

Venable LLP

National Retail Federation Generals Counsel Forum

July 15, 2010

FCPA OFAC & IATs

FCPA & OFAC: What & Why?

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- Cross Border Financial Misfeasance
- Two Statutes that can ruin a company's reputation
- General Counsel's Role:
 - Establishing and selling policy
 - Overseeing internal controls to prevent violations
 - Mitigating and choosing risk, and
 - Limiting impact of violations

FCPA & OFAC: Risk Based Solutions

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- Both Statutes Require Risk Based Solutions
- There are almost no safe harbors
- “Unfortunately, people define risk as something you avoid rather than something you take.” Anne Mulcahy, McKinsey Quarterly, March, 2010
- Objective is to give businesses a measured way to take risks

FCPA & OFAC: Venable's Background

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- Risk is an integral part of business. Profit center, not a cost center
- Venable views several laws together:
 - Office of Foreign Assets Control (“OFAC”)
 - Foreign Corrupt Practices Act (“FCPA”)
 - Anti-Money Laundering (“AML”)(Tax)
 - Export Controls (Commerce & State)
 - Anti-boycott
 - Foreign Agents Registration Act (“FARA”)
- Over 20 Attorneys in this field

Foreign Corrupt Practices Act

A Brief History

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- **Product of Watergate**
 - Investigation revealed payments to foreign officials to obtain/retain business
 - Books and record keeping requirement
 - Internal procedures requirement evolved over time
- **Civil and criminal penalties apply**
 - Civil: \$10,000 for company, \$100,000 for individual.
 - Criminal:
 - \$100,000 plus 5 years for individual.
 - \$2 million for company

FCPA: Evolution of International Regime

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- U.S. alone for a number of years.
 - Legal in FRG to deduct foreign bribes from corporate income tax
- Development of Multilateral Agreements
 - Organization for International Cooperation and Development (OECD)
 - Organization of American States
 - United Nations

FCPA/OECD

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- **OECD Anti-Corruption Convention (1999)**
 - **Leading instrument**
 - Increasing number of countries signing on every year (38 so far)
 - Requires signatory countries to
 - Enact conforming laws
 - Allow compliance inspection
 - **Cautions**
 - Signatory country laws unique
 - Multiple countries' laws may apply

UK Bribery Act

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- Effective 2010
- Not limited to “foreign officials”
- Applies to both offering or receiving a bribe
- Corporate offense for failure to prevent bribe
- No facilitation payment exception
- Jurisdiction over all companies doing any business in UK
- Criminal enforcement only
- Affirmative defense that company had adequate compliance program
- Unlimited penalties

FCPA: To Whom It Applies

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- All U.S. Citizens, wherever located.
 - Includes real persons and fictitious entities
 - Overseas subs not included if no U.S. control
- Anyone in the U.S.
- Permanent residents of the U.S.
- Note on U.S. companies:
 - Applies to all officers, directors, employees and agents

FCPA: Actions to Which Applies

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- Any payment, offer or promise to pay, or gift
- To a foreign official, political party, or candidate for public office
- For the purpose of
 - Obtaining or retaining business
 - Securing an improper advantage

FCPA: Red Flags

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- U.S. Company may not ignore actions of
 - Offshore employees
 - Agents, wherever located.
- Commissions greater than industry norm (over 10% is suspect)
- Payments to third countries without reason
- Unnecessary or unusual middle men
- “Special” Invoices
- Charitable contributions

FCPA: Due Diligence

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- Establish corporate compliance policy
- Establish internal controls
 - Compliance Officer
 - Two signature rule
 - Due diligence check list
 - Assess risk of doing business in each country
 - Check for status under OECD anti-bribery convention
 - Transparency International
 - U.S. Embassy
 - Assess risk of line of business
 - Match degree of due diligence to risk
 - Engage Internal Audit

FCPA: Affirmative Assent

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- **U.S. & Overseas Employees**
 - Annual Training
 - Sign training certificate
- **Agents**
 - Affirmative obligation by contract to comply with anti-bribery laws.
 - Consider annual certification
- **Audit Training, Payments, Invoices**

FCPA: Employee Responsibilities

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- Understand and fulfill responsibilities
 - Complete regular training
 - Willful blindness = liability
 - Conduct appropriate due diligence on agent(s)
 - Use standard form contract
 - Know “red flags”
- If in doubt, ask company management.
- Keep good records.

FCPA Enforcement: Focus on Individuals

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2009, 40 individuals charged with
FCPA crimes. 2010, 23 charged
through Q1, 2010

140 active investigations in 2009

Let's look at a few of these cases.

Gerald and Patricia Green

*Facing a maximum penalty of 10 years in prison
for FCPA violations*



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Former Congressman William Jefferson

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Sentenced to 13 years imprisonment



Jeffrey Tesler

Charged with crimes that could lead to a prison sentence of 55 years, fines and forfeiture of millions of dollars.



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Jack Stanley

Faces a possible sentence of seven years in prison

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Horst Vigener & Andreas Kley

Sentenced to 87 months in prison and \$15,000 Fines

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Foreign Corruption: How Does it work?

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H-P

- Russia, Germany, the US and too much money.
- German auditor finds €22 million paid between 2004-06 to a small software company in Leipzig for services performed in Russia.
- “It [payment] didn’t make sense,” to make such big payments to accounts controlled by small businessmen. But “I assumed the deal was OK because senior officials also signed off on the paperwork.” Junior employee at H-P WSJ, April 16, 2010, B1 & B5.

OFAC: Office of Foreign Assets Control

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- Part of the Office of Intelligence and Terrorism Finance, U.S. Treasury:
 - Director Appointed by Secretary
 - Reports to Undersecretary for Intelligence and Terrorism Finance
- “Economic Warriors” of the U.S.

OFAC's Mission

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- Enforce economic sanctions programs imposed by the President or Congress against
 - Countries (Iran, Sudan, Cuba, N. Korea)
 - Foreign Groups or Persons
 - Terrorist Organizations & Terrorists
 - Political Parties
 - Drug Kingpins & Drug Traffickers
- Which or Who “pose a threat to the National Security of the United States”

OFAC Compliance: Coverage

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- All U.S. Persons, wherever located:
 - Legal Entities
 - U.S. Government and Government sponsored enterprises.
 - U.S. Company, Partnership, wherever operating
 - Non-U.S. Subsidiaries of U.S. companies as to Cuba and North Korea only
 - U.S. Citizens, wherever located
 - U.S. Permanent residents, wherever located
 - Anyone in the U.S.
- Property in U.S. of Anyone on “List”

OFAC “Programs”

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- Multiple Sanctions Programs
 - 14 Federal Statutes
 - Each Program Unique
 - Block or Seize (Cuba)
 - Reject (Iran)
 - Complete v. partial (Cuba v. Myanmar)
- Five Categories
 - Country Programs (12)
 - Anti-Terrorism Sanctions (4)
 - Counter Narcotics Trafficking (2)
 - Non-proliferation (2)
 - Diamond Trading Sanctions

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OFAC: Private Sector Responsibilities

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- Private Sector as Government Agent
- SDN List
 - “Specially Designated Nationals List”
 - Frequent Amendments (Over 150 in 2008)
- SDN List only a start
- Civil and Criminal Fines, Jail Terms
 - Greater of \$250,000 or 2X transaction amount
- Publicity and related crimes

Application to Commercial Companies

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- “Property or Interest in Property”
 - Could not be defined more broadly.
 - Direct or indirect
- Responsibility for compliance may not be delegated
 - Reliance on lenders, suppliers, *etc.*, is not protection.
 - Down (and Up) stream due diligence required
 - Wire transfer example
 - Reason for transfer
 - Parties interested in transfer: Originator, originating FI, intermediary FIs, receiving FI, beneficiary.

OFAC: Case Study

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- **Varel Holdings, Inc. Settles Cuban Assets Control Regulations Allegations: Varel Holdings, Inc., Dallas, Texas (“Varel”),**
- \$110,000.00 to settle allegations of violations of the Cuban Assets Control Regulations between June 2005 and June 2006.
- Foreign subsidiary of Varel made eleven unlicensed exports of goods in which Cuba or Cuban nationals had an interest.
- Varel voluntarily disclosed this matter to OFAC.

OFAC: Case Study

Varel Holdings

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- Factors as to Violator: Willfulness (blindness), Recklessness, Concealment, Pattern of Conduct, Prior notice, Management Involvement, harm to sanctions program objectives, purpose of transaction, commercial sophistication of violator, compliance history, strength of OFAC compliance program, post-violation activities.
- Factors as to Sanctions Programs: Future Compliance/Deterrence Effect.
- Penalty Options: Cautionary Letter, Finding of a violation, Civil money penalty, Referral for criminal prosecution.
- Recent examples: Lloyds TSB Bank (\$217MM); Credit Suisse (\$536MM) Plus compliance plans

OFAC: Compliance Issues

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- Identify every supplier, counterparty, customer, *etc.*
- Design and implement automated screening procedures pre-transaction
- Routine batch processing for existing accounts
- Procedures to govern checking, “hit” resolution, compliance structure, governance issues through senior management
- Use Internal Audit to check screening procedures, governance procedures

OFAC & IATs

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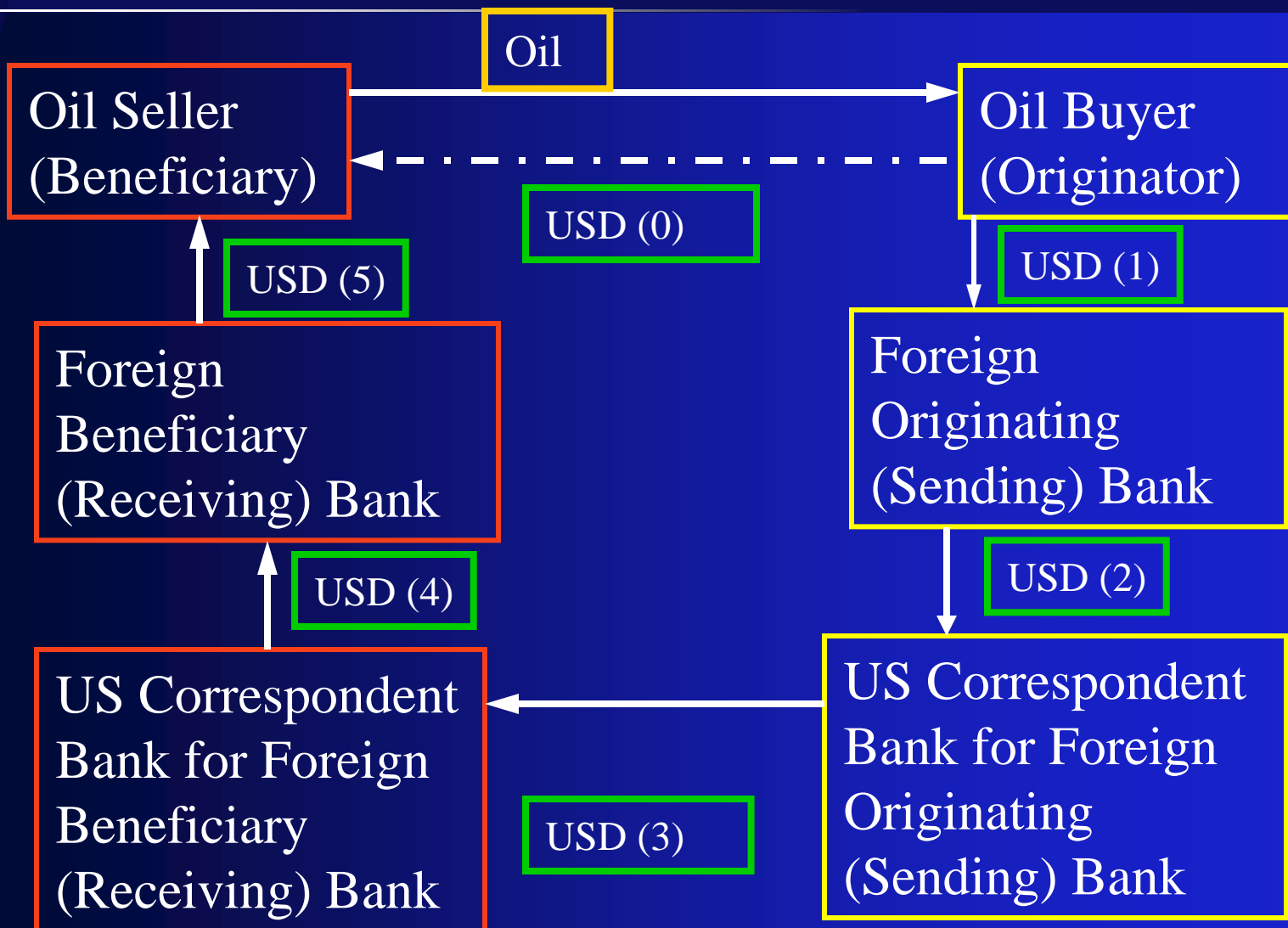
- International ACH Transaction (debit or credit)
- “Travel Rule” applied to ACH payments
- NACHA rule, not a statutory requirement
- BSA requirement imposed by OFAC
- Obligation apart from OFAC checking, really an AML Obligation

Travel Rule

EFT: Oil Sale Example

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OFAC & IATs: ACH Difference

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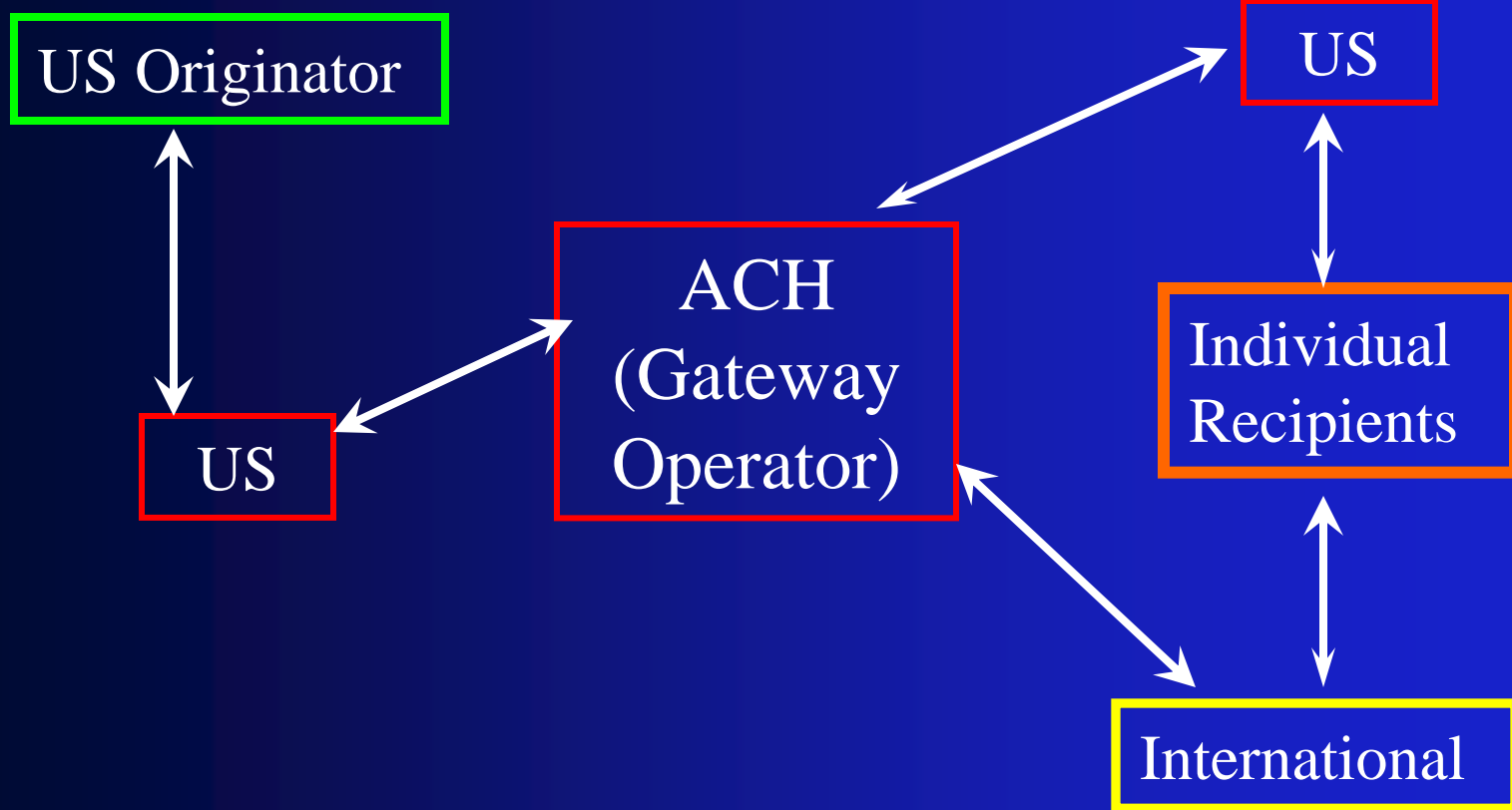
- **Batched Files (Domestic):**
 - Neither ODFI nor RDFI has obligation to check for OFAC issues
 - Responsibility is on the ODFI's and RDFI's customers
- **Batched Files (International)**
 - In bound: RDFI cannot rely on international customer, so RDFI is responsible
 - Out bound: ODFI cannot rely on international RDFI, so must look to Originator

OFAC & IATs

Reason for the “Travel Rule”

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OFAC: IAT Compliance

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- **Originator of IAT:**
- Must now supply same information as needed for international funds (wire) transfer
- **Seven mandatory addenda records are part of the IAT:**
 - 1st Addenda Record: Receiver of Transaction, Amount of Payment.
 - 2nd & 3rd Addenda Records: Key Information Related to Originator
 - 4th Addenda Record: ODFI Information
 - 5th Addenda Record: RDFI Information
 - 6th & 7th Addenda Records: Key Information Related to Receiver
- **Receiver of IAT:**
 - Receiving Depository Financial Institution Responsible for OFAC screening
 - As Entity Accepting the Debit or Credit, Either is or is not an SDN

OFAC: Compliance Implications

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- Greater Board Attention
- Designated Compliance Officer
- Greater Attention Pre-Transaction
- Regular Screening of Existing Accounts
- Routine Procedures for Screening all Transactions, Investors, Counterparties
- Swift, Accurate Reporting to OFAC
- Lack of Electronic Systems at Company's Peril

Related Law: Antiboycott

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• Antiboycott law

- U.S. persons must report any request to abide by Arab boycott of Israel
- Report on IRS or Commerce form
 - IRS Form 5713
 - BIS Form 621P

• Questions? Office of General Counsel, U.S. Treasury & Department of Commerce, Office of Antiboycott Compliance.

Related Law: Money Laundering & Terrorist Finance

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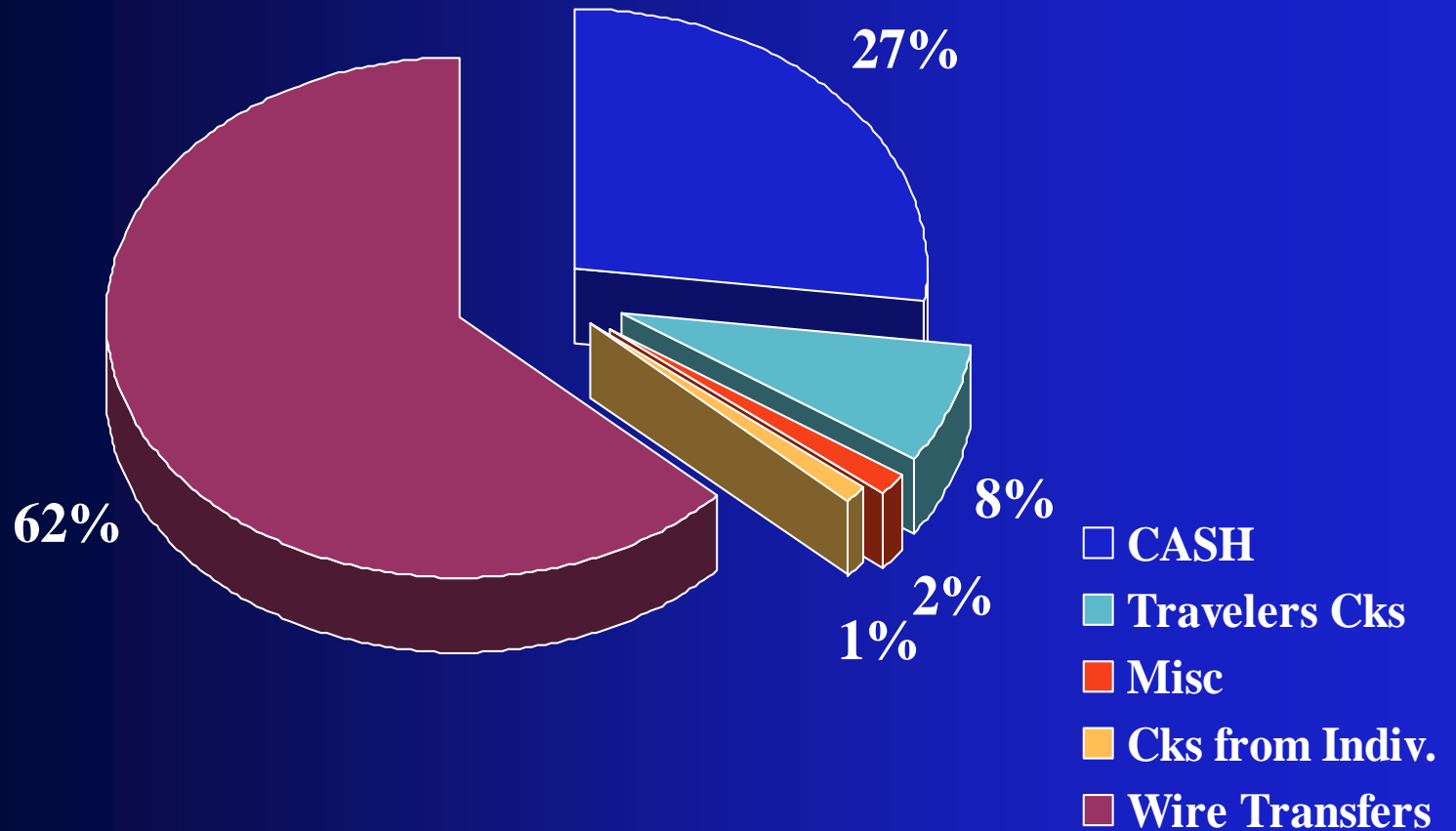
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9/11 Hijackers:
Needle in a Needle Stack

AA FL. #11 – DEPOSITS \$182,905.66

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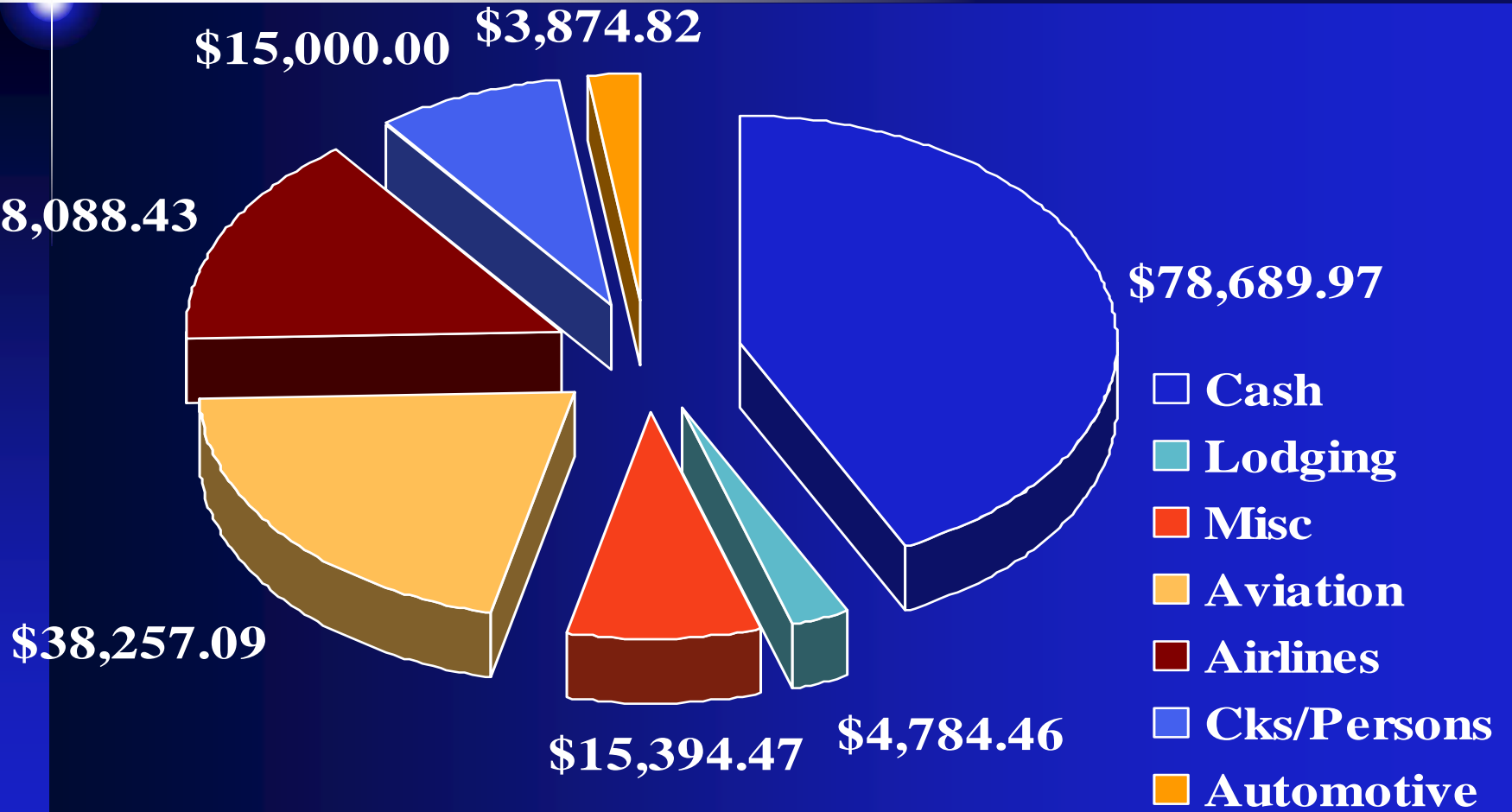
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Characteristics of Hijacker's Accounts: Plain Vanilla

Totals for Other Selected Attacks

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- **KENYA & TANZANIA (1998)**
 - < \$50,000
- **USS *COLE* (2000)**
 - < \$10,000
- **BALI (2002)**
 - < \$50,000
- **JAKARTA (2003)**
 - ~ \$30,000
- **ISTANBUL (2003)**
 - < \$40,000
- **MADRID (2004)**
 - ~ \$10,000
- **London (2005)**
 - ~ \$5,000

Venable LLP

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