

CHALLENGES FACING U.S. ANTI-MONEY LAUNDERING EFFORTS IN TRANSNATIONAL CRIME

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I. INTRODUCTION

Astute drug traffickers and other criminals are increasingly committing their crimes in one country and hiding and sheltering their vast wealth elsewhere. The various ways criminals move funds across international boundaries is limited only by their imagination. They do it the old fashioned way by hand carrying it in suitcases, across the Mexican border on horseback, in body cavities, and of course through financial institutions, including wire transfers and commercial transactions involving undervalued or overvalued commodities or falsified loan arrangements. Why do criminals do this? They know that there are still many countries on this earth that have weak enforcement and will provide their wealth a safe haven so that they can enjoy the fruits of their crime and use the money to further and continue their illegal activities. The result is that money laundering has become a global problem involving international financial transactions, the smuggling of currency cross borders, and the laundering in one country of the proceeds of crimes committed in another country. Indeed, that virtually every significant money laundering case in the United States is now transnational in nature is the rule, rather than the exception. This crime of money laundering has devastating social consequences and is a threat to the security of all our nations. We are all in agreement that to disrupt and dismantle organized criminal groups, we must attack the economic underpinnings of their crimes by following the money flow and using forfeiture to take away their financial networks. When the money flows are transnational, international cooperation is vital. Where the mechanisms for rendering assistance from one country to another are too slow and frustrate rather than facilitate cooperation then we must change our ways and streamline our legal assistance procedures. If we are not willing to do this, the criminal will always stay one step ahead of the law. Outlined below are three critical areas which are essential components for any country's anti money laundering regime.

II. STRONG DOMESTIC MONEY LAUNDERING LAWS, WHICH HAVE FORFEITURE AS ITS CENTREPIECE

Having an effective legislative framework must be a priority for every country. Each nation must criminalize money laundering and needs an effective system to identify, trace, freeze or seize and ultimately confiscate property involved in serious profit generating offences. It is critically important to have an ability to take away the economic incentive that criminals enjoy from their crimes - which provided the motivation for them to commit the crimes in the first place. As an important starting point, countries should take stock in their own national laws to see where domestic cases have broken down and

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where their system has failed them. It is a pretty good indicator that if a country is unable to do for themselves, they will be unable to do for others. Whether there is a political will to make needed legislative changes is an entirely different matter. In the United States, we have experienced enacting relevant legislation both with and without political will in two recent laws - the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") and the USA Patriot Act of 2001 ("the Patriot Act"). Prior to the passage of CAFRA, the Department of Justice had been trying unsuccessfully to amend the forfeiture laws for the better part of nine years. Year after year some other issue became the national priority for our Congress, and civil forfeiture reform was put on the back burner. On the other hand, following the terrorist attacks of September 11th, there was nothing more important to Congress than giving U.S. law enforcement the tools they required.

For its part, the United States made significant changes to its money laundering law as a result of the enactment of The Anti-Terrorism Act of 2001 (USA Patriot Act), Public Law 107-56, which became effective on October 26, 2001. The Patriot Act was enacted in record speed - some six weeks following the terrorist attacks. Most importantly, in many instances, these new powers are not limited to terrorism cases. Well before September 11, those in law enforcement - both police and prosecutors - knew for some time that our money laundering and forfeiture laws were inadequate. Even the criminals knew of the weaknesses of U.S. law and could capitalize on them. When our laws were enacted in 1986, they were intended to address primarily a domestic problem. The laws were not designed with international considerations in mind such as when the illicit proceeds were beyond our borders, and conversely what protection we could give to other countries when the illegal money was in the U.S. but the crime that generated those funds was committed abroad and did not violate U.S. penal laws. Indeed, until recently, United States federal law for the most part did not permit the forfeiture of the proceeds of foreign crimes. As another example, our laws require notice on third parties but did not adequately address how we could deliver notice on third parties who lived outside the United States, and the time limits we place on domestic notice are not always reasonable considering the time it may take to locate a foreign interested party, make a legal assistance request, and have that request executed. Furthermore, our laws did not facilitate the introduction of foreign bank records and other foreign evidence in U.S. court proceedings, especially in civil forfeiture cases.

But, as we all know, money laundering has become a global problem with the use of technology to conduct business and transfer funds from one country to another. For instance, in the area of corruption, we have all read in the newspapers such names as Abacha, Bhutto, Fujimori, Lazarenko, Marcos, and Suharto, to name a few heads of state and high ranking government officials and about their family members, cronies, and collaborators who have laundered their illicit enrichments by transferring them to jurisdictions abroad.

By amending the money laundering laws as part of the Patriot Act, the United States has strengthened its ability to assist foreign government by improving our capacity to recognize foreign restraining orders and forfeiture judgments. Importantly, we have further expanded the list of foreign crimes that are predicate offences under the money laundering laws to include: "an offence against a foreign nation involving bribery of a public official, or the misappropriation theft, or embezzlement of public funds by or for the benefit of a public official;" all crimes of violence; smuggling munitions or technology with military applications; and any offence with respect to which the United States would be obligated by any multilateral treaty to extradite or prosecute the offender.

In the Patriot Act, Congress broadened our law enforcement authority in many respects to improve U.S. anti money laundering efforts to combat terrorist financing. Among other things, the law provides broad civil forfeiture authority against domestic and foreign based property involved in terrorism and

terrorist financing offences ¹ and making terrorist financing a predicate offence for money laundering. These powers combined with a pre-existing law allowing for direct forfeiture authority for the proceeds predicate offences, including the foreign offences, as well as instrumentalities used in those crimes are extremely potent weapons in a prosecutor's arsenal to combat terrorism.

In addition, pursuant to 18 U.S.C. § 1960, any money remitter, licensed or unlicensed, who operates a business knowing that the funds being transmitted are derived from a criminal offence, or are intended to be used for an unlawful purpose can be prosecuted. The scope of the statute as amended is greater than the scope of existing money laundering laws because there is no \$10,000 requirement and because there is no specific intent requirement if the money constitutes criminal proceeds, and no proceeds requirement if the money is intended to be used to commit an unlawful act.

Also, Congress enacted a new provision, 31 U.S.C. § 5332, which makes bulk cash smuggling a criminal offence. Because it was already a crime to fail to file a CMIR report (failure to report cross border currency movements involving \$10,000), the practical effects of section 5332 are to enhance the ability of the Government to forfeit the unreported currency, and to make it possible to prove that an offence was committed before the defendant actually reached the border crossing where a CMIR report has to be filed.

III. MUTUAL LEGAL ASSISTANCE LAWS

Countries need to be able to cooperate internationally where the crime occurs outside their borders but the proceeds generated are located within their borders. They must have laws and procedures to restrain assets at the request of another jurisdiction and to enforce foreign forfeiture judgments rendered by courts in other jurisdictions so that they do not become safe havens to criminals and their illicit wealth. The following are six areas where experience has shown us that the legal systems of sovereign states frequently do not mesh, thereby impeding effective cooperation. Even where there are good domestic laws in place, the protections that law enforcement can provide does not always extend to the situations where the crime occurs outside a country's borders but the proceeds generated are within its borders and to the situations where the requested state must initiate its own domestic forfeiture or laundering proceedings in order to render legal assistance. The obstacles include:

A. Inadequate Scope of Covered Offences

A significant gap that can be exploited by criminal groups results from their knowing in which jurisdictions it is not a crime to launder the proceeds of foreign offences. To determine whether this issue manifests itself, one must first look to determine what legislative scheme is in place in the affected jurisdiction. The specific issue of whether a country can assist given the offence involved, typically turns

¹ See 18 U.S.C. § 981(a)(1)(G)(iii) which makes subject to forfeiture all assets, foreign or domestic, derived from, involved in, or intended to be used to commit any act of domestic or international terrorism. Under this provision, the burden of proof is on the property owner to prove that the property is not subject to forfeiture. Hearsay evidence is admissible in some circumstances to protect national security. Additionally, terrorist assets are broadly defined to be "All assets, foreign and domestic - (1) Of any individual, entity, or organization engaged in planning or perpetuating any act of domestic or international terrorism against the U.S., U.S. citizens or residents, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization; (2) Acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing an act of domestic or international terrorism; (3) Derived from, involved in or used or intended to be used to commit any act of domestic or international terrorism against the U.S., U.S. citizens or residents, or their property.

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on whether the particular country in question has adopted a list approach or an all-crimes approach in its anti-money laundering law. The United States went down the path of having a list approach of predicate offences in its money laundering law. Currently, we have more than 200 specified unlawful activities that are predicate crimes for money laundering. To those of you here today from countries that are developing their laws for the first time or seeking to modernize their laws, I would submit that our approach is not the one to follow. In the past, often times persons who committed crimes outside the jurisdiction of the United States could deposit their illicit proceeds in the United States with impunity because many foreign offences were not contained on our list of predicate offences. However, it should not matter where the predicate offence took place so long as the conduct would have been criminal if it had occurred where the property is found. The rationale for criminalizing money laundering should be the same regardless of the underlying offence involved -whether it be drug trafficking, extortion, alien smuggling, or internet fraud - and regardless whether the offence was a violation of United States law or that of another nation.

Currently, the foreign specified unlawful activities or money laundering predicates in the United States include an offence against a foreign nation involving:

1. the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);
2. murder, kidnapping, robbery, extortion, destruction of property by means of explosives or fire or a crime of violence (as defined in section 16);
3. fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978);
4. bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;
5. smuggling or export control violations involving-
 - (i) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or
 - (ii) an item controlled under regulations under the Export Administration Act of 1977 (15 C.F.R. Parts 730-774);
6. an offence with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States.

We still do not have complete parity in our domestic and foreign lists, but we expect that the number of cases where we will be able to render international assistance will certainly increase because now it is a crime in the United States to launder proceeds of more foreign offences. Additionally, both the proceeds and the instrumentalities from all these foreign offences are now subject to forfeiture.

B. Inability to Assist in Civil Forfeiture Cases

As many of you know, the United States has both criminal and civil (or in rem) forfeiture. In the latter instance, the United States is able to forfeit the property without convicting a person of a crime. The non-conviction based forfeiture proceedings are quasi criminal in nature, and the government must

prove that the property at issue was either derived from the commission of a criminal offence or was used to commit an offence. Nevertheless, the United States has been denied assistance from jurisdictions that have only criminal based forfeiture systems. The result is that tainted property is not restrained and remains available to the criminal because the jurisdiction where the property is located has no one to prosecute. All too frequently the suspect is a fugitive, unidentified, or living comfortably in a jurisdiction that does not extradite its nationals. In some cases, the target is dead. Yet often times, there is strong - even incontrovertible - evidence that the subject property was involved in crime. Under a civil forfeiture statute, an action can be brought to forfeit property irrespective of the status of the owner. Indeed, U.S. law even permits prosecutors to file a civil forfeiture action against foreign-based property. In many cases, an in rem action is undertaken in conjunction with a criminal investigation. In all cases, the prosecutor must demonstrate that a crime has been committed and that the property at issue was derived from or used in a criminal offence. Perhaps if some requested states had a better understanding of the civil forfeiture process, they might be more willing to render assistance in the freezing of assets, furnishing bank records, serving notice, and enforcing orders in civil forfeiture cases.

Consider the cases of notorious Colombian drug traffickers who distributed cocaine to the United States and laundered their drug proceeds in banks throughout the world. Suppose these drug traffickers are killed during raids with the police, which is not beyond the realm of possibility given the fate of Pablo Escobar, Julio Rodriguez-Gacha, and Jose Santa Cruz Londono. Since these kingpins are no longer available for prosecution in Colombia or for extradition to the United States where they were indicted, civil forfeiture actions are the only mechanism in the United States to confiscate their massive criminal wealth.

In accordance with United States law, 28 U.S.C. § 1355(b)(2), United States district courts are vested with extraterritorial jurisdiction and venue over assets located beyond U.S. borders that are subject to civil forfeiture under United States law. Section 1355(b)(2) is particularly useful in cases where the foreign country in question cannot forfeit the property under its own laws, but may be able to take other steps that advance the United States forfeiture effort (e.g., seize the property, enforce a United States forfeiture judgment, or repatriate the assets). In such cases, once the assets have been civilly forfeited in the United States, we can transmit the final civil forfeiture judgment to the foreign country for enforcement or repatriation of the assets.

However, in some jurisdictions, where they have no one to prosecute and cannot assist the United States in civil forfeiture matters, the unjust result is that drug proceeds will revert to the heirs of the deceased drug trafficker. We are heartened to learn of the increasing number of countries that recognize this gaping hole in the international arena and have extended their legal assistance laws to cover civil forfeiture proceedings as being related to foreign criminal investigations or have themselves adopted civil forfeiture laws.

C. Inability to Restrain Assets

Taking provisional measures is perhaps the most important act a requested country can take on behalf of a requesting country. Countries need to be able to respond swiftly to foreign requests to seize or freeze criminal assets located in their borders and to preserve those assets until they are forfeited. This is a critically important step to prevent their dissipation.

Previously, the United States' capacity to render this kind of assistance was seriously deficient. Now, where the statutory requirements of the Patriot Act are met, U.S. prosecutors can freeze assets at the request of another country. Foreign nations seeking a restraining order in the United States of America must (1) be a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances or maintain a treaty or other formal international agreement that provides for

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mutual forfeiture assistance with the United States of America, and (2) allege that the foreign offence committed for which forfeiture is sought constitutes a violation for which property could be forfeited under federal law if the offence were committed in the United States. Where a U.S. prosecutor files a motion for a restraining order with the court based on foreign evidence, the court may rely on information set forth in an affidavit describing the nature of the proceeding or investigation underway in the foreign country, and setting forth a reasonable basis to believe that the property to be restrained will be named in a judgment of forfeiture at the conclusion of such proceeding. Alternatively, to preserve the availability of property subject to a foreign forfeiture or confiscation judgment, a U.S. prosecutor can seek to register and enforce another country's restraining order. In this case, the Attorney General must certify that it is in the interest of justice to give effect to such foreign orders. The duration of the restraining order can vary. Where notice would likely jeopardize the availability of the property for forfeiture, the U.S. court is authorized to enter a temporary restraining order for a period not exceeding ten days (unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period) without prior notice or opportunity for a hearing. Upon entry of the *ex parte* temporary restraining order, the United States will then provide notice of the restraint to persons and entities affected by the order and so that they may seek a hearing in regard to this matter. After a hearing upon notice to interested parties, the United States can seek a restraining order, subject to renewal in 90 day intervals.

To help deal with the situation where a foreign country is unable to restrain assets for us, the United States has enacted a unilateral measure in the Patriot Act to permit Federal prosecutors to seek court orders directing defendants to repatriate their foreign based criminal wealth to the United States where it can be preserved pending forfeiture. This provision is particularly helpful where the jurisdiction where the property is located is unable to freeze the assets at the request of the United States. Although we expect that few, if any, countries will be able to honour these orders through registration and enforcement, there is nonetheless a benefit under our system in that the law permits the court to hold the defendant in contempt for his or her failure to comply with such order to return assets to the United States that he or she has laundered elsewhere. Additionally, there are enhanced sentencing provisions for the recalcitrant defendant.

This is not the only area in the Patriot Act that confers unilateral powers to immobilize assets. Where countries still invoke bank secrecy to thwart the efforts of law enforcement or otherwise declines to cooperate, we have found it necessary to find ways to circumvent those jurisdictions by providing "self-help" type measures to direct action against U.S. banks serving to conduct business in the United States for foreign banks.

The Patriot Act has created a new civil forfeiture statute, 18 U.S.C. § 981(k), to permit the forfeiture of funds held in U.S. correspondent accounts on behalf of foreign banks. By authorizing prosecutors to substitute funds in correspondent accounts in U.S. financial institutions for the funds in the targeted foreign bank account, they will now be able to seize and forfeit criminal assets that previously may have been beyond our reach. In other words, where the government can show that forfeitable property was deposited into an account at a foreign bank, U.S. prosecutors can now file a civil forfeiture action against the equivalent amount of money that is found in that foreign bank's correspondent account located in the United States. Previously, U.S. dollars derived from crime were deposited in offshore accounts where they were promptly transferred back to the United States in a correspondent account held in the name of the foreign bank. The criminal was able to avoid the forfeiture of his funds because they are held in the name of the foreign bank and not the offender. The government was required to trace the deposited funds into the correspondent account, and the foreign bank was considered to be the "owner" of the funds. Because the foreign bank was, in most cases, an innocent owner, the government could not successfully maintain a civil forfeiture action. The law redefines who is an owner of the funds for purposes of

contesting a forfeiture proceeding and applying the innocent owner defence. The “owner” of the funds is defined as the account holder at the foreign bank - not the foreign bank itself - which means that the foreign bank whose account will be the subject of the forfeiture proceeding will lack standing to object to the U.S. forfeiture action.² Moreover, it is no longer necessary to trace the money in the correspondent account to the foreign deposit. Under the Patriot Act, if the bank where the criminal proceeds are located has a correspondent bank account in the United States with available funds, civil forfeiture of an amount equivalent to the tainted funds is now authorized from the correspondent account at a bank in the United States. The Department of Justice does not intend to use this new forfeiture authority in every case as an avenue of first resort, especially where established effective procedures for international cooperation already exist.³ Indeed, the U.S. Department of Justice recognizes the controversial nature of these extraordinary powers and the possible adverse consequences to our international law enforcement relations with our foreign counterparts and the international banking community. Nevertheless, in the aftermath of the terrorist attacks, the United States believed that drastic and aggressive measures were needed so long as jurisdictions are willing to provide safe havens for criminal proceeds and to impose insurmountable barriers to international cooperation in the investigation and prosecution of money laundering and asset forfeiture cases.

Similarly, prosecutions in the United States have been impeded on numerous occasions because of prosecutors and agents have been unable to obtain foreign bank records, even when those foreign banks maintain a presence in the United States or maintain funds in a correspondent bank account there. Notwithstanding any mutual legal assistance treaty relationship we may have with any particular country, foreign banks that maintain correspondent accounts in the United States must now designate a representative within the United States to receive government subpoenas. Under this provision, Section 319(b) of the PATRIOT Act, which is codified at 31 U.S.C. 5318(k), the Attorney General and the Secretary of the Treasury may issue subpoenas to foreign banks that maintain accounts with correspondent banks in the United States in order to obtain records related to the U.S. correspondent accounts, including records maintained outside of the United States relating to the deposit of funds into the foreign bank, irrespective of foreign secrecy laws and the formal international legal assistance process. If the bank fails to comply with the subpoena, the domestic financial institution must terminate its correspondent relationship with that foreign bank not later than ten business days after receipt of written notice from the Secretary or the Attorney General that the foreign bank has failed either to comply with the subpoena or to initiate proceedings to contest it.⁴ The result is that those non cooperating foreign banks that accept criminal proceeds will not be able to enjoy access to the United States financial system.

D. Inability to Enforce Foreign Forfeiture Judgments

Where a crime has been committed in one jurisdiction and the illicit proceeds are in another, it is not always practical or possible to conduct prosecutions in each country.

² The foreign bank will be permitted to contest the forfeiture when it is alleged to have been the wrongdoer or when the foreign depositor had already withdrawn the money from the foreign bank before the money in the correspondent account was restrained or seized.

³ Section 319(a) addresses this possible issue by allowing the Attorney General, in consultation with the Secretary of the Treasury, to suspend or terminate a forfeiture “if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign bank is located and the laws of the United States with respect to liabilities arising from the restraint, seizure, or arrest of such funds . . . and that such suspension or termination would be in the interests of justice and would not harm the national interests of the United States”.

⁴ Failure to terminate the correspondent relationship in accordance with these provisions shall render the U.S. financial institution liable for a civil penalty of up to \$10,000 per day until the relationship is terminated.

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Therefore, the capability of countries to register and enforce foreign forfeiture judgments is a necessary component of any international forfeiture regime. Without this capacity, courts in the country where the criminal assets are located must then waste precious judicial and prosecutive resources to institute duplicative proceedings against property that has already been forfeited in another jurisdiction.

Although the United States lagged behind many jurisdictions in obtaining this authority, we can now finally register and enforce the final civil and criminal forfeiture judgments entered by courts in other countries. Pursuant to 28 U.S.C. § 2467, the United States can give effect to foreign forfeiture judgments rendered in connection with any violation of foreign law that would constitute a violation of an offence for which property could be forfeited under federal law if the offence were committed in the United States. The requesting state seeking enforcement of its forfeiture judgment enforced must be a party to the Vienna Convention or have entered into a treaty or other international agreement with the United States that provides for forfeiture assistance, and the request for enforcement must be certified by the Attorney General or his designee. We will file such final judgment with federal courts and domesticate them, thereby treating the judgment as if it had been rendered by a court in the United States. The court in the United States will be bound by the findings of fact in the foreign court order, and may decline enforcement in only very limited circumstances involving fundamental due process deprivations such as lack of notice, lack of jurisdiction, or fraud in the foreign proceedings. In addition to the judicial economy considerations by avoiding duplication of efforts, the benefit of such a provision is that the defendant or person affected by the order cannot have “two bites at the apple.” In other words, he or she will not be permitted two opportunities in two different forums to litigate and contest the forfeitability of the property.

E. Payment of Attorneys' Fees from Criminal Proceeds

In the United States, a criminal defendant has a constitutional right to counsel pursuant to the Sixth Amendment of the Constitution. However, he or she does not have a right to high-priced counsel or even a right to counsel of his or her own choice. Additionally, this constitutional right to counsel applies only in criminal proceedings and does not extend to civil forfeiture cases. Moreover, a defendant does not have the right to use criminal wealth and property subject to forfeiture to pay for attorneys' fees. The rule in the U.S. is that a defendant cannot use forfeitable property to pay for defence counsel.⁵ The notion is that money stolen in a fraud case or earned in a drug deal belongs to the Government and the victims, not to the defendant; so he cannot use it to pay his attorney. Even where the defendant claims he needs the funds to hire defence counsel, the rule in the U.S. is that the funds remain under restraint if the

Government satisfies the court that it has probable cause to believe that the funds will be forfeited in the event of a conviction.⁶

Other countries, however, permit a defendant to draw down against restrained criminal funds for living expenses and lawyers' fees.

If a criminal robbed a bank and was captured holding the bags of cash taken from the vault, I think we would all agree that the money would be returned to the bank, and the robber should not be entitled to use the proceeds of his crime to pay for his lawyers to mount his defence. It should be no different for other

⁵ See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989).

⁶ See *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, but if he makes this showing he is entitled to a hearing); *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) (defendant entitled to pre-trial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following *Jones*); *United States v. Jamieson*, 189 F. Supp.2d 703 (N.D. Ohio 2002) (same, following *Jones*; to satisfy 6th Amendment requirement, defendant must show he has no access to funds from friends or family; Government has right to rebut showing of lack of funds if hearing is granted).

types of crimes. Yet, if that defendant concocts an elaborate scheme to bilk money from investors or foreign governments, and sets up sham corporations with bank accounts into which he deposits his criminal proceeds, in many jurisdictions he can obtain court approval to access those funds, which by this time have been restrained, to pay for a lawyer and for living expenses for his family. This is an unfair result, especially in fraud cases, where the jurisdiction seeking to forfeit those funds is aiming to make restitution to identifiable victims.

From a prosecutor's point of view, it is frustrating to see assets that should otherwise be available for forfeiture and restitution evaporate because another country - the country where the criminal was savvy enough to launder them - has released the funds to pay lawyers and to enable the criminal's family continue to enjoy a lifestyle to which they have no right to be accustomed. Importantly, prosecutors know that so long as lawyers have a deep pocket to tap for fees, these cases will drag on, as there is no incentive for the lawyers to bring their clients to the table to cooperate. In some instances, as a result of poor court oversight, money has been released for "reasonable" living expenses, which have enabled the defendants' family to remain in high priced housing that was purchased with criminal proceeds and enabled their children to attend expensive private schools.

Countries need to re-examine the circumstances in which they will release restrained funds, and if they cannot limit this practice entirely, they must impose tighter controls. At a minimum, courts should insist on a detailed and verifiable bill of costs before releasing any money to ensure that those funds will go towards reasonable and necessary expenditures.

F. Lack of Asset Sharing Arrangements

The United States believes that the inadequacy of asset sharing arrangements is another serious impediment to the success of asset forfeiture on a global level. The sharing of forfeited assets among nations enhances international cooperation by creating an incentive for countries to work together to combat international crime. Criminals certainly do not respect national boundaries when committing crimes and laundering their profits. Ideally, law enforcement authorities throughout the world should strive to dismantle criminal organizations no matter where their assets are located. Too often law enforcement's efforts stop at the border, and police do not take that extra step of either tracing the money in another country or alerting their counterparts to the possible existence of criminal funds. In part, this may be due to notions of sovereignty and international law, and a lack of awareness among law enforcement authorities as to the availability of asset forfeiture in certain countries. However, in some cases, there is a lack of certainty with respect to asset sharing and, the attitude is that once criminal property leaves your borders, it is someone else's problem. After all, why should you do all the work if another government is going to keep the money? While keeping the money out of the hands of the criminals should always be our primary law enforcement objective, the reality is that there is a revenue generating side effect from conducting financial investigations and forfeiture cases, and which jurisdiction ultimately retains the money is a legitimate question.

In most countries, law enforcement agents, prosecutors and investigating magistrates are overworked and have limited resources. In times of shrinking resources and budget concerns, supervisors are not particularly keen to allocate the expenditure of resources on investigations where there is no hope of recovery for their government to recoup investigations and prosecution expenses. These concerns can be addressed through asset sharing, which we view is a matter of fairness. When law enforcement from several jurisdictions have worked together dedicating human resources, time, money an energy, and the result is a successful prosecution and forfeiture, those governments that contribute to the successful effort should share in the fruits of their labour. To take a finders-keepers attitude will not promote international law enforcement cooperation. Indeed, for a country that forfeits property with international cooperation

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to retain all the proceeds for itself will reward only those countries that have served as money laundering havens.

Despite having enacted forfeiture laws, most countries have not satisfactorily dealt with the issue of asset sharing. Both the Vienna Convention on narcotics trafficking and the Palermo Convention on transnational organized crime urge signatories to give special consideration to asset sharing, yet the laws of many countries provide that all forfeited proceeds shall be deposited into their national treasuries without the possibility of sharing those assets with other countries that may have devoted substantial investigative and/or prosecution resources to the successful forfeiture result.

The United States has been a proponent of international asset sharing for many years. To date, the United States Department of Justice has transferred more than \$175 million to 27 different nations. We currently have three laws (21 U.S.C. § 881(e)(1)(E), 18 U.S.C. § 981(i) and 31 U.S.C. § 9703(h) that provide for international asset sharing. We believe that if asset sharing were adopted as a policy and a practice, there would be an incentive for law enforcement in one country to pursue assets in another, and countries would more willingly participate in international investigations.

IV. GOOD RELATIONSHIP WITH THE FINANCIAL SECTOR

An effective anti-money laundering regime depends upon a strong partnership between law enforcement agencies and financial institutions. Through the filing of CTRs (currency transaction reports), information sharing under the PATRIOT Act, and the filing of SARs or STRs (Suspicious Activity Reports), U.S. financial institutions play a key role in the investigation of financial crimes, including terrorist financing. But, we rely on banks to do more than merely report suspicious transactions and monitor currency deposits.

In conducting a financial investigation, law enforcement authorities must have access to evidence to determine the identity of who opened a bank account, who the true parties to a transaction are, and who the true beneficial owner of the funds in a targeted account is. Our ability to follow the money is key to not only prosecuting criminals, but also to preventing terrorism and disrupting other transnational crime. Thus, it is critically important that banks and other financial institutions know with whom they are doing business and be able to share that information with law enforcement when necessary.

Many of the obstacles in the financial sector that impeded American law enforcement were addressed with the enactment of the Patriot Act, which importantly was enacted with the support of the banking community. Numerous provisions in the Patriot Act attempt to make financial institutions in the United States be more accountable. These measures include: prohibition on correspondent banks in the United States from doing business with foreign shell banks; requirement for enhanced due diligence for correspondent accounts with offshore banks or banks in non-cooperating jurisdictions; requirement that covered financial institutions assure that correspondent accounts of foreign banks are not used to indirectly provide banking services to foreign shell banks; requirement that covered financial institutions keep records of foreign ownership of foreign banks; and the requirement that U.S. financial institutions close the correspondent accounts of foreign banks that fail to produce records formally requested by the Justice or Treasury Departments. The Patriot Act also requires that financial institutions "maintain records of the information used to verify a person's identity, including name, address and other identifying information." The law further requires the Secretary of the Treasury, in consultation with the Attorney General and Secretary of State, to take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions for funds sent to the United States.

In the past year, the government has made clear that banks will be held liable, both under criminal and civil laws, for failure to comply with anti-money laundering requirements. In 2002, a civil penalty in the amount of \$100,000 was assessed against Great Eastern Bank of Miami for failing to file Suspicious Activity Reports. In addition, two U.S. banks, Broadway National Bank and Banco Popular of Puerto Rico were prosecuted criminally.

In January 2003, Broadway National Bank of New York, an institution used by a number of money launderers, became the first financial institution to be convicted of criminal violations of the Bank Secrecy Act for the failure to file Suspicious Activity Reports. Broadway Bank pleaded guilty to three charges: failure to maintain an anti-money laundering programme as part of illegal activity involving more than \$100,000 in a 12-month period; failure to report suspicious transactions; and structuring, in other words, accepting deposits just below \$10,000 that were calculated to evade the CTR reporting requirements. The bank agreed to pay a \$4 million fine. Evidence came out indicating that Broadway knew its obligations under the law but it chose not to comply with it. For almost ten years the bank's compliance manual sat in its vault and was never opened. Between 1996 and 1998, Broadway failed to report \$123,000,000 in suspicious cash deposits, which were then transferred to over 100 accounts, including international wire transfers to accounts in Colombia and Panama. More than one-third of the cash deposits came from one customer -a major money launderer for Colombian drug traffickers.

Also in January 2003, the United States filed a Criminal Information in the U.S. District Court for the District of Puerto Rico charging Banco Popular with one count of failing to file Suspicious Activity Reports. The bank and the government entered into a deferred prosecution agreement under which Banco Popular waived indictment, agreed to the filing of the Information charging it with a crime, and acknowledged responsibility for failing to file accurate and timely Suspicious Activity Reports when confronted with the knowledge that its accounts were being used for activity consistent with money laundering. For instance, the bank did not undertake the most minimal due diligence in an effort to "know its customer." One customer alone deposited a monthly average of \$1,400,000 from a business located near the bank which bank employees noticed had few, if any, customers. When Banco Popular filed CTRs, they were often inaccurate. The few SARs that it did file were late and contained false or inaccurate information. Banco Popular consented to a civil penalty of \$20,000,000, and it acknowledged that the United States could institute a civil forfeiture action against accounts containing over \$21,000,000 in funds believed to be the proceeds of criminal activity. Based upon Banco Populars actions including its acknowledgment of responsibility, its willingness to settle civil claims against the \$21,000,000 held in its accounts and its consent to a \$20,000,000 civil penalty, the government agreed to defer prosecution for one year. If Banco Popular is in full compliance with all of its obligations under the agreement, the government agreed then to seek dismissal of the Information.

IV. CONCLUSION

To pursue financial crimes, countries must aggressively enforce their money laundering laws and must have cooperative relationships with their financial institutions. Because of the ease with which criminals can move assets between countries, international cooperation is vital. While it is obviously important to arrest, prosecute, and convict offenders of financial crimes, it is equally important to trace, locate, seize, and forfeit the criminal wealth. Effective asset forfeiture is a critical tool of modern law enforcement. Through asset forfeiture, governments can take both the profit out of crime and disrupt criminal activity by forfeiting the property that makes the crimes possible and where necessary make restitution to victims. With the strong support of other governments, the United States has been able to use its criminal and civil forfeiture procedures to restrain and forfeit criminal property even where

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criminals have hidden their illicit assets outside of the United States.

Unfortunately, there are still jurisdictions in this world which fail to cooperate internationally and lack the political will to institute recognized worldwide standards pronounced by the Financial Action Task Force in its 40 Recommendations and eight Special Recommendations related to terrorist financing. Notwithstanding the existence of mutual legal assistance treaties, multilateral agreements, and other formal arrangements to facilitate cooperation, the mechanisms in place in some jurisdictions are patently inadequate. Any weak link in the chain affects the entire financial system. Delays in cooperation are tantamount to non-cooperation. Where countries are not willing to cooperate, the United States has enacted and will use certain unilateral measures in the Patriot Act to deal with these obstacles.

For its part, U.S. law enforcement authorities are now better equipped to institute civil forfeiture actions, provide investigatory assistance, and to restrain assets and enforce certain foreign forfeiture judgments, to assist foreign governments seeking to forfeit assets in the United States that are traceable to foreign crimes. In addition, the Department of Justice firmly supports international asset sharing as a means to further international cooperation in asset forfeiture. Each country must do its part to ensure that there are no safe places for criminals or their criminal wealth.