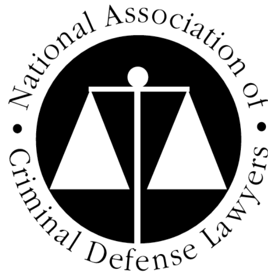

Written Statement of
Barry J. Pollack, Esq.
Member, Board of Directors
National Association of Criminal Defense Lawyers

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
House Committee on the Judiciary

Re: “Proposals to Fight Fraud and Protect Taxpayers”
April 1, 2009

Mr. Chairman, Mr. Smith and distinguished Members of the Committee:

Thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important and timely issue of fraud and our financial system. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 12,500 direct members -- and 80 state, local and international affiliate organizations with another 35,000 members -- include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

I. Introduction

As the American Bar Association's Task Force on the Federalization of Crime observed in 1998, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes." As of 2003, there were over 4,000 offenses that carried criminal penalties in the United States Code. In addition, it is estimated that there are at least 10,000, and possibly as many as 300,000, federal regulations that can be enforced criminally. The race to expand criminal laws exponentially does not serve any useful purpose, and we cannot continue to race indefinitely.

Further expanding the scope of the criminal law logically requires a presumption that what got us in the present economic and financial mess was the absence on the books of the necessary law enforcement tools to prevent it from occurring. That, however, is simply not the case. The federal arsenal to stop and to punish financial fraud in every permutation already exists. Federal criminal laws that can be used to address criminal conduct in the financial and housing markets include among many others: mail fraud, wire fraud, major fraud, securities fraud, and bank fraud.

To the extent that there are new or changed financial instruments that have grown over the past few years that have not previously been anticipated in our regulatory schemes, the answer is to update regulations to reflect these financial innovations and ensure that large segments of financial activity will not remain unregulated. The answer is not, however, to judge previously unregulated conduct through the lens of 20-20 hindsight and treat previously unregulated transactions as criminal. Further, new criminal laws cannot be applied retroactively, so any new criminal laws passed now by Congress cannot be used to address the conduct that has led to our current financial and economic turmoil.

The criminal laws are rightly reserved for egregious, intentional wrongdoing that falls well outside the mainstream of ordinary business conduct. If large numbers of honest business persons took advantage of an unregulated environment in making risky and ill-advised, but not clearly illegal, decisions, they should not now be treated as criminals. For those who went beyond that, and engaged in intentional fraudulent conduct, there are ample criminal laws on the books already that will allow for them to be prosecuted.

II. Measures to increase law enforcement funding must be balanced with indigent defense funding.

NACDL does not oppose the various measures to fund the hiring of additional prosecutors, FBI agents, or other law enforcement personnel -- many of whom have been pulled away to investigate and prosecute terrorism and national security cases -- to investigate and, where appropriate, prosecute white collar criminal offenses. However, Congress must understand it cannot simply fund half of the equation.

If there are to be more white collar criminal prosecutions, there will necessarily be the need to fund the defense of such cases. Current forfeiture statutes allow, and are routinely used, to restrain assets of criminal defendants upon indictment. As a result, increasing numbers of defendants in white collar cases cannot pay for their defense. The defense in these cases is paid by taxpayers. This happens either through public defender offices or through court appointments under the Criminal Justice Act.

Federal public defender offices are already over burdened and many lack resources and expertise to defend complex white collar criminal cases. If we are to expand such prosecutions, we must not only fund their investigation and prosecution, but we must also adequately fund the defense of these cases. These cases require intensive investigation, the review and understanding of extraordinarily voluminous documents, and, often, the use of expert witnesses. If we do not fund the defense of these cases adequately to allow for a defense team thoroughly to engage in each of these endeavors, innocent business persons who lack the resources to mount a proper defense will be convicted along with those who are guilty. This is a result that undermines true justice and cannot be tolerated.

III. NACDL opposes the Money Laundering Correction Act and supports exclusion of money laundering provisions from the Fight Fraud Act (H.R. 1748).

The past fifteen years have witnessed an alarming expansion of the money laundering statutes — principally 18 U.S.C. §§ 1956 and 1957 — by the courts, the Department of Justice and the Congress. Once a tool for drug or racketeering cases, these laws are now applied to a wide range of activities, including routine business transactions.[1] As former Deputy Attorney General Larry Thompson has observed,

> 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

[1] An argument can be made that Congress did not intend that the money laundering statutes be used to combat offenses other than those associated with drug trafficking and organized crime. Teresa E. Adams, Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 Ga. St. U. L. Rev. 531, 549-58 (2000). Nonetheless, the underlying crimes that serve as predicates for money laundering offenses, called "specified unlawful activities," include virtually all alleged white collar crimes, including federal environmental crimes and copyright infringement. See 18 U.S.C. § 1956(c)(7). See Money Laundering Campaign Hits New Targets, 3 No. 3 DOJ Alert 4, March 1993 (describing increased money laundering exposure of otherwise legitimate businesses, especially leasing companies, real estate brokers, and retailers).

> and prosecutions for conduct unrelated to drug trafficking or organized crime. These investigations and prosecutions are extremely disruptive for business and expensive to defend.

Elizabeth Johnson & Larry Thompson, Money Laundering: Business Beware, 44 Ala. L. Rev. 703, 719 (1993). As interpreted and applied, the current law is a trap for unwary individuals and businesses that inflicts felony convictions, overly harsh prison sentences, [2] and ruinous asset forfeiture.[3]

Individuals and businesses who handle dirty money with no actual knowledge of the underlying offense are nonetheless vulnerable to money laundering charges.[4] This is because courts have interpreted the knowledge requirement to include the concept of "willful blindness" or "conscious avoidance." Some courts have gone so far as to hold that willful blindness is shown where the defendant has suspicions and does not take action to confirm or disprove their truth.[5]

Compounding the statutes' over-breadth is the prosecutorial practice of piling on money laundering charges that are incidental to or virtually indistinguishable from the underlying offense. For example, prosecutors have charged money laundering where the defendant has done no more than deposit the proceeds of some "specified unlawful activity" into his bank account, even though the bank account is clearly identifiable as belonging to him.[6] Spending illegal proceeds, even without any attempt to obfuscate their source, likewise may trigger money laundering charges — against the drug dealer and the merchant who knowingly accepts his money.

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[2] Section 1956 provides for a sentence of up to twenty years, and a fine of the greater of $500,000 or twice the value of the property involved in the transaction. Section 1957 provides for a sentence of up to ten years, and includes the potential imposition of substantial fines as well. Both sections trigger severe sentences under the United States Sentencing Guidelines.

[3] Money laundering offenses trigger the broad forfeiture provisions of 18 U.S.C. § 982, which gives prosecutors the authority to seize any property "involved in" or "traceable" to the alleged offense. This means that prosecutors can seize an entire business, bank account or other asset with little regard for the nature or magnitude of the money laundering activity. A money laundering prosecution also gives prosecutors the power to use seizure warrants, seek protective orders, and confiscate substitute assets.

[4] Federal law permits juries to infer guilty knowledge from a combination of suspicion and indifference to the truth. See, e.g., United States v. Campbell, 977 F.2d 854, 856-59 (4th Cir. 1992) (reinstating the money laundering conviction of a real estate agent based upon the agent's "willful blindness" that her client was a drug dealer attempting to conceal proceeds by buying a house, when the client drove a Porsche, used a cellular telephone, and paid $60,000 in cash under the table).

[5] See United States v. Kaufman, 985 F.2d 884 (7th Cir. 1993) (upholding car dealer's money laundering conviction based on willful blindness theory, even though the undercover agents in the sting operation never told the defendant that the car purchase money was drug proceeds).

[6] Such "receipt and deposit" cases may be prosecuted under 18 U.S.C. § 1956 based on the theory that the defendant "concealed" the proceeds. See, e.g., United States v. Sutera, 933 F.2d 641 (8th Cir. 1991) (holding that deposit of three checks identified as gambling proceeds into business bank account, which bore the name of its owner, constituted concealment).

Piling on money laundering charges to an alleged crime often results in a sentence longer than what would ordinarily be incurred.[7] In white collar criminal cases, in particular, this allows prosecutors to obtain easy plea bargains and forfeitures that may not be in the interest of justice. This is despite the fact that, in many cases, the alleged "laundering" adds no additional harm and does not remotely resemble "laundering" as that term is commonly understood (i.e., creating the appearance of legitimate wealth).

These concerns militate strongly in favor of legislation to limit the money laundering statutes' scope. In August 2001, NACDL's Money Laundering Task Force issued its *Proposals to Reform the Federal Money Laundering Statutes*.[8] NACDL recommended the following statutory amendments: (1) The promotion prong of 18 U.S.C. § 1956, which has been subject to absurd application and conflicting interpretations, serves no purpose and should be repealed; (2) The concealment prong of 18 U.S.C. § 1956 should be expressly limited to financial transactions designed by the defendant with the intent to create the appearance of legitimate wealth; and (3) Congress should amend 18 U.S.C. § 1957, which broadly prohibits transactions involving illegal proceeds of a value greater than $10,000, to focus on professional money launderers, rather than one-time offenders. The report explains, "The proposals in this report are not only necessary to bring rationality and fairness to the laws but are consistent with the aims of legitimate law enforcement. The proposed amendments would simplify and clarify current law, facilitate compliance efforts by individuals and businesses, and focus federal law enforcement on serious misconduct."

Section 2 of the Money Laundering Correction Act: This provision would reverse the Supreme Court's unanimous decision in *Cuellar v. United States*, 128 S. Ct. 1994 (2008). At issue is the money laundering provision that prohibits international transportation of money designed to conceal the nature, location or ownership of criminal proceeds (18 U.S.C. § 1956(a)(2)(B)(i)). In *Cuellar*, the defendant was caught hiding drug proceeds in his vehicle while en route to Mexico. The Court held that secretive transportation is insufficient for conviction; the government must prove that the *purpose* of the transportation was to conceal the nature, location or ownership of criminal proceeds.

Section 2 of the Money Laundering Correction Act would reverse *Cuellar* so that a money laundering conviction could rest solely on evidence that the defendant concealed ill-gotten money during international transportation. NACDL believes that increasing the statute's scope to encompass mere money hiding casts the net far too wide by capturing conduct that was not intended to create the appearance of legitimate wealth. Given that the government can charge the underlying conduct and perhaps one of the numerous other money laundering, cash-reporting or anti-smuggling statutes, there is simply no justification for this.[9]

[7] Teresa E. Adams, Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 Ga. St. U. L. Rev. 531, 558-59 (2000).

[8] Available at: http://www.nacdl.org/public.nsf/whitecollar/moneylaundering

[9] For example, defendant Cuellar might have been charged with bulk cash smuggling, 31 U.S.C. § 5332, because he intended to transport cash in excess of $10,000 across an international border without reporting it.

<u>Section 3 of the Money Laundering Correction Act</u>: This provision would reverse *United States v. Santos*, 128 S. Ct. 2020 (2008). In *Santos*, the Supreme Court correctly limited the term "proceeds," as used in the principal money laundering statute, to the profits of a crime, not its gross receipts. While the *Santos* decision was based on the rule of lenity, which requires that statutory ambiguity be resolved in the defendant's favor, Justice Scalia's opinion takes into account many of the above-stated concerns with the money laundering statute.

In *Santos*, the defendants were convicted of operating an illegal gambling business (*i.e.*, a lottery that was illegal under state law) and money laundering. Justice Scalia points out that under the "receipts" definition of proceeds, every illegal lottery offense will trigger money laundering charges when the winning bettor is paid; in the words of the Court, the alleged money laundering "merges" with the gambling offense. Allowing the government to charge both the underlying offense *and* money laundering for the gross receipts of the underlying offense is, as Justice Stevens wrote in his concurring opinion, "tantamount to double jeopardy."

This "merger" problem is exacerbated by the fact that the sentence for money laundering almost invariably exceeds the sentence for the underlying offense. In *Santos*, for example, the district court sentenced defendant Santos to 60 months for the two gambling counts and 210 months for the three money laundering counts. As Justice Scalia notes, "Congress evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment, § 1955(a), but as a result of merger they would face an additional 20 years, §1956(1)(1)." When the so-called money laundering is virtually indistinguishable from the underlying offense – as with many of the more than 250 money laundering predicates -- this huge sentencing disparity makes no sense.

Finally, in other factual contexts, using the "receipts" rather than the "proceeds" or profits from unlawful activity will often vastly overstate the culpability of certain defendants, while understating the culpability of others. Where receipts are used to defray the expenses of an illegal scheme, the gross receipts are neither a true measure of the benefit to the defendant, nor the harm to the victims. Rather, the use of gross receipts is simply a mechanism artificially to inflate the penalties imposed on some individuals convicted of money laundering, but not others, with no relational relationship to the respective culpability of the defendants.

IV. Prosecutors have the tools they need to police financial markets.

General federal fraud statutes, such as the mail and wire fraud statutes, are available to address ***any*** crimes related to the subprime market and market crisis regardless of whether the crimes took place on Wall Street or Main Street. The federal courts' expansive reading of the mail fraud statute "has made it possible for the federal government to attack a remarkable range of criminal activity even though some of the underlying wrongdoing does not rest comfortably within traditional notions of fraud."[10] Leading commentators agree that "scheme to defraud," the key phrase of the mail fraud and wire fraud statutes, "has long served . . . as a charter of authority for courts to decide, retroactively, what forms of unfair or questionable conduct in commercial, public, and even private life, should be deemed criminal. In so doing, this phrase has provided

[10] Julie O'Sullivan, FEDERAL WHITE COLLAR CRIME: CASE AND MATERIALS 483 (2d ed. 2003).

more expansive interpretations from prosecutors and judges than probably any other phrase in the federal criminal law."[11]

Beyond conduct specific to Wall Street, federal prosecutors have a multitude of methods for addressing whatever "retail-level" mortgage fraud schemes that have been conducted on Main Street. In fact, the largest area of mortgage fraud activity seems to be on the local level and may be characterized as "white-collar street crime," in that it consists of traditional white collar crime – mail fraud and wire fraud – on an individual and personal level. Thus, prosecutors can use the same tools to prosecute white-collar street crime that they use to prosecute any alleged criminal conduct taking place on Wall Street. The FBI itself recently acknowledged the applicability of the same provisions used for Wall Street – including Chapters 47 (fraud and false statements), 63 (mail fraud), and 73 (obstruction) of Title 18 of the United States Code – to mortgage fraud. It specifically identified nine "applicable Federal criminal statutes which may be charged in connect with mortgage fraud."[12]

Regardless of which federal fraud statute a prosecutor uses to charge a defendant, the law currently provides a substantial potential penalty. For example, mail and wire fraud violations already carry a maximum penalty of 20 years imprisonment. In addition, any fraud that "affects" a financial institution carries an increased possible penalty of a $1,000,000 fine, 30 years imprisonment, or both. Unlike the elements of the bank fraud statute, conduct qualifying for the enhanced penalty need not be perpetrated *against* a financial institution in order to draw the increased penalties. Thus, even if a fraud perpetrated against a "mortgage lending business" could not be characterized as bank fraud, the fraud inevitably "affects" a financial institution such that the 30-year maximum sentence under the mail and wire fraud statutes would apply. By comparison, the maximum federal penalty for attempted murder is 20 years and the maximum for voluntary manslaughter is 15 years.[13]

Furthermore, criminal conduct need not go unpunished even if there is no federal statute reaching it. If, for some reason, certain conduct is beyond the jurisdiction of federal prosecutors, it can always be prosecuted on the state and local level. Indeed, the case is strong for increased state-level activity, in some instances as an alternative to federal prosecutions. At both the state and local levels, prosecutors have been aggressively battling retail-level fraud perpetrated by individual brokers, real-estate agents, lenders, buyers, and borrowers.[14] Like the federal

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[11] John C. Coffee, Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, in 1 Otto G. Obermaier & Robert G. Morvillo, WHITE COLLAR CRIME, Business and regulatory offense § 9.01 (2002).

[12] Federal Bureau of Investigation, *Press Release: FBI Issues Mortgage Fraud Notice In Conjunction With Mortgage Bankers Association* (Mar. 8, 2007), *available at* http://www.fbi.gov/pressrel/pressrel07/mortgagefraud030807.htm (last viewed Feb. 10, 2009). The list includes the following statutes: (1) 18 U.S.C. § 1001 – Statements or entries generally, (2) 18 U.S.C. § 1010 – HUD and Federal Housing Administration Transactions, (3) 18 U.S.C. § 1014 – Loan and credit applications generally, (4) 18 U.S.C. § 1028 – Fraud and related activity in connection with identification documents, (5) 18 U.S.C. § 1341 – Frauds and swindles by Mail, (6) 18 U.S.C. 1342 – Fictitious name or address, (7) 18 U.S.C. § 1343 – Fraud by wire, (8) 18 U.S.C. § 1344 – Bank Fraud, and (9) 42 U.S.C. § 408(a) – False Social Security Number.

[13] 18 U.S.C. §§ 1112 (manslaughter), 1113 (attempted murder).

[14] Coffee and Whitehead, *supra* note 3.

government, the states have ample legal authority to prosecute fraud. In addition, states – and ***not*** the federal government – are the primary regulators of mortgage brokers and the insurance industry. Thus, conduct that takes place entirely on the state or local level and that is within the state's expertise should be investigated and prosecuted by state and local officials.

While the purpose of the Fight Fraud Act is laudable, that purpose is achieved through the substance of existing federal and state statutory authorities, as well as whatever increased funding and related resources is warranted under Section 3 based on the evidence available to date, with adequate resources devoted both to the prosecution and defense functions.

Once again, thank you for inviting NACDL to share its views. We stand ready to assist the Committee and its staff as it seeks to address these important issues.

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