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Senior Specialist in American Public Law

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SUMMARY

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

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

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

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

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

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

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

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Introduction[1]

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

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 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 and intent to defraud another of either property or honest services, (3) involving a material deception.

Use of Mail or Wire Communications

The wire fraud statute applies to anyone who "transmits or causes to be transmitted by wire, radio, or television communication in interstate or foreign commerce any writings ... for the purpose 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 ... places in any post office ... or causes to be delivered by mail ... any ... matter."

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

[1] This is an abbreviated version of a longer report, CRS Report R41930, *Mail and Wire Fraud: A Brief Overview of Federal Criminal Law*, without the footnotes, citations to authority, or attribution for quotations, found in the longer version.

"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 that 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.

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 to 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 18 U.S.C. § 1346 to make it clear the term "scheme to defraud" encompassed schemes to defraud another of the right to honest services. 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.'"

As a general rule, the crime is done when the scheme is hatched and an attendant mailing or interstate phone call or email has occurred. Thus, the statutes are said to condemn a scheme to defraud regardless of its success. 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." Even a casual reading, however, might suggest that the statutes also cover a scheme specifically designed to deceive a naïve victim. Nevertheless, the courts have long acknowledged the possibility of a "puffing" defense, and there may be some question whether the statutes reach those schemes designed to deceive the gullible though they could not ensnare the reasonably prudent. In any event, the question may be more clearly presented in the context of the defendant's intent and the materiality of the deception, a focus on the scheme's creator rather than its victim.

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

The mail and wire fraud statutes clearly protect against deprivations of tangible property. They also protect certain intangible property rights, but only those that have value in the hands of the victim of a scheme. "To determine whether a particular interest is property for purposes of the fraud statutes, [courts] look to whether the law traditionally has recognized and enforced it as a property right."

Materiality

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

Intent

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

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

Honest Services

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

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

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

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."

"Conspiracy to commit wire fraud under 18 U.S.C. § 1349 requires a jury to find that (1) two or more persons agreed to commit wire fraud and (2) the defendant willfully joined the conspiracy with the intent to further its unlawful purpose." 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, as it has for mail and wire fraud, conviction ordinarily requires that the defendant commit a substantial step toward 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

Mail and wire fraud are each 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. It is also subject to a mandatory minimum two-year term of imprisonment if identify theft is used during and in furtherance of the fraud. Conviction may also result in (1) probation, (2) a term of supervised release, (3) a special assessment, (4) a restitution order, and/or (5) a forfeiture order.

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

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

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 pattern of criminal activity," like mail and wire fraud, "any person directly harmed by the defendant's conduct in the course of the scheme, conspiracy, or pattern."

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 that treat the forfeitable property as the defendant. Criminal forfeiture proceedings are conducted as part of the criminal prosecution of the property owner.

Related Criminal Provisions

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

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 the commission of a pattern of predicate offenses to operate a racketeering enterprise. Mail and wire fraud are predicate racketeering and money laundering predicate offenses.

RICO. The Racketeer Influenced and Corrupt Organizations (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 racketeering-conduct and conspiracy-to-engage-in-racketeering-conduct appear to be the RICO offenses most often built on wire or mail fraud violations. The elements of the RICO conduct offense are (1) conducting the affairs; (2) of an enterprise; (3) engaged in activities in or that impact interstate or foreign commerce; (4) through a pattern; (5) of racketeering activity. "Racketeering activity" means, among other things, any act that is indictable under either the mail or wire fraud statutes. As for pattern, a RICO pattern "requires at least two acts of racketeering activity. The racketeering predicates may establish a pattern if they [were] related and … amounted to, or threatened the likelihood of, continued criminal activity.'" The pattern of predicate offenses must be used by someone employed by or associated with a qualified enterprise to conduct or participate in its activities. "Congress did not intend to extend RICO liability … beyond those who participated in the operation and management of an enterprise through a pattern of racketeering activity." Nevertheless, "liability under § 1962(c) is not limited to upper management … An enterprise is operated not just by upper management but also by lower rung participants." The enterprise may be either any group of individuals, any legal entity, or any group "associated in fact." "Nevertheless, 'an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise and longevity sufficient to permit those associates to pursue the enterprise's purpose.'" Moreover, qualified enterprises are only those that "engaged in, or the activities of which affect, interstate or foreign commerce." *Penalties*: Imprisonment for not more than 20 years and a fine of not more than $250,000 (not more than $500,000 for organizations).

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

To establish the concealment offense, the government must establish that "(1) [the] defendant conducted, or attempted to conduct a financial transaction which in any way or degree affected interstate commerce or foreign commerce; (2) the financial transaction involved proceeds of

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

To prove the promotional offense, "the Government must show that the defendant: (1) conducted or attempted to conduct a financial transaction; (2) which the defendant then knew involved the proceeds of unlawful activity; (3) with the intent to promote or further unlawful activity." Nothing in either provision suggests that the defendant must be shown to have committed the predicate offense. Moreover, simply establishing that the defendant spent or deposited the proceeds of the predicate offense is not enough without proof of an intent to promote or conceal. *Penalties*: Imprisonment for not more than 20 years and a fine of not more than $500,000.

Merely depositing the proceeds of a money laundering predicate offense does not alone constitute a violation of Section 1956. It is enough for a violation of 18 U.S.C. § 1957, however, if more than $10,000 is involved. Section 1957 uses Section 1956's definition of specified unlawful activities. Thus, mail and wire fraud violations may serve as the basis for the prosecution under 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." *Penalties:* Imprisonment for not more than 10 years and a fine of not more than $250,000 (not more than $500,000) for organizations.

Fraud Under Other Jurisdictional Circumstances

This category includes the offenses that were made federal crimes because they involve fraud against the United States or because they are other frauds that share elements with the mail and wire fraud. The most prominent are the proscriptions against defrauding the United States by the submission of false claims, conspiracy to defraud the United States, and material false statements in matters within the jurisdiction of the United States. 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. "To prove a false claim, the government must prove that (1) [the defendant] 'made and presented' to the government a claim, (2) 'the claim was false, fictitious, or fraudulent,' (3) [the defendant] knew the claim was false, fictitious, or fraudulent, and (4) 'the claim was material' to the government." *Penalties*: Imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for organizations).

Conspiracy to Defraud the United States. The general conspiracy statute 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 convict on a charge under the 'defraud' clause, the government must show that the defendant (1) entered into an agreement (2) to obstruct a lawful government function (3) by deceitful or dishonest means and (4) committed at least one overt act in furtherance of the conspiracy." Thus, the "fraud covered by the statute reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government" by "deceit, craft or trickery, or at least by means that are dishonest." Unlike mail and wire fraud, the government need not show that the scheme was designed to deprive another of money, property, or honest services; it is enough to show that the scheme is designed

to obstruct governmental functions. *Penalties*: Imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for organizations).

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. 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 federal jurisdiction "may exist when false statements [are] made to state or local government agencies receiving federal support or subject to federal regulation." *Penalties*: Imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for organizations).

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

Bank Fraud. The bank fraud statute outlaws (1) schemes to defraud a federally insured financial institution, and (2) schemes to falsely obtain property from such an institution. To establish the bank-property scheme to defraud offense, "the Government must prove: (1) the defendant knowingly executed or attempted to execute a scheme or artifice to defraud a financial institution; (2) the defendant did so with the intent to defraud a financial institution; and (3) the financial institution was federally insured."

As for the bank-custody offense, "the government must prove (1) that a scheme existed to obtain moneys, funds, or credit in the custody of a federally-insured bank by fraud; (2) that the defendant participated in the scheme by means of material false pretenses, representations, or promises; and (3) that the defendant acted knowingly." *Penalties*: Imprisonment for not more than 30 years and a fine of not more than $1 million.

Health Care Fraud. The health care fraud provision follows the pattern of other Chapter 63 offenses. It condemns schemes to defraud. The schemes it proscribes include honest services fraud in the form of bribery and kickbacks. Attempts and conspiracies to violate its prohibitions carry the same penalties as the complete offense it describes. It is often prosecuted along with other related offenses. Parsed to its elements, the section declares, "[a] Whoever [b] knowingly and willfully [c] executes or attempts to execute [d] a scheme or artifice (1) to defraud any health care benefit program, or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property owned by, or under the custody or control of, any health care benefit program [e] in connection with the delivery of or payment for health care benefits, items, or services shall be …" *Penalties*: A fine of not more than $250,000 (not more than $500,000 for organizations) and (1) if death results, imprisonment for life or any term of years; (2) if serious bodily injury results, imprisonment for 20 years; (3) otherwise, imprisonment for not more than 10 years.

Securities and Commodities Fraud. Section 1348, the securities and commodities fraud prohibition, continues the progression of separating its defrauding feature from its obtaining-property feature. The elements of defrauding offense "are (1) fraudulent intent, (2) a scheme or artifice to defraud, and (3) a nexus with a security." To prove a violation of Section 1348(2), the government must establish that the defendant (1) executed, or attempted to execute, a scheme or artifice; (2) with fraudulent intent; (3) in order to obtain money or property; (4) by material false or fraudulent pretenses, representations, or promises. *Penalties*: Imprisonment for not more than 25 years and fines of not more than $250,000 (not more than $500,000 for organizations).

Fraud in Foreign Labor Contracting. "The substantive offense of fraud in foreign labor contracting [under 18 U.S.C. § 1351] occurs when someone: (1) recruits, solicits, or hires a person outside the United States, or causes another person to do so, or attempts to do so; (2) does so by means of materially false or fraudulent pretenses, representations or promises regarding that employment; and (3) acts knowingly and with intent to defraud." The offense occurs outside the United States when related to a federal contract or U.S. presence abroad. *Penalties*: Imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for an organization).

Honest Services Fraud (Bribery and Kickbacks) Elsewhere

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

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

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 of the United States or any of 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. *Penalties*: Imprisonment for up to 15 years, a fine of up to $250,000 (up to $500,000 for an organization).

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

"A person is guilty under § 666[(a)(1)(B)] if he, being an agent of an organization, government, or governmental agency that receives federal-program funds, corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more." *Penalties*: Imprisonment for not more than 10 years and a fine of not more than $250,000 (not more than $500,000 for organizations).

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

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." *Penalties*: Imprisonment for not more than 20 years and a fine of not more than $250,000 (not more than $500,000 for an organization).

Foreign Corrupt Practices. The bribery provisions of the Foreign Corrupt Practices Act (FCPA) are three: 15 U.S.C. §§ 78dd-1(trade practices by issuers), 78dd-2 (trade practices by domestic concerns), and 78dd-3 (trade practices by others within the United States). Other than the class of potential defendants, the elements of the three are comparable. They "make[] it a crime to: (1) willfully; (2) make use of the mail or any means or instrumentality of interstate commerce; (3) corruptly; (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to; (5) any foreign official; (6) for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage; (7) in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person." 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. *Penalties*: Imprisonment for not more than five years and a fine of not more than $100,000 (not more than $2 million for organizations).

Medicare Kickbacks. The Medicare/Medicaid kickback prohibition in 42 U.S.C. 1320a-7b(b) outlaws "knowingly and willfully [offering or paying], soliciting [or] receiving, any remuneration (including any kickback) ... (A) to induce the referral of [, or (B) the purchase with respect to] Medicare [or] Medicaid beneficiaries ... any item or service for which payment may be made in whole or in part under the Medicare [or] Medicaid programs...." *Penalties*: Imprisonment for not more than five years and a fine of not more than $25,000.

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