

THE REVIEW OF
**SECURITIES & COMMODITIES
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 54 No. 20 November 24, 2021

CRIMINAL PROCEEDS: WHEN DOES THE “TAINT” EXPIRE?

The authors begin by giving an overview of the elements of criminal money laundering under U.S. law and consider when a person is deemed to have knowledge that a transaction involves the proceeds of crime. They then suggest criteria to apply in determining whether assets remain tainted as the connection with criminal activity becomes more attenuated.

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Financial services regulators and law enforcement authorities around the world continue to focus on preventing the movement of criminal assets throughout the global financial system. Provisions of the US Anti-Money Laundering Act of 2020 designed to strengthen the US regulatory anti-money laundering framework will result in increased scrutiny on the assessment of customer risk by US financial institutions.

One of the more difficult tasks for financial institutions (and in many cases non-financial businesses) in assessing customer risk is the evaluation of a customer whose assets may constitute the proceeds of crime based on the customer’s relationship or affiliation with a bad actor, even where the relationship is indirect or highly attenuated either through multiple transactions or the passage of time. Dealing in assets that constitute the proceeds of unlawful activities can expose even *bona fide* recipients to criminal liability under US money laundering statutes, and, in the case of financial institutions, exposure under the US Bank Secrecy Act for failure to maintain an effective anti-money laundering program. A question that financial institutions and non-financial businesses often face is:

“How, if ever, do criminal proceeds lose their “taint?” In other words, do criminal proceeds obtained by Person A in Year 1 remain criminal proceeds even when, after multiple intermediate transactions, they pass to Person X in Year 10? The relevant statutes, case law, and regulatory guidance do not provide a clear answer. This article attempts to fill this gap by providing a framework for analyzing this difficult question.

THE ELEMENTS OF CRIMINAL MONEY LAUNDERING UNDER U.S. LAW

The basic elements of a criminal money laundering violation under 18 U.S.C. 1956 are:

1. the defendant must conduct a financial transaction;
2. the financial transaction must involve the proceeds of a specified unlawful activity;
3. the defendant must have knowledge that the financial transaction involved the proceeds of unlawful activity; and

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