

Mail and Wire Fraud: An Abridged Overview of Federal Criminal Law

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Summary

It is a federal crime to devise a scheme to defraud another of property, when either mail or wire communications are used in furtherance of the scheme, 18 U.S.C. 1341, 1343. Mail or wire fraud includes schemes to defraud another of honest services, when the scheme involves bribery or a kick back, 18 U.S.C. 1346; *Skilling v. United States*, 130 S.Ct. 2896 (2010). In order to convict, the government must prove beyond a reasonable doubt that the defendant (1) used either mail or wire communications in the foreseeable furtherance, (2) of a scheme to defraud, (3) involving a material deception, (4) with the intent to deprive another of, (5) either property or honest services.

Offenders face the prospect of imprisonment for not more than 20 years, a fine of not more than $250,000 (not more than $500,000 for organizations), an order to pay victim restitution, and the confiscation of any property realized from the offense.

Misconduct that constitutes mail or wire fraud may also constitute a violation of one or more other federal crimes. Principal among these are predicate offense crimes, frauds based on jurisdictional factors other than use of mail or wire communications, and other honest services frauds in the form of bribery or kickbacks. The other federal bribery and kickback offenses include bribery of public officials, federal program bribery, extortion under color of official right, and Medicare/Medicaid kickbacks. Mail and wire fraud are money laundering and racketeering predicate offenses. Numbered among the fraud offenses based on other jurisdiction grounds are the false claims and false statement offenses, bank fraud, health care fraud, securities fraud, and foreign labor contracting fraud.

This is an abridged version of CRS Report R41930, *Mail and Wire Fraud: A Brief Overview of Federal Criminal Law*, by Charles Doyle, without the footnotes, appendix, quotation marks, or citations to authority found in the longer version. Related CRS reports include CRS Report R40852, *Deprivation of Honest Services as a Basis for Federal Mail and Wire Fraud Convictions*, by Charles Doyle.

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Introduction

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

Elements

The mail and wire fraud statutes are essentially the same, except for the medium associated with the offense—the mail in the case of mail fraud and wire communication in the case of wire fraud. As a consequence, the interpretation of one is ordinarily considered to apply to the other. In construction of the terms within the two, the courts will frequently abbreviate or adjust their statement of the elements of a violation to focus on the questions at issue before them. As treatment of the individual elements makes clear, however, there seems little dispute that conviction requires the government to prove:

1. the use of either mail or wire communications in the foreseeable furtherance
2. of a scheme to defraud
3. involving a material deception
4. with the intent to deprive another of
5. either property or honest services.

Use of Mail or Wire Communications: The wire fraud statute applies to anyone who transmits or causes to be transmitted by wire, radio, or television communication in interstate or foreign commerce any writings for the purpose executing a scheme or artifice. The mail fraud statute is similarly worded and applies to anyone who for the purpose of executing a scheme or artifice causes use of the mails.

The statutes require that a mailing or wire communication be in furtherance of a scheme to defraud. It need not be an essential element of the scheme, as long as it is incident to an essential element of the scheme. A qualifying mailing or communication, standing alone, may be routine, innocent or even self-defeating, because the relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive. The element may also be satisfied by mailings or communications designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect. The element may also be satisfied by mailings or wire communications used to obtain the property which is the object of the fraud.

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

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Scheme to Defraud: The mail and wire fraud statutes both prohibit, in pertinent part, any scheme or artifice to defraud, or to obtain money or property by means of false or fraudulent pretenses, representations, or promises, or deprive another of the right to honest services by such means. From the beginning, Congress intended to reach a wide range of schemes to defraud, and has expanded the concept whenever doubts arose. It added the second prong—obtaining money or property by false pretenses, representations, or promises—after defendants had suggested that the term "scheme to defraud" covered false pretenses concerning present conditions but not representations or promises of future conditions. More recently, it added Section 1346 to make it clear the term "scheme to defraud" encompassed schemes to defraud another of the right to honest services. Even before that adornment, the words were understood to refer to wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.

The statutes condemn schemes to defraud—both the successful and the unsuccessful. Nevertheless, there may be some question whether the statutes reach those schemes designed to deceive the gullible though they could not ensnare the reasonably prudent. It is not uncommon for the courts to declare that to demonstrate a scheme to defraud the government needs to show that the defendant's communications were reasonably calculated to deceive persons of ordinary prudence and comprehension. One court considered these statements no more than an identification of a point at which the government has satisfied its burden in a particular case, without addressing whether a lesser quantum of evidence might suffice in other cases. In any event, the question may be more clearly present in the context of the defendant's intent and the materiality of deception, matters discussed below.

Materiality: Neither the mail nor the wire fraud statute include a reference to materiality. Yet materiality is an element of each offense, because at the time of the statutes' enactment, the word "defraud" was understood to require a misrepresentation or concealment of a material fact. A statement is material for mail or wire fraud purposes only if it has the natural tendency to influence or be capable of influencing the person to whom it was addressed.

Intent: Under both statutes, intent to defraud requires a willful act by the defendant with the intent to deceive or cheat, usually, but not necessarily, for the purpose of getting financial gain for one's self or causing financial loss to another. A defendant has a complete defense if he believes the deceptive statements or promises to be true or otherwise acts in good faith. A defendant has no such defense, however, if he blinds himself to the truth. Nor is it a defense if he intends to deceive but feels his victim will ultimately profit or be unharmed.

Money, Property, or Honest Services: The mail and wire fraud statutes speak of schemes to defraud or to obtain money or property. They clearly protect against deprivations of tangible property. Their protection of intangibles has not always been as clear. They do protect intangible *property* rights, although they do not apply to certain intangible rights in property that have no value in the hands of the victim of a scheme.

Some time ago, the Supreme Court held in *McNally v. United States* that the protection does not extend to "the intangible right of the citizenry to good government." Soon after *McNally*, Congress enlarged the mail and wire fraud statute coverage to include the intangible right to honest services, by defining the term "scheme or artifice to defraud" to include[s] a scheme or artifice to deprive another of the intangible right to honest services. Lest the expanded definition be found unconstitutionally vague, the Court in *Skilling v. United States* limited its application to cases of bribery or kickbacks.

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Aiding and Abetting, Attempt, and Conspiracy

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

To prove conspiracy to commit either wire or mail fraud, the government must establish that (1) two or more persons, directly or indirectly, reached an agreement to devise and execute a scheme to defraud; (2) the defendant knew the unlawful purpose of the agreement; and (3) the defendant joined in the agreement willfully, that is, with the intent to further the unlawful purpose. Most appellate courts do not list an overt act requirement among the elements of the offense, although the Sixth Circuit identifies it as a necessary element. The offense is complete upon agreement without the necessity of an overt act committed in its furtherance. As a general rule, a conspirator is liable for any other offenses that a co-conspirator commits in the foreseeable furtherance of the conspiracy. Such liability, however, extends only until the objectives of the conspiracy have been accomplished or the defendant has withdrawn from the conspiracy.

Where attempt has been made a separate offense, conviction ordinarily requires that the defendant commit a substantial step towards the completion of the underlying offense with the intent to commit it. It does not, however, require the attempt to have been successful. Unlike conspiracy, a defendant may not be convicted of both the substantive offense and the lesser included crime of attempt to commit it.

Sentencing

A mail and wire fraud are punishable by imprisonment for not more than 20 years and a fine of not more than $250,000 (not more than $500,000 for organizations), or fine of not more than $1 million and imprisonment for not more than 30 years if the victim is a financial institution or the offense was committed in relation to a natural disaster. Conviction may also result in probation, a term of supervised release, a special assessment, a restitution order, and/or a forfeiture order.

Restitution: Restitution is ordinarily required of those convicted of mail or wire fraud. The victims entitled to restitution include those directly and proximately harmed by the defendant's crime of conviction, and in the case of an offense that involves as an element a scheme, conspiracy, or patterns of criminal activity—like mail and wire fraud—any person directly harmed by the defendant's conduct in the course of the scheme, conspiracy, or pattern.

Forfeiture: Property that constitutes the proceeds of mail or wire fraud is subject to confiscation by the United States. It may be confiscated pursuant to either civil forfeiture or criminal forfeiture procedures. Civil forfeiture proceedings are conducted treating the property itself as the defendant. Criminal forfeiture proceedings are conducted as part of the criminal prosecution of the property owner. A number of defendants, convicted of either mail or wire fraud, have argued to no avail that they should not be held liable for restitution and forfeiture.

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Related Criminal Provisions

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

Predicate Offense Crimes: Some federal crimes have as an element the commission of some other federal offense. The money laundering statute, for example, outlaws laundering the proceeds of various predicate offenses. The racketeering statute outlaws committing predicate offense to operate a racketeering enterprise. Mail and wire fraud are predicate racketeering and money laundering predicate offenses.

RICO: The Racketeering Influenced and Corrupt Organization (RICO) provisions outlaw acquiring or conducting the affairs of an enterprise, engaged in or whose activities affect interstate commerce, through loan sharking or the patterned commission of various other predicate offenses. The elements under the more commonly prosecuted conduct prong are (1) conducting the affairs; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. "Racketeering activity" means, among other things, any act which is indictable under either the mail or wire fraud statutes. As for pattern, a person cannot be subjected to the sanctions [of RICO] simply for committing two widely separate and isolated criminal offenses. Instead, the term 'pattern' itself requires the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of *continuity plus relationship* which combines to produce a pattern.

The pattern of predicate offenses must be used by someone employed by or associated with a qualified enterprise to conduct or participate in its activities. The "conduct or participate" element requires a defendant to have some part in directing those activities. The element is not satisfied unless one has participated in the operation or management of the enterprise itself. Nevertheless, an enterprise is operated not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management.

The enterprise may be either any group of individuals, any legal entity, or any group "associated in fact." An enterprise "associated in fact" must have at least three structural elements: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose. Qualified enterprises are only those that engaged in, or the activities of which affect, interstate or foreign commerce.

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

Money Laundering: Mail and wire fraud are both money laundering predicate offenses, as well. Among other things, the most commonly prosecuted federal money laundering statute, 18 U.S.C.

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1956, outlaws knowingly engaging in a financial transaction involving the proceedings of a "specified unlawful activity" (a predicate offense) for the purpose (1) of laundering the such proceeds or (2) of promoting further predicating offenses.

To establish the laundering or concealment offense, the government must establish that (1) the defendant conducted, or attempted to conduct a financial transaction which in any way or degree affected interstate commerce or foreign commerce; (2) the financial transaction involved proceeds of illegal activity; (3) the defendant knew the property represented proceeds of some form of unlawful activity; and (4) the defendant conducted or attempted to conduct the financial transaction knowing the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

To prove the promotional offense, the government must demonstrate that the defendant (1) conducted a financial transaction that involved the proceeds of unlawful activity; (2) knew the property involved was proceeds of unlawful activity; and (3) intended to promote that unlawful activity.

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

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

Merely depositing the proceeds of a predicate offense does not alone constitute a violation of Section 1956. It is enough for a violation of Section 1957, if more than $10,000 is involved. Section 1957 uses Section 1956's definition of specified unlawful activities. Thus, mail and wire fraud are predicate offenses for purposes of Section 1957. Section 1957 differs from Section 1956 in two critical respects: It requires that the property have a value greater than $10,000, but it does not require that the defendant know of [the] design to conceal or promote aspects of the transaction or that anyone have such a design.

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

Fraud Under Other Jurisdictional Circumstances: This category includes the offenses that were made federal crimes because they involve fraud against the United States, as well as the other frauds that share chapter 63 with the mail and wire fraud sections. The most prominent are proscriptions against defrauding the United States by submitting false claims, conspiracy to defraud the United States, and material false statements in matters within the jurisdiction of the United States. Bank fraud, health care fraud, securities and commodities fraud, and fraud in foreign labor contracting are all chapter 63 companions of mail and wire fraud.

Defrauding the United States—False claims:

Section 287 outlaws the knowing submission of a false claim against the United States, 18 U.S.C. 287. To sustain a conviction under §287, the government must prove (1) that the defendant

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presented a false or fraudulent claim against the United States; (2) that the claim was presented to an agency of the United States; and (3) that the defendant knew that the claim was false or fraudulent. The offense carries a sentence of imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for organizations). The crime is one for which restitution must be ordered. There is no explicit authority for confiscation of property tainted by the offense, but either a private individual or the government may bring a civil action for treble damages. It is neither a RICO nor a money laundering predicate offense.

Conspiracy to defraud the U.S.: The general conspiracy statute, 18 U.S.C. 371, has two parts. It outlaws conspiracies to violate the laws of the United States. More relevant here, it also outlaws conspiracies to defraud the United States. To prove conspiracy to defraud the United States, the government must show (1) an agreement between two or more persons, (2) to defraud the United States, and (3) an overt act on the part of one of them in furtherance of the conspiracy. The "fraud covered by the statute reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government" by "deceit, craft or trickery, or at least by means that are dishonest." Unlike mail and wire fraud, the government need not show that the scheme was designed to deprive another of money, property, or honest services; it is enough that to show that the scheme is designed to obstruct governmental functions.

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

False statements: Section 1001 outlaws knowingly and willfully making a material false statement on a matter within the jurisdiction of the executive, legislative, or judicial branch of the federal government, 18 U.S.C. 1001. A matter is material for purposes of Section 1001 when it has a natural tendency to influence, or is capable of influencing, the decision of the individual or entity to whom it is addressed. A matter is within the jurisdiction of a federal entity when it has the power to exercise authority in a particular matter and may exist when false statements [are] made to state or local government agencies receiving federal support or subject to federal regulation.

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

Fraud Elsewhere in Chapter 63: Chapter 63 contains four other fraud proscriptions in addition to mail and wire fraud: bank fraud (18 U.S.C. 1344), health care fraud (18 U.S.C. 1347), securities and commodities fraud (18 U.S.C. 1348), and fraud in foreign labor contracting (18 U.S.C. 1351). Each relies on a jurisdictional base other than use of the mail or wire communications.

Bank Fraud: The bank fraud statute outlaws schemes to (1) defraud a federally insured financial institution, or (2) to falsely obtain property from such an institution. To establish the scheme to defraud offense, the government must prove (1) the defendant knowingly executed or attempted

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to execute a scheme or artifice to defraud a financial institution; (2) the defendant had the intent to defraud a financial institution; and (3) the bank involved was federally insured.

To establish the "falsely obtain" violation, the government must show that (1) a scheme existed to obtain money, funds, or credit in the custody or control of a federally insured financial institution; (2) the defendant participated in the scheme by means of a material false pretenses, representations, or promises; and (3) the defendant acted knowingly.

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

Health Care Fraud: The health care fraud proscription in Section 1347 has two prongs as well. It outlaws knowingly and willfully executing a scheme either (1) to defraud a health care benefit program, or (2) to falsely obtain property from a health care benefit program—in connection with the delivery of, or payment for, health care products or services. Construction of the two prongs mirrors the effort elsewhere, e.g., To obtain a conviction for health care fraud under 18 U.S.C. §1347, the government is required to prove beyond a reasonable doubt that the defendant: (1) knowingly devised a scheme or artifice to defraud a health care benefit program in connection with the delivery of or payment for health care benefits, items, or services; (2) executed or attempted to execute this scheme or artifice to defraud; and (3) acted with intent to defraud. The intent element, however, is a little different. Conviction requires a knowing and willful intent. To establish knowledge and willfulness, the government must prove that the defendant acted with knowledge that his conduct was unlawful, but it need show that the defendant knew of or intended to violation Section 1347 specifically.

Section 1347's penalty structure is also somewhat distinctive. General violations are punishable by imprisonment for not more than 10 years and fines of not more than $250,000. If serious bodily injury results, however, the maximum penalty is increased to imprisonment for not more than 20 years, and to imprisonment for life or any term of years should death result. Section 1347 offenses are neither money laundering nor RICO predicate offenses. They do entitle the government to restitution, but not to forfeiture of any tainted property.

Securities and Commodities Fraud: The securities and commodities fraud prohibition in Section 1348 features the same two pronged approach. It outlaws knowingly executing or attempt to execute a scheme (1) to defraud or (2) to falsely obtain money or property—with respect to commodities or securities. Under Section 1348(1), the government must provide sufficient evidence to establish that the defendant had (1) fraudulent intent; (2) a scheme or artifice to defraud; and (3) a nexus with a security. Alternatively, pursuant to Section 1348(2), the government can show that [the defendant] executed: (1) a scheme or artifice; (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property; while possessing (3) fraudulent intent. Moreover, the government must also show that the false and misleading statements were material.

Offenders face imprisonment for not more than 25 years and fines of not more than $250,000 (not more than $500,000 for organizations). The offense is neither a money laundering nor a RICO predicate offense. Victim restitution must be ordered upon conviction, but forfeiture is not authorized.

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Fraud in Foreign Labor Contracting: The recently enacted fraud in foreign labor contracting section, 18 U.S.C. 1351, establishes a 5-year felony for various fraudulent overseas recruiting and hiring practices for work to be performed within the United States or under federal contracts abroad. The offense is a RICO predicate offense and consequently a money laundering predicate offense as well. A restitution order is required at sentencing, but forfeiture is not authorized.

Honest Services Fraud Elsewhere: After *Skilling*, honest services mail and wire fraud consists of bribery and kickback schemes furthered by use of the mail or wire communications. Mail and wire fraud aside, the principal bribery and kickback statutes include 18 U.S.C. 201 (bribery of public officials), 666 (bribery relating to federal programs), 1951 (extortion under color of official right); 15 U.S.C 78dd-1 to 78dd-3 (foreign corrupt practices); and 42 U.S.C. 1320a-7b (Medicare/ Medicaid anti-kickback).

Bribery of Public Officials: Conviction for violation of Section 201 requires a showing that something of value was corruptly offered or promised to a public official or corruptly sought or agreed to be received by a public official with intent to influence any official act or in return for being influenced in the performance of any official act.

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

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

Bribery Related to Federal Programs: Section 666 outlaws bribes offered to, or solicited by, agents of any state, local, tribal, or private entity—that receives more than $10,000 in federal benefits—in relation to a transaction of $5,000 or more. Agents are statutorily defined as persons authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative. Where the bribe-giver receives an intangible benefit, the bribe amount may be used as a proxy to stand for the value of the business or transaction. The circuits appear divided over whether the government must establish a quid pro quo as in a Section 201 bribery case. The government, however, need not establish that the tainted transaction involves federal funds.

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

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

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requires the government to prove that the defendant (1) was a government official; (2) who accepted property to which she was not entitled; (3) knowing that she was not entitled to the property; and (4) knowing that the payment was given in return for officials acts: (5) which had at least a de minimis effect on commerce. Conviction does not require that the public official sought or induced payment, the government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts. Hobbs Act violations are punishable by imprisonment for not more than 20 years and a fine of not more than $250,000 (not more than $500,000 for an organization). Hobbs Act violations are RICO predicate offenses and thus money laundering predicates as well. The proceeds of a Hobbs Act violation are subject to forfeiture under either civil or criminal procedure.

Foreign Corrupt Practices: The bribery provisions of the Foreign Corrupt Practices Act are three: 15 U.S.C. 78dd-1(trade practices by issuers), 78dd-2 (trade practices by domestic concerns), 78dd-3 (trade practices by others within the United States). Other than class of potential defendants, the elements of the three are comparable. They make it a crime to (1) willfully; (2) make use of the mails or any means or instrumentality of interstate commerce; (3) corruptly; (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to; (5) any foreign official; (6) for purposes of either influencing any act or decision of such foreign official in his official capacity or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official or securing any improper advantage; (7) in order to assist such corporation in obtaining or retaining business for or with, or directing business to, any person.

None of the three proscriptions apply to payments to expedite or to secure the performance of a routine governmental action, and each affords defendants an affirmative defense for payments that are lawful under the applicable foreign law or regulation. Violations are punishable by imprisonment for not more than five years and by a fine of not more than $100,000 (not more than $2 million for organizations). Foreign Corrupt Practices Act violations are not RICO predicate offenses, but they are money laundering predicates. The proceeds of a violation are subject to forfeiture under either civil or criminal procedure.

Medicare Kickbacks: The Medicare/Medicaid kickback prohibition in 42 U.S.C. 1320a-7b(b) outlaws knowingly and willfully offering or paying, soliciting, or receiving, any remuneration (including any kickback) to induce the referral of, or the purchase with respect to, Medicare or Medicaid beneficiaries any item or service for which payment may be made in whole or in part under the Medicare or Medicaid programs. Violations are punishable by imprisonment for not more than five years and by a fine of not more than $25,000. Section 1320a-7b kickback violations are money laundering, but not RICO, predicate offenses. The proceeds of a violation are subject to forfeiture under either civil or criminal procedure.

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