d 50, 54 (2d Cir. 1978). The *United States Attorneys' Manual* demonstrates this point in a hypothetical:

problem might be resolved on a case-by-case basis by challenging each improper application for vagueness and overbreadth. Unfortunately, this solution would not resolve the problem which the vagueness doctrine was designed to correct—that individuals and prosecutors be provided with *advance* notice of what conduct is forbidden.

A simpler solution would be to provide prosecutors with guidelines similar to those adopted in RICO. The preface to the RICO guidelines states:

> It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield form the congressional purpose of the RICO statute.[81]

To this end, the guidelines further provide that authorization from the Criminal Division is required for all RICO prosecutions.[82]

Prior to October 1, 1992, there were only three categories of money laundering cases requiring prosecutorial authorization from the Money Laundering Section of the Criminal Division: 1) a prosecution where jurisdiction is solely extraterritorial; 2) a prosecution under section 1956(a)(1)(A)(ii) where the sole or principal purpose of the financial transaction is to evade taxes; or 3) a prosecution of attorneys where the financial transaction is the payment of attorneys' fees.[83] In October 1992, a fourth category was added, which requires authorization when a financial institution is to be named a defendant or an unindicted co-conspirator.[84] This change also centralizes the review and approval of money laundering prosecutions within the Money Laundering Section of the Criminal Division.[85]

In addition, the United States Attorney must now "consult" the Money Laundering Section prior to filing an indictment or

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> A bank teller who has every reason to believe that [a] series of cash deposits, each slightly less than $10,000, is the proceeds of a gambling operation but deliberately closes her eyes to what is going on around her may create criminal liability for the bank—even if the cash turns out to be drug money.

ATTORNEYS' MANUAL, *supra* note 3, § 9-105.100A (Supp. 1992).

81. ATTORNEYS' MANUAL, *supra* note 3, § 9-110.200 (1990).
82. *Id.*
83. *Id.* § 9-105.100; MUELLER, *supra* note 37, at 3-4.
84. MUELLER, *supra* note 37, at 4.
85. *Id.*

complaint in three situations: 1) when the forfeiture of a business is sought where that business allegedly facilitated a money-laundering offense; (2) when a civil action is brought against a business based on section 1956(b); and (3) when a case is brought under sections 1956 or 1957 where the alleged "specified unlawful activity" consists primarily of financial or fraud offenses and where the financial offense and the money laundering offense are so related that distinguishing the two is difficult.[86] The new guidelines also require that the Money Laundering Section be "notified" of all cases so that it can "be kept abreast of the way the statutes are being used."[87]

While these new guidelines certainly improve the problems with the overly broad and vague Anti-Money Laundering Statutes, it is unclear what deterrent effect, if any, "consultation" with and "notification" to the Money Laundering Section will have on the improper and overreaching uses of the Anti-Money Laundering Statutes.

## V. Conclusion

In a 1940 speech delivered in the great hall of the U.S. Department of Justice building, Attorney General Robert Jackson counseled federal prosecutors that not every technical violation of the law should be prosecuted. Attorney General Jackson stated:

> With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost everyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.[88]

Attorney General Jackson's admonition is especially applicable to laws like the Anti-Money Laundering Statutes where a misguided or malevolent prosecutor can easily identify some arguably "technical violation" in the broadly worded statutory provisions. This possibility, especially as it applies to routine busi-

86. *Id.* at 4-5.

87. *Id.* at 5.

88. Robert H. Jackson, United States Attorney General, The Federal Prosecutor, Address at the 2nd Annual Conference of United States Attorneys (April 1, 1940) (on file with Larry Thompson).

ness conduct, is undesirable, counterproductive, and clearly was not intended by Congress when it enacted the Anti-Money Laundering Statutes in its war on drugs.

The Anti-Money Laundering Statutes are unconstitutional as applied to routine business transactions. The statutes, which were drafted to reach drug-related activities, have been stretched beyond their original intent. The statutes are vague and overbroad.

Recent guidelines have been enacted to address theses concerns. However, due to the expansive nature of the statutes, these guidelines are largely ineffectual. At a minimum, additional guidelines are needed to prevent overzealous prosecutors from misapplying the statutes and to ensure that corporations are not deterred from entering into legitimate business transactions.