Application of 18 U.S.C. § 1960 to Informal Money Service Businesses

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I. Introduction

Section 1960 of title 18, United States Code, was enacted in 1992 to make it a federal crime to conduct a money transmitting business without a State license in any State where a license was required. Two years later, Congress enacted 31 U.S.C. § 5330, requiring all money transmitting businesses—including those already licensed by the States—to register with the Secretary of the Treasury, according to regulations that Treasury was required to promulgate.

That same year, Congress also amended § 1960 to make it an offense to operate without complying with § 5330 and the Treasury regulations. But the statute was almost never used.[1]

There were several reasons for this. First, the federal registration requirements were not implemented until 1999 and did not take effect until December 31, 2001. Obviously, until Section 5330 was fully in effect, no money transmitting business could be prosecuted for failing to comply with its terms. Second, as far as the State licensing requirement was concerned, it was too hard to prove that the defendant knew that a license was required, or that operating without a license was a crime.

All that has changed since the enactment of the USA Patriot Act.[2] Effective October 26, 2001, Section 1960 was amended in two significant ways. First, the *mens rea* requirement has been revised so that when the Government charges a money transmitter with operating without a State license, it does not need to prove that he knew that a license was required, or that operating without a license was a crime.[3]

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[1] The only reported case under § 1960 was U.S. v. Velastegui, 199 F.3d 590 (2d Cir. 1999).

[2] Pub. L. 107-56, 115 Stat. 272.

[3] Section 1960(b)(1)(A) now makes it an offense to operate a money transmitting business without a State license ''whether or not the defendant knew that the operation was required to be licensed'' or that operation without a license was punishable as an offense. In the first prosecution under the new statute, however, a trial judge in

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Second, the regulations implementing the federal registration requirement under § 5330 took effect on December 31, 2001, so it is now possible to prosecute someone for operating a money transmitting business without registering with FinCEN, even if he has a State license or operates in a State that has no licensing requirement.

Third, there are now three situations in which § 1960 can be used to prosecute a money transmitter:

1. When he operates without a State license, § 1960(b)(1)(A);
2. When he operates in violation of the Treasury regulations requiring all money service businesses to register with FinCEN; § 1960(b)(1)(B); and
3. When he transfers money knowing that the funds being transmitted are derived from a criminal offense, or are intended to be used for an unlawful purpose; § 1960(b)(1)(C).

The third alternative is brand new and does not require proof that the business was unlicensed or unregistered.

Finally, in addition to amending Section 1960 itself, Congress also amended 18 U.S.C. § 981(a)(1)(A), giving the Government, for the first time, civil forfeiture authority for § 1960 offenses. Previously, the Government had only criminal forfeiture authority under § 982(a)(1).

How all this applies to the classic money transmitting business—the storefront money remitter—is fairly clear. If the business operates without a State license in a State that requires a license, or it operates without registering with FinCEN, or the remitters knowingly transmit criminally-derived money, or money intended to be used for an unlawful purpose, they can be prosecuted under § 1960 and the Government can forfeit all property involved in the offense (including the money service business itself) either civilly (under § 981(a)(1)(A)) or criminally (under § 982(a)(1)).

The focus of the balance of this article, however, is on the application of § 1960 (and its related forfeiture provisions) to *informal* money transmitting businesses—such as hawalas and money brokers for the drug organizations—who operate outside of the traditional business structure.

II. Prosecuting Informal Money Transmitting Businesses Under §§ 1956 and 1957

The classic example of an informal money transmitting business is one in which a group of individuals—usually a money broker and a cadre of couriers—arrange to handle the currency generated by a drug organization for some percentage of the money. For example, the money transmitting business may arrange to pick up quantities of currency at a stash house, smurf it into money orders or smuggle it out of the country, and sell it on the black market, all for some prearranged commission.

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the District of Massachusetts ruled that the Government still must prove that the defendant knew that his business did not have a license.

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Previously, the principal tools for prosecuting such professional money launderers were Title 18, Sections 1956 and 1957, but there are limitations under both statutes. First, it is not a crime under either statute simply to transport criminal proceeds from one place to another. The Government must prove that there was a ''financial transaction.'' See U.S. v. Puig-Infante, 19 F.3d 929 (5th Cir. 1994) (transporting drug proceeds from Florida to Texas not a transaction absent evidence of disposition once cash arrived at destination); U.S. v. Gonzalez-Rodriguez, 966 F.2d 918 (5th Cir. 1992) (carrying cash through airport not a transaction).

Second, both § 1956 and § 1957 require proof that the money involved in the financial transaction was criminal proceeds and that the defendant knew it. Except in the international context, see § 1956(a)(2)(A), it is never an offense under §§ 1956 and 1957 to conduct a transaction involving clean money, even if the intent is to use the money to commit a criminal offense.

Third, under § 1956(a)(1)(A)(i), even if the money is derived from a criminal offense (and the defendant knows it), the Government must also prove that the defendant intended to use it to commit another crime. Alternatively, under § 1957, even if the money is derived from a criminal offense (and the defendant knows it), the statute only applies if more than $10,000 is moved by, to or through a financial institution.

Under § 1960, however, the Government may be able to prosecute the members of an informal money transmitting business (and forfeit the laundered money) in a way that avoids these obstacles.

III. Section 1960(b)(1)(B): Failure to Register with FinCEN

Under § 1960(b)(1)(B), a money transmitting business that fails to comply with the registration requirements of 31 U.S.C. § 5330, and the regulations promulgated thereunder, is guilty of a federal offense. Those provisions require all money transmitting businesses (except those businesses that operate as agents of other money transmitting businesses) to register with FinCEN.[4]

Thus, if an informal money pick-up/courier delivery operation is a ''money transmitting business'' within the meaning of § 5330 and the implementing regulations, the business and those who run it can be prosecuted under § 1960(b)(1)(B) simply for failing to register. For the following reasons, I believe the statute does apply.

There are at least three applicable definitions of a ''money transmitting business,'' all of which appear to cover the usual informal money pick-up and delivery-by-courier operation. First, § 5330(d)(1) says the following:

> The term ''money transmitting business'' means any business other than the United States Postal Service which—

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[4] The regulations in 31 C.F.R. 103.41 use the term ''money service business'' which is a broader term defined in 31 C.F.R. 103.11(uu) to include all money transmitting businesses. See 31 C.F.R. 103.11(uu)(5).

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> (A) provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments or any other person who engages as a business in the transmission of funds,*including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;*
> (B) is required to file reports under section 5313; and
> (C) is not a depository institution (as defined in section 5313(g)).

Note the italicized language in § 5330(d)(1)(A): a money transmitting business includes ''any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.'' This surely was written with the typical pick-up and delivery-by-courier operation in mind.

Second, the regulations implementing Section 5330 employ similarly broad language. 31 C.F.R. § 103.41—the regulation that took effect on December 31, 2001, requiring all money service businesses[5] to register with FinCEN—relies on the definitions of the terms ''money service business'' and ''money transmitting'' in 31 C.F.R. § 103.11(uu). That regulation, in turn, defines a money transmitting business to include the following:

> (5)(A) Any person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or
> (B) Any other person engaged as a business in the transfer of funds.

Finally, as discussed below, Section 1960(b)(2) defines ''money transmitting'' to include ''transferring funds on behalf of the public *by any and all means* including but not limited to transfers . . . by . . . courier.''

Whichever definition of ''money transmitting business'' one chooses to apply, the registration requirement in Section 5330 seems to apply to an informal money pick-up/courier delivery operation whereby a group of individuals moves quantities of money from one place to another on behalf of a third party in return for a commission or payment.

Section 5330(d)(1) does contain another requirement, however: for a money transmitting business to be required to register with FinCEN under the new regulations it must be one that is required to ''file reports under section 5313''; see § 5330(d)(1)(B). But that is not an obstacle to bringing informal pick-up/courier operations within the ambit of § 1960(b)(1)(B). At least three appellate courts have held that such informal operations fall within the definition of ''financial institutions'' that are required to file CTR's. See U.S. v. Tannenbaum, 934 F.2d 8 (2d Cir. 1991) (individual was a financial institution); U.S. v. Gollott, 939 F.2d 255 (5th Cir. 1991) (group of individu-

[5] See note 4, supra.

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als laundering cash for undercover agent were required to file CTRs); U.S. v. Schmidt, 947 F.2d 362 (9th Cir. 1991) (individual exchanging checks for cash required to file CTRs); U.S. v. Levy, 969 F.2d 136, 140 (5th Cir. 1992) (same) (Secretary of the Treasury has authority to define ''financial institution'' broadly).

Thus, under both § 5330(d)(1) and the implementing regulations, an informal money-pickup and courier-transport operation that is paid for its services is required to register with FinCEN as a money transmitting business. And a person running a pick-up/delivery-by-courier cash operation is in violation of 1960(b)(1)(B) if he/she did not register with FinCEN by December 31, 2001.[6]

IV. Section 1960(b)(1)(C): Knowledge of the Illegal Source or Unlawful Purpose

The second theory of prosecution of an informal currency laundering operation under § 1960 involves the new provision in § 1960(b)(1)(C).

As mentioned, under § 1960(b)(1)(C), a person engaged in a ''money transmitting business'' is guilty of an offense if he knows that the money he is transmitting or transporting was ''derived from a criminal offense,'' or is ''intended to be used to promote or support an unlawful activity.'' The definitions of ''money transmitting business'' in § 5330(d) and in 31 C.F.R. 103.11(uu)(5) apparently do not apply to ''money transmitting business'' in this context. Therefore, the definition in § 1960(b)(2) would seem to be the controlling one.

Section 1960(b)(2) says the following:

> (2) the term 'money transmitting' includes transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier;

In short, the statute defines ''money transmitting'' to include transferring funds *by any and all means*, including by courier.

Of course, the transfer of funds must be done ''on behalf of the public.'' What this means is discussed in the legislative history:

> Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such

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[6] It is not entirely clear what category of persons would be indictable as principals for operating a money service business in contravention of Section 1960(b)(1)(B). Possibly, the registration requirement was intended to apply to the persons actually operating, controlling, owning or acting in leadership roles in the business, and not to low-level couriers. In contrast, such low-level participants could be liable for transporting currency in contravention of Section 1960(b)(1)(C).

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> funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another. H. Rep.107-250, 107th Cong (2001).

The language in the House Report could not be more clear: the sanctions in § 1960(b)(1)(C) apply not only to ''storefronts'' or other ''formal businesses'' that deal openly with the public, but also to any person who agrees to transmit or transport funds for someone else, presumably for some remuneration.

Taken together, the definition of ''money transmitting'' in § 1960(b)(2) and the legislative history make it clear that § 1960(b)(1)(C) applies to an informal money pick-up/courier operation. If the members who participate in that operation know that the money they are transporting is ''derived from a criminal offense'' or is ''intended to be used to promote or support unlawful activity,'' they are guilty of a violation of the new statute.

It is true that money launderers for drug and other criminal organizations have long been subject to prosecution under §§ 1956 and 1957, but as mentioned at the outset, those statutes are far more restrictive than § 1960(b)(1)(C). Unlike § 1957, § 1960(b)(1)(C) contains no $10,000 requirement and no requirement that the money be transferred ''by, to or through a financial institution.'' Thus, the informal transfer of currency by or among individuals is covered.

Moreover, for purposes of § 1960(b)(1)(C), the money does not have to be the proceeds of a ''specified unlawful activity.'' To the contrary, all that is required is that the money be ''derived from a criminal offense'' or ''intended to be used to promote or support unlawful activity.'' That means *any* criminal offense, and *any* unlawful activity, not just the ''specified unlawful activity'' listed in § 1956(c)(7).

Similarly, § 1960(b)(1)(C) is much more flexible a statute than § 1956(a)(1). To obtain a conviction under § 1956(a)(1)(A)(i), for example, the Government must prove that the defendant knew the money was derived from some unlawful activity *and* that he intended to use the money to promote a specific criminal offense; the requirements are conjunctive. In contrast, the *mens rea* elements of § 1960(b)(1)(C) are disjunctive: the Government must prove *either* that the defendant knew the money was criminally derived or that it was intended for an unlawful purpose. Proving one or the other of those two mental states is obviously easier than proving both. And again, the offense from which the money was derived, or the offense that the money was intended to promote, can be *any* form of unlawful activity, not just the ''specified unlawful activity'' listed in § 1956(c)(7).

Finally, § 1960(b)(1)(C) makes it an offense to ''transport'' the subject funds. ''Transportation"—the service provided by a courier—is easier to prove than a ''financial transaction,'' which, as the case law makes clear, must involve the transfer or disposition of funds between two or more persons

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V. Conclusion

Section 1960, as amended by the USA Patriot Act, gives the Government two new avenues for prosecuting currency pick-up and courier operations. If nothing else, proof that the operation constitutes an on-going money transmitting business will support a conviction under § 1960(b)(1)(B), even if there is no proof that the money being transported comprises criminal proceeds, or that the persons engaged in the operation had any criminal intent. And § 1960(b)(1)(C) will allow the Government to prosecute those who do deal in criminally derived funds without having to prove that the money was derived from a specific crime, without having to prove that the defendant acted with any specific intent, without having to satisfy a $10,000 threshold requirement, without having to establish a nexus to any financial institution, and without having to prove that a courier had transferred funds from one person to another.

Finally, and perhaps most important, § 1960(b)(1)(C) gives the Government its first domestic tool against ''reverse money laundering,'' i.e., the practice of moving ''clean'' money via courier for the purpose of promoting a future criminal offense, such as terrorism. As mentioned, § 1956(a)(2)(A) makes it a crime to transport money into or out of the United States for the purpose of promoting a ''specified unlawful activity.'' Now, for the first time, Congress has enacted a statute that makes it a crime for a money transmitting business to move money derived from *any source* with the intent to use it to commit *any* unlawful act. The potential law enforcement applications of that provision are enormous.

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