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Features

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Money Laundering
A Global Threat and the International Community's Response

By WILLIAM R. SCHROEDER

A new era of globalization has emerged, and it is shrinking the world and shaping domestic politics and international relationships.[1] Globalization involves the international integration of capital, technology, and information in a manner resulting in a single global market and, to some degree, a global village.[2] This integration enables individuals and corporations to reach around the world farther, faster, deeper, and cheaper than ever before. However, the same aspects of globalization that have expanded opportunities for free-market capitalism also have resulted in new risks. Globalization has turned the international financial system into a money launderer's dream, siphoning off billions of dollars a year from economies around the world and extending the reach of organized crime. This unintended consequence of globalization presents a serious challenge to law enforcement agencies and financial regulators.

Because globalization represents an overarching international phenomenon, the international community's response to the challenge posed by money laundering has to address the financial, legal, and enforcement issues in a universal manner, through harmonization of remedies. Understanding the global threat of money laundering and

the international community's response will assist investigators pursuing the evidentiary trail of a launderer by identifying the enforcement tools and techniques developed to overcome obstacles encountered when crossing international boundaries.

WHAT IS MONEY LAUNDERING?

Generally, money laundering is "the process by which one conceals the existence, illegal source, or illegal application of income and then disguises that income to make it appear legitimate."[3] In other words, the process used by criminals through which they make "dirty" money appear "clean." Though initially considered an aspect integral to only drug trafficking, laundering represents a necessary step in almost every criminal activity that yields profits.

Criminals engage in money laundering for three reasons. First, money represents the lifeblood of the organization that engages in criminal conduct for financial gain because it covers operating expenses, replenishes inventories, purchases the services of corrupt officials to escape detection and further the interests of the illegal enterprise, and pays for an extravagant lifestyle. To spend money in these ways, criminals must make the money they derived illegally appear legitimate. Second, a trail of money from an offense to criminals can become incriminating evidence. Criminals must obscure or hide the source of their wealth or alternatively disguise ownership or control to ensure that illicit proceeds are not used to prosecute them. Third, the proceeds from crime often become the target of investigation and seizure. To shield ill-gotten gains from suspicion and protect them from seizure, criminals must conceal their existence or, alternatively, make them look legitimate.

"...law enforcement must work closely with financial institution managers and regulators."

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HOW IS MONEY LAUNDERED?

Money laundering consists of a three-stage process. The first stage involves the placement of proceeds derived from illegal activities—the movement of proceeds, frequently currency—from the scene of the crime to a place, or into a form, less suspicious and more convenient for the criminal. For example, a government official may take a bribe in the form of cash and place it in a safe deposit box or bank account opened under the name of another individual to hide its existence or conceal the ownership.

Layering constitutes the second stage of the laundering process and involves the separation of proceeds from the illegal source through the use of complex transactions designed to obscure the audit trail and hide the proceeds. This phase of the laundering process can include the transfer of money from one bank account to another, from one bank to another, from one country to another, or any combination thereof. Criminals layer transactions to increase the difficulty of tracing the proceeds back to its illegal source. They frequently use shell corporations and offshore banks at this stage because of the difficulty in obtaining information to identify ownership interests and acquiring necessary account information from them.

Integration, the third stage of money laundering, represents the conversion of illegal proceeds into apparently legitimate business earnings through normal financial or commercial operations. Integration creates the illusion of a legitimate source for criminally derived funds and involves techniques as numerous and creative as those used by legitimate businesses to increase profit and reduce tax liability. Common techniques include producing false invoices for goods purportedly sold by a firm in one country to a firm in another country, using funds held in a foreign bank as security for a domestic loan, comingling money in the bank accounts of companies earning legitimate income, and purchasing property to create the illusion of legal proceeds upon disposal.

The successful money launderer closely approximates legal transactions employed routinely by legitimate businesses. In the hands of a skillful launderer, the payment for goods that appeared to have been delivered by one company based upon an invoice of sale prepared by another company covers the laundering of the purchase price when the goods never existed, and the companies are owned by the same party; the sale of real estate for an amount far below market value, with an exchange of the difference in an under-the-table cash transaction, launders what, on the surface, appears to be capital gain when the property is sold again; and a variety of lateral transfer schemes among three or more parties or companies covers the trail of monetary transactions between any two of them.[4]

WHY IS MONEY LAUNDERING AN INTERNATIONAL THREAT?

Money laundering has become a global problem as a result of the confluence of several remarkable changes in world markets (i.e., the globalization of markets). The growth in international trade, the expansion of the global financial system, the lowering of barriers to international travel, and the surge in the internationalization of organized crime have combined to provide the source, opportunity, and means for converting illegal proceeds into what appears to be legitimate funds. Money laundering can have devastating effects on the soundness of financial institutions and undermine the political stability of democratic nations. Criminals quickly transfer large sums of money to and from countries through financial systems by wire and personal computers.[5] Such transfers can distort the demand for money on a macroeconomic level and produce an unhealthy volatility in international capital flows and exchange rates.[6]

> ***"Criminals engage in money laundering for three reasons."***

A recent and highly publicized case prosecuted in New York provides an example of the ease with which criminals can launder large amounts of money in a short time period.[7] Several individuals and three companies pleaded guilty to federal money laundering charges in that case in connection with a scheme that funneled more than $7 billion from Russia through a bank in New York over a 2-year period. The laundering scheme involved the transfer of funds by wire from Moscow to the United States and then to offshore financial institutions. Additionally, in 1998, federal authorities in Florida announced arrests in an international fraud and money laundering scheme involving victims from 10 countries, with losses up to $60 million laundered through two banks on the Caribbean island of Antigua.[8]

Emerging market countries[9] are particularly vulnerable to laundering as they begin to open their financial sectors, sell government-owned assets, and establish fledgling securities markets.[10] The economic changes taking place in the former Soviet States in Eastern Europe create opportunities for unscrupulous individuals where money laundering detection, investigation, and prosecution tools slowly take shape. Indeed, as most emerging markets began the process of privatizing public monopolies, the scope of money laundering increased dramatically.

The international community of governments and organizations that have studied money laundering recognize it as a serious international threat.[11] The United Nations and the Organization of American States (OAS) have determined that the laundering of money derived from serious crime represents a threat to

Ten strategies that countries and territories can follow to synthesize the universal standards adopted by the international community to combat money laundering:

- Enhance cooperation among law enforcement, financial institutions, and judiciary: a coordinated response involving the financial industry, the judiciary, and law enforcement is necessary to address the issues regarding effective counterlaundering measures.
- Criminalize laundering: adopt legislation that criminalizes the laundering of the proceeds of all "serious crime."
- Establish a financial intelligence unit (FIU): an FIU is a central office, generally composed of investigators, banking experts, and financial analysts, that obtains and analyzes information from financial institutions and then provides that information indicative of laundering to an appropriate government authority for investigation.
- Repeal bank secrecy laws: laws that unduly restrict the flow of information between financial institutions and law enforcement should be repealed and specific protections afforded those appropriately disclosing information to the authorities.
- Report large/suspicious transactions: to obtain needed information on a reliable basis, banks and other covered institutions should be required to report all "suspicious" transactions and all "large" transactions, where the reports on large transactions would help law enforcement agencies in a manner that is not cost prohibitive.
- Identify bank customers: because launderers covet anonymity for their clandestine activity, institutions must identify their customers and pass pertinent information to the appropriate authorities.
- Record customer and transaction information: banks and other covered institutions must record information obtained in identifying their customers and certain transactions and keep such records for up to 5 years.
- Establish effective antimoney laundering programs in banks: banks should establish effective internal antilaundering programs, conduct laundering-detection training for officers and employees, and provide for meaningful institutional accountability.
- Ensure international cooperation: given the ease and speed that criminals can layer and integrate funds across international boundaries, cooperation among enforcement authorities on an international basis is essential. Countries should adopt laws to facilitate such international cooperation.
- Adopt forfeiture laws: countries should adopt laws that permit the forfeiture of property connected to laundering offenses and the pretrial restraint and seizure of property subject to forfeiture in domestic cases and upon request by authorities from foreign jurisdictions.

the integrity, reliability, and stability of financial, as well as government, structures around the world.[12] In October 1995, the President of the United States, in an address to the United Nations General Assembly, identified money laundering, along with drug trafficking and terrorism, as a threat to global peace and freedom. Immediately thereafter, he signed Presidential Directive 42, ordering U.S. law enforcement agencies and the intelligence community to increase and integrate their efforts against international crime syndicates in general and against money laundering in particular.[13] The U.S. Department of the Treasury Deputy Secretary summed up the seriousness of the domestic and international threat when he testified before the U.S. Congress on March 9, 2000. During his testimony before the House

Committee on Banking and Financial Services, he advised that money laundering encouraged corruption in foreign governments, risked undermining the integrity of the U.S. financial system, weakened the effects of U.S. diplomatic efforts, and facilitated the growth of serious crime.[14] These assessments make it clear that money laundering presents not only a formidable law enforcement problem, but also a serious national and international security threat as well.

Money laundering threatens jurisdictions from three related perspectives. First, on the enforcement level, laundering increases the threat posed by serious crime, such as drug trafficking, racketeering, and smuggling, by facilitating the underlying crime and providing funds for reinvestment that allow the criminal enterprise to continue its operations. Second, laundering poses a threat from an economic perspective by reducing tax revenues and establishing substantial underground economies, which often stifle legitimate businesses and destabilize financial sectors and institutions.[15] Finally, money laundering undermines democratic institutions and threatens good governance by promoting public corruption through kickbacks, bribery, illegal campaign contributions, collection of referral fees, and misappropriation of corporate taxes and license fees.[16]

HOW MUCH MONEY IS LAUNDERED?

The International Monetary Fund estimates that the amount of money laundering occurring on a yearly basis could range between 2 and 5 percent of the world's gross domestic product—or somewhere between $600 billion and $1.5 trillion.[17] Estimates come from a variety of sources based upon both macroeconomic theories and on microeconomic approaches. The U.S. Department of the Treasury has suggested that $600 billion represents a conservative estimate of the amount of money laundered each year, and some U.S. law makers believe that, not only does the amount lie somewhere between $500 billion and $1 trillion, but that half is being laundered through U.S. banks.[18] Due to the clandestine nature of laundering activity, governments and concerned organizations cannot accurately quantify the amount of money laundered each year. Some estimates suggest that the amount of money laundered each year is approximately $2.8 trillion, an amount more than four times greater than the figure generally accepted.[19]

> ***"...$600 billion represents a conservative estimate of the amount of money laundered each year...."***

Many economists, law enforcement executives, and policy makers agree on the need to develop an acceptable means of identifying the scope of the laundering problem.[20] The inability to determine the amount of money laundered impedes an adequate understanding of the magnitude of the crime, its macroeconomic effect, and the effectiveness of current counterlaundering efforts.

WHAT IS THE INTERNATIONAL RESPONSE?

Efforts by governments to address money laundering have been under way for over 10 years. The international response to laundering has taken a number of forms, including multilateral treaties, regional agreements, international organizations, and the identification of universal counterlaundering measures.

The United States' Response

The United States commenced one of the earliest responses to money laundering. The Bank Secrecy Act of 1970 authorized the Secretary of the U.S. Department of the Treasury to establish regulatory measures requiring the filing of currency transaction reports and served as a foundation for further measures to combat laundering.[21] Subsequently, Congress enacted the Money Laundering Control Act in 1986,[22] which made the laundering[23] of proceeds derived from any one of a long list of offenses (known as "specified unlawful activities") a crime.[24] This list now includes over 100 federal offenses, selected state offenses, and certain violations of foreign laws.[25] The act also criminalized structuring certain transactions to avoid filing currency

reports.[26] Congress made civil and criminal procedures available to forfeit property involved in a laundering offense. Subsequent legislation has added further enhancements.[27]

Most recently, the Money Laundering and Financial Crimes Strategy Act of 1998 called for the development of a national strategy to combat money laundering and related financial crimes.[28] In response, the Departments of Justice and the Treasury developed a 5-year strategy that calls for designating high-risk money laundering zones to direct coordinated enforcement efforts, providing for greater scrutiny of suspicious transactions, creating new legislation, and intensifying pressure on nations that lack adequate countermoney laundering controls. In addition to its domestic efforts, the United States has become a party to multilateral treaties and agreements, as well as numerous bilateral efforts, that support enhanced international cooperation. The United States participates in and promotes the efforts of international organizations that have developed universal standards and monitor current trends to address the laundering threat to the global community. In furtherance of international cooperation, the United States transfers funds to foreign jurisdictions (known as "international sharing") that have assisted in efforts that resulted in the forfeiture of property.

Vienna Convention of 1988

The Vienna Convention represents the first concerted effort to influence the international community's response to drug money laundering.[29] It requires the signatory jurisdictions to take specific actions, including steps to enact domestic laws criminalizing the laundering of money derived from drug trafficking and provide for the forfeiture of property derived from such offenses.[30] The treaty also promotes international cooperation as a key to reducing the global threat of money laundering and requires states to provide assistance in obtaining relevant financial records when requested to do so without regard to domestic bank secrecy laws.

> ***"Emerging market countries are particularly vulnerable to laundering...."***

While the Vienna Convention remains a benchmark in identifying counterlaundering measures on an international level, it does not criminalize laundering. Rather, it obligates the parties to adopt domestic legislation that makes laundering drug proceeds a crime. Unfortunately, compliance with regard to the antilaundering provision has not been universal. The U.S. Department of State recently issued a report tracking the counterlaundering measures of various jurisdictions. The report listed 38 parties to the Vienna Convention that failed to criminalize the laundering of drug proceeds.[31] In addition, the fact that the treaty defined money laundering as a crime predicated on drug trafficking has limited its effectiveness. Of the countries tracked in the U.S. Department of State report, 66 have failed to criminalize the laundering of proceeds derived from nondrug trafficking offenses.

The Strasbourg Convention of 1990

The Council of Europe is a regional organization established to strengthen democracy, human rights, and the rule of law in its member states, in part, by harmonizing its policies and encouraging the adoption of common practices and standards. It adopted the Strasbourg Convention in November 1990,[32] which, like the Vienna Convention, requires each party to adopt legislation that criminalizes money laundering. As of December 1999, 27 of 41 member states and one nonmember (Australia) have ratified the Strasbourg Convention. Unlike the Vienna Convention, this treaty does not limit the underlying predicate offense to drug trafficking. The Strasbourg Convention requires members to adopt laws criminalizing the laundering of the proceeds from any "serious crime."[33] The treaty also requires signatories to adopt laws authorizing the forfeiture of the proceeds of serious offenses, as well as any instrumentalities of the crime, or in the alternative, the value of such property. Members must provide investigative assistance to foreign jurisdictions regarding forfeiture

cases and take appropriate measures to prevent disposal of subject property prior to confiscation.

Financial Action Task Force Recommendations

In response to increasing concerns, the governments of the Group of Seven (G-7)[34] industrialized countries established the Financial Action Task Force on Money Laundering (FATF) in 1989 as an intergovernmental body to develop and promote policies to combat money laundering.[35] The FATF, comprised of members from 26 countries and two regional organizations, includes the major financial centers of Europe, North America, and Asia and works both independently and in cooperation with other organizations to establish and strengthen member and nonmember antilaundering measures. One of the guiding principles of the FATF is that money laundering constitutes a complex economic crime, which conventional law enforcement methods cannot control effectively. Therefore, law enforcement must work closely with financial institution managers and regulators.

In April 1990, the FATF issued a report containing recommended countermeasures to money laundering. Commonly known as the "Forty Recommendations," the FATF designed these countermeasures to provide governments with a comprehensive framework for antimoney laundering action focused around the criminal justice system and law enforcement, the role of the financial sector and government regulators in combating money laundering, and the need for international cooperation.[36] The Forty Recommendations, revised and updated in 1996, encourage the full implementation of the Vienna and Strasbourg Conventions and the lifting of bank secrecy laws. Strategies encouraged by the FATF include the criminalization of the laundering of the proceeds derived from all serious crime, the forfeiture of property connected with a laundering offense or its corresponding value, the establishment of customer identification and record keeping rules, and the creation of financial intelligence units.

As a part of its ongoing efforts to combat money laundering, the FATF prepares annual laundering typology reports and conducts mutual in-depth evaluations of each member's antilaundering regimes. Consistent with its continuing oversight role and its efforts to identify key antimoney laundering weaknesses throughout the world, the FATF approved a report on the issue of noncooperative countries and territories in the international effort against money laundering. The report, adopted on June 22, 2000, named 15 countries and territories with systemic problems indicating a lack of a serious commitment to eliminating or significantly reducing money laundering.[37] The jurisdictions (noncooperating countries)[38] either failed to adopt meaningful legislation criminalizing laundering or have serious deficiencies in their banking laws and implementing regulations. By publicly criticizing these jurisdictions, the FATF and its member countries hope that international public pressure will result in antilaundering reforms. The list also served as a precursor for countries with major financial centers to issue formal advisories to its financial institutions identifying the risks of conducting financial transactions with the jurisdictions on the list. Accordingly, in July 2000, the U.S. Department of the Treasury issued such advisories on each of the jurisdictions on the name and shame list.[39] As a result of the FATF's continuing efforts to address money laundering on an international scale, their recommendations have become the accepted international standard for antimoney laundering regimes.

CONCLUSION

The global threat of money laundering poses unique challenges to the law enforcement community. To pursue the evidentiary trail of a money launderer, law enforcement agencies must identify and use tools and techniques that can help them when crossing international boundaries. Multilateral agreements that require participants to

adopt antilaundering measures and the regional and world organizations that have developed and encouraged a standardized approach to addressing laundering all have contributed to the strides made in addressing the challenges posed.[40] Efforts undertaken by nations independent of the international community often result in significant variations from the accepted standard and have the effect of facilitating laundering activity rather than combating it.[41] For example, the government of Antigua and Barbuda weakened its laws relating to money laundering, resulting in the U.S. Department of the Treasury issuing an advisory warning banks and other financial institutions to be wary of all financial transactions routed into, or out of, that jurisdiction.[42] The changes in the law strengthened bank secrecy, inhibited the scope of laundering investigations, and impeded international cooperation. A common, harmonized approach will prevent launderers from using the different laws and practices among the jurisdictions to their advantage both at the expense and disadvantage of countries interested in pursuing them.[43] Only with laws that have been harmonized can law enforcement agencies, working together with financial institution administrators and regulators, combat this ever-increasing problem. ✦

Endnotes

[1] Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (New York, NY: Farrar, Straus, Giroux, 1999).

[2] Ibid.

[3] President's Commission on Organized Crime, Interim Report to the President and the Attorney General, *The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 7 (1984).

[4] Jack A. Blum, et al., "Financial Havens, Banking Secrecy and Money Laundering," *Crime Prevention and Criminal Justice News Letter* 8, no. 34/35 (1998).

[5] See, for example, Eduardo Gallardo, "Chile Attracts Drug Money for Laundering: Strong Economy, Financial Market Lure Foreign Cartels," *Washington Times*, Oct. 21, 1997 ("Most experts believed drug gangs view Chile mostly as a good place for money laundering because of its thriving economy, with money flowing in and out of the country which would allow traffickers to make their money look legitimate by channeling it through businesses...Nearly $2 billion in foreign money poured into Chile in the first 6 months of the year for investment in its companies.").

> ***"...the United States has become a party to multilateral treaties and agreements...that support enhanced international cooperation."***

[6] See remarks of Michel Camdessus, managing director of the International Monetary Fund, at a plenary meeting of the Financial Action Task Force on Money Laundering, February 10, 1998; *http://www.imf.org/external/np/speeches/1998/021098.htm*. accessed November 13, 2000.

[7] Mark Hosenball and Bill Powell, "The Russian Money Chase," *Newsweek*, February 28, 2000, 42-43.

[8] Catherine Skipp, "Six Arrested in Global Fraud, Money-Laundering Case: Group Allegedly Bilked Victims of $60 Million," *Washington Post*, May 8, 1998, sec. A, p. 2.

[9] For example, countries in Eastern Europe, Asia, and South and Central America that have undergone transformation from a government-controlled economy to one with fewer government controls and greater market freedom for companies to trade on an international scale, such as the Czech Republic, Slovenia, and Thailand.

[10] See, Stephen R. Kroll, "Money Laundering: A Concept Paper Prepared for the Government of Bulgaria," *International Law* 28 (1994): 835, 869 (a discussion on criminalization of money laundering for Bulgaria and the special concerns about misappropriation of value from privatized enterprises during the transformation of the Bulgarian economy from a government-controlled economy to a market economy).

[11] For example, representatives of the "G-7" (now referred to as the "G-8"), seven major industrial countries in the world, including the United States, the United Kingdom, France, Germany, and Japan, who formed the Financial Action Task Force (FATF); the Organization of American States (OAS); the Council of Europe; the United Nations (UN); the Asian Pacific Group on Money Laundering; and the European Union.

[12] United Nations Declaration and Action Plan Against Money Laundering, United Nations Resolution S-20/4 D (June 10, 1998); and the Ministerial Communique, Ministerial Conference concerning the Laundering of Proceeds and Instrumentalities of Crime, Buenos Aires, Argentina (December 2, 1995); *http://www.oecd.org/fatf/Initiatives_en.htm*; accessed November 13, 2000.

[13] U.S. Department of State, *International Crime Control Report, 1999, Money Laundering and Financial Crimes*, 599.

[14] See, House Committee on Banking and Financial Services, prepared statement of Stuart Eizenstat, Deputy Secretary, U.S. Department of the Treasury (March 9, 2000); *http://www.ustreas.gov/press/releases/ps445.htm*, accessed November 13, 2000.

[15] Supra note 6, ("Potential macroeconomic consequences of money laundering include, but are not limited to: inexplicable changes in money demand, greater prudential risks to bank soundness, contamination effects on legal financial transactions, and greater volatility of international capitol flows and exchange rates due to unanticipated cross-border asset transfers.").

[16] See, Barry R. McCaffrey, "Efforts to Combat Money Laundering," *Loyola of Los Angeles International and Comparative Law Journal* 791, no. 20 (1998). Also, supra note 13.

[17] Financial Action Task Force, *Basic Facts About Money Laundering*, *http://www.oecd.org/fatf/Mlaundering_en.htm*; accessed November 13, 2000; and supra notes 6 and 14.

[18] Elise J. Bean, Deputy Chief Counsel to the Minority Senate Permanent Subcommittee Investigations, U.S. Congress, *Money Laundering 2000: What's Going On?* a presentation made at the American Bankers Association/American Bar Association Money Laundering Enforcement Seminar, October 29-31, 2000.

[19] John Walker, *Measuring the Extent of International Crime and Money Laundering*, paper prepared for the Kriminal Expo, a conference held in Budapest, Hungary, on June 9, 1999, *http://www.ozemail.com.au/~born1820/Budapest.html*; accessed October 11, 2000.

[20] There are ongoing efforts in several countries to estimate the magnitude of money laundering. An ad hoc group composed of members of the FATF is engaged in a study to quantify the amount of money laundering activity. Supra note 13.

[21] Pub. L. 91-508, § 202, Oct. 26, 1970, codified at 31 U.S.C. § 5311. ("It is the purpose of this subchapter...to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.").

[22] Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat 3207, codified at 18 U.S.C. §§ 1956, 1957, 31 U.S.C. §§ 5324-26.

[23] 18 U.S.C. §§ 1956(a)(1) and 1957(a).

[24] See, generally, Barrett Atwood and Molly McConville, "Money Laundering," *Am. Crim. L. Rev.* 36 (1999): 901 for a discussion of the conduct criminalized by this act.

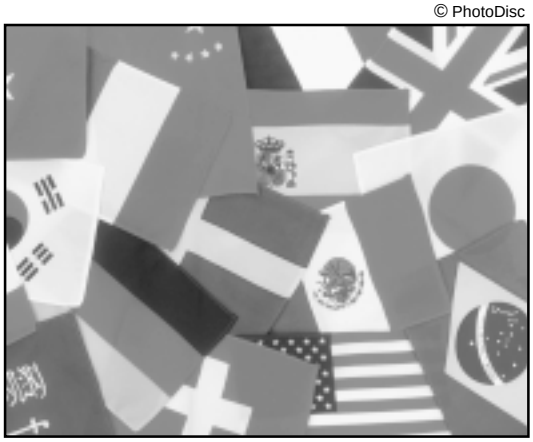
[25] 18 U.S.C. § 1956(c)(7).

[26] 31 U.S.C. §§ 5322, 5324; 18 U.S.C. § 1956(a)(2).

[27] Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550 (1994). Changes included: 1) an expanded definition of "financial transaction" to include the transfer of title to vehicles, aircraft, and real property; 2) authority for the U.S. Treasury to require financial institutions to carry out antimoney laundering programs; 3) increased record keeping to cover wire transfers; and, 4) authority for the U.S. Treasury to require financial institutions to file suspicious transaction reports. See also, Matthew S. Morgan, "Money Laundering: The American Law and Its Global Influence," *3-SUM NAFTA: Law & Business Review of the Americas* 24, 26 (Summer 1997).

[28] Pub. L. 105-310, § 2(a), 112 Stat. 2942 (Oct. 30, 1998) codified at 30 U.S.C. § 5341.

[29] The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 is commonly known as the "Vienna Convention," U.N. Docs. E/Conf. 82/15 (Dec. 19, 1998), WL 28 I.L.M. 493 (1989). One hundred fifty-three countries are parties to this treaty.



[30] See, Vienna Convention, at Article 3(1)(b) requiring each signatory state to enact domestic legislation criminalizing money laundering activity and Article 5(1), which requires each signatory to adopt measures to enable confiscation of drug trafficking and money laundering offenses.

[31] Supra note 13.

[32] Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime commonly known as the "Strasbourg Convention," Eur. Consult. Ass., Doc. No. 141 (Nov. 9, 1990), WL 30 I.L.M. 148 (1991).

[33] Ibid., at Article 6 (serious crime under the treaty may be defined by each signatory as identified by declaration).

[34] Supra note 11.

[35] House Committee on Banking and Financial Services, "Committing Money Laundering," prepared testimony of Jonathan Winer, Deputy Assistant Secretary of State, U.S. Department of State (June 11, 1998).

[36] See, Financial Action Task Force on Money Laundering: The Forty Recommendations of the Financial Task Force on Money Laundering, with Interpretative Notes, WL 35 I.L.M. 1291 (1996).

[37] *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures*, report issued by FATF, June 22, 2000.

[38] Jurisdictions named as noncooperating countries are: the Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russian Federation, St. Kitts and Nevis, and St. Vincent and the Grenadines.

[39] See FinCen Advisories issued by the U.S. Department of the Treasury for each of the 15 countries on the name and shame list in July 2000; *http://www.ustreas.gov/fincen*; accessed November 13, 2000.

[40] There are additional regional organizations, not discussed in this article, that address money laundering. They include the OAS (established in 1948), which developed model regulations for member jurisdictions to prevent money laundering through a statutory framework; the Asia/Pacific Group on Money Laundering (APG) (established in 1997) to address laundering on a regional basis by applying, inter alia, the FATF Recommendations; the Caribbean Financial Action Task Force (CFATF), which consists of representatives of 25 countries and territories in the Caribbean, along with five cooperating and supporting nations from outside the region. The CFATF has adopted the FATF Recommendations and added 19 additional region-specific recommendations.

[41] Jeffrey Lowell Quillen, "The International Attack on Money Laundering: European Initiatives," *Journal of Comparative and International Law* 213 (1991).

[42] "Treasury Warns Banks on Transaction with Antigua and Barbuda," press release issued by the U.S. Department of the Treasury, RR-3066 (April 1999) *http://www.ustreas.gov/press/releases*; accessed November 13, 2000.

[43] At the Summit of Americas held in Buenos Aires, Argentina, in 1995, representatives of 34 countries in the Western Hemisphere agreed to recommend to their governments a plan of action for a coordinated hemispheric response to combat money laundering.

Technology Update

The Public Safety Wireless Network (PSWN) Program

A Brief Introduction

By Derek Siegle and Rick Murphy

Public safety wireless interoperability refers to the ability of public safety officials to communicate with each other seamlessly in real time over their wireless communications network. Whether by voice or through data transmissions, interoperable communications can mean the difference between life and death for citizens and public safety personnel and often hold the key to minimizing loss of property when disasters occur. However, the history and evolution of public safety wireless communications seems to contradict the need for, and benefits of, interoperability. Stand-alone systems, operating independently, consequently have created obstacles to interoperability. Nonetheless, these obstacles can be overcome, and the Public Safety Wireless Network (PSWN) Program is leading efforts to do so.

History and Organization

The PSWN Program is a joint effort sponsored by the U.S. Departments of Justice and the Treasury. The program addresses issues facing public safety wireless communications, primarily in the area of interoperability among land mobile radio (LMR) networks used to support public safety missions. The program is working to plan and foster interoperability at all levels of government (e.g., local, state, and federal) and among all public safety disciplines (e.g., law enforcement, fire, and emergency medical services). In 1996, the PSWN Program was founded in response to a National Partnership for Reinventing Government (NPRG) initiative that called for the establishment of an intergovernmental wireless public safety network as a means of achieving interoperability. Since then, the vision has evolved to a system of networks, regionally focused, brought together through coordination and partnerships among public safety agencies from all levels of government.

Although its task is very challenging, the PSWN Program has made great strides in achieving interoperability among public safety agencies across the United States. The program realizes that there may never be one nationwide wireless communications system, but that statewide or regional interoperability is an achievable goal with the federal government participating where appropriate.

The PSWN Program has been active in several key areas of the interoperability challenge. The program is promoting coordination and partnerships among public safety agencies, exploring difficulties in funding and the development of funding alternatives, addressing public safety spectrum issues, supporting and participating in standards and technology development, promoting systems security improvements, and implementing pilots, proof-of-concept projects, and demonstrations in several cities and regions of the United States.

Coordination and Partnerships

Agencies must be willing to communicate with each other. Coordination and partnerships are essential to achieving interoperability. The PSWN Program realizes officers and departments first must be willing

to work together and share a mutual commitment to the goal that no man, woman, and child ever should lose their life or be injured because public safety officials cannot communicate with each other. The PSWN Program is very active in bringing representatives from different departments together to find a solution to their interoperability challenges. Public safety agencies must recognize the importance of interoperability and strive for interoperability as they plan system replacements and upgrades. This requires public safety agencies to identify their interoperability requirements and form the necessary partnerships to meet these requirements.

The PSWN Program is fostering partnerships, providing networking opportunities, raising awareness, and sharing solutions through its regional symposiums. Working with associations, such as the International Association of Chiefs of Police and the International Association of Fire Chiefs, and through the efforts of the PSWN Executive Committee, the program remains proactive in developing these relationships. The Executive Committee comprises leading representatives of local, state, and federal public safety agencies. It serves as an advisor to, and an advocate of, the program and its mission. In addition to its symposiums and Executive Committee, the program sponsors Integrated Program Teams with direct representation from radio communications specialists from all levels of government. These persons serve as members of these working groups to solve specific interoperability challenges and foster solutions and pilot concepts.

“The PSWN Program is fostering partnerships, providing networking opportunities, raising awareness, and sharing solutions through its regional symposiums.”

The program also is beginning a new outreach initiative to facilitate the formation of public safety communications councils in each of the 50 states. This campaign hopefully will be a catalyst for the coordination and partnerships necessary for tackling the interoperability challenge. Several states, such as California, Colorado, and Montana, already have working groups addressing interoperability issues. The PSWN Program will offer whatever assistance it can to states and their communications councils as they work to resolve the issue of interoperability. The program realizes it cannot accomplish its mission successfully without the direct involvement and actions of individual state and local public safety agencies across the country.

Funding

The ability of departments to obtain funding for public safety wireless projects is a major obstacle to achieving interoperability. Historically, public safety communications, particularly those that enable departments to communicate outside their normal realm of responsibility, have garnered little attention. Quite often, this issue is very low among the funding priorities of most legislatures, administrators, and even the public, until major incidents or disasters call attention to shortfalls. To help alleviate the funding difficulty, the PSWN Program is reaching out and educating individual members of Congress and making presentations to the National Association of Governors, National League of Cities, and other similar associations to inform state and local decisionmakers. The goal is to make public safety wireless communications systems and interoperability a priority investment for America’s future safety.

Conclusion

The ultimate goal of the Public Safety Wireless Network Program is to develop and enact a road map to assist public safety agencies with ongoing and future interoperability efforts, known as the Public Safety WINS. Public Safety WINS will serve as a basis to help public safety agencies formulate

strategies for interoperable systems by addressing coordination and partnership, funding, spectrum, standards and technology, and security issues associated with such an endeavor. Public Safety WINS is scheduled to be finalized by the end of fiscal year 2001. Public Safety WINS will include an introductory video supported by an interactive Web site that will provide both technical and policy solutions to interoperability issues.

The PSWN Program is committed to assisting public safety agencies with implementation strategies and their plans to address interoperability. Information regarding the program, its studies, pilots, and publications, as well as other issues regarding interoperability can be accessed at *http://www.pswn.gov* or can be obtained by contacting the program at 1-800-565-PSWN. ✦

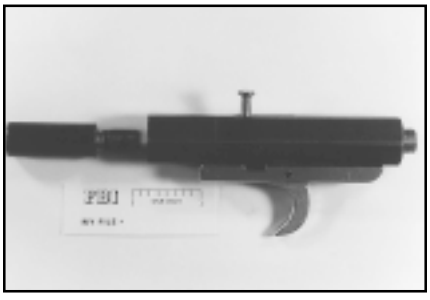
Mr. Siegle and Mr. Murphy are, respectively, the U.S. Justice and the Treasury Departments' program managers for the Public Safety Wireless Network (PSWN) Program. The PSWN Program is a federally sponsored initiative dedicated to improving public safety wireless interoperability, so that no one loses their life because public safety officials cannot communicate with one another.

Unusual Weapon

Barrel Gun

After an armed bank robbery in New York, police officers arrested two individuals exiting the bank and recovered two weapons. One of the weapons was a machine-lathed zip gun containing one .22-caliber bullet. The weapon is loaded by unscrewing the 1 1/2-inch barrel, where the round is inserted. The barrel is screwed back on, and the cocking lever is pulled back engaging the trigger lever. The firing pin has an adjustment spring for the amount of pressure needed to drive the firing pin. The weapon is 5 inches long and can be concealed easily in the palm of the hand.

Submitted by the Joint Bank Robbery Task Force of the New York, New York, Police Department



Investment Fraud

By JOHN CAUTHEN

One detective working white-collar crime encountered an investor who claimed that he did not receive a promised 900 percent annual profit on an investment. To complicate matters, the investor dumped stacks of paperwork on the detective's desk attempting to prove the fraud. Upon further questioning, the detective learned that the investor made the investment 2 or 3 years ago, but it had not paid out during the past year. The investor explained that he thought he had invested in an overseas program guaranteed by banks involving the Federal Reserve that made money by trading some type of bank instruments. He had hesitated to issue a complaint because he believed the investment would pay off soon. The scheme involved volumes of thick contracts, letters of intent, secrecy clauses, and a host of other financial terms that the investor really never understood and could not explain to the detective. The investor only understood that his involvement had no risk and that he would receive an extraordinary return. But, the investment failed.

This scenario describes a prime bank trading program fraud. These types of investment frauds have existed for many years and, historically, have involved individuals investing huge sums of money—between $500,000 and $1 million. Today, these scams have evolved into targeting larger numbers of people for smaller dollar amounts—usually between $5,000 and $100,000 each.[1]

Unfortunately, these scam artists rarely face prosecution because courts traditionally have regarded the cases as civil in nature, and the complexity of the issues and the difficulty in establishing criminal intent needed for conviction prove challenging. However, the FBI's Sacramento office has implemented investigative techniques to successfully prosecute these schemes. Initially, when investigators receive an investment fraud complaint, they should contact promoters and explain the illegality of marketing such schemes. By doing so,

Special Agent Cauthen serves in the FBI's Sacramento, California, office.

> ***"Law enforcement should ensure that all promoters receive this warning during the interview."***

investigators establish the knowledge of the promoter and warn the promoter that continuing the fraud may result in prosecution. If the promoter continues to contact potential investors to take money, the U.S. Attorney's Office may charge the scam artist with mail and wire fraud.

HOW THE FRAUD WORKS

Assuming a department eventually opens a criminal case, most investigators will become discouraged after the initial interview with these con artists. Usually, they admit taking money from the victim, promising an extraordinary return, explaining the guarantee of the investment, and failing to perform as promised. But, investment criminals will advise that they were victims, too, because although they took money from investors, they gave it to their contacts who promised they had access to a trader who could deliver the promises. Then, they will explain how their contacts took the money but failed to perform as expected. At this point, they reach into their file cabinet, pull out a huge stack of paper, throw it on the desk, and advise that they are a victim as well.

A number of promoters claim that they have access to individuals who can purchase bank instruments at a discount and resell them for a higher price for a small profit. These promoters perpetrate prime bank scams throughout the world and claim that they do this continually, making huge profits in a short time period with no risk.

The promoters collect funds from investors and have them sign a series of documents to enter into the investment. Types of documents seen at this stage include "letters of intent" and "proof of funds letters," all designed to make investors believe that they have to qualify for the investment. Additionally, the documents lend credibility to the scheme by making the investment application process appear official.

The promoter will enter into an agreement with another person, often called an intermediary or facilitator. The promoter will sign letters of intent or proof of funds and eventually sign a contract with the intermediary.

Promoters receive payment by keeping a portion of the investment and sending the balance to the intermediary, or by making arrangements to receive a percentage of the profits. At this point, the money starts to flow. The investor gives money to the promoter, who, in turn, passes it along to the intermediary who initially performs as promised. Usually, the investor receives one or two payments as profits. Then, the payments reduce greatly or cease all together. Promoters then will provide a series of excuses, often in writing, explaining in detail exactly why the investment cannot pay this month, but that it will pay soon.

In the final analysis, no legitimate investment ever takes place. In fact, everyone in the chain is an intermediary who takes a portion of the money as fees or commissions and passes the balance to the next person in the chain.

At this point, law enforcement easily recognizes the investment as a classic Ponzi scheme[2] in which money paid to old investors represents, in reality, investment principal from the new investors. By the time the matter comes to the attention of law enforcement, the money has passed through several hands and, often, through several states or countries.

TACKLING THE PROBLEMS

Several problems arise in this type of scam. First, investigators

have difficulty proving that anyone involved acted with intent to defraud, especially promoters of the scheme. These con artists use excuses like "I thought it was real" or "I thought it would work" as their most common defense.

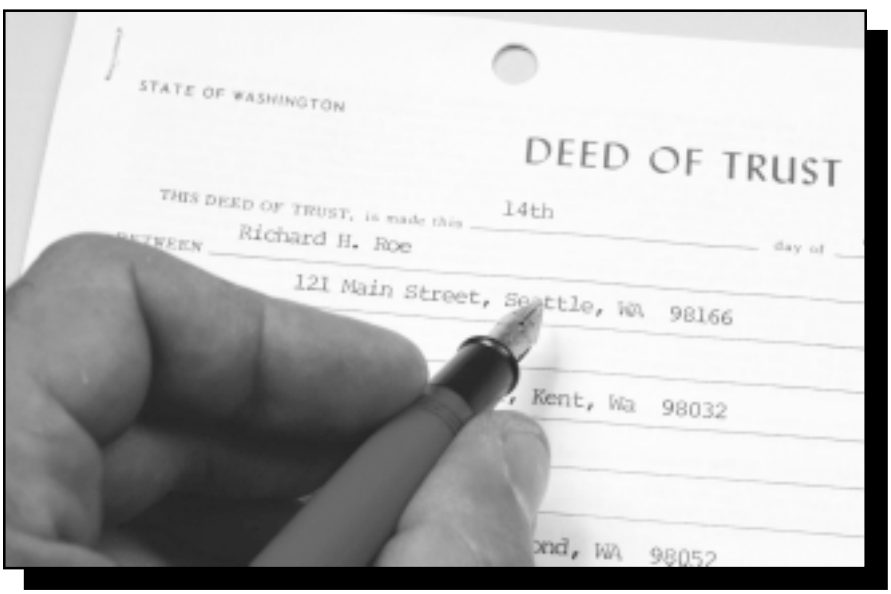
Another problem involves the level of complexity these types of schemes present. One judge characterized a prime bank scam as inherently complex, deliberately designed this way by criminals. The judge compared the difficulty of investigation to a large jigsaw puzzle thrown to the ground, leaving the investigator with seemingly unrelated pieces to pick up and reassemble.[3] The sheer volume of the paperwork alone can discourage investigators. Even if investigators manage to understand the case, they probably will have difficulty explaining it to the prosecutor. Although the investigator and the prosecutor eventually may unravel the scheme, explaining it to a jury can feel almost impossible. Nevertheless, law enforcement can investigate and prosecute these cases successfully with a minimum of frustration, assuming that they pay particular attention to contact with promoters, investors, and the prosecutor.

Contact with Promoters

Investigators strive to show intent to defraud. To prove intent, they have to show that the promoter lied intentionally about the investment to get the investor's money. Proof of intent can include evidence that the promoter previously knew that the investments were fraudulent. If the promoters did not know of the fraud before, investigators should tell them now, as well as provide an information sheet, which describes different types of investment programs and proclaims certain ones as fraudulent.[4] This sheet can prove helpful as an investigative tool for law enforcement. Investigators can give the sheet to promoters to advise them of the fraudulent investments—a criminal violation subject to federal securities laws.

Advising promoters of the fraudulence of these programs alerts them that moving any money between bank accounts in this type of program may constitute money laundering. Documenting the fact that investigators have warned promoters about the fraudulent investment may not help in the prosecution of frauds that already have occurred; however, it can help prove fraudulent intent if the individual continues to promote even after receiving the warning. Law enforcement should ensure that all promoters receive this warning during the interview. This process can assist prosecutors during trial when negating a defendant's claim of ignorance as to the illegality of the scheme.

Second, investigators need evidence that promoters have been involved in these types of investments in the past and have lost money belonging to other individuals. Items obtained by search warrants, such as bank records, may prove helpful. Investigators should ask promoters about specific deals in which they have participated in the past. If they claim that they have done this successfully before, investigators should get all the details. On the other hand, some promoters will claim that they have never done this before. If investigators learn that promoters have been involved in failed deals in the past, but still



Information Sheet

The purpose of this notice is to alert the public to persons who reportedly have marketed investment schemes that appear to be fraudulent. Various prime bank trading programs or similar trading programs which purport to offer above-average market returns with below-market risk through the trading of bank instruments are fraudulent. Offering such programs, or claiming to be able to introduce investors to persons who have access to such programs, violates numerous federal laws, including criminal laws.

It is illegal to engage in fraud in the offer or sale of a security. Under most circumstances, it is also illegal to sell securities that have not been registered with the U.S. Securities and Exchange Commission. A security includes the following items: "note," "stock," "bond," and "debenture," as well as more general terms, such as "investment contract" and "any interest or instrument commonly known as a 'security.'" In the leading opinion, the U.S. Supreme Court held that the definition of a security includes an investment contract, which is "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or third party...." Designating such instruments as "loans" does not alter their legal status as securities.

The FBI, as well as other federal and state agencies, have identified several characteristics common to fraudulent schemes. These characteristics include—

- claims that investor funds can be placed in a bank account, and then used, without risk, to trade bank debentures, or other financial instruments;
- claims that invested funds can be used to lease or rent U.S. Department of the Treasury obligations and then use these same leased securities as collateral for further trading programs;
- claims that trading medium term notes (MTNs), prime bank notes, or any other bank instruments, on a riskless basis, will yield above market average returns; and
- claims that letters of credit or standby letters of credit can be traded for profits.

In general, investment programs that offer secret, private investment markets, which offer above-market rates of return with below-market rates of risk for privileged customers in Europe, are fraudulent. There are no "secret" markets in Europe, or in North America, in which banks trade securities. Any representations to the contrary are fraudulent.

In addition, investment programs in which a financial institution is asked to write a letter, commonly referred to as a "blocked funds letter," advising that funds are available in the account, that they are "clean and of noncriminal origin" and are free of "liens or encumbrances" for a certain time frame are used frequently to perpetrate fraud schemes. These letters have no use within legitimate banking circles.

Some phrases are seen commonly in documents presented by fraudsters in the course of marketing fraudulent investment schemes. If one or more of these phrases appear in documentation, they should be treated with suspicion. These include, but are not limited to—

- noncircumvention, nondisclosure;
- good, clean, clear, and of noncriminal origin;
- blocked funds trading program;
- prime bank trading program;
- federal reserve approved;
- roll programs;
- irrevocable pay orders;
- prime bank notes, guarantees, letters of credit; and
- fresh cut paper.

The marketing of fraudulent investment schemes violates federal criminal laws. In order to report instances of suspected fraud, please contact Special Agent John M. Cauthen, FBI, Sacramento, California Division, telephone 916-481-9110 or any of the sources listed below.

Sources that can corroborate the above information include:

- *U.S. Treasury Department, Comptroller of the Currency, Enforcement and Compliance Division, 250 E Street, SW, Washington, DC 20219*
- *Securities and Exchange Commission, San Francisco District Office, 44 Montgomery Street, Suite 1100, San Francisco, CA 94104, 415-705-2500*
- *Bureau of Public Debt, Chief Counsels Office, 200 3rd Street, Room G-15, Parkersburg, WV 26106*
- *Federal Reserve, Washington DC, Office of General Counsel, 202-973-5021*

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received a large payment, this fact may prove useful.

Contacts with Investors

When dealing with a large number of victims, sometimes the only method of collecting information is mass mailing questionnaires.[5] Any communication with victims should remain open and honest. Often, victims of such schemes do not trust investigators who, they think, might ruin their investment opportunity. When writing to victims, investigators should provide all of the information that they have about the investigation. Promoters deliberately might try to interfere with victims by disseminating erroneous information. Being open and candid with investors may convince them to cooperate early. To avoid any subsequent allegations by the defense, investigators should include language advising that defendants are presumed innocent. If investors still remain in contact with promoters, any evidence of statements made by the promoter to the investor (known as "lulling" statements) will prove useful, particularly if promoters make them after investigators already have contacted the promoters and warned them about the true nature of these schemes.

Contact with Prosecutors

These types of cases can become inherently complex. Investigators should present the case to prosecutors first, then conduct the investigation. Also, investigators always should remember that the goal is to prove intent to defraud, not understanding how the investment should have worked. In fact, understanding the investment can prove impossible because of the amount of fictional information involved. Investigators should not spend too much time trying to understand the meaning of all of the financial jargon and, although investigators might think the investment sounds like it makes sense, no investments pay extraordinary returns without risk.

> ***"Chances for a successful prosecution of the case increase if a prosecutor works on the case early in the investigation."***

CONCLUSION

By using innovative investigative techniques and following certain steps in the investigation, law enforcement can prosecute fraudulent investment schemes successfully. First, investigators should interview promoters, obtain a history of their past involvement with these schemes, and warn them that these types of investments are fraudulent. Additionally, investigators should obtain evidence of previous scams through interviews, search warrants, and bank records and search for evidence that promoters knew that the program would not work.

Second, law enforcement should interview the victims. Officers should obtain evidence of lulling statements made to victims, as well as declarations made by promoters about their past success with these programs.

Most important, prior to beginning any steps, investigators should contact the prosecutor, explain the case and strategy, and keep the prosecutor informed throughout the investigation. Chances for a successful prosecution of the case increase if a prosecutor works on the case early in the investigation. If law enforcement waits until the end of the investigation to request the prosecutor's help, continuing with a civil case may be the only response. ✦

Endnotes

[1] Kim Clark, "Pumping the Prime: 'Prime Bank' Schemes are Back and Targeting the Middle Class," *U.S. News and World Report*, March 15, 1999.

[2] An investment swindle in which some early investors are paid off with money put up by later ones in order to encourage more and bigger risks. *Merriam-Webster's Collegiate Dictionary,* 10th ed. (1996), s.v. "Ponzi scheme."

[3] *U.S. vs. Sid Tweady, et al.*, Cr. S.-99-293 DFL (E. D. CA 2000) statements by Judge David Levi.

[4] Investigators can obtain this information sheet, created by the FBI and the Sacramento U.S. Attorney's Office, by contacting either of these offices. A copy of the sheet also is provided with this article.

[5] The questionnaire consists of a cover letter explaining the nature of the investigation, the status of the prosecution, and any information known about the disposition of the money. It consists of questions such as: "What promises were made? What was the promised return? What was the risk? Who made the promises? What is the promoter telling you now?" Also, the questionnaire includes a copy of the Information Sheet.

Book Review

Police Trauma: Psychological Aftermath of Civilian Combat *edited by John M. Violanti and Douglas Paton, Charles C. Thomas, LTD., Springfield, Illinois, 1999.*

Police Trauma offers comprehensive research for all law enforcement psychologists and consulting clinical psychologists by providing the conditions and precipitants of trauma stress among law enforcement. Police executives, incident commanders, line officers, policy writers, and law enforcement family members also will find this book beneficial. *Police Trauma* may help prevent or minimize trauma stress by providing information on how to better deal with traumatic experiences and establish an improved support system for officers.

The topics discussed in this book suggest future policy and procedures for the conceptualization, intervention, recovery, and immediate and extended treatment of psychological trauma in policing. Also covered are suggestions for both department and officer self-assessment.

The authors have grouped the chapters of the book into three sections: conceptual and methodological issues, special police groups, and recovery and treatment. *Police Trauma* begins with a thorough assessment of the understanding of psychological trauma involving duty-related, patrol-response trauma. The book offers an assessment test, which includes 66 characteristics to help officers understand overall risks to themselves and others, and offers guidance on how to analyze the test results for a better understanding of how trauma can affect officers. This chapter also introduces a police compassion fatigue model in which authors describe the relationship between an officer's psychological trauma, how they cope with the trauma, and their role in the department and personal family after exposure.

In another section, *Police Trauma* assesses police groups, such as the South African Police's exposure to violence. Response members of high-profile incidents also were assessed for post-intervention strategies concerning exposure to the violence and coping and recovery successes. Also in this section, the authors analyze and present organizational activities that contribute to the incident commander's emotional recovery from violence and trauma.

Police Trauma reviews a successful military model and its application to law enforcement operations based on the organizational similarities of chain of command, training, leadership, response, and commitment to control violence resulting in trauma aftermath. The military model contained three prevention phases: a primary phase, concerning prior preparation and training for trauma-type incidents; a secondary phase focusing on the participants during and immediately after a traumatic event; and the last phase addressing considerations in limiting long-term effects of trauma and how to properly prepare, respond, and recover through a shared and well-documented after-action report.

Police Trauma provides a tremendous research effort on trauma by experts directly connected to the field of law enforcement and serves as an invaluable asset for all levels and jurisdiction of the law enforcement community, including those in private industry. It presents an understanding of why police respond to trauma the way they do and how they can recover successfully.

The authors have gathered information on trauma research from professionals associated with law enforcement. These contributions provide the reader with different perspectives on police trauma and its aftermath and identify what is known, as well as what is not known, on this complex issue. *Police Trauma* serves as an excellent resource for those individuals managing law enforcement psychological stress and trauma.

Reviewed by
Larry R. Moore
Certified Emergency Manager
International Association
of Emergency Managers
Knoxville, Tennessee

Enterprise Theory of Investigation

By RICHARD A. MCFEELY

Although the media frequently focuses on the conviction of the leaders of major criminal enterprises, such as the Gambino crime family, the Colombian Cali Cartel, or the Sicilian Mafia, dozens of lesser-known individuals belonging to the same criminal organization also often receive long prison sentences. Those who escaped prosecution or served their sentence may return to find the criminal enterprise to which they once belonged extinct due to a powerful tool in the law enforcement arsenal—the Enterprise Theory of Investigation (ETI).

The ETI has become the standard investigative model that the FBI employs in conducting investigations against major criminal organizations. The successful prosecutions of major crime bosses serve as direct testaments to the benefits of this model. Unlike traditional investigative theory, which relies on law enforcement's ability to react to a previously committed crime, the ETI encourages a proactive attack on the structure of the criminal enterprise. Rather than viewing criminal acts as isolated crimes, the ETI attempts to show that individuals commit crimes in furtherance of the criminal enterprise itself. In other words, individuals commit criminal acts solely to benefit their criminal enterprise. By applying the ETI with favorable state and federal legislation, law enforcement can target and dismantle entire criminal enterprises in one criminal indictment.

Applying the ETI

By restructuring both their investigative resources and theory, many law enforcement agencies can use this model. Initially, some police agencies may hold a skeptical view of the use of the ETI because

its application requires an increased time commitment, which may affect case-closure rates and also because they may perceive the ETI as more complex than traditional investigative models. However, the advantages of the ETI easily outweigh these presumed disadvantages, primarily because the ETI provides a highly effective method of targeting and dismantling criminal enterprises.

To recognize the value of the ETI, investigators must accept several main premises. First, while some major organized criminal groups commit crimes to support idealistic views, financial profit remains the underlying motive for most criminal enterprises.

Next, major organized criminal groups typically engage in a broad range of criminal activities to achieve this profit goal. While the nexus of these violations may be closely interrelated (e.g., drug trafficking and money laundering), major criminal enterprises historically rely on numerous criminal acts to support their existence and often divide the responsibility for committing these acts among their members and crews. The ETI capitalizes on this diversity by analyzing the enterprise's full range of criminal activities, determining which components allow the criminal enterprise to operate and exploiting identified vulnerable areas within each component. For instance, to accomplish their profit objectives, major drug trafficking organizations must establish four separate subsystems within their organization—narcotics transportation and distribution, financial, and communication. The ETI identifies and then targets each of these areas simultaneously, especially those components viewed as the most vulnerable. The more diverse the criminal enterprise, the more potential for exploitation due to the existence of these types of subsystems.

A final premise of the ETI maintains that major organized criminal groups have a pyramidal hierarchy structure where the lower levels, consisting of more people, conduct the majority of the enterprise's criminal activities. Therefore, working a case "up the chain" proves beneficial because it starts the investigation at the level where most investigative opportunities exist.

Special Agent McFeely serves in the FBI's Washington, DC, field office.

"By restructuring both their investigative resources and theory, many law enforcement agencies can use [the ETI] model."

Defining an Enterprise

What defines a criminal enterprise? Do two bank robbers committing serial robberies fall within the definition? How about employees of a government contractor engaged in systematic bid-rigging? Although these criminal groups might have a loose-knit organizational structure, application of the ETI probably would not prove beneficial in these instances.

The FBI defines a criminal organization as a group of individuals with an identified hierarchy engaged in significant criminal activity. These organizations often engage in a broad range of criminal activities and have extensive supporting networks. Generally, the ETI only proves effective when the organization engages in a myriad of criminal activities. In the case of the bank robbers, federal and state robbery laws sufficiently address this group's single-purpose criminal activity. However, if the bank robbers begin to diversify by stealing cars and guns to support their robberies, the ETI now offers advantages that traditional methods of investigation do not. The ETI supports the notion that the gang's new found diversity allows law enforcement more investigative opportunities by

exploiting the most vulnerable area of their criminal activities. For example, introducing an undercover officer into a close-knit gang to obtain their robbery preparations may be practical. However, if the gang advances to criminal violations that require assistance from someone outside the gang, a department could expand its investigative opportunities and use an undercover officer to provide stolen vehicles.

Most state and federal general conspiracy laws define a criminal conspiracy as two or more individuals. The federal Continuing Criminal Enterprise statute,[1] applicable to major drug conspiracies, requires that the individual charged led five or more individuals while the federal Racketeering Influenced Corrupt Organizations (RICO) statute requires only two or more individuals to comprise a criminal enterprise.[2] Law enforcement managers must decide which statutes to use when they form the investigative strategy to direct the evidence collection toward meeting the legal requirements of each statute. This type of advance decision making supports the proactive nature of the ETI.

Using the criminal statutes as guidance, the investigation should focus continually on an essential part of the indictment—proving who belongs to the criminal enterprise. Obviously, law enforcement can use traditional investigative techniques, such as physical surveillance, to show criminal associations. However, the act of showing criminal associations does not necessarily involve proactive evidence collection against the subjects and often uses historical information to prove this element.

Determining the Scope of the Enterprise's Criminal Activities

Once investigators confidently believe that an enterprise does exist, the next step involves determining the scope of its illicit activities. This step proves important because it will help define the investigative strategy.

> ***"...with the [ETI], the larger the enterprise...the more investigative opportunities it provides for law enforcement."***

Investigators always treasure any new intelligence regarding an enterprise's current activities; however, investigations can still progress with older information. For example, a review of past investigations, prosecutions, and criminal histories of suspected members, and even open-source information (e.g., newspaper accounts) can assist in this process. The task force concept allows instant multiagency searches of historical records and indices. In fact, during this stage, agencies can piece together information that they might have, but just could not link to the actions of a criminal enterprise.

While larger police agencies often use highly trained and specialized analytical support teams to assist with case analysis, those police agencies without this resource should not skip this important step. Investigators can create simple time lines that chart significant historical events based on previous intelligence. In doing so, they can help reveal patterns of criminal activity and possibly predict future trends.[3] The investigative strategy that managers develop should anticipate the steps needed to counter these future trends, which remains the essence of the proactive nature of the ETI.

While traditional investigative theory targets individual criminals, the ETI can show they commit seemingly isolated crimes to benefit an entire criminal enterprise. The selection of favorable legislation, from simple state conspiracy laws to the more complex federal racketeering laws, will round out the investigative strategy by focusing the prosecution not only on the individual committing a crime but the leaders who order or benefit from it.

Developing an Investigative Strategy

Both historical and real-time evaluation helps form the investigative strategy. Because investigators should base this strategy on perceived weaknesses within the enterprise, they must conduct a thorough evaluation of the enterprise's activities. The investigators should obtain enough information to analyze to gain a basic understanding of the extent of the enterprise's criminal activities. Investigators should examine the full range of these illicit

Showing criminal associations does not necessarily involve proactive evidence collection against the subjects and often uses historical information to prove this element. Consider the following successful examples that focus on the members of criminal enterprises:

- A recent FBI investigation initially used gang graffiti to not only determine membership in the gang (enterprise), but to show its area of influence. Investigators also can use gang colors, clothing, and hand signals in this manner.
- Agencies can use intercepted telephone conversations, call-detail records, and pen registers to show associations.
- Officers executing warrants or processing prisoners should not overlook the more mundane collection of documentary evidence that can prove useful in showing associations. Some examples could include pagers and cellular telephones with stored numbers, or address books or scraps of paper with names and telephone numbers. Standard post-seizure practice should involve electronically capturing this type of information for later link analysis.
- Officers should include accomplice information when compiling a subject's biographical file, such as other individuals arrested and the location of the subjects (i.e., whose house or car) when the arrest took place. This information proves valuable in showing past criminal relationships.

activities, separate them into components, and draw an investigative strategy that attacks each component separately, yet simultaneously.

For example, a large and sophisticated burglary ring must have some form of each of the following components in place: methods of theft, resale of the stolen goods, and concealment of their illicit proceeds. Police can use a surveillance team to try to catch the actual burglars and, at the same time, use undercover officers to pose as a "fence" against the ring's efforts to resell the stolen property. A financial investigator could track purchases and asset acquisition of each individual. As the case progresses, investigators can shift additional resources to the enterprise's most vulnerable areas. Because the ETI ultimately attempts to indict and convict all the members of an enterprise, especially within the leadership ranks, the investigative strategy needs to address how each investigative method will advance the investigation "up the chain." At this point, the use of innovative and more sophisticated investigative techniques becomes invaluable because proving a case against the leader of a major criminal organization typically is more difficult than convicting a "player" of the organization. For example, deferring prosecution of low-level burglars in favor of cooperation or a court-authorized wiretap of the ring leader's telephone might support a hierarchical attack on the enterprise.

Additionally, financial profit remains one of the main goals of most criminal enterprises. Virtually every major criminal organization uses a system to reward its members through monetary means. Oftentimes, successfully dismantling an organization relies solely on the ability of law enforcement to disrupt this financial component. Removal of a criminal enterprise's financial base usually disables the organization to a point where they cannot recover. This occurs because even the lowest members of the organization require prompt payment for their actions. Removing the ability of an enterprise to make payments generally takes away the incentive for those doing the work to continue. Although the enterprise can fill some positions of those incarcerated members through upward attrition, only a few trusted members of a criminal organization generally handle methods of dividing, shielding, and accounting for the profits. Successfully incarcerating those in such a position of trust can result in large voids within the criminal organization.

By creating chaos and uncertainty within the financial component of the enterprise, members quickly look elsewhere for "employment" and financial rewards.

Attacking the flow of money has become the norm in major federal organized crime and drug trafficking investigations. Strategic use of asset forfeiture and money laundering statutes removes not only the illegal proceeds (e.g., cars, houses, and jewelry), but, more important, it disables the systems that the enterprise has put into place to accomplish its profit goal. Some examples include fraudulent bank accounts used to shield illicit income and property used to facilitate the criminal activity, such as "legitimate" businesses.

The plan should remain aggressive, yet workable. For instance, case managers may not include targeting the head of the criminal enterprise in the initial plan, but the investigative strategy should define the steps on how to achieve this objective.

Investigators should interface with prosecutors as early as possible in the case. Because the investigative strategy essentially remains a start-to-finish blueprint for the case, investigators must know from the outset which elements of the criminal statutes they must prove and then tailor the investigative plan accordingly.

Finally, case managers should postpone any actions that might expose the scope of the investigation until completion of the covert phase. This remains important because opportunities to arrest subjects increase as the case proceeds, which may conflict with those departments that gauge their effectiveness on raw arrest data and, therefore, might not delay arresting individuals once sufficient evidence exists.

Using a Task Force

The use of a joint task force remains a necessity in the successful application of the ETI. Any law enforcement officer who ever served on a multiagency task force recognizes the strength that combined resources provide in achieving objectives. Immediate benefits include additional staff, access to more technical and investigative equipment (e.g., different sets of surveillance vehicles), and the pooling of financial resources for items, such as payment of informants and purchase of evidence. Another major advantage that directly supports the ETI model is that different police agencies bring the potential to expand jurisdiction and expertise into all of the areas that a criminal enterprise engages. For example, while virtually every state and local police agency has counterdrug enforcement as part of its mission, very few of these agencies employ a criminal tax investigator who specializes in tracking international money transfers. Thus, getting an Internal Revenue Service special agent involved in the investigation not only adds another individual to assist with general investigations, but adds an individual who can provide an area of expertise that the task force might otherwise lack.

> ***"The use of a joint task force remains a necessity in the successful application of the ETI."***

Many federal task forces employ a wide range of individuals, including nonsworn personnel, with specialized skills not usually found in the law enforcement realm. Departments can retain bank examiners, accountants, and securities experts as either consultants or as an actual member of the task force. Many federal agencies invest considerable effort in developing a class of nonsworn professionals, ranging from investigative assistants to more specialized positions that employ an expertise in areas not typically found in the realm of sworn personnel (e.g., link analysis, chart preparations, and legal research).

Because police agencies have differing missions and methods of measuring success, the most important part of the task force formation involves complete agreement by the participating agencies regarding the objectives and goals of the investigation and what rules the task force will follow. Additionally, the participating agencies should complete a memorandum of understanding that addresses questions, such as the following:

- Which agency will maintain responsibility for the overall investigation?

- Are the lead agency's rules acceptable to the other participating agencies?
- Will the case be prosecuted in the state or federal courts?
- Will each participating agency use their own forms or will the task force adopt one standard format for investigative reports?
- Who will maintain seized evidence?
- Will each agency agree to delay arrests and seizures if it may jeopardize the investigation?
- How much funding (including overtime) will each agency contribute to the investigation?
- Whose procurement rules will the task force follow to acquire equipment and supplies?
- Will each agency accept liability for the actions of their assigned personnel?
- Will the state investigators need to be deputized or vice versa?
- Will the agencies divide the forfeiture share equally, regardless of the level of participation (e.g., one part-time officer versus three full-time officers)?

Implementing an Attack

In this stage, task force members follow the previously developed investigative strategy and merge traditional methods of evidence collection with investigative methods developed specifically to attack the identified component of the criminal enterprise. This often involves the largest commitment of personnel, time, and resources. Task force supervisors should consider assignments depending on the outline of the investigative strategy and the areas within the enterprise that remain vulnerable for exploitation, along with the area of each officer's expertise and experience. Investigators should use both traditional and sophisticated investigative techniques to receive optimal results. However, regardless of the original plan, the task force must adapt and shift investigatory resources as the case develops. For example, if the task force obtains a wire tap order to penetrate a criminal enterprise's methods of communications, case managers must consider temporarily reassigning peronnel to meet the high resource requirements of operating wire taps.

Careful coordination with prosecutors as the case develops ensures that all members of the criminal enterprise receive indictments and that the enterprise's established criminal subsystems become permanently dismantled.

Conclusion

Oftentimes, larger criminal enterprises prove problematic for agencies to dissolve using traditional investigative methods. However, with the enterprise theory of investigation, the larger the enterprise and the more diverse its illegal activities, the more investigative opportunities it provides for law enforcement.

Because the use of conspiracy or criminal enterprise statutes form the baseline from which agencies

An Example of the Enterprise Theory of Investigation

In a city plagued with chronic drive-by shootings, traditional investigative methods may focus on each shooting as an isolated incident. However, a task force suspecting gang involvement can develop a time line that shows that each time a member of a street gang was incarcerated, an increase in shootings against rival gang members occurred. Using this analysis and adopting an enterprise investigative theory, the task force can gather "traditional" evidence against the individual shooters and focus on developing evidence that shows the shootings as more than just random acts. At trial, the prosecutors can use the investigative efforts to show that gang leaders ordered the shootings to defend a perceived gap in their turf as a result of the incarceration factor and, therefore, prosecute not only the shooters but the gang leaders as well.

develop their investigative strategies, the ETI requires that departments expand the traditional models of evidence collection. While these traditional models generally only attempt to identify individuals and the crimes they commit, the ETI requires that investigators broaden evidence collection to show that an individual conducted the criminal activity to benefit the enterprise as a whole. By using favorable statutes along with a carefully laid out, multipronged attack on each established component that a criminal enterprise uses to conduct its illegal business, investigators can expand criminal culpability for a single criminal act to all members of the enterprise, regardless of whether they actually committed the crime. ✦

Endnotes

[1] 18 U.S.C. § 1961 et. seq.

[2] 21 U.S.C. § 848.

[3] For additional information on the use of time lines in investigations, see Craig Meyer and Gary Morgan, "Investigative Uses of Computers: Analytical Time Lines," *FBI Law Enforcement Bulletin*, August 2000, 1-5.

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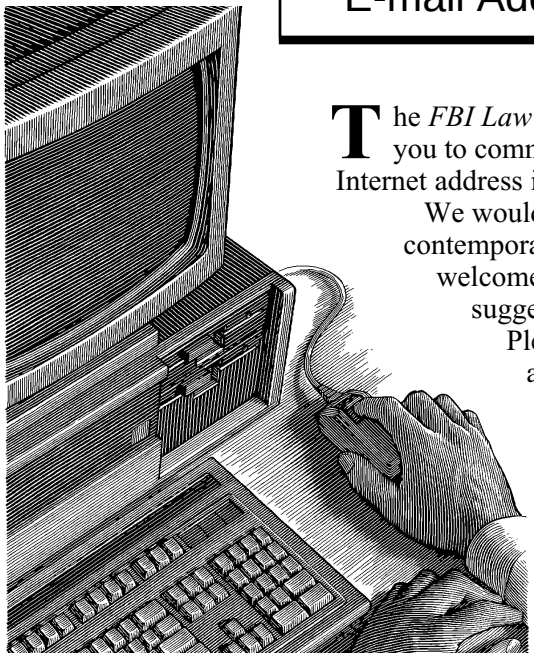

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Law Enforcement Physical Fitness Standards and Title VII

By MICHAEL E. BROOKS, J.D.

When deciding to establish physical fitness standards for potential or onboard law enforcement employees, law enforcement administrators must be cognizant of the requirements imposed by Title VII of the Civil Rights Act of 1964[1] and by the Civil Rights Act of 1991.[2] This federal legislation requires that all employers of more than 15 employees must refrain from policies and procedures that either expressly or effectively discriminate against specified categories of individuals except under limited circumstances.

Background

The Civil Rights Act of 1964 prohibits various forms of discrimination based on race, color, sex, national origin, or religion. Title VII of this act prohibits such discrimination in the workplace when the discrimination results in the loss of an employment benefit. Virtually all employment actions fall under the purview of Title VII. The U.S. Supreme Court has ruled that Title VII prohibits not only express discrimination (disparate treatment) but also prohibits neutral employment actions that have the effect of discriminating against a particular group protected by the act (disparate impact).[3] The Civil Rights Act

of 1991 established burdens of proof and other procedural requirements in litigating a Title VII action. As a result of this legislation, the only defense an employer has when a facially neutral employment standard effectively discriminates against a protected group is to prove that the standard is "job related for the position in question and consistent with business necessity."[4]

How do these laws apply in the area of physical fitness standards? They apply when a physical fitness standard limits the employment rights of a group protected by Title VII. Most notably, they apply when a particular physical fitness standard has a disparate impact on women when compared to how the same standard affects men. An ongoing case from Pennsylvania demonstrates the impact of these laws.

> ***"Virtually all employment actions fall under the purview of Title VII."***

Special Agent Brooks is a legal instructor at the FBI Academy.

Lanning v. Southeastern Pennsylvania Transportation Authority

In 1991, as a part of an effort to upgrade its 234-officer police force, the Southeastern Pennsylvania Transportation Authority (SEPTA), which operates a commuter rail system in Philadelphia and its suburbs, instituted a series of physical fitness requirements for both onboard and potential police officers. Among these was a requirement that applicants run 1.5 miles in 12 minutes. Failure to meet this standard disqualified an applicant from employment as a police officer. Prior to instituting this standard, SEPTA contracted with a noted exercise physiologist, Dr. Paul Davis, to develop a physical fitness test for its police officers. Dr. Davis conducted extensive studies to determine what physical abilities are required for a SEPTA police officer.[5] Dr. Davis determined that SEPTA officers often are called upon to run various distances in the performance of their duties. He further determined that a specific aerobic capacity was necessary for an officer to adequately perform the physical requirements of a SEPTA officer. After determining that this aerobic capacity would have a, "...draconian effect on women applicants," Dr. Davis decided that a slightly lower aerobic capacity would meet the goals of SEPTA in improving the physical abilities of its police officers, as well as their job performance. Dr. Davis advised SEPTA that applicants who could run 1.5 miles in 12 minutes would possess this slightly lower aerobic capacity.[6]

During the years 1991, 1993, and 1996, almost 60 percent of male applicants to the SEPTA police met the 1.5 miles in 12 minutes standard while an average of 12 percent of female applicants met the standard. SEPTA also began a physical fitness test of incumbent officers, which included an aerobic capacity test. Because of a grievance filed by their police union, SEPTA stopped disciplining officers who failed the test shortly after instituting it. Instead, the agency rewarded those officers who met the fitness standards.[7]

In 1997, five women who had been rejected by SEPTA because of their inability to meet the 1.5 miles run in 12 minutes standard filed a Title VII class action lawsuit on behalf of all women who applied to SEPTA in 1993 and 1996 and were rejected for this reason, as well as on behalf of all future women who would be similarly rejected. The U.S. Department of Justice, after investigating SEPTA's employment practices under Title VII, joined the lawsuit in opposition to the standard. In 1998, the U.S. District Court for the Eastern District of Pennsylvania entered judgment

for SEPTA after hearing evidence that included SEPTA studies showing that there was a statistically high correlation between high aerobic capacity and arrests and commendations among SEPTA officers and also that officers with the aerobic capacity approved by Dr. Davis were better able to perform physical tasks after running for 3 minutes than were officers without that aerobic capacity. The District Court ruled that SEPTA had established that the aerobic capacity standard was job related and consistent with business necessity and that there was a "manifest relationship of aerobic capacity to the critical and important duties of a SEPTA officer."[8] The women and the United States appealed to the U.S. Court of Appeals, Third Circuit.

The Third Circuit ruled that the lower federal court had erred because it did not find that the 1.5 miles run in 12 minutes standard was a "minimum qualification necessary for the successful performance of the job in question."[9] The Circuit Court reviewed U.S. Supreme Court case law and the Civil Rights Act of 1991 to conclude that Congress intended to reject the Supreme Court's interpretation of Title VII in a 1989 case when it ruled that in disparate impact cases an employer can prevail if the standard significantly serves a legitimate employment goal.[10] Congress, in passing the 1991 law, instead reinstated an earlier Supreme Court interpretation of Title VII that had held that in such circumstances the employer only prevails by showing that the standard is "consistent with business necessity" and "bears a manifest relationship to the employment in question."[11] The Third Circuit ruled that this means that any such standard must measure a minimally necessary skill to perform the job.

The Third Circuit also rejected an argument that the employer's burden to justify a standard that causes a disparate impact on a protected group is lessened when the job involves public safety.[12] The court reasoned that had Congress intended such a distinction for public safety jobs, it would have codified it with the 1991 act. The dissent noted that several other circuits had recognized that public safety is a consideration in determining what is a business necessity justifying a disparate impact.[13] However, with the exception of cases from the 8th, 10th, and 11th Circuits, all of theses cases predate the 1991 act, which contained the language relied upon by the majority of the Third Circuit in ruling that there can be no special consideration of the public safety nature of the job.

> ***"...the plaintiff must show that a facially neutral standard results in a 'significantly discriminatory pattern.'"***

SEPTA appealed the Third Circuit ruling to the U.S. Supreme Court, but that Court refused to hear the case.[14] The case was then sent back to the District Court for the purpose of determining if the 1.5 miles run in 12 minutes standard was minimally necessary to demonstrate the ability to perform the job of a SEPTA police officer.

On December 7, 2000, the District Court ruled that the SEPTA standard does measure a minimum characteristic (the specific aerobic capacity) necessary to perform the duties of a SEPTA police officer.[15] The District Court exhaustively reviewed all of the evidence presented during the original 1998 trial and concluded that, "meeting SEPTA's aerobic capacity standard is clearly the minimum required to perform the critical tasks of the job such as pursuits, officer backups, officer assists, and arrests. Any lesser requirement simply would not satisfy the minimum qualifications for the job of SEPTA transit police officer and would endanger the public and undermine deterrence of crime and apprehension of criminals."[16]

Discussion

The law enforcement administrator should remember that Title VII is statutory, not constitutional, law. The Supreme Court has ruled that for a governmental entity (the only type of entity restricted by the constitution) to discriminate under the equal protection clause of the Fourteenth Amendment, a plaintiff must prove an intent to discriminate.[17] Title VII contains no such requirement. As a federal statute,

it is subject to judicial interpretation and to revision by Congress. Of course, any revisions also are subject to judicial interpretation. Many of the Title VII standards never have been interpreted by the Supreme Court. Even when they have been defined, the federal circuit courts have differed on what these definitions mean. This presents administrators with the burden of insuring that judicial interpretations and legislative revisions are monitored continuously. What passes muster today may be in violation of the statute tomorrow. Also, what one court says is permissible may not be controlling law in another jurisdiction.

Physical fitness standards are only subject to scrutiny under Title VII when they either expressly discriminate against a Title VII protected group or, more commonly, when they have the effect of discriminating against such a protected group. Where there is no express discrimination, a plaintiff has the burden of proving to a court that the physical fitness standard has the effect of discriminating against a protected group. Once such a showing is made, the employer has the burden "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[18] As previously stated, this provision was added in the Civil Rights Act of 1991 after the Supreme Court had ruled that the plaintiff, not the employer, has the burden of showing that a challenged standard both has a disparate impact and that the standard does not "serve in a significant way, the legitimate employment goals of the employer." [19] Congress, therefore, not only shifted the burden of proving the necessity of such a standard to the employer, they arguably increased the standard by requiring "business necessity" instead of "significantly serving a legitimate employment goal." An employer could certainly argue that a requirement, although not absolutely required to meet a legitimate employment goal, still could significantly serve that employment goal. Congress has precluded that argument.

How does a plaintiff prove that a physical fitness standard has a disparate impact? The Supreme Court has ruled that the plaintiff must show that a facially neutral standard results in a "significantly discriminatory pattern."[20] The Equal Employment Opportunity Commission (EEOC) is a federal agency charged with promulgating federal regulations to implement Title VII and other federal antidiscrimination legislation. These regulations do not have the force of law and are not binding on federal courts interpreting federal legislation. However, courts will consider these guidelines in ruling on Title VII issues. The EEOC has provided that a selection procedure that results in a protected group's selection rate of less than 80 percent of the group with the greatest success will be considered to have resulted in a disparate impact.[21] While this is a significant issue in most Title VII litigations, it usually does not become an issue in challenges to physical fitness standards. In the *Lanning* case, for example, SEPTA conceded that the 1.5 miles run in 12 minutes standard had a disparate impact on women.[22] Commentators have concluded that most physical fitness tests legally will have a disparate impact on women due to the inherent physical differences between the sexes.[23]

Where a physical fitness standard has a disparate impact on women, the concern of the law enforcement administrator then becomes how to successfully justify the physical fitness standard under the statutory requirement. However, the Supreme Court has never ruled what "job related for the position in question and consistent with business necessity" means. As previously mentioned, the Third Circuit ruled in the *Lanning* case that this provision requires that an employer must show that the standard is a "minimum qualification necessary for the successful performance of the job in question." Other circuits have not been so restrictive. For example, the Eleventh Circuit has ruled that an employer meets the statutory standard of business

necessity by showing "...that the practice or action is necessary to meeting a goal that, as a matter of law, qualifies as an important business goal."[24] The EEOC has stated that a selection policy that has a discriminatory impact on members of a Title VII protected classification is inconsistent with EEOC guidelines unless the policy has been validated pursuant to the guidelines.[25] The guidelines then list three means to validate such a policy: criterion-related validity, content validity, and construct validity.[26] Each of these means of validation are defined in the guidelines.[27] All of these means of validation appear less restrictive than the Third Circuit standard expressed in *Lanning*.

Of particular importance to the law enforcement administrator attempting to justify a physical fitness requirement is whether the courts will consider the public safety nature of law enforcement work in establishing the business necessity of such a standard. While the Third Circuit in *Lanning* ruled that the public safety nature of a job will not change the Title VII requirement of business necessity, there is no reason to believe that public safety should not play a role in justifying a physical fitness standard as a business necessity. In the most recent *Lanning* District Court ruling, the court noted that SEPTA's studies had shown that SEPTA officers, who did not possess the aerobic capacity established by Dr. Davis for the applicants, had failed to make 470 arrests during the study period due to their inability to physically perform their job after running. The court noted the significant threat to public safety that resulted from these lost arrests in the transit system.[28] The court also noted numerous SEPTA studies that showed that individuals who could meet the aerobic standard could perform the specific job tasks of a transit police officer. These jobs included chasing criminal violators on foot, running to a request for officer backups and assists, and subduing subjects after running distances up to 3 blocks.[29] In its conclusions of law, the court held that these tasks are the job of a SEPTA transit officer and failure to be able to perform them compromises the safety of the officer, other officers, and the public at large. The court ruled that this establishes that the aerobic capacity is a minimum trait necessary to perform this job.[30]

> ***"Disparate treatment, like disparate impact, is only permissible under the business necessity justification."***

Regardless of what standard of business necessity is applied, the law enforcement administrator is going to be required to show at least a significant relationship between the physical fitness requirement and the responsibilities of members of their department. It is insufficient to simply claim that law enforcement is a physically demanding job and expect a court to uphold a physical standard that has a disparate impact on women. In *Lanning,* the SEPTA Police Department has been forced to conduct at least seven studies justifying the 1.5 miles in 12 minutes standard. These studies were all conducted by outside experts, including physicians, physiologists, and statisticians and used both SEPTA personnel and others as subjects.[31] The studies did not justify law enforcement physical requirements in general but, instead, only justified the SEPTA standard as it related to that one department. The latest District Court ruling noted repeatedly that the job requirements of a SEPTA officer were unique to that one department, even to the exclusion of other transit agencies. For example, the strongest justification of the SEPTA standard is the requirement that SEPTA officers be able to run from one station to another to back up another officer. The SEPTA studies noted that their officers are required to do this on a monthly basis.[32] Unless another agency can produce similar statistical evidence, the likelihood of justifying a similar physical standard under any business necessity requirement remains highly unlikely.

Even if an agency successfully justifies a preemployment physical standard under the business necessity requirement, what is the effect of not requiring onboard personnel to meet the same standard? The Third Circuit in the *Lanning* case noted that SEPTA mistakenly had hired a female officer in 1991 who failed to meet the 1.5 miles in 12

minutes standard. This officer later received several awards, was nominated for "Officer of the Year," and was selected as a defensive tactics instructor. The court insinuated that it found it difficult to understand how the 1.5 miles in 12 minutes standard is justified as a business necessity if this officer is not only on the force but performing at a high level.[33] The District Court, in its most recent ruling, rejected the plaintiff's argument in this area by simply noting that SEPTA is unable to discipline onboard personnel who fail to meet the standard due to its collective bargaining agreement.[34] It remains to be seen if the Third Circuit will accept this rationale under its strict business necessity standard.

A law enforcement administrator may decide to avoid these problems by avoiding a disparate impact on women. This can be accomplished by simply setting physical standards so low that few will fail. However, such a course will not accomplish much, if anything, for an administrator trying to improve an organization. Another course is to set different standards for men and women in recognition of the differences in physiology between the sexes. However, such an approach raises another federal statutory issue. When Congress enacted the Civil Rights Act of 1991, it included a provision stating, "It shall be an unlawful employment practice...in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, [or] use different cutoff scores,...on the basis of race, color, religion, sex, or national origin."[35] Here, the challenge would come from a male who could not meet the male standard but could meet the female standard. Such an action amounts to express disparate treatment of the male. Disparate treatment, like disparate impact, is only permissible under the business necessity justification.[36] The administrator who uses different physical selection standards for female applicants would, therefore, have to show what business necessity justifies such a practice.

Conclusion

The law enforcement administrator who chooses to use physical fitness standards must be prepared to negotiate a veritable minefield of legal issues when those standards have the effect of discriminating against a Title VII protected class, such as women. As has been demonstrated, even the most well-documented justifications may fail to meet the federal statutory requirements to which such standards are subject. ✦

Endnotes

[1] Title 42, USC § 703(a)(1).

[2] Public Law 102-166, §§ 3(1), (3), and (4).

[3] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[4] Title 42, USC § 2000e-2(k)(1)(A)(i).

[5] These studies are detailed in the opinion of *Lanning v. Southeastern Pennsylvania Transportation Authority* 1998 WL 341605 (E.D.Pa., 1998).

[6] From the facts discussion *Lanning v. Southeastern Pennsylvania Transportation Authority* 181 F.3d 478, 481-82 (3rd Cir., 1999)

[7] Id. at 482-83.

[8] Id. at 484.

[9] Id. at 491.

[10] *Wards Cove Packing Co. v. Antonio* 490 U.S. 642 (1989).

[11] *Griggs v. Duke Power Co.* at 431-33.

[12] *Lanning v. Southeastern Pennsylvania Transportation Authority* 181 F.3d 478, 490-91 footnote 16 (3rd Cir., 1999).

[13] Id., Justice Weis dissenting, at 499-500. Among these circuits are the 9th (*Harris v. Pan American World Airways* 649 F.2d 670 (9th Cir., 1980)); the 5th (*Davis v. City of Dallas* 777 F.2d 205 (5th Cir., 1985)); the 6th (*Zamlen v. City of Cleveland* 906 F.2d 209 (6th Cir., 1990); the 11th (*Fitzpatrick v. City of Atlanta* 2 F.3d 1112 (11th Cir., 1993)); the 10th (*York v. American Telephone and Telegraph* 95 F.3d 948 (10th Cir., 1996) and the 8th (*Smith v. City of Des Moines* 99 F.3d 1466 (8th Cir., 1996)).

[14] *Southeastern Pennsylvania Transportation Authority v. Lanning* 528 U.S. 1131 (2000).

[15] *Lanning v. Southeastern Pennsylvania Transportation Authority* 2000 W.L. 1790125 (E.D. Pa., 2000).

[16] Id. at 25.

[17] *Washington v. Davis* 426 U.S. 229, 238-39 (1976). Where a literacy test for police was challenged on equal protection grounds because it had the effect of discriminating against minority applicants.

[18] Title 42, USC § 2000e-2 (k)(1)(A)(i).

[19] *Wards Cove Packing v. Atonio* 490 U.S. 642, 659 (1989).

[20] *Dothard v. Rawlinson* 433 U.S. 321, 329 (1977).

[21] 29 Code of Federal Regulations Section 1607.4 (D) (2000). For example, if 90 percent of men meet a physical fitness requirement, at least 72 percent of women (80 percent of 90) must meet the same requirement or a disparate impact is presumed.

[22] *Lanning v. Southeastern Pennsylvania Transportation Authority* 181 F.3d 478, 485 (3rd Cir., 1999).

[23] See David E. Hollar, *Physical Ability Tests and Title VII*, 67 University of Chicago Law Review 777, 784 (Summer, 2000).

[24] *Fitzpatrick v. City of Atlanta* 2 F.3d 1112, 1118 (11th Cir., 1993). In this case, African-American firefighters challenged a no-beard rule as discriminatory under Title VII because it had a disparate impact on them due to a higher incidence of a physical condition among African-American men that restricts their ability to shave. The city successfully countered by presenting proof that firefighters must be clean shaven to successfully use a breathing device when fighting fires.

[25] 29 CFR § 1607.3 (2000).

[26] 29 CFR § 1607.5 (2000).

[27] 29 CFR § 1607.16 (2000). Content validity requires data showing that the content of a selection procedure is representative of important aspects of performance on the job. Construct validity requires data showing that the selection procedure measures the degree to which candidates have identifiable characteristics that have been determined to be important for successful job performance. Criterion-related validity requires data showing that the selection procedure is predictive or significantly correlated with important elements of work behavior.

[28] *Lanning v. Southeastern Pennsylvania Transportation Authority* 2000 WL 1790125 at pg. 10.

[29] Id. at 11-16.

[30] Id. at 24-25.

[31] Id. at 2-11.

[32] Id. at 24.

[33] *Lanning v. Southeastern Pennsylvania Transportation Authority* 181 F.3d 478, 483 (3rd Cir. 1999).

[34] *Lanning v. Southeastern Pennsylvania Transportation Authority* 2000 WL 1790125 at 26.

[35] Title 42, USC § 2000e-2(l).

[36] 29 CFR § 1607.11 (2000).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

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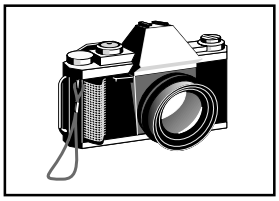

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The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize their exemplary service to the law enforcement profession.

Officer Williams

While on patrol in January 1999, Officer Lou L. Williams of the Flagler Beach, Florida, Police Department received a call to respond to two skydivers in the ocean. When she arrived on the scene, Officer Williams removed her duty gear and entered the frigid water. Risking hyperthermia, Officer Williams swam through 4- to 6-foot waves and strong riptides to reach the skydivers. After bringing one skydiver to shore, Officer Williams returned to the water to rescue the remaining skydiver who was tangled in his parachute and drowning. Eventually, Officer Williams was able to reach the second skydiver, cut the parachute away from him, and safely return him to the shoreline. Officer Williams' quick action and continued efforts saved the lives of the two skydivers.

Agent Martines

While off duty, Agent Rachael Martines of the state of Nevada's Gaming Control Board, came across a traffic accident where the vehicle rolled over, and its occupants were ejected. One of the vehicle's occupants, an 18-month-old female, had eviscerated organs and had stopped breathing. Agent Martines covered the exposed organs and immediately began CPR. She restored the child's breathing and cared for her until medical assistance arrived. Thanks to Agent Martines' valiant efforts, the child survived with no permanent injuries.

Officer Smith

On the evening of February 2, 1999, off-duty Officer Howard Smith of the Cheyenne, Wyoming, Police Department answered the door at his residence to find several hysterical young females yelling that their house was on fire and that their grandmother and younger sister were still inside the residence. Without hesitation, Officer Smith ran to the dwelling and entered the smoke-filled house to locate the occupants. Officer Smith escorted the grandmother and carried the young child from the residence to safety. Although Officer Smith himself was treated for smoke inhalation, his selfless actions prevented more serious or even life-threatening injuries to the grandmother and young child.

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