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FOR CHAPTER 41

9-41.000 BANKRUPTCY FRAUDS

The criminal provisions relating to bankruptcy were enacted to preserve honest administration in bankruptcy proceedings and to ensure the distribution to creditors of as large a portion of the bankrupt's estate as possible. These criminal sanctions are embodied in Title 18, United States Code, Sections 151 to 155.

Section § 151 makes it clear that the following provisions, 18 U.S.C. §§ 152 to 155, are applicable not only to bankruptcy proceedings but to any proceeding, arrangement or plan under the Bankruptcy Act, Title 11, United States Code. As defined in § 151:

> . . . the term ''debtor'' mean[s] a debtor concerning whom a petition has been filed under chapter 11.

9-41.010 Report of Violations

Section 3057(a) of Title 18 requires the judge, receiver or trustee having reasonable grounds for believing that any violation of laws of the United States relating to insolvent debtors, receiverships or reorganization plans have been committed, to report all the facts and circumstances to the appropriate U.S. Attorney. This report has been made mandatory in order that the United States Attorney be apprised of possible violations which ordinarily would not come to his attention. Upon receipt of this report, the U.S. Attorney determines whether an FBI investigation should be commenced; and upon completion of this investigation decides whether criminal action is warranted. The judge's report of possible violations is not a condition precedent to the initiation of an FBI investigation.

When a matter referred to the United States Attorney pursuant to 18 U.S.C. § 3057(a) by a judge, receiver or trustee is declined, 18 U.S.C. § 3057(b) requires that the United States Attorney ''report the facts of the case to the Attorney General for his direction.'' This statutory directive is satisfied by providing the Fraud Section with a concise summary of the facts of the case and the reasons for declining it. Concurrence with the decision to decline may be presumed if no disagreement is expressed by the Fraud Section.

Investigations are often begun as the result of information furnished by creditors or other interested parties, rather than by report pursuant to 18 U.S.C. § 3057(a). It is immaterial, when prosecuting an offender under any of the criminal provisions, whether the procedure set forth in 18 U.S.C. § 3057(a) has or has not been followed. *Dean v. United States,* 51 F.2d 481 (9th Cir.1931); 2 Collier on Bankruptcy (14th ed.), 1236. This section does not confer any procedural rights upon a defendant. *United States v. Filiberti,* 353 F.Supp. 252 (D.Conn.1973).

The personal opinion of the judge or trustee as to whether a criminal offense has occurred or as to whether criminal proceedings should or should not be commenced is in no way binding on the U.S. Attorney or determinative of the issues involved. Similarly, the decision of an officer of the Bankruptcy Court not to refer a matter to the U.S. Attorney should not be determinative in any prosecutive analysis.

9-41.100 OVERVIEW OF 18 U.S.C. § 152 VIOLATIONS

The principal criminal violations in connection with bankruptcy proceedings are set forth in 18 U.S.C. § 152. The section addresses acts committed by debtors and by anyone else who could attempt to defeat the purpose of the Bankruptcy Act through fraudulent means. The nine paragraphs of the section denounce the following activities:

A. The concealment of property belonging to the estate of a debtor;

B. The making of false oaths or accounts in or in relation to any case under Title 11;

C. The making of a false declaration, certificate, verification or statement under penalty of perjury as permitted under Section 1746 of Title 28 or in relation to any case under Title 11;

D. The making of false claims against the estate of a debtor;

E. The fraudulent receipt of property from a debtor;

F. Bribery and extortion in connection with a case under Title 11;

G. Transfer or concealment of property in contemplation of a case under Title 11;

H. The concealment or destruction of documents relating to the property or affairs of a debtor; and

I. The withholding of documents from the administrators of a case under Title 11.

It should be noted that although 18 U.S.C. § 152 creates nine separate crimes, each offense may be charged separately. *United States v. Gordon,* 379 F.2d 780 (2d Cir.1967); *United States v. Arge,* 418 F.2d 721 (10th Cir.1969). However, it is not appropriate to allege two offenses and impose two convictions as a result of one set of facts, all of which are essential elements of each crime. *See United States v. Ambrosiani,* 610 F.2d 65 (1st Cir.1979).

An essential element in the commission of all offenses under 18 U.S.C. § 152 is that they must be committed ''knowingly and fraudulently''. *See United States v. Yasser,* 114 F.2d 558 (3d Cir.1940); *United States v. Beery,* 678 F.2d 856 (10th Cir.1982). The word ''knowingly'' is used in the

customary way, requiring that the defendant's conduct be undertaken ''voluntarily and intentionally, and not because of mistake or accident or other innocent reason''. Devitt and Blackmar, *Federal Jury Practice and Instructions,* 3d Ed., §§ 48.04, 49.05. The word ''fraudulently'' requires proof that the conduct was ''willful'' or ''done voluntarily and intentionally, and with the specific intent to do something the law forbids'', and in addition requires proof that the conduct was done ''with the intent to deceive''. *Id.* An indictment must charge both terms or their equivalents. *See United States v. Comstock,* 161 F. 644 (R.I.Cir.1908). *United States v. Martin,* 408 F.2d 949 (7th Cir.1969), *cert. denied,* 396 U.S. 824 (1969). Also, a jury must be charged with the importance of the two terms. *Hersh v. United States,* 68 F.2d 799 (9th Cir.1934).

9-41.110 Concealment of Property

> Whoever knowingly and fraudulently conceals from the custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under Title 11 any property belonging to the estate of a debtor.

The elements of the offense are as follows: that the act was done ''knowingly and fraudulently''; that it was an act of ''concealment'' of property belonging to the ''estate of a debtor'' from either an ''officer of the court'' or ''creditors''; and that it was done by a person''.

The term ''conceal'' is no longer statutorily defined. However, an indictment for concealment of assets must, standing alone, allege time and place, description of property concealed, names or identification of parties from whom concealed, that property was part of bankrupt estate and that acts were committed knowingly and fraudulently, *United States v. Arge, supra; United States v. Ivers,* 512 F.2d 121 (10th Cir.1975). Since a bankrupt has a duty to list all of his/her property, the withholding of information is within the definition of conceal. *Coghalan v. United States,* 147 F.2d 233 (8th Cir.1945), *cert. denied,* 325 U.S. 888 (1945). It is not necessary for the trustee to make a demand in order to establish concealment. *See Douchan v. United States,* 136 F.2d 144 (6th Cir.1943), *cert. denied,* 319 U.S. 773 (1943); *United States v. Young,* 339 F.2d 1003 (7th Cir.1964).

For the first paragraph of 18 U.S.C. § 152 to apply, there must be a concealment during the bankruptcy proceeding. This does not mean, however, that the initial act of concealing must occur after the filing of the petition, it merely means that the property must *remain* concealed after the commencement of the bankruptcy proceeding. Early cases found this to be a ''continuing concealment''. *United States v. Cohen,* 142 F. 983 (D.N.Y. 1906), *aff'd,* 157 F. 65, *cert. denied,* 207 U.S. 596 (1907); *Glass v. United States,* 231 F. 65 (3d Cir.1916); *United States v. Arge, supra; United*

States v. Ivers, supra. This term is still useful in those cases in which there has been a concealment of property prior to bankruptcy and a failure to disclose after a petition has been filed. *See United States v. Fallman,* 28 F.Supp. 251 (D.Mass.1939); *Sultan v. United States,* 249 F.2d 385 (5th Cir.1957).

It makes no difference where the assets are physically secreted, the act of concealment occurs at the time and place where the bankruptcy proceeding is commenced. The offense is committed by withholding knowledge of the property from the trustee rather than by hiding away or secreting of the property. *United States v. Gordon,* 379 F.2d 788 (2d Cir.1967), *cert. denied,* 389 U.S. 927 (1967).

There must be a concealment from one of the persons enumerated in the first paragraph of 18 U.S.C. § 152. If there is a concealment from more than one of those persons mentioned, it is a separate and independent offense as to each person. The prosecution charging concealment against one will not bar the subsequent indictment charging concealment from another. *United States v. Yacht,* 135 F.Supp. 911 (S.D.N.Y.1955). However, regardless of the number of items concealed, there is only one concealment. Where there are multiple items charged the proof of concealment of any one will sustain the charge. *Bisno v. United States,* 299 F.2d 711 (9th Cir.1961).

All the essential elements of the offense must be charged in the indictment. Generally, the indictment is sufficient if it describes the offense in the terms of the statute. There must be an allegation of time and place.

The description of the property in an indictment is a most important requirement and one about which there is disagreement. Generally, an indictment is held sufficient if the description is in somewhat general terms, such as ''certain goods, wares, money, merchandise, shoes, and personal property.'' *United States v. Schireson, supra.* The description as assets of a certain value and ''assets belonging to the estate in bankruptcy'' were held to be too vague in *Beitel v. United States,* 306 F.2d 665 (5th Cir.1962). ''merchandise commonly sold in a self-service department store'' was likewise held not sufficient, *United States v. Mathies,* 202 F.Supp. 797 (W.D.Penn.1962). It is sufficient to aver that a certain amount of money has been concealed. *United States v. Lake,* 129 F. 499 (E.D.Ark.1904).

Although it is essential that guilt be established beyond a reasonable doubt, the proof may be wholly circumstantial. *United States v. Ayotte,* 385 F.2d 988 (6th Cir.1967), *rev'd on other grounds*, 394 U.S. 310 (1969); *McSheany v. United States*, 365 F.2d 90, (9th Cir.1966), *United States v. Martin*, 408 F.2d 949 (7th Cir.1969). Unexplained shortages of property of bankruptcy, shown to have been in debtor's possession prior thereto is sufficient to go to the jury. *Bisno v. United States,* 299 F.2d 711 (9th Cir.1971); *Gunzberg v. United States*, 297 F.2d 829 (5th Cir.1962). How-

ever, the jury cannot be charged that this is an inference of guilt, *United States v. Stone*, 282 F.2d 547 (2d Cir.1960).

9-41.120 False Oath or Account

> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under Title 11.

This paragraph sets out the offense of false swearing in a bankruptcy proceeding. It was held prior to the 1926 Act that false swearing in bankruptcy proceedings should be charged under the appropriate provision of the Bankruptcy Act and not under the general provision for perjury (18 U.S.C. § 1621), *Rosenthal v. United States*, 248 F. 684 (8th Cir.1918). This case may be doubtful authority under the present section. However, it is settled law that a man cannot be convicted under both statutes on the same facts. *Rosenthal v. United States, supra.* The elements of the offense are as follows: the false oath must be knowingly and fraudulently made; that the oath must be false; that the statement is material to the issue; and the oath is made in a proceeding or in relation to any proceeding under the act. In the indictment, it must be alleged that the statement was false. *United States v. Baker*, 243 F. 741 (D.R.I.1917) and *United States v. Curry, supra*.

In view of the strictness with which indictments are sometimes construed, it is undoubtedly safer to follow the practice of giving complete details concerning the false oath. There should be an allegation that the testimony was material. *See* however *United States v. Lake,* 129 F. 499 (D.Ark.1904); *United States v. Phillips,* 606 F.2d 884 (9th Cir.1979). *Ulmer v. United States*, 219 F. 641 (6th Cir.1915) *cert. denied* 238 U.S. 638 (1915). In proving the crime it must be shown that the oath was properly administrated to the defendant. *See Cameron v. United States,* 192 F. 548 (2d Cir.1911), *rev'd on other grounds*, 231 U.S. 710 (1914). Recantation does not in and of itself cure an original false statement under oath in a case under Title 11. *United States v. Diorio,* 451 F.2d 21 (2d Cir.1971).

A false oath is perjury to the extent that an indictment for subornation of perjury will lie under 18 U.S.C. § 1632. *See Hammer v. United States,* 271 U.S. 620 (1926).

The offense of giving a false oath in a bankruptcy proceeding usually has been treated subject to the common law perjury rule requiring two witnesses or a single witness plus corroboration, even though the two witness rule has long been the subject of judicial criticism. E.g. *United States v. Manchowsky,* 201 F.2d 5 (7th Cir.1953), *cert. denied,* 345 U.S. 965. Indeed, a standard jury instruction to that effect is published. Devitt and Blackmar, supra, § 49.15. However, one recent case, which has not yet been followed on this point, has explicitly rejected the two witness rule, suggesting that it never had any vitality in § 152 cases, and that in any

event the rule was effectively abolished by the passage of 18 U.S.C. 1623, which explicitly rejects it. *United States v. Jessee*, 605 F.2d 430 (9th Cir.1979).

9-41.125 False Declarations

> Whoever knowingly and fraudulently makes a false declaration certification, verification or statement under penalty (of) perjury as permitted under Section 1746 of Title 28, United States Code, in or in relation to any case under Title 11.

This paragraph was enacted in 1978 to treat unsworn declarations made under penalty of perjury in bankruptcy proceedings in the same manner as sworn statements. The cases cited under sworn false statement prohibitions may be used as guidelines for matters involving this paragraph.

9-41.130 False Claims

> Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under Title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney.

The purpose of this provision is to prevent fraud by the presentation of inflated or fictitious claims or the use of such claims. The elements of the offense are as follows: the claim must be filed or used with criminal intent; the claim must be false; and the claim must be presented or used in any case under Title 11. 2 Collier on Bankruptcy para. 29.07 (14th Ed.).

9-41.140 Fraudulent Receipt of Property

> Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of case under Title 11 with intent to defeat the provisions of Title 11.

This paragraph is to some extent the counterpart of the first paragraph in that it is aimed at preventing concealment of assets by those who would so assist the debtor. An important difference is that this paragraph also may apply to a creditor.

The essential elements of the offense are as follows: that there was receipt of a material amount of property, from a debtor; that this occurred after the filing of a proceeding under the Act; and that these acts were knowingly and fraudulently done with the intent to defeat the Act.

It has not been decided what constitutes the material amount. However, this requirement clearly was inserted in the section to prevent prosecutions for relatively insignificant transfers.

Property which was received both physically and legally before the filing is not covered by this paragraph. However, a conspiracy to receive the property could be charged even though physical transfer preceded the petition if further overt acts subsequently occurred. *See Knoell v. United States*, 239 F. 16 (3d Cir.1917).

The additional intent, to defeat the act, means only that the conduct must have been willful. *United States v. Lawson*, 255 F.Supp. 261 (D.Minn. 1966). In charging intent to defeat the act, it is not necessary to specify which provision of the act is ''intended to be defeated.'' *Lurie v. United States*, 20 F.2d 589 (6th Cir.1927).

9-41.150 Extortion and Bribery

> Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under Title 11.

This paragraph covers any extortion and bribery and any attempt to extort or bribe, and is basically directed at creditors who attempt to gain a preference by forbearing to impede the bankruptcy proceeding.

The two essential elements of the offense are the criminal intent and the bribery or extortion or the attempt to bribe or to extort. The statute does not say one shall not extort money from another as a consideration for acting or forbearing to act unlawfully, but for acting or forbearing to act at all. *United States v. Dunkley*, 235 F. 1000 (D.Cal.1916), *United States v. Weiss*, 168 F.Supp. 728 (W.D.Penn.1958).

Two other statutes may possibly be used in prosecuting bribery violations. Where the attempt is made to bribe a judicial officer, section 210 of Title 18 may be used; this section denounces the attempted bribery of the judicial officer. Section 1503 of Title 18 denounces an intent corruptly to influence any officer of any court of the United States.

9-41.160 Fraudulent Transfer or Concealment

> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under Title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of Title 11 knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation.

This paragraph prohibits the concealment or transfer by anyone acting individually or as an agent or officer of any person or corporation. The elements of the offense are as follows: that it was committed knowingly and fraudulently; that the property concealed or transferred belonged to the

person or corporation; and that the transfer was in contemplation of a proceeding or with intent to defeat the provisions of Title 11. The words ''concealed or transferred'' are to be read in the disjunctive, and therefore it is not necessary that there be concealment where property has been transferred. *United States v. Switzer*, 252 F.2d 139 (2d Cir.1958), *cert. denied*, 357 U.S. 922 (1958). It is now practically impossible for officers to shift assets about among interrelated corporations and avoid violating the prohibitions of the sixth paragraph merely because the shift is not concealed. 2 Collier on Bankruptcy para. 29.10. This paragraph does not name the persons from whom the property must be concealed as is done in the first paragraph; however, it seems logical that in establishing concealment there must be someone who had a right to know about the existence of the property such as that class enumerated in the first paragraph. Establishing a case under this paragraph is similar to establishing one under the first paragraph.

Although it is safe to couple the alternative elements in one count, i.e., ''in contemplation of a case under Title 11 and with intent to defeat the provisions of Title 11'' ''concealed and transferred'', it is preferable to set out the offenses in separate counts. It need not be alleged that the property was ''concealed *and* transferred'', since either the transfer or the concealment is a violation. *Burchinal v. United States*, 342 F.2d 982 (10th Cir.1965).

9-41.170 Fraudulent Destruction or Alteration of Documents

> Whoever after the filing of a case under Title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a debtor.

This paragraph prohibits the concealment, obstruction, mutilation or falsification of a document. It must be shown that this was knowingly and fraudulently done after filing a proceeding or in contemplation of such a filing and that the document related to the property or affairs of debtor. The few prosecutions under this clause have been accompanied by other charges.

9-41.180 Fraudulent Withholding of Documents

> Whoever after the filing of a case under Title 11 knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the Court entitled to its possession, any document affecting or relating to the property or affairs of a debtor.

This paragraph covers the withholding of a document from an officer of the court. Prosecutions under the eighth paragraph have been coupled with counts involving other offenses under this section. As with the seventh paragraph, the principal use of the withholding charge may be as an offense on which a jury might convict even though not satisfied that there was a concealment or fraudulent transfer. 2 Collier on Bankruptcy para. 29.12.

9-41.200 EMBEZZLEMENT AND ABUSE OF POSITION

Two of the sections proscribing criminal acts in connection with bankruptcy proceedings are directed at court officers, and a third applies to all participants in a case under Title 11.

9-41.210 18 U.S.C. § 153: Embezzlement by Trustee or Officer

> Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor which came into his charge as trustee, custodian, marshal, or other officer of the court, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. § 153 addresses every intentional and fraudulent withholding of, or parting with, the property of the estate of a debtor by the court officers enumerated therein. The essential elements of the offense are as follows: that at the time property or documents came into the defendant's possession he was an officer of the court in charge of the estate of a debtor; that the property or documents belong to the estate; that the property was embezzled or that the document was secreted or destroyed; and that the activity was done knowingly and fraudulently. *United States v. Lynch*, 180 F.2d 696 (7th Cir.1950); *United States v. Kaufman*, 453 F.2d 306 (2d Cir.1971).

The Court stated in *In re Biro*, 107 F.2d 386 (2d Cir.1939), that ''[w]hile embezzlement is, indeed, an offense punishable by imprisonment it is not such an offense under the Bankruptcy Act unless the embezzled property came into the charge of the accused as trustee, receiver, custodian, marshal, or other officer of the court.''

This statute reaches all property which comes into the possession of the court officer by reason of his/her position as such, whether or not it belongs to the debtor's estate. *Meather v. United States*, 36 F.2d 156 (9th Cir.1929).

9-41.220 18 U.S.C. § 154: Adverse Interest and Conduct

> Whoever, being a custodian, trustee, marshal, or other officer of the court, knowingly purchases, directly or indirectly, any

> property of the estate of which he is such officer in a case under Title 11; or
>
> Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so—
>
> Shall be fined not more than $500, and shall forfeit his office which shall thereupon become vacant. As amended Nov. 6, 1978, Pub.L. 95-598, Title III, § 314(a)(2), (e)(1), (2), 92 Stat. 2676, 2677.

It should be noted that this is only a misdemeanor statute in which the penalty is not more than $500 and the forfeiture of the office. There are simpler procedures for removing trustees, marshals, or other officers (11 U.S.C. § 324), but this statute could be useful if a judge refused to remove such a person.

9-41.230 18 U.S.C. § 155: Fee Agreement

The final criminal provision applies to all participants in a bankruptcy proceeding. While Title 11 prohibits fee arrangements, (11 U.S.C. § 102(c) and (d)), 18 U.S.C. § 155 provides the criminal sanctions as follows:

> Whoever being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them or attorney for any such party in interest, in any receivership, or case under Title 11 in any United States court or under its supervision, knowingly or fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate;
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

The purpose of this section is to prohibit the exacting of unreasonable fees for service performed by all those involved in a case under Title 11. It is a safeguard to protect against allowing named participants in a bankruptcy proceeding from dividing up a debtor's estate. However, this section is not intended to prevent a debtor from agreeing to compensate his/her attorney, in any amount agreed upon so long as the compensation was to be paid after the bankruptcy proceedings had been closed. *In re Trans-State Oil Co.*, 24 F.Supp. 454 (Tex.1938), *rev'd on other grounds*, 99 F. 658 (5th Cir.1938).

9-41.300 IMMUNITY PROVISION

Title 11 Section 343 provides,

> The debtor shall appear and submit to examination under oath at the meeting of creditors under Section 341(a) of the title. Creditors, any indenture trustee, or any trustee or examiner of the case may examine the debtor.

The purpose of the examination is to enable creditors and the trustee to locate assets and to determine if assets have been improperly disposed of or concealed.

Efforts to thwart examinations through the exercise of the privilege against self-incrimination have been met with the enactment of the immunity section (11 U.S.C. § 344) which provides,

> Immunity for persons required to submit to examination, to testify, or to provide information in a case under this title may be granted under part V of Title 18.

This section carries the general immunity provisions (Sections 6001 *et seq.* of Title 18) over into bankruptcy cases. Thus, for a witness to be ordered to testify before a bankruptcy court, in spite of a claim of privilege, the U.S. Attorney for the district in which the court sits would have to request the immunity order from that district court. The rule applies to debtors, to creditors and to any other witnesses in a bankruptcy case. If immunity is granted, the witness is required to testify. If not, the witness may claim the privilege against self-incrimination.

The immunity provisions prohibit evidentiary use of compelled testimony and its use as an investigatory lead, and bar the use of any evidence obtained by focusing investigation on witness as a result of compelled disclosure. *In re Grand Jury Proceedings*, 497 F.Supp. 979 (E.D.Pa.1980).

Under 18 U.S.C. § 3057 bankruptcy judges, receivers and trustees are required to report criminal violations to U.S. Attorneys. The following safeguards have been recommended by the Bankruptcy Division, Administrative Office of the United States Courts, in order to protect against inadvertent use of the bankrupt's testimony in developing a criminal case against the bankrupt.

1. In criminal referrals based upon evidence or leads not directly or indirectly obtained from the testimony of the bankrupt, the existing referral procedures will be followed.

2. In any case in which the debtor testifies and a criminal investigation is underway or is anticipated, the bankruptcy judge will order that no one shall have access to the transcript of the debtor's testimony without first identifying himself/herself and signing an

appropriate record reflecting that he/she has requested and been granted access to the transcript. Adoption of this procedure will assist the government in showing in any subsequent criminal proceeding that the prosecution did not have the benefit of a review of that portion of the debtor record.

3. In addition, in any case under Title 11 in which the debtor testifies, and a criminal investigation is underway or is anticipated, the bankruptcy judge will appropriately advise trustees, creditors, attorneys, and other persons who heard the debtor's testimony that, in the event they are interviewed concerning criminal aspects of the case, no disclosure should be made concerning the content of the immunized testimony of the debtor.

4. In any instance in which the only evidence of criminality is developed is the debtor's testimony, the referee will refer the case to the U.S. Attorney for possible criminal investigation without making reference to any information based directly or indirectly upon the debtor's testimony. The U.S. Attorney will request the Federal Bureau of Investigation to conduct a limited investigation, possibly including a review of available books and records and the bankrupt's schedules, to determine whether there is independent evidence upon which a criminal investigation may be predicated.

The Criminal Division recognizes that the argument may be raised that the immunity bars a referral based solely upon the immunized testimony, but it is believed that in cases of significant import, the Department has a responsibility to investigate regardless of this factor.

When the debtor is a corporation, bankruptcy judges will consider the feasibility of clearly designating an individual not suspected of criminal conduct as the person to represent the debtor, thus possibly avoiding a grant of immunity to a prospective criminal defendant. However, if a corporate officer voluntarily testifies without being clearly designated to speak for the corporation, it has been held that the immunity provisions are applicable. *United States v. Coyne*, 587 F.2d 111 (2d Cir.1978).

It also has been held that the books and records of the debtor and the bankruptcy documents are not subject to the immunity provisions of Title 11. *United States v. Seiffert, supra; United States v. Falcone*, 544 F.2d 607 (2d Cir.1976), *cert. denied*, 430 U.S. 916 (1917).

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9-42.000 FRAUD AGAINST THE GOVERNMENT

9-42.010 Coordination of Criminal and Civil Fraud Against the Government Cases

A. The FBI has been directed to furnish to both the Commercial Litigation Branch of the Civil Division and the Fraud Section of the Criminal Division copies of all reports in all matters in which the reports show that the character of the investigation consists of the following categories:

1. Fraud Against the Government;
2. Federal Housing Administration Matters;
3. Veterans Administration Matters;
4. Small Business Administration Matters;
5. Federally-Insured Student Loan Matters;
6. Medicare Matters;
7. Theft of Government Property;
8. Federal Lending and Insurance Agencies;
9. Bribery; and
10. Conflict of Interest.

Other investigative agencies are required to forward reports in any similar categories to the appropriate U.S. Attorney.

While bribery and conflict of interest matters are not presently within the jurisdiction of the Fraud Section of the Criminal Division (but rather the Public Integrity Section), they are within the jurisdiction of the Commercial Litigation Branch of the Civil Division.

B. The United States has both statutory (*e.g.*, the False Claims Act, 31 U.S.C. §§ 231 to 235) and common law rights of action against the government and from the corruption of its officials. Every report of fraud or official corruption should be analyzed for its civil potential before the file is closed. In the first instance, this review should be conducted by the Assistant U.S. Attorney or Departmental attorney assigned to the initial referral. Fraud against the government claims involving more than $200,000 in single damages plus forfeitures should be referred to the Commercial Litigation Branch.

C. Cases pursued criminally must also be analyzed for civil potential. This analysis should be conducted at the earliest possible stage. Criminal dispositions by plea bargain should not waive or release the government's civil interests, except in return for adequate consideration, as measured by the Department's standards for civil settlements generally. Proposed

civil dispositions involving over $200,000 in single damages plus forfeitures must be referred to the Commercial Litigation Branch for approval. *See* 28 C.F.R. §§ 0.45(d), 0.160, and Civil Division Directive No. 145-81, 46 Fed.Reg. 52352 (October 21, 1981); 28 C.F.R. Appendix to Subpart Y.

D. The Commercial Litigation Branch of the Civil Division notifies the appropriate U.S. Attorney and other interested offices of the Department of Justice of potential civil actions which come to the Commercial Litigation Branch's attention. The Commercial Litigation Branch coordinates its cases with the U.S. Attorney to assure the pursuit of both civil and criminal redress. This may include the simultaneous initiation of civil and criminal proceedings where the monetary recovery to the government and the deterrent effect will be enhanced, giving due consideration to the risks to the criminal case and the availability of protective orders and stays.

E. The Commercial Litigation Branch of the Civil Division follows the investigation as it develops and, where necessary, requests, in coordination with the U.S. Attorney and other interested offices of the Department of Justice, that investigation be conducted relating to areas such as damages, which are particularly pertinent to civil action.

F. The Commercial Litigation Branch of the Civil Division gives consideration at the earliest possible date to the initiation of civil action. The Commercial Litigation Branch advises the U.S. Attorney and other interested offices of the Department of Justice of any contemplated civil action. Absent a specific, detailed statement that there is a strong likelihood that institution of civil action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to institute civil action is governed solely by the standards specified in 38 Op.Atty.Gen. 98 (1934). This is, the suit is instituted unless there is: (1) doubt as to collectibility; or (2) doubt as to the facts or law.

G. The Commercial Litigation Branch of the Civil Division, in cases in which the investigation warrants the conclusion that dissipation of any substantial amounts of assets is likely, seeks provisional relief, notwithstanding the degree to which the criminal aspects of the matter have been concluded. The Commercial Litigation Branch advises the U.S. Attorney and other interested offices of the Department of Justice of any provisional action. Such provisional relief is sought unless there is a clear likelihood that efforts to prevent dissipation of assets would materially prejudice criminal prosecution of specific subjects. The criterion for determining ''substantial assets'' is set at $50,000, and in cases in which assets of this amount may be dissipated, efforts at provisional relief to secure recovery on behalf of a client agency should, if a conflict exists, be resolved within the Department at the appropriate level.

H. The Commercial Litigation Branch of Civil Division is accorded greater latitude in urging client agencies to withhold payment of claims presented by any subject known to have engaged in fraudulent conduct. The Commercial Litigation Branch advises the U.S. Attorney and other interested offices of the Department of Justice. Absent a specific, detailed statement that action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to withhold is governed by the usual Department of Justice standards. The government's common law right to withhold payment by setoff has been upheld by the Supreme Court, *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947). The right to withhold tainted claims is granted by statute governing many fraudulently caused programs, *e.g.*, 12 U.S.C. § 1709(e). Withholding is an important tool for effecting civil redress, and in recent years the government has successfully defended a number of cases in which client agencies have employed this self-help remedy. *See, e.g., Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.1975); *Brown v. United States*, 524 F.2d 693 (Ct.Cl.1975); *Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct.Cl.1975). The negotiation of favorable settlements in unliquidated matters also may be enhanced by the bargaining leverage which withholding affords. Client agencies also should be urged to withhold pay and retirement benefits to federal employees separated because of evidence of wrongdoing.

The current regulations regarding the withholding or setoff of backpay or retirement benefits are found at 4 C.F.R. Part 101 and 5 C.F.R. § 831, respectively;

I. The existing delegations of authority to settle civil fraud claims are set forth in 28 C.F.R. §§ 0.45(d), 0.160, and Civil Division Directive No. 145-81, 46 Fed.Reg. 52332 (October 27, 1981); 28 C.F.R. Appendix to Subpart Y. They provide for redelegation of the Assistant Attorney General's authority in Civil Division cases to branch directors, unit chiefs, and attorneys in charge of field offices of the Civil Division as follows:

1. Branch directors may compromise, reject officers in compromise, or close claims, in all cases against the government, where the amount to be paid by the government pursuant to the offer does not exceed $150,000 and in all cases involving claims asserted by the government where the difference between the gross amount of original claim and the proposed settlement does not exceed $150,000;

2. U.S. Attorneys are authorized to compromise, close or file suit in cases in which the sum of single damages and forfeitures under the False Claims Act, if applicable, does not exceed $200,000;

3. U.S. Attorneys are not authorized to close, compromise, or file suit in cases involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract or exploitation of public of-

fice, regardless of amount, without first consulting with the branch directors;

4. U.S. Attorneys are authorized to take all necessary steps to protect the interest of the United States, regardless of the amount claimed, in certain categories of civil actions referred directly to them by concerned agencies.

Inquiries should be directed to:

Director, Commercial Litigation Branch,
Civil Division, FTS 724-7179
Chief, Fraud Section,
Criminal Division, FTS 786-4377

9-42.020 Scope of the General Fraud Against the Government Statutes

While Congress has enacted numerous specific statutes to deal with particular types of fraud against the government, enforcement efforts rely principally on three rather general statutes: 18 U.S.C. §§ 287, 371 (discussed at USAM 9-42.300, *infra*), and 18 U.S.C. § 1001 (discussed at USAM 9-42.100 through 9-42.251, *infra*). The scope of 18 U.S.C. § 287, which encompasses false claims submitted to the United States is narrow and is discussed in USAM 9-42.180, *infra*. Of fundamental concern is the type of relationship the fraudulent act must have with the federal government in order to warrant federal prosecution.

9-42.100 18 U.S.C. § 1001: FALSE STATEMENT, CONCEALMENT

Section 1001 of Title 18 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry . . . .

The operative language of 18 U.S.C. § 1001 is ''in any matter within the jurisdiction of any department or agency of the United States.'' An often-raised defense is the claim that because the alleged act or activity has no reasonable relation to the federal government, no federal jurisdiction lies.

In determining the context in which the prohibited conduct must occur to be within the scope of 18 U.S.C. § 1001, the courts have had no problem with the validity of a legislative interest to insure the integrity of official functions encompassing utilization of 18 U.S.C. § 1001 to protect the government ''from the perversion which might result from the deceptive practices described,'' *Bryson v. United States*, 396 U.S. 64 (1969).

9-42.110 Items Not Required to Be Proved

The courts have held that 18 U.S.C. § 1001 does *not* require:

A. Any financial or property loss to the federal government (though one often exists), *United States v. Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983).

B. That the false statement be made directly to the federal government, *United States v. Uni Oil Co.*, 646 F.2d 946, 954-55 (5th Cir.1981), *cert. denied*, 455 U.S. 908 (1982).

C. Any favorable agency action, *Brandow v. United States*, 268 F.2d 559 (9th Cir.1959), *United States v. Quirk*, 167 F.Supp. 462 (E.D.Pa.1958), *aff'd*, 266 F.2d 26 (3d Cir.1959).

D. Reliance by the government, *United States v. Lichtenstein*, 610 F.2d 1272, 1278 (5th Cir.1980).

E. Actual knowledge of federal agency jurisdiction, *United States v. Yermian*, 468 U.S. 63 (1984).

9-42.120 Jurisdictional Requirements Satisfied

Jurisdictional requirements are satisfied if:

A. The agency had the power to act on the statement, *United States v. DiFonzo*, 603 F.2d 1260, 1264 (7th Cir.1979);

B. There is an ''intended'' relationship between the act and the federal government, *United States v. Stanford*, 589 F.2d 285, 297 (7th Cir.1978), or;

C. The act was calculated to induce government action, *United States v. Barbato*, 471 F.2d 918, 922 (1st Cir.1973).

The Supreme Court has interpreted 18 U.S.C. § 1001 broadly. *See, e.g., Bryson v. United States*, 396 U.S. 64 (1969). The statute is viewed as seeking to protect both the operation and the integrity of the government. A false statement may threaten to obstruct or impair the ''honest and faithful operation of some governmental agency and/or the value and integrity of a document or report issued by that government agency.''

9-42.130 Statements Warranting Prosecution

Whether or not the relationship between the fraudulent statement and the government is sufficient to warrant prosecution often depends on the context of the false statement. Not all false statements violate 18 U.S.C. § 1001. Statements warranting prosecution may be made in at least three ways:

A. Directly to a federal agency, *e.g.*, application form for employment.

B. To a private person or institution which implements federal programs.

C. To one's self, as false statements in business records which *may* be subject to federal government inspection.

These various acts have one common feature: they affect either the operation or integrity of the government. All that is necessary for jurisdiction to lie is that the false statement touch on a federal interest; it is not necessary that the statement affect or influence that interest. The only limitation on this rule is that the federal interest must exist at the time the false statement is made; it cannot arise after the defendant has made a false statement.

Once it is determined that there is jurisdiction, issues of materiality, knowledge, falsity, etc. arise. *See* USAM 9-42.140, *infra*.

9-42.140 Elements of 18 U.S.C. § 1001

A. The following acts are prohibited:

1. Making a false statement;

2. Using a false statement;

3. Falsifying;

4. Concealing; and

5. Covering up.

B. Whether the above acts are criminal depends on whether or not there is an affirmative response to each of the following questions:

1. Was the act material?

2. Was the act within the jurisdiction of the department or agency of the United States?

3. Was the act done knowingly and willfully?

9-42.141 The Making of a False Statement

The false statement may be written or oral, sworn or unsworn, voluntary or required by law, signed or unsigned. The statement need not be presented, submitted or stated directly to the federal government. *United States v. Richmond*, 700 F.2d 1183, 1187 (8th Cir.1983).

9-42.142 Knowingly and Willfully

Section 1001 of Title 18 prohibits the knowing and willful commission or omission of certain acts.

A. To commit an act ''knowingly'' is to do it with knowledge or awareness of the true facts or situation, and not because of mistake, accident or some other innocent reason. Knowledge of the relevant criminal provision governing the conduct is not required. The false statement need not be made with an intent to deceive if there is an intent to mislead or to induce belief in its falsity. Reckless disregard of whether a statement is true or a conscious effort to avoid learning the truth can be construed as acting ''knowingly.'' *United States v. Evans,* 559 F.2d 244, 246 (5th Cir.Ct. 1977), *cert. denied* 434 U.S. 1015 (1978). A defendant cannot be relieved of the consequences of a material misrepresentation for lack of knowledge when the means of ascertaining truthfulness are available.

B. An act is done ''willfully'' if done voluntarily and intentionally and with the specific intent to do something the law forbids; there is no requirement of showing evil intent on the part of a defendant in order to prove that he/she acted ''willfully.''

9-42.143 Materiality

The Second Circuit requires materiality of the false statement only in the first clause of 18 U.S.C. § 1001. *United States v. Rinald,* 393 F.2d 97 (2d Cir.) *cert. denied* 393 U.S. 913 (1965). However, the majority and better view is that the element of materiality pervades the entire statute. *E.g. United States v. Adler,* 633 F.2d 1287, 1291 (8th Cir.1980).

Almost every court that has considered the issue has held that the question of materiality of a false statement or a concealed fact under 18 U.S.C. § 1001 is an issue of law to be decided by the trial court. For a succinct statement of the legal as opposed to factual rationale, *see United States v. Ven-Fuel, Inc.,* 602 F.2d 747, 753 (5th Cir.1979).

The most often cited test for materiality appears in *United States v. Weinstock,* 231 F.2d 699, 701 (D.C.Cir.1956):

> ''Material'' when used in respect to evidence is often confused with ''relevant,'' but the two terms have wholly different meanings. To be ''relevant'' means to relate to the issue. To be ''material'' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material.

The test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made.

It is not part of the test that the government actually be influenced by the false statement or concealment; nor is it part of the test that the

government actually relies on the statement or concealment. The Court in *Weinstock, supra,* at 703, held that ''the issue to which the false statement is material need not be the main issue; it may be a collateral issue. And it need not bear directly upon the issue but may merely augment or diminish the evidence upon some point. But it must have some weight in the process of reaching a decision.''

The definition of materiality under 18 U.S.C. § 1001 is essentially the same as that covered by 18 U.S.C. §§ 1621 and 1623, the perjury statutes. For a brief summary of that definition, *see* 60 Am.Jur.2d, Perjury, § 11. *See also United States v. Gremillion*, 464 F.2d 901, 904-05 (5th Cir.), *cert. denied*, 409 U.S. 1085 (1972), for a discussion of materiality under 18 U.S.C. § 1621.

The materiality of a concealed fact or false statement is not determined by whether it actually affected an agency action.

Materiality is best shown by the testimony of expert witnesses, generally those who make the decisions on the application or statements in the particular case, concerning the influence that defendant's allegedly false statement might have had on the ultimate result of the transaction.

9-42.144 Falsity

Section 1001 of Title 18 requires that the statement or representation actually be false and the government has the burden of establishing the alleged falsity of the statement. *Webster's 3d International Dictionary* defines the adjective ''false'' as: ''not corresponding to truth or reality.'' Although a statement may be misleading, unauthorized, or even fraudulent, a conviction under this section cannot be sustained unless the statement also is false. *See United States v. Diogo*, 320 F.2d 898, 905-09 (2d Cir.1963) (literally true that defendant married). Where a statement is ambiguous, it is incumbent upon the government to negative any reasonable interpretation which would make the defendant's statement factually correct. The question of whether a literally true statement can be a false representation is an open one. While the Second Circuit in *Diogo, supra*, has held that a literally true statement cannot be said to be a false representation, the Fifth Circuit has held to the contrary. *United States v. Rodgers*, 624 F.2d 1303, 1310-11 (5th Cir.1980), *cert. denied*, 450 U.S. 917 (1981). This problem often can be avoided by casting the indictment in terms of a ''concealment of a material fact'' rather than the making of a false statement or representation, *Diogo, supra*, at 902.

9-42.145 Department or Agency

Section 1001 of Title 18 requires that the false statement be in a ''matter within the jurisdiction of any department or agency.'' 18 U.S.C. § 6 defines department and agency.

In *United States v. Bramblett*, 348 U.S. 503 (1955), the Supreme Court stated:

> The development scope and purpose of the section [18 U.S.C. § 1001] shows that ''department'' as used in this context, was meant to describe the executive, legislative and judicial branches of the Government.

That case involved false statements to the Disbursing Office of the House of Representatives, which is engaged in administrative functions of the legislature. While it has been suggested that 18 U.S.C. § 1001 is limited to administrative and housekeeping chores in connection with the legislative branch of the government, there is no authority for such a restriction.

Several courts have viewed the application of 18 U.S.C. § 1001 to the judicial branch more narrowly than *Bramblett* suggests. In *Morgan v. United States*, 309 F.2d 234 (D.C.Cir.1962), *cert. denied*, 373 U.S. 917 (1963), the court limited the application of 18 U.S.C. § 1001 to those items which essentially involved the ''administrative'' or ''housekeeping'' function of the judiciary and strictly excepted those items which involve the judicial functions of the court. The court found that representations concerning a license to practice law were of the administrative or housekeeping type. In *United States v. Erhardt*, 381 F.2d 173 (6th Cir.1967), the court applied the *Morgan* interpretation and held 18 U.S.C. § 1001 does not apply to the introduction of false documents in a criminal proceeding. More recently the Fifth Circuit has held that 18 U.S.C. § 1001 does not apply to a bail-removal hearing in a criminal proceeding, *United States v. Abrahams*, 604 F.2d 386 (5th Cir.1979).

A false statement made to the court in a private civil action has been held to be beyond the scope of the statute. *See United States v. D'Amato*, 507 F.2d 26 (2d Cir.1974). The court held that 18 U.S.C. § 1001 does not apply where the government is involved in the civil action only by way of its providing a court to decide a matter in which neither it nor its agencies are involved.

9-42.146 Concealment—Failure to Disclose

While 18 U.S.C. § 1001 is often referred to as a false statement statute, its scope extends beyond statements. 18 U.S.C. § 1001 proscribes the acts of making false statements, falsifying, concealing or covering up. Concealment and cover-up are essentially identical concepts, and often result from falsification. These latter acts need not have any relation to a statement. A concealment may involve a failure to disclose or partial disclosures of information required on an application form. However, when using such a theory the government will have to prove that the defendant had a duty to disclose the facts in question at the time he/she was alleged to

have concealed them. *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir.1981), *cert. denied*, 455 U.S. 1016 (1982). Concealment may also involve a merely physical act of concealment such as transferring inspection stamps, changing numbers on bottles to conceal rejection, concealing use of morphine, or using false stamp thereby concealing ownership of tobacco.

Some courts have required that the government be prepared to prove that the ''concealment by trick. . .'' consisted of affirmative acts. *United States v. London*, 550 F.2d 206 (5th Cir.1977).

9-42.150 False Statements as to Future Actions

While the falsification which is the subject of prosecution is usually of past or present facts, it need not be so. A present statement as to future intent, *e.g.*, a promise to do that which is not actually intended, is a false statement of an existing intent.

9-42.160 False Statement to a Federal Investigator

The circumstance often arises where a false statement has been made in response to an inquiry by an FBI agent or other agency investigator, *e.g.*, Secret Service, HUD, Immigration. The question is whether such a statement is within the purview of 18 U.S.C. § 1001. While at first blush the cases conflict, they are distinguishable on the basis of the nature of the inquiry and the form of the response.

Where the false statement has been made as a result of the questioning of a subject by an FBI agent, the preponderance of authority is to the effect that 18 U.S.C. § 1001 does not apply. Where the false statement is volunteered to an FBI agent, however, the Supreme Court has held that 18 U.S.C. § 1001 does apply. *United States v. Rodgers*, 466 U.S. 475 (1984) stating the statutory language clearly encompassed criminal investigations, and its legislative history would not support a more restricted reach. Concluding (1) that criminal investigations fell within the term ''in any matter;'' and (2) that the Bureau qualified as ''department or agency,'' the Court said the language ''within the jurisdiction'' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body. It is now clear that the term ''jurisdiction,'' defined as the ''right to say and the power to act;'' *Gonzales v. United States*, 286 F.2d 118 (10th Cir.1960), should not be given a narrow or technical meaning, *United States v. Fern*, 696 F.2d 1269 (5th Cir.1983), and extends to the power to investigate.''

Although the holding of this case is based upon those instances where an individual knowingly and willfully volunteers false information to a law enforcement or other agency, the language may be equally applicable to those not targets of an investigation who, when questioned by a law enforcement agency, knowingly provide false information. Such further con-

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 12, 1996

TO: Holders of the United States Attorneys' Manual, Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

John C. Keeney
Acting Assistant Attorney General
Criminal Division

RE: False Statements to Federal Criminal Investigators: 18 U.S.C. § 1001

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected section.

REPLACES: 9-42.160

PURPOSE: This bluesheet sets forth the Department's policy on the prosecution of cases involving false statements to federal criminal investigators.

By its plain terms, 18 U.S.C. § 1001 broadly reaches "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations * * *." Although the statute does not provide for exceptions, a number of courts of appeal have held that it does not apply to cases involving simple false denials of guilt in response to government initiated inquiries. See, e.g., United States v. Taylor, 907 F.2d 801 (8th Cir. 1990); United States v. Equihua-Juarez, 851 F.2d 1222 (9th Cir. 1988); United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988); United States v. Fitzgibbon, 619 F.2d 874 (10th Cir. 1980); United States v. King, 613 F.2d 670 (7th Cir. 1980); United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976) . These courts have concluded, inter alia, that mere denials of guilt do not impair the basic functions of the agency to which the statement is made.

Other courts have rejected the "exculpatory no" exception to 18 U.S.C. § 1001. See, e.g., United States v. Rodriguez-Rios, 14

F.3d 1040 (5th Cir. 1994) (en banc); United States v. Steele, 933 F.2d 1313 (6th Cir.) (en banc), cert. denied, 502 U.S. 909 (1991). In addition, a few courts have neither adopted nor rejected the "exculpatory no" doctrine. See, e.g., United States v. Barr, 963 F.2d 641 (3d Cir.), cert. denied, 113 S. Ct. 811 (1992); United States v. Cervone, 907 F.2d 332, 342 (2d Cir. 1990); United States v. White, 887 F.2d 267 (D.C. Cir. 1989).

It is the Department's policy that it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government. This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to federal criminal investigators would not fall within the policy. Further, certain false responses to questions propounded for administrative purposes (e.g., statements to border or INS agents during routine inquiries) are also prosecutable, as are untruthful "no's" where the defendant initiated contact with the government in order to obtain a benefit.

Prior consultation with the Criminal Division is not required before initiating prosecutions for false statements to federal investigators. However, the Fraud Section is available for consultation on any case that involves application of these principles.

struction must, in all likelihood, await another prosecution and court decision.

The statute has been held to apply where the false response is made to an investigator other than an FBI agent; to the IRS, *United States v. Ratner*, 464 F.2d 101 (9th Cir.1972); to the S.E.C., *United States v. Mahler*, 363 F.2d 673 (2d Cir.1966); to an Army officer, *Frasier v. United States*, 267 F.2d 62 (1st Cir.1959); and to the INS, *Tzantarmas v. United States*, 402 F.2d 163 (9th Cir.1968), *cert. denied*, 394 U.S. 966 (1969).

The problem has also been viewed from another direction—the form of the false statement. Where the statement takes the form of an ''exculpatory no,'' 18 U.S.C. § 1001 does not apply regardless who asks the question. ''In such instances it has been held that where an individual falsely denies the truth of questions submitted to him by government agents, such responses are not 'statements' or 'representations' within the meaning of Section 1001 and therefore are not subject to criminal prosecution under it,'' *United States v. Lambert*, 501 F.2d 943 (1974); *United States v. Bush* 503 F.2d 813 (5th Cir.1974). Another reason for such an approach is the latent spirit of the Fifth Amendment.

9-42.170 Corporate Crimes

It is well settled that a corporation may be convicted of criminal violations. *See New York Central v. H.R.R. Co.*, 212 U.S. 481, 492 (1909); *United States v. Union Supply*, 215 U.S. 50, 54-55 (1909), and corporations have been convicted of making false statements to the government. *See United States v. Olin Mathieson Chemical Corp.*, 368 F.2d 523 (2d Cir.1966); *United States v. Alamo Fence Co. of Houston*, 240 F.2d 179 (5th Cir.1957).

9-42.180 False Statements and Venue

The Supreme Court has cautioned that the venue rules are not to be treated lightly. *United States v. Johnson*, 323 U.S. 273, 276 (1961). The Sixth Amendment has been interpreted to provide a guarantee of trial in the state and district in which the crime was committed. If prosecution is brought in an improper venue, timely objection will result in dismissal of the indictment and prevent further proceedings if the statute of limitations has run.

Where a person merely prepares a false document, clearly no crime has been committed. However, it is not inconsistent to contend that venue is proper in the place of preparation when that person mails or delivers the document to the government, thus committing a crime. This analysis is consistent with 18 U.S.C. § 3237, which provides that venue is proper in any district in which a crime began, continued, or was completed, when that crime began in one district and was completed in another.

Several courts have specifically stated that preparation for the commission of the crime is not part of the crime and therefore venue is not proper in the district of preparation. These courts view preparation as independent from commission. A different result should be reached when the ''preparation'' is an integral part of the commission of the crime, and it can fairly be said that by doing the act of preparation the defendant ''began'' the commission of the crime. Once an offense has been completed, 18 U.S.C. § 3237 should permit the government the option of bringing prosecution in any proper district as far back as the ''beginning'' of the crime, as defined by the pertinent statute.

In *United States v. Travis*, 364 U.S. 631 (1961), the Supreme Court was faced with the interplay of two statutes, 18 U.S.C. § 1001 and Section 9(h) of the National Labor Relations Act. The latter statute provides that no action would be taken by the NLRB until certain affidavits were on file in the District of Columbia. The issue was whether venue in the place of mailing of the affidavits was proper. The Court seized on the language in Section 9(h) denying any NLRB action ''until'' the document was on file and in 18 U.S.C. § 1001 requiring that the false statement be made ''within the jurisdiction of department or agency.'' It reasoned that Section 9(h) did not begin to operate until the affidavit was received by the NLRB, and thus, at the time of mailing, the false statement was not within the jurisdiction of any department or agency. The more specific fraud statutes, *see* USAM 9-42.231, *infra*, do not have ''under the jurisdiction'' language. This would seem to indicate that the ''under the jurisdiction'' language in 18 U.S.C. § 1001 is not intended to have any venue significance. Because of the peculiar interaction of Section 9(h) with 18 U.S.C. § 1001, the government and courts have read *Travis* restrictively. With the exception of *Travis*, the cases hold the place of mailing a false document to be proper venue.

The most certain venue is the place where a false statement or claim is actually filed.

9-42.185 Multiplicity, Duplicity, Single Document Policy

A serious problem arises where the alleged criminal conduct involves a series of activities. The issue is whether the indictment should allege one count encompassing all the acts, or one count for each act. The problem has been framed in two judicial concepts: duplicity and multiplicity.

Duplicity is the joining in a single count of two or more separate offenses. A count is not duplicitous, however, if it simply charges commission of a single offense by different means. *See* Rule 7(c), 8(a), Fed.R.Cr.P. Multiplicity arises when a single offense is charged in more than one count.

The issue presented is the proper unit of prosecution. The tests commonly used are: (1) identical proof, and (2) legislative intent.

The first test simply involves the determination of whether each offense requires proof of an additional fact that the other does not. *See United States v. Blockburger*, 284 U.S. 299 (1931); *United States v. Albrecht*, 273 U.S. 1 (1927). The test is designed to guard against the possibility that confusion as to basis of the verdict may subject defendant to double jeopardy.

The second test is legislative intent. This test often involves the determination of whether Congress intended to prohibit each individual act or a course of conduct composed of a series of acts, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *Ebeling v. Morgan*, 237 U.S. 625 (1914).

A necessary adjunct to rules for determining congressional intent is a guide for resolving issues of multiplicity in the absence of any expressed intent. The courts have adopted a policy of resolving doubts against multiple offenses where an expression of congressional intent is lacking (rule of lenity).

A defendant violates 18 U.S.C. § 1001 each time he/she makes a false statement. If the false statements are contained in one document, however, it is the better course to indict only one count. This policy is in response to expressed judicial displeasure on multi-count indictments based on one document, *United States v. Fisher*, 231 F.2d 99, 103 (9th Cir.1956); *Bramblett, supra*, at 491. Further, little is to be gained by multi-count filing in such cases because in most cases sentences would be concurrent. This policy does not apply to false testimonial statements or perjury before a grand jury. This limitation should apply only where the false statements are contained in one document. If the same or different false statements appear in more than one document, multiple counts are warranted. Further, separate but similar false applications are punishable as separate offenses.

An indictment for conspiracy to commit a substantive crime and for the substantive crime itself is proper when each offense is alleged in a separate count, and conviction is proper on both counts. An indictment for conspiracy to violate several crimes proscribed under different statutes is proper as a single count. The alleged crime is one conspiracy, therefore, only one offense should be charged. However, where an indictment charges one conspiracy but at trial the government proves numerous conspiracies with one of several defendants as a link, the proof has been held to be prejudicial to his/her co-defendants because it impairs their ability to defend themselves. *United States v. Blumenthal*, 332 U.S. 539 (1947).

9-42.190 General Versus Specific Statutes

Issues arise when subsequent to the enactment of a general statute like 18 U.S.C. § 1001, Congress passes a more specific statute, *e.g.*, 18 U.S.C. § 1010 (false statements in Federal Housing Administration transactions). In such cases it is necessary to determine the effect of the more specific statute on the scope of the more general. Further, it must be determined whether the prosecutor has unlimited discretion to choose the statute under which he/she will prosecute.

The initial step is to determine whether Congress has expressed its intent on the relationship of the general and specific statutes. Unfortunately, Congress rarely expresses its intent with sufficient clarity. *But see* 15 U.S.C. § 714(m)(e) (1970).

The argument that a specific statute enacted subsequent to a general statute repeals the latter is often advanced, and just as often rejected. However, one court has indicated that where the two statutes clearly ''conflict,'' congressional intent may be determined by looking to the dates of enactment and the statutes' relative specificity. *United States v. Roseman*, 364 F.2d 18 (9th Cir.1966).

Often the result is that a prosecutor may choose to proceed under either of two statutes. This direction is sanctioned in the cases:

> U.S. Attorney of the district where a violation of a federal statute occurs is charged with the duty of prosecution and vested with complete control over the proceedings, in the exercise of his discretion. If the facts show a violation of two or more statutes, he may elect under which he will prosecute, in the absence of a prohibitory statute . . . *Deuitch v. Anderhold, Warden*, 80 F.2d 677, 678 (5th Cir.1935).

''It is settled law . . . that where a single act violates more than one statute, the government may elect to prosecute under either;'' *Ehrlich v. United States*, 238 F.2d 481, 485 (5th Cir.1956). ''[T]he government has the right to proceed under any statute under which it can secure a conviction.'' *United States v. Morgan*, 380 F.2d 686, 703 (9th Cir.1967) *cert. denied*, 390 U.S. 962 (1968).

> The general rule that the prosecutor has absolute discretion is limited by some courts. Where the general and specific statutes provide for the same elements of proof, *e.g.*, certain conduct done knowingly and willfully, some courts hold that the prosecutor has no right to election and may prosecute only under the specific statute. However, these cases are clearly distinguishable. They involve a choice between a specific conspiracy statute, 21 U.S.C. § 176(a), conspiracy to violate marihuana laws, and 18 U.S.C. § 371. In all the cases, the

> prosecutor chose the more specific statute, and the defendant on appeal complained that because the statute was used he/she lost the possibility to probation. In that circumstance the court heard no complaint that the prosecutor should have chosen the general rather than the specific statute.
>
> Support for this view derives from some ambiguous Supreme Court language and several circuit court decisions. In *United States v. Chase*, 135 U.S. 255, 260 (1889), the Court stated:
>
> It is an old and familiar rule that where there is, in the same statute a particular enactment and also a general one, which in its most comprehensive sense, would include what is embraced in the former, the general enactment must be taken to affect only such cases within its general language as are not within the provision of the particular enactment.

This rule of construction is limited to situations where the general and specific enactments are in the same statute, however, a later Supreme Court opinion extended the rule to situations where the more specific statute appears ''in same or another statute.'' *See United States v. Ginsberg*, 285 U.S. 204, 208 (1931); *United States v. MacEvoy*, 322 U.S. 102, 107 (1943). This authority is suspect because it does not limit the exclusive realm of the specific to situations where the elements of proof are identical and also because of recent circuit court cases which undauntingly affirm the prosecutor's right of election at least where the elements of proof are different.

United States v. Robinson, 142 F.2d 431 (8th Cir.1944), states the rule that where the general and specific statutes prescribe the same elements, the prosecution is limited to using the specific statute. *See also Price v. United States*, 74 F.2d 120 (5th Cir.1934), *cert. denied*, 294 U.S. 720 (1935). Several circuit courts have agreed with *Robinson* but have been able to distinguish it by finding the elements of proof in the particular situation to be different.

The *Robinson* rule makes sense for several reasons. First, when Congress enacts statutes with different burdens of proof, the maximum penalty is usually related to the amount of proof required. Thus, where the elements of proof are identical, it would be illogical to suppose that Congress intended to prescribe two different maximum penalties or two different statutes of limitations, use of which is subject to the prosecutor's whim. Further, when Congress punishes the theft of United States mail property by sentence of five years and later punishes the theft of United States postal bags by sentence of only two years, it is expressing a value judgment on the particular interest it seeks to protect.

The second reason *Robinson* is sound is that it obviates the constitutional arguments of vagueness and uncertainty as to the penalty that might

be imposed, excessive delegation by Congress of the power to place limits on the punishment for such conduct, and denial of equal protection of the laws. These contentions have been voiced by two Supreme Court dissenters, *United States v. Berra*, 351 U.S. 131, 135 (1955) (dissent Black, J.); *Roberberg v. United States*, 346 U.S. 273, 310 (1953) (dissent Douglas, J.), and by an unsuccessful defendant in *United States v. Coppola*, 296 F.Supp 903, *reh'g*, 300 F.Supp. 932 (D.Conn.1969).

The justification for this section discussing *Robinson* lies not with the viability of the argument, since statutes fitting it are hard to find, but rather in preparing the U.S. Attorney both to argue the rule is not law and, in the alternative, to distinguish it.

9-42.191 Policy

It is the policy of the Justice Department that in these instances where the U.S. Attorney has a choice of statutes, charges normally should be brought pursuant to the more specific statute. However, in those cases where special aggravating circumstances exist, the United States Attorney retains the discretion to charge a violation of the more serious general statute.

9-42.200 False Claims

Section 287 of Title 18, the general false claims statute provides:

> Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, shall be fined. . . or imprisoned. . . or both.

Section 287 of Title 18, like 18 U.S.C. § 1001, had its origin in an 1863 statute which was drafted ''in the wake of a spate of frauds upon the government.'' *United States v. Bramblett*, 348 U.S. 503, 504 (1955). Originally the statute penalized presentment ''for payment or approval'' of false claims upon or against the Government. . .'' *Bramblett, supra*, at 504. False statements made ''for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim'' were also proscribed. The Act of June 25, 1948, 62 Stat. 749, divided the sections into 18 U.S.C. § 287 and 18 U.S.C. § 1001, respectively.

The purpose of 18 U.S.C. § 287, is to protect the government from false, fictitious or fraudulent claims. *See United States v. Montoya*, 716 F.2d 1340 (10th Cir.1983).

The claim need not be false, fictitious *and* fraudulent; a claim that is false, fictitious *or* fraudulent will fall within the purview of 18 U.S.C.

§ 287. The language of the statute is to be considered in the disjunctive. *See United States v. Blecker*, 657 F.2d 629 (4th Cir.1981), *cert. denied*, 454 U.S. 1150 (1982).

9-42.210 Elements of 18 U.S.C. § 287

A. The essential elements of 18 U.S.C. § 287 are:

1. A claim is made;

2. Against or to a department or agency of the United States;

3. For money or property;

4. The claim is false, fictitious or fraudulent and material; and

5. The person must know at the time that the claim is false, fictitious or fraudulent.

Although it is clear from the case law that specific intent to defraud is not required for a conviction under 18 U.S.C. § 287, the circuits are divided on the issue of whether willfulness is an essential element of 18 U.S.C. § 287. For example, the Tenth, Fifth and Second Circuits have held that willfulness is not an essential element of 18 U.S.C. § 287, while the Ninth, Eighth and Fourth Circuits have reached decisions that appear to indicate that willfulness is an essential element of 18 U.S.C. § 287.

Presentation of a claim is more than an intention to make a claim. The claim must be presented actually and physically and thereby made to the government. The clearest case is presentation directly to the government. However, the claim may go through an intermediary. Presentation of a refund check for payment constitutes making a false claim on the United States. *See United States v. Branker*, 395 F.2d 881 (2d Cir.1968), *cert. denied sub nom., Lacey v. United States*, 393 U.S. 1029 (1969).

Section 287 of Title 18 has a civil counterpart in 31 U.S.C. § 3729, known as the False Claims Act, which is administered by the Civil Division. Prosecutors should be certain that all False Claims Act matters, even if declined criminally, are referred for consideration of civil fraud actions. If more than $200,000 is involved the matter should be referred to the Civil Division, Commercial Litigation Branch. Smaller claims should be considered by the Civil Section of the U.S. Attorney's Office. While it is not legally required, the normal procedure is to pursue the criminal prosecution first. When there is an opportunity to prosecute under either 18 U.S.C. § 287 or § 1001, the Civil Division benefits more by a prosecution under 18 U.S.C. § 287, because 18 U.S.C. § 287 and 31 U.S.C. § 3729 have much the same elements of proof. This fact allows the Civil Division to take advantage of the doctrines of estoppel by judgment and *res judicata*. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951); *Sealfon v. United States*, 332 U.S. 575 (1948).

9-42.300 18 U.S.C. § 371: CONSPIRACY TO DEFRAUD THE UNITED STATES

The conspiracy statute, 18 U.S.C. § 371, provides:

> If two or more persons conspire either to commit any offense against the United States, *or to defraud the United States*, or any agency thereof in any manner or for any purpose, and one or more persons do an act to effect the act of the conspiracy, each shall be . . . . (emphasis supplied).

The operative language in 18 U.S.C. § 371 is ''defraud the United States''. Although this language is broad, recent cases rely heavily on the definition of ''defraud'' provided by the Supreme Court in two early cases, *Hass v. Henkel*, 216 U.S. 462 (1910); *Hammerschmidt v. United States*, 265 U.S. 182 (1924). While *Hammerschmidt* attempted to limit the effect of *Hass*, circuit courts have relied on both attempts at defining ''defraud the United States'' to justify federal prosecution. *See, e.g., United States v. Thompson*, 366 F.2d 167 (6th Cir.1966), *cert. denied*, 385 U.S. 973 (1966).

In *Hass* the Court stated:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government . . . [A]ny conspiracy which is calculated to obstruct or impair . . . [agriculture department] efficiency and destroy the value of its operators and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulations.

Hass, supra, at 479-480.

In *Hammerschmidt*, Chief Justice Taft, writing for the Court, defined ''defraud'' as follows:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the over-reaching of those charged with carrying out the governmental intention.

The Supreme Court reaffirmed the vitality of *Hass* and *Hammerschmidt* in the recent case of *McNally v. United States*, No. 86-234 (June 24, 1987).

The general purpose of the statute is to protect governmental functions from frustration and distortion through deceptive practices. Those activities which courts have held defraud the United States ''touch'' the government in at least one of three ways:

1) They cheat the government out of money or property;

2) They interfere or obstruct legitimate Government activity; and

3) They make wrongful use of a governmental instrumentality.

9-42.310 Defrauding the Government of Money or Property

The act of defrauding the government of money or property may take many forms, including:

1. The inducement of payment for services or supplies not provided or provided at inflated prices.

2. The inducement of payment for work for which the government is not responsible. *United States v. Vincent*, 648 F.2d 1046 (5th Cir.1981); *U.S. v. Cella*, 568 F.2d 1266 (9th Cir.1978)

3. The inducement of payment of money or property because of statute to which applicant is not lawfully entitled because of his/her status.

Proof that the United States has been defrauded does not require any showing of pecuniary or proprietary loss.

9-42.311 Obstructing or Impairing Legitimate Government Activity

This type of fraud may take any of several forms:

1. Bribery of a government employee, kickbacks to government employees or extortion of money or favors by government employees, misrepresentations of financial capability, alteration or falsification of official records, submission of false documents, etc.

2. Obstructing, in any manner, a legitimate governmental function.

9-42.312 Government Instrumentality

The fraud of wrongful use of a government instrumentality is characterized by the lack of threatened or real pecuniary or proprietary loss, or obstruction of governmental activity. Such a scheme is perpetrated through the use of a government whose pride and integrity will not countenance a misuse of itself, (kickback between chief and subcontractor); (use of false IRS receipts to defraud private persons of money). Furthermore, the United States has the right to insure that funds be administered in accordance with law and honesty without corrupt influence or bribery.

Thus, a scheme to ''defraud the United States'' can range from directly cheating or swindling money or property from the government to simply using the government in a wrongful fashion with the only injury being to the pride and integrity of the government.

The cases demonstrate that the federal interest protected by the statute must be more than a congressional desire. Injury to the integrity of the government, however, is sufficient.

9-42.400 OTHER FRAUDS AGAINST THE GOVERNMENT

9-42.410 Commercial Bribery Statute

The Anti-kickback Enforcement Act of 1986 modernized and closed the loopholes of 41 U.S.C. §§ 51 to 54, the commercial bribery statute applying to government contractors. The new statute attempts to make the anti-kickback statute a more useful prosecutorial tool by expanding the definition of prohibited conduct and by making the statute applicable to a broader range of persons involved in government subcontracting.

Prosecutions under these statutes must show:

A. Prohibited conduct—The act prohibits attempted as well as completed ''kickbacks,'' which includes any money, fees, commission, credit, gift, gratuity, thing of value, or compensation of any kind. The act also provides that the inclusion of kickback amounts in contract prices is prohibited conduct in itself.

B. Purpose of kickback—The 1986 Act requires that the purpose of the kickback was for improperly obtaining or rewarding favorable treatment. It is intended to embrace the full range of government contracting. Prior to the 1986 Act, the ''kickback'' was required to be for the inducement or acknowledgement of a subcontract.

C. Covered class of ''kickback'' recipients—The 1986 Act prohibits ''kickbacks'' to prime contractors, prime contractor employees, subcontractors, and subcontractor employees. These terms are defined in the act.

D. Type of contract—The 1986 Act defines kickbacks to include payments under any government contract. Prior to this legislation, the statutes' applicability was limited to negotiated contracts.

E. Knowledge and willfulness—The 1986 Act requires one to knowingly and willfully engage in the prohibited conduct for the imposition of criminal sanctions.

9-42.420 Defense Procurement Fraud Unit

In August, 1982 the Attorney General and the Secretary of Defense established the Defense Procurement Fraud Unit (Unit) in the Criminal Divi-

sion's Fraud Section to coordinate and prosecute significant procurement fraud cases involving the Department of Defense's multi-billion dollar procurement of equipment and services.

By February 22, 1984 telex all U.S. Attorneys were advised that the Attorney General and the Secretary of Defense have agreed that all significant procurement fraud allegations will first be screened by the Unit through its liaison with the various DOD agencies, subject to appropriate security precautions. Those cases that should be pursued civilly or administratively will be so directed, leaving only those cases with real criminal potential.

If the Unit determines that specific credible evidence of criminal conduct does not exist, the Unit will decline the case for the Department of Justice. In most cases brought to the Unit, however, little or no investigation has been completed. Therefore, the Unit will advise the investigative agency to conduct further investigation to determine whether there is specific credible evidence suggesting prosecutable violations of federal laws and, if so, bring the matter back to the Unit. The Unit may also direct that the matter be taken to the appropriate U.S. Attorney after the additional workup has been completed. The Unit will monitor and prosecute a number of cases itself. Most of the cases will be referred by the Unit to the U.S. Attorney's Office for prosecutive decision. The Unit will advise the U.S. Attorneys of matters retained by the Unit for prosecution.

For a further discussion of DOD fraud matters, *see* USAM 9-42.530 *infra*.

9-42.430 Department of Defense Voluntary Disclosure Program

In July, 1986, the Department of Defense (DOD) initiated the Voluntary Disclosure Program designed to encourage self-policing and voluntary disclosure by defense contractors of procurement related problems.

The Fraud Section's Defense Procurement Fraud Unit (Unit) is the contact point in the DOJ to oversee voluntary disclosure matters. The responsibilities of the Unit include the following:

A. The Unit will review all referrals made to the DOJ by the OIG in connection with the Voluntary Disclosure Program.

B. Upon receipt of the referral from the DOD, the Unit will conduct or refer to an appropriate U.S. Attorney to conduct whatever preliminary inquiry is deemed necessary to determine whether there is specific credible evidence suggesting prosecutable violations of federal laws.

C. If the Unit determines that specific credible evidence of criminal conduct does not exist, the preliminary inquiry will be closed. The closing of a preliminary inquiry does not necessarily constitute a criminal

declination. An inquiry may be reinstituted by the Unit at any time for any reason it deems to be appropriate.

D. If the Unit determines that specific credible evidence of criminal conduct exists, the referred matter will be investigated.

E. Matters involving an impact on the government of $100,000 or more or where the fraud had posed a substantial threat to safety or our national security will be retained by the Unit or referred to an appropriate U.S. Attorney's office. The Unit will advise the U.S. Attorneys of matters, whether or not retained by the Unit. Cases referred under this paragraph to U.S. Attorney(s) will be monitored by the Unit on two bases: (1) for periodic status reports provided by the U.S. Attorneys, and (2) for review of proposed prosecutions.

F. All other matters will be referred to an appropriate U.S. Attorney's Office for prosecutive decision.

The U.S. Attorneys' offices will periodically notify the Unit of the status of ''significant'' investigations (*see* E. and F. above) of corporations referred to them that have participated in the DOD Voluntary Disclosure Program. Prior to any decision to prosecute or to decline prosecution of a volunteer corporation, U.S. Attorneys' offices will notify and obtain the concurrence of the Unit (providing a summary of the evidence, proposed theories of criminal liability and proposed charges in the case).

9-42.440 Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act

On October 27, 1986, Congress amended the False Claims Act.[1] One of Congress's objectives in modifying the act was to encourage the use of qui tam actions in which citizens are authorized to bring, as ''private Attorneys General,'' lawsuits on behalf of the United States alleging frauds upon the government. (The private citizen plaintiff in such a lawsuit is often referred to as the ''relator.'') To this end, Congress increased the amount by which a relator would share in any money recovered, liberalized the circumstances under which a private citizen could bring a qui tam action, and increased the relator's role in such litigation.

A. Procedures

The relator must do the following to initiate a qui tam suit:

(1) file the complaint under seal with the court (the defendant is not served at this time);

1 False Claims Act Amendments of 1986, Pub.L. 99-562, 100 Stat. 3153 (October 27, 1986), reprinted in 10A U.S.Code, Cong. & Admin.News (December 1986) (codified at 31 U.S.C. § 3729 *et seq.*).

(b) serve a copy of the complaint *and* a ''written disclosure of substantially all material evidence and information'' possessed by the relator on both the Attorney General and the U.S. Attorney pursuant to Rule 4(d)(4).

The government must then decide whether to take over the case as its own. If it does not notify the court that it is taking over the case, it becomes the relator's to litigate.

The government has 60 days from the date service is completed and the statement of material evidence is submitted, *whichever is latest*, to notify the court of its decision. Usually, the complaint and statement of evidence are served simultaneously on the U.S. Attorney, with service on the Attorney General occurring later. When confusion exists as to the tolling of the 60-day period, it is advisable to file a status report with the court (copy to the relator) advising it when the government's deadline expires and the complaint may be unsealed and served upon the defendant.

Sometimes 60 days is simply insufficient. The government, ''for good cause shown,'' may ask for additional time. Congress indicated that such extensions should not be granted automatically and that it expected the courts to require proof of a serious inquiry and legitimate need for more time before granting extensions of time.

Sixty days is very little time. Consequently, it is necessary to gather as much information as quickly as possible. To this end, it is important that *U.S. Attorneys promptly forward a copy of the complaint and statement of evidence to the Commercial Litigation Branch of the Civil Division*, (Michael F. Hertz, Director (FTS 724-7179) or Robert L. Ashbaugh, Deputy Director (FTS 724-7158), Post Office Box 261, Ben Franklin Station, Washington, D.C. 10044), particularly because relators frequently fail to serve the Attorney General or delay in doing so. The Commercial Litigation Branch will contact the agency involved, the Criminal Division, and, frequently, the Inspector General of the agency, to determine if the allegations are known to them and to obtain an assessment of the material evidence furnished by the relator. The Criminal Division will, in turn, check with appropriate U.S. Attorneys' offices and investigative agencies to determine if the allegations relate to a pending criminal investigation. *Because of the 60 day deadline, it must be emphasized that a prompt response is required to these inquiries.*

Based on the information and recommendations provided by the relevant agency and U.S. Attorney's Office and DOJ staff review, a decision whether to enter the case and take it over or to decline to do so will be made. After that decision is made, the Commercial Litigation Branch will coordinate as necessary with the U.S. Attorney's Office to ensure proper handling of the qui tam litigation and to ensure that it does not interfere with ongoing criminal investigations or prosecutions.

9-42.450 Medicare-Medicaid Frauds

In 1965 Congress enacted the Social Security Amendments of 1965, Pub.L. 89-97 (July 30, 1965), 79 Stat. 286:

> To provide a hospital insurance program for the aged under the Social Security Act with a benefits program and an expanded program of medical assistance to increase benefits under the Old-Age, Survivors, and Disability Insurance System, to improve the Federal-State public assistance programs, and for other purposes.

The Act included two programs popularly known as Medicare, 42 U.S.C. § 1395ff (Title 18 of Social Security Act of 1935), and Medicaid, 42 U.S.C. § 1396ff (Title 19 of Social Security Act of 1935).

Medicare and Medicaid are administered by the Health Care Financing Administration of the Department of Health and Human Services (HHS). Investigations involving either program are conducted by the Office of Inspector General of HHS.

Medicare is a health financing program for the elderly. It is financed by federally-administered trust funds. Claims for reimbursement are filed by beneficiaries or their health care providers and are paid by carriers and intermediaries (private insurance companies in each state who are the federal government's agents) under contracts to perform this service. The carrier or intermediary is reimbursed for claims that are paid, and for administrative costs, out of the federal trust funds.

Medicaid also is a health financing program for low-income individuals. It is administered by each state, pursuant to a state plan which must be approved by HHS. The states have some flexibility with regard to how they structure their respective programs. Each state is reimbursed by the federal government on a quarterly basis for a percent of the costs incurred in operating its program.

Beneficiaries and providers under either program can be prosecuted under federal law for making material false statements, submitting false claims, or being a party to a kickback scheme. The first two offenses are prohibited by the federal criminal code; all three are prohibited by specific criminal provisions in the Medicare and Medicaid statutes.

In recent years, especially with the establishment of federally-funded Medicare Fraud Control Units in many states, fraud in Medicaid is viewed as a state concern, and the HHS Office of Inspector General is significantly more active in enforcement of Medicare criminal statutes. The reimbursement principles under Medicare have grown increasingly complicated over the years. Different entities are paid under different methodologies (such as cost-based vs. charge-based vs. fee schedules) and may be subject to limits based on a number of factors. Some providers are paid directly,

some are paid by the patient, who is then reimbursed by Medicare. Successful prosecution of a Medicare case will often require a sophisticated understanding of the reimbursement principles involved in that case. The Office of General Counsel at HHS should be relied upon for assistance.

Since the people who receive medical treatment under the programs are often in a weakened physical condition, it is advisable to secure more witnesses than normally necessary to guard against the strong possibility of death or infirmities making court appearance impossible. In one Medicare case nearly 50 percent of the potential witnesses proved to be unsuitable for various reasons at the time of trial.

Another question is the number of counts to be included in the indictment. One count for each false claim or false statement is legally justified yet can create tension with trial judges who dislike lengthy indictments. Nevertheless, the use of numerous counts is desirable for several reasons:

A. It guards against loss of witnesses due to death or infirmities;

B. It negates the defense that false statements are caused by clerical mistake;

C. It avoids the problem of trying to offer other false statements not mentioned in the indictment to show state of mind, intent, rebut claim of mistake or inadvertence, repetitious conduct, etc. *See United States v. Roe*, 316 F.2d 617 (5th Cir.1963); *United States v. Weis*, 122 F.2d 675 (6th Cir.) *cert. denied*, 314 U.S. 687 (1941); and

D. It maximizes penalty under 18 U.S.C. § 408, which judges are inclined to treat lightly.

The Fraud Section has drafted a sample indictment which enables the prosecutor to include enough counts to solve the above difficulties yet satisfy the judiciary's desire for brevity.

9-42.451 Plea Bargaining

A potential problem area has been identified regarding the practice of plea bargaining as it relates to administrative sanctions available to the Health Care Financing Administration, Department of Health and Human Services, in Medicare—Medicaid fraud cases.

Specifically, provision 229 of Pub.L. No. 92-603, enacted on October 30, 1972, amended Sections 1862 and 1866(b) of the Social Security Act to enable the Secretary to deny payment under Title XVIII of the act if he/she determines that a provider or person has committed fraud or abuse against the Medicare program. Subsequent to such determinations, Section 1903(i)(2) of the act also prohibits Federal Financial participation (FFP) for payments to these providers or persons in the Medicaid program. In

addition, the legislation (Pub.L. No. 95-142, Medicare-Medicaid Anti-Fraud and Abuse Amendments) enacted on October 25, 1977, contains a provision (Section 7) which requires the Secretary to suspend program participation for a physician or individual practitioner convicted of a criminal offense related to his/her involvement in the Medicare or Medicaid programs. Suspension from program participation is immediate and applicable to both programs. The Section 7 provision is incorporated in the Code of Federal Regulations at 42 C.F.R. § 405.315-2 for Title XVIII and at 42 C.F.R. § 450.85 for Title XIX.

Since the administrative sanction would generally be effectuated subsequent to any criminal proceedings, future plea bargains including commitments to forego or restrict administrative remedies which the Department of Health and Human Services may elect to pursue pursuant to the aforementioned provisions should be rare and made only after obtaining prior *explicit* approval from the Criminal Division.

9-42.500 REFERRAL PROCEDURES

9-42.501 Relationship and Coordination With the Statutory Inspectors General

A. Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States.

The investigation and prosecution of fraud and corruption in federal programs is a major priority of the Department of Justice. On June 3, 1981, the Deputy Attorney General issued a ''Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States.'' This statement is summarized at USAM 9-42.502, *infra*. The statement was first announced at a meeting of the President's Council on Integrity and Efficiency and was the result of a combined effort of the Criminal Division, the Federal Bureau of Investigation and the Executive Office for U.S. Attorneys.

The Policy Statement has two principal purposes—early alert system for prosecutors relative to ongoing investigations and increased emphasis on coordination and cooperation between the FBI and the Inspectors General.

Several particular provisions deserve special emphasis. Consistent with the Inspector General's obligation to ''report to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of law,'' the Inspector General is to report to ''the United States Attorney in the District where the crime occurred ...'' Simultaneously, the Inspector General is expected to notify the appropriate FBI field office. The FBI is committed to investigating every criminal violation which the prosecutor determines will be prosecuted, if proved.

The timing of the report to the prosecutor is discussed in the Policy Statement. In an ordinary investigation involving completed past events, the Policy Statement simply tracks the Inspector General legislation and requires a report whenever there are reasonable grounds, *i.e.*, some evidence, to believe that a federal crime has occurred. Immediate report is required for crimes of an ongoing nature, as well as organized crime allegations. Such urgent and sensitive matters often require use of sophisticated investigative techniques, and the Inspector General is to make an immediate report upon receipt of the information. The Policy Statement requires the FBI to advise the Inspector General when the Bureau initiates an investigation as well as to keep the Inspector General regularly informed of its progress.

B. Implementation of the Policy Statement

Since the Department issued the June 3, 1981, Policy Statement there have been discussions over its meaning, with requests from various Inspectors General and the Federal Bureau of Investigation for further clarification of their respective investigative responsibilities.

The Department is concerned about the allocation of limited investigative resources and the possibility of competitive and, at times, redundant and unproductive relationships among law enforcement agencies generally. The Policy Statement addresses these issues and establishes a structure for early reporting of instances of criminality to the prosecutor. As a further refinement, to set out more clearly Department expectations regarding the use of the limited investigative resources in both the FBI and the Offices of Inspector General, the Policy Statement has been supplemented by the February 19, 1982, Implementation of the Policy Statement (*see* USAM 9-42.503, *infra*) which allocates investigative responsibility between the Inspectors General and the FBI with respect to four types of crime in which both have an investigative interest—bribery, significant allegations of fraud involving federal employees, organized crime matters and fraud against the government.

Implementation of the Policy Statement requires the cooperation and support of the U.S. Attorneys, the FBI, and the Inspectors General. The Fraud Section of the Criminal Division is charged with overseeing the operations of the policy and resolving any uncertainties or differring interpretations which arise in its implementation. Any questions or information should be directed to the Fraud Section's Deputy Chief for operations at FTS 724-7340.

9-42.502 Policy Statement of the Department of Justice on Its Relationship and Coordination With the Statutory Inspectors General of the Various Departments and Agencies of the United States

A. INTRODUCTION

The serious problem of fraud and waste in federal programs is one of the most important challenges facing the federal law enforcement community, which includes not only the Federal Bureau of Investigation, other investigative agencies and Department of Justice prosecutors but also the audit and investigation staffs of the Inspectors General. To meet this challenge we must effectively use our limited audit, investigative and prosecutorial resources and produce meaningful results. The Department of Justice has high expectations for the Inspectors General, but in the past, in some circumstances, we have not addressed and resolved in any comprehensive way how they are to work in the criminal justice system. The Department has now developed a framework for coordination of its efforts with the Inspectors General, which is outlined below.

B. LEGAL FOUNDATION

The implementing statutes place with Inspectors General the responsibility for conducting investigations relating to the programs and operations of their agencies. The statutes also require Inspectors General to ''report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there had been a violation of criminal law.''

C. GOAL OF POLICY

The Inspectors General were created in large part in response to the need for increased detention of fraud, waste, abuse and mismanagement in federal programs. In law enforcement, we have come to recognize that the United States is best served by formally initiating matters of possible criminality into the criminal justice system as early as possible. Accordingly, current FBI procedures generally provide for a preliminary prosecutive opinion before the initiation of a full-scale criminal investigation. This early alert system enables the Department of Justice to mount a coordinated and directed investigation and prosecution effort.

D. NOTIFICATION POLICY

1. When to Report

The basic rule is that whenever there is reason to believe a federal crime has occurred, the Department of Justice should be advised. There are two subcategories.

One category involves possible crimes which are completed past events and which, although they require prompt investigative and prosecutive attention, are not so urgent, or so sensitive as to suggest accelerated reporting and/or utilization of special law enforcement techniques. This first category of criminal allegations may require further investigation by the Inspector General to confirm, and should be

reported whenever there is a reasonable indication, *i.e.*, some evidence, to believe that a federal crime has occurred.

The second category involves possible crimes which are of such an urgent or sensitive nature that upon receipt of the mere allegation, accelerated reporting is required to allow for immediate prosecutive and investigative action. This second category involves allegations such as bribery, conflict of interest, fraud against the government and the like involving federal employees, and, in addition, any criminal conduct of an ongoing nature. Because of the law enforcement sensitivity, this category also includes information pertaining to the element generally known as organized crime. These urgent and sensitive matters necessitate immediate reporting to the Department because the FBI may be called on to employ body recorders, undercover operations, search warrants, Title III and other specialized law enforcement techniques which need FBI expertise and may require Department approval.

2. Where to Report

The Attorney General's interests include not only criminal investigation and prosecution but also the civil interests of the United States. To fulfill all these interests and coordinate other actions, the Inspectors General should report the above described possible violations to the prosecutor. This normally will be the U.S. Attorney in the district where the crime occurred or is occurring. In certain circumstances the reporting may be to the appropriate section of the Criminal Division. These situations include matters in which venue is uncertain or headquarters coordination or action is suggested by the nature of the crime or program.

3. What and How to Report

The report should generally consist of a written statement of the allegation, the facts developed, the evidence—both documentary and testimonial—supporting the facts, the history and status of the Inspector General investigation. To insure that appropriate consideration is given to the Agency's civil fraud claims, however, the Inspector General may wish to make a separate referral to the Civil Division.

E. THE FBI AND PROSECUTOR ROLE

At the time of reporting, the prosecutor, consulting with the FBI and the Inspector General, will be called on immediately to make a number of decisions, including whether:

1. To initiate a grand jury investigation,

2. To decline prosecution, or

3. To refer the matter for civil and/or administrative action.

In many circumstances, with the early reporting system, the prosecutor and the FBI will ask the Inspector General to conduct a joint investigation with the FBI or continue the investigation.

F. DEPARTMENT OF JUSTICE COMMITMENT

1. U.S. Attorneys and the Criminal and Civil Divisions will give investigations of Inspector General matters a high priority.

2. The Fraud Section of the Criminal Division will be charged with overseeing the operations of the policy and resolving any uncertainties of differing interpretations which may arise.

3. The FBI will keep the Inspectors General regularly informed of the progress of the investigation except in these rare instances where disclosure might endanger FBI agents or adversely affect the investigation.

4. The FBI will notify the Inspector General, at the same time it seeks a preliminary prosecutive opinion, of FBI investigations which are predicated on information or allegations other than an Inspector General report (with the same safety and security of investigation caveat).

5. The FBI will furnish a written summary at the conclusion of an investigation on the nature of judicial action, if any, taken.

6. The FBI will provide the following services:

a. Appropriate indices checks;

b. Laboratory examinations;

c. National Crime Information Center inquiries; and

d. Identification record searches and other appropriate services.

7. The FBI has completed a major Inspector General/FBI undercover operation and is seeking the support of the Inspectors General in developing other such efforts. Substantial progress has been made in coordinating the prosecutive and investigation planning in this area through the Bureau's Undercover Review Committee. The Department expects to increase the use of this technique in the government fraud and corruption area.

G. MEMORANDA OF UNDERSTANDING

As the Department and the Inspectors General gain experience with the principles set forth in this statement, refinements within the framework of the underlying policy will be formulated. It is contemplated that the FBI and the Inspectors General, consultation with the U.S. Attorneys and

the Criminal Division will address matters such as local working relationships, joint investigative procedures, threshold reporting requirements, and delegation of investigative responsibility. These may take the form of procedural and operating memoranda of understanding.

9-42.503 Implementation of the Policy Statement

Two premises underlie the following allocation of law enforcement investigative resources. First, both the FBI and Inspectors General with overlapping investigative jurisdiction have limited resources. Second, questions of appearance, sensitivity and expertise suggest the FBI is better suited to be primarily responsible for organized crime and corruption matters.

With these considerations in mind, the following comments outline the Department of Justice approach with regard to the criminal investigative jurisdiction of the FBI and the Inspectors General.

A. Inspectors General will in all instances notify the FBI of the following criminal investigative matters:

1. Bribery matters;

2. Significant allegations of fraud which culpably involve United States government employees; and

3. Organized crime related matters, including both traditional (La Cosa Nostra) and non-traditional organizations such as other ethnic groups and outlaw motorcycle gangs.

The FBI will have the primary investigative role in these three areas and, as part of the notification, the IG will transfer the investigative file and consequently investigative responsibility to the FBI. The Inspector General simultaneously will notify the prosecutor of the above described matters.

B. The Inspectors General normally will have the responsibility for conducting investigations of fraudulent misconduct involving their respective departments and agencies by non-government personnel. However, the FBI will treat fraud against the government matters as a top priority and, if asked by the prosecutor, will investigate every criminal violation that the prosecutor advises will be prosecuted, if proved. The FBI maintains the right to investigate any criminal allegations which the FBI receives independently and which involve any agency's programs or functions wherein the alleged violations are within the FBI's jurisdiction.

C. The FBI will, given adequate manpower conditions, consider undertaking joint investigations with Inspector General personnel, and encourage joint undercover operations targeted against identified major crime problems.

D. The FBI will accept responsibility for other significant criminal investigative matters, consistent with the availability of investigative resources within the applicable FBI field office. As a general rule, the FBI will not initiate investigations concerning recipient/participant-type frauds, absent indications of a pattern of widespread criminal activity.

The Fraud and Corruption Tracking System is being developed to complement the Policy Statement and will be used to insure all appropriate offices are informed of ongoing investigations.

9-42.510 Social Security Administration

9-42.511 Social Security Violations

The Social Security Number (SSN) is the primary element of identification in the various earnings and benefit payment records maintained by SSA. It is the record identifier used to insure proper payment of benefits in both the Title II and Title XVI programs.

The SSN plays a vital role in electronic enforcement programs and record linkages, such as Project Match, which are designed to identify instances of improper payments. Given this reliance on the SSN, social security programs are susceptible to fraud when multiple numbers are employed by individuals intent on securing duplicate payments or concealing income. Not only would the use of multiple SSN's facilitate initial deceptions but would also inhibit subsequent detection under the various electronic enforcement programs.

The impact of SSN misuse pervades nearly all facets of today's automated record keeping society. The SSN is used as a personal identifier, either in the application or record keeping processes, by most federal and state agencies administering benefit programs, the Internal Revenue Service, many State Departments of Motor Vehicles, credit corporations and insurance companies. Accordingly, the SSN is the key to unlimited opportunities for fraud and abuse. SSA is strengthening its procedures dealing with the issuance of SSN's and has made a firm commitment to vigorously investigate SSN misuse. Although these cases may involve little or no overpayment, U.S. Attorneys are encouraged to prosecute SSN violations whenever possible.

Title XVI of the Social Security Act (42 U.S.C. § 1381 *et seq.*), Supplemental Security Income (SSI) program, provides payments of benefits from general revenues to the needy, aged, blind and disabled. Title II of the Act (42 U.S.C. § 401 *et seq.*), provides benefits from trust funds to retired and disabled individuals, their survivors and dependents. Over $11.5 billion per month to almost 34 million beneficiaries is paid by SSA under these two programs alone.

Attempts to defraud occur in connection with applications (claims) for benefits and documents submitted in support thereof. Most violations under Title XVI involve false statements about—or concealment of—an individual's financial condition (42 U.S.C. § 138a(1), (2), and (3)). Most violations under Title II involve false statements about—or concealment of—work activity affecting initial or continuing eligibility for disability benefits, changes in marital status, and misuse of benefits by representative payees (42 U.S.C. § 408(a), (b), and (d)). The felony provisions of 42 U.S.C. § 408 punish the making of false statements to secure benefits or obtain higher benefits, the conversion of another's benefits, and the use of false Social Security numbers to obtain benefits.

There is also a statute that covers the unauthorized charging of a fee for services in connection with a claim under both Titles (42 U.S.C. § 1383(d)(3) for Title XVI and 42 U.S.C. § 406(a) for Title II). Felony statutes such as 18 U.S.C. §§ 287, 371, and 1001 are also applicable for both programs and have been used successfully.

Pursuant to an agreement reached between the Department of Justice and SSA in April 1977, SSA will not refer matters in which one or more of the factors below is present unless additional aggravated circumstances are present:

A. The suspect is 75 or more years old;

B. The suspected violation did not result in improper payment. This exception does not apply in criminal misuse cases such as conversion by a representative payee, SSN misuse or improper disclosure;

C. There is evidence that the suspect has an illness expected to result in his/her death in the near future; and

D. The suspected violation is solely a failure to disclose an increase in a pension amount.

The SSA has discontinued their procedure of summarizing each case involving one or more of the aforementioned factors and recommending against further action. SSA will, however, continue to take administrative action directed toward recovering any overpayments in those cases not warranting criminal prosecution. Matters in which the factors cited above are either not present or not compelling will be referred with an appropriate recommendation.

Each referral with a recommendation for prosecution contains the name and telephone number of the SSA Regional Integrity Specialist familiar with the facts of the case. You are invited to contact that individual for discussion, or additional investigation.

9-42-520 Department of Agriculture—Food Stamp Violations

As a result of the growing problem of theft, improper use and illegal trafficking of food stamps in violation of 7 U.S.C. § 2024, modified referral procedures concerning fraud cases involving suspected food stamp violations have been established.

These procedures will provide a means of expediting the prosecution of significant cases while permitting latitude for the prompt administrative action by the Department of Agriculture in categories of cases not deemed to warrant prosecution.

The Department of Agriculture will not refer the following categories of food stamp violations for prosecutive consideration:

A. Retailers participating in the program

Routine reports of retailer violations where the only offenses committed or suspected are the sale of ineligible items for food stamps. (Any other violations by retailers, such as case discounting of food stamps, trafficking in stamps or ATP cards, retention of stamps or cards for security or other purposes, will be treated as significant and referred.)

B. Recipients authorized to participate in the program, and applicants for participation

Reports of:

1. False applications or forgery where the report indicates that the state prosecuting authorities are cognizant of these violations, intend to pursue them and there are no additional circumstances suggesting an overriding federal interest, *e.g.*, widespread conspiracies or substantial public loss.

2. False applications where the recipient has made complete restitution.

C. Violations by others not authorized to possess food stamps

Reports of:

1. Thefts of food stamps or ATP cards where the total amount involved or suspected to be involved is small (less than $100).

2. Thefts where the identity of the thief is unknown.

All other reports containing substantial evidence of 7 U.S.C. § 2024 or other food stamp related crimes will be referred to U.S. Attorneys for consideration and prosecution. The same is true of reports falling in the above nonsignificant categories if the Department of Agriculture feels that prosecution is desirable from a program standpoint.

9-42.530 Department of Defense Memorandum of Understanding

In August 1984, Attorney General Smith and Secretary of Defense Weinberger signed a Memorandum of Understanding (MOU) between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes. Special attention is directed to the treatment of investigative jurisdiction of corruption, fraud and theft cases. It is important to note the responsibilities of the prosecutor:

—Concurrence before DOD can initiate any corruption investigation;

—Hold a conference to determine investigative jurisdiction in all fraud and theft matters; and

—Concurrence before DOD can initiate any administrative investigation or actions during the pendency of any criminal investigation.

The MOU was developed with the expectation that the more complex cases require the joint efforts of DOD and DOJ. In this regard a repeated theme of the MOU is the prosecutor's responsibility for coordinating and effectuating the various interests of the United States. The DOD/DOJ Fraud Procurement Unit has developed substantial expertise in these investigations and can assist in structuring and conducting the investigations requiring expertise from the FBI and DOD. Questions concerning the MOU should be directed to the Fraud Section at FTS 724-7038 or the Unit at FTS 557-5171.

MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES

A. PURPOSE, SCOPE AND AUTHORITY

This Memorandum of Understanding (MOU) establishes policy for the Department of Justice and the Department of Defense with regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction. This memorandum is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals, associations, corporations or other persons or entities.

B. POLICY

The Department of Justice has primary responsibility for enforcement of federal laws in the United States District Courts. The Department of Defense has responsibility for the integrity of its programs, operations and installations and for the discipline of the Armed Forces. Prompt administrative actions and completion of investigations within the two (2) year statute of limitations under the Uniform Code of Military Justice require the Department of Defense to assume an important role in federal criminal investigations. To encourage joint and coordinated investiga-

tive efforts, in appropriate cases where the Department of Justice assumes investigative responsibility for a matter relating to the Department of Defense, it should share information and conduct the inquiry jointly with the interested Department of Defense investigative agency.

C. INVESTIGATIVE AND PROSECUTIVE JURISDICTION

1. CRIMES ARISING FROM THE DEPARTMENT OF DEFENSE OPERATIONS

a. Corruption Involving the Department of Defense Personnel

The Department of Defense investigative agencies will refer to the FBI on receipt all significant allegations of bribery and conflict of interest involving military or civilian personnel of the Department of Defense. In all corruption matters the subject of a referral to the FBI, the Department of Defense shall obtain the concurrence of the Department of Justice prosecutor or the FBI before initiating any independent investigation preliminary to any action under the Uniform Code of Military Justice. If the Department of Defense is not satisfied with the initial determination, the matter will be reviewed by the Criminal Division of the Department of Justice.

The FBI will notify the referring agency promptly regarding whether they accept the referred matter for investigation. The FBI will attempt to make such decision in one (1) working day of receipt in such matters.

b. Frauds Against the Department of Defense and Theft and Embezzlement of Government Property

The Department of Justice and the Department of Defense have investigative responsibility for frauds against the Department of Defense and theft and embezzlement of government property from the Department of Defense. The Department of Defense will investigate frauds against the Department of Defense and theft of government property from the Department of Defense. Whenever a Department of Defense investigative agency identifies a matter which, if developed by investigation, would warrant federal prosecution, it will confer with the U.S. Attorney or the Criminal Division, the Department of Justice, and the FBI field office. At the time of this initial conference, criminal investigative responsibility will be determined by the Department of Justice in consultation with the Department of Defense.

2. CRIMES COMMITTED ON MILITARY INSTALLATIONS

Crimes (other than those covered by paragraph C.1.) committed on a military installation will be investigated by the Department of Defense investigative agency concerned and, when committed by a person subject to the Uniform Code of Military Justice, prosecuted by the Military

Department concerned. The Department of Defense will provide immediate notice to the Department of Justice of significant cases in which an individual subject/victim is other than a military member or dependent thereof, and when one or more subjects are not subject to the Uniform Code of Military Justice.

3. CRIMES COMMITTED OUTSIDE MILITARY INSTALLATIONS BY PERSONS WHO CAN BE TRIED BY COURT-MARTIAL

a. Offense is Normally Tried by Court-Martial

Crimes (other than those covered by paragraph C.1.) committed outside a military installation by persons subject to the Uniform Code of Military Justice which, normally, are tried by court-martial will be investigated and prosecuted by the Department of Defense. The Department of Defense will provide immediate notice of significant cases to the appropriate Department of Justice investigative agency. The Department of Defense will provide immediate notice in all cases where one or more subjects is not under military jurisdiction unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

b. Offense is not Normally Tried by Court-Martial

When there are reasonable grounds to believe that a federal crime (other than those covered by paragraph C.1.) normally not tried by court-martial, has been committed outside a military installation by a person subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will immediately refer the case to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

D. PROSECUTION OF CASES

1. With the concurrence of the Department of Defense, the Department of Justice will designate such Department of Defense attorneys as it deems desirable to be Special Assistant U.S. Attorneys for use where the effective prosecution of cases may be facilitated by the Department of Defense attorneys.

2. The Department of Justice will institute civil actions expeditiously in United States District Courts whenever appropriate to recover monies lost as a result of crimes against the Department of Defense; the Department of Defense will provide appropriate assistance to facilitate such actions.

3. The Department of Justice prosecutors will solicit the views of the Department of Defense prior to initiating action against an individual subject to the Uniform Code of Military Justice.

4. The Department of Justice will solicit the views of the Department of Defense with regard to its Department of Defense-related cases and investigations in order to effectively coordinate the use of civil, criminal and administrative remedies.

E. MISCELLANEOUS MATTERS

1. ORGANIZED CRIME

The Department of Defense investigative agencies will provide to the FBI all information collected during the normal course of agency operations pertaining to the element generally known as ''organized crime'' including both traditional (La Cosa Nostra) and nontraditional organizations whether or not the matter is considered prosecutable. The FBI should be notified of any investigation involving any element of organized crime and may assume jurisdiction of the same.

2. DEPARTMENT OF JUSTICE NOTIFICATIONS TO DEPARTMENT OF DEFENSE INVESTIGATIVE AGENCIES

a. The Department of Justice investigative agencies will promptly notify the appropriate Department of Defense investigative agency of the initiation of the Department of Defense related investigations which are predicated on other than a Department of Defense referral except in those rare instances where notification might endanger agents or adversely affect the investigation. The Department of Justice investigative agencies will also notify the Department of Defense of all allegations of the Department of Defense related crimes where investigation is not initiated by the Department of Justice.

b. Upon request, the Department of Justice investigative agencies will provide timely status reports on all investigations relating to the Department of Defense unless the circumstances indicate such reporting would be inappropriate.

c. The Department of Justice investigative agencies will promptly furnish investigative results at the conclusion of an investigation and advise as to the nature of judicial action, if any, taken or contemplated.

3. JOINT INVESTIGATIONS

a. To the extent authorized by law, the Department of Justice investigative agencies and the Department of Defense investigative agencies may agree to enter into joint investigative endeavors, including undercover operations, in appropriate circumstances. However, all such investigations will be subject to Department of Justice guidelines.

b. The Department of Defense, in the conduct of any investigation that might lead to prosecution in Federal District Court, will conduct the investigation consistent with any Department of Justice guidelines. The Department of Justice shall provide copies of all relevant guidelines and their revisions.

4. APPREHENSION OF SUSPECTS

To the extent authorized by law, the Department of Justice and the Department of Defense will each promptly deliver or make available to the other suspects, accused individuals and witnesses where authority to investigate the crimes involved is lodged in the other Department. This MOU neither expands nor limits the authority of either Department to perform apprehensions, searches, seizures, or custodial interrogations.

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9-43.000 MAIL FRAUD—18 U.S.C. § 1341

Section 1341 of Title 18 provides in relevant part:

> 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, . . . for the purpose of executing such scheme or artifice . . . 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 takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

But see also the provisions of the Criminal Fine Enhancement Act of 1984, 18 U.S.C. 3571, effective December 31, 1984.

9-43.110 Policy Concerning Prosecutions

Ordinarily prosecutions should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts. On the other hand, if the scheme is in its nature directed to defrauding a class of persons, or the general public, through the mails, with a substantial pattern of conduct, serious consideration should be given to prosecution.

9-43.200 ELEMENTS OF THE OFFENSE

The elements of mail fraud are: (1) formation of a scheme or artifice to defraud, and (2) use of the mails in furtherance of the scheme. The gist of the offense is the use of the mails to execute a fraudulent scheme.

9-43.210 The Scheme and Artifice to Defraud

The statute does not define the terms ''scheme'' or ''artifice'' and the courts have traditionally been reluctant to offer definitions of either term except in the broadest and most general terms.

The fraudulent aspect of the scheme to defraud is to be measured by nontechnical standards and is not restricted by any common-law definition of false pretenses. The law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the ''reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'' *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir.1958).

Traditional schemes to defraud a state or other governmental body through material misrepresentation, deceit, or active concealment of fact may be actionable where loss may be shown, as in a scheme to defraud a state of a sales tax revenue. However, prior approval from the Criminal Division's Public Integrity Section is required before instituting prosecutions under the mail fraud statute, 18 U.S.C. § 1341, or the fraud by wire statute, 18 U.S.C. § 1343, in election fraud cases.

The government need not show that the scheme was successful, nor that the victims were actually defrauded. *United States v. Curtis*, 537 F.2d 1091, 1095 (10th Cir.1976); *United States v. Pollack*, 534 F.2d 964, 971 (D.C.Cir.1976); *Pritchard v. United States*, 386 F.2d 760, 766 (8th Cir. 1967). The government, must, however, prove specific intent to defraud and show that the alleged scheme was calculated to deceive persons of ordinary prudence and comprehension. Direct evidence of intent to defraud is not required.

On June 24, 1987, the Supreme Court decided a case that significantly affects the extent to which the mail fraud statute can be used to prosecute a wide variety of fraudulent schemes involving citizens' ''intangible rights.'' This decision, *McNally v. United States*, No. 86-234 (June 24, 1987), rejected the notion that a scheme to defraud can be premised upon the loss of intangible rights to honest government, and held that § 1341 reaches only schemes which result in the deprivation of money or property.

In *McNally*, the defendants McNally and Gray were convicted under § 1341 for splitting insurance commissions with Howard Hunt, a Kentucky Democratic party official who had used his influence to renew the award of Kentucky's workmen's compensation insurance policy to a company that had secretly agreed to pay him commissions. McNally and Gray were paid their commissions by firms that had been designated by Hunt to serve as conduits for the payments. The defendants were indicted and tried not only on the theory that they had defrauded the citizens of the Commonwealth of Kentucky of their rights to honest and impartial government, but also on the theory that they had defrauded the citizens of Kentucky of their right to be made aware of the relevant facts in the award of the workmen's compensation insurance policy.

In rejecting the prosecution's intangible rights theory, the Court held that a deprivation of money or property by the defendants was necessary to support a mail fraud prosecution. The Supreme Court relied heavily on the language and the legislative history of § 1341, in determining Congress' original purpose in passing the mail fraud statute, although it addressed its prior decisions in *Durland v. United States*, 161 U.S. 306 (1896) and *Hammerschmidt v. United States*, 265 U.S. 182 (1924), which had analyzed the meaning of the phrase ''to defraud'' in § 1341 and the general conspiracy statute. The Court found, however, that these decisions either failed to support or undercut an intangible rights mail fraud theory of prosecution.

The implications of the *McNally* Court's mandate for an economic loss requirement under the mail fraud statute are broad and reach not only public corruption prosecutions, but employee fiduciary frauds, insider trading schemes, check-kiting schemes, and other schemes which may not result in actual or contemplated pecuniary or property loss to any victim. The Supreme Court's articulation of the new requirement suggests difficult proof problems if the facts do not clearly indicate, as in *McNally*, that the quantum of the harm was the value of the commissions received. Until the circuit courts begin to focus on the proof requisite for showing pecuniary harm, the *McNally* decision may presumptively end the use of the mail fraud statute in certain white collar cases.

9-43.220 Use of the Mails in Execution of the Scheme

The government need not prove that the use of the mails was necessary to the fraudulent scheme, nor that the defendant intended to employ the mails in carrying out the scheme, nor even that the defendant actually mailed the letter. *Pereira v. United States*, 347 U.S. 1 (1954). An indictment may be based on a co-schemer's or a non-defendant's use of the mails. *United States v. Kenofskey*, 243 U.S. 440 (1917). The government need show only that the defendant ''caused'' the mailing by acting ''with knowledge that the use of the mails follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. *Pereira v. United States, supra,* at 8.

Evidence that the mails were employed need not be direct; circumstantial evidence is sufficient.

9-43.221 In Execution of the Scheme

The requirement that the mailing be ''in furtherance of the scheme'' is loosely construed by the courts to encompass any mailing with is ''sufficiently closely related'' to the defendant's scheme, so long as the mailing contributed to the scheme and the fraud had not reached fruition before the mailing had taken place. *United States v. Maze*, 414 U.S. 395, 399 (1974). *United States v. Giovengo*, 637 F.2d 941 (3rd Cir.1980) illustrates this element. In *Giovengo*, defendant airline ticket agents used interstate reservations computers in a scheme to defraud Trans World Airlines (TWA) of the price of one-way tickets sold for cash. In holding the defendants' use of the wires in furtherance of the fraudulent scheme, the Third Circuit found disposition that ''resort to interstate wires was 'essential' rather than 'convenient' to the scheme . . .. If [defendants] had had no access to the TWA computer system . . . their plan to defraud the airline could never have succeeded.'' *United States v. Giovengo, supra*, at 945.

An excellent discussion of the ''in furtherance'' requirement is found in *United States v. Shepherd*, 511 F.2d 119 (5th Cir.1975).

9-43.222 Lulling Letters

It is a well established principle of mail fraud law that use of the mails after money is obtained may nevertheless be ''for the purpose of executing'' the fraud. This proposition was considered by the Supreme Court in *United States v. Sampson*, 371 U.S. 75 (1962), in which case salesmen fraudulently obtained applications and advance payments from businessmen and then mailed acceptances to the defrauded victims to lull them into believing the services would be performed. The Court held that such a ''lulling'' use of the mails was the purpose of executing the fraudulent scheme.

In *United States v. Maze*, 414 U.S. 395 (1974) the Supreme Court found mailings which occurred after the scheme ended outside the prohibitions of the statute. However, the Court reaffirmed the lulling letter concept of *Sampson, supra*. Thus, post-purchase mailings which are designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are mailings in furtherance of this scheme.

9-43.223 Credit Card Frauds

A. The Mail Fraud Statute, 18 U.S.C. § 1341

As noted above, in *United States v. Maze*, 414 U.S. 395 (1974), the Supreme Court decided that the forwarding by mail of credit card vouchers to credit card issuers for payment subsequent to the receipt of merchandise through the unauthorized use of a credit card did not constitute a use of the mails in furtherance of a fraudulent scheme so as to sustain prosecution under the mail fraud statute. Accordingly, mail fraud prosecutions in the credit card area are now limited to those instances (a) involving fraud in obtaining the credit card, with the use of the mail being prior to the receipt of the goods and services, or (b) involving a dishonest merchant who has knowledge that the use is unauthorized. In the latter instance, the forwarding of the voucher for payment is an integral part of the scheme, since the merchant has not yet been paid.

B. 15 U.S.C. § 1644—Fraudulent Use of a Credit Card

Prosecutions may be instituted under 15 U.S.C. § 1644, as amended October 26, 1974, which (1) prohibits, in transactions affecting interstate commerce, the obtaining of goods and services aggregating $1,000 in a single year through the use of stolen or fraudulently obtained credit cards, (2) prohibits the use of facilities of interstate commerce in the sale or transportation of stolen credit cards, (3) prohibits ''fencing'' activities involving stolen credit cards, (4) prohibits the sale or transportation of tickets for interstate travel having a value of $500 or more obtained through the use of stolen credit cards, and (5) prohibits mer-

chants from furnishing merchandise or services through the use of stolen credit cards with knowledge that the cards were stolen.

Investigation into violations of 15 U.S.C. § 1644 is conducted by the Postal Inspection Service.

9-43.300 VENUE IN MAIL FRAUD PROSECUTIONS

The constitutional requirement regarding venue relates to the locality of the offense and not the personal presence of the offender. Since the gravamen of the offense of mail fraud is the use of mails, the place where the scheme is conceived or put into motion is immaterial. The criminal act according to 18 U.S.C. § 1341 may be prosecuted in any district where one who, for the purpose of executing or attempting to execute a scheme or artifice to defraud, ''places in any post office or authorized depository for mail matter, any matter or thing to be sent or delivered by the Postal Service,'' or ''takes or receives therefrom, any such matter or thing,'' or ''knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing.'' Accordingly, the mail fraud statute has its own ''built-in'' venue provisions.

Venue, then, must be charged in one of the following districts: (1) the district in which the count letter was placed in the mail by the defendant; (2) the district in which the defendant took or received the count letter from the mails; (3) the district in which the defendant knowingly caused a letter to be delivered according to the direction thereon; *see Hagner v. United States*, 285 U.S. 427 (1931). Of course allegations and proof that defendant caused a letter to be placed in or taken from an authorized depository for mail matter is tantamount to alleging and proving that he/she did the act himself. *Ravera v. United States*, 347 U.S. 1 (1954).

Several decisions have held that venue for mail fraud prosecutions also lies in any district through which the count letter passed, citing as authority the provisions of 18 U.S.C. § 3237(a). 18 U.S.C. § 3237(a) provides in relevant part that any offense involving the use of the mails is a continuing offense and ''. . . except as otherwise expressly provided by enactment of Congress . . .'' may be prosecuted in any district from, through or into which such mail matter moves.

An application of 18 U.S.C. § 3237(a) to 18 U.S.C. § 1341 would significantly broaden venue possibilities to include any district through which a letter or other matter deposited in the mails passes on its way from the place of sending to the place of delivery. 18 U.S.C. § 3237(a) must, however, be read in light of the constitutional requirements and the explicit provisions of 18 U.S.C. § 1341. The locus of the offense under 18 U.S.C. § 1341 has been carefully specified; and only the acts of ''placing'', ''taking'' and ''causing to be delivered'' at a specified place have been penalized. Venue, therefore, should be placed according to the spe-

cific prohibitions of 18 U.S.C. § 1341, irrespective of 18 U.S.C. § 3237(a). *See Travis v. United States*, 364 U.S. 631, 636-37 (1960), wherein the Supreme Court points out that ''venue should not be made to depend upon the chance use of the mails, when Congress has so carefully indicated the locus of the crimes.'' The locus for mail fraud prosecutions is specifically set forth in 18 U.S.C. § 1341; since Congress has ''otherwise expressly provided'', 18 U.S.C. § 3237 is inapplicable to mail fraud. In view of the foregoing, it is the Criminal Division's view that those cases authorizing prosecutions under 18 U.S.C. § 1341 in districts through which the mails merely pass are incorrectly decided.

9-43.400 DRAFTING A MAIL FRAUD INDICTMENT

9-43.410 Scheme and Artifice

An indictment under 18 U.S.C. § 1341 must sufficiently charge the two necessary elements of an offense within the statute: (a) that the accused devised and intended to devise a scheme and artifice to defraud, and (b) used or caused the use of the mails in execution or attempted execution of the scheme. *United States v. Young*, 232 U.S. 155 (1914). It is insufficient to charge the violation in the language of the statute. *United States v. Hess*, 124 U.S. 483, 488-489 (1888). The indictment must contain a reasonably detailed description of the particular scheme the defendant is charged with devising.

In drafting a mail fraud substantive charge, it is not necessary to allege: (a) that the scheme or artifice contemplated a use of the mails in its execution, *United States v. Young, supra*; or (b) that anyone was actually defrauded. While an intent to defraud is essential for conviction, it is not necessary to charge it where such an intention is apparent from the very nature of the scheme alleged.

Where the scheme was devised with an intent to defraud one or more specific individuals, whose identities are known, their names should be stated in the indictment. If their names are unknown, it is advisable to allege that the names of such persons are unknown to the grand jurors. *See* generally, *Durland v. United States*, 161 U.S. 306 (1896). Where the scheme is aimed at the defrauding of a class of persons, it is sufficient to give a general description of the class.

Where an important element of the scheme lies in the knowing use of false and fraudulent pretenses and representations for the purpose of obtaining money or property, the indictment should detail the pretenses and representations along with an allegation regarding their falsity and the knowledge of the accused regarding that fact. *United States v. Comyns*, 248 U.S. 349 (1919). It is not necessary to allege the manner or respect in which the misrepresentations were false, and the failure to so allege is not defective pleading.

Where the making of false promises constitutes an element of the scheme and artifice, the indictment should allege it in the description of the scheme with details of the promises or promissory representations relied on. *United States v. Comyns, supra; Durland v. United States*, 161 U.S. 306 (1896). Fraudulent intent may appear either by allegations that the defendant had no intention of performing such promises and representations or by other sufficient allegations. It is not necessary to set out verbatim written or printed matter.

The precise time when the scheme was devised is not material so long as it is made to appear that it was devised prior to the use of the mails alleged to have been made in its execution or attempted execution. No date need be set, and if stated, it is not binding on the prosecution.

An indictment is not necessarily duplicitous because it charges the devising of a scheme and artifice to defraud and for obtaining money and property by false and fraudulent pretenses, representations and promises. Allegations which are unnecessary to the validity of the indictment, and which may therefore be disregarded as surplusage, include averments as to consummation of the scheme.

It is not necessary that the indictment identify each defendant with the particular role that he/she is to take in the execution of the scheme.

Because descriptions of the scheme are frequently quite lengthy, it is suggested that those descriptive paragraphs set out in full in one count be adopted and incorporated into another count by suitable reference pursuant to the provision of Rule 7(c), Federal Rules of Criminal Procedure. Although the count in which such matters is set forth may be deficient in other respects, that fact does not destroy its validity for reference purposes. *Crain v. United States*, 162 U.S. 625, 633 (1895). The courts have held that introductory paragraphs not part of another count and specifically referring to the counts involved are considered part of the numbered counts following them. *United States v. McGuire*, 381 F.2d 306, 318 (2nd Cir.1967). The essential allegations of a count may be supplied by reference to the matters set forth in the introductory parts of an indictment. Several courts have held that the scheme need not be repeated in subsequent counts if a use of the mail is furtherance of the ''aforesaid scheme'' is charged in those counts. However, we recommend against such draftmanship.

9-43.420 Charging a Use of the Mails

Since the use actually made of the mails constitutes the gist of the offense, each use must be pleaded with certainty of time, place and circumstances. Whether the particular use made of the mails be placing in the mails, taking from the mails or causing delivery of a letter or other

communication, it is essential to allege that the act was ''for the purpose of executing and attempting to execute'' the scheme.

The allegation that the use made of the mails was ''for the purpose of executing and attempting to execute the scheme'' described is generally sufficient unless it appears from the face of the communication that it could not possibly have any effect in furthering or carrying out the scheme. *United States v. Sampson*, 371 U.S. 75 (1962).

Allegations as to the time and place of using the mails in violation of the statute are essential. *Hagner v. United States*, 285 U.S. 427 (1931); *Durland v. United States*, 161 U.S. 306 (1896). This burden is met, however, where the mailing is charged as occurring on or about a stated date, prior to the return of the indictment, within the statutory period of limitations and during the existence of the scheme. *United States v. Kenofskey*, 243 U.S. 440 (1917). Allegation as to place of deposit or delivery is sufficient where it states a definite location showing venue within the jurisdiction of the court. *Salinger v. United States*, 272 U.S. 542 (1926); *United States v. Sorce*, 308 F.2d 299 (4th Cir.1962).

The particular communication, whether a letter, postal card, package, writing, circular, pamphlet, or advertisement, should be particularly identified and described. It is not necessary, however, to allege that it contained any false pretense or representation, nor how it would aid or was intended to aid in execution of the scheme.

Each mailing in furtherance of the scheme and artifice to defraud is a separate offense. *Badders v. United States*, 240 U.S. 391 (1916). Accordingly, proper draftsmanship requires that only one mailing should be alleged in each count. Otherwise, the count would be duplicitous. However, in that case the proper relief is not dismissal of the indictment, but an election by the government as to which mailing it will proceed on. *United States v. Goodman*, 289 F.2d 378, 379 (5th Cir.1961).

It is very important that the draftsman charge the proper method of violation of the statute. For example, if the count letter is mailed to the district of indictment from another district, be sure to charge a taking from the mails, or delivery according to the direction thereon, rather than a placing in the mail. Conversely, charge a placing in the mail in the district of indictment of a letter addressed to someone outside that district. *See Hagner v. United States*, 285 U.S. 231 (1931), which points up the problems incident to inept pleading of the use of the mails in furtherance of the scheme.

9-43.421 Charging a Placing in the Mails

Where the act relied on is the mailing of a communication in execution of the scheme, such act is properly and sufficiently charged by alleging in the words of the statute that the accused ''placed'' (or—''caused to be

placed'') the described communication in a named post office or in ''an authorized depository for mail matter'' in a named city and state, ''to be sent and delivered by the United States Postal Service'' to a named person at a named place. *Irwin v. United States*, 338 F.2d 770 (9th Cir.1964). Where the act of mailing is so alleged it is not necessary to allege that the communication was enclosed in an envelope; that such envelope was addressed; that postage was prepaid; or, if there is more than one defendant, which of them committed the act. It is unnecessary to charge that the defendant ''willfully'' caused to be placed in the mails, or ''willfully'' caused to be taken and received from the mails. *Paar v. United States*, 265 F.2d 894, 901 (5th Cir.1959).

9-43.422 Charging a Taking From the Mails

When dealing with the taking and receiving of a communication from the mails, such act is properly and sufficiently charged by alleging that the defendant ''did take and receive'' (or ''cause to be taken and received'') the described communication from the mails. *United States v. Cobb*, 397 F.2d 416 (7th Cir.1968).

9-43.423 Charging a Delivery by Mail According to the Direction Thereon

Where the act relied on is the delivery by mail of a communication in execution of the scheme, such act is properly and sufficiently charged by alleging in the words of the statute that the defendant did ''knowingly cause'' the described communication ''to be delivered by mail'' to a named person at a named place within the jurisdiction, ''according to the direction thereon,'' or ''at the place at which it was directed to be delivered to the person to whom it was addressed.'' *Kreuter v. United States*, 218 F.2d 532 (5th Cir.1955).

Where it is charged that the accused caused delivery of a letter or other communication in violation of the third clause of the statute, it is necessary to allege that he/she did so knowingly. *United States v. Richman*, 369 F.2d 46 (7th Cir.1966). This is not necessary where it is charged that the defendant placed something in the mails or took something therefrom in violation of the first or second clauses since the statute does not use the word ''knowingly'' in those connections. The element established by ''knowingly'', when a causing to be delivered is charged, can be satisfactorily described by the phrase ''for the purpose of executing the aforesaid scheme and attempting to do so'' so that a lack of the specific charge of ''knowingly'' is not necessarily fatal. *Stevens v. United States*, 306 F.2d 834 (5th Cir.1962). However, good draftsmanship dictates that ''knowingly'' be expressly charged in order to obviate an attack on the indictment.

9-43.500 EVIDENCE

9-43.510 Scheme and Artifice to Defraud

9-43.511 Intent to Defraud

Intent is indispensable in proving the existence of a scheme to defraud. However, proof of specific intent to use the mails on the part of defendants need not be proven. *Durland v. United States*, 161 U.S. 306, 313 (1896). Direct proof of willful intent is not necessary but can be inferred from the activities of the parties involved. *Golubin v. United States*, 393 F.2d 500 (10th Cir.1968); *United States v. Andreadis*, 366 F.2d 423 (2nd Cir.1966).

9-43.512 Persons Defrauded

In the absence of an express allegation that the accused planned to defraud everyone who dealt with him/her, it is not necessary to prove such an intent.

9-43.513 False Representations

Where false representations are charged, the government is not required to prove all representations alleged but only one or more or a sufficient number to show that the scheme was actually set up and that the defendant intentionally acted in some way to further its operation with knowledge that it included the making of falsifications. *Schafer v. United States*, 265 F.2d 750, 753 (8th Cir.1959).

Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same representations being made at widely different places to different persons by numerous agents in the same period is evidence that the scheme existed and that the particular salesman was carrying it on. Although such testimony is heresay, and therefore inadmissible unless it falls within an exception to the hearsay rule, such statements are permitted if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered. *Beck v. United States*, 305 F.2d 595, 600 (10th Cir.1962).

9-43.514 Impression Testimony

Impression testimony, that is, testimony of victims as to how they had been misled by defendants, is admissible to show an intent to defraud. The leading case on impression testimony is *Phillips v. United States*, 356 F.2d 297, 307 (9th Cir.1965).

9-43.520 Evidentiary Rules of Conspiracy

Where a scheme and artifice to defraud is shared by two or more, it becomes a conspiracy to defraud; the rules of evidence are the same as

where a conspiracy is charged, and the acts of each party in furthering the common scheme are the acts of all. *Pinkerton v. United States*, 328 U.S. 640, 647 (1945). Although joining a conspiracy subjects the later joiner to some of the consequences of earlier activity by others, an individual cannot be criminally liable for substantive offenses committed by coconspirators or coschemers before that individual joined the scheme or after he/she had withdrawn from it. Accordingly, he/she is not criminally responsible for the substantive mailings by coschemers before he/she joined or after he/she withdrew from the fraudulent scheme.

See discussion of conspiracy to violate the mail fraud statute in USAM 9-43.700, *infra*.

9-43.530 Simliar Acts or Conduct

Evidence of other act or conduct of a like or similar nature will not be admitted to prove a character of a person in order to show he/she acted in conformity therewith. However, such evidence is admitted for other purposes such as proof of motive, opportunity, intent, plan, scheme, knowledge, *modus operandi*, or absence of mistake or accident. Evidence of other offenses not charged in the indictment is admissible to show intent. Other similar transactions, before and after acts charged in the indictment, are admissible as proof of intent. Other similar transactions, before and after acts charged in the indictment, are admissible as proof of intent.

9-43.540 Communication to Victims

Since success of the scheme is not essential to completion of the offense, it is not necessary to prove communication of the alleged false representations to the victims. Since it is the use of the mails in furtherance of the fraudulent scheme that is prohibited rather than fraud upon any recipient of material sent through the mails, the testimony of a victim is admissible to prove the scheme even though there has been no use of the mails in defrauding him/her. *Atkinson v. United States*, 344 F.2d 97, 99 (8th Cir.1965).

9-43.550 Complaint Letters

Complaint letters received by defendants are admissible as relevant to the issue of intent to defraud. The inference might readily be drawn that, since the defendant knew victims were being misled by solicitation literature and other representations, the continued operation of the business despite this knowledge showed the existence of a scheme to defraud.

9-43.560 Parol Evidence Rule

The parol evidence rule regarding executed contracts does not make inadmissible the oral testimony of victims to show fraud in the transaction.

9-43.570 Acts Beyond the Statute of Limitations

Proof of transactions and events occurring more than five years prior to the return of the indictment is admissible if part of the scheme. The gist of the offense is the use of the mails; if the prohibited use of the mails was within the period, the prosecution is timely. It is no defense that the scheme was found earlier, and proof running back is admissible to show the scheme and intent if it is connected up with the scheme existing when use of the mails occurred. *United States v. Brandon*, 479 F.2d 830 (8th Cir.1973). The fact that a scheme may extend back beyond the limitation period does not preclude prosecution of an offense committed in furtherance of the scheme within the period.

9-43.580 Good Faith

Good faith is a complete defense to a charge of mail fraud. Evidence of similar transactions carried out honestly tends to show good faith. Proof of an expectation of performance must, however, be more than evidence of a mere hope. *Williams v. United States*, 278 F.2d 535 (9th Cir.1960). No amount of honest belief on the part of the defendant that the enterprise promoted by him/her will ultimately make profits for investors in such an enterprise will excuse false representations made to obtain money for the enterprise. *United States v. Painter*, 314 F.2d 939, 943 (4th Cir.1963).

9-43.590 Proof of Mailing

The fact of mailing is a necessary element of the offense of mail fraud. The use of the mails can be proved circumstantially by a witness who testifies that the specific item would have been mailed as a matter of routine or custom as part of an office's practice and procedure. *United States v. Scott*, 666 F.2d 384, 388 (8th Cir.1981).

9-43.600 [RESERVED]

9-43.700 CONSPIRACY TO VIOLATE THE MAIL FRAUD STATUTE

The federal conspiracy statute, 18 U.S.C. § 371, makes it an offense to conspire to commit, *inter alia* any offense against the United States. In proving such a conspiracy, it must be shown that (a) an agreement to violate a federal statute existed, (b) the defendant was a party to the agreement, and (c) an overt act to effect the object of the conspiracy was performed. *Ingram v. United States*, 360 U.S. 672 (1959). An excellent discussion of conspiracy law is contained in the ''Manual of Jury Instructions in Federal Criminal Cases'', Part II, Chapter X, ''Conspiracy Offense'', adopted by the Seventh Circuit Judicial Conference Committee on Jury Instructions as reported in 36 F.R.D. 502 *et seq.*

9-43.710 The Agreement to Commit Mail Fraud

In order to sustain a conviction for conspiracy to violate the mail fraud statute, 18 U.S.C. § 1341, it must be alleged and proved that the conspirators intended to commit the substantive offense prohibited. Since the use of the mails is the substantive violation under 18 U.S.C. § 1341, the indictment must allege, and the proof show, that the conspirators intended to utilize the mails in furtherance of a fraudulent scheme. *Pereira v. United States*, 347 U.S. 1 (1954); *Blue v. United States*, [illegible] F.2d 351, 360 (6th Cir.1943). An averment of intent is accomplished by merely alleging that the defendants ''conspired'' to use the mails in furtherance of the unlawful scheme. Direct proof of an explicit agreement is not necessary to show conspiracy, which is usually proved by circumstantial evidence. The acts of conspiracy, taken by themselves, are rarely of an unequivocally guilty character, and they can only properly be estimated when connected with all the surrounding circumstances. *Blue v. United States, supra*.

When applying the conspiracy statute (18 U.S.C. § 371) to mail fraud schemes involving two or more people, the question arises whether the government must prove a higher level of scienter on the part of the conspirator than it would have to prove if it simply charged the conspirator (as a co-schemer) with substantive mail fraud. With substantive mail fraud, the government is not required to prove actual intent to use the mails as long as it can prove that the defendant co-schemer could have reasonably foreseen a use of the mails in furtherance of the fraud. But the circuits have apparently divided in recent years (without recognizing the division) on whether or not actual intent to use the mails is required when a conspiracy charge is added to substantive mail fraud.

In 1976 the Eighth Circuit in *United States v. Donahue*, 539 F.2d 1131, 1135 (8th Cir.1976), held that ''where the charge is conspiracy to violate [the mail or wire fraud statutes], the government must also show that the scheme contemplated the use of the medium in question.'' *Donahue* relied principally on *Blue v. United States, supra. Blue* specifically held that with the charge of conspiracy to commit mail fraud, as opposed to substantive mail fraud, ''the Government has to sustain a heavier burden of proof as to the intent of the conspirators—not only to defraud, but also to defraud by use of the mails.'' Id., at 360.

But in *United States v. Reed*, 721 F.2d 1059, 1060 (6th Cir.1983), the Sixth Circuit overruled *Blue* on this very point and held that the level of scienter necessary to prove conspiracy to commit mail fraud is no different than that necessary to prove substantive mail fraud, namely, a ''reasonably foreseeable'' use of the mails. Accordingly, the Eighth Circuit's *Donahue* opinion has become less convincing.

In 1977 the Seventh Circuit, in *United States v. Craig*, 573 F.2d 455 (7th Cir.1977) addressed the issue at length and, held that in the case of conspiracy to commit mail fraud, it is not necessary for the government to prove that a defendant agreed to join the conspiracy with knowledge that the conspiracy contemplated the unlawful use of the mails or that the defendants conspired intending to use the mails.

Conspiracy to commit a crime is a different offense from the crime which is the object of the conspiracy. Accordingly, a conspiracy to violate the mail fraud statute can be accomplished without mailing a letter. *Pinkerton v. United States, supra*, at 360.

Care must be taken to distinguish between the development of a single overall conspiracy encompassing a scheme to defraud and the development of several separate and variant conspiracies, since a variation in proof may be fatal. *Kotteakos v. United States*, 328 U.S. 750 (1946); *Blumenthal v. United States*, 322 U.S. 539 (1947).

> The answer to the question whether there is a single conspiracy, therefore, depends on whether there is a single agreement. If there is but one conspiracy, the test whether the activities of the defendant constituted a single conspiracy is whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this end. It follows hence that the fact that the conspirators undertook to commit several crimes does not necessitate the conclusion that there are several conspiracies. A conspiracy may be likened to a wheel, with the hub constituting the central figure, the spokes forming its various branches and ramifications, all being held together by the rim, which represent the agreement.

United States v. Speed, 78 F.Supp. 366, 368-369 (D.D.C.1948), *cited with approval in Hayes v. United States*, 329 F.2d 209, 213 (8th Cir.1964); *Koolish v. United States*, 340 F.2d 513, 524 (8th Cir.1965); *Friedman v. United States*, 347 F.2d 697, 708 (8th Cir.1965).

If an overall conspiracy is proved, it is immaterial whether or not there were minor conspiracies or schemes inside the overall conspiracy, and that some of the defendants participated in these inner or smaller schemes, but not in all of them.

9-43.720 Participation in the Conspiracy

''Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose may be inferred from a 'development and a collocation of circumstances'.'' *Glasser v. United States*, 315 U.S. 60, 80 (1942). Once there is satisfactory proof of the existence of a conspiracy, slight evidence connecting a defendant with the conspiracy may be suffi-

cient. It is not necessary that conspirators be aware of each other's existence, or their respective roles in carrying out the conspiracy.

A conspiracy, especially one which contemplates a continuity of purpose and a continued performance of acts, is presumed to continue until there has been an affirmative showing that it has terminated; and its members continued to be conspirators until there has been affirmative showing that they have withdrawn. *Hyde v. United States*, 225 U.S. 347, 366-67 (1962); *Pinkerton v. United States*, 328 U.S. 640 (1946).

The indictment may name some conspirators who are not charged in the indictment as defendants, and may allege conspirators who are unknown to the grand jury. Such an allegation, when proper, may prevent unnecessary dismissals of conspirators where their other named co-conspirators are acquitted.

9-43.730 Acts Committed in Furtherance of the Conspiracy

Once a conspiracy has been established, the acts and declarations of each conspirator are the acts and declarations of all, provided, of course, that the defendants against whom the acts are admitted were knowingly participants in the agreement. Although joining a conspiracy subjects the late joiner to some of the consequences of earlier activity by others in furtherance of the conspiracy, an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined the conspiracy or after he/she had withdrawn from it. Accordingly, he/she is not responsible for the substantive mailings by his/her coconspirators before he/she joined or after he/she withdrew from the conspiracy.

All conspirators need not join in the commission of an overt act, for, if one of the conspirators commits an overt act in furtherance of the conspiracy, it becomes the act of all. The government is not limited to overt acts pleaded in proving the conspiracy. It may show other acts of the conspirators occurring during the life of the conspiracy. Substantive offenses can be charged as overt acts.

Washington, D.C. 20530

May 2, 1997

MEMORANDUM

TO: Holders of United States Attorneys' Manual, Title 9

FROM: John C. Keeney
Acting Assistant Attorney General
Criminal Division

Donald K. Stern
United States Attorney, District of Massachusetts
Chairman, Attorney General's Advisory Committee

SUBJECT: Authorized Investigative Demand Procedures

NOTE: 1. This is issued pursuant to USAM 1-1.600.
2. Distribute to holders of Title 9.
3. Insert as new section.

CREATES: USAM 9-44.200

PURPOSE: This bluesheet sets forth guidelines for authorized investigative demands issued pursuant to 18 U.S.C. § 3486.

9-44.200 Overview of Authorized Investigative Demands: Authority

On August 21, 1996, the President signed into law the Health Insurance Portability & Accountability Act, P.L. 104-191. Section 248 of P.L. 104-191 adds a new statute, 18 U.S.C. § 3486. This provision empowers the Attorney General, or the Attorney General's designee, to issue investigative demands to obtain records for investigations relating to Federal criminal health care fraud offenses; these records are not subject to the constraints applicable to grand jury matters set forth in Fed.R.Crim.P. 6(e). The new statute also provides for judicial enforcement of these investigative demands through contempt actions and immunizes persons complying in good faith with such demands from civil liability for disclosure of information. Investigative demands differ from inspector general subpoenas in that the scope of the latter are limited to the statutory authority of the specific inspector general and civil investigations, whereas investigative demands can be directed more broadly to various public and private victims and must involve criminal investigations.

9-44.201 Overview of Authorized Investigative Demands: Delegation

The Attorney General's authority to issue investigative demands pursuant to 18 U.S.C. § 3486 has been delegated, with authority to redelegate, to the following officials:

1. Each United States Attorney;

2. The Assistant Attorney General for the Criminal Division.

9-44.202 Overview of Authorized Investigative Demands: Limitations

Authorized investigative demands can be an important source of evidence. Issuance of these demands and access to records obtained pursuant to them, however, must be in accord with a number of legal requirements. This section presents an overview of several specific statutory requirements set forth in 18 U.S.C. § 3486; the statutory language should also be reviewed prior to issuance of an investigative demand to ensure compliance with the more routine provisions.

1. Subject Matter Limitation

Pursuant to 18 U.S.C. § 3486, the use of authorized investigative demands is limited to investigations relating to "Federal health care offenses." The term "Federal health care offense" is defined in 18 U.S.C. § 24(a) to mean a violation of, or a criminal conspiracy to violate, 18 U.S.C. §§ 669, 1035, 1347, or 1518; and 18 U.S.C. §§ 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 if the violation or conspiracy relates to a health care benefit program. The term "health care benefit program" is defined in 18 U.S.C. § 24(b) as any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

2. Geographic Limitation on Document Return

Pursuant to 18 U.S.C. § 3486, the site designated for the production of the records requested pursuant to an authorized investigative demand must be not more than 500 miles from the place where the authorized investigative demand was served.

3. Limitation on Return Date

Pursuant to 18 U.S.C. § 3486, an authorized investigative demand is required to prescribe a return date that allows a

reasonable period of time within which the objects can be assembled and made available. Unlike a forthwith subpoena, an investigative demand may not require the immediate production of records at the time it is served.

4. Authority to Compel Testimony Limited

Authorized investigative demands may be used to require the production of records, including books, papers, documents, electronic media, or other objects or tangible things. Pursuant to 18 U.S.C. § 3486, the authority to issue investigative demands to obtain testimony is limited to requiring a custodian of records to give testimony concerning the production and authentication of such records.

5. Restrictions on Individual Health Care Information

Pursuant to 18 U.S.C. § 3486, health information about an individual acquired through an authorized investigative demand may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against that individual unless the action or investigation arises out of and is directly related to receipt of health care, payment for health care, or action involving a fraudulent claim related to health. Any other use requires a court order upon a showing of good cause. In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. In granting such an order, the court shall impose appropriate safeguards against unauthorized disclosure.

6. Limitation on Use After Indictment

After an indictment has been issued, authorized investigative demands may continue to be used in furtherance of an ongoing investigation, provided they are not directed to a defendant. Cf. United States v. Phibbs, 999 F.2d 1053, 1077 (6th Cir. 1993), cert. denied, 510 U.S. 119 (1994); United States v. Harrington, 761 F.2d 1482, 1485 (11th Cir. 1985)(administrative subpoenas issued by Drug Enforcement Administration between indictment and trial held legal when issued to third parties during continuing investigation).

9-44.203 Factors to Consider Prior to Issuance of Authorized Investigative Demands

The following factors should be considered prior to the issuance of an authorized investigative demand:

1. Whether the background of the criminal investigation for which the records are being subpoenaed relates to

any act or activity involving a Federal health care offense (as defined in 18 U.S.C. § 24(a)) as required by 18 U.S.C. § 3486.

2. Whether appropriate consideration has been given to the manner in which to enforce the investigative demand in the event of noncompliance.

9-44.204 Authorized Investigative Demands: Record Keeping Procedures

In light of the fact that the authorized investigative demand is a new enforcement tool, it is anticipated that its use will be closely tracked. In order to enable the Department to reply quickly to inquiries concerning the use of investigative demands, each United States Attorney's office and the Fraud Section of the Criminal Division should maintain records on the following:

1. the number of authorized investigative demands issued and the dates of service;

2. office procedures for the issuance of, and compliance with, authorized investigative demands;

3. whether any health information obtained pursuant to authorized investigative demands was used in, or disclosed in, any administrative, civil or criminal action or investigation directed against the individual who is the subject of the information;

4. whether the investigative demand required testimony from a custodian of records;

5. whether documents were returned pursuant to the authorized investigative demand without judicial enforcement;

6. whether judicial enforcement of the investigative demand was pursued and the result of that litigation.

The specific manner in which this information is maintained is left to the discretion of each United States Attorney's office and the Fraud Section of the Criminal Division. The challenge for each office is to develop an accurate record keeping system without creating extensive administrative obstacles which render the authorized investigative demand too cumbersome to use.

UNITED STATES OF AMERICA

DRAFT

U.S. DEPARTMENT OF JUSTICE

SUBPOENA DUCES TECUM

TO:

YOU ARE HEREBY COMMANDED TO APPEAR BEFORE _____

_____,

an official of the U.S. Department of Justice, and you are hereby required to bring with you and produce the following:

which are necessary in the performance of the responsibility of the U.S. Department of Justice to investigate: Federal health care offenses as defined in 18 U.S.C. § 24(a); violations or conspiracies to violate 18 U.S.C. § 669, 1035, 1347, or 1518; or 18 U.S.C. §§ 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 if the violation relates to a health care benefit program (defined in 18 U.S.C. § 24(b)).

PLACE AND TIME FOR APPEARANCE:

At _____

_____

on the _____ day of _____, 19___, at _____ o'clock ___M.

_____

Failure to comply with the requirements of this subpoena will render you liable to proceedings in the district court of the United States to enforce obedience to the requirements of this subpoena, and to punish default or disobedience.

_____

Issued under authority of Sec. 248 of the Health Insurance Portability & Accountability Act of 1996, Public Law No. 104-91 (18 U.S.C. § 3486)

IN TESTIMONY WHEREOF

_____,

the undersigned official of the U.S. DEPARTMENT OF JUSTICE, has hereunto set his/her hand this _____ day of _____, 19 ___.

_____

(SIGNATURE)

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CHAPTER 44

9-44.000 FRAUD BY WIRE, RADIO OR TELEVISION, 18 U.S.C. § 1343

The Fraud by Wire Statute, 18 U.S.C. § 1343, provides:

> 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 not more than $1,000 or imprisoned not more than five years, or both.

(As amended July 11, 1956.)

9-44.100 INVESTIGATION OF COMPLAINTS

Primary investigative jurisdiction into possible violations of the fraud by wire statute is vested in the Federal Bureau of Investigation. In some instances, where securities are involved, complaints may be investigated by the Securities and Exchange Commission. In other instances investigations conducted by the Postal Inspection Service of the United States Postal Service may disclose possible violations of the fraud by wire statute. In both instances, the investigations are usually continued by the agency initiating the investigation. Reports of investigation are disseminated directly to the appropriate United States Attorney.

9-44.200 ELEMENTS OF THE OFFENSE

The essential elements of the offense are (1) the devising of a scheme and artifice to defraud, and (2) a transmittal in interstate or foreign commerce by means of wire, radio or television communication of writings, signs, signals, pictures or sounds for the purpose of executing the scheme and artifice to defraud. *See Huff v. United States*, 301 F.2d 760, 765 (5th Cir.1962); *Lindsey v. United States*, 332 F.2d 688, 690 (9th Cir.1964); *United States v. O'Malley*, 535 F.2d 589, 592 (10th Cir.1976) and cases cited therein; *United States v. Freeman*, 524 F.2d 337, 339 (7th Cir.1974); *United States v. Patterson*, 534 F.2d 1113 (5th Cir.1976); *United States v. Wise*, 553 F.2d 1173 (8th Cir.1977).

9-44.210 The Scheme and Artifice to Defraud

Since the fraud by wire statute was patterned after the mail fraud statutes, *United States v. Mercer*, 133 F.Supp. 288 (N.D.Calif.1955), mail fraud principles (*see generally USAM 9-43.210, infra.*), have been applied to fraud by wire prosecutions. As in mail fraud law, it is not necessary that the victim of the scheme be actually deceived or suffer a loss. *Lindsey v. United States, supra; Huff v. United States, supra; United*

States v. Jackson, 451 F.2d 281, 283 (5th Cir.1971); *United States v. O'Malley, supra; Pollack v. United States*, 534 F.2d 964, 971 (D.C.Cir. 1976); *United States v. Patterson, supra*. Reckless disregard for the truthfulness of the representations made is actionable. *United States v. Marley*, 549 F.2d 561 (8th Cir.1977).

9-44.220 Use of a Wire Communication in Interstate or Foreign Commerce

Since the statute requires a transmission in interstate or foreign commerce, an intrastate transmission does not constitute an offense. *Berfuff v. United States*, 310 F.2d 918 (5th Cir.1962). It has long been clear that the mail fraud statute reaches schemes in which the defendant did not personally place any matter in the mails; it is sufficient to show that he or she ''caused'' the mailings. *See* USAM 9-43.220, *infra*. The scope of the fraud by wire statute is equally broad. *See United States v. Calvert*, 523 F.2d 895 (8th Cir.1975). While it is necessary to show that a defendant caused the use of a wire, it is not necessary to establish that the defendant directly participated in the use of the wire. *United States v. Wise*, 553 F.2d 1173 (8th Cir.1977). It is sufficient if some communication was the foreseeable result of the act. *United States v. Jones*, 554 F.2d 251 (5th Cir.1977); *United States v. Snyder*, 505 F.2d 595, 601 (5th Cir.1974), *citing, United States v. Houlihan, supra*, wherein the Circuit Court concluded there is no requirement that the accused know that instrumentalities of interstate communications are used or foresee that such instrumentalities may be used.

Each use of the interstate instrumentality constitutes a separate offense. *See Sibley v. United States*, 344 F.2d 103 (5th Cir.1965); *Henderson v. United States*, 425 F.2d 1382 (5th Cir.1970); *United States v. Calvert, supra* at 903. The gist of the offense is not the scheme to defraud, but the use of the interstate wire communication. *United States v. Garland*, 337 F.Supp. 1, 3 (N.D.Ill.1971).

As in mail fraud law, *see* USAM 9-43.221, *infra*, it is not necessary that the victim be the originator of the wire communication, *United States v. Hancock*, 268 F.2d 205 (2d Cir.1959) or the recipient of the wire communication. *United States v. Freeman, supra*, and cases cited therein; *United States v. Auler*, 539 F.2d 642 (7th Cir.1976); or even a participant in the communication. *United States v. Goldstein*, 532 F.2d 1035, 1316 (9th Cir. 1976); *United States v. Wise, supra*, at 1174.

9-44.221 In Execution of the Scheme and Artifice

As provided by the statute, the interstate or foreign wire transmission must be for the purpose of executing the scheme and artifice to defraud. *United States v. Pollack, supra; United States v. Calvert, supra; United States v. Holmes*, 390 F.Supp. 1077 (W.D.Missouri 1975). The decision in *United States v. Maze*, 414 U.S. 395 (1974) has no adverse impact on fraud by

wire prosecutions where the scheme has not reached fruition. *See United States v. Pollack, supra*, at 971; *United States v. Calvert, supra*, at page 904. *See also* generally, USAM 9-43.221, *infra* discussing the use of the mails in execution of a fraudulent scheme. A wire use after the scheme has come to an end is not within the statute. *Battaglia v. United States*, 349 F.2d 556, 561 (9th Cir.1965); *United States v. West*, 549 F.2d 545, 556 (8th Cir.1977).

9-44.222 Lulling Telegrams and Telephone Calls

Telegrams sent for the purpose of conveying assurances to the victim of the fraud and to prevent action on his or her part which might interfere with the carrying out of the scheme are actionable under the fraud by wire statute. *Wiltsey v. United States*, 222 F.2d 600 (4th Cir.1955). *See also* USAM 9-43.222, *infra* (lulling letters).

9-44.230 Representative Schemes

9-44.231 Generally

The representative schemes set forth in USAM 9-43.230 *et seq., supra*, (mail fraud) are equally amenable to fraud by wire prosecution, provided interstate or foreign wire communication or transmission is used to execute the scheme.

9-44.232 Fraud on the Media (Telephone Company)

The fraudulent use of telephone credit cards to obtain service without charge is actionable under 18 U.S.C. § 1343. *See United States v. Fincke*, 437 F.2d 856 (2d Cir.1971); *United States v. Jones*, 554 F.2d 251 (5th Cir.1977). *See also United States v. Beckley*, 259 F.Supp. 567 (N.D.Ga. 1965); *Scott v. United States*, 448 F.2d 581 (5th Cir.1971).

Schemes to defraud the telephone company of its revenues through so-called ''blue boxes'' and ''black boxes'' are also actionable. *See United States v. Hanna*, 260 F.Supp. 430 (S.D.Fla.1966), *aff'd* 404 F.2d 405 (5th Cir.1968); *Brannen v. United States*, 382 F.2d 607 (10th Cir.1967); *United States v. Jaworski*, 343 F.Supp. 406 (D.Minn.1972); *United States v. Scaramuzzo*, 505 F.2d 102 (9th Cir.1974); *United States v. De Leeuw*, 368 F.Supp. 426 (E.D.Wisc.1974); *United States v. Shah*, 371 F.Supp. 1170 (W.D.Pa. 1974); *United States v. Ewert*, 372 F.Supp. 734 (E.D.Wisc.1974); *United States v. Freeman, supra; United States v. Klegg*, 509 F.2d 605 (5th Cir. 1975); *United States v. Douglas*, 510 F.2d 266 (9th Cir.1975); *United States v. Sorota*, 515 F.2d 573 (5th Cir.1975); *United States v. Glanzer*, 521 F.2d 11 (9th Cir.1975); *United States v. Patterson*, 528 F.2d 1037 (5th Cir.1976); *United States v. Goldstein, supra; United States v. Patterson*, 534 F.2d 1113 (5th Cir.1976); *United States v. Auler, supra; United States*

v. Harvey, 540 F.2d 1345 (8th Cir.1976); *United States v. Manning*, 542 F.2d 685 (6th Cir.1976).

9-44.300 VENUE IN FRAUD BY WIRE PROSEUCTION

Unlike the mail fraud statute, *see* discussion of venue in mail fraud prosecutions, USAM 9-43.300, *supra*, the fraud by wire statute makes no reference to the venue of the offense. Accordingly, the provisions of 18 U.S.C. § 3237(a) apply, and prosecutions may be instituted in any district in which an interstate or foreign telephone call, telegram, radio or television, writing, sign, signal, picture or sound was issued or terminated. *See United States v. Fassoulis*, 185 F.Supp. 138 (S.D.N.Y 1960); *Boruff v. United States*, 310 F.2d 918 (5th Cir.1962); and *United States v. Spiro*, 385 F.2d 210 (7th Cir.1967). Since the statute specifically requires an interstate transmission, an intrastate transmission does not constitute an offense. *See Boruff v. United States, supra*.

9-44.400 DRAFTING A FRAUD BY WIRE INDICTMENT

9-44.410 Scheme and Artifice to Defraud

An indictment under 18 U.S.C. § 1343 must sufficiently charge the two necessary elements of an offense within the statute; (a) that the accused devised and intended to devise a scheme and artifice to defraud and (b) 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. It is insufficient to charge the violation in the language of the statute. *See United States v. Mercer, supra*. As in mail fraud, the indictment must contain a reasonably detailed description of the particular scheme the defendant is charged with devising. *See United States v. Garland*, 337 F.Supp. 1, 3 (N.D.Ill. 1971); *United States v. Bagdasian*, 291 F.2d 163 (4th Cir.1961). Where specific representations are charged, it is not necessary to aver the manner or respect in which these misrepresentations were false. *United States v. Bagdasian, supra*. The comments relating to charging a scheme to defraud in a mail fraud indictment, as set forth in USAM 9-43.410, *supra*, apply also to fraud by wire indictments. It is not necessary to allege that the scheme contemplated the use of the wires in its execution; *United States v. Snyder, supra*, or that anyone suffered a loss, *Huff v. United States, supra*.

9-44.420 Charging an Interstate or Foreign Transmission

Set forth below is a suggested form for charging an interstate telephone conversation under 18 U.S.C. § 1343:

> On or about (date) in (your district) John Doe, the defendant herein, did transmit and cause to be transmitted by means of

wire communication in interstate commerce certain signs, signals and sounds, to wit, a telephone conversation between (name) in (your district) and (name) in (district in another state) for the purpose of executing the said scheme and artifice to defraud.

For cases in which the charging paragraph is set out, *see United States v. Jackson*, 451 F.2d 281 (5th Cir.1971) (telephone); *United States v. Fassoulis*, 185 F.Supp. 138 (S.D.N.Y.1960) (telephone); *Huff v. United States, supra* (telephone); *Wentz v. United States*, 244 F.2d 172 (9th Cir.1957) (telegram); *United States v. Garland, supra* (telephone). It is not necessary to set out in the indictment *in haec verba* the telephone conversation itself. *See United States v. Garland, supra.*

9-44.500 EVIDENCE

See generally, USAM 9-43.500, *supra* (mail fraud).

9-44.510 Evidentiary Rules of Conspiracy

Under 18 U.S.C. § 1343, where a scheme and artifice to defraud is shared by two or more, it becomes a conspiracy to defraud. The rules of evidence are the same as where a conspiracy is charged and the acts of each party in furthering the common scheme are the acts of all. *See Kumpe v. United States*, 250 F.2d 125 (5th Cir.1956); *United States v. Conte*, 349 F.2d 304 (6th Cir.1965).

9-44.520 Wire Transmission in Interstate Commerce

9-44.521 Fact of Actual Transmission

An interstate communication must be proved. *Boruff v. United States*, 310 F.2d 918 (5th Cir.1962); *United States v. Marino*, 421 F.2d 640 (2d Cir.1969). Generally, the communication is proved by introduction of records of the Western Union, in the case of telegrams, *United States v. Sparrow*, 470 F.2d 885 (10th Cir.1972), or by telephone company records. *See United States v. Jones*, 554 F.2d 251 (5th Cir.1977); *United States v. Green*, 295 F.2d 260 (6th Cir.1961). Parties to the telephone conversation may also provide evidence of the fact of communication, particularly where they placed the long distance calls.

9-44.522 Authentication

The burden of proof is on the government to prove the content of the telephone conversations charged as offenses under the statute. *Osborne v. United States*, 371 F.2d 913 (9th Cir.1967). It is well settled that telephone calls may be authenticated by circumstantial evidence as well as by direct recognition of the person calling. *United States v. Alper*, 449

F.2d 1223, 1229 (4th Cir.1971), *citing, United States v. Frank*, 290 F.2d 195 (3d Cir.1961). Recognition of the voice is not necessary to identification of the person with whom the conversation is alleged to have been had. Like any other ordinary fact, it may be established by direct evidence or circumstances. *Andrews v. United States*, 78 F.2d 274 (10th Cir.1935). *See also* the following cases discussing the circumstantial evidence which established the identity of the voice in question. *United States v. Zweig*, 467 F.2d 1217 (7th Cir.1972); *Cwach v. United States*, 212 F.2d 520, 524-525 (8th Cir.1954); *United States v. Platt*, 435 F.2d 220, 223 (7th Cir.1970); *Spindler v. United States*, 336 F.2d 678, 681 (9th Cir.1964); *United States v. Benjamin*, 328 F.2d 854, 861 (2d Cir.1964); *United States v. Johnston*, 318 F.2d 288 (6th Cir.1963); *Palos v. United States*, 416 F.2d 238, 240 (5th Cir.1969); *Wiltsey v. United States*, 222 F.2d 600 (4th Cir.1955); *Lewis v. United States*, 295 F.2d 411 (1st Cir.1924); McCormick, Evidence § 218 *et seq.*, particularly § 326, p. 553. The ultimate question of authenticity is for the jury to decide. *United States v. Zweiz, supra*, at 1220. In *Carbo v. United States*, 314 F.2d 718, 743 (9th Cir.1963), the Ninth Circuit stated the standard which a trial judge should apply in determining whether a telephone conversation has been adequately authenticated.

> The issue of authenticity, the identity of the author of a particular piece of evidence such as a document or phone call, is for the jury once a prima facie case of authorship is made out by the proponent of the evidence. The connection between a telephone call and the caller may be established circumstantially. The issue for the trial judge determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by the proponent.

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FOR CHAPTER 46

9-46.000 PROGRAM FRAUD AND BRIBERY

9-46.100 SCOPE OF THE STATUTE AND POLICY CONSIDERATIONS

The broad language of 18 U.S.C. § 666(a)(1)(A) and its legislative history raise a significant issue regarding the scope of the statute. The primary issue is whether the statute only prohibits the illegal taking of federal program funds or property acquired with federal funds or whether the statute prohibits the illegal taking of any funds or property of an organization or of a state or local government agency that receives federal assistance. An example of the latter situation would be the theft by an employee of a federally funded organization of a $6,000 automobile acquired independently of the federal funds.

While a 18 U.S.C. § 641 prosecution could not be maintained in hypothetical described above, the question remains whether Congress, by filling the ''serious gap in the law'', intended to create federal crimes for activities unrelated to any federal interest. By contrast, reading a requirement of a nexus between the funds or property illegally acquired and a federal program into 18 U.S.C. § 666(a)(1)(A), the prosecution creates problems of commingled funds or title transfer present in 18 U.S.C. § 641 prosecutions.

As a matter of Departmental policy, federal prosecutors should be prepared to demonstrate that the offense affects a substantial and identifiable federal interest before bringing charges under 18 U.S.C. § 666. This policy insures that federal prosecutions will occur only where significant federal interests are involved. Consultation with the Fraud Section, Criminal Division is suggested in cases where the degree of federal interest is in doubt.

Consistent with the legislative history, prosecution under 18 U.S.C. § 666 should be limited to cases where the federal assistance is given pursuant to a specific statutory scheme which authorizes assistance to promote or achieve policy objectives. The statute was not intended to reach every federal contract or every federal disbursement.

In some cases, local prosecutors will have both a strong incentive and the ability to prosecute crimes involving local programs receiving federal funding. The advisability of a federal prosecution under 18 U.S.C. § 666(a)(1)(A) should be carefully weighed against the likelihood that state prosecution will be sufficient to protect federal interests. Federal prosecutors are reminded of the Department of Justice policy which prohibits Federal prosecution of violations which were prosecuted at the state or local level, unless the approval of the Attorney General is obtained. *See Petite v. United States*, 361 U.S. 529 (1960); *see* USAM 9-2.142.

A second issue within the statute centers on the type of Federal benefit and the manner in which that benefit triggers the statute's protection.

Section 666(b) requires that the organization, government or agency must have received, 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.'' This provision does not distinguish between cash and non-cash assistance nor does it explicitly state when an organization ''receives'' federal assistance. Generally, prosecution should not be instituted until the agency has actually received cash benefits, in hand, as opposed to the mere appropriation or authorization of cash benefits. Similarly, in cases involving non-cash benefits, *i.e.*, contracts, guarantees or insurance, the agency must have received a fully executed and enforceable instrument which grants the non-cash assistance in order to obtain the statute's protection.

A third issue is the very broad language of the statute. It seemingly permits the prosecution of any state agent, regardless of whether his or her specific agency received the necessary Federal assistance, so long as the state received the required federal assistance. This broad reading, while statutorily permissible, would federalize many state offenses where Federal interest is slight or nonexistent.

A narrower reading, consistent with the stated congressional intent, requires that the agent must have illegally obtained cash or property from the agency which received the necessary Federal assistance. This narrower reading is strongly suggested in order to insure that significant Federal interests are protected and the clear intent of Congress is followed.

A fourth issue concerning the scope of the statute is the measurement of the one year period within which the necessary $10,000 in federal assistance must be received. The one year period should be measured from the date of the offense. If the protected organization received the necessary $10,000 in federal assistance within the 365 days immediately preceding the offense (including the day of the offense), then federal jurisdiction is established. If the necessary federal assistance had not been received in that one year period, then no federal jurisdiction exists.

9-46.200 THEFT AND BRIBERY IN FEDERALLY FUNDED PROGRAMS

To protect the integrity of the vast sums of money distributed through federal programs, Congress included a new criminal statute, 18 U.S.C. § 666 as part of the Comprehensive Crime Control Act of 1984.[1] The section is designed to facilitate the prosecution of persons who steal money or otherwise divert property or services from state and local governments or private organizations—for example, universities, foundations and business corporations—that receive large amounts of federal funds. Subsection (a)(1)(A) prohibits the embezzlement, stealing, obtaining by fraud or

1 18 U.S.C. § 666 was amended by Public Law 99-646. The amendment added Indian tribal government agencies to the list of protected organizations and made stylistic changes. The amendment became effective November 10, 1986.

otherwise unauthorized conversion to the use of any person other than the rightful owner or intentionally misapplies property having a value of $5,000 or more by an agent, typically an employee, of an organization or of a state, local or Indian tribal government agency that receives $10,000 or more annually in federal assistance. The maximum penalty is imprisonment for ten years and a fine of the greater of $100,000 or twice the amount obtained in violation of the section.

Under prior law, with few exceptions, thefts from such governments or organizations could be prosecuted only under the general theft statute, 18 U.S.C. § 641.[2] Use of this statute was often precluded because title to the property stolen had passed from the federal government before it was stolen or the funds were so commingled that their federal character could not be shown.

Consequently, Congress created 18 U.S.C. § 666 to insure the integrity of federal program funds administered through private organizations and state, local, or Indian tribal government agencies and to fill an apparent gap in the law which neither 18 U.S.C. § 641 or § 665 could reach.

9-46.210 Legislative History

The legislative history of 18 U.S.C. § 666 is sparse. There is no legislative history in the House and only a page and a half discussion in the Senate. S.Rep. No. 98-225, 98th Cong., 1st Sess. 369-370 (1983). Nevertheless, the limited legislative history of 18 U.S.C. § 666 indicates that Congress intended it to be construed broadly, consistent with its purpose of protecting the vast sums of money distributed through federal programs from theft and fraud. The Senate Report states that 18 U.S.C. § 666 was:

> ''designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program.''

S.Rep. No. 225, 98th Cong. 1st Sess. 369, reprinted in 1984 U.S.Code Cong. & Ad.News 3[illegible]. (the Senate Report).

The Congress also clearly intended to vitiate the problems of title transfer and commingled funds encountered under 18 U.S.C. § 641.

2 One exception, 18 U.S.C. § 665, is similar to 18 U.S.C. § 666 and makes theft or embezzlement by an officer or employee of an agency receiving assistance under the Comprehensive Employment and Training Act (CETA), 39 U.S.C. § 801 *et seq.*, a federal offense. However, 18 U.S.C. § 665 is limited only to agencies which receive CETA funds.

> This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds. Indeed, a recurring problem in this area (as well as in the related area of bribery of the administrators of such funds) has been that State and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved. *Id.* at 369.

9-46.300 ELEMENTS

9-46.310 General Elements

In all prosecutions under 18 U.S.C. § 666(a)(1)(A) the United States must prove the following general elements:

(1) that the defendant is an agent of an organization or of a state or local government agency;

(2) that the organization or entity receives benefits in excess of $10,000 in the preceding one-year period pursuant to a federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of federal assistance;

(3) that the defendant embezzled, stole, obtained by fraud, or otherwise without authority knowingly converted to the use of any person other than the rightful owner, or intentionally misapplied, property;

(4) which had a value of $5,000 or more; and

(5) was owned by or under the care, custody, or control of such organization, government, or agency.

In addition to these general elements the United States must also prove the elements of the specific prohibited act charged *i.e.*, embezzlement, larceny or criminal conversion.

9-46.320 Embezzlement

In *Moore v. United States*, 160 U.S. 268, 269 (1895), the Supreme Court defined embezzlement in the following terms:

> Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in fact that the original taking was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

To prove the crime of embezzlement under 18 U.S.C. § 666(a)(1)(A) the United States must establish the following specific elements in addition to the general elements:

1. There was a trust or fiduciary relationship between the defendant and the private organization or state or local government agency;

2. The property came into the possession or care of the defendant by virtue of his/her employment;

3. The defendant's dealings with the property constituted a fraudulent conversion or appropriation of it to his/her own use; and

4. The defendant acted with the intent to deprive the owner of the use of this property.

See United States v. Powell, 294 F.Supp. 1353, 1355 (E.D.Va.1968), *aff'd*, 413 F.2d 1037 (4th Cir.1968); *United States v. Dupee*, 569 F.2d 1061 (9th Cir.1978).

The requirement that the defendant act with the intent to deprive the owner of his property makes embezzlement a specific intent crime. *See United States v. May*, 625 F.2d 186, 189-90 (8th Cir.1980). It should be noted, however, that the intent required to violate the law is not an intent to deprive another of his/her property permanently. Therefore even if an individual intends to return the property, his/her actions are still criminal. In short, restitution is no defense to embezzlement. *See Powell, supra* at 1355.

9-46.330 Larceny

The term to steal has no established meaning in the common law. *See Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir.1938) Instead, this term refers to the crime of larceny and was developed in modern pleading to broaden larceny beyond its strict common law definition. *See United States v. Maloney*, 607 F.2d 222, (9th Cir.1979); *United States v. Archambault*, 441 F.2d 281, 282-83 (10th Cir.1971), *cert. denied*, 404 U.S. 843 (1971).

Larceny requires proof of the following four specific elements in addition to the general elements:

1. The wrongful taking and carrying away of property;

2. The absence of consent from the organization or state or local government agency; and

3. The intent to deprive the organization or state or local government agency of its property.

See United States v. Barlow, 480 F.2d 1245, 1251 (D.C.Cir.1972). Larceny, like embezzlement, is a specific intent crime.

9-46.340 Fraud

The statute does not define the phrase ''obtained by fraud''. Fraud is defined by nontechnical standards and is not to be restricted by any common-law definition of false pretenses. One court has observed, ''[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.'' *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.1941). The Fourth Circuit, reviewing a conviction under 18 U.S.C. § 2314, also noted that ''fraud is a broad term, which includes false representations, dishonesty and deceit.'' *See United States v. Grainger*, 701 F.2d 308, 311 (4th Cir.1983) *cert. denied*, 461 U.S. 947 (1983). USAM 9-46.340.

9-46.350 Knowing Conversion Without Authority

Knowing conversion without authority also is a very broad concept and includes conduct outside the definitions of embezzlement and stealing. Where the defendant's conduct does not fall within any of the other prohibited acts of 18 U.S.C. § 666(a)(1)(A), it may still be reached under the theory that the defendant's conduct constituted a knowing conversion without authority.

To prove a knowing conversion without authority the United States must establish:

1. That the defendant knowingly converted to the use of any person other than the rightful owner, property;

2. Owned by or under the care, custody, or control of an organization or state or local government agency protected by the statute;

3. Without authority to do so; and

4. With knowledge that he did not have authority to do so.

9-46.360 Intentional Misapplication

The offense intentional misapplication is not defined in Section 666. However, intentional misapplication is not materially different from the offense of willful misapplication found in 18 U.S.C. § 665.

To prove a willful misapplication violation of Section 666(a)(1)(A) the United States must establish the general elements and the following specific elements:

1. The defendant, with the intent to defraud, willfully converted or took for his/her own use or benefit or the use or benefit of another, property; and

2. Owned by or under the care, custody, or control of an organization or state or local government agency protected by the statute.

9-46.400 SCIENTER

9-46.410 Intent

Section 666 incorporates several distinct property crimes into one statute. Some of these distinct offenses, many of which were originally developed at common law, require proof of a different mental state. If the offense charged is stealing (larceny), the offense requires an intent permanently to deprive another of his property. *See Ailsworth supra*, at 442. By contrast, several other offenses included in this section, such as embezzlement and knowing conversion of property, simply require temporary misappropriation of property. Therefore, 18 U.S.C. § 666(a)(1)(A) can reach temporary misappropriation of property under either an embezzlement or knowing conversion theory of prosecution.

9-46.420 Knowledge

Another issue which may arise in a 18 U.S.C. § 666(a)(1)(A) prosecution is whether the intent element requires that the defendant knew that the protected organization received federal benefits in excess of $10,000 in any one year period. The legislative history provides no guidance on this question. However, court decisions reviewing prosecutions under 18 U.S.C. §§ 641 and 665 stand for the proposition that the United States is not required to prove that the defendant had personal knowledge that the protected organization received the requisite federal assistance.

9-46.500 PROPERTY

The term ''property'', as found in 18 U.S.C. § 666(a)(1)(A), is undefined and apparently without limitation. It includes all property, tangible and intangible, as well as money, which is under the care, custody, or control of the organization or state or local government agency.

Section 665 also includes the term ''property'' without definition. The Seventh Circuit in *United States v. Coleman*, 589 F.2d 228 (7th Cir. 1978), held that the services of persons compensated out of grant money under a CETA program are ''property'' and therefore susceptible to theft, embezzlement or willful misapplication. The court reasoned:

> In § 665 Congress was exerting is power to protect these funds from misuse at the hands of employees of these agencies. Concededly as to tangible property the protection extended to that which was purchased by the funds as well as the funds themselves. Much of the funds, however, were expected to be spent to compensate people for services; the programs are intended to generate jobs. Recognizing that the term ''property'' is protean, capable of assuming varied meanings depending on context, and that the criminal law does not of necessity adopt the most restrictive meaning as the ''literal terms,'' there is no

> reason to suppose that Congress intended to withhold protection from services purchased while extending the protection to tangible property purchased. Willful misapplication of services generated by the granted funds is indistinguishable from willful misapplication of funds themselves. A right to benefit of services for which one pays is a property right. In the CETA context, we feel a contrary result would accomplish an absurd interpretation of the statute, one that should not be imputed to Congress by a court having the proper degree of respect for that body. Thus, we think the word ''property'' need not be narrowly construed so as to include tangibles, but exclude services. *Id.* at 231.

It follows that the services of persons compensated out of grant money constitute ''property'' and are protected under 18 U.S.C. § 666(a)(1)(A).

9-46.510 Value

In order to establish a violation of 18 U.S.C. § 666(a)(1)(A) the United States must establish that the illegally obtained property had a value in excess of $5,000. Neither the statute nor the legislative history define value.

However, 18 U.S.C. § 641 defines value as ''face, par, or market value, or cost price, either wholesale or retail, whichever is greater.'' Similarly, 18 U.S.C. § 2311 defines value as:

> . . . the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

In light of these statutes and the absence of any explicit limiting provision in 18 U.S.C. § 666(a)(1)(A) or its legislative history, an equally broad definition of value is not inconsistent with the statute.

Additionally, the United States should not be required to prove the exact or approximate property value. Rather, as in prosecutions under 18 U.S.C. § 641, the United States should only be required to show that the value of the property is in excess of $5,000. *See Jalbert v. United States*, 375 F.2d 125 (5th Cir.1967).

9-46.520 Aggregation

A question related to value is whether individual thefts of property of less than $5,000 in value may be aggregated to constitute a single offense of theft of property in excess of $5,000 in value. Again the statute and its legislative history provide no guidance.

In construing 18 U.S.C. § 641, the Third Circuit has held that individual thefts of less than $100 each constituted separate offenses and could not be aggregated into one offense. *United States v. Dibilio*, 538 F.2d 972, 980 (3rd Cir.1976). Similarly, the Fifth Circuit, in reviewing a conviction under the former 18 U.S.C. § 82, held ''. . . it is settled law that the value of things taken in separate larcenies can not be aggregated to make up one felonious larceny,'' *Cartwright v. United States*, 146 F.2d 133 (5th Cir.1944).

However, when the case involves the embezzlement of funds over a period of time, it is possible to allege the loss of a single sum of money even though the embezzlement may have consisted of a series of conversions occurring at different times. *See O'Malley v. United States*, 378 F.2d 401 (1st Cir.1967), *cert. denied*, 389 U.S. 1008 (1967); *Hansberry v. United States*, 295 F.2d 800 (9th Cir.1961). In reviewing a conviction under 18 U.S.C. § 665, the Fifth Circuit in *United States v. Billingsea*, 603 F.2d 515, (5th Cir.1979), explained when separate acts can be aggregated into one offense and when they constituted separate offenses. The critical fact is the defendant's state of mind prior to and simultaneous with the first taking and the defendant's actions which may indicate preparation for several takings. Accordingly, if the defendant devised a plan or scheme which will result in the taking of sums of money on a recurring basis then the individual acts of taking can be aggregated into one offense. If, however, all that can be attributed to the defendant is an original intent to steal and the evidence merely shows that the defendant acted upon this intent from time to time, then the individual acts of taking can not be aggregated and must be considered separate offenses. *Id.* at 520. Consequently, when small sums (less than $5,000) are embezzled over a period of time, it may be possible to aggregate these amounts into a single offense when the embezzlements follow a pattern or reveal a single sustained criminal intent.

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9-47.000 FOREIGN CORRUPT PRACTICES ACT OF 1977: 15 U.S.C. § 78m(b)(2), (3); 15 U.S.C. § 78dd-1; 15 U.S.C. § 78dd-2

9-47.100 PROCEDURES

9-47.110 Policy Concerning Criminal Prosecutions

The investigation and prosecution of particular allegations of violation of the Foreign Corrupt Practices Act will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction. For example, part of the investigation may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials. Additionally, relevant accounts maintained in United States banks and subject to subpoena may be directly or beneficially owned by senior foreign government officials. Close coordination of such investigations and prosecutions with the Department of State, the Securities and Exchange Commission and other interested agencies is essential. Moreover, pursuant to a Presidential directive, the Criminal Division has established a Foreign Corrupt Practices Act Review Procedure modeled after the Antitrust Division's Business Review Procedure. As part of this procedure, which is administered by the Fraud Section, the Assistant Attorney General for the Criminal Division reviews proposed business conduct which may constitute a violation of the Act and makes a binding decision on whether or not the Department will take an enforcement action if the transaction proceeds further. For these reasons, the need for close centralized supervision of investigations and prosecutions under the Foreign Corrupt Practices Act is compelling. Consequently, unless otherwise agreed upon by the Assistant Attorney General for the Criminal Division, prosecutions of alleged violations of Sections 103 and 104 of the Foreign Corrupt Practices Act will be conducted by attorneys from the Criminal Division in Washington. Prosecutions of alleged violations of Section 102, when such violations are related to a violation of Section 103 or 104, will also be conducted by Criminal Division attorneys, unless otherwise directed by the Assistant Attorney General.

Any information relating to a possible violation of the Foreign Corrupt Practices Act should be brought immediately to the attention of the Criminal Division by contacting the Chief of the Fraud Section, who can be reached at (FTS) 786-4677. Even when such information is developed during the course of an apparently unrelated investigation, the Fraud Section should be notified immediately.

9-47.120 Investigation of Complaints

Allegations of violation of the provisions of Section 102 (Recordkeeping) and 103 (Issuers) of the Foreign Corrupt Practices Act may be investigated by the Securities and Exchange Commission or the Federal Bureau of

Investigation. All investigations of alleged violation of Section 104 (Domestic Concerns) are conducted by the Federal Bureau of Investigation.

9-47.130 Civil Injunctive Actions

The Securities and Exchange Commission has authority to obtain civil injunctions against future violations of Sections 102 and 103 of the Foreign Corrupt Practices Act. Civil injunctions against violations of Section 104 of the Foreign Corrupt Practices Act (Section 104(c)) by Domestic Concerns shall be instituted by attorneys from the Criminal Division in cooperation with the appropriate U.S. Attorney, unless otherwise directed by the Assistant Attorney General.

9-47.140 Foreign Corrupt Practices Act Review Procedure

On March 20, 1980, the Attorney General signed Order No. 878-80 establishing the Foreign Corrupt Practices Act Review Procedure. The Review Procedure permits any party covered under Sections 103 and 104 of the Foreign Corrupt Practices Act to seek a statement from the Criminal Division of the Department's present enforcement intention with respect to those sections. The Review Procedure will not apply to Section 102 of the Foreign Corrupt Practices Act which deals with the maintenance of accurate books and records by corporations which are subject to the jurisdiction of the Securities and Exchange Commission.

Section 50.18, which has been added to Part 50, Chapter I, Title 28, Code of Federal Regulations, provides:

> Although the Department of Justice is not authorized to give advisory opinions to private parties, the Criminal Division is willing, in certain circumstances, to review proposed conduct and state its present enforcement intention under sections 103 and 104 of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, 78dd-2, but not including section 102 of the Foreign Corrupt Practices Act, 15 U.S.C. § 78m(b)(2), (3). The conditions for such review are set forth below:
>
> (a) A request for a Foreign Corrupt Practices Act (FCPA) review letter must be submitted in writing in an original and five copies to the Assistant Attorney General in charge of the Criminal Division, Attention: FCPA Review Group. The mailing address is P.O. Box 7814, Benjamin Franklin Station, Washington, D.C. 20044. The address for hand-delivery is 8th floor, Federal Triangle Building, 315 9th Street, N.W., Washington, D.C. 20530.
>
> (b) The entire transaction which is the subject of the review request must be an actual transaction but need not involve

only proposed conduct. The Criminal Division will not consider a request, however, unless that portion of the transaction for which clearance is sought involves only proposed conduct.

(c) The Criminal Division will consider a review request only when submitted by a party or parties to the transaction which is the subject of the review request.

(d) The Criminal Division may, in its discretion, refuse to consider a review request.

(e) An FCPA review letter shall have no application to any party which does not join in the request therefor.

(f) A review request shall be specific and contain in detail all relevant and material information bearing on the conduct for which review is requested and on the circumstances of the proposed conduct. A review request must be signed on behalf of each requesting party by an appropriate senior officer with operational responsibility for the conduct which is the subject of the review request and who has been designated by the chief executive officer to sign the review request. In appropriate cases, the chief executive officer of each requesting party may be required to sign the review request. The person signing the review request must certify that it contains a true, correct and complete disclosure with respect to the proposed conduct and the circumstances of the conduct.

(g) Each party shall provide the Criminal Division with any additional information or documents the Division may thereafter request in order to review a matter. Any information furnished orally shall be promptly confirmed in writing, signed by the same person who signed the initial review request and certified by him to be a true, correct and complete disclosure of the requested information. In connection with any request for review, the Criminal Division will also conduct whatever independent investigation it believes is appropriate.

(h) After review of a request submitted hereunder, the Criminal Division may: state its present enforcement intention under sections 103 and 104 of the FCPA with respect to the proposed business conduct; decline to state its present enforcement intention; or take such other position or action as it considers appropriate.

(i) The Criminal Division will make every reasonable effort to respond to any review request within 30 days after receipt of

the review request and of any requested additional information and documents.

(j) No oral clearance, release or other statement purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting party or parties may rely only upon a written FCPA review letter signed by the Assistant Attorney General in charge of the Criminal Division or his delegate.

(k) Each FCPA review letter can be relied upon by any requesting party or parties to the extent the disclosure was accurate and complete and to the extent the disclosure continues accurately and completely to reflect circumstances after the date of issuance of the review letter.

(*l*) An FCPA review letter will not bind or obligate any other agency; nor will it affect the obligations of the requesting party or parties to any other agency, nor under any statutory or regulatory provision other than those specifically cited in the particular review letter.

(m) Neither the submission of a request for an FCPA review, its pendency, nor the issuance of an FCPA review letter, shall in any way alter the responsibility of the party or parties to comply with the accounting requirements of section 102 of the Foreign Corrupt Practices Act 15 U.S.C. §§ 78m(b)(2), (3).

(n) If the business conduct for which review is requested is subject to approval by a regulatory agency, a review request shall by considered before agency approval has been obtained only where it appears that exceptional and unnecessary burdens might otherwise be imposed on the requesting party or parties, or where the agency specifically requests that the party or parties first seek review from the Criminal Division. However, any FCPA review letter issued in these as in any other circumstances, will state only the Department's present enforcement intention under section 103 and 104 of the Foreign Corrupt Practices Act. Such FCPA review letter shall in no way be taken to indicate the Department's views on the legal or factual issues that may be raised before the regulatory agency, or in an appeal from the regulatory agency's decision.

(*o*)(1) The requesting party or parties may ask the Division to delay or to refrain from ever making publicly available parts of a review request, and part or all of any information or documents submitted in support of the review request. Any request for nondisclosure must be made at the time of submitting the review request or the information or documents to the

Division. The requesting party or parties must: (i) specify precisely those parts of the request, information or documents that it asks not be made publicly available; (ii) state the minimum period of time during which nondisclosure is considered necessary; and (iii) justify the request for nondisclosure, both as to content and time, by showing that the material is exempt from mandatory public disclosure because it consists of trade secrets or commercial and financial information that is privileged and confidential is received from a person, 5 U.S.C. § 552(b)(4), or because it is otherwise exempt pursuant to any other provision of 5 U.S.C. § 552(b). If the Department determines that such grounds for nondisclosure exist, then except as provided by subparagraph (2) of this paragraph the material shall not be made publicly available unless release is ordered by a court of competent jurisdiction. If the Department determines that such grounds for nondisclosure do not exist, and the Department receives a request for disclosure of the material pursuant to the Freedom of Information Act, notice of the Department's determination that there are no grounds for nondisclosure will be given to the party or parties submitting the FCPA review request at least 7 days before any release to the Freedom of Information Act requester.

(*o*)(2) Nothing contained in subparagraph (1) of this paragraph shall limit the Division's right to issue, at its discretion, a release describing the identity of the party or parties submitting an FCPA review request, the general nature and circumstances of the proposed conduct, and the action taken by the Department in response to the FCPA review request. Where the Department determines such information to be exempt from mandatory disclosure, such a release shall not disclose: (i) the identity of the foreign country in which the proposed conduct is to take place; (ii) the identity of any foreign sales agents; or (iii) other types of identifying information. The Division shall index such release and place it in a file available to the public upon request.

(*o*)(3) This paragraph reflects a policy determination by the Department of Justice and is subject to any limitations on public disclosure and any required public disclosure arising from statutory restrictions, Executive Order, or the national interest.

(p) Any requesting party or parties may withdraw a review request at any time. The Division remains free, however, to submit such comments to the requesting party or parties as it deems appropriate. Failure to take action after receipt of a

review request, documents or information, whether submitted pursuant to this procedure or otherwise, shall not in any way limit or stop the Division from taking any action at such time thereafter as it deems appropriate. The Division reserves the right to retain any review request, documents and information submitted to it under this procedure or otherwise and to use them for all governmental purposes.

For further information, contact Peter B. Clark, Senior Litigation Counsel for FCPA matters, Fraud Section, Criminal Division, Washington, D.C. 20530, (202) 786-4363.

9-47.200 FOREIGN CORRUPT PRACTICES ACT

9-47.210 Corporate Recordkeeping

The Foreign Corrupt Practices Act of 1977 (P.L. 95-213; 91 Stat. 1494) was signed into law by the President on December 19, 1977. Section 102 of the Act amends Section 13(b) of the Securities Exchange Act of 1934 to require the maintenance of accurate records by corporations which are subject to the jurisdiction of the Securities and Exchange Commission. Section 102 (15 USC § 78m(b)(2), (3)) provides:

> (2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 14(d) of this title shall—
>
> (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
>
> (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
>
> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
>
> (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
>
> (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and

appropriate action is taken with respect to any differences.

(3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

A willful violation of the provisions of Section 102 of the Foreign Corrupt Practices is a criminal act offense punishable, pursuant to the provisions of Section 32(a) of the Securities Act of 1934, 15 USC § 78ff(a) by a fine of not more than $10,000, or imprisonment of not more than five years.

It should be emphasized that the willful falsification of an issuer's books, records, or accounts in violation of Section 102 of the Foreign Corrupt Practices Act is a criminal offense whether or not such falsification is related to a foreign corrupt practice proscribed by Sections 103 and 104 of the Foreign Corrupt Practices Act (*see* USAM 9-47.020 and 9-47.030, *infra*). Such a falsification of the corporate records for any domestic purpose, unrelated to foreign bribery, may be the basis for a criminal charge.

9-47.220 Foreign Corrupt Practices By Issuers

Section 103 of the Foreign Corrupt Practices Act amends the Securities Exchange Act of 1934 to proscribe and establish criminal penalties for certain foreign corrupt practices by corporations subject to the jurisdiction of the Securities and Exchange Commission and by the officers, di-

rectors, employees, agents and stockholders of such corporations. Section 103 of the Foreign Corrupt Practices Act provides in pertinent part:

> (a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly 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—
>
> (1) any foreign official for purposes of—
>
> (A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions, or
>
> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
>
> in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;
>
> (2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—
>
> (A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or
>
> (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
>
> in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or
>
> (3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions;

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) As used in this section, the term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

Section 78dd-1 of Title 15

Section 78ff(c) of Title 15 provides:

(1) Any issuer which violates (this) section . . . shall, upon conviction, be fined not more than $1,000,000.

(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates (this) section . . . shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever an issuer is found to have violated (this) section . . . any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such an issuer.

Section 78ff(c) of Title 15

9-47.230 Foreign Corrupt Practices By Domestic Concerns

Section 104 of the Foreign Corrupt Practices Act creates a new criminal offense, proscribing the same type of foreign corrupt practices when committed by United States citizens or certain commercial entities which are not subject to the jurisdiction of the Securities and Exchange Commission. Section 104 of the Foreign Corrupt Practices Act provides:

> (a) It shall be unlawful for any domestic concern, other than issuer which is subject to section 30A of the Securities Exchange Act of 1934, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly 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—
>
> (1) any foreign official for purposes of—
>
> (A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or
>
> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
>
> in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;
>
> (2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—
>
> (A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or
>
> (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
>
> in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) shall, upon conviction, be fined not more than $1,000,000.

(B) Any individual who is a domestic concern and who willfully violates subsection (a) shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(2) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever a domestic concern is found to have violated subsection (a) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, em-

ployee, or agent of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

(c) Whenever it appears to the Attorney General that any domestic concern, or officer, director, employee, agent, or stockholder thereof, is engaged, or is about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing a permanent or temporary injunction or a temporary restraining order shall be granted without bond.

(d) As used in this section:

(1) The term 'domestic concern' means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

(3) The term 'interstate commerce' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. Such term includes the intrastate use of (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

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FOR CHAPTER 48

9-48.000 COMPUTER FRAUD

9-48.100 18 U.S.C. § 1030

In 1984, Congress enacted legislation which for the first time specifically defined several computer-related offenses. Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, 98 Stat. 2190-2192 (1984). These new offenses at 18 U.S.C. § 1030 of Title 18, United States Code, were amended significantly by enactment of the Computer Fraud and Abuse Act of 1986. These amendments, effective October 16, 1986, included the addition of three new offenses. In addition to the six offenses encoded as subsections (a)(1) through (a)(6), the section also punishes attempts and conspiracies to commit these offenses.

Section 1030 of Title 18 includes several new concepts not found in the statutes traditionally used to prosecute fraud cases. Section 1030 deals with an ''unauthorized access'' concept of computer fraud rather than the mere use of a computer. Thus, the conduct prohibited is analogous to that of a trespass (breaking and entering) rather than using a computer (similar to the use of a gun) in committing the offense. *House Committee on the Judiciary, Report on Counterfeit Access Device and Computer Fraud and Abuse Act of 1984,* H.R.Rep. No. 894, 98th Cong., 2d Sess. (1984), p. 20.

9-48.111 18 U.S.C. § 1030(a)(1): Computer Espionage

Subsection (a)(1) of Section 1030 makes it a crime to *knowingly* access a computer without authorization and thereby obtain certain classified information. The 1986 amendments deleted coverage of authorized users of federal computers since they are presently covered by administrative sanctions. Thus, concerns of prosecuting whistle blowers raised by the coverage of such users have been eliminated, and the basic offenses of this subsection are now limited to simple trespasses.

See USAM 9-90.330.

9-48.112 18 U.S.C. § 1030(a)(2): Obtaining Financial or Credit Information From a Computer

Section 1030(a)(2) of Title 18 punishes persons who *intentionally* access a computer without authorization, or who exceed their authorization, and obtain certain information contained in a financial record of a financial institution or of a card issuer as defined in Section 1602(n) of Title 15, or contained in a file of a consumer reporting agency on a consumer, as defined in the Fair Credit Reporting Act (15 U.S.C. § 1681 *et seq.*).

As in subsection (a)(1), the 1986 amendments deleted coverage of authorized users of federal computers since they are presently covered by administrative sanctions. Thus, the basic offense is now limited to simple trespass and the concerns of prosecuting whistle blowers have been elimi-

nated. The amendments also shifted the state-of-mind requirement from ''knowingly'' to ''intentionally,'' as defined in the Senate Report on the Criminal Code, No. 96-1396. This substitution of an intentional standard is meant to focus federal criminal prosecutions on those who evince a clear intent to enter, without authorization, computer files belonging to another. It goes beyond voluntarily being engaged in conduct or causing a result to require such actions to have been the person's conscious objective. However, a nonintentional initial contact with access deliberately maintained would not be exempt from prosecution. The 1984 legislative report notes the concern, raised by the Justice Department during hearings, regarding the ''obtains information'' language in subsection (a)(2) and affirms the legislative intent that the term includes ''observing'' or ''accessing.'' *See House Committee on the Judiciary, Report on Counterfeit Access Device and Computer Fraud and Abuse Act of 1984,* H.R.Rep. No. 894, 98th Cong., 2d Sess. (1984).

Another significant change to subsection (a)(2) was deletion of the reference to the financial record definitions of the Right to Financial Privacy Act and adoption of definitions for this section at subsections (e)(4) and (5). The credit reporting agency reference remains intact, but now covers a credit card issuer, as defined in 15 U.S.C. § 1602(n).

The FBI will conduct investigations of cases under 18 U.S.C. § 1030(a)(2) involving banking institutions as well as those cases that fall primarily within its traditional jurisdiction, *e.g.*, matters pertaining to organized crime, terrorism, and foreign counterintelligence. The Secret Service will investigate cases involving consumer reporting agencies as defined by the Fair Credit Reporting Act.

9-48.113 18 U.S.C. § 1030(a)(3): Interfering With the Operation of a Government Computer

As amended in 1986, subsection (a)(3) punishes anyone who, without authorization or in excess of his or her authorization, *intentionally* accesses any computer of a department or agency of the United States, a computer exclusively for federal use, or the government's operation of a computer not exclusively used by or for the federal government. As noted above, the change in the state-of-mind requirement from ''knowingly'' to ''intentionally,'' as defined in the Senate Report on the Criminal Code, No. 96-1396, is meant to focus federal criminal prosecutions on those who evince a clear intent to enter, without authorization, computer files belonging to another. It goes beyond voluntarily being engaged in conduct or causing a result to require such actions to have been the person's conscious objective. Nonintentional initial contact with access deliberately maintained, however, would not be exempt from prosecution.

Dropped from the subsection was the phrase ''uses, modifies, destroys, or discloses information in or prevents authorized use of'' that computer.

As noted in the 1984 legislative report, cited above, in subsection (a)(3), it is the use of the government's operation of the computer that is being protected and that proof of harm to the operation of the computer is not required.

Again, as stated in the above discussions of subsections (a)(1) and (2), coverage of authorized users of federal computers was deleted since they are presently covered by administrative sanctions.

Responsibility for investigations of cases under subsection (a)(3) will be divided among the FBI, Secret Service, Postal Service, and the Inspectors General on a case-by-case basis. Assignments will be made as is appropriate for the offense and not otherwise exempted as traditional jurisdiction or a prior division of responsibility under this law.

New Offenses, Effective October 16, 1986

Currently, the Departments of Justice and Treasury are discussing amendments to the Memorandum of Understanding establishing the investigative parameters of the Secret Service and FBI pursuant to the new offenses of 18 U.S.C. § 1030.

9-48.114 18 U.S.C. § 1030(a)(4): Thefts of Property Via Computer Trespass Occurring as Part of a Fraud Scheme

Subsection (a)(4) makes it a five-year felony [subsection (c)(3)(A)] to knowingly and with intent to defraud access a federal-interest computer without authorization or exceeding authorization and thereby further the intended fraud and obtain anything of value, unless the object and thing obtained consist only of use of the computer. Thus, the use of a computer must be directly related to the intended fraud and not merely incidental to it, thereby creating a distinction between simple computer trespass and thefts via computer trespass.

The state-of-mind requirement is one of ''knowingly and with intent to defraud,'' which is similar to that for violations of 18 U.S.C. § 1029 (fraud and related activity in connection with access devices). Application of this subsection is limited to federal-interest computers, defined in the Act (1986) as (a) those used exclusively for the use of the government or a financial institution *or* (b) one of two or more computers used in committing the offense, not all or which are located in the same state. Financial institutions, as defined in the act, generally include those insured or regulated by a federal agency and registered broker-dealers.

9-48.115 18 U.S.C. § 1030(a)(5): Altering, Damaging, or Destroying of Information on Federal-Interest Computers

Subsection (a)(5), also a five-year felony [subsection (c)(3)(A)], covers outside trespassers who *intentionally* access a federal-interest

computer and alter, damage, or destroy information, causing a $1,000 or more loss in a 12-month period. It also covers the modification or impairment of certain medical records without regard to cost.

9-48.116 18 U.S.C. § 1030(a)(6): Trafficking in Any Password or Similar Information to Obtain Unauthorized Access

Subsection (a)(6) is a misdemeanor provision designed to proscribe the conduct associated with private bulletin boards used by hackers to display passwords. The jurisdictional hook is trafficking (as defined in 18 U.S.C. § 1029) that affects interstate or foreign commerce or any computer used by or for the government. The state-of-mind requirements are ''knowingly and with intent to defraud.''

9-48.120 Reporting Requirements

Copies of all indictments alleging violations of 18 U.S.C. § 1030 should be provided to the Fraud Section and will be available as a resource to other offices. Information about prosecutions under this section must be compiled and reported by the Attorney General to Congress during the first three years following enactment of the statute, with the report covering Fiscal Year 1987 being the last of these reports to Congress.

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9-49.000 CREDIT CARD FRAUD

9-49.100 FRAUDULENT PRODUCTION, USE, OR TRAFFICKING IN COUNTERFEIT OR UNAUTHORIZED ACCESS DEVICE—TITLE 18, SECTION 1029

The provisions of the Credit Card Fraud Act of 1984 codified at 18 U.S.C. § 1029 expands 15 U.S.C. § 1644 (fraudulent use of credit cards) and 15 U.S.C. § 1693n (fraudulent use of debit instruments). Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, 98 Stat. 2183-4 (1984). The most significant provisions of 18 U.S.C. § 1029: (1) broaden the definitions of credit card and debit instrument to include any ''access device,'' such as an account number; (2) increase penalties in terms of both potential incarceration and potential fines; and (3) contain a substantial repeat offender provision.

Congress passed this legislation to give federal prosecutors a broad jurisdictional base to prosecute effectively a variety of credit card fraud schemes. However, certain jurisdictional thresholds were established to ensure that federal involvement is concentrated on the activities of major offenders. It is assumed that the bulk of the prosecutions for credit card fraud will continue to be handled by state and local law enforcement authorities.

9-49.130 Definitions and Legislative History

Instead of using the term ''credit card,'' or ''debit instrument,'' the term ''access device'' is used in the statute and is defined broadly as any ''card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds . . . .'' The only limitation, *i.e.*, other than a transfer originated solely by paper instrument, excludes activities such as passing forged checks.

Pertinent legislative history may be found in a report which accompanied H.R. 5616, proposed legislation which preceded the enactment of and was identical to this statute. It provides a detailed explanation of the definitions in the statute, and emphasizes the intended broad coverage of its provisions. *House Committee on the Judiciary, Report on Counterfeit Access Device and Computer Fraud and Abuse Act of 1984*, H.R.Rep. No. 894, 98th Cong., 2d Sess. (1984).

The legislative history defines the terms ''knowing state of mind'' and ''with the intent'' as used in the 18 U.S.C. § 1029(a). *See United States v. Bailey*, 444 U.S. 394, 404 (1976). The report discusses the concept of ''willful blindness'' and the proof required for such a defense to succeed. *See United States v. Jewell*, 532 F.2d 697, 700 n. 7. (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

Congress intended that prosecutions for the use of ''unauthorized access devices'' be directed to activity involving a criminal or an organized crime ring that traffics in fraudulent credit cards. Offenses involving a valid card owner who knowingly uses an expired or revoked card should be handled by state and local authorities or in civil actions by the credit card companies.

9-49.140 Investigative Agencies Responsibilities

The statute gives authority to the Secret Service, in addition to any other agency having jurisdiction such as the Federal Bureau of Investigation (or the U.S. Postal Service under Title 15), to investigate offenses under this new section. The Secret Service and the Federal Bureau of Investigation (FBI) have established guidelines to delineate their investigative authority where both agencies have concurrent jurisdiction. Generally, responsibility will be divided consistent with the traditional jurisdictional interests of the two agencies.

The FBI will conduct investigations of cases involving the banking system, or which include violations of the bank fraud and embezzlement statutes, fraud by wire, and bribery of bank officers and employees. The FBI will handle cases that fall primarily within its traditional jurisdiction, including matters pertaining to organized crime, terrorism, and foreign counterintelligence. The Secret Service will investigate violations of the statute in cases not involving banks, such as counterfeiting or misuse of credit cards or access devices of major credit card companies, telephone companies, and department stores, etc.

9-49.160 Fraudulent Use of Credit Cards and Debit Instruments--Title 15, Sections 1644 and 1693n

Although 18 U.S.C. § 1029 effectively replaces both 15 U.S.C. §§ 1644 and 1693n, the latter statutes have not been repealed. Thus, prosecutions are possible under either the new or old statute. Where possible, however, prosecution should be initiated under the new statute because of its broader scope, more severe penalties and because of the opportunity for enhanced penalties for repeat offenders. The misuse of account numbers, previously not covered in Title 15 and prosecutable only as a wire fraud, is now covered by 18 U.S.C. § 1029.

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9-60.000 PROTECTION OF THE INDIVIDUAL

9-60.100 KIDNAPPING (18 U.S.C. §§ 1201, 1202)

9-60.110 Investigative and Prosecutorial Policy

9-60.111 Kidnapping vis a vis Missing Persons

It has been the FBI's policy that, except in parental kidnapping matters, every reported kidnapping in which circumstances indicate that an actual abduction has taken place is afforded an immediate preliminary investigation to determine if a full investigation under the federal kidnapping statute is warranted.

The Criminal Division's policy is to review any decision by the FBI not to conduct an investigation in those missing persons cases wherein the facts indicate possible violations of the federal kidnapping statute. Under this policy, the FBI will refer information concerning questionable missing person cases to the Criminal Division. The Division will thoroughly review such information, and if deemed warranted, will request the FBI to commence a kidnapping investigation.

Recently, however, some controversy has arisen as to the adequacy of the investigative guidelines in situations where much younger children are missing. With regard to missing children of very tender years, we believe that in many cases an abduction may be assumed so as to warrant an immediate preliminary kidnapping investigation by the FBI.

U.S. Attorneys who become aware of a missing person case in their district which may involve a kidnapping should insure that such information is brought to the attention of the Criminal Division. Questions concerning this policy should be directed to attorneys of the Terrorism and Violent Crime Section (FTS) 368-0849.

9-60.112 Allegations of ''Mental Kidnapping'' or ''Brainwashing'' by Religious Cults

In recent years, we have received numerous complaints alleging that members of various religious sects are victims of ''brainwashing,'' ''mind-control,'' or ''mental kidnapping'' by leaders of these groups. A typical allegation is that new members are subjected to intensive indoctrination accompanied by inadequate amount of food and sleep, with the result that they become ''programmed'' to obey the wishes and commands of their leader and cease to think for themselves. As a general rule in these situations, there is no information or allegation that the ''brainwashed'' sect member has been physically restrained from leaving the sect.

It is our position that an allegation of ''brainwashing'' accompanied by interstate travel would not support a prosecution under the federal kidnapping statute. *See Chatwin v. United States*, 326 U.S. 455 (1946).

For cases involving possible violations of the peonage or involuntary servitude statutes (18 U.S.C. §§ 1581, 1583 and 1584) you should consult with the Involuntary Servitude Coordinators, Civil Rights Division, Criminal Section (FTS 3-3204), before making a prosecutive determination.

9-60.113 ''Deprogramming'' of Religious Sect Members

The Criminal Division has received a substantial number of complaints from members of various religious sects alleging that they have been abducted by their parents or persons acting on behalf of their parents for the purpose of ''deprogramming.''

It is a general policy of the Department not to become involved in situations which are essentially domestic relations controversies. If a parent abducts his/her adult child from a religious sect, accompanies that child throughout the ''deprogramming,'' and there is no violence or other aggravating circumstances, these facts would weigh against federal involvement. However, if violence or other aggravating circumstances exist, particularly where professional ''deprogrammers'' are involved, criminal prosecutions should be pursued if the evidence warrants.

9-60.120 Federal Jurisdiction

Federal jurisdiction over kidnapping extends to the following situations: (1) kidnapping in which the victim is willfully transported in interstate or foreign commerce; (2) kidnapping within the special maritime and territorial jurisdiction of the United States; (3) kidnapping within the special aircraft jurisdiction of the United States; (4) kidnapping in which the victim is a foreign official, an internationally protected person, or an official guest as those terms are defined in 18 U.S.C. § 1116(b); and (5) kidnapping in which the victim is a federal officer or employee designated in 18 U.S.C. § 1114.

9-60.130 Investigative and Supervisory Jurisdiction

Investigative jurisdiction is vested in the Federal Bureau of Investigation. Supervisory jurisdiction is vested in the Terrorism and Violent Crime Section.

9-60.140 FBI Assistance in Missing Persons Cases

In a missing person case, as a matter of cooperation, the FBI will, at the request of a state or local law enforcement agency, make available the facilities of the FBI Identification Division and the FBI Laboratory.

Information pertaining to certain categories of missing persons, including missing children, may be entered into the missing person file of the FBI operated National Crime Information Center (NCIC) by the local law enforcement agencies and, since passage of the Missing Children Act

(Pub.L. No. 97-272, amending, 28 U.S.C. § 534), by parents of missing children if the local law enforcement agency will not do so.

9-60.150 24 Hours Rebuttable Presumption

The rebuttable presumption set forth in 18 U.S.C. § 1201(b) does *not* create a presumption of kidnapping. Rather, it creates a presumption of transportation in interstate or foreign commerce in cases where an actual kidnapping has been established. The presumption was added to the statute to give the FBI jurisdiction to investigate. In a federal prosecution under 18 U.S.C. § 1201(a)(1), actual interstate or foreign transportation must be proved. *See United States v. Moore, 571 F.2d 76 (2d Cir. 1978).*

9-60.160 Penalty Provision

Public Law No. 92-539 deleted the then existing death penalty provision and provided for a penalty of ''imprisonment for any term of years or for life'' for kidnapping, 18 U.S.C. § 1201(a), or conspiracy to kidnap, 18 U.S.C. § 1201(c).

In 1976, Pub.L. No. 94-647 further extended the scope of the statute to cover situations in which the victim is a ''foreign official, an internationally protected person, or an official guest,'' (*see* USAM 9-65.830), and provided for a penalty of not more than 20 years imprisonment for an attempted kidnapping of such individuals (18 U.S.C. § 1201(d)). In 1986, Pub.L. No. 99-646 amended § 1201(a) to cover kidnappings of federal officers and employees designated in Section 1114 of Title 18 U.S.C., and provided for a penalty of not more than 20 years imprisonment for attempted kidnappings of persons so designated (Section 1201(d)).

9-60.170 Ransom Money

Section 1202 provides a penalty of not more than 10 years and/or a fine of $10,000, for the knowing receipt, possession or distribution of ransom money.

9-60.180 Use of the Fugitive Felon Act in Parent/Child Kidnappings

See discussion of the Fugitive Felon Act, 18 U.S.C. § 1073, with reference to parental kidnappings at USAM 9-69.421, and the Fugitive Felon Act generally at USAM 9-69.400.

9-60.200 THE CRIMINAL SANCTIONS AGAINST ILLEGAL ELECTRONIC SURVEILLANCE (18 U.S.C. §§ 2510 to 2513, 2701, 3121, 2232(c), 2521, 1367, AND 47 U.S.C. §§ 605, 553, 502)

9-60.201 Introduction

Congress has enacted comprehensive legislation governing electronic surveillance. In 1968, Congress passed Title III of the Omnibus Crime

Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* In 1978, the Foreign Intelligence Surveillance Act of 1978 (''FISA''), 50 U.S.C. § 1801 *et seq.*, was enacted. And most recently in 1986, Congress passed the Electronic Communications Privacy Act of 1986 (''1986 Act''), Public Law No. 99-508, which substantially revised Title III to provide coverage for the technological advances developed in the area of electronic communications since the passage of the original act. These sections explain the criminal provisions contained in Title III, as amended by the 1986 Act, other criminal provisions added by the 1986 Act, and the criminal prohibitions in the Federal Communications Act. The criminal sanction in FISA is dealt with in USAM 9-60.400.

The statutes prohibiting illegal electronic surveillance discussed in these sections are:

(1) 18 U.S.C. § 2510, which defines the terms used throughout Title III;

(2) 18 U.S.C. § 2511, which prohibits the interception of wire, oral, and electronic communications and the subsequent disclosure or use of illegally intercepted communications;

(3) 18 U.S.C. § 2512, which prohibits the manufacture, possession, advertisement, sale, and transportation in interstate or foreign commerce of devices that are primarily useful for the surreptitious interception of communications;

(4) 18 U.S.C. § 2513, which provides for the forfeiture of any device which is used, manufactured, or possessed in violation of sections 2511 or 2512;

(5) 18 U.S.C. § 2701, which prohibits unauthorized access to a wire or electronic communication while it is in electronic storage;

(6) 18 U.S.C. § 3121, which prohibits the installation of a pen register or trap and trace device without court authorization;

(7) 18 U.S.C. § 2232(c), which prohibits giving notice of a court approved electronic surveillance application in order to obstruct, impede, or prevent the interception;

(8) 18 U.S.C. § 2521, which authorizes the Attorney General to initiate civil proceedings to enjoin felony violations of Title III;

(9) 18 U.S.C. § 1367, which prohibits interference with the operation of a satellite;

(10) 47 U.S.C. § 605, which prohibits interception and divulgence or use of radio communications;

(11) 47 U.S.C. § 553, which prohibits receiving cable communications services without permission of the operator; and

(12) 47 U.S.C. § 502, which punishes willful and knowing violations of Federal Communication Commission regulations.

9-60.202 Prosecutive Policy

The criminal prohibitions against illegal electronic eavesdropping contained in Title III are part of the same act which permits federal law enforcement officers to engage in court-authorized electronic surveillance. Congress viewed the criminal sanctions and the court authorization provisions as two sides of the same coin. The retention of the government's authorization to engage in court-authorized electronic surveillance may depend on its vigorous enforcement of the sanctions against illegal electronic eavesdropping. Accordingly, it is the Department's policy to vigorously enforce these criminal prohibitions.

The Department's overall prosecutive policy under 18 U.S.C. § 2511 is to focus primarily on persons who engage or procure illegal electronic surveillance as part of the practice of their profession or as incident to their business activities. Less emphasis should be placed on the prosecution of persons who, in the course of transitory situations, intercept communications on their own without the assistance of a professional wiretapper or eavesdropper. This does not mean that such persons are never to be prosecuted, but simply that this type of prosecution is not a major thrust of the Department's enforcement program.

Most illegal interceptions fall into one of five categories: (1) domestic relations, (2) industrial espionage, (3) political espionage, (4) law enforcement, and (5) intra-business. The largest number of interceptions, more than 75 percent, are in the domestic relations category. It is the Department's policy to vigorously investigate and prosecute illegal interceptions of communications which fall within the industrial and political espionage, law enforcement, and intra-business categories. Generally such violations will have interstate ramifications which will make federal prosecution preferable to state prosecution. Nevertheless, in cases where the federal interest is slight, it may be appropriate to defer to state prosecution.

Illegal interceptions arising from domestic relations disputes generally present less of a federal interest and, therefore, local prosecution is more appropriate. However, this does not mean that federal prosecutors should abdicate responsibility for prosecuting such interceptions. Indeed, in view of the preponderance of this kind of interception, no enforcement program can be effective without the initiation of some prosecutions for deterrence purposes. U.S. Attorneys should develop effective

liaison with local prosecutors in order to convince them to shoulder their share of the burden.

Within the category of domestic relations violations, primary attention should be given to those instances in which a professional is involved, *e.g.*, private detective, attorney, moonlighting telephone company employee, and supplier of electronic surveillance devices. U.S. Attorneys should feel free to pursue these cases or refer them to local prosecutors; however, No professional should escape prosecution when a prosecutable case exists.

Domestic relations violations which do not involve a professional interceptor are the lowest priority cases for federal prosecution. While local prosecution is normally preferable, when local prosecutors are unwilling to pursue the case, resort to federal prosecution may be appropriate. Nevertheless, violations of this type will sometimes prove to be of insufficient magnitude to warrant either federal or state prosecution. In such cases, other measures may prove sufficient, for example, a civil suit for damages (18 U.S.C. § 2520), suppression of evidence (18 U.S.C. § 2515), or forfeiture of the wiretapping or eavesdropping paraphernalia (18 U.S.C. § 2513).

Disturbed persons often suspect that they are the victims of illegal interceptions. Consequently, a complaint which is based solely on suspicious noises heard on the telephone normally does not merit further investigation if the initial line check fails to produce independent evidence of a tap.

9-60.203 State Laws

Title III does not preempt the authority of the states to legislate concerning the interception of communications. The protection of privacy is as much a matter for local concern as protection of persons and property. Accordingly, the efforts of federal law enforcement personnel should supplement, not supplant, local action.

U.S. Attorneys should review the applicable statutes in their states. When there is no statute or when the existing statutes are inadequate, U.S. Attorneys should work through their federal-state law enforcement committees to obtain the enactment of appropriate legislation. When suitable state legislation exists but is not sufficiently used by local prosecutors, U.S. Attorneys should make efforts to stimulate local enforcement.

9-60.204 Investigative Jurisdiction and Supervisory Responsibility

Investigative jurisdiction over violations of 18 U.S.C. §§ 2511, 2512, 2701, 3121, and 2232(c) rests with the Federal Bureau of Investigation.

Supervisory responsibility for prosecutions rests with the General Litigation and Legal Advice Section of the Criminal Division.

9-60.205 Legislative History

A cogent statement of congressional intent in enacting Title III in 1968 appears in S.Rep. No. 1097, 90th Cong., 2d Sess. 88-108, *reprinted in* 1968 U.S.Code Cong. & Ad.News 2177. The most comprehensive treatment of legislative intent with respect to the 1986 Act is in S.Rep. No. 541, 99th Cong., 2d Sess. (1986).

9-60.210 Definitions Applicable to 18 U.S.C. § 2511 et seq.

9-60.211 ''Wire Communication''

The definition of a wire communication is set forth in 18 U.S.C. § 2510(1). It is limited to ''aural'' transfers, but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

9-60.212 ''Oral Communication''

The term ''oral communication'' is defined in 18 U.S.C. § 2510(3) to mean any verbal communication uttered by a person having a justifiable expectation of privacy. The legislative history indicates that an expectation of privacy would normally be justifiable in one's own home (*citing Silverman v. United States*, 365 U.S. 505 (1961)) or office (*citing Berger v. New York*, 388 U.S. 41 (1967)) but would not be justifiable in a jail cell (*citing Lanza v. New York*, 370 U.S. 139 (1962)) or an open field (*citing Hester v. United States*, 265 U.S. 57 (1924)). *See* S.Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968). A trespasser would not have a justifiable expectation of privacy. *Cf. United States v. Pui Kan Lam*, 483 F.2d 1202 (2d Cir.1973), *cert. denied*, 415 U.S. 984 (1974). An ''oral communication'' is specifically excluded from the definition of an ''electronic communication.'' 18 U.S.C. § 2510(12)(B). The effect of the exclusion is to make it clear that an oral communication under the statute can never be a radio communication. *See United States v. Rose*, 669 F.2d 23, 25-26 (1st Cir.), *cert. denied*, 459 U.S. 828 (1982).

9-60.213 ''Electronic Communication''

The definition of an ''electronic communication'' appears in 18 U.S.C. § 2510(12). This form of communication was added to Title III by the 1986 Act to cover most forms of electronic communications existing today. It includes any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system, but does not include: a ''wire'' or ''oral'' communication, as defined in Title III;

the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit; communications from tone-only paging devices; and communications from tracking devices.

9-60.214 ''Intercept''

The term ''intercept'' is defined in 18 U.S.C. § 2510(4) to mean the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. The 1986 Act broadened this definition to include non-aural acquisitions to accommodate the inclusion of electronic communications as protected communications under Title III.

9-60.215 ''Electronic, Mechanical, or Other Device''

The term ''electronic, mechanical, or other device'' is defined in 18 U.S.C. § 2510(5) to mean any device or apparatus which can be used to intercept communications. It is also meant to include any combination of parts designed or intended for use in converting those parts into such a device or apparatus and from which such a device or apparatus may be readily assembled. *See* S.Rep. No. 541, 99th Cong., 2d Sess. 13 (1986). Two exceptions to the meaning of ''electronic, mechanical, or other device'' are built into the statute.

The first exception is for telephone instruments furnished to a subscriber or user by a provider of a wire or electronic communication service and which are being used by the subscriber or user in the ordinary course of its business. The courts of appeals do not agree on the scope of the exception as it pertains to telephone extensions. The Criminal Division believes that the better view is found in *United States v. Harpel*, 493 F.2d 346, 351 (10th Cir.1974), wherein the court held that ''a telephone extension used without authorization or consent to surreptitiously record a private telephone conversation is not used in the ordinary course of business. This conclusion comports with the basic purpose of the statute, the protection of privacy. . . . .'' *But cf. Briggs v. American Air Filter, Inc.*, 630 F.2d 414 (5th Cir.1980); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir.1977). In addition, the Criminal Division takes the position that supervisory observing equipment used by some employers to monitor employee telephone communications falls within the ''ordinary use'' exception only if it is used solely for the legitimate business purpose of determining the need for training or improving the quality of service rendered by employees in the handling of telephone calls, and only after all employees are informed that their business telephone contacts are subject to observation. *See James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir.1979).

The second exception from the definition of an ''electronic, mechanical or other device'' is a hearing aid used to correct subnormal hearing to no

better than normal hearing. Use of an aid to hear sound that would otherwise be inaudible to a person with normal hearing does not fall within the exception.

9-60.216 ''Person''

The term ''person'' is defined in 18 U.S.C. § 2510(6) to mean any individual person as well as natural and legal entities. It specifically includes United States and state agents. According to the legislative history, ''[o]nly the governmental units themselves are excluded.'' S.Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968).

9-60.217 ''Contents''

The word ''contents'' is defined in 18 U.S.C. § 2510(8) to include any information concerning the substance, purport, or meaning of any wire, oral, or electronic communication. Excluded from the definition is the identity of the parties or the existence of the communication. It therefore distinguishes between the substance, purport, or meaning of the communication, and the existence of the communication or transactional records about it. *See* S.Rep. No. 541, 99th Cong., 2d Sess. 13 (1986).

9-60.220 18 U.S.C. § 2511

9-60.221 Scope of Prohibitions

Section 2511 of Title 18 prohibits the unauthorized interception, disclosure, and use of wire, oral, or electronic communications. The prohibitions are absolute, subject only to the specific exemptions in Title III. Consequently, unless an interception is specifically authorized, it is impermissible and, assuming existence of the requisite criminal intent, in violation of 18 U.S.C. § 2511.

Section 2511(1)(a) is a blanket prohibition against the intentional interception, endeavor to intercept, or procurement of another person to intercept or endeavor to intercept any wire, oral, or electronic communication.

Section 2511(1)(b) is applicable only to oral communications. It is less pervasive than the prohibition against the interception of oral communications contained in Section 2511(1)(a) and was included because of a question ''concerning the constitutionality of Section 2511(1)(a) as it relates to oral communications.'' *See* S.Rep. No. 1097, 90th Cong., 2d Sess. 92 (1968); *United States v. Burroughs*, 564 F.2d 1111, 1115 (4th Cir. 1977). The Criminal Division recommends that Section 2511(1)(b) should be charged in cases involving interception of oral communications. However, although the interception of an oral communication may violate both 2511(1)(a) and (b), a person may be convicted of only one offense under the section. *See* S.Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968).

Section 2511(c) and (d) of Title 18 provide additional penalties for the disclosure and use of illegally intercepted communications. The use or disclosure must be accompanied by knowledge or reason to know that the information concerned was obtained through an interception which violated 18 U.S.C. § 2511(1). The knowledge element can be satisfied either when the subject has actual knowledge or when the occurrence of the element ''can reasonably be foreseen.'' *Pereira v. United States*, 347 U.S. 1, 9 (1954).

Once the contents of an intercepted communication have become ''public information'' or ''common knowledge,'' disclosure or use of the contents of the communication is no longer prohibited. *See* S.Rep. No. 1097, 90th Cong., 2d Sess 93 (1968).

9-60.222 ''Intentional'' State of Mind

The 1986 Act changed the state of mind required to violate Sections 2511 and 2512 from ''willful'' to ''intentional.'' The purpose of the amendment was to make clear that inadvertent interceptions are not crimes under Title III. The legislative history of the 1986 Act explains what is meant by the term ''intentional'':

> ''Intentional'' means more than that one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective.
>
> A common means to describe conduct as intentional, or to say that one causes the result intentionally, is to state that it is done or accomplished ''on purpose.''

S.Rep. No. 541, 99th Cong., 2d Sess. 23 (1986).

9-60.223 Elements of Section 2511 Offenses

The essential elements of a violation of 18 U.S.C. § 2511(1)(a) are: (1) the intercepting, endeavoring to intercept, or procuring any other person to intercept a wire, oral or electronic communication; and (2) the doing of such acts intentionally. These elements contain sub-elements. For example, a wire communication must be furnished or operated by a person engaged in providing facilities for the transmission of interstate or foreign communications *or* communications *affecting* interstate or foreign commerce. Thus, private communication systems are covered where the affecting commerce jurisdictional basis is present. 18 U.S.C. § 2510(1). In addition, an oral communication must be uttered by a person having a justifiable expectation of privacy. *Id.* § 2510(2). An electronic communication must be made through a system that affects interstate or foreign commerce. *Id.* § 2510(12).

The essential elements of an 18 U.S.C. § 2511(1)(b) violation are: (1) the act or acts of using, endeavoring to use, or procuring another person to

use or endeavor to use an electronic, mechanical, or other device or its method of operations or communication; (2) the device or its method of operation or target meets one of the criteria specified in 18 U.S.C. § 2511(1)(b)(i) to (v); and (3) the doing of such act or acts intentionally.

The essential elements of a violation of 18 U.S.C. § 2511(1)(c) are: (1) the act or acts of disclosing or endeavoring to disclose to another person the contents of a wire, oral or electronic communication; (2) the doing of such act or acts knowing or having reason to know that the information was obtained through an illegal interception of a wire, oral or electronic communication; and (3) the doing of such act or acts intentionally.

The essential elements of a violation of 18 U.S.C. § 2511(1)(d) are: (1) the act or acts of using or endeavoring to use the contents of a wire, oral or electronic communication; (2) the doing of such act or acts knowing or having reason to know that the information was obtained through an illegal interception of a wire, oral or electronic communication; and (3) the doing of such act or acts intentionally.

9-60.230 Exceptions to the Prohibitions Against Intercepting Communications

9-60.231 Interceptions by Providers of Wire or Electronic Communications Services

Section 2511(2)(a)(i) of Title 18 permits employees of providers of wire or electronic communication services to intercept, disclose or use wire or electronic communications in the normal course of employment while engaged in any activity which is necessarily incident to the rendition of service or to the protection of the rights or property of the carrier of the communication. Interception, divulgence, or use for other purposes is not permitted. The provision allows telephone companies to combat ''blue box'' toll fraud by intercepting portions of telephone calls which have been completed by circumventing the companies' billing systems. *See United States v. Auler*, 539 F.2d 642 (7th Cir.1976); *United States v. Clegg*, 509 F.2d 605 (5th Cir.1975).

9-60.232 Law Enforcement Interceptions Accomplished Consensually

Under 18 U.S.C. § 2511(2)(c), a person who is acting under color of law may intercept communications when he/she is a party to the communication or when a communicating party consents to the interception.

9-60.233 Other Consensual Interceptions

When not acting under color of law, a person who intercepts a communication with the consent of a party does not violate Section 2511(1) unless the communication is intercepted for the purpose of committing any criminal or

tortious act in violation of the Constitution or laws of the United States or of any state. 18 U.S.C. § 2511(2)(d). Consent may be expressed or implied. Indeed, ''[s]urveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to.'' S.Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968). The Criminal Division believes that consent can be implied where the communication involves institutional or personal protection, the interception is limited to the minimum necessary to fulfill that interest, and a communicating party is notified that his/her communications are subject to interception. *See Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir.1983).

9-60.234 Exceptions for the Interception of Certain Electronic Communications

Because the definition of an electronic communication, as added by the 1986 Act, is so broad and all-inclusive, it became necessary to carve out some forms of electronic communications that either appeared not to be deserving of privacy protection or where a policy decision was made by Congress not to include a specific form of electronic communication. The exceptions appear in Title III either as exceptions to defined terms in 18 U.S.C. § 2510(12) or as exceptions to unlawful activity in Section 2511(2)(g). The exceptions in Section 2510 include the radio portion of cordless telephone conversations (18 U.S.C. § 2510(12)(A)); tone only paging devices (*Id.* § 2510(12)(C)); and communications from tracking devices (*Id.* § 2510(12)(D)).

The exceptions to unlawful activity listed in Section 2511(2)(g) include electronic communications that are ''readily accessible to the general public,'' as that term is defined in 18 U.S.C. § 2510(16), and radio communications that are for the use of the general public, including ship to shore general public type communications, public safety communications, citizen band radio, general mobile radio services and the like. *Id.* § 2511(2)(g). This subsection also contains other specific exceptions relating to interaction with the Federal Communications Act or where there is a necessity to service the system or locate interference. *Id.*

In addition, a person or entity providing an electronic communication service to the public may not intentionally divulge the contents of any communication while in transmission on that service except as otherwise authorized in Title III, or with the consent of the originator or intended recipient of the communication. Divulgence to a law enforcement agency is permitted if the communication was inadvertently obtained by the service provider and appeared to pertain to the commission of a crime. 18 U.S.C. § 2511(3).

9-60.235 Other Exceptions

In addition to the authorized interceptions discussed above, the remaining two major kinds of authorized interceptions are (1) the court-

authorized or emergency interceptions conducted pursuant to 18 U.S.C. § 2516 *et seq.*, and (2) electronic surveillance conducted pursuant to the Foreign Intelligence Surveillance Act (50 U.S.C. § 1801 *et seq.*).

9-60.240 Penalties

The basic penalty provision for the intentional interception of a wire, oral, or electronic communication is five years imprisonment and a fine under Title 18, United States Code. 18 U.S.C. § 2511(4)(a).

The first exception applies to unscrambled, unencrypted *radio* communications provided that the conduct is a first offense and is not for a tortious or illegal purpose, or purposes of direct or indirect commercial advantage or private financial gain. *Id.* § 2511(4)(b). Under such circumstances, the offender is subject to one year imprisonment and a fine under Title 18, unless the communication is the *radio* portion of a cellular telephone communication, a public land mobile radio service communication, or a paging service communication, in which case the offender is subject only to a fine of $500.

In addition, under 18 U.S.C. § 2511(5), if the interception is the private or home viewing of a private satellite video communication, or of a radio communication transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission (which deals with remote pickup broadcast stations), and if the communication is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the offender is subject only to civil suit by the federal government, *Id.* § 2511(5)(a)(i), for appropriate injunctive relief. A second or subsequent offense requires a mandatory $500 civil fine. 18 U.S.C. § 2511(5)(a)(ii).

A further exception to the criminal provisions applies to the interception of an unencrypted, unscrambled satellite transmission that is transmitted (i) to a broadcasting station for purposes of retransmission to the general public; or (ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls. 18 U.S.C. § 2511(4)(c).

It is intended that the private viewing of satellite cable programming, network feeds and certain audio subcarriers will continue to be governed exclusively by 47 U.S.C. § 605. S.Rep. No. 541, 99th Cong., 2d Sess. 22 (1986). In addition, Congress intended the phrase ''direct or indirect commercial advantage or private financial gain'' to have the same meaning as those terms have when used in 47 U.S.C. § 605(b). S.Rep. No. 541, 99th Cong., 2d Sess. 21 (1986).

9-60.250 Use of the Contents of Illegally Intercepted Communications Against the Interceptor

Section 2515 of Title 18 prohibits use of the contents of illegally intercepted communications as evidence in judicial proceedings. No exception is contained on the face of the statute for the use of the contents, when necessary, as evidence in a prosecution against the interceptor. Nevertheless, the legislative history of Title III indicates that ''in certain limited situations disclosure and use of illegally intercepted communications would be appropriate to the proper performance of the officers' duties.'' *See* S.Rep. No. 1097, 90th Cong., 2d Sess. 99 (1968). The example given is the use and disclosure of illegally intercepted communications ''in the investigation and prosecution of an illegal wiretapper himself.'' *Id.* at 99-100.

In *United States v. Underhill*, 813 F.2d 105 (6th Cir.1987), the court held that tape recordings of conversations consensually made by operators of an illegal gambling enterprise for the purpose of facilitating their gambling operation would not be suppressed when used against the operators themselves, even though the recordings were illegal because they were made for a criminal purpose. The court reasoned that Congress could not have intended to deprive prosecutors of the clearest evidence of wrongdoing available simply because the defendants committed a crime in creating that evidence. *But cf. United States v. Vest*, 813 F.2d 477 (1st Cir.1987) (Section 2515 requires suppression of a tape recording of a bribe transaction involving a corrupt policeman made privately by the briber without governmental participation).

In addition, it has been held that when the victims of the interceptions consent, the contents of the communication may be used against the interceptors. *See United States v. Bragan*, 499 F.2d 1376 (4th Cir.1976). However, when the victims object, at least when the contents of the illegally intercepted communications are not necessary to prove the charges, one court has held that such contents may not be introduced at trial. *See United States v. Liddy*, 12 Cr.L.Rep. 2343 (D.C.Cir., Jan. 19, 1973) (otherwise unreported), *rev'g United States v. Liddy*, 354 F.Supp. 217 (D.D.C. 1973).

9-60.260 18 U.S.C. § 2512

9-60.261 Scope of Prohibitions

Section 2512 of Title 18 provides penalties for conduct concerning devices which are primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications. It prohibits sending such devices through the mail or in interstate or foreign commerce. *Id.* § 2512(1)(b). It also prohibits the publication of an advertisement (1) concerning any device if the advertisement promotes the use of the device for the purpose of surreptitious interceptions, or (2) concerning

devices which are primarily useful for the surreptitious interception of communications. A ''device'' under Section 2512 is intended to include any combination of parts designed or intended for use in converting those parts into such a device and from which such a device may be readily assembled. *See* S.Rep. No. 541, 99th Cong., 2d Sess. 13 (1986).

The legislative history of Section 2512 indicates that the statutory prohibition applies to such things as the martini olive transmitter, the spike mike, the infinity transmitter, and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler, or cigarette pack. *See* S.Rep. No. 1097, 90th Cong., 2d Sess. 95 (1968). However, the legislative history specifically exempts parabolic and other directional microphones ''ordinarily used by broadcasters at sports events'' from the reach of the statute. *Id.*

It is worthy of note that 18 U.S.C. § 2512(1)(c)(i) prohibits the advertisement of any device for ''surreptitious interception.'' Such advertising is prohibited although the device itself may not be primarily useful for surreptitious interceptions and although the interceptions promoted are surreptitious, one-party consensual interceptions permissible under 18 U.S.C. § 2511(2)(d). *See United States v. Bast*, 495 F.2d 138 (D.C.Cir.1974).

Section 2512 violations are punishable by a fine of not more than $10,000 and imprisonment of not more than five years.

Section 2512(2) excepts from the prohibitions of the section providers of wire or electronic communication services acting in the normal course of their business and law enforcement officers acting in the normal course of their activities, or persons under contract with such law enforcement agencies.

9-60.262 Prosecutive Policy

Flagrant violations of 18 U.S.C. § 2512 should be prosecuted vigorously, especially violators who possess such devices in order to engage in electronic surveillance as a business.

Less culpable first offenders and those who violate the statute because of ignorance of the law may be appropriate subjects for more lenient disposition. In some cases a warning may be sufficient. Nevertheless, in all cases except, perhaps, for minor advertising violations, the U.S. Attorney's Office should require that the prohibited device either be surrendered voluntarily to the FBI or forfeited pursuant to 18 U.S.C. § 2513.

9-60.263 Forfeiture: 18 U.S.C. § 2513

Any device used in a violation of 18 U.S.C. § 2511 or sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of 18

U.S.C. § 2512 may be seized and forfeited to the United States pursuant to 18 U.S.C. § 2513.

When a prosecution is concluded or when prosecutive action is declined, all devices which have been used in violation of 18 U.S.C. § 2511 and all devices sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of Section 2512, if their value is less than $10,000, should be delivered to the United States Marshal for the district in which the seizure was made for forfeiture. *See* 28 C.F.R. § 8.2. If the value of the devices exceeds $10,000, then the U.S. Attorney should institute proceedings for their forfeiture. *See* 19 U.S.C. §§ 1607 and 1610.

9-60.270 Other Criminal Offenses Added by 1986 Act

9-60.271 Unlawful Access to Stored Communications: 18 U.S.C. § 2701

The 1986 Act added new statutory provisions, 18 U.S.C. §§ 2701 to 2710, to protect the privacy of stored electronic communications, either before such a communication is transmitted to the recipient, or, if a copy of the message is kept, after it is delivered. These provisions focus on technologies such as electronic mail and computer transmissions, where copies of the messages are kept. Electronic storage is defined in 18 U.S.C. § 2510(17) as both any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof and the storage of such communication by an electronic communication service for purposes of backup protection of such communication.

Section 2701 of Title 18 makes it an offense to (a) intentionally access, without authorization, a facility through which an electronic communication service is provided; or (b) intentionally exceed the authorization of such facility, *and* as a result of this conduct, obtain, alter or prevent authorized access to a wire or electronic communication while it is in electronic storage in such a system. 18 U.S.C. § 2701(a). This section covers ''electronic mail'' service, which permits a sender to transmit a digital message to the service's facility, where it is held in storage until the addressee requests it, U.S.C. § 2701, as well as ''voice mail'' service.

This provision is intended to address ''computer hackers'' and corporate spies. The provision is not intended to criminalize access to ''electronic bulletin boards,'' which are generally open to the public. A communication will be found to be readily accessible to the general public if the telephone number of the system and other means of access are widely known, and if a person does not, in the course of gaining access, encounter any warnings, encryptions, password requests, or other indicia of intended privacy. To access a communication on such a system is not a violation of the law. 18 U.S.C. § 2701(a).

If a violation of 18 U.S.C. § 2701(a) was committed for commercial advantage, malicious destruction or damage, or private financial gain, the violator could receive up to a year in prison and a $250,000 fine for the first offense and up to two years imprisonment and a fine as provided by Title 18, United States Code, for a second or subsequent offense. In all other cases, a jail term of up to six months and a fine of $5,000, or both, could be imposed. 18 U.S.C. § 2701(b)(2).

9-60.272 Unauthorized Installation or Use of Pen Registers and Trap and Trace Devices: 18 U.S.C. § 3121

The 1986 Act added 18 U.S.C. §§ 3121 to 3126, which regulate the use of pen registers and trap and trace devices. Section 3121(a) contains a general prohibition against installation or use of a pen register or trap and trace device without first obtaining a court order under 18 U.S.C. § 3123 or under FISA. Section 3121(c) provides that whoever ''knowingly'' violates Section 3121(a) is subject to a fine under Title 18 and imprisonment of not more than one year.

The statute contains provisions exempting a service provider using a pen register or trap and trace device in order to test, operate, or maintain its equipment and services, or to protect the property rights of its customers, 18 U.S.C. § 3121(b)(1), or to record the fact that a wire or electronic communication was initiated or completed in order to protect itself, another provider, or a customer from fraud or abuse. 18 U.S.C. § 3121(b)(2). Finally, it is not necessary to obtain a court order when the telephone user consents to the installation of the pen register or trap and trace device. 18 U.S.C. § 3121(b)(2).

9-60.273 Providing Notice of Electronic Surveillance: 18 U.S.C. § 2232(c)

The 1986 Act amended 18 U.S.C. § 2232 to criminalize the disclosure of a court-approved electronic surveillance application. The new provision, added as subsection (c) to 18 U.S.C. § 2232, provides a five year penalty and a fine under Title 18 for warning or attempting to warn the subject of an electronic surveillance application ''in order to obstruct, impede or prevent such interception.''

9-60.274 Injunctions Against Illegal Interception: 18 U.S.C. § 2521

The 1986 Act added 18 U.S.C. § 2521, which authorizes the Attorney General to initiate civil proceedings to enjoin a felony violation of Title III. The new provision directs the court to proceed ''as soon as practicable'' to the hearing and determination of such an action, and authorizes the court to enter a restraining order, prohibition, or other action as is warranted before final determination to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. In addition, Section 2521 provides

that any such injunction proceeding is governed by the Fed.R.Civ.P., except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

9-60.275 Interference With the Operation of a Satellite: 18 U.S.C. § 1367

The 1986 Act added 18 U.S.C. § 1367, which makes it an offense to intentionally or maliciously interfere with the authorized operation of a communications or weather satellite, or to hinder any satellite transmission. This section is intended to cover interference with transmissions from the ground to the satellite and transmissions from the satellite to the ground. *See* S.Rep. No. 541, 99th Cong., 2d Sess. 49 (1986). The penalty for this offense is a fine under Title 18 and imprisonment for not more than 10 years. The criminal prohibition does not apply to any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency or of an intelligence agency of the United States.

9-60.280 Criminal Prohibitions in the Federal Communications Act

9-60.281 Interception of Radio Communications: 47 U.S.C. § 605

Section 605(a) of Title 47 prohibits persons who transmit or receive wire or radio communications from divulging such communications except to authorized persons. According to the legislative history, the provision ''is designed to regulate the conduct of communications personnel.'' S.Rep. No. 1098, 90th Cong., 2d Sess. 108 (1968).

The nature of radio communications is such that there is the potential for a multitude of petty 47 U.S.C. § 605 violations which do not warrant the initiation of federal prosecutions. Consequently, the proper use of federal law enforcement resources usually requires that investigation and prosecution of 47 U.S.C. § 605 violations be reserved for those cases in which there is a continuing, repeated, and flagrant violation of the law despite the application of lesser measures. It should be noted that the Cable Communications Policy Act of 1984 carved out an exception for the interception of satellite cable programming by an individual for private viewing. Prior to the act, such an interception and use was, arguably, a violation of the law.

The word ''person'' in 47 U.S.C. § 605 does not include a law enforcement officer acting in the usual course of his or her duties. *See United States v. Hall,* 488 F.2d 193 (9th Cir.1973); S.Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968).

A person who ''willfully'' violates the criminal prohibitions contained in this section is subject to a fine of not more than $1,000 and imprisonment for not more than six months. 47 U.S.C. § 605(d)(1). If a person willfully violates this provision for purposes of direct or indirect com-

mercial advantage or private financial gain, the penalty is a fine of not more than $25,000 and imprisonment for not more than one year, and a $50,000 fine and imprisonment for two years for any subsequent conviction. *Id.* § 605(d)(2).

The statute also prohibits the importation, manufacture, sale, or distribution of equipment with the intent to use it in any activity prohibited by Section 605(a), and provides the same criminal penalties as for a person who has engaged in any such prohibited activity. *Id.* § 605(d)(4).

9-60.282 Unauthorized Reception of Cable Service: 47 U.S.C. § 553

The Cable Communications Policy Act of 1984 added a new section, 47 U.S.C. § 553. This section prohibits receiving cable communications service without permission of the operator, thereby prohibiting the theft of commercial cable communications. The sale or distribution of equipment that would enable a person to receive, without authority, the reception of communications services offered over a cable system also falls within the proscription of this provision.

The act provides for both criminal and civil penalties for violations of this section. The victim of an interception may bring a civil action in federal court for an injunction, damages, and costs, including reasonable attorneys' fees. Since there is a civil remedy for violations of 47 U.S.C. § 553, U.S. Attorneys should consider whether this civil remedy is an adequate alternative to prosecution.

9-60.283 Violation of FCC Regulations: 47 U.S.C. § 502

Under 47 U.S.C. § 502, any person who willfully and knowingly violates a regulation of the Federal Communications Commission is subject to a maximum fine of $500 for each day on which a violation occurs. Two pertinent regulations are found in 47 C.F.R. §§ 2.701 and 15.11, which prohibit the use of radio devices to intercept or record conversations unless *all* parties to the conversation first consent.

9-60.300 INTERSTATE AND FOREIGN EXTORTION: COMMUNICATIONS AND THREATS (18 U.S.C. §§ 875 TO 877)

9-60.310 Overview of Pertinent Provisions

Section 875 of Title 18 prohibits the transmission in interstate or foreign commerce of: (1) any demand or request for ransom or reward for the release of any kidnapped person; (2) a threat to kidnap or injure any person, either with or without the intent to extort; or (3) with intent to extort, a threat to injure the property or reputation of any person, including the reputation of a deceased person, or a threat to accuse any person of a crime.

Section 876 of Title 18 prohibits causing the mailing by the Postal Service, or the depositing for mail, of matter which contains: (1) a demand or request for ransom or reward for the release of any kidnapped person; (2) a threat to kidnap or injure any person either with or without the intent to extort; or (3) with intent to extort, a threat to injure the property or reputation of any person or deceased person, or threat to accuse any person of a crime.

Section 877 of Title 18 prohibits the mailing, in a foreign country for final delivery by the Postal Service within the United States of any communication containing: (1) a demand or request for ransom or reward for the release of any kidnapped person; (2) a threat to kidnap or injure any person, either with or without the intent to extort; (3) with intent to extort, a threat to injure the property or reputation of any person, including the reputation of a deceased person, or a threat to accuse any person of a crime.

9-60.320 Jurisdictional Requirements of 18 U.S.C. § 875

As amended by the Criminal Law and Procedure Technical Amendments Act of 1986, Section 875 now applies to both interstate and foreign telephone calls or other communications. Thus, any communication that crosses state or national borders is included within the scope of the provision.

9-60.330 Investigative Jurisdiction

Investigative jurisdiction for these statutes is vested in the FBI, with the following exception: the Postal Service investigates the depositing for mail, or causing to be so delivered, of any threat to injure the reputation of any person or to accuse any person of a crime.

9-60.340 Supervisory Jurisdiction

Supervisory jurisdiction for these statutes is vested in the Terrorism and Violent Crime Section of the Criminal Division, FTS 368-0849.

9-60.350 Special Considerations in Proving a Threat

A threat has been defined as ''an avowed present determination or intent to injure presently or in the future.'' *See United States v. Dysart,* 705 F.2d 1247, 1256 (10th Cir.1983); *United States v. Marino,* 148 F.Supp. 75, 77 (N.D.Ill.1957). *See also* 2 E. Devitt and C. Blackmar, *Federal Jury Practice Instructions,* § 66.04 (3d ed. 1977). Most courts have held that the government need not prove that the defendant actually intended to carry out the threat. *See, e.g., Dysart, supra,* at 1257; *United States v. Kelner,* 534 F.2d 1026 (1977) (collecting cases). *Contra, United States v. Patillo,* 438 F.2d 13, 16 (4th Cir.1971) (en banc). The issue of defendant's intent in uttering particular words (*e.g.,* whether an alleged threat was

made seriously or merely in jest), is a question of fact to be determined by the jury upon consideration of the words themselves and the circumstances surrounding their use. *See Martin v. United States,* 691 F.2d 1235, 1239-40 (8th Cir.1982), *cert. denied,* 459 U.S. 1211 (1983); *United States v. Carrier,* 672 F.2d 300, 304-06 (2d Cir.), *cert. denied,* 457 U.S. 1139 (1982).

A threat may be communicated to persons other than the person to whom the threat is directed. *See, e.g., United States v. Cooper,* 523 F.2d 8 (6th Cir.1975) (threats to injure fictitious persons made during calls to radio station). *See also Kelner, supra* (defendant threatened during television interview to assassinate foreign leader).

The Ninth Circuit has stated that, as a general rule, the truth of damaging allegations underlying a threat to injure the reputation of another is no defense to a charge of extortion. *See United States v. Van der Linden,* 561 F.2d 1340, 1341 (9th Cir.1977), *cert. denied,* 435 U.S. 974 (1978).

9-60.400 CRIMINAL SANCTIONS AGAINST ILLEGAL ELECTRONIC SURVEILLANCE—THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA), 50 U.S.C. § 1809

9-60.401 Introduction

Congress has enacted comprehensive legislation governing electronic surveillance. In 1968, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* In 1978, the Foreign Intelligence Surveillance Act of 1978 (''FISA''), 50 U.S.C. § 1801 *et seq.*, was enacted. And most recently in 1986, Congress passed the Electronic Communications Privacy Act of 1986 (''1986 Act''), Public Law No. 99-508, which substantially revised Title III to provide coverage for the technological advances developed in the area of electronic communications since the passage of the original act.

These statutes share several common characteristics. Both Title III and FISA prescribe authorization procedures which must be followed before electronic surveillance can be conducted. *Compare* 18 U.S.C. §§ 2516 to 2517 *with* 50 U.S.C. §§ 1802 to 1805. These procedures include judicial approval of surveillance applications; minimization of interceptions by surveilling officials; and limitations on the use of intercepted information. Moreover, both statutes impose civil and criminal sanctions on unauthorized surveillance activities. *Compare* 18 U.S.C. §§ 2511 (criminal penalties) and 2520 (civil sanctions) *with* 50 U.S.C. §§ 1809 (criminal penalties) and 1810 (civil sanctions).

9-60.402 Investigative Jurisdiction and Supervisory Responsibility

Investigative jurisdiction over violations of 50 U.S.C. § 1809 rests with the Federal Bureau of Investigation. Supervisory responsibility for

prosecutions involving Section 1809 rests with the General Litigation and Legal Advice Section of the Criminal Division.

9-60.410 50 U.S.C. § 1809: Elements of the Offense

Section 1809(a) of Title 50 provides that a person is guilty of an offense if he/she either:

(1)(a) intentionally

(b) engages in electronic surveillance

(c) under color of law, except as authorized by statute; *or*

(2)(a) intentionally

(b) discloses or uses information

(c) obtained under color of law

(d) by electronic surveillance

(e) knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

Thus, Section 1809(a) reaches two distinct acts: (1) engaging in unauthorized surveillance under color of law; and (2) using or disclosing information obtained under color of law through unauthorized electronic surveillance. Each offense involves an ''intentional'' state of mind and unauthorized ''electronic surveillance.''

9-60.411 The Intent Requirement

FISA requires that a violation of Section 1809(a) be done ''intentionally.'' The legislative history makes clear that Section 1809(a) violations were intended to be specific intent crimes, reaching only purposeful or deliberate efforts to engage in unauthorized electronic surveillance. H.R.Rep. No. 1283, 95th Cong., 2d Sess. 97 (1978).

9-60.412 Electronic Surveillance

Under FISA ''electronic surveillance'' is defined to include ''the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs within the United States . . . .'' 50 U.S.C. § 1801(f)(2). The ''contents'' of a communication is defined to include ''any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.'' 50 U.S.C.

§ 1801(n), thus suggesting that the surveillance covered by FISA includes more than simply intercepting the verbal contents of some communication.

The legislative history of FISA confirms that this broad definition of electronic surveillance was intended to reach beyond verbal interceptions to other activities.

H.R.Rep. No. 1283, 95th Cong., 2d Sess. 51 (1978); *see* S.Rep. No. 701, 95th Cong., 2d Sess. 35 (1978).

Accordingly, both FISA and Title III apply to the interception of computer data transmissions, voice and display paging devices, and regulate the use by law enforcement officials of pen registers and trap and trace devices. Tone only paging devices are not covered under either FISA or Title III. FISA only prohibits the interception of radio communications when the communications are made ''under circumstances in which a person has a reasonable expectation of privacy.'' 50 U.S.C. § 1801(f)(1). Since the message transmitted by a tone only paging device is not a communication over which there would be a reasonable expectation of privacy, FISA should not prohibit its interception.

9-60.420 Penalties

Although FISA and Title III now cover many of the same wire and radio communications, the criminal penalties applicable to each such communication may differ. *Compare* 50 U.S.C. § 1809(c) (5 years imprisonment and $10,000 fine) *with* 18 U.S.C. § 2511(4) (providing a sliding scale of imprisonment depending on the nature of the communication and other circumstances, and a fine under Title 18). Because the 1986 Act is the most recent enactment of criminal penalties for unlawful interceptions, it is recommended that U.S. Attorneys' offices prosecute electronic eavesdropping violations under Title III, unless national security or other exceptional circumstances exist that warrant application of FISA. Additionally, the legislative history of FISA makes clear that a single unlawful interception should not be punished under both statutes. *See* H.R. No. 1283, 95th Cong., 2d Sess. 97 (1978).

9-60.430 Persons Covered by 50 U.S.C. § 1809(a)

The scope of 50 U.S.C. § 1809 is limited by subsection (d) of that statute, which provides that: ''[t]here is federal jurisdiction over an offense under this section if the person committing the offense was an officer or an employee of the United States at the time the offense was committed.'' Thus, jurisdiction exists over violations of Section 1809(a) only if the person acting under color of law was also a federal officer or employee.

9-60.500 CRIMINAL SOLICITATION

9-60.501 Overview

Section 373 of Title 18, United States Code, defines and punishes the offense of solicitation to commit a federal crime of violence. The purpose of Section 373 is to allow law enforcement officials to intervene at an early stage where there has been a clear demonstration of an individual's criminal intent and danger to society. If the solicited crime of violence is actually carried out, the solicitor is punished as an aider and abettor. *See* Senate Report No. 225, 98th Cong., 1st Sess. 308-310 (1983).

9-60.510 Investigative Jurisdiction

The Federal Bureau of Investigation has investigative jurisdiction. Where the underlying felony is within the investigative jurisdiction of another federal law enforcement agency, it may be appropriate for that other agency to be involved in or assume responsibility for investigating the solicitation. This issue is to be resolved on a case by case basis.

9-60.520 Supervisory Jurisdiction

Supervisory jurisdiction is exercised by the Terrorism and Violent Crime Section.

9-60.530 Elements

Section 373 of Title 18 contains two essential elements. First, the offender must have the intent that another person engage in conduct constituting a federal felony that has an element the use, attempted use, or threatened use of violence against property or against the person of another. That intent must be manifested by strong corroborative circumstances. Second, the offender must command, entreat, induce, or otherwise endeavor to persuade that other person to engage in such conduct.

9-60.540 First Amendment Implications

The legislative intent is clear that it is the incitation to criminal activity that is punishable and not mere advocacy of ideas, which is protected by the First Amendment. *See* S.Rep. No. 225, *supra*, at 309.

9-60.550 Penalty

Section 373 of Title 18 sets the penalty for solicitation as not more than one-half the maximum term of imprisonment or fine or both fixed for the crime solicited. It also provides that if the crime solicited is punishable by life imprisonment or death, the maximum penalty for its solicitation is twenty years imprisonment.

9-60.560 Affirmative Defense—Renunciation

Subsection (b) of 18 U.S.C. § 373 provides for an affirmative defense of renunciation. The defendant bears the burden of proving, by a preponderance of the evidence, that he voluntarily and completely abandoned his criminal intent *and* that he actually prevented the commission of the crime solicited. To be voluntary and complete, the renunciation must not be motivated by a decision to postpone the crime or substitute another victim or objective. In addition, the defendant must actually prevent the crime; a mere effort or attempt to prevent the crime is not sufficient to meet the requirements of the defense.

9-60.570 Culpability of Solicitee

Solicitation is an offense whether or not the solicited crime is committed. The fact that the solicitee cannot be convicted of the violent felony is not a defense to a prosecution for criminal solicitation, any more than it is in a prosecution for aiding and abetting the substantive offense.

9-60.580 Merger

The purpose of this statute is to allow law enforcement officials to intervene as early as possible to prevent criminal behavior. Consequently, if the solicitee successfully completes the criminal act, the solicitor may be prosecuted as an aider and abettor of the solicited act. S.Rep. No. 225, *supra,* at 308. The solicitation merges into the completed offense.

9-60.700 HOSTAGE TAKING (18 U.S.C. § 1203)

9-60.710 Prosecutive Policy

It is the view of the Department of Justice that most hostage taking matters that arise within the United States can best be handled by state and local authorities. However, there may at times be situations in which federal involvement is appropriate (*e.g.*, if the hostage is a federal official or an international guest, the third party is the United States, the perpetrators are international terrorists, etc.). Because of the strong preference for state and local handling of hostage taking matters within the United States, attorneys for the government should discuss a proposed prosecution with the Criminal Division prior to its initiation. In cases of hostage taking outside the United States, other factors, such as legal issues regarding the exercise of extraterritorial jurisdiction, foreign policy considerations, and costs, are involved; therefore, it is mandatory that attorneys for the government seek approval from the Criminal Division prior to the initiation of a proposed prosecution. *See* USAM 9-2.136, *supra*.

9-60.720 Investigative Jurisdiction

Federal Bureau of Investigation.

9-60.730 Supervising Section

Terrorism and Violent Crime Section.

9-60.740 Discussion of the Offense

9-60.741 General

Section 1203 of Title 18 is intended to implement fully the International Convention Against the Taking of Hostages. *See International Legal Materials,* Vol. XVIII, No. 6, November 1979, at 1456-1463. 18 U.S.C. § 1203 became effective on January 6, 1985, when the United States became a party to the Convention after having deposited its instrument of ratification of the Convention with the United Nations on December 7, 1984.

9-60.742 Hostage Taking

Under the Convention, hostage taking is the seizing or detaining of an individual coupled with a threat to kill, injure, or continue to detain that individual in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the detained individual. It is clearly the intent of the Congress that the statutory phrase ''third person or a governmental organization'' include everything covered by the term ''third party'' used in the Convention. The term ''government organization'' covers national, state, and local governments as well as international governmental organizations. *See* 18 U.S.C. § 831(f)(2). The term ''person'' covers ''corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'' *See* 1 U.S.C. § 1.

9-60.743 Offense—18 U.S.C. § 1203(a)

Subsection 1203(a) makes it a federal crime to engage in hostage taking when the jurisdictional conditions in subsection 1203(b) are present.

9-60.744 Jurisdictional Conditions—18 U.S.C. § 1203(b)

Subsection 1203(b) sets forth the limits on federal jurisdiction over the crime of hostage taking.

A. Offenses Committed Outside the United States

If the hostage taking occurs outside the territorial jurisdiction of the United States, subsection 1203(b)(1) provides for federal jurisdiction in these circumstances: (a) if the perpetrator or one of the hostage victims

is a national of the United States; (b) if the perpetrator, regardless of his/her nationality or the nationality of the hostage victim, is subsequently found in the United States; or (c) if the United States government is the third party which the hostage taker is attempting to compel to take certain action.

B. Offenses Committed Within the United States

Article 13 of the Convention states that the Convention ''shall not apply where the offense is committed within a single state [*i.e.*, country], the hostage and the alleged offender are nationals of that state, and the alleged offender is found in the territory of that state.'' Subsection 1203(b)(2) reflects the treaty limitations contained in Article 13 by stating that it is not an offense if the crime occurred in the United States, all participants and victims are United States nationals, and all alleged offenders are found in the United States, unless the hostage taking is to compel action by the United States government. In practical terms, this means that an American robber who seizes an American cashier at a convenience store in a city in the United States, and who makes a demand upon a third party other than the United States government, and who is caught in the United States, cannot be prosecuted federally under Section 1203(a).

9-60.800 SPECIAL FORFEITURE OF COLLATERAL PROFITS OF CRIME (''SON OF SAM'') (18 U.S.C. §§ 3681 and 3682)

9-60.801 Summary of Forfeiture Statute

The Victims of Crime Act of 1984 (Chapter XIV of the Comprehensive Crime Control Act of October 12, 1984, Public Law 98-473), provides for special forfeiture of the collateral profits of crime. This anti-profits of crime law is designed to forfeit the proceeds due a convicted defendant from his/her sale of literary rights about his/her violent crime. These provisions are codified in Title 18, United States Code, Sections 3681 and 3682.

Section 3681 of Title 18 authorizes a U.S. Attorney at any time after a conviction of a defendant for an offense against the United States resulting in physical harm to an individual, upon notice to interested parties (the defendant, the person with whom the defendant has contracted, the transferee of proceeds due the defendant, and any person physically harmed as a result of the offense for which the defendant has been convicted), to move for the entry of an order of forfeiture to capture the proceeds of any contract relating to a depiction of such crime or the expression of the defendant's thoughts, opinions or emotions regarding such crime. The court must grant the motion if it determines that the interests of justice or an order of restitution so requires. Once a forfeiture order is entered the U.S. Attorney shall, in the detail required by Section 3682, give newspaper notice of the entry of such order. The notice informs victims

that the proceeds may be used to satisfy a judgment obtained against the defendant by a victim of an offense for which the defendant has been convicted.

Under 18 U.S.C. § 3681, upon the entry of a forfeiture order the person with whom the defendant has contracted must pay all proceeds due under the contract to the Attorney General. Any proceeds paid to the Attorney General must be held in escrow for five years in the Crime Victims Fund established by the act. During this five-year period the proceeds can be levied on to satisfy a money judgment rendered by a United States district court in favor of a victim of an offense of which the defendant has been convicted. The funds may also be levied upon to satisfy a fine imposed by a court of the United States. Also, when ordered by the court in the interests of justice, the proceeds may be used to satisfy a money judgment rendered in any court in favor of a victim of any crime for which the defendant has been convicted. The proceeds may also be used to pay for the legal representation of the defendant in matters arising from the offense for which the defendant has been convicted (but no more than twenty percent of the total proceeds may be so used). At the end of the five-year escrow period, the court shall direct the disposition of any remaining proceeds, and may require that this residue be paid into the Crime Victims Fund in the Treasury.

9-60.810 Pertinent Policy Considerations

Strong policy considerations favor *sua sponte* application by the U.S. Attorney for a Section 3681 order of special forfeiture whenever the U.S. Attorney is made aware of the existence of a contract relating to the depiction of an offense against the United States of which the defendant has been convicted resulting in physical harm to an individual.

The ''proceeds'' or ''collateral profits,'' as money owing to the defendant from his contract, can also be used to satisfy any outstanding state criminal fines and state restitution orders. Thus, consideration should be given, prior to seeking a (federal) forfeiture order, to deferring to state action where local statutes permit, state authorities express an intention to act, and considerations of federal-state comity indicate that in the particular circumstances the state has the greater interest in controlling the distribution of the proceeds.

9-60.820 Legal Discussion

There are three interrelated constitutional issues likely to be raised in any ''Son of Sam'' enforcement proceeding. These involve procedural due process of law, the first amendment, and the government's right to forfeit the proceeds. The prohibition against *ex post facto* laws may also apply if the offense predates the Victims of Crime Act.

9-60.821 Procedural Due Process of Law

The procedures specified for entry of a forfeiture order and disposition of the proceeds would appear to satisfy the fifth amendment's requirements of procedural due process of law inasmuch as the order is entered by a court only after a judicial hearing with notice to all interested parties, *see North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), although in appropriate circumstances it would seem permissible for the government to seek a temporary restraining order to prevent a transfer of the proceeds until there has been a hearing on a pending motion for a forfeiture order. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

9-60.822 The First Amendment

To the extent that first amendment rights (of the defendant, the press and the public) are implicated, the court must balance the overall interest of society (and the specific interests of the victims of the defendant's crime) in ensuring that no federal felon profits from any depiction from his/her crime with the asserted first amendment rights of the defendant, the person contracted with, and the public to speak and to know. These first amendment issues are discussed extensively in Note, *Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem*, 68 Cornell L.Rev. 686 (1983); Comment, *In Cold Type, Statutory Approaches to the Problem of the Offender as Author*, 71 Journal of Crim. Law and Criminology, Northwestern Univ. School of Law 255 (1980); Note, *Compensating the Victim from the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach*, 14 Columbia Journal of Law and Social Problems 93 (1978), and Note, *Criminals—Turned—Authors: Victims' Rights v. Freedom of Speech*, 54 Ind. L.J. 443 (1979), and in the interests of brevity will not be repeated here except to say that if the forfeiture (as distinguished from the attachment) nature of the statute is deemed to impermissibly impinge upon protected first amendment interests, the court should be encouraged to exercise its discretion and return any residue to the defendant after the payment of all restitution orders, civil judgments, and allowable attorneys' fees.

9-60.823 The Government's Right to Forfeit the Proceeds

The Victims of Crime Act serves two separate purposes: To establish an escrow account and to provide funding for the Crime Victims Fund.

No great difficulty should be had with the escrow account concept since it is only an attachment statute, with no transfer (except possibly via a TRO) prior to notice to all interested parties and a hearing thereon. Only the five-year duration is subject to controversy. But given the uncertainty of getting notice to victims of the existence of the escrow account and

the need to afford victims a reasonable period after receiving such notice to prepare and commence their damage actions against the defendant, the consensus of most states with ''Son of Sam'' statutes, that five years is reasonable, should be sustained.

As noted, the second purpose of the federal statute is to create a source of funding for the Crime Victims Fund. Federal forfeiture statutes generally reflect the view that proceeds of crime are contraband subject to forfeiture and these statutes have been consistently upheld against constitutional challenges. *See Russello v. United States*, 464 U.S. 16, 26-29 (1983).

Any substantive contentions of the defendant with respect to the issuance of the forfeiture order, the various levies and payments thereunder and the ultimate transfer of any unlevied upon or unused proceeds to the Crime Victims Fund will have to be resolved by the court. To assist the court in the resolution of these issues, the court should be informed that at least twenty-six states currently have ''Son of Sam'' statutes. For a description of these statutes contact the General Litigation and Legal Advice Section of the Criminal Division (FTS 786-4827).

9-60.824 *Ex Post Facto* Considerations

A federal district court in *United States v. MacDonald*, 607 F.Supp. 1183 (E.D.N.C.1985), has ruled that 18 U.S.C. §3681 cannot be applied to a criminal defendant who was convicted of crimes committed prior to the passage of the Victims of Crime Act. The *MacDonald* court concluded that the federal forfeiture statute was an additional punishment. Under this analysis of the act the court concluded that its application to Dr. MacDonald would violate the constitutional prohibition against *ex post facto* laws. Accordingly, should you have a matter which would appear to present *ex post facto* considerations, you should contact the General Litigation and Legal Advice Section of the Criminal Division (FTS 786-4827) for guidance in this area.

9-60.830 Supervisory Jurisdiction

General Litigation and Legal Advice Section. Questions about this statute may be directed to attorneys at FTS 786-4827.