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From the Presiddent

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Calling them professional money launderers,1 the Bush administration announced in 2001 its goal to investigate lawyers, bankers, and accountants. The strategy lacked any objective measure of its effectiveness to stem money laundering.2 But it moved ahead, fueled by frustrations that law enforcement lacked sufficient training and expertise to investigate complex business entity and financial structures.3

The Bank Secrecy Act (BSA) and its regulations were originally intended to help prevent financial institutions and money services providers from wittingly or unwittingly being used to disguise, move, or hold proceeds of unlawful activities. The Office of the Comptroller of the Currency monitors compliance with the BSA through Suspicious Activity Reports (SARs), Currency Transaction Reports (CTRs), Currency or Monetary Instruments Reports (CMIRs), and bank examinations. Congress centralized the filing of SARs and extended requirements to nonbanking institutions such as check cashing stores, currency exchanges, money transfer services, and other money services businesses.4

The government has attempted to extend BSA regulations to lawyers by defining them as money services businesses, in the hope of improving detection of money laundering.5 Pressure is being applied on these professionals to act as law enforcement partners. Efforts are being made to apply the BSA's "know your customer" and financial due diligence practices to lawyers. In the 111th Congress, legislation has been introduced that will require lawyers forming entities to report the beneficial owner to the government.6 And the Federal Trade Commission is currently attempting to characterize law firms as "creditors," based on traditional billing practices, to require counsel to comply with the SEC's Red Flags Rule that protects against identity theft.7

The government means business. In a recent ongoing case, the government indicted Ben Kuehne, a high profile and respected Miami attorney, for alleged failures to comply with federal anti-money laundering statutes during a due diligence investigation into funds a drug defendant wished to use for payment of his legal fees. Count One of the indictment alleges that the object of the money laundering conspiracy was to engage in monetary transactions "for the purpose of paying legal fees to the [defendant's] criminal defense team."8

The case sent shock waves through the legal community because Kuehne, a prominent member of the bar, was hired by the criminal defense firm to "do the right thing" and attempt to

ensure that monies used to pay accused drug kingpin Fabio Ochoa's legal fees were not tainted. Counsel for Ochoa wanted to make certain that he was being paid with funds that were not drug proceeds nor commingled with drug proceeds. The indictment alleges that Kuehne's investigation, as well as subsequent opinion letters that certain payments were taint-free, was a ruse. It asserts that he knew that the fees were drug proceeds by virtue of their transfer through a currency exchange operated by money brokers rather than by financial institutions (at least one of the exchanges was operated by U.S. law enforcement investigating money laundering activities). While money brokers may be used to launder unlawful proceeds, they are used by legitimate businesses to conduct international transactions as well.9 All of the funds that were wire transferred from Colombia to the Kuehne trust account were used exclusively to pay Ochoa's legal fees and were, therefore, transactions necessary to preserve Ochoa's Sixth Amendment right to counsel.

The government argued that Caplin & Drysdale10 held that a defendant has no Sixth Amendment right to use ill-gotten gains to pay counsel of choice. However, that case's holding is strictly limited to the question of whether the government may forfeit criminal proceeds paid to counsel. Therefore, the case does not invalidate the exemption to 18 U.S.C. § 1957, which excludes funds used to pay legal fees from the ambit of the money laundering statute. (NACDL filed an amicus curiae brief amplifying this argument.11)

Because law enforcement investigators admit to lacking the sophistication to distinguish criminal enterprises from legitimate business structures, the enforcement community has urged lawmakers at the state, federal, and international levels to turn legal and financial professionals into their eyes and ears. Law enforcement's insensitivity to the legitimate purposes of privacy in legal and financial matters has placed police and regulators at odds with professional communities that largely function in a prophylactic matter to avoid violations of the law. Most attorneys and financial advisors are highly principled individuals who counsel clients regarding how they can comply with laws and regulations. Businesses strive to create effective compliance programs to help keep them out of trouble. But legal counsel should not be turned into informants. Requiring lawyers to betray their trust, their duty of loyalty to their clients, is antithetical to the attorney-client relationship. And this scenario will not even be effective in advancing the goals the government seeks to obtain. Business people who become aware that the government wants their lawyers to report private information will stop asking for advice from lawyers. Thus, people will be discouraged from seeking the prophylactic legal advice that would prevent them from potentially breaking the law.

Instead, the government would do better by increasing the skill of its investigators rather than shifting its responsibilities onto the private sector. There was a time when FBI agents were required to have professional credentials. Some were lawyers, others were certified professional accountants. If law enforcement is not sophisticated enough to fight crime today, it needs to become more sophisticated. Present and future investigations will rely more and more on Internet and technology professionals.

Cyberspace is where the action is in money laundering today. In Web 2.0 virtual worlds, virtual properties sell for real money that changes hands electronically, and illegal funds are washed and transported. So far, these transactions can be performed entirely without any record or regulation. There is an acronym for the practice: RMT, or real money trade.

> Imagine that a foreign criminal desires to bring tainted money into [or out of] the United States. Traditionally, this transaction confronts many obstacles, including the need to physically relocate money over borders, requisite taxation, and compliance with reporting standards for business and financial institutions. RMT significantly overcomes these obstacles.12

Virtual worlds and virtual property have allowed for transactions in "offline" currency involving $200 million to several billion dollars annually.13 Much of this commerce is legitimate. But while attempts have been made to shield such activities from law enforcement scrutiny by calling it game play, at least one court has refused to recognize a dichotomy between business and game play involving pseudo-purchases and investments.14 Will the government get its act together on the Internet or will it recruit Internet service providers to police and report on our activities as well?

If law enforcement does not become more expert, it is not hard to imagine a United States with no privacy and no personal autonomy for its citizens. This is a United States where the counselor, to whom people go for help, reports them to the authorities. The government should cease its wrong-headed efforts to make lawyers its pawns.

Notes

1. Introduction, 2001 National Money Laundering Strategy, U.S. Dept. of the Treasury, in consultation with the U.S. Dept. of Justice (Sept. 2001) (quoting President George W. Bush).
2. "[W]e do not have a system in place that objectively evaluates which strategies have proven to be the most effective. Without objective means to measure our enforcement efforts, law enforcement cannot articulate measurable goals or be held accountable for its efforts and results. The 2001 strategy sets forth a comprehensive action plan that responds to the challenges that money laundering presents. We will target and attack large-scale criminal enterprises, professional money launderers, and their high-tech global schemes, and we will bring accountability to law enforcement through measured evaluation." Id. at 1-2. So the Bush administration equated large-scale criminal enterprises and professional money launderers with lawyers and bankers: "The 2001 strategy recognizes that money laundering investigations are the tip of the law enforcement sword, because they not only uncover the sophisticated schemes put on by professional lawyers, bankers, and accountants, but they make it possible to dismantle entire criminal enterprises by disrupting the financial operations of these illicit organizations." Id. at 2.
3. "For example, criminals deposit monies generated from narcotics trafficking, firearms smuggling, diverse fraud schemes, and other racketeering activity into bank accounts established in the name of fictitious shell corporations and sham businesses, and transfer these funds through multiple financial institutions. Law enforcement officers often lack the high-level training needed to effectively investigate these complex money laundering operations." 2001 National Money Laundering Strategy, supra, n.1, at 2.
4. The Money Laundering Suppression Act.
5. Testimony of the Office of the Comptroller of the Currency, before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the U.S. Senate, July 15, 2004. See http://www.occ.treas.gov/ftp/release/2004-57a.pdf.
6. S. 506 and H.R. 1265 (111th Cong.) will require lawyers forming business entities such as offshore tax shelters and foreign-owned financial accounts to report the name, address, and tax ID number of the U.S. beneficial owners. S. 569 will require lawyers forming entities to report the beneficial owners of each corporation or limited liability company formed and will require the lawyers to establish anti-money laundering programs to ensure they were not forming entities for criminals or "suspects."
7. The American Bar Association has brought suit against the FTC to enjoin application of the SEC Red Flags Rule against lawyers. The complaint describes the FTC's decision to call lawyers "creditors" who must prevent identity theft as "arbitrary, capricious, and contrary to law." It contends that the FTC has failed to demonstrate either a rational connection between the practice of law and identity theft or how lawyers billing clients in a standard manner could be considered to be providing clients with credit. See Martha Neil, ABA Sues FTC Over Red Flags Rule, ABA Journal Law News Now (Aug. 27, 2009), http://www.abajournal.com/news/aba_sues_ftc_over_red_flags_rule/.
8. Third indictment, United States v. Velez, No. 05-20770-CR (S.D. Fla.).
9. The transfer of wealth using a money broker produces cost savings by avoiding the high depreciation in value that occurs when U.S. dollars are exchanged for a foreign currency and vice versa. A foreign national person or entity that owes a U.S. debt makes a deal through a money broker to pay a U.S. debt with U.S. dollars obtained from a U.S. citizen or business that owes money in the foreign country. The U.S. citizen or business obtains the foreign currency to pay its foreign debt. The money broker makes money by charging a fee for the currency exchange. The transactions do not go through financial institutions and no money crosses any border. Thus, such transactions may be difficult to trace. This is especially true when more than two parties with foreign debt are involved. The very fact that such business dealings are difficult to trace leads law enforcement to color them with a sinister brush.
10. Caplin & Drysdale v. United States, 491 U.S. 617 (1989).
11. Brief of the National Association of Criminal Defense Lawyers, United States v. Kuehne, S.D. Fla., No. 05-20770-CR-Cooke, arguing that since Congress provided an exception to the money laundering statutes, 18 U.S.C. §§ 1956-1957, for bona fide attorneys' fees — transactions "necessary to preserve" an individual's Sixth Amendment right to representation —

the government's parsimonious view of what is "necessary" to a defense threatens to hamstring all complex criminal defense efforts by interjecting the threat of prosecution into every monetary transaction over $10,000 in which counsel enters. The threat of possible prosecution of retained counsel in virtually any case may well dissuade attorneys from taking on clients in certain types of cases, thus depriving some defendants of their right to counsel of choice. The brief was authored by Howard M. Shapiro, et al., WilmerHale LLP, Washington, D.C., and David Oscar Markus, Miami. Available at http://www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/Kuehne_Amicus.pdf.

12. S. Gregory Boyd and Matthew E. Moersfelder, Global Businesses in the Metaverse: Money Laundering and Securities Fraud, The SciTech Lawyer, Vol. 3, No. 3 (Winter 2007).

13. Id.

14. Securities and Exchange Commission v. SG Ltd., et al., 265 F.3d 42 (1st Cir. 2001) (applying Howey test for an investment contract to a virtual stock exchange and investments, finding that the SEC's claims were sufficient to state a claim upon which relief could be granted). The Howey test was first delineated in SEC v. W.J. Howey Co., 328 U.S. 293 (1946). "Howey remains the touchstone for ascertaining whether an investment contract exists and the test that it prescribes must be administered without regard to nomenclature. Cf. William Shakespeare, Romeo and Juliet, Act. 2, sc.2 (circa 1597. 'A rose by any other name would smell as sweet.'). As long as the three-pronged Howey test is satisfied, the instrument must be classified as an investment contract. Howey, [328 U.S. at 301]. 'Once that has occurred, it is immaterial whether the enterprise is speculative or nonspeculative or whether there is a sale of property with or without intrinsic value.' Id. 'It is equally immaterial whether the promoter depicts the enterprise as a serious commercial venture or dubs it a game.'" Id. at 47-48.

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