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Mail and Wire Fraud: A Brief Overview of Federal Criminal Law

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SUMMARY

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Mail and Wire Fraud: A Brief Overview of Federal Criminal Law

The mail and wire fraud statutes are exceptionally broad. Their scope has occasionally given the courts pause. Nevertheless, prosecutions in their name have brought to an end schemes that have bilked victims out of millions, and sometimes billions, of dollars. The statutes proscribe (1) causing the use of the mail or wire communications, including email; (2) in conjunction with a scheme to intentionally defraud another of money or property; (3) by means of a material deception. The offenses, along with attempts or conspiracies to commit them, carry a term of imprisonment of up to 30 years in some cases, followed by a term of supervised release. Offenders also face the prospect of fines, orders to make restitution, and forfeiture of their property.

The mail and wire fraud statutes overlap with a surprising number of other federal criminal statutes. Conduct that supports a prosecution under the mail or wire fraud statutes will often support prosecution under one or more other criminal provision(s). These companion offenses include (1) those that use mail or wire fraud as an element of a separate offense, like racketeering or money laundering; (2) those that condemn fraud on some jurisdictional basis other than use of the mail or wire communications, like those that outlaw defrauding the federal government or federally insured banks; and (3) those that proscribe other deprivations of honest services (i.e., bribery and kickbacks), like the statutes that ban bribery of federal officials or in connection with federal programs.

Among the crimes for which mail or wire fraud may serve as an element, RICO (Racketeer Influenced and Corrupt Organizations Act) outlaws employing the patterned commission of predicate offenses to conduct the affairs of an enterprise that impacts commerce. Money laundering consists of transactions involving the proceeds of a predicate offense in order to launder them or to promote further predicate offenses.

The statutes that prohibit fraud in some form or another are the most diverse of the mail and wire fraud companions. Congress modeled some after the mail and wire fraud statutes, incorporating elements of a scheme to defraud or obtain property by false pretenses into statutes that outlaw bank fraud, health care fraud, securities fraud, and foreign labor contracting fraud. Congress designed others to protect the public fisc by proscribing false claims against the United States, conspiracies to defraud the United States by obstructing its functions, and false statements in matters within the jurisdiction of the United States and its departments and agencies.

Federal bribery and kickback statutes populate the third class of wire and mail fraud companions. One provision bans offering or accepting a thing of value in exchange for the performance or forbearance of a federal official act. Another condemns bribery of faithless agents in connection with federally funded programs and activities. A third, the Hobbs Act, outlaws bribery as a form of extortion under the color of official right.

The fines, prison sentences, and other consequences that follow conviction for wire and mail fraud companions vary considerably, with fines from not more than $25,000 to not more than $2 million and prison terms from not more than five years to life.

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Introduction[1]

Some time ago, a federal prosecutor referred to the mail and wire fraud statutes as "our Stradivarius, our Colt 45, our Louisville Slugger … and our true love."[2] Not everyone shared the prosecutor's delight. Commentators have argued that the statutes "have long provided prosecutors with a means by which to salvage a modest, but dubious, victory from investigations that essentially proved unfruitful."[3] Federal judges have also expressed concern from time to time, observing that the "mail and wire fraud statutes have 'been invoked to impose criminal penalties upon a staggeringly broad swath of behavior,' creating uncertainty in business negotiations and challenges to due process and federalism."[4] Nevertheless, mail and wire fraud prosecutions have brought to an end schemes that bilked victims of millions, and sometimes billions, of dollars.[5]

The federal mail and wire fraud statutes outlaw schemes to defraud that involve the use of mail or wire communications.[6] Both condemn fraudulent conduct that may also come within the reach of other federal criminal statutes.[7] Both may serve as racketeering and money laundering predicate offenses.[8] Both are punishable by imprisonment for not more than 20 years; for not more than 30 years, if the victim is a financial institution or the offense is committed in the context of major disaster or emergency.[9] Both entitle victims to restitution.[10] Both may result in the forfeiture of property.[11]

Background

The first of the two, the mail fraud statute, emerged in the late 19th century as a means of preventing "city slickers" from using the mail to cheat guileless "country folks."[12] But for penalty

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[1] The report is available as CRS Report R41931, *Mail and Wire Fraud: An Abridged Overview of Federal Criminal Law*, without the footnotes and citations to authority and attribution for quotations found here.

[2] Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980) (quoted in United States v. Weimert, 819 F.3d 351, 356 (7th Cir. 2016)).

[3] John C. Coffee, Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, in WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 9.05, at 9-73 (1990) (also quoted in *Weimert*, 819 F.3d at 356).

[4] Weimert, 819 F.3d at 356 (quoting Justice Scalia's dissent from the denial of certiorari in Sorich v. United States, 555 U.S. 1204, 1205 (2009)).

[5] *See, e.g.*, United State Attorney's Office, Southern District of New York, *United States V. Bernard L. Madoff And Related Cases*, https://www.justice.gov/usao-sdny/programs/victim-witness-services/united-states-v-bernard-l-madoff-and-related-cases; United State Attorney's Office, Middle District of Florida, *Jacksonville Man Convicted Of $5 Million Conspiracy And Wire Fraud*, https://www.justice.gov/usao-mdfl/pr/jacksonville-man-convicted-5-million-conspiracy-and-wire-fraud; United States Attorney's Office, Middle District of Georgia, *National Health Care Fraud Takedown Results in Charges Against 601 Individuals Responsible For Over $2 Billion In Fraud Losses*, https://www.justice.gov/usao-mdga/pr/national-health-care-fraud-takedown-results-charges-against-601-individuals-responsible.

[6] 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud).

[7] *E.g.*, 18 U.S.C. §§ 1344 (bank fraud), 1347 (health care fraud).

[8] *Id.* §§ 1961, 1956(c)(7)(A).

[9] *Id.* §§ 1341, 1343.

[10] *Id.* § 3663A(c)(1)(A)(ii).

[11] *Id.* §§ 981(a)(1)(C), 982(a)(1).

[12] The prohibition was thought necessary "to prevent the frauds which are mostly gotten up in the large cities ... by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country," McNally v. United States, 483 U.S. 350, 356 (1987), quoting, 43 *Cong. Globe* 35 (1870)(remarks of

increases and amendments calculated to confirm its breadth, the prohibition has come down to us essentially unchanged.[13] Speaking in 1987, the Supreme Court noted that "the last substantive amendment to the statute ... was the codification of the holding of *Durland* ... in 1909."[14] Congress did amend it thereafter to confirm that the mail fraud statute and the wire fraud statute reached schemes to defraud another of the right to honest services[15] and to encompass the use of commercial postal carriers.[16]

The wire fraud statute is of more recent vintage. Enacted as part of the Communications Act Amendments of 1952,[17] it was always intended to mirror the provisions of the mail fraud statute.[18] Since its inception, changes in the mail fraud statute have come with corresponding changes in the wire fraud statute in most instances.[19]

Elements

The mail and wire fraud statutes are essentially the same, except for the medium associated with the offense—the mail in the case of mail fraud and wire communication in the case of wire fraud. As a consequence, the interpretation of one is ordinarily considered to apply to the other.[20] In construction of the terms within the two, the courts will frequently abbreviate or adjust their

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[13] Act of June 8, 1872, ch. 335, § 302, 17 Stat. 323 (1872): "That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months.... "

[14] Speaking of *Durland v. United States*, 161 U.S. 306 (1896) (rejecting the argument that the statute was limited to the common law crime of false pretenses). McNally v. United States, 483 U.S. at 357 n.6. The penalty for general violations remained at imprisonment not more than 18 months until the 1909 criminal code revision, when it was increased to imprisonment for not more than five years, Act of March 4, 1909, ch. 321, § 217, 35 Stat. 1130 (1909). So it stayed until 2002, when it was increased to imprisonment for not more than 20 years, P.L. 107-204, § 903(a), 116 Stat. 805 (2002). The penalty enhancement for defrauding a financial institution was added in 1989, P.L. 101-73, § 961(i), 103 Stat. 500 (1989), and increased from a maximum of imprisonment for not more than 20 years to its present maximum of imprisonment for not more than 30 years in 1990, P.L. 101-647, § 2504(h), 104 Stat. 4861 (1990). The application of the 30-year maximum to disaster related frauds appeared in 2008, P.L. 110-179, § 4, 121 Stat. 2257 (2008).

[15] 18 U.S.C. § 1346.

[16] P.L. 103-322, § 250006, 108 Stat. 2087 (1994).

[17] Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722 (1952).

[18] H.R. Rep. No. 82-388, at 1 (1951) ("The general object of the bill is to amend the Criminal Code ... making it a Federal criminal offense to use wire or radio communications as instrumentalities for perpetrating frauds upon the public. In principal it is not dissimilar to the post fraud statute (18 U.S.C. 1341)"); S. Rep. No. 82-44, at 14 (1951) ("This section ... is intended merely to establish for radio a parallel provision now in the law for fraud by mail, so that fraud conducted or intended to be conducted by radio shall be amenable to the same penalties now provided for fraud by means of the mails"); H.R. Rep. No .82-1750, at 22 (1952).

[19] There was no need to amend the wire fraud statute, when commercial carriers were included in the mail fraud statute or when references to the Postal Service were substituted to references to the Post Office, P.L. 103-322, §250006(1), 108 Stat. 2087 (1994); P.L. 91-375, §6(j)(11), 84 Stat. 778 (1970).

[20] Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) ("We have construed identical language in the wire and mail fraud statutes *in pari materia*") (citing Neder v. United States, 527 U.S. 1, 20 (1999) and Carpenter v. United States, 484 U.S. 19, 25 and n.6 (1987)).

statement of the elements of a violation to focus on the questions at issue before them.[21] As treatment of the individual elements makes clear, however, there seems little dispute that conviction requires the government to prove

- the use of either mail or wire communications in the foreseeable furtherance
- of a scheme and intent to defraud another of either property or honest services
- involving a material deception.

Use of Mail or Wire Communications

The wire fraud statute applies to anyone who "transmits or causes to be transmitted by wire, radio, or television communication in interstate or foreign commerce any writings ... for the purpose of executing [a] ... scheme or artifice."[22] The mail fraud statute is similarly worded and applies to anyone who "... for the purpose of executing [a] ... scheme or artifice ... places in any post office ... or causes to be delivered by mail ... any ... matter."[23]

The statutes require that a mailing or wire communication be in furtherance of a scheme to defraud. The mailing or communication need not be an essential element of the scheme, as long as it "is incident to an essential element of the scheme."[24] A qualifying mailing or communication, standing alone, may be routine, innocent or even self-defeating, because "[t]he relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive."[25] The element may be satisfied by mailings or communications "designed to lull the victim into a false sense of security, postpone inquiries or complaints, or

[21] *E.g.*, United States v. Hoffman, 901 F.3d 523, 545 (5th Cir. 2018) ("To prove those fraud offenses, the government had to show (1) a scheme to defraud that employed false material representations, (2) the use of mail or interstate wires in furtherance of the scheme and (3) the specific intent to defraud."); United States v. Weaver, 860 F.3d 90, 94 (2d Cir. 2017) ("The essential elements of mail and wire fraud are (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or the wires to further the scheme."); United States v. Pinson, 860 F.3d 152, 168 (4th Cir. 2017) (internal citations omitted) ("To convict a person of mail fraud or wire fraud the government must show that the defendant (1) devised or intended to devise a scheme to defraud and (2) used the mail or wire communications in furtherance of the scheme. One such scheme to defraud is defined in § 1346; the deprivation of another's intangible right to the defendant's honest services. As interpreted by the Supreme Court, § 1436 covers [only] bribery and kickback schemes.").

[22] 18 U.S.C. § 1343. "Purely intrastate telephone calls fall outside the reach of wire fraud under § 1343," United States v. Garrido, 713 F.3d 985, 998 (9th Cir. 2013) (citing United States v. Izydore, 167 F.3d 213, 219-20 (5th Cir. 1999); however, a "'wire communication whose origin and ultimate destination are within a single state' can violate the wire fraud statute if it is 'routed through another state.'" United States v. Halloran, 821 F.3d 321, 342 (7th Cir. 2016) (quoting Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 265 (2d Cir. 2004), *rev'd in part on other grounds*, 547 U.S. 451 (2006)).

[23] *Id.* § 1341.

[24] Schmuck v. United States, 489 U.S. 705, 712 (1989) (quoting Pereira v. United States, 347 U.S. 1, 8 (1954)); *see also* United States v. Ramer, 883 F.3d 659, 683 (6th Cir. 2018); United States v. Tavares, 844 F.3d 46, 59 (1st Cir. 2016); United States v. Nguyen, 829 F.3d 907, 921 (8th Cir. 2016).

[25] *Schmuck*, 489 U.S. at 715 (citing by way of example, Carpenter v. United States, 484 U.S. 19, 28 (1987)); United States v. Hoffman, 901 F.3d 523, 546 (5th Cir. 2018); United States v. Coughlin, 610 F.3d 89, 98 (D.C. Cir. 2010).

make the transaction less suspect."[26] The element may also be satisfied by mailings or wire communications used to obtain the property which is the object of the fraud.[27]

A defendant need not personally have mailed or wired a communication; it is enough that he "caused" a mailing or transmission of a wire communication in the sense that the mailing or transmission was the reasonable foreseeable consequence of his intended scheme.[28]

Scheme to Defraud

The mail and wire fraud statutes "both prohibit, in pertinent part, 'any scheme or artifice to defraud[,]' or to obtain money or property 'by means of false or fraudulent pretenses, representations, or promises,"[29] or deprive another of the right to honest services by such means.[30] From the beginning, Congress intended to reach a wide range of schemes to defraud, and has expanded the concept whenever doubts arose. It added the second prong—obtaining money or property by false pretenses, representations, or promises—after defendants had suggested that the term "scheme to defraud" covered false pretenses concerning present conditions but not representations or promises of future conditions.[31] More recently, it added 18 U.S.C. § 1346 to make it clear the term "scheme to defraud" encompassed schemes to defraud another of the right to honest services.[32] Even before that adornment, the words were understood to "refer 'to

[26] United States v. Lane, 474 U.S. 438, 451-52 (1986) (quoting United States v. Maze, 414 U.S. 395; 403 (1974)); United States v. Stochel, 901 F.3d 883, 889 (7th Cir. 2018); *Tavares*, 844 F.3d at 58; United States v. McGinn, 787 F.3d 116, 124 (2d Cir. 2015).

[27] United States v. Vilar, 729 F.3d 62, 95 (2d Cir. 2013) ("A scheme to defraud is not complete until the proceeds have been received and use of the mail or wires to obtain the proceeds satisfies the jurisdictional element, which is to say that the jurisdictional element is fulfilled when the defendant uses the mail or wires to convert the money to his own use.").

[28] *Pereira*, 347 U.S. at 8-9 ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."); *Nguyen*, 829 F.3d 907, 921 (8th Cir. 2016); United States v. Soto, 799 F.3d 68, 92 (1st Cir. 2015); United States v. Porter, 745 F.3d 1035, 1051 (10th Cir. 2014).

[29] Neder v. United States, 527 U.S. 1, 20 (1999); United States v. Weimert, 819 F.3d 351, 355 (7th Cir. 2016) ("To prove a scheme to defraud, the government must show that Weimert made a material false statement, misrepresentation, or promise, or concealed a material fact."); United States v. Smith, 749 F.3d 465, 477 (6th Cir. 2014) ("A scheme to defraud is any plan or course of action by which someone uses false, deceptive, or fraudulent pretenses, representations, or promises to deprive someone else of money.").

[30] 18 U.S.C. § 1346.

[31] McNally v. United States, 483 U.S. 350, 356-57 & n.6 (footnote 6 in brackets) ("Durland v. United States, 161 U.S. 306 (1986), the first case in which this Court construed the meaning of the phrase 'any scheme or artifice to defraud,' held that the phrase is to be interpreted broadly insofar as property rights are concerned. ... the Court rejected the argument that 'the statute reaches only such as cases as, at common law, would come within the definition of false pretenses, in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future. Instead, it construed the statute to 'include everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'... Congress codified the holding of *Durland* in 1909.... [Prior to *Durland* Congress amended the statute to add language expressly reaching schemes of the period .... The addition of this language appears to have been nothing more than a reconfirmation of the statute's original purpose in the face of some disagreement among the lower federal courts as to whether the statute should be broadly or narrowly read"].

[32] The phrase "deprivation of the right to honest services" extends only to bribery and kick-back schemes, Skilling v. United States, 561 U.S. 358, 408-409 (2010); United States v. Solomon, 892 F.3d 273, 276-77 (7th Cir. 2018); United States v. Suhl, 885 F.3d 1106, 1111 (8th Cir. 2018); United States v. Rosen, 716 F.3d 691, 698-99 n.3 (2d Cir. 2013).

wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'"[33]

As a general rule, the crime is done when the scheme is hatched and an attendant mailing or interstate phone call or email has occurred. Thus, the statutes are said to condemn a scheme to defraud regardless of its success.[34] It is not uncommon for the courts to declare that to demonstrate a scheme to defraud the government needs to show that the defendant's "communications were reasonably calculated to deceive persons of ordinary prudence and comprehension."[35] Even a casual reading, however, might suggest that the statutes also cover a scheme specifically designed to deceive a naïve victim.[36] Nevertheless, the courts have long acknowledged the possibility of a "puffing" defense, and there may be some question whether the statutes reach those schemes designed to deceive the gullible though they could not ensnare the reasonably prudent.[37] In any event, the question may be more clearly presented in the context of the defendant's intent and the materiality of the deception.[38]

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[33] *McNally*, 483 U.S. at 358 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

[34] Pasquantino v. United States, 544 U.S. 349, 371 (2005) ("[T]he wire fraud statute punishes the scheme, not its success."); United States v. Greenberg, 835 F.3d 295, 305-306 (2d Cir. 2016) (emphasis of the court) ("To that end, the wire fraud statute requires the Government to show proof of a 'scheme or artifice to defraud,' 18 U.S.C. § 1343, which itself demands a showing that the defendant possessed a fraudulent intent, but the Government need not prove that the victims of the fraud were *actually* injured, but only that defendants *contemplated* some actual harm or injury to their victims."); United States v. Weaver, 860 F.3d 90, 95 (2d Cir. 2017) (emphasis of the court) (parallel citations omitted) ("Although the materiality of the misrepresentations is an element of mail and wire fraud, the Supreme Court has held that the 'common law requirements of justifiable reliance and damages … plainly have not place in the federal fraud statutes.' Neder v. U.S. 527 U.S. 1, 24-25 (1999). This is so because 'by prohibiting the scheme to defraud rather than then the completed fraud, the elements of reliance and damages would clearly be inconsistent with the statutes Congress enacted.' *Id.* at 25. With respect to damages, we have explained that the government 'need not prove that the victims of the fraud were *actually* injured, but only that defendants *contemplated* some actual harm or injury to their victims.'"); United States v. Bradley, 644 F.3d 1213, 1239 (11th Cir. 2011); United States v. Aslan, 644 F.3d 526, 545 (7th Cir. 2011); United States v. Warshak, 631 F.3d 266, 310 (6th Cir. 2010).

[35] United States v. Williams, 527 F.3d 1235, 1245 (11th Cir. 2008); United States v. Laney, 881 F.3d. 1100, 1110 (9th Cir. 2018); United States v. Ferriero, 866 F.3d 107, 121 (3d Cir. 2017); United States v. Weaver, 860 F.3d 90, 94-95 (2d Cir. 2017); *but see* United States v. Corsey, 723 F.3d 366, 373 (2d Cir. 2013) ("In a related context, we have held that a defendant is liable for an objectively absurd lie if a subjectively foolish victim believes it.").

[36] United States v. Lindsey, 850 F.3d 1009, 1015 (9th Cir. 2017) ("In *United States v. Ciccone*, we rejected the defendant's argument that the Government was required to prove that the defendant's fraud was calculated to defraud persons of ordinary prudence and comprehension. We held that 'the wire-fraud statute protects the naïve as well as the worldly-wise.'"); *see also* United States v. Weimert, 819 F.3d 351, 355 (7th Cir. 2016) ("[I]t is no defense that the intended victim of wire fraud was too trusting and gullible or, on the other hand, was too smart or sophisticated to be taken in by the deception."); United States v. Svete, 556 F.3d 1157, 1168-169 (11th Cir. 2009) ("Svete and Girardot cite decisions that use the 'ordinary prudence' language as evidence that fraud requires a scheme capable of defrauding the reasonably prudent, but none of the decisions cited by Svete and Girardot overturned a conviction on the ground that the scheme was incapable of deceiving persons of ordinary prudence. The 'ordinary prudence' language was invoked instead to affirm convictions. Two sister circuits have stated that 'ordinary prudence' has a place in the proof of mail fraud, but both held that the jury instructions about materiality were sufficient to establish that the jury had found the fraudulent schemes reliable.... None of these decisions reversed a conviction of mail fraud for failure to instruct the jury that the alleged scheme had to be capable of deceiving people of ordinary prudence, and none reached the perverse result of insulating criminals who target those least likely to protect themselves.").

[37] United States v. Rodriguez, 732 F.3d 1299, 1303 (11th Cir. 2013) (acknowledging that "'puffing' or 'sellers' talk' is not a crime under federal fraud statutes"); *see also* United States v. New South Farm & Home Co., 241 U.S. 65, 71 (1916) ("Mere puffing, indeed, might not be within [the mail fraud statute's] meaning….").

[38] United States v. Weimert, 819 F.3d 351, 365 (7th Cir. 2016) ("The inconsistent opinions he expressed to reluctant bidders about how well they would like having Kalka and his investor as partners in the investment did not rise beyond puffery. They cannot reasonably be deemed material. See *United States v. Coffman*, 94 F.3d 330, 334 (7th Cir. 1996) (noting in wire fraud case that nearly 'all sellers engage in a certain amount of puffing; all buyers … know this; it

Defrauding or to Obtain Money or Property

The mail and wire fraud statutes speak of schemes to defraud *or* to obtain money or property by means of false or fraudulent pretenses.[39] The Supreme Court has said that the phrase "to defraud" and the phrase "to obtain money or property" do not represent separate crimes, but instead the phrase "obtain money or property" describes what constitutes a scheme to defraud.[40] In later look-alike offenses, Congress specifically numerated the two phrases. The bank fraud statute, for example, applies to "whoever knowingly executes … a scheme or artifice — (1) to defraud a financial institution; or (2) to obtain any of the money, funds, credits, assets, securities, or other property owned by … a financial institution, by means of false or fraudulent pretenses …"[41] It left the mail and wire fraud statutes, however, unchanged.

The mail and wire fraud statutes clearly protect against deprivations of tangible property. They also protect certain intangible property rights,[42] but only those that have value in the hands of the victim of a scheme.[43] "To determine whether a particular interest is property for purposes of the

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would not do to criminalize business conduct that is customary rather than exceptional').."); Eclectic Properties East v. Marcus & Millichap Co., 751 F.3d 990, 1000 (9th Cir. 2014) (a mail fraud-predicated RICO case) ("But these facts do not allow us to make the Plaintiffs' preferred inference that Defendants had the necessary specific intent to defraud Plaintiffs. First, the statements by Defendants about the relative security of the investments constitute 'puffing' or related expressions of opinion that are common in sales and not actionable as fraud.").

[39] 18 U.S.C. §§ 1341, 1343.

[40] Cleveland v. United States, 531 U.S. 12, 26 (2000) (quoting McNally v. United States, 483 U.S. 350, 358, 359 (1987)) ("In *McNally*, we recognized that '[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive it is arguable that they are to be construed independently.' But we rejected that construction of the statute, instead concluding that the second phrase simply modifies the first by 'making it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property'… Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities … [W]e declined to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear."). *See also* United States v. Reed, 908 F.3d 102, 124 (5th Cir. 2018); United States v. Hird, 901 F.3d 196, 202 (3d Cir. 2018); United States v. Foster, 878 F.3d 1297, 1304 11th Cir. 2018); United States v. Berroa, 856 F.3d 141, 149 (1st Cir. 2017) (quoting Loughrin v. United States, 573 U.S. 351, 363 (2014)) ("The Court [in *Loughrin*] explained that 'by means of' 'typically indicates that the given result (the 'end') is achieved, at least in part, through the specified action, instrument, or method (the 'means'), such that the connection between the two is something more than oblique, indirect, and incidental' … According, 'not every but-for cause will do.' *Id.* Rather, the 'by means of' language requires that the defendants' alleged fraud be 'the mechanism naturally inducing [a victim] … to part with money.'").

[41] 18 U.S.C. § 1344 (emphasis added). Congress followed suit in the health care fraud, securities fraud statutes. *Id*. §§ 1347, 1348.

[42] Shaw v. United States, 137 S. Ct. 462, 467 (2016) ("[W]hen interpreting the analogous mail fraud statute, we have held it 'sufficient' that the victim (here, the bank) be 'deprived of its right' to use of the property, even if it ultimately did not suffer unreimbursed loss.") (citing Carpenter v. United States, 484 U.S. 19, 26-27 (1987)); *see also* Pasquantino v. United States, 544 U.S. 349, 356 (2005) ("Canada's right to uncollected excise taxes ... is 'property' in its hands. This right is an entitlement to collect money... Valuable entitlements like these are 'property' as that term ordinarily is employed."); United States v. Baroni, 909 F.3d 550, 564 (3d Cir. 2018) ("[T]he federal fraud statutes require the defendants to scheme to defraud a victim of 'property rights' … Those property rights, however, need not be tangible.") (wire fraud statute covers email-related, politically motivated scheme to deprive Port Authority of employees' time and wages by creating massive traffic jam under the guise of a traffic study); United States v. Hoffman, 901 F.3d 523, 536 (5th Cir. 2018) (protected property includes both money in hand and money due such as that represented by state tax credits).

[43] *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (Section "1341 does not reach fraud in obtaining a state or municipal license of the kind here involved, for such a license is not 'property' in the government regulator's hands").

fraud statutes, [courts] look to whether the law traditionally has recognized and enforced it as a property right."[44]

Materiality

Neither the mail nor the wire fraud statute exhibits an explicit reference to materiality. Yet materiality is an element of each offense, because at the time of the statutes' enactment, the word "defraud" was understood to "require[] a misrepresentation or concealment of [a] material fact."[45] Thus, other than in an honest services context, a "scheme to defraud" for mail or wire fraud purposes must involve a material misrepresentation of some kind.[46] "A misrepresentation is material if it is capable of influencing the intended victim."[47]

Intent

Again, other than in the case of honest services, "'intent to defraud' requires an intent to (1) deceive, and (2) cause some harm to result from the deceit. A defendant acts with the intent to deceive when he acts knowingly with the specific intent to deceive for the purpose of causing pecuniary loss to another or bringing about some financial gain to himself."[48]

A defendant has a complete defense if he believes the deceptive statements or promises to be true or otherwise acts under circumstances that belie an intent to defraud.[49] Yet, a defendant has no

[44] *Baroni*, 909 F.3d at 564-65 (citing among others United States v. Evans, 844 F.3d 36, 41 (2d Cir. 1988)).

[45] *Neder*, 527 U.S. at 22-3.

[46] Neder v. United States, 527 U.S. 1, 25 (1999) ("Accordingly, we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."); United States v. Evans, 892 F.3d 692, 711-12 (5th Cir. 2018) (internal citations omitted) ("'Scheme to defraud' is tricky to define, 'but it includes any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the entity to be deceived.' Such falsity must be material."); Williams v. Affinion Group, LLC, 889 F.3d 116, 124 (2d Cir. 2018) (internal citations omitted) ("A 'scheme to defraud' is a plan to deprive a person of something of value by trick, deceit, chicane or overreaching. To make out such a scheme a plaintiff must provide proof of a material misrepresentation."); *see also* United States v. Roberts, 881 F.3d 1049, 1052 (8th Cir. 2018); United States v. Foster, 878 F.3d 1297, 1304 (11th Cir. 2018).

[47] *Evans*, 892 F.3d at 712; *Roberts*, 881 F.3d at 1052; *Foster*, 878 F.3d at 1304; United States v. Burns, 843 F.3d 679, 684 (7th Cir. 2016).

[48] *Evans*, 892 F.3d at 712; *see also* United States v. Bertram, 900 F.3d 743, 749 (6th Cir. 2018) ("More specifically, the omission of a material fact with the intent to get the victim to take an action he wouldn't otherwise have taken establishes intent to defraud under the wire statute."); United States v. Halloran, 821 F.3d 321, 330 (2d Cir. 2016) ("The 'scheme to defraud' element of wire fraud requires the specific intent to harm or defraud the victims of the scheme."); United States v. Faruki, 803 F.3d 847, 853 (7th Cir. 2015) ("Intent to defraud requires a willful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another.").

[49] United States v. Coughlin, 610 F.3d 89, 98 (D.C. Cir. 2010); *cf.*, United States v. Lloyd, 807 F.3d 1128, 1163-64 (9th Cir. 2015) (rejecting a challenge to the "reckless disregard" portion of a jury instruction that stated, "the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud and did not act in good faith. Proof that a defendant acted with reckless disregard as to the truth or falsity of material misrepresentations he may have made is inconsistent with good faith."); United States v. Maxwell, 579 F.3d 1282, 1301 (11th Cir. 2009) ("[A]n intent to defraud is not present if the defendant knew that he could not deceive the recipient of his statements.").

defense if he blinds himself to the truth.[50] Nor is it a defense if he intends to deceive but feels his victim will ultimately profit or be unharmed.[51]

Honest Services

The Supreme Court held in *McNally v. United States* that the protection of the mail fraud statute, and by implication the protection of the wire fraud statute, did not extend to "the intangible right of the citizenry to good government."[52] Soon after *McNally*, Congress enlarged the mail and wire fraud protection to include the intangible right to honest services, by defining the "term 'scheme or artifice to defraud' [to] include[s] a scheme or artifice to deprive another of the intangible right to honest services."[53] Lest the expanded definition be found unconstitutionally vague, the Court in *Skilling v. United States* limited its application to cases of bribery or kickbacks.[54] The Court in *Skilling* supplied only a general description of the bribery and kickbacks condemned in the honest-services statute.[55] Subsequent lower federal courts have often looked to the general federal law relating to bribery and kickbacks for the substantive elements of honest services bribery.[56] In this context, bribery requires "a quid pro quo—a specific intent to give … something of value in exchange for an official act."[57] And an "official act" means no more than an officer's formal exercise of governmental power in the form of a "decision or action on a 'question, matter, cause, suit, proceeding or controversy'" before him.[58]

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[50] United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013) ("[T]he belief or faith that a venture will eventually succeed no matter how impractical or visionary the venture may be is no defense to a charge of fraud"); *see also* United States v. Clay, 618 F.3d 946, 953 (8th Cir. 2010); United States v. Ramirez, 574 F.3d 869, 876-77 (7th Cir. 2009); United States v. Alston-Graves, 435 F.3d 331, 336-38 (D.C. Cir. 2006).

[51] United States v. Arif, 897 F.3d 1, 9 (1st Cir. 2018) ("[A] wire fraud defendant cannot 'knowingly … make false statements to secure money from clients' even if he subjectively believes[s] that his enterprise will succeed."); United States v. Hamilton, 499 F.3d 734, 736-37 (7th Cir. 2007); United States v. Chavis, 461 F.3d 1201, 1209 (10th Cir. 2006) ("A defendant's honest belief that a venture will ultimately succeed does not constitute good faith if, in carrying out the plan, he knowingly uses false representations or pretenses with intent to deceive.").

[52] McNally v. United States, 483 U.S. 350, 356 (1987). For a more detailed discussion of honest services fraud, see CRS Report R45479, *Bribery, Kickbacks, and Self-Dealing: An Overview of Honest Services Fraud and Issues for Congress*, by Michael A. Foster.

[53] 18 U.S.C. § 1346.

[54] Skilling v. United States, 561 U.S. 358, 412 (2010) ("Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague."); United States v. Baroni, 909 F.3d 550, 568 (3d Cir. 2018); United States v. Solomon, 892 F.3d 273, 276 (7th Cir. 2018); United States v. Suhl, 885 F.3d 1106, 1111 (8th Cir. 2018).

[55] *Skilling*, 561 U.S. 412-13 & n.45 (2010) (footnote 45 of the Court's opinion in double brackets) ("[T]he honest-services statute['s] … prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes. See, *e.g.*, 18 U.S.C. §§201(b), 666(a)(2); 41 U.S.C. §52(2) ('The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].'). [[Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.]]").

[56] *E.g.*, *Suhl*, 885 F.3d at 1110-11; *see also* Woodward v. United States, 905 F.3d 40, 44 (1st Cir. 2018); United States v. Johnson, 874 F.3d 990, 999 (7th Cir. 2017); United States v. Aunspaugh, 792 F.3d 1302, 1307 (11th Cir. 2015); United States v. DeMizio, 741 F.3d 373, 381-82 (2d Cir. 2014).

[57] *Suhl*, 885 F.3d at 1111 (quoting United States v. Sun-Diamond Growers of California, 526 U.S. 398, 404-05 (1999)); *see also Woodward*, 905 F.3d at 44; *Johnson*, 874 F.3d at 999; United States v. Silver, 864 F.3d 102, 111 (2d Cir. 2017).

[58] *Suhl*, 885 F.3d at 1111 (quoting McDonald v. United States, 136 S. Ct. 2355, 2371-72 (2016)). *McDonald* was a Hobbs Act bribery case, 18 U.S.C. § 1951, in which the Court used § 201's definition of "official act." *See also* United

The definition of the word "kickback" quoted by the Court in *Skilling* has since been reassigned,[59] and the courts have cited the dictionary definition on occasion.[60]

Except for the elements of a scheme to defraud in the form of a bribe and a kickback, honest services fraud, as an adjunct of the mail and wire fraud statutes, draws its elements and the sanctions that attend the offense from the mail and wire fraud statutes.[61]

Aiding and Abetting, Attempt, and Conspiracy

Attempting or conspiring to commit mail or wire fraud or aiding and abetting the commission of those offenses carries the same penalties as the underlying offense.[62] "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."[63]

"Conspiracy to commit wire fraud under 18 U.S.C. § 1349 requires a jury to find that (1) two or more persons agreed to commit wire fraud and (2) the defendant willfully joined the conspiracy with the intent to further its unlawful purpose."[64] As a general rule, a conspirator is liable for any

States v. Fattah, 902 F.3d 197, 245 (3d Cir. 2018).

[59] The text of 41 U.S.C. § 52(2) (2006 ed.) now appears in 41 U.S.C. § 8701(2).

[60] *E.g.*, United States v. DeMizio, 741 F.3d 373, 381 (2d Cir. 2014) (citing BLACK'S LAW DICTIONARY 948 (9th ed. 2009)) ("A kickback scheme typically involves an employee's steering business of his employer to a third party in exchange for a share of the third party's profits on that business.").

[61] United States v. Avery, 719 F.3d 1080, 1083 (9th Cir. 2013) ("Section 1346, which defines honest services fraud, is not a standalone criminal offense, but must be charged in conjunction with 18 U.S.C. §§ 1341 or 1343 as the means or theory by which the fraud was committed"); United States v. Ciavarella, 716 F.3d 705, 731 (3d Cir. 2013) (emphasis added) ("For an honest services mail fraud conviction, *in addition to the traditional mail fraud elements* and that the scheme was conducted through the use of bribes or kickbacks, the Government must also prove: (1) 'that the payor provided a benefit to a public official intending that he will thereby take favorable official acts that he would not otherwise take'; and (2) that the official accepted those benefits intending, in exchange for the benefits, to take official act to benefit the payor."); *cf.* United States v. Halloran, 821 F.3d 321, 330 (2d Cir. 2016) (holding, in honest services fraud case, that "[t]he 'scheme to defraud' element of wire fraud requires the specific intent to harm or defraud the victims of the scheme"). The honest services fraud statute reads in its entirety: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." 18 U.S.C. § 1346.

[62] *Id.* § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"); *id.* § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."); *id.* § 371 ("If two or more persons conspire … to commit any offense against the United States … and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."). Conspiracy to commit wire or mail fraud may be charged under either §1349 or §371).

[63] Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); United States v. Gaw, 817 F.3d 1, 7 (1st Cir. 2016); United States v. Beacham, 774 F.3d 267, 275 (5th Cir. 2014) ("Beacham argues that the evidence presented at trial did not establish his specific intent to aid and abet wire fraud because he believed the transaction to be legal and he thus acted in good faith. However, the government presented the jury with evidence sufficient to support Beacham's conviction."); United States v. Reifler, 446 F.3d 65, 96-7 (2d Cir. 2006). *See generally* CRS Report R43769, *Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2*, by Charles Doyle.

[64] United States v. Burfort, 899 F.3d 326, 335 (4th Cir. 2018); *see also* United States v. Atkins, 881 F.3d 621, 625 (8th Cir. 2018) ("To support a conspiracy conviction, the government was required to show: (1) an agreement between Atkins and one or more persons to commit wire fraud; (2) Atkins knew of the agreement; and (3) Atkins intentionally joined the agreement."); United States v. Dingle, 862 F.3d 607, 614 (7th Cir. 2017) ("For the conspiracy charge [under 18 U.S.C. § 371], the government had to prove: (1) that there was a conspiracy to commit mail fraud, (2) that Karin joined that conspiracy with the intent to further it, and (3) that at least one conspirator committed an overt act in

other offenses that a co-conspirator commits in the foreseeable furtherance of the conspiracy.[65] Such liability, however, extends only until the objectives of the conspiracy have been accomplished or the defendant has withdrawn from the conspiracy.[66]

Where attempt has been made a separate offense, as it has for mail and wire fraud,[67] conviction ordinarily requires that the defendant commit a substantial step toward the completion of the underlying offense with the intent to commit it.[68] It does not, however, require the attempt to have been successful.[69] Unlike conspiracy, a defendant may not be convicted of both the substantive offense and the lesser included crime of attempt to commit it.[70]

Sentencing

A mail and wire fraud are punishable by imprisonment for not more than 20 years and a fine of not more than $250,000 (not more than $500,000 for organizations), or fine of not more than $1 million and imprisonment for not more than 30 years if the victim is a financial institution or the offense was committed in relation to a natural disaster.[71] It is also subject to a mandatory minimum two-year term of imprisonment if identify theft is used during and in furtherance of the fraud.[72] Conviction may also result in

- probation,[73]
- a term of supervised release,[74]

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furtherance of the agreement."); United States v. Morrison, 833 F.3d 491, 499 (5th Cir. 2016). S*ee generally* CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle.

[65] Pinkerton v. United States, 328 U.S. 640, 647 (1946); United States v. Fattah, 902 F.3d 197, 254 (3d Cir. 2018); United States v. Dixon, 901 F.3d 1322, 1343 (11th Cir. 2018); United States v. Jones, 900 F.3d 440, 446 (7th Cir. 2018); United States v. Stoddard, 892 F.3d 1203, 1221 (D.C. Cir. 2017).

[66] Smith v. United States, 568 U.S. 106, 107 (2013) ("Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws"); *see also* United States v. Shephard, 892 F.3d 666, 673 (4th Cir. 2018); United States v. Belanger, 890 F.3d 13, 31-2 (1st Cir. 2018); United States v. Martinez, 862 F.3d 223, 232-33 (2d Cir. 2017).

[67] 18 U.S.C. § 1349.

[68] United States v. St. Hubert, 909 F.3d 335, 351 (11th Cir. 2018); United States v. Bernhardt, 903 F.3d 818, 827 (8th Cir. 2018); United States v. Clarke, 842 F.3d 288, 297 (4th Cir. 2016). *See generally* CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by Charles Doyle.

[69] Pasquantino v. United States, 544 U.S. 349, 371 (2005); United States v. Nguyen, 829 F.3d 907, 917 (8th Cir. 2016); United States v. Desposito, 704 F.3d 221, 231 (2d Cir. 2013).

[70] United States v. Brooks, 438 F.3d 1231, 1242 (10th Cir. 2006).

[71] 18 U.S.C. §§ 1341, 1343, 3571. The maximum for both individuals and organizations may be increased to twice the amount of gain or loss associated with the offense. *Id*. § 3571(d). Both the mail and wire fraud statutes contain the financial institution and disaster enhancement ("... If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in [s]ection 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.").

[72] 18 U.S.C. § 1029A.

[73] 18 U.S.C. §§ 3561 to 3566; U.S.S.G. §§ 5B1.1 to 5B1.3; *e.g*., United States v. Hoffman, 901 F.3d 523, 536 (5th Cir. 2018).

[74] 18 U.S.C. § 3583; U.S.S.G. §§ 5D1.1 to 5D1.3; *e.g*., United States v. Henderson, 902 F.3d 822, 824-25 (8th Cir. 2018); United States v. Campbell, 883 F.3d 1148, 1149-50 (9th Cir. 2018). *See generally* CRS Report RL31653, *Supervised Release (Parole): An Overview of Federal Law*, by Charles Doyle.

- a special assessment,[75]
- a restitution order,[76] and/or
- a forfeiture order.[77]

Sentencing Guidelines

Sentencing in federal court begins with the federal Sentencing Guidelines.[78] The Guidelines are essentially a scorekeeping system. A defendant's ultimate sentence under the Guidelines is determined by reference first to a basic guideline, which sets a base "offense level." Offense levels are then added or subtracted to reflect his prior criminal record as well as the aggravating and mitigating circumstances attending his offense.[79] One of two basic guidelines applies to mail and wire fraud. Section 2C1.1 applies to mail or wire fraud convictions involving corruption of public officials.[80] Section 2B1.1 applies to other mail or wire fraud convictions. Both sections include enhancements based on the amount of loss associated with the fraud.[81]

After all the calculations, the final offense level determines the Guidelines' recommendations concerning probation, imprisonment, and fines. The Guidelines convert final offense levels into 43 sentencing groups, which are in turn each divided into six sentencing ranges based on the defendant's criminal history.[82] Thus, for instance, the recommended sentencing range for a first-time offender (i.e., one with a category I criminal history) with a final offense level of 15 is

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[75] 18 U.S.C. § 3013; U.S.S.G. §5E1.3; *e.g.*, United States v. Sineneng-Smith, 910 F.3d 461, 468 n.2 (9th Cir. 2018); United States v. Jackson, 909 F.3d 199, 200 (7th Cir. 2018).

[76] 18 U.S.C. §§ 3663A(c)(1)(A)(ii), 3664; U.S.S.G. §5E1.1; *e.g.*, United States v. Naphaeng, 906 F.3d 173, 175 (1st Cir. 2018); United States v. Cornelsen, 893 F.3d 1086, 1089 (8th Cir. 2018). *See generally* CRS Report RL34138, *Restitution in Federal Criminal Cases*, by Charles Doyle.

[77] 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1), 1956(c)(7)(A), 1961(1)((B); U.S.S.G. §5E1.4; *e.g.*, United States v. Miller, 911 F.3d 229, 232 (4th Cir. 2018); United States v. Balsiger, 910 F.3d 942, 947 (7th Cir. 2018). *See generally* CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

[78] Gall v. United States, 552 U.S. 38, 49 (2007) ("[A] district should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.").

[79] See generally CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

[80] U.S.S.G. §2C1.1 cmt. ("Statutory Provisions: ... 18 U.S.C.... 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official) ... 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official) ...").

[81] U.S.S.G. §§2B1.1(b)(1); 2C1.1(b)(2). *E.g.*, United States v. Dickerson, 909 F.3d 118, 123-24 (5th Cir. 2018) ("The presentencing report [PSR] for Dickerson … calculated that in total the conspirators had submitted claims for $5,768,070 to over 50 different insurance companies, resulting in payments totaling $2,140,839.27 in settled claims. The PRS recommended enhancement of the total offense level by four levels due to Dickerson's status as a leader or organizer within a conspiracy involving five or more individuals, by another four levels due to the criminal scheme affecting more than 50 victims, and finally, a further 18 levels due to the $5,768,070 in 'intended losses' attributable to the scheme. The PSR also recommended a restitution order in the amount of $1,192,382.94, equivalent to 'actual losses' resulting from the offenses of conviction. The district court adopted the PSR's recommendations over Dickerson's objections, sentencing him to 168 months' imprisonment and ordering restitution of $1,192,382.94, to be paid jointly and severally … and forfeiture in the same amount."); United States v. Acevedo-Hernandez, 898 F.3d 150, 160 (1st Cir. 2018) ("[T]he court applied the two-level enhancement … for offenses involving more than one bribe. Second, the district court determined that 'the value of the payment and the benefit received or to be received or the value of anything obtained' by Acevedo exceeded $120,000, which triggered a ten-level enhancement … When these contested enhancements—as well as the uncontested four-level enhance … for being a public official in a sensitive position—were added to the base offense level of fourteen pursuant to U.S.S.G. § 2C1.1(a)(1), the total offense level resulted in thirty. … Acevedo was ultimately sentenced to sixty months of imprisonment on Count One and 120 months on Count Three, to be served concurrently.").

[82] U.S.S.G. ch.5A, Sentencing Table.

imprisonment for between 18 and 24 months.[83] A defendant with the same offense level 15 but with a criminal record placing him in criminal history category VI, would face imprisonment from between 41 and 51 months.[84] The Guidelines also provide offense-level-determined fine ranges for individuals and organizations.[85]

As a general rule, sentencing courts may place a defendant on probation for a term of from 1 to 5 years for any crime punishable by a maximum term of imprisonment of less than 25 years.[86] The Guidelines, however, recommend "pure" probation, that is, probation without any term of incarceration, only with respect to defendants with an offense level of 8 or below, i.e., levels where the sentencing range is between zero and six months.[87]

Once a court has calculated the Guidelines' recommendations, it must weigh the other statutory factors found in 18 U.S.C. § 3553(a) before imposing a sentence.[88] Appellate courts will uphold a sentence if the sentence is procedurally and substantively reasonable. A sentence is reasonable procedurally if it is free of procedural defects, such as a failure to accurately calculate the Guidelines' recommendations and to fully explain the reasons for the sentence selected.[89] A sentence is reasonable substantively if it is reasonable in light of circumstances that a case presents.[90]

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[83] *Id.*

[84] *Id.*

[85] U.S.S.G. §§ 5E1.2, 8C12.4.

[86] 18 U.S.C. §§ 3561, 3581(b).

[87] U.S.S.G. § 5B1.1. Probation in conjunction with some combination of incarceration is possible up to offense level 11, U.S.S.G. § 5B1.1(a)(2).

[88] 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider – (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for – (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines – (i) issued by the Sentencing Commission pursuant to [s]ection 994(a)(1) of Title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [s]ection 994(p) of Title 28); and (ii) that, except as provided in [s]ection 3742(g), are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [s]ection 994(a)(3) of Title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [s]ection 994(p) of Title 28); (5) any pertinent policy statement – (A) issued by the Sentencing Commission pursuant to [s]ection 994(a)(2) of Title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [s]ection 994(p) of Title 28); and (B) that, except as provided in [s]ection 3742(g), is in effect on the date the defendant is sentenced; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.").

[89] Gall v. United States, 552 U.S. 38, 51 (2007); United States v. Dyer, 908 F.3d 995, 1006 (6th Cir. 2018) (internal citations omitted) ("A district court commits procedural error when it fails to calculate (or improperly calculates) the Guidelines range, treats the Guidelines as mandatory, fails to consider the § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence."); United States v. Thomsen, 830 F.3d 1049, 1070 (9th Cir. 2016).

[90] *Gall*, 552 U.S. at 51; United States v. Sample, 901 F.3d 1196, 1199 (10th Cir. 2018) (internal citations omitted)

Supervised Release and Special Assessments

Supervised release is a form of parole-like supervision imposed after a term of imprisonment has been served.[91] Although imposition of a term of supervised release is discretionary in mail and wire fraud cases,[92] the Sentencing Guidelines recommend its imposition in all felony cases.[93] The maximum supervised release term for wire and mail fraud generally is three years—five years when the defendant is convicted of the mail or wire fraud against a financial institution that carries a 30-year maximum term of imprisonment.[94] Release will be subject to a number of conditions, violation of which may result in a return to prison for not more than two years (not more than three years if the original crime of conviction carried a 30-year maximum).[95] There are three mandatory conditions: (1) commit no new crimes; (2) allow a DNA sample to be taken; and (3) submit to periodic drug testing.[96] The court may suspend the drug testing condition,[97] although it is under no obligation to do so even though the defendant has no history of drug abuse and drug abuse played no role in the offense.[98]

Most courts will impose a standard series of conditions in addition to the mandatory condition of supervised release.[99] The Sentencing Guidelines recommend that these include the payment of any fines, restitution, and special assessments that remain unsatisfied.[100] Defendants convicted of mail or wire fraud must pay a special assessment of $100.[101]

Restitution

Restitution is ordinarily required of those convicted of mail or wire fraud.[102] The victims entitled to restitution include those directly and proximately harmed by the defendant's crime of

("Review for substantive reasonableness focuses on whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)."); United States v. Meadows, 866 F.3d 913, 920 (8th Cir. 2017); United States v. Rivernider, 828 F.3d 91, 111-12 (2d Cir. 2015).

[91] 18 U.S.C. § 3583. S*ee generally* United States Sentencing Commission, *Primer: Supervised Release* (April 2017), https://www.ussc.gov/topic/supervised-release.

[92] 18 U.S.C. § 3583(a) (emphasis added) ("The court, in imposing a sentence to a term of imprisonment for a felony ... *may* include as a part of the sentence as requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute ..."). There are no statutory provisions requiring a term of supervised release upon conviction for either mail or wire fraud, *cf*. 18 U.S.C. 1341, 1343.

[93] U.S.S.G. § 5D1.1(a) (emphasis added) ("The court *shall* order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute.").

[94] 18 U.S.C. §§ 3583(b), 3559(a), 1341, 1343.

[95] 18 U.S.C. §§3583(e), 3559(a), 1341, 1343.

[96] *Id.* § 3583(d).

[97] *Id.* §§ 3583(d), 3563(a)(5).

[98] United States v. Paul, 542 F.3d 596, 600-601 (7th Cir. 2008) (the sentencing court did not abuse its discretion in imposing the condition upon a defendant convicted of wire fraud who had not history of drug abuse but who did have a history of alcohol abuse and "gambling problems").

[99] U.S.S.G. § 5D1.3(a), (c).

[100] *Id.* at § 5D1.3(a)(5), (6); *see, e.g.*, United States v. Moschella,727 F.3d 888, 893-94 (9th Cir. 2013) (upholding payment of restitution as a condition of supervised release).

[101] 18 U.S.C. §§ 3013(a)(2), 3559, 1341, 1343.

[102] *E.g*., United States v. Balsiger, 910 F.3d 942, 956-57 (7th Cir. 2018) ("Balsiger's commission of wire fraud and the accompanying conspiracy offense (both under 18 U.S.C. § 1343) subjected him to an order of forfeiture. The criminal forfeiture statute, 18 U.S.C. § 982, only authorizes forfeiture in a wire fraud case when the offense conduct affects a financial institution. See 18 U.S.C. § 982(a)(3)(F). The government, therefore, sought—and the district court ordered—

conviction, and "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity," like mail and wire fraud, "any person directly harmed by the defendant's conduct in the course of the scheme, conspiracy, or pattern."[103]

Forfeiture

Property that constitutes the proceeds of mail or wire fraud is subject to confiscation by the United States.[104] It may be confiscated pursuant to either civil forfeiture or criminal forfeiture procedures.[105] Civil forfeiture proceedings are conducted that treat the forfeitable property as the defendant.[106] Criminal forfeiture proceedings are conducted as part of the criminal prosecution of the property owner.[107]

Related Criminal Provisions

The mail and wire fraud statutes essentially outlaw dishonesty. Due to their breadth, misconduct that constitutes mail or wire fraud may constitute a violation of one or more other federal criminal statutes as well. This overlap occurs perhaps most often with respect to (1) crimes for which mail or wire fraud are elements ("predicate offenses") of another offense;[108] (2) fraud proscribed under jurisdictional circumstances other than mail or wire use;[109] and (3) honest services fraud in the form of bribery or kickbacks.[110]

Predicate Offense Crimes

Some federal crimes have as an element the commission of some other federal offense. The money laundering statute, for example, outlaws laundering the proceeds of various predicate

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forfeiture under the civil forfeiture statute, 18 U.S.C. § 981, which (through some internal cross-referencing) authorizes the forfeiture of proceeds traceable to wire fraud. See 18 U.S.C. § 981(a)(1)(C) (referencing 18 U.S.C. § 1956(c)(7), which, in turn, references offenses listed in § 1961(1), which include § 1343, the wire fraud statute). Civil forfeiture applies by virtue of the bridging provisions in 28 U.S.C. § 2461(c)."); *see also* United States v. Naphaeng, 906 F.3d 173, 175-76 (1st Cir. 2018); United States v. Cornelsen, 893 F.3d 1086, 1088 (8th Cir. 2018); United States v. Foster, 878 F.3d 1297, 1303 (11th Cir. 2018).

[103] 18 U.S.C. § 3663A(a)(2); *e.g.*, United States v. Valdes-Ayala, 900 F.3d 20, 44-5 (1st Cir. 2018); *Cornelsen*, 893 F.3d at 1089; United States v. Thomsen, 830 F.3d 1049, 1065 (9th Cir. 2016).

[104] 18 U.S.C. §§ 981((a)(1)(A) (property involved in money laundering transaction in violation 18 U.S.C. §§ 1956, 1957 (laundering involving RICO predicate offenses, *e.g.*, mail or wire fraud)), 982(a)(1) (same); 981(a)(1)(D) (property relating to a mail or wire fraud violation held by a conservator or receiver for a financial institution), 982(a)(3) (same) 982(a)(2)(B) (proceeds from a mail or wire fraud offense affecting a financial institution).

[105] 18 U.S.C. §§ 981, 982. Moreover, 18 U.S.C. § 2461(c) "allows for criminal forfeiture when civil or criminal forfeiture is authorized for an offense and the defendant is convicted." United States v. Reed, 908 F.3d 102, 126 & n.97 (5th Cir. 2018) ("Here. The relevant civil forfeiture provision was 18 U.S.C. § 981, which allowed for civil forfeiture for mail fraud.").

[106] 18 U.S.C. § 983; *e.g.*, United States v. Real Property Located at 1407 North Collins St., 901 F.3d 268, 276 (5th Cir. 2018) ("[W]e agree with the district court that probable cause for forfeiture exists based on the charge of conspiracy to commit mail and wire fraud.").

[107] FED. R. CRIM. 32.2; *e.g.*, United States v. Holden, 908 F.3d 395, 399 (9th Cir. 2018); United States v. Austin, 907 F.3d 995, 998 (7th Cir. 2018); United States v. Hoffman, 901 F.3d 523, 561 (5th Cir. 2018).

[108] *E.g.*, 18 U.S.C. §§ 1961-1964 (racketeering); 1956 & 1957 (money laundering).

[109] *E.g.*, 18 U.S.C. §§ 1344 (bank fraud); 1347 (health care fraud); 1348 (securities fraud); 1351 (foreign labor fraud).

[110] *E.g.*, 18 U.S.C. §§ 201 (bribery of federal officials); 666 (bribery involving federal programs; 1951 (obstructing commerce by extortion under color of official right); 42 U.S.C. §1320a-7b (kickbacks on federal contracts).

offenses. The racketeering statute outlaws the patterned commission of a series of predicate offenses in order to operate a racketeering enterprise. Mail and wire fraud are racketeering and money laundering predicate offenses.

RICO

The Racketeering Influenced and Corrupt Organization (RICO) provisions outlaw acquiring or conducting the affairs of an enterprise, engaged in or whose activities affect interstate commerce, through loan sharking or the patterned commission of various other predicate offenses.[111] The racketeering-conduct and conspiracy-to-engage-in-racketeering-conduct appear to be the RICO offenses most often built on wire or mail fraud violations.[112] The elements of the RICO conduct offense are (1) conducting the affairs; (2) of an enterprise; (3) engaged in activities in or that impact interstate or foreign commerce; (4) through a pattern; (5) of racketeering activity.[113] To prove a RICO conspiracy, the government must prove: "(1) that two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity; (2) that the defendant was a party to or a member of that agreement; and (3) that the defendant joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity."[114]

"Racketeering activity" means, among other things, any act that is indictable under either the mail or wire fraud statutes.[115] As for pattern, a RICO pattern "requires at least two acts of racketeering activity. The racketeering predicates may establish a pattern if they [were] related and … amounted to, or threatened the likelihood of, continued criminal activity.'"[116]

The pattern of predicate offenses must be used by someone employed by or associated with a qualified enterprise to conduct or participate in its activities. "Congress did not intend to extend RICO liability . . . beyond those who participated in the operation and management of an enterprise through a pattern of racketeering activity."[117] Nevertheless, "liability under § 1962(c) is

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[111] 18 U.S.C. § 1962. See generally CRS Report 96-950, *RICO: A Brief Sketch*, by Charles Doyle.

[112] 18 U.S.C. §§ 1962(c) (racketeering conduct), 1962(d) (conspiracy). *See, e.g.*, Sun Life Assurance Co. of Canada v. Imperial Premium Finance, 904 F.3d 1197, 1205 (11th Cir. 2018) (18 U.S.C. §§ 1962(c), 1962(d)) (RICO violations also supply the grounds for private causes of actions); United States v. Fattah, 902 F.3d 197, 224 (3d Cir. 2018) (18 U.S.C. § 1962(d)); Empire Merchants, LLC v. Reliable Churchill LLLP, 902 F.3d 132, 137 (2d Cir. 2018) (18 U.S.C. §§ 1962(c), 1962(d)); United States v. Christensen, 828 F.3d 763, 778 (9th Cir. 2016) (18 U.S.C. §§ 1962(c), 1962(d)).

[113] Williams v. Affinion Group, LLC, 889 F.3d 116, 123-24 (2d Cir. 2018); *Christensen*, 828 F.3d at 780; *see for the general rule* United States v. Velasquez, 881 F.3d 314, 329 (5th Cir. 2018); United States v. Rios, 830 F.3d 403, 424 (6th Cir. 2016).

[114] *Fattah*, 902 F.3d at 247; *see also* United States v. Pinson, 860 F.3d 152, 161 (4th Cir. 2017).

[115] 18 U.S.C. 1961(1)(B); *Fattah*, 902 F.3d at 248; United States v. Lo, 839 F.3d 777, 791 n.6 (9th Cir. 2016); United States v. Courtney, 816 F.3d 681, 685 (10th Cir. 2016).

[116] *Fattah*, 902 F.3d at 248 (internal citations omitted) (quoting H.J. Inc. v. New Bell Tel. Co., 492 U.S. 229, 237 (1989)); *Pinson*, 860 F.3d at 161 (also quoting *H.J. Inc.*) ("Racketeering acts are related if they 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' To constitute or threaten continued criminal activity, racketeering acts may either be closed-ended, i.e. 'a closed period of repeated conduct,' or open-ended, i.e., naturally 'projecting into the future with a threat of repetition.'").

[117] Reves v. Ernst & Young, 507 U.S. 170, 184 (1993); *see also* D'Addario v. D'Addario, 901 F.3d 80, 103 (2d Cir. 2018) ("A person violates § 1962(c) … only if he 'conduct[ed]' the enterprise's affairs or participated in that conduct."); Sabrina Roppo v. Travelers Commercial Insurance Co., 869 F.3d 568, 589 (7th Cir. 2017); Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 883 (10th Cir. 2017).

not limited to upper management … An enterprise is operated not just by upper management but also by lower rung participants."[118]

The enterprise may be either any group of individuals, any legal entity, or any group "associated in fact."[119] "Nevertheless, 'an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise and longevity sufficient to permit those associates to pursue the enterprise's purpose.'"[120] Moreover, qualified enterprises are only those that "engaged in, or the activities of which affect, interstate or foreign commerce."[121]

RICO violations are punishable by imprisonment for not more than 20 years and a fine of not more than $250,000 (not more than $500,000 for organizations).[122] The crime is one for which restitution must be ordered when one of the predicate offenses is mail or wire fraud.[123] RICO has one of the first contemporary forfeiture provisions, covering property and interests acquired through RICO violations.[124] As noted earlier, any RICO predicate offense is by virtue of that fact a money laundering predicate.[125] RICO violations create a cause of action for treble damages for the benefit of anyone injured in their business or property by the offense.[126]

Money Laundering

Mail and wire fraud are both money laundering predicate offenses by virtue of their status as RICO predicates.[127] The most commonly prosecuted federal money laundering statute, 18 U.S.C. § 1956, outlaws, among other things, knowingly engaging in a financial transaction involving the proceeds generated by a "specified unlawful activity" (a predicate offense) for the purpose (1) of laundering the proceeds (i.e., concealing their source or ownership), or (2) of promoting further predicating offenses.[128]

To establish the concealment offense, the government must establish that "(1) [the] defendant conducted, or attempted to conduct a financial transaction which in any way or degree affected

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[118] *Reves*, 507 U.S. at 184; *see also* George v. Urban Settlement Services, 833 F.3d 1242, 1251 (10th Cir. 2016) ("Defendant need not have 'primary responsibility for the enterprise's affairs,' a 'formal position in the enterprise', or 'significant authority over or within an enterprise.' Instead even 'lower rung participants in the enterprise who are under the direction of upper management' may be liable under RICO if they have 'some part' in operating or managing the enterprise's affairs."); Allstate Insurance Co. v. Plambeck, 802 F.3d 665, 674-75 (5th Cir. 2015).

[119] 18 U.S.C. § 1961(4).

[120] *Pinson*, 860 F.3d at 161 (quoting Boyle v. United States, 556 U.S. 938, 946 (2009)); United States v. McArthur, 850 F.3d 925, 934 (8th Cir. 2017); United States v. McGill, 815 F.3d 846, 930-31 (D.C. Cir. 2016).

[121] 18 U.S.C. 1962(c).

[122] 18 U.S.C. 1963(a), 3571.

[123] 18 U.S.C. 3663A(c)(1)(A)(ii) (mandatory restitution offenses proscribed in 18 U.S.C. and "committed by fraud or deceit"); *cf.* United States v. Browne, 505 F.3d 1229, 1281 (11th Cir. 2007); United States v. Reifler, 446 F.3d 65, 121 (2d Cir. 2006).

[124] 18 U.S.C. §§ 1963(a), (b).

[125] *Id.* § 1956(c)(7)(A).

[126] *Id.* § 1964(c).

[127] *Id.* §§ 1956(c)(7)(A), 1961(1)(B); *e.g.*, United States v. Reed, 908 F.3d 102, 107-108 (5th Cir. 2018); United States v. Fattah, 902 F.3d 197, 224 (3d Cir. 2018); United States v. Meadows, 866 F.3d 913, 916 (8th Cir. 2017).

[128] 18 U.S.C. § 1956(a)(1). See generally CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, by Charles Doyle. Prosecutions under Section 1956 have largely replaced those under the previously enacted Travel Act, 18 U.S.C. § 1952, that outlaws interstate travel to promote or distribute the proceeds of bribery, among other predicate offenses.

interstate commerce or foreign commerce; (2) the financial transaction involved proceeds of illegal activity; (3) [the] defendant knew the property represented proceeds of some form of unlawful activity, [such as mail or wire fraud]; and (4) [the] defendant conducted or attempted to conduct the financial transaction knowing the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity."[129]

To prove the promotional offense, "the Government must show that the defendant: (1) conducted or attempted to conduct a financial transaction; (2) which the defendant then knew involved the proceeds of unlawful activity; (3) with the intent to promote or further unlawful activity."[130]

Nothing in either provision suggests that the defendant must be shown to have committed the predicate offense. Moreover, simply establishing that the defendant spent or deposited the proceeds of the predicate offense is not enough without proof of an intent to promote or conceal.[131]

Either offense is punishable by imprisonment for not more than 20 years and a fine of not more than $500,000.[132] Property involved in a transaction in violation of Section 1956 is subject to civil and criminal forfeiture.[133]

Merely depositing the proceeds of a money laundering predicate offense, like mail or wire fraud, does not alone constitute a violation of Section 1956. It is enough for a violation of 18 U.S.C. § 1957, however, if more than $10,000 is involved.[134] Section 1957 uses Section 1956's definition of specified unlawful activities.[135] Thus, mail and wire fraud violations may serve as the basis for the prosecution under Section 1957.[136] "Section 1957 differs from Section 1956 in two critical respects: It requires that the property have a value greater than $10,000, but it does not require that the defendant know of [the] design to conceal aspects of the transaction or that anyone have such a design."[137]

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[129] United States v. Anwar, 880 F.3d 958, 968 (8th Cir. 2018); *see also* United States v. Stewart, 902 F.3d 664, 679-83 (7th Cir. 2018); United States v. Tee, 881 F.3d 1258, 1267 (10th Cir. 2018).

[130] United States v. Stanford, 823 F.3d 814, 849 (5th Cir. 2016); *see also* United States v. Stoddard, 892 F.3d 1203, 1214-15 (D.C. Cir. 2018); United States v. Johnson, 821 F.3d 1194, 1203 (10th Cir. 2016); United States v. Cloud, 680 F.3d 396, 403 (4th Cir. 2012).

[131] United States v. Stewart, 902 F.3d 664, 682 (7th Cir. 2018) ("[T]he mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute; instead subsequent transactions must be specifically designed to hide the provenance of the funds involved."); *Stoddard*, 892 F.3d at 1216; United States v. Cessa, 785 F.3d 165, 171 (5th Cir. 2015).

[132] 18 U.S.C. § 1956(a)(1).

[133] *Id*. §§ 981(a)(1)(A); 982(a)(1).

[134] *Id*. § 1957(a) ("Whoever, in any of the circumstances set forth in subsection (d)[(including that the offense takes place in the United States)], knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).").

[135] *Id*. §1957(f)(3).

[136] *Id*. §§ 1957(f)(3), 1956(c)(7)(A), 1961(1)(B). In a given case, violations of Section 1957 may involve funds generated from other offenses in addition to wire or mail fraud, *e.g*., United States v. Fattah, 902 F.3d 197, 224 (3d Cir. 2018); United States v. Evans, 892 F.3d 692, 697 (5th Cir. 2018); United States v. Silver, 864 F.3d 102, 110 (2d Cir. 2017).

[137] United States v. Wetherald, 636 F.3d 1315, 1325 n.2 (11th Cir. 2011).

Violations are punishable by imprisonment for not more than 10 years and a fine of not more than $250,000 (not more than $500,000) for organizations.[138] The property involved in a violation is subject to forfeiture under either civil or criminal procedures.[139]

Fraud Under Other Jurisdictional Circumstances

This category includes the offenses that were made federal crimes because they involve fraud against the United States, or because they are other frauds that share elements with the mail and wire fraud. The most prominent are the proscriptions against defrauding the United States by the submission of false claims, conspiracy to defraud the United States, and material false statements in matters within the jurisdiction of the United States.[140] Bank fraud, health care fraud, securities and commodities fraud, and fraud in foreign labor contracting are mail and wire fraud look-alikes.[141]

Defrauding the United States

False Claims

Section 287 outlaws the knowing submission of a false claim against the United States.[142] "To prove a false claim, the government must prove that (1) [the defendant] 'made and presented' to the government a claim, (2) 'the claim was false, fictitious, or fraudulent,' (3) [the defendant] knew the claim was false, fictitious, or fraudulent, and (4) 'the claim was material' to the government."[143] The offense carries a sentence of imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for organizations).[144] The crime is one for which restitution must be ordered.[145] There is no explicit authority for confiscation of property tainted by the offense,[146] but either a private individual or the government may bring a civil action for treble damages under the False Claims Act.[147] Section 287 offenses are neither RICO nor money laundering predicate offenses.[148] Nevertheless, a defendant who presents his false claim by mail or email may find himself charged under both Section 287 and either the mail or wire fraud statutes.[149]

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[138] 18 U.S.C. §§ 1957(b), 3571.

[139] *Id*. §§ 981(a)(1)(A), 982(a)(1).

[140] *Id*. §§ 287, 351, and 1001, respectively.

[141] *Id*. §§ 1344, 1347, 1348, and 1351, respectively.

[142] 18 U.S.C. § 287. A companion, 18 U.S.C. 286, outlaws conspiracy to make a false claim.

[143] United States v. Stacks, 821 F.3d 1038, 1046 (8th Cir. 2016); United States v. Croteau, 819 F.3d 1293, 1305-306 (11th Cir. 2016); United States v. Clark, 577 F.3d 273, 285 (5th Cir. 2009).

[144] 18 U.S.C. §§ 287, 3571.

[145] *Id*. §§ 3663A(c)(1)(A)(ii).

[146] *Id*. §§ 981, 982.

[147] 31 U.S.C. §§ 3729-3733; see generally CRS Report R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, by Charles Doyle.

[148] 18 U.S.C. §§ 1956(c)(7), 1961(1).

[149] *E.g*., United States v. El-Bey, 873 F.3d 1015, 1017 (7th Cir. 2017).

Conspiracy to Defraud the United States

The general conspiracy statute has two parts.[150] It outlaws conspiracies to violate the laws of the United States.[151] More relevant here, it also outlaws conspiracies to defraud the United States.[152] "To convict on a charge under the 'defraud' clause, the government must show that the defendant (1) entered into an agreement (2) to obstruct a lawful government function (3) by deceitful or dishonest means and (4) committed at least one overt act in furtherance of the conspiracy."[153] Thus, the "fraud covered by the statute reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government" by "deceit, craft or trickery, or at least by means that are dishonest."[154] Unlike mail and wire fraud, the government need not show that the scheme was designed to deprive another of money, property, or honest services; it is enough to show that the scheme is designed to obstruct governmental functions.[155]

Conspiracy to defraud the United States is punishable by imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for organizations).[156] It is neither a RICO nor a money laundering predicate offense.[157] It is an offense for which restitution must be ordered.[158] There is no explicit authority for confiscation of property tainted by the offense.[159]

False Statements

Section 1001 outlaws knowingly and willfully making a material false statement on a matter within the jurisdiction of the executive, legislative, or judicial branch of the federal government.[160] A matter is material for purposes of Section 1001 when "it has a natural tendency to influence, or [is] capable of influencing, the decision of" the individual or entity to whom it is addressed.[161] A matter is within the jurisdiction of a federal entity "when it has the power to

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[150] 18 U.S.C. § 371; see generally CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle.

[151] "If two or more persons conspire either *to commit an offense against the United States* or to defraud the United States, or any agency thereof in any manner or for any purpose.... " 18 U.S.C. 371 (emphasis added).

[152] "If two or more persons conspire either to commit an offense against the United States or *to defraud the United States, or any agency thereof in any manner or for any purpose....* " 18 U.S.C. 371 (emphasis added).

[153] United States v. Conti, 804 F.3d 977, 979-80 (9th Cir. 2015); United States v. Coplan, 703 F.3d 46, 60-61 (2d Cir. 2012).

[154] Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); Glasser v. United States, 315 U.S. 60, 66 (1942); Tanner v. United States, 483 U.S. 107, 128 (1987).

[155] United States v. Elbeblawy, 899 F.3d 925, 938-39 (11th Cir. 2018); United States v. McKee, 506 F.3d 225, 238 (3d Cir. 2007); *Hammerschmidt*, 265 U.S. at 188; *Tanner*, 483 U.S. at 128.

[156] 18 U.S.C. § 371.

[157] *Cf. Id.* §§ 1961(1), 1956(c)(7).

[158] *Id.* § 3663A(c)(1)(A)(ii).

[159] *Cf. Id.* §§ 981, 982.

[160] *Id.* § 1001; United States v. Sampson, 898 F.3d 287, 305 n.13 (2d Cir. 2018) ("To secure a conviction under this statute, the government must prove beyond a reasonable doubt that the defendant (1) knowingly and willfully, (2) made a materially false, fictitious, or fraudulent statement, (3) in relation to a matter within the jurisdiction of a department or agency of the United States, (4) with knowledge that it was false or fictitious or fraudulent."); United States v. Henderson, 893 F.3d 1338, 1350 (11th Cir. 2018); United States v. Stacks, 821 F.3d 1038, 1043 (8th Cir. 2016); United States v. Rahman,, 805 F.3d 822, 836 (7th Cir. 2015). *See generally* CRS Report 98-808, *False Statements and Perjury: An Overview of Federal Criminal Law*, by Charles Doyle.

[161] United States v. Henderson, 893 F.3d 1338, 1346 (11th Cir. 2018); United States v. Benton, 890 F.3d 697, 712 (8th Cir. 2018); United States v. Wilson, 879 F.3d 795, 807 (7th Cir. 2018); Williams v. United States, 858 F.3d 708, 718

exercise authority in a particular matter," and federal jurisdiction "may exist when false statements [are] made to state or local government agencies receiving federal support or subject to federal regulation."[162]

A violation of Section 1001 is punishable by imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for organizations).[163] It is neither a RICO nor a money laundering predicate offense.[164] It is an offense for which restitution must be ordered.[165] There is no explicit authority for confiscation of property tainted by the offense, unless the offense relates to the activities of various federal financial receivers and conservators.[166] Moreover, in a situation where the offense involves the submission of a false claim, either a private individual or the government may bring a civil action for treble damages under the False Claims Act.[167]

Fraud Elsewhere in Chapter 63

Chapter 63 contains four other fraud proscriptions in addition to mail and wire fraud: bank fraud, health care fraud, securities and commodities fraud, and fraud in foreign labor contracting.[168] Each relies on a jurisdictional base other than use of the mail or wire communications.

Bank Fraud

The bank fraud statute outlaws (1) schemes to defraud a federally insured financial institution, and (2) schemes to falsely obtain property from such an institution.[169] To establish the bank-

(1st Cir. 2017).

[162] United States v. Ford, 639 F.3d 718, 720 (6th Cir. 2011) (quoting United States v. Rodgers, 466 U.S. 475, 479 (1984); *see also* United States v. Pinson, 860 F.3d 152, 170-71 (4th Cir. 2017); *Rahman*, 805 F.3d at 836-37; United States v. Clark, 787 F.3d 451, 459 (7th Cir. 2015).

[163] 18 U.S.C. § 1001. It is punishable by imprisonment for not more than eight years if the offense involves international or domestic terrorism as defined in 18 U.S.C. 2331 or if the matter relates to an offense under 18 U.S.C. 1591 (relating to commercial sexual trafficking), ch. 109A (relating to sexual abuse), ch. 109B (relating to sex offender registration), ch. 110 (relating to sexual exploitation of children), or ch. 117 (relating to transportation for illicit sexual purposes).

[164] *Cf. Id.* §§ 1961(1), 1956(c)(7).

[165] *Id.* § 3663A(c)(1)(A)(ii).

[166] *Cf. Id.* §§ 981, 982, *but see id.* § 981(a)(1)(D) ("(a)(1) The following property is subject to forfeiture to the United States ... (D) Any property, real or personal, which represents or is traceable to the gross receipts, obtained, directly or indirectly from a violation of … (ii) section 1001 (relating to fraud and false statements) ... if such violation relates to the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision or the National Credit Union Administration, as conservator or liquidating agent for a financial institution"); 982(a)(3)(criminal forfeiture)(same).

[167] 31 U.S.C. §§ 3729-3733.

[168] 18 U.S.C. §§ 1344, 1347, 1348, and 1351, respectively.

[169] *Id.* § 1344 ("Whoever knowingly executes, or attempts to execute, a scheme or artifice – (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both").

Id. § 20 ("As used in this title, the term 'financial institution' means – (1) an insured depository institution (as defined in [s]ection 3(c)(2) of the Federal Deposit Insurance Act); (2) a credit union with accounts insured by the National Credit Union Share Insurance Fund; (3) a Federal home loan bank or a member, as defined in [s]ection 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; (4) a System institution of the Farm Credit System, as defined in [s]ection 5.35(3) of the Farm Credit Act of 1971; (5) a small business investment

property scheme to defraud offense, "the Government must prove: (1) the defendant knowingly executed or attempted to execute a scheme or artifice to defraud a financial institution; (2) the defendant did so with the intent to defraud a financial institution; and (3) the financial institution was federally insured."[170]

As for the bank-custody offense, "the government must prove (1) that a scheme existed to obtain moneys, funds, or credit in the custody of a federally-insured bank by fraud; (2) that the defendant participated in the scheme by means of material false pretenses, representations, or promises; and (3) that the defendant acted knowingly."[171]

Violation of either offense is punishable by imprisonment for not more than 30 years and a fine of not more than $1 million.[172] Bank fraud is both a RICO and a money laundering predicate offense.[173] Conviction also requires an order for victim restitution.[174] Property constituting the proceeds of a violation is subject to forfeiture under either civil or criminal procedure.[175]

Health Care Fraud

The health care fraud provision follows the pattern of other Chapter 63 offenses. It condemns schemes to defraud.[176] The schemes it proscribes include honest services fraud in the form of bribery and kickbacks.[177] Attempts and conspiracies to violate its prohibitions carry the same

company, as defined in [s]ection 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662); (6) a depository institution holding company (as defined in [s]ection 3(w)(1) of the Federal Deposit Insurance Act; (7) a Federal Reserve bank or a member bank of the Federal Reserve System; (8) an organization operating under [s]ection 25 or [s]ection 25(a) of the Federal Reserve Act; (9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of [s]ection 1(b) of the International Banking Act of 1978); or (10) a mortgage lending business (as defined in [s]ection 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in [s]ection 3 of the Real Estate Settlement Procedures Act of 1974."). *See generally* Raphael Davidian, *Financial Institution Fraud*, 55 AM. CRIM. L. REV. 1219 (2018).

[170] United States v. Williams, 865 F.3d 1302, 1309 (10th Cir. 2017); *see also* United States v. Kerley, 784 F.3d 327, 343 (6th Cir. 2015); United States v. Adepoju, 756 F.3d 250, 255 (4th Cir. 2014); United States v. Parker, 716 F.3d 999, 1008 (7th Cir. 2013); *cf.* Shaw v. United States, 137 S. Ct. 462, 466 (2016) (holding that the government need not show either that the defendant intended to harm the bank or that the bank ultimately suffered a financial loss) ("[A] scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a 'financial institution,' at least where, as here, the defendant knew that the bank held the deposits, the funds obtained came from the deposit account, and the defendant misled the bank in order to obtain those funds."); for a discussion of the Court's decision in *Shaw*, see CRS Legal Sidebar WSLG1718, *High Court: Bank Fraud Does Not Require Bank to Lose Money*, by M. Maureen Murphy.

[171] United States v. Presendieu, 880 F.3d 1228, 1240 (11th Cir. 2018); United States v. Loughrin, 710 F.3d 1111, 1115-117 (10th Cir. 2013), *aff'd*, 573 U.S. 351 (2104); United States v. Crisci, 273 F.3d 235, 239-40 (2d Cir. 2001); *cf.* Loughrin v. United States, 573 U.S. 351, 353 (2014) (holding that the government need not prove "that a defendant charged with violating [§ 1344(2)] intended to defraud a bank.").

[172] 18 U.S.C. § 1344.

[173] *Id.* §§ 1961(1), 1956(c)(7)(A).

[174] *Id.* § 3663A(c)(1)(A)(ii).

[175] *Id.* §§ 981(a)(1)(C), 982(a)(2)(A).

[176] *Id.* § 1347. Seven of the nine offenses found in Chapter 63 involve schemes to defraud. *Id.* §§ 1341, 1343, 1344, 1347, 1348, 1351.

[177] *Id.* § 1347 ("For purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."); Skilling v. United States, 561 U.S. 358, 412 (2010) ("Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague."); *e.g.*, Fordham v. United States, 706 F.3d 1345, 1350-51 (11th Cir. 2013).

penalties as the complete offense it describes.[178] It is often prosecuted along with other related offenses.[179] Parsed to its elements, the section declares:

> [a] Whoever
>
> [b] knowingly and willfully
>
> [c] executes or attempts to execute
>
> [d] a scheme or artifice
>
> > (1) to defraud any health care benefit program, or
> >
> > (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property owned by, or under the custody or control of, any health care benefit program
>
> [e] in connection with the delivery of or payment for health care benefits, items, or services shall be …[180]

Section 1347's penalty structure is somewhat distinctive. General violations are punishable by imprisonment for not more than 10 years and fines of not more than $250,000.[181] Should serious bodily injury result, however, the maximum penalty is increased to imprisonment for not more than 20 years; should death result, the maximum penalty is imprisonment for life or any term of

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[178] 18 U.S.C. § 1349; *e.g*., United States v. Crabtree, 878 F.3d 1274, 1285 (11th Cir. 2018) ("A conviction for conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349 requires proof beyond a reasonable doubt "(1) that a conspiracy existed; (2) that the defendant knew of it; and (3) that the defendant, with knowledge, voluntarily joined it."); United States v. Barson, 845 F.3d 159, 163-64 (5th Cir. 2016).

[179] *E.g*., United States v. Evans, 892 F.3d 692, 697 (5th Cir. 2018) (defendant was charged with "conspiracy under 18 U.S.C. § 371, six counts of distributing controlled substances without a legitimate medical purpose and outside the usual course of professional practice under 21 U.S.C. § 841, five counts of money laundering under 18 U.S.C. § 1957, and eight counts of mail fraud under 18 U.S.C. § 1341. Devido [a co-defendant] was also charged with four counts of health-care fraud for false claims under 18 U.S.C. § 1347."); *Crabtree*, 878 F.33d at 1280 (defendant charged with violations of 18 U.S.C. §§ 1347 (health care fraud), 1349 (conspiracy to commit health care fraud), 1035 (false statements relating health care)); United States v. Nguyen, 829 F.3d 907, 913 (8th Cir. 2016) (defendant was charged with "attempted naturalization fraud, 18 U.S.C. § 1425(a); theft of government funds, 18 U.S.C. § 641; social-security fraud, 42 U.S.C. § 1383(a)(3); false use of a social security number, 42 U.S.C. § 408(a)(7)(B); aggravated identity theft, 18 U.S.C. § 1028A(a)(1); false statements to a government agency, 18 U.S.C. § 1001(a)(1); health-care fraud, 18 U.S.C. § 1347; and mail fraud, 18 U.S.C. § 1341"); *see generally* CRS Report RS22743, *Health Care Fraud and Abuse Laws Affecting Medicare and Medicaid: An Overview*, by Jennifer A. Staman.

[180] 18 U.S.C. § 1347(a); *e.g.*, United States v. Bertram, 900 F.3d 743, 748 (6th Cir. 2018) (internal citations omitted) ("[T]he government had to prove that the five defendants: (1) created 'a scheme or artifice to defraud' a health care program, (2) implemented the plan, and (3) acted with 'intent to defraud.' But three-part tests distract more than they inform in this case, which comes down to the meaning of 'defraud' and whether the defendants satisfied it."); United States v. Troisi, 849 F.3d 490, 494 (1st Cir. 2017) ("A defendant violates 18 U.S.C. § 1347 if she 'knowingly and willfully execute[s] a scheme [intended] to defraud a government health-care program."); United States v. Mahmood, 820 F.3d 177, 185-86 (5th Cir. 2016) (internal citations omitted) ("To prove health care fraud in violation of 18 U.S.C. § 1347(a), the Government was required to show that Mahmood either (1) knowingly and willfully executed, or attempted to execute, a scheme or artifice to defraud a health care benefit program, or (2) knowingly and willfully executed, or attempted to execute a scheme or artifice to obtain, by means of false or fraudulent pretenses, money under the control of a health care benefit program. Under either theory, the Government also had to prove that Mahmood's scheme occurred 'in connection with the delivery of or payment for health care benefits, items, or services. … Mahmood's argument focuses exclusively on the 'false or fraudulent pretenses' theory of health care fraud in 18 U.S.C. § 1347(a)(2), and ignores the Government's overwhelming evidence that he knowing and willfully executed a scheme to defraud Medicare in violation of 18 U.S.C. § 1347(2).").

[181] 18 U.S.C. 1347(a).

years.[182] Section 1347 offenses are neither money laundering nor RICO predicate offenses,[183] and proceeds of a violation of Section 1347 are not subject to confiscation.[184] Victims, however, are entitled to restitution.[185]

Securities and Commodities Fraud

Section 1348, the securities and commodities fraud prohibition, continues the progression of separating its defrauding feature from its obtaining-property feature.[186] The elements of defrauding offense "are (1) fraudulent intent, (2) a scheme or artifice to defraud, and (3) a nexus with a security."[187] To prove a violation of Section 1348(2), the government must establish that the defendant (1) executed, or attempted to execute, a scheme or artifice; (2) with fraudulent intent; (3) in order to obtain money or property; (4) by material false or fraudulent pretenses, representations, or promises.[188]

A conviction for mail fraud or wire fraud, or both, sometimes accompanies a conviction for securities fraud under Section 1348.[189]

Under either version of Section 1348, offenders face imprisonment for not more than 25 years and fines of not more than $250,000 (not more than $500,000 for organizations).[190] The offenses

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[182] *Id. See, e.g.*, United States v. Chikvashvili, 859 F.3d 285, 287 (4th Cir. 2017); United States v. Martinez, 588 F.3d 301, 317-19 (6th Cir. 2009).

[183] *Cf.* 18 U.S.C. §§ 1956(c)(7), 1961(1).

[184] *Cf. id.* §§ 981, 982, 1347. Nevertheless, the same facts may support mail fraud, wire fraud, or some other charge that would permit forfeiture under either civil or criminal forfeiture procedures. *E.g., id.* §§ 981(a)(1)(C), 1956(c)(7), 1961(1); 28 U.S.C. § 2461(c).

[185] 18 U.S.C. § 3663A(c)(1); *e.g.*, United States v. Mateos, 623 F.3d 1350, 1369-370 (11th Cir. 2010).

[186] 18 U.S.C. § 1348 ("Whoever knowingly executes, or attempts to execute, a scheme or artifice –
(1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)); or
(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) shall be fined under this title, or imprisoned not more than 25 years, or both."). *See generally* William K.S. Wang, *Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping*, 70 U. MIAMI L. REV. 220 (2015). For a discussion of the civil liability and regulatory sanction issues raised in Lorenzo v. SEC, now pending before the Supreme Court, see CRS Legal Sidebar LSB10224, *Schemes and False Statements: Supreme Court to Consider Scope of Anti-Fraud Liability Under Securities Laws*, by Jay B. Sykes.

[187] United States v. Coscia, 866 F.3d 782, 797 (7th Cir. 2017); United States v. Mahaffy, 693 F.3d 113, 125 (2d Cir. 2012).

[188] United States v. Hatfield, 724 F. Supp.2d 321, 324 (E.D.N.Y. 2010).

[189] *E.g.*, United States v. Harris, 881 F.3d 945, 948 (6th Cir. 2018); United States v. Jordan, 813 F.3d 442, 444 (1st Cir. 2016); United States v. DeMizio, 741 F.3d 373, 374 (2d Cir. 2014) (conviction for wire fraud (18 U.S.C. § 1343), securities fraud (18 U.S.C. § 1348), conspiracy (18 U.S.C. § 1349), and false statements (18 U.S.C. § 1001); United States v. Stanley, 739 F.3d 633, 639 (11th Cir. 2014).

[190] 18 U.S.C. § 1348.

are neither money laundering nor RICO predicate offenses.[191] Victim restitution must be ordered upon conviction,[192] but forfeiture is not authorized.[193]

Fraud in Foreign Labor Contracting

"The substantive offense of fraud in foreign labor contracting [under 18 U.S.C. § 1351] occurs when someone: (1) recruits, solicits, or hires a person outside the United States, or causes another person to do so, or attempts to do so; (2) does so by means of materially false or fraudulent pretenses, representations or promises regarding that employment; and (3) acts knowingly and with intent to defraud."[194] The offense occurs outside the United States when related to a federal contract or U.S. presence abroad.[195]

The offense is a RICO predicate offense and consequently a money laundering predicate offense as well.[196] A restitution order is required at sentencing,[197] but forfeiture is not authorized.[198]

Honest Services Fraud Elsewhere

After the Supreme Court's 2010 decision in *Skilling v. United States*, honest services mail and wire fraud consists of bribery and kickback schemes furthered by use of the mail or wire communications. Mail and wire fraud aside, the principal bribery and kickback statutes include 18 U.S.C. §§ 201(b)(1) (bribery of federal officials), 666 (bribery relating to federal programs), 1951 (extortion under color of official right); 15 U.S.C §§ 78dd-1 to 78dd-3 (foreign corrupt practices); and 42 U.S.C. § 1320a-7b (Medicare/Medicaid anti-kickback).

Bribery of Federal Officials

Conviction for violation of Section 201(b)(1) "requires a showing that something of value was corruptly ... offered or promised to a public official ... or corruptly ... sought ... or agreed to be received by a public official with intent ... to influence any official act ... or in return for 'being influenced in the performance of any official act."[199]

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[191] *Cf. id*. §§ 1961(1), 1956(c)(7).

[192] *Id*. §§ 18 U.S.C. 3663A(c)(1)(A)(ii).

[193] *Cf. id*. §§ 1348, 981, 982.

[194] United States v. Bart, 888 F.3d 374, 378 (8th Cir. 2018). *See generally* Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 A.B.A. J. LAB. & EMP. L. 1 (2015).

[195] 18 U.S.C. § 1351 ("(a) Work Inside the United States.-Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both. (b) Work Outside the United States.-Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment performed on a United States Government contract performed outside the United States, or on a United States military installation or mission outside the United States or other property or premises outside the United States owned or controlled by the United States Government, by means of materially false or fraudulent pretenses, representations, or promises regarding that employment, shall be fined under this title or imprisoned for not more than 5 years, or both.").

[196] *Id*. §§ 1961(1)(B), 1956(c)(7)(A).

[197] *Id*. § 3663A(c)(1)(A)(ii).

[198] *Cf. id*. §§ 1351, 981, 982.

[199] United States v. Sun Diamond Growers, 526 U.S. 398, 404 (1999); United States v. Suhl, 885 F.3d 1106, 1112 (8th Cir. 2018); United States v. Nagin, 810 F.3d 348, 351 (5th Cir. 2016). *See generally* Jay Winkelman, *Public*

The hallmark of the offense is a corrupt quid pro quo, "a specific intent to give or receive something of value in exchange for an official act."[200] The public officials covered include federal officers and employees, those of the District of Columbia, and those who perform tasks for or on behalf of the United States or any of its departments or agencies.[201] The official acts that constitute the objective of the corrupt bargain include any decision or action relating to any matter coming before an individual in his official capacity.[202]

Section 201 punishes bribery with imprisonment for up to 15 years, a fine of up to $250,000 (up to $500,000 for an organization), and disqualification from future federal office or employment.[203] Section 201 is a RICO predicate offense and consequently also a money laundering predicate offense.[204] The proceeds of a bribe in violation of Section 201 are subject to forfeiture under either civil or criminal procedure.[205]

Bribery and Fraud Related to Federal Programs

Section 666 outlaws both (1) fraud and (2) bribery by the faithless agents of state, local, tribal, or private entities—that receive more than $10,000 in federal benefits—in relation to a transaction of $5,000 or more.[206] "A violation of Section 666(a)(1)(A) requires proof of five elements. The government must prove that: (1) a defendant was an agent of an organization, government, or agency; (2) in a one-year period that organization, government, or agency received federal benefits in excess of $10,000; (3) a defendant … obtained by fraud … ; (4) … property owned by, or in the care, custody, or control of, the organization, government, or entity; and (5) the value of that property was at least $5,000."[207]

Corruption, 55 AM. CRIM. L. REV. 1565 (2018).

[200] *Sun Diamond Growers*, 526 U.S. at 404; United States v. Whitman, 887 F.3d 1240, 1247 (11th Cir. 2018); *cf. Suhl*, 885 F.3d at 1114).

[201] 18 U.S.C. § 201(a)(1); Dixon v. United States, 465 U.S. 482, 496 (1984); *Suhl*, 885 F.3d at 1111 n.2; United States v. Dodd, 770 F.3d 306, 308 n.2 (4th Cir. 2014).

[202] 18 U.S.C. 201(a)(3); McDonnell v. United States, 136 S. Ct. 2355, 2358 (2016) (To establish an official act, "[f]irst, the Government must identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official. Second, the Government must prove that the public official made a decision or took an action 'on' that 'question, matter, cause, suit, proceeding, or controversy,' or agreed to do so."); Woodward v. United States, 905 F.3d 40, 44 (1st Cir. 2018); United States v. Fattah, 902 F.3d 197, 237 (3d Cir. 2018).

[203] 18 U.S.C. §§ 201(b), 3571.

[204] *Id.* §§ 1961(1)(B), 1956(c)(7)(A).

[205] *Id.* §§ 981(a)(1)(C), 1956(c)(7)(A); 28 U.S.C. § 2461(c).

[206] 18 U.S.C. 666 ("(a) Whoever, if the circumstance described in subsection (b) of this section exists - (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof – (A) … obtains by fraud... property that – (i) is valued at $5,000 or more, and (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or (B) corruptly solicits ... or accepts ... anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more ... [or corruptly offers a thing of value to any such agent for any such purposes and in relation to such matters] shall be fined under this title, imprisoned not more than 10 years, or both.
"(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance ..."). *See generally* Derek Tister, *Theft, Fraud, and Undue Influence: Determining the Scope of the Federal Funds Bribery Statute*. 2018 U. CHI. LEGAL F. 399.

[207] United States v. Baroni, 909 F.3d 550, 570 (3d Cir. 2018); *see also* United States v. Pinson, 860 F.3d 152, 164 (4th Cir. 2017) ("Thus, to convict someone under this statute in this case, the government needed to prove three elements: (1) that the defendant, or somebody the defendant aided and abetted … fraudulently misapplied at least $5,000 in

"A person is guilty under § 666[(a)(1)(B)] if he, being an agent of an organization, government, or governmental agency that receives federal-program funds, corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more."[208]

Agents are statutorily defined as "person[s] authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative."[209] The circuits appear divided over whether the government must establish a quid pro quo as in a Section 201 bribery case.[210] The government, however, need not establish that the tainted transaction involves federal funds.[211]

Violations of Section 666 are punishable by imprisonment for not more than 10 years and a fine of not more than $250,000 (not more than $500,000 for organizations).[212] Section 666 offenses are money laundering predicate offenses.[213] Section 666 offenses are not among the RICO federal predicate offenses, although bribery in violation of state felony laws is a RICO predicate offense.[214] The proceeds of a bribe in violation of Section 666 are subject to forfeiture under either civil or criminal procedure.[215]

Hobbs Act

The Hobbs Act, 18 U.S.C. § 1951, outlaws obtaining the property of another under "color of official right," in a manner that has an effect on interstate commerce.[216] Conviction requires the

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property under the care and control of any entity; (2) that this person was an 'agent' of the entity; and (3) that this entity received over $10,000 of federal 'benefits' within one year.").

[208] United States v. Hardin, 874 F.3d 672, 676 (10th Cir. 2017).

[209] 18 U.S.C. § 666(d)(1). United States v. Pinson, 860 F.3d 152, 165 (4th Cir. 2017) (citing United States v. Keen, 676 F.3d 981, 989-91 (11th Cir. 2012); United States v. Vitillo, 490 F.3d 314, 324 (3d Cir. 2007); United States v. Sotomayor-Vazquez, 249 F.3d 1, 9 (1st Cir. 2001)) ("Our sister circuits have adopted slightly varying definitions of the term based on this language. The broadest definition, adopted by the First Third, and Eleventh Circuits, includes as an agent any person with authorization to act on behalf of the covered entity in some capacity, regardless of the person's official title.").

[210] United States v. Willis, 844 F.3d 155, 163-64 & n.17 (3d Cir. 2016) (acknowledging the split but finding it unnecessary to rule on the question); *see also* United States v. McNair, 605 F.3d 1152, 1189 (11th Cir. 2010) ("In concluding §666 does not require a specific *quid pro quo,* we align ourselves with the Sixth and Seventh Circuits. See, United States v. Abbey, 560 F.3d 513, 520 (6th Cir.... 2009) ... United States v. Gee, 432 F.3d 713, 714-15 (7th Cir. 2005)."); United States v. Shoemaker, 746 F.3d 614, 623 (5th Cir. 2014) ("To the extent that the district court concluded that proof of an actual quid pro quo was necessary to sustain the convictions, it erred as a matter of law"); *but see* United States v. Redzic, 627 F.3d 683, 692 (8th Cir. 2010) ("To prove the payment of an illegal bribe, the government must present evidence of a quid pro quo, but an illegal bribe may be paid with the intent to influence a general course of conduct. It was not necessary for the government to link any particular payment to any particular action…"); United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998); *cf.* United States v. Ganim, 510 F.3d 134, 141-42 (2d Cir. 2007).

[211] Salinas v. United States, 522 U.S. 52, 56-7 (1997); *Baroni*, 909 F.3d at 573; United States v. McLean, 802 F.3d 1228, 1235 (11th Cir. 2015).

[212] 18 U.S.C. §§ 666(a), 3571.

[213] *Id.* § 1956(c)(7)(D).

[214] *Id.* § 1961(1).

[215] *Id.* §§ (a)(1)(C), 1956(c)(7)(A); 28 U.S.C. § 2461(c).

[216] 18 U.S.C. § 1951("(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by ... extortion or attempts or conspires so to do ... shall be fined under this title

government to prove that the defendant "(1) was a government official; (2) who accepted property to which she was not entitled; (3) knowing that she was not entitled to the property; and (4) knowing that the payment was given in return for officials acts: (5) which had at least a de minimis effect on commerce."[217] Conviction does not require that the public official sought or induced payment: "the government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[218]

Hobbs Act violations are punishable by imprisonment for not more than 20 years and a fine of not more than $250,000 (not more than $500,000 for an organization).[219] Hobbs Act violations are RICO predicate offenses and thus money laundering predicates as well.[220] The proceeds of a Hobbs Act violation are subject to forfeiture under either civil or criminal procedure.[221]

Foreign Corrupt Practices

The bribery provisions of the Foreign Corrupt Practices Act (FCPA) are three: 15 U.S.C. §§ 78dd-1 (trade practices by issuers), 78dd-2 (trade practices by domestic concerns), and 78dd-3 (trade practices by others within the United States).[222] Other than the class of potential defendants, the elements of the three are comparable. They

> make[] it a crime to: (1) willfully; (2) make use of the mail or any means or instrumentality of interstate commerce; (3) corruptly; (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to; (5) any foreign official; (6) for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage; (7) in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person.[223]

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or imprisoned not more than twenty years, or both. (b) As used in this section ... (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right ...").

[217] United States v. Kincaid-Chauncey, 556 F.3d 923, 936 (9th Cir. 2009) (citing Evans v. United States, 504 U.S. 255, 268 (1992) (abrogated on other grounds by statute); *see also* United States v. Buffis, 867 F.3d 230, 234 (1st Cir. 2017) (internal citations omitted) ("First, the elements of Hobbs Act extortion. Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by … extortion or attempts or conspires to do so' has violated the Hobbs Act. To show Buffis committed Hobbs Act extortion, the government had to prove that Buffis 'obtained property form another, with his consent … under color of official right. In cases of extortion under color official right' … the government can prove up the charge by showing that the defendant obtained a payment to which was not entitled, knowing that the payment was made in return for official acts"); United States v. Taylor, 754 F.3d 217, 222 (4th Cir. 2014), *aff'd*, 136 S. Ct. 2074 (2016) (internal citations omitted) ("A Hobbs Act crime, then, has two elements: (1) robbery or extortion, and (2) interference with commerce … [T]he jurisdictional predicate of the Hobbs Act requires only that e government prove a 'minimal' effect on interstate commerce. Such an impact is not difficult to show. The effect may be so minor as to be *de minimis*."). *See generally* CRS Report R45395, *Robbery, Extortion, and Bribery in One Place: A Legal Overview of the Hobbs Act*, by Charles Doyle.

[218] *Evans*, 504 U.S. at 268; *Buffis*, 867 F.3d at 235; United States v. Ocasio, 750 F.3d 399, 409 (4th Cir. 2014), *aff'd*, 136 S. Ct. 1423 (2016).

[219] 18 U.S.C. §§ 1951, 3571.

[220] *Id*. §§ 1961(1)(B), 1956(c)(7)(A).

[221] *Id*. §§ 981(a)(1)(C), 1956(c)(7)(A); 28 U.S.C. § 2461(c).

[222] *See generally* Rahul Kohli, *Foreign Corrupt Practices Act*, 55 AM. CRIM. L. REV. 1269 (2018).

[223] United States v. Kay, 513 F.3d 432, 439-40 (5th Cir. 2007); *see also* United States v. Jefferson, 289 F. Supp. 3d 717, 735 (E.D. Va. 2017) ("To prove a substantive FCPA violation, the government must prove that (i) a domestic concern

None of the three proscriptions apply to payments "to expedite or to secure the performance of a routine governmental action,"[224] and each affords defendants an affirmative defense for payments that are lawful under the applicable foreign law or regulation.[225]

Violations are punishable by imprisonment for not more than five years and by a fine of not more than $100,000 (not more than $2 million for organizations).[226] Foreign Corrupt Practices Act violations are not RICO predicate offenses,[227] but they are money laundering predicates.[228] The proceeds of a violation are subject to forfeiture under either civil or criminal procedure.[229]

Medicare Kickbacks

The Medicare/Medicaid kickback prohibition in 42 U.S.C. 1320a-7b(b) outlaws "knowingly and willfully [offering or paying], soliciting [or] receiving, any remuneration (including any kickback) ... (A) to induce the referral of [, or (B) the purchase with respect to] Medicare [or] Medicaid beneficiaries ... any item or service for which payment may be made in whole or in part under the Medicare [or] Medicaid programs...."[230]

Violations are punishable by imprisonment for not more than five years and by a fine of not more than $25,000. Section 1320a-7b kickback violations are money laundering, but not RICO, predicate offenses.[231] The proceeds of a violation are subject to forfeiture under either civil or criminal procedure.[232]

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made use of means or instrumentalities of interstate commerce corruptly; (ii) in furtherance of an offer or payment of anything of value to any person; (iii) while knowing that the money would be offered or given directly or indirectly to any foreign official for purposes of influencing any act or decision of such foreign official in his official capacity.") (The defendant was convicted, among other offenses, of FCRA, wire fraud, and RICO violations.).

[224] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

[225] *Id.* §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

[226] *Id.* §§ 78dd-2(g), 78dd-3(e), 78ff(c).

[227] *Cf.* 18 U.S.C. § 1961(1).

[228] *Id.* § 1956(c)(7)(D).

[229] *Id.* §§ 981(a)(1)(C), 1956(c)(7)(D); 28 U.S.C. § 2461(c); *e.g.*, United States v. Aguilar, 782 F.3d 1101, 1103-104 (9th Cir. 2015).

[230] United States v. Mauska, 557 F.3d 219, 226 (5th Cir. 2009); *see also* United States v. George, 900 F.3d 405, 410-11 (7th Cir. 2018); United States v. Nerey, 877 F.3d 956, 968 (11th Cir. 2017).
42 U.S.C. §1320-7b(b)(1),(2) provides: "(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind - (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both.

"(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person - (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both."

See generally CRS Report RS22743, *Health Care Fraud and Abuse Laws Affecting Medicare and Medicaid: An Overview*, by Jennifer A. Staman.

[231] 18 U.S.C. §§ 1956(c)(7)(E), 24(a)(1), 1961(1).

[232] *Id.* §§ 981(a)(1)(C), 1956(c)(7)(E); 28 U.S.C. § 2461(c).

Statutory Text

18 U.S.C. 1341 (Mail Fraud) (Text)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1343 (Wire Fraud) (Text)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1346 (Honest Services) (Text)

For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. 1349 (Attempt and Conspiracy) (Text)

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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