

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

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9-71.000 COPYRIGHT LAW: INTRODUCTION

The responsibility of the federal government to provide some measure of protection to intellectual property has been recognized since the earliest days of the Republic. Art. I, §8, cl. 8 of the United States Constitution conferred on Congress the power, "[t]o Promote the Progress of Science and Useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Beginning with the Act of May 31, 1790, c. 15, 1 Stat. 124, Congress has exercised this power to provide federal copyright protection to an increasingly broad range of intellectual properties. See Goldstein v. California, 412 U.S. 546, 562-63, n.17 (1973). These copyright laws are now codified in Title 17 of the United States Code.

The criminal sanctions imposed by Title 17 are an important part of this statutory scheme. In the past several years these criminal sanctions have been revised significantly. New media of artistic expression are now afforded protection by the federal copyright laws. For example, copyright protection now extends to sound recordings. See 17 U.S.C. §102(a)(7). Similarly federal copyright laws also protect computer software and programs. Video games are yet another emerging area entitled to federal copyright protection.

Moreover, the penalties for criminal infringement of certain copyrights have been increased dramatically. See 17 U.S.C. §506; 18 U.S.C. §2319. Copyright infringement involving sound recordings and audiovisual works may now constitute a felony under federal law, depending on the number of infringing copies made or distributed in a 180-day period. See 18 U.S.C. §2319.

These developments in the federal copyright laws have paralleled a growing illicit trade in counterfeit records, films, audio and video tapes. The increased popularity of these forms of entertainment coupled with the development of the technology for reproducing records, films and tapes makes such piracy a highly lucrative business. Over the past few years this trade has developed into a highly sophisticated, illicit billion-dollar-a-year business. See S. Rep. No. 274, 97th Cong., 1st Sess. 3, reprinted in 1982 U.S. Code Cong. & Ad. News 127, 129. The financial loss to the film and recording industry resulting from this illegal traffic is staggering. It is estimated that record and tape pirates divert \$600,000,000 from the recording industry annually. Id. at 130.

The purpose of this chapter of the Manual is to outline the laws directed against this enormous illegal trade in order to assist U.S. Attorneys in vigorously and effectively enforcing those laws. Because

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some understanding of the copyright system is necessary to effective criminal law enforcement in this area, USAM 9-71.100 through 9-71.150, infra, contain a general overview of the federal copyright law. USAM 9-71.200, infra, then focuses specifically on the role of the criminal law in protecting intellectual property. Criminal copyright infringement, its elements and its proof, is discussed at USAM 9-71.210 to 9-71.214, infra. Also discussed are statutes prohibiting false statements on copyright notices, see 17 U.S.C. §506(c) and (d) discussed at USAM 9-71.220, infra; false statements on copyright applications, see 17 U.S.C. §506(e) discussed at USAM 9-71.230, infra; criminal violations of jukebox licenses, see 17 U.S.C. §116(d) discussed at USAM 9-71.240, infra; trafficking in counterfeit labels, see 18 U.S.C. §2318 discussed at USAM 9-71.250, infra; and other offenses, see USAM 9-71.260 and 9-71.270, infra.

9-71.010 Assignment of Responsibilities

Supervisory responsibility for prosecutions brought under 17 U.S.C. §§116 and 506 and 18 U.S.C. §2318 rests with the General Litigation and Legal Advice Section of the Criminal Division. Investigative responsibility for complaints arising under these sections rests with the Federal Bureau of Investigation. Importation of infringing articles may also be investigated by the United States Customs Service.

Prior authorization of the Criminal Division is not required for instituting prosecutions under Title 17 of the United States Code. However, because such prosecutions frequently involve technical and complex applications of the copyright laws, U.S. Attorneys are encouraged to consult the General Litigation and Legal Advice Section for assistance. Such consultation is particularly important in cases which are likely to go to trial.

9-71.020 Preemption of State Law

Historically copyright protection in the United States has been provided through a dual system. The federal government, by statute, provided limited monopolies for intellectual property. In addition, state statutory and common laws established roughly equivalent protection for a range of intellectual properties.

This dual system was, quite accurately, characterized as "anachronistic, uncertain, impractical and highly complicated." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 1, 130, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5745. Under this system federal statutory copyright protection differed from common law copyrights and state statutory and common law copyrights varied from jurisdiction to jurisdiction.

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The new copyright law has accomplished a fundamental and significant change in this system by substituting a single federal statutory copyright for the dual copyrights which previously existed. Thus, federal law now preempts the field of copyrights.

The federal preemption provision, 17 U.S.C. §301(a), provides that:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statute of any State.

This section, in broad terms, provides that federal statutory copyrights preempt all equivalent statutory and common law protection provided to intellectual property by state law. Moreover "[a]s long as a work fits within one of the general subject matter categories [of federal statutory copyrights], the bill prevents the states from protecting it even if it fails to achieve federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain." H.R. Rep. No. 1476, supra, at 131.

There are, however, some limitations on this preemption provision. For example, it does not apply to intellectual property which does not fall within the subject matter entitled to federal statutory copyright protection, as defined by 17 U.S.C. §§102 and 103. See 17 U.S.C. §301(b)(1). Therefore, works which are not fixed in any tangible form would still be entitled to state statutory or common law protection. This would include choreography which has never been filmed or notated and extemporaneous speech. Similarly, activities which violate legal rights that are not equivalent to the rights conferred by federal copyright would still be actionable under state law. See 17 U.S.C. §301(b)(3). This limitation was included in the law to permit state actions on defamation, fraud, breach of contract or invasion of privacy theories. Such actions arising in the context of a copyright dispute are not preempted by this provision. H.R. Rep. No. 1476, supra, at 132. Nor does this section preempt any cause of action arising under state law prior to January 1,

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1978, the effective date of this provision. See 17 U.S.C. §301(b)(2). Finally, nothing in 17 U.S.C. §301 limits any rights or remedies existing under any other federal law. See 17 U.S.C. §301(d).

17 U.S.C. §301 has a special provision dealing with sound recordings. 17 U.S.C. §301(c) provides that "[w]ith respect to sound recordings fixed prior to February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this Title until February 15, 2047." Thus, with respect to pre-1972 sound recordings Congress has carved out an exception to this general rule of federal preemption. These works are still entitled to state common law and statutory protection until 2047. Of course, state laws have been preempted with respect to recordings fixed after February 15, 1972.

These preemption provisions have obvious implications for federal prosecutors. With federal preemption of this area prosecutors must now recognize that individuals harmed by copyright violations do not have recourse to state criminal laws. In most instances, criminal prosecution of copyright offenders is possible only within the federal system. U.S. Attorneys should keep this factor in mind when considering whether to decline prosecution in a copyright case.

9-71.030 Applicability of Civil Copyright Law

Substantively, the criminal law of copyrights is often defined by reference to aspects of the civil law of copyright. For criminal copyright infringement to exist, there must first be civil copyright infringement. See 18 U.S.C. §506(a); 3 Nimmer on Copyright ¶15.01 et seq. (1983). Moreover, the provisions of Title 17 relating to the rights secured by copyright, notice and registration requirements, as well as judicial construction and analysis of infringing conduct, are all directly applicable to criminal cases. Thus, some understanding of the substantive law of copyright is necessary to the effective enforcement of the criminal provisions of Title 17. In this respect, U.S. Attorneys' offices prosecuting copyright cases will find Nimmer on Copyright, a four volume treatise published by Mathew Bender & Co., Inc., a useful guide to the intricacies of copyright law.

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9-71.100 OUTLINE OF TITLE 17, UNITED STATES CODE

9-71.110 Intellectual Property Entitled to Copyright Protection

9-71.111 Constitutional Limits on Copyright Protection

Art. I, §8, cl. 8 of the Constitution simply granted Congress the power to protect the "Writings" of "Authors." Accordingly, the first congressional copyright statute referred only to written works such as maps, charts and books. Act of May 31, 1790, c. 15, 1 Stat. 124. It is clear now however that Congress' constitutional authority in this area extends beyond written works to other media. As the Supreme Court has noted, this authority is not defined in a "narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles." Goldstein v. California, 412 U.S. 546, 561 (1973). Thus, the term "Author," in its constitutional sense, now denotes an "originator," or one "to whom anything owes its origin." Id., quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). Similarly the word "writings" has been construed broadly "to include any physical rendering of the fruits of creative intellectual or aesthetic labor." Id. Thus, Congress' constitutional authority to establish copyrights now reaches all tangible media of artistic expression, including photographs, motion pictures and sound recordings. See Goldstein v. California, supra, at 562-63, n. 17.

9-71.112 Statutory Limits on Copyright Protection

Today Congress, by statute, provides copyright protection to all "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. §102(a). There are two primary components to this definition. First, a work must be "original." In addition that work must be "fixed in any tangible medium of expression." The requirements of originality and fixation set the outer limits of federal copyright protection.

Originality of a copyright is satisfied by a low threshold of proof. Of course a work is not "original" if it is simply a copy of some other work existing in the public domain. However, the concept of originality does not imply the type of novelty necessary for a patent. Rather for a work to be "original" all that an author need do is contribute something more than a "merely trivial" variation, something recognizably his/her

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own, to it. See, e.g., Sid & Marty Krafft Television v. McDonald's Corp., 562 F.2d 1157, 1163 n.5 (9th Cir. 1977); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir.), cert. denied, 429 U.S. 857 (1976). Moreover, the originality requirement does not involve any assessment of the artistic quality of a work. No matter how poor artistically, an author's contribution may be copyrighted, if it is in some way original. See Gelles-Widmer Co. v. Milton-Bradley Co., 313 F.2d 143, 147-48 (7th Cir.), cert. denied, 373 U.S. 913 (1963).

The fixation requirement of a copyright is defined by 17 U.S.C. §101 in the following terms:

A work is "fixed in a tangible medium of expression" when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Within the broad parameters set by the originality and fixation requirements, all works of authorship are entitled to copyright protection. These include, but are not limited to, literary works; musical works (including any accompanying words); dramatic works (including any accompanying music); pantomimes; choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; and sound recordings. See 17 U.S.C. §102(a)(1)-(7). They also include compilations of pre-existing works and derivative works. See 17 U.S.C. §103(a). However, such compilations or derivative works must themselves reflect some originality in order to be copyrighted. This originality may result from the addition of new material to an existing work or it may consist exclusively of the selection, arrangement or presentation of pre-existing material in a new way. See United States v. Hamilton, 583 F.2d 488, 450-452 (9th Cir. 1978). Of course, the copyright of a compilation or derivative work does not affect the copyright of any pre-existing material incorporated into that work. The copyright of that pre-existing material is entirely independent of the compilation's copyright. See 17 U.S.C. §103(b).

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For purposes of the criminal law the most significant types of property subject to copyright protection are sound recordings, motion pictures and audiovisual works. Recent changes in the copyright laws have afforded these works a greater degree of protection than they have previously enjoyed. These works are described below.

9-71.113 Sound Recordings

In considering the copyright protection afforded to sound recordings it is important at the outset to distinguish between musical compositions and particular recordings of those compositions. Musical compositions have been entitled to copyright protection since 1831. Act of February 3, 1831, c. 16, 4 Stat. 436. In contrast, sound recordings have only recently received statutory copyright protection. Prior to 1971 courts consistently held that sound recordings were excluded by Congress from the copyright laws. See Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955).

In 1972, however, Congress expressly extended copyright protection to sound recordings. The Act of October 15, 1971, P.L. 92-140, 85 Stat. 391, provided statutory copyright protection for all sound recordings "fixed" in a tangible form on or after February 15, 1972. This statutory copyright has been carried forward into the current copyright law, which includes sound recordings among the works which may be copyrighted. See 17 U.S.C. §102(a)(7). Recordings fixed prior to February 15, 1972 remain ineligible for a federal copyright, but may be entitled to state statutory or common law protection. See 17 U.S.C. §301; 1 Nimmer on Copyright §2.10. This is very important for purposes of criminal law enforcement because it means that record or tape piracy involving recordings made prior to February 15, 1972 does not infringe any copyright on the recording itself. Such piracy is actionable only if the defendant infringed the copyright on the underlying musical composition. See, e.g., Heilman v. Bell, 583 F.2d 373 (6th Cir.), cert. denied, 440 U.S. 959 (1979).

Under the current copyright law sound recordings are defined to include all "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." See 17 U.S.C. §101. Thus, presently, both a musical composition and a particular artist's recorded rendition of that composition may be independently copyrighted. For example, A, the composer of a song may copyright that composition. If B, a singer, records A's song then B's recording is separately entitled to copyright

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protection. The scope of copyright protection for compositions, i.e., sheet music, and sound recordings is also discussed at USAM 9-71.133 and 9-71.134, infra.

9-71.114 Motion Pictures and Other Audio Visual Works

Motion pictures and other audiovisual works are specifically entitled to copyright protection under the current law. For purposes of the copyright laws audiovisual works "consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices. . . ." See 17 U.S.C. §101. There are three elements to this definition. First, the work must consist of "images." Second, those images must be "related," that is it must be intended that they be displayed sequentially. Third, the images must be "intrinsically intended to be shown by the use of" some machine or device. See 1 Nimmer on Copyright §2.09. This definition was drafted broadly to "encompass a wide range of cinematographic works embodied in films, tapes, video disks, and other media." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 1, 56, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5669. Accordingly, for purposes of the current copyright law video tapes, films and all other audiovisual media are entitled to the same protection.

Motion pictures are a subclass of audiovisual works. See 17 U.S.C. §101. Like other audiovisual works motion pictures consist of related images displayed by means of a machine. What distinguishes motion pictures from other audiovisual works is the additional requirement that the projected images "impart an impression of motion" when displayed. This distinction is illustrated by a comparison between a motion picture and a film strip projection. Both are audiovisual works, but only the former imparts an impression of motion.

The current copyright law also defines audiovisual works and motion pictures to include "accompanying sounds, if any." See 17 U.S.C. §101. This language was added to the copyright law in 1978 to clarify an ambiguity regarding the copyright status of motion picture sound tracks. See H.R. Rep. No. 1476, supra, at 56; 1976 U.S. Code Cong. & Ad. News, supra, at 5669. These sound tracks are now specifically protected by the copyright on the audiovisual work itself.

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9-71.120 Nature of the Rights Protected

The owner of a copyright obtains, through that copyright, the exclusive right to reproduce or distribute the copyrighted work, see 17 U.S.C. §106(1) and (3); to perform or display the work publicly, see 17 U.S.C. §106(4) and (5); and to prepare derivative works based upon the copyrighted work, see 17 U.S.C. §106(2).

The exclusive rights created by a copyright differ, however, from those conferred by patent. The monopoly established by a copyright is extremely limited. A copyright is simply an exclusive right to a particular work, to the expression of some idea in a specific format. It does not, however, confer any monopoly or rights to the underlying ideas, concepts or principles embodied in that work. See Mazer v. Stein, 347 U.S. 201, 217-218 (1954); 17 U.S.C. §102(b).

Thus, the rights of a copyright owner are not infringed by a substantially similar work, as long as that work has been independently created. In short, absent copying or some direct appropriation of a particular work the creation of similar works does not infringe a copyright. See 2 Nimmer on Copyright §8.01[A] (collecting cases); Schnadig Corp. v. Gaines Mfg. Co., Inc., 620 F.2d 1166 (6th Cir. 1980).

9-71.130 Limitations on the Rights Created by Copyright

Moreover, the exclusive rights conferred by 17 U.S.C. §106 are subject to a series of important limitations. These limitations are described in 17 U.S.C. §107 through §118. Essentially these sections provide that certain specific uses of a copyrighted work do not violate the copyright. Several of the most important limitations on these exclusive rights are discussed below.

9-71.131 Fair Use Doctrine, 17 U.S.C. §107

Historically the fair use doctrine was a judicially crafted exception to the exclusive rights created by copyright. This doctrine is now codified in 17 U.S.C. §107. The concept of fair use as a defense to copyright infringement is grounded in principles of equity. It reflects a tension which exists between the monopoly created by copyright and the free flow of ideas and information. It resolves this tension by permitting "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which [the] law is designed to foster." Iowa State University v. American Broadcasting Co., 621 F.2d 57, 60 (2d Cir. 1980). Under the fair use doctrine persons other than the copyright owner may use copyrighted material, without consent,

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as long as that material is used in a reasonable manner. See Rubin v. Boston Magazine Co., 645 F.2d 80, 83 (1st Cir. 1981). An equitable defense, such as fair use, is not subject to easy generalization or to determination by reference to any fixed rules. Rather this defense frequently turns on the facts attending the individual case. See Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir.), cert. denied, 434 U.S. 1013 (1978).

However, a few general comments can be made regarding fair use as a defense to infringement actions. As now codified, the fair use doctrine permits the reproduction of copyrighted works "for purposes such as criticism, comment, news reporting, teaching . . . scholarship or research. . . ." 17 U.S.C. §107. In practice, determining when a specific use of a copyrighted work constitutes a "fair use" generally turns on the following four factors:

A. The purpose and character of the use (this includes such considerations as whether the use is for commercial or non-profit purposes);

B. The nature of the copyrighted work;

C. The amount or substantiality of the portion used as compared to the entire work; and

D. The impact of the use on the potential market for the work. See 17 U.S.C. §107(1)-(4).

No single one of these factors is determinative. Rather all of these considerations are taken into account in determining whether a specific use was "fair."

The fair use doctrine is occasionally raised as a defense to criminal copyright prosecutions. See Heilman v. Bell, 583 F.2d 373 (6th Cir.) cert. denied, 440 U.S. 959 (1979). However, for reasons discussed in USAM 9-71.211, infra, this doctrine generally does not present serious problems of proof in criminal cases.

9-71.132 First Sale Doctrine, 17 U.S.C. §109

The first sale doctrine creates yet another limitation on the exclusive rights of copyright holders. This doctrine limits the control that a copyright holder can exercise over copies of a copyrighted work once he/she has sold or otherwise disposed of those copies. Under the

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first sale doctrine the owner of a copy of a copyrighted work may display, sell or transfer his/her copy of that work without the consent of the copyright holder. See 17 U.S.C. §109(a) and (b). The premise underlying this doctrine is that "where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy." See United States v. Moore, 604 F.2d 1228, 1232 (9th Cir. 1979) (citing cases) (emphasis added).

The first sale doctrine is frequently raised as a defense in criminal copyright infringement cases. In fact several cases have suggested that proof of the absence of a first sale is one of the elements of a criminal copyright prosecution. See, e.g., United States v. Moore, *supra*; United States v. Whetzel, 589 F.2d 707 (D.C. Cir. 1978); United States v. Drebin, 557 F.2d 1316 (9th Cir.), *cert. denied*, 436 U.S. 904 (1978). See also, USAM 9-71.212, *infra*, for a discussion of the first sale doctrine in criminal copyright cases. For this reason it is important to understand what conduct is protected by this doctrine.

At the outset the first sale doctrine applies only to the "owner" of a copy of copyrighted work. Therefore the privileges created by that doctrine do not "extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it." See 17 U.S.C. §109(c). This is an important limitation. The distribution systems for some artistic works, most notably motion pictures, rely on leases or other devices to transfer possession of copies of a copyrighted work. Thus, under these distribution systems the copyright holder remains the "owner" of the distributed copies. Therefore, persons obtaining possession of a copy of the work receive no ownership interest in it and are unable to assert the first sale doctrine as a defense to an infringement action.

In addition, the first sale doctrine restricts only some of the exclusive rights of the copyright holder. Under 17 U.S.C. §109 the owner of a copy of a copyrighted work may "sell or otherwise dispose of . . . that copy . . ." or "display that copy publicly. . . ." 17 U.S.C. §109(a) and (b) (emphasis added). Accordingly, by its terms 17 U.S.C. §109 does not affect the copyright holder's exclusive right to reproduce copies of the work. See 17 U.S.C. §106(1).

In short, through the first sale doctrine the owner of a copyrighted work receives the right to sell, display or dispose of his/her copy of that work. He/she does not, however, receive the right to reproduce and distribute additional copies made from that work. Thus if copyright owner A sells a copy of a work to B, B may in turn sell that particular copy without violating the copyright laws. B may not, however, make unauthorized copies from his/her copy without running afoul of the law.

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This, too, is an important limitation. Infringement of records and audio tapes consists largely of the unauthorized reproduction of a copyrighted work. In such an infringement action the first sale doctrine is not a defense because a first sale does not confer any right to reproduce copies of a work. The implications of the first sale doctrine for criminal law enforcement and methods of proving first sale are discussed at USAM 9-71.212, infra.

9-71.133 Limitations on the Exclusive Rights of Copyright Holders--Sound Recordings, 17 U.S.C. §114

The protection afforded sound recordings differs significantly from that conferred on other artistic media by the copyright laws. At the outset, the exclusive rights of a copyright holder in a sound recording are limited to the rights to reproduce and distribute the work, along with the right to prepare derivative works. Thus, unlike other media, a copyright on a sound recording does not confer any exclusive right to perform that work. See 17 U.S.C. §114(a). It should be noted, however, that the copyright holder of the underlying composition still retains the exclusive right to publicly perform the work. See 17 U.S.C. §114(c). In this respect the copyright protection extended to a composition exceeds that provided to a recorded rendition of that composition.

Moreover, the exclusive rights to reproduce recordings or prepare derivative works based on those recordings are narrowly defined. The copyright holder merely receives the right to reproduce or use the sounds actually captured in the recording. Therefore the creation of another recording which simulates or imitates those sounds does not violate the performer's copyright. It may, however, still violate the independent copyright of the composer. See USAM 9-71.113, supra. Only the actual appropriation of sounds contained in a copyrighted recording constitutes an infringement of the exclusive rights of the performer. See 17 U.S.C. §114(b).

This principle is important for purposes of criminal copyright law enforcement. In prosecutions involving sound recordings some defendants have alleged that they produced and distributed works which merely imitated a copyrighted recording. See United States v. Taxe, 540 F.2d 961 (9th Cir.), cert. denied, 429 U.S. 1040 (1976). Accordingly, prosecutors preparing infringement cases dealing with sound recordings must be aware of this defense and should be prepared in every case to demonstrate that the actual sounds of a copyrighted recording have been appropriated.

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What if the defendant makes some technical variations in a copyrighted recording by adding or removing sounds? Would this new recording still infringe the exclusive rights of the copyright holder? Generally, it would. The exclusive rights conferred by a copyright on a sound recording include the right to prepare derivative works from that recording. See 17 U.S.C. §§106, 114(a). A reproduction of a copyrighted recording which is technically altered by the inclusion or removal of sounds would be a derivative work. Therefore, unauthorized production of such a recording would violate the copyright holder's exclusive rights and constitute infringement.

9-71.134 Limitations on the Exclusive Rights of Copyright Holders--
Nondramatic Musical Works, 17 U.S.C. §115

Copyrights on musical works are also subject to unique limitations. Under 17 U.S.C. §115, the exclusive rights of a copyright holder to reproduce and distribute copies of a musical work are subject to compulsory licensing. Under such a license, persons other than the copyright holder may reproduce and distribute copies of the work.

In order to obtain such a compulsory license persons making or distributing copies of the work must file a notice of intention to seek a license with the Copyright Office and pay a prescribed royalty fee. See 17 U.S.C. §115(b) and (c). Failure to follow these procedures can result in civil and criminal liability for infringement. See 17 U.S.C. §115(b)(2). These licensing provisions only apply to nondramatic musical works, i.e., sheet music. Thus, 17 U.S.C. §115 has no application to other types of copyrighted works. In particular this section does not affect the separate copyright on sound recordings of these works. See 2 Nimmer on Copyright §8.04[A]. This important distinction can be illustrated by the following example. A, a performer, wishes to make a recording of B's musical composition. By following the compulsory licensing procedures A can obtain the right to record and distribute B's song. However, if a third person, C, has already recorded this song A cannot obtain a compulsory license to distribute copies of C's recording. C's recording is protected by a separate copyright which is not subject to compulsory licensing.

These compulsory licensing provisions have been raised as a defense to criminal copyright infringement prosecutions in several cases. See Heilman v. Bell, 583 F.2d 373, 375-77 (6th Cir.), cert. denied, 440 U.S. 959 (1979) (citing cases). These attempts have proven uniformly unsuccessful. Accordingly, these compulsory licensing provisions generally do not present a serious obstacle to criminal copyright prosecutions. A detailed discussion of these licensing provisions can be found at 2 Nimmer on Copyright §8.04.

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9-71.140 Duration of Copyrights

The monopoly created by a copyright is limited in yet another respect. Art. I, §8, cl. 8 of the United States Constitution authorizes Congress to enact legislation "securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (emphasis added.) Thus, the Constitution explicitly limits Congressional power to create monopolies over intellectual property. Legislation providing for such monopolies must specifically limit the duration of these exclusive rights.

Historically the American copyright system set these limits by providing copyright protection for a fixed period beginning from the date of either publication or registration of the work. See 2 Nimmer on Copyright §9.01[A][2]. Thus, under the former law a copyright subsisted for 28 years from the date of publication (or registration in an unpublished form) and could be renewed for an additional 28 year period.

In 1976, however, Congress departed from this statutory scheme. Congress no longer defined the duration of a copyright by reference to any fixed term of years. Instead, Congress adopted a system in which copyright protection began with the creation of the work and "endure[d] for a term consisting of the life of the author and fifty years after the author's death." 17 U.S.C. §302(a).

This rule now generally defines the duration of copyrights obtained on works created after January 1, 1978. In addition Congress has, by statute, provided special rules relating to works created prior to January 1, 1978 but not published or copyrighted, see 17 U.S.C. §303, and works copyrighted prior to January 1, 1978, see 17 U.S.C. §304.

Of course this life-plus-fifty year term cannot be applied universally. Anonymous works, pseudonymous works and works made for hire have no identifiable author. A life-plus-fifty years standard obviously cannot be applied to such works. Accordingly Congress has provided that copyrights on these works endure "for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first." See 17 U.S.C. §302(c).

To promote ease in administering this system, Congress requires the Copyright Office to maintain records relating to the deaths of authors. See 17 U.S.C. §302(d). Congress has also established a statutory presumption relating to the deaths of authors. This presumption comes into effect 75 years from the year of the work's first publication or 100 years from its creation, whichever occurs first. If, after this period,

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the Copyright Office has no record indicating that the author is still alive or that he/she has been dead for less than 50 years, then that author is presumed to have been dead for 50 years. Persons interested in the copyrighted work can receive a certified report to this effect from the Copyright Office. See 17 U.S.C. §302(e). Good faith reliance on this presumption constitutes a complete defense to any infringement action.

9-71.150 Copyright Registration--The Formal Requisites

Most foreign jurisdictions do not require the formal registration of copyrights. The United States, in a departure from this general international practice, does demand the observance of certain formalities as a condition to copyright protection. See 2 Nimmer on Copyright §7.01. The formal requisites for copyright registration are set forth in 17 U.S.C. §401 through §412. Generally these requisites include:

A. Registration of the work with the Register of Copyrights, see 17 U.S.C. §§408-410;

B. Attachment of copyright notices to all publicly distributed copies of the work, see 17 U.S.C. §§401-406; and

C. The deposit of copies of the work with the Library of Congress, see 17 U.S.C. §407.

Registration of a copyright is a prerequisite to any infringement action, civil or criminal. See 17 U.S.C. §411. For this reason, it is important that prosecutors be aware of the existence of these registration requirements. However, in most instances there will be no dispute regarding the registration of the copyright which is the subject of a prosecution. Therefore, no detailed discussion of these requirements is necessary in this Manual. Prosecutors with specific questions regarding registration procedures should refer to 2 Nimmer on Copyright §7.01 et seq., which contains a detailed discussion of these procedures.

9-71.200 PROTECTION OF INTELLECTUAL PROPERTY--THE CRIMINAL LAW

As previously noted, in the past decade the criminal law has assumed far greater significance in the protection of intellectual property. This development can be attributed to several factors. In part, it is a consequence of the burgeoning trade in counterfeit records, tapes and films. In addition this development is a direct result of the increased attention which this problem has received from Congress and federal law enforcement officials.

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The criminal law in this area now both complements and supplements the existing civil remedies for copyright infringement. It complements these remedies by providing criminal penalties for certain acts of copyright infringement. See 17 U.S.C. §506(a). In addition the criminal law supplements private civil remedies by prohibiting conduct which, although not civilly actionable, undermines the integrity of the copyright system. See 17 U.S.C. §506(c)-(e). The following sections outline the major criminal statutes employed to protect intellectual property.

9-71.210 Criminal Copyright Infringement: 17 U.S.C. §506(a)

17 U.S.C. §506(a) is the principal criminal statute protecting copyrighted works. 17 U.S.C. §506(a) supplements the panoply of civil remedies provided to copyright owners under federal law, see 17 U.S.C. §§502-505, and imposes criminal sanctions on certain types of infringing conduct.

17 U.S.C. §506(a) also carries the most severe sanctions of any Title 17 offense. Under the sentencing provision to 17 U.S.C. §506(a), persons convicted of large scale infringement involving sound recordings or audiovisual works are subject to a maximum penalty of five years imprisonment, a \$250,000 fine, or both. See 18 U.S.C. §2319. These penalties, which have recently been increased by Congress, make 17 U.S.C. §506(a) the single most effective criminal deterrent against unlawful appropriation of intellectual property.

17 U.S.C. §506(a) prohibits any person from infringing "a copyright willfully and for purposes of commercial advantage or private financial gain. . . ." By tying criminal liability to infringement of a copyright, 17 U.S.C. §506(a) implicitly incorporates certain aspects of the civil law of copyright infringement into the criminal law. Thus, in order for conduct to violate 17 U.S.C. §506(a) it must first constitute infringement in the civil sense. Consequently concepts such as fair use and first sale, which define civil copyright infringement, may be applicable to 17 U.S.C. §506(a).

Certain civil copyright infringements are excluded, however, from the criminal sanctions of 17 U.S.C. §506(a). For example, under civil copyright law innocent intent is no defense. In contrast, 17 U.S.C. §506(a) proscribes only willful infringement. Similarly, under the civil law non-profit public performances may constitute acts of infringement. Yet 17 U.S.C. §506(a) only prohibits infringement done "for purposes of commercial advantage or private financial gain." Thus it is clear that, while 17 U.S.C. §506(a) is defined in large measure by civil copyright law, the criminal sanctions of that section do not reach all civilly infringing conduct. See 3 Nimmer on Copyright §15.01.

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Criminal copyright infringement requires proof of the following elements:

- A. Infringement of a valid copyright;
- B. Done willfully;
- C. For purposes of commercial advantage or financial gain.

In addition several cases suggest that in prosecutions under this section the United States must also prove that the work has not been the subject of a first sale; and that the defendant knew that there has been no first sale of the work. See United States v. Atherton, 561 F.2d 747, 749 (9th Cir. 1977); see, e.g., United States v. Drebin, 557 F.2d 1316, 1326 (9th Cir.), cert. denied, 436 U.S. 904 (1978); 3 Nimmer on Copyright, §15.01. However for the reasons discussed at USAM 9-71.212, *infra*, these cases may err when they require proof of the absence of a first sale in all criminal copyright prosecutions.

The elements of criminal copyright infringement, and their proof, are described below.

9-71.211 Infringement of a Copyright

The threshold requirement for criminal copyright infringement is, of course, infringement of a valid copyright. There are several aspects to this requirement. At the outset, it means that the formal requisites of copyright registration must be satisfied. Such registration is a prerequisite to any infringement action, civil or criminal. See 17 U.S.C. §411. Registration of a copyright can be proven simply by obtaining from the Register of Copyrights a certificate of registration. By statute, such a certificate "constitute[s] prima facie evidence of the validity of the copyright. . . ." 17 U.S.C. §410(c). See United States v. Taxe, 540 F.2d 961, 966 (9th Cir.), cert. denied, 429 U.S. 1040 (1976) (criminal case, certificate provided prima facie proof of date of fixation.)

In addition, the concept of infringement implicates a host of statutory exceptions to the exclusive rights created by copyright. "Infringement" is not explicitly defined in Title 17. See 17 U.S.C. §501(a), however, provides that: "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of [17 U.S.C. §602] is an infringer of the copyright." Thus, the concept of infringement is defined by reference to the exclusive rights established by 17 U.S.C. §106. It follows that the limitations on these exclusive rights set forth in 17 U.S.C. §§107-118 also act as substantive limits on infringement actions, both civil and criminal.

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For the most part, these statutory limitations on the exclusive rights conferred by copyright do not create problems of proof in criminal cases. Many of these limitations involve conduct which is already specifically exempted from criminal liability by 17 U.S.C. §506(a). For example, 17 U.S.C. §§110 and 118, which deal with non-profit performances and displays of a copyrighted work, do not affect criminal prosecutions, since such prosecutions are limited to acts of infringement undertaken "for purposes of commercial advantage or private financial gain." See 17 U.S.C. §506(a). Other limitations, while theoretically applicable in criminal cases, have little practical impact on the government's burden of proof. For example, the "fair use" doctrine, see 17 U.S.C. §107, limits the exclusive rights of a copyright owner. See USAM 9-71.131, *supra*, for a discussion of the fair use doctrine. Serious questions of fair use may arise in the context of civil copyright infringement cases. However, as a practical matter, the fair use doctrine should not impose any additional burden on the government in a criminal infringement action. The government is already required by 17 U.S.C. §506(a) to demonstrate willful infringement conducted for purposes of private gain as part of a criminal prosecution. Proof of these elements would necessarily negate any claim by a defendant that his/her actions were a non-infringing fair use.

In practice, only one of these limitations on statutory copyrights may create problems for criminal law enforcement. That limitation is the first sale doctrine, codified in 17 U.S.C. §109. That doctrine, and its impact on criminal copyright infringement prosecutions, are discussed below.

9-71.212 First Sale Doctrine in Criminal Cases

As previously mentioned, see USAM 9-71.132, *supra*, the first sale doctrine limits the exclusive rights of a copyright holder. Generally this doctrine permits the owner of a copy of a copyrighted work to sell, display or dispose of that copy, notwithstanding the interests of the copyright holder. See 17 U.S.C. §109(a) and (b).

The first sale doctrine has become a part of the criminal law of copyright. Several cases have suggested that proof of the absence of a first sale is part of the government's case-in-chief in criminal copyright prosecutions. See, e.g., United States v. Moore, 604 F.2d 1228 (9th Cir. 1979); United States v. Whetzel, 589 F.2d 707 (D.C. Cir. 1978); United States v. Atherton, 561 F.2d 747 (9th Cir. 1977); United States v. Drebin, 557 F.2d 1316 (9th Cir. 1977). In fact, at least one case has reversed a conviction in part because of inadequacies in the government's proof on this issue. See United States v. Atherton, *supra*.

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We believe that these cases err when they imply that the first sale doctrine is necessarily involved in all criminal copyright prosecutions. It is important to recognize at the outset that 17 U.S.C. §109 confers limited rights with respect to copyrighted works, and that these rights exist only for a limited class of people.

Only the owner of an authorized copy of a copyrighted work may assert any rights by virtue of the first sale doctrine. Therefore, persons who obtain possession of a copy of a work without receiving title to it are unable to assert this defense. Similarly, the first sale doctrine permits the owner of a copy of a copyrighted work only to sell, display or dispose of that copy. It does not permit him/her to reproduce that copy and dispose of those reproductions. Accordingly individuals whose infringing conduct consists of reproducing unauthorized copies of a copyrighted work should not be able to assert the first sale doctrine as a defense. Thus, in many instances the concept of first sale is simply inapplicable.

Moreover, in instances where the first sale doctrine arguably applies as a defense these cases may err in allocating the burden of proof to the government on this question. When Congress enacted 17 U.S.C. §109 it unambiguously addressed this issue. In the House Report on this section Congress noted that:

During the course of its deliberations . . . , the committee's attention was directed to a recent court decision holding that the plaintiff in an infringement action had the burden of establishing that the allegedly infringing copies in the defendant's possession were not lawfully made or acquired. . . . The committee believes that the court's decision, if followed, would place a virtually impossible burden on copyright owners. The decision is also inconsistent with the established legal principle that the burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary. The defendant in such actions clearly has the particular knowledge of how possession of the particular copy was acquired, and should have the burden of providing this evidence to the court. It is the intent of the committee, therefore, that in an action to determine whether a defendant is entitled to the privilege established by section 109(a) and (b), the burden of proving whether a particular copy was lawfully made or acquired should rest on the defendant.

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See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 1, 80-81, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5694-95. Thus, it is clear that the first sale doctrine was designed and intended by Congress to be an affirmative defense in an infringement action. Because knowledge regarding acquisition of copies of an allegedly infringing work is particularly the province of the possessor, Congress allocated the burden of proof on the question of first sale to the person alleging it, the defendant. Since the concept of first sale, as it exists in the civil context, is incorporated into the criminal law one could argue that Congress' allocation of the burden of proof on this defense should also apply in criminal prosecutions. This Congressional determination has been ignored, however, by those cases which include the absence of a first sale as one of the elements of criminal copyright infringement.

In cases where the first sale doctrine does apply and the burden of proof lies with the government demonstrating the absence of a first sale can present serious problems of proof. Some defendants have argued that the government must completely account for the distribution of all copies of a work in order to carry its burden on this question. In effect this would require the government to trace the distribution of every copy of a copyrighted work.

This argument has been rejected by the courts which have considered it. See United States v. Moore, supra, at 1232; United States v. Whetzel, supra, at 711. These cases recognize that the wide distribution of many artistic works makes such a requirement impractical. "Therefore the Government can prove the absence of a first sale by showing that the [copy] in question was unauthorized, and it can establish this proof not only by evidence tracing the distribution of that [copy] but also by circumstantial evidence from which a jury could conclude beyond a reasonable doubt that the recording was never authorized and therefore never the subject of a first sale." See United States v. Moore, supra, at 1232.

Several types of circumstantial proof have been relied upon to demonstrate the absence of a first sale. For example, a number of cases have suggested that, when a defendant's actions indicate that copies have been obtained illegitimately, a jury may infer that no valid first sale has occurred. See United States v. Moore, supra; United States v. Whetzel, supra. Factors which indicate that copies were obtained illicitly include: sale of copies at a price far below legitimate market value; distribution of copies of inferior quality; presence of false information on the copies, such as a false address for the manufacturer; and the circumstances surrounding the sale of the copies. See United States v. Whetzel, supra, (sale of copies of tapes at night from the back of a truck in a parking lot).

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In other instances the nature of the distribution system employed by the copyright holder may negate the possibility of a first sale. This is particularly true of copyright cases involving the film industry. In a number of cases the absence of a first sale has been established by showing that the works in question were distributed exclusively through loans and leases. Since the first sale defense is premised on a sale and the transfer of title, evidence that the copyright holder sold no copies of the work effectively negates this claim. Compare, United States v. Drebin, 557 F.2d 1316 (9th Cir.), cert. denied, 436 U.S. 904 (1978), with United States v. Atherton, supra.

9-71.213 Intent

17 U.S.C. §506(a) requires proof of a specific state of mind as part of any criminal infringement prosecution. At the outset the act of infringement must be willful; that is, it must be "an act intentionally done in violation of the law." See United States v. Wise, 550 F.2d 1180, 1194 (9th Cir.), cert. denied, 434 U.S. 929 (1977). Willful conduct may also include intentional or voluntary acts done with a bad purpose or without justifiable excuse. See United States v. Murdock, 290 U.S. 389, 394 (1933).

In addition, as noted earlier, some cases suggest that the government must also demonstrate that the defendant knew the work had not been the subject of a first sale. See, e.g., United States v. Moore, 604 F.2d 1228 (9th Cir. 1979); United States v. Atherton, 561 F.2d 747 (9th Cir. 1977); United States v. Wise, supra. For the reasons discussed in USAM 9-71.212, supra, it is questionable whether knowledge regarding absence of a first sale is appropriately part of the government's case-in-chief. Moreover, proof of a willful violation of the copyright laws would necessarily imply that a defendant did not believe that the work had been subject to a first sale. However, to the extent that knowledge regarding first sale is deemed part of the government's proof this knowledge can be proven directly by admissions from the defendant, see United States v. Wise, supra, at 1194-95, or it can be inferred from circumstantial evidence, see United States v. Moore, supra, at 1232; United States v. Whetzel, 589 F.2d 707, 711-12 (D.C. Cir. 1978) (sale of tapes at night in parking lot; tapes valued at far below market price; tapes falsely labelled.)

Finally the government must show that the defendant engaged in this willful act of infringement "for purposes of commercial advantage or private financial gain." See 17 U.S.C. §506(a). For purposes of 17 U.S.C. §506(a) it is irrelevant whether any profit was, in fact, realized.

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See United States v. Taxe, 380 F. Supp. 1010, 1018 (C.D. Cal. 1974), aff'd, 540 F.2d 961 (9th Cir. 1976). All that is required is that the defendant engage in the infringing conduct with the hope or expectation of profit. E.g., United States v. Moore, supra, at 1235; United States v. Wise, supra, at 1195.

9-71.214 Criminal Copyright Infringement Penalties

A. One important feature of the new federal criminal copyright laws consist of the penalties imposed for criminal infringement. These penalties, which can be found at 18 U.S.C. §2319, have been increased significantly. Moreover special graduated penalties are now provided for copyright infringement of motion pictures, audiovisual works, phonorecords and sound recordings. See 18 U.S.C. §2319(b)(1) and (2).

The maximum penalty for criminal copyright infringement is generally set at one year imprisonment, a \$25,000 fine, or both. See 18 U.S.C. §2319(b)(3). Congress recognized, however, that this penalty provided an inadequate deterrent to those engaged in the highly lucrative business of record and tape piracy. Accordingly, Congress provided specific enhanced penalties for copyright infringement involving sound recordings, phonorecords, motion pictures and audiovisual works.

These penalties are directly tied to the number of infringing copies produced or distributed by the defendant over a 180-day period. Under this sentencing scheme, as the number of infringing copies increases so too does the maximum sentence. 18 U.S.C. §2319 also provides enhanced penalties for recidivists, reserving the most severe sanctions for those who have previously been convicted of copyright infringement.

B. Under 18 U.S.C. §2319 these enhanced penalties are graduated. 18 U.S.C. §2319 establishes a two-tier sentencing scheme. A maximum sentence of two years imprisonment, a \$250,000 fine, or both may be imposed for criminal infringement of copyrights involving sound recordings or audiovisual works when:

1. The infringement involves the reproduction or distribution of more than 100 but less than 1,000 copies of one or more sound recordings in any 180-day period, see 18 U.S.C. §2319(b)(2)(A); or

2. The infringement involves the reproduction or distribution of more than 7 but less than 65 copies of one or more audiovisual works in a 180-day period, see 18 U.S.C. §2319(b)(2)(B).

C. The most severe penalty, 5 years imprisonment, a \$250,000 fine or both, is reserved for the following three situations:

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1. Infringements involving the reproduction or distribution of at least 1,000 copies of one or more sound recordings in any 180-day period, see 18 U.S.C. §2319(b)(1)(A);

2. Infringements involving the reproduction or distribution of at least 65 copies of an audiovisual work in any 180-day period, see 18 U.S.C. §2319(b)(1)(B); or

3. Infringement by a defendant who has previously been convicted of copyright infringement, where the prior conviction related to sound recordings or audiovisual works, see 18 U.S.C. §2319(b)(1)(C).

D. The way in which these sentencing provisions are structured has an impact upon the plea negotiation process. 18 U.S.C. §2319 affects the plea process in two ways. First, it requires that any infringement plea involving these enhanced penalties specify the number of infringing copies made by the defendant. By specifying the extent of the infringing conduct in the plea colloquy, the prosecutor sets a ceiling on the maximum sentence and establishes a factual record to support that sentence.

E. In addition, by tying these enhanced penalties to prior infringement convictions, 18 U.S.C. §2319 introduces a new tactical consideration into plea bargaining. In cases involving both corporate and individual defendants prosecutors will want to insure that guilty pleas are entered by the individual defendants. Such pleas could then be used in subsequent prosecutions to enhance the penalties faced by those individuals.

9-71.220 Protection of Copyright Notices: 17 U.S.C. §506(c) and (d)

A. One of the formal requisites of a statutory copyright is that all copies of the work bear a prescribed form of notice. See 17 U.S.C. §§401 and 402. This notice contains the name of the copyright owner, the date of the work's first publication and a symbol indicating that the work has been copyrighted.

17 U.S.C. §506(c) and (d) are criminal statutes which are designed to protect the integrity of these copyright notices. 17 U.S.C. §506(c) provides that:

Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.

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B. Three distinct acts are prohibited by this subsection. These are:

1. Placing a notice of copyright, or words of the same purport, which one knows to be false on an article;
2. Publicly distributing an article which bears such notice or words; and
3. Importing for public distribution an article bearing such notice or words.

Any of these three acts, performed with the requisite intent, violates the law.

C. 17 U.S.C. §506(c) calls for proof of a specific intent as part of any prosecution. Under 17 U.S.C. §506(c) at the outset the government must show that the defendant knew that the copyright notice was false. In addition, however, it must be shown that the defendant acted "with fraudulent intent." The addition of this fraudulent intent requirement makes 17 U.S.C. §506(c) a specific intent crime.

D. Subsection (d) of 17 U.S.C. §506 complements subsection (c) of 17 U.S.C. §506 by prohibiting the removal or alteration of valid copyright notices from an article by any person acting with fraudulent intent. While 17 U.S.C. §506(d) does not require proof of a compound state of mind, it, like 17 U.S.C. §506(c), is a specific intent crime.

E. These two subsections share several common characteristics. At the outset, unlike 17 U.S.C. §506(a), subsections (c) and (d) proscribe conduct which is not otherwise actionable. In other words, violations of 17 U.S.C. §506(c) and (d) do not create independent civil liability under federal law. Moreover the penalties imposed by these two subsections are identical--a maximum fine of \$2,500. Finally, neither section has been vigorously enforced. In fact, there are no reported cases applying either 17 U.S.C. §506(c) and (d) or its predecessor, section 105 of 1909 Copyright Act. See 3 Nimmer on Copyright §15.02.

9-71.230 False Representations: 17 U.S.C. §506(e)

As part of the copyright process, individuals wishing to obtain statutory protection for a work must file an application for copyright registration with the Register of Copyright. These applications must identify the copyright claimant; explain how the claimant obtained the work; and identify and describe the work. See 17 U.S.C. §409(1)-(11). On

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the basis of these representations, the Copyright Office determines whether to issue a copyright to the applicant. See 17 U.S.C. §410.

Title 17 U.S.C. §506(e) is designed to ensure the accuracy of these copyright applications. This section provides that:

Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

17 U.S.C. §506(e) calls for proof of the following four elements as part of a criminal prosecution:

- A. A false representation;
- B. Of a material fact;
- C. Knowingly made; and
- D. In a copyright application or any written statement filed in connection with an application.

There are no recorded cases applying 17 U.S.C. §506(e). From the text of this subsection, however, it is apparent that 17 U.S.C. §506(e) differs in one significant respect from the other criminal offenses described in 17 U.S.C. §506. 17 U.S.C. §506(e) proscribes any knowingly false statements in copyright applications. Thus, unlike subsections (a), (c) and (d), of 17 U.S.C. §506, in subsection (e) of 17 U.S.C. §506 this offense is a general intent crime.

9-71.240 Criminal Violations of Licensing Provisions: 17 U.S.C. §116(d)

A similar set of prohibitions, although of more narrow application, can be found in 17 U.S.C. §116(d). 17 U.S.C. §116 generally describes the right of copyright owners to royalties for public performances of copyrighted musical works "by means of a coin-operated phonorecord player." 17 U.S.C. §116(a). In short, this section defines the rights and duties of jukebox operators under federal copyright law. This section provides for compulsory licensing of jukebox operators and the payment of statutorily prescribed royalties for the public performance of phonorecords by jukebox. See 17 U.S.C. §116(b). Operators must apply for a certificate for the jukebox and place that certificate on the jukebox as

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part of this licensing procedure. 17 U.S.C. §116(d) makes it a crime for any person to:

- A. Knowingly make a false statement on an application for a jukebox license; or
- B. Knowingly alter a certificate issued for a jukebox; or
- C. Knowingly affix a certificate to a jukebox other than the one it covers.

The penalty for violations of this subsection is a maximum \$2,500 fine. There are no recorded cases interpreting this criminal statute.

9-71.250 Trafficking in Counterfeit Labels: 18 U.S.C. §2318

18 U.S.C. §2318 is closely related to, and complements, the criminal provisions of Title 17. This section prohibits anyone from knowingly trafficking in "counterfeit label[s] affixed or designed to be affixed to a phonorecord, or a copy of a motion picture or other audio visual work. . . ." 18 U.S.C. §2318(a).

A. However, 18 U.S.C. §2318 is not, strictly speaking, a copyright statute. The scope of this section is broader than Title 17. It encompasses trafficking in counterfeit labels on both copyrighted and uncopyrighted works. See United States v. Sam Goody, Inc., 506 F. Supp. 380, 386 (E.D.N.Y. 1981). Under 18 U.S.C. §2318(c) federal jurisdiction exists:

1. When this trafficking occurs within the special maritime and territorial jurisdiction of the United States, or within the special aircraft jurisdiction of the United States;
2. When the mail or a facility of interstate or foreign commerce is used in the commission of the offense; or
3. When the counterfeit label is affixed or designed to be affixed to a copyrighted work.

B. Generally, there are five elements to a 18 U.S.C. §2318 violation:

1. First, the defendant must be "trafficking" in labels for phonorecords, motion pictures or audiovisual works. Section 2318

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defines traffic broadly to include: "to transport, transfer or otherwise dispose of, to another, as consideration for anything of value or to make or obtain control of with intent to so transport, transfer or dispose of . . ." 18 U.S.C. §2318(b)(2).

2. Second, the labels must be counterfeit, that is, they must appear to be genuine when, in fact, they are not. See 18 U.S.C. §2318(b)(1). This requirement distinguishes this offense from the "bootlegging" or "pirating" of recordings or tapes. Counterfeit records or tapes are works which are made to appear legitimate. Bootleg or pirated records and tapes are copies with no pretensions of legitimacy. Under 18 U.S.C. §2318 only trafficking in counterfeit works is prohibited. See United States v. Schultz, 482 F.2d 1179, 1180 (6th Cir. 1973). Tape piracy, of course, may be independently prosecutable under Title 17 or provisions of state law.

3. Third, the counterfeit label must be "affixed or designed to be affixed to a phonorecord or a copy of a motion picture or other audio visual work." For purposes of 18 U.S.C. §2318 the terms "copy," "phonorecord," "motion picture" and "audiovisual work" have the meaning given those terms by 17 U.S.C. §101. Therefore these terms are defined by reference to the copyright laws.

In addition it should be noted that 18 U.S.C. §2318 prohibits trafficking in counterfeit labels "affixed or designed to be affixed" to a record or audiovisual work. Therefore, it is not necessary that the label actually be attached to a work. Simply trafficking in labels will trigger this statutory prohibition.

4. Fourth, the defendant must know that the labels are counterfeit. By limiting this offense to knowing traffic in counterfeit labels, Congress defines 18 U.S.C. §2318 as a general intent crime.

5. Fifth, the jurisdictional bases of 18 U.S.C. §2318 must be satisfied; i.e., the offense must occur in the special maritime or territorial jurisdiction of the United States, involve a copyrighted work or involve the use of the mails or facilities of interstate or involve the use of the mails or facilities of interstate or foreign commerce. See 18 U.S.C. §2318(c)(1)-(3).

C. The maximum penalty for a violation of 18 U.S.C. §2318 is five years imprisonment, a \$250,000 fine, or both. See 18 U.S.C. §2318(a).

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9-71.260 Interstate Transportation of Stolen Property: 18 U.S.C. §2314

Over the past several years the courts of appeals have divided sharply on the issue of whether the National Stolen Property Act, 18 U.S.C. §2314, prohibits the interstate transportation of counterfeit copies of copyrighted works. Compare United States v. Drebin, 557 F.2d 1316, 1332 (9th Cir. 1977) (Section 2314 applies to interstate transportation of copyrighted works) with United States v. Smith, 686 F.2d 232 (5th Cir. 1982). The Supreme Court has now resolved this conflict in favor of the view that interstate transportation of infringing copies of a copyrighted work does not violate 18 U.S.C. §2314. Dowling v. United States, _____ U.S. _____, 53 U.S.L.W. 4978 (June 28, 1985).

While the court's ruling in Dowling largely forecloses 18 U.S.C. §2314 as a prosecutive option in criminal copyright cases, the court explicitly reserved the issue of whether section 2314 would apply to cases where the infringer "obtained the source material through illicit means." See Dowling v. United States, *supra*, 53 U.S.L.W. at 4980, n.7. Thus, in cases where the underlying copyrighted work is "stolen, converted or taken by fraud" section 2314 may still apply. Prosecutors should be alert to this possibility in reviewing any criminal copyright case.

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9-71.270 Other Criminal Statutes

The sale, reproduction and distribution of counterfeit or pirated copies of a copyrighted work may frequently be part of a larger fraudulent scheme. By marketing counterfeit works as genuine many defendants may be engaging in a scheme to defraud retailers and consumers. Assuming that the jurisdictional means are used such a scheme could violate the federal mail and wire fraud statutes. See 18 U.S.C. §§1341 and 1343. Similarly, while copyright laws do not permit copyright protection of works prepared by the United States government, the government may receive and hold copyrights transferred to it by third parties. See 17 U.S.C. §105. Therefore infringement or other misappropriation of a copyright held by the United States may constitute a theft of government property, prohibited by 18 U.S.C. §641. These and other alternate bases of prosecution should also be considered by the U.S. Attorney in all appropriate cases.

9-71.280 Statute of Limitations

In considering whether to indict copyright and Title 18 offenses together, one should note that these offenses are subject to different statutes of limitations. Prosecutions of Title 18 offenses generally must be commenced within five years of the date of the crime itself. See 18 U.S.C. §3282. In contrast, 17 U.S.C. §507(a) provides that "[n]o criminal proceedings shall be maintained under the provisions of this title unless it is commenced within three years after the cause of action arose." Thus Title 17 criminal offenses are subject to a shorter statute of limitations than the complementary Title 18 crimes.

This distinction has obvious implications for prosecutors when selecting charges for a proposed indictment. In some cases Title 17 offenses which are clearly beyond the statute of limitations may still be subject to prosecution as violations of 18 U.S.C. §§2314 and 2318. Prosecutors should be alert to this possibility when considering which charges to proceed under in a criminal copyright investigation.

9-71.300 FORFEITURE

Finally, federal law protects intellectual property by providing for forfeiture of both infringing copies of copyrighted works and all equipment used in the manufacture of these infringing copies. Under the current law two types of forfeiture proceedings exist--civil and criminal.

Criminal forfeiture comes into play only after a defendant has been convicted of a substantive criminal offense. Thus, criminal forfeiture is a form of penalty directed against the individual who has broken the law. There are two criminal forfeiture provisions which relate to copyright violations. The most significant of these forfeiture provisions is found at 17 U.S.C. §506(b). This section provides that:

When any person is convicted of [criminal copyright infringement], the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.

In addition, 18 U.S.C. §2318 contains a similar provision, requiring the court as part of any judgment of conviction to "order the forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed." See 18 U.S.C. §2318(d).

In considering these criminal forfeiture provisions it is important to note at the outset that they are mandatory. By their terms these sections require that "the court in its judgment of conviction shall . . . order the forfeiture" of the goods specified. See 17 U.S.C. §506(b); 18 U.S.C. §2318(d). Thus under 17 U.S.C. §506(b) and 18 U.S.C. §2318(d) the district court has no discretion to decline to order forfeiture as part of a judgment of conviction. Both provisions do, however, grant to the district court some measure of discretion over the disposition of the forfeited property. Under these criminal forfeiture provisions the court may order the "destruction or other disposition" of this property.

It is also important to note the scope of these forfeiture provisions. 17 U.S.C. §506(b) provides for the forfeiture of "all infringing copies or phonorecords and all implements, devices or equipment used in the manufacture of such infringing copies or phonorecords." Thus, forfeiture under 17 U.S.C. §506(b) reaches not only the infringing copies but also the equipment used in the manufacture of those copies. The

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forfeiture mandated by 18 U.S.C. §2318(d) is somewhat narrower in scope. It applies only to counterfeit labels, articles to which those labels have been affixed and articles to which those labels were intended to have been affixed. It does not, however, include any of the equipment used in the manufacture of the labels.

These forfeiture provisions are an important part of the penalty scheme established by Congress for criminal copyright offenses. For this reason, prosecutors should in all cases seek forfeiture as part of any prosecution under 17 U.S.C. §506(a) or 18 U.S.C. §2318. As a procedural matter this means that indictments alleging violations of either of these statutes should contain a forfeiture paragraph.

Inclusion of such a paragraph in an indictment is important for several reasons. Rule 7(c)(2) of the Federal Rules of Criminal Procedure provides that "[n]o judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." Thus, at a minimum, failure to include such a paragraph in the indictment precludes the government from later forfeiting this property as part of the criminal prosecution. Moreover, at least one case has suggested that failure to comply with Rule 7(c)(2) of the Federal Rules of Criminal Procedure can result in dismissal of the indictment. See United States v. Hall, 521 F.2d 406 (9th Cir. 1975). Following Hall Rule 7(c)(2) of the Federal Rules of Criminal Procedure was amended. This amendment was specifically designed to address the questions raised by Hall and indicates that denial of the judgment of forfeiture, rather than dismissal of the indictment, is the appropriate remedy for a violation of Rule 7(c)(2) of the Federal Rules of Criminal Procedure. However, in order to avoid any litigation on this issue or duplicative civil forfeiture proceedings prosecutors are urged to include a forfeiture paragraph in the indictment in all appropriate instances.

In addition to forfeiture ordered as part of a judgment of conviction, Title 17 provides for civil forfeiture proceedings. See 17 U.S.C. §509. These proceedings are entirely distinct from the criminal forfeiture authorized by 17 U.S.C. §506(b) and 18 U.S.C. §2318. A civil forfeiture under 17 U.S.C. §509 is an in rem proceeding directed against the property which has been manufactured or used in violation of the law. Therefore, unlike the criminal forfeitures, a civil forfeiture is not dependent on a finding that any individual defendant has violated the law. Moreover civil forfeiture proceedings are governed by a lower burden of proof than criminal prosecutions. These factors combine to make civil forfeiture an attractive alternative to criminal prosecution in some cases.

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Title 17 U.S.C. §509 defines the scope of civil forfeiture under the copyright laws. Under this section:

All copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a), and all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced, and all electronic, mechanical, or other devices for manufacturing, reproducing, or assembling such copies or phonorecords may be seized and forfeited to the United States.

Three general classes of property are subject to forfeiture under 17 U.S.C. §509. These are:

- A. All criminally infringing copies or phonorecords;
- B. All plates, molds, masters and other means by which such copies may be reproduced; and
- C. All devices for manufacturing, reproducing or assembling such copies or phonorecords.

Subsection (b) of 17 U.S.C. §509 describes the procedures for seizure, forfeiture and disposition of property; remission and mitigation of forfeiture; and the compromise of claims. Moreover the Criminal Division of the Department of Justice has recently organized an Office of Asset Forfeiture to deal with the legal issues raised by this, and other, forfeiture provisions. Prosecutors with specific questions regarding practice and procedure under 17 U.S.C. §509 should consult that office for assistance.

9-71.400 PROSECUTIVE POLICY

In determining whether to proceed with a criminal copyright prosecution, the U.S. Attorney should bear in mind two important considerations. First, federal law now preempts much of the copyright field. 17 U.S.C. §301. This federal preemption largely eliminates the state courts as a forum for copyright prosecutions. Thus, a decision by the U.S. Attorney to decline prosecution in a copyright matter generally forecloses all avenues of criminal prosecution. This consideration suggests that all criminal copyright matters should receive careful attention by the U.S. Attorney.

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Second, the criminal penalties of 17 U.S.C. §506(a) for willful infringements undertaken for purposes of commercial advantage or private financial gain, form an important part of the copyright enforcement scheme. An increased need for deterrence in this area is reflected in the 1982 enactment of felony penalties for piracy and counterfeiting of sound recordings and audiovisual works. See 18 U.S.C. §2319. Consequently, all meritorious cases, not just those within the pre-1982 guidelines on this subject, which fall within the parameters of these felony statutes should receive serious consideration.

Once the elements of the offense are technically met, the U.S. Attorney should consider the following factors in determining whether to pursue a criminal copyright prosecution.

A. The seriousness of the offense. Felony penalties for first offenses begin at seven copies for audiovisual works, and one hundred copies for sound recordings. In this context, prosecution of felony offenses of comparatively moderate scale may have substantial deterrent impact. It should also be kept in mind that lesser volumes of counterfeiting or pirating activity may suitably lend themselves to the plea bargaining process in particular cases since 18 U.S.C. §2319(b)(3) provides misdemeanor penalties upon conviction for the first offense. A misdemeanor plea also serves a deterrent function because of the prospect of felony charges for a future offense. Prosecutions focused on the most serious offenders should, of course, be given top priority. Thus, appropriate factors should include the nature and volume of the infringing activity or a prior history of similar conduct by the suspect. Individuals who have continued to infringe for financial gain after civil remedies have been successfully invoked should receive particular attention.

B. The likelihood of successful prosecution. An unsuccessful prosecution could be counterproductive not only in terms of allocation of resources, but also with respect to deterrence. The presence of legal or evidentiary problems should be carefully evaluated particularly with regard to criminal intent. A suspect who is making the counterfeit or pirated works himself/herself may be a promising suspect since the possession and use of elaborate duplicating equipment, blank cassettes or labels, in order to manufacture illegal copies for sale, may be good evidence of criminal intent. As to others in the chain of distribution, a greater degree of proof of criminal intent is usually necessary to preclude the successful assertion of defenses, such as lack of scienter.

If assistance or legal advice is needed, or if resource limitations do not permit the handling of a particular case which otherwise merits prosecutive attention, please contact the General Litigation and Legal Advice Section of the Criminal Division, FTS 724-6948.

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9-72.000 CUSTOMS

The principal customs statutes involved are included in Title 19, United States Code, and 18 U.S.C. §§541-552. Additional statutory provisions dealing with the importation of specific items are found in other portions of the United States Code. These cases are supervised by the General Litigation and Legal Advice Section.

9-72.010 Investigation and Referral of Cases

The Customs Service is the agency primarily charged with the enforcement of customs laws. Violations are referred for prosecution directly to the U.S. Attorney by the District Director of Customs, the General Litigation and Legal Advice Section receiving a copy. Criminal violations are reported immediately; forfeiture and civil penalty reports are withheld for a reasonable time so that Customs may receive and act on petitions for remission. Forfeiture and penalty actions are generally withheld by Customs while related criminal prosecutions are pending unless the running of the statute of limitations is imminent. See USAM 9-72.030, infra. Importations contrary not only to customs laws and regulations but to other laws or regulations of the United States which subject violators and the property involved to criminal, civil penalty, or forfeiture sanctions of such laws may also be referred to the U.S. Attorney for prosecution or suit.

9-72.020 Prosecution of Cases

In general, the chief objects of enforcement are to protect the revenue on imported articles and to prevent the smuggling into the United States of prohibited articles. The policy with respect to prosecutions is somewhat similar to that in internal revenue cases. Deliberate and willful frauds, especially when the violations may involve substantial losses of duty, or are part of the operation of a smuggling ring, or involve the clandestine importation of contraband, such as narcotics and marihuana intended for sale, should be prosecuted vigorously.

9-72.030 Statute of Limitations

The limitation on bringing criminal actions under Title 18 is 5 years from the date of the offense. See 18 U.S.C. §3283. The limitation on bringing civil penalty and forfeiture actions is also 5 years but the period runs from the time the violation is discovered. See 19 U.S.C. §1621.

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9-72.040 Advising the Department

The U.S. Attorney should keep the Department currently advised respecting the developments in important criminal, penalty, and forfeiture cases reported to him/her.

9-72.100 COMPROMISE AND FORFEITURE

Criminal liability under the customs laws may not be compromised. However, compromise offers and petitions for remission of forfeiture of civil penalties may be considered by the Department in cases referred for prosecution or suit. The courts have no powers of remission in customs cases.

9-72.110 Property Subject to Forfeiture

Illegally imported goods are subject to forfeiture under 18 U.S.C. §545, 19 U.S.C. §§1460 and 1497, while 19 U.S.C. §1595(a) applies to vehicles, etc., used in importing or subsequent transportation, etc., of smuggled goods as does the Contraband Transportation Act in certain instances. Property seized under the customs laws is referred to the U.S. Attorneys for disposition if the value thereof exceeds \$10,000 or a claim and a cost bond are filed.

9-72.120 Initiating Forfeiture Proceedings

Unless the forfeiture is remitted administratively or compromised, or the U.S. Attorney declines prosecution because of the insufficiency of the evidence, the forfeiture should be consummated through a filing of a complaint in rem, a copy of which should be furnished to the Department. Forms of complaint set forth below are for guidance only. Such proceedings should conform as near as possible to those in admiralty. See 28 U.S.C. §2461, Rules A, C, E, Supplemental Rules for Certain Admiralty and Maritime Claims, 28 U.S.C. 2d Supp. 1965-66.

It is important that forfeiture proceedings be instituted within a reasonable time following seizure. A number of courts have denied forfeiture where actions have not been instituted reasonably promptly. See, e.g., Sarkisian v. United States, 472 F.2d 468 (10th Cir. 1973), cert. denied, 414 U.S. 976 (1973), and United States v. One 1971 Opel, 360 F. Supp. 638 (C.D. Cal. 1973). However, the Supreme Court has recently

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undercut somewhat the position taken in these earlier cases. In United States v. \$8,850.00, 103 S. Ct. 2005 (1983), the Court held that the issue should be evaluated in terms of the four-factor test of Barker v. Wingo, 407 U.S. 514 (1972): length of delay, reason for delay, defendant's (claimant's) assertion of right, and prejudice to the defendant (claimant).

9-72.130 Notice of Forfeiture Proceedings

Rule C(4) of the Civil Supplemental Rules, Admiralty and Maritime Claims, provides for notice by publication in any in rem action. No other notice is required. The provisions of the rule are applicable in forfeiture cases under the internal revenue, narcotics, and customs laws. However, U.S. Attorneys should insure that in all forfeiture actions instituted under the above laws any person known to have an interest in property subject to judicial forfeiture is served with copies of the complaint, the warrant for the arrest of the property, and notice of the pendency of the action. Such notice should set forth the time within which any claimant must file his/her answer as set forth in subdivision (6) of the rule. This should be done personally if expedient, or by certified mail, return receipt requested, addressed to the last known address of such person.

9-72.140 Property Subject to Rapid Depreciation

When the value of the seized property is depreciating rapidly, its storage costs are on the rise, and the trial is not immediately foreseeable, the wisest course may be to secure the written agreement of all interested parties to:

- A. Sell the property pursuant to court order and deposit the proceeds into court (see 19 U.S.C. §1612); or
- B. Bond (vehicles) out pursuant to terms similar to those in 18 U.S.C. §3617(d).

If agreement cannot be reached among the parties, the U.S. Attorney can petition the court for an order to sell the property under supplementary Admiralty Rule E(9)(b).

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9-72.150 Proceeding to Judgment

To avoid unnecessary expenses (storage charges) and depreciation of property, especially in vehicle seizure cases, complaints should be disposed of as expeditiously as the circumstances in the case may permit, without jeopardizing the criminal case or the rights of claimants. If there is a default, a default judgment or decree should be sought promptly.

9-72.160 Terms of Decree of Forfeiture

U.S. Attorneys should, whenever possible, provide in the decree of forfeiture for the delivery of the merchandise to the District Director of Customs for sale or other appropriate disposition. The decree should take into account the terms of any accepted compromise offer or petition allowed by the Attorney General involving remission or mitigation of forfeiture or other special terms. U.S. Attorneys should be guided by specific requests from competent authority, such as the General Services Administration, the Department of Justice, or the District Director of Customs, as to provisions respecting the disposition of the forfeited property which the court should be asked to include in its decree. For example, where property decreed forfeited has been requested for official use by the General Services Administration, such request should be reflected in the decree, a copy of which must be transmitted immediately to the General Services Administration, Washington, D.C.

9-72.170 Disposition of Merchandise Forfeited

Except for forfeited liquor, which may not be sold but must be disposed of pursuant to 26 U.S.C. §5688, and contraband narcotics, which are administratively forfeited and disposed of by the seizing agency, merchandise forfeited under the customs laws shall be delivered to the District Director of Customs for sale unless disposal by the U.S. Marshal is required under the terms of the decree of forfeiture. Customs has a well established procedure for the sale of merchandise involved in violation of customs laws and as a result is in a position to obtain the best possible price on public sale. Since the object of the delivery of the property to Customs authorities for sale is to realize better prices, this factor must be taken into consideration in each case.

When the property is turned over to Customs, the U.S. Marshal should promptly transmit to the District Director a statement of all proper charges in connection with the seizure, detention, and delivery of the

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property. If Customs requests the U.S. Marshal to retain the property at the place of storage, the U.S. Marshal will comply. Any additional charges after notification of the availability of the merchandise for delivery to Customs shall be charged against the proceeds.

9-72.200 CIVIL PENALTY ACTIONS

The civil penalty actions are civil in nature and are governed by the Federal Rules of Civil Procedure. Several provisions of the customs law provide that civil penalties equal to the value of articles illegally imported may be imposed upon those who were involved in the illegal activity. Under some provisions, such as 18 U.S.C. §545, the penalty is imposed as an alternative to forfeiture of the articles. Other sections, such as 19 U.S.C. §1497, provide that the penalty may be imposed in addition to forfeiture of the articles. A civil penalty equal to the value of the articles may be imposed under 19 U.S.C. §1595a(b) upon those who are in any way concerned with the unlawful activity.

9-72.210 Financial Report

Before instituting a penalty action, the U.S. Attorney should ascertain whether the evidence is sufficient to sustain the action. If the financial status of the defendant is in doubt, the U.S. Attorney should have Customs furnish a financial report on the defendant.

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9-73.000 IMMIGRATION AND NATURALIZATION VIOLATIONS; PASSPORT AND VISA VIOLATIONS

This chapter covers those statutes in Title 8 which protect the United States against unlawful entry of aliens, plus Chapter 75 of Title 18--Passports and Visas.

9-73.010 Guidelines on INS Undercover Operations

The Attorney General has issued, effective March 19, 1984, Guidelines on INS Undercover Operations. All INS undercover operations fall into one of three categories under the Guidelines: (1) those undercover operations which must be authorized by the INS Commissioner with the concurrence of the Assistant Attorney General for the Criminal Division; (2) those which must be authorized by the appropriate Regional Commissioner; and (3) those which must be approved by the appropriate District Director or Chief Patrol Agent. In general, the graver the risk of harm or intrusiveness, the higher the approval level required. The Guidelines require periodic consultation by INS with the U.S. Attorney or Strike Force Chief during the course of an undercover operation, no matter who has approved its implementation. The Guidelines also create an Undercover Operations Review Committee comprised of INS personnel and Criminal Division attorneys to review and vote on operations requiring central office approval.

The Guidelines define an "undercover operation" as "any investigative operation in which an undercover employee or cooperating private individual is used."

The Guidelines describe the manner in which application should be made for approval of an undercover operation. They also authorize the District Director or Chief Patrol Agent to approve undercover operations in the first two categories listed above in emergency situations.

9-73.020 Definitions of Terms Used in Immigration Law

The terms "undocumented alien," "illegal alien," and "unauthorized alien" are equivalent, and are generally used as shorthand substitutes for the following phrase which appears in the Immigration and Nationality Act, 8 U.S.C. §1101 et seq.: "[A]ny alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens" See

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8 U.S.C. §1324(a). The Ninth Circuit Court of Appeals used the term, "illegal alien," to refer "to aliens who have entered this country and/or are found to be in this country in violation of the laws of the United States. In this category are aliens who enter without inspection, aliens who overstay their non-immigrant visas and passes, and any others who enter or remain in the United States in violation of immigration and other laws. For most purposes, the term is synonymous with deportable aliens." See International Ladies' Garment Workers', Etc. v. Sureck, 681 F.2d 624, 626 n.1 (9th Cir. 1982).

Definitions of some fifty terms used in the Immigration and Naturalization Act appear at 8 U.S.C. §1101.

9-73.100 8 U.S.C. 1324

8 U.S.C. §1324(a) makes it a crime to bring undocumented aliens into the United States (paragraph (1)); to knowingly transport undocumented aliens in the United States in furtherance of such violation of law (paragraph (2)); to conceal, harbor, or shield undocumented aliens from detection (paragraph (3)); and to willfully or knowingly encourage or induce the entry of undocumented aliens (paragraph (4)). Attempts to commit any of the aforesaid acts are also proscribed. The elements of a crime charged under 8 U.S.C. §1324(a) are:

A. Defendant (brought into, etc., or transported, etc., or harbored, etc., or encouraged the entry of, etc.) an alien (into or within) the United States;

B. The alien had not been lawfully admitted or was not lawfully entitled to enter; and

C. This was known to the defendant.

Establishment of a violation of section 1324(a)(2) requires proof of two additional elements:

D. The defendant knew that the alien's last entry was within three years; and

E. Defendant acted in furtherance of the alien's violation of the law.

The elements of a crime charged under 8 U.S.C. §1324(a) are set forth in United States v. Shaddix, 693 F.2d 1135, 1137-1138 (5th Cir. 1982); and United States v. Gonzales-Hernandez, 534 F.2d 1353, 1354 (9th Cir. 1976).

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There is a failure of proof of the second element--that the alien had not been lawfully admitted or was not lawfully entitled to enter--where an immigration officer testifies that he/she questioned the suspected aliens about their places of birth, occupations, where they were coming from, and if they had immigration papers, and states that he/she concluded that they were undocumented aliens, but fails to testify as to their responses. See United States v. Comacho-Davalos, 468 F.2d 1382 (9th Cir. 1972).

A violation of the 8 U.S.C. §1324(a)(1) proscription against bringing into or landing an undocumented alien in the United States occurs even if the defendant brings the alien here in a public conveyance such as an airline. See United States v. Washington, 471 F.2d 402 (5th Cir. 1973), cert. denied, 412 U.S. 930 (1973). It also occurs where the defendant guides the aliens into the United States on foot. See Carranza-Chaldez v. United States, 414 F.2d 503 (9th Cir. 1969).

Note that the unit of prosecution is the unauthorized alien. For example, under a "bringing in" charge, each alien brought in constitutes a separate crime and should form a separate count of the indictment. See Vega-Murrillo v. United States, 264 F.2d 240 (9th Cir. 1959), cert. denied, 360 U.S. 936 (1959) (coming to the same conclusion as, but amending the reasoning of Vega-Murrillo v. United States, 247 F.2d 735 (9th Cir. 1957), cert. denied, 357 U.S. 910 (1958)); Jones v. United States, 260 F.2d 89 (9th Cir. 1958); Sepulveda v. Squier, 192 F.2d 796 (9th Cir. 1951). In fact, an indictment referring to four aliens in a single count was held bad for duplicity in United States v. Martinez-Gonzales, 89 F. Supp. 62 (S.D. Cal. 1950). In practice, indictments are drafted so that a single alien is listed in each count. See, e.g., United States v. Rubio-Gonzales, 674 F.2d 1067, 1068 (5th Cir. 1982); United States v. Perez, 600 F.2d 782, 783-784 (10th Cir. 1979); United States v. Bunker, 532 F.2d 1262, 1264 (9th Cir. 1976).

It has been held that illegal entry, 8 U.S.C. §1325, is not a lesser included offense to the alien smuggling section, 8 U.S.C. §1324(a). See United States v. Pruitt, 719 F.2d 975 (9th Cir. 1983) cert. denied, ___ U.S. ___, 104 S. Ct. 536 (1983); United States v. Rosales-Lopez, 617 F.2d 1349 (9th Cir. 1980), aff'd, 451 U.S. 1982 (1981); United States v. Wishart, 582 F.2d 236 (2d Cir. 1978), cert. denied, 439 U.S. 987 (1978). Rosales-Lopez also approves the imposition of consecutive sentences for violations of the subsections of 8 U.S.C. §1324(a). It has also been held that an acquittal on a charge of bringing in illegal aliens, 8 U.S.C. §1324(a)(1), does not bar retrial for encouraging their entry, 8 U.S.C. §1324(a)(4), even though both trials are based on the same transaction. See United States v. Narvaez-Granillo, 119 F. Supp. 556 (S.D. Cal. 1954). And it is not duplicitious for a single conspiracy count of an indictment

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to allege, as objects of the conspiracy, violations of more than one subsection of 8 U.S.C. §1324(a). See United States v. Avila-Dominguez, 610 F.2d 1266 (5th Cir. 1980), cert. denied sub. nom., Perez v. United States, 449 U.S. 887 (1980).

Aiders and abettors as well as principals may be prosecuted for violations of any of the subsections of 8 U.S.C. §1324(a), notwithstanding the fact that only 8 U.S.C. §1324(a)(1), and not 8 U.S.C. §1324(a)(2)-(4), is by its terms made specifically applicable to acts "by himself or through another." See United States v. Avillar, 575 F.2d 1316 (10th Cir. 1978).

In the following cases, the court quoted the language of an indictment under 8 U.S.C. §1324(a) and upheld its validity: United States v. Wishart, 582 F.2d 236, 238 (2d Cir. 1978), cert. denied, 439 U.S. 987 (1978); Martinez-Quiroz v. United States, 210 F.2d 763 (9th Cir. 1954).

See Annot., 21 A.L.R. Fed. 254.

9-73.110 Intent

8 U.S.C. §1324(a) has been challenged on the ground that the element of the crime--that defendant knew that the alien was not lawfully entitled to be in the United States--is unconstitutionally vague. It has also been argued that the element of proof required by 8 U.S.C. §1324(a)(2)--that the defendant knew the alien's last entry into the United States occurred within the past three years--is unconstitutionally vague. All such challenges have been repulsed. See United States v. Pruitt, 719 F.2d 975 (9th Cir. 1983), cert. denied, _____ U.S. _____, 104 S. Ct. 536 (1983); United States v. Cantu, 501 F.2d 1019 (7th Cir. 1972); Banderas-Aquirre v. United States, 474 F.2d 985 (5th Cir. 1973), and cases cited therein. Typically, the prosecution establishes defendant's knowledge that the aliens were not lawfully entitled to enter the United States by evidence that the aliens paid him/her a substantial fee for transporting them, or by evidence of defendant's surreptitious manner of transporting or harboring them. See, e.g., United States v. Espinoza-Franco, 668 F.2d 848 (5th Cir. 1982); United States v. Perez-Gomez, 638 F.2d 215, 218-219 (10th Cir. 1981). Also helpful in establishing defendant's guilty knowledge is evidence of defendant's previous arrests for bringing in or transporting illegal aliens. See United States v. Herrera-Medina, 609 F.2d 376 (9th Cir. 1979); United States v. Holley, 493 F.2d 581, 584 (9th Cir. 1974), cert. denied, 419 U.S. 861 (1974); United States v. Ruiz-Juarez, 456 (9th Cir. 1015 Cir.), cert. denied, 407 U.S. 914 (1972). For example, in United States v. McMahon, 592 F.2d 871 (5th Cir. 1979), a trial for conspiracy to transport aliens in violation of 18 U.S.C. §371 and 8 U.S.C. §1324(a)(2),

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the court admitted into evidence defendant's prior misdemeanor conviction for aiding and abetting an alien to elude examination in violation of 8 U.S.C. §1325. Similarly, defendant's confession that he/she transported illegal aliens can be used in a subsequent trial based on another transportation of illegal aliens, to prove the element of knowledge. See United States v. Madrid, 510 F.2d 554 (5th Cir. 1975), cert. denied, 429 U.S. 940 (1976). Proof that the defendant knew that the aliens were not entitled to remain in the United States can consist of evidence that one of the aliens told the defendant so. See United States v. Bunker, 532 F.2d 1262 (9th Cir. 1976). Proof that defendant's car had certain special equipment in it and that defendant drove in a peculiar manner after spotting the Border Patrol are also relevant. See United States v. Vasquez-Cazares, 563 F.2d 1329 (9th Cir. 1977), cert. denied, 434 U.S. 1021 (1978). But sometimes the central culprits are in a lead car, behind which follows another vehicle containing the illegal aliens. In such a situation, proof that the lead car behaved suspiciously, without directly linking it to the vehicle behind, may not be enough. See United States v. McMahon, supra.

Although the Ninth Circuit Court of Appeals criticized an 8 U.S.C. §1324(a)(1) indictment which alleged that the alien was not entitled to reside in the United States, but which failed to clearly allege defendant's knowledge of that fact, the court nevertheless upheld the indictment by inferring an allegation of such knowledge. See United States v. Bunker, supra. The Fifth Circuit Court of Appeals has held that even though 8 U.S.C. §1324(a)(1) does not specifically require that the person act knowingly, as do 8 U.S.C. §1324(a)(2), (3), and (4), "knowing" will be read into 8 U.S.C. §1324(a)(1) to save it from constitutional infirmity. See United States v. Boerner, 508 F.2d 1064 (5th Cir. 1975), cert. denied, 421 U.S. 1013 (1975).

Proof that the defendant acted willfully in furtherance of the alien's violation of law, an element in an 8 U.S.C. §1324(a)(2) charge, is a rather elusive concept. In United States v. Shaddix, 693 F.2d 1135, 1138-1139 (5th Cir. 1982), where defendant was charged with transporting illegal aliens, the Fifth Circuit Court of Appeals held that the "in furtherance of" element of the crime was established by evidence that the defendant offered employment to and transported aliens whom he knew had entered the country illegally. But it has been held that the acts of a farm foreman, which consisted of driving illegal aliens from one work site to another on the farm, were not "in furtherance of such violation." See United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977). One district court has held that an indictment charging a violation of 8 U.S.C. §1324(a)(2) need not allege that the transportation was in furtherance of the violation. See United States v. Tindall, 551 F. Supp. 161 (W.D. Tex. 1982).

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The meaning of "entry" is often relevant to the intent issue, in cases where defendant is charged with bringing illegal aliens into the United States. See discussion of "entry" at USAM 9-73.150, infra.

9-73.120 The Employer Exemption in 8 U.S.C. §1324(a)

8 U.S.C. §1324(a) contains the following proviso:

Provided, however, That for the purpose of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

It is critical to note that the employer exemption applies only to harboring, not to any of the other acts proscribed by 8 U.S.C. §1324(a). It is not applicable to 8 U.S.C. §1324(a)(1), (a)(2), nor (a)(3), nor to the concealing and shielding from detection prohibitions of 8 U.S.C. §1324(a)(4). It is equally critical to note that the employment exemption from harboring applies only to the usual and normal practices incident to employment. Thus, for example, in United States v. Singh, 628 F.2d 758 (2d Cir. 1980), cert. denied, 449 U.S. 1034 (1980), the conviction of an employer for harboring unauthorized aliens was upheld, and the Second Circuit Court of Appeals explained that: "Evidence of extended periods of employment without the receipt of salary was certainly relevant to the issue of whether the employment of these aliens was the usual and normal practice incident to employment." Id. at 763.

United States v. Herrera, 584 F.2d 1173 (2d Cir. 1978), contains a substantial discussion of the employment exemption from the harboring prohibition. The decision points out that:

The employment proviso does not exempt employers from the operation of the statute, rather, it is a refinement of what is meant by "harboring" and only comes into play should a defendant wish to establish that his acts constituted employment, or the usual and normal practices incident thereto, not harboring An employer who goes beyond the "normal" limits of employment may violate the statute In short, if, despite the employment relationship, defendants have acted by providing shelter or other services to substantially facilitate the aliens [sic] remaining in this country illegally, they may be found guilty of harboring.

Id. at 1144.

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The elaborate alarm system and means of escape which defendants had created to thwart INS efforts to discover the aliens-employees were held not to be usual and normal incidents or employments.

United States v. Cantu, 557 F.2d 1137 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978), grew out of a raid on Mario's restaurant in San Antonio. Cantu, the proprietor, seated his unauthorized alien employees with bona fide customers, and they tried to leave posing as customers, to fool INS agents. The agents were not fooled, and Cantu was convicted of violating 8 U.S.C. §1324(a)(3). In this opinion, the Fifth Circuit Court of Appeals rejected Cantu's defenses (1) that he could not be convicted of concealing, harboring or shielding from detection because the aliens exited in full view of INS agents, and (2) that the prosecution should have been required to prove that Cantu's acts were part of a chain of events constituting smuggling. The decision pointed out that: "[S]ection 1324 does not prohibit only smuggling-related activity, but activity 'tending substantially to facilitate an alien's remaining in the United States illegally.'" Id. at 1180.

In United States v. Tarig, 521 F. Supp. 773 (D. Md. 1981), defendant moved to dismiss the indictment which charged him with harboring illegal aliens, arguing that since the aliens were his employees, he was exempt from a harboring charge with respect to them. In rejecting this contention, the court pointed out that the two aliens had been locked in a bedroom, with one of them hiding under the bed, that the defendant did not reveal the aliens' presence to the INS agents, and that such conduct was not a usual and normal practice incident to employment. Similarly, in United States v. Winnie Mae Manufacturing Co., 451 F. Supp. 642 (C.D. Cal. 1978), the court had no trouble in determining that the employer exception did not cover such activities as constructing and using a hidden stairwell, a false wall, and an unmarked building for the illegal aliens.

The fact that a defendant actually believes that everything he/she did with respect to his/her employees who were unauthorized aliens constituted usual and normal practices incident to employment is not a defense to a harboring charge if in fact any of the practices were not usual and normal incidents of employment. See United States v. Fierros, 692 F.2d 1291 (9th Cir. 1983).

9-73.130 8 U.S.C. §1324(a)(3)--Concealing, Harboring, and Shielding
Illegal Aliens From Detection

United States v. Acosta de Evans, 531 F.2d 428 (9th Cir.), cert. denied, 429 U.S. 836 (1976), defined "harboring" to include both

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concealment and mere sheltering. It also held that "from detection" modifies only "shield," it does not modify "conceal" or "harbor." "Harbor" was also construed in United States v. Lopez, 521 F.2d 437 (2d Cir. 1975), cert. denied, 423 U.S. 995 (1975), to include merely "providing shelter to." Lopez also rejected the argument that the harboring must be part of an alien-smuggling operation. In United States v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982), when INS agents appeared on a job site, one of the company employees ran up a hill yelling to a couple of illegal aliens that, "Immigration is here." Id. at 1070. His conviction for "shielding," 8 U.S.C. §1324(a)(3), was upheld by the Fifth Circuit Court of Appeals.

There are two earlier cases which held that an element of proof in a harboring charge is that the defendant attempted to conceal the alien. These are United States v. Smith, 112 F.2d 83 (2d Cir. 1940), and Susnjar v. United States, 27 F.2d 223 (6th Cir. 1928), but we believe they are no longer controlling, for the following reasons. The original version of 8 U.S.C. §1324, enacted in 1907, prohibited only the smuggling of aliens. It was amended in 1917 to prohibit the concealing and harboring of aliens as well, but because of faulty draftsmanship no penalty was provided for concealing or harboring. In United States v. Evans, 333 U.S. 483, 484 n.1 (1948), the Supreme Court declined to construe the smuggling penalty as applicable to concealing and harboring, rendering the prohibition against concealing and harboring unenforceable. The present version of 8 U.S.C. §1324(a) was enacted in 1952. In United States v. Lopez, supra, the Second Circuit Court of Appeals repudiated its earlier interpretation of "harbor," in Smith, as clandestine sheltering. Now, as the Ninth Circuit pointed out in United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir.), cert. denied, 429 U.S. 836 (1976):

Only Susnjar remains as precedent for de Evans's position [that harboring must be clandestine]. As Susnjar was decided before both the Supreme Court's decision in Evans and the revision of the statute, its vitality is questionable. The purpose of the section is to keep unauthorized aliens from entering or remaining in the country We believe that this purpose is best effectuated by construing "harbor" to mean "afford shelter to" and so hold [footnotes omitted].

In an appropriate case, charging an employer with participating in a scheme to defraud the INS of its right to have its immigration program administered in accordance with its regulations, 18 U.S.C. §371, may be worth considering.

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9-73.140 Material Witnesses in Alien Smuggling Cases

Typically, when an alien smuggling case is developed, the arresting officers select two to four of the undocumented aliens who they believe will make good witnesses at trial. The other aliens are deported or granted voluntary departure in lieu of deportation, except those who possess evidence favorable to the defendant. Previously, a number of courts effectively required the government to hold all undocumented alien witnesses until defense counsel had an opportunity to interview them and decide which ones he/she wanted held for trial as defense witnesses. See, e.g., United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971). However, the United States Supreme Court changed that practice by holding, in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), that the Executive Branch's responsibility to faithfully execute Congress' immigration policy of prompt deportation of illegal aliens justifies deportation of undocumented alien witnesses upon the Executive's good-faith determination that the aliens possess no evidence favorable to the defendant. And in order for the defendant to demonstrate a violation of his/her Sixth Amendment right of confrontation, he/she would have to show not merely that deportation of the aliens deprived him/her of their testimony, but he/she must at least make some plausible showing of how their testimony would have been both material and favorable to his/her defense. Of course, if the alien material witnesses are released when the defendant becomes a fugitive, the defendant cannot later be heard to complain that he/she had no opportunity to interview the witnesses. See United States v. Vega-Limon, 548 F.2d 1390 (9th Cir. 1977).

Although the undocumented alien material witnesses are essential witnesses to so many criminal cases brought under Title 8, what to do with these witnesses pending trial is a tough issue which has been dealt with differently in various judicial districts. In some districts, the witnesses are incarcerated pursuant to material witness warrants (a form warrant for arrest of a witness appeared as Form 22 of the Federal Rules of Criminal Procedure before the Appendix of Forms was deleted), occasionally on INS detainers. As of December, 1983, 374 undocumented aliens were detained as material witnesses. In at least two districts, the court has issued an order requiring the government to promptly depose the aliens and return them to their countries of origin. In past years, aliens were often "farmed out," that is, released from incarceration to obtain gainful employment pending trial. The practice of releasing aliens to work has received tacit judicial approval, United States v. Tsutagawa, 500 F.2d 420, 422-423 (9th Cir. 1974); United States v. Verduzco-Macias, 463 F.2d 105 (9th Cir. 1972), cert. denied, 409 U.S. 883 (1972); United

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States v. Mattison, 437 F.2d 84 (9th Cir. 1970); United States v. Winnie Mae Manufacturing Co., 451 F. Supp. 642, 650 (C.D. Cal. 1978).

The practice is now infrequent because it put INS agents in the uncomfortable position of negotiating with prospective employers; the aliens were sometimes underpaid or otherwise treated unfairly; the aliens were injured on the job under circumstances where the United States might be held liable in damages; the aliens absconded before trial, even in many instances where half of the aliens' wages were being withheld to ensure their appearance; or the aliens were intimidated by the defendant. Obviously, it is in the alien's interest to be gainfully employed pending trial; employment was his/her usual purpose for illegally entering the United States.

Interestingly, in Verduzco-Macias, *supra*, the court noted that after the aliens were farmed out, one-half of their pay was withheld to ensure their appearance at trial. General Order No. 85 of the United States District Court for the Southern District of California permits alien material witnesses to be employed as farm workers pending trial and to assign 50 percent of their wages as security for performance of the conditions of their personal appearance bond. See United States v. Mattison, *supra*. However, the U.S. Attorney for the Southern District of California does not utilize General Order No. 85 because it requires INS agents to bargain with prospective employers and because the withholding provision does not effectively ensure the alien's appearance at trial since he/she is frequently willing to forego half his/her wages, since to appear for trial means he/she will be deported immediately following trial.

There is no assurance that the transcripts of depositions of undocumented alien material witnesses who are deported or who voluntarily return to their countries of origin will be admissible at trial. In fact, the United States Court of Appeals for the Ninth Circuit has ruled them inadmissible absent the express waiver by defendant of his/her Sixth Amendment right of confrontation. See United States v. Vasquez-Ramirez, 629 F.2d 1295 (9th Cir. 1980). But see, United States v. Seijo, 595 F.2d 116 (2d Cir. 1979).

18 U.S.C. §3149, which impliedly authorizes the detention of persons as material witnesses in criminal proceedings, provides, in pertinent part, that: "No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice" (emphasis added). One would assume that the statute means that the testimony of "such witness"

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cannot "adequately be secured by deposition" unless the transcript of deposition will be admissible at trial. If Vasquez-Ramirez, supra, accurately states the law--that the transcript of a deposition cannot be introduced into evidence in a criminal case without the defendant's permission--then under no circumstances can the testimony of a witness be "adequately secured by deposition" without defendant's consent to use of the deposition transcript at trial.

There is another legal impediment to use at a criminal trial of a transcript of a deposition of an undocumented alien material witness. Rule 15 of the Federal Rules of Criminal Procedure, pursuant to a 1974 amendment, for the first time authorized the taking of depositions by the government in criminal cases. However, Rule 15(e) of the Federal Rules of Criminal Procedure provides that the transcript may only be used if the witness is unavailable at trial, and that whether the witness is unavailable is to be determined pursuant to Rule 804(a) of the Federal Rules of Evidence. Rule 804(a) of the Federal Rules of Evidence provides that a witness is not considered unavailable if his/her absence was procured by the "proponent of his statement for the purpose of preventing the witness from attending or testifying." The question as to whether the United States has procured the absence of an undocumented alien material witness by deporting him/her or agreeing to his/her voluntary departure in lieu of deportation had not been answered with any degree of finality.

Congress has been concerned about the amount of time undocumented aliens remain incarcerated as material witnesses. It is not uncommon for the witnesses to serve more time in jail than the defendants. It is imperative to remind the courts to schedule prompt trials of cases for which material witnesses are being held.

9-73.150 Meaning of "Entry"

8 U.S.C. §1324(a)(1) provides that anyone who "brings into or lands in the United States" an illegal alien commits an offense. Perhaps surprisingly, "brings into or lands" is a rather elusive concept. For example, United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982), was an appeal from the dismissal by the United States District Court for the Southern District of Florida, sitting en banc, of eighty-nine indictments charging 336 defendants with substantive violations of 8 U.S.C. §1324(a)(1) or with conspiracy to violate that statute. The defendants had brought many of the visaless "Mariel boat people" from Cuba to the United States, so that these Cuban nationals could seek political asylum or some other status which would permit them to come into the United States and remain. The Eleventh Circuit Court of Appeals upheld the dismissal, finding that 8 U.S.C. §1324(a)(1) requires proof of a general criminal intent, and that there was none here. The court believed

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that the general intent required under the Section was an intent to illegally introduce aliens into the United States, not merely the transportation to the United States of refugees seeking asylum.

The issue as to what constitutes an entry arises in connection with the question of "paroling" aliens into the United States. Parole was explained in United States v. Kavazanjan, 623 F.2d 730, 733 (1st Cir. 1980), thus:

[T]he Attorney General is authorized to parole aliens into the United States "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." 8 U.S.C. §1182(d)(5) (1970). As a result of this inherent flexibility, large numbers of aliens--both refugees and others--have been paroled into this country. Unless a parolee gains permanent resident status in the interim pursuant to 8 U.S.C. §1255 (1970), he is restored to his former status upon fulfillment of the conditions of parole or whenever parole is deemed no longer warranted.

Id. §1182(d)(5).

The defendant in Kavazanjan had encouraged aliens to obtain visas for transit through the United States and then, upon arrival, apply for asylum, at which time INS paroled them into the United States pending decision on the asylum requests. The First Circuit Court of Appeals concluded that "'entry' is not accomplished until physical presence of an alien in this country is accompanied by freedom from official restraint." Id. at 736. Accordingly, the defendant could be prosecuted for a violation of 8 U.S.C. §1324(a)(4) with respect to those aliens who fled upon arriving at the airport, but not with respect to those who claimed asylum and were paroled into the United States.

United States v. Orejel-Tejeda, 194 F. Supp. 140 (N.D. Cal. 1961), held that the intra-United States transportation of aliens from an area where they were lawfully admitted for agricultural work to an area where they were not permitted to work under their entry permits did not violate 8 U.S.C. §1324(a)(2), prohibiting the transportation of aliens not "lawfully entitled to enter or reside within the United States." The court explained that its decision rested primarily on the fact that 8 U.S.C. §1324(a)(2) is aimed at aliens illegally present in the United States. A similar holding was made in United States v. Quinancz-Alvarado, 317 F. Supp. 1344 (W.D. Tex. 1970). However, in United States v. Van Drunen, 501 F.2d 1393 (7th Cir. 1974), cert. denied, 419 U.S. 1091 (1974),

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the defendant was held to have violated 8 U.S.C. §1324(a)(2) by transporting, from Texas to Chicago, an alien who possessed a border-crossing card authorizing her to remain in the United States for only 72 hours and only in the immediate vicinity of the border. The Van Drunen court distinguished Orejel-Tejeda by the fact that the alien in Van Drunen admitted that at the time of her entry into the United States she intended to travel to Chicago and so entered fraudulently. One who enters fraudulently is not entitled to enter. See 8 U.S.C. §1182(a)(19). See United States v. Mount Fuji Japanese Steak House, Inc., 435 F. Supp. 1194 (E.D. N.Y. 1977).

9-73.160 Extraterritoriality

A number of cases have held that 8 U.S.C. §1324(a)(4), which prohibits encouraging or inducing undocumented aliens to enter the United States, has extraterritorial application, that is, that persons can be prosecuted under 8 U.S.C. §1324(a)(4) for acts occurring partially or wholly outside the United States. See United States v. Nunez, 668 F.2d 10 (1st Cir. 1981); United States v. Correa-Negron, 462 F.2d 613 (9th Cir. 1972), and cases cited therein.

We believe that a persuasive argument can be made that the criminal prohibition against the attempted bringing of undocumented aliens into the United States, 8 U.S.C. §1324(a)(1), is extraterritorial in reach. It should be noted, however, that the only reported decision construing the extraterritoriality of this section held against the government. See Yenkichi Ito v. United States, 64 F.2d 73 (9th Cir. 1933), cert. denied, 289 U.S. 762 (1933). For cogent analyses of the principles of extraterritoriality, see Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), cert. denied, 366 U.S. 948 (1961), and United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968), cert. denied, 392 U.S. 936 (1968).

9-73.200 8 U.S.C. §§1325, 1326, 1327, AND 1328

9-73.210 8 U.S.C. §§1325 and 1326

8 U.S.C. §1325 and 8 U.S.C. §1326 are the penal provisions usually used against aliens who enter the United States unlawfully. 8 U.S.C. §1325 makes it unlawful for an alien to enter the United States at any time or place other than as designated by immigration officers, to elude examination or inspection by immigration officers, or to obtain entry to the United States by a false or misleading representation or the willful

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concealment of a material fact. 8 U.S.C. §1326 generally penalizes an alien who has already been deported, but re-enters or attempts to re-enter. The first offense under 8 U.S.C. §1325 is a misdemeanor; subsequent offenses are felonies. 8 U.S.C. §1326 is a felony statute.

Sometimes an indictment under 8 U.S.C. §1325 will contain a felony count for a second offender, and an alternative misdemeanor count to which it is hoped the offender will plead guilty. The Ninth Circuit Court of Appeals has held that in an 8 U.S.C. §1325 prosecution the prior commission of an offense must be established by a prior conviction, not merely by proof of prior commission of a prohibited act. See United States v. Arambula-Alvarado, 677 F.2d 51 (9th Cir. 1982). That case also holds that in an 8 U.S.C. §1326 prosecution for re-entry after deportation, the defendant may collaterally attack his/her prior deportation as being violative of INS regulations.

It has been held that an alien should not be charged with both illegal entry, 8 U.S.C. §1325, and illegal re-entry after deportation, 8 U.S.C. §1326, for the same act of entry. See United States v. Rosales-Lopez, 617 F.2d 1349 (9th Cir. 1980), aff'd, 451 U.S. 182 (1981); United States v. Ortiz-Martinez, 557 F.2d 214 (9th Cir. 1977).

The United States Court of Appeals for the Ninth Circuit has held that the confession of an alien that he entered the United States unlawfully must be corroborated at trial by independent evidence which "need not independently establish any element beyond a reasonable doubt, but must 'merely fortify the truth of the confession.'" See United States v. Lopez-Garcia, 683 F.2d 1226, 1228 (9th Cir. 1982), cert. denied, _____ U.S. _____, 103 S. Ct. 822 (1982). Sufficient independent corroboration was determined in that case to consist of the following:

- (1) defendant was stopped in Oceanside, California which is some 40 miles north of San Diego;
- (2) he was stopped while traveling on a train in a northerly direction;
- (3) he was observed to be nervous and rigid;
- and (4) he had a one-way ticket to Fullerton, California, which he was attempting to secret.

Id. at 1228.

In United States v. Pulido-Santoyo, 580 F.2d 352 (9th Cir. 1978), cert. denied, 439 U.S. 915 (1978), the court of appeals discussed the kind of evidence needed to prove that the defendant knew that the man he aided in entering the country was an undocumented alien. The most important evidence was the fact that after his arrival in the United States, the

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alien had the defendant pick him up in an area near the Mexican border where there are no roads leading from the border, and no checkpoints. Another piece of evidence was defendant's prior conviction for transporting undocumented aliens in the same area, putting him on notice that it was a notorious area for that kind of activity. Other probative evidence included the fact that the alien asked defendant to drive the alien's truck from Mexico to the United States, without explaining why he could not do it himself.

Where defendant brought two aliens to the border and instructed them to claim United States citizenship, the Ninth Circuit Court of Appeals held that he could not be convicted of aiding and abetting an illegal entry under 8 U.S.C. §1325 because the ruse did not work, and so the aliens did not enter, or obtain entry to the United States, or elude examination or inspection by immigration officers. See United States v. Oscar, 496 F.2d 492 (9th Cir. 1974). But a conviction for aiding and abetting an illegal entry was upheld where the defendant picked the alien up in his car after the alien's entry, and drove him elsewhere. See United States v. Mallides, 339 F. Supp. 1 (S.D. Cal. 1972), rev'd on other grounds, 473 F.2d 859 (9th Cir. 1973).

8 U.S.C. §1325 has also been used in prosecutions of person who arrange fraudulent marriages between United States citizens and aliens, in order to obtain resident status for the alien. The principal case is Lutwak v. United States, 344 U.S. 604 (1953). However, fraudulent marriage cases are also brought under 18 U.S.C. §§1001 and 1546. The subject is discussed at USAM 9-73.741, infra (Sham Marriages Between United States Citizens and Aliens).

Two courts of appeals have held that specific intent need not be proved in a prosecution under 8 U.S.C. §1326, that is, that the defendant knew he was not entitled to re-enter the United States without the permission of the Attorney General. See United States v. Hussein, 675 F.2d 114 (6th Cir. 1982), cert. denied, 459 U.S. 869, 103 S. Ct. 154 (1982); Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1978).

There is a split in the circuits as to whether, in a prosecution for violation of 8 U.S.C. §1326 for re-entry after deportation, the defendant may attack the validity of the underlying deportation order. The rule in the Fifth Circuit is that "a defendant cannot collaterally attack the original deportation order when subsequently prosecuted . . . for illegal re-entry under 8 U.S.C. §1326. See United States v. De La Cruz-Sepulveda, 656 F.2d 1129, 1131 (5th Cir. 1981); accord United States v. Gonzales-Parra, 438 F.2d 694 (5th Cir. 1971), cert. denied, 402 U.S. 1010 (1971).

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The Third, Seventh, and Ninth Circuit Courts of Appeals allow such collateral attacks. See United States v. Robles-Sandoval, 637 F.2d 692 (9th Cir. 1981), cert. denied, 451 U.S. 941 (1981). See Ramirez-Juarez v. Immigration and Naturalization Service, 633 F.2d 174, 176 n.3 (9th Cir. 1980); United States v. Rangel-Gonzalez, 617 F.2d 529 (9th Cir. 1980); United States v. Bowles, 331 F.2d 742 (3d Cir. 1964); United States v. Rosal-Aguilar, 652 F.2d 721 (7th Cir. 1981). The Second and Tenth Circuit Courts of Appeals do not. See United States v. Petrella, 707 F.2d 1064 (2d Cir. 1983); Arriaga-Ramirez, v. United States, 325 F.2d 857 (10th Cir. 1963); United States v. Mohammed, 372 F. Supp. 1048 (S.D.N.Y. 1973). The Eighth Circuit Court of Appeals, while indicating that a limited pre-trial review of the deportation hearing may be permissible in some circumstances, Hernandez-Ucibe v. United States, 515 F.2d 20 (8th Cir. 1975), cert. denied, 423 U.S. 1057 (1976), has not squarely addressed the issue. See United States v. Cabrera, 650 F.2d 943 (8th Cir. 1981). At least several cases should be read in order to discern the nuances of the term "collateral attack" when used in this context. For example, probably no court will hold a trial de novo.

8 U.S.C. §1326 has also withstood a challenge contending that it is unconstitutionally vague when it is used to punish mere presence in the United States. See United States v. Alvarago-Soto, 120 F. Supp. 848 (S.D. Cal. 1954).

And it has been held that deportation proceedings begun after defendant's re-entry, followed by his/her prosecution for illegal re-entry, does not constitute double jeopardy. See United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972). For other cases and minor points, see Annot., 59 A.L.R. Fed. 190.

9-73.220 8 U.S.C. §§1327 and 1328

8 U.S.C. §1327 is a rarely-used provision prohibiting persons from aiding subversive aliens in entering the United States.

8 U.S.C. §1328 prohibits three kinds of sexual activities with respect to aliens. It prohibits (1) importing aliens for prostitution, (2) holding aliens for prostitution, and (3) keeping, maintaining, controlling, supporting, employing, or harboring aliens for the purpose of prostitution. Each of the three is a separate crime. See Dalton v. Hunter, 174 F.2d 633 (10th Cir. 1949), cert. denied, 338 U.S. 906 (1949).

The original statute, 18 Stat. 477, Sec. 3 (1875), and its subsequent revision, 32 Stat. 1213, Sec. 3 (1903), expressly prohibited only the

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first two kinds of activity prohibited by the present 8 U.S.C. §1328. In 1907, the prohibition against keeping, maintaining, controlling, supporting, or harboring an alien female for the purpose of prostitution was added. See 34 Stat. 898, Sec. 3 (1907). However, in 1910 the Supreme Court declared the 1907 addition to the statute a constitutionally impermissible infringement on the police power reserved to the states because it sought to regulate behavior of persons after the alien had been imported into the United States. See Keller v. United States, 213 U.S. 138 (1909). Accordingly, when the statute was reenacted in 1910, in essentially its present form, the phrase, "in pursuance of such illegal importation" was added to the harboring, etc. provision in order to preserve the connection between the behavior sought to be regulated and Congress' power to control immigration. The 1910 re-enactment also substituted "alien" for "woman or girl," making it clear that prostitution of both sexes was covered. See Lewis v. Frick, 233 U.S. 291, 300 (1914).

Each use of the word "prostitute" in 18 U.S.C. §1328 is followed by the phrase, "or for any other immoral purpose." The latter phrase has been held to include concubines, United States v. Bitty, 208 U.S. 393 (1908), where the Supreme Court stated:

We must assume that in using the words "or for any other immoral purpose," Congress had reference to the views commonly entertained among the people of the United States, as to what is moral or immoral in the relations between man and woman in the matter of such intercourse.

Id. at 402.

But the phrase probably includes only immoral purposes related to sex. It does not, for example, include such an immoral act as the selling of babies. See United States v. Baker, 136 F. Supp. 546, 549-550 (S.D.N.Y. 1955). (The Baker opinion also maintains that the United States is powerless to prosecute an alien for acts committed abroad in violation of United States law, a holding which has subsequently been criticized by numerous authorities, e.g., United States v. Pizzarusso, 388 F.2d 8, 11 (2d Cir. 1968), cert. denied, 392 U.S. 936 (1968); Rocha v. United States, 288 F.2d 545, 548 (9th Cir. 1961), cert. denied, 366 U.S. 948 (1961).

The fact that the prostitute has resided here, and then gone abroad and returned, does not bar prosecution for acts committed with respect to his/her return. See United States v. Smith, 112 F.2d 83, 85 (2d Cir. 1940); United States v. Villet, 173 F. 500 (S.D.N.Y. 1909). On the other hand, where the defendant imported an alien for purposes of prostitution, then discontinued the relationship for two years, and then resumed it, his/her conviction for harboring an alien as a prostitute was reversed on

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the ground that the harboring was not "in pursuance of such illegal importation." See United States v. Lavoie, 182 F. 943 (W.D. Wash. 1910).

A "holding" under the statute has been held to occur if the alien was "detained by the defendant at the premises in question for the purposes of prostitution either by physical means, directly or indirectly applied to her by the defendant, or by threats, express or implied, directly or indirectly made to her by the defendant or by command or commands made to her directly or indirectly by the defendant, and calculated and operating to restrain her freedom of action and will. * * * It is not necessary to a conviction that the defendant should have held . . . [the woman] for such purposes for any given period of time." See United States v. Giuliani, 147 F. 594, 596, 600 (D. Del. 1906).

9-73.300 ARREST, SEARCH, AND SEIZURE BY IMMIGRATION OFFICERS

The general rules concerning arrest, search and seizure applicable to other federal officers are, of course, applicable to immigration officers. This section will merely highlight some of the special statutory provisions and precedential decisions peculiarly applicable to immigration officers and their work.

Several sections of the Immigration and Naturalization Act, 8 U.S.C. §§1101 et seq., contain authorization for immigration officers regarding arrest, search and seizure. The Act gives immigration officers dual authority to make arrests either for the purpose of holding an alien for matters relating to civil administrative proceedings or for the purpose of commencing criminal proceedings, or both. 8 U.S.C. §1225 provides that all aliens arriving at United States ports must be examined by immigration officers who are authorized, without a warrant, to board and search any conveyance believed to carry aliens, and to detain for further inquiry anyone "who may not appear . . . at the port of arrival to be clearly and beyond a doubt entitled to land." 8 U.S.C. §1252(a) authorizes the arrest upon warrant of the Attorney General of any alien, pending a determination of his/her deportability. 8 U.S.C. §1252(c) authorizes arrest of the alien at any time within six months after a final order of deportation has been entered. 8 U.S.C. §1324(b) authorizes immigration officers to seize, without a warrant, conveyances used to transport illegal aliens, and 8 U.S.C. §1357 authorizes them, inter alia, to:

A. Interrogate anyone believed to be an alien as to his/her right to remain in the United States;

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B. Arrest any alien who he/she sees attempting to enter the United States illegally or who he/she has reason to believe is in the United States illegally and is likely to escape before a warrant can be obtained for his/her arrest;

C. Within 25 miles of the border and in international waters, to board any conveyance and have access to private lands (except dwellings) to search for aliens;

D. Make warrantless arrests for felonies under the immigration laws if there is likelihood of the person's escaping before a warrant can be obtained for his/her arrest; and

E. Search persons (including their personal effects) seeking admission to the United States if the officer has cause to suspect that grounds exist for excluding the person from the United States, and such would be disclosed by such search.

8 U.S.C. §1357(a)(1), authorizing immigration officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," has a deceiving simplicity. It is deceiving because in practice the courts have strained to give the section a reasonable and meaningful interpretation in light of the Fourth Amendment. The Circuit Courts of Appeals have evinced a reluctance to believe that such interrogations occur without a detention, however brief. Since there is usually some kind of stop or detention, the question arises as to whether immigration officers may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. The Supreme Court has declined to give that question a general answer. See United States v. Brignoni-Ponce, 422 U.S. 873, 884 n.9 (1975). However, it has recently answered the question with respect to "factory surveys," that is, worksite inspections to discover illegal aliens. See Immigration and Naturalization Service v. Delgado, ___ U.S. ___ (April 17, 1984), 52 U.S.L.W. 4436, was an injunction suit to constrict the Service's authority to conduct factory inspections. The case involved three worksites, two of which were entered with probable cause warrants (which contained the names of no individual employees), the third by permission. The surveys lasted one to two hours. Agents were posted at the doors. Other agents moved from employee to employee asking questions. The Supreme Court held that the surveys did not infringe anyone's rights because the employees at the worksite were not "seized," and the employees who were questioned were not "detained."

The Office of General Counsel for the Immigration and Naturalization Service has prepared a 43-page memorandum entitled, The Law of Arrest,

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Search, and Seizure for Immigration Officers, Publication No. M-69. It can be obtained by phoning the Office of the Deputy General Counsel, FTS 633-3195. Two recent cases of interest are Oliver v. United States, U.S. _____ (April 17, 1984), 52 U.S.L.W. 4425, and United States v. Villamonte-Marques, 462 U.S. 579, 103 S. Ct. 2073 (1983). Oliver is a reaffirmation of the vitality of Herter v. United States, 265 U.S. 57 (1924), which permits police officers to enter and search a field, even one fenced and posted with no trespass signs, without a warrant (although there is no violations of anyone's Fourth Amendment rights, the entry may nevertheless constitute a trespass under state law). The decision has significant implications for immigration officers, who need to enter agricultural fields in order to locate and apprehend illegal aliens working as farmhands. Villamonte-Marques holds that the suspicionless boarding of vessels, when authorized by stature, also does not run afoul of the Fourth Amendment.

9-73.310 Arrest of Illegal Aliens by State and Local Officers

8 U.S.C. §1324(c) specifically authorizes state and local officers to enforce the criminal provisions of 8 U.S.C. §1324:

(c) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws, [Emphasis added]

There is also a general federal statute which authorizes local officials to make arrests for violations of federal statutes. 18 U.S.C. §3041 provides:

For any offense against the United States the offender may . . . by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned . . . for trial before such court of the United States by law has cognizance of the offense.

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The Fifth Circuit Court of Appeals has held that 18 U.S.C. §3041 authorizes the named officials to issue process for the arrest, to be executed by law enforcement officers. See United States v. Bowdach, 561 F.2d 1160, 1168 (5th Cir. 1977). The court of appeals held that any other "interpretation would either seriously deplete the ranks of judges and mayors, allow many criminals to run free, or both." Id. at 1168.

Rule 4(a)(1) of the Federal Rules of Criminal Procedure provides that an arrest warrant "shall be executed by a marshal or by some other officer authorized by law." The phrase, "some other officer," includes state and local officers. See United States v. Bowdach, supra.

In the absence of a specific federal statute, the validity of an arrest without a warrant for violation of federal law by local peace officers is to be determined by reference to local law. See Miller v. United States, 357 U.S. 301, 305 (1958); United States v. Di Re, 332 U.S. 581, 189 (1948).

The United States Court of Appeals for the Ninth Circuit held, in Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983), that the structure of the Immigration and Nationality Act does not evidence an intent to preclude local enforcement of the Act's criminal provisions. Id. at 474. Based on the pertinent legislative history, the court of appeals rejected the argument that since 8 U.S.C. §1324(c) specifically authorizes local officers to make arrests for violations of 8 U.S.C. §1324, and 8 U.S.C. §§1325 and 1326 contain no comparable provision, Congress must have intended that local officers be precluded from making arrests for violations of 8 U.S.C. §§1325 and 1326. Id. at 475. The decision warns, however, that the first violation of 8 U.S.C. §1325 is a misdemeanor, and that if applicable state law authorizes law enforcement officers to arrest for misdemeanors only if committed in their presence, they would not be authorized to arrest aliens for illegal entry (unless the officers should happen to know that the alien had previously been convicted of illegal entry) unless they saw him/her cross the border. And the Ninth Circuit Court of Appeals further pointed out that it had previously held, in United States v. Rincon-Jimeniz, 595 F.2d 1192, 1194 (9th Cir. 1979), that the crime of illegal entry is not a continuing offense, but is complete at the time of entry, thereby rebutting the contention that it is a continuing crime and therefore is a misdemeanor committed in the presence of the arresting officer. Gonzalez v. City of Peoria, supra, at 475-476.

From the Criminal Division perspective, the disappointing aspect of Gonzales is the statement that an alien's "inability to produce documentation does not in itself provide probable cause [to arrest]."

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Gonzalez v. City of Peoria, supra, at 16. Pursuant to 8 U.S.C. §1304(e), aliens issued registration cards must carry such cards with them at all times. Lawfully admitted aliens would be issued such cards. (A possible exception may exist for Canadian citizens.) Aliens who gain entry without the requisite inspection, and who therefore are not issued such cards, violate 8 U.S.C. §1325.

Consequently, a law enforcement officer confronting an alien who is unable to produce documentation has probable cause to believe that a violation of 8 U.S.C. §1304(e) (failure to possess documents) or 8 U.S.C. §1325 (entry without inspection) has occurred. (If the alien is undocumented and has been in the United States for longer than 30 days, he or she has also violated 8 U.S.C. §1306(a).) Thus, we believe that the inability to produce documentation does provide probable cause to arrest for immigration violations.

9-73.400 REPORTING OF DECISIONS

The outcome of all important prosecutions arising under the immigration and nationality laws should be reported to the General Litigation and Legal Advice Section. In all cases in which the decision is adverse to the government, except criminal cases in which no appeal is allowed by law, copies of the pleadings and other documents, except insofar as previously supplied to the Section, should be promptly submitted along with an appeals recommendation. See USAM Title 2, Appeals.

9-73.500 DEPORTATION

9-73.510 Extradition and Deportation

No agreement shall be made by a U.S. Attorney that an individual will not be extradited or deported or that his/her extradition or deportation will be delayed, altered or restricted to certain nations without the prior approval of the Criminal Division in criminal cases and in cases involving extradition, or the Civil Division in civil cases.

9-73.520 Promise of Non-Deportation

The U.S. Attorney should not as a part of a plea agreement or an agreement to testify, or for any other reason in a criminal case, promise

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an alien that he/she will not be deported, without prior authorization from the Criminal Division.

9-73.600 18 U.S.C. §§1541-1546: PASSPORT AND OTHER ENTRY DOCUMENT VIOLATIONS

Chapter 75 of Title 18, §§1541-1546, provides criminal penalties for offenses related to passports, visas, and other entry documents. The first four sections, 18 U.S.C. §§1541-1544, are concerned exclusively with passports. 18 U.S.C. §1545 deals with safe conducts as well as passports. 18 U.S.C. §1546 deals with visas, permits, and other entry documents. See Annot., 3 A.L.R. Fed. 623.

Passport is defined at 8 U.S.C. §1101(a)(3) as "any travel document issued by competent authority showing the bearer's origin, identity, and nationality, if any, which is valid for the entry of the bearer into a foreign country." The Supreme Court has stated: "'[A passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.' See Urtetique v. D'Arcy, 9 Pet 692, 698 9 L. Ed. 276 (1835)." See Haig v. Agee, 453 U.S. 280, 292 (1981). 8 U.S.C. §1104 entrusts control of passport and visa matters to the Bureau of Consular Affairs of the Department of State, and establishes in the Bureau a Passport Office and a Visa Office. 8 U.S.C. §1185(b) makes it unlawful for a United States citizen to attempt to depart from or enter the United States without a valid passport.

22 U.S.C. §211a authorizes the Secretary of State to issue United States passports in foreign countries. 22 U.S.C. §212 limits issuance of United States passports to United States nationals only. 22 U.S.C. §213 prescribes the method of applying for a passport, 22 U.S.C. §§213, 214a, and 215 control the fees for passports, and 22 U.S.C. §217 limits the temporal validity of passports to no more than 10 years. State Department regulations governing passports appear at 22 C.F.R. Part 51. See 60 Am. Jur. 2d "Passports" for a general discussion of the law of passports.

The statute of limitations for violations of 18 U.S.C. §§1541-1544 is 10 years. See 18 U.S.C. §3291.

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9-73.610 18 U.S.C. §1541: Issuance of Passports, Etc., Without Authority

18 U.S.C. §1541 makes it a crime to issue or verify a passport, or other instrument in the nature of a passport, without authority to do so. For example, state and local governments may not issue documents designed to facilitate overseas travel of their residents. See 17 Op.Att.Gen. 674 (1884). Similarly, forgery of a document purporting to be such a travel document issued by a state or local government would also violate 18 U.S.C. §1541. See 9 Op.Att.Gen. 350 (1859). 18 U.S.C. §1541 also makes it a crime for consular officers to verify passports for persons not owing allegiance to the United States, even if they are citizens.

9-73.620 18 U.S.C. §1542: False Statement in Application for Passport and Use of a Passport Fraudulently Obtained

18 U.S.C. §1542 proscribes both false statements made to obtain a passport, and use of any such passport so obtained.

The false statement against which this section is most commonly used is the use of a false name in obtaining a passport. United States citizens often attempt to obtain passports using false names in order to conceal criminal activity. A problem of proof can arise when the passport applicant has routinely used aliases and now seeks to obtain a passport in the name of one of those aliases. In United States v. Cox, 593 F.2d 46 (6th Cir. 1979), a Michigander named Cox applied for a passport in the name of Stein. Cox was employed by the City of Detroit as Cox, but obtained his driver's license, Social Security card and credit as Stein. Cox testified that he adopted the name Stein in order to, inter alia, shed the stigma of a criminal conviction in the name of Cox. Michigan follows the common law in recognizing the right of a person to adopt any name he/she chooses, without registering the new name. Cox was convicted in the name of Cox of applying for a passport in the false name of Stein. The conviction of Cox, or Stein, was reversed by the United States Court of Appeals for the Sixth Circuit, for two reasons. One reason was that the passport regulations, 22 C.F.R. §51.24 (1977), recognize that a name may be changed without court action:

An applicant who has changed his name by the adoption of a new name without formal court proceedings shall submit with his application evidence that he has publicly and exclusively used the adopted name over a long period of time.

The court noted, id., at 49, that the record did not disclose whether defendant complied with this regulation, but stated that it would be

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immaterial to the decision in the case. The other reason was stated by the Sixth Circuit Court of Appeals, id. at 48, as follows:

There was no showing that the defendant assumed the name Stein for fraudulent purposes. In the absence of such proof he was legally entitled to use that name as his own.

Similarly, in United States v. Wasman, 641 F.2d 326 (5th Cir. 1981), it was held that in a prosecution for making a passport application in a false name, it was reversible error to exclude defendant's explanation that he needed to obtain a passport in a Gentile name, in order to do business with Arab nations. The decision explains that defendant's explanation was not admissible to prove good motive, but was admissible to negate the allegation of wrongful intent, that is, to prove that the defendant was making a legitimate adoption of another name. Incidentally, after remand and re-conviction, the United States Court of Appeals for the Eleventh Circuit declined to determine the admissibility of hearsay statements that third persons warned the defendant to adopt a Gentile name.

Browder v. United States, 312 U.S. 335 (1941), is the leading case on use of a passport, the application for which contained a false statement. Browder obtained a passport in his real name, but in the portion of the application asking when his last passport was obtained, he falsely stated, "none." The statement was false because he had previously obtained a passport, and in a false name. He then used the new passport to enter the United States. The Supreme Court upheld Browder's conviction under 18 U.S.C. §1542 for innocent use of a passport secured by a false statement.

See Annot., 53 A.L.R. Fed. 507.

9-73.630 18 U.S.C. §1543: Making or Using a Forged Passport

18 U.S.C. §1543 proscribes the forgery, alteration, etc., of passports or the use of or furnishing to another of a forged, altered, void, etc., passport or purported passport. It applies to instruments issued or purportedly issued by foreign governments as well as by the United States. See United States v. Dangdee, 616 F.2d 1118 (9th Cir. 1980).

9-73.640 18 U.S.C. §1546: Fraud and Misuse of Visas, Permits, and Other Entry Documents, and False Personation--General

The offenses proscribed in 18 U.S.C. §1546 originated in 18 U.S.C. §22 of the Immigration Act of 1924. It was enacted in its present form in

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1952, only slightly changed from the original. For a legislative history, see United States v. Varga, 380 F. Supp. 1162 (E.D.N.Y. 1974).

Generally, the first paragraph of 18 U.S.C. §1546 proscribes the forging, etc., of an entry document or its use, possession, etc. The second paragraph proscribes the possession, etc., of plates or distinctive papers used for the printing of entry documents. The third paragraph makes it a crime, when applying for an entry document or admission into the United States, to personate another or appear under a false name. The fourth paragraph makes it a crime to give a false statement under oath in any document required by the immigration laws or regulations.

This section protects only entry documents. In United States v. Campos-Serrano, 404 U.S. 293 (1971), the Supreme Court held that alien registration cards, which the alien was issued after his initial entry, but which could be used for re-entry, did not fall within the purview of the statute and no prosecution could be maintained for possessing a counterfeit one. Also, it has been held inapplicable to a forged foreign passport on the ground that such is not an "other document required for entry" within the intentment of the first paragraph of 18 U.S.C. §1546. See United States v. Vargas, 380 F. Supp. 1162 (E.D.N.Y. 1974). Both Companos-Serrano and Vargas reason that 18 U.S.C. §1546 reaches only documents whose raison d'être is the facilitation of entry into the United States.

However, 18 U.S.C. §1546 is applicable in certain situations where no entry document is applied for, but the person seeking admission to the United States falsely personates another. See United States v. Carrillo-Colmenero, 523 F.2d 1279 (5th Cir. 1975); United States v. Knight, 514 F.2d 1286 (5th Cir. 1975); United States v. Mouyas, 42 F.2d 743 (S.D.N.Y. 1930); Contra, McFarland v. United States, 19 F.2d 807 (6th Cir. 1927). It also constitutes false personation when an alien applies in his/her own name for entry documents, but falsely states that he/she previously used another name, the other name being the name of a real person who was an alien lawfully entitled to enter the United States. See Shimi Miho v. United States, 57 F.2d 491 (9th Cir. 1932). And 18 U.S.C. §1546 is equally applicable to United States citizens as well as foreigners. Id. The statutory scheme indicates that 18 U.S.C. §1546 was also designed to apply to anyone who makes false statements in a visa application to a United States consular official overseas. See United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968), cert. denied, 392 U.S. 936 (1968). In fact, the Ninth Circuit Court of Appeals has commented: "It is difficult to see how many of the offenses described in Section 1546 could be committed by an alien were he not in a foreign country," Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), cert. denied, 366 U.S. 948 (1961).

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An indictment charging an offense under the first paragraph of 18 U.S.C. §1546 was quoted approvingly in United States v. Santelises, 476 F.2d 787 (2d Cir. 1973). An indictment charging false personation under the third paragraph of 18 U.S.C. §1546 is set forth in United States v. Knight, 514 F.2d 1286, n.1 (5th Cir. 1975). An indictment charging receipt of an immigrant visa knowing it was procured by fraud (in violation of the first paragraph under 18 U.S.C. §1546) and false statements under oath in an application for a non-quota visa (in violation of the fourth paragraph of 18 U.S.C. §1546) is quoted in United States v. Rodriguez, 182 F. Supp. 487 (S.D. Cal. 1960), rev'd in part and aff'd in pertinent part, sub nom., Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), cert. denied 366 U.S. 948 (1961).

9-73.641 Sham Marriages Between United States Citizens and Aliens

18 U.S.C. §1546 has often been used in prosecutions when an alien and a United States citizen falsely state that they are married, in order to obtain a visa or permanent residence status for the alien in the United States. What if the two purported marriage partners have satisfied all the marriage requirements of a particular state, and the marriage ceremony has been performed, but the parties entered into the marriage only to obtain permanent residence status for the alien (commonly referred to as "an immigration benefit"), never intending to live as man and wife? Is their statement to the United States government that they are married a false statement? This would make an interesting law school examination question, but it has, fortunately, been answered by the Supreme Court in Lutwak v. United States, 344 U.S. 604, 611 (1953), as follows:

We do not believe that the validity of the marriages is material. No one is being prosecuted for an offense against the marital relation. We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States and to commit offenses against the United States. * * * The common understanding of a marriage, which Congress must have had in mind when it made provision for "alien spouses" in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations. Such was not the case here, or so the jury might reasonably have found.

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Lutwak was followed in Johl v. United States, 370 F.2d 174 (9th Cir. 1966), and Chin Bick Wah v. United States, 245 F.2d 274 (9th Cir. 1975), cert. denied, 355 U.S. 870 (1957).

However, the Seventh Circuit Court of Appeals, in United States v. Lozano, 511 F.2d 1 (7th Cir. 1975), cert. denied, 423 U.S. 850 (1975), in effect declined to follow the holding in Lutwak, supra, reasoning that since the purported marriage partners' statement that they were married was literally true because all state law requirements had been satisfied, they could not be convicted of making false statements. The Second Circuit Court of Appeals, in United States v. Diogo, 320 F.2d 898 (2d Cir. 1963), reversed convictions based upon false claims of marital status made to obtain immigration benefits. The Diogo court held that when the petitioners state that they are married, they may mean to claim merely that they are married under state law, in which case the statement would be literally true, and they would lack the mens rea for a false statements conviction. For the government to convict them, it must prove that when they claimed they were married, they had the specific intent to misrepresent their marriage relationship as one acceptable for immigration purposes. The Diogo court attempted to distinguish its earlier holding in United States v. Rubenstein, 151 F.2d 915 (2d Cir.), cert. denied, 326 U.S. 766 (1945), a decision whose reasoning parallels Lutwak, by stating that the marriage in Rubenstein was in fact a nullity because it lacked the mutuality of consent required by the law of contracts. Later, in United States v. Sarantos, 455 F.2d 877 (2d Cir. 1972), the Second Circuit Court of Appeals upheld the conviction of a lawyer for aiding persons in obtaining residence status in the United States by entering into sham marriages, but did not directly address the issue raised in Diogo, except to say:

The court [in Diogo] was referring to the well established rule that to ascertain truth or falsity, one must look to the meaning intended by the party who have the answer and not to the interpretation, however reasonable, given it by government authorities.

Sarantos, supra, at 881.

It is worth noting that Lutwak also held that evidence of acts subsequent to the termination of a conspiracy to enter sham marriages was admissible to prove the sham nature of the marriages, facts "such as the fact that the parties continued to live apart after they came to the United States; that money was paid the so-called wives as a consideration for their part in the so-called marriages; and that suits were started to

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terminate whatever legal relationship there might have been upon the record." Lutwak v. United States, 344 U.S. at 617.

9-73.700 OTHER RELATED STATUTES

- 8 U.S.C. §1306(a) Alien's failing to apply for registration or fingerprinting
- 8 U.S.C. §1306(b) Failure of alien to give notice of change of address
- 8 U.S.C. §1306(c) Alien who makes false statements in registering
- 8 U.S.C. §1306(d) Counterfeiting alien registration cards and forms
- 18 U.S.C. §911 False personation as United States citizen
- 18 U.S.C. §1001 The general false statements statute
- 18 U.S.C. §1015 False statements relating to naturalization, citizenship, or registry of aliens; false denial of citizenship to avoid duty or liability imposed by law;
- Use of fraudulently obtained certificate of arrival, declaration of intention, certificate of naturalization or citizenship, etc.; false certificate of appearance or oath taking relating to immigration, citizenship, etc.
- 18 U.S.C. §§1421-1429 Nationality and citizenship--crimes committed in connection with naturalization and citizenship proceedings.
- 18 U.S.C. §1621 Perjury generally in connection with any matter in which a law of the United States authorizes an oath to be administered.
- 18 U.S.C. §4221 Perjury before United States consular official overseas.

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9-75.000 OBSCENITY

Obscenity prosecutions are initiated under 18 U.S.C. §1461 through §1465 and §2252. See USAM 9-75.010-.050, infra, and 9-75.082, infra. 18 U.S.C. §2252 is directed at material involving the sexual exploitation of minors. A related provision is found in 18 U.S.C. §2251, which makes it a criminal offense to cause a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. See USAM 9-75.081, infra. This provision is directed at the actual abuse of children in producing photographs, films and the like. 47 U.S.C. §223 prohibits, inter alia, obscene or indecent telephone calls. See USAM 9-75.090-.091, infra. See also USAM 9-63.410-.490. Civil forfeiture proceedings for imported obscene material are initiated under 19 U.S.C. §1305 and criminal and civil forfeiture are available for violations of 18 U.S.C. §§2251 and 2252. See USAM 9-75.060, 9-75.083, 9-75.084, infra. The General Litigation and Legal Advice Section has the supervisory responsibility for all such cases and matters. Consultation with that Section is required before any criminal prosecution may be instituted. A civil action under 19 U.S.C. §1305 may be instituted without prior authorization. See USAM 9-75.700, infra.

18 U.S.C. §§1461-1465 are also predicate offenses for violation of the RICO statute, 18 U.S.C. §§1961-1968. See 18 U.S.C. §1961(1). Questions concerning RICO authorization and the application of the RICO guidelines (see USAM 9-110.100 - .143) should be addressed to the Organized Crime and Racketeering Section. Questions concerning obscenity issues should be addressed to the General Litigation and Legal Advice Section.

The General Litigation and Legal Advice Section should be advised in writing as to the nature and value of any property or interest forfeited under 18 U.S.C. §§2253 or 2254 for violations of 18 U.S.C. §§2251 or 2252 or forfeited in connection with an obscenity-based RICO prosecution.

9-75.010 Mailing Obscene or Crime-Inciting Matter

18 U.S.C. §1461 provides:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

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Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or

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imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

9-75.020 Importation or Transportation of Obscene Matters

18 U.S.C. §1462 provides:

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Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce-

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture film, paper, letter writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be find not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

9-75.030 Mailing Indecent Matter on Wrappers or Envelopes

18 U.S.C. §1463, provides:

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent, are nonmailable

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matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

9-75.040 Broadcasting Obscene Language

18 U.S.C. §1464, provides:

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

The application of this section to broadcast speech has been interpreted in Duncan v. United States, 48 F.2d 128 (9th Cir. 1931), cert. denied, 283 U.S. 863; Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972); and United States v. Smith, 467 F.2d 1126 (7th Cir. 1972).

The Federal Communications Commission (FCC) and the FBI have joint responsibility for investigating cases arising under this section. In general, cases which originate with the FCC will be handled by that agency and not referred to U.S. Attorneys or to the FBI. However, the General Counsel of the FCC may from time to time refer a case involving unusual or compelling circumstances, such as a threat to life or property, to the Criminal Division which may, in turn, refer it to the appropriate U.S. Attorney. This is consistent with Department policy that criminal proceedings under 18 U.S.C. §1464 involving citizen band and amateur radio frequencies be reserved for incidents of such magnitude that an administrative sanction such as the loss or suspension of a license by the Federal Communications Commission under 47 U.S.C. §312, would not be a sufficient penalty. In addition, the FCC stands ready to assist in the investigation of other cases when requested in writing to do so by the Department, a U.S. Attorney, or the FBI.

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In Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978), the Supreme Court held that broadcast material which is indecent but not obscene can be regulated by the FCC by requiring "channeling" into late night hours and the broadcasting of appropriate warnings. The basis for the Court's ruling was the intrusive nature of radio and television and the likelihood that children or adults could be unwittingly exposed to material considered offensive. The Court specifically declined to consider whether such material would be appropriate for prosecution under 18 U.S.C. §1464.

9-75.050 Transportation of Obscene Matters for Sale or Distribution

18 U.S.C. §1465, provides:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

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9-75.060 Immoral Articles; Prohibition of Importation

19 U.S.C. §1305, provides:

(a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were enclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: Provided, that the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: Provided further, that the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter

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provided; and no protest shall be taken to the United States Customs Court from the decision of such customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

9-75.070 Private Remedies

39 U.S.C. §3008 allows an individual who has received a sexually oriented advertisement to initiate a complaint with the Postal Service so that administrative corrective action may be taken. 39 U.S.C. §3010 permits a person to place his/her name on a list maintained by the Postal Service of those who do not wish to receive such advertisements and imposes certain requirements on distributors of such material with regard to the names listed. Sanctions for violation of these requirements are provided in 39 U.S.C. §3011 and related criminal provisions are found in 18 U.S.C. §§1735-1737.

9-75.080 Sexual Exploitation of Children; Child Pornography

Legislation was enacted by the 95th Congress dealing with the use of children in the production of films and photographs depicting sexual activity and with the distribution of obscene material depicting children engaging in such activity. The legislation was amended by the 98th Congress. Among other things, the amendments deleted the requirement that distributed material be legally "obscene."

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9-75.081 Sexual Exploitation of Children

18 U.S.C. §2251 provides:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c) Any individual who violates this section shall be fined not more than \$100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than \$200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than \$250,000.

9-75.082 Certain Activities Relating to Material Involving the Sexual Exploitation of Minors

18 U.S.C. §2252 provides:

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(a) Any person who--

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than \$100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than \$200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than \$250,000.

9-75.083 Criminal Forfeiture

18 U.S.C. §2253 provides:

(a) A person who is convicted of an offense under section 2251 or 2252 of this title shall forfeit to the United States such person's interest in--

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(1) any property constituting or derived from gross profits or other proceeds obtained from such offense; and

(2) any property used, or intended to be used, to commit such offense.

(b) In any action under this section, the court may enter such restraining orders or take other appropriate action (including acceptance of performance bonds) in connection with any interest that is subject to forfeiture.

(c) The court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, beyond a reasonable doubt, that such property is subject to forfeiture.

(d)(1) Except as provided in paragraph (3) of this subsection, the customs laws relating to disposition of seized or forfeited property shall apply to property under this section, if such laws are not inconsistent with this section.

(2) In any disposition of property under this section, a convicted person shall not be permitted to acquire property forfeited by such person.

(3) The duties of the Secretary of the Treasury with respect to dispositions of property shall be performed under paragraph (1) of this subsection by the Attorney General, unless such duties arise from forfeiture effected under the customs laws.

9-75.084 Civil Forfeiture

18 U.S.C. §2254 provides:

(a) The following property shall be subject to forfeiture by the United States:

(1) Any material or equipment used, or intended for use, in producing, reproducing, transporting, shipping, or receiving any visual depiction in violation of this chapter.

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(2) Any visual depiction produced, transported, shipped, or received in violation of this chapter, or any material containing such depiction.

(3) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) All provisions of the customs law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

9-75.085 Definitions for Chapter

18 U.S.C. §2255 provides:

For the purposes of this chapter, the term--

- (1) "minor" means any person under the age of eighteen years;
- (2) "sexually explicit conduct" means actual or simulated--

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(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or public areas of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising; and

(4) "organization" means a person other than an individual.

9-75.086 Comment

The child pornography statutes were enacted on February 6, 1978, and amended on May 21, 1984. The amendments deleted the requirements in the original legislation that the subject material be legally obscene and that production or distribution be for a commercial purpose and narrowed its coverage to visual depictions. (The original legislation had also covered written descriptions of child pornography.) The amendments also raised the age in the "minor" definition from 16 to 18, added civil and criminal forfeiture provisions, and provided authorization for interception of wire or oral communications under 18 U.S.C. §2516.

The lengthy hearings and committee reports respecting the original legislation and the later amendments evidence Congress' special concern with the problem of sexual child abuse--a concern which we share. Therefore, to the extent that prosecutive resources are available, priority should be given to prosecutions under 18 U.S.C. §§2251 and 2252. See also USAM 9-75.140. Particular attention should be given to considering what assets may be forfeitable either criminally or civilly under 18 U.S.C. §§2253 and 2254.

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The Department must report annually to Congress with regard to prosecutions, convictions and forfeitures under these statutes. Therefore, it is imperative that U.S. Attorneys maintain close contact with the General Litigation and Legal Advice Section during the investigative and prosecutive stages of these cases. Copies of indictments, with the date of return noted thereon, should be furnished to the Section.

Investigation to date indicates that the great majority of child pornography cases involve small dealers or traders, generally operating out of their homes. Frequently sales transactions are initiated by postal inspectors as a result of the receipt of information from the Customs Service that a particular individual is importing child pornography. These cases, although they involve small dealers, are clearly appropriate for federal prosecution, and many non-commercial cases, where the material is furnished without charge, will also be appropriate for prosecution. The material being distributed by these individuals is particularly offensive, and Congress, in enacting 18 U.S.C. §§2251-2255, has evinced, as noted above, a particular concern with this problem.

The courts have generally held that test purchases by postal inspectors do not constitute entrapment. See the annotation at 77 A.L.R. 2d 792. Therefore, the fact that these cases are based upon solicited purchases does not make the cases legally defective. However, some indication of a predisposition to sell, such as evidence of prior sales or some indication in correspondence with the postal inspector that the individual has no qualms about engaging in the business, should be present. If correspondence from the subject specifically evidences a predisposition not to sell prior to the solicitation from the postal inspector, a charge of entrapment might very well be sustainable.

It should also be emphasized that prosecutions should not be limited to cases involving material actually produced in your district. Under 18 U.S.C. §2252, prosecution is permissible on the basis of material mailed or shipped into as well as out of your district.

Two aspects of this legislation are potentially troublesome and may limit the types of cases which can be successfully prosecuted.

First, 18 U.S.C. §2251 provides jurisdiction not only in those cases where subject material has moved in interstate commerce but also in those cases where a defendant "knows or has reason to know" material will move in interstate commerce. While there will be no difficulty in establishing jurisdiction where it can be shown that material, in fact, was mailed or was shipped in interstate commerce, the alternative basis for jurisdiction

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will obviously be more difficult to establish. However, it may be possible to prove that a defendant knew or had reason to know that material would move in interstate commerce by such factors as: (1) the purpose of the production, (2) the nature and size of the operation, (3) the relationship of the defendant to the subsequent use or destination of the subject material, and (4) prior conduct of the defendant with regard to production and distribution of such material. Of course, the quality of such evidence will vary greatly from case to case.

Second, the age of the minor is an element of the offense in both 18 U.S.C. §§2251 and 2252. Some material depicts children who are clearly under the age of 18. However, the age of the child is not so readily apparent in other material. In the latter cases, it may be necessary to identify the child and offer proof of age in order to establish this element of the offense. In light of the clandestine fashion in which such films and magazines are produced, this will often be impossible. Therefore, in such instances, it may be necessary to limit prosecutions to materials depicting children who are obviously younger than 18.

With regard to choice of the appropriate statute, a question has arisen as to the possible use of 18 U.S.C. §545 in prosecuting importers of child pornography on the theory that the importation is "contrary to law" in that it is contrary to 18 U.S.C. §2252 (and 18 U.S.C. §§1461 and 1462 if it is obscene). 18 U.S.C. §545 should not be used in these cases. United States v. Nicholas, 97 F.2d 510 (2d Cir. 1938), involved a complaint for forfeiture which was brought pursuant to 19 U.S.C. §1593, the predecessor of 18 U.S.C. §545, against printed matter the importation of which was claimed to be "contrary to law" because the mailing and interstate or foreign shipment of the material was illegal under 18 U.S.C. §§334 and 396, the predecessors of 18 U.S.C. §§1461 and 1462. The court held that since imported printed matter must be diverted and examined for possible violations of the law when it appears at a port of entry, such material had not been "imported" for the purpose of 19 U.S.C. §1593 and dismissed the complaint. This case has never been overruled, and it appears to be the only case dealing specifically with imported printed matter in the context of an action under 18 U.S.C. §545. Moreover, 18 U.S.C. §§1462 and 2252 are statutes which are directed specifically at the importation of such material, and the use of these specific statutes is more appropriate than the use of a general merchandise statute.

Finally, it should be emphasized that visual depictions of child pornography, unlike material covered by 18 U.S.C. §§1461-1465, need not meet all the elements of the Supreme Court's obscenity test. See New York v. Ferber, 458 U.S. 747 at 761, 764-765 (1982). Specifically, the Court deleted the requirements that the material must appeal to prurient

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interest, that the portrayal must be patently offensive, and that the material must be taken as a whole. Thus, the statutes would now appear to cover any work which contains a visual depiction of a nude child posed in a sexually provocative manner or which emphasizes the genital area, as well as material which would meet the traditional obscenity test.

Public Law No. 95-225, which enacted 18 U.S.C. §§2251, 2252 and 2255 (then 2253), also made certain changes in 18 U.S.C. §2423, a part of the White Slave Traffic Act, including the extension of the coverage of that provision to the transportation of minor boys as well as minor girls.

9-75.090 Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications

47 U.S.C. §223 provides:

(a) Whoever-

(1) in the District of Columbia or interstate or foreign communication by means of telephone-

(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;

(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

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(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(2) knowingly permits any telephone facility under his control to be used for any purpose prohibited by this section,

shall be fined not more than \$50,000 or imprisoned not more than six months, or both.

(b)(1) Whoever knowingly-

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than \$50,000 or imprisoned not more than six months, or both.

(2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

(3) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(4)(A) In addition to the penalties under paragraphs (1) and (3), whoever, in the District

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of Columbia or in interstate or foreign communication violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either-

(i) by a court, pursuant to a civil action by the Commissioner or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(5) The Attorney General may bring suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

9-75.091 Comment

47 U.S.C. §223, which originally consisted of just subsection (a), deals in part with the making of obscene or indecent comments by telephone and was enacted in 1968. Subsection (b) of 47 U.S.C. §223 was added on December 8, 1983, in response to public outcry concerning the existence of so-called "Dial-A-Porn" services, by which a person can make a telephone call and receive a recorded obscene message. Although the legislative history of the original statute suggests that Congress' main concern was with people who receive obscene or indecent telephone calls, the language of 47 U.S.C. §223(a) is broad enough on its face to cover obscene recorded messages. Since Congress in enacting subsection (b) of 47 U.S.C. §223 made no change in the original provision (now subsection (a)(1)(A)), it is unclear what Congress now intends this provision to cover. Under another provision of the bill enacting subsection (b) of 47 U.S.C. §223, Congress gave the Federal Communications Commission 180 days to issue regulations defining the defense set forth in 47 U.S.C. §223(b)(2).

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The Commission issued regulations restricting the defense to service providers who either (a) limit operations to the hours of 9:00 p.m. to 8:00 a.m. Eastern Time or (b) require payment by credit card before transmission of the message. However, the Second Circuit struck down these regulations. Until valid regulations are issued, it does not appear the government may take action under 47 U.S.C. §223(b). No action under 47 U.S.C. §223 for obscene telephone calls should be initiated without prior consultation with the General Litigation and Legal Advice Section.

9-75.100 PROSECUTIVE POLICY

9-75.110 Venue

Cases under the obscenity statutes may be prosecuted in the district where the material is mailed or deposited with a facility of interstate commerce, the district of receipt, or any intermediate district through which the material passes. See 18 U.S.C. §3237. In cases where there are complaints by postal patrons about the unsolicited receipt of obscene material, the district of receipt would appear to be the appropriate choice of venue. On the other hand, in cases involving numerous mailings by a distributor into various districts, the district of origination may be the appropriate venue for the case. Workload problems and other considerations may also dictate the choice of venue. Furthermore, if a case is to be based solely upon test purchases by postal inspectors, it will be venued in the district of origination of the obscene mailing rather than some other district, unless the government has some information showing that there were prior mailings into the recipient district by the individual involved. Prosecutions will not be brought in jurisdictions through which obscene material passes in transit except in unusual circumstances and only with the express concurrence of the General Litigation and Legal Advice Section.

9-75.120 Multiple Prosecutions

Because of the nation-wide scope of operations of the large-scale obscene material distributors, cases involving multiple violations of the obscenity laws are frequently referred by investigative agencies to one or more U.S. Attorneys contemporaneously. Although multiple prosecutions are generally not favored (see USAM 9-2.142), large-scale distributors will not be automatically insulated and multiple prosecutions for violations of the obscenity statutes may be authorized. Because of the possibility of such multiple prosecutions, it is imperative that the General Litigation

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and Legal Advice Section be consulted with regard to all prosecutions. See USAM 9-75.000, supra.

Whether or not more than one prosecution will be authorized will depend largely upon: (1) whether the transmission of material occurred prior to or subsequent to the first indictment, (2) the nature of the material transported or mailed, and (3) the district or districts into which the material was sent. Where the defendant had transmitted materials prior to the return of the first indictment, an additional indictment will not be authorized unless the materials are transmitted to a different district, the materials are different than those involved in the first indictment, and the materials are of such an explicit nature that there can be no question as to their obscenity. Where, subsequent to the return of the first indictment, the defendant transmits the same materials to either the same or a different district, an additional indictment may be authorized only where the materials are of such an explicit nature that there can be no question as to their obscenity or where aggravated circumstances exist. Where, subsequent to the return of the first indictment, the defendant transmits different materials to either the same or a different district, a new indictment may be authorized since this act is totally unrelated to the act charged in the prior indictment.

9-75.130 Federal-State Relations

The federal role in prosecuting obscenity cases is to focus upon the major producers and interstate distributors of pornography while leaving to local jurisdictions the responsibility of dealing with local exhibitions and sales. This role has not met with complete acceptance and understanding by citizens of communities confronted with offensive matter who find their local prosecutor ineffectual in this area. Even so, local prosecutors have been regarded as having the primary obligation to deal with such material on a local level.

The existing federal-state dichotomy of roles has been reinforced by the Supreme Court in Miller v. California, 413 U.S. 15 (1973). That decision rejuvenates the authority of state and local jurisdictions to regulate the exhibition, sale, and distribution of obscene matter within their jurisdictions by establishing the principle that local standards of candor are the ones by which juries or judges determine the obscenity vel non of questionable material. The reaction to this development on the part of district attorneys has varied with their interpretation of Miller, the personal aggressiveness of particular district attorneys in enforcing

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the laws generally and obscenity measures particularly, and the attitude of an area's citizens regarding pornography and their aggressiveness in communicating opposition to its display.

Local prosecutors, however willing to prosecute, frequently experience difficulty because of several factors, notably a lack of expertise in the field, lack of support by the community and/or its officials, and lack of necessary funds. In these circumstances the United States may provide assistance through prosecutive efforts not falling precisely within the above guidelines. Conversely, local authorities dealing with obscene material being distributed within their area may develop evidence of interstate distribution useful to a federal prosecution. Communication between federal and local prosecutors, and coordination of efforts in such instances, can be highly productive in both federal and local efforts.

9-75.140 Prosecutive Priority

Prosecutive priority should be given to cases involving large-scale distributors who realize substantial income from multi-state operations and cases in which there is evidence of involvement by known organized crime figures. However, prosecution of cases involving relatively small distributors not meeting the above criteria, particularly distributors of especially offensive material or who are the subjects of numerous citizen complaints, can have a deterrent effect and would dispel any notion that obscenity distributors are insulated from prosecution if their operations fail to exceed a predetermined size or if they fragment their business into small-scale operations. Therefore, the occasional prosecution of such distributors may be appropriate.

Special priority should be given to cases involving the use of the minors engaging in sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct or cases involving the mailing or interstate or foreign shipment of obscene material depicting minors engaging in sexually explicit conduct (18 U.S.C. §§2251-2253).

The Attorney General, in a memorandum dated October 4, 1982, directed U.S. Attorneys to prosecute aggressively within the Department's priority areas and to expand their activities beyond these areas where obscenity is a significant local problem, especially where federal assistance has been requested by the local Law Enforcement Coordinating Committee (LECC). The Assistant Attorney General, Criminal Division, on August 24, 1983, requested U.S. Attorneys to discuss local enforcement needs with Postal Service and FBI personnel in their districts and indicated that special

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training could be made available by Department obscenity specialists for those U.S. Attorneys requesting such assistance.

9-75.200 JUDICIAL DEFINITION OF OBSCENITY

In Miller v. California, 413 U.S. 15 (1973), the Court stated at 24:

The basic guidelines for the trier of fact must be:
(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, *supra*, at 230, quoting Roth v. United States, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary artistic, political, or scientific value.

The Court set forth *id.* at 25, the following examples of what a state statute could define for regulation under part (b) of the standard set forth above:

- (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and
- (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

In United States v. 12,200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 130 n.7, (1973), the Court stated that for purposes of the federal statutes the Court was prepared to construe prong (b) of the test to encompass the conduct set forth as examples in Miller, *supra*, at 25. Therefore, a proper statement of the test for obscenity in federal cases would be as follows:

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(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct including but not limited to representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, or representations or descriptions of masturbation, excretory functions, or lewd exhibition of the genitals, and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

9-75.300 [RESERVED]

9-75.400 PANDERING

In Ginzburg v. United States, 383 U.S. 463 (1966), and Mishkin v. New York, 383 U.S. 502 (1966), a majority of the Court constructed the element of "pandering" from the conduct of the publishers and distributors surrounding the production, sale and publicizing of their questioned material. This element was defined by the Court as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." Pandering thus appears to be a course of conduct on the part of a publisher or distributor with regard to the production, sale and publicizing of material dealing with sex which deliberately focuses on and commercially exploits the sexually provocative aspects of the material.

9-75.410 Effect on Finding of Obscenity

The pandering element may be determinative of a finding of obscenity in a close case involving questionable material because it is relevant to and may assist in satisfying the test for obscenity set forth in Roth v. United States, 354 U.S. 476 (1957) and Miller v. California, 413 U.S. 15 (1973). The relationship between pandering and the elements of the obscenity test can be demonstrated as follows:

A. Deliberate characterization of materials as erotically arousing can be viewed as a stimulant to the reader or viewer to accept them as prurient.

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B. Similarly, such characterization linked with blatant advertising tends to force public confrontation with the offensive aspects of the work. Once confronted, the brazenness of the appeal heightens the offensiveness of the material.

C. The circumstances of presentation and dissemination of the material in question are relevant to determining whether the literary, artistic, political or scientific value claimed for it is real or spurious.

In sum, representations in advertising as well as other conduct which proclaims the obscenity of the questioned material or is inconsistent with its claimed social importance will be taken at face value and be construed against the publisher or distributor. Thus, evidence of conduct may be determinative in finding material obscene in close cases in spite of other evidence.

More recent Supreme Court decisions have reaffirmed the concept of pandering or "variable obscenity". The case of Redrup v. New York, 386 U.S. 767 (1967), demonstrates the critical importance of developing conduct evidence, and Ginsberg v. New York, 390 U.S. 629 (1968), upheld the right to restrict certain types of materials from minors that could not be proscribed for adults.

9-75.420 Type of Material Required

The material itself must have the intrinsic capability to be exploited. That is, the commercial exploitation must be of material which by its pervasive treatment or description of sex manifests, when taken as a whole, a morbid and shameful interest in sex or a tendency to arouse lustful thoughts. The Court speaks of close cases, questionable materials, situations where there is ambiguity or doubt. This portends that innocuous material, or material lacking the sexual content which made for a close case under the pure Roth-Miller standard, will not suddenly be found obscene even when a strong element of pandering is present.

9-75.430 Evidence or Proof of Pandering

The Supreme Court has emphasized the importance of developing prosecutions which focus upon the conduct of the defendant and the manner in which he/she displays and disseminates his/her materials in addition to a focus upon the material itself. The following conduct should be scrutinized as evidence of pandering:

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A. Advertising and promotional material, such as direct-by-mail circulars, which stress the sexual candor of the publication.

B. Indiscriminate solicitation of orders without regard to the sensitivities of those solicited, or to what importance the material might have to a particular occupation or profession.

C. Dealings by the publisher or purveyor solely or almost exclusively with material designed for a defined sexually deviant group or groups (homosexuals, sado-masochist, etc.).

D. Statements or testimony by authors, suppliers or others concerning editorial goals and practices which demonstrate deliberate emphasis on sexual content.

E. Documentary evidence, correspondence, contracts, etc., which indicate editorial goals and practices similar to the above.

F. The covers of paperbacks, and the blurbs found on inside and back covers, which stress the sexual content of the book.

G. In some instances where the material is obviously cheaply produced, the price of the material vis a vis its cost of production.

H. Unique conduct peculiar to the given case (i.e., in the Ginzburg case emphasis was placed on the attempts to secure suggestive postmarks).

9-75.500 SCIENTER

A. The federal obscenity statutes require that the offenses therein described be committed "knowingly." See 18 U.S.C. §§1461-1463, 1465. In the context of a federal obscenity prosecution the word "knowingly" has two applications:

1. It requires the government to prove that the defendant either intended or should reasonably have anticipated that, as a natural consequence of his/her acts, the mail or facilities of interstate commerce would be used for the carriage of the materials named in the indictment.

2. It also requires the government to prove that the defendant was aware of the character of his/her act when he/she caused the

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mails to be used for the carriage of the challenged materials. In short, the defendant must be shown to have had scienter or "guilty knowledge."

In Rosen v. United States, 161 U.S. 29 (1896), the Supreme Court held that the necessary "guilty knowledge" is demonstrated by proof that a defendant had "knowledge or notice of the contents" of the obscene material which he caused to be distributed. The Court further held that the subjective belief of a defendant as to the obscenity of the materials he is charged with distributing is irrelevant in determining the presence of scienter. In effect, the Court indicated that once a defendant was shown to have "knowledge or notice of contents," the law would presume that the defendant acted with a guilty mind. This effectively denies the defense of honest mistake to defendants in federal obscenity cases. See Schindler v. United States, 208 F.2d 289 (9th Cir. 1953), cert. denied, 347 U.S. 928; United States v. Oakley, 290 F.2d 517 (6th Cir. 1961), cert. denied, 368 U.S. 888.

In recent years, the Supreme Court has considered the subject of scienter in the context of two state obscenity cases. In Smith v. California, 361 U.S. 147 (1960), the Court held that a criminal obscenity statute must require proof of scienter to be constitutional. However, the Smith opinion did not indicate what level of awareness on the part of a defendant would suffice to satisfy the scienter requirement. Nor did the Court state what kind of evidence might be used to prove scienter.

In Mishkin v. New York, 383 U.S. 502 (1966), the Supreme Court approved the New York Court of Appeals definition of the elements of scienter which reads:

"...[O]nly those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised..." (Emphasis original.)

Like Ginzburg, the Mishkin case involved clear cut commercial pandering. Since evidence of pandering shows defendant's intention to exploit salacious material for his/her own profit, such evidence would seem to support a finding of "guilty awareness" (scienter) as readily as would proof that the defendant had actually read the challenged materials. Of course, evidence that a defendant actually knew the contents of the publications in question should still be sought since it will facilitate proof of scienter. However, proof that a defendant actually perused the challenged materials is by no means necessary and often cannot be proved

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by direct evidence. See Smith v. California, 361 U.S. 147, 154 (1959), United States v. Hockman, 277 F.2d 631 (7th Cir. 1960).

B. In Mishkin, the Supreme Court indicated that the sort of evidence which can prove scierter included evidence of:

1. Defendant's instructions to his/her artists and writers;
2. Defendant's effort to disguise his/her role in the enterprise that published and sold the books;
3. The transparency of the character of the material;
4. The character of the titles, covers, and illustrations;
5. The massive number of obscene books published by the defendants;
6. The repetitive quality of the sequences and format of the materials; and
7. The exorbitant prices marked on the books.

This catalogue suggests that evidence of pandering is as important in proving scierter as it is in proving that the elements of the Roth-Miller test are met.

Finally, in Hamling v. United States, 418 U.S. 87, 123 (1974), the Court, reaffirming its ruling in Rosen, held that the scierter requirement with respect to proof of knowledge as to the material is satisfied if the prosecution shows that the defendant had knowledge of "the contents of the materials he distributed, and that he knew the character and nature of the materials."

9-75.600 MATERIAL INVOLVED

Volume distributors of pornography operate with the greatest intensity in the book, pictorial representation, and film areas. Through the facilities of the Postal Service and the Federal Bureau of Investigation most of these dealers are known, and their activities are monitored. The activities of a distributor and the manner in which he/she advertises and disseminates his/her material may be considered in addressing the issue of obscenity of the material. See USAM 9-75.400.

9-75.610 Deviant Material

Deviant material (i.e., homosexual, sado-masochistic) presents certain unique prosecutive problems involving proof of prurient appeal to the relevant audience. These problems are reflected in United States v. Klaw, 350 F.2d 155 (2d Cir. 1965), a case in which a conviction based on deviant material was reversed and the Solicitor General declined to appeal. However, in Mishkin v. New York, 383 U.S. 502 (1966), the Supreme Court indicated that sado-masochistic material may provide the basis for a prosecution under the obscenity statutes.

9-75.620 Private Correspondence

Although federal obscenity law does not distinguish between commercial and non-commercial obscene correspondence, the primary objective of prosecution in private correspondence cases should be to restrain the exploitation of obscene private correspondence for commercial gain, such as by the sale or solicitation of sale of obscene materials, or by the operation of a correspondence club for paying participants. The principal thrust of prosecutions should be directed toward those who are the prime movers in such endeavors. See United States v. Zuideveld, 316 F.2d 873 (7th Cir. 1963), cert. denied, 376 U.S. 916 (1964), and Redmond v. United States, 384 U.S. 264 (1966).

A more troublesome area is that involving correspondence between one party and a non-consenting party (non-consensual) and between consenting parties (consensual). Appropriate disposition of these cases requires a careful analysis of the underlying facts and circumstances.

Non-consensual correspondence is reprehensible as a practice and a gross invasion of privacy; prosecution in many such cases is appropriate. A prosecutive determination should be made, however, in the light of all the circumstances, mitigating or aggravating, including any prior relationship and correspondence between the parties involved. In appropriate cases involving non-consensual correspondence, U.S. Attorneys may desire to employ the procedure set forth below as to consensual cases.

It is the Department's view that generally no useful purpose is served by a felony conviction of individuals who have willingly exchanged private letters, although obscene. This is not to say that prosecution may never be instituted in such cases. Rather, prosecution should be the exception and confined to those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated.

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In an effort to arrive at dispositions in these cases which will best serve the interests of justice, U.S. Attorneys should give careful consideration to all of the surrounding circumstances, such as the subject's prior record, particularly with respect to his/her involvement with obscene materials and sex-related offenses; his/her employment, including his/her opportunity for close association with young people; and his/her educational level. The primary objective should be to arrive at a disposition calculated to deter and rehabilitate the subject, preserve his/her potential as a useful citizen, and minimize the risks to society should a potential sex offender go unpunished. In pursuit of these objectives, the following recommendations may be employed flexibly according to the circumstances of each case.

The U.S. Attorney should determine initially whether a strong warning and declination of prosecution is adequate in the particular case. This disposition should suffice in the routine cases of consensual obscene private correspondence. In other cases, the U.S. Attorney should give serious consideration to exploring with defense counsel voluntary submission by the accused to psychiatric evaluation, the report to be made available to the U.S. Attorney. Such an evaluation should be of assistance to the U.S. Attorney in determining his/her future course of action, bearing importantly on such factors as prospects for rehabilitation of the subject, including his/her need for and probable response to psychiatric treatment, and the likelihood of his/her being a danger to society. Should the report indicate that psychiatric treatment may help and the subject agrees to undertake treatment, the U.S. Attorney may defer action for a reasonable period of time to insure that the agreement is being carried out in good faith.

U.S. Attorneys should insure that violations by military personnel or by federal or state employees are brought to the attention of the appropriate commanding officer or federal or state agency, respectively, for whatever administrative action they may deem necessary. In all cases in which the subject is an employee of the federal government and the U.S. Attorney determines that prosecution is warranted, the prosecution should be had in federal court rather than in the state court. Prosecution of these cases, as with all other obscenity cases, must be cleared through the General Litigation and Legal Advice Section.

U.S. Attorneys should not indulge in the practice of routinely referring obscene correspondence cases to state prosecutors. For example, it would be clearly inconsistent for the U.S. Attorney to decline prosecution because he/she had determined that a warning or psychiatric treatment would be an adequate remedy and, thereafter, refer the case to

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state authorities for possible prosecution. This is not to say that there may not be instances in which deferment to state jurisdiction is entirely appropriate.

9-75.621 Exception--Child Pornography Cases

Investigation has shown that many individuals who import or consensually exchange child pornography for their own collections do so repeatedly and with full knowledge that it is illegal to do so. In addition, many of these individuals regularly engage in sexual child abuse. Many of these people are also involved in occupations which bring them into frequent contact with children. Prosecution of these individuals by local authorities for child molesting is often unsuccessful for several reasons. First, the victimized children are often introduced to the sexual activity by their own parents or friends of the family and participate in a family sex group, and therefore the authorities have little chance of gaining the youngsters' cooperation. Second, a significant group of children are those who are emotionally neglected and who are befriended only by the pedophile, creating a strong bond between the two. Third, a local police investigator often cannot work up a case against a suspected child molester because he/she may not permit a child to enter a location if he/she believes the child may be molested. Fourth, an experienced local defense attorney can continue a child molesting prosecution for so long that the victim will either become uncooperative or will not be able to testify because he/she has subconsciously blocked the entire incident from memory. Finally, child molestation prosecutions will subject the victims to the trauma of testifying before a grand jury and/or at trial.

Because of the nature of the violators and the difficulties frequently encountered by local prosecutors, U.S. Attorneys are urged to aggressively pursue noncommercial as well as commercial child pornography cases. Particular attention should be paid to cases where one or more of the following factors exists:

- A. More than three Customs seizures over the past year;
- B. A large quantity of child pornography imported at one time;
- C. An arrest history of crimes against children;
- D. Known membership in a family sex group;
- E. Employment involving children;

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F. Photographs depicting the recipient involved in sexual activity with children;

G. Correspondence with other pedophiles or undercover agents relating to sexual involvement with children; and

H. The individual is known to have mailed or otherwise distributed child pornography in the past.

This list should not be interpreted as a limitation on prosecution to cases where only these factors are present. Other circumstances may exist from which the U.S. Attorney may conclude that prosecution is warranted, and consultation with the General Litigation and Legal Advice Section in such cases is encouraged. Regardless of what decision is made with regard to prosecuting federally, if there are indications that child abuse is present, the matter should be called to the attention of local prosecutive authorities.

9-75.700 FORFEITURE PROCEDURES

Forfeiture actions initiated under the customs laws (19 U.S.C. §1305) should receive the prompt and thorough consideration of those U.S. Attorneys having ports of entry within their jurisdictions since undue delay in commencing such action or in proceeding to trial may create First Amendment problems. See United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971), which requires that a complaint for forfeiture must be filed within 14 days following seizure and that trial must be completed within 60 days.

While it is not necessary to secure Department authorization before filing a libel in a matter referred by the Customs Service for forfeiture action under 19 U.S.C. §1305, the General Litigation and Legal Advice Section should be notified immediately after filing.

9-75.710 Effect of Pandering

The pandering principle enunciated in Ginzburg v. United States, 383 U.S. 463 (1966), has not yet been successfully applied to a forfeiture case. In view of the fact that customs seizures are made at the ports of entry before the questionable material has been advertised and disseminated by the importer, it will be only in the unusual case where the principle will be applicable. For instance, the fact that the importer regularly uses such in a business which panders to the prurient interest of those whom it serves may be relevant. Whether the use of pandering methods of dissemination on the part of the foreign distributor

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can be utilized to clarify the obscene character of ambiguous material received at a port presents a more difficult question. In light of the uncertainty in this area, the Department urges a guarded approach in the application of this principle in forfeiture cases. The General Litigation and Legal Advice Section should be contacted if it is anticipated that this principle will be utilized.

9-75.720 Request to Edit

Importers of articles placed under seizure by Customs as obscene, and therefore subject to condemnation under 19 U.S.C. §1305, occasionally make a request to the Customs Service or to the U.S. Attorney after referral of the matter to him/her for forfeiture action, to be permitted to delete the offending portions of the articles. There is no statutory authority to edit articles offered for importation and seized as obscene. Engaging in this practice casts government officers in the role of censor, one which is neither authorized nor desirable.

9-75.730 Request to Re-export

Importers of articles placed under seizure by Customs as obscene, and therefore subject to condemnation under 19 U.S.C. §1305, may make a request to the Customs Service, or to the U.S. Attorney after referral of the matter to him/her for forfeiture action, to be permitted to re-export the articles. To permit re-exportation of an article once a complaint for forfeiture has been filed is inadvisable. The filing of the complaint should represent a final decision by the government that the article is obscene and will sustain forfeiture. To allow re-exportation without an adjudication would fail to carry out the statutory purpose of effecting the destruction of obscene material or to achieve the deterrent effect of forfeiture.

However, prior to the filing of a complaint greater latitude may be exercised with respect to the re-exportation of articles of questionable prosecutive merit. Re-exportation should be permitted only in those cases where the U.S. Attorney entertains grave doubts as to the possibility of a successful action under 19 U.S.C. §1305. The allowance of re-exportation under such circumstances serves the interests of the government since trial may generate publicity for the importer and, if unsuccessful, actually enhance the value of the article. But in cases where a prosecution is viable, a liberal re-exportation policy could encourage importers to offer clearly actionable material in the belief that they could retrieve it from destruction by merely seeking re-exportation, editing it, and reoffering it for reimportation without the risk that should attend the attempt to enter articles fit for condemnation.

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Therefore, if the article is actionable, the importer's request for re-exportation should be denied and a complaint for forfeiture filed.

In the event that an importer approaches the U.S. Attorney with a request to re-export an article prior to the time such article has been formally referred to the U.S. Attorney by the Customs Service for his/her evaluation, the importer should be instructed to contact the Customs Service. If Customs officials thereafter informally request the U.S. Attorney's views concerning the merits of such a request, the U.S. Attorney should review the article in question and render his/her advice accordingly.

If after formal referral to the U.S. Attorney but before a complaint has been filed, an importer seeks permission from the U.S. Attorney to re-export an article and the U.S. Attorney is of the opinion that re-exportation would comport with the interests of the government, he/she should return the article to the Customs Service stating that a request for re-exportation has been made and that the U.S. Attorney has no objection to the re-exportation of the article in question. He/she should then inform the importer that the article has been returned to the Customs Service and that the matter should be taken up with that agency. If the Customs Service concurs in the decision to allow re-exportation, Customs will make the necessary arrangements with the importer and impose such conditions on the re-exportation as are appropriate.

If in reviewing the article in question the U.S. Attorney concludes that the article is clearly not obscene, it should be returned to the Customs Service with advice that the U.S. Attorney declines to proceed against the article. If an importer has been in contact with the U.S. Attorney concerning the possible re-exportation of the article, he/she should be informed that the U.S. Attorney has decided not to seek forfeiture of the article and has returned it to the Customs Service with whom the importer may make arrangements for either entry or re-exportation of the article.

In the event of a disagreement between Customs Service officials and the U.S. Attorney as to whether or not a complaint for forfeiture should be filed or re-exportation permitted with regard to a particular article offered for importation, the matter should be referred to the Criminal Division at once, and, if a decision would necessarily involve consideration of the content of the article, the article should accompany the transmittal. The Customs Service will cooperate in transmitting the article for this purpose. Because of the strict time limitations imposed upon the government in the prosecution of these cases as a result of various judicial decisions, e.g., United States v. Thirty-Seven (37)

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Photographs, 402 U.S. 363 (1971); United States v. One Book Entitled "The Adventures of Father Silas," 249 F. Supp. 911 (S.D.N.Y. 1966), it is imperative that the U.S. Attorney immediately contact the General Litigation and Legal Advice Section in the event of such a disagreement.

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9-76.000 TRANSPORTATION

9-76.100 AVIATION

The Federal Aviation Administration of the Department of Transportation, including the regional attorneys thereof, refer directly to the appropriate U.S. Attorneys' cases involving violations of the civil penalty provisions of the Federal Aviation Act of 1958 (49 U.S.C. §1471). Civil penalty cases under Title IV of the Act, which is administered by the Civil Aeronautics Board, are referred initially to the Criminal Division for evaluation.

U.S. Attorneys are authorized to effect settlement of the civil penalties provided in 49 U.S.C. §1471 without the prior approval of the Criminal Division in those instances where the amount of the compromise is acceptable to the Federal Aviation Administration or the Civil Aeronautics Board, unless the difference between the total amount of the penalties and the amount of the proposed settlement exceeds \$750,000. In the latter situation, the U.S. Attorney should forward to the General Litigation and Legal Advice Section an appropriate memorandum with supporting reasons for the recommended settlement, since approval of the Associate Attorney General must be secured (see §28 C.F.R. §§0.160, 0.161). If the U.S. Attorney believes that a compromise settlement should be effected in an amount less than is acceptable to the Administration or the Board, the matter should be submitted to the General Litigation and Legal Advice Section for decision. Such compromise settlements may be made without filing suit or at any other time before a judgment is obtained, in which event the settlement need not be reduced to a judgment unless the U.S. Attorney deems that advisable. In addition to the principle amount, the settlement should include any costs to which the government is entitled.

U.S. Attorneys should make a determination on the merits as to the action called for, irrespective of the small amount which in some instances may be acceptable to the Administration or the Board as a compromise settlement of the civil penalty involved. Such an action is not one to collect a trivial specific amount claimed by the government as due and owing to it, but rather is an action to impose a penalty for violation of a federal statute. When a suit is instituted, the full amount of the penalty should be sought.

Although the clerk may enter a defendant's default pursuant to Fed. R. Civ. P. 55(a), he/she may not enter a judgment by default under 55(b)(1) Fed. R. Civ. P., since the civil penalty is not "a sum certain" or one "which can by computation be made certain." Therefore, judgment by default should be entered only by the court. See Fed. R. Civ. P. 55(b)(2).

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9-76.200 MOTOR CARRIER SAFETY

The Federal Highway Administration of the Department of Transportation investigates and refers directly to the U.S. Attorneys criminal cases involving violations of the Motor Carrier Safety Regulations (see 49 C.F.R., pts. 390-397) promulgated pursuant to Part II of the Interstate Commerce Act (49 U.S.C. §304) and violations of the Hazardous Materials Transportation Act 49 U.S.C. §§1801-1811) involving motor carriers. The U.S. Attorney should advise the Federal Highway Administration of all significant developments in the case with copies furnished to the Criminal Division.

A vigorous enforcement program is followed in regard to offenses which endanger the public on the highways.

9-76.300 RAILROAD AND PIPELINE SAFETY

The Federal Railroad Administration (FRA) of the Department of Transportation administers the following railroad and pipeline safety statutes:

- A. The Safety Appliance Acts (45 U.S.C. §§1-16);
- B. The Locomotive Inspection Act (45 U.S.C. §§22-34);
- C. The Accident Reports Act (45 U.S.C. §§38-43);
- D. The Hours of Service Act (45 U.S.C. §§61-64);
- E. The Signal Inspection Law (49 U.S. §26); and
- F. The Hazardous Materials Transportation Act (49 U.S.C. §1801-1811).

The Accident Reports Act contains criminal penalties. The Hazardous Materials Transportation Act has both civil and criminal sanctions. The other referenced acts are civil in nature (see USAM 9-76.350). Supervision of criminal prosecutions and civil penalty actions under these acts is assigned to the General Litigation and Legal Advice Section. Questions arising under these statutes should be addressed to that Section (FTS 724-6893).

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9-76.310 Investigation and Referral of Cases

Investigations of all cases arising under the railroad and pipeline safety statutes are conducted by the FRA. The FRA will refer all cases directly to the appropriate U.S. Attorney, except cases involving novel questions of law.

9-76.320 Case Status Reports

The U.S. Attorney should advise the Chief Counsel, FRA of all significant developments in a case, including the filing of an information or complaint, the docket number, the arraignment, the trial date, the position taken by the railroad and, the proposed settlement of the case, etc. Copies of such correspondence should be furnished to the General Litigation and Legal Advice Section when significant or unusual developments or matters are involved. The Criminal Division should, of course, be promptly notified of adverse decisions and of cases where an appeal is taken by defendant.

9-76.330 Trial of Cases

Most of these cases are concluded without trial, but if a trial seems necessary, the Chief Counsel, FRA, should be informed as far in advance as possible of the date of trial. Although FRA attorneys are thoroughly familiar with this area of law, the regulations promulgated by the FRA pursuant thereto and court decisions arising thereunder, and are well informed with respect to railroad records and practices, trial of the case must be conducted by the U.S. Attorney or one of his/her assistants. FRA inspectors and one of the attorneys on the Chief Counsel's staff will report to the U.S. Attorney and, subject to his/her directions, assemble the evidence to be adduced (much of which must be obtained from the defendant's records and notes of the inspectors) and perform such other duties incident to preparation of the case for trial as the U.S. Attorney desires.

The FRA inspectors need not be subpoenaed as witnesses. Arrangements for their appearance should be made through the Chief Counsel. The Chief Counsel will also assist the U.S. Attorney in securing the appearance of other principal witnesses.

In the discretion of the U.S. Attorney, the facts may be agreed upon, stipulated with the defendant's attorneys, and submitted to the court for decision. However, the proposed stipulation should first be submitted to the Chief Counsel of the FRA for his advice.

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9-76.340 Criminal Penalty Provisions

The Hazardous Materials Transportation Act provides that any person who is determined by the Secretary of Transportation to have knowingly violated any provision of the Act or any regulation issued thereunder, may be subject to a civil penalty of not more than \$10,000 for each violation. See 49 U.S.C. §1809. A willful violation of a provision of the Act or a regulation issued thereunder is a criminal offense punishable by a fine of not more than \$25,000 and imprisonment for a term not to exceed five years. The substitution of the word "willfully" in 49 U.S.C. §1809(b), dealing with criminal penalty, implies that Congress intended that the mens rea required before a criminal penalty can be imposed by greater than that for the civil penalty. See United States v. Allied Chemical Corp., 431 F. Supp. 361 (W.D. N.Y. 1977).

The Accident Reports Act makes it a misdemeanor for a railroad to fail to submit the required report of an accident within the time provided.

9-76.350 Civil Penalty Provisions

Under the Federal Claims Collection Act (31 U.S.C. §3711) and regulations promulgated thereunder (see 4 C.F.R. §§101-105), the FRA is authorized to collect and compromise administratively civil penalties and forfeitures arising from violations of railroad safety statutes. Occasionally, it will be necessary to refer claims arising under the Safety Appliance Acts, the Locomotive Inspection Act, the Hours of Service Act, and the Signal Inspection Law to the appropriate U.S. Attorney when such claims cannot be disposed of under the applicable standards of the Federal Claims Collection Act. Since three written demands, at 30-day intervals, must normally be made upon a debtor pursuant to a requirement contained in 4 C.F.R. §102.2, Hours of Service Act cases in which the violation will expire due to the short statute of limitations of 2 years (see 45 U.S.C. §64a), will necessarily be referred to the U.S. Attorney.

Due to the mandatory nature of these acts and the absolute duties which they impose upon carriers, the Department regards the penalties, although recoverable in civil proceedings, as not being merely civil obligations but penal sanctions, and accordingly does not accept compromise settlements of less than the full statutory penalty on each count with costs, to which the government is entitled as a matter of right. See 28 U.S.C. §1918(a).

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9-78.000 WORKER PROTECTION STATUTES

The primary federal worker protection statutes are the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., and the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §801 et seq. Supervision of criminal prosecutions under these Acts is assigned to the General Litigation and Legal Advice Section. Questions arising under these statutes should be directed to the General Litigation and Legal Advice Section.

9-78.010 Railroad and Pipeline Safety Acts

See USAM 9-76.300.

9-78.100 OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §651 et seq., provides for enforcement of its provisions by means of civil and criminal penalties, 29 U.S.C. §666, and by injunction proceedings, 29 U.S.C. §662. Investigations are conducted by the Occupational Safety and Health Administration of the Department of Labor.

9-78.110 Criminal Violations

Criminal cases are referred by the Department of Labor to the Criminal Division. If the Criminal Division determines that prosecution is warranted, the case will be referred to the appropriate U.S. Attorney. Complaints of violations should be referred by the U.S. Attorneys to the regional office of the Department of Labor and to the General Litigation and Legal Advice Section. Questions regarding OSHA criminal matters should be directed to the General Litigation and Legal Advice Section.

9-78.111 Willful Violation of a Safety Standard which Causes Death to an Employee

Title 29 U.S.C. §666(e) provides criminal penalties for any employer who willfully violates a safety standard prescribed pursuant to the Occupational Safety and Health Act, where that violation causes death to any employee. Four elements must be proved in order to establish a criminal violation of 29 U.S.C. §666(e). The government must prove (1) that the defendant is an employer engaged in a business affecting

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commerce, (2) that the employer violated a "standard, rule, or order" promulgated pursuant to 29 U.S.C. §655, or any regulation prescribed under the Act, (3) that the violation was willful, and (4) that the violation caused the death of an employee.

A. Employer

The term "employer" is defined in 29 U.S.C. §652(5) as "a person engaged in a business affecting commerce who has employees." The term "employer" has been interpreted for civil OSHA purposes as being limited to the employing business entity, thereby covering individuals only if they are sole proprietors of a business. See, e.g., Skidmore v. Travelers Insurance Co., 356 F. Supp. 670, 672 (E.D. La.), aff'd, 483 F.2d 67 (5th Cir. 1973). Criminal enforcement, however, is not limited to the business entity, whether a corporation, partnership, or sole proprietorship. Culpable supervisors and corporate officers, as well as other persons who have a responsible share in the prohibited conduct, may be punishable as principals under 18 U.S.C. §2 for aiding and abetting or for willfully causing the employer's violation. See United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1960), cert. denied, 385 U.S. 1002, reh. denied, 386 U.S. 938 (1977).

The employer must be "engaged in business affecting commerce." 29 U.S.C. §652. The use of this phrase shows Congressional intent to exercise fully its constitutional authority under the commerce clause. Brennan v. OSHRC, 492 F.2d 1027, 1030 (2d Cir. 1974); Godwin v. OSHRC, 540 F.2d 1013, 1015 (9th Cir. 1976); United States v. Dye Construction Co., 510 F.2d 78, 83 (10th Cir. 1975). The use of supplies and equipment from out of state sources is generally sufficient to show the business "affects commerce." United States v. Dye Construction Co., 510 F.2d at 83, citing Katzenback v. McClung, 379 U.S. 294 (1964).

B. Willfulness

In United States v. Dye Construction, 510 F.2d 78 (10th Cir. 1975), the only case to address the issue of what constitutes "willfulness" for the purpose of finding a criminal violation, the court concluded that 29 U.S.C. §666(e) does not require that the government prove that the employer entertained a specific intent to harm the employee or that the employer's action involve moral turpitude. United States v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975). Instead, the court approved the following jury instruction:

The failure to comply with a safety standard under the Occupational Safety and Health Act is willful if done knowingly and purposely by an employer who, having a

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free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally.

510 F.2d at 81. See also, Consolidation Coal v. United States, 504 F.2d 1330, 1335 (10th Cir. 1974).

Several circuits have adopted a similar definition of "willfulness" in the context of OSHA civil enforcement. See F. X. Messina Constr. Corp. v. OSHRC, 505 F.2d 701 (1st Cir. 1974); Intercounty Constr. Co. v. OSHRC, 522 F.2d 777, 780 (4th Cir. 1975), cert. denied, 423 U.S. 1072 (1976); Georgia Electric Co. v. Marshall, 595 F.2d 309, 319 (5th Cir. 1979); Empire-Detroit Steel Div. v. OSHRC, 579 F.2d 378, 384 (6th Cir. 1978); Western Waterproofing Co. Inc. v. Marshall, 576 F.2d 139, 143 (8th Cir.), cert. denied, 439 U.S. 965 (1978); National Steel Shipbuilding v. OSHRC, 607 F.2d 311, 314 (9th Cir. 1978). The Third Circuit has adopted a more stringent definition of "willfulness," which requires an element of "obstinate refusal to comply." See Frank Irej, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1207 (3d Cir. 1974), aff'd on other grounds, 430 U.S. 442 (1977).

Ignorance of the applicable standard is not a defense, where intentional disregard or plain indifference to the requirements of the law can be shown. For example, a company may not fail to make its supervisors on the job site aware of OSHA regulations, then plead ignorance when caught in a violation. Georgia Electric Co. v. Marshall, 595 F.2d at 320. Such conduct itself shows plain indifference to the requirements of the law. However, a defendant who pleads ignorance would be entitled to the bracketed portion of Devitt and Blackmar instruction #14.10 allowing professed ignorance to be considered on the question of intent. See United States v. McIntyre, 582 F.2d 1221, 1224-25 (9th Cir. 1978).

Indifference to general safety or to a specific hazard can also be evidence of intentional disregard of or plain indifference to the requirements of the law. See Georgia Electric Co. v. Marshall, 595 F.2d 319-20 (indifference to employee safety); United States v. Dye Constr. Co., 510 F.2d at 82 (gross indifference to the hazard). On the other hand, belief that a practice in violation of OSHA standards is safe is not a defense. F. X. Messina Constr. Co. v. OSHRC, 505 F.2d at 702; Intercounty Constr. Co. v. OSHRC, 522 F.2d at 780; Western Waterproofing Co. v. Marshall, 576 F.2d at 143. On the contrary, a defendant's substitution of his own judgment for the requirements of the standard may itself show intentional disregard of or plain indifference to the standard. Western Waterproofing Co. v. Marshall, 576 F.2d at 143.

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9-78.112 Unauthorized Advance Notice of Inspection

Title 29 U.S.C. §666(f) provides criminal penalties for any person who gives advance notice of an inspection to be conducted under the Occupational Safety and Health Act, without authority from the Secretary of Labor or his designees.

9-78.113 False Statement, Representation, or Certification

Title 29 U.S.C. §666(g) provides criminal penalties for any person who knowingly makes a false statement, representation, or certification in any application, record, report, plan, or other document filed, required to be filed, or required to be maintained pursuant to the Occupational Safety and Health Act.

9-78.120 Civil Penalties and Enforcement

Civil penalty and enforcement proceedings are handled by the Solicitor's Office of the Department of Labor. Civil penalties are assessed by the Occupational Safety and Health Review Commission, an independent, quasi-judicial body. See 29 U.S.C. §§661, 659, 666(c). Review of the Commission's orders lies with the United States court of appeals. 29 U.S.C. §660. Injunction proceedings may be brought in the United States district courts, 29 U.S.C. §662, as may civil actions to recover civil penalties owed, 29 U.S.C. §666(k). Questions regarding OSHA civil matters should be addressed to the Civil Division.

9-78.200 FEDERAL MINE SAFETY AND HEALTH ACT

The Federal Mine Safety and Health Act of 1977, as amended ("MSHA"), 30 U.S.C. §801 et seq., provides for enforcement of its provisions by means of civil and criminal penalties, 30 U.S.C. §820, and by other civil and administrative enforcement methods. See, e.g., 30 U.S.C. §817(a) (withdrawal orders); 30 U.S.C. §818 (injunctions). Investigations are carried out by the Mine Safety and Health Administration of the Department of Labor. Complaints of violations should be referred by the U.S. Attorneys to the Assistant Secretary for Mine Safety and Health, United States Department of Labor, 4051 Wilson Boulevard, Arlington, VA 22203 and also to the General Litigation and Legal Advice Section.

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9-78.210 Criminal Violations

Criminal cases are referred by the Department of Labor to the Criminal Division, or, in some cases, directly to the U.S. Attorneys. If the Criminal Division determines that a case referred to it warrants prosecution, the case will be referred to the appropriate U.S. Attorney. Questions regarding MSHA criminal matters should be directed to the General Litigation and Legal Advice Section.

9-78.211 Willful Violation of a Mandatory Health or Safety Standard or Withdrawal Order

Title 30 U.S.C. §820(d) provides criminal penalties for any operator who willfully fails to comply with a mandatory health or safety standard, or who knowingly violates or refuses to comply with an order under 30 U.S.C. §814 or §817. Three elements must be proved in order to establish an offense under 30 U.S.C. §820(d). The government must prove (1) that the defendant is an operator of a coal or other mine which is subject to the Act, (2) that the defendant violated a mandatory health or safety standard or an order of withdrawal at that mine, and (3) that the violation was willful.

A. The defendant is an operator of a mine subject to the Act.

Title 30 U.S.C. §820(d) applies to "operators" of mines subject to the Mine Safety and Health Act. Mines subject to coverage include coal or other mines, the products of which enter commerce, or the operations or products of which affect commerce. 30 U.S.C. §803. Note that the Act now covers mines other than coal mines. See 30 U.S.C. §802(h)(i). "Operator" is defined to include any owner, leasee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine. 30 U.S.C. §802(d).

Title 30 U.S.C. §820(c) provides that whenever a corporate operator violates Section 820(d), any director, officer, or agent of the corporate violator who knowingly authorized, ordered, or carried out the act constituting the violation shall be subject to the same penalties as can be imposed under 30 U.S.C. §820(d). Similarly culpable agents of operators which are partnerships or sole proprietorships, rather than corporations, are punishable as principals under 18 U.S.C. §2 as aiders and abettors of the operator's violation.

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B. The operator violated a mandatory health or safety standard or withdrawal order.

The operator must have violated a mandatory health or safety standard under the Act or an order pursuant to 30 U.S.C. §814 or §817. Sections 814 and 817 set forth provisions for orders requiring operators to cause all persons, other than certain specified persons, to be withdrawn from and prohibited from entering certain areas of a mine.

Mandatory health and safety standards are established either by statute or by regulation. The statute itself sets forth interim mandatory health standards for underground coal mines at 30 U.S.C. §§841-846, and interim mandatory safety standards for underground coal mines at 30 U.S.C. §§861-878. Regulations setting forth mandatory health and safety standards for various types of mines are found in Title 30 of the Code of Federal Regulations.

Regulations establishing or modifying mandatory health or safety standards can form the basis of a criminal prosecution only when they have been promulgated under the formal rulemaking procedures of 30 U.S.C. §811. United States v. Finley Coal Company, 493 F.2d 285 (6th Cir. 1974); United States v. Consolidation Coal Co., 477 F. Supp. 283, 286 (S.D. Ohio 1979). Care should be exercised to insure that criminal charges are based only on mandatory health or safety standards set forth in the statute or properly promulgated under 30 U.S.C. §811.

C. The violation was willful.

The violation of the mandatory health or safety standard or withdrawal order must be willful. The leading case on the intent requirement of this statute approves a jury instruction that a failure to comply with a mandatory health or safety standard is willful.

if done knowingly and purposefully by a . . . mine operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements.

United States v. Consolidation Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).

9-78.212 Unauthorized Advance Notice of Inspection

Title 30 U.S.C. §820(e) provides criminal penalties for any person, unless otherwise authorized by the Act, who gives advance notice of any inspection to be conducted under the Act.

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9-78.213 False Statement, Representation, or Certification

Title 30 U.S.C. §820(f) provides criminal penalties for any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to the Act.

9-78.214 Equipment Falsely Represented as Complying with Requirements

Title 30 U.S.C. §820(h) provides criminal penalties for any person who knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal or other mine which is represented as complying with the Act or any applicable specification or regulation, which does not so comply.

9-78.220 Civil Penalties and Enforcement

Civil penalty and enforcement proceedings are handled by the Solicitor's Office of the Department of Labor. Civil penalties are assessed by the Federal Mine Safety and Health Review Commission. See 30 U.S.C. §§802(o), 820(i), 823. Review of the Commission's orders lies in the United States courts of appeals, 30 U.S.C. §816(b). Injunction proceedings may be brought in the United States district courts, 30 U.S.C. §818, as may civil actions to recover civil penalties owed, 30 U.S.C. §820(j). Questions regarding MSHA civil matters should be addressed to the Civil Division.

9-78.300 MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

The Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. 97-470, January 14, 1983, 96 Stat. 2584, codified at 29 U.S.C. §1801 et seq., became effective on April 14, 1983. It repealed and replaced the former Farm Labor Contractor Registration Act of 1963 as amended in 1974, codified at 7 U.S.C. §2041 et seq.

The purpose of the Act is to remove restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers, to require farm labor contractors to register, and assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employees.

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he/she → The Act, inter alia, requires any person engaging in farm labor contracting activities to obtain a certificate of registration from the Secretary of Labor specifying the farm labor contracting activities he is authorized to perform, to carry said certificate while engaging in farm labor contracting activities, and to exhibit it, upon request, to all persons with whom he intends to deal in that capacity. The Act also prohibits the knowing employment of illegal aliens.

he/she → The Act requires the disclosure to migrant and seasonal agricultural workers of certain information on wages and working conditions by recruiters, employers, and housing providers, and imposes certain record keeping requirements on employers. Knowingly providing false or misleading information under the disclosure requirements is a violation of the Act. The Act requires payment of wages when due, prohibits employers from requiring workers to purchase goods and services from them, and prohibits the unjustified violation by employers of the terms of working arrangements made with workers. The Act also provides for safety and health of housing, and for motor vehicle safety and insurance. An antidiscrimination clause protects workers who institute enforcement proceedings or testify in such proceedings.

Criminal penalties for willful and knowing violations of the Act or any regulation under the Act, are available under 29 U.S.C. §1851. The penalty for a first offense is a fine of not more than \$1,000, imprisonment for up to one year, or both. A conviction for a subsequent violation carries a penalty of a fine of not more than \$10,000, imprisonment for up to three years, or both. The penalty for knowing recruitment or employment of illegal aliens by a farm labor contractor who has been refused issuance or renewal of a certificate of registration, or has failed to obtain one, is a fine of not more than \$10,000, imprisonment for not more than three years, or both.

The Act also provides for enforcement by means of actions for injunctive relief brought by the Solicitor of Labor, 29 U.S.C. §1852, administrative civil money penalties, 29 U.S.C. §1853, and private civil actions by persons aggrieved by a violation, 29 U.S.C. §1854. Most violations are handled by the Department of Labor by imposing monetary penalties or seeking injunctive relief. According to the Department of Labor, the regional offices of the Department of Labor investigate alleged or apparent criminal violations of the Act. After review by the Regional Solicitors' offices the cases are forwarded directly to the office of the appropriate U.S. Attorney. The Department of Labor has advised that it

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forwards only cases involving habitual violators, such as those who have been previously warned, civilly fined, enjoined, or criminally prosecuted, and cases involving undocumented workers. U.S. Attorneys should carefully review such referrals on a timely basis and prosecute meritorious cases. It is requested that you advise the appropriate regional office of the Department of Labor of your decision in each referred case.

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9-79.000 OTHER CRIMINAL DIVISION STATUTES

9-79.100 WHITE SLAVE TRAFFIC

Cases under the White Slave Traffic Act, also known as the Mann Act, 18 U.S.C. §2421 et seq., are investigated by the Federal Bureau of Investigation and are referred directly to the U.S. Attorneys. The General Litigation and Legal Advice Section, Criminal Division, is responsible for supervision of the Act. Inquiries regarding the Act should be addressed to that Section.

Sections 2421 and 2422 of the Act spell out several offenses including the offense of knowingly transporting a female in interstate or foreign commerce or in the District of Columbia or in any territory or possession of the United States for the purpose of prostitution or debauchery, or for any other immoral purpose. Generally, prosecutions under 18 U.S.C. §2421 and §2422 should be limited to persons engaged in commercial prostitution activities, even though the element of commercialism is not a legal requirement. Prosecution of persons not engaged in commercial prostitution enterprises as panderers, operators of houses of prostitution, or call-girl operations, and of those acting for or in association with such persons, should not be instituted without consultation with the General Litigation and Legal Advice Section. Moreover, conspiracy cases against women or girls, the transportation of whom is the substantive offense involved, or cases depending on such persons as coconspirators (i.e., where not more than one person other than such "victim" can be proved a conspirator) should not be instituted without consultation with the General Litigation and Legal Advice Section.

18 U.S.C. §2423 was amended on February 6, 1978, by Pub. L. 95-225, which also added 18 U.S.C. §2251 and §2252 as a result of lengthy hearings evidencing Congress' special concern with the sexual exploitation of minors. 18 U.S.C. §2423 makes it an offense to transport or facilitate the movement of any minor in interstate or foreign commerce or within the District of Columbia or any territory or possession of the United States with the intent that (1) such minor engage in prostitution; or (2) such prohibited sexual conduct will be commercially exploited. It defines "minor" as a person under the age of eighteen, thus extending its protection to males as well as females while leaving unchanged the age limitation which existed under the prior 18 U.S.C. §2423.

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9-79.200 BANK RECORDS AND FOREIGN TRANSACTIONS ACT

For a further discussion of the provisions of the Bank Records and Foreign Transactions Act--which is frequently referred to in the following discussion as the Bank Secrecy Act--U.S. Attorneys and their Assistants should refer to a monograph entitled Investigation and Prosecution of Illegal Money Laundering--A Guide to the Bank Secrecy Act (1983), which can be obtained from the Narcotic and Dangerous Drug Section of the Criminal Division.

The Bank Records and Foreign Transactions Act consists of two sections. Title I, codified at 12 U.S.C. §1829(b) and §§1951-1959 (with effectuating regulations contained at 31 C.F.R. §§103.31-103.37), requires banks and other financial institutions to retain certain financial records for periods of up to five years. Title II--which was entitled the Currency and Foreign Transactions Reporting Act--was originally codified at 31 U.S.C. §§1051-1122. In 1982, these sections were re-enacted without substantive change as 31 U.S.C. §§5311-5322 and are now entitled Records and Reports on Monetary Instruments Transactions, with applicable regulations at 31 C.F.R. §103.11 et seq. Provisions contained in these sections require private individuals, banks, and other financial institutions to file reports with the federal government regarding certain of their foreign and domestic financial transactions. Failure to comply with the reporting requirements of the Bank Secrecy Act may lead to civil penalties, civil forfeiture, or criminal misdemeanor and felony sanctions.

A. In order to aid law enforcement officials in the detection and investigation of criminal, tax, and regulatory violations, the Bank Secrecy Act requires reports which identify:

1. The source, volume, and movement of United States currency transported into or out of the country ("Report of International Transportation of Currency or Monetary Instruments");
2. Certain deposits made into domestic financial institutions ("Currency Transaction Report"); and
3. United States persons who engage in transactions or maintain a relationship with a foreign financial agency ("Foreign Bank Account Report").

B. The Bank Secrecy Act's reporting requirements have been held constitutional in a number of contexts: 31 U.S.C. §5316 has been held not to be violative of the First Amendment, United States v. Fitzgibbon, 576 F.2d 279 (10th Cir. 1978), cert. denied, 439 U.S. 910 (1978); the

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reporting requirements of Title 31 were upheld by the Supreme Court against Fourth Amendment attack, California Bankers Association v. Schultz, 416 U.S. 21 (1974); and, applicable Fifth Amendment rights have been held to be sufficiently protected under the Act's reporting requirements, United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980), and United States v. Fitzgibbon, supra.

C. The Act consists of eight main parts:

1. Definitions;
2. Reporting provisions;
3. Recordkeeping provisions (in addition to those required by Title 1);
4. Criminal penalties;
5. Civil penalty and injunction provisions;
6. Exemption provisions;
7. Provisions regarding the dissemination of financial information; and
8. Search and forfeiture provisions.

9-79.210 Report on Domestic Financial Transactions

31 U.S.C. §5313 (with applicable regulations at 31 C.F.R. §103.22), requires domestic financial institutions to report currency transactions which involve the payment, receipt, or transfer of United States coins or currency (or other monetary instruments as the Secretary of the Treasury may prescribe) in the amount of \$10,000 or more. The report must be made on IRS Form 4789, commonly called a Currency Transaction Report (CTR), which is to be filed with the Internal Revenue Service within fifteen days following the day a reportable currency transaction occurs. Multiple cash transactions of under \$10,000 apiece which occur in one day at one financial institution and aggregate over \$10,000 must likewise be reported. See United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979).

In order to convict a defendant for violating 31 U.S.C. §5313, the government must show that the defendant willfully violated the requirements. See United States v. Warren, 612 F.2d 887 (5th Cir. 1980),

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cert. denied, 446 U.S. 956 (1980); United States v. Granda, 565 F.2d 922 (5th Cir. 1978). To show a willful violation, the government must prove that the defendant actually knew of the currency reporting requirements and voluntarily and intentionally failed to comply with the requirements. Id. Corporate liability can be premised on an agency relationship, United States v. Beusch, 596 F.2d 871 (9th Cir. 1979), and the knowledge of a corporation can be inferred from the aggregate knowledge of individual employees. See United States v. Sawyer Transport, Inc., 337 F. Supp. 29, 30-31 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972).

9-79.220 Reports on Foreign Financial Transactions

9-79.221 Reports on the Export and Import of Monetary Instruments

31 U.S.C. §5316 (through the provisions of 31 C.F.R. §104.23), requires any person who transports or has someone else transport United States currency or other monetary instruments in excess of \$5,000 into or out of the United States, or who receives such monetary instruments in the United States from abroad, to report the transaction. This report is made on Form 4790 ("Report of International Transportation of Currency or Monetary Instruments," commonly known as a CMIR), which must be filed with the United States Customs Service at the time of entry into the United States or at the time of departure, mailing, or shipping from the United States.

Enforcement of the export/import reporting requirements is strengthened by two additional provisions: (1) 31 U.S.C. §5317(a) which authorizes the Customs Service to apply for a search warrant to search for and seize monetary instruments which are not reported, and (2) 31 U.S.C. §5317(b) permits the United States to seek the forfeiture of monetary instruments for which a CMIR has not been filed, or for which the CMIR contains a material omission or misstatement.

In order to convict a defendant of violating the reporting requirements of 31 U.S.C. §5316 (formerly §1101), the government must show that the defendant had knowledge of the reporting requirements and willfully violated the law. See United States v. Warren, 612 F.2d 887 (5th Cir. 1980), cert. denied, 446 U.S. 956 (1980); United States v. Chen, 605 F.2d 433 (9th Cir. 1979); United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980); United States v. San Juan, 545 F.2d 314 (2d Cir. 1976). See also, United States v. \$6,250 in United States Currency, 706 F.2d 1195 (11th Cir. 1983), in which it was held that the defendant's "physical presentation of the currency" by

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throwing a purse containing \$6,250 at Customs officers did not constitute sufficient compliance with the reporting laws. The court held that the reporting laws do not require a traveler to surrender currency or the monetary instruments but, rather, require a traveler who is carrying more than \$5,000 to provide certain information to the government by filing a CMIR with the U.S. Customs Service. The defendant had been advised of the reporting requirements both before and after he threw the purse and he had not filed the report. See United States v. Rojas, 671 F.2d 159 (5th Cir. 1982); see also, United States v. Rodriguez, 592 F.2d 553 (9th Cir. 1979); United States v. Granda, 565 F.2d 922 (5th Cir. 1978).

The regulations contained at 31 C.F.R. §104.23, which implement the import/export reporting requirements of the Bank Secrecy Act, provide that the report is to be filed "at the time of . . . departure, mailing, or shipping from the United States." There can be no violation of the export reporting requirements prior to that time. It is important to note that there is not an attempt provision included under the Bank Secrecy Act, so a person must actually complete the violation prior to being charged with an offense for violation of the import/export reporting requirements. Several courts have defined what constitutes the "time of departure." "Time of departure" does not necessarily mean the moment the plane is airborne. Most courts have held that "the time of departure does not mean the moment the aircraft leaves the runway." See United States v. Rojas, supra; United States v. Cutaia, 511 F. Supp. 619 (E.D.N.Y. 1981).

In Cutaia, supra, the district court held that the "time of departure" is "that time reasonably close to the moment of the carrier's actual departure when the passenger has manifested a definite commitment to leave the country." Id. "Time of departure" was reached in that case where the defendant had checked his bags, gotten a boarding pass, and sat in the boarding area, even though the plane would not be departing for approximately thirty minutes. It should be noted that in United States v. Gomez-Londono, 422 F. Supp. 519, 525 (E.D.N.Y. 1976), rev'd on other grounds, 553 F.2d 805 (2d Cir. 1977), aff'd 580 F.2d 1046 (2d Cir. 1978), the court suggested that the time of departure is not reached until the defendant has received a boarding pass and is ready to board, or has already boarded the aircraft.

9-79.222 Reporting on Foreign Financial Agency Transactions

Under 31 U.S.C. §5314 (31 C.F.R. §103.24), a United States resident or citizen who engages in a transaction with a foreign financial agency, or who has a financial interest in, or signature or other authority over, bank securities or other financial accounts in a foreign country must

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report certain information about the transaction or the financial interest in the account. This information is reported on Treasury Form 90-22.1, called a "Report on Foreign Bank and Financial Accounts," or FBA. In addition, a person who is required to file an FBA must also check the appropriate box on their tax return and file IRS Form 4683 with the return. See generally, United States v. Hajecate, 683 F.2d 894 (5th Cir. 1982) (the applicability of the "exculpatory no" defense).

9-79.230 The Recordkeeping Provisions

Two provisions of the Bank Secrecy Act are important with regard to recordkeeping. First, 31 U.S.C. §5314 requires United States citizens and residents and domestic financial institutions to keep records of their transactions and relations with foreign financial institutions. The regulations which implement this section spell out what records are required to be made and retained by financial institutions, banks, and securities and exchange brokers.

Second, 31 U.S.C. §5318(2) authorizes the Secretary of the Treasury to promulgate regulations which require domestic financial institutions to maintain appropriate procedures to ensure compliance with the reporting requirements of the Act. For example, domestic financial institutions are required to keep records of all the exemptions from the currency transaction reporting requirements that they have granted to customers.

9-79.240 Venue

Venue for a violation of 31 U.S.C. §5316(a)(1)(A) or (a)(1)(B), both of which concern the transportation or other sending of currency or other monetary instruments into or out of the United States, may be established in either the situs of the port of entry, the port of departure, or the place of mailing or shipping. 31 C.F.R. §103.25(b) provides that "[r]eports required to be filed by §103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing, or shipping from the United States." Id. The above language indicates quite clearly that the failure to file, which constitutes a 31 U.S.C. §5316 offense, may occur at any one of these three places.

If a person enters or departs the United States without the currency or monetary instruments on his/her person, venue is, nevertheless, determined by the port of entry or departure, or place of mailing or shipping. Venue is the same because 31 C.F.R. §103.25(b) provides that, in such instances, the reports must be filed by mail on or before the date

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of entry, departure, mailing, or shipping. Therefore, if a person should fail to file prior to the mailing or shipping, or, if the mailing or shipping has occurred, prior to or contemporaneously with the entry or departure, venue not only exists at the place of entry or departure but also at the place of mailing or shipping. It should be noted that because entry or departure of a person without currency or monetary instruments on their person requires that such person file directly with the Commissioner of Customs in Washington, D.C., venue will also exist in Washington, D.C. See 31 C.F.R. §103.25(b).

Venue for a violation of 31 U.S.C. §5316(a)(2), which concerns the receiving of currency or monetary instruments, may be established at any port of entry or departure, or Washington, D.C. 31 C.F.R. §103.25(c) provides in pertinent part:

Reports required to be filed by §103.23(b) [the receiving of currency or other monetary instruments] shall be filed with the Commissioner of Customs within 30 days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure or by mail addressed to the Commissioner of Customs....(emphasis added)

Although this language indicates that any port of entry or port of departure is sufficient for venue purposes, it is suggested that prosecutors look to the port of entry or departure where the currency or other monetary instruments were received. Also, the 30-day filing deadline, as set forth above, applies only to persons who receive currency or other monetary instruments.

Questions pertaining to the issue of venue with respect to violations involving the Foreign Bank Account Report may be addressed to the offices identified at USAM 9-79.310, infra.

9-79.250 Criminal Penalties

Under the Bank Secrecy Act, certain violations of the reporting or recordkeeping requirements may be criminal offenses. The Act provides for both misdemeanor and felony offenses.

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9-79.251 Misdemeanor Offenses

31 U.S.C. §5322(a) provides that a person who willfully violates the Act or the regulations prescribed under it shall be fined not more than \$1,000 and/or imprisoned up to one year. To show a willful violation, the government must prove that the defendant actually knew of the currency reporting requirements and voluntarily and intentionally failed to comply with the requirements. See USAM 9-79.300 and USAM 9-79.400, infra.

9-79.252 Felony Offenses

The felony penalties of 31 U.S.C. §5322(b) apply to all violations of the Bank Secrecy Act, unless specifically excluded, where certain conditions are present. Under 31 U.S.C. §5322(b), a felony violation occurs when the defendant violates the Act (or the regulations promulgated thereunder) "while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than \$100,000 in a 12-month period." The penalty for a felony violation is a fine of up to \$500,000 and/or imprisonment for not more than five years.

9-79.253 Use of Other Criminal Statutes

18 U.S.C. §1001 can be used both in cases involving the filing of a false CTR, CMIR, or FBA and in situations involving a scheme to avoid the filing of the forms, such as a pattern of cash transactions at a financial institution in amounts under \$10,000 where the aggregate sum of the transactions over a short period of time may exceed that amount. Other possible Title 18 charges for currency offenses include 18 U.S.C. §371 (for a conspiracy to avoid filing the currency transaction reports), 18 U.S.C. §1341 (mail fraud), and 18 U.S.C. §1343 (wire fraud). A false response on an income tax return or on IRS Form 4683 may involve perjury under 26 U.S.C. §7206. A further discussion of the use of these and other additional criminal provisions may be found in the monograph mentioned at USAM 9-79.200, supra.

9-79.260 Civil Remedies

9-79.261 Injunctions

31 U.S.C. §5320 allows the Secretary of the Treasury to bring a civil action to enjoin a violation or to enforce compliance with the Bank Secrecy Act, regulations prescribed thereunder, or orders.

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9-79.262 Civil Penalties

31 U.S.C. §5321(a) provides that domestic financial institutions and any partner, director, officer, or employee of a domestic financial institution can be fined up to \$1,000 for each violation of the Bank Secrecy Act. If a domestic financial institution fails to follow the compliance procedures required by the Act or the regulations, a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs.

31 U.S.C. §5321(a) also provides that the Secretary of the Treasury may impose additional civil penalties on a person who does not file a CMIR, or who files a CMIR containing a material omission or misstatement. The civil penalty can be levied for not more than the value of the monetary instrument for which the report was required, although such penalty must be reduced by any amount forfeited under 31 U.S.C. §5317(b). This portion of the civil penalty provision can be very helpful when a large volume of currency is involved and criminal prosecution is not available.

31 U.S.C. §5321(b) authorizes the Secretary of the Treasury to bring civil actions to collect civil penalties. 31 U.S.C. §5321(c) provides authority for the Secretary of the Treasury to remit any part of a civil forfeiture or civil penalty imposed under 31 U.S.C. §5317(b) or §5321(a)(2). This statute thereby provides a procedure to protect innocent third parties.

9-79.270 Exemptions

31 U.S.C. §5318, 31 C.F.R. §103.45, and 31 C.F.R. Part 103 "Appendix--Interpretations and Exemptions" provide for certain exemptions from compliance with the reporting requirements. All transactions between domestic financial institutions are exempt. Domestic financial institutions can also request exemptions from the CTR requirements for large-volume customers. The Department of the Treasury has the power to grant or deny exemptions, and it maintains a list of all bank customers who have been granted exemptions.

9-79.280 Dissemination of Financial Information

31 U.S.C. §5319 provides that the Secretary of the Treasury may disseminate information from domestic financial transaction reports

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(CTRs), export/import reports (CMIRs), and foreign financial agency transaction reports (FBAs) to other agencies for use in criminal, tax, or regulatory investigations or proceedings. Any information disseminated, however, must be received in confidence and can only be disclosed to persons utilizing the information for official purposes relating to the criminal, tax, or regulatory investigation or proceeding for which the information was sought.

9-79.290 Treasury Financial Law Enforcement Center (TFLEC)

The Treasury Financial Law Enforcement Center (TFLEC) serves as a centralized national clearinghouse and repository for criminal/financial intelligence and expertise. TFLEC is responsible for receiving, storing, analyzing, and disseminating all information collected pursuant to the Bank Secrecy Act.

Upon the written request of a recognized domestic or foreign law enforcement agency, the Secretary of the Treasury can authorize TFLEC to provide information requested about a named subject or organization. Access to this information is predicated, however, on the requirement that the subject or subjects are bona fide targets of an ongoing criminal investigation. TFLEC information will not be provided to agencies outside the federal government for purposes of initiating investigations or providing leads in response to nonspecific requests.

To obtain financial information from TFLEC, the head or designated representative of the requesting law enforcement agency, except the Department of Justice (see USAM 9-79.320, infra), should make a written request indicating the type of information desired. The request should state that the information is to be used in an ongoing criminal investigation or other proceeding. The request should be directed to: Commissioner of Customs, Treasury Financial Law Enforcement Center, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

9-79.300 BANK RECORDS AND FOREIGN TRANSACTIONS ACT (CONT.)

9-79.310 Advising the Department of Justice

The U.S. Attorney should keep the Department of Justice advised respecting the developments in important Bank Secrecy Act cases as they arise. Telephone advice and assistance as to criminal sanctions and civil penalties may be obtained by calling the General Litigation and Legal

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Advice Section (FTS 724-7144), the Fraud Section (FTS 724-7127), or the Narcotic and Dangerous Drug Section (FTS 724-7045), depending on the underlying nature of the investigation or prosecution. Telephone advice and assistance as to the seizure and forfeiture of monetary instruments may be obtained by calling the Asset Forfeiture Office (FTS 272-6420).

9-79.320 Access

The Currency and Foreign Transactions Reporting Act authorizes the Secretary of the Treasury to make information filed pursuant to its provisions available to any Department or Agency, but only "upon such conditions and pursuant to such procedures as he may by regulation prescribe." See 31 U.S.C. §5319. Consistent with this view, the Secretary of the Treasury has notified law enforcement agencies that access to information contained in the reports must be based upon an agency's "need in connection with an authorized criminal or regulatory investigation or proceeding."

The Department of Justice has obtained an agreement from the Secretary of the Treasury to honor requests signed on behalf of the Attorney General by an Assistant Attorney General. U.S. Attorneys wishing to obtain information filed pursuant to the Bank Secrecy Act should submit requests to the Office of Enforcement Operations (FTS 633-3684). Requests should identify the particular information desired and describe the investigation in connection with which it is being requested. The Office of Enforcement Operations will forward such requests, in proper form, to the Treasury Department.

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9-85.000 PROTECTION OF GOVERNMENT INTEGRITY

9-85.100 BRIBERY (18 U.S.C. §201)

9-85.101 Investigative Jurisdiction

The FBI has primary jurisdiction over investigations of bribery offenses involving public officials, as defined in 18 U.S.C. §201(a). 28 U.S.C. §535.

9-85.102 Administering Section

The Public Integrity Section of the Criminal Division is assigned staff responsibility for those federal bribery statutes which apply to public officials.

9-85.110 Discussion of Offense

Although there are a number of federal statutes prohibiting bribery of federal officials, the most frequently employed and most important provision is 18 U.S.C. §201. This statute reaches bribery involving a public official or a person who has been selected to be a public official. These terms are defined in 18 U.S.C. §201(a). The courts have broadly construed public official: employees of the European Exchange System (Harlow v. United States, 301 F.2d 361 (5th Cir.) cert. denied, 371 U.S. 814 (1962)), a state employee holding an appointment as a Market Administrator from the Secretary of Agriculture (United States v. Levine, 129 F.2d 745 (2nd Cir. 1942)), a duly appointed and qualified examining physician for a local selective service board acting as such (United States v. Kemler, 44 F. Supp. 649 (D.C. Mass. 1942)). Persons licensed by the federal government to perform certain regulatory functions such as grain inspection (7 U.S.C. §450) have been successfully prosecuted under 18 U.S.C. §201. But in the case United States v. Del Toro, 513 F.2d 656 (2nd Cir. 1975), the court of appeals refused to extend the definition of the term to a city employee working on a federally funded project with ultimate supervision in a federal agency. The Southern District of New York and the Criminal Division believe this case was wrongly decided, thus, whenever similar cases arise in other circuits, prosecution under 18 U.S.C. §201 is encouraged.

18 U.S.C. §201 also covers persons who have been selected to be public officials, but who have not been confirmed, and those officially informed that they will be so selected. The question of what constitutes being

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officially informed within the meaning of the statute has not been settled.

18 U.S.C. §201(b) provides for felony sanctions against whoever, directly or indirectly "corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or person selected to be a public official to give anything of value to any other person or entity, with intent (1) to influence any official act; or (2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (3) to induce such public official or such person who has been selected to be a public official to do or omit to do any action in violation of his lawful duty." 18 U.S.C. §201(b) is violated even though the official offered a bribe is not corrupted or the object of the bribe cannot be attained. United States v. Jacobs, 431 F.2d 754, 759-760 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971). While a specific intent to influence official action must be shown, it is not an element of the offense that the briber knew that the person to whom he/she was offering a bribe was a federal rather than a state official. (United States v. Jennings, 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973)).

18 U.S.C. §201(c) provides for felony sanctions against whoever, being a public official or person selected to be a public official, directly or indirectly "corruptly asks, solicits, seeks, accepts, receives, or agrees to receive anything of value for her or himself or for any other person or entity, in return for: (1) being influenced in the performance of any official act; or (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (3) being induced to do or omit to do any act in violation of his official duty." 18 U.S.C. §201(c) is violated even though the public official did not have ultimate decision making authority, provided that his/her advice and recommendation could be influential. United States v. Heffler, 402 F.2d 924 (3d Cir. 1968), cert. denied, sub nom., Cecchini v. United States, 394 U.S. 946 (1969).

Both 18 U.S.C. §201(b) and §201(c) would reach situations involving a purely ministerial act, in view of the broad definition of "official act" in 18 U.S.C. §201(a). See United States v. Birdsall, 233 U.S. 223 (1914); United States v. Irwin, 354 F.2d 192 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).

Unlike 18 U.S.C. §201(b)(1), 18 U.S.C. §201(c)(1) is limited to the public official's "being influenced in his [own] performance..." emphasis added.

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Both 18 U.S.C. §201(b) and §201(c), unlike 18 U.S.C. §201(f) and §201(g), reach situations where something of value is designated for some third party and not the public official to be corrupted.

18 U.S.C. §201(f) and §201(g) deal with prohibited gratuities or "tips." Conduct prohibited by 18 U.S.C. §201(f) and §201(g) may also fall within the scope of 18 U.S.C. §201(b) and §201(c). But 18 U.S.C. §201(f) and §201(g) do not require proof of a quid pro quo or unlawful influence. For example, these subsections require the government to prove merely that something of value was given to a public official for or because of an official act performed or to be performed by said public official, and the government does not have the burden of proving that the gratuity was given for the purpose of influencing that or any other official act. 18 U.S.C. §201(f) and §201(g) cover situations where gratuities are given or received for or because of an official act already performed or to be performed. 18 U.S.C. §201(b) and §201(c) only cover situations where a bribe attempt or agreement is made in contemplation of some action to be performed. If a situation arises where an individual has violated two related subsections of 18 U.S.C. §201, for example 18 U.S.C. §201(c) and §201(g), a violation of both subsections could be charged. Consecutive sentences could not, however, be imposed.

18 U.S.C. §201(d), (e), (h) and (i) deal with witness bribery. The first two subsections are similar to 18 U.S.C. §201(b) and §201(c), and the latter two subsections are similar to 18 U.S.C. §201(f) and §201(g) and the above discussion of 18 U.S.C. §201(b), (c), (f), and (g) are, therefore, generally applicable to the witness bribery provision.

18 U.S.C. §201(j) makes it clear that the subsections dealing with witnesses will not prohibit payments to witnesses which are otherwise proper and lawful.

18 U.S.C. §201(k) makes it clear that the provisions of 18 U.S.C. §201 are not meant to supersede the obstruction-of-justice statutes.

9-85.120 Sentencing

In addition to the imprisonment and fines set forth in 18 U.S.C. §201, the statute provides, in 18 U.S.C. subsection §201(e), that upon conviction under 18 U.S.C. subsections §201 (b), (c), (d), or (e) the offender may be disqualified from holding any office under the laws of the United States. Since the statute uses the phrase "may be disqualified," it would be advisable to call this phrase to the attention of the court if disqualification from holding office is sought. Under former 18 U.S.C. §§202, 205, 206, 207, the statutes stated that the defendant shall be disqualified from

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holding such office. The Supreme Court in Burton v. United States, 202 U.S. 344, 369-370 (1906), stated that this statute, by its own force, without any statement in the judgment of conviction regarding disqualification, made one convicted under the statute forever incapable of holding any office of honor, trust, or profit under the government of the United States. Drawing an analogy from the Burton case, it might be argued that an agency or department could disqualify a person convicted under the new law from holding office, even though the judgment of conviction did not contain a reference to disqualification. To avoid problems in this regard, however, it would be advisable to request the judge to state in the judgment of conviction that the defendant is disqualified from holding office under the United States.

9-85.200 CONFLICTS OF INTEREST (18 U.S.C. §202 ET. SEQ.)

9-85.201 Investigative Jurisdiction

The Federal Bureau of Investigation has primary jurisdiction over investigations of conflicts of interest violations set forth in 18 U.S.C. §§203, 204, 205, 207, 208, 209, 210, 211, 281 and 283. It is anticipated that many allegations of violations of the conflicts of interest statutes will be brought to the attention of the Department of Justice by the Inspectors General of the various departments and agencies, and that in many instances the Office of the Inspector General reporting the allegation will have conducted some preliminary investigation to determine if referral of the matter to the Department of Justice is warranted. In such circumstances, questions will arise as to whether the FBI or the Inspector General should conduct any necessary additional investigation or whether a joint FBI-Inspector General investigation is appropriate. Such questions should be resolved in accordance with the "Policy Statement of the Department of Justice and its Relationship and Coordination with the Various Departments and Agencies of the United States" of June 3, 1981 (see USAM 9-42.502).

9-85.202 Administering Section

On May 22, 1981, the Conflicts of Interest Crimes Branch was established within the Public Integrity Section of the Criminal Division to administer and to discharge the Criminal Division's responsibilities for the enforcement of federal conflicts of interest laws. Criminal Division Directive to the Staff No. 85, May 22, 1981. The Conflicts of Interest Crimes Branch is charged with developing and implementing enforcement policy concerning conflicts of interest crimes; assisting the U.S.

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Attorneys with the investigation and prosecution of conflicts of interest offenses; examining legislative proposals and instigating new legislation when such action is warranted; and serving as the Criminal Division's principal conflicts of interest contact person for the Office of Legal Counsel, Office of Government Ethics, and the Inspectors General. The Director of the Conflicts of Interest Crimes Branch may be reached at FTS 724-7137.

9-85.203 Prosecutive Policy

Allegations of violations of the federal conflict of interest laws should be thoroughly investigated. Sufficient investigation should be conducted to establish proof or the absence of proof of a complaint or an allegation or to clearly show that the issue cannot be resolved. If investigation results in proof of an offense, the offender should be prosecuted unless there are strong reasons not to prosecute. The offender's failure to profit from his/her crime, and the fact that the offense did not involve fraud against the government are not appropriate reasons for declining to prosecute conflict of interest crimes. But, for example, when it is unquestionably clear that a petit jury would acquit the offender or if administrative disposition would be clearly more appropriate than prosecution, a decision against prosecution is justifiable.

9-85.204 Office of Government Ethics' Responsibility for Conflicts of Interest Matters

Title IV of the Ethics in Government Act of 1978 (Pub.L. 95-521, October 26, 1978) established the Office of Government Ethics within the Office of Personnel Management. The Director of the Office was vested with the responsibility of providing overall direction of Executive Branch policies related to preventing conflicts of interest on the part of officers and employees of executive agencies. Pub.L. 95-521, Title IV, §402(a). Such responsibility includes the development, recommendation, and interpretation of regulations governing conflicts of interest and ethical problems, as well as the authority to render formal advisory opinions on matters of general applicability and on important matters of first impression which involve the interpretation of application of 18 U.S.C. §§202-209. The Office of Personnel Management, upon recommendation of the Director of the Office of Government Ethics, has promulgated comprehensive regulations which explain and amplify the provisions of the post-employment restrictions of 18 U.S.C. §207. 5 C.F.R. §737.1 et seq. In addition, the Director entered into an agreement with the Department of Justice, effective May 19, 1980, relating to the Office of Government Ethics' responsibility for rendering formal advisory opinions. Under the terms of

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that agreement, the Office of Government Ethics will consult with the Criminal Division before rendering any advisory opinion on an actual or apparent violation of any conflicts of interest law. If the Criminal Division determines to undertake a criminal investigation of the matter, the Office of Government Ethics will refrain from issuing any opinion until the Criminal Division makes a prosecutive determination. Similarly, when an advisory opinion is sought in a matter not involving an actual or apparent violation of the law, the Office of Government Ethics has agreed to consult the Department of Justice Office of Legal Counsel before issuing any opinion. The importance of the agreement to Departmental prosecutors is that once an advisory opinion has been issued, a person who is involved in the transactions or activity in question, or in a materially identical transaction or activity, and who relies upon the advisory opinion in good faith, shall not be subject to prosecution under the conflicts of interest statutes. Another important function of the Office of Government Ethics is to consult, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflicts of interest problems in individual cases. Pursuant to the regulations of the Office of Personnel Management, each agency must establish a counseling service to provide authoritative advice and guidance to employees who seek advice and guidance on questions of conflicts of interest and ethical standards of conduct. 5 C.F.R. §735.105. Any counselor in an agency counseling service may request assistance from the Office of Government Ethics in resolving conflicts of interest questions.

Finally, under 5 C.F.R. §737.1(c)(6), the heads of federal departments and agencies are required to report substantiated allegations of violations of 18 U.S.C. §207 to the Office of Government Ethics as well as to the Department of Justice. Criminal enforcement of the provisions of 18 U.S.C. §207 remains the exclusive responsibility of the Attorney General. 5 C.F.R. §737.1(a).

9-85.205 Designated Agency Ethics Official for the Department of Justice

The regulations of the Office of Personnel Management require each agency to have a designated agency ethics official (DAEO) appointed by the head of the agency to coordinate and manage the agency's ethics program. 5 C.F.R. §738.201 et seq. The Assistant Attorney General for Administration has been designated the agency ethics official for the Department of Justice. 28 C.F.R. §45.735-26. The duties of the Assistant Attorney General for Administration as DAEO are set forth in 5 C.F.R. §738.203 and 28 C.F.R. §45.735-26(b). These consist primarily of the responsibility for carrying out the Department's ethics program, to include reviewing financial disclosure reports submitted by the Department's employees, as well as developing and conducting an education program and a counseling

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program for Department employees concerning all standards of conduct matters including post-employment matters. Any present or former employee of the Department of Justice who wishes to obtain general advice concerning his or her own present or proposed activities or financial transactions should contact the Office of the Assistant Attorney General for Administration. If the Assistant Attorney General for Administration believes that a particular request should be answered by the Office of Government Ethics, there is a procedure available for referring the question to that Office. 5 C.F.R. §738.301(b).

Finally, there is a procedure whereby an individual may request a formal advisory opinion from the Director of the Office of Government Ethics on a proposed activity or transaction. Such formal opinions are only issued with regard to non-hypothetical situations which involve matters of general applicability or important matters of first impression concerning the applicability of the conflicts of interest and standards of conduct laws and regulations. The procedure for requesting a formal advisory opinion is found at 5 C.F.R. §738.301 et seq.

9-85.206 Standards of Conduct Regulations Relating to Conflicts of Interest

By Executive Order 11222 of May 9, 1965, the President required Agency heads to issue regulations establishing standards of conduct for their respective agencies. This requirement is also found in the regulations of the Office of Personnel Management, 5 C.F.R. §735.104. Such regulations incorporate, as standards of conduct regulations, the prohibitions of the conflicts of interest statutes in Chapter 11 of Title 18, U.S.C., and can, in some instances, prohibit a broader range of activity than the criminal statutes. A violation of a criminal conflict of interest statute, therefore, will ordinarily subject a federal employee to the risk of disciplinary action by his/her department or agency in addition to the criminal penalty imposed by the statute. This dual nature of a conflict of interest violation underscores the need for swift investigative and prosecutive action by the Department of Justice, because in most instances of conflicts of interest crimes the employee's agency will need to protect its own operations and funds by taking swift and appropriate disciplinary action against its employee. Coordination between the prosecutor and the concerned agency will normally be necessary to insure that disciplinary action which might jeopardize the criminal investigation is not initiated.

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9-85.210 Definitions (18 U.S.C. §202(a), (b))

18 U.S.C. §202(a), for the purposes of the conflict of interest provisions defines the term "special Government employee" and serves to establish a category of intermittent and temporary personnel, as distinguished from regular, full-time personnel. The term is defined to include officers and employees of the legislative as well as the executive branch, independent agencies, and the District of Columbia who are employed, with or without compensation, to perform duties either on a full-time or intermittent basis, for not more than 130 days in any period of 365 consecutive days.

In addition to the above persons, a part-time local representative or a Member of Congress in the Member's home district or state is classified as a special government employee even though his/her service exceeds the 130 day standard. Similarly, a part-time United States Magistrate is a special employee.

The conflict of interest provisions apply in general to officers of the Armed Forces on active duty. Section 202(a) provides, however, that a Reserve or National Guard officer, unless otherwise an officer or employee of the United States, on a tour of active duty solely for training is a special government employee. In addition, a Reserve or National Guard officer who is serving involuntarily on extended active duty is classified as a special government employee. Enlisted members of the Armed Forces are specifically excluded by 18 U.S.C. §202(a) from the coverage of the conflict of interest statutes.

Section 202(b) of 18 U.S.C., for the purposes of 18 U.S.C. §§205 and 207, defines "official responsibility" to mean the direct administrative or operating authority, whether intermediate or final, and either exercisable alone with others, and either personally or through subordinates to approve, disapprove, or otherwise direct government action. The term is intended to cover supervisory personnel.

9-85.220 Compensation (18 U.S.C. §§203 and 205)

Section 203(a) of 18 U.S.C. prohibits the designated public officials from directly or indirectly receiving, agreeing to receive, asking, demanding, soliciting, or seeking any compensation for any services rendered or to be rendered either by the public officials or others, at a time when they are public officials, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before certain designated forums. Section 203(b) of 18 U.S.C. deals with the source of the unlawful compensation, and 18 U.S.C. §203(c)

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provides for less restrictive prohibitions affecting special government employees.

Section 205 of 18 U.S.C. deals primarily with uncompensated services by federal officers and employees. There is, however, a provision in 18 U.S.C. §205(1) that prohibits the receipt of any gratuity, or any share of or interest in any claim against the United States in consideration of assistance in the prosecution of such claim. The remainder of the statute bars uncompensated services as agent or attorney which give rise to conflicts between the federal officer or employee's governmental and private employment. Members of Congress are excluded from the coverage of 18 U.S.C. §205, but unlike 18 U.S.C. §203, in court services are covered by 18 U.S.C. §205.

It has been held that the agreement to receive prohibited compensation, and the receipt thereof are distinct offenses under 18 U.S.C. §203. Burton v. United States, 202 U.S. 344 (1906).

Under 18 U.S.C. §203, it must be shown that the defendant had "knowledge of the nature or purpose of the receipt" of the payment while he/she was in one of the classes therein enumerated. United States v. Johnson, 419 F.2d 56 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970); United States v. Quinn, 141 F. Supp. 622 (S.D. NY 1956).

9-85.230 Exemption of Retired Officer of the Uniformed Services (18 U.S.C. §206)

Section 206 of 18 U.S.C. provides that 18 U.S.C. §§203 and 205 do not apply to a retired officer of the uniformed services of the United States (which includes the Public Health Service, and Coast and Geodetic Survey as well as the Army, Navy, Air Force, Marine Corps, and Coast Guard) while not on active duty and not otherwise an officer or employee of the United States. In addition, section 2 of Public Law 87-849 (Act of October 23, 1962, 76 Stat. 116) provides for the retention of the provisions in former 18 U.S.C. §§281 and 283 which apply to retired officers of the armed, not uniformed, forces of the United States. Under the provisions of 18 U.S.C. §281, a retired officer of the armed forces not on active duty may not represent any person in the sale of anything to the government through the department in whose service he/she holds a retired status. Under the provisions of 18 U.S.C. §283, the retired officer is prohibited within two years next after retirement to act as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States involving the Department in whose service he/she holds a retired status, and is prohibited from acting as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States

involving any subject matter which he/she was directly connected while in an active duty status.

Section 206 of 18 U.S.C. provides also that 18 U.S.C. §§203 and 205 shall not apply to any person excepted by statute. The comparable provisions of former 18 U.S.C. §§281 and 283 contain similar exemptions.

9-85.240 Disqualification (18 U.S.C. §207)

Section 207 of 18 U.S.C., which restricts the activities in which former Executive Branch officials may become involved after leaving government employment, was revised by Congress as part of the Ethics in Government Act of 1978. Title V, §501, Pub. L. 95-521 (October 26, 1978). Prior to the July 1, 1979, effective date of those revisions, two additional clarifying amendments to 18 U.S.C. §207 were made. Pub.L. 96-28 (June 22, 1979). The amendments to 18 U.S.C. §207 made by the above legislation do not apply to individuals who left government service prior to the July 1, 1979, effective date of those amendments unless such an individual returned to government service after that date. Title V, §502, Pub. L. 95-521 (October 26, 1978). The legislative history of the Ethics in Government Act of 1978 sets forth the congressional intent that individuals who left government service prior to July 1, 1979, will continue to be subject to the former provisions of 18 U.S.C. §107. S.REP. No. 95-170, page 49, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4625; H.R. REP. No. 95-1756, p. 77, reprinted in [1978] U.S. CODE CONG & AD. NEWS 4393.

The provisions of former 18 U.S.C. §207 are of continuing importance in several respects: first, the permanent disqualification provision of former 18 U.S.C. §207(a) continues to apply to individuals who left government service prior to July 1, 1979; second, violations of former 18 U.S.C. §207(b) were possible until July 1, 1980, and can be prosecuted until barred by the statute of limitations; and third, violations of former 18 U.S.C. §207(c) were possible until July 1, 1979, and can also be prosecuted until barred by the statute of limitations. The text of former 18 U.S.C. §207 has been reprinted in this Chapter for ready reference at USAM 9-85.249a. In addition, those sections of the United States Attorneys' Manual which dealt with the former statute have been reprinted at USAM 9-85.249b.

The Office of Personnel Management's regulations, 5 C.F.R. §737.1 et seq., provide guidance to federal agencies about enforcement of the statute and provide guidance to the individuals who are bound by its prohibitions. The regulations were issued with the concurrence of the Attorney General and are consistent with the Attorney General's opinion as to the correct interpretation of 18 U.S.C. §207. The regulations also contain numerous

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illustrations of the correct application of 18 U.S.C. §207's prohibitions in specific circumstances.

A discussion of 18 U.S.C. §207 as it applies to employees of the U.S. Attorneys' offices have been prepared by the Executive Office for U.S. Attorneys. This has been incorporated at USAM 10-2.669 et seq.

9-85.241 Permanent Disqualification

Subsection (a) of 18 U.S.C. §207 provides, in part, a lifetime prohibition against a former government employee making any formal or informal appearance, or making any communication intended to influence, on behalf of another person, in the circumstances described below. The prohibition concerning appearances retains the prohibition on acting as an agent or attorney of 18 U.S.C. subsection §207(a) of the prior statute, but expands the types of prohibited acts to include any representational activity on behalf of another person in a physical appearance before an agency of the United States. The terms "agent or attorney, or otherwise represents" were intended by Congress to include appearances in any professional capacity, whether as attorney, consultant, expert witness, or otherwise. H.R. REP. No. 95-1756, P. 74, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4390.

The prohibition against making any communication on behalf of another person expands the prohibition of former 18 U.S.C. §207. It prohibits communications such as correspondence, telephone calls, or conveying material to the United States if such communications are made with the intent to influence.

Such appearances and communications are prohibited by 18 U.S.C. §207(a) if the appearances are before, or the communications are to, an agency, department, court, court martial, or civil, military, or naval commission, or officer or employee of the United States, or the District of Columbia; and if such appearances or communications are in connection with a particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest; and in which the former employee participated personally and substantially at any time as a government employee.

Subsection (a) of 18 U.S.C. §207 does not preclude post-employment activities which may fairly be characterized as no more than aiding and assisting in the representation of another, so long as such assistance is entirely in-house and involves no direct contact with the government in the form of an appearance or a communication. The Senate version of Subsection (a) of 18 U.S.C. §207, S.555, did prohibit the rendering of such aid or

assistance, but the Conference Committee adopted the less stringent language of the House provision instead. H.R. REP. No. 95-1756, p. 74, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4390.

9-85.242 Two Year Disqualification of All Former Government Employees

Subsection (b)(i) of 18 U.S.C. §207 provides a two-year prohibition for all former government employees regarding the same kind of appearances and communications described in USAM 9-85.241, supra, but with respect to any particular matter which was actually pending under the former employee's official responsibility within a period of one year prior to the termination of such responsibility. Whereas the permanent disqualification of 18 U.S.C. §207(a) of the statute does not apply unless the former government employee had personally and substantially participated in a particular matter, the shorter disqualification of 18 U.S.C. §207(b)(i) applies to that potentially broader class of particular matters which had been under a former government employee's official responsibility.

The term "official responsibility" is defined in 18 U.S.C. §202(b). Under the Office of Personnel Management's regulations, the scope of an employee's official responsibility is ordinarily determined by those areas assigned by statute, regulation, executive order, job description or delegation of authority. The term includes authority for planning, organizing, and controlling matters, rather than authority to review or make decisions on ancillary aspects of a matter. 5 C.F.R. §737.7(b).

The regulations also clarify that a former government employee is barred by 18 U.S.C. §207(b)(i) from representing another as to a particular matter, notwithstanding that as a government employee the individual was not aware that the matter was pending under his/her official responsibility. However, a prosecution under this subsection would require proof that, at the time of the former employee's representations/acts, the individual was aware that the particular matter had been under his/her official responsibility during the final year of his/her government employment. The regulations exhort former employees who suspect or have reason to believe that a particular matter may have been under their official responsibility to make further inquiry. 5 C.F.R. §737.7(b)(4).

The words "actually pending" in 18 U.S.C. §207(b)(i) mean that the disqualification arises only if the same particular matter was in fact referred to or under consideration by persons within the employee's area of responsibility. A former employee is not barred from representing another in a particular matter merely because his/her official responsibility included responsibility for the same general types of matter so that the

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particular matter could have been under his/her official responsibility. 5
C.F.R. §737.7(c).

Finally, as with 18 U.S.C. §207(a), the prohibition of 18 U.S.C. §207(b)(i) does not preclude post-employment activities which consist of aiding and assisting in the representation of another which involve no direct contact with the government in the form of an appearance or a communication with the intent to influence.

9-85.243 The Concept of the Senior Employee

The prohibitions of subsections (b)(ii) and (c) of 18 U.S.C. §207 apply to former senior employees. This concept is defined by 18 U.S.C. §207(d) to include three classes of officers and employees:

A. 18 U.S.C. §207(d)(1)(A): Employees paid under the Executive Schedule Pay Rates or at a Comparable Rate

These are set forth in 5 U.S.C. §§5311 to 5318, and are to be distinguished from the General Schedule Pay Rates, or "G.S. Levels" which are found at 5 U.S.C. §5331 et seq. There are five pay levels in the Executive Schedule. Level I positions are the Cabinet positions, including the Secretaries of the major departments and the Attorney General. 5 U.S.C. §5312. Level II includes the Secretaries of the Air Force, Army, and Navy, as well as certain Deputy Secretaries, Directors, Chairpersons, and Administrators of various departments and agencies. 5 U.S.C. §5313. Level III positions under 5 U.S.C. §5314 include various Under Secretaries, Chairpersons, and Deputy Administrators. Level IV positions under 5 U.S.C. §5315 include other Assistant Secretaries, Deputies, General Counsels, Inspectors General, and Members of a variety of Boards, Commissions, and Councils as well as some U.S. Attorney positions. Finally, Level V positions were paid \$58,500 per annum as of October 1, 1980, under 5 U.S.C. §5316, and included other Inspectors General, General Counsels, Assistant Directors and various Commissioners, Directors, Deputies, and Administrators. This last amount is significant because Senior Employees include any officer or employee receiving a rate of pay under other authority comparable to or greater than that set forth in the Executive Schedule. The phrase "under other authority" is currently interpreted by the Office of Government Ethics as not including any employee paid under the General Schedule. Thus, all senior employees from within the ranks of General Schedule employees are subject to designation pursuant to 18 U.S.C. §207(d)(1)(C), discussed infra, and are not designated by operation of 18 U.S.C. §207(d)(1)(A).

B. U.S.C. §207(d)(1)(B): Senior Commissioned Officers of the Uniformed Services

These are the officers in pay grades 0-9 and 0-10 as set forth in 37 U.S.C. §201. That statute defines the following positions: 0-9 includes the ranks of Lieutenant General in the Army, Air Force, and Marine Corps, the rank of Vice Admiral in the Navy, Coast Guard, and Environmental Science Services Administration, and the position of Deputy Surgeon General in the Public Health Service; 0-10 includes the ranks of General in the Army, Air Force and Marine Corps, Admiral in the Navy, Coast Guard and Environmental Science Services Administration, and the position of Surgeon General in the Public Health Service.

C. 18 U.S.C. §207(d)(1)(C): Employees in positions involving significant decision-making or supervisory responsibility

These positions are designated by the Director of the Office of Government Ethics. However, the Director may only designate positions from within certain classes of positions which involve significant decision-making or supervisory responsibility. Thus, the Director may designate positions from those:

1. For which the basic pay rate is equal to or greater than that of a GS-17 and which are not covered by 18 U.S.C. §207(d)(1)(A) or §207(d)(1)(B), *supra*. (An individual's basic rate of pay is to be determined by his/her GS level alone, without regard to his/her step or any ceiling limitation imposed by law. 5 C.F.R. §737.25(b)(4));
2. Which are part of the Senior Executive Services (SES); or
3. Which are active duty commissioned officers assigned to pay grade 0-7 (Brigadier General, Rear Admiral, lower half, and Commodore, and Assistant Surgeon General having rank of Brigadier General) or to pay grade 0-8 (Major General, Rear Admiral, upper half, Deputy Surgeon General, and Assistant Surgeon General having rank of Major General). These two pay grades are defined by 37 U.S.C. §201.

The Director of the Office of Government Ethics must designate on an annual basis which positions within the above three categories involve significant decision-making or supervisory responsibility. These designations appear at 5 C.F.R. §737.33 for each federal agency. For example, the designation for the Department of Justice includes all U.S. Attorneys who are eligible to be so designated because their positions are within the Senior Executive Service.

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9-85.244 Two Year Disqualification for Senior Employees

Subsection (b)(ii) of 18 U.S.C. §207 provides a two-year prohibition affecting only senior employees (see USAM 9-85.243, *supra*, for a discussion about "Senior Employees") regarding representing others, or aiding and assisting in the representation of others by personal presence at any formal or informal appearance before the United States as to matters in which a senior employee participated personally and substantially at any time as a government employee. Congress intended the words "by personal presence at" to convey the meaning that the prohibition on aiding and assisting applies only to the former senior employee's physical presence at a formal or informal appearance. Hence, the bar would not apply to oral or written communications such as conveying material to the United States, telephone calls, correspondence, or aiding in the preparation of a brief. H.R. REP. No. 96-115, p. 6 (May 2, 1979), reprinted in [1979] U.S. CODE CONG. & AD. NEWS 328-333. Such communications, however, may still be barred under 18 U.S.C. §207(a) (see USAM 9-85.241, *supra*.)

The prohibition of 18 U.S.C. §207(b)(ii) is designed to prevent a former senior employee from playing any auxiliary role during a negotiation proceeding or similar transaction with the government, so that the former senior employee cannot lend his/her personal influence to the resolution of the matter or even appear to do so. 5 C.F.R. §737.9(b).

9-85.245 One Year Disqualification for Senior Employees

An additional prohibition affecting only senior employees is that of subsection (c) of 18 U.S.C. §207. This subsection is designed to provide a reasonable "cooling off" period of one year between the time a senior employee leaves his/her department or agency and the time he/she may reappear before the same department or agency in his/her private capacity, either on behalf of him/herself or a client. S. REP. NO. 95-170, p. 49, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4265. The prohibition extends to any matter pending before a senior employee's former department or agency including new matters, but 18 U.S.C. §207(c) does not prohibit aiding, assisting, or consulting on matters pending before his/her former agency, provided the former senior employee has no contact with that agency, either in person or by oral or written communication with the intent to influence. Moreover, the prohibition would extend to all such contacts with the senior employee's former agency, regardless of whether the matter is actually pending before such agency, as long as the agency has a direct and substantial interest in the particular matter, wherever it is pending. Unlike 18 U.S.C. §207(a) and (b), which extend only to particular matters involving specific parties, the coverage of 18 U.S.C. §207(c) is not limited

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to particular matters involving a specific party or parties. Any particular matter would be covered whether or not a part has been identified.

The prohibition of 18 U.S.C. §207(c) does not apply, however, unless the particular matter involves an actual or potential dispute, or an application or submission to obtain government rulings, benefits, or approvals, because these are the types of situations which present the appearance that personal influence and the unfair use of inside information gained by a senior employee's government affiliation are decisive. 5 C.F.R. §737.11(e); see, 5 C.F.R. §737.1(c). Also, the Senate Report indicates that 18 U.S.C. §207(c) does not apply to legislative activities by former officials. S. REP. No. 95-170, p. 49, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4265.

There are some significant exceptions which apply only to the prohibition of subsection (c) of 18 U.S.C. §207:

First, subsection (c) is the only prohibition in 18 U.S.C. §207 which does not apply to a special government employee, as that term is defined in 18 U.S.C. §202(a), provided that special government employee has served in his/her government position for less than sixty days in a given calendar year.

Second, 18 U.S.C. §207(c) does not apply to a former senior employee while he/she is an elected official of a state or local government. 18 U.S.C. §207(d)(2)(A).

Third, 18 U.S.C. §207(c) does not apply to a former senior employee who is principally occupied or employed with a state or local agency, an accredited institution of higher education, or certain hospitals or medical research organizations, as long as his/her appearance or communication is on behalf of such agency, institution, or organization. See 18 U.S.C. §207(d)(2)(B).

Fourth, 18 U.S.C. §207(c) does not prevent a former senior employee from appearing before or communicating with his/her former agency on matters of a personal and individual nature, such as personal income tax or pension benefits. 18 U.S.C. §207(i).

Fifth, 18 U.S.C. §207(c) does not prohibit a former senior employee from making or providing a statement based on his/her own special knowledge in the particular area that is the subject matter of the statement, as long as he/she receives no compensation in connection with the statement. 18 U.S.C. §207(i). Thus a former senior official is not barred from expressing his/her own views to his/her former agency, from providing information when requested by his/her former agency on a matter in which he/she had been involved as a government employee, or from recommending someone for

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employment with his/her former agency based on his/her own personal knowledge of that person. 5 C.F.R. §737.11(i).

Sixth, the operation of the 18 U.S.C. §207(c) bar can be limited to less than the entirety of a department or agency. This limitation reflects the congressional belief that given the complexity and size of some executive departments, it would be unfair to apply a department-wide one-year ban to former senior employees of an entity which in reality is separate and distinct from its parent department or agency. Congress felt there was little danger that former senior employees of such a separate and distinct entity could exercise undue influence over officials in other units of their department. S. REP. No. 95-170, p. 154, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4370. Consequently, two mechanisms for limiting the operation of 18 U.S.C. §207(c) have been provided. The first is found at 18 U.S.C. §207(d)(1)(C), which provides that the Director of the Office of Government Ethics may limit the operation of 18 U.S.C. §207(c) to permit former senior employees of a separate bureau or department within an agency to have communications with and appearances before other separate and unrelated bureaus and departments within the same parent agency. To do so, the Director must determine that there exists no potential for the use of undue influence or unfair advantage. The designations of such separate components of agencies pursuant to 18 U.S.C. §207(d)(1)(C) are found at 5 C.F.R. §737.32; and would, for example, make each Division in the Department of Justice and each U.S. Attorney's office a separate component of the Department of Justice.

The second mechanism for limiting the operation of 18 U.S.C. §207(c) is found at 18 U.S.C. §207(e) which provides that the Director of the Office of Government Ethics may accomplish the same effect as under 18 U.S.C. §207(d)(1)(C) by designating as separate a statutory agency or bureau which exercises distinct and separate functions from those of other organizational units within its parent agency. A former senior employee of such a designated unit would then be free of the restrictions of 18 U.S.C. §207(c) with regard to the rest of his/her former agency. 18 U.S.C. §207(e) specifically provides, however, that such a designation would not apply to a former head of the designated unit or to a former senior employee whose official responsibilities included the designated unit; they would still be fully bound by the prohibition of 18 U.S.C. §207(c). The designations permitted by 18 U.S.C. §207(e) are found at 5 C.F.R. §737.31. Within the Department of Justice, the designated agencies include INS, DEA, FBI, the Parole Commission, and the Bureau of Prisons. Essentially, the difference between 18 U.S.C. §207(d)(1)(C) and 18 U.S.C. §207(e) is that the latter can only apply to a subpart of an agency that has been created by statute, as opposed to having been created administratively.

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9-85.246 Exceptions

Subsection (f) of 18 U.S.C. §207 contains an exception to the prohibitions of 18 U.S.C. §207(a), (b), and (c) of the statute regarding the furnishing of scientific or technological information by former government employees. This exception allows former government employees to make communications solely for the purpose of furnishing scientific or technological information to the government without regard to the various disqualifications imposed by 18 U.S.C. §207, provided the former employee complies with the procedures for such communications promulgated by the particular department or agency with which he/she is communicating. An exempted communication is not limited to the actual furnishing of scientific or technological information, but includes an inquiry to determine the type or form of information required. 5 C.F.R. §737.15(a).

The exception of 18 U.S.C. §207(f) also provides a means to exempt a particular former employee from the prohibitions of the statute where the former employee has outstanding qualifications in a scientific, technological, or other technical discipline. This method would permit such a former employee to communicate with a department or agency if the head of the department or agency publishes a certification in the Federal Register that the former employee is so qualified, that he/she is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by such former employee's participation. This certification exemption should be used only where the former employee's involvement in a matter is needed on so continuous and comprehensive a basis that compliance with an agency's usual procedures for furnishing scientific or technical information would be burdensome and impractical. 5 C.F.R. §737.17(b).

9-85.247 Partners

The only prohibition in the federal conflicts of interest statutes regarding the activities of partners of current officers and employees of the executive branch is found at 18 U.S.C. §207(g). The prohibition relates to partners of current employees only; there is no corresponding prohibition imputed to the partners of former executive branch employees. 5 C.F.R. §737.21(b).

The former 18 U.S.C. §207 expressly stated that it contained the only prohibition affecting partners, but that language was dropped by Congress in the amended 18 U.S.C. §207 upon the advice of the Department of Justice that the language was unnecessary; otherwise, the prohibition relating to partners was intended to be unchanged in substance from the former

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prohibition. S. REP. No. 95-170, p. 155, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4371.

Subsection (g) of 18 U.S.C. §207 in its present form prohibits a partner of an officer or employee of the executive branch, independent agency, or of the District of Columbia, including a special government employee, to act as agent or attorney for anyone before the United States in connection with any particular matter in which the United States is a party or had a direct and substantial interest, and in which the employee participates or has participated personally and substantially as a government employee or which is the subject of his/her official responsibility. The prohibition of subsection (g) is not limited to particular matters involving a specific party or parties. Unlike subsections (a) and (b) of 18 U.S.C. §207, which extend only to particular matters involving specific parties, the disqualification in 18 U.S.C. §207(g) extends to any particular matter whether or not a party has been identified.

The phrase "before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia or any officer for employee thereof...", which phrase modifies "acting as agent or attorney," has been added to the wording of the former statute as it applied to partners. This additional language conforms the wording of 18 U.S.C. §207(g) to that of 18 U.S.C. §207(a) and (b), but does not change the substance of the prohibition in the new statute to that which applied to partners under the former 18 U.S.C. §207. It does, however, negate the implication that existed, without that language, that the range of activity prohibited for partners under 18 U.S.C. §207 was broader than the range of activities prohibited for current government employees under 18 U.S.C. §205. See B. MANNING, FEDERAL CONFLICT OF INTEREST LAW at 205-207 (1964).

9-85.248 Criminal and Administrative Sanctions Under 18 U.S.C. §207

Violations of 18 U.S.C. §207(a), (b), and (c), which apply to former government employees, are punishable by a maximum \$10,000 fine, or two years imprisonment, or both. A violation of 18 U.S.C. §207(g), which applies to partners of current government employees, is a misdemeanor punishable by a maximum \$5,000 fine, or one year imprisonment, or both.

In addition to the criminal penalties, 18 U.S.C. §207(j) also provides that a former employee found to have violated 18 U.S.C. §207(a), (b), or (c) may be barred from having any communications with, or from making any appearances before, the former agency on any pending matter for up to five years, or may be subject to other appropriate disciplinary action. Such action may only be taken after notice and an opportunity for a hearing, and

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after a finding by the head of such department or agency that a violation has occurred. The resulting disciplinary action imposed is subject to review by the appropriate United States District Court. General procedures applicable to such administrative enforcement of 18 U.S.C. §207 are found at 5 C.F.R. §737.27.

One important feature of the administrative disciplinary remedy is that it must be taken by the agency which employed the former government official, regardless of what agency is the subject of the former employee's communication or appearance in violation of the statute. In most instances involving a violation of 18 U.S.C. §207(a) or (b), and in all instances implicating 18 U.S.C. §207(c), the agency contacted by the former employee will, in fact, be his/her own agency. Yet in those instances where a particular matter is pending in an agency other than an individual's former agency, the violation of 18 U.S.C. §207(a) or (b) would not necessarily involve a contact with the former agency at all.

9-85.249 Summary of Prohibitions on Activities of Former Employees

The following is a summary in chart form of the restrictions under 18 U.S.C. §207 which apply to the activities of former government employees. The chart is provided as a limited reference only; for a more detailed description of a particular prohibition, one should refer to the appropriate preceding section regarding the applicable prohibition of the statute. The chart does not take into account any of the exceptions under the statute which might apply to a specific situation.

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| Former officers and employees of Executive Branch, of any Independent Agency of United States, or of District of Columbia, who left after June 30, 1979 | | |
|--|---|--|
| | Who are <u>NOT</u> senior employees under 18 U.S.C. §207(d). | Who are senior employees under 18 U.S.C. §207(d). |
| Restrictions as to <u>new matters</u> and matters not formerly under official responsibility or in which no personal and substantial participation | No restrictions apply to any activity. | If matter is pending before former agency, for <u>one year</u> may not act as agent or attorney or otherwise represent in an appearance, or communicate with intent to influence. 18 U.S.C. §207(c) (No restriction on otherwise aiding and assisting) |
| Restrictions as to matters in which <u>participated personally and substantially.</u> | May <u>never</u> act as agent or attorney or otherwise represent in an appearance, or communicate with intent to influence. 18 U.S.C. §207(a). (No restriction on otherwise aiding and assisting.) | May <u>never</u> act as agent or attorney or otherwise represent in an appearance, or communicate with intent to influence. 18 U.S.C. §207(c) Also, for <u>two years</u> , may not represent or aid in representing by personal presence at an appearance. 18 U.S.C. §277(b)(ii) (No restriction on otherwise aiding and assisting.) |
| Restrictions as to matters which were <u>actually pending under official responsibility</u> within one year prior to termination of that responsibility. | For <u>two years</u> may not act as agent or attorney or otherwise represent in an appearance, or communicate with intent to influence 18 U.S.C. §207(b)(i). (No restriction on otherwise aiding and assisting.) | For <u>two years</u> may not act as agent or attorney or otherwise represent in appearance, or communicate 18 U.S.C. §207(b)(i) (No restriction on otherwise aiding and assisting.) |

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9-85.249-a Former 18 U.S.C. §207

The following is the text of former 18 U.S.C. §207 which continues to apply in the circumstances described in USAM 9-85.240, supra:

18 U.S.C. §207. Disqualification of former officers and employees in matters connected with former duties or official responsibilities; disqualification of partners

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, or any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed, or

(b) Whoever, having been so employed, within one year after his employment has ceased, appears personally before any court or department or agency of the Government as agent, or attorney for, anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or directly and substantially interested, and which was under his official responsibility as an officer or employee of the Government at any time within a period of one year prior to the termination of such responsibility—

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both Provided, that nothing in subsection (a) or (b) prevents a former

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officer or employee, including a former Government employee, with outstanding scientific or technological qualifications from acting as attorney or agent or appearing personally in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former officer or employee.

(c) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States, in connection with any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which the United States is a party or had a direct and substantial interest and in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility—

Shall be fined not more than \$5,000, or imprisoned not more than one year, or both.

A partner of a present or former official or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia or of a present or former special Government employee shall as such be subject to the provisions of 18 U.S.C. §203, §205, and §207 of this title only as expressly provided in 18 U.S.C. §207(c).

9-85.249-b U.S. Attorneys' Manual Sections Dealing with Former 18 U.S.C. §207

Reprinted below are the provisions of the United States Attorneys' Manual which dealt with former 18 U.S.C. §207:

(A) Former 9-85.241 Permanent Disqualification

Subsection (a) of Section 207 provides that a former officer or employee of the executive branch, any independent agency, or the District of Columbia, including a special government employee, is permanently barred from knowingly acting as agent or attorney for anyone other than the United States in any particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated substantially as a government officer or employee. Section 207(a) imposes a life-time bar on the designated activities. Section 207(a) replaces the phrase "claim against the United States" which was narrowly construed in United States v. Bergson, 119 F.Supp. 459 (D. D.C. 1954) with the phrase "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter involving a specific party or parties..." in which the government has an interest.

The subsection requires that the United States be a party or directly and substantially interested in the matter. The statute also substitutes a "participation" test on the part of the employee for the test under prior law involving "directly connected" employment. The disqualification applies to matters in which the former employee "participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise." Former Attorney General Katzenbach cited the following as an example of personal and substantial participation:

...if it's the Attorney General's judgment that a...suit be brought, I would suppose that he would be participating personally and substantially, because after all that is the decisive question. And it would seem to me in that instance certainly he would have participated personally and substantially because he is the fellow who threw the switch, and it doesn't seem to me you can do much more than that.

Hearings before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 87th Cong., 1st Sess. at p. 77.

(B) Former 9-85.242 Matter under Official Responsibility - One Year Disqualification

Subsection (b) bars a former employee of the executive branch, independent agency, or District of Columbia, for a period of one year after his employment has ceased, from appearing personally as agent or attorney for anyone other than the United States before any court, department or agency in connection with any particular matter involving a specific party or parties in which the United States has a direct and substantial interest and which was under his official responsibility at any time within one year prior to the end of such responsibility. The former employee need not have personally participated in the matter. All that is required is that the matter was within his official responsibility as that term is defined in section 202(b). If the employee had personally and substantially participated in the matter he would come within the ban of section 207(a).

Where, in the year prior to the end of his government service, a former officer or employee has changed areas of responsibility by transferring from one agency to another, it is our view that Congress intended the period of his post employment ineligibility as to matters in a particular area to end one year after his responsibility for that area ends.

For example, if an individual transfers from a supervisory position in the Internal Revenue Service to a supervisory position in the Post Office Department and leaves that department for private employment nine months later, he will be free of the restriction of subsection (b) in three months insofar as Internal Revenue matters are concerned. He will, of course, be bound by it for a year in respect to Post Office Department matters. The above interpretation is the result of reading the phrase "Whoever having been so employed, within one year after his employment has ceased..." as referring to the termination of his employment with a particular department or agency of the government and not solely to his final separation from the government.

Section 207(b) covers special government employees. Neither section 203 nor section 205 prevents a special government employee, during his period of affiliation with the government, from representing another person before the government in a particular matter only because it is within his official responsibility. Thus, the inclusion of a former special government employee within the one-year post employment ban of 18 U.S.C. §207(b) may subject him to a temporary restraint from which he was free prior to the end of his government service.

(C) Former 9-85.243 Personnel Appearance Prohibited

The use of the phraseology "appears personally...as agent, or attorney" in section 207(b) is in contradistinction of the phraseology "acts as agent or attorney" which is used elsewhere in the conflict of interest laws. (See, e.g., Section 205(1), and (2), and 207(a).) It seems, therefore, that while a personal appearance is required under Section 207(b), the employee or former employee need not personally appear before the government to come within the other conflict of interest provisions relating to any employee's actions as an agent or attorney for another.

(D) Former 9-85.244 Assisting Another Not Prohibited

Neither subsection (a) or (b) precludes postemployment activities which may fairly be characterized as no more than aiding and assisting another. Subsection (a), as it first appeared in H.R. 8140, the bill which became P.L. 87-849, made it unlawful for a former officer or employee to act as agent or attorney for, or to aid or assist, anyone in a matter in which he had participated. The House Judiciary Committee struck the underlined words, and the bill became law without them. Thus, an individual who has left an agency to accept private employment may, for example, immediately perform technical work in his company's plant in relation to a contract for which he had official responsibility or which he helped the agency negotiate.

he/she →

his/her →

he/she →

he/she →

(E) Former 9-85.245 Particular Matter Involving Specific Party

Both subsections (a) and (b) of 18 U.S.C. §207 describe the activities they forbid as being in connection with "particular matter[s] involving specific party or parties" in which the former officer or employee has participated. The quoted language does not include general rule-making, the formulation of general policy or standards, or other similar matters." Thus, past participation in or official responsibility for a matter of this kind on behalf of the government does not disqualify a former employee from representing another person in a proceeding which is governed by the rule or other result of such matter.

(F) Former 9-85.246 Exception

Section 207 contains an exception which allows former officers or employees, including former special Government employees, with outstanding scientific or technological

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qualifications to act as agent or attorney or to appear personally in connection with a particular matter in a scientific or technological field, provided the head of the department or agency concerned certifies in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former employee.

(G) Former 9-85.247 Partners

Subsection (c) of Section 207 prohibits the partner of a present officer or employee of the executive branch, independent agency, or of the District of Columbia, including a special Government employee, to act as agent or attorney for anyone in connection with any matter including those in court in which the officer or employee participated or has participated personally and substantially as a Government employee, or which is the subject of his official responsibility. The maximum penalties for a violation of this section are \$5,000 fine or imprisonment for one year or both.

18 U.S.C. §207 specifically provides that a partner of a former or present officer or employee of the executive branch, an independent agency, or the District of Columbia shall be subject to the provisions of 18 U.S.C. §203, §205, and §207 only as expressly provided in 18 U.S.C. §207(c).

Partners of former officers or employees are not barred by the statute from acting as agent or attorney on a matter in which the former officer or employee participated personally and substantially, despite the fact that the provisions relating to partners are included in 18 U.S.C. §207 which deals with disqualification of former officers. The caveat at the end of 18 U.S.C. §207 that partners of former employees will be liable only as provided in subsection (c) of 18 U.S.C. §207 fortifies the position that partners of former officers are not covered by the statute.

Partners of present or former employees of the legislative and judicial branches of the Government are not included in the provisions of 18 U.S.C. §207(c). The House Report 87-748 at p. 23 interprets this omission as leaving existing law governing the rights and obligations of partners of present or former employees of the legislative and judicial branches unchanged. H.R. REP. No. 748, 87th Cong., 1st Sess. (July 20, 1961).

The statute does not seem to cover a partner of a government employee who is also a partner in a firm in which the government employee is not a

his/her → employee is not a member and who acts in his latter capacity. Representative Lindsay, at the Senate Hearing before the Committee on the Judiciary, 87th Cong., 2d Sess., on H.R. 8140, a bill to strengthen the Criminal Laws Relating to Bribery, Graft, and Conflicts of Interest and for Other Purposes, June 21, 1962, p. 42, indicated that a partner in that situation should not be disqualified.

9-85.250 Acts Affecting a Personal Financial Interest (18 U.S.C. §208)

18 U.S.C. §208(a) makes it a felony for any officer, or employee, of the executive branch to personally and substantially participate in a particular matter in which not only he/she, but, alternatively, his/her spouse, minor child, partner, organization in which he/she is serving as an officer, partner, director, trustee, or any person or organization with whom the official or employee is negotiating or has an arrangement with concerning prospective employment has to his/her knowledge a financial interest. The reach of this section is not limited to business enterprises, but covers non-profit research entities as well.

The statute covers officers and employees of the executive branch, independent agencies, and the District of Columbia, including special government employees. Employees of the legislative and judicial branches are not covered by the section.

9-85.251 Exemption

18 U.S.C. §208 (b) adopts a de minimis rule authorizing an agency exemption of an employee's disqualifying interest of insignificant proportions either on an ad hoc basis or pursuant to a general agency regulation published in the Federal Register. An interest, for example, in a small share ownership in a mutual fund which holds shares of corporations transacting business with the government could be considered de minimus under the statute.

9-85.260 Payments From Private Source For Public Service (18 U.S.C. §209)

18 U.S.C. §209 bans the receipt, by officers and employees of the Executive Branch, independent agencies and the District of Columbia of payments from private sources as compensation for their services as public servants. The statute enumerates persons and entities forbidden to supply extra compensation, including an individual, partnership, association, corporation or other organization, and applies the same penalty to both payor and payee.

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9-85.261 Exception - Employee Benefit Plan of Former Employer

18 U.S.C. §209(b) permits participation in employee welfare or benefit plans maintained by a former employer. 18 U.S.C. §209(c) makes the prohibitions of 18 U.S.C. §209 inapplicable to a special government employee or to any person serving without compensation, and to any person contributing to his salary as such. 18 U.S.C. §209(d) allows contributions and awards authorized by the government Employees Training Act. While the section lists specified exceptions, House Report 87-748 at p. 25 indicates that the enumeration is not to be construed as limiting the right of an employee to receive compensation from private sources other than as payment for services as a government official. 18 U.S.C. §209 does not bar private employment outside governmental hours or other activities not connected with the government position of the official and not proscribed by other statutory prohibitions.

9-85.270 Payments to Influence Appointment (18 U.S.C. §210, §211)

18 U.S.C. §210 forbids the payment of promise or payment any money or thing of value in consideration for the promise of the use of influence to secure any appointive office under the United States for any person. Solicitation of such payments or of political contributions, in return for the promise of the use of influence or of support in obtaining any such office is forbidden by 18 U.S.C. §211, which is broader in coverage than 18 U.S.C. §210 as it includes, solicitation of any thing of value in return for aiding a person to obtain any employment in an executive department or agency.

9-85.280 Sentencing

Violation of 18 U.S.C. §203 is punishable by a \$10,000 fine, or two years imprisonment, or both. Any person convicted of such a violation is automatically barred from holding any office "of honor, trust, or profit" under the United States. The same penalties apply under 18 U.S.C. §204, practice by Members of Congress in the Court of Claims.

Violation of 18 U.S.C. §205 is punishable by a \$10,000 fine, or two years imprisonment, or both; but not disqualification from office.

Violation of 18 U.S.C. §207(a), (b), or (c), is punishable by a \$10,000 fine, or two years imprisonment, or both. 18 U.S.C. §207(g) carries a maximum penalty of a \$5,000 fine, or one year imprisonment, or both.

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Violation of 18 U.S.C. §208 carries a \$10,000 fine, or two years imprisonment, or both; while violation of 18 U.S.C. §209 carries a \$5,000 fine, or one year imprisonment, or both.

Violation of 18 U.S.C. §210 or §211 is punishable by a \$1,000 fine, or one year imprisonment, or both.

9-85.290 Recommended Reading List

A. "Memorandum Re The Conflict of Interest Provisions of Public Law 87-849, 76 Stat. 1119, Approved October 23, 1962," Appendix to Part 45 of 28 C.F.R.

B. H. CONG. RES. No. 175, 85th Cong., "Code of Ethics for Government Service," passed July 11, 1968. (Contained in the Appendix to Part 45 of 28 C.F.R.)

C. Exec. Order No. 11222, May 8, 1965, 3 C.F.R. 160, as amended by Exec. Order No. 11590, April 23, 1971.

D. B. MANNING, FEDERAL CONFLICT OF INTEREST LAW (1964).

E. The Association of the Bar of the City of New York, SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAW, CONFLICT OF INTEREST AND FEDERAL SERVICE (1960).

F. Perkins, The New Federal Conflict of Interest Law, 76 HARV. L.REV. 1134 (1963).

G. S. REP. No. 2213, 87th Cong., 2d Sess. (September 29, 1962) (Titled "Strengthening the Criminal Laws Relating to Bribery, Graft and Conflict of Interest").

H. H.R. REP. No. 748, 87th Cong., 1st Sess. (July 20, 1961) (Titled "Bribery, Graft and Conflict of Interest").

I. Regulations Concerning Post Employment Conflict of Interest, 5 C.F.R. Part 737 (Office of Personnel Management Regulations).

J. Employee Responsibilities and Conduct, 5 C.F.R. Part 735 (Office of Personnel Management Regulations).

K. Standards of Conduct, 28 C.F.R. Part 45 (U.S. Department of Justice Regulations).

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L. S.REP. No. 95-170, 95th Cong., 1st Sess. (May 16, 1977) (Titled "Public Officials Integrity Act of 1977") (See 1978 U.S. CODE CONG. & AD. NEWS 4216).

M. H.R. REP. No. 96-115, 96th Cong., 1st Sess. (May 2, 1979) (Titled "Amending Section 207 of Title 18, United States Code") (See 1979 U.S. CODE CONG. & AD. NEWS 328).

N. USAM 10-2.669 et seq. (Titled "Post-Government Employment Restrictions") (Issued by the Executive Office for United States Attorneys, and containing extensive Bibliography on Post-Government Employment Restrictions).

O. Opinions of the Office of Legal Counsel, Vol. 1, Jan. 27, 1977-Dec. 31, 1977 (G.P.O. Washington, D.C. 1980) (Opinions 77-1, 77-3, 77-4, 77-5, 77-9, 77-28, 77-64, 77-72).

P. Opinions of the Office of Legal Counsel, Vol. 2, Jan. 11, 1978-Dec. 31, 1978 (G.P.O. Washington, D.C. 1981) (Opinions 78-37, 78-40, 78-56, 78-61, and 78-70).

9-85.300 BETRAYAL OF OFFICE

9-85.310 Census Violations

9-85.311 Investigative Jurisdiction

Federal Bureau of Investigation

9-85.312 Supervisory Jurisdiction

The General Litigation and Legal Advice Section of the Criminal Division supervises the citizen violations in regard to census taking. The Public Integrity Section of the Criminal Division supervises employee violations.

9-85.313 Background

The Bureau of the Census of the Department of Commerce conducts censuses and surveys of population, agriculture, manufacturing, business, and other subjects at various intervals. The censuses are taken pursuant to the Act of August 31, 1954, 68 Stat. 1012, as amended, which codified

Title 13, United States Code. The annual surveys are authorized by Section 181 of Title 13. The geographic scope of the census is explained in 13 U.S.C. §191.

The authority of Congress to enact legislation providing for the collection of data of the types mentioned and of other types called for by the Bureau's schedules of inquiries has been upheld by the courts in United States v. Moriarity, 106 Fed. 886, 891-92 (S.D. N.Y. 1901) and in United States v. Sarle, 45 Fed. 191 (D. R.I. 1891). U.S. Const., Art. I, Section 2.

9-85.314 Offenses by Census Employees

Offenses by employees of the Department of Commerce in regard to census taking are covered by 13 U.S.C. §§211-214, i.e., receiving compensation for appointment of employees, refusal or neglect to perform duties, false statements, and wrongful disclosure of information. The basic elements of the offenses denounced by 13 U.S.C. §211-214 directly involve misconduct by government employees, investigative jurisdiction of which lies with the Federal Bureau of Investigation. Where complaints or allegations are received involving possible violations of these particular statutes, they should be immediately submitted to the nearest local FBI office in the district where the alleged misconduct occurred.

9-85.315 Offenses by Others

Violations may arise from the refusal of individuals or businesses to respond to questionnaires or to furnish census enumerators with information pertaining to the censuses and surveys. The penalty provisions for violations by respondents are contained in Sections 221 through 225 of Title 13. The constitutionality of the census in general, and of these penalty provisions in particular, was challenged by two citizens as a result of two incidents during the 1960 census. In United States v. Rickenbacker, 309 F. 2d 462, 463 (2d Cir. 1962), cert. denied, 371 U.S. 962 (1963), the defendant refused to answer a supplementary household questionnaire (concerning such matters as the contents, construction, and conveniences in his house), claiming that such inquiry violated his rights under the Fourth Amendment. The Second Circuit, in finding the inquiry to be not unduly broad in scope, reasoned that "the authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively." Citing Moriarity, supra. See also, United States v. Sharrow, 309 F.2d 77 (2d Cir. 1962), cert. denied, 372 U.S. 949 (1963). (Caveat: The Rickenbacker case also presented a problem of statutory construction

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regarding the applicability of the penalty provision to instances involving the household questionnaire as opposed to inquiry regarding the respondent himself of "the family to which he belongs or is related." 13 U.S.C. §221(a). The court avoided this issue inasmuch as Rickenbacker had refused to answer either questionnaire.)

Following the 1970 Census there were five prosecutions of individuals for refusing to answer the Census questionnaire. One case originated in Delaware and the remaining four involved persons in Hawaii. The Delaware case was successfully prosecuted. However, two of the Hawaii cases were dismissed after conviction on the basis of discriminatory prosecution. The Hawaii defendants had been quite effective in publicizing their protest against answering the Census. The fact that only those who obtained media coverage of their protest were prosecuted formed the basis for the defense of discriminatory prosecution. Set forth below is a brief statement on each of the 1970 cases:

1. United States v. Little, 321 F.Supp. 388 (D. Del. 1971), defendant was found guilty and fined \$100 (which was suspended), and placed on 30 days' probation after he had completed the form.
2. United States v. Dickinson, Cr. 12796 (D. Hawaii) (unreported) defendant pleaded guilty July 1971 and was fined \$50.
3. United States v. Danks, 357 F.Supp. 193 (D. Hawaii 1973), defendant was convicted, fined \$50; he filed a motion to vacate sentence, set aside the conviction and expunge the record on the grounds that he was a victim of discriminatory prosecution. The motion was granted, the fine was returned and his record was expunged.
4. United States v. Steele, 461 F.2d 1148 (4th Cir. 1972), defendant was found guilty and he appealed on grounds of discriminatory prosecution, the conviction was reversed, and the case was dismissed.
5. United States v. Watumull, Cr. 12794 (D. Hawaii) (unreported), defendant was found guilty.

Since the decisions in United States v. Steele, supra, and United States v. Danks, supra, there have been a number of appellate decisions on discriminatory prosecution running counter to, and better reasoned than, the decisions in Steele and Danks. An example of these later decisions is found in United States v. Catlett, 584 F.2d 864 (8th Cir. 1978). Catlett was charged with willfully failing to file his income tax returns, his alleged reason being to protest the use of the funds for military purposes. Catlett's protest received widespread publicity and in his trial he raised the defense of discriminatory prosecution. The Court of Appeals upheld

Catlett's conviction and, in finding no defense of discriminatory prosecution, stated that "(s)ince the government lacks the means to investigate and prosecute every suspected violation of the tax laws, it makes good sense to prosecute those who will receive or are more likely to receive, the attention of the media."

9-85.316 Venue

Venue for prosecution of offenses under 13 U.S.C. §§221-225, inclusive, would lie in the district where the prohibited conduct occurs. The neglect or failure to furnish information when official request is made by "registered or certified mail or telegram" is penalized by 13 U.S.C. §224, and for the purpose of prosecution, prima facie evidence of an official request is defined in 18 U.S.C. §241. Venue for such prosecution under 13 U.S.C. §224 would lie in the district where the requested information was required to be filed. United States v. Lombardo, 241 U.S. 73 (1916).

9-85.317 Referrals to U.S. Attorney

Whenever the Department of Commerce feels that the facts surrounding a refusal to furnish desired census information justify prosecution, the file in each case will be forwarded by the Department to the appropriate U.S. Attorney. In all instances of refusal to answer census questionnaires, the U.S. Attorney should make certain that efforts have been made to persuade the delinquent to comply with the Census Bureau's request. Prosecution of the citizen or business involved may be instituted under 13 U.S.C. §221 or §224, respectively, if the delinquent persists in refusal to supply the required census data.

9-85.318 Injunctive Actions Against Bureau of Census

If injunctions are sought to prevent the Bureau of Census from requiring answers to one or more of the questions on the schedules of inquiries, the Civil Division should be advised so that the necessary information can be obtained from the Department of Commerce.

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9-90.000 INTERNAL SECURITY AND NATIONAL DEFENSE

The prosecution of any violation involving foreign relations, national defense or internal security shall be authorized only in accordance with USAM 9-2.132.

9-90.100 ATOMIC ENERGY ACT (42 U.S.C. §§2011-2296)

The Atomic Energy Act provides that no action shall be brought for a violation of the Act unless it is commenced by the Attorney General and the Nuclear Regulatory Commission has been advised thereof. 42 U.S.C. §2271(c). Prosecutions brought pursuant to certain sections of the Act (42 U.S.C. §§2273-2276) must be expressly authorized by the Attorney General. 42 U.S.C. §2271(c).

The Internal Security Section has supervisory jurisdiction over Atomic Energy Act violations that have national security implications, and the General Litigation and Legal Advice Section has jurisdiction over regulatory violations of the Act. Prosecutions under 42 U.S.C. §§2274-2278 and §2284 involve the national security and are supervised by the Internal Security Section. Such prosecutions shall be authorized only in accordance with USAM 9-2.132. Supervision of prosecutions brought pursuant to 42 U.S.C. §§2011-2273 and §§2280-2283 depends on whether the offense has national security implications.

9-90.110 Criminal Use of Restricted Data (42 U.S.C. §§2274-2278)

The Atomic Energy Act establishes criminal penalties for the transmittal of, receipt of, or tampering with Restricted Data with intent to injure the United States or secure an advantage to a foreign nation. 42 U.S.C. §§2274-2277. Restricted Data is data classified by the Nuclear Regulatory Commission in accordance with 42 U.S.C. §§2161-2162 because it concerns the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of special nuclear material in the production of energy. See 42 U.S.C. §2014(y).

In addition, it is a criminal offense to photograph, draw, or map certain nuclear facilities, or to use aircraft or space vehicles for such purposes without authorization. 42 U.S.C. §2278(b). This provision is analogous to 18 U.S.C. §795 and §796, which prohibit the photographing and sketching of defense installations or the use of aircraft for photographing defense installations.

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The constitutionality of 42 U.S.C. §2274, which proscribes the unauthorized communication, transmittal, or disclosure of Restricted Data with reason to believe it will injure the United States or secure an advantage to a foreign nation, has been upheld in a proceeding by the United States to preliminarily enjoin the publication of a magazine article describing how to manufacture the hydrogen bomb. United States v. Progressive, Inc., 467 F. Supp. 990 (D. Wisc. 1979), dismissed 610 F.2d 819.

9-90.120 Nuclear Sabotage (42 U.S.C. §2284)

It is a criminal violation to willfully destroy or cause physical damage to a nuclear facility or nuclear fuel, or to attempt to do so. 42 U.S.C. §2284(a) (added June 20, 1980 by Pub. L. 96-295).

The willful interruption of a nuclear facility by tampering with the machinery, components or controls, or the attempt to do so, is also a criminal violation. 42 U.S.C. §2284(b) (added Jan. 4, 1983 by Pub. L. 97-415).

9-90.130 National Security Violations of Other Atomic Energy Act Provisions

The Internal Security Section has supervisory jurisdiction over those violations of 42 U.S.C. §§2011-2273 and §§2280-2283 that affect the national security.

Examples of violations that may affect the national security include: the unauthorized production, transfer, receipt, or possession of special nuclear material (42 U.S.C. §2077(a)); the unauthorized manufacture, possession, import or export of an atomic weapon (42 U.S.C. §2122); and the unauthorized manufacture, possession, importation or exportation of a nuclear facility (42 U.S.C. §2131). Enhanced penalty provisions are triggered when these offenses are committed with an intent to injure the United States or secure an advantage to a foreign nation (42 U.S.C. §2272). An enhanced penalty provision is also provided for violations of those sections of the Act for which no criminal penalty is specifically provided when the offense is committed with intent to injure the United States or secure an advantage to a foreign nation. 42 U.S.C. §2273.

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9-90.140 Other Prohibited Transactions Involving Nuclear Materials (18 U.S.C. §831)

The Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. No. 97-351, makes it a criminal offense: (1) to unlawfully possess or use nuclear material when it will cause substantial injury, (2) to knowingly take, use without authorization, or fraudulently obtain nuclear material, or (3) to threaten or attempt to use nuclear material for illegal purposes. See 18 U.S.C. §831. Prosecutions pursuant to this section are supervised by the Internal Security Section.

9-90.200 CONTEMPT OF CONGRESS

The Internal Security Section has jurisdiction over prosecutions under 2 U.S.C. §192 in which witnesses having Communist Party or other subversive connections are involved. Section 194 of Title 2 is the companion statute to 2 U.S.C. §192 and sets forth the referral procedure.

Under the provisions of 2 U.S.C. §194, contempt of Congress cases are referred directly by the Congress by means of certification of the President of the Senate or Speaker of the House of Representatives to the appropriate U.S. Attorney "whose duty it shall be to bring the matter before the grand jury for its action." The U.S. Attorney should immediately notify this Division of the receipt of such a case and as soon as possible thereafter advise the Division of the nature of the contempt and of the U.S. Attorney's legal appraisal of the alleged offense. No prosecution shall be initiated by the U.S. Attorney without certification pursuant to 18 U.S.C. §194 and prior authorization by this Division. See USAM 9-2.132.

9-90.300 ESPIONAGE

The espionage provisions found inclusively in 18 U.S.C. §§792-799 deal with material related to "national defense." Prosecution under the espionage provisions shall be initiated in accordance with USAM 9-2.132.

9-90.310 "National Defense"

"National defense" has been construed as "a generic concept of broad connotations referring to the military and naval establishments and the related activities of national preparedness." However, the connection of

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the information to the national defense must not be a "strained one nor an arbitrary one." It must "be reasonable, direct, and natural." See Gorin v. United States, 312 U.S. 19, 32. Moreover, "information relating to the national defense" does not include information from sources lawfully accessible to the general public, information which the government has either made public or has never deemed appropriate to be withheld. See United States v. Heine, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946).

Whether the material involved in a particular case is information connected with or relating to the national defense within the meaning of these provisions is a question of fact to be determined by the jury under proper instructions from the court.

9-90.320 Communication or Receipt of Classified Information Prohibited

50 U.S.C. §783(b) makes it unlawful for any officer or employee of the United States or of any federal department or agency to communicate to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government, any information classified by the President or by the head of any such department or agency as affecting the security of the United States, knowing or having reason to know that such information has been so classified. This provision was upheld in the case of Scarbeck v. United States, 317 F. 2d 546 (D.C. Cir. 1962), cert. denied, 374 U.S. 586.

50 U.S.C. §783(c) makes it unlawful for any agent or representative of any foreign government to obtain, receive, or attempt to obtain or receive, directly or indirectly from any officer or employee of the United States or of any federal department or agency any information classified as affecting the security of the United States. See also USAM 9-90.940, infra, (Classified Information Procedures Act of 1980).

9-90.330 Computer Espionage

Section 1030(a)(1) of Title 18, United States Code, makes it a felony to knowingly access a computer without authorization, and obtain information that has been classified for national defense or foreign relations purposes (or restricted data as defined by the Atomic Energy Act), with intent or reason to believe that such information is to be used to the injury of the United States or to the advantage of a foreign nation.

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This provision is similar to an offense punishable under an Espionage Act provision: knowingly obtaining national defense information with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation. See 18 U.S.C. §793(b). Both provisions are aimed at the act of illegally obtaining classifiable information. Although Section 1030(a)(1) is narrower than the espionage provision in that it applies only when classified information is obtained through unauthorized access to a computer, it is broader than Section 793(b) in that it pertains to not only national defense information, but also to information that has been classified for foreign relations purposes and to sensitive atomic national defense information.

The penalty provisions of the two statutes are similar: substantive violations of either statute are subject to imprisonment for not more than ten years, a fine not to exceed \$10,000 (or, for a violation of the computer theft provision, a fine of twice the value obtained by the offense), or both. Fines of the same magnitude may be imposed for conspiracies to violate the espionage provision subject the offender to longer potential term of imprisonment (ten years) than conspiracies to violate the computer theft statute (five years). Unlike the espionage provision, the computer theft statute provides for enhanced penalties for repeat offenders: subsequent offenses are punishable by a fine of not more than the greater of \$100,000 or twice the value obtained by the offense, or imprisonment for not more than twenty years, or both.

The essential elements of a Section 1030(a)(1) violation are:

- (1) knowingly accessing a computer;
- (2) in the absence of authorization, or beyond the scope of one's authorization;
- (3) thereby obtaining information;
- (4) which information has been classified for national defense or foreign relations reasons, or constitutes restricted data as defined in the Atomic Energy Act; and
- (5) doing so with intent or reason to believe that the information so obtained is to be used to the injury of the United States, or to the advantage of a foreign nation.

Element (1) requires that a computer be accessed. The term computer is defined in 18 U.S.C. §1030(e).

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With respect to element (4), the requirement that the information "has been determined by the United States Government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations," it is unlikely that the government will be required to prove that the information was properly classified because its release would cause the harm specified in the law or order governing its classification. See Scarbeck v. United States, 317 F. 2d 546 (D.C. Cir. 1962), cert. denied, 374 U.S. 856, reh'g denied, 375 U.S. 874 (1963) (in prosecution of foreign service officer for communicating classified information to a foreign agent, in violation of 50 U.S.C. §783, government was not required to prove that the classified information was properly classified "as affecting the security of the United States").

The scienter requirement of 18 U.S.C. §1030(a)(1) is twofold: (1) the defendant must have knowingly accessed a computer, and (2) he or she must have obtained the classified information "with the intent or reason to believe that [it] is to be used to the injury of the United States, or to the advantage of any foreign nation." The second scienter requirement is taken directly from the Espionage Act, 18 U.S.C. §794, which has been held to require "bad faith." See Cofin v. United States, 312 U.S. 19, reh'g denied, 312 U.S. 713 (1941).

Prosecutions under 18 U.S.C. §1030(a)(1) shall be initiated in accordance with USAM 9-2.132.

9-90.400 FALSE STATEMENTS

The Internal Security Section has jurisdiction over cases which involve false statements concerning membership in organizations advocating the violent overthrow of federal and state governments, made to agencies and departments of the United States, in violation of 18 U.S.C. §1001 and similar statutes. Cases frequently arise in connection with the filing of applications for government employment, loyalty certificates for personnel of the Armed Forces, and personnel security questionnaires submitted to the Department of Defense and the Atomic Energy Commission for security clearance. Prosecutions in such cases shall be initiated in accordance with USAM 9-2.132.

9-90.500 EXPORT CONTROL

The prosecution of any violation of export control statutes shall be authorized only in accordance with USAM 9-2.132 unless otherwise noted.

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9-90.510 Export Administration Act: 50 U.S.C. App. §§2401-2420

The Export Administration Act, 50 U.S.C. App. §§2401-2420, and the rules and regulations promulgated thereunder, 15 C.F.R. §§368-399, prohibit the exportation of strategic goods and technologies without a license from the Department of Commerce. Violations are investigated by the Commerce Department of the Customs Service.

Prosecution of Export Administration Act violations shall not be undertaken without the prior approval of the Criminal Division. See USAM 9-2.132. However, as in cases under the neutrality laws (see USAM 9-90.830), the U.S. Attorney is authorized to take whatever action is necessary to prevent the commission of an offense where time does not permit seeking prior authorization. Often an illegal exportation can be circumvented by the seizure of the items that are about to be exported. Seizure of strategic goods and technologies that are about to be exported in violation of the Export Administration Act is authorized by 22 U.S.C. §401. United States v. Marri, 321 F. Supp. 59, 63 (E.D. N.Y. 1970); see United States v. Various Pieces of Semiconductor Manufacturing Equipment, 649 F.2d 606 (8th Cir. 1981).

9-90.520 Arms Export Control Act: 22 U.S.C. §2778

The Arms Export Control Act, 22 U.S.C. §2778, and the rules and regulations promulgated thereunder, 22 C.F.R. §§121-130, prohibit the importation and exportation of arms, ammunition and implements of war without a license from the Department of State. Violations are investigated by the Customs Service.

Unless the unlicensed shipment has no relevance to the foreign relations of the United States (e.g., smuggling small quantities of weapons), prosecution of violations of the Arms Export Control Act should not be undertaken without prior approval of the Criminal Division. See USAM 9-2.132. However, as in cases under the neutrality laws (see USAM 9-90.830), the U.S. Attorney is authorized to take whatever action is necessary to prevent the commission of an offense where time does not permit seeking prior authorization. Often an illegal exportation can be circumvented by the seizure of the munitions pursuant to the provision of 22 U.S.C. §401.

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9-90.530 Trading With the Enemy Act: 50 U.S.C. App. §5(b)/Foreign Assets Control

Pursuant to the authority granted in the Trading With the Enemy Act (50 U.S.C. App. §5(b)), the Secretary of the Treasury has promulgated regulations prohibiting unlicensed transactions between U.S. nationals and certain designated foreign countries and their nationals. See 31 C.F.R. §500.101 to §500.809. Investigations of violations of the Foreign Assets Control Regulations are conducted by the Treasury Department, and cases are referred by that Department to the Internal Security Section and to the U.S. Attorneys for prosecution.

9-90.540 International Emergency Economic Powers Act: 50 U.S.C. §§1701-1706

Pursuant to the International Emergency Economic Powers Act (50 U.S.C. §§1701-1706), the President is granted authority to declare a national emergency with respect to any unusual and extraordinary threat, which has its source outside the United States, and to take action to meet that property in which any foreign country or a national thereof has an interest. Criminal violations are investigated by the Treasury Department. Prosecution of violations which involve the exportation of property in which a foreign national or foreign country has an interest shall not be undertaken without the prior approval of the Criminal Division. See USAM 9-2.132.

9-90.600 REGISTRATION

The Internal Security Section administers and enforces three registration statutes: (1) the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. §§611 et seq.); (2) the Voorhis Act (18 U.S.C. §2386); and (3) the Act of August 1, 1956 (50 U.S.C. §§851-857), and two related statutes: 2 U.S.C. §441e and 18 U.S.C. §219. The registration statutes and the conflicts provisions (18 U.S.C. §219) require the express prior approval of the Criminal Division or higher authority before prosecution may be initiated. See USAM 9-2.132. In addition, the Section is responsible for the supervision of prosecutions under the Federal Regulation of Lobbying Act (2 U.S.C. §261 et seq.) and 46 U.S.C. §1225. These statutes and the foreign campaign contribution violation (2 U.S.C. §441e) require consultation prior to instituting grand jury proceedings, as well as seeking an indictment of filing an information. USAM

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arrangements will be made on a case-by-case basis for cooperation between the U.S. Attorney and the attorneys of the Internal Security Section.

9-90.610 Foreign Agents Registration Act: 22 U.S.C. §§611 et seq.

The Foreign Agents Registration Act requires the registration with the Attorney General of agents of foreign principals engaged in political or quasi-political activities, unless exempt. Inquiries regarding administration and enforcement of the Act should be directed to the Registration Unit, Criminal Division, Department of Justice, Washington, D.C. 20530. No prosecution under the Act may be instituted without the express prior approval of the Criminal Division or higher authority. See USAM 9-2.132.

9-90.620 Public Officials Acting as Agents of Foreign Principals: 18 U.S.C. §219

It is illegal for a public official, as defined, to act as an agent of a foreign principal in such a manner as to require his/her registration under the Foreign Agents Registration Act. See 18 U.S.C. §219. This prohibition does not apply to the employment of an agent of a foreign principal as a special government employee in any case where the head of the employing agency certifies that such employment is required in the national interest. No prosecution under this section should be instituted without the express authorization of the Criminal Division or higher authority. See USAM 9-2.132.

Special note should be made that Members of Congress are now specifically included in the category of people covered by 18 U.S.C. §219 and that an apparently unintended effect of the use of the term public official is to make it a felony for a person to serve as a juror in a federal court if he/she is an agent of a foreign principal required to register.

9-90.630 Political Contributions by Foreign Nationals: 2 U.S.C. §441e

The making of political contributions by a foreign national directly or through any other person in connection with any election, convention or caucus for any political office is illegal under 2 U.S.C. §441e.

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9-90.640 Voorhis Act: 18 U.S.C. §2386

The Voorhis Act requires registration with the Attorney General of certain organizations, the purpose of which is to overthrow the government or a political subdivision thereof by the use of force and violence. The rules and regulations promulgated thereunder are set forth in 28 C.F.R. §10.1 et seq.

9-90.650 Act of August 1, 1956: 50 U.S.C. §§851-857

The registration with the Attorney General of certain persons who have knowledge of or have received instruction or assignment in the espionage, counter espionage or sabotage services or tactics of a foreign government rules and regulations promulgated pursuant to this Act are set forth in 28 C.F.R. §12.1 et seq.

9-90.660 Federal Regulation of Lobbying Act: 2 U.S.C. §261 et seq.

The Lobbying Act requires registration with the Clerk of the House of Representatives and the Secretary of the Senate of any person engaged for pay in attempting to influence the passage or defeat of legislation by Congress and the filing of reports on a calendar quarter basis.

9-90.670 Employment of Persons to Appear Before Congress or Government Agency: 46 U.S.C. §1225

It is illegal for any person employed or retained by any shipbuilder or ship operator, or subsidiary, affiliate, associate or holding company or such shipbuilder or ship operator, holding or applying for a contract under Chapter 27 of the Merchant Marine Act, 1936, to present, advocate or oppose any matter within the scope of the Shipping Act, 1916, as amended; the Merchant Marine Act, 1970, as amended; the Merchant Marine Act, 1928, as amended; the Intercoastal Shipping Act, 1933, or Chapter 27, before Congress or any committee thereof, or before the Federal Maritime Board, or the Secretary of Commerce unless the shipbuilder or ship operator has filed with the Secretary of Commerce a statement of the subject matter in respect of which such person is retained or employed, the nature and character of compensation received or to be received by such person directly or indirectly.

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9-90.700 INTELLIGENCE IDENTITIES PROTECTION ACT (50 U.S.C. §§421-426)

The Intelligence Identities Protection Act, which was enacted on June 23, 1982, amends the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States Intelligence officers, agents, informants, and sources. See 50 U.S.C. §421.

It establishes three distinct criminal offenses for the intentional disclosure to unauthorized persons of information identifying covert agents.

A. The first section, 50 U.S.C. §421(a), applies to those individuals who have been given authorized access to classified information which identifies a covert agent. Such an individual is subject to a fine of \$50,000 or imprisonment for ten years, or both, if he/she intentionally discloses, to any individual not authorized to receive classified information, any information identifying such agent, knowing that the information disclosed identifies such agent, and knowing that the United States is taking affirmative measures to conceal the agent's intelligence relationship to the United States.

B. The second section, 50 U.S.C. §421(b), applies to those who learn the identity of a covert agent "as a result of having authorized access to classified information." The distinction between this category of offenders and the category covered by 50 U.S.C. §421(a), is that under 50 U.S.C. §421(a), the offender must have had authorized access to specific classified information which identifies the covert agent whose disclosure is basis for the prosecution, while 50 U.S.C. §421(b) requires that the identity be learned only "as a result" of authorized access to classified information in general. Offenders under 50 U.S.C. §421(b) are subject to a fine of \$25,000 or five years in prison, or both. With the two exceptions discussed above, i.e., the relationship of the offender to the classified information and the penalty for conviction, the two offenses, and the elements of proof thereof, are the same.

C. The third section, 50 U.S.C. §421(c), applies to any person who discloses the identity of a foreign agent. As is required by 50 U.S.C. §421(a) & (b), the government must prove that the disclosure was intentional and that the relationship was classified. The government must also prove that the offender knew that the government was taking affirmative measures to conceal the classified intelligence relationship of the covert agent. The government must prove that the defendant knew that he/she was disclosing a classified relationship the government seeks by affirmative measures to conceal.

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Unlike the previous two sections, authorized access to classified information is not a prerequisite to conviction under 50 U.S.C. §421(c). The United States must prove that the disclosure was made in the course of a pattern of activities, i.e., a series of acts having a common purpose or objective; that the pattern of activities was intended to identify and expose covert agents; and that there was reason to believe such activities would impair or impede the foreign intelligence activities of the United States.

The Act establishes certain statutory defenses, such as the prior public disclosure by the United States of the intelligence relationship (50 U.S.C. §422(a)).

9-90.800 OTHER - I

9-90.810 Sabotage

The federal sabotage laws are found in 18 U.S.C. §2151 through §2157. Prosecutions shall be initiated only in accordance with USAM 9-2.132.

9-90.820 Rebellion or Insurrection

18 U.S.C. §2383 penalizes those individuals who incite, assist or engage in any rebellion against the authority or laws of the United States. This statute, although similar to the offense of treason (United States v. Greathouse, 4 Sawyer 457 (C.C. Cal., 1863)), is designed to encompass overt acts of rebellion directed against the federal government. Prosecutions thereunder shall be initiated in accordance with USAM 9-2.132.

9-90.830 Neutrality Laws

Chapter 45 of Title 18 (18 U.S.C. §§951-969) entitled "Foreign Relations" covers the conduct of individuals within the United States with respect to foreign governments. The Federal Bureau of Investigation has investigative jurisdiction over violations of 18 U.S.C. §§951-962.

No prosecution under these statutes should be initiated without the express prior approval of the Criminal Division. See USAM 9-2.132. In those instances where arrests must be made in order to prevent the commission of the offense and time does not permit obtaining approval of

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the Division, the U.S. Attorney is authorized in his/her discretion to take whatever action he/she deems appropriate to preserve the interests of the government. In this event, the U.S. Attorney should immediately notify the Division as to the action taken and the attendant circumstances.

The amendment of 18 U.S.C. §951 by the Comprehensive Crime Control Act now requires that persons acting as agents of foreign governments notify the Attorney General rather than the Secretary of State. This amendment also provides a definition of the term "agent of a foreign government" and specific exemptions from the notification requirement.

9-90.840 Passport Matters

The Internal Security Section has jurisdiction over prosecution under 8 U.S.C. §1185(b) and 18 U.S.C. §§1542-1544 when the defendants have subversive connections or where travel to a restricted country is involved. In these cases, the express authorization of the Assistant Attorney General in charge of the Criminal Division must be obtained before prosecution is instituted. See USAM 9-2.132.

9-90.850 Sedition

Sedition and related offenses are covered in 18 U.S.C. §§2387-2391. 18 U.S.C. §2387 operates in time of peace, 18 U.S.C. §2388 in time of war.

9-90.851 Freedom of Speech

18 U.S.C. §2387 is not intended to limit expressions of opinion or criticism of the government, its policies (civil or military), or any officials or officers or their actions so long as such expressions are not made with intent to bring about the unlawful situations covered by this section and do not have a natural tendency and a reasonable probability of effecting these forbidden results. See Dunne v. United States 138 F.2d 137 (8th Cir.), cert. denied, 320 U.S. 790.

9-90.860 Seditious Conspiracy

Seditious conspiracy is covered in 18 U.S.C. §2384. Prosecutions shall be initiated in accordance with USAM 9-2.132.

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9-90.861 Necessity of Force

Force is an essential element of the offense described in 18 U.S.C. §2384, and mere solicitation or entreaty without a purpose of applying or using force to accomplish the ends sought to be attained is outside the scope of this section. See Wells v. United States, 257 F. 605 (9th Cir.). The force contemplated must be force directed against the officers of the government charged with duty. A conspiracy to prevent by force private individuals from producing goods to fulfill their contracts with the government was held not to be punishable under former Section 6. Haywood v. United States, 268 F. 795 (7th Cir.), cert. denied, 256 U.S. 689. See also Anderson v. United States, 273 F. 20 (8th Cir.), cert. denied, 257 U.S. 647; Baldwin v. Franks, 120 U.S. 678.

9-90.862 Necessity of an Overt Act

An overt act is not an ingredient of an offense under 18 U.S.C. §2384. Byrant v. United States, 261 F. 141 (8th Cir.).

9-90.900 OTHER - II

9-90.910 Smith Act

The Smith Act, originally part of the Alien Registration Act of 1940, is now found in 18 U.S.C. §2385. In brief, the Act proscribes teaching or advocating the duty or necessity of overthrowing or destroying the

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Government of the United States by force or violence, publishing or circulating literature which so teaches or advocates, organizing or helping to organize a group or assembly of persons who so teach or advocate, membership in any such group or assembly knowing the purposes thereof, or conspiring to do any of the foregoing. In Dennis v. United States, 341 U.S. 494, the constitutionality of the teaching and organization section of the Act was upheld and in Scales v. United States, 367 U.S. 203, the Supreme Court upheld the constitutionality of the membership provisions. In the latter case, the Court also held that section 4(f) of the Internal Security Act of 1950, which provided, in part, that neither "the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of that act or any other criminal statute, did not repeal pro tanto the membership clause of the Smith Act by excluding from the reach of that clause membership in any Communist organization.

Prosecutions under the Smith Act shall be initiated in accordance with USAM 9-2.132.

9-90.920 Treason

The crime of treason is covered in 18 U.S.C. §2381. Prosecutions for treason shall be initiated in accordance with USAM 9-2.132.

There have been no recent prosecutions instituted under the levying war clause of the treason statute. However, the clause prohibiting the giving of aid and comfort has been invoked by the government since the beginning of World War II in the following cases: Cramer v. United States, 325 U.S. 1; Haupt v. United States, 330 U.S. 631; Stephan v. United States, 133 F.2d 87 (6th Cir.) cert. denied, 318 U.S. 78; Chandler v. United States, 171 F.2d 921 (1st Cir.), cert. denied, 336 U.S. 918; East v. United States, 184 F.2d 131 (1st Cir.), cert. denied, 340 U.S. 939; Gillars ("Axis Sally") v. United States, 182 F.2d 962 (D.C. Cir.); Burgman v. United States, 188 F.2d 637 (D.C. Cir.) cert. denied, 342 U.S. 838; United States v. Monti, 100 F. Supp. 209 (E.D. N.Y.); D'Aguino ("Tokyo Rose") v. United States, 192 F.2d 338 (9th Cir.), cert. denied, 343 U.S. 935; Kawakita v. United States, 343 U.S. 717.

9-90.930 Miscellaneous

Violations of other statutes not primarily concerned with internal security may on occasion relate to security matters. As in other cases

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involving subversive activities, prosecution shall not be instituted without the express authorization of the Assistant Attorney General in charge of the Criminal Division or higher authority. See USAM 9-2.132. The following general statutes may be involved in cases relating to internal security; accessory after the fact, 18 U.S.C. §3; harboring, 18 U.S.C. §1071 and §1072; jumping bail, 18 U.S.C. §3150; obstruction of justice, 18 U.S.C. §§1501-1507.

9-90.940 Classified Information Procedures Act of 1980

The Internal Security Section is responsible for the implementation of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. (Supp. V 1981), which established certain pretrial, trial, and appellate procedures for criminal cases in which there is a possibility that classified information will be disclosed. Therefore, the Internal Security Section is to be consulted in any case in which there is a possibility that classified information will be disclosed or will play a role in the prosecutive decision.

In criminal cases in which there is a possibility that classified information will be revealed at trial, the issue often arises of whether the importance of going forward with the prosecution outweighs the risk of damage to the national security which may result from the public disclosure of the classified information at the trial. In the past, the government has been impeded in making informed resolutions of this issue because of the absence of uniform procedures permitting the government to ascertain before trial what classified information the defense will seek to disclose, and whether the court will determine that it is admissible. In addition, in those cases in which the decision is made to prosecute, resolution of issues relating to classified information has often been unnecessarily burdensome. CIPA was designed to address these problems.

The key elements of CIPA include: (1) a provision for a pretrial conference, on motion of any party, to consider matters relating to classified information that may arise in connection with the prosecution; (2) a requirement that the defense notify the government of any classified information it will seek to introduce at trial or at a pretrial proceeding; (3) a provision for a pretrial hearing to determine the admissibility of classified information; (4) a provision authorizing the court to issue an order to protect against the disclosure of classified information made available by the United States to any defendant; (5) a provision permitting the use of summaries or admissions of relevant facts as alternatives to the disclosure of specific classified information;

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(6) a provision for interlocutory appeals by the government of adverse rulings concerning the admissibility of classified information, the use of substitutes for the disclosure of specific classified information, and the sanctions imposed by the court for the government's refusal to permit disclosure of classified information which has been found to be admissible; (7) a requirement that the Attorney General issue guidelines specifying the factors to be used by the Department of Justice in reaching a decision as to whether to prosecute a violation of federal law in which there is a possibility that classified information will be revealed; and (8) a requirement that the Attorney General: (a) make semi-annual reports to Congress concerning cases in which prosecution is declined under Section 12(a) of the Act, and (b) make an annual report to Congress concerning the operation and effectiveness of the Act.

CIPA also required that the Chief Justice issue security procedures to protect against the compromise of classified information which is in the custody of the courts. A copy of these procedures, which became effective on March 29, 1981, appears at USAM 9-90.941.

9-90.941 Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information

A. Purpose. The purpose of these procedures is to meet the requirements of Section 9(a) of the Classified Information Procedures Act of 1980, Pub. L. 96-456, 94 Stat. 2025, which in pertinent part provides that:

. . . [T]he Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court . . .

These procedures apply in all proceedings in criminal cases involving classified information, and appeals therefrom, before the United States district courts, the courts of appeal and the Supreme Court.

B. Court Security Officer. In any proceeding in a criminal case or appeal therefrom in which classified information is within, or reasonably expected to be within, the custody of the court, the court shall designate

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a court security officer. The Attorney General or the Department of Justice Security Officer, with the concurrence of the head of the agency or agencies from which the classified information originates, or their representatives, shall recommend to the court persons qualified to serve as court security officers. The court security officer shall be selected from among those persons so recommended.

The court security officer shall be an individual with demonstrated competence in security matters, and shall, prior to designation, have been certified to the court in writing by the Department of Justice Security Officer as cleared for the level and category of classified information that will be involved. The court security officer may be an employee of the Executive Branch of the government detailed to the court for this purpose. One or more alternate court security officers, who have been recommended and cleared in the manner specified above, may be designated by the court as required.

The court security officer shall be responsible to the court for document, physical, personnel and communications security, and shall take measures reasonably necessary to fulfill these responsibilities. The court security officer shall notify the court and the Department of Justice Security Officer of any actual, attempted, or potential violation of security procedures.

C. Secure Quarters. Any in camera proceeding--including a pretrial conference, motion hearing, or appellate hearing--concerning the use, relevance, or admissibility of classified information, shall be held in secure quarters recommended by the court security officer and approved by the court.

The secure quarters shall be located within the federal courthouse, unless it is determined that none of the quarters available in the courthouse meets, or can reasonably be made equivalent to, security requirements of the Executive Branch applicable to the level and category of classified information involved. In that event, the court shall designate the facilities of another United States government agency, recommended by the court security officer, which is located within the vicinity of the courthouse as the site of the proceedings.

The court security officer shall make necessary arrangements to ensure that the applicable Executive Branch standards are met and shall conduct or arrange for such inspection of the quarters as may be necessary. The court security officer shall, in consultation with the U.S. Marshall, arrange for the installation of security devices and take

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such other measures as may be necessary to protect against any unauthorized access to classified information. All the aforementioned activity shall be conducted in a manner which does not interfere with the orderly proceedings of the court. Prior to any hearing or other proceeding, the court security officer shall certify in writing to the court that the quarters are secure.

D. Personnel Security--Court Personnel. No person appointed by the court or designated for service therein shall be given access to any classified information in the custody of the court, unless such person has received a security clearance as provided herein and unless access to such information is necessary for the performance of an official function. A security clearance for justices and judges is not required, but such clearance shall be provided upon the request of any judicial officer who desires to be cleared.

The court shall inform the court security officer or the attorney for the government of the names of court personnel who may require access to classified information. That person shall then notify the Department of Justice Security Officer, who shall promptly make arrangements to obtain any necessary security clearances and shall approve such clearances under standards of the Executive Branch applicable to the level and category of classified information involved. The Department of Justice Security Officer shall advise the court in writing when the necessary security clearances have been obtained.

If security clearances cannot be obtained promptly, personnel in the Executive Branch having the necessary clearances may be temporarily assigned to assist the court. If a proceeding is required to be recorded and an official court reporter having the necessary security clearance is unavailable the court may request the court security officer or the attorney for the government to have a cleared reporter from the Executive Branch designated to act as reporter in the proceedings. The reporter so designated shall take the oath of office as prescribed by 28 U.S.C. §753(a).

Justices, judges and cleared court personnel shall not disclose classified information to anyone who does not have a security clearance and who does not require the information in the discharge of an official function. However, nothing contained in these procedures shall preclude a judge from discharging his official duties, including giving appropriate instructions to the jury. ← his/her

Any problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action.

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E. Persons Acting for the Defendant. The government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act.

F. Jury. Nothing contained in these procedures shall be construed to require an investigation or security clearance of the members of the jury or interfere with the functions of a jury, including access to classified information introduced as evidence in the trial of a case.

After a verdict has been rendered by a jury, the trial judge should consider a government request for a cautionary instruction to jurors regarding the release or disclosure of classified information contained in documents they have reviewed during the trial.

G. Custody and Storage of Classified Materials.

1. Materials Covered. These security procedures apply to all papers, documents, motions, pleadings, briefs, notes, records of statements involving classified information, notes relating to classified information taken during in camera proceedings, orders, affidavits, transcripts, untranscribed notes of a court reporter, magnetic recordings, or any other submissions or records which contain classified information as the term is defined in Section 1(a) of the Act, and which are in the custody of the court. This includes, but is not limited to (1) any motion made in connection with a pretrial conference held pursuant to Section 2 of the Act, (2) written statements submitted by the United States pursuant to Section 4 of the Act, (3) any written statement or written notice submitted to the court by the defendant pursuant to Section 5(a) of the Act, (4) any petition or written motion made pursuant to Section 6 of the Act, (5) any description of, or reference to, classified information contained in papers filed in an appeal, pursuant to Section 7 of the Act, and (6) any written statement provided by the United States or by the defendant pursuant to Section 8(c) of the Act.

2. Safekeeping. Classified information submitted to the court shall be placed in the custody of the court security officer who shall be responsible for its safekeeping. When not in use, the court security officer shall store all classified materials in a safe or safe-type steel file container with built-in, dial-type, three-position, changeable combinations which conform to the General Service Administration standards for security containers. Classified information shall be segregated from other information unrelated to

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the case at hand by securing it in a separate security container. If the court does not possess a storage container which meets the required standards, the necessary storage container or containers are to be supplied to the court on a temporary basis by the appropriate Executive Branch agency as determined by the Department of Justice Security Officer. Only the court security officer and alternate court security officer(s) shall have access to the combination and the contents of the container unless the court, after consultation with the security officer, determines that a cleared person other than the court security officer may also have access.

For other than temporary storage (e.g., brief court recess), the court security officer shall insure that the storage area in which these containers shall be located meets Executive Branch standards applicable to the level and category of classified information involved. The secure storage area may be located within either the federal courthouse or the facilities of another United States government agency.

3. Transmittal of Classified Information. During the pendency of a trial or appeal, classified materials stored in the facilities of another United States government agency shall be transmitted in the manner prescribed by the Executive Branch security regulations applicable to the level and category of classified information involved. A trust receipt shall accompany all classified materials transmitted and shall be signed by the recipient and returned to the court security officer.

H. Operating Routine.

1. Access to Court Records. Court personnel shall have access to court records only as authorized. Access to classified information by court personnel shall be limited to the minimum number of cleared persons necessary for operating purposes. Access includes presence at an in camera hearing or any other proceeding during which classified information may be disclosed. Arrangements for access to classified information in the custody of the court by court personnel and persons acting for the defense shall be approved in advance by the court, which may issue a protective order concerning such access.

Except as otherwise authorized by a protective order, persons acting for the defendant will not be given custody of classified information provided by the government. They may, at the discretion of the court, be afforded access to classified information provided

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by the government in secure quarters which have been approved in accordance with §3 of these procedures, but such classified information shall remain in the control of court security officer.

2. Telephone Security. Classified information shall not be discussed over standard commercial telephone instruments or office intercommunication systems.

3. Disposal of Classified Material. The court security officer shall be responsible for the secure disposal of all classified materials which are not otherwise required to be retained.

I. Records Security.

1. Classification Markings. The court security officer, after consultation with the attorney for the government, shall be responsible for the marking of all court documents containing classified information with the appropriate level of classification and for indicating thereon any special access controls that also appear on the face of the document from which the classified information was obtained or that are otherwise applicable.

Every document filed by the defendant in the case shall be filed under seal and promptly turned over to the court security officer. The court security officer shall promptly examine the document and, in consultation with the attorney for the government or representative of the appropriate agency, determine whether it contains classified information. If it is determined that the document does contain classified information, the court security officer shall ensure that it is marked with the appropriate classification marking. If it is determined that the document does not contain classified information, it shall be unsealed and placed in the public record. Upon the request of the government, the court may direct that any document containing classified information shall thereafter be protected in accordance with §7 of these procedures.

2. Accountability System. The court security officer shall be responsible for the establishment and maintenance of a control and accountability system for all classified information received by or transmitted from the court.

J. Transmittal of the Record on Appeal. The record on appeal, or any portion thereof, which contains classified information shall be transmitted to the court of appeals or to the Supreme Court in the manner specified in §7(c) of these procedures.

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K. Final Disposition. Within a reasonable time after all proceedings in the case have been concluded, including appeals, the court release to the court security officer all materials containing classified information. The court security officer shall then transmit them to the Department of Justice Security Officer who shall consult with the originating agency to determine the appropriate disposition of such materials. Upon the motion of the government, the court may order the return of the classified documents and materials to the department or agency which originated them. The materials shall be transmitted in the manner specified in §7(c) of these procedures and shall be accompanied by the appropriate accountability records required by §9(b) of these procedures.

L. Expenses. Expenses of the United States Government which arise in connection with the implementation of these procedures shall be borne by the Department of Justice or other appropriate Executive Branch agency.

M. Interpretation. Any question concerning the interpretation of any security requirement contained in these procedures shall be resolved by the court in consultation with the Department of Justice Security Officer and the appropriate Executive Branch agency security officer.

N. Term. These procedures shall remain in effect until modified in writing by The Chief Justice after consultation with the Attorney General of the United States, the Director of Central Intelligence, and the Secretary of Defense.

O. Effective Date. These procedures shall become effective forty-five days after the date of submission to the appropriate Congressional Committees, as required by the Act.

The above security procedures were issued on February 12, 1981, by Chief Justice Burger after taking into account the views of the Attorney General of the United States, the Director of Central Intelligence, and the Secretary of Defense, as required by law.

9-90.942 Pre-indictment Use of Classified Information

When interviewing witnesses, classified information can only be discussed with witnesses who have an appropriate clearance. The classifying agency should be contacted prior to the interview to determine if witness is cleared. If not, declassification of material or utilization of a non-classified summary which satisfies the needs of the investigation could be sought.

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Disclosures of classified information to the grand jury are not authorized as a result of the secrecy provisions of Rule 6 of the Federal Rules of Criminal Procedure. For guidance on how to handle classified information before a grand jury, contact the Chief of the Internal Security Section, Criminal Division.

Witnesses, subjects or targets of an investigation who have lawfully acquired classified information from non-public sources cannot lawfully disclose such information to their uncleared attorneys. The attorneys must seek either to have the information declassified, secure a security clearance, or obtain the information pursuant to an appropriate protective order.

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9-100.000 THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF
1970 - I

The Comprehensive Drug Abuse Prevention and Control Act, Pub. Law 91-513, became law on October 27, 1970. Some parts of the Act became effective immediately. Others, notably the penal provisions, became effective on May 1, 1971.

The Act is divided into four titles. Title I establishes certain drug rehabilitation programs, under the jurisdiction of the Department of Health, Education and Welfare. Titles II and III constitute a complete revision, consolidation and reconstruction of federal statutes dealing with legitimate and illegitimate trafficking in narcotics and dangerous drugs. Title IV provides that the Secretary of Health, Education and Welfare shall submit annual reports to Congress concerning certain advisory councils.

This chapter deals solely with Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act. Title II is known as the Controlled Substances Act; Title III is the Controlled Substances Import and Export Act.

Title II defines pertinent terms, establishes schedules of controlled substances for the control of legitimate dealings in such substances, and sets up a registration system for all persons lawfully dealing in controlled substances. Title II also contains extensive penal provisions relating to illicit trafficking in controlled substances as well as administrative provisions relating to administrative inspections, forfeitures, injunctions, etc.

Title III provides for the regulation of the importation and exportation of controlled substances. To do this, it establishes a registration system applicable to those authorized to import and export controlled substances. It also establishes penalties for violation of its provisions.

What follows is an analysis of the provisions of Title II and III with comments regarding those provisions which seem to be of primary interest to prosecutors. Criminal Division intends to update this chapter from time to time and would appreciate comments and suggestions from prosecutors in this regard.

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9-100.100 TITLE II - Parts A, B AND C

9-100.110 Part A - Short Title, Findings and Declaration, Definitions

9-100.111 Short Title - Section 100 - 21 U.S.C. §801 note

This Section provides that Title II of the Comprehensive Drug Abuse Prevention and Control Act is to be cited as the "Controlled Substances Act."

9-100.112 Findings and Declarations - Section 101 - 21 U.S.C. §801

This section contains findings and declarations by Congress regarding the need for federal regulation of controlled substance activities. The section spells out Congress' intent to regulate controlled substances under the commerce power and indicates that such regulation applies to all controlled substances, regardless of whether they move in interstate commerce.

Challenges to the constitutionality of the Controlled Substances Act have been uniformly rejected. See United States v. Lopez, 459 F.2d 949 (5th Cir.), cert. denied sub. nom., Merena v. United States, 409 U.S. 878 (1972); United States v. Daras, 462 F.2d 1361 (9th Cir.), cert. denied, 409 U.S. 1046 (1972); United States v. Scales, 464 F.2d 371 (6th Cir. 1972); United States v. Mather, 465 F.2d 1035, 1037 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); United States v. Rodriguez-Camacho, 468 F.2d 1220 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973); United States v. Richardson, 477 F.2d 1280 (8th Cir.), cert. denied, 414 U.S. 843 (1973). See also, United States v. Simpson, 481 F.2d 582 (5th Cir.), reh. denied, 481 F.2d 1404, cert. denied, 414 U.S. 1095 (1973), which upheld the constitutionality of the special parole term which is an adjunct of prison sentences imposed for controlled substance felonies. And see United States v. Kiffer, 477 F.2d 349 (2d Cir.), cert. denied sub. nom. Harmash v. United States, 414 U.S. 831 (1973), which upheld the constitutionality of the Controlled Substances Act's prohibitions as they apply to marihuana.

9-100.113 Definitions - Section 102 - 21 U.S.C. §802

This section contains 26 definitions. Of principal interest are the following:

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A. Addict

Addict is defined as anyone habitually using a narcotic drug so as to endanger public morals, health, safety, or welfare; or one who is so far addicted to the use of narcotics as to have lost the power of self control.

B. Administer

Administer refers to the direct application of a controlled substance to the body of a patient or research subject by a practitioner or his/her agent or by the patient or research subject under the practitioner's direction.

C. Controlled Substance

Controlled Substance refers to any drug or other substance or immediate precursor which is found in schedules I through V of the Controlled Substances Act.

D. Counterfeit Substance

Counterfeit Substance is a controlled substance which falsely bears the name, mark, or likeness of the true manufacturer, distributor, or dispenser of the controlled substance. (The penalty provisions relating to counterfeit substances are found in sections 401(a)(2) and 403(a)(5) of the Controlled Substances Act (21 U.S.C. §841(a)(2) and 21 U.S.C. §843(a)(5)).

E. Dispense

Dispense refers to the delivery of a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner and encompasses incidental functions such as prescribing, administering, packaging, labeling and compounding. A word of warning. In light of the manner in which "dispense" is defined, one who "dispenses" a controlled substance cannot be said to violate the Act's provisions. In other words, the activities encompassed within the definition of "dispense" are lawful within the meaning of the Act. In this connection, see also the definition of "ultimate user," below. Accordingly, the word "dispense" should not be used to charge a controlled substance offense. For a contrary view regarding use of the word "dispense," see United States v. Leigh, 487 F.2d 206 (5th Cir. 1973), reh. denied, 488 F.2d 1055 (1974).

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F. Distribute

Distribute means to deliver a controlled substance, other than by administering or dispensing. Thus, when the word "distribute" is used to charge a controlled substance offense, the "procuring agent" defense which was available under previous narcotic laws cannot be successfully interposed by a defendant. See United States v. Sawyer, 210 F.2d 169 (3d Cir. 1954). The "procuring agent" doctrine was based on the nature of the transfer from the defendant to the undercover agent. A sale was criminal but a mere delivery was not. See United States v. Barcella, 432 F.2d 570, 571-572 (1st Cir. 1970). Under the definition of "distribute," one who delivers controlled substances to a buyer is guilty of violating the Controlled Substances Act even if he is a "procuring agent" within the meaning of Sawyer and even if the delivery to the buyer is not a sale. See also United States v. Miller, 483 F.2d 61 (5th Cir. 1973), cert. denied, 414 U.S. 1159 (1974).

G. Immediate Precursor

Immediate Precursor means either the principal compound used to manufacture a controlled substance or a chemical intermediary used (or likely to be used) to manufacture a controlled substance.

H. Manufacture

Manufacture includes such functions as processing, packaging and labeling but does not include similar activity by a practitioner incidental to his dispensing function.

I. Marihuana

Marihuana includes all parts of the plant cannabis sativa L., the seeds and resin thereof, and every compound, salt, or other derivative of the cannabis plant, its seeds or resin. This broad definition demonstrates Congress' intent to encompass within the term "marihuana" all botanical varieties, derivatives, etc. of the cannabis plant. In this connection, see United States v. Rothberg, 480 F.2d 534, 536 (2d Cir.), cert. denied, 414 U.S. 85 (1973); United States v. Gaines, 489 F.2d 690 (5th Cir. 1974); United States v. Honneus, 508 F.2d 566 (1st Cir. 1974). Marihuana's being subjected to regulation under schedule I of the Controlled Substances Act has been held to be reasonable and proper. See United States v. Kiffer, 477 F.2d 349 (2d Cir.), cert. denied sub. nom. Harmash v. United States, 414 U.S. 831 (1973); United States v. La Froscia, 354 F. Supp. 1338 (S.D.N.Y. 1973); and United States v. Maiden,

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355 F. Supp. 743 (D. Conn. 1973). A challenge against the marihuana possession provisions of the Controlled Substances Act and the Louisiana Controlled Dangerous Substances Law on the ground that they violate rights of privacy, constitute cruel and unusual punishment, and are violative of equal protection of the laws was rejected in Louisiana Affiliate of the National Organization for the Reform of Marihuana Laws v. Guste, 380 F. Supp. 404 (E. D. La. 1974).

J. Narcotic Drug

Narcotic Drug includes opium, opium derivatives (e.g. morphine and heroin), coca leaves and derivatives thereof (e.g. cocaine hydrochloride), and opiates.

K. Practitioner

Practitioner is a term of broad scope, including, among other things, physicians, dentists, pharmacies, and hospitals legally authorized to administer, dispense, distribute, or conduct research with controlled substances in the course of their professional practice or research.

L. State

State includes the 50 states, all territories and possessions, the District of Columbia, Puerto Rico, the Canal Zone, and the Trust Territory of the Pacific Islands.

M. Ultimate User

Ultimate User means one who lawfully obtains and possesses a controlled substance for his own use or for the use of a member or animal of his household. ← his/her
← his/her

N. United States

United States means all places and waters subject to the jurisdiction of the United States.

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9-100.120 Part B - Authority to Control; Standards and Schedules

9-100.121 Authority and Criteria for Classification of Substances -
Section 201 - 21 U.S.C. §811

This section describes the procedures whereby the Attorney General may (1) add a drug to the controlled substance schedules set forth in the Act (see USAM 9-100.122, *infra*), (2) remove a drug from such schedules, or (3) transfer a controlled substance from one schedule to another. These changes are to be effected pursuant to the rulemaking provisions of the Administrative Procedure Act (5 U.S.C. §§551-559). A record must be made and affected parties afforded a hearing. (By delegation of authority, the Drug Enforcement Administration conducts the necessary hearings, see 21 C.F.R. §1308.41 *et seq.*) The Attorney General may institute proceedings under this section on his/her own motion, at the request of the Secretary of Health, Education, and Welfare, or on the petition of an interested party. A substance can be added to the schedules or transferred from one schedule to another if the Attorney General (actually, the Administrator of the Drug Enforcement Administration, by delegation of authority) finds that the substance has a potential for abuse and satisfies criteria listed in §202(a) of the Act (21 U.S.C. §812(a)), USAM 9-100.320, *infra*. A substance can be removed from the schedules if it is found that it does not meet the requirements for inclusion in any schedule. Where the United States is bound by treaty to regulate a controlled substance, the Attorney General is to issue an order placing the drug in a schedule he/she deems appropriate. Such action need not be accompanied by a hearing or by "potential for abuse," etc. findings.

Regarding procedural due process problems which may arise in connection with administrative hearings held for the purpose of placing a drug in a controlled substance schedule, see Hoffman - La Roche, Inc. v. Kleindienst, 478 F.2d 1 (3d Cir. 1973).

9-100.122 Schedules of Controlled Substances - Section 202 - 21 U.S.C.
§812 - General

This section contains the five schedules of substances initially subjected to control under the Act. The schedules are to be updated and republished semiannually during the two year period "beginning one year after the date of" enactment of the Controlled Substances Act and annually updated and republished thereafter. (The most recent updating, as of April 1, 1975, is to be found in the Code of Federal Regulations, to wit, 21 C.F.R. §1308.11 *et seq.*) Regarding republication of the schedules,

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see United States v. Nocar, 497 F.2d 719 (7th Cir. 1974); United States v. Infelice, 506 F.2d 1358 (7th Cir.), cert. denied, 419 U.S. 1107 (1974); United States v. Mundt, 508 F.2d 904 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975); United States v. Grummell, 542 F.2d 789 (9th Cir. 1976).

Section 202(b) of the Act sets forth the findings required to place a drug in each schedule of controlled substances. Generally, the three findings that are required relate to a substance's (1) potential for abuse, (2) currently accepted medical use, and (3) safety, or alternatively, tendency to induce psychological or physical dependence. Schedule I controlled substances embrace drugs which have a high potential for abuse, have no currently accepted medical use, and are not considered safe to use. On the other hand, schedule V controlled substances have a low potential for abuse, have a currently accepted medical use, and may cause limited physical or psychological dependence.

9-100.123 Schedules of Controlled Substances - Specific

Section 202(c) of the Act sets forth the various schedules (five in number) of controlled substances established by the Act. Narcotics, stimulants, depressants, hallucinogens, etc. are listed in appropriate schedules.

Schedule I lists a number of opiates, among which are heroin and various other morphine compounds. Certain hallucinogenic substances such as LSD, marihuana, mescaline, and peyote are also listed in schedule I.

Schedule II lists opium and various derivatives thereof, coca leaves and derivatives thereof (e.g. cocaine), and synthetic substances such as methadone. It should be noted that methamphetamine (and its derivatives) is now listed in schedule II. Originally, methamphetamine was listed in schedule III. However, the drug was transferred to schedule II on July 7, 1971, see 36 Fed. Reg. 12734 (July 7, 1971). In this connection, see the recent publication of the controlled substance schedules, 21 C.F.R. §1308.11 et seq. It should also be noted that methaqualone, a sedative hypnotic, was added to schedule II on October 4, 1973, see 38 Fed. Reg. 27516 (Oct. 4, 1973).

Schedule III lists various drugs which stimulate or depress the central nervous system and also lists substances containing limited amounts of codeine.

Schedule IV includes tranquilizers such as meprobamate and long acting barbiturates.

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Schedule V relates to compounds, mixtures, and preparations containing small amounts of narcotic drugs, such compounds, mixtures, etc. having valuable medicinal qualities.

Under section 202(d) of the Act, the Attorney General is authorized to except any compound, mixture, or preparation containing a depressant or stimulant substance mentioned in parts (a) and (b) of schedule III or in schedules IV and V if it contains one or more active medicinal ingredients not having a depressant or stimulant effect and if the quantity of the nonstimulant-depressant ingredients is enough to vitiate the potential for abuse inherent in the depressant or stimulant substance. NOTE: For a case involving a request to remove marihuana from control under the Controlled Substances Act or, alternatively, to transfer marihuana from Schedule I to Schedule V, see National Organization For The Reform of Marihuana Laws (NORML) v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974).

9-100.130 Part C - Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances

9-100.131 Rules and Regulations - Section 301 - 21 U.S.C. § 821

This section authorizes the Attorney General to promulgate necessary rules and regulations and to charge appropriate fees for registration, etc. This authority does not constitute an unlawful delegation of legislative power, see Yakus v. United States, 321 U.S. 414, 425-426 (1944); Currin v. Wallace, 306 U.S. 1, 15 (1939).

9-100.132 Persons Required to Register - Section 302 - 21 U.S.C. § 822

Those who manufacture, distribute, or dispense controlled substances must annually register with the Attorney General and may engage only in the activities set forth in their certificate of registration. Separate registrations are required for each principal place of business or professional practice where controlled substances are manufactured, distributed or dispensed. The Attorney General is authorized to inspect such establishments. Registration may be waived for certain manufacturers, distributors and dispensers if this is found to be consistent with the public health and safety. Agents or employees of registrants, common carriers, warehousemen, and ultimate users are exempted from registration requirements.

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For the regulations relating to registration, see 21 C.F.R. §1301.01 et seq.

9-100.133 Registration Requirements - Section 303 - 21 U.S.C. §823

This section relates to the registration of manufacturers, distributors, and practitioners. Each subsection provides that the Attorney General shall register an applicant unless he/she determines that the issuance of a registration is inconsistent with the public interest. In each registration category, certain factors must be considered in determining the "public interest."

A. Subsection 303(a) relates to the registration of a manufacturer of schedule I or II controlled substances. The public interest factors to be considered are:

1. Maintenance of effective controls against diversion of schedule I or II substances;
2. Compliance with state and local laws;
3. Promotion of technical advances and development of new substances;
4. The applicant's previous dangerous drug conviction record;
5. Experience in manufacturing controlled substances and the exercise of effective controls against diversion; and
6. Other relevant factors.

B. Subsection 303(b) relates to the registration of a distributor of schedule I or II controlled substances. The factors to be considered are:

1. Maintenance of effective controls against diversion;
2. Compliance with state and local laws;
3. Prior dangerous drug record;
4. Past experience in distributing controlled substances; and
5. Other relevant factors.

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him/her → C. Subsection 303(c) provides that the registration granted a manufacturer or distributor of schedule I or II controlled substances does not entitle the registrant to manufacture or distribute other controlled substances or amounts in excess of the specific quota assigned to him under section 306 of the Act (21 U.S.C. §826).

D. Subsections 303(d) and 303(e) relate to manufacturers and distributors of schedule III, IV and V controlled substances and repeat substantially the provisions of subsections 303(a) and (b). The factors used to determine "public interest" are the same in both subsections.

E. Under subsection 303(f), practitioners and pharmacists may be registered to dispense or conduct research with schedule II - V controlled substances if they are so authorized by the state in which they practice. Pharmacies also qualify to dispense such substances if they are authorized to so dispense under state law. Special registration procedures apply to practitioners wishing to conduct research in schedule I controlled substances.

9-100.134 Denial, Revocation, or Suspension of Registration Section 304 -
21 U.S.C. §824

his/her → Subsection 304(a) empowers the Attorney General to revoke or suspend any registration if the holder is found to have falsified his/her application, lost his state license, or to have been convicted of a controlled substance felony. Revocation or suspension may be limited to the particular substance which is involved in the action. The Attorney General must institute proceedings designed to deny, suspend, or revoke a registration by a show cause order and afford the affected applicant or registrant a hearing. The Attorney General, in his/her discretion, may suspend a registration simultaneously with the institution of proceedings under this section if he/she finds that there is imminent danger to the public health or safety. The Attorney General may also suspend or revoke a quota issued under section 306 of the Act (21 U.S.C. §826). When a revocation order becomes final, all controlled substances owned or possessed by the registrant are to be impounded (section 304(f)).

9-100.135 Labeling and Packaging Requirements - Section 305 - 21 U.S.C.
§825

Section 305(a) makes it unlawful to distribute controlled substance in a commercial container unless the container bears an appropriate label

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containing an identifying symbol. A different symbol is required for each schedule of controlled substances. Manufacturers may not distribute a controlled substance unless the drug's labeling contains an appropriate identifying symbol. The term "labeling" includes, inter alia, written, printed or graphic matter accompanying a controlled substance, 21 C.F.R. §1302.02(c). See also, United States v. Guardian Chemical Corporation, 410 F.2d 157 (2d Cir. 1969).

The terms "commercial container" and "label" are not defined in the Controlled Substances Act or in the Controlled Substances Import and Export Act. However, they are defined in the controlled substance regulations. See 21 C.F.R. §1302.02(a)(b). The identifying symbols for each schedule of controlled substances may be found at 21 C.F.R. §1302.03(c).

Section 305(c) requires the Secretary of Health, Education, and Welfare to promulgate regulations under the Food, Drug, and Cosmetic Act (21 U.S.C. §353(b)) providing that the label of any schedule II, III, or IV prescription drug shall, when dispensed to a patient, contain a clear warning that it is illegal to transfer the drug to anyone other than the patient. This requirement applies to the situation where a schedule II, III, or IV drug is delivered to an ultimate user by a practitioner (e.g. physician) or is delivered to such a user by, e.g., a pharmacist, pursuant to the lawful order of a practitioner.

Section 305(d) makes it unlawful to distribute insecurely sealed containers of schedule I or II controlled substances or schedule III or IV narcotics.

NOTE: The term "commercial container," as used in section 305(a), does not include the container in which a controlled substance is delivered to an ultimate user.

9-100.136 Quotas Applicable to Certain Substances - Section 306 - 21
U.S.C. §826

Section 306(a) requires the Attorney General to determine the total amount of schedule I and II controlled substances which will be manufactured in the United States each year and to establish production quotas for each basic class of drugs in such schedules. The production quotas are designed to furnish sufficient schedule I and II drugs to satisfy the yearly medical, scientific, industrial and export needs of the United States and to establish and maintain reserve stocks.

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Section 306(b) requires the Attorney General to limit or reduce individual production quotas so that they will not exceed in the aggregate the total amount determined necessary for the United States for any given year. In doing this, the Attorney General is to revise the quota of each manufacturer in the same proportion as the limitation or reduction of the aggregate of the quotas. Any amount already produced by a manufacturer which is in excess of the revised quota is to be subtracted from the manufacturer's following year's quota.

Section 306(c) obligates the Attorney General to annually establish manufacturing quotas for schedule I and II substances for those lawfully engaged in manufacturing such drugs. In fixing such quotas, the Attorney General considers each manufacturer's production cycle, current rate of disposal, estimated disposal, inventory, the trend of the national disposal rate during the preceding calendar year, the economic availability of raw materials, yield and stability problems, emergencies such as strikes and fires, and various other factors.

Section 306(d) provides for the fixing of quotas for schedule I and II substances for those registrants who have not manufactured these substances during one or more previous years. In setting up the quotas, the Attorney General is to consider generally the factors set forth in section 306(c).

Section 306(e) allows a registered manufacturer to apply for an increased quota to meet his/her estimated disposal, inventory and other requirements for the remainder of the year. In processing such an application, the Attorney General is to consider those factors which have a bearing on the need for such an increase.

Section 306(f) provides that no registration or quota is required for incidentally produced schedule I or II controlled substances which result from the manufacture of a schedule I or II substance which a manufacturer is registered to produce. The Attorney General may by regulation restrict the retention and disposal of such incidentally produced substances.

Note: Manufacturers who produce schedule I or II controlled substances in violation of section 306's quota requirements are punishable under section 402(b) (21 U.S.C. §842(b)).

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9-100.137 Records and Reports of Registrants - Section 307 - 21 U.S.C.
§827

Section 307(a)(1) requires every registrant (except certain practitioners and research establishments, see section 307(c), infra) as of May 1, 1971 and every second year thereafter to make a complete and accurate record of all stocks of controlled substances on hand. Section 307(a)(2) provides that, when a substance is first designated as a controlled substance, all registrants manufacturing, distributing or dispensing the substance must make complete and accurate records of all stocks on hand. Section 307(a)(3) requires (as of May 1, 1971) every registered manufacturer, distributor or dispenser of controlled substances to maintain on a current basis a complete and accurate record of each controlled substance manufactured, received, sold, delivered, or otherwise disposed of. However, no perpetual inventory need be maintained.

Section 307(b) provides that records shall be kept in accordance with regulations promulgated by the Attorney General and contain information required by such regulations. Such records must be kept separately from all other records of the registrant. However, in the case of non-narcotic substances, ordinary business records will suffice if the information required by the Attorney General is readily retrievable therefrom. Controlled substance records must be maintained and made available for at least two years for inspection and copying by federal officials authorized by the Attorney General.

Section 307(c)(1) exempts from record keeping requirements practitioners who prescribe or administer schedule II through V narcotics in the lawful course of their professional practice or who dispense schedule II through V non-narcotic controlled substances to patients unless they charge the patients for the substances. Section 307(c)(2) exempts from record keeping requirements establishments registered to conduct research with controlled drugs in preclinical research or teaching. Section 307(c)(3) exempts from record keeping requirements persons who have been granted exemption from such requirements by the Attorney General.

Section 307(d) requires registered manufacturers to make reports when and as required by the Attorney General, of every sale, delivery, or other disposal of any controlled substance. Section 307(d) also provides that registered distributors shall, with respect to narcotic controlled substances, make such reports as the Attorney General may require. Reports are to identify by registration number the person or establishment to whom sale, delivery or other disposal was made, unless the recipient is exempt from registration.

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Section 307(e) provides that regulations promulgated under sections 505(i) and 512(j) of the Food, Drug and Cosmetic Act (21 U.S.C. §355(i) and §360(b)(j)), relating to the investigational use of drugs in humans and animals must include such procedures as the Secretary of Health, Education and Welfare, after consultation with the Attorney General, determines are necessary to ensure the security and accountability of controlled substances used in such research.

9-100.138 Order Forms - Section 308 - 21 U.S.C. §828

Section 308(a) makes it unlawful for any person to distribute a schedule I or II controlled substance to another unless it is distributed pursuant to the written order of the person to whom it is distributed. (Note that section 308(a) applies to those who "distribute", not to those who "dispense.") The order is contained on a form issued in blank by the Attorney General pursuant to section 308(d), infra, and relevant regulations.

Section 308(b) provides that order form requirements do not apply to lawful exportations of schedule I or II controlled substances nor to the delivery or storage of such substances by a common or contract carrier or warehouseman in the lawful and usual course of business.

Ware-
houseperson →

Section 308(c)(1) requires distributors of schedule I or II controlled substances to preserve order forms for two years and to make them available for inspection and copying by authorized federal officers and by state or local enforcement officers who are authorized by law to inspect such forms. Section 308(c)(2) requires those persons who furnish order forms to make a duplicate of them, to retain such duplicates for two years, and to have them available for inspection and copying.

Section 308(d)(1) provides that the Attorney General may issue order forms only to registered manufacturers, distributors or dispensers of scheduled I or II controlled substances or to persons exempted from such registration. Section 308(d)(1) makes it unlawful for any person other than the one to whom an order form is issued to use the form to obtain controlled substances or to supply it to anyone else with the intent of bringing about the distribution of controlled substances. Under section 308(d)(2), reasonable fees may be charged by the Attorney General for order forms.

Note: Violations of the order form requirements of section 308(a) are punishable under section 403(a)(1) (21 U.S.C. §843(a)(1)). Violators

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of section 308(d)(1)'s prohibitions are punishable under section 403(a)(3) (21 U.S.C. §843(a)(3)). Regulations relating to order forms may be found at 21 C.F.R. §1305.01 et seq.

Section 308(e) makes it unlawful to obtain schedule I or II controlled substances by means of order forms for any purpose other than their use, distribution, dispensing or administration in the conduct of a lawful business or in the course of professional practice.

9-100.139 Prescriptions - Section 309 - 21 U.S.C. §829

Section 309(a) provides that, except when dispensed by a practitioner (other than a pharmacist) to an ultimate user, no schedule II substance which is a prescription drug may be dispensed without a written prescription. However, provision is made for the dispensing of schedule II substances on oral prescriptions in emergency situations. Prescriptions for schedule II substances must be retained for at least two years and no prescription for such a substance may be refilled.

Section 309(b) provides that, except when dispensed by a practitioner (other than a pharmacist) to an ultimate user, no schedule III or IV controlled substance which is a prescription drug may be dispensed without a written or oral prescription. Such prescriptions may not be filled or refilled more than six months after their date of issuance and may not be refilled more than five times after issuance unless renewed by the issuing practitioner.

Section 309(c) prohibits the distribution or dispensing of a schedule V controlled drug other than for a medical purpose.

Section 309(d) provides that, whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Food, Drug and Cosmetic Act should be so considered because of its abuse potential, he/she shall so advise the Secretary of Health, Education and Welfare and furnish him all relevant data.

Note: Violations of section 309's prescription requirements are punishable under section 402(a)(1) (21 U.S.C. §842(a)(1)).

9-100.140 Piperidine Reporting (Section 310) - 21 U.S.C. §830

Section 310 makes it unlawful for any person to distribute, sell or import piperidine without reporting such information to the Attorney

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General within a time period (not less than seven days) concerning such acts. The person reporting is required to preserve a copy of each report for two years.

Also section 310(a)(1) provides that the Attorney General may require, by regulation, that the following information be reported:

A. The quantity, form, and manner in which, and date on which, the piperidine was distributed, sold or imported.

B. In the case of the distribution or sale of piperidine to an individual, the name, address, and age of the individual and the type of identification presented to confirm the identity of the individual.

C. In the case of the distribution or sale of piperidine to an entity other than an individual, the name and address of the entity and the name, address, and title of the individual ordering or receiving the piperidine and the type of identification presented to confirm the identity of the individual and of the entity. Section 310(a)(2) provides that no person may distribute or sell piperidine unless the recipient or purchaser presents to the distributor or seller identification of such type, to confirm the identity of the recipient or purchaser (and any entity which the recipient or purchaser represents), as the Attorney General establishes by regulation. However, Section 310(a)(3) provides that sections 310(a)(1) and 310(a)(2) shall not apply to:

a. The distribution of piperidine between agents or employees within a single facility (as defined by the Attorney General), if such agents or employees are acting in the lawful and usual course of their business or employment;

b. The delivery of piperidine to or by a common or contract carrier for carriage in the lawful and usual course of its business, or to or by a warehouseman for storage in the lawful and usual course of its business; but where such carriage or storage is in connection with the distribution, sale, or importation of the piperidine to a third person, this subparagraph shall not relieve the distributor, seller, or importer from compliance with sections 310(a)(1) or 310(a)(2); or

c. Any distribution, sale, or importation of piperidine with respect to which the Attorney General determines that the

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report required by section 310(a)(1) or the presentation of identification required by section 310(a)(2) is not necessary for the enforcement of this subchapter. Section 310(b) provides that any information which is reported to or otherwise obtained by the Department of Justice under this section and which is exempt from disclosure pursuant to 5 U.S.C. §522(a) by reason of 5 U.S.C. §522(b)(4) thereof shall be considered confidential and shall not be disclosed, except that such information may be disclosed to officers or employees of the United States concerned with carrying out this subchapter or subchapter II of this chapter or when relevant in any proceeding for the enforcement of this subchapter or subpart II of this chapter. Section 310(c) provides that for purposes of this section, 21 U.S.C. §341(d), and 21 U.S.C. §842(a)(9):

(1) The term "import" has the meaning given such term in 21 U.S.C. §951(a)(1).

(2) The term "phencyclidine" means 1- (1-phenylcyclohexyl) piperidine, its salts, or any immediate precursor, homolog, analog, or derivative (or salt thereof) of 1-(1-phenylcyclohexyl) piperidine that is included in Schedule I or II or part B of this subchapter.

(3) The term "piperidine" includes its salts and acyl derivatives.

9-100.200 TITLE II - OFFENSES AND PENALTIES

9-100.210 Manufacturing, Distributing, Possessing - Section 401 -
21 U.S.C. §841

Section 401(a)(1) makes it unlawful for an unauthorized person to knowingly or intentionally manufacture, distribute, or dispense a controlled substance or to possess a controlled substance with intent to manufacture, distribute or dispense it. (A mother, who directed her daughter to deliver five packets of heroin to a government informant, was held to have constructively transferred the heroin to the informant and thus to have unlawfully distributed it. See United States v. Waller, 503 F.2d 1014 (7th Cir. 1974)). Section 401(a)(2) makes it unlawful to knowingly or intentionally create, distribute or dispense a counterfeit substance or to possess a counterfeit substance with intent to distribute or dispense it.

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9-100.211 Comments

Since the word "dispense," as defined in section 102(10) (21 U.S.C. §802(10)), relates to activities which are lawful within the meaning of the Controlled Substances Act, that word should not be used to charge a violation of section 401(a). The word "distribute" should be used instead. Contra United States v. Leigh, 487 F.2d 206 (5th Cir. 1973).

Regarding the meaning of the phrase "counterfeit substance" as used in section 410(a)(2), see section 102(7) (21 U.S.C. §802(7)). No prosecutions should be instituted under section 401(a)(2) without consultation with the Narcotic and Dangerous Drug Section. See USAM 9-2.223.

Physicians who sell controlled substances to non-patient addicts or who issue controlled substance prescriptions to such persons should be prosecuted under the "distribution" provisions of section 401(a)(1). See also United States v. Moore, 423 U.S. 122 (1975). Contra United States v. Leigh, supra.

Regarding the type of evidence needed to establish possession with intent to distribute, see United States v. Ortiz, 445 F.2d 1100, 1104-1105 (10th Cir. 1971) (amphetamines); United States v. Mather, 465 F.2d 1035 (5th Cir.), cert. denied 409 U.S. 1085 (1972) (cocaine); United States v. Henry, 468 F.2d 892 (10th Cir. 1972) (heroin and cocaine); United States v. Anderson, 468 F.2d 1280, 1283 (10th Cir. 1972) (marihuana); United States v. Nocerino, 474 F.2d 993 (2d Cir. 1973) (amphetamines and barbiturates). See also United States v. Blake, 484 F.2d 50, 58 (8th Cir. 1973) (heroin); United States v. Polite, 489 F.2d 679 (5th Cir. 1974) (heroin); United States v. Luciw, 518 F.2d 298 (3d Cir. 1975) (amphetamines).

The Eighth Circuit Court of Appeals has held that a defendant may properly be convicted of possessing a controlled substance with intent to distribute and of distributing such a substance since "the evidence needed to prove possession with intent to distribute is different from that required to prove actual distribution," United States v. Richardson, 477 F.2d 1280, 1282 (8th Cir. 1973). The Second Circuit has considered this issue but has not yet ruled on it, see United States v. Vasquez, 468 F.2d 565 (2d Cir. 1972). See also United States v. Costello, 483 F.2d 1366 (5th Cir. 1973) and United States v. Horsley, 519 F.2d 1264 (5th Cir. 1975).

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Simple possession of a controlled substance, section 404(a) (21 U.S.C. §844(a)), seems to be a lesser included offense vis-a-vis a charge of possession with intent to distribute. Thus, it appears that a defendant charged with possession with intent to distribute is entitled to a lesser included offense instruction which would allow the jury to find him/her guilty of simple possession. See Sansone v. United States, 380 U.S. 343, 349-350 (1965), "[I]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it...is entitled to an instruction which would permit a finding of guilt of the lesser offense." See also United States v. Methvin, 441 F. 2d 584 (5th Cir. 1971); and see United States v. Blake, 484 F.2d 50, 58 (8th Cir. 1973); United States v. Trujillo, 497 F.2d 408 (10th Cir. 1974); United States v. Howard, 507 F.2d 559 (8th Cir. 1974); and United States v. Wade, 502 F.2d 144 (6th Cir. 1974).

Occasionally, substances sold purportedly as controlled substances to undercover Drug Enforcement agents prove on analysis to be harmless materials such as flour or sugar. In such instances, if there is evidence that the defendants knew they were dealing with a federal agent and, with the intent of fraudulently obtaining money from the agent, that they deliberately sold the agent a harmless substance claiming it to be heroin, cocaine, etc., a charge of conspiracy to defraud (18 U.S.C. §371) may be in order. Such a charge was successfully prosecuted against one defendant (the other defendant was the beneficiary of a Bruton error) in United States v. Morales, 477 F.2d 1309 (5th Cir. 1973). Alternatively, if such evidence exists, a U.S. Attorney could consider referring the matter to local or state authorities for prosecution under a larceny by trick statute.

When a defendant agrees to sell a controlled substance to a DEA undercover agent and then, after receiving the purchase price from the agent, flees with the money without delivering the substance to the agent the defendant may be prosecuted for theft of government property, 18 U.S.C. §641. Regarding scienter in such cases, the better view is that the prosecution need not prove that the defendant knew that the money he/she stole belonged to the United States. See United States v. Smith, 489 F.2d 1330 (7th Cir. 1973).

Several cases have recently arisen involving illegal distribution of cocaine in which the defence has contended that the type of cocaine involved is D-cocaine, a synthetic variety which allegedly is not within the coverage of the Controlled Substances Act. In these cases, the defense has contended, through expert witnesses, that the only type of cocaine which falls within Schedule II(a)(4) of the Act is an isomer known as L-cocaine, a derivative of coca leaves. L-cocaine is clearly covered by the Act. D-cocaine, however, is one of several cocaine isomers which

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present difficulties. DEA chemists cannot show that d-cocaine, as well as several other cocaine isomers, are derived from coca leaves or coca compounds or that these isomers are chemically identical or equivalent to l-cocaine. Most of these isomers, including d-cocaine, are of rare occurrence and little is known of their effect on the human body. The Drug Enforcement Administration is now having its chemists conduct more sophisticated tests which should clearly establish the presence of l-cocaine. Thus, when the defense contends that the cocaine involved in any case is not the type which is covered by Schedule II (a) (4), the prosecution should be able to refute this contention. Prosecutors should consult, before trial, with the DEA chemist who is to testify about the cocaine. The chemist will brief the prosecutor on the types of tests which were conducted, their reliability, the exact nature of the cocaine isomer problem, techniques to use to neutralize the testimony of expert witnesses for the defense, etc. For instances in which the government successfully prevailed on this issue, see United States v. Orzechowski, 547 F.2d 978 (7th Cir. 1976); United States v. Hall, 552 F.2d 273 (9th Cir. 1977).

In cases involving distribution of cocaine, the prosecution may have to contend with an argument that not all types of cocaine are within the coverage of the Controlled Substances Act, i.e. within Schedule II(a)(4) of the Act. See 21 U.S.C. §812. In certain cases, highly qualified chemists testifying for the defense have maintained that the only type of cocaine which falls within Schedule II(a)(4) is an isomer known as "L-cocaine." DEA chemists are inclined to agree with this assertion, since L-cocaine is a derivative of coca leaves whereas other isomers cannot be shown to have been derived from coca leaves or compounds thereof. The Fifth Circuit Court of Appeals, however, has reserved ruling on the question of whether L-cocaine is the only illegal isomer. See United States v. Bockius, 564 F.2d 1193, 1194, note 1 (5th Cir. 1977).

There are considered to be eight isomers of cocaine, including L cocaine. Most of the isomers are of rare occurrence and little is known of their effect on the human body. The isomer which the defense traditionally claims to be present in cocaine trafficking cases is D-cocaine. D-cocaine is an isomer whose molecular structure is the mirror image of L-cocaine. When a defense attorney contends that the cocaine in issue is D-cocaine rather than L-cocaine, the government must prove that the substance is in fact L-cocaine.

Drug Enforcement Administration chemists conduct sophisticated tests designed to affirm the presence of L-cocaine as well as to detect other isomers which may be present. Thus, when the defense contends that the cocaine involved in a case is not the type which is covered by the Controlled Substances Act, the prosecution should consult, before trial,

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with the DEA chemist who is to testify about the cocaine. The chemist will explain to the prosecutor the types of tests which were conducted, their reliability, the exact nature of the cocaine isomer problem, techniques which can be used to neutralize the testimony of the expert witness for the defense, etc. For cases in which the Government successfully met the "cocaine isomer" defense, see United States v. Orzechowski, *supra*; United States v. Umentum, 547 F.2d 987 (7th Cir. 1976); United States v. Wilburn, 549 F.2d 734 (10th Cir. 1977); United States v. Hall, *supra*; United States v. Bockius, 564 F.2d 1193 (5th Cir. 1977).

9-100.212 Penalties

The penalties provided by section 401(b) for violations of section 401(a) depend on the schedule in which the controlled substance is classified. Another factor to be considered is whether the defendant has previously been convicted of a felonious violation of any federal law relating to controlled substances. When a prior conviction exists, a sentence twice that authorized for first offenders may be imposed. A previous conviction is "final" for purpose of subsequent offender sentencing under section 401(b) even though it is on appeal or is the subject of a certiorari request. See Gonzalez v. United States, 224 F.2d 431 (1st Cir. 1955); People v. Morgan, 296 F.2d 75 (Cal. 1956); State v. Court of Appeals, Division 1, 441 P.2d 544 (D. Ariz. 1968); United States v. Allen, 425 F. Supp. 78 (E.D. Pa. 1977).

Briefly, the penalties provided by section 401(b) for section 401(a) first offenses are as follows:

| Substances | Maximum Fine | Sentence | Spec. Parole Term | Probation Susp. Sent. | Parole |
|-------------------------------|-----------------|-------------------|----------------------|--------------------------|--------|
| I and II narcotics | \$25,000 | up to 15 years | at least 3 years | Yes | Yes |
| I and II non-nar. drugs | \$15,000 | up to 5 years | at least 2 years | Yes | Yes |
| IV. cont. substances | \$10,000 | up to 3 years | at least 1 year | Yes | Yes |
| V. cont. substances | \$5,000 | up to 1 year | None | Yes | Yes |

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Section 401(b)(4) makes it a misdemeanor to distribute a small amount of marihuana for no remuneration. It is doubtful that any occasion will arise for charging a section 401(b)(4) violation. Factual situations which fit within section 401(b)(4) can more easily be prosecuted under the simple possession provisions of the Act, i.e. section 404 (21 U.S.C. §844). Inter alia, prosecution under section 404 will present fewer problems of proof. A word of caution; when distribution of a small amount of marihuana is charged under section 401(a)(1), it may be advisable to allege that the distribution was of a specific amount and/or was for remuneration. This would make it clear that a section 401(b)(4) charge is not intended.

Section 401(b)(5) provides that any person who violates section 401(a) by manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute, or dispense, except as otherwise authorized, phencyclidine (defined at 21 U.S.C. §830(c)(2)) shall be sentenced to not more than ten years imprisonment, a fine of not more than \$25,000, or both. A prior felony conviction of any narcotic offense will result in a prison term of 20 years and fine up to \$50,000 or both. A special parole term of two years is provided for first offenders and four years special parole for second time offenders.

Section 401(b)(6) provides that a person convicted of a section 401(a) violation involving a quantity of marihuana exceeding 1,000 pounds, shall be sentenced to imprisonment for not more than 15 years and a fine of not more than \$125,000. If the person is a second time offender, the person shall be sentenced to up to 30 years imprisonment and a fine of not more than \$250,000.

Section 401(d) provides that any person who knowingly or intentionally (1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or (2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter, shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than \$15,000, or both.

9-100.213 Special Parole Term

Section 401(b) contains a special sentencing provision known as a "special parole term." (Special parole term provisions are also found in the Controlled Substances Import and Export Act, see 21 U.S.C. §960 and §962(a)). When a violator is sentenced to prison, an appropriate special

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parole term must be imposed by the sentencing court. When, through inadvertence or otherwise, a special parole term is not imposed at time of sentencing, appropriate action should be taken to correct the oversight. In this respect, it should be noted that amendment of the sentence to include a special parole term, particularly the minimum term, does not constitute impermissible "increased punishment" within the meaning of the double jeopardy provisions of the Constitution. See Bozza v. United States, 330 U.S. 160 (1974); Mathes v. United States, 254 F.2d 938 (9th Cir. 1958); Reyes v. United States, 262 F.2d 801 (5th Cir. 1959); Hayes v. United States, 249 F.2d 516 (D.C. Cir. 1957), cert. denied, 356 U.S. 914 (1958); and Deutschmann v. United States, 254 F.2d 487 (9th Cir.), cert. denied, 357 U.S. 928 (1958). For an instance where a judge forgot to impose a special parole term and later corrected this oversight, see United States v. Thomas, 356 F. Supp. 173 (E.D. N.Y. 1972), aff'd, 474 F.2d 1336 (2d Cir. 1973). When a sentence is amended to include a special parole term, the defendant and his/her attorney should be given an opportunity to appear in court and be informed of the need for correcting the sentence. See Caille v. United States, 487 F.2d 614 (5th Cir. 1973); Tanner v. United States, 493 F.2d 1350 (5th Cir. 1974); Thompson v. United States, 495 F.2d 1304 (1st Cir. 1974). See also Mayfield v. United States, 504 F.2d 888 (10th Cir. 1974). Regarding guilty pleas and the obligation of the district court to inform defendants of the special parole term which can be imposed, see United States v. Richardson, 483 F.2d 516 (8th Cir. 1973); and Roberts v. United States, 491 F.2d 1236 (3d Cir. 1974); Bell v. United States, 521 F.2d 713 (4th Cir. 1975). Bachner v. United States, 517 F.2d 589 (7th Cir. 1975); McRae v. United States, 540 F.2d 943 (8th Cir. 1976).

When a district judge, in accepting a guilty plea, violates Rule 11, Fed. R. Crim. P., by failing to advise the defendant of the special parole term which must be imposed, and the defendant thereafter attacks the sentence by way of a 28 U.S.C. §2255 motion, relief may be denied if all the defendant can show is a failure to comply with the formal requirements of Fed. R. Crim. P. 11. See McRae v. United States, supra; Del Vecchio v. United States, 556 F.2d 106 (2d Cir. 1977); Davis v. United States, 417 U.S. 333, 346 (1974).

Section 401(b) provides minimum special parole terms for various offenses but contains no restriction as to the maximum term which may be imposed. However, it has been held that this is merely a proper Congressional entrusting of the appropriate term to be imposed to the sound discretion of the sentencing judge. United States v. Simpson, 481 F.2d 582, note 2 (5th Cir. 1973); United States v. Perez, 526 F.2d 859 (5th Cir. 1976); United States v. Rea, 532 F.2d 147, 148 (9th Cir. 1976).

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Contentions that the special parole provisions are invalid because they do not contain maximum limits have not received a friendly reception in the courts. See United States v. Rich, 518 F.2d 980, 986 (8th Cir. 1975); United States v. Rivera-Marquez, 519 F.2d 1227 (9th Cir. 1975); United States v. Rea, *supra*; United States v. Jones, 540 F.2d 465 (10th Cir. 1976).

9-100.214 Youth Corrections Act

A word about sentencing of youthful offenders under the Youth Corrections Act is necessary. A court may sentence under the Youth Corrections Act a youth who is convicted of violating any penal provision of the Controlled Substances Act (other than the Act's continuing criminal enterprise provisions, see USAM 9-100.280, *infra*, or the Controlled Substances Import and Export Act, see 18 U.S.C. §5010(b)). Violators through the age of 25 years may be sentenced as "youthful offenders," see 18 U.S.C. §4209 and §506(e). See also, United States v. Carol, 328 F. Supp. 894 (S.D.N.Y. 1971). The only exception to Youth Corrections Act treatment would be where a young adult offender (22 through 25 years of age) is convicted of violating the continuing criminal enterprise provisions of the Controlled Substances Act, 21 U.S.C. §848. 21 U.S.C. §848 carries a mandatory penalty of "not less than 10 years." The young adult offender statute (18 U.S.C. §4209) contains a note indicating that its provisions do "not apply to any offense for which there is provided a mandatory penalty."

When a youth convicted of simple possession (21 U.S.C. §844) is sentenced under the Youth Corrections Act because the court feels the misdemeanor sanctions of 21 U.S.C. §844 are insufficient punishment, there is a strong possibility that the sentence may be vacated on appeal. See United States v. Hartford, 489 F.2d 652, 654-655 (6th Cir. 1974). Also, it should be noted that the Seventh Circuit Court of Appeals has held that a youthful offender charged with simple possession should be prosecuted by way of indictment since, if convicted, the youth may be sentenced under the Youth Corrections Act to up to four years confinement. See United States v. Neve, 357 F. Supp. 1 (W.D. Wis. 1973), *aff'd*, 492 F.2d 465 (7th Cir. 1974). Thus, in the Seventh Circuit, a youth who violates 21 U.S.C. §844 should be prosecuted by way of indictment unless indictment is waived.

9-100.215 Parole

With the exception of the continuing criminal enterprise provisions of the Controlled Substance Act (see 21 U.S.C. §848(c)), parole is

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available to those who violate the provisions of the Controlled Substances Act or the Controlled Substances Import and Export Act. It should be noted that P.L. 93-481 (effective October 26, 1974) amended section 702 of the Controlled Substances Act so as to make parole (under 18 U.S.C. §4202) available "to any individual convicted under any of the laws repealed [by the Controlled Substances Act or the Controlled Substances Import and Export Act] without regard to the terms of any sentence imposed on such individual under such law." This means that violators of previous narcotic laws who were precluded from parole eligibility by the terms of such laws will become eligible for parole consideration as provided by 18 U.S.C. §4202. The case of Warden v. Marrero, 417 U.S. 653 (1974), which reached a contrary result on the parole eligibility issue, is no longer to be considered controlling. Sentencing under 18 U.S.C. §4208(a)(2) is still precluded for violations under the prior law. See Bradley v. United States, 410 U.S. 605 (1973).

9-100.220 Violations Relating to Prescriptions, Labeling, Recordkeeping, Etc. - Section 402 - 21 U.S.C. §842

9-100.221 Section 402(a)

A. Section 402(a)(1)

Section 402(a)(1) makes it unlawful for:

1. A registered pharmacist to distribute in a nonemergency situation, a schedule III prescription controlled drug without a written prescription (21 U.S.C. §829(a));
2. A registered pharmacist to fail to retain a written prescription relating to the dispensing of a schedule II prescription controlled drug (21 U.S.C. §829(a));
3. A registered pharmacist to refill a prescription for a schedule II controlled drug (21 U.S.C. §829(a));
4. A registered pharmacist to distribute a schedule III or IV prescription controlled drug without a written or oral prescription (21 U.S.C. §829(b));
5. A registered pharmacist to fill or refill a schedule III or IV controlled drug prescription more than six months after the prescription's issuance (21 U.S.C. §829(b));

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6. A registered pharmacist to refill a schedule III or IV controlled drug prescription more than five times after its issuance unless the prescription has been renewed (21 U.S.C. §829(b)); and

7. A registrant, or any other person, to distribute a schedule V controlled drug other than for a medical purpose (21 U.S.C. §829(c)).

Comment

Section 402 (a)(1) replaces provisions of the Food, Drug, and Cosmetic Act which prohibited the improper dispensing of depressant and stimulant drugs by pharmacists. See former 21 U.S.C. §331(q)(7), 360a(d)(1), 360a(e), 1064 ed. For a case under previous law dealing with unlawful refilling of prescriptions by a druggist, see Kadis v. United States, 373 F.2d 370 (1st Cir. 1967).

B. Section 402 (a)(2)

Section 402(a)(2) makes it unlawful for:

he/she → 1. A manufacturer to deliver a controlled substance which he is not authorized to make to a registered manufacturer, distributor, practitioner, pharmacy or researcher (21 U.S.C. §823(a),(d));

2. A distributor to deliver a controlled substance which he/she is not authorized to handle to a registered distributor, practitioner, pharmacy or researcher (21 U.S.C. §823(b)(e));

3. A pharmacy to deliver a schedule I controlled substance to a registered manufacturer, distributor or researcher (21 U.S.C. §823(f));

4. A practitioner, unless specifically authorized, to deliver a schedule I controlled substance to a research subject (21 U.S.C. §823(f));

5. A practitioner, unless specifically authorized, to prescribe a schedule I controlled substance for a research subject (21 U.S.C. §823(f));

6. A practitioner, unless specifically authorized, to administer a schedule I controlled substance to a research subject (21 U.S.C. §823(f));

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7. A practitioner, unless specifically authorized, to deliver a schedule I controlled substance to a registered manufacturer, distributor, or researcher (21 U.S.C. §823(f)); and

8. A manufacturer to produce a controlled substance which he is not authorized to manufacture (21 U.S.C. §823 (a)(d)).

Comment

For legislation similar to section 402(a)(2), see former 21 U.S.C. §331(q)(1)(2), and 21 U.S.C. §360a. Note that section 402(a)(2)'s prohibitions are directed only against registrants, i.e. manufacturers, distributors, practitioners, pharmacies and researchers. In this regard, see United States v. Jin Fuey Moy, 241 U.S. 394 (1916). Regarding a physician's illegally selling amphetamines and barbiturates, see White v. United States, 399 F.2d 813, 816-819 (8th Cir. 1968).

C. Section 402(a)(3)

Section 402(a)(3) make it unlawful for:

1. A manufacturer or distributor to deliver a controlled substance whose container does not bear a label containing the substance's identifying symbol (21 U.S.C. §825(a));

2. A manufacturer to deliver a controlled substance unless accompanying labels and other written, printed or graphic matter contain the substance's identifying symbol (21 U.S.C. §825(b));

3. A practitioner or a pharmacy to dispense to a patient a schedule II, III or IV controlled substance whose label does not contain a clear, concise warning that it is unlawful to transfer the substance to any person other than the patient (21 U.S.C. §825(c));

4. A manufacturer, distributor or practitioner to deliver a schedule I or II controlled substance or a schedule III or IV narcotic unless its container is securely sealed (21 U.S.C. §825(d)).

Comment

Concerning the terms "label" and "labeling" as they are used in the Food, Drug and Cosmetic Act, see United States v. 24 Bottles "Sterling Vinegar and Honey, etc.", 338 F.2d 157 (2d Cir. 1964), and United States v. Lanpar Co., 293 F. Supp. 147 (N.D. Tex.). For regulations relating to

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controlled substance labeling and packaging requirements, see 21 C.F.R. §1302.01 et seq.

D. Section 402(a)(4)

Section 402(a)(4) makes it unlawful for:

1. Any person (e.g. a manufacturer, distributor, practitioner, pharmacist, researcher, importer, exporter, patient, or college student) to remove, alter or obliterate an identification symbol or label from any controlled substance commercial container (21 U.S.C. §825(a), and §958(d)); and
2. A practitioner or pharmacist, while distributing a controlled substance to a patient, to remove, alter or obliterate a symbol or label on the substance's container which warns that it is unlawful to transfer the substance to any person other than the patient (21 U.S.C. §825(c)).

Comment

No provision similar to section 402(a)(4) appears in previous federal narcotic and dangerous drug legislation. However, for a provision relating to the removal, breaking and defacing of customs seals, see 18 U.S.C. §549. See also, 18 U.S.C. §506, which relates to mutilation, alteration, etc. of department and agency seals.

E. Section 402 (a)(5)

Section 402(a)(5) makes it unlawful for:

1. Any person to refuse to make any record, report, notification, declaration, order or report form, statement or invoice required under the Controlled Substances Act or the Controlled Substances Import and Export Act (21 U.S.C. §§827, 958(d));
2. Any person to fail to make any record, report, notification, declaration, order or order form, statement, or invoice required under the Controlled Substances Act or the Controlled Substances Import and Export Act (21 U.S.C. §§827, 958(d));
3. Any person to refuse to keep any record, report, notification, declaration, order or order form, statement, invoice, or information required under the Controlled Substance Act or the Controlled Substances Import and Export Act (21 U.S.C. §§827, 958(d));

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4. Any person to fail to keep any record, report, notification, declaration, order or order form, statement, invoice, or information required under the Controlled Substances Act or the Controlled Substances Import and Export Act (21 U.S.C. §§827, 958(d));

5. Any person to refuse to furnish federal inspectors any record, report, notification, declaration, order or order form, statement, invoice or information required under the Controlled Substances Act or the Controlled Substances Import and Export Act (21 U.S.C. §§827, 958(d)); and

6. Any person to fail to furnish to inspectors any record, report, notification, declaration, order or order form, statement, invoice or information required under the Controlled Substances Act or the Controlled Substances Import and Export Act (21 U.S.C. §§827, 958(d)).

Comment

Section 402(a)(5) is based on former 21 U.S.C. §331(g)(4) and (5) (1964 ed.). Because of the "public aspect" of information encompassed by section 402(a)(5), there does not seem to be a self-incrimination problem regarding records, reports, etc. required to be kept under the Act. See Shapiro v. United States, 335 U.S. 1, 32-35 (1948); Leary v. United States, 395 U.S. 6, 13 (1969). See also Justice Brennan's discussion of Shapiro, supra, in Mackey v. United States, 401 U.S. 667, at 707-708 (1971).

F. Section 402(a)(6)

Section 402 (a)(6) makes it unlawful for:

1. Any person (e.g., manufacturer, distributor, pharmacist, importer, exporter) to refuse to allow inspectors, who have an administrative inspection warrant, entrance into a controlled substance factory, warehouse, storage area, etc. (21 U.S.C. §§880(b) (2), 965);

2. Any person to refuse to allow inspectors not having an administrative inspection warrant entrance into a controlled substance factory, warehouse, etc., when an emergency situation exists (21 U.S.C. §§880(c), 965);

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3. Any person to refuse to allow inspectors who have an administrative inspection warrant to inspect a controlled substance factory, warehouse, etc. (21 U.S.C. §§880(b)(2), 965); and

4. Any person to refuse to allow inspectors who do not have an administrative inspection warrant to inspect a controlled substance factory, warehouse, etc. when an emergency situation exists (21 U.S.C. §§880(c), 965).

Comment

Section 402(a)(6)'s prohibitions require reference to section 510 of the Controlled Substances Act, i.e., 21 U.S.C. §880, which deals with administrative inspections and warrants. Reading sections 402(a)(6) and 880 together, it seems clear that section 402(a)(6)'s prohibitions apply where entries and inspections are authorized by an administrative inspection warrant and to warrantless entries and inspections which are necessitated by emergency situations. See 21 U.S.C. §880(c). Thus, under ordinary circumstances, custodians or controlled substance premises can refuse to permit a warrantless entry and inspection without violating Section 402(a)(6). See United States v. Anile, 352 F. Supp. 14 (N.D.W.Va. 1973). See generally See v. City of Seattle, 387 U.S. 541 (1967). Faced with a refusal to permit a warrantless inspection, inspectors may not effect a forcible entrance, Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). Regarding problems connected with warrantless administrative inspections generally, see Camara v. Municipal Court, 387 U.S. 523 (1967) and see v. City of Seattle, *supra*. See also United States v. Biswell 406 U.S. 311, 314-315 (1971). Concerning consent inspections, see United States v. Hammond Milling Co., 413 F.2d 608, 612 (5th Cir. 1969), cert. denied, 396 U.S. 1002 (1970). Regarding inspections where consent was held not to have been voluntarily given, see United States v. Stanack Sales Co., 397 F.2d 849 (3d Cir. 1968) and United States v. J.B. Kramer Grocery Co., 418 F.2d 987 (9th Cir. 1969).

G. Section 402 (a)(7)

Section 402(a)(7) makes it unlawful for:

1. Any person to remove, break, injure or deface a seal placed on controlled substances belonging to one whose registration has been suspended or revoked (21 U.S.C. §824(f));

2. Any person to remove, break, injure or deface a seal placed on controlled substances which have been seized because they were illegally manufactured, distributed or acquired (21 U.S.C. §881(a)(1));

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3. Any person to remove or dispose of officially sealed controlled substances which belong to one whose registration has been suspended or revoked (21 U.S.C. §824(f)); and

4. Any person to remove or dispose of seized controlled substances which have been sealed as a result of their having been illegally manufactured, distributed, or acquired (21 U.S.C. §881(a)(1), (c)(1)).

Comment

For legislation similar to section 402(a)(7), see 18 U.S.C. §549, which relates to the removal, breaking, etc. of customs seals. See also Hughes v. United States, 338 F.2d 651 (1st Cir. 1964) and Mungo v. United States, 423 F.2d 1351 (4th Cir. 1970).

H. Section 402(a)(8)

Section 402(a)(8) makes it unlawful for:

1. Any person to use to his/her own advantage information about a secret trade process which was obtained during an inspection of controlled substance plants, records, documents, etc. (21 U.S.C. §880); and

2. Any person to reveal to any unauthorized person information about a secret trade process which was obtained during an inspection of controlled substance plants, records, documents, etc. (21 U.S.C. §880).

Comment

There is a provision similar to section 402(a)(8) in the Food, Drug and Cosmetic Act, see 21 U.S.C. §331(j). See also, 18 U.S.C. §1905 (disclosure of confidential information). As to what constitutes a "trade secret," see Consumers Union v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y.); GTI Corporation v. Calhoun, 309 F. Supp. 762, 768 (S.D. Ohio); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

I. Section 402(a)(9)

Section 402(a)(9) makes it unlawful for:

1. Any person to distribute or sell piperidine unless the recipient or purchaser presents to the distributor or seller

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identification of such type, to confirm the identity of the recipient or purchaser, etc. (21 U.S.C. §830(a)(2)).

9-100.222 Section 402(b)

Section 402(b) makes it unlawful for:

A. A manufacturer to make a schedule I or II controlled substance which is not authorized by his/her registration and production quota (21 U.S.C. §826); and

B. A manufacturer to make a schedule I or II controlled substance in excess of his/her production quota (21 U.S.C. §826).

Comment

For similar legislation dealing with narcotics, see former 21 U.S.C. §§505(a)(2), 509, 515. There are no reported cases under the previous legislation. Note that section 402(b) applies only to schedule I and II controlled substances.

9-100.223 Penalties - Section 402(c)(1)

Section 402(c)(1)'s civil penalty provisions should be used when a violation of section 402's provisions is due to mistake, negligence, inadvertence, or is minor in nature. Section 402(c)(2)'s misdemeanor provisions should be invoked when it can be shown that an offense was "knowingly" committed, i.e., when it was done "voluntarily and purposely and not because of mistake or accident." See the "Manual on Jury Instructions," 33 F.R.D. at 553. Regarding the term "knowingly," see United States v. Freed, 401 U.S. 601 (1971), United States v. International Minerals & Chemicals Corp., 402 U.S. 558 (1971). See also, United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964). Section 402(c)(2)(B) should be used when the violator is a second offender in order to double penalties. Section 402(c)(2)(C) provides that sections 402(c)(2)(A) and (B) shall not apply to violators of section 402(a)(5) with respect to a refusal or failure to make a report required under 21 U.S.C. §830(a) (piperidine reporting).

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9-100.230 Order Forms, Fraud, Counterfeiting, etc. - Section 403 - 21
U.S.C. §843

A. Section 403(a) makes it unlawful for:

1. Any registrant to distribute a schedule I or II controlled substance contrary to the order form requirements of 308 (i.e. 21 U.S.C. §828);

2. Any person manufacturing or distributing a controlled substance to use a fictitious registration number or a registration number which is revoked, suspended, or issued to another person;

3. Any person to obtain a controlled substance by fraud, forgery, or deception;

4. Any person to omit material information or to furnish false material information in any report or record, or to present false or fraudulent identification where the person is receiving or purchasing piperidine and the person is required to present identification under 21 U.S.C. §830(a); and

5. Any person to make, distribute or possess any punch, die, etc. designed to produce a counterfeit controlled substance.

B. Section 403(b) makes it illegal for any person to use a "communication facility" (e.g. mail, telephone, radio) to commit or to facilitate the commission of any felonious violation of the Controlled Substances Act or the Controlled Substances Import and Export Act.

C. Penalties - Section 403(c)

Section 403(c) provides that anyone who violates section 403's provisions is subject to imprisonment for up to four years, a fine of not more than \$30,000, or both. These penalties are doubled for subsequent offenders.

Comment

Note that section 403(a)(1)'s order form prohibitions apply only to registrants. Regarding order form requirements and offenses under previous drug laws, see Minor v. United States, 396 U.S. 87 (1969). It should be noted that, under section 403(a)(4), the controlled substance false statement statute, the falsity must be material. Note further that section 403(a)(4) covers not only the furnishing of false statements but also the failure to supply required information. Section 403(a)(5)

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applies to those who use a trademark or other identifying mark on a particular drug or container so as to render it counterfeit. Concerning the meaning of the phrase "counterfeit substance," see section 102(7) of the Act (21 U.S.C. §802(7)). Section 403(b), the "use of a communication facility" statute, derives from former 18 U.S.C. §1403 (1964 ed.) and applies to all controlled substances. Former 18 U.S.C. §1403 applied only to marihuana and narcotic violations. Regarding the use of a "communication facility," to wit, the mails, to import marihuana, see United States v. White, 450 F.2d 264 (5th Cir. 1971), cert. denied, 405 U.S. 1072 (1972).

9-100.240 Simple Possession - Section 404 - 21 U.S.C. §844

Section 404(a) makes it unlawful for any person knowingly or intentionally to possess a controlled substance unless he/she can show that the substance was obtained directly from a practitioner acting in the course of his/her professional practice, that he/she obtained the substance pursuant to a valid prescription issued by such a practitioner, or that he/she is otherwise authorized to possess the substance. A first time violator of section 404(a) is punishable by up to one year's imprisonment, a fine of not more than \$5,000, or both. These penalties are doubled for subsequent offenses.

9-100.241 First Offender

Section 404(b)(1) provides that a section 404(a) violator who has no previous controlled substance or other dangerous drug convictions may, without a judgment of conviction being entered, be placed on probation for up to one year. If probation is thereafter violated, a judgment of conviction may be entered and sentence imposed. However, if the offender complies with the terms of probation, the court may dismiss the charges against him/her at the end of the probation term. Such dismissal shall not constitute a court adjudication of guilt. However, a nonpublic record of the dismissal will be kept by the Department of Justice solely for the use of courts in determining, in subsequent proceedings, whether the offender qualifies for treatment as a first time violator of section 404(a). Dismissal of section 404(a) charges is not to be deemed a conviction but such treatment is available to a section 404(a) offender only once.

9-100.242 Expungement of Record

Section 404(b)(2) provides that, when charges are dismissed against a section 404(a) offender who was not over 21 years at the time of the

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offense, the entire record of the offender's arrest, indictment and the proceedings against him/her may be expunged. However, in the event of expungement, a nonpublic record of the violator's arrest, etc. must still be retained by the Department of Justice.

Important: Regarding the procedures to be followed relating to the retention of nonpublic records and court-ordered expungement of official records, see Department of Justice Order No. 2710, a copy of which is set forth at USAM 9-101.110.

9-100.243 Comment

Note that section 404 applies to any "controlled substance," i.e. heroin, cocaine, hashish, marihuana, LSD, amphetamines, barbiturates, etc. See the definition of "controlled substance," section 102(6) (21 U.S.C. §802(6)).

A section 404 simple possession offense seems to be a lesser included offense with respect to a charge of possession with intent to distribute (21 U.S.C. §841(a)(1)). Thus, it seems that a defendant charged with possession with intent to distribute is entitled to a lesser included offense instruction which would allow the jury to find him/her guilty of simple possession. See Sansone v. United States, 380 U.S. 343, 349-359 (1965), "[I]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it...is entitled to an instruction which would permit a finding of guilt of the lesser offense." See also United States v. Methvin, 441 F.2d 584 (5th Cir. 1971); Fuller v. United States, 407 F.2d 1199, 1227-1228 (D.C. Cir. 1968); United States v. Blake, 484 F.2d 50, 58 (8th Cir. 1973).

The United States Court of Appeals for the District of Columbia, in an exhaustive discussion of the issue, has held en banc that heroin addiction is no defense to a charge of simple possession, United States v. Raymond Moore, 486 F.2d 1139 (D.C. Cir. 1973).

9-100.250 Distribution to Persons Under 21 Years of Age - Section 405 -
21 U.S.C. §845

Section 405(a)(1) provides that any person 18 years or older who distributes a controlled substance to anyone under the age of 21 is punishable by up to twice the prison term and/or fine provided by section 401(b) (21 U.S.C. §841(b)). Also, at least twice the special parole term

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authorized by section 401(b) must be imposed. Subsequent section 405(a)(1) offenders are punishable by up to three times the prison term and/or fine authorized by section 401(b). Also, at least three times the special parole term authorized by section 401(b) must be imposed.

Comment

Note that section 405's provisions apply to any controlled substance, i.e. heroin, cocaine, marihuana, LSD, etc. See the definition of "controlled substance," section 102(6) (21 U.S.C. §802(6)).

Regarding subsequent offenders of section 405, Congress has indicated the types of sentences it believes should be imposed as follows (H.R. 91-1444 (part 1), 91st. Cong., 2d Sess. page 50):

Thus in the case of a second or subsequent offense under this section, these sentences could range from up to 45 years' imprisonment or \$75,000, plus 9 years' special parole, for a narcotic schedule I or II substance; to 15 years' imprisonment or \$45,000, plus 6 years' special parole, for a nonnarcotic schedule I or II substance or any schedule III substance; to 9 years' imprisonment or \$30,000 plus 3 years' special parole, in the case of a schedule IV substance; and to 3 years' imprisonment or \$15,000, or both, in the case of schedule V substances.

9-100.260 Attempt and Conspiracy - Section 406 - 21 U.S.C. §846

Section 406 makes it a crime to attempt or conspire to commit any offense defined in the Controlled Substances Act. The crime of attempt is new to the dangerous drug area. Previous narcotic, marihuana and other dangerous drug legislation had no such provision. A discussion of the crime of attempt, methods of proving it and other related problems may be found in USAM 9-101.300.

The conspiracy provision of section 406 is common law in nature, that is, it does not require the allegation of an overt act. See United States v. De Viteri, 350 F. Supp. 550 (E.D.N.Y. 1972). United States v. DeLazo, 497 F.2d 1168, 1171 (3d Cir. 1974). Concerning common law conspiracies, see Singer v. United States, 323 U.S. 338, 340 (1945) and Fiswick v. United States, 329 U.S. 211, 216 (1946). Regarding conspiracies under previous narcotic and marihuana legislation and there being no need to allege an overt act in connection therewith, see United States v. Gardner,

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202 F. Supp. 256 (N.D. Cal. 1962). Leyvas v. United States, 371 F.2d 714, 717 (9th Cir. 1967); and Ewing v. United States, 386 F.2d 10, 15 (9th Cir. 1967).

It should be noted that the Controlled Substances Import and Export Act has an attempt-conspiracy provision substantially identical to section 406, see 21 U.S.C. §963. Situations will arise where a defendant should be charged with conspiring to violate the provisions of both the Controlled Substances Act and the Controlled Substances Import and Export Act. Court of Appeals have split on the issue of whether such a conspiracy should be charged in one count or two counts. The First and Sixth Circuits have indicated that the conspiracy is one in nature and this should be charged in one count. See United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975) and United States v. Adcock, 487 F.2d 637 (6th Cir. 1973). The Fifth and Ninth Circuits have held that the conspiracy should be charged in two counts. See United States v. Houlton, 525 F.2d 943, 950 et seq. (5th Cir. 1976) and United States v. Marotta, 518 F.2d 681 (9th Cir. 1975). Prosecutors in these circuits should abide by the decision of their court of appeals. As for other circuits, the Criminal Division takes the position that a conspiracy of this kind should be charged in separate counts.

Regarding the manner in which a prosecutor should charge defendants with conspiring to violate both the old drug laws and the new controlled substance provisions ("overlapping conspiracy"), see United States v. King, 335 F. Supp. 523, 555 (S.D. Cal. 1971). Concerning sentencing where an overlapping conspiracy exists, see United States v. De Simone, 468 F.2d 1196, 1199 (2d Cir. 1972), cert. denied, 410 U.S. 989 (1973). See generally United States v. Noah, 475 F.2d 688, 693 (9th Cir. 1973) and United States v. Basurto, 497 F.2d 781, 791 (9th Cir. 1974).

Caveat: The conspiracy provisions of the Controlled Substances Act and the Controlled Substances Import and Export Act are intended to embrace all dangerous drug conspiracies. Accordingly, 18 U.S.C. §371, the general conspiracy statute, should not be used to charge a conspiracy involving controlled substances.

9-100.270 Additional Penalties - Section 407 - 21 U.S.C. §847

Section 407 provides that any penalty imposed under the Controlled Substances Act is to be in addition to any civil or administrative penalty otherwise authorized by law.

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9-100.280 Continuing Criminal Enterprise - Section 408 - 21 U.S.C. §848

Section 408 creates a new kind of dangerous drug violation, to wit, a "continuing criminal enterprise." Section 408(a)(1) provides that any one who engages in a continuing criminal enterprise shall be imprisoned not less than 10 years and fined up to \$100,000 for a first offense. These penalties are doubled for subsequent offenders. Under section 408(a)(2), any one who is found to have engaged in a continuing criminal enterprise shall forfeit to the government any profits he/she obtained from the enterprise and any legal interest, property right, etc. he/she may have in such enterprise.

Under section 408(b), a person is engaged in a continuing criminal enterprise if he/she commits a felonious controlled substance violation which is part of a continuing series of such violations from which he/she obtains substantial income or resources and which violations are undertaken with five or more other persons with respect to whom the person occupies a supervisory or managerial position.

Section 408(c) provides that a sentence imposed for a continuing criminal enterprise violation may not be suspended nor may probation or parole be granted. Section 408(d) provides that section 408 forfeiture actions are to be brought in United States district or territorial courts.

Comment

After extensive review of Fed. R. Crim. P. 7(c)(2), 18 U.S.C. §1963 and 21 U.S.C. §848, the Criminal Division has taken the position that an indictment brought under either 18 U.S.C. §1963 or 21 U.S.C. §848 should contain a forfeiture paragraph regardless of whether the government intends to seek forfeiture of any property. Thus, 21 U.S.C. §848 indictments should contain a forfeiture paragraph (relating to property described in 21 U.S.C. §848(a)(2) even when the government does not intend to seek forfeiture). The Criminal Division has taken this position as a result of the decision in United States v. Hall, 521 F.2d 406 (9th Cir. 1975). In Hall, supra, an 18 U.S.C. §545 indictment was ordered dismissed because it did not contain language indicating that the government intended to seek forfeiture of two smuggled diamond rings involved in the case. The Criminal Division believes that Hall rationale might be held applicable to prosecutions under 18 U.S.C. §1963 and 21 U.S.C. §848 if the government neglects to add a forfeiture paragraph to the indictment. The Division disagrees with the Hall holding. The Criminal Division believes that the proper remedy in cases where a forfeiture paragraph is improperly omitted from the indictment is merely to preclude forfeiture. However, the Division believes that the risk of dismissal under 18 U.S.C. §1963 and



U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

January 15, 1987
(Expires June 15, 1987)

TO: Holders of United States Attorneys' Manual Title 9

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

William F. Weld
Assistant Attorney General
Criminal Division

RE: Consultation Prior to Institution or Dismissal of
Criminal Charges Under Continuing Criminal Enterprise
Statute

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-100.280.

PURPOSE: This bluesheet implements new policy regarding the
consultation requirement prior to institution or
dismissal of criminal charges under 21 U.S.C. §848.

The following should replace the first three paragraphs at
9-100.280:

Section 408 creates a new kind of dangerous drug violation, to wit, a "continuing criminal enterprise." Section 408(a) provides that any one who engages in a continuing criminal enterprise shall be imprisoned not less than 10 years and shall be subject to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, U.S.C. or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual. These penalties are doubled for subsequent offenders. Under section 408(a), any one who is found to have engaged in a continuing criminal enterprise shall forfeit to the government any profits he/she obtained from the enterprise and any legal interest, property right, etc. he/she may have in such enterprise.

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Subsection 408(b) (a result of the Anti-Drug Abuse Act of 1986 Pub. L. No. 99-570) provides for a mandatory life sentence for any "principal administrator, organizer or leader of the enterprise" if either: (1) the enterprise drug activity "involved at least 300 times the quantity of a substance described in [the penalty provisions of §841(b)(1)(B) amended by Subtitle A of this Act]." (Thus, for example, engaging in an enterprise involving 30 kilos of heroin, 150 kilos of cocaine or 66,000 pounds of marihuana would subject its leader(s) to life imprisonment.); or (2) "the enterprise ... received \$10,000,000 in gross receipts during any 12 month period of its existence" from the manufacture, distribution, or importation of the substances listed in the amended 841(b)(1)(B), that is, heroin, cocaine, cocaine base (crack), PCP, LSD, fentanyl, or marijuana. This section must be specially charged in the indictment, and proved.

Until this point in time, consultation has been required prior to charging any violation of 21 U.S.C. §848. Such consultation is no longer required, but may be advisable when unique questions of law or fact are present.

HOWEVER, BEFORE CHARGING OR DISMISSING THE "PRINCIPAL ADMINISTRATOR" OFFENSE, APPROVAL OF THE ASSISTANT ATTORNEY GENERAL OF THE CRIMINAL DIVISION IS REQUIRED. SUCH REQUESTS WILL BE PROCESSED THROUGH THE NARCOTIC SECTION. WE WISH TO CLOSELY MONITOR THE USE OF THIS SPECIAL PROVISION AND INSURE THAT IT IS EFFECTIVELY AND CONSISTENTLY USED.

Under Section 408(d), a person is engaged in a continuing criminal enterprise if he/she commits a felonious controlled substance violation which is part of a continuing series of such violations from which he/she obtains substantial income or resources and which violations are undertaken with five or more other persons with respect to whom the person occupies a supervisory or managerial position.

Section 408(e) provides that a sentence imposed for a continuing criminal enterprise violation may not be suspended nor may probation or parole be granted.

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21 U.S.C. §848 is not worth the comparatively little additional effort required to place a forfeiture paragraph in the indictment. Questions about appropriate forfeiture language to be inserted in a 21 U.S.C. §848 indictment should be addressed to the Narcotic and Dangerous Drug Section.

The evidence showing that an accused has engaged in a continuing criminal enterprise should be as strong as possible with regard to proving that he/she obtained "substantial income or resources" from the enterprise. Not only must it be shown that the defendant has "substantial income or resources" but also it must be demonstrated that such resources are attributable to the continuing criminal enterprise he/she operated. Regarding "substantial income," see United States v. Jeffers, 532 F.2d 1101, 1115-1117 (7th Cir. 1976). Where the evidence on "substantial income or resources" is weak, there is great danger that a motion for acquittal will be granted. Note also that, regarding the accused's supervisory or management position, it must be shown that he/she exercised that status with respect to at least five other persons.

Section 848 is the only provision in the Controlled Substances Act or the Controlled Substances Import and Export Act which contains a minimum mandatory sentence. In this respect, it is similar to previous narcotic and marihuana legislation, see e.g., former 21 U.S.C. §174 and §176a.

Regarding unsuccessful attacks on the constitutionality of continuing criminal enterprise provisions and other aspects of section 408, see United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973) and United States v. Collier, 358 F. Supp. 1351 (E.D. Mich. 1973), aff'd., 493 F.2d 327 (6th Cir. 1974); United States v. Sisca, 503 F.2d 1337, 1345-1346 (2d Cir. 1974); and United States v. Sperling, 506 F.2d 1323, 1343-1344 (2d Cir. 1974).

The U.S. Attorney shall consult with the Narcotic and Dangerous Drug Section prior to instituting grand jury proceedings, filing an information, or seeking an indictment for a violation of the Continuing Criminal Enterprise statute (21 U.S.C. §848).

9-100.290 Dangerous Special Drug Offender Sentencing - Section 409 - 21 U.S.C. §849

Section 409 of the Controlled Substances Act (21 U.S.C. §849) contains special sentencing provisions authorizing the imposition of sentences in excess of the usual maximum of defendants who are found to be "dangerous special drug offenders." It should be noted that section 409 is merely a sentencing provision. It does not create a substantive

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offense of any kind. Serious problems can arise regarding the proper procedure for filing a dangerous special drug notice, the type of evidence needed to show "dangerousness," etc. In this respect, see United States v. Tramunti, 377 F. Supp. 6 (S.D.N.Y. 1974). (Regarding similar difficulties with a kindred statute (18 U.S.C. §3575), see United States v. Kelly, 374 F. Supp. 1394 (W.D. Mo.), and United States v. Duardi, 384 F. Supp. 874 (W.D. Mo. 1974).) A detailed discussion of section 409, particularly the procedures to be utilized thereunder is to be found in USAM 9-100.900 infra. CAVEAT. No proceedings should be instituted under section 409 without first consulting with the Narcotic and Dangerous Drug Section of the Criminal Division.

9-100.300 TITLE II - OFFENSES AND PENALTIES (CONT'D)

9-100.310 Information for Sentencing - Section 410 - 21 U.S.C. §850

Section 410 allows a court, in imposing sentence upon a controlled substance offender, to consider any information (other than confidential or privileged information) concerning the defendant's background, character or conduct.

9-100.320 Proceedings to Establish Prior Convictions - Section 411 - 21 U.S.C. §851

Section 411 sets forth the procedure for bringing to the court's attention a defendant's previous conviction record when the U.S. Attorney wishes to have subsequent offender penalties imposed. To bring such penalties into play, the U.S. Attorney should, before trial or entry of a guilty plea, file an information setting forth the previous convictions relied upon. When, despite due diligence, a U.S. Attorney learns of a previous conviction only after trial begins or as a guilty plea is about to be entered, a reasonable delay in the proceedings will be allowed for the filing of a "previous convictions" information. If the increased punishment, which will result from the filing of such an information, will exceed three years imprisonment, the triggering offense must be charged in an indictment unless it is waived. After conviction, but before sentence is imposed, the court must afford the defendant an opportunity to affirm or deny the allegations in the "previous convictions" information. If the defendant denies or challenges the validity of a prior conviction, he/she shall be granted a hearing. The U.S. Attorney must prove any factual issue beyond a reasonable doubt. The court, if requested, shall enter findings of fact and conclusions of law. If the defendant challenges the

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constitutionality of a previous conviction, he/she must establish by a preponderance of the evidence any factual issue involved. If the defendant does not respond to the "previous convictions" information, or if the court finds that there were previous convictions, an appropriate sentence shall be imposed. If the court finds for the defendant, it should, at the U.S. Attorney's request, postpone sentencing so that the finding may be appealed. A conviction which occurred more than five years before the date of the information may not be challenged by the defendant.

Note: The language of section 411 indicates that the filing of a "previous convictions" information is discretionary with the U.S. Attorney. Thus, for valid reasons in a given case, a U.S. Attorney may decide to forego the filing of such an information. For a case in which a "previous convictions" information resulted in the defendant's receiving a 20 year prison sentence and a 20 year special parole term, see United States v. Torres, 377 F. Supp. 743, 744 (W.D. Tex. 1974).

The Fifth Circuit Court of Appeals has held that a defendant may not be sentenced as a subsequent offender when the prosecutor does not file a "previous convictions" information until after sentence is imposed. See United States v. Noland, 495 F.2d 529 (5th Cir. 1974).

A prior conviction within the meaning of section 411 is one which became final before the commission of the offense for which sentence is to be imposed. Also, "prior convictions" within the meaning of section 411 are limited to previous convictions under the Controlled Substances Act, the Controlled Substances Import and Export Act and other federal laws relating to narcotics, marijuana or other dangerous drugs. (In this respect, see, e.g. section 401(b)(1)(A)). Thus, previous state drug convictions are not considered "prior convictions" within the meaning of section 411.

Questions may arise as to whether subsequent offender penalties may be imposed on a controlled substance violator whose previous drug conviction is in the process of appeal or is the subject of a certiorari request. The Criminal Division takes the position that a conviction is "final" for controlled substance subsequent offender sentencing even though it is in the process of appellate review. In this connection, see Gonzalez v. United States, 224 F.2d 431 (1st Cir. 1955); People v. Morgan, 296 P.2d 75 (Cal.); State v. Court of Appeals, Division I, 441 P.2d 544 (Arizona). See also those cases holding that a prior conviction can be used for impeachment purposes even though it is still on appeal. E.g., United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir.), cert.

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denied 337 U.S. 959 (1949); United States v. Hauff, 395 F.2d 555, 557 (7th Cir.), cert. denied 393 U.S. 843 (1968); United States v. Allen, 457 F.2d 1361, 1363 (9th Cir.), cert. denied, 409 U.S. 869 (1972); United States v. Franicevich, 471 F.2d 427, 428-429 (5th Cir. 1973). See Fed. R. Evid. 609(e).

9-100.400 TITLE II - PART E: ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

9-100.410 Procedures - Section 501 - 21 U.S.C. §871

Section 501 empowers the Attorney General to take certain actions to ensure the efficient execution of his/her functions under the Controlled Substances Act. He/she may delegate his/her functions to any officer or employee of the Department of Justice, promulgate and enforce rules and regulations, and accept any devise, bequest, gift or donation given for the purpose of preventing or controlling the abuse of controlled substances.

9-100.420 Education and Research Programs - Section 502 - 21 U.S.C. §872

Section 502 authorizes the Attorney General to carry out educational and research programs relating to the enforcement of controlled substance laws. These include training of personnel, comparison of the deterrent effects of enforcement strategies, development of specialized controlled substance field tests, evaluation of the nature and sources of supply of illegal drugs, and information necessary to carry out the function of designating substances as coming within the coverage of the Act.

When authorized by the Attorney General, the identity of research subjects may be withheld and disclosure may not be compelled. Researchers may be authorized by the Attorney General to possess, distribute and dispense controlled substances. When acting within the scope of their authority, such researchers shall be exempt from prosecution, both state and federal.

9-100.430 Cooperative Arrangements - Section 503 - 21 U.S.C. §873

The Attorney General is instructed to cooperate with local, state and federal agencies regarding suppression of trafficking in and abuse of controlled substances. In this respect, he/she is authorized to exchange information, cooperate in the prosecution of federal and state cases as

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well as in proceedings before state licensing boards, and conduct training programs for federal, state and local personnel. He/she is to establish a unit which will maintain all information and statistics relating to controlled substance abusers and offenders received from federal, state and local agencies and make such information available to such agencies for law enforcement purposes. The Attorney General is also to conduct programs designed to destroy wild or illicit growth of plant material from which controlled substances may be extracted. At the Attorney General's request, all federal agencies must assist him/her in performing his/her functions, except for furnishing the identity of a patient or research subject whose identity is required to be kept confidential.

9-100.440 Advisory Committees - Section 504 - 21 U.S.C. §874

Section 504 empowers the Attorney General to appoint advisory committees to assist him/her in preventing and controlling the abuse of controlled substances. Members of such committees are to receive compensation at the rate fixed in section 504.

9-100.450 Administrative Hearings - Section 505 - 21 U.S.C. §875

To carry out his/her functions, the Attorney General is authorized to hold hearings, administer oaths, issue subpoenas, examine witnesses and receive evidence anywhere in the United States. Except as otherwise provided, hearings are to be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §551, et seq.

9-100.460 Subpoenas - Section 506 - 21 U.S.C. §876

In any investigation relating to his/her functions under the Controlled Substances Act the Attorney General may subpoena witnesses, compel their attendance and testimony, and require the production of records and other tangible things containing relevant or material evidence. Witnesses may not be required to appear at a place more than 500 miles distant from the place of service of the subpoena and will be paid the same fees as provided for witnesses in federal courts. Personal service of subpoenas is required. In the case of contumacy or failure to obey, resort should be had to a federal court which may, by order, compel compliance with the subpoena. Failure to obey such a court order may be punished as contempt.

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9-100.470 Judicial Review - Section 507 - 21 U.S.C. §877

Final determinations of the Attorney General made under the Controlled Substances Act are subject to judicial review, on application of an aggrieved party. Review is to be conducted by the United States Court of Appeals for the District of Columbia or by the circuit court in which such party's principal place of business is located within 30 days after notice of decision. The Attorney General's findings of fact, if supported by substantial evidence, shall be conclusive.

9-100.480 Power of Enforcement Personnel - Section 508 - 21 U.S.C. §878

Officers and employees designated by the Attorney General are authorized to do the following: to carry firearms; to execute and serve search warrants, administrative inspection warrants, subpoenas and summons; to make arrests without a warrant where the offense is committed in their presence or for any felony where there is probable cause to believe that the person to be arrested has committed such felony, to make seizures of property under the Controlled Substances Act, and to perform such other duties as the Attorney General may designate.

9-100.490 Search Warrants - Section 509 - 21 U.S.C. §879

Section 509(a), incorporating former 18 U.S.C. §1405, provides that search warrants relating to controlled substance offenses may be served at any time of the day or night if the issuing judge or magistrate is satisfied that there is probable cause to believe that grounds exist for issuance and service at that time.

Section 509(b), which authorized the issuance of "no-knock" search warrants in limited situations, was repealed on October 26, 1974. The repeal was effected by P.L. 93-481, which was signed into law on October 26, 1974. It should be noted that circumstances may still occasionally arise where an unannounced entry might be justified under the "exigent circumstances" doctrine. See Ker v. California, 374 U.S. 23, 37-41 (1963); United States v. Samuels, 374 F. Supp. 684 (E.D. Penn. 1974). However, unannounced entries by investigative agents should generally be discouraged and should only be resorted to in extreme situations. It is recommended that, whenever such a situation arises and there is time to do so, that the Narcotic and Dangerous Drug Section of the Criminal Division be contacted telephonically for its views. It should be noted that the presence of controlled substances alone, without more, is not sufficiently "exigent" to warrant a forcible entry. See United States v. Doering, 384 F. Supp. 1307, 1310-1311 (W.D. Mich. 1974).

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Note: The United States Court of Appeals for the District of Columbia has held that an application for a warrant to conduct a nighttime search under section 509(a) need not show any more than probable cause to believe that the controlled substances sought will be found at the place named at the time the warrant is executed, i.e. ordinary probable cause suffices. See United States v. Gooding, 477 F.2d 428 (D.C. Cir. 1973), aff'd, 416 U.S. 430 (1974).

9-100.500 TITLE II - PART E (CONT'D.)

9-100.510 Administrative Inspections and Warrants - Section 510 - 21
U.S.C. §880

Section 510 authorizes the Attorney General to conduct administrative inspections of "controlled premises." Such premises are defined as places where controlled substance records or documents are kept and places (including factories and warehouses) where registrants or those exempted from registration are permitted to handle controlled substances.

Officers and employees designated as "inspectors" by the Attorney General conduct administrative inspections. The inspectors, upon identifying themselves to the individual in charge of controlled premises, stating their purpose, and presenting a written notice of inspection authority, have the right to enter such premises. When an administrative inspection warrant is required or has been issued, it takes the place of the written notice.

Unless restricted by an administrative inspection warrant, an inspector may examine and copy controlled substance records which are required to be kept or made. He/she may also inspect controlled premises, equipment found therein, raw materials, finished and unfinished drugs, containers, labeling etc. However, an inspector may not examine financial, sales or pricing data unless he/she obtains written consent.

Section 510(d) provides for the issuance and execution of administrative inspection warrants. Such warrants may be issued by federal judges and magistrates and by judges of a state court of record. The probable cause which must be shown for the issuance of such a warrant is defined as "a valid public interest in the enforcement of [the Controlled Substances Act] or regulations thereunder sufficient to justify administrative inspections...in the circumstances specified in the application." The definition of administrative probable cause relates

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back to and is based on the decisions in Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. Seattle, 387 U.S. 541 (1967).

Warrantless inspection of books and records may be made pursuant to an administrative subpoena issued in accordance with section 506 (21 U.S.C. §876). Warrantless inspections of controlled premises may be made where the owner or person in charge consents thereto, where there is imminent danger to health or safety, in emergency situations, and in situations where an administrative inspection warrant is not constitutionally required.

Comment

For a case discussing and upholding the administrative search warrant provisions, see United States v. Greenberg, 334 F. Supp. 364 (W.D. Pa. 1971). Concerning the broad scope of an administrative inspection warrant, see United States v. Montrom, 345 F. Supp. 1337 (E.D. Pa. 1972), aff'd 480 F.2d 918 (3d Cir. 1973). Regarding the type of situation in which an administrative inspection warrant is required, see United States v. Anile, 352 F. Supp. 14 (N.D. W. Va. 1973). Concerning administrative inspections generally, see Colonnade Catering Co. v. United States, 397 U.S. 72 (1970), and Biswell v. United States, 406 U.S. 311, 314-315 (1972).

9-100.520 Forfeitures - Section 511 - 21 U.S.C. §881

The Drug Agents' Guide to Forfeiture of Assets contains material on 21 U.S.C. §881. It has been distributed to U.S. Attorneys' offices and is also available from the Government Printing Office.

The Asset Forfeiture Office is also preparing a manual which will summarize the substantive provisions of all of the civil forfeiture statutes contained in the United States Code, including 21 U.S.C. §881. Requests should be directed to the Asset Forfeiture Office, 272-6420.

9-100.530 Injunctions - Section 512 - 21 U.S.C. §882

Section 512 provides for the issuance of injunctions by federal courts to prevent violations of the Controlled Substances Act. When an injunction or restraining order is alleged to have been violated, the accused has the right to trial by a jury. (Section 512 is similar to kindred provisions contained in the Food, Drug, and Cosmetic Act. See 21 U.S.C. §332.)

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9-100.540 Enforcement Proceedings - Section 513 - 21 U.S.C. §883

Section 513 authorizes the Administrator of the Drug Enforcement Administration to grant a person against whom criminal action is contemplated an opportunity to present his/her views or to show cause why he/she should not be prosecuted. Ordinarily this opportunity will be afforded only to registrants who have committed minor violations of the Act. A section 513 hearing may be sufficient to obtain the registrant's compliance with the act. Thus, after such a hearing, there may be no need to institute court action. Regarding DEA's procedures under section 513, see 21 C.F.R. §1316.31 et seq.

9-100.550 Immunity and Privilege - Section 514 - 21 U.S.C. §884

Section 514 authorizes a U.S. Attorney, with the approval of the Attorney General, Deputy Attorney General or duly authorized Assistant Attorney General to apply to a court for an immunity order requiring a witness to testify or produce evidence concerning any controlled substance violation before a federal court or grand jury. The giving of testimony or production of evidence under an immunity grant does not shield a witness against prosecution but merely prevents the government's using his/her testimony against him, Kastigar v. United States, 406 U.S. 441 (1972). The "use" immunity also extends to state prosecutions. Section 514 immunity encompasses all kinds of criminal prosecution except a prosecution for perjury or giving a false statement or for otherwise failing to comply with the immunity order. Regarding prosecutions for perjury and false statements, see In re Baldinger, 356 F. Supp. 153 (C.D. Cal. 1973); United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973); Application of U.S. Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D. D.C. 1973).

Note: The Organized Crime Control Act of 1970, which was enacted prior to the Controlled Substances Act, contains use immunity provisions similar to section 514 which are broad enough to encompass controlled substance violations. To achieve uniformity regarding grants of immunity, requests for immunity in controlled substance cases should be made under the Organized Crime Control Act, i.e., 18 U.S.C. §§6002-6003.

Please also refer to USAM 1-11.000, IMMUNITY.

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9-100.560 Burden of Proof: Liabilities - Section 515 - 21 U.S.C. §885

Section 515 relieves the government from having to establish in a controlled substance prosecution that the defendant does not come within any of the Act's exemptions or exceptions. This is in line with existing case law. See United States v. Rowlette, 397 F.2d 475, 479-480 (7th Cir. 1968); United States v. Ramzy, 446 F.2d 1184 (5th Cir. 1971); United States v. Messina, 481 F.2d 878, 880 (2d Cir. 1973). Section 515 also provides that, when a person is charged with having illegally possessed a controlled substance, a prescription label (see 21 U.S.C. §353(b)(2)) shall be admissible into evidence to show that the substance was validly obtained. Section 515(b) provides that, absent proof that a person is a registrant or that he/she validly possesses an order form, the burden of establishing these facts shall be upon him/her. As to section 515(b)'s "creating [an] affirmative defense as to which the defendant bears the burden of going forward," see United States v. Kelly, 500 F.2d 72 (7th Cir. 1974).

Section 515(d) provides that no Drug Enforcement Administration agent or other law enforcement officer lawfully engaged in enforcing controlled substance laws shall be subject to civil or criminal liability other than as provided in the search warrant abuse provisions of 18 U.S.C. §2234-2235.

9-100.570 Payments and Advances - Section 516 - 21 U.S.C. §886

Section 516 provides for the payment of money by the Drug Enforcement Administration to informants and for the disposition of official funds which are retrieved after they have been used to purchase controlled substances.

9-100.600 TITLE II - PART G: CONFORMING, TRANSITIONAL AND EFFECTIVE DATES, GENERAL PROVISIONS

9-100.610 Repeals and Conforming Amendments - Section 701 - No Citation In U.S. Code

Section 701 repeals the dangerous drug amendments to the Food, Drug, and Cosmetic Act, e.g., 21 U.S.C. §321(v), §331(q) and §360a. (The dangerous drug amendments related to depressant and stimulant drugs such as LSD, amphetamines, barbiturates, etc. The appendix to this manual contains a table showing where the substance of the former provisions may be found in the Controlled Substances Act.) Other sections of the United

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States Code have been amended to conform with the Controlled Substances Act by deleting references therein to depressant or stimulant drugs. 18 U.S.C. §1952, which deals with interstate and foreign travel or transportation in aid of racketeering enterprises, has been amended to include within its definition of unlawful activity business enterprises dealing in controlled substances. 42 U.S.C. §242(a) has been amended to allow research regarding the use and misuse of narcotics and other controlled substances.

9-100.620 Pending Proceedings - Section 702 - 21 U.S.C. §321 note

Section 702 provides that drug violations occurring prior to May 1, 1971 may be prosecuted under laws which were in effect prior to the effective date of the criminal provisions of the Controlled Substances Act. Seizure, forfeiture and injunction proceedings commenced prior to May 1, 1971 are not affected by repeals or amendments made by section 701 of the Act. Administrative proceedings pending before the Bureau of Narcotics and Dangerous Drugs on October 27, 1970 are to be concluded in accordance with laws and regulations in effect prior to October 27, 1970. Drugs determined to be depressants and stimulants are to be automatically controlled under the Controlled Substances Act without court proceedings and are to be listed in appropriate schedules of the Act by the Attorney General after consultation with the Secretary of Health, Education and Welfare. Drugs determined to be depressants or stimulants prior to October 28, 1970 but which were not listed in the schedules of the Controlled Substances Act are to be automatically controlled without further proceedings.

Note: Regarding prosecution for pre-May 1971 drug offenses and sentencing therefor, see Bradley v. United States, 410 U.S. 605 (1973).

9-100.630 Provisional Registration - Section 703 - 21 U.S.C. §822 note

Section 703 provides for provisional registration of those who are engaged in manufacturing, distributing or dispensing controlled substances on the day previous to the effective date of section 302's registration provisions and who are already registered under the Food, Drug and Cosmetic Act or the Internal Revenue Code of 1954.

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9-100.640 Effective Dates and Other Transitional Provisions - 21 U.S.C.
§801 note

The Controlled Substances Act, with various exceptions, took effect on May 1, 1971. However, certain provisions became effective on enactment, i.e., October 27, 1970. Those provisions which became effective on October 27, 1970 are Part A - containing the Act's findings, declarations and definitions, Part B - containing the authority to control, standards and schedules, Part E - containing administrative and enforcement provisions, and Part F - providing for the establishment of a commission on marihuana and drug abuse. Also immediately effective were section 702, concerning pending proceedings; section 704, concerning the Controlled Substance Act's effective date; section 705, providing for the continuing in effect of previous regulations; section 706, containing the severability provisions; section 707, the saving provision; section 708, relating to the application of state law; and section 709, containing the appropriation authorization. Sections 305 (labels and labeling) and 306 (manufacturing quotas) became effective May 1, 1971.

9-100.700 TITLE III - IMPORTATION AND EXPORTATION AMENDMENTS;
REPEALS OF REVENUE LAWS

9-100.701 Short Title - Section 1000 - 21 U.S.C. §951 note

This section provides that section 1001 et seq. are to be cited as the Controlled Substances Import and Export Act.

9-100.702 Definitions - Section 1001 - 21 U.S.C. §951

Section 1001 (a)(1) defines the term "import" as meaning the bringing in or introduction of an article into any area under federal jurisdiction without regard to whether such activity constitutes an importation within the meaning of the tariff laws. Section 1001(a)(2) defines the phrase "customs territory of the United States" as having the meaning given it by general headnote 2 to the Tariff Schedules of the United States, i.e., the phrase encompasses "only the States, the District of Columbia and Puerto Rico." Section 1001(b) provides that terms defined in section 102 of the Controlled Substances Act which are also used in the Controlled Substances Import and Export Act are to have the same meaning as they have in the Controlled Substances Act.

Comment: "Import" By giving the term "import" a broad definition Congress seems to have intended to remove restrictions which have

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heretofore been placed on it. See e.g. United States v. Morello, 250 F.2d. 631, 635 (2d Cir. 1957) and Pineda v. United States, 393 F.2d 139 (5th Cir. 1968), cert. denied, 292 U.S. 943 which held that illegal importation of narcotics is accomplished when the narcotics are brought within the territorial waters of the United States. See also United States v. Lember, 319 F. Supp. 249 (E.D. Va. 1970) where it was held that the crime of smuggling marihuana into the United States is complete "when the [mail] package arrives ashore and [is] opened." For cases broadly construing the term "import" as used in the Controlled Substances Import and Export Act, see United States v. Jackson, 482 F.2d 1167, 1178 (10th Cir. 1973); United States v. Buddy Joe Barnard, 490 F.2d 907 (9th Cir. 1973).

9-10.710 Importation of Controlled Substances - Section 1002 - 21 U.S.C. §952

Section 1002(a) makes it unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States) or to import into the United States from any place outside thereof any schedule I or II controlled substance or any schedule III, IV or V narcotic. Subsections (a) (1) and (2) contain certain exceptions to this prohibition. They permit the importation of as much crude opium and coca leaves as the Attorney General finds necessary to provide for medical, scientific and other legitimate purposes. The Attorney General may also allow the importation of such amounts of schedule I and II substances and schedule III, IV and V narcotics as he/she finds necessary to provide for the medical scientific or other legitimate needs of the country. However, such importations are allowed only during an emergency in which domestic supplies of such drugs are found to be inadequate or when competition among domestic manufacturers is found to be inadequate and cannot be made adequate by registering more manufacturers.

Section 1002(b) prohibits the importation of any nonnarcotic schedule III, IV or V controlled substance unless the drug is imported for medical, scientific or other legitimate purposes and is imported pursuant to notification and declaration requirements prescribed by regulation.

Section 1002(c) authorizes the Attorney General to permit the importation of more coca leaves than would ordinarily be authorized but requires all cocaine and ecgonine contained in such leaves to be destroyed.

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9-100.711 General

It has been held that an individual who obtains narcotics of hashish in the United States, subsequently transports them to another country, and then returns to the United States with them still in his/her possession may be prosecuted for illegal importation, see United States v. Williams, 435 F.2d 1001 (5th Cir. 1970); United States v. Doyal, 437 F.2d 271 (5th Cir. 1971).

9-100.712 Venue

The continuing offense venue statute (18 U.S.C. §3237) has been held to be applicable to section 1002 offenses, see United States v. Jackson, 482 F.2d 1167 (10th Cir. 1973); United States v. Barnard, 490 F.2d 907 (9th Cir. 1973).

9-100.713 Mail Packages

Concerning the broad authority of Customs inspectors to examine mail coming into the United States, see United States v. Doe (Rodriquez), 472 F.2d 982 (2d Cir. 1973). Regarding controlled deliveries of foreign mail packages containing controlled substances, especially the obtaining of search warrants for residences to which such packages are to be delivered prior to actual delivery, see United States ex rel. Beal v. Skaff, 418 F.2d 430 (7th Cir. 1969); United States v. Outland, 476 F.2d 581 (6th Cir. 1973); United States v. Feldman, 366 F. Supp. 356 (D. Hawaii 1973).

9-100.720 Exportation of Controlled Substances - Section 1003 - 21 U.S.C. §953

Section 1003(a) makes it unlawful to export any schedule I, II, III, or IV narcotic unless: (1) it is shipped to a country which is a party to certain international narcotic control conventions, (2) the destination country has an adequate narcotic import control system, (3) the destination country has issued the consignee a narcotic import license, (4) the exporter establishes that the narcotic is to be used for medical or scientific purposes in the destination country, and (5) the Attorney General has issued an export permit.

Section 1003(b) allows the Attorney General to authorize the exportation of schedule I, II, III and IV narcotics for special scientific purposes if the destination country will permit importation for such purposes.

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Section 1003(c) prohibits the exportation of any nonnarcotic schedule I or II controlled substance unless: (1) it is shipped to a country which has an adequate control system for such imports, (2) the consignee holds permits required under the laws of the country of import, (3) it is established by the exporter that the substance is to be used for medical, scientific or other legitimate purposes in the destination country and that it will not be diverted from such country, and (4) the Attorney General has issued an export permit.

Section 1003(d) authorizes the Attorney General to permit the exportation of nonnarcotic schedule I or II controlled drugs if they are intended for a special scientific purpose in the destination country and such country allows importation for such a purpose.

Section 1003(e) prohibits the exportation of any nonnarcotic schedule III or IV controlled substance or any schedule V controlled drug unless documentary proof is furnished showing that the importation of such substances does not violate the laws of the destination country, a special invoice accompanies the shipment, and two copies of the invoice are furnished the Attorney General before exportation.

9-100.730 Transshipment and In-transit Shipment of Controlled Substances
- Section 1004 - 21 U.S.C. §954

Exempt from the import-export restrictions of sections 1002 and 1003 and from the registration requirements of section 1007 (21 U.S.C. §957) are controlled substances which are imported from transshipment to another country. Under section 1004(1), a schedule I controlled substance may be imported for transshipment to another country if it is intended for scientific, medical, or other legitimate uses in the destination country and the Attorney General has given prior written approval for such importation and transshipment. Under section 1004(2), a schedule II, III or IV controlled substance may be imported for transshipment only when the Attorney General is given advance notice of the transaction.

9-100.740 Possession on Board Vessels, etc. Arriving in or Departing
from United States - Section 1005 - 21 U.S.C. §955

Section 1005 makes it unlawful for any person to bring or possess on board any vessel, aircraft, or any vehicle of a carrier, arriving in or departing from the United States or the customs territory of the United States a schedule I or II controlled substance or a schedule III or IV narcotic unless the substance is entered in the cargo manifest or is part of official supplies.

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Caveat: In United States v. Valot, 481 F.2d 22 (2d Cir. 1973), a section 1005 violation to wit, possessing hashish on board an airplane arriving in the United States was held to be a lesser included offense with regard to illegal importation. The court states: "We find that the offense of possession on board an aircraft merges with the offense of illegal importation once the latter offense has been committed." Id. at 27. See also United States v. Tonarelli, 55 F.R.D. 423 (D. P.R.). Thus, care should be used in charging section 1005 offenses so that a "lesser included offense" situation will not arise.

9-100.741 Manufacture, Distribution, or Possession with Intent to Manufacture or Distribute Controlled Substance on Board Vessels (P.L. 96-350) - 21 U.S.C. §955a

A. 21 U.S.C. §955a(a) provides that it is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

B. 21 U.S.C. §955a(b) provides that it is unlawful for a citizen of the United States on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

C. 21 U.S.C. §955a(c) provides that it is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

D. 21 U.S.C. §955a(d) provides that it is unlawful for any person to possess, manufacture, or distribute a controlled substance-

1. Intending that it be unlawfully imported into the United States; or

2. Knowing that it will be unlawfully imported into the United States.

E. Exceptions to 21 U.S.C. §955a(a), (b) and (c) are found at 21 U.S.C. §955a(e). 21 U.S.C. §955a(e) provides that 21 U.S.C. §955a(a), (b) and (c) will not apply to a common or contract carrier, or an employee thereof, who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business or to a public vessel of the United States or any person on board such a vessel who possesses or

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distributes a controlled substance in the lawful course of his/her duties, if the controlled substance is a part of the cargo entered in the vessel's manifest and is intended to be lawfully imported into the country of destination for scientific, medical, or other legitimate purposes. 21 U.S.C. §955a(e) also provides that the burden of going forward with evidence of the existence of an exception rests upon the person claiming its benefit.

F. 21 U.S.C. §955a(f) provides that the person who violates 21 U.S.C. §955a(a) shall be tried in the United States District Court at the point of entry where that person enters the United States or in the United States District Court for the District of Columbia.

G. 21 U.S.C. §955a(g) is the penalty provision for 21 U.S.C. §955a violations. 21 U.S.C. §955(g) provides that violators of 21 U.S.C. §955a(a), (b), (c) or (d) shall be punished in accordance with the penalties set forth in section 1010 (21 U.S.C. §960). If the person convicted of 21 U.S.C. §955a to 955b is a second time offender, that person shall be punished in accordance with penalties set forth in section 1012 (21 U.S.C. §962).

H. 21 U.S.C. §955a(h) expresses the intent of Congress to extend the jurisdiction of the United States beyond its territorial boundaries.

9-100.742 Definitions (P.L. 96-350) - 21 U.S.C. §955b

This section contains five definitions, they are as follows:

A. Customs Waters

The definition of "customs waters" is found in 19 U.S.C. §1401(j) which states:

The definition of "customs waters" means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.

B. High Seas

High seas is defined as all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nations.

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C. Vessel of the United States

Vessel of the United States means any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended, or owned in whole or in part by the United States or a citizen of the United States, or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accordance with article 5 of the Convention of the High Seas, 1958.

D. Vessel Subject to the Jurisdiction of the United States

Vessel subject to the jurisdiction of the United States includes a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with a paragraph (2) of article 6 of the Convention of the High Seas, 1958.

E. Comprehensive Act

Comprehensive Act means the Comprehensive Drug Abuse Control and Prevention Act of 1970. All terms used in 21 U.S.C. §§955a, and 955d that are defined in the Comprehensive Act have the meanings assigned to them by that Act.

9-100.743 Attempt or Conspiracy (P.L. 96-350) - 21 U.S.C. §955c

Any person who attempts or conspires to commit any offense defined in 21 U.S.C. §§955a to 955d is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

9-100.744 Seizure or Forfeiture of Property (P.L. 96-350) - 21 U.S.C. §955d

Any property described in 21 U.S.C. §881(a) that is used or intended for use to commit, or to facilitate the commission of, an offense under 21 U.S.C. §§955a to 955d shall be subject to seizure and forfeiture in the same manner as similar property seized or forfeited under 21 U.S.C. §881.

9-100.750 Exemption Authority - Section 1006 - 21 U.S.C. §956

Section 1006(a) authorizes the exempting from sections 1002(a)(b) (importation), 1003 (exportation), 1004 (transshipment) and 1005

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(possession on board vessels) of any person who possesses a controlled substance (except a schedule I substance) for personal medical use or for administration to an animal accompanying him/her provided he/she has lawfully obtained the drug and declares it.

Section 1006(b) authorized the exempting from the coverage of the Controlled Substances Import and Export Act of compounds, mixtures, etc. which contain stimulants or depressants listed in paragraphs (a) and (b) of schedule III or in schedules IV-V if such preparations contain one or more nonstimulant or nondepressant ingredients which vitiate the abuse potential of the controlled substances with which they are combined.

9-100.760 Persons Required to Register - Section 1007 - 21 U.S.C. §957

Section 1007 prohibits any person from importing or exporting any controlled substances in schedules I, II, III or IV unless he/she is registered or is exempt from registration.

Exempted from registration requirements are agents and employees of registered importers and exporters, carriers and warehousemen; ultimate users, and whatever importers and exporters the Attorney General decides need not register.

Caveat: Section 1007(a) should not be used against anyone other than importers and exporters who are required to register under the Controlled Substances Import and Export Act. In this regard, see United States v. Jin Fuey Moy, 241 U.S. 394 (1916).

9-100.770 Registration Requirements - Section 1008 - 21 U.S.C. §958

Section 1008(a) directs the Attorney General to register an applicant as an importer or exporter of a schedule I or II controlled substance if he/she determines such registration is consistent with the public interest and treaty obligations. Concerning the public interest, the Attorney General is to consider the same factors taken into account in registering domestic manufacturers under section 303 of the Controlled Substances Act (21 U.S.C. §823).

Section 1008(b) provides that a registrant may import or export schedule I or II controlled substances only to the extent specified in his/her registration.

Section 1008(c) directs the Attorney General to register applicants to import schedule III, IV or V controlled substances or to export a

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schedule III or IV controlled drug unless he/she decides that the issuance of such a registration is inconsistent with the public interest.

Section 1008(d) provides that a registration shall not be effective for more than one year. Also, unless regulations otherwise provide, sections 302(f) (inspection of registered establishments), 304 (denial, revocation or suspension of registration), 305 (labeling and packaging) and 307 (recordkeeping) of the Controlled Substances Act shall apply to section 1008 registrants.

Section 1008(e) authorizes the Attorney General to promulgate necessary rules and regulations and to charge reasonable registration fees.

Section 1008(f) provides that registrants may import and export controlled substances to the extent authorized by their registrations and in conformity with other provisions of the Controlled Substances Act and the Controlled Substances Import and Export Act.

Section 1008(g) requires a separate registration for each place of business where controlled substances are imported or exported.

Section 1008(h) provides that, except in emergencies, the Attorney General, prior to issuing an import and export registration to a bulk manufacturer of schedule I or II controlled substances and before promulgating a regulation authorizing importation of such a substance, must give registered manufacturer of such substances an opportunity for a hearing.

9-100.780 Manufacture or Distribution for Purposes of Unlawful Importation - Section 1009 - 21 U.S.C. §959

Section 1009 makes it unlawful for any person who is outside the territorial jurisdiction of the United States to manufacture or distribute a schedule I or II controlled substance knowing or intending that it will be unlawfully imported into the United States.

This section is intended to reach acts committed outside the United States. Those who violate it may be tried in the United States District Court where they enter the United States or in the United States District court for the District of Columbia.

Note: One who participates in a federal offense committed in whole or in part within the United States is subject to federal jurisdiction,

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United States v. Bowman, 260 U.S. 94, 97 (1922); Rivard v. United States, 375 F.2d 882, 885-887 (5th Cir.), cert. denied sub nom. Groleau v. United States, 389 U.S. 884 (1967); Brulay v. United States, 383 F.2d 345, 349-350 (9th Cir. 1967), cert. denied, 389 U.S. 986 (1967). Charron v. United States, 412 F.2d 657, 659 (9th Cir. 1969). And see also, Perlman v. United States, 430 F.2d 22 (7th Cir.), cert. denied, 400 U.S. 832 (1970). For a case upholding section 1009, see United States v. Daniszewski, 380 F. Supp. 113 (E.D. N.Y. 1974).

9-100.790 Penalties

9-100.791 Prohibited Acts A - Penalties - Section 1010 - 21 U.S.C. §960

Section 1010's penalties apply to any unauthorized person who knowingly or intentionally imports or exports a controlled substance, who brings or possesses such a substance on board a vessel, aircraft or vehicle, or who manufactures or distributes a controlled substance for purposes of unlawful importations.

Section 1010(b)(1) provides that anyone importing, exporting, etc. a schedule I or II narcotic is to be punished by a fine of up to \$25,000, not more than 15 years imprisonment, or both. When a prison term is imposed it must include a special parole term of at least three years.

Section 1010(b)(2) provides that anyone importing, exporting, etc. controlled substances other than schedule I or II narcotics is to be punished by a fine of not more than \$15,000, by up to five years imprisonment, or by both. When a prison sentence is imposed it must include a special parole term of not less than two years if a schedule I, II or III controlled drug is involved or a special parole term of at least one year if a schedule IV controlled substance is involved.

Section 1010(c) provides that a special parole term may be revoked if its conditions are violated and sets forth the consequences of revocation.

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| Substances | Maximum Fine | Sentence | Spec. Parole Term | Probation Susp. Sent. | Parole |
|---|-----------------|-------------------|----------------------|--------------------------|--------|
| I and II narcotics | \$25,000 | up to 15 years | at least 3 years | Yes | Yes |
| I and II non-nar- drugs III cont. substances | \$15,000 | up to 5 years | at least 2 years | Yes | Yes |
| IV. cont. substances | \$15,000 | up to 3 years | at least 1 year | Yes | Yes |
| V. cont. | \$15,000 | up to 5 | None | Yes | Yes |

Comment

The offense of importation applies to the bringing in of controlled substances to any state, territory or possession of the United States. See USAM 9-100.702, supra for the definition of "import" in section 1001. To illustrate, it is an offense to transport heroin from Europe to the Virgin Islands. See USAM 9-100.113.N, supra for the definition of "United States" in section 102(26) of the Controlled Substances Act (21 U.S.C. §802(26)). The further transportation of the heroin from the Virgin Islands to Puerto Rico or to Florida would also constitute an illegal importation. See USAM 9-100.702, supra for the definition of "customs territory of the United States," in section 1001.

Regarding venue of importation offenses, the continuing offense statute (18 U.S.C. §3237) has been held to be applicable. See United States v. Jackson, 482 F.2d 1167 (10th Cir. 1973); United States v. Barnard, 409 F.2d 907 (9th Cir. 1973).

9-100.792 Prohibited Acts B - Penalties - Section 1011 - 21 U.S.C. §961

Section 1011 contains the penalties for those who violate the transshipment and in-transit shipment provisions of the Controlled Substances Import and Export Act. Section 1011(1) provides that any such offender is to be fined not more than \$25,000. A violation for which such a fine is assessed shall not constitute a crime nor evoke any disability based on a criminal conviction. However, when a shipment offense is

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charged and found to have been committed "knowingly or intentionally," section 1011(2) provides that the violator may be imprisoned up to one year, fined not more than \$25,000 or both.

Section 1011 penalizes those (1) who import a schedule I controlled substance for transshipment to another country without the Attorney General's prior written approval, (2) who transfer or transship a schedule I substance within the United States for immediate exportation without the Attorney General's prior approval (3) who import a schedule II, III or IV substance for transshipment to another country without giving advance notice to the Attorney General, and (4) who transfer or transship within the United States for immediate exportation a schedule II, III or IV substance without giving advance notice to the Attorney General.

Comment

Section 1011's civil penalty provisions should be used when a transshipment or in-transit violation is due to mistake, negligence, inadvertence or is minor in nature. When an offense is committed "knowingly or intentionally," section 1011's misdemeanor provisions should be invoked.

9-100.800 TITLE III - IMPORTATION AND EXPORTATION AMENDMENTS;
REPEALS OF REVENUE LAWS (CONT'D.)

9-100.810 Second or Subsequent Offenses - Section 1012 -21 U.S.C. §962

Section 1012(a) provides that any person convicted of violating the Controlled Substances Import and Export Act is punishable by twice the punishment otherwise authorized when the violation is a second or subsequent offense. When one is convicted of a crime punishable under section 1010(b) of the Controlled Substances Import and Export Act (e.g. importation, exportation) and the violation is a subsequent offense, the court must impose twice the special parole term otherwise authorized.

Section 1012(b) provides that a person is considered to be a subsequent offender if, before he/she commits the triggering violation, one or more prior felony convictions of him/her under the Controlled Substances Act, the Controlled Substances Import and Export Act, or other federal legislation relating to narcotics or other dangerous drugs have become final.

Comment: Note that previous state drug convictions are not to be considered in determining whether a violator is a subsequent offender

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within the meaning of section 1012. A previous conviction is "final" for subsequent offender purposes even though it is on appeal or is the subject of a certiorari request. See Gonzalez v. United States, 224 F.2d 431 (1st Cir. 1955); People v. Morgan, 296 P.2d 75 (Cal. 1956); State v. Court Of Appeals, Division 1, 441 P.2d 544 (Ariz. 1968). See also those cases holding that a prior conviction can be used for impeachment purposes even though it is still on appeal. See, e.g., United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir.), cert. denied, 337 U.S. 959 (1949); United States v. Hauff, 395 F.2d 555, 557 (7th Cir.), cert. denied, 393 U.S. 843 (1968); United States v. Allen, 457 F.2d 1361, 1363 (9th Cir.), cert. denied, 409 U.S. 869 (1972); United States v. Franicevich, 471 F.2d 427, 428-429 (5th Cir. 1973).

9-100.820 Continuing Criminal Enterprise and Dangerous Special Drug Offender

It should be noted that a felonious violation of the Controlled Substances Import and Export Act may be used to trigger the continuing criminal enterprise and dangerous special drug offender provisions of the Controlled Substances Act. See 21 U.S.C. §848(b)(1)(2) and 21 U.S.C. §849(a).

9-100.830 Attempt and Conspiracy - Section 1013 - 21 U.S.C. §963

Section 1013 provides that anyone who attempts or conspires to commit a violation of the Controlled Substances Import and Export Act is punishable by imprisonment, fine, or both, not to exceed the maximum prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Comment: The conspiracy provision of section 1013 is common law in nature, that is, it does not require the allegation of an overt act. Concerning common law conspiracies, attempt, and other matters relevant to section 1013, see discussion under section 406, the attempt-conspiracy provisions of the Controlled Substances Act.

9-100.840 Additional Penalties-Section 1014 - 21 U.S.C. §964

Section 1014 provides that any penalty imposed for a violation of the Controlled Substances Import and Export Act shall be in addition to, and not in place of, any other authorized civil or administrative penalty.

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9-100.850 Applicability of Part E of the Controlled Substances Act -
Section 1015 - 21 U.S.C. §965

Section 1015 provides that Part E of the Controlled Substances Act (i.e. the administrative and enforcement provisions) shall apply to activities of the Attorney General and Drug Enforcement Administration under the Controlled Substances Import and Export Act, to administrative and judicial proceedings under that Act, and to violations of the Controlled Substances Import and Export Act.

9-100.860 Authority of Secretary of Treasury - Section 1016 - 21 U.S.C.
§966

Section 1016 provides that nothing in the Controlled Substances Import and Export Act shall affect the Treasury Secretary's authority under customs and related laws.

9-100.870 PART B - Amendments and Repeals, Transitional and Effective
Date Provisions

9-100.871 Repeals - Section 1101 - Not carried into U.S. Code

Section 1101 repeals prior federal laws relating to importation of narcotics, depressant and stimulant drugs, and marihuana. It also repeals revenue laws dealing with narcotics and marihuana. The only major criminal offense not carried over into the Controlled Substances Import and Export Act is found in former 18 U.S.C. §1407, which required narcotic addicts and violators to register prior to crossing the border. The only other criminal provisions which are not reenacted are found in former 21 U.S.C. §§191-193. Those sections related to importation and exportation of opium between the United States and China by Chinese subjects.

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9-100.872 Conforming Amendments - Section 1102 - Not Carried into U.S. Code

Section 1102 delegates references to repealed narcotic and dangerous drug laws which were contained in the Internal Revenue Code and other federal statutes. Where appropriate, in place of the deletions, references to the new law are inserted. Other sections in the Code referring to the term "narcotic drug" have been amended so as to conform them with the definition of that term in the Controlled Substances Act. 21 U.S.C. §198a has been amended to give the Secretary of the Treasury broader authority regarding investigations of controlled substance smuggling.

9-100.873 Pending Proceedings - Section 1103 - 21 U.S.C. §171 note

Section 1103(a) provides that prosecutions for violations occurring before May 1, 1971 are not affected by repeals and amendments contained in the new law.

Section 1103(b) provides that civil seizures, forfeitures and injunction proceedings commenced before May 1, 1971 are not affected by repeals and amendments made by the new law.

Note: Regarding the effect of section 1103 on prosecutions for pre-1971 drug offenses and sentencing therefor, see Bradley v. United States, 410 U.S. 605 (1973). It should be noted that Bradley decision failed to resolve the issue of whether the new controlled substance legislation makes those convicted of violating previous narcotic laws eligible for parole under the general parole statute (18 U.S.C. §4202). This issue was resolved adversely to such offenders in Warden v. Marrero, 417 U.S. 653 (1974). However, Congress thereafter made parole available to such offenders, P.L. 93-481 (Oct. 26, 1974).

9-100.874 Provisional Registration - Section 1104 - 21 U.S.C. §957

Section 1104 provides for the provisional registration of persons legitimately engaged in importing and exporting controlled substances.

9-100.875 Effective Date and Other Transitional Provisions Section 1105 - 21 U.S.C. §957 note

Section 1105(a). The Controlled Substances Import and Export Act became effective on May 1, 1971.

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Under section 1105(b) the following sections of the Controlled Substances Import and Export Act became effective immediately upon enactment (i.e. October 27, 1970): sections 1000 (title of the Act), 1001 (definitions), 1006 (exemption authority), 1015 (dealing with administrative and enforcement provisions), 1016 (authority of the Secretary of the Treasury), 1103 (pending proceedings), 1104 (provisional registration) and 1105 (effective date, etc.).

Section 1105(c) provides that, if the Attorney General postpones the effective date of section 306 of the Controlled Substances Act (manufacturing quotas) and the postponement applies to narcotics, the repeal of the Narcotics Manufacturing Act of 1960 is to be postponed for the same period, with specified exceptions. If postponement occurs, certain modifications of the Act are to take effect. Section 1105(c) is now of no importance since the Attorney General never exercised the postponement authority which it granted him.

Section 1105(d) provides that rules, orders and regulations issued under any law affected by the Controlled Substances Import and Export Act and which are in effect on October 26, 1970 shall continue in effect until modified, superseded or repealed.

9-100.900 DANGEROUS SPECIAL DRUG OFFENDER SENTENCING - CONTROLLED SUBSTANCES ACT (21 U.S.C. §849)

Special provisions are contained in section 409 of the Controlled Substances Act (21 U.S.C. §849) which authorize the imposition of sentences in excess of the usual maximum on defendants who are found to be "dangerous special drug offenders." It should be noted that the provisions do not create mandatory minimum penalties (see 21 U.S.C. §849(d)). Further, the provisions are not to be utilized unless authorization is first obtained from the Criminal Division. This is to ensure that 21 U.S.C. §849 is used uniformly and effectively throughout the United States.

In essence, 21 U.S.C. §849 provides that defendants over 21 years of age who are convicted of felonious violations of the Controlled Substances Act or the Controlled Substances Import and Export Act and who are found to be "dangerous special drug offenders" shall be sentenced to prison terms of up to 25 years. On appeal by the government the sentences can be increased as well as reduced.

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A defendant is a "dangerous special drug offender" for purposes of 21 U.S.C. §849 if he/she falls into any one of three categories (habitual, professional, or organized criminal) set forth in 21 U.S.C. §849(e).

Under 21 U.S.C. §849(e)(1), a defendant who has been previously convicted of two or more controlled substance felonies, who has been imprisoned for at least one such felony, and who has been released from prison for less than five years before commission of the triggering controlled substance felony, would be a "dangerous special drug offender."

Under 21 U.S.C. §849(e)(2), a defendant who commits a controlled substance felony which is part of a criminal pattern of controlled substance dealings, which constitutes a substantial source of his/her income, and in which he/she manifests special skill or expertise would be a "dangerous special drug offender." Controlled substance dealings would form a "pattern" if they embraced criminal acts having the same or similar purposes, results, participants, victims, or methods of commission or were otherwise interrelated and not isolated events. A "substantial source of income" is defined as being income which, for any period of one year or more exceeds the minimum wage for a 40 hour week determined under the Fair Labor Standards Act of 1938, as amended, and which for the same period exceeds 50% of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Code of 1954, as amended. To establish that a pattern of criminal conduct constitutes a substantial source of income, it could be shown that the defendant had in his/her name or under his/her control income or property not explained as derived from a source other than controlled substance dealings. "Special skill or expertise" would include unusual knowledge, judgment, or ability (such as manual dexterity) which facilitates the initiating, organizing, planning, financing, directing, managing, supervising, executing, or concealing of controlled substance dealings. It would also include the enlistment of accomplices in controlled substance dealings and the disposition of the fruits or proceeds of such dealings.

Under 21 U.S.C. §849(e)(3), a defendant whose controlled substance felony is part of a conspiracy of three or more persons to engage in a pattern of controlled substance dealings and who initiates, organizes, plans, finances, directs, manages, or supervises the connection with such dealings would be a "dangerous special drug offender."

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A defendant would be "dangerous" under 21 U.S.C. §849(f) if a period of incarceration longer than that provided for his/her controlled substance offense is needed to protect the public from further criminal activity on his/her part.

Under 21 U.S.C. §849(a), when a U.S. Attorney prosecuting a controlled substance felony believes the defendant is a "dangerous special drug offender," he/she may, before trial or entry of a guilty or nolo contendere plea, file with the court a notice (1) stating that the defendant is a dangerous special drug offender who is subject to 21 U.S.C. §849(b)'s sentencing provisions and (2) indicating with particularity why the defendant is believed to be a dangerous special drug offender. The notice's allegations are not to be in issue at the defendant's felony trial nor may the fact that he/she is alleged to be a dangerous special drug offender be disclosed to the jury. Without the consent of both parties, the allegations may not even be revealed to the trial judge before the defendant is convicted. If the court finds that the filing of the notice as a public record may prejudice consideration of a pending criminal matter, it may order the notice sealed during the pendency of the case, subject only to inspection by the defendant and his/her attorney. U.S. Attorneys filing notices under 21 U.S.C. §849 should request that the notices be sealed unless otherwise instructed by the Criminal Division. Practically speaking, a U.S. Attorney should file the notice with the clerk of court and request the clerk to have it sealed by a judge other than the one who is presiding over the trial of the defendant who is alleged to be a dangerous special drug offender. Were the clerk to submit the notice to the presiding judge with a request that it be sealed by him/her (*i.e.* the judge), there would be a risk that the judge might guess the nature of the notice's contents. In view of 21 U.S.C. §849(a)'s prohibition against revealing to the presiding judge, before conviction, a defendant's alleged dangerous special drug offender status, it is possible that "disclosure" of this kind could disqualify the presiding judge from acting further in the case. See United States v. Tramunti, 377 F. Supp. 6 (S.D.N.Y. 1974). An argument could be made that this type of revelation is not the kind of "disclosure" contemplated by 21 U.S.C. §849(a). It is not certain, however, that this argument would prevail.

In rare instances where only one judge would be available for sealing a dangerous special drug offender notice and that judge would also be presiding in the defendant's controlled substance felony case the disclosure problem might be resolved by filing the notice with the clerk of court and asking the clerk to keep the notice confidential until the defendant has been convicted of the felony charged against him/her. Thereupon the notice could be brought to the attention of the presiding judge.

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Under 21 U.S.C. §849(b), a defendant alleged to be a special dangerous drug offender is entitled to a presentence hearing. See Specht v. Patterson, 386 U.S. 605, 610 (1967). The hearing is to be held by the court, sitting without a jury. Prior to the hearing, the defendant and the government may inspect the presentence report. In unusual cases, the court may withhold presentence report material which is irrelevant, diagnostic in nature, confidential, or which has previously been disclosed in open court. The court can require the government and the defendant to give notice as to any portions of the presentence report they intend to controvert. At the hearing, both parties are entitled to be represented by counsel, to have compulsory process, and to cross-examine witnesses. If a preponderance of the information established that the defendant is a dangerous special drug offender, he/she can be sentenced to imprisonment for up to 25 years. In imposing sentence the court must make a matter of record its findings, the information on which the findings are based, and the reasons for the sentence imposed.

21 U.S.C. §849(c) makes it clear that section 849(b)'s sentencing provisions do not prevent a court from imposing a life sentence or a sentence of more than 25 years if such sentence is otherwise authorized.

21 U.S.C. §849(d) provides that a court may not, in sentencing a defendant as a special dangerous drug offender, impose less than the mandatory minimum provided for the defendant's controlled substance violation.

Under 21 U.S.C. §849(h), an appeal from a dangerous special drug offender sentence may be taken by either party. The government must file a notice of appeal within five days of sentencing. The defendant has 10 days in which to appeal (Rule 4(b), Fed. R. App. P.). The taking of an appeal by the government allows the appellate court to review the defendant's conviction as well as his/her sentence. The sentencing court may extend for up to 30 days the time for taking a review. (However, the court may not extend the government's time for appealing after such time has expired.) If the government is granted an extension, this enlarges the defendant's time for taking a review of his/her sentence and for appealing his/her conviction. Review of a dangerous special drug offender sentence embraces consideration of whether the sentencing procedure was proper, whether the sentencing findings were clearly erroneous, and whether there was an abuse of discretion. The appellate court may affirm the sentence, impose or direct the imposition of any sentence otherwise authorized, or remand for further proceedings and imposition of sentence. The sentence may be made more severe only if review has been had at the

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government's request and then only after a hearing has been held. Increase of a sentence by an appellate court seems permissible, see North Carolina v. Pearce, 395 U.S. 711 (1969); Walsh v. Picard, 446 F.2d 1209 (1st Cir. 1971); Robinson v. Warden, 455 F.2d 1172 (4th Cir. 1972). As with other appeals, U.S. Attorneys must obtain Departmental authorization before requesting appellate review of a dangerous special drug offender sentence. In view of the five day time limit for appealing, if a dangerous special drug offender hearing terminates in an unsatisfactory manner, the Criminal Division should be immediately informed by telephone so that consideration may be given as to whether an appeal is in order.

For a fuller understanding of the implications of 21 U.S.C. §849's provisions it is suggested that reference be made to the legislative history of the "dangerous special offender" provisions of the Organized Crime Control Act of 1970 (18 U.S.C. §§3575-3578). (The "dangerous special offender" provisions are substantially identical to 21 U.S.C. §849). The legislative history appears in the appendix to D.J. Memo No. 769 (to U.S. Attorneys), February 17, 1972. See also excerpts from S. Rep. No. 91-617 (regarding the Organized Crime Act's "dangerous special offender" provisions) herewith attached.

9-100.910 Excerpts From Legislative History of "Dangerous Special Offender" Provisions of the Organized Crime Control Act of 1970

See S. Rep. No. 91-617, 91st Cong., 1st Sess. 162-167 (1969).

The defendant must be over 21 years of age. This would include any defendant who had his/her twenty-first birthday prior to the day on which he/she committed the felony; it would also include a continuing offense, so long as it terminated or continued after the defendant's twenty-first birthday. The proceeding may not be initiated unless there is "reason to believe" the defendant is a dangerous special offender. See Minnesota v. Probate Court, 309 U.S. 270 (1940). Notice of the special offender allegation at or after charge and before trial or acceptance of plea is constitutionally timely. See United States v. Claudy, 204 F.2d 624 (3d Cir. 1953); see generally Oyler v. Boyles, 368 U.S. 448, 452 (1962); Chandler v. Fretag, 348 U.S. 3, 8 (1954). Where an offer to plead is made but no dangerous special offender notice has been appended, a delay should normally be granted on request to the prosecutor before plea acceptance and sentence, so that he/she may decide if a special offender notice should be filed. Similarly, the notice is freely amendable, but where amendments are made continuances should be granted to meet the test of

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"reasonable time." No disclosure to the jury should be made of the allegation. See Spencer v. Texas, 385 U.S. 554 (1967).

21 U.S.C. §849(b) provides that upon a plea or verdict the court shall before sentence hold a hearing, fixing the time and giving 10 days notice to the government and the defendant. In connection with the hearing, the parties shall be informed of the substance of such parts of the presentence report as the court intends to rely upon except where compelling reasons are placed in the record; they shall also have rights to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear. A duly authenticated copy of a former judgment shall be prima facie evidence of such former judgment. See Iowa Code Ann. section 747.6 (1966). If it appears by preponderance of the information, including information submitted at trial or the hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for a term not to exceed (25) years. Otherwise it shall sentence the defendant in accordance with the penalties prescribed for such felony absent aggravation. The findings of the court, including an identification of the information relied upon, and its reasons, shall be placed in the record.

No distinction is made in invoking the special sentencing provision between plea and verdict. See generally United States v. Jackson, 390 U.S. 570 (1968). The special term is imposed in lieu of the ordinary term. The normal fine may still be imposed. The court and not a jury must make the required finding. See generally State v. Losieau, 184 Neb. 178, 166 N.W. 2d (1969); Model Penal Code 7.03, (P.O.D. 1962); Model Sentencing Act 12; A.B.A. Sentencing 1.1, at 3, 261-62. The government and the defendant must be informed of the substance of those parts of the presentence reports on which the court intends to rely. The precise language and confidential sources need not be disclosed, and "compelling reasons," if placed in the record, can justify the withholding of particular information. Discretionary disclosure of the entire report, however, is not precluded. Compare Fed. R. Crim. P. 32(c)(2); Model Penal Code 7.07 (P.O.D.1962). Assistance of counsel is guaranteed. See Chandler v. Fretag, 348 U.S. 3 (1954); cf. Mempa v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948). The right to compulsory process is guaranteed, but it is qualified by the limited scope of disclosure of the presentence report and of cross-examination. No limit on the discretionary power of the court to curtail the presentation of evidence in the hearing and the examination of particular witnesses should

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be read into the authorization for compulsory process and limited cross-examination. No effect on the right of allocution is intended. See generally Fed. R. Crim. P. 32(a)(1); Hill v. United States, 368 U.S. 424 (1962); Green v. United States 365 U.S. 301 (1961). The scope of confrontation and cross-examination afforded exceeds what the committee feels to be the requirements of the fifth and sixth amendments under due process. See Williams v. New York, 337 U.S. 241 (1949). The requirements of Specht v. Patterson, 386 U.S. 605 (1967), are inapplicable, since no separate charge triggered by an independent offense is at issue. Only circumstances of aggravation of the offense for which the conviction was obtained are before the court. Cf. Gryder v. Burke, 334 U.S. 728, 732 (1948); Graham v. West Virginia, 224 U.S. 616 (1912); Moore v. Missouri, 159 U.S. 673, 677 (1895). Hearsay information may be appropriately discounted, although considered. See United States v. Doyle, 348 F.2d 715, 721 (2d Cir. 1965) cert. denied, 382 U.S. 843 (1965); proposed 18 U.S.C. §3577, below. The court ordinarily should obtain a study of the defendant under 18 U.S.C. §4208(b) and consider it a source of information on which to base the sentence imposed under 18 U.S.C. §3575(b).

21 U.S.C. §849(c) provides that this section shall not prevent the imposition and execution of a sentence of death.

21 U.S.C. §849(d) provides that the court shall not impose upon a dangerous special offender a sentence less than any mandatory minimum.

21 U.S.C. §849(e) sets out the meanings of "special offender."

21 U.S.C. §849(e)(1) defines special offender to include a defendant who on at least two previous occasions has been convicted of an offense punishable by over 1 year's imprisonment, and who has been imprisoned for at least one such offense.

This provision is designed to deal with the habitual offender. See generally Chewning v. Cunningham, 368 U.S. 443 (1962); Gryger v. Burke, 334 U.S. 728, 732 (1948); Graham v. West Virginia, 224 U.S. 616 (1912). The offender is being neither tried nor punished for past offenses; his/her latest offense is merely considered aggravated by special circumstances. Moore v. Missouri, 159 U.S. 673, 677 (1885). Such sentencing is not cruel and unusual punishment. McDonald v. Massachusetts, 180 U.S. 311, 313 (1901). "Imprisonment" includes imprisonment in prison or jail under 28 U.S.C. §5010.

Any proceeding which results in a disposition traditionally considered a "conviction," including a court-martial or a proceeding under

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chapter 402 of title 18 or not set aside under 18 U.S.C. §5021, is considered a "conviction." Juvenile proceedings under chapter 403 of Title 18 are not included. Invalid convictions are not regarded. See Burgett v. Texas, 389 U.S. 109, 115 (1967). Neither are judgments on which direct appeals are pending. Convictions for which pardons on the ground of innocence have been obtained are also excluded. Cf. United States v. Sales, 387 F.2d 131 (2d Cir. 1967), cert. denied, 393 U.S. 863 (1968). The convictions must have been obtained on at least two occasions and have resulted in at least one imprisonment, although the order of the convictions and imprisonment is not relevant. Jointly tried or jointly charged offenses count as only one offense.

21 U.S.C. §849(e)(2) defines special offender to include a defendant who committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his/her income, and which manifested special skill or expertise. In support of such findings it may be shown that the defendant has had income or property not explained as derived from a source other than such conduct.

This provision is designed to deal with the professional offender, who may neither be a recidivist nor play a leadership role in organized crime. The requirements of pattern precludes the application of the provision to an isolated offense. Elements of the pattern may or may not have been the subject of prior judicial proceedings. Cf. Williams v. Oklahoma, 358 U.S. 567, 584-587 (1959); Williams v. New York, 337 U.S. 241, 244 (1949). The circumstances of the conduct itself must demonstrate that the offender is a professional possessing special skill or expertise, from which it may be inferred, for the purpose of "dangerous," see 21 U.S.C. §849(f), that subsequent use of that skill is likely. The phrase "skill or expertise" is meant broadly and would include, for example, knowledge of established channels for fencing stolen property or forming alliances with accomplices. See generally, Task Force on Assessment, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact - An Assessment 96-101 (1967). Finally, the pattern must be a substantial source of the defendant's income, from which it may be similarly inferred that such conduct will continue in the future. In making these determinations the court may consider the defendant's unexplained wealth or income. Cf. Holland v. United States, 348 U.S. 121 (1954); United States v. Johnson, 319 U.S. 503 (1943). The defendant himself/herself is not required to offer the explanation. Compare Friffin v. California, 380 U.S. 609 (1965). The provision merely sets out a permissible inference similar to the inference from unexplained possession of stolen property. See Wilson v. United States, 162 U.S. 613, 619 (1896).

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21 U.S.C. §849(e)(3) defines special offender to include a defendant who committed such felony in furtherance of a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction and did, or agreed that he/she would, act in a specified leadership position or use force or bribery as all or part of such conduct.

This provision is designed to deal primarily with the organized crime offender. Those who personally play or are to play leadership roles or are the enforcers or executors of violence are singled out for special sentencing treatment. Those who give and those who receive bribes are also covered. The word "bribe" is not used in a narrow or technical sense, and should be interpreted broadly. The degree of aggravation in the sentence in each case must be determined by the court from all the facts and circumstances in the context of these statutory standards and within the outside limits of the penalty range. The sophistication of the organization, its division of labor, the complexity of its goals, and its contemplated time span are all factors to consider. See, e.g. Franzese v. United States, 392 F.2d 954 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969).

The phrase "pattern of conduct" covers continuing, repetitive, intermittent, sporadic, or other conduct in which two or more similar or different criminal acts bear relationships to one another which are relevant to the purposes of sentencing, regardless of the nature of the relationships. The variety of such relationships precludes more detailed specification of them in the bill. See proposed 18 U.S.C. §3575(e)(2), above.

21 U.S.C. §849(f) provides that a defendant is "dangerous" if confinement longer than that ordinarily provided is required to protect the public from further crime by him/her. "Dangerous" is not limited to a particular type of offense. Crimes against property or persons and "victimless" offenses, such as gambling, would be included. See A.B.A. Sentencing at 149. "Dangerous" may be inferred, although not necessarily, from the establishment of the requirements of 21 U.S.C. §849(e).

Each of these above definitions describes specific conduct aggravating a specific offense. None attempts to punish status or define a crime. Cf. Lanzetta v. New Jersey, 306 U.S. 451 (1939). Compare Robinson v. California, 370 U.S. 660 (1962), with Powell v. Texas, 392 U.S. 514, 542 (1968).

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21 U.S.C. §849(g) provides that the time for appealing the conviction of one sentenced after special offender proceedings is measured from the imposition of the original sentence. Delay in appealing the conviction until either party's appeal of the sentence is exhausted is not permitted. The result in Corey v. United States, 375 U.S. 169 (1963), under 18 U.S.C. §4208(b) would not obtain here. The provision envisions that review of both sentence and conviction will be heard together. The scope of review encompasses all factual and legal questions, substantive and procedural, as well as the exercise of discretion.

18 U.S.C. §3576 provides that the government or the defendant may seek court of appeals review of the sentence imposed following a special hearing. The review by the government must be taken at least 5 days before expiration of the time for taking a review of appeal by the defendant. Review must be diligently prosecuted. The time for taking a review may be extended by up to 30 days. Any extension of the government's time must be granted before the ordinary time expires and accompanied by an equal extension for the defendant. The court of appeals considers the entire record and may affirm the sentence, impose or direct the imposition of any sentence that the sentencing court could have imposed, or remand for further proceedings an imposition of sentence. A sentence may be changed to the disadvantage of the defendant only on review taken by the government and after hearing. Withdrawal of review taken by the government forecloses only change to the disadvantage of the defendant. Review by the government may be dismissed for abuse of the right to take such review.

The government may obtain review of the failure to impose any special sentence of the sentence imposed. Where the sentence is vacated and remanded for new proceedings subsequent review is contemplated. A defendant found to be a dangerous special offender but given a sentence less than the maximum authorized for ordinary offenders, may take a sentence review. An extension of time does not require a showing of "excusable neglect." Compare Fed. R. App. P. 4(b). The court may extend the defendant's time after it has expired, but not the government's. Compare Fed. R. App. P. 4(b). The requirement that a court extending the government's time extend the defendant's "for the same period" means that the defendant always will have five days more in which to take a review or appeal than the government has to take a review. Except for providing that the government's time to seek review expires 5 days before the defendant's requiring diligent prosecution by each party to a review, and liberalizing and regulating extensions of time as described above, the provision is silent regarding the timetable for sentence review. Applicable court rules at present give the defendant 10 days to seek

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review. Fed. R. App. P. 4(b). 18 U.S.C. §3576 would give the government 5 days absent extension. The five-day lag, the limitations on increasing sentences, and the authority for dismissal for abuse obviate any due process objections to government appeal. Cf. North Carolina v. Pearce, 395 U.S. 711, 723-726 (1969).

1984 USAM (superseded)

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9-101.000 THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970 - II

9-101.100 PROCEDURES RELATING TO EXPUNGEMENT OF OFFICIAL RECORDS

Please refer to USAM 3-4.000 for narrative summary.

9-101.110 DOJ Order 2710

SUBJECT: CONTROLLED SUBSTANCES ACT

1. PURPOSE. This order prescribes the procedures to be followed pursuant to the Controlled Substances Act, 21 U.S.C. §844 (1970), for the retention of a nonpublic record by the Department of Justice, and the expungement of official records pursuant to court order.

2. SCOPE. This order applies to all U.S. Attorneys' offices, the Criminal Division, the Office of Management and Finance, the U.S. Marshals Service, the Federal Bureau of Investigation, and the Drug Enforcement Administration.

3. CANCELLATION. DOJ Order 2710.7A is cancelled.

4. CONTROLLED SUBSTANCES ACT. This order is promulgated pursuant to the Controlled Substances Act (21 U.S.C. §844).

5. POLICY. The Directives and Records Management Unit, Administrative Services Section, Operations Support Staff, Office of Management and Finance (OMF), will be responsible for the administration of the nonpublic record.

6. RETENTION OF NONPUBLIC RECORD.

a. The U.S. Attorney responsible for the case, upon obtaining a certified copy of the court order of dismissal and discharge, issued under 21 U.S.C. §844(b)(1), from the Clerk of

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Court, shall obtain from his records all recordation relating to the person's arrest, indictment or information and trial. These recordations shall be prominently identified as a nonpublic record under the Controlled Substances Act under 21 U.S.C. §844(b)(1). A certified copy of the court order of dismissal and discharge, and an executed Form OBD-160, Controlled Substances Act, Defendant Information (with the specific name, address and zip code of each individual or agency or component (federal, state, or local) thereof whom the Assistant U.S. Attorney knows or has reason to believe is maintaining a record) shall be forwarded as indicated on Form OBD-160.

b. The Directives and Records Management Unit, OMF, upon receipt of a certified copy of the court order of dismissal and discharge and an executed Form OBD-160 from the U.S. Attorney, shall notify the appropriate organizational elements in the Department and applicable federal instrumentalities maintaining Records of these matters by Form OMF-95, Retention of Nonpublic Records, and furnish each element with a copy of the court order. Said Departmental elements and federal instrumentalities shall be responsible for maintaining their headquarters and field office records as nonpublic and protecting them against disclosure. In addition, the Directives and Records Management Unit, OMF, shall notify those state and local agencies whom the Unit knows or has reason to believe, are maintaining relevant records, of the existence and effect of the court order.

7. EXPUNGEMENT OF RECORDS. If the court enters an order under 21 U.S.C. §844(b)(2) to expunge from all official records (other than the aforesaid nonpublic records to be retained by the Department of Justice) all recordation relating to a person's investigation, arrest, indictment or information, trial, finding of guilty, and dismissal and discharge:

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a. The U.S. Attorney responsible for the case shall:

(1) Obtain from the Clerk of Court a certified copy of the court order to expunge.

(2) Prepare Form OBD-160, same as paragraph 6(a).

(3) Expunge his own records and prepare Form DOJ-329, Certificate of Expungement.

(4) Forward to the Directives and Records Management Unit, OMF, the certified copy of the court order to expunge, Form OBD-160, and Form DOJ-329.

b. The Directives and Records Management Unit, OMF, upon receipt of a certified copy of the court order to expunge, Form OBD-160, and Form DOJ-329, from the U.S. Attorney, shall notify the appropriate organizational elements in the Department of Justice and applicable federal instrumentalities maintaining relevant records, by Form OMF-96, Expungement of Records, and furnish each element with a copy of the court order. Said Departmental elements and federal instrumentalities shall be responsible for expunging their records and obtaining Form DOJ-329 from their headquarters and field offices, and delivering each Form DOJ-329 to the Directives and Records Management Unit, OMF.

c. Expungement orders under 21 U.S.C. §844(b)(2) require that all records be eliminated, not sealed, except the nonpublic record to be administered by the Directives and Records Management Unit, OMF. The nonpublic record shall consist of a copy of the certified court order to expunge, a copy of Form OBD-160, and all applicable Forms DOJ-329 located in the Directives and Records Management Unit, OMF, and the FBI fingerprint card which the FBI shall forward to the Unit.

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8. MULTIPLE DEFENDANTS. If a court discharges a defendant and dismisses the proceedings against him under 21 U.S.C. §844(b)(1) and subsequently orders an expungement under 21 U.S.C. §844(b)(2), all recordation identifying the defendant and relating to his investigation, arrest, and discharge and dismissal shall be expunged from the records of any co-defendant.

9. AVAILABILITY OF NONPUBLIC RECORDS.

a. The Directives and Records Management Unit, OMF, shall retain a nonpublic record in accordance with 21 U.S.C. §844(b)(1) solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, a person qualifies for a dismissal and discharge.

b. When there is reason to believe an individual does not qualify for a dismissal and discharge because of a prior dismissal and discharge under 21 U.S.C. §844(b)(1), the U.S. Attorney at the Direction of the Court should submit the individual's fingerprints to the Directives and Records Management Unit, OMF, which will match them up with existing fingerprint files within the Unit's nonpublic record.

c. The nonpublic records retained by the Department of Justice shall be available only to a federal court upon a federal court order issued to the Attorney General demanding such records, or upon the written request of a U.S. Attorney, for use by a federal court in determining whether or not a person qualifies under 21 U.S.C. §844(b). Such order or request should be made prior to the application of the sentencing provisions of 21 U.S.C. §844(a), or the dismissal and discharge provisions of 21 U.S.C. §844(b).

10. FORMS AVAILABILITY. Initial distribution of Form OBD-160 is being made simultaneously with this order to each U.S. Attorney. Form DOJ-329 and

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additional copies of Form OBD-160 may be obtained through normal supply channels.

9-101.120 Form OBD-160 - Certificate of Expungement

DEPARTMENT OF JUSTICE
CERTIFICATE OF EXPUNGEMENT

I hereby certify that all recordation relating to the arrest, indictment of information, trial, finding of guilty, and dismissal and discharge of _____ in the case of _____ (Name) _____ (Title) _____ (Number) have been expunged from all official records pursuant to an order issued by the U.S. District Court for the _____ District of _____ dated _____, under authority of Public Law 91-513, Sec. §404(b)(2), 21 U.S.C. §844(b)(2).

SIGNATURE

TYPED OR PRINTED NAME
AND TITLE

DATE

MARCH 9, 1984

Ch. 101, p. 5

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9-101.130 Form DOJ-329 - Controlled Substance Act-Defendant Information

TO: Office of Management and Finance
Operations Support Staff
Administrative Services Section
Directives and Records Management Unit
Washington, D.C. 20530

DATE:

FROM:

SUBJECT: Defendant Information, Controlled Substances Act, Public Law
91-513(b)(1), 21 U.S.C. §844

The following information and attached certified court order
applies to:

Nonpublic record (21 U.S.C. §844(b)(1))

Expungement (21 U.S.C. §844(b)(2))

NAME: _____

DATE OF BIRTH: _____

FBI NUMBER: _____

DEA NUMBER: _____

U.S. MARSHAL NUMBER: _____

CRIMINAL NUMBER: _____

U.S. ATTORNEY CONTROL KEY NUMBER: _____

OTHER IDENTIFICATION: _____

ATTACHMENT

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9-101.200 STATUTE TABLES

9-101.210 TABLE I - Former U.S.C. Sections and New Act

This table sets forth former criminal provisions of the United States Code relating to narcotics, marihuana and dangerous drugs and indicates those sections of the Comprehensive Drug Abuse Prevention and Control Act which cover similar subject matter.

| Former United States Code Section | Drug Abuse Prevention and Control Act Section |
|--------------------------------------|--|
| 18 U.S.C. §1403 | Title II, §403(b) |
| 18 U.S.C. §1405 | Title II, §509 |
| 18 U.S.C. §1406 | Title II, §514 |
| 18 U.S.C. §1407 | Omitted |
| 21 U.S.C. §173 | Title III, §1002 |
| 21 U.S.C. §174 | Title III, §1010(a) (1), (b) (1) |
| 21 U.S.C. §176a | Title III, §§1002, 1010(a) (1), (b) (2) |
| 21 U.S.C. §176b | Title II, §405 |
| 21 U.S.C. §178 | Title III, §1010(a) (2), (b) (1) |
| 21 U.S.C. §180 | Title III, §§1004, 1011 |
| 21 U.S.C. §182 | Title III, §§1003, 1010(a) (1) |
| 21 U.S.C. §183 | Title III, §1010(a) (1), (b) |
| 21 U.S.C. §184a | Title III, §1010(a) (2), (b) (1) |
| 21 U.S.C. §188b | Title II, §401(a) (1) |
| 21 U.S.C. §188c | Title II, §401(a) (1) |
| 21 U.S.C. §188d | Title III, §§1001(a), 1002 |
| 21 U.S.C. §188f | Title II, §401(a) (1) |
| 21 U.S.C. §188L | Title II, §401(b) (1) (A) |
| 21 U.S.C. §191 | Omitted |
| 21 U.S.C. §193 | Omitted |
| 21 U.S.C. §331(q) (1) | Title II, §401(a) (1) |
| 21 U.S.C. §331(q) (2) | Title II, §401(a) (1) |
| 21 U.S.C. §331(q) (3) | Title II, §401(a) (1), 404(a) |
| 21 U.S.C. §331(q) (4) | Title II, §401(a) (5) |
| 21 U.S.C. §331(q) (5) | Title II, §§402(a) (5), (6), 510(b) (3) (A) |

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| | |
|-----------------------|---|
| 21 U.S.C. §331(q) (6) | Title II, §402(a) (6) |
| 21 U.S.C. §331(q) (7) | Title II, §§309, 402(a) (1) |
| 21 U.S.C. §360a | Title II, §§401(a) (1), 402(a) (1), (5), (6), 404 |
| 21 U.S.C. §505, 509 | Title II, §402(b) |
| 21 U.S.C. §515 | Title II, §401(a) (1), (b) (1) (A) |
| 26 U.S.C. §4704(a) | Title II, §401(a) (1), (b) (1) (A) |
| 26 U.S.C. §4705(a) | Title II, §§308, 403(a) (1) |
| 26 U.S.C. §4724(a) | Title II, §401(a) (1), Title III, §1007(a) |
| 21 U.S.C. §4724(b) | Title III, §1007(a) |
| 21 U.S.C. §4724(c) | Title II, §404 |
| 26 U.S.C. §4742(a) | Title II, §308 |
| 26 U.S.C. 4744 | Title II, §404(a) |
| 26 U.S.C. 4755 | Title II, §401(a) (1), Title III, §§1002, 1010(a) (1) |
| 26 U.S.C. §7237 | Title II, §§401(b) (1) (A), 402(c), 403(c), 404 |
| 26 U.S.C. §7238 | Omitted |
| 48 U.S.C. §1421m | Title III, §§1001-1003, §1010(a) (1) |

9-101.220 Table II - New Act and Former U.S.C. Sections

This table sets forth criminal provisions of the Comprehensive Drug Abuse Prevention and Control Act relating to narcotics, marihuana and dangerous drugs and indicates previous sections of the United States Code which covered similar matter.

| Drug Abuse Prevention and Control Act Section | Former United States Code Section |
|---|-----------------------------------|
| Title II, §403(b) | 18 U.S.C. §1403 |
| Title II, §509 | 18 U.S.C. §1405 |
| Title II, §514 | 18 U.S.C. §1406 |
| Omitted | 18 U.S.C. §1407 |
| Title II, §1002 | 21 U.S.C. §173 |
| Title III, §1010(a) (1), (b) (1) | 21 U.S.C. §174 |
| Title III, §§1002, 1010(a) (1), (b) (2) | 21 U.S.C. §176a |
| Title II, §405 | 21 U.S.C. §176b |
| Title III, §1010(a) (2), (b) (1) | 21 U.S.C. §178 |

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| | |
|---|-----------------------|
| Title III, §§1004, 1011 | 21 U.S.C. §180 |
| Title III, §§1003, 1010(a) (1) | 21 U.S.C. §182 |
| Title III, §1010(a) (1), (b) | 21 U.S.C. §183 |
| Title III, §1010(a) (2), (b) (1) | 21 U.S.C. §184a |
| Title II, §401(a) (1) | 21 U.S.C. §188b |
| Title II, §401(a) (1) | 21 U.S.C. §188c |
| Title III, §§1001(a), 1002 | 21 U.S.C. §188d |
| Title II, §401(a) (1) | 21 U.S.C. §188f |
| Title II, §401(b) (1) (A) | 21 U.S.C. §188L |
| Omitted | 21 U.S.C. §191 |
| Omitted | 21 U.S.C. §193 |
| Title II, §401(a) (1) | 21 U.S.C. §331(q) (1) |
| Title II, §401(a) (1) | 21 U.S.C. §331(q) (2) |
| Title II, §§401(a) (1), 404(a) | 21 U.S.C. §331(q) (3) |
| Title II, §402(a) (5) | 21 U.S.C. §331(q) (4) |
| Title II, §§402(a) (5), (6) | 21 U.S.C. §331(q) (5) |
| 510(b) (3) (A) | |
| Title II, §402(a) (6) | 21 U.S.C. §331(q) (6) |
| Title II, §§309, 402(a) (1) | 21 U.S.C. §331(q) (7) |
| Title II, §§401(a) (1), 402(a) (1), (5), (6), §404 | 21 U.S.C. §360a |
| Title II, §402(b) | 21 U.S.C. §§505, 509 |
| Title II, §401(a) (1), (b) (1) (A) | 21 U.S.C. §515 |
| Title II, §401(a) (1), (b) (1) (A) | 26 U.S.C. §4704(a) |
| Title II, §§308, 403(a) (1) | 26 U.S.C. §4705(a) |
| Title II, §401(a) (1), Title III §1007(a) | 26 U.S.C. §4724(a) |
| Title III, §1007(a) | 26 U.S.C. §4724(b) |
| Title II, §404 | 26 U.S.C. §4724(c) |
| Title II, §308 | 26 U.S.C. §4742(a) |
| Title II, §404(a) | 26 U.S.C. §4744 |
| Title II, §401(a) (1), Title III §§1002, 1010(a) (1) | 26 U.S.C. §4755 |
| Title II, §§401(b) (1) (A), 402(c), 403(c), 404 | 26 U.S.C. §7237 |
| Omitted | 26 U.S.C. §7238 |
| Title III, §§1001-1003, 1010(a) (1) | 48 U.S.C. §1421m |

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9-101.230 Table III - New Act Numerical Order and Former U.S.C. Sections

This table sets forth in numerical order various penal sections of the Comprehensive Drug Abuse Prevention and Control Act and indicates previous provisions of the United States Code covering similar matter.

| Drug Abuse Prevention Control Act Section | Former United States Code Section |
|---|--------------------------------------|
| Title II, §308 | 26 U.S.C. §4705(a) |
| Title II, §308 | 26 U.S.C. §4742(a) |
| Title II, §§309(b), 402(a) (1) | 21 U.S.C. §331(q) (7) |
| Title II, §401(a) (1) | 21 U.S.C. §188(b) |
| Title II, §401(a) (1) | 21 U.S.C. §188c |
| Title II, §401(a) (1) | 21 U.S.C. §188f |
| Title II, §401(a) (1) | 26 U.S.C. §4704(a) |
| Title II, §401(a) (1) | 21 U.S.C. §331(q) (1) |
| Title II, §401(a) (1) | 21 U.S.C. §331(q) (2) |
| Title II, §401(a) (1) (b) (1) (A) | 21 U.S.C. §515 |
| Title II, §§401(a) (1), 404(a) | 21 U.S.C. §331(q) (3) |
| Title II, §401(a) (1), Title III §1002 | 26 U.S.C. §4755 |
| Title II, §401(a) (1), Title III §1007(a) (1) | 26 U.S.C. §4724(a) |
| Title II, §401(b) (1) (A) | 21 U.S.C. §188L |
| Title II, §§401(b) (1) (A), 402(c) 403(c), 404 | 26 U.S.C. §7237 |
| Title II, §401(b) (4) | 26 U.S.C. §4742(a) |
| Title II, §402(a) (5) | 21 U.S.C. §331(q) (4) |
| Title II, §402(a) (5) | 21 U.S.C. §331(q) (5) |
| Title II, §402(a) (6) | 21 U.S.C. §331(q) (6) |
| Title II, §402(b) | 21 U.S.C. §505, 509 |
| Title II, §403(a) (1) | 26 U.S.C. §4705(a) |
| Title II, §403(b) | 18 U.S.C. §1403 |
| Title II, §404(a) | 26 U.S.C. §4724(c) |
| Title II, §404(a) | 26 U.S.C. §4744 |
| Title II, §405 | 21 U.S.C. §176b |
| Title III, §§1001-1003, 1010(a) (1) | 48 U.S.C. §1421m |
| Title III, §1002 | 21 U.S.C. §173 |
| Title III, §1002 | 21 U.S.C. §188d |
| Title III, §§1002, 1010(a) (1), (b) (1) | 21 U.S.C. §174 |

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| Title III, §§1002, 1010(a) (1), (b) (2) | 21 U.S.C. §176a |
| Title III, §1003 | 21 U.S.C. §182 |
| Title III, §1004 | 21 U.S.C. §180 |
| Title III, §1007(a) (1) | 26 U.S.C. §4742(b) |
| Title III, §1010(a) (1), (b) (1) | 21 U.S.C. §183 |
| Title III, §1010(a) (2), (b) (1) | 21 U.S.C. §178 |
| Title III, §1010(a) (2), (b) (1) | 21 U.S.C. §184a |
| Title III, §1011 | 21 U.S.C. §180 |

9-101.240 Table IV - New Act and New U.S.C. Citations

COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT
OF 1970

| Drug Abuse Prevention and Control Act Section | U.S. Code Citation |
|---|--|
| Title I | |
| §1 | 42 U.S.C. §§2688a(a) 2688k, 2688l, 2688m, 2688n, 2688o(c), 2688r |
| §2 | 42 U.S.C. §§201(g), 257(a), 258, 259, 260, 261, 261a |
| §3 | 42 U.S.C. §§225a, 242a(a), 246(d) (e) (i) (j) (k) |
| §4 | 42 U.S.C. §257a |
| Title II | |
| §100 | 21 U.S.C. §801 note |
| §101 | 21 U.S.C. §801 |
| §102 | 21 U.S.C. §802 |
| §103 | 21 U.S.C. §803 |
| §201 | 21 U.S.C. §811 |
| §202 | 21 U.S.C. §812 |
| §301 | 21 U.S.C. §821 |
| §302 | 21 U.S.C. §822 |

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|---|---|
| §303 | 21 U.S.C. §823 |
| §304 | 21 U.S.C. §824 |
| §305 | 21 U.S.C. §825 |
| §306 | 21 U.S.C. §826 |
| §307 | 21 U.S.C. §827 |
| §308 | 21 U.S.C. §828 |
| §309 | 21 U.S.C. §829 |
| §401 | 21 U.S.C. §841 |
| §402 | 21 U.S.C. §366 |
| §403 | 21 U.S.C. §843 |
| §404 | 21 U.S.C. §844 |
| §405 | 21 U.S.C. §845 |
| §406 | 21 U.S.C. §846 |
| §407 | 21 U.S.C. §847 |
| §408 | 21 U.S.C. §848 |
| §409 | 21 U.S.C. §849 |
| §410 | 21 U.S.C. §850 |
| §411 | 21 U.S.C. §851 |
| §501 | 21 U.S.C. §871 |
| §502 | 21 U.S.C. §872 |
| §503 | 21 U.S.C. §873 |
| §504 | 21 U.S.C. §874 |
| §505 | 21 U.S.C. §875 |
| §506 | 21 U.S.C. §876 |
| §507 | 21 U.S.C. §877 |
| §508 | 21 U.S.C. §878 |
| §509 | 21 U.S.C. §879 |
| §510 | 21 U.S.C. §880 |
| §511 | 21 U.S.C. §881 |
| §512 | 21 U.S.C. §882 |
| §513 | 21 U.S.C. §883 |
| §514 | 21 U.S.C. §884 |
| §515 | 21 U.S.C. §885 |
| §516 | 21 U.S.C. §886 |
| §601 | 21 U.S.C. §887 note |
| §701 [Repeals & Conforming Amendments] | Not carried into U.S. Code as a separate section |
| §702 | 21 U.S.C. §321 note |
| §703 | 21 U.S.C. §822 note |
| §704 | 21 U.S.C. §801 note |
| §705 | 21 U.S.C. §801 note |
| §706 | 21 U.S.C. §901 |
| §707 | 21 U.S.C. §902 |
| §708 | 21 U.S.C. §903 |
| §709 | 21 U.S.C. §904 |

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Title III

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|-------------------------------|---|
| §1000 | 21 U.S.C. §951 note |
| §1001 | 21 U.S.C. §951 |
| §1002 | 21 U.S.C. §952 |
| §1003 | 21 U.S.C. §953 |
| §1004 | 21 U.S.C. §954 |
| §1005 | 21 U.S.C. §955 |
| §1006 | 21 U.S.C. §956 |
| §1007 | 21 U.S.C. §957 |
| §1008 | 21 U.S.C. §958 |
| §1009 | 21 U.S.C. §960 |
| §1011 | 21 U.S.C. §961 |
| §1012 | 21 U.S.C. §962 |
| §1013 | 21 U.S.C. §963 |
| §1014 | 21 U.S.C. §964 |
| §1015 | 21 U.S.C. §965 |
| §1016 | 21 U.S.C. §966 |
| §1101 [Repeals] | Not carried into U.S. Code as a separate section |
| §1002 [Conforming amendments] | Not carried into U.S. Code as a separate section |
| §1103 | 21 U.S.C. §171 note |
| §1104 | 21 U.S.C. §957 note |
| §1105 | 21 U.S.C. §951 note |

Title IV

| | |
|-------|-----------------|
| §1200 | 42 U.S.C. §3509 |
|-------|-----------------|

9-101.300 ATTEMPT (CONTROLLED SUBSTANCES ACT SECTION 406, AND
CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT SECTION 1013) -
21 U.S.C. §846, §963

Section 406 of the Controlled Substances Act and Section 1013 of the Controlled Substances Import and Export Act add the crimes of attempt and conspiracy to the list of controlled substance offenses. Section 406 deals with attempts to commit crimes defined by the Controlled Substances Act which are, generally, manufacturing, distributing, possessing and similar offenses. Section 1013 relates to attempts to commit offenses which are set forth in the Controlled Substances Import and Export Act, e.g., the illegal importation and exportation of controlled substances.

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The crime of attempt is one which is not frequently found in federal statutes. While there is no general federal attempt statute, such as is found in many of the states, some federal statutes do include the crime of attempt. A complete list is not included. Examples are: 18 U.S.C. §794 (attempt to deliver defense information to aid a foreign government); 18 U.S.C. §1403 (use of communications facilities to commit certain narcotics violations); 18 U.S.C. §1509 (attempting to obstruct court orders); 18 U.S.C. §2113(a) (the bank robbery statute); 18 U.S.C. §2194 (attempt to shanghai sailors). In addition, there are certain federal statutes which deal with offenses which, while not specifically categorized as "attempts" are nevertheless crimes which are steps toward completion of the more serious offense. The Hobbs Act, 18 U.S.C. §1952, is the best example of this type of offense. Others are listed in I Working Papers, National Commission Reform of the Federal Criminal Law 353-54 (1970).

Federal law has long differentiated between the commission of the substantive offense and an attempt to commit the offense. The general rule is that if an attempt is not defined by the statute, it cannot itself be punished. Thus the Supreme Court, in Keck v. United States, 172 U.S. 434 (1899), held in a smuggling prosecution that:

[w]hilst it [18 U.S.C. §545] embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same . . . It was indeed argued at bar that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore, such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction between the attempt to commit an offense and its actual commission.

Id. at 444.

The present legislation avoids this difficulty. It contains what may be termed a "general" attempt statute, at least insofar as controlled substance offenses are concerned. A general attempt statute is included in the draft of the new federal criminal code.

It has been said that criminal attempt "is more intricate and difficult of comprehension than any other branch of the criminal law." Hicks v. Commonwealth, 86 Va. 223, 9 S.E. 1024, 1025 (1889). Attempt has been a part of the criminal law for a long time, but time alone has not been successful in resolving all of the problems which attempt creates.

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For a brief history of attempt law, see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 558 et seq. (2d Ed. 1960). Professor Hall traces the concept of attempt from at least the time of Plato. The first problem, then, is definitional: at what point does mere preparation cease to be an innocent act and become criminal? The Controlled Substances Act, like any other federal statute which speaks of attempt, does not define the term, and the courts will presumably have to rely upon the common law, such as it is, to provide such a definition.

Attempt may be defined with reference to its elements: 1) an intent to commit a crime; 2) the execution of some overt act in pursuance of the intention; and 3) a failure to consummate the crime. United States v. Baker, 129 F. Supp. 684 (S.D. Cal. 1955). Mr. Justice Holmes made the following statement with respect to the elements of this offense:

Preparation is not an attempt. But some preparation may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, then intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentia [opportunity to change one's mind], in the need of a further exertion of the will to complete the crime.

Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N.E. 55, 56. See also, United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920, where Judge Learned Hand said:

A neat doctrine by which to test when a person, intending to commit a crime which he fails to carry out, has "attempted" to commit would be that he has done all that it is within his power to do, but has been prevented by intervention from outside; in short, that he has passed beyond any locus poenitentia. Apparently that was the original notion, and may still be the law in England; but it is certainly not now generally the law in the United States, for there are many decisions which hold that the accused has passed beyond "preparation," although he has been interrupted before he has taken the last of his intended steps. The decisions are too numerous to cite, and would not help much anyway, for there is, and obviously can be, no definite line We have found scarcely any decision of federal courts, but, so far as they go, they are in accord.

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Id. at 633. See also, Mims v. United States, 375 F.2d 135, 148-49 nn. 40, 41 (5th Cir. 1967). For a good general definition of "attempt" as it is used in jury charges, see W. Mathes and E. Devitt, Federal Jury Practice and Instruction §13.14 (1965) and 1 E. Devitt and C. Blackmar, Federal Jury Practice and Instruction §16.16 (1970).

In United States v. Robles, 185 F. Supp. 82 (N.D. Cal. 1960), the defendant was charged with using communication facilities, in this case, the United States mail, in attempting to illegally import heroin into the United States as prohibited by 18 U.S.C. §1403. The court, in finding that there was a violation, stated:

The next question to be answered is whether the sending of the letter in question constituted an attempt to violate Title 21 U.S.C. section 174, within the legal meaning of the word "attempt" as used in Title 18 U.S.C. section 1403. Defendant did not go so far as to purchase the drug in Mexico. The purchase would not, in and of itself, have constituted a violation of Title 21 U.S.C.A section 174. The record shows quite clearly . . . however, that defendant was trying to buy a "load" [jargon for a quantity of drugs] in Mexico and bring it into the United States. He took the first step in the furtherance of this plan by writing and mailing the letter . . . to find a source of supply. When defendant wrote the letter, and mailed it, he began a course of conduct designed to culminate in the unlawful importation of a narcotic drug into the United States To attempt to do an act does not imply a completion of the act, or in fact any definite progress towards it. Any effort or endeavor to effect the act will satisfy the term of the law. Robles, supra, at 85.

It therefore seems a safe proposition that the line between mere preparation to do a criminal act, and an attempt, punishable by the criminal law, is a thin one indeed; since it does appear to be a matter of "degree," no hard and fast rules can readily be formulated. It is important to note that an "attempt" is not the same as an "endeavor." The latter term, it has been held, is a broader term which does not entail the complexities attendant upon the term "attempt." United States v. Russell, 255 U.S. 138 (1921). However, the present act refers to attempt and not

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endeavor. Care should be taken to distinguish between judicial opinions based upon the concept of endeavor and those based upon the crime of attempt. Some courts have used the terms interchangeably; other courts, notably the Supreme Court, have differentiated between them. Cf. 1 Working Papers, supra no. 3 at 356-57.

A question which invariably arises in a discussion of the law of attempt is that of impossibility, whether it be impossibility in law or impossibility in fact. The classic formulation of the problem is put thus: if (a) attempts to pick (b's) pocket, but (b's) pocket is empty, can (a) be charged with the crime of attempt? The early English cases held no (Regina v. Collins, 169 Eng. Rep. 1477 (Q.B. 1865); Regina v. McPherson, 169 Eng. Rep. 975 (Q.B. 1857); see generally, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 586 et seq. (2d ed. 1960)) but it now appears that impossibility is not always a defense to a charge of attempt. This can give rise to some interesting situations. E.g., in People v. Cummings, 296 P.2d 610 (Cal. Dist. Ct. App. 1956), the defendant was found guilty of an attempt to commit an abortion even though a woman, a police investigator, was not pregnant. Thus in United States v. Butler, 204 F. Supp. 339 (S.D.N.Y. 1962), the court said:

. . . . I am not holding that legal impossibility is a defense to an attempt charge. As the comments to the Model Penal Code point out, since one of the functions of penalizing attempts is to make amenable to the corrective process of the law persons who manifest a certain dangerousness, impossibility should not be a defense --- unless the means chosen are so inappropriate as to negate dangerousness.: Butler, supra, at 343-44.

For purposes of the Controlled Substances Act, this problem may arise in the typical situation where an individual, thinking that he/she is selling or buying illicitly, a controlled substance, is in fact given a harmless substance, such as talcum powder. In a California case, People v. Sui, 126 Cal. 41, 271 P.2d 575 (1954), the defendant, a court bailiff and deputy sheriff, thought that he was buying heroin from another sheriff's deputy; the other deputy, who had informed the police, gave the defendant talc and not heroin. Yet the court affirmed the defendant's conviction for attempted possession of heroin, saying that the defendant intended to commit the crime of possession; delivery to him of what he thought was heroin was the direct, unequivocal act toward the commission of the crime of possession, and therefore, he was guilty of the crime of attempt. The reasoning of the court in Sui would seem applicable to attempts charged under either section 406, or section 1013, when similar circumstances are involved.

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Another problem which must be dealt with in the area of attempted crimes is the concept of merger. In general, it is said that an attempt is "merged" into the completed offense; therefore, the defendant may not be convicted and punished for both the completed offense and the commission of the attempt. Giles v. United States, 157 F.2d 588 (9th Cir. 1946), cert. denied, 331 U.S. 813 (1947).

Actual commission of the crime is no bar to prosecution for attempt. Attempts to violate federal law generally include both successful and unsuccessful transactions. Guzik v. United States, 54 F.2d 618 (7th Cir. 1932), cert. denied, 285 U.S. 545 (1932); contra, United States v. Baker, 129 F. Supp. 684 (N.D. Cal. 1955).

It has been argued that conviction of the completed offense should be considered a conviction of the attempt in the event that the evidence is subsequently determined to be insufficient to support conviction of the completed offense, provided that the submission of the charge of the completed offense to the jury on such insufficient evidence was not prejudicial. I Working Papers, National Commission on Reform of the Federal Criminal Laws, 367 (1970). This would avoid the necessity if a retrial of the determination of insufficiency is made after verdict and there is sufficient evidence to support a conviction of the attempt. Id. The indictment or information need not specifically set forth the crime of attempt for both the charge of attempt and commission of the completed crime to be submitted to the jury. Fed. R. Crim. P. 31(c), See also, United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y. 1973), aff'd, 484 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 976 (1974).

Regarding the elements of attempt and jury instructions with regard thereto, see United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974).

9-101.400 REFERRAL OF CONTROLLED SUBSTANCE CASES TO STATE OR LOCAL
PROSECUTORS

Questions arise from time to time about the considerations which should govern in deciding whether to prosecute controlled substance cases in federal courts and in determining under what circumstances such cases should be referred to state or local prosecutors for appropriate action. While no general policy can be formulated which will take into account the factual pattern of every controlled substance case or of local conditions prevailing in various parts of the country, it is believed that certain factors should enter into any controlled substance prosecutive determina-

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tion. Among the factors to be considered are: (1) the sufficiency of the evidence, (2) the degree of federal involvement, (3) the effectiveness of state and local prosecutors, (4) the willingness of state or local authorities to prosecute cases investigated primarily by federal agents, (5) the amount of controlled substances, (6) the violator's background, (7) the possibility that prosecution will lead to disclosure of evidence of controlled substance violations committed by other persons, and (8) the district court's backlog of cases.

A few comments appear to be in order regarding certain of the factors mentioned above.

A. Declination of federal prosecution on evidentiary grounds is understandable and justified. However, absent unusual circumstances, declination should not be based solely on any of the other foregoing factors, e.g., on the amount of controlled substances involved. The amount involved is only one of several factors which should be considered before deciding whether to prosecute in federal court or whether the matter should be referred to any other prosecutive authority. It may be noted that, in considering the amount involved, attention should be given to the purity of the controlled substance and the method of packaging.

B. When a U.S. Attorney declines to prosecute a controlled substance case and thereafter a state or local prosecutor also declines prosecution, the Drug Enforcement Administration should be afforded an opportunity to again request federal prosecutive consideration. Such cases should be prosecuted unless prosecution does not appear to be in the public interest. Federal prosecution might not be warranted, for instance, where the violator qualifies for processing under a deferred prosecution plan.

C. In appraising the effectiveness of the local judicial process, consideration should be given to the professional competence of local and state prosecutors and the length of time it takes to try a controlled substance case in local and state courts. Also to be considered are the penalties provided by local or state law and the sentencing policies and practices of local and state judges. Even when local laws provide severe penalties for drug offenses and local prosecutors are not only highly competent but are also willing to prosecute referred drug cases, it may be advisable to prosecute federally if local court congestion or lenient sentencing practices result in long trial delays or unduly light sentences.

D. In determining what kind of person a violator is, consideration should be given to his/her age, degree of culpability, and prior criminal record. Other factors to be considered in determining whether to

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prosecute are whether mitigating circumstances exist, whether the offender has cooperated with the government, and whether he/she is dependent on drugs. To illustrate, if an offender is young, has no previous criminal record, is a narcotic addict, and was arrested in possession of narcotics intended for his/her own personal use, it may be appropriate to defer prosecution conditioned on the offender's enrollment in a narcotic addict treatment program.

E. Federal prosecution of narcotic violators often leads to their cooperating with the government. This in turn leads to their disclosing evidence of narcotic violations committed by other individuals. Thus, in deciding whether to refer a narcotic case to state or local prosecutors, serious consideration should be given to the question of whether the offender would, if federally prosecuted, cooperate and furnish evidence of narcotic violations committed by his/her confederates or by others.

F. U.S. Attorneys are urged to cooperate fully with state and local prosecutors and investigators and to encourage them in actively combating controlled substance trafficking. In this connection, there will be instances where state or local prosecution of controlled substance, and especially narcotic, offenders will be warranted even where there has been a substantial federal involvement in the case. However, it should be recognized that the federal government has grave responsibilities in the vital area of controlled substance law enforcement. Thus, care should be taken by federal prosecutors in deciding which is the most appropriate judicial forum in which to prosecute a controlled substance case.

G. U.S. Attorneys should confer with Special Agents in charge of DEA field offices in their districts regarding standards and procedures to be utilized in determining whether controlled substance cases should be prosecuted federally or referred to state or local prosecutors.

H. Periodically, U.S. Attorneys should meet or confer with state and local prosecutors in connection with referral of federal cases for prosecution.

9-101.500 CONTROLLED SUBSTANCES DESTRUCTION PROCEDURES

The Drug Enforcement Administration's drug storage procedures are designed to reduce the cost involved in storing and transporting large quantities of controlled substances. They also protect against the possibility of unauthorized persons obtaining access to such drugs. In essence, the procedures provide for the keeping of detailed records from

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the time of seizure until destruction. Appropriate security measures are also in effect. When large seizures of marijuana are involved, a substantial amount is usually destroyed shortly after seizure and smaller amounts are retained for trial purposes. There seems to be no valid objection to trying marijuana cases without introducing the entire amount seized. See Chandler v. United States, 318 F.2d 356 (10th Cir. 1963); United States v. Duffy, 454 F.2d 809 (5th Cir. 1972); 2 Wigmore on Evidence, 3rd Ed. 1940, §439. See also United States v. Bradley, 460 F.2d 529, 530 (5th Cir. 1972) and 26 U.S.C. 5609(a).

The following guidelines govern the destruction of all controlled substances (as opposed to prior destruction policy which only applied to bulk amounts of marijuana), and serve as a balance between the security and storage problems of the Drug Enforcement Administration and the trial strategy concerns of federal prosecutors. They are as follows:

A. Policy Statement

In our fight against drug trafficking, the Department of Justice recognizes that the Drug Enforcement Administration is currently facing serious nationwide storage and security problems regarding narcotics and dangerous drugs (hereinafter controlled substances) seized during enforcement activities. There is currently in existence a Justice Department policy that authorizes destruction of bulk seizures (i.e., large marijuana seizures). However, this bulk destruction policy is not sufficient to deal with the storage and security problems. Recent studies by the Drug Enforcement Administration clearly indicate that the storage and security problems are not limited to the bulk and size of the seizures, but are also directly related to the volume and value of the seizures. This is evidenced by the fact that the Drug Enforcement Administration is currently maintaining 60,000 controlled substance exhibits in eight regional laboratory vaults, valued at 5.4 billion dollars.

It is not economically or practically feasible to maintain this number of exhibits in regional laboratory vaults. Accordingly, these guidelines provide for procedures whereby seized controlled substances can be photographed prior to trial and then routinely destroyed. It is believed that the photographs can be introduced as demonstrative evidence at trial and be just as effective as the real evidence in most cases. Small representative samples can be retained for laboratory testing and evidentiary purposes. To implement this policy, and at the same time to protect the due process rights of defendants, the following procedures shall be followed by U.S. Attorneys.

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B. Procedures

1. Initial Steps:

a. Each Attorney shall consult with the Special Agent in Charge of the Drug Enforcement Administration office in his/her district to review and evaluate the current and future storage and security problems relating to seized controlled substances with the view toward implementing the national policy stated above.

b. After a thorough review and evaluation of the current and future storage and security problems, it is anticipated that U.S. Attorneys will implement the following procedures to accomplish the national policy stated above. However, if a U.S. Attorney initially or subsequently determines that there are no current or future storage or security problems in his/her district, and he/she wants to be exempt from implementing the following described procedures, he/she shall communicate his/her reasons for such an exemption, in writing, to the Assistant Attorney General, Criminal Division, who may exempt a specific district from implementing the procedures described hereafter.

2. Implementation:

In those districts where the policy is implemented, the following procedures will be established:

a. Under no circumstances can any controlled substances be destroyed by the Drug Enforcement Administration prior to indictment (except those routinely destroyed under the existing bulk destruction policy).

b. After the return of the indictment, at the arraignment and plea, the U.S. Attorney shall file a Notice of Intent to Destroy Controlled Substances (hereinafter Notice) in all cases unless he/she believes unusual circumstances justify maintaining all seized evidence for use at trial. The U.S. Attorney has the sole and exclusive authority to make such a decision, and when such circumstances are present, said Notice will not be filed with the court and the controlled substances shall not be destroyed by the Drug Enforcement Administration.

c. At the time the Notice is filed with the court at the arraignment and plea, a copy shall be immediately served upon

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the defendant, or his/her attorney. After the arraignment and plea, a copy of said Notice shall be immediately delivered by the U.S. Attorney's office to the Drug Enforcement Administration. Under no circumstances can the Drug Enforcement Administration destroy seized evidence unless they have received a copy of this Notice and have followed the procedures set forth therein.

d. The Notice shall specifically identify the controlled substances to be destroyed, and shall advise the defendant that:

(1) All seized controlled substances relating to that indicted case shall be photographed and destroyed 45 days after the date of the filing of the Notice with the court, except for a small sample that will be retained for later testing and evidentiary purposes; and

(2) The defendant or his/her attorney can object to destruction or can request the right to examine, inspect or scientifically test the seized controlled substances before they are destroyed, pursuant to Fed. R. Crim. P. 16. This request must be set forth in writing to the U.S. Attorney within 15 days after the date that the Notice was filed with the court.

e. If such a defense request for examination, inspection, or testing is made, the U.S. Attorney and the Drug Enforcement Administration shall make appropriate arrangements to comply with that request. If the request relates to scientifically testing the seized controlled substance prior to destruction, the U.S. Attorney and the Drug Enforcement Administration must allow the defense sufficient time to complete the scientific testing before the controlled substances are destroyed. The examination, inspection or scientific testing must be coordinated with the appropriate Drug Enforcement Administration field office by the defense so as to insure the availability as well as the integrity of the seized controlled substances. The scientific testing may only be conducted by a competent analytical laboratory registered as such with the Drug Enforcement Administration.

f. If the defendant or his/her attorney has filed a motion with the court to postpone or prevent the destruction of controlled substances in accordance with this policy, the running of the 45-day holding period for destruction and the

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15-day holding period for defense objection or request to examine, inspect or scientifically test shall be stayed pending disposition of the motion by the court. The appeal of a court order denying a defense motion to postpone or prevent the destruction of controlled substances shall likewise toll the running of the 45-day and 15-day holding periods. Should a court grant a motion to postpone or prevent the destruction pursuant to these procedures, the running of the 45-day and 15-day holding periods shall be tolled indefinitely pending further judicial review of the court's order.

g. At the end of the 45 day holding period, if there has been no defense request to examine, inspect or test the controlled substances, or if such request has been satisfied, the Drug Enforcement Administration will take photographs of the entire controlled substance exhibit and remove a small sample for possible later evidentiary and testing purposes. After the procedure is completed, the destruction procedure shall be automatically instituted by the Drug Enforcement Administration.

9-101.600 DOMESTIC OPERATIONS GUIDELINES FOR THE DRUG ENFORCEMENT
ADMINISTRATION: COMMENTS ON SELECTED PROVISIONS

On December 28, 1976, the Attorney General issued domestic operations guidelines for the Drug Enforcement Administration. The guidelines are designed to increase efficiency in the operations of the Drug Enforcement Administration and to improve coordination between the Drug Enforcement Administration and various branches of the Department of Justice.

Copies of the DEA Domestic Operations Guidelines have been distributed to U.S. Attorneys' offices throughout the country. The Attorney General intends that the U.S. Attorney in each district will be responsible in large measure for insuring compliance by the Drug disagreement as to their interpretation should be referred to the Investigation Review Unit for resolution.

Most of the DEA guidelines are self-explanatory. However, certain of the guidelines dealing with coordination of investigative and prosecutive efforts by DEA agents and United States Attorneys seem worthy of a few words of explanation. Those guidelines, together with pertinent comments about them, are as follows.

A. DEA agents must notify U.S. Attorneys about any investigation as soon as there is probable cause to make an arrest, even though an arrest

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though an arrest is not actually contemplated. When an investigation involves a major drug trafficking organization, the U.S. Attorney is to be informed as soon as DEA determines that the subjects are part of a major trafficking group. Notification of any investigation involving the systematic gathering of intelligence about specific individuals or groups must be made to the U.S. Attorney about investigations which have been reported to him/her. Also submit periodic progress reports about such investigations to him/her. (See DEA Guidelines, Sec. I, D, par. 1.)

1. Comment: The intent of this guideline is that each U.S. Attorney is to play a meaningful role during the investigative stage of DEA cases and particularly in major investigations. Each U.S. Attorney, after consultation with the local DEA office, should determine in what form he/she wishes reports about ongoing investigations to be submitted to him/her. It is recommended that consideration be given to requiring that such reports be in written form, although this is a matter within the U.S. Attorney's discretion. Whenever a U.S. Attorney requires a written report from DEA regarding an investigation (or other matters covered by the guidelines), he/she should specify what form the report should take, and the frequency with which it should be sent to him/her. Periodic furnishing of copies of standard investigative reports (DEA 6's should normally satisfy this requirement). Each U.S. Attorney should also inform the local DEA office as to when and how often he/she or members of his/her staff are to be consulted about important developments in ongoing investigations. Procedures should be developed for the furnishing of legal assistance to DEA agents regarding knotty legal problems which arise in the course of investigations. U.S. Attorneys should consider delegating at least one experienced Assistant U.S. Attorney as a liaison officer to monitor major ongoing DEA investigations. The designated liaison officer should review all investigative reports relating to major investigations and should furnish directly or through other Assistant U.S. Attorneys, whatever advice or assistance that may be required to fully develop such investigations.

B. Consistent with Department of Justice guidelines, U.S. Attorneys are directed to develop policy relating both to declination of prosecution and to referral of cases to state and local authorities. (See DEA Guidelines, Sec. I, D, par.3.)

1. Comment: Each U.S. Attorney should establish prosecutive policy regarding the types of controlled substance cases which will be accepted for prosecution. In this connection, consideration should be given, inter alia, to such factors as (a) the seriousness

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of the offense, (b) the kind and amount of drug involved, (c) the need to provide a deterrent to similar offenses, (d) the strength of the government's case, (e) the offender's degree of culpability as well as his/her past criminal history, if any, (f) the offender's circumstances, (g) the probable sentence which would follow on conviction, (h) the possibility of civil, administrative, or other proceedings in lieu of prosecution, and (i) the availability of prosecutive and judicial resources. Each U.S. Attorney should also develop policies and procedures for referring cases to state or local prosecutors. In this connection, factors such as the following should be considered: (1) the sufficiency of the evidence, (2) the degree of federal involvement, (3) the effectiveness of state and local prosecutors, (4) the willingness of state or local authorities to prosecute cases investigated primarily by federal agents, (5) the amount and type of controlled substance involved, (6) the violator's background, (7) the possibility that prosecution will lead to disclosure of evidence of controlled substance violations committed by other persons, (8) the types of sentences being imposed in state and local courts, and (9) the district court's backlog of cases. (Regarding referral of controlled substance cases to state and local prosecutors, see USAM, 9-2.023.)

C. Except in exigent circumstances and in cases which are referable to state or local authorities, U.S. Attorneys are to be consulted prior to arrest. Further consultation should occur immediately after the arrest of a defendant. A written report must be furnished to the U.S. Attorney no later than five working days after the arrest. (See DEA Guidelines, Sec. I, D, par. 4.)

1. Comment: Each U.S. Attorney should confer with the local DEA office about arrest consultation procedures. Such procedures will probably vary from district to district. (Note that, where exigent circumstances exist or where a case is of the type which under the U.S. Attorney's guidelines for prosecution, is referable to state or local authorities, DEA need not consult the U.S. Attorney immediately before and after the arrest.) Inter alia, it should be determined how much advance notification each U.S. Attorney wishes regarding an arrest. Also, a U.S. Attorney may want to delegate selected Assistant U.S. Attorneys to receive notification in his/her place. The written arrest report should set forth the probable cause for the arrest, the appearance before the magistrate, and the result of any interview with the defendant. The five-day requirement for the arrest report is designed to preclude any difficulties which might arise should a defendant request a preliminary hearing within the brief time periods set out in 18 U.S.C. §3060(b). Reports

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relating to any warrantless arrest should show that the arrest was within the scope of DEA's arrest power as set forth in 21 U.S.C. §878(3). U.S. Attorneys should designate an experienced Assistant U.S. Attorney to advise DEA agents on questions of law and to assist agents in preparing complaints, search warrant affidavits, and warrants. At least one additional Assistant U.S. Attorney should also be appointed to act in the place of the primary Assistant whenever that Assistant is unavailable for consultation by DEA agents.

D. Any seizure made without a warrant which is not incident to an arrest must be reported in writing to the U.S. Attorney within 10 working days after the seizure. (See DEA Guidelines, Sec. I, D, par. 5.)

1. Comment: The seizure report should set forth relevant details about the seizure. If it appears for any reason that the seizure may be held legally defective, the U.S. Attorney or prosecutor assigned to the case should confer with the local DEA office. A determination can then be made regarding further action in the case.

E. Prior to trial, DEA shall inform the U.S. Attorney whether an informant or defendant-informant has been compensated in any way and whether any type of electronic surveillance was used in the investigation. (See DEA Guidelines, Sec. I, D, par. 6.)

1. Comment: Each U.S. Attorney should determine how much advance pretrial notice he/she desires and the form it should take regarding informant compensation and electronic surveillance. He/she, or a delegated Assistant U.S. Attorney, should then confer with the local DEA office with a view to establishing appropriate notification procedures. The mere offering of compensation for activities leading to the arrest of an offender is not, of itself, improper, United States v. Ladley, 517 F.2d 1190, 1193 (9th Cir. 1975). However, the fact that an informant is being compensated is the type of information which should be disclosed to the defense or complications may ensue, see United States v. Morell, 524 F.2d 550 (2nd Cir. 1975). Regarding DEA's use of electronic surveillance of any kind in an investigation, the report to the U.S. Attorney should detail all the circumstances involved, particularly the kind of device(s) used.

F. On request, any U.S. Attorney will have the right to review all relevant DEA case files and manuals. Procedures are to be devised by U.S. Attorneys to ensure the security and confidentiality of such materials. (See DEA Guidelines, Sec. I, D, par. 7.)

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1. Comment: Each U.S. Attorney should confer with the local DEA office with a view to adopting procedures designed to ensure the prompt delivery of DEA case files and manuals to the U.S. Attorney or prosecutors who have need of them. U.S. Attorneys should adopt appropriate procedures to maintain the security and confidentiality of such materials. Prosecutors who have custody of these materials for purposes of pre-trial or trial preparation should be particularly careful about protecting them against unauthorized disclosure.

G. In extraordinary circumstances and upon appropriate notification to the U.S. Attorney before institution of prosecutive proceedings, DEA may assure an informant or defendant-informant that he/she will not have to testify as a witness and that his/her identity will not be disclosed in court proceedings. (See DEA Guidelines, Sec. II, A, par. 6.)

1. Comment: U.S. Attorneys should confer with local DEA offices about this important matter and determine how much advance notification they require and what form the notification is to take. Notification should be made prior to the arrest of an offender whenever possible. It is settled, of course, that the government has a privilege of refusing to disclose the identity of an informant at trial. McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957). The privilege is not an absolute one and, where the defendant can show that disclosure is required to insure a "fair trial," the informant's identity must be revealed. Roviaro, 353 U.S. at 60-61. When a demand is made by the defense to reveal an informant's identity, if the government intends to assert the privilege and resist the demand, this should be made clear promptly to prevent any misunderstanding and prejudice. United States v. Truesdale, 400 F.2d 620, 623 (2d Cir. 1968). In order to compel disclosure, the defendant must show that the informant's testimony would probably be material to a substantial issue in the case. See Encinas-Sierras v. United States, 401 F.2d 228 (9th Cir. 1968). In view of these considerations, it is clear that non-disclosure of an informant's identity can at times hamper or even fatally injure the government's case. Accordingly, DEA should not make any commitments about non-disclosure to informants absent the most compelling circumstances, and then only with the appropriate level of supervisory approval.

H. DEA may not seek the cooperation of or utilize a defendant-informant without the U.S. Attorney's prior approval (See DEA Guidelines, Sec. II, C, par. 2.)

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1. Comment: Procedures should be agreed upon between the U.S. Attorney and the local DEA office concerning consultation about possible use of a defendant-informant. Particular attention should be given to situations in which the prospective defendant-informant is represented by counsel but does not wish to have his/her counsel informed of his/her cooperation with the government because of a possible conflict of interest on the part of such counsel. The fact that a defendant has an attorney does not mean that law enforcement officials cannot obtain information from him/her without prior notice to and without the prior consent of his/her attorney. The right to counsel can be waived in this situation although a higher standard is imposed to show waiver once counsel has been appointed. United States v. Cobbs, 481 F.2d 196, 199 (3rd Cir. 1973); Williams v. Brewer, 509 F.2d 227, 233 (8th Cir. 1974). See also, United States v. Woods, 544 F.2d 242, 254-255 (6th Cir. 1976); United States v. Satterfield, 417 F. Supp. 293 (S.D.N.Y. 1976), aff'd F.2d (2d Cir. Dec. 7, 1976), Dook. No. 76-1372); Brewer v. Williams, U.S. (March 23, 1977, Dook. No. 74-1263). DEA will use defendant-informants being prosecuted in state courts only with the approval of the state prosecutor. The U.S. Attorney will be informed of the status of any such informant should the informant's cooperation result in a case's being forwarded for federal prosecution.

I. DEA may advise a defendant-informant that his/her cooperation will be made known to the U.S. Attorney but must make no further representations to the informant without express written approval of the DEA Special Agent in Charge (SAC). (See DEA Guidelines, Sec. II, C, par. 3.)

1. Comment: This guideline restricts DEA's authority to make promises regarding disposition of pending cases. The mere fact that a law enforcement officer indicates to an offender that his/her cooperation will be called to the attention of the U.S. Attorney is not improper, see United States v. Glasgow, 451 F.2d 557 (9th Cir. 1971). Of course, the question of whether a defendant-informant is to receive special consideration in return for his/her cooperation is a decision which is reserved for the U.S. Attorney. This guideline is not intended to authorize DEA Regional Directors to make representations regarding disposition of a case or the penalties which will be imposed.

J. The U.S. Attorney must be notified whenever DEA has reason to believe that an informant or defendant-informant has committed a serious crime. If DEA wishes to continue using such an informant, it must notify

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the U.S. Attorney who will make a decision after consulting the Chief of the Narcotic and Dangerous Drug Section of the Criminal Division. (See DEA Guidelines, Sec. II, D. pars. 3 and 5.)

1. Comment: Procedures should be agreed upon between each U.S. Attorney and the local DEA office regarding prompt notification and the manner in which such notification is to be transmitted. When DEA wishes to continue using an informant who apparently has committed a serious offense, the U.S. Attorney should contact the Chief of the Narcotic and Dangerous Drug Section so that the concerned Section of the Criminal Division can make a prompt recommendation about further use of the informant and thus contribute to a speedy resolution of the problem.

K. During undercover investigations, DEA may furnish an item necessary to the commission of an offense (e.g., a legal chemical), other than a controlled substance, with the approval of the DEA Special Agent in Charge after consultation with the U.S. Attorney and DEA Headquarters. In extraordinary cases, after consultation with the U.S. Attorney and with the approval of the DEA Administrator, DEA may furnish a controlled substance to an offender during an undercover investigation. (See DEA Guidelines, Sec. III, subsection D and E.)

1. Comment: Consultation procedures should be agreed upon by each U.S. Attorney and the local DEA Office. In investigations involving the proposed furnishing of a controlled substance to a suspect, details about the extraordinary nature of the case should be promptly transmitted to the U.S. Attorney. After considering the information submitted to him/her, the U.S. Attorney should make his/her views known to DEA officials as quickly as possible so that the issue may be speedily resolved.

L. It is recommended that all DEA reports submitted to a U.S. Attorney be promptly reviewed by him/her or by a member of his/her staff and that regular contact be maintained between his/her office and the Drug Enforcement Administration. To the extent possible, an Assistant U.S. Attorney assigned to an investigation or prosecution should continue in that assignment and every effort be made to avoid shifting particular cases among various Assistants. Further, the DEA case agent or his/her supervisor should be consulted by U.S. Attorneys or their Assistants on all questions relating to plea bargaining, as well as to the granting of formal or informal immunity, before the government is committed to a particular course of action.

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M. CONTROLLED SUBSTANCE UNITS

In U.S. Attorneys' offices which have Controlled Substance Units, the U.S. Attorney may wish to delegate prosecutors from such units to perform many of the functions discussed above. However, such units should not be used as a substitute for a complaint and warrant unit. Prosecutors in Controlled Substance Units should have a minimum of one year of criminal jury trial experience, which includes trial of a substantial number of controlled substance cases. The units are responsible for developing major narcotic cases, primarily narcotic conspiracy prosecutions. The units are intended to work closely with DEA agents on a full time basis in developing and prosecuting major controlled substance cases. The units are primarily narcotic conspiracy prosecutions. The units are intended to work closely with DEA agents on a full time basis in developing and prosecuting major controlled substance cases. Prosecutors in the units routinely make themselves available for periodic briefings by DEA officials. The DEA guidelines discussed above should result in smoother coordination of the prosecutive and investigative efforts of the Controlled Substance Units and DEA agents and should make for increased efficiency in the operations of these groups.

N. STATE AND LOCAL TASK FORCES

Ordinarily, the guidelines set forth in Subsection D of Section I of the DEA guidelines will not apply to Task Force investigations. The guidelines in Subsection D deal with reports to U.S. Attorneys about investigations of major drug trafficking organizations, reports about intelligence gathering activities, requirements that DEA consult with a U.S. Attorney before and after a defendant's arrest, the furnishing of U.S. Attorneys with written arrest reports, and the submission to U.S. Attorneys of written reports about warrantless seizures. Task Force investigations frequently relate to lower levels of drug trafficking and prosecution of cases resulting therefrom often is in state courts. Clearly, application of the foregoing guidelines to investigations of this kind would serve no useful purpose. However, whenever it appears to the U.S. Attorney that a Task Force investigation is likely to result in a case which will be prosecuted in a federal court, DEA agents from the Task Force should comply with the requirements of Subsection I-D of the DEA guidelines. This provision does not apply to the Attorney General's Organized Crime Drug Enforcement Task Forces.

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9-102.000 THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF
1970 - III: FORMS OF INDICTMENTS

The following forms are offered merely as starting points upon which prosecutors may allege violations of federal narcotics laws.

In the absence of specific facts involved in a given situation, it is not possible to accurately describe the amount or form of controlled substance to be alleged. Therefore, for the purpose of these forms, the substance has been described, in most instances, as so many (grams) (kilograms) (milligrams) (pounds) of the subject substance.

In each form, with minor exceptions, the name of the person to whom the substance was dispensed or distributed has been omitted as being a dispensable element to the charge. However, because bills of particulars ordinarily require the disclosure of such information, where circumstances permit, such names are normally included in the indictment or information.

The statutory references are included within the parentheses at the bottom of each form.

At the discretion of the prosecutor, the charge may be made more concise by using, e.g., 21 U.S.C. §841 in place of section 841, Title 21, United States Code, although words written at length are more certain, particularly when used in the body of the indictment or information. It is also suggested that the use of initials, such as DEA, be avoided so as not to invite unnecessary argument. Abbreviations are often tolerated but not preferred.

Although piperidine is not a controlled substance but a precursor for the manufacture of phencyclidine, it should be noted that piperidine reporting has been added to the Act at Section 830. Other sections of the Act provide for piperidine violations, i.e., Sections 841(d)(1), 841(d)(2), 842(2)(9), and 843(a)(4)(B).

9-102.001 Controlled Substance - Manufacture, Distribute, Possess with Intent To Manufacture, Distribute, Schedule I and II Narcotic Drug and Schedule I, II, III, IV, and V Controlled Substances

On or about the ____ day of _____, 19____, in the _____
District of _____, JOHN DOE knowingly and intentionally did

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unlawfully [manufacture] [distribute] [possess with intent to (manufacture) (distribute)] about _____ grams of _____, a [schedule (I) (II) (III) (IV) (V) controlled substance].

(Title 21, United States Code, section 841(a) (1))

9-102.002 Controlled Substance - Manufacture, Distribute, Possess with Intent To Manufacture, Distribute, Schedule I and II Narcotic Drug and Schedule I, II, III, IV, and V Controlled Substances

On or about the _____ day of _____ 19____, in the _____ District of _____, JOHN DOE, not being authorized as provided in the Controlled Substances Act (21 U.S.C. §801, et seq.), did knowingly and intentionally [manufacture] [distribute] [possess with intent to (manufacture) (distribute)] about _____ grams of _____ a [schedule (I) (II) (III) (IV) (V) controlled substance].

(Title 21, United States Code, section 841(a) (1))

9-102.003 Controlled Substances - Distributing a Small Amount of - Without Remuneration

On or about the _____ day of _____ 19____, in the District of _____, JOHN DOE, knowingly and intentionally did distribute for no remuneration, a small amount of marijuana, a schedule I controlled substance, that is, _____.

(Title 21 United States Code, sections 841(b) (4), 844[a] [b])

9-102.004 Controlled Substances - Create, Distribute, Dispense, Process With Intent to Distribute or Dispense Counterfeit Substances

Prosecutions under this subsection require prior authorization by the Department. Assistance in the preparation of such indictments will be given at that time, if requested.

(Title 21, United States Code, section 841(a) (2))

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9-102.005 Controlled Substances - Possession of Piperidine With Intent to Manufacture Phencyclidine

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE, not being authorized as provided in the Controlled Substance Act (Title 21, United States Code, Section 801, et seq.), knowingly and intentionally did possess piperidine, that is (identified substance) _____, with intent to manufacture phencyclidine, a schedule III controlled substance.

(Title 21, United States Code, section 841 (d) (1))

9-102.006 Controlled Substances - Possession of Piperidine Knowing or Having Reason to Believe that it will be used to Manufacture Phencyclidine

On or about the _____ day of 19____, in the _____ District of _____, JOHN DOE, did knowingly and intentionally possess piperidine, that is (identified substance) _____, knowing or having reasonable cause to believe that the piperidine, that is (identified substance) _____, would be used to manufacture phencyclidine, that manufacture not being authorized as provided in the Controlled Substance Act (Title 21, United States Code, Section 801 et seq.)

(Title 21, United States Code, section 841(d) (2))

9-102.007 Controlled Substances - Distribute Schedule II Drugs Without Prescription

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE, being a [manufacture] [distributor] [dispenser] of controlled substances subject to the requirements of sections 821-829, Title 21, United States Code, unlawfully and knowingly did distribute in violation of section 829(a), Title 21, United States Code, a schedule II controlled substance, that is, about _____ milligrams of _____ a prescription drug as defined by the Federal Food, Drug and Cosmetic Act without a written prescription, written for that purpose, by a practitioner.

(Title 21, United States Code, sections 842(a) (1), 829(a))

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9-102.008 Controlled Substances - Distribute Schedule III or IV Drugs Without a Prescription

On or about the ____ day of _____, 19____, in the District of _____, JOHN DOE, being a [manufacturer] [distributor] [dispenser] of controlled substances subject to the requirements of sections 821-829, Title 21, United States Code, unlawfully and knowingly did distribute, in violation of section 829(b), Title 21, United States Code, a schedule [III] [IV] controlled substance, that is, about _____ milligrams of _____, a prescription drug as defined by the Federal Food, Drug and Cosmetic Act, without a written or oral prescription of a practitioner in conformity with section 503(b) of the Federal Food, Drug and Cosmetic Act.

(Title 21, United States Code, sections 842(a)(1), 829(b))

9-102.009 Controlled Substances - Distribute, a Schedule V Drug for other than Medical Purpose

On or about the ____ day of _____, 19____, in the District of _____, JOHN DOE, being a [manufacturer] [distributor] [dispenser] of controlled substances subject to the requirements of section 821-829, Title 21, United States Code, unlawfully and knowingly did [distribute] in violation of section 829(c), Title 21, United States Code, a drug, that is, about _____ of _____, a schedule V controlled substance, other than for a medical purpose.

(Title 21, United States Code, sections 842(a)(1), 829(c))

9-102.010 Controlled Substances - Distributing Not Authorized by Registration

On or about the ____ day of _____, 19____, in the _____ District of _____, JOHN DOE, being a registered [manufacturer] [distributor] [dispenser] of controlled substances, unlawfully and knowingly did [distribute] about _____ grams of _____, a schedule [I] [II] [III] [IV] [V] controlled substance not authorized by his registration, to Richard Roe, [another registered (manufacturer) (distributor) (dispenser)] of controlled substances [another authorized person].

(Title 21, United States Code, section 842(a)(2))

Note

Common carriers, researchers, ultimate users rightfully in possession, etc.

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9-102.011 Controlled Substances - Manufacturing Not Authorized by
Registration

During the period from, on or about the _____ day of _____, 19____,
to on or about the _____ day of _____, 19____, in the _____
District of _____, JOHN DOE, being a registered manufacturer of
controlled substance, unlawfully and knowingly did manufacture about _____
grams of _____, a schedule [I] [II] [III] [IV] [V] controlled
substance not authorized by his registration.

(Title 21, United States Code, section 842(a) (2))

9-102.012 Identifying Symbol; Controlled Substance Commercial Containers

On or about the _____ day of _____, 19____, in the _____
District of _____, JOHN DOE, a registered [manufacturer]
[distributor] of controlled substances, unlawfully and knowingly
distributed about _____ kilograms of _____, a controlled substance
listed in schedule [I] [II] [III] [IV] [V] in a commercial container, in
violation of section 825(a), Title 21, United States Code, in that the
commercial container did not bear a label, as defined by section 201(k) of
the Federal Food, Drug and Cosmetic Act (Title 21, United States Code,
section 321(k)) containing the identifying symbol required for such
controlled substance under regulations promulgated by the Attorney General
(Code of Federal Regulations, Title 21, Part 1302).

(Title 21, United States Code, sections 842(a) (3), 825(a))

Note

The symbol required to appear on labels of controlled substance
commercial containers vary according to the schedule of the controlled
substance involved. See 21 C.F.R. §1302.03. Regarding the location and
size of the symbol on the label, see 21 C.F.R. §1302.04.

9-102.013 Distribution by Manufacturer Identifying Symbol on Labeling

On or about the _____ day of _____, 19____, in the _____
District of _____, JOHN DOE, a registered manufacturer of
controlled substances, unlawfully and knowingly distributed about _____

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grams of _____, a controlled substance listed in schedule [I] [II] [III] [IV] [V], in violation of section 825(b), Title 21, United States Code, in that the labeling of such substance, as the term "labeling" is defined in section 201(m) of the Federal Food, Drug, and Cosmetic Act (Title 21, United States Code, section 321(m)), did not contain the identifying symbol described in section 825(a), Title 21, United States Code, contrary to the requirements of regulations promulgated by the Attorney General (Code of Federal Regulations, Title 21, Part 1302).

(Title 21, United States Code, sections 842(a) (3), 825(b))

Note

"Labeling," as defined in the Food, Drug and Cosmetic Act (21 U.S.C. §321(m)), encompasses "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, (2) or accompanying such article." Thus, the term "labeling" would embrace not only written matter on controlled substance containers or wrappers but also printed and graphic material accompanying such containers, e.g., technical reports, leaflets, charts, etc. Regarding the term "labeling," see United States v. 24 Bottles "Sterling Vinegar and Honey, etc." 338 F.2d 157 (2d Cir. 1964) and United States v. Lanpar Company, 293 F. Supp. 147, 153 (N.D. Texas, 1968).

9-102.014 Controlled Substance - Removing, Altering, Obliterating Symbols

On or about the ___ day of _____, 19___, in the _____ District of _____, JOHN DOE, unlawfully and knowingly did [remove] [obliterate] the symbol _____ from the label, as defined in section 201(k) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. §321(k)), attached to a commercial container of _____ milligrams of _____, a schedule [I] [II] [III] [IV] [V] controlled substance, said symbol being required by Title 21, United States Code, section 825(a) and regulations issued thereunder (Code of Federal Regulations, Title 21, Part 1302).

(Title 21, United States Code, sections 842(a) (4), 825(b))

Note

See note USAM 9-102.010, supra.

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This subsection also covers altering. If the charge is based on such an offense, the facts showing the particulars of the alteration must be set out by alleging that the defendant altered the symbol, etc., "in that he did _____."

This form, with slight modifications, can also be used to charge an individual with removing, altering or obliterating a symbol attached to "labeling" which accompanies a controlled substance. In this regard, see the second form under 21 U.S.C. §842(a) (3), supra.

9-102.015 Controlled Substances - Removing, Altering, Obliterating Labels

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE unlawfully and knowingly did [remove] [obliterate] from a commercial container of _____ milligrams of _____, a schedule [I] [II] [III] [IV] [V] controlled substance, a label (as defined in section 321(k), Title 21, United States Code) which contained the identifying symbol of such controlled substance, which symbol was required to be on said label by section 825(a), Title 21, United States Code, and regulations promulgated thereunder (Code of Federal Regulations, Title 21, part 1302).

(Title 21, United States Code, sections 842(a) (4), 825(b))

Note

See notes, USAM 9-102.011, supra.

9-102.016 Distributing Controlled Substance to a Patient Without Warning of Prohibition Against Transfer

On or about the _____ day of _____, 19____, in the _____ District _____, JOHN DOE, a registered dispenser of controlled substances, unlawfully and knowingly distributed _____ milligrams of _____, a schedule [II] [III] [IV] Controlled substance, to and for Richard Roe, a patient, in a container, the label of such substance not containing a clear, concise warning that it is a crime to transfer such substance to any person other than the patient for whom it was prescribed, contrary to the requirements of section 825(c), Title 21, United States

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Code, and a regulation promulgated thereunder (Code of Federal Regulations, Title 21, section 290.5).

(Title 21, United States Code, sections 842(a)(3), 825(c))

Note

The regulation cited above, 21 C.F.R. §290.5, requires the following warning: "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed."

9-102.017 Controlled Substances - Refusal and Failure to Make, Keep, Furnish Records, Reports, etc.

From on or about the ____ day of _____, 19__, up to and including the date of the filing of this indictment, in the _____ District of _____, JOHN DOE, being a registered [manufacturer] [distributor] [dispenser] of controlled substance, [manufacturing] [distributing] [dispensing] of controlled substances, unlawfully and knowingly did refuse and fail to keep, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered and otherwise disposed of by him, during the period aforesaid, at his principal place of [business] [professional practice] located at No. _____ Street, City of _____, his registered location, as he was required to do by Title 21, United States Code, section 827(a)(3) and regulations of the Attorney General issued thereunder (Code of Federal Regulations, Title 21, sections (1304.21, 1304.22, 1304.23, 1304.24), in that JOHN DOE (identify the record involved and state the facts showing in which respect the record was not complete and accurate).

(Title 21, United States Code, section 842(a)(5))

Note

This subsection also covers exporters and importers. The registration requirements for such registrants appear in 21 U.S.C. §958. Under the regulations, different sections relate to different classes of registrants. These should be considered carefully and appropriate changes made in the above form.

If the offense is based on the failure to keep any record, not a complete and accurate one, appropriate deletions should be made from the above form.

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9-102.018 Controlled Substances - Distribution Without Seals

On or about the ____ day of _____, 19__, in the _____ District of _____, JOHN DOE, being a registered [manufacturer] [distributor] of controlled substances, unlawfully and knowingly did distribute, in violation of section 825(d), Title 21, United States Code, about _____ milligrams of _____ [a schedule (I) (II) controlled substance], [a narcotic drug schedule (III) (IV) controlled substance], in a [bottle] [multiple dose vial] [(other) commercial container] without there being securely affixed to the [stopper] [cap] [lid] [covering] [wrapper] thereof a seal in the manner required by a Regulation of the Attorney General (Code of Federal Regulations, Title 21, section 1302.07).

(Title 21, United States Code, sections 842(a) (3), 825(d))

9-102.019 Controlled Substances - Breaking Seals Placed Under 21 U.S.C §824(f)

On or about the ____ day of _____, 19__, in the _____ District of _____, JOHN DOE unlawfully, and knowingly did [remove] [break] [injure] [deface] the seal upon a container containing packages of _____, a schedule [I] [II] [III] [IV] [V] controlled substance, said seal having theretofore been placed on said container, and the contents thereof, at the direction of the Attorney General pursuant to Title 21, United States Code, section 824.

(Title 21, United States Code, sections 842(a) (7), 824(f))

9-102.020 Controlled Substances - Breaking Seals Placed Under 21 U.S.C. §881(c) (1)

On or about the ____ day of _____, 19__, in the _____ District of _____, JOHN DOE unlawfully, and knowingly did [remove] [break] [injure] [deface] the seal placed upon a container containing _____ packages of _____, a schedule [I] [II] [III] [IV] [V] controlled substance, said container, and the contents thereof, being then in the custody of, and under seal at the direction of, the Attorney General pursuant to Title 21, United States Code, section 881.

(Title 21, United States Code, sections 842(a) (7), 881(c) (1))

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9-102.021 Controlled Substances - Distribution or Sale of Piperidine in Violation of Reporting Requirements

On or about the ____ day of _____, 19__, in the _____ District of _____, JOHN DOE, being a [distributor] [seller] [importer] of piperidine, that is (identified substance) _____, subject to the reporting requirements of section 830, Title 21, United States Code, did unlawfully and knowingly [distribute] [sell] piperidine, that is (identified substance) _____, in violation of section 830(a) (2), Title 21, United States Code.

(Title 21, United States Code, sections 842(a) (9), 830(a) (2))

9-102.022 Controlled Substances - False or Fraudulent Information in Applications, Reports, Records

On or about the 4 day of _____, 19__, in the _____ District of _____, JOHN DOE, knowingly and intentionally did furnish materially false and fraudulent information in an application for registration as a [manufacturer] [distributor] [dispenser] of controlled substances, in that in said application on form number 225, signed by JOHN DOE and submitted for filing to the Registration Branch, Drug Enforcement Administration, on the aforesaid date as required by a Regulation of the Attorney General (Code of Federal Regulations, Title 21, section 1301.34,), JOHN DOE stated and represented that he had no prior conviction record under federal or state laws relating to the manufacture, distribution or dispensing of controlled substances, whereas, in truth and fact, as JOHN DOE then well knew, he had been convicted of _____ in violation of Title 21 _____, 19__, in the United States District Court for the _____ District of _____.

(Title 21, United States Code, section 843(a) (4) (A))

Note

This subsection also covers applications, reports, records, etc. required under Title II and the Controlled Substances Import and Export Act (Title III). If such documents under Title III are involved, see 21 U.S.C. §958 and the applicable Regulations, making appropriate changes in the above form.

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9-102.023 Controlled Substances - Acquisition of Piperidine by the use of False or Fraudulent Identification

On or about the ____ day of _____, 19____, in the _____ District of _____, JOHN DOE, being subject to the [purchase] [receiving] requirements of Section 830, Title 21, United States Code, did knowingly and intentionally present [false] [fraudulent] identification to [purchase] [receive] piperidine, that is (identified substance) _____, in violation of 830(a), Title 21, United States Code.

(Title 21, United States Code, sections 830(a), 843(1)(4)(B))

9-102.024 Controlled Substances - Inspections (Refusing Entry into Controlled Premises)

1. From on or about the ____ day of _____, 19____, up to and including the date of the filing of this indictment, JOHN DOE CO., INC. was a [manufacturer] [distributor] [dispenser] of controlled substances registered under the provisions of Title 21, United States Code, section 823 and [manufactured] [distributed] [dispensed] such substances at the [factory] [warehouse] of said company, a controlled premise, located at No. _____ Street, City of _____, State of _____.

2. During all of the aforesaid period, JOHN DOE, the defendant herein, was President of the said John Doe Co., Inc., and custodian of the aforesaid [factory] [warehouse].

3. On or about the ____ day of _____, 19____, in the _____ District of _____, JOHN DOE unlawfully and knowingly did refuse Richard Roe, an Inspector designated by the Attorney General to enter controlled premises, entry into the aforesaid controlled premises of the John Doe Co., Inc., for the purpose of conducting an administrative inspection thereof as authorized by Title 21, United States Code, section 880, and Regulations issued thereunder (Code of Federal Regulations, Title 21, Part 1316, Subpart A).

(Title 21, United States Code, sections 842(a)(6), 880(B)(1))

Note

See 21 U.S.C. §965 for inspections under the Controlled Substance Import and Export Act. If such inspections are involved, appropriate changes must be made in the above form. Registration requirements for importers and exporters appear in 21 U.S.C. §958.

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9-102.025 Controlled Substances - Inspecting (Refusal Thereof)

1. From on or about the _____ day of _____, 19____, up to and including the date of the filing of this indictment, John Doe Co., Inc., was a [manufacturer] [distributor] [dispenser] of controlled substances, registered under Title 21, United States Code, section 823, and [manufactured] [distributed] [dispensed] controlled substances at the [factory] [warehouse] of said company, a controlled premise, located at No. _____ Street, City of _____, State of _____.

2. During all of the aforesaid period, JOHN DOE, the defendant herein, was President of the said John Doe Co., Inc., and custodian of the aforesaid [factory] [warehouse].

3. On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE unlawfully and knowingly did refuse administrative inspection of the aforesaid controlled premise by Richard Roe, an Inspector designated by the Attorney General to conduct such inspections, as authorized by Title 21, United States Code, section 880, and Regulations issued thereunder (Code of Federal Regulations, Title 21, Part 1316, Subpart A).

(Title 21, United States Code, section 842(a)(6), 880)

Note

See notes, USAM 9-102.020, supra.

9-102.026 Controlled Substances - Revealing Information Acquired During Inspection

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE unlawfully and knowingly did reveal to the Richard Roe Company certain information, that is, the formula used by the _____ Company in the compounding and processing of _____, a schedule _____ controlled substance, said formula being a trade secret of the said _____ Company, and as such, entitled to judicial protection, the aforesaid information having been acquired, as JOHN DOE well knew, in the course of an administrative inspection at No. _____ Street, City of _____, State of _____, 19____, as authorized by Title 21, United States Code, section 880, and Regulations thereunder (Code of Federal Regulations Title 21, Part 1316, Subpart A).

(Title 21, United States Code, sections 842(a)(8), 880)

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Note

Also applies to any inspection authorized under Title II or Title III.

This subsection also covers the use, to a defendant's own advantage, of any such information.

9-102.027 Controlled Substances - Manufacturing Unauthorized by Registration and Quota

During the period from on or about the _____ day of _____, 19____, to, on or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE, being a registered manufacturer of controlled substances, unlawfully and knowingly did manufacture about _____ grams of _____, a schedule [I] [II] controlled substance, without express authorization therefore by his registration and by a production quota for such substance assigned to him for the aforesaid period pursuant to Title 21, United States Code, section 926, and Regulations thereunder (Code of Federal Regulations Title 21, Parts 1301 and 1303).

(Title 21, United States Code, sections 842(b)(1), 826)

9-102.028 Controlled Substances - Manufacture in Excess of Quota

During the period from on or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE, being a registered manufacturer of controlled substances, unlawfully and knowingly did manufacture a total of _____ grams of _____, a schedule [I] [II] controlled substance, said total amount being about _____ grams in excess of the manufacturing quota for such substance, assigned to him for the aforesaid period pursuant to Title 21, United States Code, section 826 (Code of Federal Regulations, Title 21, Part 1303).

(Title 21, United States Code, sections 842(b)(2), 826)

Note

See the alternative form for this subsection, USAM 9-102.025, supra.

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9-102.029 Controlled Substances - Manufacturing in Excess of Quota
(Alternative Form)

During the period from, on or about the _____ day of _____, 19____, to on or about the _____ day of _____, 19____, in the District of _____, JOHN DOE, being a registered manufacturer of controlled substances, unlawfully and knowingly did manufacture about _____ grams of _____, a schedule [I] [II] controlled substance, in excess of the manufacturing quota for such substance assigned to him for the aforesaid period pursuant to Title 21, United States Code, section 826 (Code of Federal Regulations, Title 21, Part 1303).

(Title 21, United States Code, sections 842(b)(2), 826)

Note

This form is preferable in those cases where proof is not available as to the total amount manufactured due to the lack of production records, loss of portion of the substance in making chemical analyses, etc. Whether this form or USAM 9-102.024 should be used is a matter within the prosecutor's discretion.

9-102.030 Controlled Substances - Distributing Without Order Form

On or about the _____ day of _____, 19____, in the District of _____, JOHN DOE, being a registered [manufacturer] [distributor] of controlled substances, knowingly and intentionally, did distribute, in the course of his legitimate business as such [manufacturer] [distributor], about _____ kilograms of _____, a schedule [I] [II] controlled substance, to Richard Roe, not in pursuance of a written order of the said Richard Roe made on a form issued in blank by the Attorney General or his delegate as required by Title 21, United States Code, section 828, and a Regulation issued thereunder (Code of Federal Regulations, Title 21, Part 1305).

(Title 21, United States Code, sections 843(a)(1), 828(d)(1))

Note

Order forms may be obtained only by those registered under 21 U.S.C. §823 to handle schedule I and II controlled substances and under 21 U.S.C. §958 (exporters). 21 C.F.R. §1305.04(a).

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Registered dispensers under sections 823 and 958 of Title 21, United States Code, may "dispose" of such substances under the conditions of 21 C.F.R. §1305.08(a).

Section 843(a)(1) uses "except pursuant to an order or an order form." "Order" is not defined.

9-102.031 Controlled Substances - Use of Revoked, Suspended Registration Numbers

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did use, in the course of the [manufacture] [distribution] of _____, a controlled substance, registration number _____ which had theretofore been duly issued to him pursuant to Title 21, United States Code, §823, but which, to his knowledge, had been [revoked] [suspended] by the Attorney General on the _____ day of _____, 19____, in that JOHN DOE, for the purpose of obtaining said substance, presented to the Richard Roe Company, a registered [manufacturer] [distributor] of controlled substances, Copies I and II of Drug Enforcement Administration order form number 222c, serially numbered _____, with the aforesaid [revoked] [suspended] registration number printed thereon.

(Title 21, United States Code, section 843(2))

9-102.032 Controlled Substances - Use of Fictitious Registration and Numbers Issued to Another Person

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did use, in the course of the [manufacture] [distribution] of _____, a controlled substance, registration number _____ which [had, to the knowledge of JOHN DOE, theretofore been duly issued to _____ a registered (manufacturer) (distributor) of such substance], [was a fictitious registration number and known by John Doe to be such], in that JOHN DOE, for the purpose of obtaining said controlled substance, furnished to the Richard Roe Company, a registered [manufactured] [distributor] of controlled substances, Copies I and II of Drug Enforcement Administration order form number 222c, serially numbered _____, [with the said registration number (of the said _____) printed thereon]. [With the said fictitious registration number printed thereon].

(Title 21, United States Code, section 843(a)(2))

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Note

This same language may be used for any other use in the course of manufacture or distribution.

If the facts are that the defendant merely used a number without knowing that such number had been issued to another person, make an appropriate change in the above form.

9-102.033 Controlled Substance - Obtaining Possession by Misrepresentation, Fraud, Forgery, Deception or Subterfuge

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did acquire and obtain possession of _____ bottles, each containing one hundred (100) tablets of _____, a controlled substance, from Richard Roe, Inc., a registered [manufacturer] [distributor] of controlled substances by furnishing to the said Richard Roe, Inc., Copies I and II of Drug Enforcement Administration order form number 222c, serially numbered _____, on each of which copies JOHN DOE had forged the name of _____, the person to whom the said order form had been duly issued, [the said order form as to forged, being of the following description and tenor:]

[set out copy]

(Title 21, United States Code, section 843(a)(3))

Note

The bracketed words in the above form are not absolutely essential if the document is sufficiently described in the indictment and the particulars of the forgery set out.

This subsection also covers misrepresentation. If the charge is based on that element of the offense, the specifics should be set forth and the misrepresentation charged as having been made with respect to a material fact or words of similar import.

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9-102.034 Controlled Substances - Obtaining Possession by Forged Prescriptions

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did acquire and obtain possession of _____ milligrams of _____, a schedule [II] [III] [IV] [V] controlled substance, from Richard Roe, a registered pharmacist, by furnishing to the said Richard Roe a falsely made and forged written prescription for such substances, dated the _____ day of _____, 19____, on which the said JOHN DOE had forged the signature of _____, a registered practitioner, the said prescription, as so forged and falsely made, being of the following description and tenor:

[set out copy]

(Title 21, United States Code, section 843(a)(3))

Note

See notes, USAM 9-102.029, supra.

9-102.035 Controlled Substances - Punches, Dies, Plates, etc.

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally, and without authorization, did [make] [distribute] [possess] a [punch] [die] [plate] [stone] designed to print, imprint and reproduce the identifying mark, " _____," upon the labeling of the immediate container of a drug, that is, _____, a schedule [I] [II] [III] [IV] [V] controlled substance, so as to render such drug a counterfeit substance, the said identifying mark being the trade name of Richard Roe, Inc., a registered [manufacturer] [distributor] of said drug.

(Title 21, United States Code, section 843(a)(5))

9-102.036 Controlled Substances - Use of Communication Facilities in Committing Felonies

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did use a communication facility, that is, a public telephone, in facilitating the knowing and intentional importation, by Richard Roe, of _____ grams of _____, [a schedule (I) (II) controlled substance] [a

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schedule (III) (IV) (V) narcotic drug controlled substance] into the United States, a felony under Title 21, United States Code, section 952(a), in that JOHN DOE used said telephone to transmit the said Richard Roe at _____, _____, a communication informing Richard Roe that he, the said JOHN DOE, had sold the said controlled substance to individuals in the United States.

(Title 21, United States Code, sections 843(b), 952(a))

Note

"Communication facility" also includes the mail, telephone, wire, radio, etc.

9-102.037 Controlled Substances - Simple Possession

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE unlawfully, knowingly and intentionally did possess milligrams of _____, a schedule [I] [II] [III] [IV] [V] controlled substance.

(Title 21, United States Code, section 844(a))

Note

A first offense is a misdemeanor which is chargeable by information.

9-102.038 Controlled Substances - Attempts to Commit Title Two Offenses

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did attempt to distribute _____ grams of _____, a [schedule (I) (II) (III) (IV) (V) controlled substance], contrary to Title 21, United States Code, section 841(a) (1).

(Title 21, United States Code, sections 841(a) (1), 846)

9-102.039 Controlled Substances - Conspiracy to Commit Offenses

1. From on or about the _____ day of _____, 19____, and continuously thereafter up to and including the date of the filing of this indictment, in the _____ District of _____, and

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elsewhere, JOHN DOE, RICHARD ROE and _____, the defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together, with each other, and with diverse other persons whose names are to the Grand Jury unknown, to (state the offense-object of the conspiracy) in violation of Section _____, Title _____, United States Code.

2. It was part of said conspiracy that the defendants and conspirators would _____, etc.

3. It was further a part of said conspiracy that the defendants and co-conspirators would _____, etc.

Note

This statute does not require an overt act as does section 371. U.S. Attorneys, however, usually include such acts to outline the scope of the conspiracy and its broad factual components. If overt acts are not included, the ways and means by which the conspiracy was to be carried out must be set forth in as much detail as the factual situations (paragraphs 2 and 3 in the above form).

9-102.040 Continuing Criminal Enterprise

From _____ or about the _____ day of _____, 19____, and continuously thereafter up to and including the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE unlawfully, knowingly and intentionally violated section _____, Title 21, United States Code, as alleged in count _____ of this indictment (said count being incorporated herein by reference), which violation was part of a continuing series of violations of the Controlled Substances Act, Title 21, United States Code, section 801, et seq. [and/or the Controlled Substances Import and Export Act, Title 21, United States Code, section 951, et seq.], undertaken by JOHN DOE in concert with at least five other persons with respect to whom JOHN DOE occupied a position of organizer, a supervisory position, and any other position of management, and from which such continuing series of violations JOHN DOE obtained substantial income and resources, in violation of section 848, Title 21, United States Code.

Note

The Criminal Division takes the position that an indictment brought under 21 U.S.C. §848 should contain a forfeiture paragraph regardless of whether the government intends to seek forfeiture of any property. Thus,

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21 U.S.C. §848 indictments should contain a forfeiture paragraph (relating to property described in §848(a)(2)) even when the government does not seek forfeiture. The Criminal Division's position is based on the decision in United States v. Hall, 521 F.2d 406, (9th Cir. 1975). In Hall, a general smuggling (18 U.S.C. §545) indictment was ordered dismissed because it did not contain language indicating that the government intended to seek forfeiture of two diamond rings involved in the case. The Criminal Division believes that the Hall rationale might be held applicable to prosecutions under 21 U.S.C. §848 if the government neglects to add a forfeiture paragraph to the indictment. The Criminal Division disagrees with the Hall holding. The Division believes that the proper remedy in cases where a forfeiture paragraph is improperly omitted from the indictment is merely to preclude forfeiture. However, the Division believes that the risk of dismissal under Hall is not worth the comparatively little additional effort required to add a forfeiture paragraph to a §848 indictment. Questions about appropriate forfeiture language should be addressed to the Narcotic and Dangerous Drug Section.

When a jury finds that specific property is subject to forfeiture, judgment should be entered in accordance with Rule 32(b)(2), Federal Rules of Criminal Procedure.

9-102.041 Controlled Substances - Importation for Transshipment of
Schedule I Substances Without Prior Approval

On or about the _____ day of _____, 19____, in the _____
District of _____, JOHN DOE knowingly and intentionally did
import into the United States, without prior written approval of the
Attorney General or his delegate, _____ grams of _____, a
schedule I controlled substance, for transshipment from the United States
to _____, the said substance having been so imported and
transshipped for other than scientific, medical and other legitimate
purpose in the said country of _____.

(Title 21, United States Code, sections 954(1)(A), 961)

Note

The statute requires prior written approval of the Attorney General while the regulations (21 C.F.R. §1312.31(g)) provide that if the approval is not given within 21 days (27 days in some circumstances), it shall be deemed approved.

See USAM 9-102.038, supra.

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9-102.042 Controlled Substances - Transshipping and Transferring Schedule I
Substances Without Prior Approval

On or about the _____ day of _____, 19____, in the _____
District of _____, JOHN DOE knowingly and intentionally did
transfer and transship, without prior written approval of the Attorney
General or his delegate, _____ grams of _____, a schedule I
controlled substance, from a private aircraft, Registration No. _____,
to Flight Number _____ of _____ Airlines for immediate
exportation of said substance to _____, for other than scienti-
fic, medical or other legitimate purposes in the said country of _____.

(Title 21, United States Code, sections 954(1)(B), 961(2))

Note

See notes, USAM 9-102.037, supra.

9-102.043 Controlled Substances - Importation for Transshipment Without
Advance Notice

On or about the _____ day of _____, 19____, in the _____
District of _____, JOHN DOE knowingly and intentionally did
import into the United States _____ grams of _____, a
schedule [II] [III] [IV] controlled substance, for transshipment from the
United States to _____, JOHN DOE not having given advance
written notice of such importation to the Attorney General or his delegate
as required by Title 21, United States Code, section 954, and in
accordance with Regulations issued hereunder (Code of Federal Regulations,
Title 21, section 1312.32).

(Title 21, United States Code, sections 954(2), 961)

Note

See form, USAM 9-102.040, supra.

9-102.044 Controlled Substances - Transshipment of Schedule II, III, or
IV Substances Without Advance Notice

On or about the _____ day of _____, 19____, in the _____
District of _____, JOHN DOE knowingly and intentionally did

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transfer and transship _____ grams of _____, a schedule [II] [III] [IV] controlled substance, from the vessel SS _____ to the vessel SS _____ for immediate exportation of such substance to _____, JOHN DOE not having given advance written notice of such transfer and transshipment to the Attorney General or his delegate as required by Title 21, United States Code, section 954, and in accordance with Regulations thereunder (Code of Federal Regulations, Title 21, section 1312.32).

(Title 21, United States Code, sections 954(2), 961)

9-102.045 Controlled Substances - Manufacture, Distribution, or Possession with Intent to Manufacture or Distribute Controlled Substances on Board United States Vessels

On or about the _____ day of _____, 19____, while aboard the vessel (name) _____, a vessel of the United States, with (city of port of entry) _____, in the _____ District of _____, being the first place to which the defendant[s] was/were brought, the defendant[s] _____, did knowingly and intentionally [manufacture] [distribute] [possess with intent to distribute or manufacture] a controlled substance, that is _____, a schedule [I, II, III, IV, V] controlled substance in violation of Title 21, United States Code, section 955a(a).

(Title 21, United States Code, section 955a(a))

9-102.046 Controlled Substances - Manufacture, Distribution, or Possession with Intent to Manufacture or Distribute Controlled Substances by a Citizen of the United States on Board Any Vessel

On about the _____ day of _____, 19____, JOHN DOE, a citizen of the United States, while on board the vessel (name) _____, did knowingly and intentionally [manufacture] [distribute] [possess with intent to distribute or manufacture] a controlled substance, that is (identified substance) _____, a schedule [I, II, III, IV, V] controlled substance in violation of Title 21, United States Code, section 955a(b).

(Title 21, United States Code, section 955a(b))

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9-102.047 Controlled Substances - Manufacture, Distribution, or Possession with Intent to Manufacture or Distribute Controlled Substances on Board a Vessel Within the Customs Waters of the United States

On or about the _____ day of _____, 19____, while aboard the vessel (name) _____, within the customs waters of the United States, with (city of port of entry) _____, in the _____ District of _____, being the first place to which the defendant[s] was/were brought, the defendant[s] _____, did knowingly and intentionally [manufacture] [distribute] [possess with intent to distribute or manufacture] a controlled substance, that is (identified substance) _____, a schedule [I, II, III, IV, V] controlled substance in violation of Title 21, United States Code, section 955(a) (c).

(Title 21, United States Code, section 955(a) (c))

9-102.048 Controlled Substances - Importing Into the Customs Territory of the United States Schedule I or II Substances and Narcotic Drugs in Schedules III, IV, or V

On or about the _____ day of _____, 19____, in [the _____ District of _____], JOHN DOE knowingly and intentionally did import _____ grams of _____, a [schedule (I) (II) controlled substance], [a Schedule (III) (IV) (V) narcotic drug controlled substance], into the customs territory of the United States from _____, a place outside such territory, but within the United States, contrary to Title 21, United States Code, section 952(a).

(Title 21, United States Code, sections 952(a), 960(a) (1))

Note

"Customs territory of the United States" is defined by 21 U.S.C. §951(a) (2).

"United States," in a geographic sense, is defined in 21 U.S.C. §802(26).

See form, USAM 9-102.042, supra.

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9-102.049 Controlled Substances - Importing Nonnarcotic Substances Into
the Customs Territory of the United States

On or about the _____ day of _____, 19____, in [the _____
District of _____], [the District of Columbia], [the
District of (Puerto Rico)], JOHN DOE knowingly and intentionally did
import _____ grams of _____, a schedule [III] [IV] [V]
nonnarcotic controlled substance, into the customs territory of the United
States from _____, a place outside of such territory but
within the United States, contrary to Title 21, United States Code,
section 952(b).

(Title 21, United States Code, sections 952(b), 960(a)(1))

Note

"Customs territory" of the United States is defined in 21 U.S.C.
§951(a)(2).

See form, USAM 9-102.043, supra.

9-102.050 Controlled Substances - Importing Into the United States
Schedule I or II Substances and Narcotic Drugs in Schedules
III, IV or V

On or about the _____ day of _____, 19____, in the _____
District of _____, JOHN DOE knowingly and intentionally did
import _____ grams of _____, a [schedule (I) (II) con-
trolled substance], [a schedule (III) (IV) (V) narcotic drug controlled
substance], into the United States from _____ contrary to Title 21,
United States Code, section 952(a).

(Title 21, United States Code, sections 952(a), 960(a)(1))

Note

"United States" in a geographic sense, is defined in 21 U.S.C.
§802(26).

See form, USAM 9-102.044, supra.

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9-102.051 Controlled Substances - Importing Nonnarcotic Substances Into the United States

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did import _____ grams of _____, a schedule [III] [IV] [V] nonnarcotic controlled substance, into the United States from _____ contrary to Title 21, United States Code, section 952(b).

(Title 21, United States Code, sections 952(b), 960(a) (1))

Note

"United States," in a geographic sense, is defined in 21 U.S.C. §802(26).

9-102.052 Controlled Substances - Importing Into the Customs Territory of the United States by Unregistered Importers

On or about the _____ day of _____, 19____, in [_____ District of _____, [the District of Columbia], [the District of Puerto Rico], JOHN DOE knowingly and intentionally did import _____ grams of _____, a schedule [I] [II] [III] [IV] [V] controlled substance, into the customs territory of the United States from _____, a place outside of such territory but within the United States, contrary to Title 21, United States Code, section 957(a) (1).

(Title 21, United States Code, sections 960(a) (1), 957(a) (1))

Note

"Customs territory of the United States" is defined by 21 U.S.C. §951(a) (2); "United States" in a geographic sense by 21 U.S.C. §802(26).

See form, USAM 9-102.046, supra.

9-102.053 Controlled Substances - Importing Into the United States by Unregistered Importers

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did import _____ grams of _____, a schedule [I] [II] [III] [IV] [V] controlled substance into the United States from _____, contrary to Title 21, United States Code, section 957(a) (1).

(Title 21, United States Code, sections 957(a) (1), 960(a) (1))

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Note

"United States," in a geographic sense, is defined in 21 U.S.C. §802(26).

9-102.054 Controlled Substances - Manufacture or Distribution for Purposes of Unlawful Importation

1. On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE, at (a place outside the territorial jurisdiction of the United States), did [manufacture] [distribute], contrary to Title 21, United States Code, section 959, _____ grams of _____, a schedule [I] [II] controlled substance, JOHN DOE [then intending that such substance be unlawfully imported into the United States] [then knowing that such substance would be unlawfully imported into the United States].

2. The _____ District of _____ was the point of entry where JOHN DOE entered the United States following commission of the aforesaid offense.

(Title 21, United States Code, sections 959[I] [II], 960(a)(3))

Note

"United States," in a geographic sense, is defined in 21 U.S.C. §802(26).

9-102.055 Controlled Substances - Exporting Schedule I and II Controlled Substances and Schedule III or IV Narcotic Drug Controlled Substances

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did export from the United States to the Republic of _____, contrary to Title 21, United States Code, section 957, and a Regulation thereunder (Code of Federal Regulations, Title 21, section 1312.21(a)), _____ grams of _____, a [schedule (I) (II) controlled substances] [schedule (III) (IV) narcotic drug controlled substances], there not then being in effect, with respect to JOHN DOE, a registration as an exporter of such substance or an exemption from such registration.

(Title 21, United States Code, sections 957(a)(2), 957(b)(1), 957(b)(2), 960(a)(1))

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Note

The above form covers exportation by unregistered exporters of the substance described therein. If the facts involve an exportation by a registered exporter without a permit issued pursuant to 21 C.F.R. 1312.21, 21 U.S.C. §953(a)(5) applies.

See form, USAM 9-102.049, supra.

9-102.056 Controlled Substances - Exporting Schedule III or IV Non-narcotic Controlled Substances or Schedule V Controlled Substances

On or about _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did export from the United States to the Republic of _____, contrary to Title 21, United States Code, section 957, and a Regulation thereunder (Code of Federal Regulations, Title 21, United States Code, sections 1312.21(b)), _____ grams of _____, a [schedule (III) (IV) nonnarcotic controlled substance] [schedule V controlled substance], there not being in effect, with respect to JOHN DOE, a registration as an exporter of such substance or an exemption from such registration.

(Title 21, United States Code, sections 957(a)(2), 957(b)(1), 957(b)(2) 960(a)(1))

Note

See note, USAM 9-102.048, supra.

9-102.057 Controlled Substances - Bringing or Possessing on Board Aircraft, etc., Arriving in or Departing From the United States

On or about the _____ day of _____, 19____, in the _____ District of _____, JOHN DOE knowingly and intentionally did [bring] [possess], contrary to Title 21, United States Code, section 955, _____ kilograms of _____, a [schedule (I) (II) controlled

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substance], [schedule (III) (IV) narcotic drug controlled substance], on board an aircraft, that is, Flight No. _____ of _____ Airlines then [arriving] [departing from] the United States, the said substance not then being a part of the cargo entered in the manifest for, or part of the supplies of, said aircraft.

(Title 21, United States Code, sections 955, 960(a) (2))

Note

See form, USAM 9-102.051, supra.

9-102.058 Controlled Substances - Bringing or Possessing on Board Aircraft, etc. Arriving in or Departing from the Customs Territory of the United States

On or about the _____ day of _____, 19____, in [the _____ District of _____] [the District of Columbia] [the District of Puerto Rico] knowingly and intentionally did [bring] [possess] contrary to Title 21, United States Code, section 955 _____ kilograms of _____, a [schedule (I) (II) controlled substance], [schedule (III) (IV) narcotic drug controlled substance], on board an aircraft, that is Flight No. _____ of _____ Airlines then [arriving] [departing from] the customs territory of the United States, said substance not then being a part of the cargo entered in the manifest for, or part of the supplies of, said aircraft.

(Title 21, United States Code, sections 955, 960(a) (2))

Note

"Customs territory of the United States" is defined by 21 U.S.C. §802(26).

9-102.059 Controlled Substances - Attempts and Conspiracy to Commit Title III Offenses

See form, USAM 9-102.034, supra.

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9-102.060 Information Charging Prior Offenses

UNITED STATES

: INFORMATION

v.

: Section 851 of Title 21 U.S.C.,
: relating to indictment _____,
: C.F. _____, filed the _____ day
: of _____, 19__.

JOHN DOE

:

I, _____ United States Attorney for the _____
District of _____, do accuse the defendant above named, who
was charged on the _____ day of _____, 19__, in the _____
District of _____ with _____, in
violation of Title 21, United States Code, section _____, of
having been previously convicted as herein below described:

The said defendant, on or about the _____ day of _____, 19__,
in the _____ District of _____ was duly
convicted of _____, etc.

9-102.061 Civil Penalty Complaint

UNITED STATES OF AMERICA)
Plaintiff)

v.)

Civil Action No.)

JOHN DOE AND RICHARD ROE)
t/a ATLAS PHARMACY)
Defendants)

COMPLAINT

The plaintiff, UNITED STATES OF AMERICA, by and through its attorney,
_____, United States Attorney for the _____
District of _____, alleges upon information and belief
as follows:

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1. This is a civil action brought by plaintiff to recover civil penalties resulting from defendants' violation of sections 827, 828, 829 and 842(a) of Title 21, United States Code. Plaintiff also seeks an injunction against further violations of these sections.

2. This court has jurisdiction pursuant to Title 21, United States Code, sections 842(c)(1), 882(a) and Title 28, United States Code, sections 1345, 1355.

3. ATLAS PHARMACY is a retail pharmacy located at _____ Street, _____, within the jurisdiction of this Court.

4. ATLAS PHARMACY is a partnership owned by JOHN DOE and RICHARD ROE. JOHN DOE resides at _____ Street, _____. ATLAS PHARMACY is registered with the Drug Enforcement Administration as a retail pharmacy under number _____. The firm is also registered with the State Board of _____ as an apothecary under number _____.

5. Between _____, 1975, _____ and _____, 1975, the Drug Enforcement Administration conducted an administrative inspection of the premises of ATLAS PHARMACY pursuant to Title 21, United States Code, sections 822(f), 880(a), (b) and Title 21, Code of Federal Regulations, sections 1315.01 through 1316.13. The inspection revealed the following violations of Title 21, United States Code, sections 827, 828, 829 and 842(a).

FAILURE TO KEEP COMPLETE AND ACCURATE RECORDS

6. (Two Violations) An audit was conducted at ATLAS PHARMACY of two pharmaceutical preparations. The audit period extended from the close of business on _____, 1973, through the close of business on _____, 1975. The first substance audited as Preludin 75 mg. Enduret capsules, which contain phenmetrazine and its salts. The other substance audited was Ritalin 20 mg. tablets which contain methylphenidate. Phenmetrazine and methylphenidate are substances listed in schedule II of the Controlled Substances Act. See Title 21, United States Code, Section 812, and Title 21, Code of Federal Regulations, section 1308.12(d). The audit conducted by the Drug Enforcement Administration revealed a surplus of 36,510 Preludin 75 mg. Enduret capsules and a surplus of 4,224 Ritalin 20 mg. tablets. The surplus of these drugs resulted from the failure of JOHN DOE and RICHARD ROE, t/a ATLAS PHARMACY, to prepare and maintain complete and accurate records reflecting receipt and distribution of the two drugs, in violation of Title 21, United States Code, sections 827(a)(3), 842(a)(5) and Title 21, Code of Federal Regulations, section 1304.24.

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FAILURE TO RETAIN OFFICIAL ORDER FORMS

7. (One Violation) The Drug Enforcement Administration audit also showed that JOHN DOE and RICHARD ROE, t/a ATLAS PHARMACY, failed to keep available for inspection for a two-year period official order forms showing receipts of controlled substances, in violation of Title 21, United States Code, sections 828(c)(2), 842(a), and Title 21, Code of Federal Regulations, section 1305.13(c).

IMPROPER FILLING OF PRESCRIPTIONS

8. (Seventy-Six Violations) The Drug Enforcement Administration audit further showed that JOHN DOE and RICHARD ROE, t/a ATLAS PHARMACY, improperly filled seventy-six (76) prescriptions, in violation of Title 21, United States Code, section 842(a)(1), and Title 21, Code of Federal Regulations, sections 1306.05(a) and 1306.06. The improperly filled prescriptions are as follows:

1.) Fifty-two (52) xeroxed prescriptions whose numbers are:

No. _____ No. _____ No. _____
No. _____ No. _____ No. _____
No. _____ No. _____ No. _____

2.) Twenty-four (24) prescriptions bearing the name of

_____, M.D. but not signed by
_____, M.D. The numbers of these
prescriptions are:

No. _____ No. _____ No. _____
No. _____ No. _____ No. _____

(etc.)

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CONSENT JUDGMENT
INJUNCTION AND FINES

On _____, 19____, a complaint for an injunction and civil penalty was filed in this court against the above defendants on behalf of the United States of America by _____, United States Attorney for the _____ District of _____. The complaint charged that the defendants, to wit, JOHN DOE and RICHARD ROE, t/a ATLAS PHARMACY, had failed to keep complete and accurate controlled substance records, had failed to retain official controlled substance order forms, and had improperly filled prescriptions for controlled substances, in violation of Title 21, United States Code, sections 827, 828, 829 and 842(a).

In response to the summons and complaint in this case, the defendants appeared through their attorney and consented to entry of an order granting an injunction and assessing a civil penalty.

The court being fully advised in this matter and on motion of the parties hereto, it is -

ADJUDGED, ORDERED and DECREED as follows:

(1) That the Court has jurisdiction of the subject matter of this suit and of the parties thereto,

(2) That the complaint states a cause of action against the defendants and that the unlawful acts alleged in the complaint have been committed by the defendants,

(3) That the drugs referred to in the complaint are controlled substances within the scope of the Controlled Substances Act, Title 21, United States Code, section 812.

It is further ADJUDGED, ORDERED and DECREED that:

(1) The injunction requested in the complaint be and the same is hereby granted and that the defendants, their officers, agents and employees are hereby ordered to:

(a) prepare and maintain complete and accurate records relating to the receipt and distribution of controlled substances, in accordance with Title 21, United States Code, section 827(a)(3), and Title 21, Code of Federal Regulations, section 1304.24.

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(b) retain for inspection for a two-year period official order forms showing receipts of controlled substances pursuant to Title 21, United States Code, section 828(c)(2), and Title 21, Code of Federal Regulations, sections 1305.13, and

(c) cease and desist improperly filling prescriptions in violation of Title 21, United States Code, section 842(a)(1), and Title 21, Code of Federal Regulations, sections 1306.05 and 1306.06.

It is further ADJUDGED, ORDERED and DECREED THAT THE DEFENDANTS WITHIN ten (10) days from the date of issuance of this Order execute and file with the Clerk of this Court a good and sufficient penal bond with surety in the sum of _____ thousand dollars (\$ _____,000), such bond being approved by this Court and payable to the United States of America, and conditioned on the defendants' abiding by and performing all the terms and conditions of this Order and such further Orders and Decrees as may be entered in this proceeding.

The United States Attorney on being advised by a duly authorized representative of the Drug Enforcement Administration that the conditions of this injunction have been complied with after the expiration of one (1) year shall transmit such information to the Clerk of this Court. Thereupon, the bond given in this proceeding shall be cancelled and discharged.

It is also ADJUDGED, ORDERED and DECREED that this Court expressly retains jurisdiction to issue such further decrees and orders as may be necessary to properly dispose of this proceeding. Should the defendants fail to abide by and perform all the terms and conditions herein set forth, or of such further order or decree as may be entered in this proceeding, or of said bond, then said bond shall on motion of the United States of America be forfeited and judgment entered thereon.

Finally, it is ADJUDGED, ORDERED and DECREED that the defendants pay a civil penalty to the United States of America in the amount of _____ thousand dollars (\$ _____).

Dated at _____ this _____ day
of _____, 19 _____

United States District Judge

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We hereby consent to entry of the foregoing judgment.

United States Attorney

By: _____
Assistant United States Attorney

Attorney for Defendants

(Title 21, United States Code, section 843)

1984 USAM (superseded)

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9-103.000 DRUG RELATED LEGISLATION OF 1984

9-103.100 CONTROLLED SUBSTANCE REGISTRANT PROTECTION ACT OF 1984

9-103.110 Overview

The Controlled Substance Registrant Protection Act of 1984, Pub. L. No. 98-305, 98 Stat. 221 (1984), which is codified at 18 U.S.C. §2118, provides criminal penalties for certain theft offenses (e.g., robbery, attempted robbery, burglary, attempted burglary, and conspiracy to commit robbery or burglary) directed against persons or establishments registered with the Drug Enforcement Administration under Section 302 of the Controlled Substance Act (21 U.S.C. §822). The Act was signed on May 31, 1984, and applies to all acts and violations occurring after the date of enactment.

The Act is intended to combat the large number of burglaries and robberies directed against DEA registrants (estimated to be in excess of 5,000 per year) by authorizing federal participation in the investigation and prosecution of such offenses. At the same time, however, the legislative history indicates that Congress recognized that these crimes are primarily state and local concerns. Federal jurisdiction has been limited, therefore, to only the most serious cases, and such federal involvement is intended to supplement, and not to supplant, state and local efforts.

Investigative and prosecutive guidelines (see USAM 9-103.130, *infra.*) have been issued which also serve to limit the involvement of federal authorities in these matters. For example, although the statute requires a \$500 cost (replacement value) for the stolen controlled substances as one of the jurisdictional conditions precedent in 18 U.S.C. §2118(a), the guidelines include a \$5,000 amount as a precedent to the initiation of federal involvement where there is neither an interstate nexus nor death or significant bodily injury to another person. It is also made clear in these guidelines that it is the responsibility of local law enforcement authorities to respond to the scene of an offense covered under the Act, and that only after notification from the responding local law enforcement agency will the FBI become involved in the matter.

9-103.120 Analysis and Discussion

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9-103.121 Taking or Attempted Taking of a Controlled Substance

Subsection (a) of the Act prohibits the taking, or attempted taking, by force, violence, or intimidation of any material or compound that contains a controlled substance belonging to or which is in the care, custody, control, or possession of a DEA registrant. Federal jurisdiction attaches whenever:

A. The replacement cost of the material or compound is not less than \$500;

B. The offender traveled in interstate or foreign commerce or used a facility in interstate or foreign commerce to facilitate the taking or attempted taking; or

C. A person other than the offender was killed or suffered significant bodily injury as a result of the taking or attempted taking.

Persons convicted under this provision can be imprisoned for not more than twenty years, fined not more than \$25,000, or both, unless they qualify for enhanced punishment under the provisions of subsection (c), discussed infra.

9-103.122 Entering, Attempted Entry, or Remaining on the Premises

Subsection (b) of the Act prohibits the unauthorized act of entering, attempting to enter, or remaining in the business premises or property (including conveyances and storage facilities) of a DEA registrant with the intent to steal a material or compound containing a controlled substance. Federal jurisdiction attaches whenever:

A. The replacement cost of the controlled substance is not less than \$500;

B. The offender traveled in interstate or foreign commerce or used a facility in interstate or foreign commerce to facilitate the burglary; or

C. A person other than the offender was killed or suffered significant bodily injury as a result of the entry or attempt.

Persons convicted under this provision may be imprisoned not more than twenty years, fined not more than \$25,000, or both, unless they qualify for enhanced punishment under subsection (c), discussed infra.

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9-103.123 Enhanced Penalties for Use of Deadly Weapon or Where Death Results

Subsection (c)(1) of the Act provides for enhanced penalties whenever in the course of violating subsections (a) or (b) the perpetrator uses a deadly weapon or device to assault any person or to place any person's life in jeopardy. Offenders can be imprisoned for not more than twenty-five years, fined not more than \$35,000, or both.

Similarly, subsection (c)(2) provides for enhanced penalties whenever in the course of violating subsections (a) or (b) the perpetrator kills any person. Offenders can be imprisoned for any term of years or life, fined not more than \$50,000, or both.

9-103.124 Conspiracy

Subsection (d) of the Act proscribes the conspiring between two or more persons to violate subsections (a) or (b) whenever one or more of the conspirators commits any overt act to effect the object of the conspiracy. Offenders can be imprisoned not more than ten years, fined not more than \$25,000, or both. These penalties are considerably greater than the penalties available for violation of the general conspiracy statute (18 U.S.C. §371).

9-103.130 Investigative and Prosecutive Guidelines

The following investigative and prosecutive guidelines for the Controlled Substance Registrant Protection Act of 1984 have been adopted by the Department of Justice.

9-103.131 Investigative Guidelines

In cases where there is dual federal and state jurisdiction, the FBI will investigate or otherwise assist local law enforcement agencies in the following situations:

A. When death or significant bodily injury occurs or there is a significant possibility that death or serious bodily injury could occur;

B. When large quantities of controlled substances are involved, in accordance with local quantity or monetary criteria for federal

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investigation of other controlled substance offenses, but in no event at a level below a value of \$5,000;

C. When a suspect, is a Class 1 or 2 DEA violator or other federal target;

D. When the facility burglarized or robbed is a manufacturing or distribution center (e.g., a warehouse); or

E. When interstate activity is involved.

It will be the responsibility of the local law enforcement agency to respond to the scene of an offense covered under the Act and conduct the preliminary investigation. The local law enforcement agency will then notify the FBI of the existence of any of these situations.

In cases of mutual interest to the FBI and DEA, these agencies will exchange information and ensure that investigative efforts are coordinated.

9-103.132 Prosecutive Guidelines

U.S. Attorneys will be required to obtain approval from the Assistant Attorney General of the Criminal Division prior to instituting grand jury proceedings, seeking an indictment, or filing an information for any offense proscribed under the Controlled Substance Registrant Protection Act of 1984. The following factors will be critical in considering whether to grant approval:

A. The most suitable forum for prosecution due to the available penalties, rules on the admissibility of evidence, and relative availability of resources;

B. The existence of other federal or state charges;

C. Whether interstate activity is involved;

D. Whether a principal defendant is a Class 1 or 2 DEA violator or other federal target;

E. Whether a large-scale drug trafficking operation is involved; and

F. The attitude of the local prosecutor toward a federal prosecutor.

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9-103.140 Criminal Division Approval

In order to ensure uniform application of the new law and to monitor its use as required by Congress, the Criminal Division must review and approve all prosecutive action (e.g., indictments, informations) related to 18 U.S.C. §2118.

Requests for prosecution should include:

- A. A summary of why prosecution in federal court is preferred to state court proceedings;
- B. Whether there are any other outstanding state or federal charges;
- C. The interstate nexus, if any;
- D. The significance of the violator(s) and the operation;
- E. The quantity and dollar value (viz., replacement cost) of the drugs involved;
- F. Any prior state or federal arrest/conviction record of the defendant(s);
- G. Whether injury or death to the registrant is involved;
- H. The relative potential punishment for the offense(s) in state and federal court;
- I. The position of the state or local prosecutor to the proposed federal prosecution of the defendant(s);
- J. The point at which the FBI became involved in the case, and the percentage of the investigation which is federal and the percentage which is state or local; and
- K. Other pertinent factors.

Requests for approval will be processed through the Narcotic and Dangerous Drug Section of the Criminal Division, P.O. Box 521, Ben Franklin Station, Washington, D.C. 20044-0521. When time is of the essence, however, such approval can be obtained as expeditiously as is necessary under the circumstances, which could be days or even hours. Questions concerning the authorization of prosecutions under the Act

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should be directed to the Narcotic and Dangerous Drug Section, FTS 724-7123.

9-103.200 AVIATION DRUG-TRAFFICKING CONTROL ACT OF 1984

9-103.210 Overview

The Aviation Drug-Trafficking Control Act amends the Federal Aviation Act of 1958 and the Independent Safety Board Act of 1974 to:

A. Require that the Federal Aviation Administration revoke the airman certificates of persons who utilize aircraft in the commission of a state or federal felony violation relating to a controlled substance or who utilize such aircraft to facilitate the commission of such offense;

B. Require that the FAA revoke an owner's certificate of registration of an aircraft if such aircraft has been used with the owner's permission to carry out an activity, that is a state or federal felony violation relating to a controlled substance;

C. Create a criminal penalty where a person serves in any capacity as an airman without an airman certificate in connection with the illicit transportation by aircraft of any controlled substance;

D. Prevent the reissuance of a revoked certificate for a period of five years except in unusual circumstances;

E. Expand the provision concerning forgery or alteration of aviation-related certificates to make the proscription applicable to anyone who "sells, uses, attempts to use, or possesses with the intent to use" such fraudulent certificate; and

F. Increase the penalty for forgery or alteration of certificates, or the sale, use, attempted use, or possession with intent to use such certificate, as well as the false or misleading marking of an aircraft, where such violation involves a federal or state felony relating to a controlled substance.

None of these provisions are applicable where the violation relates to the simple possession of a controlled substance.

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The Act, Pub. L. No. 98-499, 98 Stat. 2312, was signed on October 19, 1984, and applies to all acts and violations occurring after the date of enactment.

9-103.220 Analysis and Discussion

The Aviation Drug-Trafficking Control Act strengthens in several ways the ability of the Federal Aviation Administration (FAA) to deal with persons who utilize aircraft in the commission of an offense which is "punishable by death or imprisonment for a term exceeding one year under a state or federal law relating to a controlled substance (other than a law relating to simple possession of a controlled substance)."

9-103.221 Revocation of Airman Certificates

Section 2 of the Act adds a new subsection (c) to 49 U.S.C. App. §1429, "Transportation, distribution, and other activities related to controlled substances," which states that the Administrator of the FAA (hereinafter "the Administrator") "shall issue an order revoking the airman certificates of any person" who (1) is convicted of a federal or state felony related to a controlled substance (other than simple possession) wherein an aircraft was used in the commission of the offense or to facilitate the commission of the offense (e.g., spotter plane, ferry to get participants to the drug transaction) and the person served as an airman or was on board such aircraft, or (2) is determined by the Administrator to have knowingly engaged in such a drug offense as delineated supra. In order to take advantage of this latter clause the Administrator must establish all of the elements of the criminal violation. However, the legislative history makes it clear that the concepts of administrative law, and not those procedures and standards of proof relating to criminal procedure, are to be applied.

The provision further provides for a pre-revocation notice and hearing to the holder of the airman certificate, as well as an appeal to the National Transportation Safety Board (NTSB). Any revocation order shall be stayed upon the filing of an appeal with the NTSB unless the Administration advises that safety in air commerce or air transportation requires the immediate effectiveness of such order, which gives the NTSB 60 days to dispose of the appeal. The Act further provides that the Administrator shall not revoke any certificate, and the NTSB shall not affirm any such revocation, if the holder of the certificate is acquitted of all criminal charges arising from such activity.

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The legislative history indicates that this new revocation authority is in addition to the FAA's general authority to take appropriate action in matters where an airman violates the drug laws or FAA regulations on drugs.

9-103.222 Reissuance of Airman Certificate

Section 3 of the Act amends 49 U.S.C. App. §1422 by making the present subsection (b) into (b)(1) and adding a new subsection designated as (b)(2). New 49 U.S.C. App. §1422(b)(2) provides that the Administrator shall not issue an airman certificate to any person whose airman certificate has been revoked pursuant to 49 U.S.C. App. §1429(c) (see supra) during the five-year period beginning on the date of such revocation, except that a certificate may be issued after one year if, in addition to the findings required in subsection 1422(b)(1), the following two conditions are met: (i) the Administrator determines that the five-year revocation is excessive considering the nature of the offense or the act committed and the burden which revocation places on such person, and (ii) revocation for the five-year period would not be in the public interest. The determinations under clauses (i) and (ii) are not subject to administrative or judicial review.

In addition, if a person whose airman certificate has been revoked is subsequently acquitted of all charges arising from such activity, or where the conviction which served as the basis for the revocation is reversed on appeal, the Administrator shall issue an airman certificate to such person "if such person is otherwise qualified to serve as an airman under this section."

9-103.223 Revocation and Reissuance of Certificate of Registration

Section 4(a) of the Act amends 49 U.S.C. App. §1401 by converting the present subsection (e) into (e)(1) and adding a new subsection (e)(2). New 49 U.S.C. App. §1401(e)(2) provides that the Administrator shall revoke the certificate of registration issued to an owner under 49 U.S.C. App. §1401, as well as each other certificate of registration held by such owner, if the Administrator determines that such aircraft has been used to carry out or facilitate a state or federal felony drug offense (other than simple possession) and that the use of the aircraft was permitted in such manner. To establish the knowledge of a corporate or other non-individual owner, the statute requires that the government show that "a majority of the individuals who control such owner or who are involved in forming the

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major policy of such owner permitted the use of the aircraft with knowledge of such intended use."

The revocation, appeal, and reissuance procedures to be used in matters involving certificates of registration are identical in all relevant ways to those pertaining to airman certificates, which are discussed supra.

Section 5 of the Act adds a new subsection (q) to 49 U.S.C. App. §1472. New subsection 1472(q) provides a maximum punishment of a \$25,000 fine, imprisonment not to exceed five years, or both, for any person who knowingly and willfully serves in a capacity as an airman without an airman certificate authorizing him or her to serve in such capacity in connection with the knowing felonious transportation by aircraft of a controlled substance.

9-103.224 Transporting Controlled Substances Without Airman Certificate

Section 5 of the Act adds a new subsection (q) to 49 U.S.C. App. §1472. New subsection 1472(q) provides a maximum punishment of a \$25,000 fine, imprisonment not to exceed five years, or both, for any person who knowingly and willfully serves in any capacity as an airman without an airman certificate authorizing him or her to serve in such capacity in connection with the knowing felonious transportation by aircraft of a controlled substance.

"Airman," as defined at 49 U.S.C. App. §1301, includes "any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way;...any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator."

9-103.225 Criminal Penalties for Fraudulent Certificate, Etc.

Section 6 of the Act amends 49 U.S.C. App. §1472 by converting the present subsection (b) (involving the forgery or alterations of certificates and false marking of aircraft) into (b)(1) and expanding its coverage to include anyone who "sells, uses, attempts to use, or possesses with the intent to use" a fraudulent certificate. The Act also creates new subsection 1472(b)(2), which increases the maximum penalty available for a 1472(b)(1) violation (viz., a \$1,000 fine, imprisonment not to exceed three years, or both) to a \$25,000 fine, five years imprisonment,

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or both, in cases involving (b)(1) violations where the offense involves a federal or state felony violation relating to a controlled substance (other than that of simple possession). In the case of a person who sells a fraudulent certificate in violation of (b)(1), application of the enhancement provision in (b)(2) requires a showing that such person knew that the purchaser intended to use the certificate in connection with the commission of a federal or state drug felony violation.

9-103.230 Policy Considerations

To effectuate the intent of Congress, all aircraft-related drug convictions of persons who hold certificates described supra should be brought to the attention of the Federal Aviation Administration for further administration action. In addition, even if criminal charges are not contemplated or where, as stated in the legislative history, "an airman is not convicted because of technicalities which apply to criminal proceedings but not to administrative proceedings," prosecutors should also refer the matter to the FAA. Such matters should be referred to either: Manager or Special Agent, Investigations and Security Division, ACS 300, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591. Both people can also be reached at FTS 426-8768.

Questions concerning the provisions of the Aviator Drug-Trafficking Control Act should be directed to Narcotic and Dangerous Drug Section, FTS 724-7123.

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9-104.000 NARCOTIC ADDICT REHABILITATION ACT OF 1966

9-104.001 Generally

The Narcotic Addict Rehabilitation Act (P.L. 89-793) recognizes the fact that narcotic addicts, including those who violate federal criminal laws, are medical problems and should receive treatment rather than mere punishment. The Narcotic Addict Rehabilitation Act established several different but related types of commitment procedures, all of which contain both institutional and aftercare provisions. Although this Act remains in effect, it is not utilized to the extent to which it was in the years immediately following its enactment in light of other programs which are available to defendants who are sentenced under regular sentencing provisions.

9-104.010 Title I

Under Title I of the Narcotic Rehabilitation Act (28 U.S.C. §§2901-2906), certain narcotic addicts charged with a federal offense may be eligible for civil commitment in lieu of criminal prosecution. If the court finds such addicts proper subjects for rehabilitation, they are committed to the custody of the Surgeon General for a period not to exceed 36 months. The pending criminal charge is held in abeyance during treatment and is dismissed if the addict successfully completes the program. However, prosecution is resumed if the patient is unsuccessful in the rehabilitation program.

9-104.020 Title II

Under Title II of the Act (18 U.S.C. §§4251-4255), certain addicts who have been convicted of violating a federal criminal statute may be sentenced to treatment for their addiction. The U.S. Attorney should advise the court if he/she has reason to believe that a convicted defendant is a narcotic addict. A convicted addict sentenced under Title II is committed to the custody of the Attorney General for an indeterminate period, not to exceed 10 years. However, the duration of this period may not exceed the maximum sentence that could otherwise have been imposed. See Baughman v. United States, 450 F.2d 1217 (8th Cir. 1971), cert. denied, 406 U.S. 923 (1972).

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9-104.030 Note on Title I and II

Titles I and II are not often utilized. However, this is probably not of great consequence since the federal prison system now has adequate facilities to treat addicts who are convicted of violating federal criminal laws and who are sentenced to prison. Thus, such addicts can be afforded proper treatment within the federal system even though they have not resorted to the procedures set forth in Titles I and II of the Narcotic Addict Rehabilitation Act. The fact that a convicted person is a narcotic addict will ordinarily appear in the pre-sentence report. Arrangements can thereafter be made by prison authorities to make treatment facilities available to the addict within the prison system.

9-104.040 Title III

Title III of the Narcotic Addict Rehabilitation Act (42 U.S.C. §§3411-3426) deals with the voluntary and involuntary civil commitment of addicts who are not charged with or convicted of any state or federal criminal offense. Title III provides for a diagnostic examination which is followed by a judicial hearing. If the court finds that the patient is a narcotic addict who is likely to be rehabilitated through treatment, it must commit him to the institutional custody of the Surgeon General.

Note on Title III

A narcotic addict may qualify for treatment under Title III only if "appropriate State or other facilities are not available to such person" (42 U.S.C. §3412(b)). The Surgeon General has certified that there are adequate state or local narcotic addiction treatment facilities in every state except Louisiana, Virginia, and Kansas City, Missouri. In any jurisdiction where adequate state or local treatment facilities exist, those who request Title III commitment should be referred to the appropriate local or state authorities for treatment. Where state and local treatment facilities are inadequate (i.e., Louisiana, Virginia and Kansas City, Missouri), Title III may be used. Addicts who qualify for Title III treatment in this latter situation are committed to privately operated regional treatment facilities with which the federal government has contracts for treatment of Title III patients.

9-104.050 Confidentiality of Patient Records

Records of patients undergoing treatment for drug or alcohol abuse are confidential. See 21 U.S.C. §1175 and 42 U.S.C. §4582. The

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confidentiality requirements extend to all alcohol and drug abuse programs conducted, regulated, or directly or indirectly assisted by the federal government. See 21 U.S.C. §1175(a), 42 U.S.C. §4582(a) and 42 C.F.R. §2.12(a).

The regulations relating to the confidentiality of patient records are found at 42 C.F.R. §2.1, et seq. The regulations were drafted and promulgated in 1975 by the Special Action Office for Drug Abuse Prevention and the Department of Health, Education, and Welfare. Attorneys in the Public Health Division of the Office of General Counsel, Department of Health and Human Services, presently monitor the regulations and ordinarily initially review alleged violations of them.

The confidentiality statutes and regulations specify the manner in which requests should be made by law enforcement officials for patient records and other patient information for investigative or prosecutive purposes. Patient records and similar information cannot be released to law enforcement officers until a court order has been obtained by the officers authorizing such release. See 21 U.S.C. §1175(b)(2)(C), 42 U.S.C. §4582(b)(2)(C) and 42 C.F.R. §2.61, et seq. If law enforcement officials do not obtain the necessary court order, program personnel are prohibited from disclosing patient information. See 21 U.S.C. §1175(c), 42 U.S.C. §4582(c) and 42 C.F.R. §2.13(a). When patient records are seized by law enforcement officials without a court order, a determination must be made as to whether prosecution is appropriate. Prosecution would be under the provisions of 21 U.S.C. §1175(f) or 42 U.S.C. §4582(f).

Regarding the strict manner in which the confidentiality requirements are construed, see United States v. Graham, 548 F.2d 1302, 1314 (8th Cir. 1977).

The responsibility of U.S. Attorneys in patient confidentiality matters is as follows. Most alcohol and drug abuse programs are conducted by state or local treatment personnel, with appropriate federal financial assistance. Personnel of such programs seem to be merely private individuals who manage programs which are funded by the federal government. The fact that such programs are federally funded would not seem to make them federal, or even quasi-federal, programs. See generally, Pope v. Commissioner of Internal Revenue, 138 F.2d 1006, 1009 (6th Cir. 1943); National Labor Relations Board v. Jones & Laughlin Steel Corp. 331 U.S. 416, 429 (1947); 67 C.J.S. Officers §3. The Attorney General may not provide legal representation solely to vindicate private rights or to redress private grievances in which the public has no vital interest. Allen v. County School Board of Prince Edward County, 28 F.R.D. 358 (E.D. Va. 1961). The Attorney General may authorize a U.S. Attorney

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to represent a non-government party in a civil case where the interests of the United States are meaningfully involved. See Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976); 28 U.S.C. §517. See also In re Debs, 158 U.S. 564, 586 (1895). However, it is doubtful that cases involving attempts by law enforcement officers to obtain drug patient records could be said to involve federal interests to such an extent as to warrant legal representation of alcohol or drug abuse program personnel by U.S. Attorneys or members of their legal staff. In short, U.S. Attorneys appear to have no obligation to act as legal representatives for program personnel when requests are made of such personnel by law enforcement officers for patient records or other patient information. It would seem that representation in such cases would have to be furnished by the attorney who represents the institution of which the drug program is a part. The Public Health Division of the Office of General Counsel, Department of Health and Human Services, is in accord on this point. See, e.g., the attached copy of a letter dated May 5, 1980, sent to Directors of Alcohol and Drug Abuse Treatment Programs by the Directors of the National Institute on Alcohol Abuse and Alcoholism and the National Institute on Drug Abuse. The letter indicates how alcohol and drug abuse program personnel should handle requests from law enforcement officials for patient information.

he/she → Although U.S. Attorneys have no obligation to represent program personnel in confidentiality matters, nevertheless, when any such matter comes to the attention of a U.S. Attorney at an early stage, he should endeavor, acting as an amicus curiae, to advise the appropriate court in an informal manner of the requirements of the confidentiality statutes and regulations.

U.S. Attorneys are responsible for prosecuting cases involving unauthorized or improper disclosure of patient records. The sanctions for such violations are the fines set forth in 21 U.S.C. §1175(f) and 42 U.S.C. §4582(f). The prosecutive obligation is based on the Department's responsibility to enforce all federal criminal statutes, 28 U.S.C. §516, United States v. Tonry, 433 F. Supp. 620 (E.D. La. 1977). When a report of an alleged confidentiality violation is received by a U.S. Attorney, the matter should be carefully reviewed to determine whether the facts and the nature of the violation warrant prosecutive action. Should any difficulties arise in this regard, the U.S. Attorney should consult the Narcotic and Dangerous Drug Section of the Criminal Division.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
ALCOHOL, DRUG ABUSE, AND MENTAL HEALTH ADMINISTRATION
8800 FISHERS LANE
ROCKVILLE, MARYLAND 20857

May 5, 1980

Directors
Alcohol and Drug Abuse Treatment Programs

Dear Program Directors:

In response to the recent seizure of patient records from a drug treatment program in San Francisco, questions have arisen about how alcohol and drug abuse program personnel should handle requests from law enforcement officials for information about patients. This letter is intended to answer these questions and assist program personnel by setting forth guidelines for complying with the Federal confidentiality regulations (42 CFR Part 2) and the authorizing legislation (21 U.S.C. 1175, 42 U.S.C. 4582) when responding to law enforcement requests for copies of patient records or other patient identifying information.

Because the primary responsibility for compliance with the confidentiality statutes and regulations lies with the program and its staff, we recommend that these guidelines be thoroughly discussed with the program's legal counsel and that the program promptly undertake steps to ensure that its staff is familiar with and able to implement the recommended procedures.

I. General

These guidelines apply to the personnel of all alcohol or drug abuse programs conducted, regulated, or directly or indirectly assisted by the Federal Government (See 42 CFR 2.12(a); 21 U.S.C. 1175(a); 42 U.S.C. 4582(a)). They provide information on how to handle law enforcement requests for alcohol or drug abuse patient records or other patient identifying information for the purpose of investigating or prosecuting any patient. They do not apply to other types of law enforcement requests for patient information, such as requests for information about a patient's treatment during probation, parole, or other pre or post-trial conditional release, which have been consented to by the patient in accordance with 42 CFR 2.39.

Any disclosure of patient records or other patient identifying information in response to law enforcement requests that are related to the investigation

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or prosecution of any patient must be authorized by a court order issued in accord with the requirements of 42 CFR Part 2, Subpart E. If a program employee is merely served with compulsory process from a Federal, State, or local court the individual is prohibited from disclosing the requested patient information under the confidentiality statutes and regulations (See 42 CFR 2.13(a), 2.61; 21 U.S.C. 1175(c); 42 U.S.C. 4582(c)).

2. Compulsory Process With a Court Order

In those cases in which a program employee is served with both compulsory process and an authorizing court order issued under 42 CFR Part 2, Subpart E, the individual may comply with the compulsory process without violating the Federal confidentiality statutes and regulations (See 42 CFR 2.61). If the compulsory process requires a court appearance (such as a subpoena) or if the program employee has any questions regarding compliance with the request for information, he or she should immediately contact the program's legal counsel.

3. Compulsory Process Without a Court Order

If a program employee is served with compulsory process without a 42 CFR Part 2, Subpart E, authorizing court order, he or she must make a noncommittal response (See generally 42 CFR 2.13). The program employee should inform the law enforcement officials making the request that Federal law prohibits disclosure of the identity, the absence, presence, or whereabouts of any patient, or even the patient status of any person (See 42 CFR 2.13(b) and (c)). The officials should be referred to the confidentiality regulations, 42 CFR Part 2, and the authorizing statutes, 21 U.S.C. 1175 and 42 U.S.C. 4582, including specifically, the provisions under which a court order authorizing the disclosure may be sought (See 42 CFR 2.61-2.67). If the person about whom information is requested never has been a patient, the program may acknowledge this fact to the law enforcement officials.

If the law enforcement officials persist in trying to obtain patient information, they should be requested, but not forced, to leave the program premises and the program should immediately consult with its legal counsel. As indicated in item 6, programs should inform local law enforcement officials of the confidentiality restrictions before the officials attempt to obtain patient records. This will avoid crisis, confrontation situations which are likely to arise if the confidentiality restrictions are first communicated to law enforcement officials in the context of a particular investigation and are perceived as limiting their good faith efforts to perform their public responsibilities.

4. Seizure of Records or Arrest of Program Personnel

If law enforcement officials seize patient records in apparent violation of the Federal confidentiality statutes and regulations or arrest program

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personnel because they have refused to disclose patient information which is subject to the Federal confidentiality statutes and regulations, the program's legal counsel should be contacted immediately. In the case of seized records, the program's counsel should consider immediately seeking a court injunction to recover the records and to block the use of any information that the law enforcement officials have obtained from the records.

If a program staff member is arrested or must show cause why he or she should not be held in contempt of court, the program's counsel should immediately inform the court of the prohibition of Federal law which led to the staff member's refusal to provide the information sought and the preeminence of the Federal law over any conflicting State or local law, including the court's compulsory process (See 42 CFR 2.13(b), 2.61; 2.23) and take other appropriate legal action.

At the earliest practicable time following the seizure by law enforcement officials of patient records in violation of the Federal confidentiality statutes and regulations a full report of the incident, including the factual background and the response of program personnel, should be sent to:

Mr. Fleetwood Roberts, Special Projects Branch, NIAAA,
Room 11A-02, Parklawn Building, 5600 Fishers Lane, Rockville,
Maryland 20857, if an alcohol abuse program is involved; or

Ms. Sheila Gardner, Confidentiality Compliance Specialist,
Division of Community Assistance, NIDA, Parklawn Building,
Room 9-03, 5600 Fishers Lane, Rockville, Maryland 20857, if
a drug abuse program is involved.

This report should describe what immediate steps have been taken to recover any seized records or to take other remedial action and what actions are planned to prevent reoccurrences of the incident. The information provided will be used to determine whether (1) program personnel took all necessary steps to comply with the confidentiality statutes and regulations, (2) an investigation of the incident should be conducted and whether the matter should be referred to the Department of Justice for possible prosecution under the confidentiality statutes and regulations, and (3) the procedures established for handling these incidents should be modified or supplemented to assist other program personnel across the country in avoiding, or better dealing with, similar occurrences.

The alleged violation may also be reported to the local office of the United States Attorney (See 42 CFR 2.7).

5. Use of Legal Counsel: Obtaining Advice and Pursuing Remedies

We emphasize that program staff must rely upon the program's legal counsel and that counsel must become familiar with the requirements of the confidentiality statutes and regulations. Representation of program personnel in court or other legal proceedings must be undertaken by counsel to the program and cannot be performed by HEW, the Department of Justice, or any other agency of the Federal Government. However, oral advice can be obtained on the requirements of 42 CFR Part 2 directly from the HEW Office of General Counsel in those cases in which the program's legal counsel is unavailable and time is of the essence. In these situations, the program may make direct inquiries to Mr. Chris Pascal (301-443-3096) or Mr. Robert Lanman (301-443-1212) of the HEW General Counsel's Office. Written requests for interpretation of the confidentiality regulations should be directed to Mr. Lanman or Mr. Pascal at the following address: Public Health Division, HEW Office of the General Counsel, Room 4A-53, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. We suggest that these requests be prepared in consultation with the program's legal counsel. Copies of prior legal opinions interpreting the confidentiality regulations may be obtained from Mr. Roberts or Ms. Gardner at the addresses listed above.

Programs which receive funds from the National Institute on Alcohol Abuse and Alcoholism or the National Institute on Drug Abuse may, under the HEW grants administration regulations, 45 CFR Part 74, use the grant funds to pay the cost of reasonable attorneys' fees incurred for legal advice and assistance in complying with the confidentiality regulations. (See 45 CFR Part 74, Subpart Q, Appendix C, section II.B.16, and Appendix F, sections B2 and G31.) Included in the authorized use of these funds would be the pursuit of legal remedies to recover patient records or to prohibit the use of information gained from patient records in the investigation or prosecution of any patient. It is up to the individual program to determine how much, if any, grant funds it wishes to use for legal services in complying with the confidentiality regulations. However, a determination by the program not to use grant funds in this manner will not be considered an acceptable basis for failure to comply with the confidentiality regulations.

6. Preventing the Occurrence of Incidents With Local Law Enforcement Agencies Which Lead to Prohibited Disclosures and Uses of Patient Records

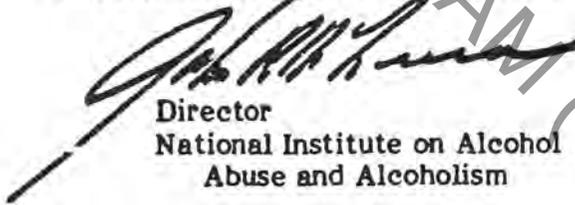
We encourage treatment programs and their legal counsel to explore methods for preventing disputes with law enforcement agencies over patient

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confidentiality. Sometimes these disputes arise solely from a lack of prior information about the Federal confidentiality requirements and from a misunderstanding of these requirements. One way to prevent this problem is for programs and their counsel to meet with local law enforcement agencies and discuss the Federal confidentiality requirements before an incident occurs. The exchange of information and the potential for education will be enhanced in an environment free from hostility and crisis.

Requests for technical assistance in developing a good working relationship with law enforcement agencies should be directed to Mr. Roberts or Ms. Gardner at the addresses above.


Director
National Institute on Alcohol
Abuse and Alcoholism


Director
National Institute on Drug
Abuse

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9-110.000 ORGANIZED CRIME AND RACKETEERING

9-110.100 RACKETEER INFLUENCED AND CORRUPT ORGANIZATION (RICO)

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. §§1961-1968), commonly referred to as the "RICO" statute. The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. NO. 91-617, 91st Cong., 1st Sess. 76 (1969). However, the statute is sufficiently broad to encompass any illegitimate enterprise affecting interstate or foreign commerce.

9-110.101 Division Approval

No RICO criminal or civil prosecutions or civil investigative demand shall be issued without the prior approval of the Organized Crime and Racketeering Section, Criminal Division. See RICO Guidelines at USAM 9-110.200, infra.

9-110.102 Investigative Jurisdiction

18 U.S.C. §1961(10) provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. §1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in 18 U.S.C. §1961.

9-110.110 Prohibited Activities

The RICO statute creates three new substantive offenses, and one conspiracy offense contained in 18 U.S.C. §1962, subsections (a), (b), (c), and (d).

18 U.S.C. §1962(a), which outlaws the acquisition of an enterprise with income derived from illegal activity, provides in pertinent part:

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It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis supplied)

The gravamen of the offense is the illegal derivation of the funds. The acquisition can in all respects be legitimate. Congress simply makes it illegal to invest ill-gotten gains. (See United States v. Cauble, 706 F.2d, Crim. No. 82-2087 (5th Cir. May 31, 1983); United States v. Zang, 703 F.2d 1186 (10th Cir. 1982); United States v. McNary, 620 F.2d 621 (7th Cir. 1980)).

18 U.S.C. §1962(b), which outlaws the acquisition or maintenance of an interest or control in an enterprise through illegal activity, provides:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis supplied)

The gravamen of the offense is the illegal acquisition or maintenance of an interest or control. Examples are the acquisition of control through extortion or a scheme to defraud, see United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975), and the maintenance of an interest through bribery. United States v. Jacobson, 691 F.2d 110 (2d Cir. 1982); United States v. Gambino, 566 F.2d 414 (2d Cir. 1977), cert. denied 435 U.S. 952 (1978).

18 U.S.C §1962(c), which outlaws the use of an enterprise to commit illegal acts, provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's

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affairs through a pattern of racketeering activity or collection of an unlawful debt. (Emphasis supplied)

This section is designed to reach those persons who by employment or association in an enterprise use that enterprise to engage in unlawful activities. The enterprise may be legitimate, but need not be. See USAM 9-110.100. For example, a group of individuals could organize an enterprise without legal form or title, but with the appearance of legitimacy, to perpetrate a scheme to defraud certain banking institutions and the U.S. Small Business Administration, as alleged in United States v. Rafsky, Cr. No. 75-0247R (E.D. Va.). See United States v. Martino, 648 F.2d 367 (3d Cir), 648 F.2d 407 (1981), vacated in part 650 F.2d 952 (1982).

18 U.S.C. §1962(d) provides:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

See United States v. Sutherland, 656 F.2d 1181, reh'g denied 663 F.2d 101 (5th Cir. 1981).

9-110.120 Common Elements

Violations of 18 U.S.C. §1962(a), (b) or (c) require proof of either a pattern of racketeering activity or the collection of an unlawful debt. In a pervasive scheme of criminal activity it is not uncommon to find both elements. Where both are present, each can be charged in a separate count.

In addition, violations of 18 U.S.C. §1962(a), (b) or (c) require that the enterprise involved be engaged in or affect interstate or foreign commerce. This element, the basis for federal jurisdiction, must be proved in all RICO statute cases. It is not, however, an element of proof that the particular acts with which a defendant is charged have, in and of themselves, any effect on interstate or foreign commerce. See United States v. Groff, 643 F.2d 396 (6th Cir. 1981); United States v. Rone, 598 F.2d 564, cert. denied 445 U.S. 946 (10th Cir. 1979); United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied sub nom. Walgren v. United States, 102 S. Ct. 2040 (1982); United States v. Allen, 565 F.2d 964 (4th Cir. 1981).

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9-110.121 Pattern of Racketeering Activity

To establish a "pattern of racketeering activity," as defined in 18 U.S.C. §1961(5), requires proof of at least two acts of "racketeering activity." Each racketeering activity must itself be an act subject to criminal sanction, that is, violative of an independent statute. United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). 18 U.S.C. §1961(1) enumerates, either generically (state) or specifically (federal), acts which qualify as racketeering activity:

A. Violations of State Law--any act or threat involving:

1. Murder
2. Kidnapping
3. Gambling
4. Arson
5. Robbery
6. Bribery
7. Extortion
8. Dealing in Obscene Matter
9. Dealing in Narcotic or Other Dangerous Drugs

B. Violations of 18 U.S.C.:

1. Section 201 (Bribery)
2. Section 224 (Sports Bribery)
3. Sections 471, 472, 473 (Counterfeiting)
4. Section 659 (Theft from Interstate Shipment)
(Felony)
5. Section 664 (Embezzlement from Pension and Welfare Fund)
6. Sections 891, 892, 894 (Extortionate Credit
Transactions)
7. Section 1084 (Transmission of Gambling Information)
8. Section 1341 (Mail Fraud)
9. Section 1343 (Wire Fraud)
10. Sections 1461-1465 (Obscene Matter)
11. Section 1503 (Obstruction of Justice)
12. Section 1510 (Obstruction of Criminal Investigation)
13. Section 1511 (Obstruction of State or Local Law
Enforcement)
14. Section 1951 (Interference with Commerce, Bribery,
or Extortion)
15. Section 1952 (Interstate Transportation In Aid of
Racketeering)
16. Section 1953 (Interstate Transportation of Wagering
Paraphernalia)
17. Section 1954 (Unlawful Welfare Fund Payments)

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18. Section 1955 (Prohibition of Illegal Gambling Business)
19. Sections 2312 and 2313 (Interstate Transportation of Stolen Motor Vehicles)
20. Section 2314 (Interstate Transportation of Stolen Property)
21. Section 2315 (Sale of Stolen Goods)
22. Section 2320 (Trafficking in Certain Motor Vehicles or Motor Vehicle Parts)
23. Sections 2341-2346 (Trafficking in Contraband Cigarettes)
24. Sections 2421, 2422, 2423, 2424 (White Slave Traffic)

C. Violations of 29 U.S.C.:

1. Section 186 (Restrictions of Payments and Loans to Labor Organizations)
2. Section 501(c) (Embezzlement from Union Funds)

D. Bankruptcy Fraud

E. Fraud in the Sale of Securities

F. Felonious Activity Involving Narcotic or Dangerous Drugs, such as:

1. Manufacture
2. Importation
3. Receiving
4. Concealment
5. Buying
6. Selling
7. Dealing

G. Violations of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §5311 et seq.

Any combination of the above-listed crimes can form a pattern of racketeering activity, even if both acts constitute state crimes only. See, however, RICO guidelines on judicial prosecution of cases involving only state predicate crimes. The basis for federal jurisdiction, as mentioned above, is the effect of the enterprise on interstate or foreign commerce. However, nexus or relationship between the acts of racketeering charged must be proved to establish the pattern.

The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because

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the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

S. REP. No. 91-617, 91st Cong. 1st Sess. 158. See United States v. Martino, 648 F.2d 367 (11th Cir. 1981); United States v. Aleman, 609 F.2d 298 cert. denied 445 U.S. 946 (7th Cir. 1979); United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

Moreover, one of the acts must have occurred after the effective date of the RICO statute (Oct. 15, 1970) and the more recent act must have occurred "within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering." 18 U.S.C. §1961(5); United States v. Walsh, 700 F.2d 846 (2d Cir. 1983); United States v. Welsh, 656 F.2d 1059 (5th Cir. 1981), cert. denied sub nom Castell v. United States, 102 S.Ct. 1767 (1982). The Criminal Division requires that each defendant must have committed one act of racketeering within the five-year statute of limitation in order to be charged with violating 18 U.S.C. §1962(c). See United States v. Walsh, supra.

Finally, the "social status" of the defendant is immaterial. It is not an element of the offense that the defendant is associated with organized crime. He/she need only have committed acts prohibited by the RICO statute. United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975).

9-110.122 Collection of an Unlawful Debt

The alternative element in a 18 U.S.C. §1962 violation is the collection of an unlawful debt. Unlike the pattern of racketeering element, only one collection is necessary to make out a violation. There are two methods of proving the collection of an unlawful debt. The circumstances are narrow but are peculiarly designed to combat common methods of organized criminal activity.

A. The first method requires:

1. A gambling activity or business illegal under federal, state or local law; and
2. A debt incurred or contracted in that gambling activity or business; and
3. Collection of that debt.

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B. The second method requires:

1. A debt incurred in connection with the business of lending money which is unenforceable in whole or in part because of federal or state usury laws (to be usurious the rate of interest must be double the legally enforceable rate of interest under state or federal law); and

2. Collection of that debt.

The first method permits a new avenue of attack on the illegal gambling business in that the new forfeiture provisions of 18 U.S.C. §1963, discussed in USAM 9-110.130, permit the forfeiture of the legitimate front used to cover the illegal activity. The second method is designed to attack the loanshark where there is an absence of proof of violence in the collection of the debt.

9-110.130 Criminal Penalties

18 U.S.C. §1963(a) provides for the imposition of a maximum term of imprisonment of twenty years and a fine of \$25,000 for each violation of 18 U.S.C. §1962. In addition, 18 U.S.C. §1963(a) provides for a forfeiture proceeding in personam against the defendant in that, upon conviction, the violator:

shall forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of Section 1962.

Any forfeiture is subject, of course, to the rights of innocent persons. Once the property interests of the accused are forfeited, 18 U.S.C. §1963(c) grants the courts the power to authorize the Attorney General to seize the forfeited property or interest and dispose of the same in accordance with the provisions of the subsection.

At the time of an indictment charging a violation of 18 U.S.C. §1962, the United States may move pursuant to 18 U.S.C. §1963(b) for a restraining order or prohibition or other device, including a request for a performance bond, to protect any property interest subject to forfeiture

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under 18 U.S.C. §1963(a). Where forfeiture of the enterprise and other property interests used in the commission of a 18 U.S.C. §1962 violation will be sought, the United States can and should move to protect that property interest from liquidation and disposal during the pendency of the criminal proceeding via this provision.

he/she →
his/her →

The Federal Rules of Criminal Procedure require the inclusion of an allegation in the indictment specifying the property interests to be forfeited. The purpose of this allegation is to apprise the accused, in accordance with the standards of due process, that he stands to lose his property interests which are utilized in violation of 18 U.S.C. §1962. See United States v. Bello, 470 F. Supp. 723 (S.D. Calif. 1979).

9-110.140 Civil Remedies

9-100.141 Of the United States

The civil remedies contained in the RICO statute are designed "to free the channels of commerce from predatory activities" and not to punish the violator, which remains within the province of the criminal provisions discussed in USAM 9-110.130. S. REP. NO. 91-617, 91st Cong., 1st Sess. 81 (1969); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); United States v. Local 560, International Brotherhood of Teamsters, 560 F. Supp. 511 (D. N.J. 1982).

A. 18 U.S.C. §1964(a) grants district courts the power to hear civil actions by the United States to:

1. Divest a person of any interest in an enterprise;
2. Restrain future activities or investments of any person;
3. Dissolve or reorganize any enterprise, subject to the rights of innocent persons.

B. 18 U.S.C. §1964(b) authorizes the Attorney General, as defined in 18 U.S.C. §1961(10), to institute civil proceedings and directs the courts to expedite such matters. 18 U.S.C. §1964(b) also provides for interlocutory restraining orders and prohibitions and the acceptance of performance bonds pending the final disposition of the civil proceeding.

C. A preceding criminal action is not a prerequisite to the institution of a civil action. However, careful consideration should be

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given to filing a civil action initially where informants who could be identified by discovery under the Federal Rules of Civil Procedure are concerned. In fact, since the discovery tools provided in a civil action could jeopardize a criminal case prior to trial, the initial finding of a civil case where a criminal proceeding is anticipated, or the simultaneous seeking of an indictment and filing of a Section 1964 civil action is not recommended. Furthermore, in the event that a civil action is filed subsequent to a conviction in a criminal proceeding, Section 1964(d) provides for the assertion of the doctrine of collateral estoppel by the United States in a civil proceeding.

9-110.200 RICO GUIDELINES PREFACE

The decision to institute a federal criminal prosecution involves a balancing process, in which the interests of society for effective law enforcement are weighed against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned.

Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate its remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute. Stated another way, a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be added to an indictment unless it serves some special RICO purpose as enumerated herein.

Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose, rather than to attack the activity which Congress most directly addressed--the infiltration of organized crime into the nation's economy.

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These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

9-100.210 Authorization of Prosecution: The Review Process

Effective September 15, 1980, the review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section. To commence the review process, a final draft of the proposed indictment and a prosecutive memorandum shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. The guidelines provide detailed guidance for the use of RICO charges in criminal investigations and prosecutions, as well as in all civil applications of RICO. Attorneys are, however, encouraged to seek guidance from the Organized Crime and Racketeering Section, telephonically or by letter, prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review. Communication with the Organized Crime and Racketeering Section well in advance of indictment may result in the resolution of problems with a proposed RICO indictment and effect an expeditious review.

The submitting attorney must anticipate that the RICO review process, which is handled on a first-in-first-out basis, is a time consuming process, in which the reviewer has no control over the number of cases submitted for review during a given time frame. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. Unless there is a backlog, 15-working days is usually sufficient. The review process will not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the clerk of the court shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be

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advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecutive memorandum at a later date.

9-110.211 Duties of the Submitting Attorney

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the grand jury, the Section shall be notified in writing of any significant rulings which have an impact upon the RICO statute. For example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the U.S. Attorney as well as the defense should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The government's briefs and motions will provide assistance to other U.S. Attorneys' offices handling similar RICO matters.

Once a verdict has been obtained, the U.S. Attorney should forward the following information to the Organized Crime and Racketeering Section for retention: (a) the verdict on each count of the indictment, (b) a copy of the judgment of forfeiture, (c) estimated value of the forfeiture, (d) judgment and sentence(s) received by each RICO defendant.

9-110.300 RICO SPECIFIC GUIDELINES

9-110.310 Considerations Prior to Seeking Indictment

Except as hereafter provided, the attorney for the government should seek authorization for an indictment charging a RICO violation only if in his judgment those charges:

A. Are necessary to ensure that the indictment:

1. Adequately reflects the nature and extent of the criminal conduct involved; and

2. Provides the basis for an appropriate sentence under all the circumstances of the case; or

B. Are necessary for a successful prosecution of the government's case against the defendant or a co-defendant; or

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C. Provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct.

9-110.311 Commentary

All-encompassing examples are difficult, if not impossible, to formulate when discussing RICO; however, by way of illustration only:

A. When a diversified course of criminal conduct involving division of labor and functional responsibilities exists, for which other conspiracy statutes are inadequate, charging a RICO conspiracy may be appropriate;

B. When the course of criminal conduct has aspects which aggravate the seriousness of the crime (including prior criminal activity by a RICO defendant) which realistically can be foreseen as grounds for the sentencing judge imposing a heavier sentence under RICO than for the underlying acts, a RICO count may be appropriate;

C. When, subject to all of the guidelines, an essential portion of the evidence of the criminal conduct in a pattern of racketeering activity can be shown to be admissible only under RICO, and not under other evidentiary theories (such as: prior similar acts, continuing crime or conspiracy), a RICO count may be appropriate;

D. When a substantial prosecutive interest will be served by forfeiting an individual's interest in or source of influence over the enterprise which he has acquired, maintained, operated or conducted in violation of 18 U.S.C. §1962, RICO may be appropriate.

9-110.320 Approval of Organized Crime and Racketeering Section Necessary

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division.

9-110.321 Commentary

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal

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Division having supervisory responsibility for this statute. A RICO prosecutive memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section, Criminal Division, Box 571, Ben Franklin Station, Washington, D.C. 20044, at least 15-working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire, as authorizations based on oral presentations will not be given.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the sole criteria by which the Department of Justice will determine whether to approve the indictment, felony information, civil complaint, or civil investigative demand. As in the past, the fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. §1962 is not required.

In addition to the above considerations, the use of RICO in a prosecution is also governed by the Principles of Federal Prosecution (July 1980). Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the Principles of Federal Prosecution.

9-110.330 Charging RICO Counts

A RICO count of an indictment will not be charged where the predicate acts consist solely and only of state offenses except in the following circumstances:

A. Cases where local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the federal government has significant interest;

B. Cases in which significant organized crime involvement exists; or

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C. Cases in which the prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.331 Commentary

The purpose of this guideline is to underscore the principle that prosecution of state crimes, except in the circumstances set forth above, is primarily the responsibility of the state authorities. These guidelines will be construed in light of a practical understanding of the realities of state law enforcement rather than a theoretical view of the reach of state law.

9-110.340 Charging a Violation of 18 U.S.C. §1962(c)

No indictment shall be brought charging a violation of 18 U.S.C. §1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction.

9-110.341 Commentary

The purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute.

9-110.350 Relation to Purpose of the Enterprise

In order to constitute a violation of 18 U.S.C. §1962, the pattern of racketeering activity or collection of unlawful debt must have some relation to the purpose of the enterprise.

9-110.351 Commentary

This guideline covers the type of situation that occurred in United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied 435 U.S. 957 (1978) in which mere geographic co-location between the enterprise (a trailer park) and the pattern of racketeering activity (gambling) was held insufficient under 18 U.S.C. §1962(c).

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9-110.360 Charging Enterprise as a Group Associated in Fact

No RICO count of an indictment shall charge the enterprise as a group associated in fact, unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic or other identifiable goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity.

9-110.361 Commentary

The purpose of this guideline is to restrict the use of the RICO statute by requiring that the "enterprise" have a demonstrable existence apart from the mere confederation of the individuals committing the underlying predicate acts. However, RICO counts may be approved in otherwise appropriate circumstances when it can be demonstrated that the enterprise has the attributes required by this guideline.

For example, such an enterprise could be an existing club or unincorporated association, with an organizational framework and hierarchy, with individuals occupying offices or positions of authority in the hierarchy over a regular membership; who function in diversified roles. The enterprise must have some common denominator such as an interest, avocation, or other regular activity separate and apart from the criminal acts, but which is directed toward an economic or other identifiable goal. Other indicia of the enterprise's separate existence may include formalized membership, recruitment and induction and/or membership insignia.

Stated another way, independent of the proof of the requisite pattern of racketeering, the evidence must be forthcoming to demonstrate the structure and existence of the enterprise. See United States v. Turkette, 452 U.S. 576 (1981); United States v. Errico, 635 F.2d 152 (2d Cir. 1980).

9-110.400 RICO PROSECUTIVE (PROS) MEMO FORMAT

9-110.401 Preface

A well written, carefully organized pros memo is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. This section sets out the criteria by which a RICO pros memo is evaluated by the Organized Crime and Racketeering Section. Close

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attention by attorneys to the comments below will ensure that delays and declinations are kept to a minimum.

9-110.402 Purpose

The purpose of standardizing the format for RICO prosecutive memoranda is threefold:

- A. To ensure compliance with the policy of the RICO guidelines;
- B. To ensure legally sufficient indictments and theories of prosecution; and,
- C. To provide a manageable means of conveying sufficient information for the timely review of RICO indictments.

9-110.403 General Requirements

A RICO pros memo shall be an accurate, candid and thorough analysis of the strengths and weaknesses of the proposed prosecution. In the interests of uniformity, a RICO pros memo should be divided into the following categories:

- A. Identification of the Defendant
- B. A Statement of Proposed Charges
- C. A Summary of the Case
- D. A Statement of the Law
- E. A Statement of the Facts
- F. Anticipated Defenses/Special Problems or Considerations
- G. Forfeiture Section
- H. RICO Policy Section
- I. Conclusion
- J. Final Draft of Proposed Indictment

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9-110.404 Specific Requirements

Identification of the Defendants

This section should identify each proposed defendant by name and aliases, date and place of birth (if known), criminal arrests and convictions, current employment and major business or labor interests (if any), and connection to or membership in an organized crime family, corrupt union or other criminal organization. If relevant, the defendant's health, age and potential for flight to avoid prosecution should be noted as factors in determining whether he/she will actually stand trial or receive incarceration. The memo should also indicate whether a defendant's current incarceration is likely to diminish the merit of the proposed charges.

9-110.405 A Statement of Proposed Charges

Since the pros memo will not receive final approval until the proposed indictment is reviewed, it is required that the memo provide a schematic of the proposed charges, such as:

| <u>Defendant</u> | <u>Charge</u> | <u>Indictment</u> |
|------------------|-------------------------------------|---|
| Smith | Hobbs Act Taft-Hartley RICO | Counts 3, 4, 5 Counts 6-10 Counts 1 and 2 |
| Jones | Taft-Hartley Tax Evasion RICO | Counts 6-10 Count 11 Counts 1 and 2 |

9-110.406 Summary of the Case

This section summarizes the significant highlights of the evidence in the case and the prosecutive theory upon which it is based. The summary should marshal the evidence in a manner likely to provide a clear understanding of the nature and strength of the evidence. While the Summary section covers the same ground as the Statement of Facts, the latter section requires greater detail and witness attribution.

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Because the Summary is a narrative outline of the Facts section, which in turn is to be based strictly on admissible evidence, neither section should contain informant information, general intelligence data or interesting but inadmissible hearsay. It is not the function of the Summary, once the case reaches the pros memo stage, to establish the significance of the prosecution beyond that suggested by the evidence itself. The strength of the case becomes blurred, not enhanced, by resorting to irrelevant references (from an evidentiary standpoint) to organized crime's involvement or similar allegations. The Summary is essentially equivalent to the government's summation; the Facts section is comparable to a trial brief; neither should stray into areas which the court at trial would not likely permit.

9-110.407 Statement of the Law

This section should state the legal elements of proof for each of the crimes alleged, to include the relevant case law (particularly from the appropriate circuit) governing those elements. Even though the reviewer has undoubtedly seen these elements and cases many times before, the Law section serves the important role of establishing that the writer is knowledgeable of his/her burden and has prepared the memo accordingly. Except in unusual cases the Statement of Law should precede the Statement of Facts; this sequence provides the reviewer with the legal standards against which the evidence is to be evaluated.

The Statement of Law section relates only to the elements of proof and relevant case law in that area. Legal problems and solutions which relate to other areas, such as the Federal Rules of Evidence, anticipated attacks against wiretaps, photo spreads, or joinder of offenses, to name but a few, should be discussed in the Anticipated/Defenses/Special Problems section.

The Statement of Law must provide the following information:

- A. The precise formulation of the RICO enterprise.
- B. The relevant case law of the circuit which supports this formulation of the enterprise.
- C. Any case law, regardless of the circuit it originated in, which would preclude this prosecution.
- D. How the enterprises's affairs were conducted through the pattern of racketeering activity.

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E. How the enterprise was engaged in or its activities affected interstate commerce.

F. If applicable, the elements and theory of any conspiracy to violate 18 U.S.C. §1962.

9-110.408 Statement of Facts--Proof of the Offense

As the title suggests, this section should state facts, not opinions, hearsay, information or colorful asides. The facts must be recited concisely, accurately, and logically--if for no other reason than that the time within which a pros memo is approved is in inverse proportion to the accuracy and quality of the Facts section. Obviously not every fact unearthed during the investigation should be included and a pros memo which contains needless or peripheral detail has no better chance for prompt approval than one that contains too little. Accordingly, pros memos which merely incorporate by reference investigative reports or grand jury material, or which boilerplate extensive portions of investigative reports within the Statement of Facts section, are not sufficient.

The recommended format for the Facts section is to set out the relevant gist of each key witness' anticipated testimony, individually and in chronological sequence. Not all cases are best articulated in this manner but there should be good reason to depart from the general format. Although it is usually more convenient to write up the case in a single narrative which combines the testimony of several witnesses, do not do so. For many of the reasons set out below, and based on past experience, such narratives are to be discouraged. The Summary section, if done well, will be sufficient to put each witness' testimony in correct context. Where there are groups of witnesses who will merely authenticate documents or who will testify to essentially the same recurring events, their testimony need not be individually summarized.

Before the substance of a particular witness' testimony is set out, the writer must indicate whether the witness has been immunized or promised any considerations and, if so, the details thereof. The witness' past criminal record should be stated. And, importantly, the writer should note whether the witness has already testified in the grand jury; if not, an explanation should be supplied together with the basis for believing that the testimony will be available at trial.

The prospective testimony should be specific on all major points, providing, where possible, the names, dates and places of key events and

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conversations to the extent the witness has and can do so. For example, where two government witnesses have attended a conspiratorial meeting with two-proposed defendants, the description of each witness' testimony of that meeting should cover the areas of when, where and who said what. Key meetings or conversations must not be summarized to the point where it is unclear to the reader what was said and by whom. A phrase such as "It was then suggested and agreed by the defendants that they would pay the kickback to 'A'" is unacceptable; because, upon close analysis, it is uncertain whether each defendant specifically and verbally "agreed" to something or whether "agreement" was simply inferred by the witness. And the passage also suggests that the defendants agreed specifically to a "kickback," which would be a significant inculpatory admission, when in fact the testimony may only allege that they agreed to make a "payment" which arguably constituted a kickback. Avoid such characterizations and/or generalizations of this type. If the evidence results from a wiretapped or recorded conversation, the key remarks of a defendant should be quoted verbatim. If the evidence was not recorded, the correct procedure is to set forth, as precisely as recalled by the witness, what was said. For example, "A" will testify that "B" showed a loan application to the group and complained that "C," a union trustee, was balking at processing the loan. "D" responded, "Let's pay 'C,' two points as a fee." "B" said "Good idea, I'll tell him." Although this recitation doesn't explicitly indicate that the "fee" was intended to be a kickback, it is obvious from the context that it was, especially since "C," as a fiduciary of the fund, could not legally receive a fee for processing the loan application. In the Anticipated Defenses section the writer would, of course, anticipate the claim that the defendants intended only to pay a legal fee. The writer would then refute the claim both on its factual incredulity and by citing the case law and union constitution (if applicable) which prohibit such a conflict of interest.

A frequent defect in a pros memo, for which the above hypothetical also serves as an example, is for the writer to gloss over, or fail to recognize, inconsistencies or weaknesses in the case. If two or more government witnesses participated in an event or conversation which is critical to the case, the extent to which the witnesses are consistent or contradictory on any key point is also critical. The pros memo should supply, in the example above, "E's" account of the same meeting with "A," "B" and "D." A general statement, often made in pros memos, that "E" corroborates "A's" testimony that the meeting with "B" and "D" occurred is unacceptable. The critical questions are: Does "E" attribute the same responses to "B?" If not, were "A" and "E" asked to cover the same ground in the grand jury and, if not, why not? It is not usual for one government witness to corroborate another government witness on some points while being in dispute on others. The writer must recognize and

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discuss those points which are critical and indicate the extent of the problem. Not all differences in recollection warrant discussion in the pros memo but material differences do. A pros memo should also alert the reviewer if a government witness has contradicted himself in past statements on major points.

← himself
herself

The Statement of Facts should not contain conjecture or opinion, except as allowed by the Rules of Evidence (e.g., state of mind). Frequently pros memos include assumptions or conclusions drawn by a witness based on extrinsic events. For the most part, objections to testimony along these lines will be sustained as hearsay. The writer must also avoid asserting his/her own subjective opinions as if they are fact. For example, "Immediately after his meeting with "E" and "A," according to airline records and cancelled checks, defendant "D" flew to Chicago and discussed the kickback with "C," the union trustee." In fact, the airline records and checks may only establish that "D" flew to Chicago, from which the inference is drawn that a meeting occurred.

9-110.409 Anticipated Defenses/Special Problems of Considerations

The Defense section should cover the factual and evidentiary weaknesses in the case and the likely legal defenses or theories. It would be impossible here to list all of the recurring defenses encountered in RICO prosecutions. In any event, each case is unique. It is the writer's job to recognize, based upon a thorough review of the grand jury transcripts, investigative reports, court papers, etc., which potential defenses merit discussion. For illustrative purposes, the writer should always consider the following:

A. If a search warrant was involved, is there a probable cause issue? Was there proper inventory served? Has the writer personally reviewed the warrant and affidavit and been satisfied that the search will pass muster at a suppression hearing? If the search is questionable, how will the loss of its fruits affect the case; how difficult is the taint problem?

B. If a wiretap was involved, was there proper minimization; prompt service of inventory; adequate voice identification; accurate transcriptions made; are key conversations audible; were the original tapes properly sealed and stored; were 18 U.S.C. §2517(5) orders obtained for use of recorded conversations in unrelated prosecutions, etc.?

C. If a defendant's prior sworn testimony, confession, or inculpatory admissions are relevant, what will be his defense: failure to warn; failure to comply with Departmental regulations; earlier promise of immunity or non-prosecution?

← his/
her

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D. Does the case involve an unusual application of a federal statute, such as the applicability of the Travel Act to a particular state's commercial bribery statute? If so, what is the prevailing case law in the circuit? How unique is the enterprise that is alleged; what is the prosecutive theory of each defendant's participation in a pattern or racketeering acts; is the theory of participation against one defendant different than as against another?

E. If the indictment contains a RICO conspiracy charge, how does the proof aliunde stack up against each defendant? What is the test and procedural technique in the district of prosecution for proving a conspiracy? How serious will be the spill-over prejudice if the court strikes the evidence against a particular defendant?

F. Are there problems involving:

1. Statute of limitations and pre-indictment delay;
2. Prosecutorial vindictiveness;
3. Tax disclosures;
4. Pre-indictment publicity; Fed. R. Crim. P. 6(e) violations;
5. Chain of custody and authenticity questions for key prosecution documents;
6. Alibis; entrapment; Bruton.

In addition to the selected category above and/or whatever unique problems exist in the case, the writer should make every effort to convey the seriousness of a potential problem instead of skirting it. If a key government witness, upon whom part or all of the prosecution rests, has been convicted of perjury or fraud or has testified in a series of acquittals, it would not be enough to note that (his) credibility will be severely tested, which states the obvious. In such a case, the pros memo should indicate why the witness' testimony, despite these handicaps, will be credible.

Obviously, it is not necessary to address every conceivable defense nor is it required that the writer negate a defense that would be inapplicable simply to show that an effort was made to anticipate defenses. On the other hand, it ought to be a rare case where a defendant

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raises a substantial issue at trial which was not discussed in the pro memo but the existence of which was or should have been anticipated.

Special problems should also be anticipated. Examples include recordings of poor audibility, the exercise of a privilege (marital or constitutional), the need to depose gravely ill witnesses, and the availability of protected witnesses in multidistrict prosecutions.

9-110.410 Forfeiture

The purpose of this section is to set forth the proof by defendant when the indictment charges that interests of that defendant are subject to forfeiture pursuant to 18 U.S.C. §1963. This section must deal with the following issues:

- A. The identity of the interest(s) sought.
- B. The proof that those interests are exclusively owned by the defendant.
- C. The theory upon which forfeiture is predicated (i.e., interest acquired/maintained or interest affording a source of influence over the enterprise);
- D. The identity of any third parties who have a claim to the property sought to be forfeited (e.g., victims of extortion, lien holders, bona fide purchasers for value) or third parties whose property rights will be substantially affected by a forfeiture of the defendant's interest (e.g., minority stockholders in a closely held corporation, partners, individuals with an undivided interest in the property).
- E. How the submitting attorney plans to preserve the interests of the United States and innocent third parties in the property during the interval between the entry of the judgment of forfeiture and the time when the government may seize and dispose of the property.
- F. What the ultimate disposition of the property should be (e.g., is it commercially feasible to sell it, should it be returned to third parties, should it be destroyed, etc.).
- G. Is the forfeiture sought disproportionate to the criminal conduct charged?

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As the foregoing questions illustrate, there are many troublesome issues surrounding RICO forfeitures which will surface after the property has been forfeited. It is the submitting attorney's responsibility to anticipate these problems and develop a forfeiture plan before the indictment is returned.

9-110.411 RICO Policy Section

In this section of the pros memo the submitting attorney must explain how the facts in this case relate to the RICO Guidelines. The submitting attorney must do more than restate the guidelines in a conclusory fashion; he/she must explain "why" RICO is appropriate. In addition, the RICO Guidelines must be read as a whole. In other words, to be approved, a proposed RICO must not only evidence those principles which justify RICO's use, but also must not be contrary to those principles which weigh against its use. For example, where a proposed RICO prosecution would be prohibited under one guideline, prosecution will not necessarily be authorized simply because it does fit within one of the other guidelines.

9-110.412 Conclusion

This section is self-explanatory. It can also be used to indicate miscellaneous items such as anticipated length of trial, the date by which the indictment must be returned, and other matters.

9-110.413 Proposed Indictment--Final Draft

A pros memo will not receive final action unless the final draft of the proposed indictment is simultaneously submitted for review. It goes without saying that indictments must be proofread carefully. While the section's review will pick up the more obvious errors in pleading, other errors involving allegations of fact, time, or place will only be caught by the trial attorney's personal familiarity with the evidence. All statutory citations, particularly of state statutes, should be double-checked for typographic errors. Review by the Organized Crime and Racketeering Section of all proposed RICO cases is not a substitute for the necessary first line review at the field level before the case is submitted to the Criminal Division.

One of the principal reasons RICO reviews take longer than anticipated is that the case either has not been reviewed at the originating office by a supervisor, or the draft indictment is incomplete and/or unaccompanied by a pros memo. Another recurring problem is the

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submission by the submitting attorney of a "final" draft indictment to Strike Force 18, which the author continues to modify without informing the reviewer, or simultaneously submits for review within the originating office. In any event, the indictment being reviewed turns out not to be the same indictment ultimately submitted for approval. Therefore in order to avoid wasted effort, the submitting attorney must not forward as a final draft indictment one which he/she has not in fact finalized or which has not been approved by the originating office.

Further, it is the responsibility of the submitting attorney after the indictment has been returned to forward a copy bearing the seal of the clerk of court, to the Organized Crime and Racketeering Section.

9.110.500 FORMS

9-110.600 SYNDICATED GAMBLING

Sections 801-811 of the Organized Crime Control Act of 1970, which amend Title 18, United States Code, by adding Sections 1511 and 1955, are designed to combat "illegal gambling business" or syndicated gambling. 18 U.S.C. §1511 is directed at the political and police corruption which makes widespread illegal gambling possible, while 18 U.S.C. §1955 is directed at the illegal gambling itself.

9-110.601 Basis for Federal Jurisdiction

Congress enacted this legislation pursuant to its power to regulate interstate commerce. In so doing, Congress made the finding that illegal gambling does involve widespread use of and does have an effect upon interstate commerce. Hence, the federal government has jurisdiction to initiate investigations and prosecutions of persons conducting large scale illegal gambling businesses without showing that the proscribed activity has affected interstate commerce. Perez v. United States, 402 U.S. 146 (1971); United States v. Harris, 460 F.2d 1041, 1048 (5th Cir.), cert. denied, 409 U.S. 877 (1972); Schneider v. United States, 459 F.2d 540 (8th Cir.), rehearing denied, 478 F.2d 1403, cert. denied, 409 U.S. 877 (1972).

9-110.602 Scope of Federal Jurisdiction

Congress did not intend to occupy the field of illegal gambling exclusively nor to relieve local law enforcement bodies of their

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obligations to enforce local gambling provisions. The syndicated gambling laws are directed only at those individuals who operate gambling businesses of major proportions: selection of targets for investigation and prosecution should be made on that basis. See United States v. Riehl, 460 F.2d 454, 458 (3d Cir. 1972).

9-110.603 Investigative or Supervisory Jurisdiction

Investigative jurisdiction for violations of the syndicated gambling provisions is vested in the Federal Bureau of Investigation. In investigating, the FBI is authorized under 18 U.S.C. §2516 to intercept wire or oral communications pursuant to court order. See USAM 9-7.000 (Electronic Surveillance). The services of the FBI laboratory are available both to analyze any physical evidence seized and to support expert testimony at the time of trial.

Supervision of prosecutions under these statutes, including investigations and service of warrants, is vested in the Organized Crime and Racketeering Section.

9-110.604 Definitions

Both 18 U.S.C. §1511 and §1955 utilize the same definition of "illegal gambling business." The breadth of activities included under the meaning of the term "gambling" are identical, as are the activities excluded from coverage. See USAM 9-110.200.

9-110.610 Obstruction of State or Local Law Enforcement

A violation under 18 U.S.C. §1511 may be shown by proving:

A. That two or more persons conspired to obstruct the enforcement of the criminal laws of a state or local government.

B. That such conspiracy was intended to facilitate an illegal gambling business.

C. That one such person was an official or employee of the state or local government (e.g., a policeman, member of the city council, mayor; the statute is intended to be broad and should be so interpreted in this area).

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D. That one such person conducted, financed, managed, supervised, directed or owned all or part of an illegal gambling business (n.b., this person might be the same person who is employed by the state or local government or he might be another individual). See USAM 9-110.220. ← he/she

E. That one such person did any act to effect the object of the conspiracy. Again the statute is intended to be read broadly in this context. The act need not be unlawful in itself, such as making a payoff to a policeman, but might be a phone call, the mailing of a letter, attendance at a meeting, etc. ← police officer

9-110.620 Illegal Gambling Businesses

A violation under 18 U.S.C. §1955 may be shown by proving that the defendant conducts, finances, manages, supervises, directs or owns all or part of any illegal gambling business. The meaning of the terms "finance," "manage," "supervise," "direct," and "own," are so common that no definitions are required. See United States v. Bobo, 477 F.2d 974, 988 (4th Cir. 1973). "Conduct," as the legislative history of 18 U.S.C. §1511, the companion statute to 18 U.S.C. §1955, states at H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970), pp. 52-53, 1970 U.S. CODE CONG. & AD. NEWS, 4029:

. . . refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet.

The term "conduct" is intended to mean any participation in the operation of a gambling business, regardless of how minor the role. United States v. Becker, 461 F.2d 230, 232 (2d Cir.), vacated and remanded on other grounds, 417 U.S. 903; United States v. Ceraso, 467 F.2d 653, 656 (3d Cir. 1972).

For an illegal gambling business to exist under 18 U.S.C. §1955, it must, among other requirements, involve five or more persons who "conduct," etc. Therefore, in computing whether five or more persons were involved, the prosecution may count runners, telephone clerks, salesmen, and watchmen. United States v. Hunter, 478 F.2d 1019, 1022 (7th Cir.), cert. denied, 414 U.S. 857, rehearing denied, 414 U.S. 1087 (1973); United States v. Harris, 460 F.2d 1041 (5th Cir.), cert. denied, 409 U.S. 877 (1972), dealers as well as doormen were specifically held to be persons who conduct an illegal gambling business. Since the only ← sales-person, watch-persons, door-persons

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exclusions intended by Congress were the individual players or bettors and not the professional bookmaker who bets in the course of (his) business, the lay-off bettor is also included as one who "conducts" part of the gambling business. United States v. McHale, 495 F.2d 15, 18 (7th Cir. 1974). Only bettors who merely use the facilities provided by those engaged in the business of illegal gambling are not subject to prosecution under this law. Moreover, such customers can not be considered in determining whether a particular operation involves five or more persons.

9-110.621 Conspiracy

Defendants may properly be charged with both conspiring to violate (18 U.S.C. §371) and with violating 18 U.S.C. §1955. Iannelli v. United States, 420 U.S. 770 (1975).

9-110.622 Obtaining Evidence in an Illegal Gambling Business Case

Before a warrant of arrest, interception, or search and seizure will be issued, the government must establish probable cause to believe that the suspended operation is within the statutory definition of an "illegal gambling business." United States v. DeCesaro, 502 F.2d 604 (7th Cir.).

Subsection (c) of 18 U.S.C. §1955, allows, under conditions set forth therein, a probable cause finding as to "gross revenue in excess of \$2,000 in any single day," the third element. United States v. Palmer, 465 F.2d 697 (6th Cir.), cert. denied, 409 U.S. 874. The finding goes solely to probable cause for a warrant of arrest, interception or search and seizure, and cannot be utilized to establish an element of proof of the offense at trial.

While it is not necessary in obtaining search warrants and authorizations for electronic surveillance to show interstate activity, some mention should be made in an application of the Congressional finding that illegal gambling affects interstate commerce. See USAM 9-110.201.

9-110.623 Forfeiture

Subsection (d) of 18 U.S.C. §1955 provides that all property used in violation of the provisions of the section may be seized and forfeited to the United States. Department rules for the confiscation of property, including money, used in an illegal gambling business are contained in 28 C.F.R. 9(a).

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9-110.624 Compensation to Informants

18 U.S.C. §1955(d) also provides for the award of compensation to informants with respect to forfeitures made under this section. Department rules for making such awards are contained in 28 C.F.R. 9(a)(9).

9-110.700 LOANSHARKING

Chapter 42 (Sections 891 to 896) of Title 18, United States Code, is designed principally to bring the resources of federal law enforcement to bear on the loansharking of criminal organizations. While it is desirable that some manifestation of organized crime involvement be present (see "Use of Chapter 42," *infra* at USAM 9-110.304), that fact is not a necessary element of the offense and need be neither pleaded nor proved. United States v. Cheiman, 578 F.2d 160, 164 (6th Cir. 1978), cert. denied, 439 U.S. 1068 (1979); United States v. Mase, 556 F.2d 671, 674 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978); United States v. Andrino, 501 F.2d 1373, 1377-78 (9th Cir. 1974); United States v. Annerino, 495 F.2d 1159, 1164 (7th Cir. 1974). Indeed, if the defendants seek to raise this issue before the jury, the government has been held to be permitted to prove the organized crime connection. United States v. Nace, 561 F.2d 763, 768 (9th Cir. 1977).

9-110.701 Structure of the Act

18 U.S.C. §892

18 U.S.C. §892 proscribes making or conspiring to make any "extortionate extension of credit," defined in 18 U.S.C. §891(6) as:

. . . any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person.

Subsection 18 U.S.C. §891(1) states that:

To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby

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the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

There are three elements to a substantive offense under 18 U.S.C. §892:

A. That an agreement to extend credit was made;

B. That there was an understanding, expressed or implied, tacit or otherwise, that if there was delay in making repayment, violence and other criminal means would be used to harm the debtor; and

C. That defendant acted knowingly and willfully in entering this agreement and understanding. United States v. DeVincent, 546 F.2d 452, 456, n. 4 (1st Cir. 1976), cert. denied, 431 U.S. 903 (1977).

There is seldom any dispute that an extension of credit was made in prosecutions under 18 U.S.C. §892. Even an agreement to extend credit by means of a check which bounced has been ruled an extension of credit under the Act. United States v. Totaro, 550 F.2d 957, 959 (4th Cir.), cert. denied, 431 U.S. 920 (1977).

The sticking point in these prosecutions is usually proof of the understanding of the debtor at the time the extension of credit was made. The debtor himself can, of course, testify as to hearsay matters of which he was aware concerning the collection practices of the creditors--so long as these contributed to his understanding of the terms of the extension of credit. United States v. Martorano, 557 F.2d 1, 9 (1st Cir.), on rehearing, 561 F.2d 406 (1977), cert. denied, 435 U.S. 922 (1978); United States v. Bowdach, 501 F.2d 220 (5th Cir. 1974), cert. denied, 420 U.S. 948 (1975).

This hearsay is admissible totally independent of the provisions of 18 U.S.C. §892(c) and is admitted solely for the purpose of showing the victim's state of mind, not the truth of the matter asserted. Id. Even past criminal conduct known to the victim which might otherwise be inadmissible can be admitted if it is relevant to the state of mind of the borrower at the time the loan was made. United States v. DeVincent, supra; United States v. Bowdach, supra; United States v. Frazier, 479 F.2d 983, 986 (2d Cir. 1973); United States v. Marchesani, 457 F.2d 1291, 1296 (6th Cir. 1972).

It should be noted that 18 U.S.C. §892 does not require an agreement that violence will be used in collection; all that is required is that the

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victim comprehend it will be used. United States v. DeVincent, supra, at 455, n. 1; United States v. Annoreno, 460 F.2d 1303, 1308 (7th Cir.), cert. denied, 409 U.S. 852 (1972). So long as fear was instilled in the victim, no proof that the fear was reasonable need be adduced. United States v. DeVincent, supra, at 456.

The fear of the victim may be proved not only by the victim's testimony, but also by testimony of those near to him at the time and familiar with his affairs sufficient to make them knowledgeable of his state of mind. United States v. Nakaladski, 481 F.2d 289, 297 (5th Cir.), cert. denied, 414 U.S. 1064 (1973); see United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972). Acts of the victim which show fear and which are a matter of public record can also be used. United States v. DeCarlo, 458 F.2d 358 (3d Cir.), cert. denied, 409 U.S. 843 (1972) (death certificate of a suicide victim). Nonetheless, the jury may disregard a denial of fear by the victim if other evidence proves he was, in fact, afraid. United States v. Nakaladski, supra, at 299; United States v. DeLutro, 435 F.2d 255, 257 (2d Cir. 1970), cert. denied, 402 U.S. 983 (1971).

Subtle hints conveyed to the debtor as to the consequences of nonpayment are equally as probative of his state of mind as are explicit threats. Annoreno, supra, at 1309. The intent of the defendant is proved as in all other cases, but it can be inferred from the state of mind knowingly and intentionally induced in the victim. United States v. Martorano, supra, at 8, n. 3.

18 U.S.C. §892(a) also outlaws conspiracies to make extortionate loans. It should be noted that no overt act is required; the agreement alone is sufficient to warrant conviction. In such prosecutions, the name of the victim need not be set out in the indictment, unlike the requirement in substantive 18 U.S.C. §892 and 894 counts. United States v. Tomasetta, 429 F.2d 978, 980-81 (1st Cir. 1970). All victims, named and unnamed, may testify as to their experience with the conspirators to show motive, intent, usual business practice and the relationship between the conspirators. Nakaladski v. United States, supra, at 296. In contrast to the substantive offense, in which the government must prove that fear was communicated to the victim, the conspiracy involves only proof that the conspirators agreed that fear would be instilled in a victim. Id. at 297.

18 U.S.C. §893

18 U.S.C. §893 is intended to reach the source of loansharking funds by prohibiting the willful advancement of money or property to any person "with reasonable grounds to believe that it is the intention of that

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person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit." This is the least used section of the Act, and no reported decisions relative to it have been published. This is due to the fact that it is usual for illegitimate lenders to participate actively in loansharking activity, thereby making a 18 U.S.C. §892 conspiracy or 18 U.S.C. §894 charge possible.

18 U.S.C. §894

18 U.S.C. §894 reaches the enforcement arm of the loanshark by making it a crime to make "use of an extortionate means . . . to collect or attempt to collect any extension of credit (see above for definition), or to punish any person for the nonpayment thereof." The crime has three elements.

- A. That there was principal or interest outstanding;
- B. That defendant(s) attempted to collect, or did collect, the sums due;
- C. That defendant(s) knowingly employed extortionate means in that collection or attempt. United States v. Natale, 526 F.2d 1160, 1166 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976).

Much of the dispute arising from prosecutions under 18 U.S.C. §894 has involved claims that the money due was not the result of a loan made in violation of 18 U.S.C. §892 and, it was claimed, was therefore outside the statute. It does not matter how the original claim or debt arose. United States v. Muscarella, 585 F.2d 242 (7th Cir. 1978); United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978); United States v. Mase, 556 F.2d 671, 673 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978); United States v. Czarnecki, 552 F.2d 698, 703 (6th Cir.), cert. denied, 431 U.S. 939 (1977); United States v. Roberts, 546 F.2d 596, 597 (5th Cir. 1977), cert. denied sub nom., Mancini v. United States, 431 U.S. 968 (1977); United States v. Largent, 545 F.2d 1039, 1042 (6th Cir. 1976), cert. denied, 429 U.S. 1098 (1977); United States v. Schaffer, 539 F.2d 653, 654 (8th Cir. 1976); United States v. Burke, 495 F.2d 1226 (5th Cir.), cert. denied, 419 U.S. 1079 (1974); United States v. Briola, 465 F.2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973); United States v. Keresty, 465 F.2d 36, 40-41 (3d Cir.), cert. denied, 409 U.S. 991 (1972) (all of the above cases dealt with credit extended in gambling transactions); United States v. Cheiman, 578 F.2d 160 (6th Cir. 1978), cert. denied, 439 U.S. 1068 (1979) (obligation--a disputed promise to invest in a business); United States v.

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Bufalino, 576 F.2d 446, 452 (2d Cir.), cert. denied, 439 U.S. 928 (1978) (attempt to recover money obtained by fraud); United States v. Schwartz, 548 F.2d 427 (2d Cir. 1977) (obligation for truck rentals); United States v. Annerino, 495 F.2d 1159, 1166 (7th Cir. 1974) (collection of money embezzled); United States v. Bonanno, 467 F.2d 14, 17 (9th Cir. 1972), cert. denied, 410 U.S. 909 (1973) (attempt to collect an amount advanced to facilitate importation of marijuana).

There is seldom, if ever, much dispute concerning the second element of the offense, but there is almost always a contest as to whether or not the methods used by the defendants were extortionate. Probably, the nerviest defense to this third element is a confession that the money was taken from the victim at gunpoint, therefore robbery rather than extortion should have been charged. The courts have held that a confession to robbery is never a defense to a charge of extortion. United States v. Cheiman, supra, at 164, n. 17; see United States v. Martorano, supra. The most usual manifestations of coercion are prediction of the victim's early demise, threats to break arms, legs, and heads, and arsons committed against the victim's house, business, or car. Threats to bring in someone involved in organized crime or the syndicate, United States v. Nakaladski, supra, at 301; United States v. Keresty, supra; see United States v. Zito, supra, or describing the collectors as dangerous people for which defendant could not be responsible, United States v. Annerino, supra; United States v. Quintana, 457 F.2d 874 (10th Cir.), cert. denied, 409 U.S. 877 (1972), are just as extortionate in nature.

As in the 18 U.S.C. §892 prosecutions, however, the inquiry focuses upon whether defendants in any way created a climate in which the victim had reason to fear for his safety, that of his family, his property, or reputation. Where unsecured loans are made at ridiculous multiples of commercial interest rates and repayments are made secretly on street corners, in taverns, pool halls or empty or closed stores, most courts will need little to convince them collections were extortionate. United States v. Annoreno, supra, at 1309; see United States v. Natale, supra, at 1174. The methods of proving that the victim was placed in fear are basically the same as those used in prosecutions under 18 U.S.C. §892. This includes proof of other extortionate collections known to the victim and alluded to by the defendant in his collection attempts.

As with 18 U.S.C. §892 prosecutions, the fact that a particular victim denies being afraid not to pay is not conclusive, so long as the methods used were such as would engender fear in an average man. Congress meant to protect the intrepid as well as the timid. United States v. Natale, supra, at 1,168. And, if relatives of the victim are used as targets and conduits for the threat, their reactions are also relevant. United States v. Zito, supra.

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A point to remember on appeal of any conviction under 18 U.S.C. §894 is that, if the jury found that the loan was made in violation of 18 U.S.C. §892, any collection of that loan is necessarily a violation of 18 U.S.C. §894. United States v. Nakaladski, *supra*, at 298.

Intent of the defendants is proved as in any other case, and can include past similar unlawful collection activities of the defendant near in time to the offense charged. United States v. Largent, *supra*, at 1043.

Conspiracies to collect in an extortionate manner are covered in 18 U.S.C. §894 similar to the conspiracy portion of 18 U.S.C. §892. All comments made there would apply.

18 U.S.C. §896

18 U.S.C. 896 makes clear that state prosecutions for extortionate credit transactions are not preempted by the federal statute. In those rare instances in which the petite policy allows federal prosecution following a state prosecution, the fact that an acquittal resulted in state court does not foreclose successful federal action. United States v. Burke, *supra*.

9-110.702 Constitutional Authority

The constitutionality of the Act has been upheld by the Supreme Court. Perez v. United States, 402 U.S. 146 (1971).

9-110.703 Methods of Proof

The methods of proof possible when the victim is available as a witness have been outlined earlier. Whenever the victim is not available, subsections (c) of 18 U.S.C. §892 and §894 allow the introduction of evidence of the collection reputation of the defendant providing evidence of the facts set out in 18 U.S.C. §892(b)(1) and (2) have been introduced. The purpose of admitting this evidence is only to prove the state of mind of the absent victim, and when so limited, its use has been upheld by the courts. United States v. Spears, 568 F.2d 799 (10th Cir. 1978), cert. denied, 439 U.S. 839 (1979). 18 U.S.C. §892(c) and §894(c) should be used only when the prosecutor believes its use is vital to the success of the prosecution.

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9-110.704 Use of Chapter 42

Since the chapter was neither intended to preempt the field of loansharking to the exclusion of state law nor create a federal crime of usury, each potential investigation or prosecution should be judged in terms of the propriety of federal intervention. While decision on the use of the statute is that of the U.S. Attorney alone, the following criteria may be relevant:

A. Is the extension of credit at issue part of a commercialized loansharking enterprise, or is it merely a single incident?

B. What is the creditor's reputation, and does ~~he~~^{she} have, or claim to ~~have~~^{have}, affiliations with the organized criminal element?

C. Was some other crime committed or suggested in the course of entering or attempting to settle the transaction; specifically, did gambling lead to creation of the debt or was an attempt made to recruit the debtor to commit some other crime to earn repayment?

D. Were there objective reasons for the debtor's belief that ~~he~~^{she} would be injured if ~~he~~^{she} failed in or delayed payment? ~~he/she~~^{he/she}

110
9-110.705 Problems in Chapter 42 Cases

In the early days of the statute, it was found that an inordinate number of these cases were resulting in acquittals. Examination of the reasons behind this state of affairs led to the discovery that many of the debtors were coming back under the influence of the creditors after making the original complaint to federal authorities. In some instances, this was due to an offer to forgive the debt; in others, additional threats were made and were effective.

Prosecutors should remember that loanshark victims are, by nature, followers and extremely subject to suggestions by others. Thus, whenever possible, their testimony should be backed up by consensual electronic surveillance or other means of proof independent of the victim's testimony.

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9-110.706 Alternative Statutes

Use of facilities in interstate commerce in aid of extortion is a violation of 18 U.S.C. §1952. Extortion of a business affecting interstate commerce is a violation of 18 U.S.C. §1951. In some instances these charges may be preferable to those contained in Chapter 42. Also, loansharking offenses are among those included in the definition of racketeering activity set out in 18 U.S.C. §1961. See the section on the Racketeer Influenced and Corrupt Organizations (RICO) statute for appropriate usage of that statute, infra, at USAM 9-110.100.

9-110.707 Penalty

All the offense sections of Chapter 42 carry a penalty of up to 20 years in prison or a fine of up to \$10,000, or both.

9-110.800

1984
USAM
See Insert



U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

July 7, 1986 (Expires December 7, 1986)

TO: Holders of United States Attorneys' Manual Title 9

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

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: MURDER-FOR-HIRE AND VIOLENT CRIMES IN AID OF
RACKETEERING ACTIVITY

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-110.800 et seq.

PURPOSE: This bluesheet implements new policy regarding the requirement of approval by the Assistant Attorney General prior to seeking an indictment under 18 U.S.C. § 1952A when there is a conflict between federal and state or local jurisdiction, between or under § 1952B in any case.

The following should be added after USAM 9-110.707

9-110.800 Murder-for-Hire and Violent Crimes
in Aid of Racketeering Activity

The Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, Ch. X, Part A (Oct. 12, 1984), added two new offenses to Title 18, codified at 18 U.S.C. §§ 1952A and 1952B. Section 1952A makes it a crime to travel or use facilities in interstate or foreign commerce with intent that a murder in violation of state or federal law be committed for money or other pecuniary compensation. The maximum penalty varies with the severity of the conduct: \$10,000 and/or five years for any violation; \$20,000 and/or twenty years if personal injury results; life imprisonment and/or \$50,000 if death results.

Section 1952B makes it a crime to commit any of a list of violent crimes in return for pecuniary compensation from an enterprise engaged in racketeering activity, or for the purpose of joining, remaining with, or advancing in such an enterprise. The listed violent crimes are murder, kidnapping, maiming, assault with a dangerous weapon, assault resulting in serious bodily injury, and threatening to commit a "crime of violence," as defined in 18 U.S.C. § 16, newly added by this legislation. The listed crimes may be violations of state or federal law. In addition, attempts and conspiracies to commit the listed crimes are covered. The maximum penalty varies with the particular violent crime involved, ranging from \$3,000 and/or three years for attempting or conspiring to commit one of the lesser offenses, to \$50,000 and/or life imprisonment for murder or kidnapping. The definitions of "racketeering activity" and "enterprise" are based on the definitions in the RICO statute, 18 U.S.C. § 1961.

9-110.801 Division Approval

Criminal prosecutions under Section 1952A may not be initiated by indictment or information without the prior approval of the Assistant Attorney General, Criminal Division, if a state or local prosecutor with jurisdiction over the offense objects to federal prosecution. The views of the appropriate state or local prosecutor are to be solicited in advance of an indictment or information and recorded in the file. Where approval is required because of an objection, the failure to obtain the required approval of the Assistant Attorney General prior to indictment will not affect the continuation of the prosecution of any matter unless the Department so orders.

No criminal prosecution under Section 1952B shall be initiated by indictment or information without the prior approval of the Assistant Attorney General, Criminal Division.

See approval guidelines at USAM 9-110.810, infra.

9-110.802 Murder-for-Hire

The substance of section 1952A is patterned after the ITAR statute, 18 U.S.C. § 1952, and the case law under that provision may be applicable with respect to some issues. However, the new statute has some novel features. First, according to the legislative history, the murder must be "performed or planned as consideration for the receipt of 'anything of pecuniary value.'" See S. Rep. No. 98-225, 98th Cong., 1st Sess. 306 (1983) (hereinafter cited as Senate Report). "Anything of pecuniary value" is defined to mean money, a negotiable instrument, a commercial interest, or "anything else the primary significance of which is economic advantage." As examples that clearly come within the definition, the Senate Report mentions an "option to purchase" and a "promise of future payment," even if either such contract is unenforceable as contrary to public policy. Ibid.

The term "facility in interstate commerce" is defined to expressly include "means of transportation and communication." This definition includes interstate telephone calls within its scope, as is the case under section 1952. See United States v. Villano, 529 F.2d 1046 (10th Cir.), cert. denied, 426 U.S. 953 (1976). The definition is as broad as the corresponding definition in section 1952 of "any facility in interstate or foreign commerce." Senate Report at 306 n.5. The legislative history also makes it clear that section 1952A covers both the "hit man" and the person who ordered the murder, under the theory that the order-giver causes the hit man to travel or use facilities in interstate commerce. Id. at 306. Finally, the Senate Report states that, because the essence of the offense is the interstate element coupled with the requisite intent, the violation is complete whether or not the murder is carried out or even attempted. Ibid.

9-110.803

Violent Crimes in Aid of
Racketeering Activity

The substance of this offense is similar in some ways to that of the murder-for-hire provision. For example, the term "anything of pecuniary value" has the same meaning in both statutes. Senate Report at 306 n.5. Also, section 1952B, in conjunction with 18 U.S.C. § 2, covers both the hit man and the order-giver. Id. at 307. One major difference between the two offenses is that the interstate commerce element in section 1952B is not based on travel or the use of interstate facilities; rather, the nexus is based on connection of the violent crime to an "enterprise engaged in racketeering activity." The terms "enterprise" and "racketeering activity" are essentially borrowed from the definitions of those terms in the RICO statute, 18 U.S.C. § 1961, and have the same scope as the corresponding RICO terms. The interstate nexus for section 1952B is supplied in the definition of "enterprise," which, unlike the corresponding RICO definition, contains the interstate requirement as part of the definition. It should also be noted that the definition in section 1952B does not include "individual," as the RICO definition does.

The violent crimes covered by section 1952B include not only the specific offenses listed, but any "crime of violence." The latter term is defined in new section 16 of Title 18, which is also added by Chapter X, Part A, of the new legislation. The legislative history notes that this definition includes a threatened or attempted simple assault or battery, and also includes burglary, because, under new section 16(b), burglary is a felony that, by its nature, involves a substantial risk that physical force against person or property may be used in the commission of the offense. Senate Report at 307.

9-110.810

Approval Guidelines

The following guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Section 1952A

Section 1952A is a broad and powerful statute that reaches conduct within the jurisdiction of state and local authorities. Because of the need to avoid encroaching on the authority of state and local law enforcement authorities, approval by the Assistant Attorney General, Criminal Division, is required if the United States Attorney believes that any state or local prosecutor with responsibility for prosecuting a state murder charge for the same basic offense objects to a federal prosecution under section 1952A, or if the views of the appropriate prosecutors have not been solicited. The views of the state or local prosecutor who apparently has jurisdiction over the conduct in question must be solicited in every case proposed to be brought under Section 1952A, unless a compelling reason, such as local corruption, dictates otherwise. These views, or the reason for not soliciting them, must be recorded in the file. The failure to obtain approval of the Assistant Attorney General prior to initiation of prosecution will not affect the continuation of the prosecution unless the Department so orders.

Requests for approval should be in accordance with the guidelines at USAM 9-110.811.

Section 1952B

Section 1952B also reaches conduct within state and local jurisdiction. In addition, section 1952B incorporates two important terms defined in the RICO statute, 18 U.S.C. Section 1961-1968 -- namely, "enterprise" and "racketeering activity." Because of the need to maintain consistent applications and interpretations of the elements of RICO, in addition to the need to avoid encroaching on state and local law enforcement authority, all proposed prosecutions under 1952B must be submitted to the Assistant Attorney General, Criminal Division, for approval in accordance with the following guidelines.

9-110.811 The Review Process for Authorization

The review process for authorization of prosecutions under section 1952A when a conflict arises between federal and state or

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local authority and for authorization required in any case under section 1952B is similar to that for RICO prosecutions under 18 U.S.C. §§ 1961-1968. See USAM 9-100.200, et seq. However, approval of prosecutions under these two new statutes is at the Division level, rather than at the Section level. To commence the formal review process, submit a final draft of the proposed indictment and a prosecutive memorandum to the Assistant Attorney General, Criminal Division, Room 2107, Department of Justice, Washington, D.C. 20530. Before the formal review process begins, however, prosecuting attorneys are encouraged to consult with the Organized Crime and Racketeering Section by telephone in order to obtain preliminary guidance and suggestions.

The review process can be time-consuming, because of the likelihood that modifications will have to be made to the indictment, and because of the heavy workload of the reviewing attorneys. Therefore, unless extraordinary circumstances justify a shorter time frame, a period of 15 working days must be allowed for the review process.

9-110.812 General Guidelines: Sections 1952A and 1952B

In deciding whether to approve a prosecution under section 1952A or 1952B, the Assistant Attorney General will analyze the prosecution memorandum and proposed indictment to determine whether there is a legitimate reason why the offense cannot or should not be prosecuted by state or local authorities. For example, federal prosecution may be appropriate where local authorities do not have the resources to prosecute, where local authorities are reasonably believed to be corrupt, where local authorities have requested federal participation, or where the offense is closely related to a federal investigation or prosecution. A prosecution will not be authorized over the objection of local authorities in the absence of a compelling reason. Accordingly, every prosecution memorandum must state the views of local authorities with respect to the proposed prosecution, or the reasons for not soliciting them. In addition, the specific factors set forth in the following sections will be considered with respect to all proposed prosecutions.

9-110.813 Specific Guidelines: Section 1952A

According to the legislative history, the murder-for-hire provision was enacted to combat the activities of the professional contract killer, or "hit-man," employed by organized criminal elements. See Organized Crime and the Use of Violence: Hearings Before the Permanent Subcommittee of Investigations of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess. 44, 50 (1980). Therefore, unless unusual circumstances are present, a prosecution under section 1952A should not be instituted where the intended murder concerns a domestic situation between family

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members, or a private dispute between two individuals, and there is no connection to or allegation of any other serious criminal activity in the investigation.

9-110.814 Specific Guidelines: Section 1952B

1. Section 1952B was enacted to combat "contract murders and other violent crimes by organized crime figures." See Senate Report at 306. The statutory language is extremely broad, in that it covers such conduct as a threat to commit an assault, and other relatively minor conduct normally prosecuted by local authorities. Thus, although the involvement of traditional organized crime will not be a requirement for approval of proposed prosecutions, a prosecution will not be authorized unless the violent crimes involved are substantial because of the seriousness of injuries, the number of incidents, or other aggravating factors.

2. The statutory definition of "enterprise" also is very broad; it is closely related to the definition of the same term in the RICO statute, 18 U.S.C. § 1961(4). (However, it should be noted that the definition in section 1952B, unlike the RICO definition, includes a requirement of an effect on interstate commerce as part of the definition, and does not include an "individual" within the definition.) No prosecution under section 1952B will be approved unless the enterprise has an identifiable structure and purpose apart from the racketeering activity and crimes of violence it is engaged in, and otherwise meets the standards for a RICO prosecution.

3. The term "racketeering activity" is borrowed directly from the RICO statute, 18 U.S.C. § 1961(1). It will be construed in the same way under section 1952B as it is under RICO, for purposes of approval. See USAM 9-110.100, et seq. The requirement in section 1952B that the enterprise be "engaged in" racketeering activity will be construed to mean that the enterprise, or persons employed by or associated with it, committed two or more separate acts of racketeering activity before the commission of the violent crimes charged under section 1952B. This requirement will be similar to the requirement of proof of a "pattern of racketeering activity" under RICO, 18 U.S.C. § 1961(5). See USAM 9-110.121.

9-110.815 Prosecution Memorandum

Every request for approval of a proposed prosecution under section 1952A or 1952B must be accompanied by a final draft of a proposed indictment and by a thorough prosecution memorandum. The prosecution memorandum should generally conform to the standards outlined for RICO prosecutions. See USAM 9-110.400,

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et seq. It is especially important that the memorandum contain a concise summary of the facts, a statement of the applicable law, a discussion of anticipated defenses and unusual legal issues, and a statement of justification for using section 1952A or 1952B. For cases under section 1952B, submission of a thorough memorandum is particularly important, because of the complexity of the issues involved and because of the statute's similarity to RICO. While the memorandum in support of a section 1952A indictment ordinarily need not be very detailed, the memorandum for a section 1952B case must meet the strict standards for a RICO prosecution memorandum in every respect.

9-110.816

Post-Indictment Duties

Once the indictment or information has been approved and filed, it is the duty of the prosecuting attorney to submit to the Criminal Division a copy bearing the seal of the clerk of the court. In addition, the attorney should keep the Criminal Division informed of any unusual legal problems that arise in the course of the case, so those problems can be considered in providing guidance to other prosecutors.

(Superseded)

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9-111.000 POLICY WITH REGARD TO FORFEITURE OF ASSETS WHICH HAVE BEEN
TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

9-111.100 FORFEITURE UNDER RICO (18 U.S.C. §1963) AND DRUG FELONY
STATUTES (21 U.S.C. §853)

The Comprehensive Crime Control Act of 1984 ^{1/} extensively revised criminal forfeiture law and procedure. New 18 U.S.C. §1963(c) and 21 U.S.C. §853(c) provide that criminal forfeitures under sections 1963(a) and 853(a), respectively, "relate back" to the commission of the act which gives rise to the forfeiture. Thus, the interest of the United States in the property vests at that time and is not extinguished simply because a defendant subsequently transfers the property to another person. As explained in the Senate Report: "[a]bsent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction." ^{2/} S. Rep. No. 98-225, 98th Cong., 1st Sess. at 200 (footnote omitted). More specifically, the report notes that "[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length transactions." Id. at 200-201.

As an equitable measure, 18 U.S.C. §1963(c) and 21 U.S.C. §853(c) both provide that forfeiture shall not be ordered if a transferee

^{1/} Pub. L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984).

^{2/} The Senate Report also noted that the 18 U.S.C. §1963(c) codified "the 'taint' theory which has long been recognized in forfeiture cases." Indeed, under most civil forfeiture statutes, the forfeiture relates back to the time of the acts which give rise to it. See, e.g., United States v. Stowell, 133 U.S. 1 (1890); United States v. \$84,000 in U.S. Currency, 717 F.2d 1090 (7th Cir. 1983), cert. denied, U.S. , 105 S. Ct. 131 (1984). The Seventh Circuit, however, twice rejected the government's argument that the "relation back" doctrine was applicable to criminal forfeitures. See United States v. Alexander, 741 F.2d 962 (7th Cir. 1984); United States v. McManigal, 708 F.2d 276 (7th Cir.), reaff'd in pertinent part, 723 F.2d 580 (7th Cir. 1983). Thus, the new legislation effectively reverses the Seventh Circuit's holding in Alexander and McManigal.

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establishes, at a hearing pursuant to sections 1963(m) or 853(n), that he/she was a bona fide purchaser and was reasonably without cause to believe that the property was subject to forfeiture.

9-111.200 APPLICATION OF FORFEITURE PROVISIONS TO ASSETS TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

As a result of the amendments to the forfeiture provisions, assets transferred by a defendant to an attorney for payment of legal fees may be subject to forfeiture if the government proves that the fee was paid from assets that are forfeitable. An attorney would be entitled to keep the assets only if he/she could prove at a post-forfeiture proceeding that he/she was a bona fide purchaser and was reasonably without cause to know the asset was subject to forfeiture.

9-111.210 Sixth Amendment Considerations

The Sixth Amendment guarantees a defendant the absolute right to counsel in federal criminal prosecutions that may result in imprisonment. See Scott v. Illinois, 440 U.S. 367, 373 (1979); Arsinger v. Hamlin, 407 U.S. 25, 37 (1972) (defendant may not be imprisoned unless afforded the right to counsel). Accordingly, a defendant who establishes indigency is entitled to the assistance of court-appointed counsel at each critical stage of the proceedings, including the first appeal as of right. See, e.g., 18 U.S.C. §3006A; Fed. R. Crim. P. 44(a). Additionally, a solvent defendant is entitled to retain counsel of choice. But this guarantee of the right to counsel of choice is neither absolute nor unqualified. A court may restrict a defendant's choice when there is a significant countervailing public interest. 3/

Some district court's have held that the third party forfeiture provisions interfere with a defendant's Sixth Amendment rights when they are applied to legitimately paid attorney fees. See, e.g., United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985), United States v. Badalamenti, 84 Cr. 236 (PNL) (S.D. N.Y. July 10, 1985); United States v. Ianiello, S 85 Cr. 115 (CBM) (S.D. N.Y. Sept. 3, 1985). As a result,

3/ See, e.g., United States v. Brown, 591 F. 2d 307, 310 (5th Cir. 1979), cert. denied, 442 U.S. 913 (1979); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); United States v. Gary, 565 F.2d 881, 887 (5th Cir. 1978), cert. denied, 435 U.S. 955 (1978); United States v. Robinson, 553 F.2d 429, 430 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978).

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they have reasoned, the statutes must be construed to exempt legitimate attorney fees from forfeiture to avoid unconstitutionality. The Department believes, however, that these decisions are incorrect.

The application of the third party forfeiture provisions to attorney fees impacts only the qualified right to counsel of choice and not a defendant's absolute right to be represented at all critical stages. A defendant who is effectively rendered indigent by their potential application is entitled to appointed counsel. Cf., United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979) ("the ... restraining order does not deprive [the defendant] of counsel, but only of the attorney of his choice. [He] will still be entitled to court-appointed counsel, if he has no means to hire an attorney."); see also United States v. Brodson, 241 F.2d 107 (7th Cir.) cert. denied, 354 U.S. 911 (1957).

The impact of the third party forfeiture provisions upon the ability to obtain counsel of choice in any event has been severely overstated and does not amount to an unconstitutional interference. The third party forfeiture provisions do not prohibit a defendant from paying attorney fees with assets which have not been generated or obtained from criminal activity. Additionally, if prior to conviction a defendant voluntarily restrains sufficient property to satisfy the judgment of forfeiture, it will not be necessary for the government to void any third party transfers. The same may be true even in the absence of a pretrial restraint if the defendant has sufficient funds at the time of the judgment of forfeiture to satisfy it.^{4/} Also, a defendant who is

^{4/} After obtaining a forfeiture judgment, the government may be entitled to satisfy the judgment from any funds in the hands of the defendant even if it cannot trace those funds. In United States v. Conner, 752 F.2d 566 (11th Cir. 1985), the court held that the government has no duty to trace cash proceeds of racketeering to specific assets owned by the defendant at the time of the forfeiture verdict in order to forfeit such assets. Presumably, the government may collect the forfeited sum from any assets owned by the defendant. As the court noted, "[m]oney is a fungible item. It matters not that the government received the identical money which the defendants received as long as the amount that was received in violation of the racketeering statute is known. The forfeiture in this case is for a specific amount of money. It is in personam and is money judgment against the defendant for the same amount of money which came into his hands illegally in violation of Title 18, Section 1963(a)(1) [RICO]." Id. at 576.

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indigent by virtue of a restraining order may have counsel of choice appointed, provided counsel is willing to accept appointment under the Criminal Justice Act. Finally, if a defendant transfers forfeitable assets to an attorney and has no assets to satisfy a forfeiture judgment, an attorney still can retain the fee if he/she was an unwitting participant and can establish by a preponderance of the evidence that he/she was reasonably without cause to believe the property was subject to forfeiture.

In view of the foregoing, the argument that the forfeiture provisions are constitutional only if they exempt attorney fees is an extreme and unwarranted interpretation of the Sixth Amendment. It amounts to arguing that the qualified right to counsel of choice includes the right to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity. The Sixth Amendment does not incorporate any such guarantee. Perhaps the most elementary qualification on the right to counsel of choice is economic. A defendant is entitled only to counsel of choice who he/she can afford. See United States v. Rogers, 471 F. Supp. 847, 851 (E.D. N.Y. 1979) ("Economic realities impose one obvious limitation on the defendant's right to be represented by a particular attorney.") If a defendant cannot afford a particular attorney, he/she is not entitled to have the government provide funds to pay that attorney. But that is what would happen if forfeitable assets transferred to an attorney were exempt from the third party forfeiture provisions. 5/

Most courts have not directly confronted the question of whether the subsequent forfeiture of assets transferred to an attorney for legitimate fees violates the qualified right to counsel of choice. Several courts, however, have held that a defendant can be prevented from using assets which are subject to forfeiture to pay counsel of choice. See, e.g.,

5/ Upon conviction, a defendant is divested of any title to forfeitable assets, and title passes to the United States as of the date of the offense. In the case of the forfeitable proceeds generated by the crime itself (e.g., proceeds of drug trafficking, loan sharking, bribery), operation of the relation back doctrine means that a convicted defendant is not just divested of any interest but that he/she never acquires any interest in such property. Unquestionably, to argue that such property may be used to pay counsel is to argue that the government must subsidize the payment of counsel of choice. But the Sixth Amendment only requires that counsel be appointed if a defendant cannot afford counsel, and the appoint does not have to be counsel of choice.

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United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), cert. denied, 105 S. Ct. 133 (1984); United States v. Long, 654 F.2d 911, 915-17 (3d Cir. 1981); United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979). The only cases to actually consider application of the third party forfeiture provisions to attorney fees are United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985) and United States v. Ianniello, S 85 Cr. 115 (CBM) (S.D. N.Y. Sept. 3, 1985). ^{6/}

As noted above, these courts held that any "legitimate" attorneys' fees and costs are immune from forfeiture, apparently even if the attorney knows they are being paid with forfeitable assets. The holdings, however, were based principally upon the courts' reading of congressional intent and only secondarily on constitutional grounds. The courts surmised that Congress intended the third party forfeiture provisions to apply only to sham transactions and not to transfers for legitimate fees. As discussed below, the Department believes that the courts' conclusion concerning Congressional intent is erroneous.

9-111.220 Congressional Intent

There is very little from which to conclude that Congress intended to create an exemption for attorney's fees from the operation of the third party forfeiture provisions. Indeed, such a conclusion effectively would render meaningless the "reason to know" requirement for equitable relief. More significantly, however, it is facially contrary to the plain language and history of the legislation.

The statutes themselves do not contain any language exempting from their operation property which an attorney accepts as payment for legal services and which he/she has reasonable cause to know is subject to forfeiture. In subsections (c) both statutes simply state that property subject to forfeiture becomes so at the time of the offense and in subsections (a) they define the types of property subject to forfeiture. None of the subsections contain any exception for property transferred to attorneys for legal fees.

The legislative history indicates that Congress explicitly rejected the notion that attorney fees are exempt from forfeiture. The Senate Report cited with approval United States v. Long, 654 F.2d 911 (3d Cir.

^{6/} Badalamenti, *supra*, discussed the issue in *dicta* in considering a motion to quash a subpoena to an attorney.

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1981), which it characterized as "holding that property derived from a violation of 21 U.S.C. §848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction, and that an order restraining the attorney from transferring or selling the property was properly entered." S. Rep., supra, at 200 n. 28.

Exemption of attorney fees also would undermine substantially the purpose of the third party forfeiture provisions. As the district court in In Re Grand Jury Subpoena, (Simels), No. M-11-188 (DNE) (S.D. N.Y., March 11, 1985) rev'd on other grounds, No. 85-6066 (2d Cir. June 27, 1985) stated: "[f]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power." Slip Op. at 18, n.14. It is hard to overestimate how significantly Congress' intent could be undermined by excluding attorney fees. A defendant could take full advantage of his/her ill-gotten gain by intentionally transferring tainted assets in payment of attorney fees and retaining only legitimate assets.^{7/}

^{7/} The conclusion that attorney fees constitutionally can be forfeited upon conviction also dispenses with the additional argument that the threat that attorney fees may be forfeited unconstitutionally interferes with the right to counsel of choice. It is axiomatic that if forfeiture of fees upon conviction does not violate the right to counsel of choice, then the threat that forfeiture might occur also does not violate that right. Moreover, in the absence of a restraining order, the inability to retain counsel when forfeiture is alleged is due solely to counsel's desire to be guaranteed payment of his/her fee. In this regard, the third party forfeiture provisions are not unlike other economic limitations. They mean only that the government's claim to forfeitable assets is superior to any other claims arising after commission of the offense, including counsel's claim to a fee. This does not interfere with a defendant's ability to retain counsel any more than a prior mortgage or tax lien which may encumber a defendant's assets. If counsel refuses to represent a prospective client because he/she believes that the client does not have the financial ability to pay as a result of these prior encumbrances there is no interference with the right to counsel of choice. Likewise, the forfeiture provisions do not impermissibly deny a defendant his/her counsel of choice.

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9-111.230 Policy Limitations on Application of Forfeiture Provisions to Attorney Fees

While there are no constitutional or statutory prohibitions to application of the third party forfeiture provisions to attorneys fees, the Department recognizes that attorneys, who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to meet the requirements for equitable relief without hampering their ability to represent their clients. In particular, requiring an attorney to bear the burden of proving he/she was reasonably without cause to believe that an asset was subject to forfeiture may prevent the free and open exchange of information between an attorney and a client. The Department recognizes that the proper exercise of prosecutorial discretion dictates that this be taken into consideration in applying the third party forfeiture provision to attorney fees. Accordingly, it is the policy of the Department that application of the forfeiture provisions to attorney fees be carefully reviewed and that they be uniformly and fairly applied.

9-111.300 DIVISION APPROVAL

No forfeiture proceedings under 18 U.S.C. §1963 or 21 U.S.C. §853 may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No civil forfeiture proceedings under any statute may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No formal or informal, written or oral, agreements may be made to exempt an asset transferred to an attorney as fees for legal services from forfeiture under 18 U.S.C. §1963 or 21 U.S.C. §853 or any civil forfeiture statute without the prior approval of the Assistant Attorney General, Criminal Division. See USAM 9-111.700, infra.

9-111.400 ATTORNEY FEE FORFEITURE GUIDELINES

The purpose of these guidelines is twofold. First, it is to insure that any forfeiture of assets transferred to attorneys as fees for legal services has been reviewed carefully. Second, it is to insure that the public's interest that those convicted of certain offenses do not realize

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any economic benefit from their illegal activity is pursued fairly and with due consideration for the individual's right to counsel in a criminal matter.

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

9-111.410 Forfeiture of Assets Transferred to an Attorney in a Fraudulent or Sham Transaction

Forfeiture of an asset transferred to an attorney as fees for legal services may be pursued where there are reasonable grounds to believe the transfer was a fraudulent or sham transaction designed to shield from forfeiture assets which otherwise are forfeitable.

The mere fact that an attorney has received a forfeitable asset as payment for legal fees by itself does not provide reasonable grounds to believe the transfer was a fraudulent or sham transaction. There must be reasonable cause to believe the asset was transferred for the purpose of impeding or defeating the government's ability to forfeit it. Generally, there should be some proof that a scheme existed to maintain the client's interest in the asset or ability to use it to his/her benefit. This may be shown, for example, by proof that the value of services actually rendered and that there was agreement by the attorney to transfer the asset or some portion of it back to the client. In other situations there may be evidence that the attorney agreed to transfer the asset to another third party for the benefit of the client or to an account or corporation that is controlled by the client. The evidence, however, need not establish that the attorney was a participant in the criminal activity giving rise to the forfeiture or that he/she otherwise violated any law.

9-111.420 Forfeiture of Assets Transferred to an Attorney for Representation in a Civil Matter

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a civil matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, when there are reasonable grounds to believe that the attorney had reasonable cause to know that the asset was subject to forfeiture at the time of the transfer. See USAM 9-111.520, infra.

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9-111.430 Forfeiture of Assets Transferred to an Attorney for Representation in a Criminal Matter

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a criminal matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, where there are reasonable grounds to believe that the attorney had actual knowledge that the asset was subject to forfeiture at the time of the transfer. However, such reasonable grounds must be based on facts and information other than compelled disclosures of confidential communications made during the course of the representation. See USAM 9-111.512 and 9-111.610, infra.

9-111.500 DISCUSSION OF ACTUAL KNOWLEDGE AND/OR REASONABLE CAUSE TO KNOW

The principal issue to be addressed in the application of these guidelines is what constitutes "actual knowledge" or "reasonable cause to know" that an asset is subject to forfeiture "at the time of the transfer." This issue must be resolved on a case-by-case basis. However, the following principles shall be applied in determining whether the prerequisite of actual knowledge or reasonable cause to know exists in a particular case.

9-111.501 At the Time of the Transfer

For purposes of these guidelines, a transfer occurs at the time an attorney becomes entitled to the asset free from any claim by the defendant or others. For example, if an asset is transferred to an attorney to be held in trust for the defendant, with the understanding that the attorney shall be entitled to a portion of the asset for legal services rendered, the time of the transfer will be the time at which the attorney renders the services and becomes entitled to the asset. If he/she has the requisite knowledge at that time, the asset may be subject to forfeiture.

9-111.510 Actual Knowledge of Forfeitability

For purposes of these guidelines, actual knowledge refers not simply to knowledge that some of a client's assets are either subject to forfeiture or from criminal misconduct. Rather, an attorney must have actual knowledge that the particular asset he/she received was subject to

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forfeiture. The guidelines require that there be reasonable grounds to believe that actual knowledge exists.

Reasonable grounds exist for believing that an attorney has actual knowledge that an asset is subject to forfeiture when there is evidence that it was known to the attorney at the time of the transfer either: (a) that the government had asserted that the particular asset is subject to forfeiture or (b) that the particular asset in fact is from criminal misconduct. See USAM 9-111.530, infra.

9-111.511 Knowledge that the Government has Asserted that a Particular Asset is Subject to Forfeiture

Generally an attorney will have actual knowledge that the government has asserted a claim that an asset is subject to forfeiture based upon some proceedings instituted by the government. Normally the government will do this by initiating civil forfeiture proceedings against the asset, or by applying for pre-indictment or pre-conviction restraining orders under 18 U.S.C. §1963 or 21 U.S.C. §853, or by obtaining an indictment containing a forfeiture count.

A civil forfeiture proceeding, if known to an attorney, will establish actual knowledge of the forfeitability of any assets which are the subject of the proceeding since such assets must be specifically identified in the complaint. ^{8/} For the same reason an attorney has actual knowledge of the forfeitability of any asset which he/she knows is subject to a restraining order based upon a forfeiture allegation in a criminal proceeding. However, when the government asserts a claim only by including a forfeiture count in an indictment and no assets have been restrained, the return of the indictment by itself will not necessarily establish actual knowledge that a particular asset is forfeitable. It will depend upon how specifically the asset is described in the forfeiture allegation.

^{8/} This is because in a civil forfeiture proceeding the res is the defendant and it must be sufficiently identified to allow seizure. A defendant, in most cases, will not be able to transfer an asset which is the subject of a civil forfeiture action to an attorney because the asset is actually seized as soon as the proceeding is instituted. However, in the rare case where a transfer takes place after the suit is initiated but before the seizure occurs, an attorney who has knowledge of the civil forfeiture action has actual knowledge that the particular asset is subject to forfeiture.

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There are essentially three means by which an indictment can describe property that is alleged to be subject to forfeiture. It may specifically describe the property, such as "ten shares of stock in XYZ Corp. certificate nos. 1-10, purchased on January 1, 1985" or "account 12345 at First National Bank, Downtown Branch in the name of the defendant." It can set forth a generic description of certain property by amount and/or type, such as "ten shares of stock in XYZ Corp." or simply "\$200,000." Finally, it can allege a broad all-inclusive description of property subject to forfeiture by incorporating statutory language, such as "any and all proceeds or profits of the criminal enterprise."

If property is specifically described, an attorney undoubtedly has actual knowledge of its forfeitability if he/she is aware of the contents of the indictment. However, if property is included in the forfeiture count only under a generic description or by the inclusion of the all-inclusive statutory language, an attorney does not have actual knowledge based on that fact alone that any particular asset is forfeitable. Instead, reasonable grounds to believe that an attorney has actual knowledge that the asset is subject to forfeiture would have to be based on evidence that the attorney knew the asset in fact was from criminal misconduct. Of course, the fact that an all-inclusive forfeiture allegation or a generic description was included in the indictment would be relevant evidence to establish such knowledge. See USAM 9-111.512, infra.

9-111.512 Knowledge that the Asset in Fact is from Criminal Misconduct

Regardless of whether any criminal or civil proceedings have been instituted or whether a forfeiture count specifically describes an asset, an attorney may have actual knowledge that an asset in fact is from criminal misconduct. Evidence that the attorney learned from the client or another involved in the criminal activity that the asset was from an illegitimate source would be compelling proof of the attorney's knowledge. Except when the use of such communications involves compelled disclosure of a confidential communications made during the course of representation, such communications may be relied upon to establish actual knowledge that the asset came from criminal misconduct. See USAM 9-111.430, supra. For example, a client's testimony at trial or voluntary disclosure of his/her communications with his/her attorney may be relied upon to establish actual knowledge. See USAM 9-111.610, infra.

While generic or all-inclusive descriptions of property alleged to be forfeitable by themselves do not establish actual knowledge that a particular asset has been alleged to be forfeitable, such descriptions are probative and relevant evidence to prove that an attorney had actual

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knowledge that an asset was from criminal misconduct. Also relevant is evidence of the method and manner of payment and the attorney's knowledge of the client's means of livelihood, so long as it is based on information other than compelled disclosure of confidential communications during the course of the representation. See USAM 9-111.610, *infra*. Additionally, the presence or absence of an order restraining assets is relevant.

The existence of actual knowledge that an asset is from criminal misconduct will have to be determined on a case-by-case basis, taking into consideration all of the relevant evidence. For example, if an indictment alleges that "all profits and proceeds, including \$200,000" are subject to forfeiture and \$200,000 has been restrained, there would have to be other evidence of an attorney's knowledge of the source of his/her fee to prove that he/she had actual knowledge that other cash he/she received is from the criminal misconduct. ^{9/} On the other hand, if there were no order restraining a sufficient amount of cash and the fee was paid in cash, circumstantial evidence may establish that the attorney had actual knowledge that the fee was paid from the proceeds of criminal misconduct. For example, actual knowledge might be established if a forfeiture count was based on a drug felony charge, the fee was paid in a manner suggesting that it was the proceeds of drug trafficking and there was evidence--other than from confidential communications--that the attorney knew the client had no legitimate source of income. This latter evidence might exist where a pauper's petition was filed by the attorney for the client in other proceedings, and the client had not been gainfully employed since that time.

9-111.520 Reasonable Cause to Know that an Asset is Subject to Forfeiture

"Reasonable cause to know that an asset is subject to forfeiture" means that there is information known to an attorney which if known to a reasonably prudent person would cause such person to believe that the

^{9/} In any event, if the government sought to forfeit a fee in such a case without direct evidence of the attorney's knowledge, the attorney could probably obtain equitable relief. He may be able to rely on the fact that sufficient cash was restrained to establish that he/she reasonably was without cause to believe that other cash is not subject to forfeiture.

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asset is forfeitable. ^{10/} Just as with actual knowledge, the starting point for deciding if an attorney has reasonable cause is an examination of the evidence of the attorney's knowledge of any legal proceedings instituted by the government for forfeiture of assets.

If civil proceedings have been instituted by the government to forfeit a particular asset or if a particular asset has been restrained, as discussed above, an attorney who has knowledge of the proceedings has actual knowledge of forfeitability. See USAM 9-111.511, *supra*. The same is true if the asset is specifically described in an indictment and the attorney knows the contents of the indictment. In these situations, any requirement under these guidelines that there be reasonable cause to know that an asset is forfeitable is met.

In other situations, all of the facts known to the attorney will have to be considered. The quantum of evidence required to establish reasonable cause to know will be substantially less than that needed to establish actual knowledge. However, the mere fact that an indictment alleges that "all profits or proceeds of the criminal activity" are subject to forfeiture will not meet the level of proof required to demonstrate reason to know. Similarly, forfeiture allegations which describe assets generically are sufficient to put an attorney notice that any assets of the type described potentially are subject to forfeiture, but they are not sufficient by themselves to establish reasonable cause to know. An attorney who accepts any such assets acts at his or her peril, and circumstantial evidence may establish that there was reasonable cause to know. Perhaps the only fact that *prima facie* would negate reasonable cause is the presence of a restraining order. For example, if an indictment alleges that \$200,000 is subject to forfeiture, the existence of a restraining order applying to that same amount of cash could negate reasonable cause to believe that other money is forfeitable. See note 9, *supra*.

^{10/} The standards set forth herein concerning proof of reasonable cause to know express no opinion concerning the Department's position as to what proof constitutes that a third party was "reasonably without cause to believe that the property was subject to forfeiture." Rather, the standards herein apply only to the Department's policy of not seeking forfeiture in certain cases unless there is evidence that an attorney had reasonable cause to know. See USAM 9-111.420, *supra*.

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9-111.530 Policy Concerning Issuance of Notification Letters to Attorneys

There may be cases where there are reasonable grounds to believe that all of a defendant's assets are subject to forfeiture. Under these guidelines, however, the only assets which an attorney conclusively would be held to have actual knowledge of forfeitability are those specifically named in the indictment or subject to a restraining order or civil forfeiture proceeding. There would have to be some evidence in addition to the forfeiture allegations to establish actual knowledge of the forfeitability of those assets which are not specifically described or subject to restraint. See USAM 9-111.510, *supra*. As a result, it may be extremely difficult in cases where all of a defendant's illegitimate assets have not been discovered to prove actual knowledge, even though there are grounds to believe no legitimate assets exist. Although this may limit the cases in which actual knowledge may be established, the Department believes it is inappropriate to give written notice to an attorney that a particular asset or that all assets belonging to a defendant are from an illegitimate source or subject to forfeiture simply to meet the requirement of actual knowledge imposed by these guidelines.

Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice. The argument could be made that if the notice is not based upon a probable cause determination that the assets are subject to forfeiture, it was sent only to harass the attorney or cause him/her to abandon the case and not because the asset legitimately is subject to forfeiture. Thus, the government may be sidetracked into prolonged litigation which is only ancillary to the criminal charges. Additionally, if there is probable cause that a particular asset or all of a defendant's assets are forfeitable, the written notice is unnecessary. The assets which are known to the government at the time of indictment can be specifically described in the forfeiture count. ^{11/} Additional assets discovered after return of the indictment can be included in a superseding indictment or can be subjected to a restraining order by making an appropriate showing

^{11/} Including the assets in the indictment would not only have the benefit of establishing knowledge, but also would allow a restraining order to be obtained without a further showing.

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to the court. Therefore, actual knowledge will be established by the restraining order or the specific description in the indictment. 12/

Another reason cautioning against written notice is that if it is not routinely and uniformly given, it will be argued that the government is targeting certain attorneys and attempting to prevent them from representing criminal defendants in certain cases. The Department does not have or endorse such a policy and believes it is unwise to create even an appearance that such a policy exists.

The limitation herein does not apply to written notice of the government's intent to seek forfeiture of an asset when it has been concluded that an attorney has actual knowledge--based on facts and information other than that contained in the written notice--that the asset is subject to forfeiture. However, where the criminal case giving rise to the forfeiture has not been concluded, such notice should be given only in extraordinary cases and may not be given without the approval of the Assistant Attorney General, Criminal Division.

9-111.600 DISCOVERY OF INFORMATION CONCERNING AN ASSET TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

Proceedings to forfeit an asset transferred to an attorney may be instituted only after the requirements of these guidelines and the approval of the Assistant Attorney General, Criminal Division have been obtained. Of course, this requires that a certain amount of information concerning the transfer of the asset be known. The discovery of information concerning the payment of a fee may be carried out as set forth herein.

12/ Perhaps the only situation in which some forfeitable assets would not be covered in this manner is when there is evidence that all assets belonging to a defendant are from criminal activity, but the government has not been able to locate all of them. In such cases, if there is probable cause to establish that all of the defendant's assets acquired after a particular date were from the criminal misconduct, the evidence could be presented to the grand jury and an allegation to that effect could be included in the forfeiture count. This allegation would be relevant and probative to prove that an attorney had actual knowledge that an asset he/she received was forfeitable. See USAM 9-111.510, *supra*. Actual knowledge could be established by evidence, from sources other than confidential communications, that the attorney knew the asset he/she received was obtained by the defendant after the date alleged in the indictment.

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9-111.610 Compelled Disclosure of Confidential Communications During the Course of the Representation

As set forth above, actual knowledge of the forfeitability of an asset, cannot be established by compelled disclosure of confidential communications made during the course of the representation. See USAM 9-111.430, *supra*. This limitation upon compelled disclosure of confidential communications does not preclude the use of these confidential communications when they are voluntarily disclosed. For example, the testimony of the defendant at trial may be relied upon. This limitation also does not preclude the use of a subpoena to obtain non-privileged fee information, such as the amount, source and method of payment. See USAM 9-111.620, *infra*. But the subpoena may not seek to obtain any confidential communications.

This limitation on compelled disclosures does not recognize or imply that all confidential communications between a client and an attorney are protected either by that attorney-client privilege or the constitutional right to counsel. Only those confidential communications which meet all the requirements for privilege or which relate to defense preparation are protected. See, e.g., United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981); United States v. King, 536 F. Supp. 253, 264-65 (C.D. Cal. 1982). The Department imposes this limitation in recognition of the fact that the need for clients to make full and free disclosure to their attorneys outweighs the detriment of placing limitation on the use of some non-privileged communications in certain limited situations.

9-111.620 Subpoenas Issued to Attorneys to Obtain Fee Information

The Department requires that any grand jury or trial subpoenas to an attorney for information relating to the representation of a client must be authorized by the Assistant Attorney General, Criminal Division. See USAM 9-2.161(a). Information concerning the amount, source and method of payment of a fee paid to an attorney is information "concerning the representation of a client." Consequently, before a subpoena may be issued for such information, each of the requirements of that policy must be met. Most of these requirements should be easily met when issuing a subpoena to an attorney for fee information.

The requirements that the information be non-privileged and relevant can be satisfied when the subpoena calls for fee information. Generally, courts have held that fee information is not privileged. See, e.g., In re Shargel, 742 F.2d 61 (2d Cir. 1984); In re Ousterhoudt, 722 F.2d 591 (9th Cir. 1985); In re Special Grand Jury (Harvey), 676 F.2d 1005 (4th Cir.)

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vacated and withdrawn, 697 F.2d 112 (1982) (en banc). In re Grand Jury Subpoena (Slaughter), 694 F.2d 1258 (11th Cir. 1982); In re Grand Jury Proceedings, United States v. Jones, 517 F.2d 666 (5th Cir. cert. denied, 449 U.S. 1083 (1981)); United States v. Strahl, 590 F.2d 10 (1st Cir. 1978, cert. denied, 440 U.S. 918 (1979)); United States v. Haddad, 527 F.2d 537 (6th Cir. 1975) cert. denied, 425 U.S. 974 (1976). They also have recognized that fee information may be relevant to a criminal case or investigation. It may prove unexplained wealth which is relevant to show that a defendant obtained substantial income from his/her illegal activities. It may show that the fee for one or more alleged conspirators was paid by another co-conspirator which is relevant to prove "association in fact" or may lead to the discovery of other co-conspirators. Finally, it may show the disposition of forfeitable assets or lead to the discovery of forfeitable assets which have been hidden by a defendant. The requirement that reasonable attempts to obtain the information from alternative sources must be exhausted will have to be considered on the facts of each case, but it should pose no special problem. The remaining two requirements, however, do involve some special considerations.

The requirement that there be "reasonable grounds to believe . . . that the information sought is reasonably needed" is straight-forward when the fee information is sought to prove association in fact or unexplained income. But where the purpose of a subpoena is solely or principally to obtain evidence relevant to a forfeiture count, this requirement translates into reasonable grounds to believe that the fee information is evidence of or will lead to evidence either of the disposition of forfeitable assets or the existence of hidden assets. This means that there must be a basis to conclude that there are assets subject to forfeiture which have not been identified or located. This may exist, for example, if there is evidence that a defendant either had no legitimate income or derived all of his/her income from an illegitimate source at the time the fee was paid. It may also exist if there is evidence that a defendant derived a certain and substantial amount of income from his/her illegal activity, the disposition or whereabouts of which are unknown, and he/she had no substantial legitimate income at the time the fee was paid.

The final requirement is that the need for the information must outweigh the potential adverse effects on the attorney-client relationship. If the fee information is sought solely or principally to obtain evidence concerning a forfeiture count, the availability of post-judgment discovery may mean that the need to subpoena the information, particularly at trial, does not outweigh the potential for disqualification. See USAM 9-111.630, infra.

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9-111.630 Post-Judgment Discovery Proceedings Under 18 U.S.C. §1963 and
21 U.S.C. §853

Both the RICO and drug felony forfeiture statutes provide that the court may order that depositions be taken or that records be produced after an order of forfeiture is entered in order to identify and locate property declared forfeited. See 18 U.S.C. §1963(1); 21 U.S.C. §853(m). Consequently, if an order of forfeiture is entered covering property which is described generically or by incorporation of the statutory language, the government may make application to the court to obtain records, documents or testimony concerning the identity and location of that property. When an application is made for the deposition of an attorney or the production of records by an attorney concerning the transfer of assets for legal services, the requirement set forth in USAM 9-111.620, supra, that there be reasonable grounds to believe that the fee information will be evidence either of the disposition of forfeited assets or lead to the discovery of forfeited assets shall apply.

It should be noted that since these statutory proceedings will occur after trial, the likelihood for any adverse impact upon the attorney-client relationship will be diminished substantially. In particular, the potential for disqualification of the attorney from representation of the client because of the need to testify at trial should not arise. Therefore, when fee information is sought solely for purposes of forfeiture and it is feasible, the discovery of such information should be deferred to the post-trial proceedings rather than proceeding by way of grand jury or trial subpoena.

9-111.700 AGREEMENTS TO EXEMPT FROM FORFEITURE AN ASSET TRANSFERRED TO AN
ATTORNEY AS FEES FOR LEGAL SERVICES

Agreements may be entered into to exempt from forfeiture an asset transferred to an attorney as fees for legal services, but only with the prior approval of the Assistant Attorney General, Criminal Division. See USAM 9-111.300, supra. Agreements may be approved only if: (1) there are reasonable grounds to believe that the particular asset is not subject to forfeiture; and (2) the asset is transferred in payment of legitimate fees for legal services actually rendered or to be rendered.

Efforts should be made to assist in identifying the assets, if any, belonging to a defendant which are not subject to forfeiture. In this regard, any proffer of evidence by an attorney as to the source of the assets may be relied upon. However, an agreement to exempt fees based on such a proffer must contain an express condition that the agreement is not

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binding if full and accurate disclosure has not been made or if the proffer is false or misleading.

In determining whether an asset is being transferred in payment of a legitimate fee, the amount of the fee may be taken into consideration. However, the focus should not be on whether the fee is reasonable. The focus must be on whether it is a legitimate transaction or a sham transaction designed to shield assets from forfeiture. If the transaction is legitimate, the fee, even if it appears exorbitant, may be exempted if it is paid from a source that meets the first requirement. Conversely, a fee, even if reasonable, may not be exempted from forfeiture by agreement if the first requirement is not met. Any agreement to exempt a fee from forfeiture, however, may be limited to specific amount if there is basis to believe that only assets in that amount are not subject to forfeiture.

1984 USAM (superseded)



U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

January 15, 1987
(Expires June 15, 1987)

TO: Holders of United States Attorneys' Manual Title 9

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

W.F.W.
C.D.
RE: Forfeiture of Substitute Assets

William F. Weld
Assistant Attorney General
Criminal Division

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-111.800

PURPOSE: This bluesheet sets forth the consultation requirement prior to institution of forfeiture proceedings pursuant to 18 U.S.C. §1963(n).

The following is a new section.

18 U.S.C. §1963(n) and 21 U.S.C. §853(p) allow the government to seek criminal forfeiture of any property of a defendant as a substitute to property forfeitable under the sections if, as a result of any act or omission of the defendant, the property forfeitable under subsection (a) of the sections--

- (1) cannot be located upon the exercise of due diligence;
- (2) has been transferred or sold to, or deposited with, a third party;
- (3) has been placed beyond the jurisdiction of the court;
- (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty.

BEFORE THIS PROVISION IS UTILIZED, CONSULTATION WITH THE ASSET FORFEITURE OFFICE IS REQUIRED.

BS #9.051

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9-120.000 COLLECTIONS I - CRIMINAL COLLECTION SYSTEM

Supervision of matters pertaining to collection of criminal fines, criminal penalties, court costs, and appearance bond forfeiture judgments is assigned to the Office of Enforcement Operations of the Criminal Division.

This chapter describes the Criminal Collection System drawn by the Criminal Division from the best aspects of collection work in the U.S. Attorneys' offices.

A. This outline is premised upon three points:

1. One attorney should be assigned criminal collection responsibility and held accountable for the work product of the office in this area. Responsibility and accountability mean that one assistant does most, if not all, of the legal work required for criminal collection activity. He serves as the head of the Criminal Collection Unit, makes legal decisions, and provides supervision and legal guidance for the collection clerks. This Assistant U.S. Attorney position is established in 28 C.F.R. §0.171. ← he/she

2. One support staff employee should be appointed criminal collection clerk and the duties of that position should be clearly defined. This clerk works under the guidance of the attorney with collection responsibility and performs all clerical and reporting tasks for the Criminal Collection Unit. In districts where the total collection workload requires the assignment of two or more collection clerks, one clerk should be specifically designated as the criminal collection clerk.

3. All criminal collection work for the entire district should be consolidated in one office under the direction of the attorney with criminal collection responsibility.

In most districts, neither criminal collection attorney nor clerk assignments will require the full time of either staff member. In some districts, a substantial effort will be needed to correct a backlog of problems. After this initial period, a smaller amount of time will be required to maintain a criminal collection program which meets Criminal Division and Department standards and effectively enforces outstanding fines, appearance bond forfeiture judgments, criminal court costs, and criminal penalties.

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B. An effective criminal collection program systematically locates the debtor, secures accurate and complete financial information, and enforces the judgment by arranging and supervising appropriate payments or by initiating legal action designed to eliminate the debt. To accomplish this threefold task, a Criminal Collection Unit must, as a minimum, employ an enforcement system which will efficiently:

1. Familiarize the attorney with criminal collection responsibility and the collection clerk with collection problems and opportunities in the district.
2. Discover all unsatisfied criminal monetary impositions which are owed to the United States government.
3. Report these impositions to the Department of Justice.
4. Accomplish timely review of each criminal imposition as required by the Criminal Division. This review may be monthly or even daily, but in no case should more than four months elapse between reviews of active cases or more than a year elapse between reviews of suspense cases.

These reviews should promote close contact with the debtor and result in a complete financial picture of the individual.

5. Aggressively employ the clerical and legal collection techniques available under federal and state law.

6. Permit cooperation and information exchange between the U.S. Attorney and the U.S. Probation Office, the Federal Bureau of Investigation, the Internal Revenue Service, and the U.S. Bureau of Prisons, as well as any other agency with an interest in the debtor. However, caution should be taken to comply with the provisions of the Privacy Act (5 U.S.C. §§552(a), et seq.). (See USAM 9-120.210, infra.)

7. Allow closing of cases only when impositions have been properly satisfied.

An accurate, understandable, and useable criminal collection clerical system is an absolute necessity for the efficient functioning of the Criminal Collection Unit. Accepting less is not only expensive and time consuming, but may result in a failure to aggressively pursue all criminal debtors and enforce the judgments of the court.

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Eighty percent of the criminal collection task can be effectively accomplished by clerical or paralegal personnel. The final 20 percent includes the employment of legal sanctions available to the U.S. Attorney and is essential to the collection program. Thus, attorney supervision and participation is necessary to guarantee prompt functioning of the entire system at all times.

9-120.100 CLERICAL AND RECORD-KEEPING RESPONSIBILITIES

9-120.110 Criminal Debtor Cards (Forms USA-117A)

The Criminal Debtor Card (Form USA-117A) is an 8 1/2" x 10 1/2" white card with a snap-out carbon copy. "Criminal Debtor Card" is printed on the bottom center of the form and "USA-117A" on the lower left corner. The upper portion of the card presents a general information section which includes background material on the debtor. Entries in this section which are likely to change (e.g., address of debtor) should be made in pencil. Beneath this heading are seven columns used to record all collection efforts attempted and all payments received in the case. The column headings are generally self-explanatory. (See USAM 9-122.001.)

The snap-out carbon copy is used to report the imposition to the Justice Data Center so that it may be included on the Attorney General's records.

It is helpful to copy an abstract or summary of the judgment onto the Form USA-117A. This establishes at the outset the nature and type of imposition which must be collected. Stand-committed fines and fines imposed as conditions of probation are governed by specific collection policies. The summary of judgment alerts the collection staff to employ the correct procedures.

It is also useful to record a brief synopsis of telephone conversations, letters, personal interviews, and other collection efforts. These entries are necessary to provide those reviewing the case with a quick, comprehensive background of the collection activity.

In addition to reflecting the collection attempts noted in the case folder, the Form USA-117A will detail all payments which the debtor has made to the Clerk of the United States District Court. The six columns on the right half of the form are used to record these payments. Some clerks will send, upon request, a list of all payments received from criminal debtors. Proper coordination and cooperation with the U.S. District Court Clerk will insure accurate payment information.

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The Forms USA-117A should be filed apart from the case folders maintained for all debtors. See USAM 9-120.120, *infra* (Case Folders). Since reference to the case folders will not be necessary each time information on a particular debtor is needed, accurate and complete Forms USA-117A can provide a time-saving device for information retrieval. In addition, since this is the permanent record of the collection effort, it should note every collection activity.

Three basic filing categories are suggested: open, closed, and transferred.

A. Open. One alphabetical file including all Forms USA-117A for criminal fine debtors, appearance bond forfeiture judgment debtors, criminal court cost debtors, or criminal penalty debtors who have not satisfied their obligations.

B. Closed. One alphabetical file including all Forms USA-117A for criminal fine debtors, appearance bond forfeiture judgment debtors, criminal court cost debtors, or criminal penalty debtors who have satisfied their obligations. These forms are to be handled in compliance with Department of Justice regulations with respect to records disposal. See OBD 2710.2 (10/6/76).

C. Transferred. One alphabetical file for those criminal fine debtors, appearance bond forfeiture judgment debtors, criminal court cost debtors, or criminal penalty debtors whose obligations were imposed in your district and who have moved elsewhere without satisfying their obligations. This third category is recommended in order to effectively clear your records as these debtors satisfy their obligations. When their obligations are satisfied, your district is notified and you can then close your Form USA-117A.

9-120.120 Case Folders

The criminal collection clerk should maintain a collection case folder for each criminal debtor with an outstanding criminal imposition. In cases with multiple defendants, each debtor should be maintained in a separate case folder.

Absent a criminal monetary imposition, the case folders are shipped to the Federal Records Center according to a prescribed schedule. When a criminal imposition remains unsatisfied, the folder is retained by the Criminal Collection Unit until such satisfaction. In all but the most voluminous cases, the criminal collection folder can be the same folder used during the cases and matters stages of the prosecution. Before

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placing the folder in the alphabetical file of criminal collection folders within the unit, the collection clerk should clearly note on the jacket that it is now a criminal collection folder. The designation of the case folder as a criminal collection folder is also noted on the office master index card for the case.

The criminal collection case folder should include all court orders, motions, letters, and documents pertinent to the collection activity; for example, copies of demand letters and financial statements of debtor. A copy of the judgment levying the monetary imposition must be enclosed to positively verify the validity of the judgment. Folders for those debtors whose financial situation prevents current payment (status codes 887 and 888) should include a brief memorandum indicating the reasons for placing the case in an annual review status.

The three filing categories suggested for the Forms USA-117A are also recommended for the case folders: open, closed, and transferred.

A. Open. One alphabetical file including all case folders for criminal fine debtors, appearance bond forfeiture judgment debtors, criminal court costs debtors, and criminal penalty debtors who have not satisfied their obligations.

B. Closed. One alphabetical file including all case folders for criminal fine debtors, appearance bond forfeiture judgment debtors, criminal court cost debtors, and criminal penalty debtors who have satisfied their obligations. These forms are to be handled in compliance with Department of Justice regulations with respect to records disposal.

C. Transferred. One alphabetical file for those criminal fine debtors, appearance bond forfeiture judgment debtors, criminal court cost debtors, and criminal debtors whose impositions were assessed in the district and who have moved elsewhere without satisfying their obligations. This third category will help clear collection records as these impositions are satisfied. It will also retain the case folder for reference should questions arise in the district to which the case has been transferred. As these obligations are satisfied, the originating district is notified and the case folder can be closed. (Other procedures necessitated by case transfer are outlined in USAM 9-120.150 infra.)

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9-120.130 Suspense System

A suspense system or "tickler file" for criminal impositions should be created. The only function of the suspense system is to bring cases requiring review to the timely attention of the Collection Unit so that prompt collection activity may be initiated in every case.

This suspense system should consist of a 3 x 5 index card for each debtor with an unsatisfied criminal monetary imposition. The card should list only the debtor's name.

The index cards are placed in the suspense file which contains a series of dividers numbered 1-31 for each possible day of the month. There is only one such series, not 12. Cards are placed behind the appropriate number corresponding to the day (disregarding the month) the file is to be reviewed. Thus, cards alerting review on March 5, May 5, and December 5 would all be found behind the same "number five" divider.

Each day of the month, all cards for that day are pulled. On March 5, for example, all cards behind the "number five" divider are reviewed. Those pertaining to the current month and year are noted. Cards for any other month and year are immediately returned to the suspense file so that they will trigger case review when the appropriate month arrives.

The collection clerk then pulls the debtor card for each case to be reviewed that day. After initial review, case folders for those needing extensive work should be pulled. Example 1: X's criminal debtor card is pulled. He has received a demand letter, and a follow-up telephone call is now required. This call can be made automatically without further reference to the case folder. After the call is completed, a memorandum noting the result of the call is placed in the case folder, and the action is recorded on X's debtor card.

Upon completion of the review, each suspense card should be marked for the next review day and placed behind the corresponding day in the suspense file. The day of next review and the action taken must be noted on the debtor's Form USA-117A, and any correspondence involved should be placed in the debtor's folder.

Example 2: It is April 20, 1976. The Y case is reviewed and a demand letter is sent requesting a reply in ten days. The suspense 3 x 5 card is marked for 5/1/76 and placed behind 1 in the index card suspense file; the action and the date 5/1/76 is noted on Y's Form USA-117A; a copy of the letter is placed in Y's case folder. On the first day of May, the suspense card is again pulled, appropriate action is taken, the suspense card is marked and placed behind a new date, and the action and date area

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again noted on Y's Form USA-117A. This process is repeated for each review.

Example 3: It is April 20, 1976. The Z case is reviewed; verification of imprisonment until 1978 has been received, and no assets of the debtor have been located. The case should be reviewed in one year. The suspense card is marked 4/20/77, and returned to the 20 slot in the Z's case folder; the action and suspense date are noted on suspense file; the notice indicating continued imprisonment is placed in Z's Form USA-117A.

A 1-31 type suspense system is recommended because it provides the simplest and most efficient method for prompting timely review. Other suspense systems, while perhaps as effective, require the creation of elaborate rules for placement of cards in their particular slots. Diary systems are discouraged as the effort required to completely caption each case in the diary on its proper date is too time consuming, and may tempt the collection clerk to omit posting to the diary when pressed with other collection tasks. The 3 x 5 card requires a minimum of effort to maintain.

9-120.140 Payments

Full payment should be demanded initially in every case.

When full payment cannot be made immediately, a courtesy arrangement consisting of an installment payment program can be created. Installment programs, based upon accurate financial information (i.e., Forms OBD-500, Forms OBD-500a, OBD-500b, OBD-500c, Federal Bureau of Investigation financial investigations, Internal Revenue Service income tax returns, U.S. Probation Office presentence reports), should be structured to liquidate the obligation as soon as possible. The debtor should clearly understand that installment payments are a courtesy extended to him/her by the government.

The U.S. Attorneys may send a pre-addressed envelope to the installment payment debtor five or six days prior to the due date for each installment. Sending a pre-addressed envelope serves as a reminder that payment is due, and that the U.S. Attorney is anticipating prompt remittance. Inasmuch as the use of postage-paid envelopes for this purpose may be a violation of 39 U.S.C. §3204, postage-paid envelopes should not be used.

The envelope should be addressed to the U.S. District Court Clerk. The debtor who is making installment payments on a criminal monetary imposition levied in a jurisdiction other than the district in which

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he/^{she} presently resides may receive an envelope addressed to the local U.S. District Court Clerk or to the supervising U.S. Attorney. However, payments ultimately must be forwarded to the U.S. District Court Clerk in the district of imposition. Thus, the local court clerk would logically be the addressee since this would enable him/^{her} to forward the payment within the clerk of court system to the district of imposition and at the same time notify the U.S. Attorney of payment. If the local court clerk refuses to accept a payment for forwarding to another jurisdiction, the U.S. Attorney's office should contact the Criminal Division Collection Unit so that it may work with the Administrative Office of the U.S. Courts to solve the problem.

The U.S. Attorney in the transferee district may prefer to have payments directed to him/^{her} for forwarding to the U.S. District Court Clerk in the district in which the imposition was assessed. This latter procedure is less desirable, however, since the General Accounting Office has repeatedly ruled that court clerks alone should receive payments.

It is unwise in transfer cases to have installment payments mailed directly to the district of imposition for the delay in notifying the U.S. Attorney in the district in which the debtor currently resides would hinder effective supervision of the payment schedule.

Each installment payment program should be reviewed annually to determine whether or not a change in the debtor's financial situation requires an adjustment in the amount of the installments.

Each installment debtor who misses a payment must be contacted immediately by telephone, mail, or personal interview, if possible, to reassert the importance of regular payments. The suspense system should be organized to trigger this follow-up activity.

Personal checks should be accepted for payment of fees, fines, and costs of all U.S. District Court Clerks except in cases where good judgment would dictate requiring payment in a more guaranteed form. This general policy is prescribed by the Administrative Office of the U.S. Courts and is stated in Memorandum No. 564, issued May 30, 1972, to all Clerks of U.S. District Courts. Those district court clerks who find this general policy unsuitable for their district should advise the Accounting Branch of the Administrative Office of the U.S. Courts of the policy that is in effect for their district and the reasons for its continuance.

When jurisdiction of probation has been transferred, all fines and costs payments shall be made to the U.S. District Court Clerk that has

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received the jurisdictional transfer. The court clerk shall be responsible for processing all of the payments and upon completion of the payments of fines and costs will notify the court clerk of origin regarding the satisfaction of the judgment. This policy is prescribed by the Administrative Office of the U.S. Courts and is stated in a memorandum issued June 5, 1972 to all Clerks of U.S. District Courts and all U.S. Probation Officers.

9-120.150 Case Transfer

There are five required steps to be taken when supervision of a criminal fine, appearance bond forfeiture, criminal court cost, or criminal penalty is transferred to a foreign district. The steps are basic and meant to provide adequate information to allow the originating district to terminate the case and the transferee district to begin collection efforts. Three terms must be defined to prevent confusion.

A. District of Imposition - The federal district in which the criminal fine, appearance bond forfeiture judgment, criminal court cost, or criminal penalty was imposed.

B. Originating District - The district which is presently transferring the case. If the case is being transferred for the first time, the district of imposition and the originating district will be the same.

C. Transferee District - The district to which the case is being transferred and in which the debtor currently resides.

In most cases, the district of imposition is also the originating district. However, given the mobile debtor who may continually move about the country, the originating district occasionally may not be the district in which the imposition was assessed. It is also possible that a mobile debtor will leave the district of imposition and later return. In such cases, the district of imposition will also be the transferee district at a later time.

Fine debtors who are on probation are under the immediate supervision of the Probation Office and the individual probation officer is responsible for collection of the criminal imposition. The U.S. Attorney should monitor the progress of these cases. When a probation fine debtor moves from one district to another and Probation Office jurisdiction is transferred, the U.S. Attorney should process a transfer as outlined below. In those cases in which supervision only is transferred, the U.S. Attorney will not transfer the case. This change has been made to eliminate

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paperwork; for this reason, it is requested that U.S. Attorneys not return cases previously transferred while supervision remains in their district.

The transfer policy does not apply to incarcerated fine debtors. When the debtor is not only fined but imprisoned as well, the district of imposition should retain the case folder and record the fine on its Criminal Outstanding Fines and Forfeitures Pending Inventory without regard to the federal district in which the institution of confinement is located. If, upon release, the debtor moves to a district other than that of imposition, the transfer procedure explained below is then implemented.

A. The originating district should ascertain the debtor's current address in the foreign jurisdiction.

No judgment should be transferred unless definite address information is provided. Addresses must be specific. A generalization such as "he/she lives in New York City" is not acceptable.

B. The originating district should send a copy of the defendant's Criminal Debtor Card (Form USA-117A) to the transferee district.

The originating district retains its Form USA-117A, placing it in the "transferred" file after clearly noting the date of transfer and the transferee district on the form. When the originating district is not also the district of imposition, the Form USA-117A may be placed in the "closed" file.

C. The originating district should send a copy of the collection case folder to the transferee district.

1. Originating District Responsibilities

The case folder, or xerox copies of the pertinent documents in it, should be forwarded to the transferee district. The case folder should include all court orders, motions, letters, and documents pertinent to the collection of the imposition. Two certified copies of the judgment and commitment order levying the monetary imposition and a Certification of Judgment for Registration in Another District (CIV-101) must be enclosed so that the judgment can be registered in the transferee district and recorded as a judgment lien against realty held in the transferee district. FBI financial investigations, if available, should also be forwarded.

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The case folder should be placed in a "transferred" file. The date of transfer and the transferee district should be noted on the jacket. When the originating district is not also the district of imposition, the case folder may be placed in the "closed" file.

It must be recognized that the originating district and the district of imposition have an obligation to assist in the collection of the imposition. Prior to and after transfer, these districts must cooperate with the U.S. Attorney in the transferee district to effect collection.

2. Transferee District Responsibilities

When a debtor owns real property in the originating district, liens against the realty should be renewed by the U.S. Attorney in the originating district as required by state law.

The transferee district, bearing primary responsibility for effecting collection, must remind the originating district of the forthcoming expiration of such liens and the need to renew them. Should the transferee district determine that renewal is not necessary for the protection of the government's interest, liens may be allowed to expire.

If the debtor owns real property in the transferee district, the newly registered judgment should be perfected as a lien. The Assistant U.S. Attorney with collection responsibility should exercise discretion in perfecting liens when the judgment is very small (less than \$150).

28 U.S.C. §1963 allows for registration of foreign judgments in the transferee district. When a criminal fine judgment of the foreign court is presented to the U.S. District Court Clerk in the transferee district, the clerk may choose to register the judgment as a civil judgment or a miscellaneous judgment. Registration as a civil or miscellaneous judgment neither alters the criminal nature of the fine nor prevents perfecting the judgment as a lien against all nonexempt realty in the transferee district. The fine retains its criminal character and therefore may not be closed as uncollectible or compromised.

In a few districts, the U.S. District Court Clerk may refuse to accept a foreign criminal judgment for registration. This amounts to a refusal by the court clerk to accept the Administrative Office of

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the U.S. Courts' printed Form CIV-101. Such clerks require the U.S. Attorney in the transferee district to file a civil suit upon the foreign criminal judgment. The new civil judgment, based upon the foreign criminal judgment, will then be registered and a judgment lien may be perfected. Registration of the judgment in a transferee district simplifies legal enforcement proceedings. Registration is not a prerequisite for administrative collection attempts. Demand letters, telephone demands, personal interviews, and other administrative techniques can be conducted even though the judgment is not registered.

D. The originating district and the transferee district must complete the proper record-keeping procedures.

The transferee district, upon receipt of notice of the transfer, should prepare a Criminal Debtor Card and open a criminal collection case folder. The imposition amount on the Debtor Card should reflect only the amount of the transferred imposition which remains unpaid at the time of the transfer. The original date of imposition, not the date on which the debtor card is prepared, must be entered on the debtor card.

E. The originating district should send a cover letter to the transferee district.

A copy of the cover letter should be sent to the Criminal Division Collection Unit. The letter should include the current address of the debtor, unusual details of the case, the district's experience in attempting to collect, and information concerning the term of the debtor's probation, if applicable. The status of any existing judgment lien against realty in the originating district should also be reported as well as the date of the expiration of the lien and the procedures necessary to renew it.

If the debtor is on probation, the transferee district should contact the local probation office, determine the supervising probation officer and offer the U.S. Attorney's assistance in the enforcement effort.

If a district of imposition is transferring a case, the cover letter must include an additional request. The transferee district should be asked to notify the district of imposition when the debt has been satisfied. The district of imposition should also request notification if the debtor moves from the transferee district to another district.

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These requests are necessary because the district of imposition retains the Criminal Debtor Cards for all transferred cases in a "transferred" file. When notification of satisfaction is received from the transferee district, the district of imposition may make the appropriate notation on the Form USA-117A and place it in the "closed" Form USA-117A file. Decisions to compromise or close appearance bond forfeiture judgments or criminal court cost cases should also be reported to the district of imposition so that the debtor's Form USA-117A can be removed from the "transferred" file and placed in the "closed" file.

F. Case Transfer Check List. Originating District.

1. Ascertain the debtor's address.
2. Send a copy of the Criminal Debtor Card to the transferee district.
3. Transfer the case folder, or xerox copies of the pertinent documents in it, two certified copies of the judgment and commitment order, and a Certification of Judgment for Registration in Another District (CIV-101) to the transferee district.
4. Send a cover letter to the transferee district including the current address of the debtor, any unusual details of the case, the originating district's experience in attempting to collect, information concerning the term of the debtor's probation (if applicable), the status of any existing judgment liens against realty (noting the date of expiration and the procedures necessary to renew), and a request to be notified when the fine is satisfied or the debtor moves to another district. Send a copy of the cover letter to the Criminal Division Collection Unit.
5. Note the transfer on the Criminal Debtor Card and file it with the "transferred" forms (district of imposition) or "closed" forms (other than district of imposition).
6. Include a memorandum of the transfer in the debtor's case folder and file it with the "transferred" case folders (district of imposition) or "closed" case folders (other than district of imposition).

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7. Renew judgment liens on real estate in the originating district as requested by the U.S. Attorney in the transferee district.

G. Case Transfer Check List. Transferee District.

1. Include the debtor's name, the balance of his ^{her} fine, and the original date of imposition on the Criminal Debtor Card.

2. Register the judgment in the U.S. District Court Clerk's office.

3. Perfect a judgment lien in the transferee district.

4. Verify the debtor's address and initiate enforcement efforts. If the debtor cannot be located at the address provided within 30 days, return the case to the originating district.

5. Remind the originating district to renew judgment liens as required.

6. Notify the originating district when the case is closed or transferred.

9-120.160 Closing

Criminal fines can only be closed through:

A. Payment in full;

B. Presidential pardon;

C. Death of the debtor (corporation dies when it is legally dissolved, either voluntarily by the action of the corporation or involuntarily through the courts); or

D. Termination of probation (those fines specifically imposed as terms and conditions of probation).

All fines erroneously closed for any other reason must be immediately reopened.

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Criminal fines may not be compromised or closed as uncollectible. United States Constitution, Article II, Section 2; United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956), aff'd, 238 F.2d 83 (5th Cir. 1956), appeal dismissed, 352 U.S. 1029 (1957). To do so would infringe upon the exclusive pardoning power of the President of the United States. Petitions for executive clemency should be addressed to the Pardon Attorney.

Criminal fines may be remitted by the court under Fed. R. Crim. P. 35 within 120 days after the judgment has become final.

Criminal fines abate at the death of the debtor and may not be collected from the debtor's estate (Crooker v. United States, 325 F.2d 318 (8th Cir. 1963); United States v. Knetzer, 117 F. Supp. 917 (S.D. Ill. 1954).

The Bankruptcy Reform Act of 1978 permits criminal fines to be collected in bankruptcy proceedings, and U.S. Attorneys should file a proof of claim. Fines, penalties, and forfeitures are nondischargeable. 11 U.S.C. §523(a)(7). Because of ambiguities in the statute, it is possible that a corporation may propose a Chapter 11 plan that would discharge a portion of its fine. Likewise, an individual may attempt to discharge a fine in a Chapter 13 plan. Any such attempt should be opposed, and the Criminal Division's Collection Unit (also known as Fine Enforcement Unit) should be notified.

On February 22, 1978, the Supreme Court ruled that the imposition of fines upon individuals sentenced under Section 5010 of the Federal Youth Corrections Act (18 U.S.C. §§5005-5026) is lawful and appropriate. Durst v. United States, 434 U.S. 542 (1978). The United States Court of Appeals in three circuits had earlier held fines to be inconsistent with the rehabilitative purposes of the Act. Collection efforts should therefore be initiated against criminal fine debtors sentenced under the Federal Youth Corrections Act subsequent to the Durst decision.

Collection efforts against criminal debtors with outstanding fines imposed on or before January 29, 1968, for wagering tax violations (26 U.S.C. §4401, et seq.) should be terminated. Decisions in Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), ruled that the proper assertion of the privilege against self-incrimination provides a complete defense against punishment. In United States v. Coin and Currency, Etc., 401 U.S. 715, 91 S. Ct. 1401 (1971), the majority of the court viewed Marchetti and Grosso as holding that gamblers had a Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate

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them, and, further, that in absence of a waiver of that right, they could not be prosecuted at all. Coin and Currency also announced the retroactive application of Marchetti and Grosso to wagering tax violations.

There is no general requirement to initiate any court process in relation to outstanding criminal fines in wagering tax cases imposed on or before January 29, 1968. Fines collected under subsisting judgments are not refundable. Please note, however, that collection action should continue with respect to all judgments of conviction imposed under the wagering tax statutes subsequent to January 29, 1968.

Appearance bond forfeiture judgments may be compromised or closed as uncollectible in accordance with the guidelines set forth in the next chapter. Since these impositions are civil in nature, they do not cease to exist at the death of the debtor, but may be collected from his estate. Therefore, death is not an immediate justification for closing the case. Enforcement efforts should be directed against the debtor's estate.

Court costs may also be compromised or closed as uncollectible. When court cost assessments are compromised or closed after diligent, fruitless efforts to collect, the Criminal Division should be notified by a memorandum indicating the circumstances warranting such action. Court costs may also be collected from the estate of the deceased debtor.

9-120.170 U.S. District Court Records

A thorough review of the closed criminal docket records in the Office of the U.S. District Court Clerk should be conducted to insure that the U.S. Attorney is notified of all outstanding impositions in the district. The district court closed criminal dockets are the official records of the closed criminal cases within the district and will reflect all criminal monetary impositions. In some districts, impositions may also be discovered in a Judgment Record (a book containing copies of all judgments and commitment orders for the district) or a Judgment Index (a series of 3 x 5 index cards or a bound book in alphabetical order listing all monetary impositions, both civil and criminal).

In most districts, the closed criminal dockets will also record all payments on criminal impositions. In other districts, payments can be found in a Payment Ledger, also maintained by the district court clerk.

Persons conducting a search of the clerk's records to determine unsatisfied criminal fine impositions may find it productive to begin the search with a review of the Forms JS-3 on file in the clerk's office.

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This is the card portion of a snap-out form used by the clerk to report the record of a trial to the Administrative Office for U.S. courts. It is similar in function and format to the Criminal Docket Card (Form USA-115) in the U.S. Attorneys' Docket and Reporting System. It will indicate if a fine was imposed, but little more. However, it is much easier to scan JS-3s and determine the cases where a fine was imposed, and then provide to the specific docket for details.

Thus, district court clerks employ several methods of recording criminal impositions and payments. To simplify the review process and insure its accuracy, the U.S. District Court Clerk should be consulted prior to the search. The clerk can fully explain the record-keeping procedures used in his ^{office} and outline the best method for discovering criminal impositions and payments.

The attorney with criminal collection responsibility should insure that all personnel conducting the search are familiar with the nature and content of the district court closed criminal dockets (or whatever record-keeping procedure is used in the district) and know the appropriate location of the information they seek. The docket search should be well documented to avoid unnecessary repetition in the future.

The search should be conducted in conjunction with a review of all closed criminal Forms USA-117A to verify the proper closing of these forms.

Unsatisfied criminal impositions discovered upon examination of the district court records should be immediately reported to the Department. (Cross reference to Title I) Some may, in fact, be discharged due to death of the debtor, Presidential pardon, or expiration of probation (fines which are specifically imposed as terms and conditions of probation). In the event the fine has been discharged by death, pardon, or expiration of probation, the U.S. Attorney should write a letter to the district court clerk notifying him/her of the discharge of the fine.

It is unlikely that the clerk will enter this notification of the discharge in the docket record as it is not an official court order. However, the clerk should be asked to place the letter in the district court case file. This will permanently clarify the record as far as the fine is concerned so that, in the future, when Department or GAO examiners or members of the Criminal Division Collection Unit visit the district and discover the fine, the U.S. Attorney can point to the letter in his ^{file} and in the court clerk's file indicating discharge or remission. ^{her}

As implied above, a copy of this letter should be placed in the debtor's case folder within the U.S. Attorney's office. The Criminal Debtor Card (Form USA-117A) should also indicate that the fine has been discharged.

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9-120.180 Paralegal Staffing

The criminal collection task is one which readily lends itself to completion by paralegal personnel. Utilization of Collection Unit employees who have achieved paralegal proficiency will undoubtedly improve collection programs and minimize the amount of time which Assistant U.S. Attorneys must devote to this task. The Executive Office for U.S. Attorneys and the Attorney General's Advisory Committee of U.S. Attorneys have endorsed the concept of paralegal staffing for use in the Department of Justice, and the American Bar Association has determined that such staffing is within the ethical standards set by the Code of Professional Responsibility.

This entire text of criminal collection information should be utilized by the paralegal staff. It describes those skills which must be exercised by criminal collection paralegal employees. Such personnel must have a basic understanding of the relevant sections of the United States Code and the appropriate Federal Rules of Civil and Criminal Procedure. They must be familiar with the legal techniques which can be used to secure financial information from reluctant debtors and those which are employed to seize debtor-held realty and personalty. Moreover, they must establish and operate a smoothly functioning, comprehensive criminal collection program which accurately maintains all criminal collection records and, under an Assistant U.S. Attorney's supervision, efficiently translates the attorney's instructions into legal action.

Thus, the paralegal program contemplates more than the promotion of criminal collection clerks to paralegal positions for which they are ill suited and untrained. Rather, it envisions a true advance in legal competence and performance. Understanding and implementing the policies and techniques explained in this publication will effect this advance in legal performance. The requirements explained herein define the proficiency which must be demonstrated by paralegal criminal collection personnel.

9-120.200 LOCATING THE DEBTOR AND INITIAL DEMAND

9-120.210 Location of Debtors

Occasionally, the collection case folder may not contain a current, correct address for the criminal debtor. Thus, in some instances, the first collection task may be to locate the debtor. In order to

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accelerate this effort, more than one location procedure should be used simultaneously.

When attempting to locate debtors, it is important to comply with the Privacy Act (5 U.S.C. §552). However, it should be noted that most requests for information are made to agencies within the Department of Justice (e.g. Federal Bureau of Investigation, Bureau of Prisons, etc.). The Privacy Act does not significantly affect these activities. Disclosure of the information within the Department of Justice is simply on a "need to know" basis. Securing information from other departments or agencies may, however, require compliance with 5 U.S.C. §552(e)(3), the Privacy Act. It is recommended that a "Privacy Act of 1974 Compliance Information" form be attached to letters directed to departments or agencies outside the Department of Justice when making location efforts. (See USAM 1-5.000 for Privacy Act Compliance Statement to Accompany Debtor Location Efforts.)

The Privacy Act also applies to the disclosure of information by the Department of Justice to other departments or agencies. The Act requires the U.S. Attorneys' offices to keep records of information transmitted out of the office to another department or agency. (See USAM 1-5.000 for Accounting Form for Disclosures (5 U.S.C. §552a(c)).

The following location procedures may be helpful in locating debtors with monetary impositions as a result of criminal prosecution:

A. Internal Revenue Service Project 719

In an attempt to assist U.S. Attorneys in collecting criminal fines and appearance bond forfeiture judgments, the Criminal Division Collection Unit participates in Internal Revenue Service Project 719, a program which uses Internal Revenue Service computerized records to provide current address information upon specific request.

To participate in the program, the district must send to the Criminal Division Collection Unit only two items: (1) the debtor's name, and (2) the debtor's Social Security account number. If the Social Security account number is not provided, it is impossible for the request to be forwarded to the Internal Revenue Service.

If the debtor has filed a federal income tax return within three years, the Internal Revenue Service computer will automatically print an IBM card with the street and city address reported by the debtor on the tax return and send it to the Criminal Division Collection Unit. If the debtor failed to file a tax return within three years, the IBM card will

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read "no record." The Criminal Division Collection Unit will forward the IBM cards to the U.S. Attorneys.

Social Security account numbers should be maintained for all debtors. The account numbers may be available from U.S. Probation Office pre-sentence reports, from the arresting authorities (listed on FBI arrest records), from prisons and correctional institutions, or from U.S. Armed Forces Locator Services (for those debtors who have served in the Armed Forces). Social Security account numbers are not available from the Social Security Administration.

Internal Revenue Service Project 719 may be used for any fine or appearance bond forfeiture judgment of \$100 or more.

B. Federal Bureau of Investigation Arrest Records

Arrest records provide a quickly attainable, chronological listing of the individual's arrests. An inquiry to the jurisdiction of last arrest often provides location information. A long series of arrests which stops abruptly may indicate imprisonment or death. Exact procedures for acquiring FBI rap sheets should be ascertained from the local FBI office.

C. U.S. Postal Service

The Postal Service retains change of address notices for one year after filing. Thus, a check with the Postal Service is rarely effective in locating debtors who have moved more than one year prior to the check. Nevertheless, it is an economical, relatively effortless search technique. Typing "ADDRESS CORRECTION REQUESTED" under the return address block of envelopes mailed to the debtor will alert the Postal Service to inform you of changes in the debtor's address. Registered mail with forwarding and return-receipt requested is also an effective way to locate individuals. Whenever possible, registered mail and correspondence marked "ADDRESS CORRECTION REQUESTED" follows the debtor and provides the U.S. Attorney with the debtor's address.

D. State Bureaus of Vital Statistics and State Departments of Motor Vehicles and Driver's Licenses

State Bureaus of Vital Statistics can provide a record of the debtor's death and State Departments of Motor Vehicles and Driver's Licenses can ascertain if an automobile is registered to the debtor and report the address given by the debtor at the time of registration or at

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the time of obtaining a driver's license. Each agency should be told why such information is necessary. The U.S. Attorney should determine the exact form for these requests and make every effort to comply to that form.

The Criminal Division Collection Unit has found that information from the drivers' license records of the State Motor Vehicle Departments can be most helpful in tracing unlocated criminal debtors.

The following "Directory: Departments of Motor Vehicles and Drivers' License Bureaus" lists the address for each state's department or bureau, and indicates whether or not a telephone information service is available. Written requests to the State Departments of Motor Vehicles and State Drivers' License Bureaus should be on official Department of Justice stationery; each request should include the debtor's name and date of birth. Telephone requests to the State Departments of Motor Vehicles and the State Drivers' License Bureaus should be prefaced by identifying oneself as an employee of the U.S. Attorney's office; each request should include the debtor's name and date of birth.

If you have any questions or comments concerning the "Directory: Departments of Motor Vehicles and Drivers' License Bureaus," please contact the Criminal Division Collection Unit, FTS 633-5541, at your convenience.

DIRECTORY: DEPARTMENTS OF MOTOR VEHICLES AND
DRIVERS' LICENSE BUREAUS

| <u>State</u> | <u>Address</u> | <u>Telephone</u> |
|--------------|--|------------------|
| ALABAMA | State Department of Revenue Motor Vehicle and License Division Post Office Box 104 Montgomery 36130 | (205) 832-6740 |
| ALASKA | Director of Motor Vehicles Post Office Box 960 Anchorage 99510 | (907) 269-5551 |

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|-------------------------|---|----------------|
| ARIZONA | Supervisor Department of Transportation Motor Vehicle Division Title Records Section 1801 West Jefferson Phoenix 85007 | (603) 261-7639 |
| ARKANSAS | Department of Finance & Administration Office of Motor Vehicle Registration Correspondence Unit Post Office Box 1272 Little Rock 72203 | (501) 371-2541 |
| CALIFORNIA | Department of Motor Vehicles Division of Registration Information Histories, Unit 14 Post Office Box 12747 Sacramento 95813 | (916) 322-2497 |
| COLORADO | State of Colorado Motor Vehicles Division Master Files Section 140 West Sixth Avenue Denver 80204 | (303) 839-3751 |
| CONNECTICUT | Traffic Records Coordinator Department of Motor Vehicles 60 State Street Attention: Copy Records Section Weathersfield 06109 | No |
| DELAWARE | Director Motor Vehicle Division Highway Administration Building Dover 19901 | (302) 678-4467 |
| DISTRICT OF COLUMBIA | Department of Motor Vehicles Driver Records & Rehabilitation Section 301 C Street, N.W. Washington, D.C. 20001 | No |
| FLORIDA | Department of Highway Safety Division of Drivers License Tallahassee 32304 | (904) 488-3405 |

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| | | |
|----------|---|----------------|
| GEORGIA | Director Motor Vehicle Unit 126 Trinity-Washington Building Atlanta 30334 | (404) 656-4100 |
| HAWAII | Director Department of Transportation 869 Punchbowl Street Honolulu 96813 | No |
| IDAHO | Motor Vehicle Division Drivers License Section Post Office Box 34 Boise 83731 | (208) 334-3698 |
| ILLINOIS | Secretary of State Motor Vehicle Division 2701 S. Dirksen Parkway Springfield 62723 | No |
| INDIANA | Bureau of Motor Vehicles Paid Mail Section - Room 416 State Office Building Indianapolis 46204 | (317) 232-2890 |
| IOWA | Supervisor Record Section Drivers License Division Department of Transportation Lucas State Office Building Des Moines 50319 | No |
| KANSAS | Superintendent Kansas Highway Patrol Townsite Plaza #2 200 East Sixth Topeka 66603 | (913) 296-3801 |
| KENTUCKY | Director Division of Driver Licensing Bureau of Vehicle Regulation State Office Building Frankfort 40601 | (502) 564-6800 |

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|---------------|--|----------------|
| LOUISIANA | Director Department of Public Safety Data Processing Center Post Office Box 66614 Baton Rouge 70896 | (504) 925-6226 |
| MAINE | Director Data Processing Motor Vehicle Division 1 Child Street Augusta 04330 | (207) 289-3348 |
| MARYLAND | Director Motor Vehicle Administration Driver Records Division 6601 Ritchie Highway N.E. Glen Burnie 21062 | No |
| MASSACHUSETTS | Registrar Registry of Motor Vehicles 100 Nashua Street Boston 02114 | Yes* |
| MICHIGAN | Department of State Bureau of Driver and Vehicle Services Information Services Section Commercial Look-Up Unit Secondary Complex Lansing 48918 | (517) 322-1624 |
| MINNESOTA | Driver License Records Driver & Vehicle Services Division Transportation Building St. Paul 55155 | (612) 296-6911 |
| MISSISSIPPI | Supervisor Registration Section Motor Vehicle Comptroller Woolfolk State Office Building Post Office Box 1140 Jackson 39205 | (601) 354-7411 |
| MISSOURI | Director Motor Vehicle and Licensing Post Office Box 100 Jefferson City 65101 | No |

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| | | |
|----------------|--|----------------|
| MONTANA | Registrar Division of Motor Vehicles 925 Main Street Deer Lodge 59722 | (406) 846-1423 |
| NEBRASKA | Department of Motor Vehicles 301 Centennial Mall South Driver Records Division Post Office Box 94789 - State Capitol Lincoln 68509 | (402) 471-2281 |
| NEVADA | Chief Automation Division Department of Motor Vehicles 555 Wright Way Carson City 89711 | (702) 885-5365 |
| NEW HAMPSHIRE | Director of Motor Vehicles James Hayes Building Hazen Drive Concord 03301 | Yes* |
| NEW JERSEY | Director Driver Records Abstract Unit Division of Motor Vehicles 25 S. Montgomery Street Trenton 08666 | Yes* |
| NEW YORK | Public Services Bureau Department of Motor Vehicles Empire State Plaza Albany 12228 | No |
| NEW MEXICO | Driver Services Bureau Motor Vehicle Division Manuel Lujan Sr. Building Santa Fe 87503 | (505) 827-2258 |
| NORTH CAROLINA | Director Drivers' License Section Division of Motor Vehicles 1100 New Bern Avenue Raleigh 27697 | No |

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| | | |
|----------------|---|----------------|
| NORTH DAKOTA | Driver License Division State Highway Building Capitol Grounds Bismark 58505 | No |
| OHIO | Director Bureau of Motor Vehicles Post Office Box 16520 Attention: MVODLS Columbus 43216 | Yes* |
| OKLAHOMA | Director Department of Public Safety Driver Record Section Post Office Box 11415 3600 N. Eastern Oklahoma City 73136 | No |
| OREGON | Director Administrative Section Motor Vehicle Division 1905 Lana Avenue N.E. Salem 97314 | (503) 378-6935 |
| PENNSYLVANIA | Bureau of Motor Vehicles Teletype Room 113 Department of Transportation Transportation & Safety Building Harrisburg 17122 | (717) 787-4016 |
| PUERTO RICO | Department of Transportation Public Works Post Office Box 41243 Minillas Station Santurce 00910 | No |
| RHODE ISLAND | Director Registry of Motor Vehicles State Office Building Providence 02903 | No |
| SOUTH CAROLINA | Director Motor Vehicle Division Drawer 1498 Columbia 29216 | (803) 758-3158 |

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| | | |
|--------------|--|----------------|
| SOUTH DAKOTA | Department of Public Safety Drivers Improvement Program 118 W. Capitol Pierre 57501 | No |
| TENNESSEE | State of Tennessee Department of Safety Andrew Jackson State Office Building Nashville 37219 | (615) 741-3311 |
| TEXAS | Chief Driver and Vehicle Records Division Department of Public Safety Post Office Box 4087 5805 North Lamar Austin 78773 | Yes* |
| UTAH | Director State Tax Commission Motor Vehicle Division State Fairgrounds 1095 Motor Avenue Salt Lake City 84116 | (801) 533-5311 |
| VERMONT | Director Information Unit Department of Motor Vehicles State Office Building Montpelier 85603 | (802) 828-2121 |
| VIRGINIA | Manager Vehicle Information Request Department Vehicle Services Administration Division of Motor Vehicles Post Office Box 27412 Richmond 23269 | (804) 257-0412 |
| WASHINGTON | Department of License Driver Records Highway License Building Olympia 98504 | No |

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| | | |
|---------------|--|----------------|
| WEST VIRGINIA | Director Department of Motor Vehicles 1800 Washington Street, East Charleston 25305 | No |
| WISCONSIN | A 1 - Leadworker Vehicle Files Wisconsin Department of Transportation Post Office Box 7909 Madison 53707 | (608) 266-3666 |
| WYOMING | Director Motor Vehicle Division 2200 Carey Avenue Cheyenne 82002 | No |

*For information about the telephone service and/or telephone numbers available in this state, contact the Criminal Division Collection Unit at FTS 633-5541.

E. Welfare Offices

Information concerning the debtor's address should be utilized if available under state law.

F. Armed Forces Records (Including Veterans Administration Records)

Requests for Armed Services records may provide information which can serve two purposes: (1) locate the debtor and (2) determine whether the individual was pardoned under either the December 24, 1945, or December 24, 1952, retroactive Presidential pardons to those who served honorably in the Armed Forces of the United States during war time.

On December 24, 1945, the President signed a proclamation granting a full pardon to all persons convicted of a violation of the laws of the United States, except the laws governing the Army and Navy, who on or after July 29, 1941, and prior to December 24, 1945, entered, enrolled in, or were inducted into the Armed Forces of the United States. The Service member must have served in active status for not less than one year and must have been honorably discharged or separated from active service under honorable conditions. The proclamation does not include a pardon of such persons for any offense of which they were convicted after the date of their entry, enrollment in, or induction into the Service.

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On December 24, 1952, the President signed a similar proclamation. The debtor must have entered the Service prior to December 24, 1952, and must have served for not less than one year subsequent to June 25, 1950. The other conditions of the 1945 pardon applied.

These two Presidential pardons are equivalent to individually granted pardons and remit any criminal judgment which was assessed prior to the date of the pardons.

Military records for most individuals who have served can be obtained from:

National Personnel Records Center
(Military Personnel Records)
9700 Page Boulevard
St. Louis, Missouri 63132

Armed Forces Locator Services may also be helpful in providing address information for military personnel.

The locator services and the information they can provide are as follows:

A. United States Navy

The U.S. Navy Locator Service can provide current addresses for active duty personnel and retired personnel. Complete military records for discharged naval personnel (not career retired) are maintained at the National Personnel Records Center in St. Louis. The Locator Service needs to know the debtor's name and Social Security number or as much identifying information as possible.

Address: Commander, Naval Military Personnel Command
Washington, D. C. 20370
Attention: Locator Services

Telephone Number: (Due to personnel limitations, the Naval Military Personnel Command's telephonic locator service has been terminated.)

B. U.S. Marine Corps

The U.S. Marine Corps Locator Service can provide current addresses for retired, active reserve, and active duty personnel. Information on

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discharged personnel (not career retired) is located at the National Personnel Records Center in St. Louis. The U.S. Attorney should send the name, Social Security number, and any other information which can help to identify the debtor.

Address: Commander, U.S. Marine Corps
Washington, D.C. 20380

Attention: Locator Services

Telephone Number: (202) 694-1624

C. U.S. Air Force

The U.S. Air Force Locator Service in Washington, D.C., can provide current addresses for active personnel. The U.S. Attorney should report the name and Social Security number of the individual and any other information which would help to identify him/her. The service will respond to telephonic requests only.

Telephone Number: (202) 695-4803

The U.S. Air Force Locator Service at Randolph Air Force Base, Texas, can provide current address information for retired personnel. The records for discharged Air Force personnel (not career retired) are found at the National Personnel Records Center in St. Louis.

Address: Air Force Military Personnel Center/MPCD003
Randolph Air Force Base, Texas 78148

Telephone Number: (512) 652-5774

D. U.S. Army

The U.S. Army Locator Service in Fort Benjamin Harris, Indiana, can provide current addresses for active duty personnel. The U.S. Attorney should send the name of the individual, his/her Social Security number and any other information which would help to identify him/her.

Address: U.S. Army Enlisted Records and
Evaluation Center
Fort Benjamin Harris, Indiana 46249

Telephone Number: (317) 542-4211

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The U.S. Army Retired Activities Unit in Alexandria, Virginia, can provide current address information for retired personnel. The records of discharged Army personnel (not career retired) are found at the National Personnel Records Center in St. Louis.

Address: Retired Activities Division
2461 Eisenhower Avenue
Alexandria, Virginia 22331

Attention: Locator Services

Telephone Number: (703) 325-8785

G. Internal Revenue Service--Alcohol, Tobacco and Firearms (ATF)
Division Agent Data

This information is available when ATF agents refer the case to the U.S. Attorney for prosecution.

H. State and Local Taxing Authorities

These may also be contacted.

I. Bureau of Prisons and State Correction Authority Information

Bureau of Prisons Policy Statement 7500.15 (Manual Bulletin 496, revised) directs all federal correctional institutions to send Bureau of Prisons Form 63(a), "Notice to U.S. Attorney of Release of Inmate with Criminal Fine Judgment," to the U.S. Attorney in the district of imposition prior to the date of the inmate's release. The procedure detailed by the Bureau is not always followed. Thus, we suggest that U.S. Attorneys contact the place of imprisonment of every incarcerated fine debtor annually and ask:

1. Is the fine debtor imprisoned in that institution? If not, (1) Is he/^{she} elsewhere in the federal correctional system? (2) Is he/^{she} in the hands of state or local authorities? (3) Has he/^{she} been released? If released, what was the nature of the release, and the address given by the individual at the time of release?

2. If currently imprisoned in the institution contacted, (1) What is the earliest possible mandatory release date: (2) Will the

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institution send a Bureau of Prisons Form 63(a), "Notice to the U.S. Attorney of Release of Inmate with Criminal Fine Judgment," to the U.S. Attorney in compliance with Bureau of Prisons Policy Statement 7500.15?

A sample form letter allowing prison authorities to check appropriate boxes in order to respond can be devised. A pre-addressed, stamped envelope should be enclosed to encourage prompt reply. A sample Bureau of Prisons letter is printed in USAM 9-122.005.

State Corrections authorities should be approached in the same fashion, although they are under no obligation to automatically notify the U.S. Attorney of the release of an inmate with an unpaid federal criminal fine.

When a debtor has been imprisoned, released, and becomes unlocated, the Bureau of Prisons or State Correctional authorities where the debtor was known to be incarcerated may also be contacted and requested to provide the U.S. Attorney with a copy of the debtor's personal history statement or prison case file. This information can provide social security numbers, F.B.I. numbers, military service numbers, names of relatives, employers, etc.

J. City Directories and Reverse Listing Telephone Directories

These compilations can assist in locating and obtaining information on debtors. City directories are usually available in the Office of the U.S. Marshal.

K. Credit Agencies

Fine debtors will often have creditors in addition to the United States Government. These private debts will place them on the records of local credit agencies who will, in some instances, provide current addresses to the U.S. Attorney.

L. Public Utilities Companies

When a debtor has moved from one location to another within the same municipality, the public utility companies (i.e., telephone, power, light, and gas) serving that municipality often can provide the debtor's current address.

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M. Attorneys

The fine which the debtor owes is the result of a criminal prosecution. Thus, the debtor probably retained an attorney to represent him^{/her} in that prosecution. This attorney may be able to provide the debtor's address or arrange for the debtor to visit the U.S. Attorney's office to discuss payment of the fine.

N. Employer or Former Employers

Employers frequently maintain background information files which include the employee's address, telephone number, Social Security account number, relatives, and other helpful information.

O. Federal and State Probation Offices

These offices can provide a wealth of information on debtors who are supervised or have been supervised by their offices.

The U.S. Probation Offices prepare presentence reports in all felony and some misdemeanor cases. The presentence report will include such information as the defendant's social security number, employers, names of relatives, etc. Such information can be very helpful in trying to locate an unlocated debtor.

P. Relatives and Friends

Often this source of information is overlooked. Relatives or friends may be quite willing to help locate or contact the debtor if requested to do so.

9-120.220 Demand Letters

A demand letter reminds the debtor of his^{/her} obligation to make full payment and should be sent to every criminal debtor 2-10 days after judgment. The demand letter is the initial collection attempt and, unless special circumstances indicate to the contrary, should be mailed to the debtor only once. The demand letter is a courtesy extended by the U.S. Attorney which allows the debtor to satisfy his^{/her} obligation without further legal proceedings. If the courtesy is rejected, more effective enforcement steps should be promptly employed.

Unlike some civil pre-judgment debtors who may feel that they have a legitimate reason for contesting the government's demand, the criminal debtor knows, or should know, that his^{/her} obligation has been clearly established by the final order of a federal^{/she} court. If he^{/she} fails to respond to the initial demand letter, he^{/she} will ignore a second or third letter as

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well. The U.S. Attorney should anticipate less than overwhelming success from demand letters and should therefore be prepared to routinely employ second-level enforcement techniques to secure financial information and payment in full.

A sample demand letter is printed in USAM 9-122.002.

In every case in which the reliability or good faith of the debtor or the accuracy of the address is in question, the demand letter should be sent by certified mail, return-receipt and forwarding requested.

For those debtors whose cases have not received recent attention, address verification should be obtained (see USAM 9-120.210, Location of Debtors), and each should be sent a demand letter which clearly presents the United States Government's interest in satisfaction of the obligations. Certified mail with return-receipt and forwarding requested should be routinely used in these cases. Note, however, that a letter returned "unclaimed" does not necessarily indicate the addressee does not reside at the address. Further clarification is necessary.

A Financial Statement of Debtor (Form OBD-500), the short form Financial Statement of Debtor (Form OBD-500B), or some other type of brief financial questionnaire should accompany the demand letter in all cases in which such information was not obtained at judgment or cannot be secured from the Probation Office. The Form OBD-500 is a four-page financial form designed to be completed by an individual, rather than corporate debtor. While the Form OBD-500 avoids extremely complex questions, modestly educated debtors may nevertheless be discouraged by its length and complexity. Therefore, a two-page Form OBD-500B has been designed to encourage responses from such debtors. The Form OBD-500B allows the debtor to quickly and accurately provide required responses without struggling to determine the exact meaning of the questions. While the short form will not supply exhaustive financial information, positive responses can be followed up by further efforts to secure detailed information. When the Form OBD-500B indicates that the debtor lacks the ability to make payments, and he^{/she} is believed to have responded truthfully, the U.S. Attorney need not take further steps to secure more complete information. Where the debtor's native language is Spanish, the Form OBD-500A, which is a translated version of Form OBD-500, may be used.

A Privacy Act statement has been incorporated in Financial Statement of Debtor Forms OBD-500, OBD-500A, and OBD-500B. This Privacy Act statement outlines why the information is sought, the statutes under which the Department of Justice is requesting the information, and further informs the debtor that if he^{/she} does not voluntarily furnish the information,

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the Department has the right to seek disclosure by legal methods. The legal methods are discussed in USAM 9-120.310 Judgment Debtor Examinations, USAM 9-120.320 Written Interrogatories, and USAM 9-120.330 Depositions Upon Written Questions. It should be mentioned that the Privacy Act provides that the debtor is not required to provide his Social Security account number on either the above-mentioned Financial Statement of Debtor Forms or under legal proceedings.

The Form OBD-500C is an eight-page financial statement designed to be completed by corporate debtors. It is detailed and extensive, and provides a complete financial picture of the corporate debtor. The Privacy Act is not applicable to corporate debtors, therefore, the Form OBD-500C need not be accompanied by a Privacy Act Statement.

9-120.230 Telephone

The telephone is perhaps the most efficient, time-saving collection tool available to the U.S. Attorney. Demand letters should be sent in conjunction with full use of the telephone. A telephone call demonstrates the personal interest of the U.S. Attorney in satisfaction of the imposition. Firm, persistent, non-harassing utilization of this form of personal contact has been found to be extremely productive and has been termed the most effective tool available to the U.S. Attorney in attempting to collect criminal monetary impositions.

9-120.240 Using Teletype to Locate Debtors

The U.S. Attorney's office teletype can be used to directly hook-in to computers containing state driver's license records and federal and state criminal history records. This section will describe in general terms the method for retrieving such information. (For specific instructions, see your teletype operator or call the Department of Justice Telecommunications Service (JUST) Network Control Section.)

Currently, the JUST system is equipped with a "HELP" feature that enables the user to receive operating instructions directly from the terminal. By typing the word HELP in the destination field of the teletype and then sending the message, the operator will receive a list or "Menu" of information sources that are available to the user. Accordingly, by following the instructions received with the menu, the user can request step-by-step instructions and examples for querying federal and state records. The only information that the instructions do not provide is the U.S. Attorneys' office originating agency identifier

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(ORI) code. This code should be available from your administrative office.

There are two computerized records systems listed in the menu that will be useful for locating debtors. The first is the FBI's National Crime Information Center (NCIC). This system will provide a subject's federal criminal history and identification information. Criminal histories are particularly helpful for locating criminal debtors who usually have a continuous record of arrests. By checking to see where the debtor was arrested last and then contacting the arresting agency, his/her whereabouts may be ascertained. To retrieve this information, the debtor's name and FBI number or the name, date of birth, race and sex must be transmitted into the system.

The second records system is the National Law Enforcement Telecommunications System (NLETS). This system has two features that are useful. The first is state criminal histories and the second is state driver's license information. By submitting a debtor's name, date of birth, race and sex to a given state, the user can check to see if a debtor has been arrested or has a driver's license.

Since your requests are processed by computer, it is essential that you follow instructions exactly or your request will be rejected. However, once you master the technique of submitting requests, you will have an extremely useful tool for locating debtors.

9-120.300 SECURING FINANCIAL INFORMATION

An effective criminal collection effort systematically locates the debtor, secures accurate and complete financial information, and enforces the judgment by arranging and supervising appropriate payments or by initiating legal action designed to eliminate the debt. Financial information may often be obtained by requesting that the debtor complete a Financial Statement of Debtor (Form OBD-500, 500A, or 500B) or visit the U.S. Attorney's office for a personal interview.

Many debtors will voluntarily complete a Form OBD-500, OBD-500A or OBD-500B or visit the U.S. Attorney's office. Occasionally, debtors will refuse to cooperate in this manner. It then becomes necessary to employ routine legal techniques designed to secure necessary financial information from uncooperative debtors. This is an extremely important step in the enforcement of criminal monetary judgments. Debtors who refuse to provide financial information must not be rewarded by U.S. Attorney inactivity. If debtors who deliberately ignore a series of

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demand letters are successful in avoiding payment, the U.S. Attorney's criminal collection record will be unacceptably poor. Rather, the U.S. Attorney should realize that demand letters are only the first step in a total collection program and, if ignored, must be quickly followed by more aggressive legal procedures which will promote debtor cooperation.

Although most of the court orders being enforced by the Criminal Collection Unit are criminal fines resulting from criminal prosecutions, it must be remembered that 18 U.S.C. §3565 provides for criminal fine judgments to be enforced in the same manner as civil judgments. 18 U.S.C. §3565 states

In all criminal cases in which judgment or sentence is rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, such judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases.

(a) 18 U.S.C. §3565 allows the U.S. Attorney to utilize the procedures established by the Federal Rules of Civil Procedure to enforce criminal judgments. Pierce v. United States, 255 U.S. 398 (1921), noted that the customary civil case proceedings in aid of or supplemental to an execution could also be used to enforce a criminal fine.

Three legal procedures which are designed to promote debtor cooperation and which may be employed by the U.S. Attorney are judgment debtor examinations (oral depositions) conducted through the U.S. Magistrate's court, written interrogatories mailed to the parties, and depositions upon written questions.

9-120.310 Judgment Debtor Examinations

The U.S. Magistrate can assist the U.S. Attorney in his/^{her} efforts to acquire current financial information by conducting judgment debtor examinations (oral depositions) in his/^{her} court. The following is an explanation of the legal basis for such examinations.

As previously mentioned, 18 U.S.C. §3565 provides for the use of the Federal Rules of Civil Procedure to enforce criminal impositions. Fed. R. Civ. P. 69(a) states that "In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears

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of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held."

". . . [T]he manner provided in these rules. . ." refers generally to the civil rules on depositions and discovery, Rules 26 thru 33. United States v. McWhirter, 376 F.2d 102 (5th Cir. 1967).

Rule 30 of the Fed. R. Civ. P. is the rule which provides for oral depositions. The rule states that "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." Thus, the U.S. Attorney may depose the fine debtor upon oral questions. The requirement for an action referred to in the opening phrase ". . . after commencement of the action . . ." is met by the initial criminal prosecution; no new suit need be commenced in order to conform to the rules.

The U.S. Attorney's right to depose the fine debtor is established by the above rules. The U.S. Magistrate is included in the process by 28 U.S.C. §636(a)(2), which states that "each United States Magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment . . . (2) the power to administer oaths and affirmations, impose conditions of release under Section 6146 of Title 18, and take acknowledgements, affidavits, and depositions . . ."

Therefore, if possible, oral depositions should be taken before the U.S. Magistrate. Several advantages are evident. A subpoena issued from the magistrate's court should effectively attract the debtor's attention. In addition, the oath issued by the judicial officer and the courtroom environment in which the deposition is taken may persuade the debtor to provide more complete and accurate financial information.

Definite procedures for conducting such examinations should be established in cooperation with the U.S. Magistrate. It may be more convenient for the magistrate if several such examinations are conducted at one time.

Fed. R. Civ. P. 45 provides that "Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoenas may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination

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permitted by Rule 26(b) . . ." In accordance with this last sentence, it may be helpful to request that the debtor bring with him/his^{her} most recent income tax return, bank statements, deed records, etc. The subpoena may be accompanied by U.S. Marshals Service Process Receipt and Return (Form USM-285).

Judgment debtor examinations are initiated in the following way. The U.S. Attorney requests the judgment debtor examination and serves reasonable notice in writing to every other party to the action. The notice should state the time and place for taking the deposition and the name and address of the debtor. The U.S. District Court Clerk then issues a subpoena to compel the debtor's attendance. (See Forms and Pleadings, USAM 9-122.008 through 9-122.012.)

Most U.S. Magistrates record depositions on tape, a copy of which is sent to the Clerk of the U.S. District Court following the deposition. The Assistant U.S. Attorney who conducts the deposition would appear in the magistrate's court, ask all questions which he/^{she} considers pertinent, and note each response as it is given, thereby eliminating the cost of a transcript. Questions can be patterned after those found in the Financial Statement of Debtor (Form OBD-500) or any similar form used by this office.

If the debtor fails to respond to the order to appear in the magistrate's court, a "Motion for Rule to Show Cause Why Defendant Should Not be Held in Contempt" should immediately be filed in the U.S. District Court. Notice, along with a copy of the motion, should be sent to the debtor. (See Forms and Pleadings, USAM 9-122.010.) By this action, the U.S. Attorney is not so much interested in pursuing punishment for contempt as he/^{she} is in securing the appearance of the debtor so that financial information can be acquired.

9-120.320 Written Interrogatories

A second method by which to secure financial information from reluctant debtors is the use of written interrogatories. This procedure may be preferred when the criminal imposition is small or the debtor lives a great distance from the U.S. Attorney's office.

A previously discussed, 18 U.S.C. §3565 and Fed. R. Civ. P. 69(a), key the employment of the Discovery Provisions of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 33 states that "Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a

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partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party."

The summons and complaint referred to in the last sentence are, of course, the actions which initiate a civil suit. Since a criminal prosecution has already been successfully concluded, this criminal prosecution serves as the basis for the interrogatories.

The interrogatories mailed to the debtor may be the Financial Statement of Debtor (Form OBD-500, OBD-500A, or OBD-500B) which is included in the demand letter. The original should be filed with the clerk of the U.S. Court and a copy mailed to the debtor. If the interrogatories are mailed with the demand letter, the letter should explain that the Form OBD-500 or OBD-500B represents interrogatories submitted under Fed. R. Civ. P. 33 and that, unless the questions are promptly answered, a motion for an order compelling discovery will be filed with the clerk of the court. (See Forms and Pleadings, USAM 9-122.013 through 9-122.015.) In special cases, the U.S. Attorney may wish to have the interrogatories served on the debtor by the U.S. Marshal. Unless the court allows a longer time, the interrogatories must be returned within 30 days.

If the debtor does not respond within 30 days, a motion for an order compelling discovery should immediately be filed with the clerk of the court. Notice and a copy of the motion should be sent to the debtor. (See Forms and Pleadings, USAM 9-122.016 and 9-122.017.) This motion is filed pursuant to Fed. R. Civ. P. 37, which describes the sanctions which result from a failure to make discovery and states that "a party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows: (1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending . . . (2) Motion. If . . . a party fails to answer an interrogatory submitted under Rule 33 . . . the discovery party may move for an order compelling an answer. . ."

If the court grants the order compelling answers to interrogatories, the debtor should receive a copy of the court order directing that the interrogatories are to be answered and an additional copy of the interrogatories (Form OBD-500, OBD-500A or OBD-500B). (See Forms and Pleadings, USAM 9-122.019 and 9.122.020.) This letter should be sent by certified mail, return-receipt requested.

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If the debtor fails to respond within the time period ordered by the court, his^{her} failure may be considered a contempt of court. A "Motion for Rule to Show Cause Why Defendant Should Not Be Held In Contempt" should be filed in the United States District Court. Notice, along with a copy of the motion, should be sent to the debtor. (See Forms and Pleadings, USAM 9-122.024.) Once again, the U.S. Attorney is more interested in securing the appearance of the debtor than pursuing punishment for contempt of court.

When written interrogatories are used, the procedure for compelling reluctant debtors to respond can be a lengthy one. However, since it is extremely important that accurate and complete financial information be acquired, the U.S. Attorney should be prepared to systematically and promptly follow the procedure through the contempt hearing in every case if necessary. Debtors must realize that failure to cooperate with the U.S. Attorney will routinely result in effective legal action being directed against them.

9-120.330 Deposition Upon Written Questions

A third technique which can be used to acquire financial information from reluctant criminal debtors is the deposition upon written questions. Once again, 18 U.S.C. §3565 and Rule 69(a) of the Fed. R. Civ. P. key the use of the civil discovery rules. The civil rule which provides for depositions upon written questions is Fed. R. Civ. P. 31.

Federal Rules of Civil Procedure 31 states that "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes."

The U.S. Attorney must serve a copy of the written questions upon every other party with a notice stating (1) the name and address of the debtor who is to answer them and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken.

The written questions which constitute the deposition can be a Financial Statement of Debtor (Forms OBD-500, OBD-500A, or OBD-500B). A copy of the form is served upon the debtor (and any co-defendant) along with a notice stating the name and address of the debtor (indicating that he^{she} is to appear to answer all questions on the form) and the name and address of the notary public before whom the deposition is to be taken. A

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copy of the notice and Form OBD-500 is given to the notary as well. (See Forms and Pleadings, USAM 9-122.028.)

At the deposition, the answers of the debtor are entered on the Form OBD-500, OBD-500A, or OBD-500B which is then signed by the debtor. The notary certifies that the witness was duly sworn by him^{/her} and that the deposition is a true record of the testimony given by the witness. He^{/she} then seals the deposition in an envelope endorsed with the title of the action and marked "Deposition of (name of witness)" and delivers it to the Clerk of the U.S. District Court.

The deposition upon written questions is most efficiently utilized when a readily available notary public can serve as the officer before whom the deposition is taken. However, the notary may not be an employee of the U.S. Attorney since Fed. R. Civ. P. 28 prohibits a deposition from being taken before an employee of any of the parties. The deposition need not be conducted before a court reporter since no sophisticated stenographic ability is necessary. Thus, the cost of conducting the deposition is greatly reduced. In addition, the entire deposition should take only a few minutes to complete, so several may be scheduled at one time.

If the debtor fails to appear for the deposition upon written questions, his^{/her} failure may be considered a contempt of court. A "Motion for Rule to Show Cause Why Defendant Should Not Be Held in Contempt" should be filed in the U.S. District Court. Notice, along with a copy of the motion should be sent to the debtor. (See Forms and Pleadings, USAM 9-122.030.) Once again, the U. S. Attorney is attempting to secure the appearance of the debtor rather than pursue punishment for contempt of court.

The three methods of securing financial information discussed in this chapter are certainly not an all inclusive listing of the measures which can be used to secure such information. Other methods include, for example, taking the debtor's oral deposition in the U.S. Attorney's office. This method, of course, requires the employment of a court reporter, an expense which will be avoided by using the techniques presented here.

If the U.S. Attorney is presently experiencing success with a financial information discovery procedure which is less complicated than those discussed in this chapter, he^{/she} is encouraged to continue utilizing this simpler, more effective method. Fed. R. Civ. P. 69(a) allows the U.S. Attorney to obtain discovery in the manner provided in the federal civil rules or in the manner provided by the practice of the state in which the district court is held. Perhaps state rules provide for more

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efficient discovery procedures. It is only necessary that some routine and established procedure, not necessarily those discussed, be employed to acquire accurate, current, and complete financial information from reluctant debtors.

9-120.340 Criminal Fine/Forfeiture Litigation Reports

It should be recognized from the outset that individuals convicted of felonies will rarely voluntarily disclose their true financial status, and indeed may make every effort to conceal or convey their assets to defeat outstanding criminal fines or bond forfeitures. However, one of the best sources of financial information regarding a debtor's resources is the prosecutor and the agency investigator assigned to the case. These individuals will usually have some information about the defendant's financial capability, which could involve revelations of real and personal property. The prosecution team could also provide names of persons who may have knowledge of a debtor's financial resources, such as protected witnesses, co-defendants, relatives and business associates. These third parties can be subpoenaed and deposed.

Additional information can be obtained from bail hearings, where the defendant will often be compelled to reveal assets such as real property or business interests in the community. The defendant's selection of a quality defense attorney may also be indicative of the debtor's financial resources. The Assistant charged with collecting fines and bond forfeitures should make every attempt to obtain the above-described information as soon as possible after sentencing. And prosecutors should be encouraged to provide this data in the format provided in the Criminal Fine/Forfeiture Litigation Report (Report) (see USAM 9-122.069) for each defendant who is fined or forfeits bail. By requiring the prosecution team to provide such information, the U.S. Attorney can insure enforcement of monetary penalties, which too often are neglected. Furthermore, the Report will memorialize pertinent collection data, thus providing a continuity of information despite personnel changes.

Too often an Assistant will request a financial ability investigation by the FBI without realizing that the prosecutor and agency investigator have the pertinent information. The result is usually a time-consuming reinvestigation that is a duplication of effort, a waste of resources, and a loss of first-hand information and insights.

Another valuable source of information is bank loan applications submitted by debtors for the purchase of realty or vehicles. These records may be subpoenaed under Fed. R. Civ. P. 26(b), 69 and 45 from the

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bank. Such documents will usually present a more accurate picture of the debtor's finances than revealed to the government. If the debtor has an interest in a partnership or corporation, records pertaining to his interest and the value of the entity may be subpoenaed.

The Report has a question concerning transfers of property made by the defendant during the period from the indictment stage through sentencing. Persons to whom debtor property was transferred during such time should be subpoenaed, and questioned about the consideration paid for the property. If inadequate consideration was involved, this is a badge of fraud and a fraudulent conveyance suit should be considered to set aside the property transfer.

9-120.350 FBI Financial Investigations

Investigations to establish the financial ability of a criminal debtor to pay his debt can be conducted by the Federal Bureau of Investigation if the debt exceeds \$2,500. Investigations of a lesser amount will also be conducted but only if there has been a fraudulent transfer of assets or if other special circumstances arise that would justify the use of the FBI.

Before requesting an Ascertain Financial Ability (AFA) investigation, the U.S. Attorney's office should insure that it has taken every step at its disposal to collect the imposition. This includes exhausting all other sources of financial information, such as contacting the prosecutor and the agent who conducted the original investigation of the underlying offense, or using civil discovery. Because of limited investigative resources, requests by the U.S. Attorney for AFA investigations are discouraged and sound judgment should be exercised to limit investigations to debtors with large criminal impositions or where there is fraud involved.

9-120.400 ENFORCING THE JUDGMENT

There are several legal collection techniques which can be used to effect collection from uncooperative debtors who fail to respond voluntarily to demand letters, requests for financial statements, appointments for personal interviews, or demands for prompt payment. These debtors require immediate attorney attention so that proper legal enforcement techniques can be initiated.

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The aggressive application of legal collection techniques characterizes an efficient and effective collection unit. Collection from uncooperative debtors with assets should be the goal of every person associated with criminal collection work. Securing and processing payments without employing legal collection techniques is, of course, desirable. However, many times the debtor will remain unpersuaded by requests for voluntary payments. It is then imperative that the attorney with criminal collection responsibility be prepared to utilize all available legal enforcement techniques.

Collection clerks should also be familiar with these techniques so that they can bring cases to the attorney's attention in a proper and timely fashion and can recommend specific techniques in appropriate cases.

This brief explanation of legal collection techniques is intended only as an introduction to the enforcement procedures available to the U.S. Attorney. Consideration should be given to each of the following techniques.

9-120.410 Federal Rule of Civil Procedure 69(a)

Title 28 of the United States Code gives to the Supreme Court of the United States rule-making authority over other federal courts. The Supreme Court, pursuant to this authority, has promulgated rules of civil procedure for use in the federal district courts. The court rules attempt: (1) to aid the court in expediting and performing its business, (2) to establish uniform procedures for the conduct of the court's business, and (3) to provide parties to a suit with procedural information and instructions on matters pertaining to the judicial proceedings.

Fed. R. Civ. P. 69(a) is one such rule. It allows the judgment creditor, the United States Government, to use any discovery techniques provided by the Federal Rules of Civil Procedure or state court practice. Fed. R. Civ. P. 69(a) also provides the means for enforcing the judgment through execution.

Fed. R. Civ. P. 69(a) states in part:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution . . . and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute

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of the United States governs to the extent that it is applicable

The effect of Fed. R. Civ. P. 69(a), therefore, is to allow the judgment creditor, the United States government, to obtain an order directing the U.S. Marshal to seize such property of the judgment debtor as may be taken under the law of the state in which the court is held.

9-120.420 Liens on Real Estate

The perfection and timely renewal of liens against debtor-held real estate are positive steps which protect the government's interest in satisfaction of criminal monetary impositions. 28 U.S.C. §§1962 and 1963 provide guidelines for the perfection of liens.

The lien is a security interest in real estate. A security interest in real estate means that the party holding the lien, usually a creditor of the owner of the real estate, may initiate legal proceedings to sell the real estate covered by the lien. These proceedings to sell the real estate are termed "foreclosing" on the lien. The proceeds from the sale are distributed to the lien holder in satisfaction of the debt secured by the lien. If the sale produces more money than is necessary to satisfy the debt, the excess is paid to the property owner. If the sale produces insufficient funds to satisfy the entire debt, the unsatisfied portion remains a legally enforceable debt and collection attempts are continued until the entire debt is paid.

Even if the U.S. Attorney chooses not to foreclose on a lien, it serves the useful purpose of restricting the ease with which the real estate can be sold. In most instances, the real estate in the possession of a new owner will remain subject to the lien and may be sold to satisfy the lien, even though the new owner did not incur the debt which serves as the basis for the lien. The resulting loss of transferability is obvious.

"Perfection" of liens refers to the completion of procedures necessary to bring liens into existence and make them effective. Necessary procedures are prescribed in the law of the state in which the federal district court sits. The procedures required by each state can be found in the volume entitled Law Digests of the Martindale-Hubbell Law Directory. (For more information on the Martindale-Hubbell Law Directory see: Exemptions Available to Individual Debtors, a monograph available in the Civil Division Practice Manual, Sections 3-17.1, et seq.)

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Often the lien of the U.S. District Court is referred to as a "judgment lien" since the state law provides that a lien is perfected or brought into existence by recording a copy of the federal district court judgment in the office of the county clerk, county recorder, or some other state or county office. When recordation of the judgment is completed, the lien is brought into existence or "perfected."

In those districts in which recordation of the federal court judgment requires payment of a fee, U.S. Attorney enforcement efforts will ordinarily include lien perfection only in cases involving impositions in excess of \$150.

While criminal judgments in favor of the United States never cease to be enforceable, judgment liens which are perfected by recording the judgment may lapse. Accordingly, a motion should be filed or such other action taken as is required, pursuant to the law of the state in which the lien has been perfected, to renew the judgment lien before its expiration. However, if a judgment lien has become dormant due to a lapse of time, a new suit may be brought on the old judgment at any time by filing a "Complaint on Judgment." (See Forms and Pleadings, USAM 9-122.033.) A new judgment will be obtained as a result of the complaint and this new judgment may be recorded in the prescribed manner and a new judgment lien will be perfected. United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956), aff'd 238 F.2d 83 (5th Cir. 1956); Miller v. United States, 160 F.2d 608 (9th Cir. 1947).

Some state laws provide that liens will not be effective against real estate, valued to a specific maximum amount, which is used as the debtor's residence or homestead. This is called exempt real estate, and recording a federal court judgment will have no legal effect on this property. Nevertheless, the judgment should be recorded since, in some instances, cautious land title companies will refuse to clear title on homestead property when a lien has been perfected, even though the real estate is exempt from the lien.

Liens are not regarded as the beginning and end of the collection effort. Sale of the real estate is often not a realistic step because of state exemption laws, other perfected liens, contested or unclear title to the real estate, and the absence of willing bidders. Liens merely insure the satisfaction of a debt should the debtor wish to transfer or sell the real property. The Criminal Division regards liens as a protective initial step.

Additionally, Fed. R. Civ. P. 62(a) prevents all attempts to enforce federal judgments until 10 days after the entry of judgment. Thus, lien

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foreclosure does not become a realistic measure until after the 10-day stay. However, absent state law providing for an automatic stay pending an appeal, liens can be perfected and foreclosed during an appeal. United States v. Sturgis, 14 F. 810 (S.D. N.Y. 1883).

9-120.430 Federal Rule of Criminal Procedure 38(a)

Title 28 of the United States Code gives to the Supreme Court of the United States rule-making authority over other federal courts. The Supreme Court, pursuant to this authority, has promulgated rules of criminal procedure for use in the federal district courts. Like the rules of civil procedure, these rules attempt: (1) to aid the court in expediting and performing its business, (2) to establish uniform procedures for the conduct of the court's business, and (3) to provide parties to a suit with procedural information and instructions on matters pertaining to the judicial proceedings.

Fed. R. Crim. P. 38 is one such rule. The section of the rule which most interests the Criminal Collection Unit is Section 38(a)(3). Fed. R. Crim. P. 38(a)(3) concerns cases which are on appeal and is important to the Criminal Collection Unit because it empowers the court to enter one of four orders which greatly assist the U.S. Attorney in his/her enforcement effort.

Fed. R. Crim. P. 38 is discussed in detail in USAM 9-120.500, Enforcement During Appeal or Incarceration.

9-120.440 Installment Payment Orders

The law of several states allows a judgment creditor (the United States Government) to obtain an order compelling the judgment debtor (fine or appearance bond forfeiture judgment debtor) to make specified installment payments to the judgment creditor where it is shown that the judgment debtor is receiving or will receive money from any source. This order is called an installment payment order. (See Forms and Pleadings, USAM 9-122.038.) An installment payment order may be obtained even though another judgment creditor is utilizing an income execution against the judgment debtor at the same time, provided the judgment debtor's income is sufficient to warrant an order requiring him/her to make additional payments. An installment payment order may also be obtained even though an execution against the debtor's income is not being utilized.

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In some states, the installment payment order allows the creditor to obtain more of the judgment debtor's income than the state laws governing income execution permit. State income execution laws usually establish a percentage of the debtor's income which is exempt from an income execution. If this figure is 90 percent, for example, then only 10 percent of the debtor's income is subject to an income execution. The installment payment orders allow for specific payments, separate and distinct from the income execution payments, which exceed the percentage ceiling allowed by state law for income executions. Perhaps 20 or 30 percent of a debtor's income could be taken by an installment payment order. The court determines the exact amount of the payments which it will order.

The installment payment orders result from federal district court hearings sought by the judgment creditor (the United States Government). Notice must be given to the judgment debtor so that he^{/she} may appear and oppose the motion. (See Forms and Pleadings, USAM 9-122.035 through 9-122.037.)

9-120.450 Execution Against Income (Garnishment)

An execution against income, commonly called garnishment, is a process whereby wages in the hands of an employer are paid not to the employee, but to a third party who is a creditor of the employee. A debtor's bank account may also be garnished, since it too is money in the hands of a third party.

The "garnishee" is the person against whom the process of garnishment is issued, the person who has money in his^{/her} possession belonging to the judgment debtor. The garnishee in an income execution is the employer. The "judgment debtor" is the party who owes money to the judgment creditor; in this case, he^{/she} is the employee who owes a criminal monetary judgment. The "judgment creditor" is the party who initiates the income execution, the party who is owed money by the judgment debtor; in this case, the United States Government by reason of a criminal fine, appearance bond forfeiture judgment, criminal penalty, or criminal court cost.

The law of the state in which the federal court sits prescribes the procedures for compelling an income execution.

Usually, the income execution can be issued by the federal district court judge or the clerk of the federal district court. (See Forms and Pleadings, USAM 9-122.040 and 9-122.041.) The income execution is issued to the U.S. Marshal who serves it upon the garnishee (employer). In some states, the income execution is first served on the judgment debtor

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himself/^{herself} and a short period of time is allowed for the debtor to begin making voluntary payments to the judgment creditor in the amount specified in the income execution.

If the judgment debtor fails to make these voluntary payments, then the income execution is served upon the employer, or garnishee, who must begin to withhold the specified amount from the debtor's paycheck and pay it over to the United State government. The service upon the employer is considered the "levy" upon the money which the judgment debtor is receiving or will receive.

Some states provide that the income execution is effective only against the money due and owing to the judgment debtor (employee) at the time of the service upon the employer. In these states, the process must be repeated for each pay period. Other states provide that one income execution is effective until the entire debt is satisfied.

State law also establishes a percentage of the debtor's income which is exempt from the income execution. Therefore, only a specific percentage of the debtor's wage or salary may be taken pursuant to an income execution. If the state law exempts 90 percent of the judgment debtor's income, for example, then only 10 percent of the debtor's income is subject to the income execution. The exemptions available in each jurisdiction can be found in the volume entitled Law Digests of the Martindale-Hubbell Law Directory. (For more information on the Martindale-Hubbell Directory see: Exemptions Available to Individual Debtors, a monograph available in the Civil Division Practice Manual, Sections 3-17.1, et seq.)

Many times a simple reference to the possibility of an income execution will be effective in prompting payment. Actual garnishment should follow the demand for payment if the debtor fails to respond and the Assistant U.S. Attorney determines that an income execution will be effective. Garnishment is a severe remedy since the practical result, despite federal law to the contrary, is often dismissal of the employee whose wages are so taken. Thus, the U.S. Attorney should use this collection technique only if other less severe techniques have been ineffective.

9-120.460 Execution Against Realty and Personalty

Execution is not an action, but instead may be viewed as a "process of the court." It is a document issued to a U.S. Marshal or other proper officer authorizing and requiring him/^{her} to execute and enforce the judgment

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of the court by satisfying the judgment out of the real and personal property of the judgment debtor and the debts due him./her

Fed. R. Civ. P. 69(a) provides the means for enforcing the judgment through execution. Fed. R. Civ. P. 69(a) states in part:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution . . . and in proceedings on and in the aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable

The effect of Fed. R. Civ. P. 69(a), therefore, is to allow the judgment creditor, the United States government, to obtain an order directing the U.S. Marshal to seize such property of the judgment debtor as may be taken under the law of the state in which the court is held.

Since 18 U.S.C. §3565 provides that criminal fines may be enforced by execution in like manner as civil cases, we have a means of enforcing both civil and criminal judgments.

The execution may be issued by the Clerk of the U.S. District Court. It is "issued" by delivering it to the U.S. Marshal. (See Forms and Pleadings, USAM 9-122.045.) The execution, stating the names of the parties in whose favor and against whom, the date when, and the court in which the judgment was rendered, together with the amount of the judgment and the amount due thereon, is presented to the marshal. It must also specify the last known address of the judgment debtor and where the judgment was entered. The execution may be accompanied by U.S. Marshals Service Process Receipt and Return (Form USM-285) (USAM 9-122.047). Issuance of the execution often creates a lien against the property of the judgment debtor. The law of the state in which the federal court sits determines the creation and duration of the execution lien.

After receiving the execution, the U.S. Marshal "levies" on the property of the debtor. "Levy" means that the marshal either takes property into his/her custody (personal property which can be moved) or identifies immobile property as having been subjected to an execution levy. This may often be done by serving a copy of the execution on the debtor.

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In most cases, the effect of a levy upon the debtor's property is to give the marshal a special interest in the goods seized, not absolute title thereto. This special property in the goods gives the marshal the right to sell the property to satisfy the judgment. The judgment debtor whose property has been taken under execution remains its general owner, subject only to the special interest acquired by the marshal by reason of his/levy, and the marshal's right to dispose of so much thereof by sale as may be required to satisfy the execution (pay the debt in full).

If the execution and levy does not prompt voluntary payment in full or initiation of a reasonable payment schedule, then the property may be sold by the marshal. This is seldom done with respect to real estate because of state exemption laws, other perfected liens, untested or unclear title to the real estate and the absence of willing bidders (see USAM 9-120.420), but is feasible when marketable personal property is involved. The notice requirements for the sale and the method of sale are prescribed by state law.

The proceeds of the sale, after deduction of fees and expenses, are paid to the party who issued the execution (the United States Government) in satisfaction of the debt. Any excess amount is returned to the debtor. Any deficiency remains as a legally enforceable debt and collection attempts are continued until the entire amount is collected.

9-120.470 Setoff from Civil Service Retirement System

Setoff against the Civil Service Retirement System may be requested to recover any valid debt to the United States, provided: (1) the employee has been separated, (2) the debt amounts to \$5 or more, and (3) the creditor agency has exhausted all other means of recovery.

Money payable from the retirement system may be available for setoff as follows: (1) any annuity payment due the former employee is available; (2) if the former employee has less than five years of civilian service, his/lump-sum credit is available; (3) if the former employee has more than five years of civilian service, his/lump-sum credit is available if and when he/she applies for refund. If he/she does not apply for a refund, his/her annuity payments are available when he/she establishes eligibility for annuity; and (4) upon the death of an employee or former employee, the lump-sum credit is available for setoff.

The following procedure must be observed in requesting setoff of money payable from the retirement system: (1) request for Recovery of Debt

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Due the United States, Standard Form 2805, must be submitted in duplicate to the Commission by the agency requesting setoff; (2) a statement should be sent to the Commission along with the Standard Form 2805 showing in detail what attempts have been made to recover the debt; and (3) a standard Form 2805 filed with the Commission remains valid and in effect until the amount has been fully recovered from the system or until the Commission is notified by the agency requesting the setoff that the debt no longer exists. Therefore, if an indebtedness for which a Standard Form 2805 has been filed becomes completely or partially satisfied in some way other than by setoff from the system, the Commission should be notified.

For a more detailed explanation of this type of setoff, see Federal Personnel Manual Supplement 831-1, Subchapter S19. "Loans, Indebtedness, and Setoffs."

9-120.500 LIAISON ACTIVITY

9-120.510 U.S. Probation Office

Close coordination should be established between the U.S. Attorney's office and the Probation Office with respect to debtors who are on probation. The actions of each office in dealing with fine debtors who are on probation, whether or not the fine is a condition of probation, should be clearly established. The object of such an understanding is not the establishment of rigidly defined spheres of authority, but rather the promotion of cooperation between the two offices, thus insuring that the orders of the court are carried out and that all fines imposed by the court are collected.

The Collection Unit (also known as the Fine Enforcement Unit) and the Administrative Office for the U.S. Courts, Probation Division, have formalized an agreement regarding the collection of fines in probation cases.

When a fine is imposed as a condition of probation, the U.S. Attorney's office should not contact the debtor directly. Instead, the U.S. Attorney's office should contact the supervising probation officer to determine what arrangements have been made with the probationer to dispose of his criminal fine. If the probationer does not immediately pay the imposition in full, the U.S. Attorney's office should monitor the payment schedule established for the probationer by the Probation Office. When it appears that probation may expire without full payment of the fine, the U.S. Attorney's office should contact the supervising probation officer to

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determine what appropriate action will be taken (e.g., extension or revocation). Once probation terminates, the fine imposed as a condition of probation also terminates.

Arrangements should be made with the Probation Office to notify the U.S. Attorney unit of probation terminations (either expiration of term, or revocation) where fine collection is concerned. Likewise, notification should be received of transfers of jurisdiction between Probation Offices. When jurisdiction is transferred, the U.S. Attorney should also transfer the case; however when supervision only is transferred, the case should remain on the records of the U.S. Attorney's office. (See USAM 9-120.150, Case Transfer.)

In order to promote cooperation and understanding between the Probation Office and the U.S. Attorney's office, it is recommended that the U.S. Attorney and the attorney with collections responsibility meet with the Chief Probation Officer to outline their responsibilities and set forth the support each office can render the other. As a guide for such a discussion, see USAM 9-122.070, Memorandum of Understanding, which suggests the major points that should be understood by each office. It is further suggested that the attorney with collection responsibility periodically visit the Probation Office with the view towards promoting enhanced cooperation between the two offices.

9-120.520 U.S. Magistrate

Channels of communication between the U.S. Magistrate and the U.S. Attorney should be opened. Supplementary proceedings (judgment debtor examinations) may be conducted before the U.S. Magistrate under either the Federal Rules of Civil Procedure or state law. (See USAM 9-120.310, Judgment Debtor Examinations.) The procedures for conducting judgment debtor examinations should be coordinated with the U.S. District Court.

The U.S. Magistrate should be encouraged, in appropriate cases, to impose fines as conditions of probation. (See USAM 9-121.200.)

Realistic bond setting procedures and pre-trial release requirements should also be discussed.

9-120.530 Bureau of Prisons

Bureau of Prisons' Policy Statement 7500.15 and 28 CFR §0.171(c) direct that the U.S. Attorney should be notified of the release of federal

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prisoners with unpaid criminal fine judgments. Since the U.S. Attorney benefits from such information, the Criminal Collection Unit within the office should take the initiative in insuring that such information is received. In those instances where a criminal fine debtor with a stand committed fine executed a Pauper's Oath to secure release from prison, a copy of the Pauper's Oath should be obtained from the prison.

9-120.540 Federal Bureau of Investigation

Direct liaison should be established with the local Special Agent in Charge of the Federal Bureau of Investigation. The exact procedure for obtaining FBI rap sheets (arrest records) and financial ability investigations should be ascertained and followed. A description of the type of information sought often helps the FBI avoid needless investigative time. FBI financial-ability investigations should not be requested in terms of locating the debtor, although that is often desired as well. Technically, they are investigations of the debtor's financial condition and should be requested as such. (Utilization of rap sheets was described under USAM 9-120.200.)

9-120.550 Additional Federal Investigative Agencies

Other federal agencies and offices such as the Internal Revenue Service, the Department of the Treasury's Bureau of Alcohol, Tobacco, and Firearms, the Secret Service, the U.S. Marshals Service, etc. can provide valuable assistance in locating and obtaining essential information concerning fine debtors. Each agency should be personally contacted by the Assistant U.S. Attorney with collection responsibility. He^{/she} should outline the U.S. Attorney's interest in criminal collections and indicate those areas in which he^{/she} feels each agency may be able to assist him^{/her}. Wherever possible, definite guidelines concerning each agency's available assistance should be compiled. The opportunity to call on other agencies should not be abused; initial steps in the collection process should always be undertaken by the U.S. Attorney.

9-120.560 Local and State Law Enforcement Agencies

Local and state law enforcement agencies may provide arrest records, background information, addresses, and the place of the debtor's confinement.

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9-120.570 United States District Court Clerk

Close liaison should be established with the United States District Court Clerk to insure that the U.S. Attorney is notified of all criminal impositions and payments.

9-120.600-9-120.800 [RESERVED]

9-120.900 RESTITUTIONS TO THE UNITED STATES GOVERNMENT

Public Law 97-291, the Victim and Witness Protection Act of 1982, modified Title 18 of the United States Code by adding Sections 3579 and 3580. These provisions allow the court in sentencing to order, in addition or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of an offense, including the United States. Restitution may, or may not be ordered as a condition of probation. If not ordered as a condition of probation, the U.S. Attorney will enforce restitution to the United States in the same manner as a judgment in a civil action. Where restitution is ordered as a condition of probation, the collection responsibility rests with the Probation Office.

9-120.910 Reimbursements for Attorneys Fees Authorized Under the Criminal Justice Act-18 U.S.C. §3006A(f)

The Department of Justice is not responsible for monitoring or collecting reimbursements for attorney fees authorized pursuant to 18 U.S.C. §3006A(f). In the event this sort of reimbursement is made a condition of probation, enforcement responsibility appropriately resides with the U.S. Probation Office. Where probation is not involved and the reimbursement of Criminal Justice Act expenditures is instead required independently by court order, the court may use its contempt power to effect collection. In this regard, the assistance of the U.S. Attorney may be necessary in filing an information under 18 U.S.C. §402 following the failure of the defendant to comply with the court order, and the subsequent issuance by the court of a show cause as to why contempt should not be found. United States v. Durka, 490 F.2d 478, 480 (7th Cir. 1973).

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9-121.000 COLLECTIONS II - CRIMINAL COLLECTION POLICY

9-121.100 APPEARANCE BOND FORFEITURE JUDGMENTS

It is the responsibility of the Criminal Division to enunciate policy with respect to motions for forfeiture and judgment of appearance bonds upon failure of the principal to appear as required. 28 C.F.R. §0.55(q).

The types of release prescribed by the Bail Reform Act appear in 18 U.S.C. §3146. The portions of the statute prescribing each type are individually dealt with below.

18 U.S.C. §3146 - Release in noncapital cases prior to trial.

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

- (1) place the person in the custody of a designated person or organization agreeing to supervise him;
- (2) place restrictions on the travel, association, or place of abode of the person during the period of release;
- (3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

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(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

9-121.110 Release On Recognizance

Release on personal recognizance is used to describe release from custody without a monetary bond requirement. It is not a radical form of release, but rather a redirection in release procedures providing the judicial officer setting release conditions with a new basic tool.

Utilization of release on recognizance by these officers, often U.S. Magistrates, can strike at the source of the appearance bond forfeiture judgment problem in many districts (i.e., release of the debtor on insufficiently secured or completely unsecured appearance bonds).

In those cases in which the defendant released on his/her recognizance does not appear, no collection problem is presented as no monetary amount was assigned as a condition of release. Failure to appear may be enforced by utilizing 18 U.S.C. §3150, which establishes several penalties for refusing to obey court orders to appear.

9-121.120 Unsecured Appearance Bond

When a defendant, who has been released upon execution of an unsecured appearance bond, fails to appear at the designated time and place, a motion for forfeiture of the bond and a request for judgment should ensue as expeditiously as court rules allow. (See Forms and Pleadings, USAM 9-122.050 through USAM 9-122.052.) When a judgment is obtained, the same collection process prescribed for criminal fines should commence. However, since such appearance bond forfeiture judgments do not abate with the debtor's death, collection efforts should continue against the estate of the deceased debtor.

The Bankruptcy Reform Act of 1978 (PL 95-598), which took effect October 1, 1979, eliminated the priority granted appearance bond forfeiture judgments in bankruptcy proceedings. Until such time as adequate case law in the area has been developed, the U.S. Attorneys'

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Offices should contact the Criminal Division Collection Unit when an appearance bond forfeiture judgment debtor files for bankruptcy.

It is the policy of the Criminal Division that all forfeited unsecured personal bonds be reduced to judgment and that aggressive collection efforts be made to enforce the judgment. Unlike criminal fine cases, compromise or closing as uncollectible is possible when payment in full cannot be secured. The authority of the Department to compromise in this area is limited to cases of doubtful collectibility arising from doubt in fact or doubt at law. Doubt at law arises in cases in which an action at law, such as a sale by execution, probably would not lie due to the particular circumstances of the case. Of course, compromise or closing with respect to the principal should ordinarily be refused while the principal remains a fugitive (see USAM 9-121.500).

Within the above guidelines, U.S. Attorneys have authority to compromise appearance bond forfeiture judgments in most cases in which the difference between the amount of the judgment and the proposed settlement does not exceed \$60,000, and may close such judgments in cases in which the amount of the judgment is less than \$60,000 (see Criminal Division Directive No. 2, 28 C.F.R., Appendix to Subpart Y). Where the amount is greater than \$60,000, authority for compromise or closing must be sought from the Criminal Division Collection Unit.

9-121.130 Third Party Custody And Personal Restrictions

The Judicial Officer may determine that release on personal recognizance or execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required. 18 U.S.C. §3146 states that:

"When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions: (1) place the person in the custody of a designated person or organization agreeing to supervise him; (2) place restrictions on the travel, association, or place of abode of the person during the period of release;..."

If these are the only conditions of release, there is no monetary obligation to enforce should the defendant fail to appear.

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9-121.140 Ten Percent Cash Deposit

If none of the previous additional release requirements are considered sufficient to insure the appearance of the defendant, the Magistrate may require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release.

This condition of release clearly places a financial burden upon the individual if he/she fails to appear as directed by the court. If the 10 percent deposit consists of anything other than cash, the officer of the court accepting such deposit should be urged to insure that the deposit is owned by the individual presenting it.

If the security accepted for deposit in the registry consists of a deed to real property, the guidelines for justification outlined below can help insure that the value of the security is sufficient to satisfy the amount to be deposited should the principal fail to appear. (See USAM 9-121.150.)

Once again, if the bond is declared forfeit, a motion for judgment should be made as expeditiously as possible under court rules and should be followed by an effort to gain not only the deposit within the registry of the court, but also the balance of the judgment due.

The same possibilities for compromise or closing as uncollectible exist for this type of condition as for all other monetary release conditions.

The Criminal Collection Unit in the U.S. Attorney's Office should be aware of deposits of cash or securities in the registry of the court. In the event that the prosecution of a defendant results in the imposition of a fine, such cash or security deposited by the defendant as security for his/her attendance may be applied in satisfaction of a fine. Rudd v. United States, 138 F.2d 745 (7th Cir. 1943); United States v. Widen, 38 F.2d 517 (7th Cir. 1930). Cash deposited by a defendant as collateral on an appeal bond may also be applied in satisfaction of a fine. United States v. Weissman, 280 F. Supp. 881 (W.D. Okla. 1968). (See Forms and Pleadings, USAM 9-122.054 through USAM 9-122.056.) Cash or securities deposited by a surety as collateral on an appearance bond may not be applied in satisfaction of a fine imposed upon the defendant who appeared

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in accordance with the obligation of the bond. Heine v. United States, 135 F.2d 914 (6th Cir. 1943); United States v. Davis, 47 F. Supp. 176 (S.D.N.Y. 1942), aff'd 135 F.2d 1013 (2d Cir. 1943).

However, in the Fifth Circuit, money posted for bail in the court's registry cannot be applied directly to a criminal fine. United States v. Powell, 639 F.2d 224 (5th Cir. 1981). Nevertheless, U.S. Attorneys within the Fifth Circuit can still obtain money deposited by a defendant in the registry of the court. This should be effected through execution on the Clerk of Court prior to the funds being returned to the defendant.

Money or securities of principals in the registry of the court have been directed to satisfy fines before tax liens. United States v. Klein, 163 F. Supp. 823 (S.D.N.Y. 1958).

9-121.150 Cash Deposit or Surety Bond

If third party custody, personal restrictions, and ten percent cash deposits are considered insufficient protection, then the Magistrate may require the execution of a bail bond with sufficient solvent sureties or the deposit of cash in lieu thereof.

9-121.151 Total Cash Deposit

A cash deposit in the full amount of the bail is, of course, the easiest type of release condition to enforce. If the defendant fails to appear, the judge orders the total amount on deposit to be forwarded to the Treasury and no collection problem is created.

9-121.152 Personal Sureties

In dealing with personal sureties (including one serving as his/her surety as above), the distinction between the power to grant bail and the power to accept the bond after the bail has been granted should be kept in mind. While bail pending trial in noncapital cases is almost a right of the defendant, Fed. R. Crim. P. 46(d) states:

Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of

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other bonds and undertakings for bail entered into by him/her and remaining undischarged and all his/her other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

In some districts, court employees, such as the United States District Court Clerk, have been delegated authority to judge the acceptability of assets pledged to meet the requirements of the appearance bond.

Those officers accepting or taking bail have a certain amount of discretion as to what they will accept as financially sufficient. Hodgkinson v. United States, 5 F. 2d 628 (5th Cir. 1925). Courts have variously held that this discretion may be exercised to reject for moral risk as well as financial (United States v. Nebbia, 357 F. 2d 303 (2d Cir. 1966)); to reject a bond by a surety fully indemnified against loss by a third party (United States v. Lee, 170 F. 613 (S.D. Ohio 1909)); or to reject property outside the district (Ex parte Cassesse, 288 F. 197 (E.D.N.Y. 1923)). United States District Courts can set guidelines for the exercise of such discretion.

The U.S. Attorney is in a position to tactfully seek judicial promulgation of rules with respect to property requirements of personal sureties which will require that the net worth of the prospective surety is at least equal to the amount of the bond. The following are suggested as guidelines:

A. Secure a certified copy of the deed to all of the surety's property which he/she is listing as a part of his/her net worth.

B. Obtain a certified copy of the deed showing the surety's residence homestead (if this property is exempt under state law from creditor's process).

C. Require presentation of letters from two independent appraisers showing the fair market value of the property listed by the surety as a portion of his/her net worth statement, exclusive of the surety's residence homestead (if exempt under state law from creditor's process).

D. Require the defendant to provide a certification of payment of all taxes due from any taxing authority with power to seize the pledged property for failure to make payment.

E. Obtain a statement from the mortgagee holding a lien against any of the property being used in the net worth statement which shows the amount of the lien by the mortgagee.

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Each of the above statements or deeds may be presented by the prospective surety to the Judicial Officer admitting or setting bail.

Guidelines such as those appearing above, if authorized by the court and followed by those accepting bail, can simplify the collection of judgments when the defendant fails to appear.

If personal sureties are found to be insolvent or unable to meet the conditions of the bond, the U.S. Attorney should initiate an investigation to determine if the surety swore falsely concerning his/her assets when justifying his/her ability to serve as surety. Prosecutions for false swearing or perjury under 18 U.S.C. §1001, should be vigorously pursued against those individuals who have sworn falsely as to their property in order to act as sureties.

In situations where a personal surety pledges realty as collateral for an appearance bond, the U.S. Attorney can seek to have the realty forfeited directly to the United States at the time the judgment is sought under Fed. R. Crim. P. 46(e)(3). This is accomplished by moving the court for an order vesting title of the pledged realty in the United States pursuant to 18 U.S.C. §3150, which states in part:

Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, . . . , incur a forfeiture of any security which was given or pledged for his release, . . .

The order should also seek the appointment of a receiver, who would be directed to preserve the realty, sell it and deliver the proceeds of the sale, after paying fees, expenses, etc., to the U.S. Attorney for application to the appearance bond forfeiture judgment. (See USAM 9-122.064 through 9-122.068 for examples of the motions to be filed with the court).

This order should further direct the U.S. Marshal to place the United States in exclusive peaceful possession of the pledged realty. (See USAM 9-122.066). This provision of the order often results in the surety doing his/her utmost to persuade the fugitive to surrender in the hope of securing the return of his/her property under Fed. R. Crim. P. 46(e)(4).

As it relates to the realty, this procedure obviates any necessity to consider the homestead exemption since the United States is in the position of a contingent secured creditor and not merely a general judgment creditor. Also, this method of vesting title in the United States has already received the imprimatur of a title company which has

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been willing to insure the title of the receiver's grantees. Moreover, there should not be any question the grantees receive good title since the entire process is sanctioned by a federal court.

9-121.153 Individuals Serving As Professional Sureties

The guidelines for justification of sureties pointed out above should also be followed for individuals acting as professional, paid sureties. The basic problem encountered when dealing with this type of surety is that one piece of property is often pledged as security for several bonds. In the event of a default or several defaults, the value of the property is well below the total amounts due.

Compromise or closing as uncollectible are allowed when dealing with professional sureties of this class. However, only in exceptional situations, e.g., insolvency or bankruptcy of the surety, would the Criminal Division authorize closing judgments of more than \$60,000 when paid, professional sureties are involved. The U.S. Attorney should follow the same criteria for appearance bond forfeiture judgments \$60,000 or less.

Payment in full should be promptly demanded and received from professional sureties.

In all cases of extended nonpayment, compromise or closing involving a professional surety, the professional surety should be required to stipulate that he^{/she} will no longer write bonds in federal court.

9-121.154 Corporate Sureties

Corporations engaged in the business of providing appearance bonds for a fee must appear on the current Department of the Treasury, Fiscal Service, Bureau of Financial Operations Circular 570: Surety Companies Acceptable on Federal Bonds. Those corporations which have met the provisions of Title 6 of the United States Code need not justify in each case their ability to meet the financial obligation assumed under the bond.

A corporation holding a "Certificate of Authority to Write Federal Bonds" may not underwrite any risk on any bond or policy on behalf of any individual, firm, association, or corporation, whether or not the United States is an interested party, if the amount of the bond is greater than 10 percent of the paid-up capital and surplus of the company as determined by the Secretary of the Treasury. There are reinsurance provisions within

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Department of the Treasury regulations allowing more than one company to participate in any such bond. However, it is unlikely that the U.S. Attorney will encounter this problem in enforcing appearance bond forfeiture judgments.

The Criminal Collection Unit within each U.S. Attorney's Office should be aware of the corporations in their district which regularly write bonds and confirm that these corporations appear on the Department of the Treasury Circular 570. In the event that a corporation is writing bonds in a district in which it is not authorized to do so, the Department of the Treasury and the Criminal Division Collection Unit should be notified.

The demand letter to a corporate surety should include a copy of the judgment as well as a copy of the bond. Demand should be made to the general agent of the corporation's main office with an information copy to the agent writing the bond.

Any corporate surety which fails to comply with 6 U.S.C. §11, which requires full payment 30 days after final judgment, should be brought to the attention of the court and the Criminal Division Collection Unit. Notification to the Criminal Division is essential so that it may work with the Department of the Treasury to secure full payment of the judgment and removal of the surety from the approved list.

The U.S. Magistrates should also be notified by the U.S. Attorney and be requested to refuse bonds written by corporate sureties who fail to comply with 6 U.S.C. §11.

In dealing with professional sureties, whether individual or corporate, all forfeitures should be moved to judgment as expeditiously as court rules allow. The surety's financial ability is not taken into consideration before the forfeiture is moved to judgment.

Again, while compromise or closing are technically possible when dealing with professional or corporate sureties, the Criminal Division will agree to compromise or close appearance bond forfeiture judgments more than \$60,000 only if the surety is going out of business. The U.S. Attorney is asked to conform to the same criteria for compromise or closing of appearance bond forfeiture judgments of \$60,000 or less. Requests by sureties to reduce the amount owed are properly handled by the courts under Fed. R. Crim. P. 46(e). These requests may be made much beyond the 120 days established by Fed. R. Crim. P. 35 because of specific language in the rule. Babb v. United States, 414 F.2d 719 (10th Cir. 1968).

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If a professional or corporate surety seeks to compromise or close an appearance bond forfeiture judgment, the surety should be required to stipulate that it will not write bonds in the federal judicial system in the future.

9-121.160 Miscellaneous

In addition to administrative closing by the U.S. Attorney, Fed. R. Crim. P. 46(e)(2) and 46(d)(4) allows sureties to petition the court to set aside a forfeiture or remit a forfeiture judgment when justice does not require enforcement. When sureties so move, the U.S. Attorney should object when the government has expended money because of the defendant's failure to appear. All expenses incurred because of failure to appear should be sought, to include investigative agency expense in apprehending the fugitive, cost of extradition (legal fees, marshal's cost, transportation), cost of witnesses who may have been in court to testify on the date of the failure to appear, U.S. Attorney personnel costs, expenses of inconvenience as they can be verified, and appropriate court costs.

No appearance bond forfeiture may be reduced to judgment more than six years after the forfeiture has been declared. 28 U.S.C. §2415(a) established a six-year period of limitations on government suits for money damages based on contract, express or implied.

9-121.200 FINES IMPOSED AS CONDITIONS OF PROBATION

The Criminal Division has always encouraged the imposition of fines commensurate with the defendant's ability to pay. This commitment to rational sentencing procedures is reflected in the increasing assessment of the fines as conditions of probation. We encourage contact with the United States Probation Office to discuss fines imposed as conditions of probation and sentencing recommendations in presentence reports.

Many U.S. Attorneys have successfully resolved difficulties in collecting criminal fines by persuading the U.S. Probation Officers to recommend, in appropriate cases, fines as conditions of probation in their presentence reports. This procedure gives both the U.S. District Court and the U.S. Attorney's Office greater flexibility and control in collecting the imposition. For example, if a debtor is cooperative but unable to pay, the fine imposed as a condition of probation terminates once probation expires. The U.S. Attorney may then close the case and remove it from his/her records. On the other hand, if a debtor is

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uncooperative and refuses to pay, the U.S. District Court may extend or revoke his/her probation for failing to comply with a condition of probation. This sentencing alternative, when properly employed, is far superior to the straight fine imposition which remains outstanding until payment in full, death of debtor, or Presidential pardon.

9-121.210 Fine Remission During Probationary Period

The probation provisions of 18 U.S.C. §3651 allow the court to impose a fine as a condition of probation and to eliminate all or a portion of the fine during the period of supervision. The statute states: "[w]hile on probation and among the conditions thereof, the defendant may be required to pay a fine in one or several sums;... The court may revoke or modify any condition of probation, or may change the period of probation."

Judicial review occurring during the term of probation does not infringe upon executive enforcement responsibility or Presidential pardoning power.

Fines specifically made as conditions of probation provide flexibility and strong control by the court during the period of supervision. If an outstanding balance remains despite the probationer's good faith attempts to satisfy the imposition, the court may remit the portion of the fine which the debtor is unable to pay. A high degree of U.S. Attorney - U.S. Probation Office coordination can aid the court in achieving its goal of punishment and rehabilitation.

9-121.220 Fine Remission Upon Expiration or Revocation of Probation

As indicated, a fine imposed as a condition of probation may be remitted by the court during the period of probation supervision. Another portion of 18 U.S.C. §3651, indicates that, in certain circumstances, the fine will be eliminated when the period of probation terminates. This portion states: "[t]he defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation."

It must initially be determined whether or not the fine has been imposed as a condition of probation. This should be clearly stated in the judgment and commitment order. For example, a sentence reading as follows would indicate that the fine is a condition of probation:

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Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his ^{her} authorized representative for imprisonment for a term of five years and to pay a fine of \$5,000, execution of sentence is hereby suspended and the defendant is placed on probation for a period of three years and, as a special term and condition of probation, the defendant will pay a fine of \$5,000.

Other judgment and commitment orders will be less clearly worded but will, nevertheless, impose a fine as a condition of probation. 18 U.S.C. §3651 states: "probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment." The code's presumption is that probation is granted as to the entire sentence.

Therefore, any phrase describing the fine in the following or similar terms will allow the Assistant U.S. Attorney with criminal collection responsibility to interpret the sentence as imposing the fine as a condition of probation: "The fine imposed is to be paid during the period of probation." "The fine imposed is to be paid according to the terms and conditions established by the Probations Office." "The fine is to be paid through the Probation Officer."

9-121.221 Not a Condition of Probation

If the fine is not imposed as a condition of probation, neither expiration nor revocation of probation will affect the existence of the fine. Expiration is the natural termination of probation after the period of supervision has ended. Revocation is court ordered termination of probation because of probation violations. In both instances, when the fine is not a condition of probation, the fine continues in existence and must be collected by the U.S. Attorney even though probation terminates.

9-121.222 Condition of Probation

If the fine is imposed as a condition of probation, it terminates with the expiration or revocation of probation.

A. Expiration. If the probation expires (naturally terminates after the period of supervision has ended), the fine is remitted and the U.S. Attorney should close the collection case. United States v. Rosello, 193

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F. Supp. 900 (D. Puerto Rico 1961). A notation of the closing, citing 18 U.S.C. §3651, is entered on the Criminal Debtor Card and a brief memorandum is inserted in the case folder. Both are filed in the "closed" files.

B. Revocation. If the probation is revoked by the court, the U.S. Attorney must look to the further action of the court to determine if an imposition remains to be collected. Three possibilities are present:

1. The court may order execution of the sentence which it had originally imposed and suspended. In the example of the five-year sentence of imprisonment and \$5,000 fine, the defendant would once again owe the original \$5,000 fine and the U.S. Attorney would immediately initiate enforcement attempts.

2. The court may impose a new sentence. This sentence may be no greater than that which was originally imposed, but may be less severe. 18 U.S.C. §3653. In other words, the court may reimpose the \$5,000 fine or impose any smaller amount authorized by statute. It may not impose a larger amount, even if the larger amount is authorized by the statute under which the defendant was sentenced. Roberts v. United States, 320 U.S. 264 (1943). If a fine is imposed at the resentencing, the defendant would once again owe the amount assessed and the U.S. Attorney would immediately initiate enforcement attempts. If no fine is imposed at the resentencing, the defendant does not owe a fine and the U.S. Attorney may close the collection case.

3. The court may have originally suspended imposition of sentence. This means that instead of sentencing the defendant to five years imprisonment and a \$5,000 fine, the court imposed no sentence at all, but simply placed the defendant on probation and directed him/her to pay a fine as a condition of the probation. If imposition of sentence was suspended, the court may impose any sentence it originally may have imposed by statute. Thus, if a \$5,000 fine is imposed at this point, the U.S. Attorney would immediately initiate collection attempts. If no fine is imposed, the U.S. Attorney may close the collection case.

In all three instances described above, in order for the defendant to owe a fine, it must be imposed at the resentencing. If a fine is not assessed at the resentencing, the U.S. Attorney may close the collection case. It is therefore imperative that the U.S. Attorney be informed of the results of the probation revocation hearing so that he/she may take the appropriate action with respect to the outstanding fine.

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When the probationer has made a good faith effort to satisfy his/her imposition, nonpayment of the fine, standing alone, will not be considered a sufficiently serious violation to justify revocation of probation. If the probationer is too poor to make payments or is sincere in his/her efforts to satisfy the fine, the court may choose to allow probation to expire even though the fine has not been paid in full. United States v. Taylor, 321 F.2d 339 (4th Cir. 1963). However, if the failure of the probationer to pay all or any portion of his/her fine has been willful, deliberate, or intentional, or the probationer's plea of pauperism has been insincere, or he/she has shown a long history of indifference to his/her legal obligations, then the court may enter an order revoking probation for failure to pay the fine which has been imposed as a condition of probation. United States v. Taylor, 200 F. Supp. 582 (M.D.N.C. 1963), aff'd 325 F.2d 1020 (4th Cir. 1964). Revocation of probation lies within the discretion of the sentencing court. United States v. Williams, 378 F.2d 665 (4th Cir. 1967).

Probation Officers are charged with the responsibility of enforcing all conditions of probation and therefore of insuring that fines imposed as conditions of probation are paid as directed by the court. United States Probation Officers' Manual, Chapter 5, Section 1, 5.4. This does not eliminate the responsibility of the U.S. Attorney who is always ultimately responsible for the collection of criminal fines. Sentences placing debtors on unsupervised probation require coordination between the Probation Office and the U.S. Attorney's Office to insure payment.

It is, thus, quite important that the two offices cooperate to effect enforcement of the orders of the court. The Criminal Division of the Department of Justice and the Administrative Office of the United States Courts work together to promote harmony and coordination of collection efforts between the U.S. Attorney and the U.S. Probation Office. Conferences between the Department and the Administrative Office have resulted in this policy of cooperation.

When a fine debtor is placed on probation, the U.S. Attorney should allow the U.S. Probation Office to make initial efforts to enforce the judgment and should actively employ enforcement techniques only after conferring with the Probation Office. The two offices should clearly outline the assistance which each can render with respect to fine debtors. Meetings should be arranged for discussion of the status of both paying and nonpaying probationer fine debtors, the financial ability of debtors who have been the subject of Probation Office presentence reports, and other topics of mutual interest. (See USAM 9-120.510.)

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The actions of each office in dealing with fine debtors who are on probation, whether or not the fine is a condition of probation, should be clearly outlined. The object of such an understanding is not the establishment of rigidly-defined spheres of authority, but rather the promotion of cooperation between the two offices, thus insuring that the orders of the court are carried out and that all fines imposed by the court are enforced.

In those cases in which probationers fail to satisfy their fines during the period of probation supervision, and that period of supervision is less than the maximum of five years allowed by 18 U.S.C. §3651, the U.S. Attorney should contact the Probation Office prior to expiration of probation and discuss the possibility of extending the period of supervision for another year or to the maximum five-year period. When the probationer has made insufficient effort to satisfy the obligation and is capable of paying, the U.S. Attorney should strongly recommend such an extension.

When a fine is imposed as a condition of probation and the probationer becomes a fugitive, the fine does not immediately expire. Usually a warrant for the arrest of the probationer is issued, and this effectively tolls the running of the period of probation. That is, the warrant retains jurisdiction for the U.S. District Court over the defendant. Once the defendant is arrested, the defendant is brought before the court on a revocation hearing. Up to this point, probation has not been revoked and the fine therefore remains. At the revocation hearing, the defendant may be resentenced to a prison term or placed again on probation depending on the sentencing judge. If no warrant issues for the fugitive probationer's arrest, the probationary period continues to run.

Should the U.S. Attorney feel that consultation with the Probation Office is not producing proper results, the Criminal Division Collection Unit should be notified so that it may work with the Administrative Office of the United States Courts to resolve the problem.

9-121.300 PRESUMPTION OF DEATH

9-121.310 Individual Debtor

The administrative elimination of criminal fine and penalty debtors from the Criminal Outstanding Fines and Forfeitures Pending Inventory may be accomplished under the Department of Justice presumption of death

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policy. This policy and the deported debtors' policy (See USAM 9-121.400) provide the only methods by which criminal fines and penalties may be removed from the inventory in the absence of payment in full, Presidential pardon, or death of the debtor. (Fines imposed as conditions of probation may be closed when the period of probation supervision expires.) (See USAM 9-121.200, Fines Imposed as Conditions of Probation.) Criminal penalties are presumed to be penal in nature and therefore not capable of compromise or closing as uncollectible unless a reading of the statute governing the prosecution indicates that the criminal penalty is civil in nature. A criminal penalty is civil in nature if the language in the statute refers to "bringing suit" to enforce the penalty.

The presumption of death policy states that a debtor is presumed dead only if (1) the location of the debtor and his/her property subject to creditor's process is unknown, (2) the debtor is at least 75 years old, and (3) the debtor has been diligently sought each year for five years immediately prior to the presumption of his/her death.

When these three requirements have been fulfilled, a notation is entered on the Criminal Debtor Card, a brief memorandum is included in the case folder, and both are placed in the "closed" files. The U.S. District Court Clerk should also be notified so that a notation may be made in the court's files.

9-121.311 Location

Before the presumption of death policy may be applied, the U.S. Attorney must determine that the location of both the debtor and his/her property are unknown. If either is discovered, the policy may not be implemented. In addition, if either the debtor or his/her property is discovered after the policy has been utilized, the normal collection activity must be resumed.

9-121.312 Age

If the debtor's age is unknown, the U.S. Attorney may assume that the debtor was 21 years old when he/she was fined. This is a reasonable assumption since statistics reveal that the median age of convicted defendants at sentencing is greater than 21 years. The conservative interpretation of these statistics builds the presumption of death policy on a sound premise. Thus, 49 years or more after the imposition of the fine or criminal penalty, the searches routinely made each year begin to fulfill the third requirement listed above. If the debtor and his/her

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property cannot be found after five years, he/she may be presumed dead and his/her case may be closed.

If the debtor's age is known, his/her actual age is used and no presumption of age is necessary.

9-121.313 Searches

The third requirement prescribes five annual diligent searches for the debtor. These searches are made to further increase the probability that the presumption of the elderly debtor's death is correct; they are merely a continuation of the searches made each year for every unlocated debtor. The five searches which enable the application of this policy must always be conducted in the five years immediately prior to the closing of the case, even though extensive location efforts may have been made in earlier years. The standard techniques for locating missing debtors are employed in these annual searches.

A memorandum detailing the administrative closing of the collection case is sent to the Criminal Division Collection Unit. A memorandum similar to the following is sufficient:

This office has closed the following case due to an administrative presumption of death. The debtor is 75 years of age or older and has been diligently sought for five years immediately prior to his/her removal. Neither the debtor nor property in the debtor's name has been discovered.

The memorandum would then present a brief description of the collection activity taken in each of the five annual searches. The description may be drawn from the Criminal Debtor Card (Form USA 117A), the permanent record of the collection activity taken in each case. For example:

A. Example No. 1.

1. Name: David Baker
2. Age: 80
3. Claim Number: 32001
4. Date Of Imposition: 2/30

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5. Amount Of Imposition: 5,000
6. Amount Paid To Date: Nothing Paid
Date Of Last Payment:

7. 1971: Reviewed the file - demand letter with OBD-500 enclosed was mailed to debtor's last known address by registered mail, forwarding requested. The letter was returned undelivered. A check of the telephone and city directories in the area of debtor's last known address proved unsuccessful. A FBI arrest record indicated debtor was last arrested in January, 1936. A FBI financial ability investigation was unable to locate the debtor or his property.

8. 1972: Internal Revenue Service Project 719 request indicated that the debtor filed no income tax returns in the last three years.

9. 1973: Inquiries to the State Bureau of Vital Statistics and the State Department of Motor Vehicles revealed no information concerning the debtor's address.

10. 1974: FBI arrest records indicated debtor was last arrested on January 19, 1936.

11. 1975: Armed Services records and VA records revealed no indication of military service or Veterans Administration benefits. A check of telephone and city directories for cities in the area of debtor's last know residence revealed no listing for the debtor.

B. Example No. 2

1. Name: Hartman, Alice
2. Age: Unknown
3. Claim Number: 420001
4. Date Of Imposition: 1/8
5. Amount Of Imposition: 200
6. Amount Paid To Date:
7. Date Of Last Payment: \$25 paid 3/42

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8. 1971: Demand letter with OBD-500 enclosed sent by registered mail, forwarding requested to last known address. Letter returned "address unknown." FBI arrest records indicated that debtor was last arrested in Phoenix, Arizona, in 6/48. U.S. Attorney, District of Arizona, reported no information available from county sheriff.

9. 1972: Internal Revenue Service Project 719 request indicated no income tax returns were filed in last three years.

10. 1983: U.S. Probation Office records reported last contact with debtor was mandatory release in 7/43.

11. 1974: State Bureau of Vital Statistics, Arizona, had no record of debtor.

12. 1975: Demand Letter sent by registered mail, forwarding requested to last known address. Letter was returned undelivered. Internal Revenue Service Project 719 request indicated no income tax returns were filed in last three years.

It must be repeated that death may be presumed only in those cases in which the location of the debtor and his/her property are unknown. If the debtor can be contacted, his/her fine or criminal penalty may be satisfied only by payment in full, Presidential pardon, or death, regardless of his/her age.

9-121.330 Corporate Debtors

It is the policy of the Department of Justice that criminal fines involving corporations not be closed until payment in full is received or the corporation has been legally dissolved. Legal dissolution occurs primarily when the corporate charter is forfeited, not when the corporation becomes inactive or defunct. In other words, the corporation must be more than no longer doing business, it must cease to exist as a corporate entity.

While the Criminal Division agrees that involuntary dissolution through state action should not be the exclusive method by which a fine from a defunct corporation may be closed, alternative procedures must carefully insure that the corporation is permanently defunct before the debtor is presumed dead and enforcement efforts are terminated. Therefore, forfeiture of the corporate charter, or the right to do business, or any other corporate power which has a legal effect less than

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complete dissolution, but which prevents the corporation from transacting business until certain fines and penalties are paid, may be considered equivalent to dissolution. However, this policy will not allow the closing of corporate fines until seven years after the date on which the corporate powers were forfeited and until seven annual checks with the appropriate state agency have determined that the corporation has not been restored to an active status. Prior approval in writing must be secured from the Criminal Division.

In some states a corporation never expires but may be renewed at any time upon payment of a state franchise tax. If this situation should exist, it is suggested that after the yearly inquiries with your Secretary of State or other officials responsible for corporation supervision to ascertain current status, the case may be closed after seven years of inactivity.

If the corporate powers, rights, and privileges have not been restored after seven years and the Criminal Division authorizes the termination of collection efforts, the corporate fine may be administratively closed. A brief notation should be entered on the Criminal Debtor Card (Form USA-117A), a memorandum included in the case folder, and both placed in the "closed" files. The U.S. District Court Clerk should also be notified.

If the corporation is later restored to an active status, the collection case must be reopened and the debtor vigorously pursued.

9-121.400 DEPORTED DEBTORS

A corollary of the presumption of death policy allows deported criminal fine-and-penalty debtors to be administratively eliminated from the Criminal Outstanding Fines and Forfeitures Pending Inventory.

The deported debtor policy allows criminal fine-and-penalty cases to be administratively closed only if: (1) the debtor has been deported from the United States by the Court and resides in a foreign country, (2) the debtor owns no property in the United States which is subject to creditor's process, and (3) the debtor is at least 75 years of age.

The U.S. Attorney must first search for the debtor's assets located in the United States. If such assets are discovered, standard criminal collection techniques are employed to collect the imposition from these assets. (See USAM 9-120.400, Enforcing the Judgment.) In such cases, the policy pertaining to deported debtors may not be applied until these assets are exhausted.

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In addition to the search for domestic assets, the U.S. Attorney must ascertain and verify the foreign address of the debtor and make a demand for full payment. If the debtor does not respond, no further action is required until the debtor reaches age 75 when one more attempt must be made to collect the imposition. If this attempt proves fruitless and a check with the Immigration and Naturalization Service reveals that the debtor has not returned to the United States, the imposition may be administratively closed. A notation is entered on the Criminal Debtor Card, a brief memorandum is included in the case folder, and both are placed in the "closed" files. The U.S. District Court Clerk should also be notified.

If the age of the debtor is unknown, the U.S. Attorney may assume that the debtor was 21 years old when the fine or criminal penalty was imposed.

A memorandum detailing the administrative closing of the case is sent to the Criminal Division Collection Unit. A memorandum similar to the following is sufficient:

This office has administratively closed the following case. The debtor was fined \$1,000 and deported to Mexico on October 30, 1945. The debtor presently resides in Mexico and owns no realty or personalty located in the United States. The debtor is now 75 years of age and has failed to respond to our demand for full payment.

9-121.500 FOREIGN NATIONALS WITH APPEARANCE BOND FORFEITURE JUDGMENTS

Foreign national appearance bond forfeiture judgment debtors may be administratively eliminated from the criminal Inventory Computer Printout if certain conditions are met.

The foreign national debtor policy allows appearance bond forfeiture judgment debtors to be administratively closed only if: (1) the appearance bond forfeiture has been moved to judgment, (2) the debtor is a citizen of another country and is residing in that country with no likelihood of returning to the United States, (3) the debtor has no property within the United States subject to execution, and (4) the debtor has refused to respond to the U.S. Attorney's demands for payment of the appearance bond forfeiture judgment.

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After the above conditions are met, the approval of the Criminal Division Collection Unit must be secured prior to administratively closing the appearance bond forfeiture judgment by submitting a memorandum detailing the facts of the case and a statement that the conditions for closing have been met.

If the Criminal Division Collection Unit concurs with the U.S. Attorney's request to close, a notation is entered on the Criminal Debtor Card, a brief memorandum is included in the case folder, and both are placed in the "closed" files. The U.S. District Court Clerk should also be notified.

Should a foreign national debtor ever re-enter the United States, the bond forfeiture judgment may be enforced at that time.

9-121.600 STAND-COMMITTED FINES

A stand-committed fine is one which requires that the debtor remain incarcerated until the fine is paid in full. The title "stand-committed" refers to the special manner in which this fine is enforced and is derived from the wording of the sentence which is usually similar to the following: "Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby ordered to pay a fine in the sum of \$1,000 and to stand committed in the custody of the Attorney General or his authorized representative until the fine is paid in full."

Occasionally, the sentencing judge will suspend execution of the stand-committed fine for 30 or 60 days to allow the defendant an opportunity to secure adequate funds to satisfy the imposition. When this occurs, the U.S. Attorney should closely supervise the conduct of the debtor. The debtor's suspense system card should be marked to initiate review of the case two weeks before payment is due. At that time, if the fine has not been paid in full, the debtor should receive a letter indicating that he will be incarcerated on the date designated for execution of the sentence if the fine remains unpaid. If payment is not received on the appointed day, the U.S. Attorney should prepare an Order of Arrest and an affidavit in support of the order, present it to the presiding judge for his/her signature, and deliver it to the U.S. Marshal who will arrest the debtor and place him/her in incarceration until the fine is paid in full. If the U.S. Attorney does not supervise execution of the sentence in this manner, it is unlikely that the order of the court will be enforced.

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Since indigents may not be imprisoned for debt, 18 U.S.C. §3569 details the procedure by which an indigent with a stand-committed fine may be released from imprisonment without paying his/her fine. The debtor must apply to the United States Magistrate for a hearing to determine his/her indigency. If the debtor is serving a term of years, the application may be made to the warden of the institution of incarceration. The warden will notify the U.S. Attorney of the district where the fine was imposed and will request any information disputing the debtor's claim of indigency. If no information is received by the warden from the U.S. Attorney, it will be assumed that the inmate's statement is true. If during the hearing on the debtor's financial status there is evidence that he/she is unable to pay the fine and has no property exceeding \$20 in value (except property exempt from creditor's process) the inmate may take a pauper's oath and be discharged from incarceration. The oath is administered by the United States Magistrate or the warden.

If the debtor possesses non-exempt property in excess of \$20 in value, he/she is still eligible for release if the Attorney General determines that all such property is reasonably necessary for the support of the debtor or his/her family. In such instances, the case will be referred to the Director of the Bureau of Prisons who has been delegated authority by the Attorney General to make the final determination. See 28 C.F.R. §0.96. The Director will decide if the inmate is to be released without any payment, or whether partial payment or payment in full will be necessary as a condition of release.

The pauper's oath serves only to release the debtor from imprisonment. It does not remit the fine or relieve the debtor of his/her obligation to make full payment. See United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956), aff'd, 238 F.2d 83 (5th Cir. 1956). Nor does serving an additional 30-day term as provided for in 18 U.S.C. §3569 serve as a substitute or alternative for payment of a fine. See Vitagliano v. United States, 601 F.2d 73 (2d Cir. 1979). The U.S. Attorney must continue vigorous and aggressive collection attempts until the fine is paid in full and may enforce the judgment by execution against the property. However, the debtor may not be sentenced for contempt of court for failure to make payments. See United States v. Baird, 241 F.2d 170 (2d Cir. 1957).

18 U.S.C. §3569 provides that the debtor must be confined for 30 days before he/she qualifies to petition for an indigency hearing and pauper's oath. Recent Supreme Court decisions, most notably Williams v. Illinois, 399 U.S. 235 (1970), and Tate v. Short, 401 U.S. 395 (1971), have invalidated this 30-day provision. When a debtor who is serving a term of

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years reaches his/her release date, he/she is immediately eligible for release if he/she has taken a pauper's oath. No 30-day waiting period need elapse. Bureau of Prisons policy statement 2101.2A directs prison personnel to notify the U.S. Attorney one month in advance of such release and to include a copy of the sworn statement of indigency. If such notification is not being received, the U.S. Attorney should contact the Criminal Division Collection Unit so that it may work with the Bureau of Prisons to solve the problem.

If a stand-committed fine is assessed in a judgment and commitment order which does not impose a term of years as well, the debtor may apply to the U.S. Magistrate for an indigency hearing prior to being confined and thereby completely avoid incarceration.

Thus, it is clear that a stand-committed fine is a sensible sentencing alternative to employ for defendants who have the ability to pay the fine and who would find incarceration an extremely undesirable alternative to payment in full. Such a sentence will eliminate the necessity for time-consuming clerical and legal enforcement techniques. The debtor will pay the fine immediately and the U.S. Attorney may close the collection case.

Conversely, a stand-committed fine is an unwise sentence to impose upon a debtor who will qualify for the pauper's oath prescribed by 18 U.S.C §3569. These debtors, by definition, possess few assets which are subject to levy by the U.S. Attorney. Since the oath does not relieve the debtor of his/her obligation to pay the fine, it is included on the records of the U.S. Attorney and, in most cases, remains there for a number of years.

The Criminal Division believes that the enforcement process begins at sentencing. While improper employment of stand-committed fines compounds enforcement problems, appropriate utilization of this sentencing alternative encourages prompt payment. The U.S. Attorney should insure that the U.S. Probation Office clearly understands the advantages and disadvantages of stand-committed fines so that their sentencing recommendations in presentence reports can be properly tailored to the financial circumstances of the defendant.

9-121.700 ENFORCEMENT DURING APPEAL OR INCARCERATION

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9-121.710 Debtors on Appeal

Criminal Division policy has traditionally proscribed garnishment or execution against property of the defendant during the pendency of an appeal. This policy has been reconsidered in view of the large number of narcotic and white collar crime cases in which there is a likelihood of the defendant concealing or conveying assets during the appeal. In such cases the U.S. Attorney should take action to protect the interests of the government.

Various possibilities exist to insure that the defendant's assets will not be dissipated during the pendency of an appeal. Unless a stay of execution was ordered at sentencing, the U.S. Attorney may levy execution on the debtor's property 10 days after entry of judgment and place funds it secures in the registry of the court. United States v. Kazuyuki Fujimoto, 14 F.R.D. 448 (D. Hawaii 1953).

When an appeal is filed, the defendant has a right to request a stay of execution on the payment of a fine under the provisions of Rule 38 of the Fed. R. Crim. P. However, Fed. R. Crim. P. 38 also provides the government with various options to preserve its ability to collect the fine during the pendency of the appeal and after the case has been affirmed. In that regard, Fed. R. Crim. P. 38(a)(3) provides:

The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

It should be understood that fine judgments are to be enforced "by execution against the property of the defendant in like manner as judgments in civil cases" (emphasis supplied), 18 U.S.C. §3565. Accordingly, Fed. R. Crim. P. 38(a)(3) is not to be used as a process to enforce payment of a fine (see Fed. R. Crim. P. 54(b)(5)). Thus, the U.S. Attorney must enforce payment of a fine judgment by execution. The U.S. Attorney cannot, under the guise of a Fed. R. Crim. P. 38(a)(3) motion, simply request the court to order the defendant to pay the fine. United States v. Graziano, 682 F.2d 1384 (11th Cir. 1982).

As previously noted, when the U.S. Attorney levies execution, the defendant may then move for a stay of execution under Fed. R. Crim. P. 38(a)(3). If the defendant's stay is granted the court may require the defendant to fulfill any of the provisions of Fed. R. Crim. P. 38(a)(3) mentioned above. And notwithstanding Graziano, supra, in some instances

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district courts allow the U.S. Attorney to plead in the alternative for relief under any of the provisions of Fed. R. Crim. P. 38(a)(3) set forth above.

Fed. R. Crim. P. 38(a)(3) motions should be filed in every case in which the defendant has the financial ability to pay the fine, and the U.S. Attorney believes that there is a likelihood of dissipation of assets during pendency of the appeal. These motions should be filed in the U.S. District Court. If the district court refuses to hear the motion on the ground of no longer having jurisdiction in the case, the motion should then be filed in the U.S. Court of Appeals.

9-121.711 Financial Examination or Order Restraining Dissipation of Assets

As mentioned above, ability to execute on the debtor's assets is the sine qua non of judgment enforcement. However, there may be instances where, despite evidence in the underlying trial that the defendant profited from his/her criminal activities, the U.S. Attorney will be unable to levy execution because the debtor concealed or conveyed assets. By requiring the defendant to submit to an examination of assets under Fed. R. Crim. P. 38(a)(3), the U.S. Attorney may be able to flush out real or personal property for execution.

The prosecutor, with his/her intimate knowledge of the case, has the best chance for uncovering assets that have been hidden or fraudulently conveyed. The Assistant charged with collection responsibility also has a role since knowledge as to state collection law is essential in determining if and how assets may be reached. By showing that the defendant has been untruthful about his/her assets, the court may be more receptive toward granting a restraining order, the posting of a bond to guarantee payment, or the deposit of a fine.

In those instances where the defendant has placed his/her assets beyond the reach of the court, it can order the defendant to deposit the amount of the fine in the registry of the court. If the defendant fails to comply with this requirement, the court can deny the appeal. Stern v. United States, 249 F.2d 720 (2d Cir. 1957), cert. denied, 357 U.S. 919 (1958).

9-121.712 Bond to Guarantee Fine Payment

As previously mentioned, the U.S. Attorney may file a "Motion to Require Deposit of Fines or Posting of Bond" and a brief and affidavit in

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support thereof. A notice of the motion is sent to the debtor along with copies of the motion, brief and affidavit. (See Forms and Pleadings, USAM 9-122.057 through 9-122.060.) The bond granted under this motion should not be confused with an appeal bond which is required to insure the defendant's appearance. The purpose of the bond under Fed. R. Crim. P. 38(a)(3) is to insure payment of the fine if the conviction is affirmed by requiring the defendant to provide a surety. Such bond will normally be co-signed by a professional surety company which must pay the fine according to the provisions of the bond if the defendant defaults. United States v. Phillips, 42 F.R.D. 581 (W.D. Pa. 1967), vacated on other grounds sub nom. United States v. Sams, 406 F.2d 404 (3d Cir. 1969).

The court, under Fed. R. Crim. P. 38, can also require the defendant to deposit all or part of the fine in the registry of the district court. As in the case of posting a bond, the U.S. Attorney files a "Motion to Require Deposit of Fines or Posting of Bond" and a brief and affidavit in support thereof. A notice of the motion is sent to the debtor along with copies of the motion, brief, and affidavit. (See Forms and Pleadings, USAM 9-122.057 through 9-122.059.)

The money which is deposited with the clerk of the district court is not forwarded to the Treasury; instead, the clerk retains such funds until the appeal is decided. If the defendant prevails, the deposit is returned to him/her in full. If the conviction is upheld, the deposit is sent to the Treasury in full or partial payment of the fine.

9-121.720 Incarcerated Debtors

Just as U.S. Attorney responsibility for probationer fine debtors does not terminate with the commencement of the period of probation supervision, so also U.S. Attorney attention to incarcerated fine debtors does not end with the debtor's imprisonment. Every effort should be made to enforce the judgment during the period of detention; cases should be placed in a suspense status only after all enforcement attempts have been exhausted.

Every incarcerated fine debtor should receive a demand letter reminding him/her of his/her outstanding imposition. The letter should include a Financial Statement of Debtor (Form OBD-500 or OBD-500B) and direct that the form be completed and returned to the U.S. Attorney. Many incarcerated debtors will, of course, refuse to cooperate in this manner. Others, however, will provide a brief summary of their financial situation. If real property is listed on the completed Form OBD-500,

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OBD-500A or OBD-500B or discovered in independent searches conducted by the U.S. Attorney or other governmental agencies, a judgment lien should be perfected. If nonexempt, easily liquidated personalty is found, execution should immediately issue. In other words, no enforcement opportunity should be postponed simply because the debtor is incarcerated.

Garnishment of prisoners' trust funds (wages earned for prison work) is proscribed as a result of the interpretation of legislation establishing prison industries and as a matter of policy settled between the Criminal Division and the Bureau of Prisons. With the exception of Internal Revenue Service tax liens and repayment for willful destruction of government property, the terms of the trust contract require the permission of the inmate before funds can be dispersed. The rationale supporting exemption of prisoners' trust funds from garnishment reflects concern for rehabilitation of inmates. Since prisoners are not compelled to work, but are paid when they do, garnishment of the wages of working inmates would discourage employment in prison industries and preclude any rehabilitative benefits derived from such work.

Thus, except for prisoners' trust funds, Criminal Division policy encourages the vigorous and aggressive employment of enforcement procedures against incarcerated debtors with assets subject to garnishment or execution. Any policy to the contrary would only invite dissipation of assets during imprisonment.

9-121.800 FINES IMPOSED BY UNITED STATES MAGISTRATES

With the enactment and implementation of the Federal Magistrates Act (28 U.S.C. §§631-639), questions have arisen concerning the U.S. Attorney's responsibility for collecting Magistrate-imposed fines and the procedures used to collect such impositions.

The Administrative Office of the United States Courts has prepared a report entitled "Disposing of Petty Federal Offenses by Mail" which proposes a system for the collection of certain Magistrates' fines. The Criminal Division concurs with the policy stated in this report wherein officers of the court are assigned responsibility for the collection of such fines. The report proposes that a Central Violations Bureau "...can be established in each District, under the jurisdiction of the District Court Clerk. This bureau would serve all Magistrates and Court Divisions within the District."

Demand letters, summonses, and warrants for arrest are prepared by the Central Violations Bureau, the U.S. District Court Clerk, or the U.S. Magistrate, depending upon local arrangement, not by the U.S. Attorney.

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Certain larger Magistrate fines, usually imposed in misdemeanor cases and presenting more difficult collection problems, may escape collection by the procedures employed by the Central Violations Bureau. If the Magistrate finds that his/her office of the Central Violations Bureau is unable to effect collection of such fines, he/she may refer these cases to the U.S. Attorney. In these instances of specific referral, the U.S. Attorney should accept the case for collection, regardless of the dollar amount of the fine, and request from the Magistrate's office all available information concerning the debtor and his/her financial status.

In addition, the U.S. Attorney should attempt to collect all Magistrate fines imposed in cases in which an Assistant U.S. Attorney appeared in the Magistrate's court and represented the interest of the United States Government.

Thus, the U.S. Attorney must enforce two classes of fines imposed by the U.S. Magistrate: (1) fines specifically referred to the U.S. Attorney by the Magistrate and (2) fines imposed in cases in which an Assistant U.S. Attorney represented the interests of the government.

Except for the cases in which an Assistant U.S. Attorney appeared, the U.S. Attorney has no responsibility to actively discover and record the fines imposed by Magistrates. Rather, the Magistrates will refer those fines not collected by the Central Violations Bureau to the U.S. Attorney. After referral, these fines should be listed on the Criminal Debtor Card (Form USA-117A) and carried on the Criminal Outstanding Fines and Forfeitures Pending Inventory. A collection case folder should be prepared and the techniques used to enforce fines imposed by U.S. District Court judges should be employed.

Please refer any questions concerning the procedures utilized to enforce Magistrate-imposed fines to the Criminal Division Collection Unit so that a uniform policy with respect to the enforcement of such impositions can be provided.

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| DEBTOR'S NAME Button, William T. | | ADDRESS OF DEBTOR 706 Lydia, Ft. Worth, Texas | | TELEPHONE 123-4567 | DIST. 77 | DIV. 0 | COMPLAINT NO. 800242 | DEF. NO. 001 | |
|--|---------------------------|---|----------|------------------------------|---------------------------------------|--|--|--------------------------|--------------------------------------|
| OTHER PERSONS MAKING PAYMENTS | | ADDRESS OF OTHER PERSONS | | TELEPHONE | AGENCY NO. 312 | AGENCY FILE NO. FBI 8273-987 | | BIV./SECTION C | COURT DOCKET NO. 80 CR 158 |
| SOCIAL SECURITY NO. (DEBTOR) 123-45-6789 | ATTORNEY NO. 18 | PRINCIPAL OFFENSE CHARGED CODE TITLE SECTION 18 0659 | | | INTEREST RATE | D / FILE NO. 15-73-3456 | | | |
| DATE 10 9 80 | TYPE 1 | IMPOSITION FINE/FPF. 1,000 | INTEREST | COURT COSTS 20 | TOTAL AMOUNT DUE U.S. 1,020 | | CONTROL NO. RECEIVED FROM: DIST. DIV. COMPLAINT NO. DEF. NO. TYPE <input type="checkbox"/> TRANSFER <input type="checkbox"/> ASSIST | | |
| COLLECTION INFORMATION | | | | | | | | | |
| NAME EMPLOYER | | ADDRESS | | TELEPHONE | | NAME ATTORNEY/RELATIVE | | ADDRESS TELEPHONE | |
| NAME | | ADDRESS | | TELEPHONE | | OTHER | | | |
| NAME | | ADDRESS | | TELEPHONE | | OTHER | | | |
| DATE | ACTION CODE | OTHER COLLECTION INFORMATION AND EFFORTS | | | DATE | RECEIPT NO. | AMOUNT OF PAYMENT | BALANCE | |
| ORDER: | | Defendant sentenced to pay a fine of \$500 on each | | | 5 1 81 | 1274 | 75.00 | \$1,020.00 | |
| | | of counts 1 & 3; total fine \$1,000 plus \$20 costs. | | | 6 1 81 | 1324 | 75.00 | 945.00 | |
| 10 12 80 | 825 | Abstract of judgments sent to Dallas County Recorder | | | 7 10 81 | 1394 | 75.00 | 795.00 | |
| | | to perfect judgment lien. | | | | | | | |
| 10 18 80 | 823 | Demand letter to 501 Slater St., Dallas, Texas | | | | | | | |
| | | with "Address Correction Requested" | | | | | | | |
| 11 10 80 | 835 | Demand letter returned. (Moved, left no forwarding | | | | | | | |

CRIMINAL DEBTOR CARD

USA-17A 17A
REPLACES MAILING WHICH IS OBSOLETE

MARCH 21, 1984
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| DATE | | | ACTION CODE | OTHER COLLECTION INFORMATION AND EFFORTS | DATE | | | RECEIPT NO. | AMOUNT OF PAYMENT | BALANCE |
|------|----|----|-------------|--|------|----|----|-------------|-------------------|---------|
| MO | DA | YE | | | MO | DA | YE | | \$ | \$ |
| | | | | address.) FBI arrest records requested. | | | | | | |
| | | | | Internal Revenue Service Project 719 request | | | | | | |
| | | | | mailed. | | | | | | |
| 12 | 8 | 80 | | Arrest record shows no arrest since 10/80. | | | | | | |
| 1 | 19 | 81 | 823 | IRS Project 719 address: 708 Lydia, Ft. Worth, | | | | | | |
| | | | | Texas. Demand letter with OED-500 mailed to | | | | | | |
| | | | | Ft. Worth address. | | | | | | |
| 2 | 2 | 81 | | No response to demand letter. Telephone call to | | | | | | |
| | | | | debtor (768-0481); debtor refuses to cooperate. | | | | | | |
| | | | | Letter to debtor advising of motion to compel | | | | | | |
| | | | | answers to interrogatories. | | | | | | |
| 2 | 16 | 81 | 841 | Motion to compel filed with court and notice and | | | | | | |
| | | | | motion sent to debtor. | | | | | | |
| 3 | 1 | 81 | | Order granting motion to compel; letter, order, | | | | | | |
| | | | | and OED-500 sent to Ft. Worth address. | | | | | | |
| 3 | 15 | 81 | 847 | Letter advising of contempt proceedings mailed | | | | | | |
| | | | | to debtor. | | | | | | |

| DATE 81 | | | ACTION CODE | OTHER COLLECTION INFORMATION AND EFFORTS | DATE | | | RECEIPT NO. | AMOUNT OF PAYMENT | BALANCE |
|---------|----|----|-------------|--|------|----|----|-------------|-------------------|---------|
| MO | DA | YR | | | MO | DA | YR | | \$ | \$ |
| 3 | 22 | 81 | | Telephone call; debtor refuses to cooperate. | | | | | | |
| 3 | 28 | 81 | | Motion for Rule to Show Cause filed and sent to debtor. | | | | | | |
| 4 | 16 | 81 | | Order entered granting motion to show cause. | | | | | | |
| | | | | Served by U.S. Marshal. | | | | | | |
| 4 | 20 | 81 | 829 | Interview with debtor; OED-500 completed; debtor to pay \$75 monthly installments. | | | | | | |
| 5 | 1 | 81 | 801 | First installment payment received. | | | | | | |
| 6 | 1 | 81 | 801 | Installment payment received. | | | | | | |
| 7 | 5 | 81 | 823 | Reminder of missed installment payment sent to debtor. | | | | | | |
| 7 | 10 | 81 | 801 | Installment payment received. | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
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UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

COLLECTION CODES**

Collection TYPE OF IMPOSITION Codes

- | | |
|--------------------------|---|
| 1. Criminal Fine (+) | 7. Mortgage Foreclosures (*) |
| 2. Civil Judgment (*) | 8. Determined Claims (*) - (Prejudgments) |
| 3. Penalty (B) | 9. Assist Effort (B) |
| 4. Appearance Bond | A. Restitution (Tax only) |
| Forfeiture Judgments (+) | B. Appearance Bond Forfeiture - |
| 5. Other Forfeitures (B) | Prejudgment (+) |
| 6. Court Costs (B) | |

NOTE: Type of Imposition Codes noted by a (+) are for Criminal ONLY.
Type of Imposition Codes noted by an (*) are for Civil ONLY.
Type of Imposition Codes noted by a (B) are for BOTH Civil and Criminal.

Collection PENDING Codes - (801 - 888)

NOTE: Collection Activity Codes prefixed with an asterisk (*) CANNOT be used for Criminal Fine Collection activity. Underlined Codes are either changed or new with Change 2, October 1, 1981.

- 801 Installment or Other Partial Payment Received
803 Cash Paid to Date Increase
804 Cash Paid to Date Decrease
805 Partial Collection by Offset
807 Partial Satisfaction from Lien Foreclosure Proceedings
808 Amount of Imposition Increase
809 Amount of Imposition Decrease
*811 Compromise Negotiations Pending with Debtor
*813 Compromise Offer Submitted to Department
*815 Agency Views Solicited on Compromise Proposal
*817 Compromise Accepted--Awaiting Payment
*818 Non-Cash Credit Increase
*819 Non-Cash Credit Decrease
*821 Liquidation or Arrangement Proceedings in Progress
(Bankruptcy, Receivership, Wage Earner Plan, Estate, etc.)
823 Notice of Judgment and/or Demand Letter to Debtor
824 Partial Collection by Assist
825 Judgment Perfected as a Lien
826 Assist Ended
827 Credit Report Requested or Obtained

**Taken from U.S. Attorney's Docket and Reporting System Manual
Order USA 2840, Appendix 1, October 1, 1981.

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Collection PENDING Codes (cont't)

- 829 OBD - 500 Requested or Obtained
831 Financial Ability Investigation by FBI Requested
833 Financial Ability Investigation by Agency Requested
835 Financial Ability Investigation Undertaken by Other Officials
(U.S. Attorney, U.S. Marshal, U.S. Probation Officer)
836 Paid to Date (Balance)
837 Pauper's Oath (Fines Only)
838 Reinstate Terminated Record
839 Notice of Debtor's Release from Prison Received
841 Supplementary Proceedings Pursuant to Rule 69(a), Fed. R. Crim. P.
Scheduled or Conducted
843 Writ of Execution Issued
845 Garnishment Proceedings Initiated
846 Lien Foreclosure Action Commenced
847 Other Ancillary Suit Commenced
849 Collection Efforts Being Reactivated After Judgment Held in "Inactive (or Suspense)" Category; Retransferred to Pending Category
*852 Partial Payment by Bid Back

PENDING CODES THAT TEMPORARILY SUSPEND COLLECTION ACTIVITY FOR ONE OF THE FOLLOWING REASONS:

- 881 Motion for New Trial or to Vacate Judgment Pending
882 Appeal Pending and Execution Stayed by Supersedes Bond (Civil Case)
883 Appeal Pending (Criminal Case)
884 Payments Deferred to a Day Certain, or During a Specified Period (e.g., Probation)
885 Presently Unable to Ascertain Location of Debtor
886 Debtor Serving Criminal Sentence and No Assets Available for Execution
887 Transferred to Suspense (Formerly Inactive) Category Because Presently Uncollectible
888 Suspense (Formerly Inactive) Items Reviewed to Ascertain Whether Collection is Now Possible; Retained in "Suspense" Status
893 Claim Returned to Referring Agency for Collection Monitoring.

Collection DISPOSITION Codes - (901 - 975)

NOTE: Collection Activity Codes prefixed with an asterisk (*) CANNOT be used for Criminal Fine Collection activity. Underlined codes are changed or new with Change 2, October 1, 1981.

- 901 Paid in Full--Lump Sum
903 Paid in Full--Final Installment Payment Received

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Collection DISPOSITION Codes (con't)

- 905 Paid in Full--Final Collection made by Offset
- 907 Paid in Full--Final Collection made by Lien Foreclosure
- 909 Paid in Full--Other
- *911 Compromise Paid in Full--Lump Sum
- *913 Compromise Paid in Full--Final Installment Payment Received
- *915 Compromise Paid in Full--Other
- 924 Paid in Full--Final Collection by Assist
- 925 All or Balance of Fine Remitted or Suspended
- 926 Appearance Bond Forfeiture Set Aside or Forfeiture Judgment Remitted
- 935 Collection Effort Transferred from This District
- *937 Claim Returned to Referring Agency for Surveillance
- 939 Claim Returned to Referring Agency for Collection
- 951 Balance Permanently Uncollectible--Death or Incompetency of Debtor Without Estate
- *952 Paid in Full--Final Collection by Bid Back
- *953 Balance Permanently Uncollectible--No Assets Available to Pay Government's Priority Claim in Insolvency or Estate Proceedings
- *955 Balance Permanently Uncollectible--Debtor Cannot be Located After Diligent Search
- *957 Balance Permanently Uncollectible--Non-Fraud Judgment Debt Discharged-In-Bankruptcy
- *958 Balance Permanently Uncollectible, Collection Effort Waived by Agency
- *959 Balance Permanently Uncollectible--Other
- 965 Judgment Vacated Per Appellate Decision
- 975 Judgment Set Aside on Motion for New Trial or to Vacate Judgment
- 980 All or Balance of Criminal Forfeiture Unrealized, Remitted, or Applied to the Expenses of Seizure and Sale (USA-117A or USA-165)
- *982 Partially Paid from Cash Proceeds of Sale, Deficiency Judgment not Collected, Returned to Agency
- *984 Partially Paid by Bid Back, Deficiency Judgment not Collected, Returned to Agency

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9-122.002 Demand Letter

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

_____ (date)

_____ (name)

_____ (address)

Re: _____ (case name)

_____ (case number)

Dear _____:

On _____ (date), you were sentenced by the United States District Court for the _____ (district) to pay a fine of _____ (amount). To date, you have failed to satisfy this imposition.

Please call _____ (telephone no.), and speak with Assistant United States Attorney _____ (name) regarding payment, or if you prefer, you may write or visit this office at your earliest convenience so that we may arrange for the satisfaction of this debt.

If you do not make a payment in full, the enclosed Financial Status Form must be completed and returned to this office within ten days. Checks or money orders are made payable to the Treasurer of the United States and sent to the Clerk of the United States District Court, _____ (address). A self-addressed envelope is enclosed for your convenience.

A lien has been placed against all real estate which you now own or will acquire in the future to insure payment of this judgment.

Very truly yours,

United States Attorney

MARCH 21, 1984

Ch. 122, p. 7

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9-122.003 Reminder of Missed Installment Payment

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

(date)

(name)

(address)

Re: _____
(case name)

(case number)

Dear _____:

Our records indicate that you have failed to make a scheduled payment in accordance with the installment payment program which we have arranged to liquidate your debt to the United States.

In order to avoid the expense and inconvenience of further legal proceedings, it is recommended that you send your check or money order, payable to the Treasurer of the United States, to the Office of the United States District Court Clerk, _____ (address) . The enclosed stamped envelope is included for your convenience.

Very truly yours,

United States Attorney

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9-122.004 FBI Financial Ability Investigation Request (\$500 or More)

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

(date)

(name)
Special Agent in Charge
Federal Bureau of Investigation

(address)

Re: _____
(case name)

(case number)

Dear Sir:

On _____ (date), a criminal fine was imposed against the above-named defendant in the amount of _____ (amount). To date, no part of this indebtedness has been paid and the debtor has neglected to respond to any of our communications regarding this matter.

We therefore request that your office make an investigation into the financial ability of the debtor to pay this judgment in whole or in part. According to our information, the debtor's last known address was: _____
(address)

Thank you for your cooperation.

Very truly yours,

United States Attorney

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9-122.005 Bureau of Prisons Letter

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

(date)

(name)
Warden

(prison)

(address)

Dear Sir:

(Name) owes a _____
(amount) criminal fine to the United States
Government. If _____
(name) remains in your custody, please assist our
enforcement effort in the following manner:

- (a) ask the debtor to complete the enclosed Financial Statement of Debtor Form (OBD-500) and return it to our office in the attached, postage-free envelope;
- (b) notify our office of the debtor's earliest possible release date;
- (c) include a copy of this letter in the debtor's records folder to remind your staff to provide our office with
 - (1) two months advance notice of his/her release through Bureau of Prisons Form 63(a) or
 - (2) timely notice of his death or transfer to another institution.

If _____
(name) is no longer in your custody, please indicate the date of his/her release and forwarding address.

Your cooperation is appreciated.

Very truly yours,

United States Attorney

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9-122.006 Transfer Letter

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

(date)

(name)

United States Attorney

(address)

Re: _____
(case name)

(case number)

Dear _____ :

A criminal fine of _____ (amount) was imposed against _____ (name) on _____ (date) in the United States District Court for the _____ (district). A balance of _____ (amount) remains on this judgment. _____ (Name) now resides in your district at _____ (address), so we are transferring this matter to your district for enforcement. The debtor is not on probation.

A lien has been perfected against the debtor's real estate. It will expire on _____ (date). If the fine remains outstanding at that time, this office will renew the lien on request.

Enclosed for your use are the following: (1) Certification of Judgment for Registration in Another District (in duplicate), (2) two certified copies of judgment, (3) a xerox copy of the Criminal Debtor Card maintained by this office, (4) a copy of the Federal Bureau of Investigation report dated _____ (date).

Please file this judgment in your district, proceed with efforts to collect the amount owing the government, and notify this office if the debtor moves to another district or pays this imposition in full. If we can be of any assistance to you in your enforcement effort, please do not hesitate to contact us at your earliest convenience.

Very truly yours,

United States Attorney

cc: Criminal Division Collection Unit

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9-122.007 IRS Tax Return Request

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

(date)

(name)

(address)

Re: _____
(case name)

(case number)

Dear _____

Pursuant to Title 26, C.F.R. §301.6103(a)-1(g), it is requested that this office be furnished copies of the income tax returns for _____ (name) for _____ (periods), together with any and all additional information collected by your revenue and intelligence agents, _____ (name), _____ (address).

This office is conducting an official investigation to determine the financial ability of _____ (name) to satisfy the criminal fine assessed against him/her on _____ (date) in _____ (case name and number) and these documents are needed in connection with our investigation.

Documents furnished in response to this request will be limited in use to the purpose for which they are requested and will under no condition be made public except to the extent that publicity necessarily results if they are used in litigation.

Access to these documents, on a need-to-know basis, will be limited to those attorneys or employees of my office who are actively engaged in the investigation or subsequent litigation, or other federal employees assisting me in this investigation. Persons having access to these documents will be cautioned as to the confidentiality of the information contained therein and of the penalty provisions of Section 7213 of the Internal Revenue Code and Title 18, United States Code, Section 1905, regarding the unauthorized disclosure of such information.

Very truly yours,

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
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9-122.008 Notice of Judgment Debtor Examination

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number)
)
 Plaintiff,)
)
)
 v.)
) NOTICE OF JUDGMENT
) DEBTOR EXAMINATION
)
)
 (name))
)
)
 Defendant.)

YOU WILL PLEASE TAKE NOTICE that pursuant to Rules 26 and 69(a) of the Federal Rules of Civil Procedure on _____ (date), the undersigned will take the oral deposition of _____ (name), defendant in the above-entitled cause, before Honorable _____ (name), United States Magistrate, at _____ (address of Magistrate's Court), at _____ (time), and you will bring with you:

1. All deeds to real estate owned by you or in which you hold interest,
2. Evidence of any conveyance of real estate made by you subsequent to _____ (date),
3. All stock certificates, bonds, or other securities in your name or held jointly by you and others,
4. Copies of your Federal and State Income Tax returns for _____ (years),
5. All bank books in your name individually or jointly with others,
6. Any other documents, books or records tending to show your net worth.

DATED:

United States Attorney

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9-122.009 Judgment Debtor Examination Subpoena

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
Plaintiff,)
) JUDGMENT DEBTOR
) EXAMINATION SUBPOENA
)
)
_____(name)_____,)
)
Defendant.)

YOU ARE COMMANDED to appear at (address of Magistrate's Court) on
the (date), at (time), for a judgment debtor examination in the
above-entitled action and to bring with you:

1. All deeds to real estate owned by you or in which you hold an interest,
2. Evidence of any conveyance of real estate made by you subsequent to (date),
3. All stock certificates, bonds or other securities in your name or held jointly by you and others,
4. Copies of your Federal and State Income Tax returns for (years),
5. All bank books in your name individually or jointly with others,
6. Any other documents, books or records tending to show your net worth.

DATED: _____, 19 __.

Attorney for

Clerk

Address

. By:

Deputy Clerk

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9-122.010 Motion for Rule to Show Cause Why Defendant Should Not be Held
in Contempt

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
 Plaintiff,) _____ (case number)
)
 v.) MOTION FOR RULE TO SHOW CAUSE
) WHY DEFENDANT SHOULD NOT BE
 _____ (name),) HELD IN CONTEMPT
)
 Defendant.)

TO THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE _____
(district) _____:

The plaintiff, United States of America, by and through its attorneys, _____ (name), United States Attorney, and _____ (name), Assistant United States Attorney, for _____ (district), charges the defendant, _____ (name), and petitions the Court for an order to show cause as follows:

On _____ (date), the United States of America, plaintiff, obtained a judgment against the defendant herein in the United States District Court for the _____ (District), said judgment being in the sum of _____ (amount).

On _____ (date), a subpoena to take a deposition was served on _____ (name), the defendant in this action, by a Deputy United States Marshal commanding him/her to appear in Courtroom _____ (number) of the United States Courthouse, _____ (address of Magistrate's Court), on the _____ (date), at _____ (time), thereof, and answer concerning his/her property.

The defendant did not appear at the previously designated time, nor has he/she appeared at any time since then or communicated any reason for not appearing. There has been no enlargement of time nor have there been any objections to said subpoena since served.

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WHEREFORE, the United States Attorney charges that the defendant is in contempt of the above-entitled court and prays that an order be issued by this court, based upon this petition and the accompanying affidavit, directing the defendant to appear before this court at the time fixed in said order, to show cause why he/she should not be punished for contempt of court, and further prays that upon the hearing of the charges contained herein, the defendant be found guilty of contempt and that such imprisonment or fine, or both, be imposed upon the defendant as may be deemed proper.

DATED:

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United States Attorney

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6. This affidavit is made in support of a Motion for Rule to Show Cause why the Defendant should not be held in contempt for refusing to obey the subpoena to take a deposition.

Assistant United States Attorney

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19 ____.

Notary Public

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9-122.013 Notice of Interrogatories

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number)
 Plaintiff,)
) NOTICE OF INTERROGATORIES
 v.)
)
 (name),)
)
 Defendant.)

TO: (name)
(address)

The plaintiff, the United States of America, pursuant to Rules 31, 33, and 69 of the Federal Rules of Civil Procedure, hereby propounds and serves the within written Interrogatories to be answered separately and fully in writing under oath within thirty (30) days from the date of service hereof.

United States Attorney

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9-122.014 Letter Accompanying Notice of Interrogatories

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

(date)

(name)

(address)

Re: _____
(case name)

(case number)

Dear _____:

Enclosed is a copy of the Interrogatories and Answers on Supplementary Proceedings in connection with the above action, arising out of a judgment in the United States District Court for the _____ (district) wherein you were ordered to pay a fine and costs in the amount of _____ (amount) . A balance of _____ (amount) remains.

You are required to answer, under oath, the enclosed Interrogatories and return them to this office or file them with the Clerk of the United States District Court for the _____ (district) within thirty (30) days after you receive them.

Very truly yours,

United States Attorney

Enclosure

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9-122.017 Motion to Compel Answers to Interrogatories

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
)
 Plaintiff,)
)
) MOTION TO COMPEL
) ANSWERS TO INTERROGATORIES
)
 v.)
)
 (name))
)
)
 Defendant.)

The United States moves for entry of an order compelling the defendant, (name) to answer its Interrogatories. As grounds for this motion, the attached memorandum is incorporated herein by reference.

The undersigned certifies that he/she has made a good faith attempt to obtain sworn answers from defendant prior to filing of this motion, pursuant to Local Rules, and defendant has failed to respond.

United States Attorney

Attachment

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9-122.018 Memorandum In Support of Motion To Compel Answers to
Interrogatories

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
) MEMORANDUM IN SUPPORT OF
 v.) MOTION TO COMPEL ANSWERS TO
) INTERROGATORIES.
 (name))
 Defendant.)

On (date), defendant was sentenced to imprisonment for (years) and to pay a fine of (amount) and costs by the Chief Judge of the United States District Court for the (district) in (case number), in said Court. After release, the defendant moved to (address), and the judgment and commitment was registered in this District Court under (case number).

The fine and costs remain unpaid despite continued efforts to collect the judgment. On (date), Interrogatories were mailed to the defendant at (address), and certified return receipt postmarked (date), signed (name), was returned to the writer. Copy of receipt is hereto attached. On (date), the defendant was again requested in writing to answer the said Interrogatories. To date, no response has been received.

Title 18, United States Code, Section 3565, provides that criminal fines may be enforced by execution against the property of the defendant in like manner as judgments in civil cases. Rule 69, Federal Rules of Civil Procedure provides that in aid of the judgment or execution, the judgment creditor or his/her successor in interest when that interest appears of record may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice in the state in which the District Court is held. Rule 33(a) provides for the propounding of written Interrogatories by a party upon another party, and Rule 37(a) provides that if a party fails to answer Interrogatories propounded under Rule 33(a), the discovering party may move for an order compelling discovery.

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For a case supporting the right to post judgment discovery as herein used, see, United States v. McWhirter, 376 F.2d 102 (5th Cir. 1967).

The undersigned attorney certifies that, pursuant to Local Rules of this Court, he/she has attempted in good faith to obtain sworn answers from the defendant prior to filing of this motion, and that defendant has failed to respond.

United States Attorney

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9-122.020 Letter Accompanying Order Granting Motion to Compel Answers to Interrogatories

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

(date)

(name)

(address)

Re: _____
(case name)

(case number)

Dear _____:

Enclosed is a confirmed copy of the Order entered by Judge _____ (name) on this date in which he/she granted our motion and directed you to answer our Interrogatories on or before _____ (date). Also enclosed is another copy of our Interrogatories and a stamped, self-addressed envelope for your convenience.

If you fail to comply with the Court's Order, you will expose yourself to being held in contempt of Court.

Very truly yours,

United States Attorney

Enclosure

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9-122.021 Motion to Withdraw Motion to Compel Answers to Interrogatories

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
)
 v.) MOTION TO WITHDRAW
) MOTION TO COMPEL ANSWERS
) TO INTERROGATORIES
 (name),)
)
 Defendant.)

Plaintiff, the United States of America, moves to withdraw its Motion to Compel Answers to Interrogatories which was filed by plaintiff on (date) , for the reason that defendant has made arrangements with the plaintiff to make weekly payments in satisfaction of his/her debt to the United States, which debt was the basis for the Interrogatories.

United States Attorney

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9-122.022 Order Withdrawing Motion to Compel Answers to Interrogatories

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
) _____
 Plaintiff,)
) ORDER WITHDRAWING
 v.) MOTION TO COMPEL ANSWERS
) TO INTERROGATORIES
)
 _____,)
 (name))
)
 Defendant.)

AND NOW, this _____ (date), upon consideration of the motion by the United States, it is ordered that leave be granted to the United States to withdraw its Motion to compel Answers to Interrogatories filed on _____ (date).

United States District Judge

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9-122.023 Letter Advising of Contempt Proceedings

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

(date)

(name)

(address)

Re: _____
(case name)

(case number)

Dear _____

On _____ (date), Interrogatories were sent to you to ascertain your financial condition so that the judgment imposed at the above criminal number in the amount of _____ (amount) may be satisfied.

When we did not receive answers to the Interrogatories, we filed a Motion to Compel Answers to Interrogatories with the Court on _____ (date).

On _____ (date), the Honorable _____ (name), United States District Judge, ordered that you serve on the plaintiff answers to the written Interrogatories on or before _____ (date).

To this date, we have not received answers to the Interrogatories. You are therefore in violation of the Court order.

If you do not serve answers to the Interrogatories upon this office within seven (7) days, we will ask the court to hold you in contempt of court. Enclosed is a copy of the Interrogatories sent to you on _____ (date), and a stamped, self-addressed envelope for your convenience.

Very truly yours,

United States Attorney

Enclosure

UNITED STATES ATTORNEYS' MANUAL
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9-122.024 Motion for Rule to Show Cause Why Defendant Should Not be Held
in Contempt

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
Plaintiff,)
)
v.) MOTION FOR RULE TO SHOW
) CAUSE WHY DEFENDANT SHOULD
) NOT BE HELD IN CONTEMPT
_____(name),)
)
)
Defendant.)

AND NOW comes the United States of America by _____ (name) , United States Attorney for the _____ (district) , and moves the Court to enter an order pursuant to Rule 37(b) (1) of the Federal Rules of Civil Procedure directing the defendant, _____ (name) , to show cause, if any there be, why he/she should not be held in contempt of this Court for failure to obey its lawful order. In support of this petition, the following is respectfully represented:

1. On _____ (date) , the plaintiff, United States of America, served upon the defendant certain Interrogatories by certified mail.

2. The defendant having failed and neglected to answer said Interrogatories, the United States, on _____ (date) , filed a motion to compel the defendant to answer said Interrogatories.

3. This court on _____ (date) , ordered the defendant to answer the plaintiff's written Interrogatories on or before _____ (date) . A copy of said order was mailed to the defendant, return receipt requested. A copy of the government's letter to the defendant dated _____ (date) , and a copy of the receipt returned to the United States Attorney's Office are attached hereto and marked Exhibit "A" and Exhibit "B".

4. The defendant has ignored, failed and neglected to comply with the lawful requirement of said order of this Court.

United States Attorney

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9-122.025 Order Granting Motion to Show Cause

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number) _____
)
 Plaintiff,)
)
 v.) ORDER GRANTING
) MOTION TO SHOW CAUSE
)
 (name))
 _____)
)
 Defendant.)

AND NOW, this _____ (date) _____, upon presentation and consideration of the foregoing petition of the United States,

IT IS ORDERED that the defendant, _____ (name) _____, appear before this Court at _____ (address) _____, on _____ (date) _____, at _____ (time) _____, and show cause, if any there be, why he/she should not be held in contempt for failure to obey the order of this court of _____ (date) _____, which directed that he/she answer plaintiff's written Interrogatories on or before _____ (date) _____.

The Marshal is directed to make personal service of the foregoing petition and this order upon the defendant.

United States District Judge

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.026 Motion to Vacate Order to Show Cause

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
) MOTION TO VACATE
 v.) ORDER TO SHOW CAUSE
)
 (name))
)
 Defendant.)

AND NOW comes the United States of America by (name), United States Attorney for the (district), and moves the Court to enter an Order directing that its Order of (date), be vacated. In support of this motion the following is respectfully represented:

1. On (date), plaintiff, the United States of America, filed a Petition for a Rule to Show Cause Why Defendant Should Not be Held in Contempt of this Court for failure to obey its order to answer Interrogatories.

2. On (date), the Honorable (name), ordered that the defendant, (name), appear before the Court on (date), at (time), and show cause why he/she should not be held in contempt for failure to obey the court's order of (date), which directed that he/she answer plaintiff's written Interrogatories by (date).

3. On (date), the defendant made arrangements with the plaintiff to make weekly payments in satisfaction of his/her debt to the United States, which debt was the basis for the Interrogatories.

Wherefore, it is respectfully requested that the Court vacate its order of (date).

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.027 Order Granting Motion to Vacate Order to Show Cause

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
) ORDER GRANTING MOTION TO
 v.) VACATE ORDER TO SHOW CAUSE
)
 (name),)
)
 Defendant.)

AND NOW, this (date), upon presentation and consideration of the foregoing Motion of the United States,

IT IS ORDERED that the order of this Court entered on (date), which directed that the defendant, (name), appear before this Court on (date), at (time), and show cause why he/she should not be held in contempt for failure to obey the order of this Court of (date), be and the same is hereby vacated.

United States District Judge

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.028 Notice of Written Deposition

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,

Plaintiff,

v.

(name) _____,

Defendant.

)
) _____ (case number)
)
) NOTICE OF WRITTEN DEPOSITION
)
)
)
)
)
)

WILL YOU PLEASE TAKE NOTICE that on _____ (date) _____, the undersigned will take the written deposition of _____ (name) _____, _____ (address) _____, defendant in the above-entitled cause, before _____ (notary) _____, at _____ (address) _____, at _____ (time) _____, and you will bring with you:

1. All deeds to real estate owned by you or in which you hold an interest,
2. All stock certificates, bonds or other securities in your name or held jointly by you and others,
3. Evidence of any conveyance of real estate made by you subsequent to _____ (date) _____,
4. Copies of your Federal and State Income Tax returns for _____ (years) _____.
5. All bank books in your name individually or jointly with others,
6. Any other documents, books, or records tending to show your net worth.

DATED:

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.029 Subpoena for Written Deposition

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
) SUBPOENA FOR WRITTEN DEPOSITION
 v.)
)
 (name),)
)
 Defendant.)

TO: (name)
(Address)

YOU ARE COMMANDED to appear on (date), at (time), at the Office of the United States Attorney, (room), (address), to be examined under oath before a notary public concerning your property and income for the purpose of determining what of your property and income is available for satisfaction of the judgment entered against you in (case number) in the United States District Court for the (district) on (date). There presently remains due (amount) on this judgment.

YOU ARE COMMANDED to produce at the examination all of your books, papers, and records which may contain information concerning your property and income, including but not limited to copies of your Federal income tax returns for (years), all bank account records for the past year, all documents, deeds, and records pertaining to your interest in real estate or real estate trusts, all stock certificates, bonds, all records pertaining to stock in which you might have an interest, all life insurance policies, and any of all evidence of indebtedness due you.

Your failure to comply with this Citation may subject you to punishment for contempt of court.

Clerk of the
United States District Court

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.030 Motion for Rule to Show Cause Why Defendant Should Not be Held
in Contempt

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number)
 Plaintiff,)
) MOTION FOR RULE TO SHOW
 v.) CAUSE WHY DEFENDANT SHOULD
) NOT BE HELD IN CONTEMPT
 (name),)
)
 Defendant.)

AND NOW comes the United States of America by (name), United States Attorney for the (district) and moves the Court to enter an order pursuant to Rule 37(b)(1) of the Federal Rules of Civil Procedure directing the defendant, (name), to show cause, if any there be, why he/she should not be held in contempt of this Court for failure to obey its lawful order. In support of this petition the following is respectfully presented:

1. On (date), the United States of America, plaintiff, obtained a judgment against the defendant herein in the United States District Court for the (district), said judgment being in the sum of (amount).

2. On (date), the United States of America, plaintiff, served defendant, (name), with a notice of deposition upon written questions to take place at (address), on (date), at (time).

3. On (date), (name), Clerk of the United States District Court for the (district), issued a subpoena to compel defendant's attendance at said deposition.

4. That on (date), at (time), and at all times thereafter, defendant failed to appear for such examination.

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

WHEREFORE, the United States Attorney charges that the defendant is in contempt of this Court and prays that an order be issued by this Court, based upon this petition, directing the defendant to appear before this Court at the time fixed in said order, to show cause why he/she should not be punished for contempt of Court.

United States Attorney

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.031 Order Granting Motion to Show Cause Why Defendant Should Not
be Held in Contempt

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
) ORDER GRANTING MOTION TO
 v.) SHOW CAUSE WHY DEFENDANT
) SHOULD NOT BE HELD IN CONTEMPT
 (name),)
)
 Defendant.)

AND NOW, this (date), upon presentation and consideration of
the foregoing petition of the United States,

IT IS ORDERED that the defendant, (name), appear
before this Court at (address), on (date), at
(time), and show cause why he/she should not be held in contempt
and punished therefor.

The United States Marshal is directed to make personal service of the
foregoing petition and this order upon the defendant.

ENTER:

United States District Court Judge

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.032 Notice of Motion to Revive Judgment

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number)
 Plaintiff,)
)
) NOTICE OF MOTION
 v.) TO REVIVE JUDGMENT
)
)
 (name),)
)
)
 Defendant.)

TO: (name)
(address)

Notice is hereby given to you that a motion has been filed in the above matter by the plaintiff to revive a judgment entered against you in the United States District Court for the (district), in favor of the plaintiff, in which the sum of (amount) remains unpaid.

A copy of the motion is hereby enclosed.

United States Attorney

Enclosure

UNITED STATES ATTORNEYS' MANUAL
TITLE 9—CRIMINAL DIVISION

3-122.033 Complaint on Judgment

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
)
 Plaintiff,)
) COMPLAINT ON JUDGMENT
)
 v.)
)
 (name),)
)
 Defendant.)

COMES NOW the United States of America, plaintiff above named, and for a cause of action against defendant complains and alleges as follows:

That this action is brought in the above-entitled Court pursuant to the provisions of Title 28, United States Code, Section 1345, by reason of the fact that the United States of America is named herein as plaintiff.

That the defendant, (named), hereinafter referred to as said defendant, is a resident of the County of (name), State of (name), and within the jurisdiction of the United States District Court for (district).

That on or about (date), a judgment was entered in favor of the United States of America and against said defendant, (name), in the case of (case name), in the United States District Court for (district).

That a copy of said judgment is hereto annexed, made a part hereof as though fully set forth herein, and marked Exhibit "A".

That the plaintiff is the owner and holder of said judgment. That said defendant now owes to the plaintiff on said judgment the sum of (amount) as principal;

WHEREFORE, plaintiff prays judgment against the defendant, (name), in the sum of (amount), together with its costs incurred in this action, and for such other relief which to the Court may seem just in the premises.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.034 Order Reviving Judgment

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
)
 Plaintiff,)
) ORDER REVIVING JUDGMENT
 v.)
)
 (name))
)
 Defendant.)

This matter coming to be heard on motion to revive judgment filed herein by the plaintiff, the plaintiff appearing by and through its attorneys, and the defendant not appearing in person or by counsel,

And the Court having examined the file herein, the Court finds that notice of said motion, with copy of said motion attached, was duly served upon the defendant herein, and that the time for answer has expired;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the judgment of the plaintiff against the defendant heretofore entered on (date), in the principal sum of (amount), less the sum of (amount) having been collected and applied on the judgment leaving a balance of (amount), is hereby revived.

DATED:

United States District Judge

UNITED STATES ATTORNEYS' MANUAL
TITLE 9—CRIMINAL DIVISION

9-122.036 Motion for Installment Payment Order

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number) _____
)
 Plaintiff,)
)
 v.)
) MOTION FOR INSTALLMENT
) PAYMENT ORDER
)
 (name) _____)
)
 Defendant.)

The United States moves for an order compelling the defendant, (name) _____, to make installment payments to the judgment creditor, the United States, upon the judgment entered against him/her. As grounds for this motion, the attached affidavit is incorporated herein by reference.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9—CRIMINAL DIVISION

9-122.037 Affidavit in Support of Motion for Installment Payment Order

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number) _____
)
 Plaintiff,)
)
)
 v.) AFFIDAVIT IN SUPPORT OF
) MOTION FOR INSTALLMENT
) PAYMENT ORDER
 _____ (name) _____,)
)
) Plaintiff.)

_____ (name) _____, United States Attorney, being duly sworn, deposes and says:

1. That the United States is the judgment creditor above named.
2. That on _____ (date) _____, a criminal fine judgment was assessed against _____ (name) _____, defendant, by _____ (name) _____, United States District Court Judge for the _____ (district) _____ in cause _____ (number) _____.
3. That on _____ (date) _____, this Court ordered the defendant to answer the plaintiff's written Interrogatories on or before _____ (date) _____.
4. That, pursuant to said order, defendant submitted answers to plaintiff's Interrogatories on _____ (date) _____. A copy of said Interrogatories is attached hereto.
5. That it appears from said Interrogatories that (state facts as to the income of debtor and the reasonable financial requirements of the debtor and his family).
6. That said criminal fine is wholly unpaid and there is now due thereon the sum of _____ (amount) _____.
7. That no previous application has been made for the order asked for herein or for similar relief.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.038 Order for Installment Payments

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
 v.) ORDER FOR INSTALLMENT PAYMENTS
 (name))
 Defendant.)

AND NOW, this (date), upon consideration of the motion of the United States Attorney, it is

ORDERED that (name), the judgment debtor named above, pay out of his income to the United States of America, judgment creditor, the sum of (amount) per (time period) beginning (date), upon the judgment set forth in the plaintiff's affidavit until said judgment is fully satisfied.

United States District Court Judge

DATED:

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.039 Application for Writ of Garnishment

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
)
 Plaintiff,)
)
)
 v.) APPLICATION FOR
) WRIT OF GARNISHMENT
)
 (name),)
)
)
 Defendant.)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the United States of America, plaintiff, and makes application for issuance for a Writ of Garnishment against (name), as garnishee, and being duly sworn says that plaintiff has heretofore instituted suit against (name), (docket number), United States District Court, (district), and that in that suit plaintiff recovered a judgment on (date), in the sum of (amount) against (name), plus all costs of suit; that such debt is just, due and unpaid; that the defendants have not, within plaintiff's knowledge, property in their possession within this state subject to execution sufficient to satisfying such debt; that garnishment applied for is not sued out to injure either defendants or the garnishee, and that plaintiff has reason to believe and does believe that the said garnishee whose place of business is (address), is indebted to the defendants.

WHEREFOR, plaintiff prays that a Writ of Garnishment issue against (name), garnishee.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.040 Writ of Garnishment

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
) WRIT OF GARNISHMENT
 v.)
)
 (name),)
)
 Defendant.)

TO THE UNITED STATES MARSHAL FOR THE (district) :

WHEREAS, in the United States District Court for the (district),
in a certain cause entitled United States of America, plaintiff, v.
(name), defendant, the plaintiff, United States of America,
recovered a judgment on (date), against said defendant, (name),
and all cost of suit; and that said plaintiff has applied for a Writ of
Garnishment against (name), therefore, you are hereby commanded to
summon said garnishee before said court at (address), then and
there to enter upon oath, within twenty (20) days from the date of service
of this writ, what, if anything, garnishee is indebted to the said (name),
what, if anything, garnishee has in his possession, and had in his
possession when this writ was served, and what other persons, if any,
within said garnishee's knowledge are indebted to said (name) and have
effects belonging to him in their possession.

HEREIN FAIL NOT, but make due return as the law directs.

GIVEN UNDER my hand and seal on this (date).

Clerk of the
United States District Court

UNITED STATES ATTORNEYS' MANUAL
TITLE 9—CRIMINAL DIVISION

9-122.041 Interrogatories

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
)
 v.) INTERROGATORIES
)
 (name),)
)
 Defendant.)

NOTICE

To (name), Garnishee: You are required to answer the following Interrogatories, under penalty of perjury, within ten days after service hereof. And should you neglect or refuse to do so, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

United States Attorney

INTERROGATORIES

1. Were you at the time of the service of the Writ of Garnishment, served herewith, or have you been, between the time of such service and the filing of your answer to this Interrogatory, indebted to the defendant? If so, how, and in what amount?

UNITED STATES ATTORNEYS' MANUAL
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2. Had you at the time of the service of the Writ of Garnishment, served herewith, or have you had between the time of such service and the filing of your answer to this Interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

I declare under the penalties of perjury that the answers to the above Interrogatories are, to the best of my knowledge and belief, true and correct as to every material matter.

Date

Signature

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.042 Affidavit for Garnishment

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number) _____
)
 Plaintiff,)
)
)
 v.) AFFIDAVIT FOR GARNISHMENT
)
)
 (name) _____,)
)
)
 Defendant.)

_____ (name) _____, being first duly sworn states:

I. He is an Assistant United States Attorney;

II. That plaintiff holds the following unsatisfied judgments against
(name) _____:

1. Judgment for _____ (amount) _____, rendered on _____ (date) _____, resulting
from a criminal fine judgment in _____ (docket number) _____.

2. Judgment for _____ (amount) _____, rendered on _____ (date) _____, resulting
from bond forfeiture in _____ (docket number) _____, subject to payments of
_____ (amount) _____ each paid on _____ (dates) _____ leaving a balance due of
_____ (amount) _____.

3. And for costs herein expended.

III. That garnishee is holding monies belonging to the defendant,
(name) _____.

Assistant United States Attorney

Subscribed and sworn to before me by _____ (name) _____,
this _____ (date) _____.

Notary Public

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.043 Praeipe for Writ of Execution

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
 Plaintiff,) _____ (case number)
)
 v.) PRAEPIPE FOR WRIT OF EXECUTION
)
 (name))
)
 Defendant.)

The Clerk will please issue a Writ of Execution against the above-named defendant, _____ (name) _____, upon the judgment rendered in this cause. A judgment was entered against the above-named defendant on _____ (date) _____. The total amount of the judgment now due and owing is _____ (amount) _____ on _____ (date) _____.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9—CRIMINAL DIVISION

9-122.045 Writ of Execution

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
) WRIT OF EXECUTION
 v.)
)
 (name) ,)
)
 defendant.)

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the _____ :

Whereas, on _____ (date) , the United States of America recovered a Judgment in the United States District Court for the _____ (district) against _____ (name) for the sum of _____ (amount) , together with _____ (amount) costs and disbursements, said Judgment was entered on _____ (date) , in the office of the Clerk of the said Court at _____ (city, state) .

And there is now at the date of this writ actually due on the judgment the aggregate sum of _____ (amount) as principal and costs.

Now you, the said U.S. Marshal, are hereby commanded to satisfy the Judgment, and your costs and disbursements, out of the personal property of said debtor or if sufficient thereof cannot be found, then out of the real property belonging to said debtor on the day whereon the Judgment was entered or at any time thereafter, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed hereon.

WITNESS, the Honorable _____ (name) , Judge of the United States District Court for the _____ (district) , attested by my hand and the seal of said Court this _____ date _____ .

Clerk of the
United States District Court

By: _____
Deputy Clerk _____

MARCH 21, 1984
Ch. 122, p. 58

Standard Form No. 2803
6 GAO 5000
2805-104

REQUEST FOR RECOVERY OF DEBT DUE THE UNITED STATES
(Civil Service Retirement System)

Director, Bureau of Retirement and Insurance
United States Civil Service Commission
Washington, D.C. 20415

In order to liquidate an indebtedness to the United States, it is requested that the gross amount of the debt as shown be set off against the individual account in the Civil Service Retirement and Disability Fund of the former employee named herein. The individual retirement account, Form 2806, of the former employee is (is not) attached.

When action has been completed, check should be forwarded to:

Form with four L-shaped checkboxes for routing instructions.

NOTE TO AGENCY.—The address shown above should be that of the office designated by the employing agency to receive evidence of the liquidation of the debt.

Form with fields for: NAME OF FORMER EMPLOYEE, DATE OF BIRTH, DATE OF TERMINATION OF SERVICE, DEPARTMENT OR ESTABLISHMENT, LOCATION OF EMPLOYMENT, AMOUNT OF INDEBTEDNESS, REASON FOR INDEBTEDNESS, APPROPRIATION AND/OR FUND (TITLE AND SYMBOL NUMBER), DISBURS'NG OFFICER (NAME AND SYMBOL NUMBER), and a signature line with (DATE) and (TITLE) labels.

I hereby certify that the indebtedness identified above is properly due the United States and that all other means of recovery have been exhausted.

UNITED STATES CIVIL SERVICE COMMISSION
REPORT OF ACTION ON REQUEST FOR RECOVERY

- RETIREMENT ACCOUNT IS AVAILABLE FOR IMMEDIATE SET-OFF. YOU WILL BE NOTIFIED WHEN RECOVERY HAS BEEN COMPLETED
- RETIREMENT DEDUCTIONS FOR LAST KNOWN PERIOD OF SERVICE HAVE BEEN REFUNDED. BOTH COPIES OF REQUEST ARE RETURNED.
- RETIREMENT ACCOUNT FOR LAST KNOWN PERIOD OF SERVICE HAS NOT BEEN RECEIVED IN THE COMMISSION. REQUEST FOR RECOVERY HAS BEEN INDEXED AND FILED FOR POSSIBLE FUTURE ACTION
- DEBTOR HAS A VESTED TITLE TO ANNUITY AND HAS NOT FILED AN APPLICATION FOR BENEFITS REQUEST FOR RECOVERY HAS BEEN INDEXED AND FILED FOR POSSIBLE FUTURE ACTION.
- THE AMOUNT OF INDEBTEDNESS IS LESS THAN \$500. BOTH COPIES OF REQUEST ARE RETURNED AND SET-OFF WILL NOT BE MADE BECAUSE THE COST OF RECOVERY WOULD EXCEED THE AMOUNT OF INDEBTEDNESS

- DEBTOR HAS NO AMOUNT TO HIS CREDIT IN THE RETIREMENT FUND BOTH COPIES OF REQUEST ARE RETURNED
- WE ARE UNABLE TO IDENTIFY THE DEBTOR FROM THE DATA FURNISHED. IF YOU WILL FILL IN THE DATE OF BIRTH AND RETURN BOTH COPIES OF THE REQUEST, ANOTHER ATTEMPT WILL BE MADE.
- DATA YOU HAVE FURNISHED INDICATES THAT DEBTOR IS NOW AN EMPLOYEE, AND THERE IS NO SHOWING THAT ATTEMPTS TO RECOVER THROUGH EMPLOYING AGENCY HAVE BEEN EXHAUSTED BOTH COPIES OF REQUEST ARE RETURNED
- OTHER (Specify)

BUREAU OF RETIREMENT AND INSURANCE EXAMINER

9-122.048 Request for Recovery of Debt Due the United States

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

1984 USAM (Superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 9—CRIMINAL DIVISION

9-122.049 Order Forfeiting Bail

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
)
 Plaintiff,) ORDER FORFEITING BAIL
)
)
 (name),)
)
 Defendant.)

THIS MATTER coming on for (action) on
(date), and the defendant having failed to appear after due
notice to said defendant, and it appearing to the Court that there has
been a breach of condition of the appearance bond and that the bond should
be forfeited, it is

ORDERED that the surety bond heretofore made in the above-entitled
matter be and it is hereby forfeited.

DATED:

United States District Court Judge

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.050 Notice of Motion for Judgment on Forfeiture of Appearance Bond

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
) _____
 Plaintiff,)
)
 v.) NOTICE OF MOTION FOR
) JUDGMENT ON FORFEITURE
 (name)) OF APPEARANCE BOND
 _____)
 Defendant.)

TO THE DEFENDANT AND HIS ATTORNEY, AND TO _____
BAIL BOND AGENCY:

PLEASE TAKE NOTICE that on _____ (date), at _____ (time), in the
Courtroom of the Honorable _____ (name), United States
District Judge, _____ (district), plaintiff, United States of
America, will move the above-entitled Court under Rule 46(e)(3) of the
Federal Rules of Criminal Procedure for Judgment on Forfeiture of the
Appearance Bond filed by the _____ (bond company) on behalf of the
defendant in the above-entitled matter.

Said motion will be based on this notice, the files and records of
the court, and the affidavit of _____ (name) hereto attached.

DATED:

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.051 Motion for Judgment on Forfeiture of Appearance Bond

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
)
 Plaintiff,)
)
 v.) MOTION FOR JUDGMENT ON
) FORFEITURE OF APPEARANCE BOND
)
 (name),)
)
 Defendant.)

Now comes the United States of America, by (name) United States Attorney for the (district), and states as follows:

1. On (date), (name) obligated himself/herself and executed a bond to the United States of America under the terms of which he/she securely and firmly bound himself/herself unto the United States of America in the some of (amount). The condition of the bond provided that the defendant was to appear in accordance with all orders and directions of the Court relating to the appearance of the defendant before the Court, and if the defendant failed to perform this condition, payment of the amount of the bond would be due forthwith.

2. On (date), upon failure of the defendant to appear in accordance with the orders and directions of the Court, the bond was forfeited by the Court pursuant to Rule 46(e) (3) of the Federal Rules of Criminal Procedure.

3. The bond entered into by the defendant is on file in the Office of the Clerk in this Court and is incorporated as part of this motion by express reference as if set out haec verba.

WHEREFORE, the United States of America moves pursuant to Rule 46(e) (3) of the Federal Rules of Criminal Procedure that it have and recover of and from the defendant, (name), judgment in the amount of (amount), and further moves the court to order the Clerk of this Court to turn over to the Treasurer of the United States of America (amount) placed on deposit with him by the defendant.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.052 Affidavit in Support of Motion for Judgment on Forfeiture of
Appearance Bond

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 (name),)
)
 Defendant.)

_____ case number
AFFIDAVIT IN SUPPORT OF MOTION

_____ (name), being duly sworn according to law,
upon oath deposes and says:

1. I am an Assistant United States Attorney and have been assigned
to prosecute the above-captioned matter.

2. On _____ (date), _____ (defendant) was arrested on a
complaint charging violation of Title 18, United States Code, _____ (sections).

3. On _____ (date), a Federal grand jury sitting at _____ (location)
indicated _____ (defendant) for violation of Title 18, United States
Code, _____ (sections).

4. On _____ (date), bail was set by United States Magistrate
_____ (name) in the amount of _____ (amount) surety bond, and
_____ (defendant) tendered a _____ (amount) surety bond of the
_____ (surety) conditioned upon the appearance of _____ (defendant)
which was accepted by the Clerk of the Federal District Court on the same
day.

5. On _____ (date), _____ (defendant) entered a
plea of guilty to the charges of Indictment _____ (number).

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

6. On _____ (date) , _____ (defendant) was sentenced by the Honorable _____ (name) , United States District Court Judge, and execution of said sentence was stayed until _____ (date) , with the direction that the defendant present himself/herself to the United States Marshal on said date.

7. On _____ (date) , the United States moved before the Honorable _____ (name) to forfeit the _____ (amount) surety bail of _____ (name) . This application was based upon information of the FBI that _____ (defendant) had left the country and upon the confirmation of his attorney, _____ (name) , that _____ (defendant) was rumored to have fled the jurisdiction.

8. All efforts to positively locate _____ (defendant) have proved unsuccessful to date.

Assistant United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.053 Appearance Bond Forfeiture Judgment Order

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number) _____
)
 Plaintiff,)
)
) APPEARANCE BOND
 v.)
) FORFEITURE JUDGMENT ORDER
)
)
 (name) _____)
)
)
 Defendant.)

This cause coming on to be heard on the motion of _____ (name) _____,
United States Attorney for the _____ (district) _____, and this Court
being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the United States of
America have and recover judgment against the defendant, _____ (name) _____,
in the sum of _____ (amount) _____, and further ordered that the Clerk of the
Court apply _____ (amount) _____ on deposit in partial satisfaction of
judgment pursuant to Rule 46 of the Federal Rules of Criminal Procedure.

ENTER:

United States District Court Judge

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.054 Motion for Fine Payment From Registry Deposit

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number) _____
)
 Plaintiff,)
)
) MOTION FOR FINE PAYMENT
 v.) FROM REGISTRY DEPOSIT
)
)
 (name) _____,)
)
)
 Defendant.)

Now comes the United States of America, by _____ (name), United States Attorney for the _____ (district), and states as follows:

1. On _____ (date), _____ (defendant) was fined _____ (amount) in the above-entitled cause.

2. To date, defendant has paid the United States of America _____ (amount) of said fine, leaving a balance of _____ (amount) unpaid on said fine.

3. On _____ (date), _____ (defendant) obligated himself and executed an Appearance Bond, in the amount of _____ (amount). The bond entered into by the defendant is on file in the Office of the Clerk of this Court and is incorporated as part of this motion by express reference as if set out haec verba. As a condition of said bond defendant deposited with the Registry of this Court the sum of _____ (amount), which sum remains currently on deposit.

4. The purpose for which said bond was deposited with this Court has been served and it is no longer necessary to maintain said bond with this Court.

WHEREFORE, the plaintiff, United States of America, moves this Court pursuant to Title 28, United States Code, Section 2042, to enter an order in the above-entitled cause directing the Clerk of this Court to pay over the _____ (amount) currently on deposit by the defendant as aforesaid to the Treasurer of the United States in complete satisfaction of the defendant's fine.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.055 Notice of Motion for Fine Payment From Registry Deposit

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,

Plaintiff,

v.

(name)

Defendant.

)
)
)
)
)
)
)
)
)
)
)

(case number)

NOTICE OF MOTION FOR FINE
PAYMENT FROM REGISTRY DEPOSIT

PLEASE TAKE NOTICE that on _____ (date) _____, at _____ (time) _____, in the United States District Court for the _____ (district) _____, plaintiff, United States of America, will move the court under Title 28, United States Code, Section 2042, for an order in the above-entitled cause directing the Clerk of the United States District Court to pay over the _____ (amount) _____ currently on deposit by defendant to the Treasurer of the United States in complete satisfaction of the defendant's fine.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.056 Order for Fine Payment From Registry Deposit

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number)
)
 Plaintiff,)
)
) ORDER FOR FINE PAYMENT
 v.) FROM REGISTRY DEPOSIT
)
)
 (name))
)
)
 Defendant.)

This cause coming to be heard on the motion of (name), United States Attorney for the (district), and this Court being fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that (name), Clerk of the United States District Court for the (district), is directed to pay over forthwith to the Treasurer of the United States the sum of (amount) deposited in the Registry of the Court by the defendant, (name), in connection with the Appearance Bond executed by said defendant in this case, as payment in full of the fine owed by the defendant in this cause.

ENTER:

United States District Court Judge

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.057 Notice of Motion to Require Deposit of Fines for Posting of Bond Pending Appeal

UNITED STATES DISTRICT COURT
(DISTRICT)

(name))
)
) (case number)
)
) Appellant,)
)
)
) v.)
)
) UNITED STATES OF AMERICA,)
)
)
) Appellee.)

NOTICE OF MOTION TO REQUIRE
DEPOSIT OF FINES OR POSTING
OF BOND PENDING APPEAL.

TO THE DEFENDANT AND HIS ATTORNEY:

PLEASE TAKE NOTICE that on _____ (date) _____, at _____ (time) _____, in the courtroom of the Honorable _____ (name) _____, United States District Judge, _____ (district) _____, plaintiff, United States of America, will move the above-entitled court under Rule 38(a)(3) of the Federal Rules of Criminal Procedure for an order requiring the deposit of fines or posting of bond.

Said motion will be based on this notice, the files and records of the court, and the brief in support of motion attached hereto.

DATED:

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.058 Motion to Require Deposit of Fines or Posting of Bond Pending Appeal

UNITED STATES DISTRICT COURT
(District)

(name))
)
Appellant,)
)
v.) (case number) _____
)
) MOTION TO REQUIRE DEPOSIT
) OF FINES OR POSTING OF
) BOND PENDING APPEAL
)
UNITED STATES OF AMERICA,)
)
Appellee.)

COMES NOW the United States of America by its attorney, _____ (name) _____, United States Attorney for the _____ (district) _____, and moves the Court pursuant to Rule 38(a) (3) of the Federal Rules of Criminal Procedure for an order requiring the defendant, _____ (name) _____, pending appeal, to deposit the amount of his/her fines and costs in the Registry of the District Court or give bond for the payment thereof or to submit to an examination of his/her assets. Alternatively, plaintiff moves the court for an order preventing the defendant from dissipating his/her assets during the pendency of the appeal.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.059 Brief in Support of Motion to Require Deposit of Fines or Posting of Bond Pending Appeal (Individual)

UNITED STATES DISTRICT COURT
(District)

_____(name)_____,)
) (case number)_____
Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

BRIEF IN SUPPORT OF MOTION TO
REQUIRE DEPOSIT OF FINES OR
POSTING OF BOND PENDING APPEAL

A jury verdict of guilty was returned against the defendant, (name), on multiple counts involving violations of the Title 18, United States Code, (Section).

On (date), the following sentence was imposed upon the defendant: fined (amount) and sentenced to (years) imprisonment.

A fine imposed in a criminal case is enforced by execution against the property of a defendant in the same manner as a judgment in a civil case. See Title 18, United States Code, Section 3565. Unless a defendant voluntarily pays a fine imposed upon him/her or has assets which can be attached to enforce collection, generally it is not possible to collect the fine while the defendant is in prison. Collection after release from a lengthy prison term is difficult because defendants often lack attachable assets, are not steadily employed, and may be difficult to locate.

With regard to the instant case, the defendant is (age). In view of the length of the prison sentence imposed upon the defendant and the age which he/she may be when released from prison, it is highly unlikely that the fine imposed by the court ever will be collected, unless immediate steps are taken to insure payment.

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

The Court should not be rendered powerless to enforce its decree should the judgment appealed from be affirmed. Stern v. United States, 249 F.2d 720 (2d Cir. 1957).

In order to protect the Court's judgment herein pending appeal and to insure collection if the conviction is affirmed, the defendant should be required to deposit the amount of his/her fine in the Registry of the Court, or to give bond for the payment therefore, or to submit to an examination of assets in accordance with the provisions of Rule 38(a)(3) of the Federal Rules of Criminal Procedure.

For the foregoing reasons, the United States of America respectfully requests that this motion be granted.

United States Attorney

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.060 Brief in Support of Motion to Require Deposit of Fines or
Posting of Bond Pending Appeal (Corporation)

UNITED STATES DISTRICT COURT
(District)

(name) _____,)
)
Appellants,) _____ (case number)
)
v.) BRIEF IN SUPPORT OF MOTION TO
) REQUIRE DEPOSIT OF FINES OR
) POSTING OF BOND PENDING APPEAL
UNITED STATES OF AMERICA,)
)
Appellee.)

A jury verdict of guilty was returned against the defendants, _____
(names) _____, on multiple counts of _____ (offense)
on _____ (date) _____, and on _____ (date) _____, the following sentences were
imposed upon the defendants:
_____ (corporation) was fined _____ (amount) _____;
_____ (name) was sentenced to several _____ (years) concurrent
terms of imprisonment and fines _____ (amount) _____ and the costs of the action
were taxed to him/her.

The evidence at trial showed that the defendant corporation is owned
by the defendant _____ (name) _____ and that defendant _____ (corporation)
is primarily engaged in the publication of nudist magazines. The
affidavit on information and belief attached hereto and marked Exhibit A
shows that on _____ (date) _____, after the jury verdict and shortly before the
fines were imposed, Articles of Incorporation for _____ (new corporation)
were filed with the Secretary of State for the State of _____.
The defendant _____ (name) _____ is the president, director,
and sole stockholder for this corporation. The principal business of
_____ (new corporation) _____ is the publication of nudist magazines.

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

Defendants stood trial, were convicted by a jury, and sentenced by the Court. Said sentence may be evaded by the defendants by the simple process of dissolving corporations, transferring assets, and establishing new corporations. There is evidence that this process may have in fact occurred. _____ (New corporation) appears to be publishing many of the nudist magazines previously published by _____ (old corporation) _____. The court should not be rendered powerless to enforce its decree should the judgments appealed from be affirmed. Stern v. United States, 249 F.2d 720 (2d Cir. 1957). Therefore, to protect the Court's judgment, defendants should be required to deposit the amounts of their fines and costs in the Registry of the District Court, or in the alternative, to give bond for the payment thereof.

For the foregoing reasons, the United States of America respectfully submits that the order prayed for should be granted.

United States Attorney

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.061 Affidavit in Support of Motion to Require Deposit of Fines or
Posting of Bonds Pending Appeal (Corporation)

UNITED STATES DISTRICT COURT
(DISTRICT)

_____, (name))
Appellant,) _____ (case number)
v.) AFFIDAVIT IN SUPPORT OF MOTION
UNITED STATES OF AMERICA,)
Appellee.)

I, _____ (name), United States Attorney for the _____ (district),
being first duly sworn, do hereby depose and say that I have in my
possession certified records from the office of the Secretary of State of
the State of _____ which disclose that the Articles of
Incorporation for _____ (new corporation), were filed with
said office on _____ (date), listing _____ (name) as a director
of the corporation; that on _____ (date), _____ (name), as president
and director of _____ (new corporation), did file a verified
application for a permit to issue and sell 25 shares of its common stock
to _____ (name).

United States Attorney

Subscribed and sworn to before me by _____ (name)
this _____ (date).

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.062 Order Requiring Deposit of Fines Pending Appeal

UNITED STATES DISTRICT COURT
(DISTRICT)

_____(name)_____,)
) (case number)_____
Appellant,)
) ORDER REQUIRING DEPOSIT
v.) OF FINES PENDING APPEAL
)
UNITED STATES OF AMERICA,)
)
Appellee.)

This cause coming to be heard on the motion of _____(name)_____, United States Attorney for the _____(district)_____, and this Court being fully advised of the premises:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that _____(name)_____, appellant in the above-entitled case, pending appeal, is directed to deposit, within 30 days of the date hereof, in the Registry of the United States District Court for the _____(district)_____ the sum of _____(amount)_____ as security for satisfaction of the fine owed by the defendant in this cause.

ENTER:

United States District Court Judge

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.063 Bond Under Rule 38(a) (3) to Insure Fine Payment

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
) BOND UNDER RULE 38(a) (3)
 v.) TO INSURE FINE PAYMENT
)
 (name),)
)
 Defendant.)

Whereas, (name), defendant in the above-entitled action was convicted and sentenced, amongst other things, to pay a fine of (amount) in this Court; and

Whereas, by an order made on (date), by the Honorable (name), (defendant) was required to give bond either in cash or securities as security for payment of the said fine; and

Whereas, said defendant has this day deposited with the Clerk of this Court (security deposited) in the amount of (amount) as security for payment of the said fine;

NOW, THEREFORE, we (names) do hereby acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of (amount) as and for payment of the fine which (defendant) was sentenced to pay herein as aforesaid.

The condition of this Bond is that if (defendant) fails to file a timely Notice of Appeal from the judgment of conviction imposed in this case, or if (defendant) appeals to the United States Court of Appeals for the (circuit) by Notice of Appeal from the judgment of this Court entered (date), and the said Appeal is dismissed or the said judgment is affirmed, then payment by us of the amount of this Bond shall be due forthwith, and we will pay the said fine of (amount) and, in such event, the Clerk of the United States

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

District Court for the _____ (district) _____ may and shall sell (security deposited) in the amount of _____ (amount) _____ and apply the proceeds thereof toward the payment of the said fine; but if, on appeal, the said judgment of conviction or that portion of sentence pertaining to the said fine is reversed, then this Bond is to be void.

Forfeiture of this Bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above-entitled matter at the time of such breach and if the Bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against defendant for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned is duly exonerated.

This Bond is signed on this _____ (date) _____, at _____ (location) _____.

Defendant

Surety

Approved:

United States District Court Clerk

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.064 Notice of Motions for Forfeiture of Bail, Entry of Judgment,
and Appointment of a Receiver

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number)
)
 Plaintiff,)
)
)
 v.)
)
) NOTICE OF MOTIONS FOR
) FORFEITURE OF BAIL, ENTRY
) OF JUDGMENT, AND APPOINTMENT
) OF A RECEIVER
)
 (name),)
)
)
 Defendant,)
)
)
 and)
)
)
 (name),)
)
)
 Surety.)

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of (name), Assistant United States Attorney for the (district), the undersigned will move this Court before the Honorable (name) in the Courtroom of the United States Court for the (district) on (date), for orders (1) declaring a forfeiture of the bail of (defendant), and directing the entry of judgment of default in the amount of (amount) against (defendant and surety), jointly and severally, on (defendants) bail bond pursuant to Rule 46(e) of the Federal Rules of Criminal Procedure; (2) forfeiting to, and vesting in, the United States of America all right, title and interest of (surety) in the parcel of real estate commonly known as (address), which was pledged as security for the aforementioned bond, and directing the United States Marshal to place the United States of America in immediate peaceful and exclusive possession of the aforementioned parcel pursuant to Title 18, United States Code, Section 3150; and (3) appointing a Receiver, pursuant to Rule 69 of the Federal Rules of Civil Procedure, to take possession of and to sell the premises commonly known as (address) in partial satisfaction of the judgment of default entered against (defendant and surety).

UNITED STATES ATTORNEY

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.065 Affidavit in Support of Motions for Forfeiture of Bail, Entry of Judgment, and Appointment of a Receiver

UNITED STATES DISTRICT COURT
(District)

UNITED STATES OF AMERICA,)
)
) (case number) _____
)
 Plaintiff,)
)
)
 v.)
)
) (name) _____)
)
) Defendant,)
)
) and)
)
) (name) _____)
)
) Surety,)

AFFIDAVIT

_____, (name) _____, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney duly appointed according to law, and acting as such, on the staff of _____ (name) _____, United States Attorney for the _____ (district) _____. I am fully familiar with the facts and proceedings herein. I submit this affidavit in support of the Government's motions for (a) forfeiture of bail herein and entry of judgment of default pursuant to Title 18, United States Code, Section 3150 and Rules 46(e)(1) and 46(e)(3) of the Federal Rules of Criminal Procedure, and (b) appointment of a Receiver pursuant to Rule 69 of the Federal Rules of Civil Procedure.

2. On _____ (date) _____, the defendant _____ (name) _____ was arraigned before the Honorable _____ (name) _____, United States Magistrate for the _____ (district) _____ on a complaint charging violation of Title _____ (title) _____, United States Codes, Section _____ (sections) _____. Bail was set in the amount of _____ (amount) _____ personal recognizance bond, co-signed by _____ (name) _____, surety, and secured by the deed to the _____ (name's) _____ residence. The condition of the bond provided that the defendant was to appear in accordance with all orders and direction of the Court.

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

3. On _____ (date) _____, the defendant _____ (name) _____ failed to appear in accordance with the order of the Court.

Wherefore, your deponent respectfully prays for orders directing (1) that the bail herein be declared forfeited; (2) that judgment in the amount of _____ (amount) _____ be entered against _____ (name) _____, defendant, and _____ (name) _____, surety, jointly and severally, in favor of the United States, and that execution be issued thereon; (3) that all right, title and interest of _____ (surety) _____ in the parcel of real estate commonly known as _____ (address) _____, be forfeited to and vested in the United States of America; (4) that a Receiver be appointed to take possession of, preserve and sell the premises commonly known as _____ (address) _____, in partial satisfaction of the judgment of default entered against _____ (defendant and surety) _____; (5) that the United States Marshal place the United States of America in immediate and exclusive possession of the aforementioned premises; and (6) that the Court order such other and further relief as it deems just and proper.

ASSISTANT UNITED STATES ATTORNEY

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.066 Order of Forfeiture of Bail and Order of Judgment

UNITED STATES DISTRICT COURT
(District)

UNITED STATES OF AMERICA,)
)
 Plaintiff) _____ (case number)
)
 v.) ORDER OF FORFEITURE
) OF BAIL AND ORDER OF
) JUDGMENT
 (name))
 Defendant)
 and)
 (name))
 Surety.)

The United States of America having moved this court for an order declaring the forfeiture of bail in this action, for an order directing the entry of judgment of default in the amount of _____ (amount) jointly and severally against _____ (name), defendant, _____ (name), surety, on the bail bond of _____ (name), and for an order forfeiting to and vesting in the United States of America all right, title and interest of _____ (surety) in the parcel of real property commonly known as _____ (address), and said motions having come on for hearing before me on _____ (date), wherein _____ (name), United States Attorney, of counsel, appeared in support of said motion, and _____ (name), counsel for defendant _____ (defendant), having appeared in opposition thereto, argument of counsel having been heard and due deliberation been had thereon, and there appearing to be no reason why the Court should not grant the relief sought by the United States of America, it is

ORDERED, that the bail in the above entitled action _____ (amount personal recognizance bond) be and it hereby is declared forfeited, and it is further

ORDERED, that the Clerk of the United States District Court, _____ (district) enter a judgment of default in the amount of _____ (amount) against _____ (defendant and surety), jointly and severally, in favor of the United States of America, and it is further

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

ORDERED that all right, title and interest of _____ (surety),
in the parcel of real estate commonly known as _____ (address),
is hereby forfeited to and vested in the United States of America, and it
is further

ORDERED that the United States Marshal, at such time as the United
States Attorney directs, place the United States of America in peaceful
and exclusive possession of the aforementioned parcel of real property.

Dated:

UNITED STATES DISTRICT JUDGE

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.067 Order of Forfeiture

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
) (case number)
 Plaintiff,)
)
 v.) ORDER OF FORFEITURE
)
 (name))
 Defendant,)
)
 and)
 (name))
 Surety.)

The United States having made a motion, returnable before the Court on _____ (date), seeking an order forfeiting to, and vesting in the United States of America all right, title and interest of _____ (surety), in the parcel of real property commonly known as _____ (address), more fully described in the deed, dated _____ (date), from _____ (name), as grantors, to _____ (surety), as grantees, recorded in the Office of the City Register for _____ (county), in Book _____ (number) at page _____ (number) on _____ (date) a copy of which is annexed hereto and incorporated herein, and it appearing to the Court after hearing all parties, that the relief sought should be granted, it is

ORDERED that all right, title, and interest of _____ (surety) in the parcel of real property commonly known as _____ (address), and more fully described in the deed annexed hereto and incorporated herein, is forfeited to and vested in the United States of America.

Dated:

UNITED STATES DISTRICT JUDGE

NOTE: This order is recorded in the County Clerk's Office, making the United States the owner of record of the realty.

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.068 Order Appointing a Receiver

UNITED STATES DISTRICT COURT
(DISTRICT)

UNITED STATES OF AMERICA,)
)
) (case number)
)
) Plaintiff,)
)
) v.) ORDER APPOINTING
) A RECEIVER
)
) (name),)
)
) Defendant,)
)
) and)
)
) (name),)
)
) Surety.)

The United States of America having moved this court for an order appointing a Receiver pursuant to Rule 69 of the Federal Rules of Civil Procedure to take possession of, preserve, and sell the premises commonly known as (address), in partial satisfaction of the judgment of default entered against (name), defendant, and (name), surety, in the amount of (amount), and it appearing to the Court that the relief requested should be granted, it is

ORDERED that (name) is hereby appointed Receiver of the premises commonly known as (address), hereinafter "premises," and it is further

ORDERED that the Receiver take possession of the premises, and take such steps as are reasonably necessary to sell the premises, and to preserve the premises during the period of the Receivership estate, and it is further

ORDERED that the Receiver may incur such expenses that are reasonable and necessary to preserve and to sell the premises, including but not limited to, brokers' fees, commissions, utilities, heat, insurance, and local taxes, and it is further

ORDERED that the Receiver obtain three appraisals of the premises from disinterested licensed real estate brokers, familiar with the value of single family residences in the locale where the premises is located, and submit copies of these appraisals to the Court, to the attorney for (surety) and to the attorney for the United States of America and it is further

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

ORDERED that within 10 days after the Receiver has served copies of the contract of sale upon the attorney for (surety) , and the attorney for the United States of America, they may file their objections to the proposed sale with the Court, and it is further

ORDERED that out of the net proceeds of the sale, the Receiver shall first pay the reasonable and necessary expenses incurred by him/her in preserving, and selling the premises, and it is further

ORDERED that the Receiver retain 5 percent of the net proceeds of sale as his/her commission, and it is further

ORDERED that if any reasonable and necessary expenses of the Receiver must be paid prior to the sale, the Receiver shall submit the bills for those expenses to the United States Attorney, who will advance funds to pay those expenses, and it is further

ORDERED that all funds advanced by the United States Attorney to pay expenses incurred by the receiver shall be reimbursed by the Receiver to the United States Attorney out of the net proceeds of sale, and it is further

ORDERED that the proceeds of the sale remaining in the hands of the Receiver after the payment of the necessary and reasonable expenses, Receiver's commissions and the reimbursement to the United States Attorney for funds advanced by him/her, shall be delivered to the United States Attorney and credited against the judgment entered in the above-entitled criminal proceeding, and it is further

ORDERED that, upon request of (surety) the Receiver make available for them to remove from the premises those items of personal property that are designated by the United States Attorney, and it is further

ORDERED that the Receiver is empowered to execute any and all documents that are necessary for conducting the sale and the title closing.

Dated:

UNITED STATES DISTRICT JUDGE

MARCH 21, 1984
Ch. 122, p. 85

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.069 Criminal Fine/Forfeiture Litigation Report

This report is to be prepared by the prosecutor for each defendant who is fined or forfeits bail. The purpose of the report is to aid the United States Attorney in the collection of these monetary penalties.

Criminal Fine

Appearance Bond Forfeiture

Court No. _____ Defendant No. _____ Date of Imposition _____

U.S. Attorney Complaint No. _____ Defendant No. _____

Type of offense charged _____

Name of Prosecutor _____

Investigating Agency _____ Field Agency File No. _____

Name of Agency Investigator _____ Tel. No. _____

1. Name of Defendant _____

2. Aliases _____

3. Date of Birth _____

4. Social Security Number _____

5. FBI Identification Number _____

6. Place of Residence _____

7. Nationality of Defendant _____

8. Immigration Information _____

9. Is defendant subject to deportation? _____

10. If married, name and address of spouse _____

11. Name of surety for appearance bond _____

12. Name and address of employer _____

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

13. Has cash/property been pledged with court? _____
14. Financial aspect of crime: estimated amount defendant gained from offense for which convicted. _____

15. Real property held by defendant or nominees. _____

16. Personal property belonging to defendant, *i.e.* cash, bank or savings accounts, securities, collectibles and other assets of value. _____

17. Names of third parties with possible knowledge of defendant's assets (Relatives, business associates, informants, protected witnesses, financial institutions). _____

18. Any other information which may be useful in locating defendant's assets. _____

19. Was there any transfer of defendant's property just before defendant's indictment or trial? If so, describe in detail. _____

20. Was any agreement/promise made with any party relating to the defendant's property? Describe. _____

Name and Title

Attach sheet of paper if additional space is needed.

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-122.070 Memorandum of Understanding Between U.S. Attorney and Chief
United States Probation Officer

The purpose of this understanding is to insure that the orders of the court are carried out and that all fines and money judgments ordered by the court are enforced. It is recognized that the United States Probation Office has the direct responsibility to enforce fines or restitutions ordered as a special condition of probation. It is further recognized that enforcement of fines and other money judgments (such as appearance bond forfeiture judgments or restitution to the United States) which are not ordered as a special condition of probation, are the responsibility of the U.S. Attorney. The action of each office in dealing with their fine debtors should be clearly outlined. The object of such understanding is not establishment of rigidly defined spheres of authority, but rather the promotion of cooperation and efficiency in the two offices.

In different Districts, a wide spectrum of arrangements exist between the U.S. Attorney and the United States Probation Office, and these reflect the attitudes of the courts. Listed below are certain points that should be understood by both Offices. Because the collection section of the U.S. Attorney interacts with the U.S. Probation Office, the attorney charged with collection responsibility has participated in this agreement. Periodic liaison by the collections attorney can eliminate friction between the offices and improve collection operations.

A. Upon receipt of a judgment considered a condition of probation, the U.S. Attorney's office will send an information request letter (see USAM 9-122.071) to the U.S. Probation Office for completion. This document will serve to memorialize collection responsibility and resolve any ambiguity in interpreting the Judgment and Commitment Order in the given case. The letter will also be sent annually to the U.S. Probation Office to obtain the status of the case as well as payment information.

B. Where a fine or restitution is imposed as a special condition of probation, enforcement is the responsibility of the U.S. Probation Office and the U.S. Attorney will not contact the debtor or take any action to collect the judgment unless requested to do so. Upon request by the U.S. Probation Office, the U.S. Attorney's office may conduct discovery proceedings, garnishment or execution. The U.S. Probation Office should inform the U.S. Attorney whether liens are to be registered against probation fine debtors. Where a defendant is placed on unsupervised probation and a fine is imposed as a condition of probation, the U.S. Attorney will take no enforcement action unless requested by the U.S. Probation Office.

UNITED STATES ATTORNEYS' MANUAL
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is imposed as a condition of probation, the U.S. Attorney will take no enforcement action unless requested by the United States Probation Office.

C. The U.S. Probation Office will inform the U.S. Attorney of the approaching termination (either expiration of term, or revocation) of probation where a fine is a condition of probation and a balance remains unpaid. Unless the court directs otherwise, expiration of the term of probation cancels any unpaid balance of the fine. The U.S. Attorney may wish to discuss before the termination of probation, the desirability of extending the term to insure fine payment. When probation is revoked, resentencing may impose a new fine that is not a condition of probation. Where probation jurisdiction is transferred, the U.S. Probation Office will also notify the U.S. Attorney.

D. Where a Judgment and Commitment Order provides for a mixed sentence, *i.e.*, probation on one count and a fine that is not a condition of probation on another count, the U.S. Probation Office and U.S. Attorney should coordinate their enforcement efforts. It is recommended that the U.S. Probation Office attempt collection during the term of probation and the U.S. Attorney collect the balance outstanding when probation is terminated. Similar coordination may insure that appearance bond forfeiture of probationers are collected during the term of probation.

E. The U.S. Attorney is responsible for the collection of fines or appearance bond forfeiture judgments from debtors on parole, even though they are under supervision of the U.S. Probation Office. Since the U.S. Probation Office has no enforcement authority where the fine is not a condition of probation, it usually is not feasible for the U.S. Probation Office to undertake collection. The U.S. Attorney will inquire if the U.S. Probation Office desires to be notified of actions taken to collect a debt from a parolee under its supervision.

F. The U.S. Attorney's office and the U.S. Probation Office will support the fine enforcement activities of each other as discussed below.

1. As mentioned, the U.S. Attorney can, upon request by the United States Probation Office, conduct discovery, garnishment, or execution against probationers who are reluctant to pay their fines.

2. Upon request by the U.S. Probation Office if it lacks computerized record keeping equipment, the U.S. Attorney will offer the Chief Probation Officer printouts showing payments of probation fine debtors in a format that would be a useful management tool.

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3. Upon release from prison, parolees report initially to the U.S. Probation Office. If the parolee has an outstanding fine or bail bond forfeiture, he/she should be promptly directed to the U.S. Attorney's office to complete a financial statement (OBD-Form 500).

4. The U.S. Probation Office usually maintains the Probation Form-3 which contains the Social Security Number or FBI Number. This information is useful to the U.S. Attorney's collection unit for skip-tracing its unlocated fine debtors.

5. If the U.S. Attorney's office expresses a need for financial information from a parolee's presentence report, the U.S. Probation Office will endeavor to obtain the material.

6. If requested by the Chief Judge of the District Court, the Chief U.S. Probation Officer will supply to the Court and to the Administrative Office of United States Courts an annual report detailing the collection of criminal fines imposed as a condition of probation in the District; upon such request, the U.S. Attorney will supply to the Court an annual report detailing the collection of straight and stand-committed criminal fines in the District.

G. The parties agree to confer on an ongoing basis, as necessary, to insure the effectiveness of criminal fine enforcement and to promote the criminal fine collection effort.

Chief U.S. Probation Officer
(District)

U.S. Attorney
(District)

Chief, U.S. Attorney's
Collection Unit

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9-122.071 Information Request Letter to U.S. Probation Officer

United States Attorney
(District)

United States Probation Office
(District)

Re: United States v. _____ defendant
Court Number _____. Fine in amount of _____.

Dear Sir or Madam:

Please furnish this office with answers to the following questions about the above captioned case and return this letter.

1. Is this fine a condition of probation? Yes. No.
2. Will your office enforce the collection of this fine? Yes. No.
3. Name of debtor's probation officer: _____.
4. Status of probation. Active. Inactive.
If inactive, explain why. _____
_____.
5. Date of expiration of probation. _____.
6. Amount of fine paid to date. \$ _____ as of _____ (date) _____.
7. Do you desire assistance from this office in the collection?
Yes. No.
8. Any comments concerning this case? _____

_____.
9. Signature of Probation Officer. _____

Very truly yours,

United States Attorney

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9-123.000 COSTS OF PROSECUTION

28 U.S.C. §1918(b) provides:

Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution.

Under this statute, the imposition of costs is discretionary with the court. Numerous cases have upheld the power of the courts to impose costs against unsuccessful defendants in federal prosecutions. See, e.g., In re Swan, 150 U.S. 637 (1893); United States v. American Theater Corp., 526 F. 2d 48 (8th Cir. 1975), cert. denied, 430 U.S. 938 (1977). However, in the absence of an award by the court, costs may not be taxed against a defendant. See Morris v. United States, 85 F. 73, 76 (8th Cir. 1911).

Costs awards under 28 U.S.C. §1918(b) should not be sought as a matter of course, for they can often spawn pesky litigation and ultimately compound the Department's already vexatious criminal collection problems. However, if the government has been caused great expense to prosecute a case, and it appears that a defendant is able to pay, it is proper for the U.S. Attorney to recommend to the court that costs be imposed.

The decision to seek costs is left to the U.S. Attorney. He/she is in the best position to determine whether costs will be allowed by his/her courts, can be recovered from the defendant and would be worth the investment of additional resources in any particular case.

9-123.100 TAXATION OF COSTS OF PROSECUTION

Once costs have been imposed, the procedural starting point for having them taxed against the defendant is Rule 54(d) of the Federal Rules of Civil Procedure. Rule 54(d) provides in relevant part that:

Costs may be taxed by the clerk [of court] on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Pursuant to this Rule, costs of prosecution are initially taxed by the clerk of court rather than the judge. It is to be noted, however, that the language of the Rule is permissive in nature and thus does not encroach on the court's inherent power to usurp this function for itself if it so desires.

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The taxation process is initiated by filing a duly verified bill of costs with the clerk. Local rules generally prescribe the time period in which the bill must be filed. If there are no local rules prescribing a time period, the bill should be filed within a reasonable time after entry of judgment. Failure to submit the bill on time may result in a dismissal of the government's action. See United States v. Pinto, 44 F.R.D. 357 (W.D. Mich. 1963). It would appear, however, that the time period in which the cost bill must be submitted will not start running until all appeals from the underlying prosecution have been disposed of. See United States v. Hoffa, 497 F. 2d 294 (7th Cir. 1974). Cf. Popeil Bros., Inc. v. Schick Electric Co., 516 F. 2d 772 (7th Cir. 1975).

The submission of a bill of costs is made mandatory by the last sentence of 28 U.S.C. §1920 which directs that "a bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree." 28 U.S.C. §1924 prescribes the requisite form of verification to be submitted with the bill:

Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and the services for which fees have been charged were actually and necessarily performed.

The standard form bill of costs available in most clerks of court offices already contains the necessary verification. (See Appendix I.)

A copy of the verified bill of costs, with the time set for appearance before the clerk, must be served on the defendant. Written objections to an item claimed may be made at this time or the defendant may await the time set for taxation to submit objections. Once the clerk's determination is made as to the costs allowable and taxable, either party may move within 5 days pursuant to Rule 54(d) of the Federal Rules of Civil Procedure to have it reviewed, whereupon the allowance of costs becomes a de novo determination to be made by the court. See American Steel Works v. Hurley Construction Co., 46 F.R.D. 465 (D. Minn. 1969).

If objections to the costs requested are filed with the clerk of court after his/her determination is made, the clerk is not required to consider the objections. See Lee v. United States, 238 F. 2d 341 (9th Cir. 1956). Moreover, although the 5-day period under Rule 54(d) of the Federal Rules of Civil Procedure is subject to enlargement, Rule 6 of the Federal Rules of Civil Procedure; United States v. One Ford Coupe, 26 F. Supp. 598 (M.D. Pa. 1939), if it is not enlarged, a motion for review filed after 5 days will

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usually be dismissed. See Lee v. United States, supra. A timely filing, however, is apparently not jurisdictional and the court, in its discretion, may entertain a tardy motion. See Baum v. United States, 432 F. 2d 85 (5th Cir. 1970); United v. Kolesar, 313 F. 2d 835 (5th Cir. 1963).

The action of the trial court in taxing costs is subject to modification or reversal on appeal only when it is shown that there was an abuse of discretion or that the order of the court was otherwise erroneous action. See Farmer v. Arabian-American Oil Co., 379 U.S. 227 (1964).

9-123.200 PREREQUISITES TO TAXATION

9-123.210 Requirement of A Conviction

28 U.S.C. §1918(b) is clear in its direction that costs may be imposed only when a conviction is obtained. Thus, if a defendant is indicted on several counts, convicted as to some but acquitted on the others, he/she may not be required to pay costs relating to the counts on which he/she was acquitted. See United States v. Rosenblum, 182 F. 2d 956 (7th Cir. 1950); United States v. Miller, 223 F. 193 (S.D. Ga. 1915).

There is some question as to whether costs incurred in a mistrial or in obtaining a conviction which is later set aside may be taxed against a defendant who is subsequently retried and convicted on the same charges. In United States v. Murphy, 59 F. 2d 734 (S.D. Ala. 1932), the defendant was brought to trial on three separate occasions. The first trial resulted in a conviction which was set aside, the second in a mistrial and the third in the defendant again being convicted. The court allowed costs which were apparently incurred in each of the three trials. A similar result occurred in Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935), cert. denied, 297 U. S. 709 (1936). Neither of these cases, however, actually addressed the question of whether otherwise allowable expenses incurred in previous proceedings might be taxed as costs of prosecution, for objections on these grounds to the taxation of the expenses as costs were not raised. In the only case directly confronting the issue, it was held that the separate cost of a mistrial could not be taxed against a subsequently convicted defendant where the mistrial was due solely to the jury's failure to agree upon a verdict. See United States v. Deas, 413 F. 2d 1371 (5th Cir. 1969).

9-123.220 Requirement That Costs Be Incurred in the Prosecution of the Case

28 U.S.C. §1918(b) also limits the recovery of costs to allowable expense which accrue during the course of the prosecution of a case. For

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purposes of this section, a prosecution is commenced after an indictment has been returned or an information has been filed. Consequently, fees and expenses which are incurred in preliminary hearings or in obtaining an indictment may not be taxed as costs of prosecution. See United States v. Briebach, 245 F. 204 (E.D. Ark. 1917).

At the other end of the spectrum, a prosecution terminates when final judgment is entered. However, only costs incurred at the trial level may be assessed against a defendant. The award of costs to the United States which are incurred in the appellate process is proscribed by Rule 39(b) of the Federal Rules of Appellate Procedure. Furthermore, costs incurred in appeal related hearings, although within the jurisdiction of the district court, may not be taxed as costs of prosecution as this would penalize the defendant for exercising his/her right of appeal. See United States v. Hoffa, 497 F. 2d 294 (7th Cir. 1974).

9-123.300 FEES AND EXPENSES TAXABLE

The fees and expenses which may be taxed as costs of prosecution are set out in 28 U.S.C. §1920. This section was designed to be read with 28 U.S.C. 1918(b) as well as any other statute calling for the imposition of costs in criminal or civil matters. See United States v. Procaro, 361 F. 2d 683 (2d Cir. 1966). 28 U.S.C. §1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

1. Fees of the clerk and marshal;
2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and copies of papers necessarily obtained for use in the case;
5. Docket fees under section 1923 of this title; and
6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

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9-123.310 Fees of the Clerk and Marshal

The only fees taxable as costs of prosecution in this category are those chargeable by the United States Marshal under 28 U.S.C. §1921. The clerk's fees chargeable under 28 U.S.C. §1914 are either limited to civil actions or expressly made inapplicable to services performed on behalf of the United States.

28 U.S.C. §1921 provides in pertinent part:

Only the following fees of United States Marshals shall be collected and taxed as costs, except as otherwise provided:

* * *

For all services in a criminal case except for the summoning of witnesses, a sum to be fixed by the court not exceeding \$25 where conviction is for a misdemeanor and not exceeding \$100 where conviction is for a felony;

* * *

Under this section, Marshal's fees, other than those chargeable to summoning witnesses, are limited to a maximum of \$100. Summons fees are set at \$2 for each subpoena or summons served, and 12 cents per mile for necessary travel incurred in serving or endeavoring to serve this process (except in the District of Columbia). Like witnesses fees, at USAM 9-123.330, *infra*, these fees may only be taxed as costs if the witness actually testifies or it is otherwise shown that his/her testimony is material to the prosecution. See Kirby v. United States, 273 F. 391 (9th Cir. 1921), *aff'd* 260 U.S. 423 (1922); United States v. Wilson, 193 F. 1001 (S.D. N.Y. 1911).

28 U.S.C. §1921 encompasses all of the charges of Marshals that may be taxed as costs of prosecution. See United States v. Pommerening, 500 F. 2d 92 (10th Cir. 1974), *cert. denied*, 419 U.S. 1088 (1974), *reh'g denied*, 420 U.S. 939 (1975). Consequently, such items as Marshal's per diem, guard hire, toll fees incurred in transporting prisoner witnesses and lodging expenses for prisoner witnesses are not allowable. See Pommerening, *supra*; United States ex rel Griffin v. McMann, 310 F. Supp. 72 (E.D. N.Y. 1970). It would appear, however, that the lump sum of \$25 and \$100, because they

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pertain to "all services in a criminal cases may include these and any other charges not falling within the express provisions of the statute.

9-123.320 Fees of the Court Reporter for All or Any Part of the Stenographic Transcript Necessarily Obtained for Use in the Case

The costs of a stenographic transcript of a witness' grand jury testimony may be taxed if necessarily obtained for use in the case. This applies as well to copies of grand jury testimony furnished the defendant under the Jencks Act. See United States v. Pommerening, 500 F. 2d 92 (10th Cir. 1974).

The taxability of the costs of a trial transcript is a matter that has spawned a considerable amount of controversy. See generally, 6 Moore's Federal Practice, ¶54.77 [7]. One line of authority suggests that a transcript obtained by the government for its own use during trial is not "necessarily obtained for use in the case" and consequently may not be taxed as an item of cost. See Firtag v. Gendleman, 152 F. Supp. 226 (D. D.C. 1957). The other holds that the allowability or non-allowability of the costs of a trial transcript is a matter committed to the sound discretion of the court. See United States v. Procaro, 361 F. 2d 683 (2d Cir. 1966).

In Procaro, a case involving the taxation of costs against a defendant in connection with his conviction for income tax evasion, the court affirmed the allowance of \$2,770.26 in stenographers' fees paid by the government for a daily copy of the trial transcript, stating that this item was well within the district court's discretion to tax as costs of prosecution.

Fees expended for transcripts of depositions fall within this category of costs. See United States v. Kolesar, 313 F. 2d 835 (5th Cir. 1963). In civil cases, the fact that a deposition is not received in evidence at the trial will not prevent taxation if its taking can be shown to have been reasonably necessary to a party's case. Koppinger v. Cullen Schlitz and Assoc., 513 F. 2d 901 (8th Cir. 1975). In a criminal case, a deposition may be taken only pursuant to a court order, whenever, due to exceptional circumstances of the case, it is in the interest of justice that the testimony of a prospective witness be taken. See Rule 15, Fed. R. Crim. P. It would appear, therefore, that a deposition in a criminal case is necessarily obtained for use in the case and that the transcript fee may be taxed as part of the costs of prosecution.

In this connection, Rule 15 of the Federal Rules of Criminal Procedure provides that where a deposition is taken at the instance of the government, the court may direct that the expense of travel and subsistence of the

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defendant and his/her attorney as well as the cost of the transcript shall be paid by the government. If the defendant is subsequently convicted, only the cost of the transcript may be recovered as the other expenses do not fall within the ambit of 28 U.S.C. §1920.

9-123.330 Fees and Disbursements for Printing and Witnesses

9-123.331 Non-Government Employee Witnesses

The fees and expenses for non-government employee witnesses which may be taxed as costs of prosecution are set forth in 28 U.S.C. §1821. This section provides that a witness shall receive \$30 for each day's attendance in any court, or before any person authorized to take his/her deposition pursuant to any rule or order of the court, including the time spent in going to and returning from court, plus travel expenses at the rate of 20 cents per mile for travel by private automobile and at the actual cost of transportation for travel by common carrier. Witnesses who attend at points so far removed from their residence as to preclude return on a daily basis, are entitled to subsistence at the rate payable to government employees for official travel in the area. These fees are taxable as costs whether the witness appears voluntarily or pursuant to a subpoena. Furthermore, they are not restricted to the day the witness actually testifies, but may be recovered for each day the witness necessarily attends. See Bennett Chemical Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200 (S.D. N.Y. 1959).

A rule of judicial construction has arisen with respect to the maximum mileage allowance taxable as costs in civil cases. The rule is that the taxable mileage allowance of a witness who attends from out of the district is limited to 100 miles from the place of trial, which is the limit imposed by Rule 45(d)(1), of the Federal Rules of Civil Procedure for service of a subpoena. However, unlike in civil cases, the territorial limits for service of a subpoena in a criminal case is not restricted and consequently the 100 mile rule is inapplicable to costs imposed pursuant to 28 U.S.C. §1918(b). See F. R. Crim. P. 47, Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935); cert. denied, 297 U.S. 709 (1936).

9-123.332 Government Employee Witnesses

A government employee may not receive fees for services as a witness on behalf of the United States or the District of Columbia. See 5 U.S.C. §5537(a). However, a government employee is entitled to travel expenses from his/her agency when summoned or assigned by his/her agency to testify or produce official records on behalf of the United States. See 5 U.S.C. §5751. If he/she testifies, or it is otherwise shown that his/her testimony

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is material to the case, these disbursements may be taxed as costs of prosecution against the convicted defendant. See United States v. Pommerening, 500 F. 2d 92 (10th Cir. 1974); Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935); cert. denied, 297 U.S. 709 (1936).

With respect to the amount and administration of travel expenses payable to government employee witnesses, see 5 U.S.C. §§5701-5709 and USAM 3-2.400, et seq.

9-123.333 Non-Testifying Witnesses

When witnesses are subpoenaed but do not testify, the presumption is that their testimony was not material and that they were unnecessarily brought to court. Unless this presumption is rebutted, the fees of such witnesses are not taxable as costs of prosecution. See United States v. Lee, 107 F. 2d 522, 527 (7th Cir. 1939), cert. denied, 309 U.S. 659 (1940).

Whether the testimony of a witness is material depends on the particular problems of proof associated with a case. The government bears the burden of showing the necessity for the presence of the witness if his/her attendance and/or travel fees are to be taxed against the defendant. In United States v. Hoffa, 497 F. 2d 294 (7th Cir. 1974), the court suggested that the required showing could be made by filing a statement of the non-testifying witness and a duly verified affidavit explaining why the witness' proposed testimony was necessary. See also Federal Savings and Loan Insurance Company v. Szarabajka, 330 F. Supp. 1202 (N.D. Ill. 1971).

9-123.340 Fees for Exemplification and Copies of Papers Necessarily Obtained for Use in the Case

This category includes the reasonable expense of preparing maps, charts, graphs, drawings, photographs, photostats and motion pictures necessary for exemplification of matters before the courts. The expense of exhibits which merely corroborate a witness' testimony, or are obtained for convenience in preparation of trial, are not taxable as costs of prosecution. Similarly, the expense of printing trial briefs and memoranda will usually not be allowed. See generally, 6 Moore's Federal Practice, ¶154.77 [6] (2nd ed. 1974).

9-123.350 Docket Fees Under 28 U.S.C. §1923

28 U.S.C. §1923(a) provides in relevant part:

Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

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\$20 on trial or final hearing. . .in. . . criminal . . .
cases. . .

* * *

\$2.50 for each deposition admitted in evidence.

The fees which may be taxed as costs under this category are apparently unrelated to any actual expense incurred by the United States. The only prerequisites to having these fees taxed as costs of prosecution are that the defendant be convicted and, with respect to depositions, that they be admitted in whole or in part in evidence.

It should be noted that other than the docket fees authorized under this section, attorney fees may not be taxed as part of the costs of prosecution. See United States v. Murphy, 59 F. 2d 734 (S.D. Ala. 1932).

9-123.360 Compensation of Court Appointed Experts, Compensation of Interpreters and Salaries, Fees, Expenses and Costs of Special Interpretation Services Under 28 U.S.C. §1828

The only fees which would seem to be taxable under this category are those expended for expert witnesses appointed by the court pursuant to Rule 706 of the Federal Rules of Evidence. Fees and expenses incurred for interpreters or special interpretation services are apparently not allowable as items of cost in criminal prosecutions. See 28 U.S.C. §§1827(g) and 1828(c).

9-123.400 NON-TAXABLE COSTS

Costs in criminal prosecutions are dependent wholly upon statutory provisions. See 20 Am. Jur. 2d, Costs, §100 at 79. Furthermore, statutes relating to costs are strictly construed and items to be taxed must fall within the express language of the statute. See United States v. Pommerening, 500 F. 2d 92 (10th Cir. 1974). Such items as jury fees, jury mileage, jury meals and lodging, bailiff's fees and the judge's traveling and maintenance expenses do not fall within the provisions of 28 U.S.C. §1920 and therefore may not be taxed as costs of prosecution. See Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935). Similarly, Marshal's per diem expenses and lodging expenses for prisoner witnesses are not authorized. See United States ex rel Griffin v. McMann, 310 F. Supp. 72 (E.D. N.Y. 1970).

Other expenses which have generally been disallowed as items of cost include fees for expert witnesses in excess of the statutory allowance, Kirby Lumber Company v. Louisiana, 293 F. 2d 82 (5th Cir. 1961);

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attorney's travel expenses for taking of depositions, Kiefel v. Las Vegas Hacienda, Inc., 40 4 F. 2d 1163 (7th Cir. 1968), cert. denied, 395 U.S. 908 (1969), reh'g denied, 395 U.S. 987 (1969); costs of preparing lists of exhibits, Brookside Theater Corp. v. Twentieth Century-Fox Film Corp., 11 F.R.D. 259, 265-266 (W.D. Mo. 1951), modified & aff'd. 194 F. 2d 846 (8th Cir. 1952); trial briefs, Kenny v. United States, 118 F. Supp. 907 (D. N.J. 1954); loss of wages of a witness, Anderson v. Clear Ridge Aviation, 9 F.R.D. 50 (D. Neb. 1949); in the absence of a court order, the expense incurred in the preparation of a model, Johns Manville Corp. v. Cement Asbestos Products Co., 428 F. 2d 1381, 1385 (5th Cir. 1970).

9-123.500 SIMILARITY TO TAXATION OF COSTS IN CIVIL CASES

The foregoing includes a number of citations to cases involving the taxation of costs in civil proceedings. Lest this be a matter of concern to the reader, it should be remembered that the fees and expenses taxable as costs in criminal cases are substantially the same as those taxable as costs in favor of the prevailing party in civil cases. See United States v. Procaro, 361 F. 2d 683 (2d Cir. 1966). Indeed, given the dearth of reported decisions dealing specifically with costs imposed pursuant to 28 U.S.C. §1918(b), a resort to the wealth of civil authority on the subject of allowable costs will often be necessary in determining whether a particular expenditure may properly be taxed as part of the costs of prosecution.

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9-130.000 LABOR STATUTES GENERALLY

9-130.100 INVESTIGATIVE JURISDICTION GENERALLY

All criminal matters within USAM 9-130.000 through USAM 9-139.000 are investigated by the Federal Bureau of Investigation with the following exceptions:

A. 29 U.S.C. §1131: Office of Employee Benefits Security, United States Department of Labor. See USAM 9-135.000 and USAM 9-136.020.

B. 29 U.S.C. §439: Labor Management Services Administration, United States Department of Labor. See USAM 9-136.010.

C. 29 U.S.C. §308a: Office of Employee Benefits Security, United States Department of Labor. See USAM 9-136.020 and USAM 9-135.000.

D. 29 U.S.C. §216(a): Wage and Hour Division, United States Department of Labor. See USAM 9-139.201.

E. 29 U.S.C. §461 and §463: Office of Elections and Trusteeships, United States Department of Labor. See USAM 9-139.600.

F. 29 U.S.C. §502: United States Department of Labor. See USAM 9-139.710.

G. 29 U.S.C. §503: United States Department of Labor. See USAM 9-139.720.

9-130.200 SUPERVISORY JURISDICTION

Questions concerning the statutes included in this title should be referred to the Labor Unit of the Organized Crime and Racketeering Section of the Criminal Division with the following exceptions:

A. 18 U.S.C. §1951: Extortion under color of official right or extortion by a public official through misuse of his/her office is supervised by the Public Integrity Section, Criminal Division.

B. 18 U.S.C. §1951: Bank robbery, kidnapping, and airplane hijacking charged in connection with 18 U.S.C. §1951 are supervised by the General Litigation and Legal Advice Section, Criminal Division.

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9-130.300 CONSULTATION FOR USAM 9-130.000 TO 9-139.000

Consultation with the Criminal Division is required (see USAM 9-2.133) prior to initiating criminal prosecution in the following matters:

A. 18 U.S.C. §1951: Extortion under color of official right or extortion by a public official through misuse of his/her office. See USAM 9-131.030.

B. 18 U.S.C. §1951: Cases arising out of labor disputes. See USAM 9-131.030.

C. 18 U.S.C. §1951: Robbery (if the local prosecutor has stated an objection to a federal filing). See USAM 9-131.030.

D. 29 U.S.C. §504: Prohibited Service with Labor Unions and Employer Associations. See USAM 9-138.030.

E. 29 U.S.C. §1111: Prohibited Service with Employee Benefit Plans. See USAM 9-138.030.

F. 45 U.S.C. §152, Tenth and §180: Labor Disputes in the Railway and Airline Industries. See USAM 9-139.103.

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9-131.000 18 U.S.C. §1951: THE HOBBS ACT

The Hobbs Act, 18 U.S.C. §1951 (a), provides that:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

The original Federal Anti-Racketeering Statute of 1934 (see 18 U.S.C. §420 (a) - (e) (1940)) (48 Stat. 979) proscribed substantially the same conduct as does the present Hobbs Act, with one notable exception. The original statute excepted from its coverage "the payment of wages by a bona-fide employer to a bona-fide employee." The Supreme Court in United States v. Local 807, 315 U.S. 521 (1942), construed this exception to countenance the use of violent and coercive means to achieve the status of "employee". However, after passing on the question, the Court noted that "[t]his does not mean that such activities are beyond the reach of federal legislative control." *Id.* at 536

Congress responded, and, despite opposition by labor leaders, the Hobbs bill became law on July 3, 1946. The Hobbs Act was enacted specifically to circumvent the holding of Local 807 (91 Cong. Rec. 11900) and "to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship." See United States v. Green, 350 U.S. 415, 419 (1956).

The original Hobbs bill was introduced a scant three weeks after Local 807, *supra*, was announced. See Cong. Rec. 3101-2. The bill was passed by the House of Representatives April 9, 1943 (see Cong. Rec. 3230), and after the Senate Judiciary Committee failed to report it out, it was again passed by the House on December 12, 1945. See Cong. Rec. 11922. The Senate passed in on June 21, 1946 (92 Cong. Rec. 7308), and President Truman signed the Hobbs Act on July 3, 1946. See 92 Cong. Rec. 10104. Finally, in June 1948 (62 Stat. 793), the Hobbs Act (see 18 U.S.C. §420 (a) - (e)) was renumbered and rephrased into its present form (see 18 U.S.C. §1951).

Although the Hobbs Act is not limited in its application only to labor-related extortion, Congress, at the time the bill was passed, was particularly concerned with the widespread illegitimate activities of certain labor unions. See 91 Cong. Rec. 11900-11922. The legislative

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history of the Act lucidly portrays that the measure was not intended to interfere with labor's right to strike and picket peacefully or to take any other legitimate and peaceful concerted action. See 91 Cong. Rec. 11900-11922. Congress' intent was to protect interstate commerce from robbery and extortion perpetrated by anyone--including union members. Representative Hobbs made the following observation as to the purpose of his bill:

This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion extortion, whether or not the perpetrator has a union card. It covers whoever in any way or degree interferes with interstate or foreign commerce by robbery or extortion.

See 89 Cong. Rec. 3217.

On March 28, 1978, the United State Supreme Court decided United States v. Culbert, 435 U.S. 371 (1978), and reversed the holding of the Ninth Circuit Court of Appeals that although an activity may be within the literal language of the Hobbs Act, it also must constitute "racketeering" to be within the parameters of the Act.

After a jury trial, Culbert was convicted of attempting to obtain \$100,000 from a federally insured bank by means of telephoned threats of physical violence to the bank's president, in violation of the Hobbs Act (see 18 U.S.C. §1951). The Ninth Circuit, relying on United States v. Yokley, 542 F.2d 300 (6th Cir. 1976), reversed the Hobbs Act conviction, holding that the government, in addition to proving defendant's conduct comes within the language of the statute, must also prove undefined "racketeering" to constitute a Hobbs Act offense.

The Supreme Court emphatically rejected the restrictive views of the Sixth and Ninth Circuits, and reaffirmed its own view of the comprehensive scope of the Hobbs Act.

Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language. We therefore decline the invitation to limit the statute's scope by reference to an undefined category of conduct termed "racketeering." (See Culbert, supra at 380)

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The effect of this holding is to remove a cloud of uncertainty with regard to Hobbs Act prosecutions in the Sixth and Ninth Circuits. The government no longer has to contend with the argument that it must allege and prove undefined "racketeering" as an element of a Hobbs Act prosecution.

9-131.010 Investigative Jurisdiction

Investigative jurisdiction of offenses under 18 U.S.C. §1951 is in the FBI.

9-131.020 Supervisory Jurisdiction

Supervisory jurisdiction over 18 U.S.C. §1951 generally is exercised by the Organized Crime and Racketeering Section (Labor-Management Unit), Criminal Division, with the following exceptions: Extortion under color of official right or extortion by a public official through misuse of his/her office is supervised by the Public Integrity Section, Criminal Division. Questions concerning the use of 18 U.S.C. §1951 in connection with robbery, bank extortion, airplane hijacking, and kidnapping should be directed to the General Litigation and Legal Advice Section, Criminal Division.

9-131.030 Authorizing Prosecution

In general, prior authorization is not necessary to institute prosecutions for violation of the Hobbs Act in those cases where there is evidence of actual or threatened use of force or violence. However, in the following circumstances the matter must be referred to the appropriate section of the Criminal Division for consultation prior to the issuance of a complaint, return of an indictment, or filing of an information. See USAM 9-2.133.

A. Extortion "under color of official right" or otherwise involving a public official's misuse of his/her office--Public Integrity Section;

B. Cases not involving actual or threatened use of force or violence generally--Organized Crime and Racketeering Section (Labor-Management Unit);

C. Cases arising out of labor disputes--Organized Crime and Racketeering Section (Labor-Management Unit);

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D. Cases involving kidnapping--General Litigation and Legal Advice Section;

E. Cases involving robbery generally--Organized Crime and Racketeering Section (Labor-Management Unit);

F. Cases involving extortion or robbery of banks--General Litigation and Legal Advice Section;

G. Cases involving extortion directed at airlines--General Litigation and Legal Advice Section.

Criminal Division attorneys may be consulted at any stage during the investigation process. In this connection it should be noted that when requests are made by U.S. Attorneys for FBI investigation of a possible Hobbs Act violation, the FBI field offices will notify Washington, and the supervisor will often consult with the appropriate section before investigation is concluded. Any delay or other difficulties arising out of this procedure may be obviated by discussing the matter with the appropriate sections prior to initiating an investigation.

9-131.040 Departmental Policies

The Department of Justice has two general policies restricting the use of the Hobbs Act in certain situations.

A. The robbery provision of the statute is to be utilized only in instances involving organized crime or wide-ranging schemes, see USAM 9-131.110, infra; and

B. Prosecution should not occur where the only commerce affected is purely unlawful and no extraordinary circumstances exist, see USAM 9-131.180, infra.

The appropriate section of the Criminal Division should be consulted before prosecution is initiated in cases covered by these policies. See USAM 9-131.030, supra.

9-131.100 DEFINITIONS



U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

May 13, 1986

(Expires October 13, 1986)

TO: Holders of United States Attorneys' Manual Title 9

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

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: Consultation Prior to Prosecution

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of USAM 9-131.030.

AFFECTS: USAM 9-131.030

PURPOSE: This bluesheet describes changes in the procedure requiring consultation with the Criminal Division prior to prosecution of certain offenses.

The following should replace the material at USAM 9-131.030:

9-131.030 Consultation Prior to Prosecution

Effective immediately consultation with the Criminal Division which is required prior to the commencement of prosecution under 18 U.S.C. §1951 will be limited to the circumstances listed below. In the following circumstances prior to the return of an indictment or the filing of an information consultation should be made with the appropriate Section of the Criminal Division indicated below and as set forth in USAM 9-2.133.

- A. Extortion "under color of official right" or otherwise involving a public official's misuse of his/her office - Public Integrity Section;
- B. Cases arising out of labor disputes - Organized Crime and Racketeering Section (Labor Management Unit); and
- C. Cases where written approval by the Assistant Attorney General of the Criminal Division is

required before filing a count charging violation of the Hobbs Act by robbery. Such approval is required if the U.S. Attorney believes that the local prosecutor with responsibility for prosecuting a state robbery charge for the same basic offense objects to a federal prosecution of a defendant for Hobbs Act robbery because of a pending or imminent state prosecution. The views of the local prosecutor must be solicited and recorded in the file. The failure to obtain approval of the Assistant Attorney General prior to indictment will not affect the continuation of the prosecution unless the Department so orders. Requests for approval are to be processed through the General Litigation and Legal Advice Section.

Criminal Division attorneys may be consulted at any stage during the investigation process. In this connection it should be noted that when requests are made by the United States Attorneys for FBI investigation of a possible Hobbs Act violation, the FBI field offices will in certain cases notify Washington and FBI headquarters may consult with the appropriate Section of the Criminal Division before investigation is concluded. Any delay or other difficulties arising out of this procedure may be obviated by discussing the matter with the appropriate Sections of the Criminal Division.



U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

October 6, 1986
(Expires March 6, 1987)

TO: Holders of United States Attorneys' Manual Title 9

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

WFW
William F. Weld
Assistant Attorney General
Criminal Division

RE: Hobbs Act Approval

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-131.040; 9-131.180

PURPOSE: This bluesheet rescinds the Division's policy against basing Hobbs Act jurisdiction on illegal or illicit commerce.

The following should be substituted for the material at USAM 9-131.040:

9-131.040 Departmental Policy

The robbery provision of the statute is to be utilized only in instances involving organized crime or wide-ranging schemes. See USAM 9-131.110, infra. The appropriate section of the Criminal Division should be consulted before prosecution is initiated. See USAM 9-131.030, supra.

Note: Strike USAM 9-131.180 paragraph three at page 27.
A notice of permanent revision is forthcoming.

BS # 9.048

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9-131.110 Robbery

The Hobbs Act defined robbery in 18 U.S.C. §1951(b)(1) as:

. . . the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

The legislative history of the Hobbs Act reveals that its definition of robbery was modeled after section 850 of the Penal Law of New York.

[T]here is nothing clearer than the definitions of robbery and extortion in this bill The definitions in this bill are copied from the New York Code substantially.

See 91 Cong. Rec. 11900 (Statement of Representative Hobbs).

While the statutory definition is posited in terms of "taking or obtaining" and no mention is made of aspiration or specific intent, the Hobbs Act has been construed as requiring these elements. See USAM 9-131.130 and USAM 9-131.140, infra. In 1958 the Third Circuit held that the mere stopping of a truck on the highway without the taking of any property did not constitute a violation of the Hobbs Act:

'Robbery' under the Hobbs Act is common law robbery, and robbery as defined by the New York Penal Laws and construed by the courts of that State. In order to establish commission of the crime the Government must prove forcible taking and carrying away with the specific intent to steal personal property taken from the person of another by violence or putting in fear, and with the intention to permanently keep the property so taken.

See United States v. Nedley, 255 F.2d 350, 357 (3d Cir. 1958). See also Esperti v. United States, 406 F.2d 148 (5th Cir. 1969); United States v. Caci, 401 F.2d 664 (2d Cir. 1968); United States v. De Sisto, 289 F.2d 833 (2d Cir. 1961); United States v. Caldarazzo, 444 F.2d 1046 (7th Cir. 1971); United States v. Pearson, 508 F.2d 595 (5th Cir. 1975); United

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States v. Hanigan, 681 F.2d 1127 (9th Cir. 1982); United States v. Jarrett, 705 F.2d 198 (7th Cir. 1983).

As a matter of policy, the Department has restricted use of the robbery provisions of the Hobbs Act to cases which involve organized criminal activity or which are part of some wide-ranging scheme. The appropriate section must be consulted before any action is taken in robbery cases under 18 U.S.C. §1951. See USAM 9-131.030, supra.

9-131.120 Extortion and the Special Exception for Labor Disputes

The Hobbs Act defines extortion in 18 U.S.C. §1951 (b)(2) as:

. . . the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

In the past, Hobbs Act prosecutions in the labor context have typically arisen out of two basic situations:

A. Where the objective is a legitimate labor goal, e.g., a wage increase, but violence or the threat of violence is the means of attaining the goal; and

B. Where the means employed are apparently legitimate, e.g., a peaceful strike, but the ultimate objective sought is wrongful (usually the personal enrichment of a union representative rather than the benefit of the workers he/she represents).

The applicability of the Hobbs Act to the first situation has been eliminated by the United States Supreme Court in United States v. Enmons, 410 U.S. 396 (1973). The Court ruled five to four to uphold the dismissal of an indictment charging four union members and officials with conspiracy to violate the Hobbs Act by means of extensive acts of violence against the property of an employer. The alleged purpose of the violence was to force the employer to agree to the union's proffered collective bargaining agreement calling for higher wages and other monetary benefits. While holding that the Hobbs Act properly reaches situations where union officials use threats of force or violence against employers as a means of extorting personal payoffs or wages for unwanted and fictitious services, the Court concluded that the Act does not apply to instances where force is used to achieve legitimate labor objectives such as higher wages for genuine services which the employer seeks.

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In determining that the statute proscribes only those instances where actual or threatened force or violence is used to obtain illegitimate labor objectives, the Court noted that the term "wrongful" found in the definition of extortion has meaning only if the alleged extortionist has no lawful claim to the property which he/she seeks to obtain. See Enmons, supra at 400. Although the Court's interpretation of the term "wrongful" might have resulted in an application of the Enmons rationale outside the field of labor disputes, the lower courts have rejected a general "claim of right" defense beyond the context of labor-management relations. See e.g., United States v. Cerilli, 603 F.2d 415, 419 (3d Cir. 1979); United States v. French, 628 F.2d 1069 (8th Cir. 1980); United States v. Porcaro, 648 F.2d 753 (1st Cir. 1981); United States v. Thordarson, 646 F.2d 1323 (9th Cir. 1981); United States v. Warledo, 557 F.2d 721 (10th Cir. 1977); United States v. Zappola, 677 F.2d 264 (2d Cir. 1982). Consequently, a defense of "legitimate claim" has been rejected where the non-labor defendant asserted a contractual right to business property which he/she attempted to coerce from the victim. The Porcaro court expressly refused to expand Enmons outside the labor strike violence setting, stating "we . . . find no basis for extending Enmons to protect from Hobbs Act prosecution the use of force and threats to resolve a contractual dispute among businessmen." See United States v. Porcaro, supra, at 268-69, rejecting a "good faith claim" to repayment of a debt as a defense to extortion among businessmen in view of "Congress' express intent to incorporate the traditional state law of extortion."

The appellate courts have also considered and refined the interpretation of the term "wrongful" in cases involving labor-management disputes. These decisions have tended to narrow the parameters of the Enmons exception to the Hobbs Act. See USAM 9-131.170, infra. However, great care should be exercised when dealing with the Hobbs Act in the labor context and the Criminal Division should be consulted at an early stage. See USAM 9-131.030, supra.

9-131.130 Property

A substantive violation of the Hobbs Act requires a showing that the requisite impact on interstate commerce was effected by means of robbery or extortion. The statute also proscribes interference with commerce by means of conspiracy or attempting to commit robbery or extortion, as well as threatening or committing physical violence pursuant to a plan to rob or extort. Since robbery and extortion are the only means of affecting interstate commerce that the Hobbs Act comprehends, every such violation must necessarily involve the appropriation or attempted appropriation of another's "property."

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The Act's definition of robbery speaks in terms of obtaining the personal property of another. Thus, like common law robbery, the Hobbs Act requires that the property involved be tangible personal property which is capable of asportation. See USAM 9-131.110, supra. However, the Act's definition of extortion is couched in broad language of "obtaining property." This definition was derived from New York's extortion statute and the term "property" under the statute has been interpreted "to embrace every species of valuable right and interest and whatever tends in any degree, no matter how small, to deprive one of the right, or interest, deprives him of his property." See People v. City Prison, 145 App. Div. 861, 130 N.Y. Supp. 698, 700 (1911). Although money is the usual object of an extortion, other "property" is sufficient under the Act. In United States v. Green, 350 U.S. 415 (1956), the Supreme Court upheld a conviction under an indictment charging the defendant union official with extorting an employer's "money, in the form of wages to be paid for imposed, unwanted, superfluous and fictitious services." Wages of this type, therefore, fall within the "property" subject to extortion under the Hobbs Act.

The Second Circuit has ruled that the obtaining of intangible property by coercive means can constitute extortion. United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969). In holding that the right to solicit business in a particular geographical area constitutes "property" for purposes of Hobbs prosecutions, the Tropiano court noted that:

The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property.

Id., at 1075-76 (citing cases).

See also, Bianchi v. United States, 219 F.2d 182 (8th Cir. 1955) (rights under construction contract); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963) (one half interest in a professional boxer); Battaglia v. United States, 383 F.2d 303 (9th Cir. 1967) (space in a bowling alley for coin operated pool table; United States v. Nadaline, 471 F.2d 340 (5th Cir. 1973) (business accounts and unrealized profits resulting from forbearance to hire particular sales representative); United States v. Santoni, 585 F.2d 667 (4th Cir. 1978) ("right to make a business decision free from outside pressure wrongfully imposed," i.e., the award of a

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subcontract at the request of a public official and under the threat of economic harm); United States v. Zemek, 634 F.2d 1159, 1173-1174 (9th Cir. 1980) (right to make business decision and to solicit business free from wrongful coercion, *i.e.*, the good will and customer revenues of competing business); United States v. Local 560, 550 F. Supp. 511 (D. N.J. 1982) (rights of labor union members with respect to internal union affairs as guaranteed under federal labor law).

9-131.140 "Obtaining" Property

An initial question presented in many potential Hobbs Act cases is whether the defendant has "obtained" the property of the victim. To obtain the property of another generally involves some reciprocity, that is, there must be both a giving up and a taking, *see* People v. Squillante, 185 N.Y.S. 2d 357 (Sup. Ct. 1959). Where extortion is the method of obtaining property, it is not necessary that the defendant making the extortionate demand himself/herself receive the benefit of his/her extortion. For example, it would constitute a violation of the statute for a union officer to threaten an employer with a work stoppage unless he/she paid a sum of money to a third person. *See* United States v. Provenzano, 334 F.2d 678 (3d. Cir.), *cert. denied*, 380 U.S. 915 (1965). The relationship (or lack thereof) between the defendant making the threat and the person receiving the property will, of course, be relevant at trial in order to establish a motive of the defendant, but it is not an element of the offense that the defendant himself/herself receive even an indirect benefit.

It is necessary, however, that some benefit be conferred and that the defendant so intend. For example, it would not be a violation of the Hobbs Act merely for a union official to threaten a strike unless the employer stopped doing business with a certain supplier, but it would be a violation if the purpose of the threat (as distinguished from its result) were to force the employer to do business or increase his/her business with one or more other suppliers. *Cf.*, Battaglia v. United States, *supra*. Of course, a classic violation would also exist if the official's power to cause the employer to refuse to deal with the supplier were used as a weapon to coerce the supplier to deliver his/her property to the defendant.

The Second Circuit's treatment of the "obtaining of property from another" element of the Hobbs offense requires comment. In United States v. Glasser, 443 F.2d 994 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971), the Second Circuit upheld the conviction of a glazier's union officer under Count I of an indictment which charged, in the court's words, that the defendant entered into

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a conspiracy to interfere with interstate commerce by spraying a special type of acid on, and thus causing damage to, windows which had been installed by nonunion glaziers, thereby having an extortive effect on (a) the nonunion installers of such glass, (b) the owners of shops requiring installation of such glass, and (c) the insurance companies which insured the windows, because, after these incidents of spraying, Glasser allegedly sent lists of unionized glaziers to the insurance companies.

Id. at 997.

In response to the defendant's argument that the "obtaining of property from another" test of the Hobbs offense was not satisfied, the court stated that "[t]he insurance companies and the store owners both suffered direct financial harm resulting from the cost of replacing the ruined windows and paying escalated insurance premiums." Id. at 1007. Further, the court noted that "[t]he nonunion glaziers whose installation were destroyed also suffered damage. . . for they were deprived of the right to seek future plate glass installation contracts." Id.

The court's analysis of the defendant's conduct as it related to the insurance companies and the nonunion glaziers is correct. The destruction of the windows and the defendant's suggestion to insurance companies that the replacement be performed by specific union shops constituted an appropriation of the replacement price of the windows by means of a threat of violence, i.e., an implicit threat of continued destruction of nonunion glass. Similarly, the systematic destruction of nonunion glass installations and the defendant's subsequent suggestions to store owners and insurance companies regarding replacement clearly communicated the intended message to the nonunion glaziers that it would be useless to solicit business in areas of union jurisdiction. Thus, the defendant appropriated, for the benefit of his/her union, the right of the nonunion glaziers to do business in certain areas and with certain customers.

The court's reference to "escalated insurance premiums" as the property extorted from the store owners necessitates some comment. It must be remembered that extortion is a "larceny-type" offense which requires that the defendant intend to obtain the victim's personal property by means of actual or threatened force, violence or fear. It requires not only that the victim be deprived of his/her property but also that the defendant obtain that property, directly or indirectly, or that a person intended by the defendant obtain the property. Consequently, it is

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submitted that the increased premiums resulting from the destruction of the windows is analytically irrelevant for purposes of this Hobbs Act prosecution. Increased premiums cannot be considered extorted or appropriated property because the increased premiums were merely an incidental effect of the destruction and were not intended by the defendant. The defendant obviously did not intend to benefit the insurance companies by allowing them to collect higher premiums.

The Glasser court's emphasis on the victim's loss, without concomitant analysis of gain intended by the defendant, is misleading. An extortion count cannot be predicated simply on the fact that the defendant caused his/her victims to part with valuable property or property rights. It cannot be overemphasized that extortion is a "larceny-type" offense which requires not only a giving up of property by the victim, but also a taking by the defendant for the benefit of himself/herself or some third person intended by him/her.

In light of the foregoing, Glaser should not be cited as authority for the proposition that the Hobbs Act extortion offense is complete when the victim parts with his/her property as the result of the defendant's coercion.

9-131.150 Actual or Threatened Force or Violence

The gravamen of the extortion offense under the Hobbs Act is coercion for the purpose of obtaining another's property. This coercion may be in the form of actual violence to the victim's person or property. Most often, however, the coercion manifests itself in the form of threats (express or implied) to do violence to the victim's person or property. See United States v. Sweeney, 262 F.2d 272 (3d Cir. 1959). Whether the victim is coerced into giving up his/her property by physical compulsion or because of a reasonable fear of violence and injury to his/her person or property, the Act is violated. In cases involving extortion "under color of official right," however, the coercion is deemed to be inherent in the official's office, and no proof of threats or violence is required. See United States v. Kenny, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972); United States v. Crowley, 504 F.2d 992 (7th Cir. 1974); United States v. Price, 507 F.2d 1349 (4th Cir. 1974).

9-131.160 "Fear"

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9-131.161 Scope of the Definition

The term "fear" as used in the definition of extortion not only encompasses fear of violence but also fear of damage or injury to the victim's business. It is well settled that the wrongful use of fear of economic loss is a sufficient "fear" for purposes of extortion under the Hobbs Act. See Stirone v. United States, 361 U.S. 212 (1960); United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968); United States v. Pranno, 385 F.2d 387 (7th Cir. 1967); United States v. Sopher, 362 F.2d 523 (7th Cir.), cert. denied, 385 U.S. 928 (1966); United States v. Kramer, 355 F.2d 891 (7th Cir. 1966); United States v. Provenzano, 334 F.2d 678 (3d Cir.), cert. denied, 380 U.S. 915 (1965); Cape v. United States, 283 F.2d 430 (9th Cir. 1960); United States v. Palmiotti, 254 F.2d 491 (2d Cir. 1958); United States v. Floyd, 228 F.2d 913 (7th Cir.), cert. denied, 351 U.S. 938 (1956); United States v. Varlack, 225 F.2d 665 (2d Cir. 1955); United States v. Dale, 223 F.2d 181 (7th Cir. 1955); Callanan v. United States, 223 F.2d 171 (8th Cir.), cert. denied, 350 U.S. 862 (1955); Bianchi v. United States, 219 F.2d 182 (8th Cir.), cert. denied, 349 U.S. 915 (1955); Hulahan v. United States, 214 F.2d 441 (8th Cir.), cert. denied, 348 U.S. 856 (1954); United States v. Compagna, 146 F.2d 524 (2d Cir.), cert. denied, 324 U.S. 867 (1945); Nick v. United States, 122 F.2d 660 (8th Cir.), cert. denied, 314 U.S. 687 (1941).

In addition, the nature of the defendant's conduct may be such that it can be reasonably interpreted as creating a continuing fear in the mind of the victim. For example, in United States v. Addonizio, 451 F.2d 49 (3d Cir. 1972), after construing an indictment charging sixty-five substantive violations of the Hobbs Act, the court held that there was ample evidence indicating that the victim's fear was a continuing one and, hence, "[i]t was not necessary for the Government to prove a separate extortionate demand for each count." Id. at 60, citing, United States v. Tolub, 309 F.2d 286 (2d Cir. 1962).

Fear of economic loss may include fear on the part of a businessperson of being denied an opportunity to obtain business. See, e.g., Addonizio, *supra* (fear of not being awarded city contracts if customary kickbacks not paid to city officials); United States v. Hathaway 534 F.2d 386, 394-96 (1st Cir. 1976) (fear of lost business opportunities unless payments to public officials were paid); United States v. Brecht, 540 F.2d 45, 51 (2d Cir. 1976) (business supplier's fear of loss of ability to compete successfully for subcontracts if corporate employee not paid kickback).

It is also noteworthy that the fear of economic loss which provides the basis of a Hobbs Act extortion may be induced, not only by wrongful threats of strikes and work slow downs, but also by threats of violence

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and force to the victim's business property or employees. In United States v. Iozzi, 420 F.2d 512, 515 (4th Cir. 1970),

[W]e hold that obtaining money through the fear of economic injury induced by threats of violence or force constitutes extortion under the Act.

9-131.162 Reasonableness of the Fear

The victim's fear of violence or of economic loss must be a reasonable one if it is to be the basis of an extortion under the Hobbs Act. See Carbo v. United States, 314 F.2d 718 (9th Cir.), cert. denied, 377 U.S. 953 (1964); United States v. Tolub, supra; Cape v. United States, supra; Callanan v. United States, supra; Bianchi v. United States, 219 F.2d 182 (8th Cir.), cert. denied, 349 U.S. 915 (1955); United States v. Compagna, supra; Nick v. United States, supra. The reasonableness of the fear is usually manifest in cases where there is a direct threat of violence. Direct evidence as to the nature of the violence threatened or the existence of a conspiracy will generally support a jury's inference that the victim's fear was real and reasonable. To prove attempted extortion, it is necessary to prove only an attempt to instill fear. See Carbo v. United States, supra, at 740-41. This principle is particularly helpful in situations where the victim is cooperating with the government at the time of the alleged extortion attempt. See, e.g., United States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977) (whether or not an undercover government agent could be put in fear as a victim of extortion was irrelevant to an "attempt to instill fear").

On the other hand, because subtle extortions are covered by the Hobbs Act, the government need not show that the fear was the direct consequence of the threat of economic loss or that the victim personally feared the extortionist provided that the circumstances indicate that the threat is reasonably calculated to instill fear in the victim. See, e.g., United States v. Quinn, 514 F.2d 1250, 1266-67 (5th Cir. 1975) (solicitation of employer, who was cooperating with government agents, to make contribution to church day care center under threat of labor picketing); United States v. Duhon, 565 F.2d 345, 351-353 (5th Cir. 1978), where it was held that the fear of economic harm caused by current labor picketing and by the anticipated repetition of property damage experienced during an unrelated labor dispute several years earlier were a sufficient basis for concluding that the employers were "simply planning for an inevitable demand for money" when they agreed to offer a union leader \$5,000 to remove the pickets prior to meeting with him/her.

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It is well settled in Hobbs Act prosecutions that evidence of the victim's state of mind is admissible as bearing upon the reasonableness of his/her fear. Extortion involves a state of mind as an element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under the Act. It was, therefore, essential to show that such payment was under compulsion. The existence of this compulsion might be proved in several ways but one proper way is to show the state of mind under which the committee acted. See United States v. Stirone, 311 F.2d 277, 280 (3d Cir.), cert. denied, 372 U.S. 935 (1963), quoting Nick v. United States, at 641, supra.

The victim of an extortionate conspiracy in Carbo v. United States, supra at 727, testified that one of the defendants threatened him/her by saying: "When I mean to get you, you are going to be dead, . . . We will have somebody out there to take care of you." Further, the trial judge admitted testimony of the victim to the effect that the victim knew one of the defendants was an "underworld" person and a "strongarm" person. Id. at 740. While the general rule is that evidence of a defendant's evil character, disposition or reputation is not admissible because of its inherently prejudicial nature, the court of appeals held that it is proper to introduce proof of the defendant's reputation (with a proper instruction) for the limited purpose of showing the victim's state of mind and reasonableness of his/her fear. The instruction approved by the Carbo court reads in pertinent part as follows:

Now, it is contended here by the Government that this witness Leonard [victim] was put in fear of Mr. Sica [defendant] and I think they are entitled to show or have Mr. Leonard tell why he was afraid and to look at the situation to see if it was one which was reasonably calculated to produce that fear. But the reputation of Mr. Sica per se is not before you, except in this limited way.

See Carbo, supra, at 742, note 35.

The court's rationale is best expressed by the following passage:

The question is not whether the United States may use Sica's reputation as a sword against him, but whether he may himself make use of it as a shield to immunize himself from proof of the means by which the conspirators planned to frighten their victims into submission. If he may, then all who are known to live by violence are free to extort by the tacit threat of

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violence conveyed by their reputations; for the reasonableness of the resulting fear, as determined by its cause, may not be presented to the jury.

We cannot accept this result as a sound balance of the conflicting interests involved.

Carbo, supra, at 741 (emphasis added).

Similarly, the victim's state of mind may be shown by the victim's own testimony at trial. See United States v. Stirone, supra; Bianchi v. United States, supra. The trial judge's instruction in Bianchi read in part:

I say to you that this testimony was admitted solely for the purpose of showing the state of mind of the party or parties speaking, with reference to why money would be paid, if you find any was paid, as charged in the indictment, and if you find this testimony did show a state of mind, then you can consider it for that purpose only, and for no other purpose in this case.

See Bianchi, supra, at 192.

Accordingly, the existence and reasonableness of the victim's fear may be evidenced by statement he/she made to third parties. Such evidence is admissible under the well recognized "state of mind" exception to the hearsay rule. See United States v. Stirone, supra; United States v. Kennedy, 291 F.2d 457 (2d Cir. 1961).

In United States v. Tolub, 309 F.2d 286 (2d Cir. 1962), the court of appeals held that there was sufficient evidence showing the reasonableness of the victim's fear of economic loss. The court cited the victim's testimony to the effect that he was "overwrought" (Id. at 288), "awed and upset" (Id. at 289), as evidencing the existence of his/her fear of economic loss. The court noted the evidence showed that the defendant was the business agent of the union and could see his power "to cause slowdowns and stoppages, even though, such slowdowns were not approved by the union" (Id. at 289) and, hence, there was ample evidence from which the jury could infer that the victim's fear was a reasonable one.

While the victim's testimony is generally admissible as bearing on the reasonableness of his/her fear, his/her testimony is not necessary as a matter of law. In United States v. Delutro, 435 F.2d 255 (2d Cir.

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1970), the defendant was convicted of violating the federal loansharking statute (see 18 U.S.C. §894), as well as the Hobbs Act. The defendant's appeal was based on the fact that the government failed to establish the corpus delicti of the Hobbs offense out of the mouth of the victim in that the victim of the extortion denied at trial that any threats were made or that he/she was ever put in fear. The Second Circuit held that the record disclosed sufficient proof of the use of "extortionate means" by the defendant to justify the jury's guilty verdict. Id. at 256-57. The court held that independent of the victim's testimony there was reliable evidence justifying a finding of "an implicit threat of violence." This evidence consisted of: (1) the admission of a tape recording of the conversation between the defendant and the victim containing the alleged implicit threat; (2) testimony of two FBI agents regarding statements made by the victim to them that the defendant was "vicious," (Id. at 256), that the victim "could get killed" (Id. at 256) and that the victim once met with the defendant without telling the FBI because he/she was afraid for his/her life and the lives of his/her family (Id. at 256); and (3) the testimony of the FBI agent who observed the victim's physical actions during the conversation with the defendant.

Thus, the court rejected the appellant's contention that the use of extortionate means must be established by at least some testimony from the alleged victim. The court noted that if the appellant's argument were accepted, "then the purpose of the statute could easily be nullified by terrorizing the victim" (Id. at 256) and silencing him at trial.

9-131.170 "Wrongful" Use of Actual or Threatened Force,
Violence, or Fear

In United States v. Enmons, 410 U.S. 396 (1973), the Supreme Court, by a five-to-four vote, held that the Hobbs Act does not reach the actual or threatened use of violence directed at the obtaining of "legitimate labor objectives" or economic benefits which can otherwise be lawfully obtained by collective bargaining. The Court reasoned that the word "wrongful" in the statutory term, "wrongful use of actual or threatened use of force, violence, or fear," had meaning only if it were interpreted to limit the statute's coverage to those instances where the alleged extortionist had no lawful claim to the property which he/she sought to obtain. In the context of labor-management disputes, the Court specifically noted violent demands on employers for personal payoffs or wages for unnecessary and fictitious services as examples of "wrongful" claims by union officials. However, since the property demanded and sought to be obtained in Enmons--higher wages and employment benefits during the course of a violent, but otherwise lawful strike--was a

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legitimate objective of collective bargaining, the Court found that the Act's prohibitions on extortion did not apply to the facts in Enmons.

The Court had earlier held that the coercion of wages for unnecessary and fictitious services could be prosecuted by the Hobbs Act in United States v. Green, 350 U.S. 415 (1956). Such wage demands were the primary reason for the Hobbs Act's enactment and were later made "unfair labor practices" prohibited by the Taft-Hartley Act as wage exactions for "services which are not performed or not to be performed." See 29 U.S.C. §158 (b)(6).

Subsequent to Enmons, *supra*, lower federal courts have considered the parameters of the Enmons decision and what constitutes an "illegitimate labor objective" for purposes of the Hobbs Act. In United States v. Stofsky, 409 F. Supp. 609, 614-617 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2nd Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), union officials were charged with the wrongful use of violence to persons and property in connection with a scheme to close down non-union furrier businesses, which were accepting sub-contract work from union shops, and to thereby deprive the non-union shops of property in the form of their right to solicit business and operate their shops free from wrongful interference. The government argued that such pressure against neutral third parties in a labor dispute was an unfair labor practice under the Taft-Hartley Act and therefore not in pursuit of a legitimate labor goal. However, prosecution ultimately could not be pursued under this theory in light of the district court's observation that as valid as the government's argument might be with respect to any other industry, the Taft-Hartley Act's exemption of the garment industry from its secondary boycott provisions nullified the "wrongful" nature of the alleged claims on the non-union shops.

Accordingly, as a result of the Enmons decision, the success of Hobbs Act prosecutions in connection with labor disputes may depend on the disparate treatment afforded different industries and economic interests by federal labor law. These differences may have no relationship to whether disputes in these industries may be accompanied by violent injury to persons and property. For example, union organizing of employees in the construction industry may generally occur before any employees are employed by means of a "pre-hire" agreement between an employer and a labor union relating to the contracting or subcontracting of construction work by union members. See 29 U.S.C. §158 (e). In other industries, demands on an employer that he/she enter into collective bargaining with a representative of his/her employees are permitted only after a showing of support for the union among the employees. See 29 U.S.C. §158 (a)(3) and 159. See also, United States v. Jacobs, 543 F.2d

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18 (7th Cir. 1976), cert. denied, 431 U.S. 929, noting a distinction between legitimate demands for recognition by a union authorized to represent the required number of employees and similar demands on behalf of a union without the requisite authority and showing of interest among non-construction employees for purposes of an investigation under 18 U.S.C. §1951.

In United States v. Russo, 708 F.2d 209 (6th Cir. 1983), the Sixth Circuit held that the use of fear was "wrongful" for purposes of Hobbs Act extortion where corporate officials threatened trucking employees with economic loss of their jobs, unprofitable truckloads, and loss of equity in their trucks unless the employees paid the employer's contributions for health and welfare and pension benefits. The court found that the defendant company officials had no lawful claim to the payments because the existing collective bargaining agreement expressly required the employer to make the contribution payments rather than the employees. Thus, the Court relied on the contract between the employer and the union to establish a wrongful objective outside the Enmons labor exception.

In United States v. Wilford, 710 F.2d 439 (8th Cir. 1983), the Eighth Circuit relied on a different theory in upholding the Hobbs Act convictions of four union officials who had obtained for their union one month's dues and initiation fees from transient out-of-state truckers as a pre-condition to unloading cargo at a construction site. On appeal, defendant's argued that their actions were legitimate labor objectives under Enmons because they were merely 1) enforcing their rights under a collective bargaining agreement with the construction contractor and/or 2) soliciting membership in the union and organizing non-union truckers. The court found that there was sufficient "evidence to support the jury's conclusion that these were not the defendants' true objectives." Id. at 444. The opinion noted that the jury had also convicted each defendant of demanding and accepting an illegal unloading fee in violation of section 302 of the Taft-Hartley Act (29 U.S.C. §186(b)(2)). Moreover, the court also relied on the Taft-Hartley Act's civil proscription against forcing self-employed persons to join a labor union in 29 U.S.C. §158(b)(4)(ii)(A). Accordingly, the Wilford court in part looked to federal labor law outside the Hobbs Act to make the determination as to whether the defendant labor union officials' actions were "wrongful," and on that basis permitted a jury's specific rejection of asserted lawful objectives.

The Wilford opinion relied in part on the Fifth Circuit's prior holding in United States v. Quinn, 514 F.2d 1250 (1975). In Quinn, a labor representative had demanded and obtained from an employer, under

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threat of continued picketing, monies which the appellate court characterized as reimbursement of attorneys' fees and bail for striking employees. The court rejected the representative's Enmons defense finding that the employer payment to the defendant did not satisfy the criteria required by the exceptions in Section 302(c) for which employer payments to labor representatives and organizations are permitted. Therefore, because the demand and receipt of the payment violated Section 302, the court ruled that the defendant "had no lawful claim to the payment; its receipt was statutorily declared not to be a legitimate labor objective. Thus it was wrongful and the Enmons rationale provides no defense." Id. at 1259. This result was reached even though there was a bona-fide labor dispute and the defendant was representing employees in the quest for higher pay.

Other federal criminal statutes should be considered where labor violence occurs that can not be reached by the Hobbs Act because of the Enmons holding. For example, in United States v. Thordarson, 646 F.2d 1323 (9th Cir. 1981), a labor union in California attempted to organize the employees of a trucking employer and obtain the employer's recognition of the union. In the course of the organizing campaign several of the employer's trucks were damaged or destroyed in California, Arizona and Connecticut. To avoid the assertion of an Enmons defense, the government prosecuted the violence under 18 U.S.C. §844(I) (use of explosives to damage property used in interstate commerce); 18 U.S.C. §1952 (travel in interstate commerce to commit arson in violation of the Travel Act); 29 U.S.C. §501(c) (embezzlement of union funds in furtherance of the violence) and 18 U.S.C. §1962(d) (RICO). The Ninth Circuit reversed the district court's dismissal of the indictment, and held that the Enmons exception did not apply to violence prosecuted under federal statutes other than the Hobbs Act. Id. at 1329-1331.

As discussed at USAM 9-131.120, supra, these circuit courts have rejected a general "claim of right" defense under Enmons outside the context of labor-management disputes. See, e.g., United States v. Cerilli, 603 F.2d 415, 419 (3d Cir. 1979); United States v. French, 628 F.2d 1069 (8th Cir. 1980); United States v. Porcaro, 648 F.2d 753 (1st Cir. 1981); United States v. Thordarson, supra; United States v. Warledo, 557 F.2d 721 (10th Cir. 1977); United States v. Zappola, 677 F.2d 264 (2d Cir. 1982).

9-131.180 Under Color of Official Right

In addition to the "wrongful use of actual or threatened force, violence, or fear," the Hobbs Act defines extortion in terms of "the

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obtaining of property from another, with his consent . . . under color of official right." Recent decisions in several circuit courts of appeals upholding convictions obtained under this clause of the Act have given emphasis to a heretofore largely unused tool for combatting official corruption.

Until recently, the only court of appeals decision to deal with extortion "under color of official right" was United States v. Kenny, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972). The court in that case upheld an instruction to the jury which defined extortion under the Hobbs Act as being the obtaining of property by the traditional illicit methods (the wrongful use of force, threats or fear) or by the obtaining of it under color of official right. The instruction defined the latter phrase as the taking by a public officer of money not due him/her or his/her office, whether or not the taking was accomplished by force, threats or use of fear.

The court in Kenny adopted the position taken in a law review article entitled, "Prosecution of Local Political Corruption Under the Hobbs Act--The Unnecessary Distinction Between Bribery and Extortion". See 3 Seton Hall L.Rev. 1 (1971). The gravamen of the article is that the wording of the Hobbs Act in light of the history of extortion under common law indicates that a public official may commit extortion without any coercive activity on his/her part since it is his/her office which provides an incentive for the payment of funds. Thus, no distinction between such extortion and bribery of a public official is justified. A similar position may be found at 5 Loyola U. L.J. 513 (1974).

The Kenny case remained the only decision based upon a definition of extortion under color of official right until 1974 when the United States Circuit Court of Appeals for the Seventh Circuit decided three cases arising from convictions for extortion under color of official right obtained in the Northern District of Illinois.

The first of these cases was United States v. Staszczuk, 502 F.2d 875 (7th Cir. 1974). The Staszczuk case was redecided en banc on May 16, 1975, 517 F.2d 53 (7th Cir. 1975), but the interpretation and definition of extortion under color of official right set forth by the original panel was left standing.

Staszczuk involved a Chicago alderman who accepted three \$3,000 payments from a "zoning consultant" in return for the alderman-defendant's agreement not to oppose the consultant's clients' applications for zoning amendments relating to three properties in the defendant's ward. The indictment charged Staszczuk with affecting

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commerce by means of extortion in that he "obtained property not due either him or his office . . . with [the consultant's] consent being induced under color of official right."

The Staszuk court noted that the defendant conceded, "as we believe he must, that under the Hobbs Act 'color of official right' may replace the coercion of 'force, violence, or fear,'" Id. at 878. The court then cited evidence that the defendant's official functions, and the victim's impression of them, encompassed the unbiased consideration and treatment of all zoning applications, and held: "[t]o accept money in return for an agreement not to oppose such application--in effect to suspend independent judgment on the merits of such zoning changes--constitutes obtaining property from another, with his consent, induced 'under color of official right'," Id. at 878.

In a concurring opinion, Senior District Judge William J. Campbell, sitting by designation, while agreeing fully with the opinion of the panel, set forth his views on the distinction between the acceptance of a bribe by a public official and extortion under color of official right. Judge Campbell viewed the latter term as being established when the evidence demonstrated that "the public official has obtained from the 'victim' something of value to which the official is not entitled, in return for something that should have been provided without payment," i.e. the victim-payor is otherwise lawfully entitled to what he/she desires. This situation is distinguished from that where the money the public official receives is not being paid to prevent the coercive use of office, but rather to assist the payor in his/her efforts to obtain something to which the payor is not lawfully entitled. This latter activity Judge Campbell would characterize as the acceptance of a bribe and not extortion. The opinion of the panel noted concurrence with Judge Campbell's opinion.

As previously noted, the Staszuk decision was redecided en banc on May 16, 1975. Most of the second opinion was devoted to the issue of interstate commerce, an issue which the original panel had decided adversely to the government in one count of the indictment. In reversing the panel's decision that commerce was not affected, the Court en banc made no reference to Judge Campbell's concurrence or to the panel's concurrence therein. Three factors are primarily responsible for this omission. First, the distinction is clearly obiter dictum; second, Judge Campbell was not a member of the court sitting en banc; and third, the Seventh Circuit, between the original and en banc decisions, appears to have decided the issue contrary to the views of Judge Campbell. (For the significant holding of the Staszuk court en banc as regarding commerce, see 9-131.190, infra.)

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The second case involving extortion under color of official right to be decided by the Seventh Circuit was United States v. Crowley, 504 F.2d 992 (7th Cir. 1974). That case involved a Chicago police officer who collected \$100 per month for six months from the proprietors of a bowling alley located in a high crime area in return for the officer's guarantee to give police protection necessary for the operation of a profitable business. The court followed the rationale of Kenny and Staszczuk in rejecting the defendant's argument that force or fear were required to establish extortion under the Hobbs Act. The Crowley court noted that the Hobbs Act is clearly phrased in the disjunctive and approved a jury instruction which gave the following definition:

Extortion under color of official right by a law enforcement officer need not involve force or threat. If a victim reasonably feels compelled to pay money to a law enforcement officer, because of that officer's wrongful use of his official position for the purpose of obtaining money, the requirements of the crime of extortion under color of official right are satisfied.

See Crowley, *supra*, at 5.

Since the Crowley decisions involved the taking of money by an official in return for something to which the victim was entitled, the views of Judge Campbell concerning bribery outside the Hobbs Act remained unaffected. A third decision by the Seventh Circuit, however, rejected the Campbell approach when faced with that theory in the form of an argument by the defendants. In United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), payments of \$100 to \$150 per month were collected from 53 taverns and distributed among various officers of the vice squad in a Chicago police district. In return for the payment it was agreed that there would be no harassment of the payor taverns by members of the vice squad. Harassment was understood to be premises checks, I.D. checks of individuals in the bars and the harassment of "gay bar" patrons with flashlights. Additionally, the vice squad agreed to assist the tavern owners in any trouble they might have and to slant any required "followup reports" in favor of the bar owners. Additional assurances included both prior warnings by the vice squad that raids would be made and immunity from shakedowns by individual vice squad members.

The indictment charged 23 police officers, including Captain Braasch, Commander of the district, who did not participate in the proceeds of this extortion ring but did exercise some control over it, with conspiracy to

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commit extortion by extracting money from the tavern proprietors under color of official right. The defendants argued on appeal that extortion under color of official right as used in the Hobbs Act means either the acceptance of money by a public officer to perform an act that he/she was already under a legal duty to perform, or the taking of money under a claim by the officer that he/she had an official right to the money by virtue of his/her office. The proof here, they argued, showed payment in return for something to which the proprietors were not entitled, and thus constituted "classic bribery" and not extortion under color of official right.

In dismissing this argument, and presumably the distinction made by Judge Campbell, the Braasch opinion, written by Associate Justice (Retired) Tom C. Clark, sitting by designation, stated:

Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain payments is the crux of the statutory requirement of "under color of official right," and appellants' wrongful use of official power was obviously the basis of this extortion. It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.

See Braasch, supra, at 151.

The argument that extortion under color of official right and bribery are mutually exclusive seems to have been finally put to rest by the decisions in United States v. Hall, 536 F.2d 313 (10th Cir. 1976), and United States v. Hathaway, 534 F.2d 386 (1st Cir. 1976). Those cases affirmed convictions of public officials for extortion under color of official right in violation of the Hobbs Act in one count, and for travel in interstate commerce with intent to carry on bribery in violation of 18 U.S.C. §1952 in another count. Both counts in each case referred to the same exchange of property.

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The next appellate decision after Braasch to deal with color of official right was decided by the Fourth Circuit on December 23, 1974. In United States v. Price, 507 F.2d 1349 (4th Cir. 1974), the defendant was the chairman of the county council. The defendant accepted \$12,000 from an interstate hotel chain in return for his/her assurance that a motel built by the chain would be granted an occupancy permit which had previously been denied due to building code deficiencies. Price was indicted for extortion by fear of economic loss and under color of official right.

Price's defense was that his/her office of county council chairman had no de jure power to issue an occupancy permit and thus the money was not obtained under color or official right. The Circuit Court, however, approved a jury instruction which defined "under color of official right" as a "wrongful taking by a public officer of money not due him, or his office," and continued:

[I]t is not necessary that you conclude that the defendant could in fact assure the issuance of an occupancy permit . . . The issue . . . is not whether the defendant had the power to withhold the permit, but whether it was reasonable for [the victim to believe] that . . . he had such power. 507 F.2d 1350.

The circuit court thus rejected Price's contention that guilt must be predicated only upon a finding that he perverted the legal or statutory power of his public office, and held, "It is enough that he appeared to act under 18 U.S.C. §1951(b)(2)'s 'color of official right.'" Finally, the court also concluded that the conviction was supportable under the theory that the payment was induced by fear of economic loss.

The problem of de facto as opposed to de jure power was more thoroughly discussed in the case of United States v. Mazzei, decided en banc, 521 F.2d 639 (3rd Cir.), cert. denied, 423 U.S. 1014 (1975). Mazzei was a Pennsylvania state senator who was reported to be seeking office space for a regional office of the newly formed Bureau of State Lotteries, even though as a legislator he/she had no statutory power with respect to that Bureau or its leasing practices. The victim, an interstate corporation, was anxious to rent unused office space in one of its buildings. Hearing of Mazzei's interest, the victim arranged to meet with him/her to discuss the leases. The authority responsible for securing office space for state agencies soon inspected the premises. The defendant then visited the victim, suggested what the rental should be, and stated that, "it was the practice on all state leases that ten percent of the gross amount of the rentals would be paid to a senate finance

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reelection committee," which amount the defendant then calculated. The victim submitted his/her proposal and obtained the lease, after which the defendant inquired of an intermediary whether an envelope had been left for him/her by the victim. The victim then caused \$8,755, ten percent of the gross rental, to be delivered to the defendant. A second lease was obtained by the victim under similar circumstances after which he/she forwarded ten percent of the rental, amounting to \$11,300 to Mazzei.

Mazzei's two-pronged defense was that the payments were voluntary purchases of his influence in an area in which he/she had no official power and in which he/she never pretended to have official power; and that coercion is required as an element of extortion under color of official right. Citing Price and Staszczuk, the court held, as to the first defense, that the jury need not have concluded that Mazzei had de jure power to secure the grant of the leases. As to the second defense, the court relied on Kenny and held that any element of coercion that might be required to establish extortion under the Hobbs Act is supplied by the misuse of the defendant's official power. The Third Circuit thus seems to have rejected the two most common defenses raised in prosecutions of this type.

A further discussion of de facto ^{versus} de jure, power can be found in United States v. Meyers, 529 F.2d 1033 (7th Cir. 1976), which holds that candidates for public office who obtain property in exchange for a future official act or forbearance may be charged with conspiracy to extort under the Hobbs Act. This case, despite some sweeping language to the effect that candidates are liable as public officials, is primarily based upon the well established principle that a conspiracy continues to exist until its objective is achieved. The defendants had become public officials when they rendered the quid pro quo for which the property was given, and were therefore public officials during a portion of the conspiracy.

In two decisions, strongly expressed and reasonable concerns have been raised regarding the difficult distinction between legitimate campaign contributions and those induced under color of official right. See United States v. Williams, F. Supp. (E.D. La. 1979), and United States v. Cerilli, 603 F.2d 415 (3d Cir. 1979), (J. Aldesert, dissenting). Prudential considerations now warrant a Division policy that a campaign contribution will only be considered induced under color of official right where it corresponds to a specific, identifiable quid pro quo. Cf. United States v. Trotta, 525 F.2d 1096 (2d Cir.), cert. denied, 425 U.S. 971 (1976). Obviously, this policy in no way restricts the application of the Hobbs Act to campaign contributions obtained under duress or fear. (See USAM 9-131.160 through 131.162, supra). Payments which directly accrue to the personal benefit of a public official, even where styled as

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campaign contributions, also need not be tendered in exchange for a quid pro quo to be prosecuted under the "color-of-official-right" theory of the Hobbs Act. Finally, this new Division policy requiring the showing of a quid pro quo in the campaign contributions context in no way vitiates the support that the United States v. Trotta, supra, gives to the proposition that personal payments induced under color of official right need not be pleaded or shown to have been tendered in exchange for a quid pro quo.

What is perhaps the extreme case of how much coercion the office itself may be held to exert can be found in the case of United States v. Kuta, 518 F.2d 947 (7th Cir.), cert. denied, 423 U.S. 1014 (1975), in which no threat, real or implied, and no demand for payment were established. The case involved a realtor who believed that the approval by an alderperson was required to obtain zoning changes in the alderperson's ward. Kuta was alderperson for Chicago's twenty-third ward, and the realtor contacted him/her seeking to have some of his/her property in that ward rezoned. Kuta merely informed the realtor that he/she had no objection, and subsequently the city council approved the rezoning, with Kuta voting in favor. Approximately two weeks later, Kuta called the realtor and asked to see him/her. The realtor initiated the subsequent conversation by asking how much he/she owed. Kuta replied "\$1500" and the realtor paid it. In affirming Kuta's conviction, the court held that the evidence was sufficient to show that it was Kuta's office that brought forth the realtor's payment, and, therefore, the conduct fell within the ambit of extortion under color of official right.

Further clarification of the nature of the prohibited activity under color of official right was given by the Second Circuit in United States v. Trotta, 525 F.2d 1096 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976). In that case the court reversed the district court's dismissal of an indictment charging extortion under color of official right, holding that the agreement to give or the giving of a quid pro quo by officials in return for the property obtained was not an essential element of the offense, and that the obtaining of involuntary campaign contributions was a prohibited activity.

These recent developments in the law of extortion under color of official right have broadened the Hobbs Act to a point where it has become and is likely to continue to be a primary weapon to be used to combat official corruption. Sufficient federal authority may be marshalled to put to rest the arguments that a conviction for extortion under color of official right requires proof of force, fear or threats; that extortion and bribery are mutually exclusive; and that color of official right refers only to misuse of the official's statutory powers.

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In light of the importance of this tool, however, great care should be taken to insure that it is used only in appropriate cases. Until the Supreme Court decides upon the validity of this type of conviction, prosecutorial discretion should be used to insure that any case which might reach that level of review is worthy of federal prosecution. Such restraint would require that only significant amounts of money and reasonably high levels of office should be involved.

An area for careful scrutiny in deciding upon the use of this restraint is the Hobbs Act's requirement that the extortion obstruct, delay or affect commerce. See USAM 9-131.190, supra. The acceptance of payments by public officials is often of such a nature that interstate commerce is simply not affected. For instance, in cases where pardons, acquittals, releases or failures to arrest are sold to individuals who have acted criminally only in their capacity as individuals, commerce is unaffected and no federal jurisdiction exists.

Additionally, the Criminal Division has adopted a general policy against prosecution in cases where the only commerce involved is purely illegal and no extraordinary circumstances exist. For instance, if the purpose of a payment is solely to facilitate the sale of narcotics or prostitution, prosecution, absent extraordinary circumstances, is inappropriate. The purpose of this policy is to avoid causing the government to argue that Congress enacted the Hobbs Act to protect these illicit enterprises through its authority under the commerce clause. This policy has no application, however, where licit and illicit commerce are mixed, or where illicit commerce has an effect on legitimate commerce, e.g., illegal liquor, the elimination of which will enhance the flow of legal alcoholic beverages. For a further discussion of the commerce element of the Hobbs Act, see USAM 9-131.190, infra.

Finally, there is some question as to whether the Hobbs Act defines this type of extortion as "the obtaining of property from another under color of official right," or as "the obtaining of property from another, with his consent, induced under color of official right." While this distinction is largely academic since the courts have upheld indictments setting forth both phraseologies and attributed the same elements to each, for the sake of uniformity the latter definition should be used when tracking the statutory language into an indictment. While the common law offense of extortion which was committable only by public officials made no mention of consent, the grammatical structure of the Hobbs Act would appear to support the latter language. Additionally, the characterization of color of official right as the inducement for consent to pay is no assistance in combating the de jure versus the de facto defense, since it emphasized the victim's reasonable belief in the official's power.

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Due to the involved nature of prosecutions for extortion under color of official right, and the need for a uniform approach in this changing area of law, the requirement that authorization be obtained from the Criminal Division prior to seeking an indictment in all Hobbs Act prosecutions not involving threats, force or violence must be strictly observed. See USAM 9-131.030, supra.

9-131.190 Interstate Commerce

There are two essential elements of the Hobbs offense: robbery or extortion and interference with commerce. See Stirone v. United States, 361 U.S. 212 (1960). There is some authority for the proposition that when the facts underlying the jurisdictional element of the government's case are uncontroverted, it is not necessary to submit that question to the jury. See United States v. Compagna, 146 F.2d 524 (2d Cir.), cert. denied, 324 U.S. 867 (1945). However, the Supreme Court in Stirone v. United States, supra, indicated that the commerce aspect of the violation could not "be treated as surplusage." Hence, the better approach would appear to be to treat the issue as a mixed question of law and fact. Thus, it would be for the judge to determine whether, as a matter of law, the government's proof regarding the effect on commerce, if believed by the jury, is sufficient to establish the jurisdictional element of the offense. The question should then be submitted to the jury under a proper instruction. Such an instruction characteristically consists of the following:

If you believe the Government's evidence regarding interstate commerce [summarizing the relevant facts] beyond a reasonable doubt, then you are instructed as a matter of law that there was an effect on interstate commerce and the necessary federal jurisdictional element is satisfied.

See generally, United States v. Green, F.2d 155 (7th Cir.), cert. denied 355 U.S. 871 (1957); United States v. Kramer, 355 F.2d 891 (7th Cir. 1966); United States v. Lowe, 234 F.2d 919 (3d Cir. 1956); United States v. Varlack, 225 F.2d 665 (2d Cir. 1955); Hulahan v. United States, 214 F.2d 441 (8th Cir. 1954); United States v. Augello, 451 F.2d 1167, 1170 (2d Cir. 1971).

See also, United States v. Addonizio, 451 F.2d 49 (3d Cir. 1972), where the court upheld the trial judge's charge to the jury:

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that they could find the interstate element of the crime if they believed that any of the following facts had been established:

(a) that the Southside project was designed to service firms and industries engaged in interstate commerce; or

(b) that the Verona Construction Company was, during the time in question, engaged in business in New Jersey and other states; or

(c) that the Southerly Extension was designed to provide water service to firms and industries engaged in interstate commerce; or

(d) that Interpace was engaged in business in New Jersey and other states; or

(e) that the Southerly Extension was dependent upon interstate commerce for materials and supplies for completion; or

(f) that Constrad was formed for the purpose of doing business both within and outside New Jersey, and did engage in business outside of that state; or

(g) that the Meadowlands project was designed to provide facilities for both light and heavy industry and to attract such industry by virtue of its location near rail lines and the Newark Airport; or

(h) that the purpose of the Dunkers Pond and Susquehanna Aqueduct projects was to furnish water to firms and businesses engaged in interstate commerce and if they further believed that there was "a conspiracy which contemplated the extortion of monies from any of the firms . . . just mentioned, or from any firms working on these several municipal projects.

Id. at 74-75.

In United States v. Hyde, 448 F.2d 815 (5th Cir.), cert. denied, 404 U.S. 1058 (1971), the United States Court of Appeals for the Fifth Circuit upheld the following instruction:

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Now, Ladies and Gentlemen of the Jury, it is the duty of the Court and not the jury to determine whether the government's evidence, if believed established that interstate commerce was affected by the conduct of the defendant to as to bring the activities of the defendants within the scope of the Hobbs Act and sustain federal jurisdiction.

I instruct you that if you find from the evidence beyond a reasonable doubt, that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment, and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected.

Id. at 841.

The defendants argued that the foregoing instruction erroneously deprived the jury of its role in finding the facts regarding the interstate commerce element of the Hobbs offense. However, the court of appeals held that the trial judge's emphasis on the phrase "if believed" in the instruction properly informed the jury as to its function as fact-finder with regard to the issue of interstate commerce. Id. at 842. In so holding, the court noted that an acceptable method of charging the jury regarding interstate commerce is to enumerate the government's factual allegations concerning interstate commerce and then instruct the jury that those facts, if believed by the jury, would satisfy the interstate commerce element of the Hobbs offense. The court held that the trial judge did not abuse his/her discretion in failing to enumerate the specific facts dealing with interstate commerce. Rather, the court said, since these facts were complicated, the trial judge's reference simply to the government's evidence as charged in Counts One and/or Two, "if believed," was, "in the context of this case," proper in order to avoid "omission, over-enumeration, over-simplification of some facts compounded by over-complication of other facts." Id.

It should be noted, however, that since the court sought to limit its holding to the specific facts of the case before it, the Hyde decision should not be interpreted as promulgating any significant change in the law. Consequently, it is recommended that as a matter of policy, the government's proposed instructions regarding interstate commerce should include a recital of the relevant foundational facts. See e.g., United States v. Addonizio, supra.

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It is not necessary for the government to show that the defendant actually intended to delay, obstruct or affect interstate commerce. All that must be proved is that the defendant committed or threatened the commission of an act whose natural and probable consequence would be to delay, obstruct or affect commerce. Nor is it of any consequence that the defendant was totally ignorant of any effect on interstate commerce. A proper instruction in this regard may consist of merely charging the jury that:

[I]t is not necessary . . . to find that the defendants, in conspiring, considered that the effect of their conspiracy would be to affect interstate commerce or that one of the purposes of the conspiracy was to affect such commerce.

See United States v. Varlack, 225 F.2d 665, 672 (2d Cir. 1955)

All that is necessary is that the natural effect of the acts committed pursuant to the conspiracy was to affect, delay or obstruct interstate commerce.

See United States v. Battaglia, 394 F.2d 304, 312 (7th Cir. (1968)

A. Substantive Scope

The statutory language of 18 U.S.C. §1951 specifically proscribes robbery or extortion which "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce." This language has been construed as evidencing a congressional intent to extend the jurisdiction of the Hobbs Act to the constitutional limits of Congress' power under the commerce clause. The United States Supreme Court said in Stirone v. United States, 361 U.S. 212, 215 (1960), that:

[The Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.

The cases indicate that the Hobbs Act is to be construed broadly and "is not limited to conduct which directly and immediately obstructs a particular movement of goods in interstate commerce." See United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967). The commerce aspect of the Hobbs violation is satisfied even in cases where the affected commerce has terminated before the defendant acted.

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[A] deliberate act which tends to prevent articles from being used once they have reached their destination after being shipped in interstate commerce dams up the stream of commerce and delays, obstructs and affects interstate commerce as surely as though the same act had cut off the supply at its source.

See Battaglia v. United States, 383 F.2d 303, 305-6 (9th Cir. 1967), quoting United States v. Stirone, 168 F. Supp. 490, 496 (W.D. Pa 1957).

A substantial number of the cases prosecuted under the Hobbs Act involve extortion of money or other property from a business whose operation is dependent upon interstate shipments of materials and supplies. The courts have been unanimous in holding that:

Extortion by threat to disrupt a local activity the stoppage of which would in turn result in stoppage of interstate shipment of raw materials essential for that activity falls within the act.

See United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967); United States v. Amabile, 395 F.2d 47, 49 (7th Cir.), cert. denied, 401 U.S. 924 (1971) (where the court noted that "[i]t is unnecessary that the extortion have as substantial an effect on interstate commerce as a combination in restraint of trade").

In most Hobbs Act prosecutions involving interference with local construction, for example, the Federal jurisdictional element is satisfied by showing that a strike or work slowdown would delay the interstate shipment and receipt of the necessary building supplies and materials. However, the question of the sufficiency of the effect on interstate commerce may arise in cases where the only effect of the extortion is a delay in the construction of the plant whose product will move in interstate commerce. The argument is simply that the delay in the construction of the plant whose product will move in interstate commerce necessarily delays the production and ultimate interstate shipment of the product. The Third Circuit in United States v. Stirone, 262 F.2d 571, 574 (3d Cir.) accepted this argument and the Supreme Court, reversing on other grounds, left the question undecided. See Stirone v. United States, 361 U.S. 212, 215 (1960). In United States v. Kramer, 355 F.2d 891, 897 (7th Cir. 1966), the court considered the prospective use of the building under construction as one of the interstate aspects that was subject to delay and obstruction by reason of the defendants' extortion. Accordingly, in

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United States v. Pranno, supra, the court affirmed the conviction of the defendant city officials for conspiracy to extort \$40,000 from the owner and contractor of a proposed manufacturing plant by threatening the withholding of the building permit. The indictment alleged, and the proof showed, that the carrying out of the threat would have delayed the shipment of the plant's products out of the state. The court said:

Although the money was paid, and the permit obtained, it is clear that if the permit had been withheld to fulfill the threat the construction and operation of the plant would have been delayed. Shipment into Illinois of building material and the raw material for the proposed product would have been delayed as well as shipment of products of the plant outside of Illinois.

Pranno, supra, at 389 (emphasis added).

B. Potential Effects

It is not necessary that commerce actually be affected by the defendant's conduct. Congress has the power under the commerce clause "to deal with extortion or attempted extortion actually or potentially affecting interstate commerce . . ." Hulahan v. United States, 214 F.2d 445 (8th Cir. 1954); United States v. Pranno, supra, (extortion by threat which, if carried out, would obstruct commerce); United States v. DeMet, 486 F.2d 816, 821-22 (7th Cir. 1973) (depletion of business assets which thereby curtails the victim's potential as a purchaser of goods moving in commerce); United States v. Staszczuk, 517 F.2d 53 (7th Cir. 1975) (en banc) (extortion which has a "realistic probability" of affecting interstate commerce). In Staszczuk the court affirmed the conviction of a Chicago alderman for extortion "under color of official right." The alderman accepted money from an individual in return for an assurance that he/she would not object to the rezoning of property in his/her ward upon which the payor wished to build an animal hospital. The only nexus with commerce introduced into evidence was that construction of the hospital would have required use of materials manufactured outside the State of Illinois. After the rezoning was approved, however, the payor changed his/her mind and never built the hospital.

After noting Congress' intent to exercise its full power under the commerce clause in enacting the Hobbs Act, the court in Staszczuk placed primary importance upon the intent of the parties at the time of payment. Thus viewed, the transaction was an extortion which, had payment not been made, would have curtailed the flow of construction materials in commerce.

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The subsequent failure of the victim to build the hospital was characterized by the court as a mere fortuitous circumstance. But compare United States v. Elders, 569 F.2d 1020 (7th Cir. 1978), where the court held that a realistic probability of an effect on commerce was not demonstrated in a case where public officials' extortion of kickbacks in connection with a public works contract occurred after the victim had ceased interstate purchases of equipment and had decided to terminate its business; see also United States v. Merolla, 523 F.2d 51 (2d Cir. 1975), where the victim's "one-shot deal" in which he/she agreed to construct a building for the defendant and had purchased all building materials before the alleged extortion had occurred was held not to establish the requisite effect on commerce. The necessary effect was held to require a victim who "customarily obtains supplies through interstate commerce" and for whom the purchase of interstate goods "must be of a continuing nature." Id. at 54.

The extent to which proof of a probable or potential effect on commerce is sufficient in attempt or conspiracy cases is best demonstrated by those decisions which uphold Hobbs Act convictions involving "undercover enterprises" as victims whose fictitious operations have only potential impacts on commerce. See USAM 9-131.300, infra, and United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), where an attempt to extort a fictitious gambling business in return for action by the defendant public official on legislation favorable to gambling was held to have a sufficient nexus to commerce inasmuch as the movement of tourists and workers interstate would increase as a result of the anticipated gambling legislation. See also United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982) (potential effect on commerce could have resulted from public officials' conspiracy to extort representatives of a fictional corporation in return for action to expedite the victims' undertaking of the construction of a hotel project with interstate effects). For a case which does not appear to restrict its analysis to the potential consequences of the extortion, see United States v. Brooklier, 459 F. Supp. 476 (C.D. Ca. 1978), aff'd, 685 F.2d 1208 (9th Cir. 1982) (attempted violation involving the completed extortion of \$6,500 from a fictitious undercover business purporting to deal in pornography was not precluded by the factual impossibility of an actual effect on commerce).

C. Individuals As Victims

In 1967 the Court of Appeals for the Ninth Circuit observed with reference to the Hobbs Act that:

[T]he only question left for litigation has been, not the question of the constitutional power of Congress,

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but the question of the intent of Congress to include, or not to include, within the reach of a statute the kind of activity involved in the litigation.

See Battaglia v. United States, 383 F.2d 303, 305 (9th Cir. 1967). The Seventh Circuit, which has been in the forefront of espousing a broad construction of the commerce element with respect to business and commercial victims, has developed a distinction between direct and indirect effects on commerce where individuals are the victims of the extortion. The "direct" effect is said to be one which actually or potentially impedes or obstructs the movement of goods or articles in commerce. On the other hand, the "indirect effect" or "depletion of assets" theory has been described as a circumstance where:

. . . commerce is affected when an enterprise which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods.

See United States v. Mattson, 671 F.2d 1020, 1024 (7th Cir. 1982); United States v. Elders, supra (court's emphasis omitted).

The Mattson court rejected the argument that the depletion-of-assets theory could be applied where defendants extorted \$3,000 under color of official right from an individual as payment for city electrician's license. The court held that the indirect effect on commerce could only be utilized in cases where a business enterprise was the victim and engaged in interstate commerce or where the business enterprise had money reserves for purchasing goods in interstate commerce that were directly and immediately diminished by the extortion. See Matson, supra, at 1024. The court found that the individual employee extorted in Mattson lacked a sufficient nexus with commerce to meet the requisites of the Hobbs Act. Subsequently, in United States v. Boulahanis, 677 F.2d 586 (7th Cir. 1982), the court clearly distinguished its ruling in Mattson from a case where a business club was forced to deplete its assets in order to pay \$500 per month to the defendant, ruling that "extortion is likely to have a greater effect on interstate commerce when directed at businesses than at individuals. That is the pragmatic justification for drawing the line between individuals and business or other enterprises so far as applying the depletion-of-assets theory is concerned . . ." Id. at 590,

However, the Mattson holding may be distinguished from the case where the effect on commerce by the actual or attempted extortion of an

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individual victim is "direct" and the movement of articles or commodities in commerce is actually or potentially impeded without any intermediate effect, that is, without the two-step process whereby depletion of the individual's assets leads to the diminution of his/her purchases in commerce as an individual rather than as the operator of a business enterprise. For example, the actual or potential obstruction of the movement of labor across state or national boundaries was held to constitute commerce within the meaning of the Hobbs Act in United States v. Hanigan, 681 F.2d 1127 (9th Cir. 1982). Hanigan involved the robbery of undocumented aliens traveling from Mexico to Arizona for the purpose of working as unskilled agricultural laborers. In affirming the conviction, the Ninth Circuit upheld a jury instruction that labor or laborers could be articles of commerce despite contrary language in the federal antitrust law (15 U.S.C. §17) to which the savings provision at 18 U.S.C. §1951(c) makes reference. Because the purpose of the referenced antitrust provision is to exempt the activities of organized labor from the antitrust laws, the court noted that 18 U.S.C. §1951(c) "merely makes clear that the inclusion of labor within the [Hobbs] Act does not affect the operation of the antitrust . . . laws" and does not except labor from the definition of "commerce.": Id. at 1130.

The Hanigan court also ruled that the "commerce" which is protected by the Hobbs Act is not restricted to the flow of "legally condoned articles." The fact that the individual victims were undocumented alien laborers who had entered the country illegally did not deprive them of the protection of the Hobbs Act against a robbery which directly and potentially interfered with interstate commerce by preventing them from working as agricultural laborers in the United States. Id. at 1131.

9-131.200 ELEMENTS OF AN OFFENSE

9-131.210 Robbery or Extortion

See USAM 9-131.110 and 9-131.120, supra.

9-131.220 "Or Commits or Threatens Physical Violence to Any Person or Property in Furtherance of a Plan or Purpose to do Anything in Violation of This Section"

The Hobbs Act also prohibits the commission or the threatened commission of "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.

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This language forbids any actual or threatened physical violence for the purpose of robbery or extortion. Since the Act includes provisions for attempt and conspiracy, any actual or threatened physical violence for the purpose of robbery or extortion would be provided for by the attempt or conspiracy provisions. Consequently, this language merely declares illegal that which is already proscribed by the Act. It does not make criminal the act of obstructing commerce by actual or threatened violence in the absence of a purpose or plan to rob or extort.

See United States v. Franks, 511 F.2d 25 (6th Cir.), cert. denied, 422 U.S. 1042 (1975)

9-131.230 Affecting Commerce

See USAM 9-131.190, supra.

9-131.240 "Intent in Cases Predicated on the Wrongful Use of Actual or Threatened Force, Violence or Fear"

Extortion as defined in 18 U.S.C. §1951 is a "larceny-type offense" and therefore requires an intent to permanently deprive another of his/her property by means of a wrongful use of actual or threatened force, violence, or fear. The Hobbs Act has been characterized as a "general intent" crime for which the defendant's knowledge of the illegality of his/her acts is not required; see e.g., United States v. Furey, 491 F. Supp 1048, 1059 (E.D. Pa), aff'd without opinion, 636 F.2d 1211 (3d Cir. 1980). However, the ruling of United States v. Emmons, supra, that the extortionist in labor-management disputes has a defense if he/she has a lawful claim to the property which he/she seeks to obtain has been construed to require proof of the defendant's knowledge that he/she was not entitled to obtain his/her victim's property in a labor-management case. See United States v. Arambasich, 597 F.2d 609, 611 (7th Cir. 1979) (labor union official who received employer payments for labor peace); compare, United States v. Warledo, 557 F.2d 721, 729-730 (10th Cir. 1977), (the fact that non-labor defendants may have believed they had a lawful claim against their victim was not material to their "wrongful" use of actual or threatened violence to press their property demands). However, an express, direct or positive threat of violence or economic loss is not required. See Bianchi v. United States, 219 F.2d 182 (8th Cir.), cert. denied, 349 U.S. 915 (1955); Callanan v. United States, 223 F.2d 171 (8th Cir.), cert. denied, 350 U.S. 852 (1955); Hulahan v. United States, 214 F.2d 441 (8th Cir.), cert. denied, 348 U.S. 856 (1954).

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Veiled threats are as much proscribed by the Hobbs Act as express ones. See United States v. Dale, 223 F.2d 181 (7th Cir. 1955) (defendant's allusions to his/her past gangsterism and his/her facility with a black-jack constituted sufficient evidence to support a finding of a reasonable fear of violence in the victim's mind); Cape v. United States, 283 F.2d 430 (9th Cir. 1960). An individual is deemed to intend the natural and probable consequences of his/her acts and, hence, the defendant is responsible for any fear that reasonably flows from his/her conduct. See United States v. Green, 246 F.2d 155 (7th Cir.), cert. denied, 355 U.S. 871 (1957).

The controlling consideration is not so much whether the defendant caused the victim's fear of economic loss, but whether he made use of such fear to extort money or other property. See Callanan v. United States, supra. In Callanan, there was no express threat of violence or even of a strike. The defendant union representative merely asked the victim contractor for \$28,000 as insurance against labor problems. The court noted that there was sufficient evidence for the jury to infer that the victim contractor reasonably feared that if the \$28,000 was not paid "reprisals" would be taken and labor difficulties designed to harass the employee and not to accomplish legitimate labor objectives would follow. . . . Id. at 176.

The court added that:

If fear was created in the victim's mind, if such fear was a reasonable one, and if the defendants by making use of that fear extorted money or property, the foundation for guilt is established.

[T]he offense is present whether the defendants are responsible for any past difficulties in the way of prior illegal strikes or unfair labor practices which may have created the fear, or whether the fear may have been created by what might have happened to others in similar cases.

Id. at 175.

Similarly, in United States v. Compagna, 146 F.2d 524 (2d Cir.), cert. denied, 324 U.S. 867 (1945), the victim movie producers and exhibitors testified that in light of the defendants' threats to call a strike, they feared not only economic loss, but violence. The court found no evidence of direct threats of violence or any evidence indicating that the defendant had been involved in any violent strikes in the past. The

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court held that the admission of evidence of the victim's fear was not prejudicial, saying:

The victims' fears originated from acquaintance with the general disorders and violence which had accompanied other strikes. As such, it was part of what everybody knows, and I cannot see how it could have prejudiced the accused with the jury. Indeed it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears, when Bioff threatened to call strikes.

Id. at 529 (emphasis added).

See also, United States v. Varlack, 225 F.2d 665, 668 (2d Cir. 1955) ("defendants seized upon the opportunity presented by the longshoremen's hostility to the company's introduction of technical improvements on its pier, to line their own pockets . . ."); see Bianchi v. United States, supra at 190 (wide publicity of terroristic tactics in similar matters).

While it is not always necessary to show direct or express threats, or even that the defendant implanted the fear in his/her victim's mind, it is absolutely essential that there be some evidence of duress. See United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965). The essence of extortion is a coercive exaction of property from another.

9-131.300 ATTEMPT

The Hobbs Act specifically proscribes an "attempt" to violate its provisions and, therefore, the proof need not show that money actually changed hands in order to support a conviction. Accordingly, the statute covers attempts to rob and extort as contrasted with attempts to obstruct commerce by completed robbery or extortion. See United States v. Rosa, 560 F.2d 149, 153 (3d Cir. 1977); United States v. Gambino, 560 F.2d 414, 419 (2d Cir. 1977); (attempt to instill fear). The usual rules of law pertaining to an attempt to commit a particular offense apply to an attempt under the Hobbs Act. Thus, any overt act, beyond mere preparation, with the intent and for the purpose of committing robbery or extortion would constitute an attempt to violate the Hobbs Act if the requisite impact on interstate commerce were shown. See generally, United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952).

If the offense is completed, the attempt is merged in the completed offense and, consequently, the defendant cannot be cumulatively punished

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for both an attempt to extort or rob and the completed act of extortion or robbery. However, there may be a conviction for both attempt and the completed substantive offense if each is based on a separate set of facts. See United States v. Tolub, 187 F. Supp. 705 (S.D.N.Y. 1960), aff'd, 309 F.2d 286 (2d Cir. 1962). Moreover, pleading attempt and the substantive offense in the same count is not duplicitous. See United States v. Quinn, 364 F. Supp. 432, 437 (N.D. Ga. 1973), aff'd, 514 F.2d 1250 (5th Cir. 1975). However, the Third Circuit has held that charging conspiracy to violate the act and the attempt in the same count is not permitted. See United States v. Starks, 515 F.2d (3d Cir. 1975).

Finally, an attempted obstruction of commerce may be demonstrated by the threatened or completed extortion of fictitious enterprises which lack any commercial operations. In United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), a fictitious company was established by the FBI as part of an undercover operation. The defendant attempted to extort payments from the fictitious corporation for his/her help in enacting legislation favorable to gambling in the State of Washington. The court held that the commerce element of the statute had been proven:

Because of the extensive effects on interstate commerce that would have developed from the anticipated legislation, we need not find the interstate nexus solely in the effects of the extortion on the fictitious corporation So-Cal. It is enough that the scheme if successful, would have affected commerce. Id. at 894.

In Bagnariol, the commerce effects were predicated on the potential, natural consequences of the extortion rather than the extortionate transaction itself. Id. at 896. For a discussion of the doctrine of impossibility and attempt under 18 U.S.C. §1951, United States v. Brooklier, 459 F. Supp. 476 (C.D. Cal. 1978), aff'd, 685 F.2d 1208 (9th Cir. 1982), where the completed extortion of a fictitious undercover business was upheld as an attempt under the rationale that the extortion would have affected interstate commerce but for a fact unknown to the defendants namely, that the business was not actually engaged in commerce and therefore no interstate operations of the victim could be affected.

9-131.400 CONSPIRACY

Since the Hobbs Act itself makes it an offense to conspire to obstruct commerce, it is unnecessary to prosecute conspiracy violations under 18 U.S.C. §371. The Hobbs Act provides for a maximum penalty of 20

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years and requires no allegation or proof of an overt act. See United States v. Tolub, 187 F. Supp. 705 (S.D.N.Y. 1960), aff'd, 309 F.2d 286 (2d Cir. 1962); United States v. Callanan, 173 F. Supp. 98 (E.D. Mo. 1959), aff'd., supra, 364 U.S. 587 (1961); Ladner v. United States, 168 F.2d 771 (5th Cir.), cert. denied, 335 U.S. 827 (1948).

The commission of the substantive offense and a conspiracy to commit it are distinct offenses and therefore separately punishable despite Congress' combination of the two offenses in a single statute. See United States v. Callanan, 364 U.S. 587 (1961). Because factual impossibility is not a defense to an inchoate offense like conspiracy, a fictitious enterprise without actual operations in commerce may be the victim of a conspiracy to commit extortion in violation of the Hobbs Act. See United States v. Brooklier, 459 F. Supp. 476 (C.D. Cal. 1978), aff'd, 685 F.2d 1208 (9th Cir. 1982); United States v. Jannotti, 673 F.2d 578, 590-94 (3d Cir. 1982).

While a substantive extortion "under color of official right" requires that a principal participant in the crime be a holder of public office, a conspiracy to obtain property from another color of official right can be committed by persons who are not public officials where the extortionate scheme begins before and continues after the principal's entry into office. See United States v. Meyers, 529 F.2d 1033 (7th Cir. 1976) (candidates agreed to use extorted payments in consideration of future acts as public officials).

Conspiracy prosecutions of union leaders or individuals associated with organized crime quite frequently involve difficult problems of proof. Evidence of participation in the conspiracy has to be neither direct nor overwhelming before it can properly be submitted to the jury.

In United States v. Masiello, 235 F.2d 279 (2d Cir.), cert. denied, 352 U.S. 882 (1956), the jury returned verdicts of "guilty" against one Masiello, a Teamsters business agent, and one Stickel, the Secretary-Treasurer of the same Local, for conspiracy to affect interstate commerce by extortion in violation of the Hobbs Act. The evidence against Masiello was particularly strong, but that against Stickel was largely circumstantial. The evidence indicated that Stickel was present when Masiello accepted payoffs from victim milk haulers (Id. at 281, 282) and that Stickel wrote letters containing equivocal language which was interpreted by Masiello's victims as threatening. (Id. at 235, 281, note 1). The record also disclosed that Masiello had told victims that Stickel "was 'impatient' for his money" (Id. at 282) and that Stickel himself had told a victim that he (Stickel) "knew everything that Masiello knew." (Id. at 282.)

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On appeal, the defendants asserted that the government's evidence established only that:

- A. Stickel was either ignorant of Masiello's activities; or
- B. Although not ignorant, he was "benevolently indifferent, took no active part, and received none of the spoils"

Id. at 283

The court thought the second assertion incredible and held that even if the jury viewed the evidence in this light, "it could, and, indeed, rationally should, find the defendants guilty." (Id. at 283.) The court noted that Stickel was no "sophisticated bystander" and that a union leader who "knows and permits the use of the threat of his power to extort payments from the employers, . . . has made himself a conspirator, whether he shares in the illicit proceeds or not." (Id. at 283.)

The court viewed the defendants' assertion that Stickel was ignorant of Masiello's activities as "presuppos[ing] a naivete dazzling in its innocence." (Id. at 283.) The court regarded the defendants as shrewd individuals, . . . keep[ing] their separate roles distinct, with Stickel speaking only in compliance, while Masiello made the specific demands and collected the cash." (Id. at 284.) The court held that there was sufficient evidence to submit the case to the jury, adding that:

Actually all the evidence was mosaic, each bit making its own contribution, and all building up to a compelling whole as first the court and second the jury should actually view it.

Id. at 283. See also, United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968).

9-131.500 VENUE

Article III, section 2 of the United States Constitution requires that criminal trials shall be held "in the State where the said Crimes shall have been committed." Accordingly, 18 U.S.C. §3237, provides in pertinent part:

[A]ny offense against the United States begun in one district and completed in another, or committed in

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more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

In United States v. Varlack, 225 F.2d 665 (2d Cir. 1955), evidence indicated that the defendant union officials sought to extort money from the American Sugar Refining Company by threatening to cause prolonged work stoppages and thereby prevent the unloading of the victim company's ships in Philadelphia, Pennsylvania. The defendants asserted that most of the events relating to the alleged extortion took place in the Eastern District of Pennsylvania and, hence, it was error to try them in the Southern District of New York. The court held that venue was proper in the Southern District of New York because the record indicated that the defendants traveled from Philadelphia into the Southern District of New York and there committed acts in furtherance of their plan of extortion.

In United States v. Floyd, 228 F.2d 913 (7th Cir.), cert. denied, 351 U.S. 938 (1956), the venue issue was again raised. This case involved the prosecution of a Teamster's official for interference with interstate commerce by extorting \$2650 from the victim subcontractor who was stringing an interstate pipeline through the Southern District of Illinois. The defendants asserted that venue was improper in the Southern District of Illinois because all of the threats were made in the Northern District of Illinois and the payments were made in Missouri. The court held that "venue under the statute involved may be laid in any jurisdiction where commerce is affected," (Id. at 918) (emphasis added), and the evidence indicated that commerce was obstructed, interfered with and affected within the Southern District of Illinois.

The court took notice of the second paragraph of 18 U.S.C. §3237, which provides in part:

Any offense involving . . . transportation in interstate or foreign commerce, is a continuing offense and, . . . may be inquired of and prosecuted in any district from, through or into such commerce.. moves.

The court held the above provision applicable because the case "involved transportation" in that men or women, material and equipment from other states were transported into the Southern District of Illinois. The court added that the pipeline was an interstate pipeline and, hence, any delay in its construction would delay the ultimate transportation of oil through the Southern District of Illinois and into other states. Recognizing that the Hobbs offense involves two essential elements,

extortion and its effect on commerce, the court concluded that venue may be properly laid either in the jurisdiction wherein the coercion is perpetrated or in that wherein commerce is affected thereby. Id. at 919.

9-131.600 INDICTMENTS

9-131.610 Sufficiency of the Indictment

The Supreme Court, Stirone v. United States, 361 U.S. 212 (1960), held that interference with commerce and extortion [or robbery] are essential elements of the Hobbs Act offense and both must be charged in the indictment. "Neither is surplusage and neither can be treated as surplusage." Id. at 218.

Rule 7(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

The general rule with regard to the specificity of an indictment was established in United States v. Callanan, 113 F. Supp. 766 (E.D. Mo. 1953). In Callanan, supra, the indictment was couched in the general terms of the statute, i.e., it alleged "wrongful use of actual and threatened force, violence and fear," without pleading specific facts. (Id. at 767.) The court held that the indictment fell "short of stating the substance of the offense and informing the defendants of the essential facts of the charge they must meet." (Id. at 770.) Under the Callanan test, an indictment is defective and not curable by a bill of particulars if it fails to:

- (1) State the facts on which the government will rely to show wrongful, actual or threatened force, violence and fear, as charged; and
- (2) Plead the facts connecting the condemned conduct with interstate commerce.

But compare Esperti v. United States, 406 F.2d 148 (5th Cir.), cert. denied, 393 U.S. 939 (1969), and Turf Center v. United States, 325 F.2d, 793 (9th Cir. 1963). Accordingly, it has been held that:

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The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

See Anderson v. United States, 262 F.2d 764, 769 (8th Cir.), cert. denied, 360 U.S. 929 (1959). See also United States v. Addonizio, 451 F.2d 49, 58 (3d Cir. 1972).

The rule followed in the Second Circuit is much more liberal, however. In United States v. Palmiotti, 254 F.2d 491 (2d Cir. 1958), the indictment alleged that the defendant:

. . . obtain[ed] from an agent and representative of Robert S. MacLean, Inc., a sum of money belonging to said company, to wit \$190, with its consent, induced by wrongful use of threatened force and fear.

Id. at 495.

The defendant contended that the indictment was fatally defective because it merely alleged "wrongful use of threatened force and fear" rather than the specific factual nature of the threats. The court held that:

[A]n indictment which charges a statutory crime by following substantially the language of the statute is amply sufficient, provided that its generality neither prejudices [the] defendant in the preparation of his defense nor endangers his constitutional guarantee against double jeopardy.

Id. at 495

The court said that the specificity of the indictment with regard to the amounts of money involved and the dates of the alleged extortions protected the defendant in the preparation of his defense and against any possible double jeopardy.

Accord: United States v. Trotta, 525 F.2d 1096 (2d Cir. 1975), cert. denied, sub nom. Trotta v. United States, 425 U.S. 971 (1976).

9-131.620 Variance Between Indictment and Proof

Adverse decisions in regard to variance between the indictment and the proof have generally arisen in connection with the commerce element and the predicates for extortion. In Stirone v. United States, supra, the indictment charged interference with the shipment of sand into Pennsylvania to be used in building a steel plant there. The government's proof showed not only an interference with the importation of sand into Pennsylvania but also an interference with the prospective interstate shipments of steel to be produced by the proposed manufacturing plant. The Supreme Court held that the trial judge committed prejudicial error in submitting the matter to the jury on the alternative grounds of obstructing the movement of the building supplies or the movement of the prospective product when the indictment had charged only obstruction of the building supplies. The Court held that this variation between the pleading and the proof "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury;" Id. at 217. But, the Court indicated that an indictment containing a general allegation of an effect on commerce would have prevented the variance.

It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.

Id. at 218. Where proof will be predicated on a depletion-of-assets theory (see USAM 9-131.190), for example, allegations that the victim depended on articles and commodities in the channels of commerce and that commerce was affected, ect. "by extortion" can be as material as the allegation of specific consequences which may flow from the extortion. See, e.g., United States v. Addonizio, supra, at 75-77 (no variance where general allegation permitted proof of three separate theories of effect).

In jurisdictions requiring the exact factual nature of the effect on interstate commerce to be pleaded, the draftsman of an indictment should take pains to allege as many interferences of interstate commerce as are foreseeable under the factual situation. The same is true with regard to the various modes of committing an extortion under the Act. The attorney trying the case must then confine his/her proof to the specific allegations of the indictment.

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In Bianchi v. United States, 219 F.2d 182 (8th Cir.), cert. denied, 349 U.S. 915 (1955), the indictment charged an extortion by means of threatened physical violence to the victim's person and property as well as wrongful use of fear of economic loss induced by threats of the industrial strife. Id. at 186. Although the government produced no proof of threats of violence, there was a sufficient showing of a reasonable fear of economic loss. The court held that there was no prejudicial variance between the indictment and the proof, saying:

We perceive no sound reason why the doing of the prohibited thing in each and all of the prohibited modes may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.

Id. at 195.

Where an indictment fails to allege all of the appropriate statutory means of committing the offense, however, the indictment which is too narrowly particularized may jeopardize material areas of evidence which were considered by the grand jury. For example, in United States v. Iozzi, 420 F.2d 512 (4th Cir. 1970), the indictment alleged extortion by means of wrongful use of fear of economic loss, while the proof showed threats of violence and force. The court noted that the defendant was sufficiently apprised of the charges against him/her and held that there was no fatal variance between the charge and the proof. While fear of economic loss may be induced by purely economic means such as threat of a strike or work slow down, the court recognized that this same fear of economic loss might reasonably be inflicted by threats of force or violence to a person's business property or employees. Thus, an indictment drawn in terms of extortion by the wrongful use of economic loss may be held sufficient to substantiate a conviction based only on proof of actual or threatened violence against the victim's property or employees where such evidence is probative of economic fear. Accord, United States v. Russo, 708 F.2d 209, 212-214 (6th Cir. 1983). But compare, United States v. Cusmano, 659 F.2d 714 (6th Cir. 1981) where the evidence of the defendants' reputation for violence and reputed affiliation with organized criminal activity, as known to their victims, was permitted to be considered by the jury on the issue of the reasonableness of the victims' fear of economic loss and also as a separate extortionate means, namely, fear of physical violence. Because the indictment narrowly charged the defendants only with threats

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of economic loss, consideration of the evidence on grounds other than the victim's fear of economic loss was held to be a constructive amendment of the indictment. Id. at 719.

The problem of variance again manifested itself in United States v. Critchley, 353 F.2d 358 (3d Cir. 1965). Here the indictment specifically confined the alleged wrongdoing to October 7 and 8, 1962, while the proof disclosed threats on August 10 and October 5. Consequently, the court reversed on the grounds that a "defendant cannot be subjected to prosecution for interference with interstate commerce which the grand jury did not charge." Id. at 362. However, the Third Circuit has declined to adopt a "per se" rule and has held that each case must be considered in terms of prejudice to the defendant. The court has also indicated that amore liberal approach is indicated for indictment in which the relevant time frame is not restricted to particular dates. United States v. Somers, 496 F.2d 723, 745 (3d Cir. 1974) (proof of extortionate demands in late 1968 and early 1969 did not prejudice a defendant charged with extortion "between on or about January 1 and July 31, 1970" where defense was not surprised and did not rely on a defense for which the time frame was material). See also, United States v. Barna, 442 F. Supp. 1232, 1236 (M.D. Pa.), aff'd without opinion, 578 F.2d 1376 (3d Cir. 1978) (variance between proof of payment on March 2, 1972 and July 15, 1972 held not fatal).

9-131.630 Extract from Sample Indictment Charging Extortion by Use of Actual and Threatened Violence

See United States v. Green, 350 U.S. 415 (1956).

INDICTMENT

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

| | | |
|---------------------------|---|------------------|
| United States of America |) | Docket No. 5236 |
| |) | |
| v. |) | |
| |) | |
| Jack Green and General |) | VIO: Sec. 1951, |
| Laborers' Local No. 397 |) | Title 18 U.S.C., |
| of Granite City, Illinois |) | Interference |
| Association of Workingmen |) | with Commerce by |
| |) | Threats and |
| |) | Violence |

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affiliated with International)
Hod Carriers Building and)
Common Laborers Union of)
America)

Count One

That on or about, April 13, 1953, at and adjacent to Chain of Rocks Canal, in the County of Madison, in the State of Illinois, in the Southern Division of the Southern District of Illinois and within the jurisdiction of this court, being a projected channel and conduit for traffic in interstate commerce on the Mississippi River and its tributaries, Jack Green and General Laborers' Local No. 397 of Granite City, Illinois, a Labor Union and Voluntary Association of Workingmen Affiliated with International Hod Carriers Building and Common Laborers Union of America, hereinafter called the Defendants, did unlawfully and willfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce as that term is defined in and by 18 U.S.C. §1951, to wit: interstate commerce, and the movement of articles and commodities in such commerce by extortion, as that term is defined and and by said section of 18 U.S.C., that is to say, by then and there attempting to obtain from another, to wit, one Arthur W. Terry, Jr., then doing business under the name, style and description of Terry Engineering Co., and then and there engaged in executing a contract with the United States of America for the maintenance of a levee bordering said canal and theretofore erected and constructed as a part thereof, certain property of the said Arthur W. Terry, Jr., to wit, his money, in the form of wages to be paid for imposed, unwanted, superfluous and fictitious services of laborers commonly known as swampers, in connection with the operation of machinery and equipment then being used and operated by said Arthus W. Terry, Jr. in the execution of his said contract for maintenance work on said levee, the attempted obtaining of said property from said Arthur W. Terry, Jr. as aforesaid being then intended to be accomplished and accomplished with the consent of said Arthur W.

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Terry, Jr., induced and obtained by the wrongful use, to wit, the use for the purpose aforesaid, of actual and threatened force, violence and fear made to said Arthus W. Terry, Jr. and his employees and agents then there being in violation of 18 U.S.C. §1951.

9-131.640 Extract from Sample Indictment Charging Conspiracy to Extort by Means of Threats of Economic Injury

INDICTMENT
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA) Cr. No. 321-67
)
) 18 United States
) Code, Sections 2,
) 371, and 1951;
) Title 29, United
) States Code
) 186(a)(b)(c)
PETER W. WEBER)

COUNT VI

The Grand Jury further charges:

1. At all times pertinent hereto, the Bechtel Corporation, a Delaware corporation, with principal offices at San Francisco, California, was engaged in the general construction business in various states of the United States, and more particularly was engaged in the construction, and the preparation for construction, within the State of New Jersey of approximately ninety miles of petroleum products pipeline to be utilized in connection with the aforesaid interstate petroleum products pipeline of the Colonial Pipeline Company; and that for the purpose of performing the aforesaid petroleum products pipeline construction, the Bechtel Corporation transported, moved, and caused to be transported and

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moved, articles, commodities, men, materials, supplies and machinery in interstate commerce between various states of the United States and the State of New Jersey, and more particularly from outside the State of New Jersey to the site of said pipeline construction within the State of New Jersey.

2. At all times pertinent hereto, the said Bechtel Corporation was an employer of members of Local Union 825, International Union of Operating Engineers, who were employed in an industry affecting commerce, to wit, the aforesaid petroleum products pipeline construction on behalf of the Colonial Pipeline Company.

3. At all times pertinent hereto, JAMES V. JOYCE was the owner of Joyce Pipeline Company, a sole proprietorship, engaged in the general business of pipeline construction, with principal offices located at Andover, New York; and was at all times subsequent to the receipt of a subcontract from the Bechtel Corporation, on or about October 4, 1963, in connection with the aforesaid Colonial Pipeline Company's petroleum products pipeline construction project, an employer of members of Local Union 825, International Union of Operating Engineers, who were employed in an industry affecting commerce, to wit, the aforesaid petroleum products pipeline construction on behalf of the Colonial Pipeline Company.

4. At all times pertinent hereto, THOMAS E. STANTON was an agent and employee of JAMES V. JOYCE and the Joyce Pipeline Company.

5. At all times pertinent hereto, the defendant, PETER W. WEBER, was Business Manager of Local Union 825, International Union of Operating Engineers, and a representative of members of that Local Union who were employed in an industry affecting commerce by the Bechtel Corporation and the Joyce Pipeline Company, to wit, the interstate petroleum products pipeline construction on behalf of the Colonial Pipeline Company.

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6. At all times pertinent hereto, FRANK BISONIC was a Steward of Local Union 825, International Union of Operating Engineers, and a representative of employees who were employed by the Bechtel Corporation in an industry affecting commerce, to wit, the construction of the interstate petroleum products pipeline on behalf of the Colonial Pipeline Company.

7. That commencing on or about August 26, 1963, and continuously thereafter to on or about December 31, 1964, the exact dates being unknown to the Grand Jury in the State and District of New Jersey, and elsewhere, the defendant, PETER W. WEBER, and the following named co-conspirators, FRANK BISONIC, JAMES V. JOYCE and THOMAS E. STANTON, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together, and with each other, and with divers other persons to the the Grand Jury unknown, to obstruct, delay and affect commerce, as that term is defined in section 1951 of title 18, United States Code, and the movement of articles and commodities in such commerce, by extortion, as that term is defined in section 1951 of title 18, United States Code.

8. It was part of said conspiracy that the said defendant and the co-conspirators would obtain the property of the Bechtel Corporation, to wit, a quantity of United States currency, with the consent of the Bechtel Corporation, its officers and agents, such consent to be induced by the wrongful use of the fear of financial and economic injury to the business of the Bechtel Corporation by the said defendant and the co-conspirators, in that the said defendant and the co-conspirators would threaten to impose, and would in fact impose, labor disputes, work stoppages, work slowdowns, and other unwarranted labor difficulties on the Bechtel Corporation, in connection with the construction by the Bechtel Corporation of the aforesaid interstate Colonial pipeline project, unless and until the Bechtel Corporation, its officers and agents, awarded a subcontract to JAMES V. JOYCE and the Joyce Pipeline Company.

All of the above in violation of section 1951, title 18, United States Code.

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9-131.700 JURY INSTRUCTIONS

The following are the instructions on substantive violation of Hobbs Act by extortion through the wrongful use of fear of economic loss given by District Judge Wortendyke in United States v. Weber:

The fifth count of this indictment charges that the defendant interfered with interstate commerce by an act of extortion; that is, by his forcing Colonial to abandon its contract with the Osage Construction Company and to award that identical contract to Napp-Grecco at a substantially higher price. The specific statute which his conduct is alleged to have violated is the Anti-Racketeering Statute, which is also known as the Hobbs Act, 18 U.S.C. §1951.

That statute, in its pertinent parts, reads as follows:

Whoever, in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by * * * extortion or attempts * * * so to do * * * violates the law.

(1) Commerce

The word "commerce" as it is used in this law means interstate commerce.

The elements of the offense charged in this count, which the government has the burden of proof to establish, are:

1. That during the period from June 4, 1964, and July 31, 1964, the Colonial Pipeline Company, a corporation, was engaged in the business of owning, operating, and adding to an interstate petroleum products pipeline, for the purpose of carrying petroleum products in interstate commerce.

2. That during this period of time, and by reason of acts on the part of the defendant, property was obtained from Colonial by extortion.

3. That this extortion did in some way or degree obstruct, or delay, or affect the business in which the Colonial Pipeline Company was engaged.

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If you find that the defendant did not force Colonial through the wrongful use of threats of unwarranted labor disputes, to surrender its contract with Osage and award that contract to Napp-Grecco, then you must render a verdict of acquittal on Count V. Furthermore, if you only find that the defendant forced Colonial to surrender its contract with Osage, but are unable to find beyond a reasonable doubt that he induced Colonial through the wrongful use of fear to award the contract to Napp-Grecco, then you must render a verdict of acquittal on Count V.

In order to find the defendant guilty of this charge you must determine that the defendant forced Colonial through the wrongful use of fear to by-pass the second lowest bidder for the Linden Delivery Project, the Joyce Construction Company, and to award the contract to the Napp-Grecco Corporation. If you find that Colonial awarded the Linden Delivery Project contract to Napp-Grecco merely because of the uncoerced refusal of the Joyce Construction Company to accept its contract, then you must render a verdict of not guilty on Count V.

Now, I have told you that there are three elements to the crime charged in this fifth count. The first of these involves Colonial's participation in interstate commerce.

There seems to be no serious dispute about this element of the offense.

The remaining two elements of the crime are concerned with an extortionate taking of Colonial's property as alleged by the government, which did "obstruct, delay or affect commerce."

If you find, beyond a reasonable doubt, that the Colonial Pipeline Company was a firm that was engaged in a business involving interstate commerce, that is, the operating or the building of an interstate petroleum pipeline, you must then determine from the evidence whether, by reason of an act or acts done on the part of the defendant, property was obtained from

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Colonial by extortion and whether this obtaining of Colonial's property, if done, did, in some way or degree, either obstruct, or delay, or affect the business in which Colonial was engaged during the period covered by this count.

(2) Extortion

The word "extortion" is defined in this statute. I will now read that definition to you:

"The term 'extortion' means the obtaining of property from another with his consent, induced by the wrongful use of actual or threatened . . . fear."

(3) Property

The property in question under this count is a contract to construct the Linden Delivery System, Project 1. When the statute prohibits the taking of the property of another by means of fear, the word "property" includes a contract.

A contract is a valuable property right. It can be taken, just as any other property can be taken.

Where a contract is obtained by way of extortion from a firm which is engaged in interstate commerce, then the taking of that contract and the payment of money pursuant to that contract does, as a matter of law, obstruct, delay, or affect both the business of the firm which is forced to give the contract and, therefore, interstate commerce as well.

When property is obtained by way of extortion, it is not necessary for the government to show that the person who committed the act of extortion actually derived any direct benefit himself. "Extortion," as defined by the statute, prohibits the taking of the property of another either for one's own benefit or the benefit of someone else.

In simple language, that means that just as a man cannot use fear to acquire money or contracts for himself, so, too, he may not lawfully use such fear to

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compel or to induce a firm engaged in interstate commerce to give its property, or its money, or a contract to pay its money to another firm.

Thus, it is no defense to one charged under this statute that he did not compel the payment of anything to himself, or that he has not been proved to have received any direct or even indirect benefit.

However, you may, as I will instruct you later, consider the question of whether or not the defendant has been shown to have received any direct or indirect benefit in resolving the question of whether or not there was intent to obtain money by the wrongful use of fear. This may bear on motive.

It is the burden of the government to prove to you, beyond a reasonable doubt, that the defendant, acting wrongfully, deliberately and intentionally used a reasonable fear within Colonial to induce it to part with its property.

The government, therefore, must prove to you, beyond a reasonable doubt, that Weber "wrongfully" used an "actual fear" of Colonial's, and that he did so "intentionally and deliberately" in order to induce Colonial to put aside its contract with Osage and to award that identical contract to Napp-Grecco.

You will note that I have stressed the phrases "wrongfully," "actual fear," and "deliberately and intentionally."

(4) Wrongfully

Ladies and gentlemen, the word "wrongfully" has a special meaning in this statute.

A labor leader or a bargaining representative may lawfully use all of the coercive power at his command, including the imposition of strikes, when he acts solely and exclusively to advance the interests of the working men whom he represents. It is from the men that he holds his power, as in trust, and he may impose economic coercion on employers when he acts in

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the interest and in behalf of the men whom he represents. Indeed, it may often be his duty to do so, or to threaten to do so. There is, therefore, nothing unlawful in the employment of non-violent economic pressure by a bargaining representative when he acts with the sole and exclusive interest of improving the wages, hours, and conditions of employment of the men whom he represents.

On the other hand, such a representative has no right to impose the kind of economic pressure for a non-legitimate labor purpose, that is, either for his own personal enrichment or for the enrichment of some other private person or firm.

Moreover, the designation of recipients of contracts is not a legitimate labor concern. The use, or the threat of the use of labor unrest for the purpose of influencing such awards is not a legitimate exercising of power.

Every firm has the right to contract, freely, according to its own best interest.

I, therefore, instruct you that while the defendant had the right, under the law, to impose economic coercion for a legitimate labor purpose, he had no right, and would be acting unlawfully, if you find that he used such coercion, deliberately and intentionally, for the purpose of instilling or using fear within Colonial in order to induce Colonial to surrender with Osage and make the award to Napp-Grecco.

(5) Fear

The term "fear" as used in this statute has the commonly accepted meaning. It is a state of anxious concern, alarm, and apprehension of anticipated harm to a business. Anxious concern of anticipated economic loss of adverse effect on a business would constitute fear as this term is used in the statute.

It will be your duty to determine the question of fact as to whether or not the defendant, knowingly and

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intentionally, utilized an actual fear within Colonial with the specific intent of inducing Colonial to part with its property.

(6) Reasonable Fear

When I say an actual fear, I mean a present and a reasonable fear.

The law requires proof, beyond a reasonable doubt, that the fear was reasonable and actual, and that the defendant knew of and intentionally used that actual fear, because the law does not hold any man responsible for the unforeseeable or the unreasonable reactions of those with whom he speaks or deals.

But the law does prohibit the knowing and intentional creation or instillation of fear, or the knowing and intentional use of an existing fear, when this is done with the specific purpose of inducing another to part with his property.

(7) Intent

Intent is a state of mind and may be proved by circumstantial evidence. Indeed, it rarely, if ever, can be proved by any other means.

While witnesses may testify as to what they see a defendant do and what they hear him say, there can be no eyewitness account of the state of mind and the intent with which those acts were done or words were spoken.

But what a defendant does or says may indicate his intent or the lack of his intent to commit the offense charged.

Ordinarily, it is fair to assume that an accused intended all of the natural and probable consequences of the acts and words which he knowingly causes or speaks.

In determining this issue of intent, you should consider all of the proven acts and statements of the accused, in the context of the proven circumstances.

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So, in the context of the evidence before you in this case, you must determine from this evidence what act or course of conduct on the part of the defendant, Peter Weber, would tend to establish or refute intent on his part to instill or use fear in the mind of Glenn Giles and Charles Brecheisen, or other Colonial executives, and thereby induce Colonial to part with its property.

In this regard, you need not find that the defendant made any specific threat either to or against Colonial or Osage. Nor need you find that the defendant made a specific demand upon Colonial that it award the contract to Napp-Grecco, and none other.

A threat may exist and be communicated to another even though the language use, literally construed, would not amount to a threat. It may be communicated to anyone by innuendo from words spoken. It may be communicated to another by acts or by a course of conduct which brings about a state of fear within a victim. And it may be communicated to another by a combination of words spoken and course of conduct on the part of one who seeks to create the understanding in the mind of another that there is a threat.

These, then, will be questions of fact for you, the jury, to decide. You, and you alone, must decide whether or not Colonial was engaged in building an interstate pipeline, and whether or not the defendant, knowingly and intentionally, by his words or conduct, or both, either instilled or used a reasonable fear of economic injury within Colonial to induce Colonial to part with its property which, in this case, is a contract to build its Linden Delivery System.

(8) Direct and Circumstantial Evidence

As I explained previously, there are two types of evidence from which a jury may determine the guilt or innocence of a defendant. One is direct evidence, such as the testimony of a witness who actually observed what occurred or heard statements spoken by the defendant.

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The other type of evidence is circumstantial evidence. Circumstantial evidence has been defined as that evidence which tends to establish a disputed fact by proof of other facts which, if true, have a legitimate tendency to lead to a conclusion that the disputed fact in issue sought to be established is also true. Circumstantial evidence may consist of a particular fact, a series of facts, or a chain of circumstances, and you may consider such facts of circumstantial evidence and infer from them such reasonable conclusions as you believe they tend to establish. Circumstantial evidence in point of value as proof is intrinsically no different from testimonial evidence, and in this case you will consider both direct and circumstantial evidence and determine on full and impartial consideration of this evidence whether or not there has been established therefrom that the defendant is guilty of a violation of law charged by the indictment.

(9) Economic Pressure by Union Official

As I have told you, this Act does not prohibit a union official from using his position or his power to put economic pressure on employers of the men he represents if, but only if, he does so entirely and exclusively for their benefit. But this Act does make it unlawful for a union official to use this power, a power which has been entrusted to him by the men whom he represents, either for his own personal benefit or for the private benefit of some other person or firm. It is this abuse of power which the extortion law aims to curb.

Your duty, then, will be to decide the factual questions in this case. It is for you, and only for you, to decide whether or not this defendant, by dint of his union position, deliberately and intentionally instilled fear within Colonial or Bechtel, or deliberately and intentionally used a fear which he knew to exist within these firms, with the deliberate purpose of either enriching himself, or some other individual or firm.

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It is for you to decide, as a question of fact, whether or not Weber intended to create, or to cause, or to use Colonial's fear of him to induce Colonial to take the contract from Osage and to award it to Napp-Grecco.

(10) Threat

In this regard, you should, of course, consider whatever words Weber is alleged to have used. But that is not the final test under this statute. No precise words are needed to convey a threat. As I have told you, this may be done by innuendo or suggestion. In deciding whether this conversation conveyed a threat, and was intended by Weber to convey a threat, you may and should consider the language together with the circumstances under which it was spoken against the background of the relationship of the parties which you find have existed. If you find that, under these circumstances, the purport of the natural effect of the defendant's language was to convey a threat, then the mere form of the words is unimportant.

Of course, if you do not find, beyond a reasonable doubt, that the defendant intended either to instill fear or use any such fear which he knew to exist to induce Colonial to take the contract away from Osage and award that contract to Napp-Grecco, then you may not find him guilty.

If you find, beyond a reasonable doubt, from the evidence in this case that the defendant was the representative of a labor union as charged in this indictment and, as such a representative, made a demand upon officers or representatives of Colonial, as charged in this count, and if you find that the defendant made express or implied threats to representatives of Colonial with respect to industrial strife on its pipeline project, unless his demand was complied with; and if such demand was wrongful and for the benefit of the defendant personally or for the benefit of another firm, and not for the benefit of the union members and not intended by the defendant for the interest of the members of his union; and if

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you further find and believe from the evidence that the Colonial Pipeline Company agreed to the demand because of fear of economic loss on the pipeline project by and as a result of labor trouble from the craft represented by the defendant, then you may find that the defendant committed extortion, as the word "extortion" is used in the law I have read to you and in the indictment.

If you find and believe from the evidence that the defendant did commit extortion as charged in Count V in the indictment, and you further find that at the time of the extortion the Colonial Pipeline Company was engaged in owning and operating or building an interstate pipeline, then I say to you as a matter of law that interstate commerce would be affected by such act of extortion by the defendant as charged in the indictment.

(11) Conspiracy

The sixth and seventh counts of this indictment alleged that this defendant entered into a conspiracy, that is, an illegal agreement to violate the Anti-Racketeering Statute, and that the defendant did, in fact, violate this statute when he, acting in concert with James V. Joyce, Thomas Stanton and Frank Bionic, forced the Bechtel Corporation to award a subcontract to the Joyce Pipeline Company.

It is the sixth count which alleges the defendant's participation in the illegal agreement and the seventh count which alleges that the name co-conspirators put that agreement into effect.

Now, the sixth count of this indictment charges, and the government must prove beyond a reasonable doubt, that:

(1) during the period from August 26, 1963, to December 31, 1964, the Bechtel Corporation was engaged in preparing to construct and in actually constructing the Colonial interstate oil pipeline; and

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(2) that during this period of time, the defendant entered into an agreement or an understanding that he would, acting together with others, use extortion to obtain a substantial subcontract for Joyce from Bechtel.

The seventh count charges an additional element. That is, this count charges that the defendant, acting together with Joyce, Stanton, and Bisonic, actually put the alleged illegal agreement into effect by the use of extortionate pressure to obtain a \$300,000 subcontract for Joyce from Bechtel.

I have already defined the terms "extortion," "wrongfully," and "actual fear" in regard to Count V of this indictment. Those definitions are the same and are applicable to these counts, Counts VI and VII.

I shall now instruct you as to what the law means by the term "conspiracy."

Now, ladies and gentlemen, a conspiracy is nothing more than a combination, or an agreement by two or more persons to accomplish a criminal or unlawful purpose by unlawful means. In the case before you, it is the alleged agreement to obstruct, delay, or affect commerce by the extortion of a subcontract from Bechtel to the Joyce Pipeline Company.

Ladies and gentlemen of the jury, the substance of my instruction to you of the law relating to the establishment of a conspiracy must be applied by you to the facts in this case in your first determination as to whether or not a conspiracy as charged in this indictment existed.

It is sufficient if on proof of all the relevant facts and circumstances you find, beyond a reasonable doubt, that the minds of at least two alleged co-conspirators met in an understanding so as to bring about a deliberate agreement to do the acts as charged in the indictment.

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Under the sixth count, it is the burden of the government to prove to you, beyond a reasonable doubt, that the defendant reached an understanding and conspired with Joyce, Stanton, and Bisionic, or any one of them, to wrongfully use an actual fear of the Bechtel Corporation to force Bechtel to award a subcontract for river crossing work to James Joyce.

The government need not prove that the defendant came to such a meeting of the minds with each and every one of these men. It is sufficient if you find, as a matter of fact, that he did come to such an understanding with any one of them.

The Government, therefore, need not show that the defendant and all the alleged co-conspirators all sat around one table, at one time, and entered into a solemn pact, either orally or in writing. Nor do I mean that the Government must prove that the defendant met and discussed, with each alleged co-conspirator, all the details of the alleged plan, or all of the means by which it would be carried out, or all of its illegal objects.

Indeed, it would be extraordinary if there had been such a formal meeting, or document, or even specific oral agreement. A conspiracy is, by its very nature, usually secret in its origin and in its execution.

It is sufficient if the Government proves to you, beyond a reasonable doubt, that the accused came to a mutual, but a tacit, understanding that he would accomplish the unlawful objectives.

It is not necessary for the Government to prove that each alleged party to the agreement knew the names, or even the exact function of each and every other alleged participant in the agreement. Such proof is not required to establish that there was a mutual understanding or agreement.

It is sufficient if the Government proves to you, beyond a reasonable doubt, that the accused knowingly associated himself with an enterprise, and that he knew that the scope of this enterprise, to be

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successful, would require the assent and participation of others who would be unknown to him.

It is sometimes the case that, in an effort to preserve secrecy and to thereby ensure safety, participants in a conspiracy keep their identity and exact functions secret even from some of their partners in the venture.

Now, when I say the Government must prove that the defendant entered into an illegal agreement, I do not mean that the defendant must be shown to have met and talked with each of the other alleged conspirators. Nor is it necessary that the Government prove that each and every one of the other named individuals actually agreed to participate in a common undertaking. It is sufficient if the Government proves that the defendant came to an express or implied meeting of the minds with any one of them, Stanton or Joyce or Bisonic, that they would use extortionate pressure to force Bechtel to award a contract to Joyce.

Thus, for example, the evidence does not establish nor does the Government claim that the alleged conspirators, Weber, Joyce, Stanton, and Bisonic, all sat down together and plotted the means by which they were going to extort a contract from Bechtel.

The evidence shows only the individual acts and declarations of the defendant and the other alleged co-conspirators.

It will be for you to decide based upon these acts and declarations whether or not the defendant and either Joyce or Stanton or Bisonic or all of them together agreed to participate in a common undertaking in violation of this statute.

Generally, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators. These acts, however, when taken together and in connection with each other may show a conspiracy to secure a particular result as satisfactorily and conclusively as more direct proof.

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The first question for you to decide is whether or not there was an agreement. That is, you must decide the question of fact as to whether or not the Government has proved that some time between August 26, 1963, and December 31, 1964, there did exist an agreement between the defendant and either Joyce, or Stanton, or Bisonic, to do acts within this state which would violate the federal statute which prohibits the use of extortionate conduct.

In determining whether or not the defendant was a member of the conspiracy, you are not to consider what others may have said or done. This means that the membership of any defendant in a conspiracy must be established by the evidence of his own conduct, what he himself said or did, and you must make this determination, ladies and gentlemen, without regard to and independently of the statements, acts or declarations of the other alleged co-conspirators.

Participation in the conspiracy by the defendant must be established by proof which is based upon the reasonable inferences drawn from the defendant's own acts and conduct, his own statements and declarations, his connection with the acts and conduct of other alleged co-conspirators and his acquiescence therein.

In this regard you should, of course, consider whatever words Weber is alleged to have used. But that is not the final test under this statute. No precise words are needed to convey a threat. As I have told you, this may be done by innuendo or suggestion. In deciding whether this conversation conveyed a threat, and was intended by Weber to convey a threat, you may and should consider the language together with the circumstances under which it was spoken against the background of the relationship of the parties which you find to have existed. If you find that, under these circumstances, the purport or the natural effect of the defendant's language was to convey a threat, then the mere form of the words is unimportant.

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From the evidence presented in this case, and only from the evidence so presented, you must first decide whether there was a conspiracy, and if you so find, then you must decide whether the defendant joined this conspiracy.

The guilt of a conspirator is not determined by the extent or scope of his participation. Some conspirators play larger roles than others.

A conspirator need not become a member of the illegal agreement at its inception. Once he joins, however, he effectively adopts the previous acts and declarations of his fellow conspirators.

It makes no difference that a conspirator may have joined the conspiracy after it had been already formed. If you find that the accused joined a conspiracy after its beginning, you may hold the accused as responsible as the originator for all the acts which preceded his joining.

If you find that this defendant did come to a meeting of the minds with Joyce, Stanton, or Bionic, that he, acting in concert with one or more of them, would use extortionate pressure to induce Bechtel to award a contract to Joyce, then you may consider the acts and statements of any party to this agreement done in furtherance of the objects of the conspiracy as binding against the defendant.

Thus, if you find that, in fact, there was such a partnership in crime, then during the period of its existence each co-conspirator found by you to be a member of the partnership speaks and acts not only for himself, but also for his partners, even though they were not present.

9-131.800 THE HOBBS ACT IN RELATION TO TAFT-HARTLEY (29 U.S.C. §186)

Section 302 of the Taft-Hartley Act is a criminal provision, malum prohibitum, which proscribes the acceptance of any thing of value or its request or demand by an employee's representative from any employer. The Hobbs Act contemplates extortion or coercive demands for property. Taft-

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Hartley is a misdemeanor and is separate and independent fro the Hobbs Act felony.

The extortion of money from any employer by a union representative may give rise to prosecutions for both Hobbs and Taft-Hartley violations. "The fact that the same conduct may give rise to separate and independent violations of law does not render the charges or convictions based thereon inconsistent or mutually exclusive." United States v. Kramer, 355 F.2d 891, 896 (7th Cir. 1966) (union official convicted under Hobbs and Taft-Hartley for extorting money from employer). The language of Taft-Hartley is broad and it contemplates coercive demands for as well as passive receipt of payment.

An exception to this generally applicable rule arises when a charge of extortion and a charge under 29 U.S.C. §186(a)(4), which prohibits payment "with intent to influence [any officer or employee of a labor organization] in respect to any of his actions, decisions, or duties," are sought to be included in one indictment. In essence, the former must involve a coercive demand while the latter is in the nature of a bribe offered or given by the employer on his own initiative, and they are, therefore, mutually exclusive.

It is also noteworthy that the Taft-Hartley offense is not a lesser included offense in cases where a union official is charged with extortion and the victim is an employer. Hence, a defendant union official in a Hobbs prosecution is not entitled to an instruction on Taft-Hartley even if the facts would have justified charging and convicting the defendant for the Taft-Hartley violation. See, Bianchi v. United States, 219 F.2d 182 (8th Cir.), cert. denied, 349 U.S. 915 (1955).

An extortionate payment between employer and representative which also violates 29 U.S.C. §186 is outside the exception to the Hobbs Act carved out in United States v. Enmons, 410 U.S. 396 (1973). Since the payment is prohibited by federal criminal law (Taft-Hartley), it cannot be a "legitimate labor objective" under Enmon, United States v. Quinn, 514 F.2d 1250 (5th Cir. 1975). See USAM 9-132.000.

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9-132.000 29 U.S.C. §186: LABOR MANAGEMENT RELATIONS ACT (TAFT-HARTLEY ACT)

9-132.010 Investigative Jurisdiction

Investigative jurisdiction is with the Federal Bureau of Investigation.

9-132.020 Supervisory Jurisdiction

Supervisory jurisdiction over the statute is with the Labor Unit of the Organized Crime and Racketeering Section, Criminal Division.

9-132.030 Authorizing Prosecution [Reserved]

9-132.040 Legislative History

In 1947, the United Mine Workers of America, during contract negotiations with employers, demanded a provision which would require mine operators to pay a certain amount of money per ton of coal mined into a pension fund controlled and managed solely by the officials of UMWA. Recognizing the need for supervision over the use of such potentially large amounts of money, Congress responded with section 302 of the Labor Management Relations Act, popularly known as the Taft-Hartley Act (29 U.S.C. §186). See S. Rep. No. 105, 80th Cong., 1st sess. 52, 92 Cong. Rec. 4892-94 (1947). The original bill contained the following two subsections prohibiting bribery of union officials and "shakedowns" of employers:

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative or any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or agree to receive or accept, from the employer of such employees any money or other thing of value.

In time, it became apparent that the bribery and "shakedown" sections had loopholes. Employers were using middle persons to avoid the narrow

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proscriptions of section 302(a) (see S. Rep. No. 187, 86th Cong., 1st Sess. at 11 (1959)) and union officers and employees were "shaking down" employers of non-union employees, thus evading the "representative of an employer's employees" language of section 302(c). Id. at 13-14.

Consequently, when Section 302 of the Labor Management Relations Act was amended as part of the Labor-Management Reporting and Disclosure Act of 1959, Congress extensively revised subsections (a) and (b). In the words of the Senate Subcommittee on Labor, the proposed revisions were meant to strengthen the statute "by making it applicable to all forms of extortion and bribery in labor-management relations, some of which may slip through the present law." Id. at 13. It appears that Congress was, by its amendment, attempting to make explicit what Judge Learned Hand had declared was the purpose of the statute, i.e., "to prevent employers from tampering with the loyalty of union officials and disloyal union officers from levying tribute from employers." United States v. Ryan, 225 F.2d 417, 426 (2d Cir. 1955) (dissenting).

Legislative comments on the 1959 amendments to Section 302 may be found in S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess. (1959); and H.R. Rep. No. 1147 and S. 1555, 86th Cong., 1st Sess. (1959); 2 U.S. Code Cong. & Ad. News 2318, et seq., (1959). Bill provisions, reports and debates are compiled in Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (2 Vols.), (National Labor Relations Board, 1959); and in Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 841-1083 (U.S. Department of Labor, 1964).

As amended, 29 U.S.C. §186(a) makes it unlawful for an employer, as defined in 29 U.S.C. §152, or an association of such employers, or a labor relations consultant acting in the interest of such an employer to pay, lend or deliver or agree to pay, lend or deliver any money or other thing of value to:

- A. Any representative of his/her employees;
- B. Any union, or officer or employee thereof, which represents, seeks to represent or would admit his/her employees to membership;
- C. Any of his/her employees in excess of their normal compensation to cause them to influence other employees in the exercise of their rights to bargain collectively; and
- D. Any union officer or union employee intending to influence him/her in his/her actions as a representative of employees.

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Just as an employer's payment of or his/her agreement to pay, lend or deliver money or anything of value to a union representative is unlawful, so, too, is the demand, request or acceptance of or agreement to accept such a payment. Demands by a union, its officers or employees, for payment of unloading fees from interstate truck owners or operators are also proscribed. Excepted from prohibition is the payment of compensation to employees. See 29 U.S.C. §186(b)(2).

Because 29 U.S.C. §186(a) and (b) contain such broad proscriptions on payments by employers and the acceptance of such payments by labor unions and their officers, it was necessary for Congress to spell out in 29 U.S.C. §186(c) exactly what kinds of payment could legally be made. The payments permitted by 29 U.S.C. §186(c) include:

A. Wages or other legitimate payments to employees whose established duties include openly representing their employer in labor relations and payments to employees who also are employee representatives or officers or employees of union for services rendered to the employer;

B. Payments in settlement of a court judgment or a claim (in the absence of fraud or duress);

C. The market value of commodities;

D. Dues checked off under valid authorizations;

E. Contributions to pension trusts and various kinds of welfare benefit plan trusts which are jointly administered and meet certain other specific requirements; and

F. Contributions by an employer to a plant, area, or industry-wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978 (29 U.S.C. §175(a)).

In the words of the proponents of the amendments:

The purpose of these amendments to Section 302 is to forbid any payment or bribe by an employer or anyone acting on his behalf, whether, technically an agent or not. The demand or acceptance of such bribes is also proscribed.

105 Cong. Rec. 866 (1959).

The Supreme Court, in Arroyo v. United States, 359 U.S. 419, 425-26 (1959), wrote:

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Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employer representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.

9-132.041 1984 Amendments

Effective October 12, 1984, 29 U.S.C. §186 was amended to impose felony penalties. Recognizing that "Federal prohibitions and penalties designed to protect the legitimacy of labor relations have . . . proved to be inadequate," Congress amended 29 U.S.C. §186(d) by increasing the maximum penalty for violations of 29 U.S.C. §186(a) and/or 186(b) to imprisonment for five (5) years and a \$15,000 fine where the value of a bribe or prohibited payment exceeds \$1,000. S. Rep. No. 98-83 on S.336, Committee on Labor and Human Resources, 98th Cong., 1st Sess. 12 (1983). Payments of \$1,000 or less continue to be punished as misdemeanors. 29 U.S.C. §186(d)(2), as amended by the Comprehensive Crime Control Act of 1984, §801, Pub. L. No. 98-473.

The amendments also affected violations of 29 U.S.C. §186 which involve the transmittal of certain prohibited payments through labor organizations, employee pension and welfare benefit trusts, or labor-management cooperation committees. These types of transactions, which focus on a failure to comply with the restrictions in 29 U.S.C. §186(c)(4) through (c)(9), and which occur on or after October 12, 1984, are no longer subject to criminal liability unless the defendant intends to benefit himself/herself or other persons who he/she knows are not entitled to benefit from the transaction. See 29 U.S.C. §186(d)(1), as amended.

A substantial portion of the legislative history of the amendments is summarized in the following three Senate Committee reports: S. Rep. No. 98-225 on S.1762, Committee on the Judiciary, 98th Cong., 1st Sess. 297-299 (1983); S. Rep. No. 98-83 on S.336, Committee on Labor and Human Resources, 98th Cong., 1st Sess. (1983); and S. Rep. No. 97-497 on S.1785, Committee on Labor and Human Resources, 97th Cong., 2d Sess. (1982). The Department of Justice's views on the legislation were expressed by D. Lowell Jensen, Assistant Attorney General of the Criminal Division, in testimony before the Senate Committee on Labor and Human Resources. Hearing on S.336 before the Senate Subcommittee on Labor, 98th Cong., 1st Sess. 96-116 (March 15, 1983) and Hearing before the Senate Subcommittee on Labor on S.1785, 97th Cong., 2d Sess. 64-94 (Feb 3, 1982).

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9-132.100 DEFINITIONS

Although 29 U.S.C. §186 was greatly expanded through the amendments contained in Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, the terms contained in the amendments are not defined in the LMRDA definitional section, 29 U.S.C. §402, which specifically excludes 29 U.S.C. §186 by limiting its coverage to Chapter 11 of Title 29. When this fact becomes noteworthy with respect to a particular definition, the differences will be pointed out.

9-132.110 Interstate Commerce

The terms "commerce" and "affecting commerce" as used in 29 U.S.C. §186 are defined in 29 U.S.C. §142(1) and are broadly construed by the courts. In N.L.R.B. v. Fainblatt, 306 U.S. 601 (1937), the Supreme Court said that Congress did not intend "to make the operation of the [NLRB] depend on any particular volume of commerce affected more than that to which courts would apply the maximum de minimus." And in N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224 (1962), the Court noted that, by passing this Act, "Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."

This broad language was specifically cited in United States v. Ricciardi, 357 F.2d 91 (2d Cir.), cert. denied, 384 U.S. 942 (1966). The defendant, a representative of a union of apartment-house owners, argued that he did not represent employees "employed in an industry affecting commerce" because the members of his union were only employed in New York City apartment-houses. Citing Reliance Fuel, supra, the court seized on the only possible connection with interstate commerce in the case. Because the apartment houses bought and used large amounts of fuel oil, said the court, a labor dispute in the New York apartment-house industry would interfere with the sale and distribution of out-of-state fuel oil on more than a de minimus basis. Accord Cutler v. American Federation of Musicians, 316 F.2d 456 (2d Cir. 1963); Orchestra Leaders of Greater Philadelphia v. Philadelphia Musical Society, 203 F. Supp. 755 (E.D. Pa. 1962).

The interstate commerce aspect of 29 U.S.C. §186 is phrased in terms of "employees employed in an industry affecting commerce." The section never states that the employer must be involved in an industry affecting commerce. As to whether an employee can be "employed in an industry affecting commerce" when his/her employer's business is on a purely local level, the court in Sheet Metal Contractor's Ass'n. v. Sheet Metal Workers International Ass'n., 248 F.2d 307 (9th Cir. 1957), held that the jurisdiction of 29 U.S.C. §186 is not keyed to the character or form of a particular employer's business but, instead, is built around a characterization of the employees to whose representative payments are made.

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That is, where an employer whose interstate business is truly de minimus bargains with a union through an employer's association whose membership includes interstate employers, then his/her employees are employed in an industry affecting commerce. The rationale for this interpretation of the jurisdiction grant is the belief that Congress could not have intended to provide that the "levying of tribute" is forbidden only where the employers are large and their business substantial. *Id.* at 309.

9-132.120 Employer

The definition of "employer" under 29 U.S.C. §186 is the same as that used in proceedings before the National Labor Relations Board. See 29 U.S.C. §142(3) and §152(2) where "employer" is defined as including "any person acting as an agent of an employer, directly or indirectly." The definition excludes the United States, state and local governments, government-owned corporations, Federal Reserve banks, and railway and airline carriers which are subject to the Railway Labor Act (45 U.S.C. §151 et seq.). For provisions covering prohibited payments in the railway and airline industries, see USAM 9-139.000, infra.

9-132.130 Labor Organization

29 U.S.C. §142(5) defines this term as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The definition is self-explanatory and the only difficulty that arises in this regard is that 29 U.S.C. §402(i) contains a much broader definition of "labor organization" for purposes of the LMRDA. As pointed out at USAM 9-132.000, the definitions in 29 U.S.C. §402 do not apply to 29 U.S.C. §186. 29 U.S.C. §402(i) specifically includes a "conference, general committee, joint or system board, or joint council which is subordinate to a national or international labor organization, other than a state or local central body." Thus, joint councils, general committees, etc., may not be covered by 29 U.S.C. §186(a)(2) (disputes, wages, rates of pay, hours of employment, or conditions of work). However, because any person holding a position in a joint council, etc., is also likely to be a "representative of employees," a payment to such a person would violate 29 U.S.C. §186(a)(1).

9-132.140 Officer

Again, although 29 U.S.C. §402(q) defines "officer" as "any constitutional officer, any person authorized to perform the functions of president, vice-president, secretary, treasurer, or other executive

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functions of a labor organization, and any member of its executive board or similar governing body," this definition applies only to the LMRDA. The definitional sections of the Taft-Hartley Act do not contain any definition of "officer;" however, N.L.R.B. v. Coca-Cola Bottling Co., 350 U.S. 264 (1956), held that the term "officer" as used in that Act applies only to those persons so designated in the union's constitution. This means that persons who perform the functions of officers but are not so designated are not covered by the Taft-Hartley Act. See also S. Rep. No. 187, 86th Cong., 1st Sess. at 95, wherein the Senate recognized that the Coca-Cola interpretation of the Taft-Hartley Act would permit a union to rewrite its constitution so as to provide for only one officer, thus allowing all of the other persons who perform "officer's" duties to escape the proscriptions of the Taft-Hartley Act.

9-132.200 THE PAYORS - 29 U.S.C. §186(a)

Section §186(a) of Title 29 provides as follows:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value,

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

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(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

9-132.210 Employer, Association of Employers and "Agents" of Employers

Originally, the statute made reference only to "employers." See USAM 9-132.000 supra. The amended statute, however, provides for an expanded class including employers, employer associations, etc. This amendment was intended to remove any doubt that the term "employer" included any person acting as an agent of an employer, either directly or indirectly. See S. Rep. No. 187, supra at 43.

To determine who is an employer under the Act, the courts have examined "the actual relations of the parties [and] not the words of their contracts...." Carroll v. Associated Musicians of Greater New York, 183 F. Supp. 636, 641, (S.D.N.Y.), aff'd, 284 F.2d 91 (2d Cir. 1960). For example, the Second Circuit held in Cutler v. American Federation of Musicians, 316 F.2d 546 (2d Cir. 1963.), cert. denied, 375 U.S. 941, that an orchestra leader engaged in the single engagement field is an "employer" for purposes of the Taft-Hartley Act under the following circumstances. The defendant union imposed a 1 1/2% "tax" on the union scale wages of the orchestra leader and the members of his orchestra, the "tax" to be paid out of the lump sum the orchestra leader received from the promoters of the concert. Noting that the orchestra leader negotiated the contracts with the "purchasers" (promoters) of the performances, paid the individual members of the orchestra out of the lump sum received and otherwise had "effective control" of the orchestra, the court concluded that the leader was the "employer" regardless of the fact that the union's standard form contract referred to the "purchaser" of the orchestra as the employer. Thus, the payment of the "tax" by the orchestra leader, "as an employer," to the union was a prohibited payment under 29 U.S.C. §186, and this was true even though the orchestra leader himself was also a member of the union.

An individual's status as "employer" for one purpose does not, however, mean that he/she will always be an "employer" for all purposes under the statute. In Zentner v. American Federation of Musicians, 237 F.Supp. 457 (S.D.N.Y.), aff'd, 343 F.2d 758 (2d Cir. 1965), the court held that 29 U.S.C. §186 did not bar the exaction of "work dues equivalents" by locals from members of the Federation performing within their jurisdiction. Here the "work dues equivalents" were levied upon the orchestra leader, not in

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his capacity as an "employer" but rather as a member of the Federation like the other members of the orchestra. The court held that, "so long as the levy applies to employer and employee members alike, in practice as well as in theory, Section 302 is wholly inapplicable." *Id.* at 463. The "tax" in Cutler, supra, did not meet this test because it was based on the "employer" share as an employer and did not fall equally on him and the other union members working for him.

The report of the Senate Committee on Labor and Public Welfare indicates that the intent of the 1959 amendment was to forbid any payment or bribe by an employer or anyone who acts in the interest of an employer whether technically an agent or not. S. Rep. No. 187, supra, at 43. The report took note of the McClellan Committee's findings regarding management middle-persons "flitting about the country on behalf of employers to defeat attempts at labor organization." *Id.* at 10. The amendment permits the prosecution of management middle-persons who make illicit payments without the troublesome burden of proving that "the payments were authorized or ratified by the employer or otherwise within the scope of the middle person's employment." *Id.* at 11.

In United States v. Lozai, 420 F.2d 512 (4th Cir. 1970), the defendant union official was charged with receipt of unlawful payments under 29 U.S.C. §186(b). He defended on the grounds that he had no knowledge that the money came from an employer of members of his union and that there was not sufficient evidence to show that the employer had made the payment. The court, noting the evidence that the money came out of the employer's own bank account, cited the amended version of 29 U.S.C. §186(a) to the effect that it not only prohibits receipt of money from an employer, but also from anyone who acts in the interest of an employer. See also United States v. Lavery, 161 F.Supp. 283 (M.D. Pa. 1959), for a case holding that 29 U.S.C. §186 included employer associations and "agents" of employers even before the 1959 amendment.

Payments to union officials by employers and persons acting in the interest of employers through non-employer corporate instrumentalities have been successfully prosecuted under 29 U.S.C. §186. See, e.g., United States v. Overton, 470 F.2d 761, 765-766 (2d Cir. 1972) where employer payments made in the form of "dividend distributions" through a corporation in which the union official shared ownership with the employers, were held to be a disguised prohibited payment whose purpose was to secure labor peace and to exploit the union official's influence; see also United States v. Ferrara, 458 F.2d 868, 872-73 (2d Cir. 1972) (prohibited payments made through non-employer entity whose shareholders and principal officers also owned, controlled or were key officers of the employer corporation); United States v. McMaster, 343 F.2d 176 (6th Cir. 1965) (employer payments disguised as

fees for truck rentals from a non-employer corporation controlled by the union official). For an illustration of prohibited payments being received from a non-employer (band promoter) who acted in the interest of employer (band leaders), see United States v. Bloch, 696 F.2d 1213 (9th Cir. 1982).

9-132.220 Pay, Lend or Deliver

29 U.S.C. §186(a) covers all payments not excepted by 29 U.S.C. §186(c). It is not limited merely to those payments involving bribery or shakedowns. In International Longshoremen's Ass'n v. Seatrain Lines, Inc., 326 F.2d 916 (2d Cir. 1964), the union had attempted to convince dock employers to pay the union a certain sum in lieu of dues lost because of automation. The employers balked at making the payments, saying they would be illegal. The union argued that unless the payments were the result of a bribe or shakedown they would be legal. The court held that any such payments, be they the result of bribery or shakedown or of an arm's-length agreement between the parties, would be illegal, and that to call the payments lawful merely because they were characterized as a compromise settlement of a union claim would be to nullify the effect of the statute since any payment would be called a settlement of a claim or demand made by the union.

Prior to the 1959 amendments, there was a split of authority on the question of whether the Act's language--"pay or deliver any money or other thing of value"--included a bona-fide loan. Because the word "lend" was not in the statute, many in the labor-relations field attempted to circumvent the statute's prohibitions by characterizing improper payments as loans. Such characterizations were not, for the most part, successful. See United States v. Freuhauf, 365 U.S. 146 (1961); United States v. Roth, 333 F.2d 450 (2d Cir. 1964), cert. denied 380 U.S. 942; and United States v. Golden, 45 L.R.R.M. 2868 (N.D. N.Y. 1959); where it was held that a pre-1959 "loan" was proscribed by 29 U.S.C. §186 as some "other thing of value." The 1959 amendment adding "lend" to 29 U.S.C. §186(a) should dispel any judicial doubts about Congress' intent to forbid the making or acceptance of even bona fide loans between the employer and the employee's representative.

9-132.230 Other Thing of Value

As mentioned above, the phrase "other thing of value" was sometimes construed prior to the 1959 amendments to include bona fide loans. This interpretation of the phrase was premised on the theory that the use of the money or benefit of having it in hand were things of value. See United States v. Freuhauf, 365 U.S. 146 (1961). Although loans are now directly prohibited by the statute, the rationale behind the pre-amendment "loan" cases is still valid. The payment or acceptance of anything having value is prohibited by the statute.

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In United States v. Roth, supra, the Court stated that "value" is usually set by the desire to have the "thing" and depends on the individual and circumstances in a case considering an interest-free loan having ascertainable market value. Similar items of pecuniary value under 29 U.S.C. §186 have included the free use of a leased automobile as measured by the monthly rental payments, United States v. Boffa, 688 F.2d 919, 934-35 (3d Cir. 1982); award of service contracts to a company in which a union official held an undisclosed interest, United States v. DeBrouse, 652 F.2d 383, 387 (4th Cir. 1981); and the savings resulting from a lower "special rate" for accommodation charge to a union official by a hotel employer (where the savings were not a sale or purchase at the prevailing market price within the meaning of 29 U.S.C. §186(c)(3)), United States v. Schiffman, 552 F.2d 1124, 1126 (5th Cir. 1977).

However, in some cases value is not measured solely by a pecuniary standard. In United States v. DeBrouse, supra, the court held that an employer's payment of salary to a third party for which the third party performed no services was a "thing of value" to the union official who had requested that the payment be made despite the fact that the employer received no pecuniary benefit from the salary payment. But compare, United States v. Scotto, 641 F.2d 47, 57 (2d Cir. 1980) where the court expressed doubt about whether "mere goodwill from delivering such contributions [from employers to third party-politicians] is properly within the meaning of 'thing of value' under §186(b)(1)."

It should be noted that employer payments of "salary" for "no show" employment, if received directly by the union official, would violate 29 U.S.C. §186(b)(1) inasmuch as 29 U.S.C. §186(c)(1) excepts only employer compensation by reason of the union official's service as a bargaining unit employee of the employer. Accordingly, DeBrouse should not be interpreted to prohibit a union official's solicitation of bona fide employment for members of the bargaining unit, an objective properly within his/her responsibilities as a union representative. Courts have been careful to construe the phrase "thing of value" in light of the congressional purpose, which is to curtail actual and potential corrupt practices affecting collective bargaining.

One of the issues in Zentner v. American Federation of Musicians, 237 F. Supp. 457, 463 (S.D.N.Y.), aff'd, 343 F.2d 758 (2d Cir. 1965), was whether a union could require a band leader to furnish the names, addresses and locals of the musicians in his employ as well as the scale wages received by each member. Because the band leader was an "employer" under

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the Act, he refused to furnish the lists, claiming that to do so would amount to an illegal payment. The court disagreed, but said that [i]nformation with respect to one's employees may be a thing of value, and in some circumstances may even constitute the subject of a transaction in violation of Section 302...." Id. at 463. However, the court noted, "it would be a perversion of the congressional purpose to construe the phrase 'anything of value' to include the requested information." Id. at 463.

Similarly, in N.L.R.B. v. Wyman-Gordon Co., 270 F.Supp. 280 (D.Mass. 1967), rev'd on other grounds, 397 F.2d 394 (1st Cir.) the court reversed, with instructions to reinstate the District Court's judgment. Id. at 759. The employer contended that to comply with a union request to turn over a list of names and addresses of 1700 employees would violate 29 U.S.C. §186 because the list was a "thing of value." In the context of a representation dispute involving rival unions, the District Court held that:

The possible value of such a list as a mailing list gives this contention some surface plausibility. But it must be rejected as patently contrary to the intent of Congress in enacting the statute....The obvious purpose of the statute was to protect the employees from harm, not help. 270 F. Supp. 280, 286.

The phrase "other thing of value" has also been held to include benefits flowing from the use or application of the money paid. In Conditioned Air and Refrigeration Co. v. Plumbing and Pipe Fitting Labor-Management Relations Trust, 159 F.Supp. 887 (S.D.Cal. 1956), an employer made payments to a trust fund set up under the guidelines of 29 U.S.C. §186(c), but the trust deviated from those guidelines and spent money to enforce the collective bargaining agreement. The court held that, although the money was paid to the trust, the benefits from the application of the money constituted a "thing of value" to the local union, and the payments were, therefore, illegal. This reasoning, it should be noted, is somewhat strained. The decision could have rested on the theory that the payment of the money to an "improper" trust was an illegal payment of money to a "representative" of the company's employees.

9-132.300 THE PAYEES - 29 U.S.C. §186(a)(1)-(4)

There are four distinct classes of individuals, organizations and groups to whom payments are forbidden. See USAM 9-132.200, supra. They will be discussed in the order in which they appear in the statute.

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9-132.310 Any Representative of Any Employee - 29 U.S.C. §186(a)(1)

The original act limited the forbidden payments to this group. Consequently, the precise meaning of "any representative" was the subject of much controversy. One of the earliest contentions made was that only a labor organization could be punished for violation of this section because the organization was the only official "representative" of the employees. United States v. Ryan, 350 U.S. 299 (1956). Refusing to read the term "representative" in this narrow sense, the Supreme Court held that, "In using the term representative Congress intended that it include any person authorized by the employees to act for them in dealings with their employers." Id. at 302. To read the term otherwise, said the Court, would be to ignore the obvious import of the statute's penalty provisions.

In Brennan v. United States, 240 F.2d 253 (8th Cir. 1957), cert. denied, 353 U.S. 931 (1958), the Eighth Circuit held that the term "representative" included any person who is empowered or authorized in any way to represent employees in their dealing with their employers in matters relating to wages, hours or working conditions. The following instruction given by the trial judge in Brennan was approved by the appellate court:

The word "representative" in Section §186 of the National Labor Relations Act and elsewhere in any of my instructions is used in its ordinary everyday meaning and means a labor representative. As such, it includes any person who is empowered, authorized, or designated in any way, directly or indirectly, by any employee or employees, to represent such employee or employees in any matter relating to their wages or hours or working conditions by standing in the place of such employee or employees in any responsible dealing with the employer involving such matters.

If a person be so authorized to act it is not necessary that he actually exercise all or any of the powers conferred upon him. Representative as used in this Act may also include one who is empowered, authorized or designated by any employee or employees to represent any employee or employees in any negotiation by such employer as a representative of said employees in any matter relating to their wages, hours, or working conditions.

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Any labor organization, such as a local union, union council, union conference or international union which is empowered, authorized or designated by any dealing with the employer with respect to hours, wages or working conditions is by virtue thereof a representative of such employee or employees, and any individual who actively holds and occupies an office or position of responsibility in any such union local, council, conference, or international, who is empowered or authorized in such office or position to act for any such labor organization in which he holds office in such way as to affect any such employee in a substantial way in any dealing with the employee's conditions, is thereby also a representative of such employee or employees.

Brennan, supra at 264. Accord, Korholz v. United States, 269 F.2d 897 (10th Cir. 1959).

Note that under the Brennan test one need not actually represent employees in negotiations or similar activities with employers. The mere authority to do so is enough. See United States v. Fisher, 387 F.2d 165 (2d Cir. 1969), cert. denied, 390 U.S. 953.

A question also arises after Brennan as to whether a representative is one who deals with the employer in matters relating only to wages, hours and working conditions, or whether the definition in Ryan should be more broadly applied. In Mechanical Contractors Ass'n. v. Local Union 420, 265 F.2d 607 (3d Cir. 1959), the court, noting that "strained interpretations intended to limit the Act's operations are to be avoided", held that any employee-designees administering a fund not meeting the requirements of 29 U.S.C. §186(c)(5) are "representatives of employees" even though they do not really represent employees with respect to wages, hours or conditions of employment. Accord, Sheet Metal Contractors Ass'n v. Sheet Metal Workers Internation Ass'n, 248 F.2d 307, 315 (9th Cir. 1957); Local No. 2 v. Paramount Plastering, Inc., 195 F. Supp. 287, 292 (S.D. Cal.), aff'd, 310 F.2d 179 (9th Cir. 1962). But see, Weir v. Chicago Plastering Institute, 177 F. Supp. 688, 700 (N.D. Ill.), rev'd on other grounds, 279 F.2d 92 (7th Cir. 1959), which suggests that a more narrow definition of the term "representative" might have to be applied when the action is a criminal prosecution for payments to an illegally constituted trust fund, as opposed to decisions in civil actions holding such funds are "representatives."

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In Independent Association of Mutual Employees v. New York Racing Ass'n., 398 F.2d 587 (2d Cir. 1968), a trust was held not to be a "representative of employees" because there was a "controlling imbalance" on the board of trustees in favor of the employer, and, therefore, the employee-designated trustees had no real power. But compare, Costello v. Lipsitz, 547 F.2d 1267 (5th Cir. 1977).

9-132.320 Labor Organizations and Their Officers or Employers - 29 U.S.C. §186(a)(2)

A major inadequacy of the original statute was illustrated by the holding in Ventimiglia v. United States, 242 F.2d 620 (4th Cir. 1957). There the defendant officials of a non-unionized weather-proofing business obtained a subcontract on a union job. In order to secure permission for their non-union men to work on the job, the defendants paid the business agent of the local roofers union \$100 a month in return for the issuance of working cards for their men. Conspiracy convictions under 29 U.S.C. §186 were set aside by the Fourth Circuit on the ground that neither the roofers union nor the business agent was technically a "representative" of any of the defendant employer's non-union employees. The Report of the Senate Committee on Labor and Public Welfare indicates that the defect underscored by Ventimiglia was to be cured in the amended statute "by adding a new subdivision proscribing payments to any labor organization, or any officer or employee, which is seeking to represent or would admit to membership any of the employees of the employer." S. Rep. No. 187, supra, at 14.

This subparagraph obviously forbids payments from employers to labor union officials who are attempting to organize the employers' employees. It also appears to prohibit flatly the payment by an employer to officials or employees of unions which represent the same class or type of workers as the employer's employees. This is to say that the phrase "or would admit to membership" brings the Act's proscriptions to bear on a teamster official who "shakes down" an employer of non-union truckers. The legislative history clearly indicates that this is what the Act was intended to do. S. Rep. No. 187, supra, at 14.

The phrase "would admit to membership" has been held to mean that:

at the time the acts were performed and done...there was either a present intention for the employees [the employer] to apply for membership or that there was a present intention for [the employer] to obtain work in the...area and to employ employees that would and could be admitted, to membership in [the recipient's local union].

United States v. Sink, 355 F. Supp. 1067, 1071 (E.D. Pa.), aff'd without opinion, 485 F.2d 683 (3d Cir. 1973). Sink involved an employee who had never employed workers in the territorial jurisdiction of the local union whose official had solicited payment, but who only planned to do so as part of a business expansion.

However, where the "present intention" of the employer to hire employees who would be admitted to membership is not clear, as in the case of a construction contractor who has no definite plans to undertake projects which would require the use of union labor and who is not a party to any labor agreement which would obligate him/her to use subcontractor-employers who would use in union labor in the future, the potential representative relationship between the employees of an "employer" and the recipient's labor organization has been held to be "too indirect" and "too nebulous" to support conviction under 29 U.S.C. §186(b)(1) and (a)(2). United States v. Cody, 722 F.2d 1052, 1057-59 (2d Cir. 1983). The holding in Cody is consistent with the reasoning of the decision in Sink in view of the court's recognition in Cody, supra, at 1059, that "there may be circumstances in which the possible future hiring of unionized workers might lead to abuses that 29 U.S.C. §186 was designed to prevent" and its discussion of why future hiring of employees who would be admitted to membership was not a certainty in that case. The court in Sink had instructed that the potential representative relationship should not be "some indefinite, uncertain future, vague possibility." Sink, supra at 1070-71.

On the other hand, the court's general statement in Cody, supra, at 1058, that 29 U.S.C. §186(a)(2) requires an "existing employment relationship, between the employer and members of the union, not the possibility of a future relationship" appears to run counter to the view that 29 U.S.C. §186 should be construed in a manner which guards against potential conflicts-of-interest arising from the operation of union hiring halls as in the construction industry where pre-hire labor agreements are standard procedure. See, e.g., United States v. Gibas, 300 F.2d 836, 840 (7th Cir. 1962), holding that it was proper to instruct that the contractor-employer making payments did not have to have a member of the recipient's local union in his employ on the specific date of payment where the union hiring hall was the source of construction employees as needed. Moreover, contrary to the court's characterization in Cody of the Sink case as one which merely involved an expansion of the employer's business into an area where "its present employees would have been admitted to the local union," the portion of the charge in Sink quoted above indicates that Sink involved the future hiring of employees in the new territory to which the employer intended to expand his/her business.

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Another way to view the Cody decision is that although the payor formerly had contractual dealings, and might have such dealings again, with the subcontractor-employers whose existing employees would clearly be admitted to union membership, such former or future relationships were not shown to be the motive for the payments thereby precluding the conclusion that the payor was a "person acting in the interest of [some] employer" whose existing employees would be admitted to membership. See discussion on Cody, supra at 1058, noting that the subcontractors had completed work on the contractor-payor's project at the time of the allegedly prohibited payment. Accordingly, if such motive could have been established by reference to a connection between the payment and some past or future abuse of an actual or potential labor-management relationship, it might be argued that the payor clearly acted in the interest of employer-subcontractors by paying or agreeing to pay at any time the subcontractor's existing employees would have been admitted to membership.

Of course, proof of such a connection between the prohibited payment and the recipient's conduct would be tantamount to proof of an "intent to influence" the recipient with respect to his/her as a representative or as an officer of the union. In such case, the payment or agreement to pay could be charged as bribery under 29 U.S.C. §186(b)(1) and (a)(4) for which no actual or potential representative relationship is required as under 29 U.S.C. §186(b)(1) and (a)(2). See United States v. Bloch, 696 F.2d 1213 (9th Cir. 1982), and USAM 9-132.340, infra.

Since the statute prohibits payments to a "labor organization, or any officer or employee thereof," it is not necessary to show that the officer or employee himself represented or sought to represent the employer's employees. All that is necessary is that he/she be an officer or employee of a labor organization which meets the requirements of the subsection. In United States v. Fisher, 387 F.2d 165 (2d Cir. 1967), the defendant union officer argued that 29 U.S.C. §186 did not apply to him because, even though he was an officer, he did not in fact represent employees in negotiations with their employer. He contended that, as secretary-treasurer, he was a mere bookkeeper, and that since 29 U.S.C. §186 was meant to prevent union officers from "selling out" the union members, it did not apply to him because he had no power to sell them out. In affirming his conviction the Second Circuit held that there was no indication in the legislative history that Congress had any intention to exempt constitutional officers, or to require the courts to determine the degree of a person's responsibility after it had been established that he/she held union office. Id. at 168.

9-132.330 Employer Interference With Employee Rights - 29 U.S.C. §186(a)(3)

29 U.S.C. §186(a) forbids the paying, lending or delivering of money or other thing of value by an employer:

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(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employees or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing....

This subsection was included in the amended statute as a result of the disclosures of the McClellan Committee. It appeared that some sections of management refused to recognize the right of employees "to form and join unions without interference and to enjoy freely the right to bargain collectively with their employer concerning their wages, hours, and other conditions of employment." H.R. Rep. No. 741, 86th Cong., 1st Sess. at 6 (1959).

Recent convictions under 29 U.S.C. §186(a)(3) include United States v. Vornado, Cr. No. 80-110 (D. N.J. filed April 3, 1980) in which an employer corporation was convicted of conspiracy to violate 29 U.S.C. §186(a)(3) by paying an employee to circulate petitions seeking decertification of a union local as the employees' bargaining representative; and United States v. Absopure Water Co., Cr. No. 82-80074 (E.D. Mich. 1982) in which an employer corporation was convicted under 29 U.S.C. §186(a)(3) for paying employees for providing information on union organizing activities and influencing other employees with respect to a representation election. Copies of pleadings in these cases are available from the supervisory section, USAM 9-132.020, supra.

9-132.340 "Bribery" of Officers or Employees of a Labor Organization 29
U.S.C. §186(a)(4)

Subparagraph 4 of 29 U.S.C. §186(a) forbids payments by an employer or other named persons:

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions or duties as a representative of employees or as such officer or employee of such labor organization.

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This subsection specifically requires proof of an "intent to influence," a more rigorous showing than that required by preceding subsections. However, the language of the subsection is broad in its definition of the class of persons to whom payments are proscribed. Subsections (1) and (2) of 29 U.S.C. §186(a) require that, for the payment to be unlawful, the recipient must be a representative of the employer's employees or a labor organization or officer or employee thereof, which represents, seeks to represent or would admit to membership any employees of the employer. While these subsections require that there be an existing or demonstrably potential relationship between the payor and the payee, the prohibition of subsection (4) of 29 U.S.C. §186(a) is applicable and independent of any such showing.

This interpretation is born out in the legislative history of the Act. In an appendix to the expression of its views, the minority of the Senate Committee on Labor and Public Welfare clearly interpreted 29 U.S.C. §186(a)(4) as proscribing the subversion of union officials in the performance of their official duties by an employer "even if the employer and the subverted official's union have absolutely no relations with each other." S. Rep. No. 187 at 98. The report noted:

If an employer in the steel industry gives something of value to his acquaintance, the head of a textile workers union, to persuade him to influence his union to change its political line, that would be a crime under the bill.

Id. at 99.

Where an actual or potential representative relationship does exist, any violation of 29 U.S.C. §186(a)(4) is also a violation of 29 U.S.C. §186(a)(1) or (a)(2). However, where the proof will support the scienter requirement of 29 U.S.C. §186(a)(4), prosecution under the latter subsection is preferred. A recipient's conviction under 29 U.S.C. §186(b)(1) with proof of a corresponding specific intent on the part of the recipient "to be influenced" has been held to be equivalent to "bribery" for purposes of 29 U.S.C. §504 which bars convicted union officials from union positions for five years following conviction or imprisonment. Hodgson v. Chain Service Restaurant Union, 355 F. Supp. 180, 186 (S.D. N.Y. 1973).

It should be noted, however, that the Court of Appeals, Second Circuit, has stated in the context of a RICO prosecution that the fact that 29 U.S.C. §186(a)(4) imposes a scienter requirement on the maker of the payment does not necessarily impose a corresponding requirement of an "intent to be influenced" on the taker of the payment. See United States v. Boylan, 620 F.2d 359, 362 (2d Cir. 1980) (dictum). This statement is consistent with the observation in Arroyo v. United States, 359 U.S. 419, 423-424 (1959) that 29 U.S.C. §186 does not require a mutuality of intent:

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An employer might be guilty under subsection (a) if he paid money to a representative of employees even though the latter had no intention of accepting. . . . A representative might be guilty if he coerced payments from an innocent and unwilling employer. . . . Both would be guilty if the payment were ostensibly made for one of the lawful purposes specified in Section 302 (c) if both knew that such purpose was merely a sham.

Although convictions predicated on a union official's "intent to be influenced" have been sustained, see, e.g., United States v. Ferrara, 458 F.2d 868, 873, n.5 (2d Cir. 1972); an alternative view of the evidentiary requirements of 29 U.S.C. §186(b)(1) with respect to "bribery" payments made in violation of 29 U.S.C. §186(a)(4) was expressed in United States v. Bloch, 696 F.2d 1213, 1216 (9th Cir. 1982) where the Court stated:

[a] "willful" violation of 29 U.S.C. §186 [(b)(1)] requires only that the defendant [recipient] act with knowledge that the payments are from a person acting in the interest of an employer and are intended to influence the defendant's duties as a union employee [Material in brackets and emphasis added.]

With respect to the disqualification of employers and persons acting in the interest of employers, a conviction of a bribe-payor who acted with an "intent to influence" the union official under 29 U.S.C. §186(a)(4) would also bar one from holding office with an association of employers or from service as a labor relations consultant under 29 U.S.C. §504. However, any conviction under 29 U.S.C. §186 will bar a person from service with an employee pension or welfare plan because, unlike 29 U.S.C. §504, disqualification under 29 U.S.C. §1111 does not depend on characterization of the underlying offense as "bribery." A conviction for "illegally demanding money from an employer" has also supported removal from union office as a condition of a probated sentence. See United States v. Barrasso, 372 F.2d 136 (3d Cir. 1967) (per curiam). See also USAM 9-138.000, infra (Prohibited Office Holding).

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9-132.350 Payments to Third Parties

A troublesome problem is posed in cases where a union officer requests that an employer make a payment to a third person who does not fall within one of the classes specified in 29 U.S.C. §186(a). For example, the officer asks that a construction company whose employees he/she represents give his/her brother/sister a substantial discount on the price of a house which the company is building for him/her. In this case it is clear that the payment of something of value to the officer's brother/sister by the employer does not, in and of itself, come within the specific prohibition of 29 U.S.C. §186 since the brother/sister is not one of the persons listed in 29 U.S.C. §186 subsection(a)(1)-(4). But equally clearly, to say that the officer has not violated the statute by requesting that payment would be to permit the easy subversion of the purposes of 29 U.S.C. §186. Accordingly, prosecution should proceed on the theory that the benefit to the officer's brother/sister is some "other thing of value" to the officer even if he/she does not receive anything of measurable pecuniary value.

The decision of the United States Court of Appeals, Fourth Circuit, in United States v. DeBrouse, 652 F. 2d 383, 387-388 (4th Cir. 1981) is the first decision to uphold application of this theory in the case of a union official who demanded that an employer pay salary to a third party for services not performed. The union official received no pecuniary benefit, directly or indirectly, from the third party. On the other hand, the Court of Appeals, Second Circuit, has expressed doubt whether "mere goodwill" which a union official might derive from the delivery of political campaign contributions from employers to third-party politicians is properly the receipt of a "thing of value" under 29 U.S.C. 186(b)(1). For further discussion, see USAM 9-132.230, supra.

Of course, when a payment is made to a third person under circumstances which permit a showing that the union official did in fact receive some direct or indirect benefit, either money passed through the third person as a conduit or the value of having money or property held by the third for the official's use, there is no need to utilize the "third party beneficiary" approach discussed above. See, e.g., United States v. Pecora, 484 F.2d 1289 (3d Cir. 1973) (profits from testimonial dinner to which employer contributed held for the union official's use); and United States v. Lanni, 466 F.2d 1102 (3d Cir. 1972) (salary for "no show" employee held for union official's use).

9-132.400 ACCEPTANCE OF PROHIBITED PAYMENTS - 29 U.S.C. §186(b)(1)

29 U.S.C. §186(a) delineates four distinct courses of conduct, each of which is declared unlawful and constitutes an offense

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when engaged in by an employer. 29 U.S.C. §186(b)(1) is directed against one who solicits or is the recipient of payments proscribed under 29 U.S.C. §186(a). See United States v. Donovan, 339 F.2d 404, 407 (7th Cir. 1964), cert. denied, 380 U.S. 975 (1964).

9-132.410 Any Person

The manner in which the statute is drafted makes this term self-defining. 29 U.S.C. §186(a) makes payments to certain designated organizations and individuals illegal. 29 U.S.C. §186(b) makes it a crime for a person to accept a payment prohibited by 29 U.S.C. §186(a), and, therefore, the "person" who commits the 29 U.S.C. §186(b) violation can only be one of those designated in 29 U.S.C. §186(a). A passage from the legislative history of the Act supports this interpretation:

The intent of these amendments to Section 302(a) and (b) is to forbid any payment or bribe by an employer or anyone who acts in the interest of an employer whether technically an agent or not and to forbid the receipt of any such bribe by any person, whether an individual, an officer or employee of a labor organization or a committee representing employees...

S. Rep. No. 187 at 43.

Of course, a private individual can violate 29 U.S.C. §186(b)(1) as an aider and abettor (see infra).

9-132.420 Request, Demand, Receive or Accept

When a union official "demands" a payment from an employer, he/she may be prosecuted under the Hobbs Act, 18 U.S.C. §1951, if the employer is threatened with force or violence or fears economic loss. In addition, a "demand" can also give rise to a simultaneous prosecution for violation of 29 U.S.C. §186(b). See "The Hobbs Act in Relation to Taft-Hartley 302", USAM 9-131.800, supra and United States v. Kramer, 355 F.2d 892, 896 (7th Cir. 1966) cert. denied, 384 U.S. 100 (1966). It should be noted, however, that a charge of a Hobbs Act extortion and a charge under 29 U.S.C. §186(a)(4), which prohibits payment "with intent to influence [any officer or employee of a labor organization] in respect to any of his actions, decisions, or duties," are considered mutually exclusive. This is because the former must involve a coercive demand while the latter is in the nature of a bribe offered or given by the employer on his/her own initiative.

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9-132.430 Prohibited by 29 U.S.C. §186(a)

Any prosecution under 29 U.S.C. §186(b) must, of course, depend on subsection (a) of 29 U.S.C. §186, but an issue occasionally raised under 29 U.S.C. §186(b) is whether there can be any situation, other than those contained in the exception provisions of 29 U.S.C. §186(c), in which money passes from an employer to a union official or employee representative but there is no Taft-Hartley violation.

In United States v. Ricciardi, 357 F.2d 91, 99-100 (2d Cir. 1966), the defendant raised this issue by attacking a jury instruction to the effect that a violation of 29 U.S.C. §186(b)(1) and (a)(1) did not require evidence of the prohibited payment's connection to union affairs and could be predicated on personal friendship. The court approved of the instruction holding that all payments within 29 U.S.C. §186(a)(1) and outside the statutory exceptions are prohibited regardless of whether the payment was made because of the union official's status as a representative or because of personal friendship; accord United States v. Thompson, 466 F. Supp. 18, 21 (W.D. Pa.) aff'd without opinion, 588 F.2d 825 (3d Cir. 1978) (upholding the conviction of a union official who accepted an unsolicited Christmas gift from an employer). The reasoning of Ricciardi, supra, which dispenses with proof of "evil motive" or "corrupt purpose" under 29 U.S.C. §186(a)(1) appears to apply with equal force to payments in violation of 29 U.S.C. §186(a)(2). See, e.g., United States v. Sink, supra, at 1072.

In Arroyo v. United States, 359 U.S. 419 (1959), the defendant union official was convicted under 29 U.S.C. §186(b)(1) for the receipt of two checks which were paid by employers and intended by them as a contribution to a welfare trust fund properly established under 29 U.S.C. §186(c)(5) on behalf of their employees. The union official failed to deposit the checks in an existing welfare plan bank account and instead used the checks to open a new bank account which the defendant then used for his own personal purposes and for nonwelfare union purposes. The Supreme Court reversed the conviction under 29 U.S.C. §186, holding that the payment transaction between the employers and the union official was "within the precise language of 186(c)" and therefore was not a violation of 29 U.S.C. §186(a) and (b). Arroyo, supra, at 421-423.

Although the checks were drawn payable to the union rather than to the welfare trust, supra, at 431; the Court concluded that its "literal construction" of Arroyo, 29 U.S.C. §186, was consistent with the Congressional purpose to safeguard collective bargaining relationships

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rather than to punish larcenous or fraudulent conduct affecting welfare plan funds. But compare, United States v. Silva, 517 F. Supp. 727 (D.R.I. 1980), aff'd per curiam, 644 F.2d 68 (1st Cir. 1981), where the defendant union official received employer checks which were payable to a local union and represented pension and welfare contributions as well as union membership dues which were then co-mingled in the union's bank account and used in part for the union official's personal benefit. In finding the defendant guilty under 29 U.S.C. §186(b)(1), the trial court distinguished the case from Arroyo on the grounds that the contributions had not been made pursuant to a bona fide written agreement establishing a trust fund jointly administered by employers and the union in accordance with 29 U.S.C. §186(c)(5). Silva, supra, 734. Furthermore, the Arroyo decision itself distinguishes its holding in cases where benefit-plan contributions are ostensibly made for the purposes specified in 29 U.S.C. §186(c) if both employer and union official know that such purpose is merely a sham. Arroyo, supra, at 424; Haley v. Palatnik, 509 F.2d 1038, 1042 (2d Cir. 1975).

For a discussion of the October 12, 1984 amendments pertaining to violations involving an employer's withholding and/or payment of union dues, employee pension and welfare benefit plan contributions, and payments for labor-management cooperation committees, see USAM 9-132.640, infra.

A similar situation arose in United States v. Borland, 309 F. Supp. 280 (D.Del. 1970). There the defendant union official caused pay checks to be issued to union members who did not work on the job. The defendant then cashed the checks for himself. All of this conduct took place unbeknownst to the employer. Thus, ostensibly, he was issuing paychecks valid under 29 U.S.C. §186(c)(1). The government argued that Arroyo could be distinguished because the payment was valid only on the surface, (because no work was done), whereas the payment in Arroyo was valid in fact, (because it met the requirements of 29 U.S.C. §186(c)(5)). The court held that defendant had not violated 29 U.S.C. §186. It would be difficult to believe, they said, that 29 U.S.C. §186(b) exempts from punishment the misappropriation of checks payable to a welfare fund but, at the same time, punishes the misappropriation of payroll checks. In light of the 29 U.S.C. §186 purpose to protect collective bargaining, it was held, there is no reason to punish one type of fraud and not another. Since no payment was made with intent to subvert the collective bargaining process, no violation of 29 U.S.C. §186 was proved.

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9-132.440 The Unloading Racket - 29 U.S.C. §186(b)(2)

29 U.S.C. §186(b)(2) provides:

It shall be unlawful for any person acting as an officer, agent representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in Part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, that nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

A typical case involving issues under 29 U.S.C. §186(b)(2) might arise when an "unloading fee" is demanded from the driver. The driver, or his/her employer, may fear that the goods will be boycotted if the unloading is done by the driver himself/herself or that the consignee, fearing strikes and picketing if a union person is not hired to unload will refuse to accept the cargo. Consequently, the union is able to apply enough pressure to force the hiring. If the "fee" paid is bona fide wages paid as compensation for genuine services, 29 U.S.C. §186(b)(2) is not violated.

The Senate committee report speaks of the practice of exacting "arbitrary fees for the so-called 'privilege' of loading and unloading of trucks, fees for which no work is done and which go to the benefit of the union or another person other than the one performing the work." S. Rep. No. 187, 86th Cong., 1st Sess. p. 14. However, there is also support in the legislative history for the proposition that 29 U.S.C. §186(b)(2) is intended to reach the kind of fees and charges paid for unnecessary and unwanted services. See remarks of Congressman Barden at 105 Cong. Rec. 15697-98 (1959), concerning the exaction of unloading charges in the form of wages paid for unnecessary labor as part of a so-called "hot cargo" agreement outlawed in 1959 in certain industries by the enactment of 29 U.S.C. §158(e); see also remarks of Congressman O'Hara concerning the demanding or acceptance of "unloading fees as a condition to permitting nonunion drivers to unload their own cargo." 105 Cong. Rec. 15021 (1959), [emphasis added].

Accordingly, while 29 U.S.C. §186(b)(2) exempts fees paid by employers to their employees as compensation for services, compensation for fictitious or unnecessary services appears to be prohibited. Such wage payments, if demanded by union representatives through the use of actual or threatened use of force, violence, or fear, may be prosecuted as extortion in violation

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of 18 U.S.C. §1951. See, e.g., United States v. Green, 350 U.S. 415 (1956); United States v. Kemble, 198 F.2d 889 (3d Cir. 1952).

Certain minority members of the Senate Committee on Labor and Public Welfare expressed the view that the proposal enacted as 29 U.S.C §186(b)(2) did not reach the practice whereby

the union or union official seeking to exact a fee for permitting the truck to be unloaded, requires the operator to join the union and pay a sizable initiation fee even if he lives and works in another locality and belongs to another union, even if it is merely another local of the extorting union. This gives the deal the appearance of legitimate labor activity but is nothing but disguised extortion. A minority amendment designed to outlaw this kind of racket was rejected.

S. Rep. No. 187, supra, at 99

However, union representatives who engaged in conduct like that described in the Senate report have been convicted of violating 29 U.S.C. §186(b)(2) and extortion in violation of 18 U.S.C. §1951 where they attempted to disguise the wrongful taking of money from non-union truck operators as a legitimate requirement that the operators join the union and pay dues before unloading supplies delivered by them to a construction site; United States v. Wilford, 710 F.2d 439 (8th Cir. 1983). The court in Wilford found that the union officers and employees had no lawful claim to the money they demanded from drivers and that therefore the payments of "union dues" were extorted by the "wrongful" use of fear of economic loss due to the threatened refusal to unload trucks for non-payment. In establishing the absence of any lawful claim to such membership dues and initiation fees, the government argued that the dues and fees had been a sham and therefore outside the exception for the lawful solicitation and payment dues in 29 U.S.C. §186(c)(4). See USAM 9-132.540, infra. The union representatives had requested dues payments from victims who were self-employed persons who could not lawfully be solicited for membership in the union, or who would receive no benefit in return for membership other than having their trucks unloaded, or who were not afforded the privileges of other bona fide union members under the collective bargaining agreements in force at the job site. See Wilford, supra at 444-445.

Moreover, the court indicated the provision of the collective bargaining agreement in force at the site which required only union members to drive trucks "on the job" would be unlawful "hot cargo" agreement under the Taft-Hartley Act when applied to the delivery of supplies and materials to the construction site. Wilford, supra at 443, n.4. That is, while a

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labor union is permitted by 29 U.S.C. §158(e) to bargain with employers in the construction industry for the purpose of entering into an agreement whereby only firms using union labor will be retained to perform contracting or subcontracting work at a construction site, this exception to the general prohibition against such "hot cargo" agreements with employers [in other industries] and common carriers does not permit such an agreement to be made concerning the delivery of supplies and materials to the construction site. For a discussion of such agreements, see H.R. [Conference] Rep. No. 1147, 86th Cong., 1st Sess. 39-40 (1959).

9-132.500 THE EXCEPTIONS - 29 U.S.C. §186(c)

In United States v. Ryan, 350 U.S. 299, 305 (1956), the Supreme Court said that 29 U.S.C. §186 is a "malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representatives of his employees...." 29 U.S.C. §186(c) enumerates six exceptions to the prohibitions in 29 U.S.C. §186(a) and (b), and these will be discussed in some detail below.

It should be noted, in general, that when a payment falls within one provision of 29 U.S.C. §186(c) but not within another, more particularized exception, the latter governs and a violation exists. International Longshoreman's Ass'n v. Seatrains Lines, Inc., 326 F.2d 916 (2d Cir. 1964). For example, a payment to a union welfare fund in accordance with a collective bargaining agreement settling a dispute between the parties may be exempt under 29 U.S.C. §186(c)(2), but it would be a violation unless it meets the requirements of 29 U.S.C. §186(c)(5).

However, with respect to certain violations which occur on or after October 12, 1984, and involve payments to labor organizations, employee pension and welfare benefit trusts, and labor management cooperation committees, criminal prosecution requires proof of an additional element. That is, for violations which arise under 29 U.S.C. §186(a) and (b) because the transactions fail to comply with the restrictions in 29 U.S.C. §186(c)(4) through (c)(9), criminal prosecution requires an intent to benefit the defendant who participates in the transaction or other persons who the defendant knows are not permitted to receive the payment or other thing of value. See 29 U.S.C. §186(d)(1). See USAM 9-132.540 through 9-132.590; USAM 9-132.640, infra.

9-132.501 Burden of Protection

Where the defendant claims the payment he/she is accused of giving or receiving fits under one of the exceptions in 29 U.S.C. §186(c), the issue

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arises as to who must produce the evidence to support the claim. In United States v. Fabrizio, 193 F.Supp. 446 (D. Del. 1961), the court rejected the government's argument that, since the defendant was claiming to come within an exception to the liability imposed by the statute, the burden was on him, not the government, to show that he came within that exception. The defendant, as president of a coal company, was charged with responsibility for payments to a union committeeman representing employees of the company. Inasmuch as there was considerable evidence in the government's case which tended to show that the defendant had no personal knowledge of the fact, if it was a fact, that the committeeman was not also an employee, the court concluded that the burden of negating the existence of the 29 U.S.C. §186(c)(1) exception was on the government. In that context, however, this holding amounted to nothing more than that the government retains the burden of proving that defendant violated the Act.

A similar claim was made by an employee representative convicted of receiving unlawful payments from his employer in United States v. Donovan, 339 F.2d 404 (7th Cir.), cert. denied, 380 U.S. 975 (1964). The court agreed that, once evidence has been produced which tends to bring a defendant within the exception, it is incumbent upon the prosecution to negative the applicability of such exception. There, the employer had testified that the defendant had performed no services for him, and the government's burden of proof was met.

In sum, the government always has the burden of proof in regard to defendant's violation of the Act, but the defendant has the burden of production in regard to evidence that he/she falls within one of the exceptions to the Act. Once such evidence is introduced, either in the government's case or in the defendant's case-in-chief, part of the government's burden of proof is the negating of this evidence.

9-132.510 Exception 1: Payments to Representative of Employees for Services Rendered as an Employee

When it is claimed that the payment received was in compensation for services as an employee, the issue to be determined is whether a good faith work relationship existed. It is a common practice of large industrial concerns to employ shop stewards on a full time basis, and in most instances the steward is, in fact, a "representative" of the employees. If such employment is in good faith and for actual services to the employer, the exception applies. See Reinforcing Iron Workers Local 426 v. Bechtel Power Co., 634 F.2d 258 (6th Cir. 1981). Payment of compensation by an employer to his/her employees for time spent on union business (e.g., grievance meetings) is permitted. Employees Ind. Union v. Wyman Gordon Co., 314 F. Supp. 458 (N.D. Ill. 1970).

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However, 29 U.S.C. §186 proscribes employer payments to union stewards who are paid as the steward on multiple jobs in separate locations for the same time periods or on jobs where the steward fails to be physically present as required. In such cases the steward clearly does not receive compensation for services performed as an employee. See United States v. Kaye, 556 F.2d 855, 864-65 (7th Cir. 1977); United States v. Motzell, 199 F. Supp. 192 (D.N.J. 1971).

9-132.520 Exception 2: Payment of Judgments, Arbitration, Awards and Compromise Settlement

29 U.S.C. §186(c)(2) exempts the above payments from the 29 U.S.C. §186(a) and (b) proscriptions but is worded so broadly that a literal construction of it could vitiate them. For example, any payment made in response to a union demand could be termed a compromise settlement of a dispute; however, the few reported cases under this subsection have not so construed the exception.

As discussed above in International Longshoreman's Ass'n v. Seatrains Lines, Inc., 326 F.2d 916 (2d Cir. 1964), one of the union's negotiation demands was that dock employers pay the union a certain sum in lieu of dues lost to the union because of automation. In a suit for a declaratory judgment that such payments would be the result of a compromise settlement and thus excepted by 29 U.S.C. §186(c)(2), the Second Circuit held that interpretation would nullify the effect of the statute, since any such payment from an employer to a union could be characterized as a compromise settlement. Additionally, the court held that 29 U.S.C. §186 subsection (c)(4) provides a more particularized method for employer payment of dues which must be adhered to if such payments are to be legal.

Neither collective-bargaining agreements, which are settlements of "disputes" between the parties, nor the "decision or award of an arbitrator" can permit the parties to do something clearly within the prohibition of the statute. See Minkhoff v. Scranton Frocks, Inc., 181 F. Supp. 542 (S.D.N.Y. 1960).

9-132.530 Exception 3: Sale or Purchase of Article at Prevailing Market Price

As with the employment exception in 29 U.S.C. §186(c)(1), this exception, 29 U.S.C. §186(c)(3), poses factual rather than legal questions. In United States v. McMaster, 343 F.2d 176 (6th Cir. 1965), one defendant claimed that the money received had been in return for a truck his

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company had rented to the employer. At the trial, however, he failed to produce any evidence as to the make, weight, or license number of the truck. The court upheld his 29 U.S.C. §186 conviction, saying that the services he claimed to have performed were fictitious, and emphasized that, where the exemption is claimed under 29 U.S.C. §186(c)(3), a full examination of the surrounding circumstances should be made. Whether a particular transaction is "in the regular course of business" is a factual question which has been held not to require further definition by the court. United States v. DeBrouse, supra, at 389.

It has been noted above (see USAM 9-132.220, supra) that "loans" are prohibited "payment" under 29 U.S.C. §186. An interesting but perhaps academic question in this area is whether a union employee or official can ever obtain a loan from an institution whose employees could be admitted to the official's union. It was noted earlier that the term "would admit to membership" was added to 29 U.S.C. §186(a) to cover the situation where the union official was "shaking down" employers of non-union employees. Therefore, a bona fide loan would not seem to be within the intent of the amendment. But the word "lend" was itself added to the statute by the amendment. If legitimate loans are not prohibited, then perhaps there is a small loophole in the statute. On the other hand, one should not be prevented from securing a bona fide loan merely because he/she happens to be an employee or official of a union that "would admit to membership" any of the lender's employees. In this regard see United States v. DiSalvo, 252 F. Supp 740 (S.D.N.Y. 1966), where it is suggested that an arm's-length loan between the union employee or official and the lending institution might not be a violation of the statute.

9-132.540 Exception 4: Dues Checked Off Under Valid Authorization

For transactions which involve the payment of dues or equivalent fees, infra, to labor organizations on or after October 12, 1984, and which are prohibited because such payments are not made in compliance with requirements of 29 U.S.C. §186(c)(4), criminal prosecution requires proof of an additional element, namely, an intent on the part of the defendant who participates in the transaction to benefit himself/herself or other persons who the defendant knows are not permitted to receive the payment or other thing of value. See 29 U.S.C. §186(d)(1). This requirement, which did not apply to violations of this kind prior to October 12, 1984, is consistent with the factual circumstances in United States v. Wilford, 710 F.2d 439 (8th Cir. 1983), which upheld the conviction of union officials for demanding and accepting the payment of "dues" and initiation fees from employers and motor vehicle operators in violation of 29 U.S.C. §186(b)(1) and (b)(2). Payments into the union treasury were made in return for being permitted to unload cargo under circumstances where the defendants knew they

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were not entitled to request that the victims pay dues and initiation fees to the union. Under the guise of soliciting "membership dues and fees," the officials in effect collected tribute from victims who in some cases were self-employed persons who could not lawfully be solicited for membership in the union, or who would receive no benefit in return for their membership other than having their trucks unloaded, or who were not afforded the privileges of other bona fide union members under the collective bargaining agreements in force at the job site. Id. at 444-445.

In short, the participants to the transactions understood that the dues payments, although ostensibly made for purposes specified in 29 U.S.C. §186(c), were merely a sham. See Arroyo v. United States, 359 U.S. 419, 421-23 (1959). Compare United States v. Silva, 517 F. Supp. 727, 734 (D. R. I. 1980), aff'd per curiam, 644 F.2d 68 (1st Cir. 1981), where the defendant-union official received from the employer checks payable to the union in part for membership dues which had not been properly authorized under 29 U.S.C. §186(c)(4). The court held that the knowing receipt of such payments was itself sufficient for conviction under 29 U.S.C. §186(b)(1). It should be noted, however, that the defendant-official deposited such payments into an account over which he had sole discretion to use and part of which he subsequently used for his personal benefit. Id. at 736.

Under this exception, the employer is allowed to pay the union dues of his/her employees directly to the union by deducting the proper amount from the employees' pay. This is known as a dues "check-off" and can only be done under a written assignment from the employee. The assignment may not be for a period greater than one year or the length of the collective bargaining agreement, whichever occurs sooner. Because the provision specifically mentions only "dues," much litigation has developed over attempts to expand the exception. Such attempts have generally been successful.

In Schwartz v. Associated Musicians of Greater New York, 340 F.2d 228 (2d Cir. 1964), the employer, orchestra leader deducted a certain percentage from the pay of each "sideman" and turned this levy over to the union. Sidemen did not work on a regular basis, and the percentage levy was only collected when the member was working. It was contended that membership dues were an obligation uniformly imposed on all members to maintain their membership and that these non-regular monetary charges imposed on only a relatively small number of members each year, therefore, were not "dues" within the 29 U.S.C. §186(c)(4) exception. The Second Circuit rejected this contention, saying that 29 U.S.C. §186 was intended to prevent bribery and "shakedowns," neither of which was involved, and that the tax was similar to dues in that it applied equally to all members who worked. It is interesting to note that the court uses the legislative intent behind 29 U.S.C. §186 in various ways depending on the particular provision involved and the result sought.

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Similarly, in International Union of Mine, Mill and Smelter Workers v. American Zinc, Lead and Smelting Co., 311 F.2d 656 (9th Cir. 1963), the court held that a special strike assessment levied by the union could be paid by the employer under the dues "check-off" exception. The court's decision was based, in part, upon an opinion by the Department of Justice, 22 L.R.R.M. 46 (1948), that the term "membership dues" included initiation fees and assessments as well as regular periodic dues, especially where the union constitution so provided.

The above cases are illustrative of the general decisions in this area. They indicate clearly that the employer deduction need not be regular, nor need it carry the label of "membership dues" in order to be valid. Other cases following this line are: N.L.R.B. v. Food Fair, 307 F.2d (3d Cir. 1962); Grajczyk v. Douglas Aircraft Co., 210 F. Supp. 702 (S.D.Cal 1962); and Heineman v. Douglas Aircraft Co., 211 F. Supp. 76 (S.D.Cal. 1962).

The courts have refused, however, to allow some payments claimed to fall within this exception. In International Longshoreman's Ass'n v. Seatrain Lines, Inc. 326 F.2d 916 (2d Cir. 1962), discussed earlier, it was held that payments to a union in lieu of dues lost by automation did not fall within the exception. The exception is limited to a situation where the dues or assessments are checked off, in fact, from existing employees. Also, where the exception is claimed, mere characterization of the payments as dues without more proof will not suffice. See United States v. Gibas, 300 F.2d 836 (7th Cir. 1962), cert. denied, 371 U.S. 817 (1963).

Although assessments and initiation fees are considered to be within the exception, "fines" cannot be so included because 29 U.S.C. §411(a)(5) provides that no member of a labor union may be fined unless he/she had been served with written, specific charges, given a reasonable time to prepare his/her defense and afforded a full and fair hearing. A check-off assignment would, in effect, be a waiver of these rights as to imposition of the fine. See Felter v. Southern Pacific R.R. Co., 359 U.S. 326 (1959). See also Bay Counties District Council of Carpenters and Joiners, 145 N.L.R.B. 168, where it was held that a union could not accept the checked-off dues and then reallocate the funds to pay off fines imposed on members.

9-132.550 Exception 5: Payments to Welfare and Pension Trust Funds

29 U.S.C. §186(c)5) exempts from the prohibition of the statute payments to a trust fund which meets all of the specific requirements set forth in

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that paragraph. Should any of these requirements be lacking, payments to such a fund would be illegal payments to a "representative of employees" under 29 U.S.C. §186(a). See Local No. 2 v. Paramount Plastering, Inc., 310 F.2d 179, 182, 185-86 (9th Cir. 1962), cert. denied, 372 U.S. 944; and Mechanical Contractors Ass'n v. Local Union 420, 265 F.2d 607 (3d Cir. 1959). For transactions which involve the payment of contributions to an employee welfare or pension benefit trust on or after October 12, 1984, criminal prosecution requires proof of an additional element, namely, an intent on the part of the defendant who participates in the transaction to benefit himself/herself or other persons who he/she knows are not permitted to receive the payment or other thing of value. See 29 U.S.C. §186(d)(1). See USAM 9-132.640, infra. This additional element is consistent with the holding of United States v. Inciso, 292 F.2d 374 (7th Cir. 1961), one of the few criminal prosecutions under 29 U.S.C. §186 to have involved the improper receipt of employee benefit trust contributions. In upholding that the conviction of a union officer who had caused the labor union to unlawfully receive health and welfare contributions from employers by depositing such monies in the union treasury rather than the welfare trust funds, as required by 29 U.S.C. §186(c)(5)(A), the court ruled in Inciso that a "willful" violation of 29 U.S.C. §186(d) requires "proof of an awareness of the restrictions of that section or a reckless disregard for that section." Id. at 380. Although the court had the government had met its burden by demonstrating the defendant's awareness of the requirement that health insurance contributions not be handled in the same manner as membership dues, Inciso represents the only reported decision to require more than proof of knowledge of the operative facts and surrounding circumstances which constitute the prohibited transaction for a "willful" violation. Compare United States v. Silva, supra, at 734, holding that no bad purpose or knowledge of illegality is required for willful receipt of welfare plan contributions in violation of 29 U.S.C. §186(c)(5).

9-132.551 Purpose and Beneficiaries of the Trust

Unless the purposes of a trust fund, established by agreement between employers and a union of employees, are within those permitted by 29 U.S.C. §186(c)(5)(A) and (c)(6), payments to such a trust fund will be deemed unlawful. 29 U.S.C. §186(c)(5)(A) limits such trusts, in general terms, to the purposes of (1) providing health and welfare benefits, and (2) providing pensions or annuities for employees, their families and dependents, and 29 U.S.C. §186(c)(6) which allows trusts for apprenticeship programs and pooled vacation benefits. These purposes may be effectuated either by direct payments from the trust or through the purchase of insurance to provide the benefits.

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In Local No. 2 v. Paramount Plastering, Inc., supra, several trust funds were established by agreement between the union and an employer's association, among them some for payments into a pension fund as to which no question was raised. However, one trust was established to provide better public relations for the general advancement of the plastering industry, and other trusts were established to promote the welfare of the industry and to improve labor-management relations. The propriety of these trusts was challenged. The court concluded that the purposes, powers and functions of the trusts were not within the exceptions created by Congress and were not permissible objects for the use of trust funds. See also Sheet Metal Contractors Ass'n v. Sheet Metal Workers International Ass'n, 248 F.2d 307 (9th Cir 1957), cert. denied, 355 U.S. 924; and Mechanical Contractors Ass'n v. Local 420, supra.

Local No. 2, supra indicates that the general purpose of the trust, welfare, pension, health benefits, etc., must be kept within the strict bounds of 29 U.S.C. §186(c)(5)(A) or (c)(6); however, in Blassie v. Kroger, 345 F.2d 58 (8th Cir 1965), some leeway in interpreting 29 U.S.C. §186(c)(5)(A) was permitted. Among the questions raised in Blassie was whether the trust could pay welfare, pension and/or annuity benefits to persons other than those presently employed by the contributing employer, i.e., retired persons, employees of the trust, employees of the union and officers of the union. The court answered affirmatively, saying that the trustees should pursue:

(A) construction policy favoring inclusion and benefit where there is no positive statutory language or interference exclusion, rather than one favoring inclusion and a denial of benefits where there is no positive statutory language of inclusion.

Blassie, supra 345 F.2d at 68. Thus, a trust agreement may provide for officers and employees of the union and/or employees of the trust, provided that their employers makes contributions for them in the same amount as is paid by other employers.

It should be emphasized that Blassie does not, in reality, expand the permissible purposes of a union trust beyond those specifically listed in 29 U.S.C. §186(c)(5)(A) and (c)(6), but merely provides some flexibility in interpreting the existing language. The subsection speaks of payments to employees and dependents of employees, and Blassie held that retired persons, union officers and trust employees could be beneficiaries because the term "employee" is limited neither to present employees nor to employees of the principal contributing employer. Employees of the union and the trust fund became eligible because the union and the fund were "employers" and the Act contemplates contributions from more than one employee. Blassie v. Kroger, supra, at 71-72.

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Blassie did, however, follow the line of Local No. 2 by holding that a trust for "recreation" was illegal because it did not fit within the term "medical care." See also Mechanical Contractors Ass'n v. Local Union 420, 265 F.2d 607, 611 (3d Cir. 1967); Sheet Metal Contractors Ass'n v. Sheet Metal Workers International Ass'n, 248 F.2d 307 (9th Cir. 1957); and Conditioned Air and Refrigeration Co. v. Plumbing and Pipefitting Labor-Management Relations Trust, 159 F.Supp. 887 (S.D.Cal.), aff'd 253 F.2d 427 (9th Cir 1956). The validity of this interpretation is confirmed by the fact that in 1959 Congress felt it necessary to add Subsection (6) to 29 U.S.C. §186(c) allowing for trusts which provided pooled vacation, holiday and severance benefits. Prior to this amendment, the courts had held that such benefits were not within the permissible purview of 29 U.S.C. §186 subsection (c)(5). See South Louisiana Chapter v. Local 130, I.B.E.W., 177 F. Supp. 432, 436-37 (E.D. La.).

9-132.552 Written Agreement

29 U.S.C. §186(c)(5)(B) requires that employer contributions welfare and pension benefit plans which are sponsored by labor unions be made pursuant to a written agreement with the employer which specifies a "detailed basis on which payments are to be made." For an example of a criminal prosecution based in part on a union officer's receipt of welfare benefit payments absent the required written agreement, see United States v. Silva, supra, at 734.

9-132.553 Equal Administration

Because a primary purpose of 29 U.S.C. §186 is to insure that welfare and pension contributions are used for purposes set forth in the statute and to preclude potential abuses by union officers if such funds were left to their sole control, see Walsh v. Schlecht, 429 U.S. 401, 411 (1977); (1977); 29 U.S.C. §186(c)(5) requires that there be equal representation of both employers and employees in the administration of benefit trust funds. For criminal prosecutions involving abuse of this requirement, see Silva, supra, at 736; and United States v. Inciso, 292 F.2d 374, 377 (7th Cir. 1961) (health and welfare contributions deposited by defendant in union treasury).

Where the employer retains control over the operation of the benefit plan, however, 29 U.S.C. §186(c)(5) does not apply inasmuch as there is not

a possibility of a prohibited payment to a representative of employees in violation of 29 U.S.C. §186(a). Ind. Ass'n of Mutuel Employees v. New York Racing Ass'n, 398 F.2d 587, 590 (2d Cir. 1968); Walsh v. Schlecht, supra, at 410, n. 7; but compare, Costello v. Lipsitz, 547 F.2d 1267 (5th Cir. 1977). Custody of employer-controlled funds in the hands of a bank or trustee who is independent of union control similarly does not require imposition of 29 U.S.C. §186(c)(5) restrictions. Mutuel Employees, supra, at 590-91; Shapiro v. Rosenbaum, 171 F. Supp 875 (S.D. N.Y. 1959). However, a union veto over the uses to which the contributions may be devoted has been held to constitute effective control of the trust despite the absence of actual custody of the fund in the union. See Mechanical Contractors' Ass'n of Philadelphia, supra, at 611-612; Sheet Metal Contractors' Ass'n, supra, at 316.

9-132.560 Exception 6: Trust for Apprentice Program and Pooled Vacation Benefits

For criminal prosecution of violations which arise by failure to comply with this exception on or after October 12, 1984, see USAM 9-132.640, infra.

As noted earlier, in 1959 Congress felt it necessary to expand the list of permissible trusts in 29 U.S.C. §186(c). Trusts for apprenticeship programs and pooled vacation benefits had been struck down by the courts because they did not fit within the wording of 29 U.S.C. §186(c)(5). Subsection (c)(6) of 29 U.S.C. §186 was added to permit such trusts. H. Rep. No. 741, 86th Cong., 1st Sess. at 23 (1959). These trusts, it is important to note, are subject to the restrictions, other than "purpose," imposed on the 29 U.S.C. §186 (c)(5) welfare and pension trusts. In Re Trustees of Operations Engineers, 303 F. Supp, 1126 1131 (N.D.Cal. 1969); H. Rep. No. 741, supra. Under 29 U.S.C. §186(c), payment of "holiday, severance or similar benefits" is a permissible purpose, as is a training program other than of the apprenticeship type. See 29 U.S.C. §186(c)(6).

9-132.570 Exception 7: Trust for Scholarships and Day-Care Centers

For criminal prosecution of violations which arise by failure to comply with this exception on or after October 12, 1984, see USAM 9-132.640, infra.

29 U.S.C. §186(c)(7) sets forth the exception for trusts for the purpose of scholarships for the benefit of employees or child care centers for preschool and school age dependents of employees.

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9-132.580 Exception 8: Trust for Legal Services

For criminal prosecution of violations which arise by failure to comply with this exception on or after October 12, 1984, see USAM 9-132.640, infra.

29 U.S.C. §186(c)(8) provides an exception for trusts for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice.

9-132.590 Exception 9: Labor Management Cooperation Committees

For criminal prosecution of violations which arise by failure to comply with this exception on or after October 12, 1984, see USAM 9-132.640, infra.

29 U.S.C. §186(c)(9) permits an employer to contribute monies to a "plant, area, or industry-wide labor management committee established for one or more of the purposes set forth in section 5(b) [sic] of the Labor Management Cooperation Act of 1978." Section 6(b) of the Labor Management Cooperation Act (Pub. L. No. 95-524, 92 Stat. 2020) sets forth certain purposes for which committees may be jointly organized by employers and labor organizations for a particular plant, area, or industry. The purposes are summarized at 29 U.S.C. §175(a) as the improvement of

. . . labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communicating with respect to subjects of mutual interest and concern.

The legislation originated in congressional hearings which explored methods of improving industrial productivity and which reviewed projects whereby representatives of industry, labor unions and local government had formed committees to study and deal with conditions of employment, job training, retention and recruitment of industry in particular locations, and the migration of labor away from particular communities. See Hearing on S. 533 Before the Subcommittee on Employment, Poverty, and Migratory Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. (1977). Accordingly, it might be argued that 29 U.S.C. §186(c)(9) has effectively overturned prior rulings which had enjoined employer contributions to "industry promotion funds" in which labor unions participated. See, e.g., Local No. 2 v. Paramount Plastering, supra, at USAM 9-132.551.

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Unlike the statutory exceptions for welfare and pension benefit plans in 29 U.S.C. §186(c)(5) through (c)(8), however, the terms of 29 U.S.C. §186(c)(9) do not require a trust fund or incorporate the terms of 29 U.S.C. §186(c)(5)(B), which requires a written agreement, joint and equal administration, annual audit, etc. The primary restrictions on payments to such committees appear to be that the committee be "jointly organized" by employers and labor organizations which represent employees in the jurisdiction covered by the committee and that the purposes fall within those described in the Cooperation Act, 29 U.S.C. §175a. The significance of Section 6(e) of the Cooperation Act, namely, that the Act shall have no effect on the terms and conditions of any collective bargaining agreement, is not yet clear with respect to 29 U.S.C. §186. 92 Stat. 2021. However, no government grant or assistance, administered by the Federal Mediation and Conciliation Service, may be made to any committee which discourages the exercise of rights under the National Labor Relations Act (to join or not join labor unions) or which interferes with collective bargaining in any plant or industry. 29 U.S.C. §175a(b)(3).

9-132.600 CRIMINAL INTENT - 29 U.S.C. §186(d)

9-132.610 Effect of the October 12, 1984 Amendments

Criminal conviction for any violation of 29 U.S.C. §186, whether occurring before or after October 12, 1984, requires proof that the defendant acted "willfully." See USAM 9-132.620, *infra*. However, for a certain category of violations which occur on or after October 12, 1984, an additional element of specific intent is also required to be proved. This special category of offenses involves the transmittal of prohibited payments through labor organizations, employee pension and welfare benefit trusts, or labor-management cooperation committees. See USAM 9-132.640, *infra*.

9-132.620 Willful Violation - 29 U.S.C. §186(d)

As used in 29 U.S.C. §186(d), whether for criminal prosecution of violations occurring before or after October 12, 1984, "willfully violates" is generally accepted to mean that the defendant acted with knowledge of the operative facts constituting the offense. See, e.g., United States v. Lanni, 466 F.2d 1102, 1110 (3d Cir. 1972). 29 U.S.C. §186 is a malum prohibitum offense and the weight of authority does not require a specific intent to violate the law or a reckless disregard of the law.

The following is a list of the holdings by circuit in cases which have dealt with the issue of what constitutes a "willful" violation of 29 U.S.C. §186:

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A. FIRST CIRCUIT

"Willfully" means that the person knowingly and intentionally committed the acts which constituted the charge of a 29 U.S.C. §186 violation. It does not require any knowledge or awareness that such acts are in fact prohibited by law. See United States v. Silva, 517 F. Supp. 727, 735 (DRI), aff'd, on other grounds, 644 F.2d 68 (1st Cir. 1980).

B. SECOND CIRCUIT

It is unnecessary that the defendant knew he/she was violating the law or acting in reckless disregard of the law. See United States v. Ricciardi, 357 F.2d 91, 100 (2d Cir. 1966), cf. United States v. Boylan; 620 F.2d 359, 361 (2d Cir. 1980), United States v. Scotto, 641 F. 2d 47, 55 (2d Cir. 1981).

C. THIRD CIRCUIT

Knowledge of operative facts is sufficient. See United States v. Lanni, supra, at 1110; United States v. Pecora, 484 F.2d 1289 (3d Cir. 1973).

D. SIXTH CIRCUIT

It is not necessary that the defendant have read and possess knowledge of the statute which makes his/she conduct illegal. See United States v. Carter, 311 F.2d 934, 943 (6th Cir. 1963).

E. SEVENTH CIRCUIT

This circuit has stated that the government must prove a defendant charged under 29 U.S.C. §186 acted with "reckless disregard" of the requirements of 29 U.S.C. §186. In practical application, however, the courts in this Circuit seem to require only that the defendant acted with knowledge of the operative material facts involved in the payments.

The standard was initially established in United States v. Inciso, 292 F.2d 374 (7th Cir. 1961). In United States v. Keegan, 331 F.2d 257 (7th Cir. 1964), cert. denied, 379 U.S. 823, the court defined reckless conduct as consisting of (1) knowledge of the operative material facts surrounding the payments, and (2) knowledge that such payments were likely to be illegal. However, in Keegan the court dispensed with the second element and apparently only required knowledge of the operative facts when it approved a jury instruction to that effect. In United States v. Kaye, 556 F.2d 855, 863 (7th Cir. 1977), the court seemed to follow the reasoning in

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Keegan by only requiring proof of the first element to satisfy the "reckless disregard" standard for a willful notion of 29 U.S.C. §186. The court noted that the government had satisfied the second element as well.

F. NINTH CIRCUIT

A "willful" violation of 29 U.S.C. §186(b)(1) in connection with a payment under 29 U.S.C. §186(a)(4) requires only that the defendant act with knowledge that the payments are from a person acting in the interest of an employer and, are intended to influence the defendant's duties as a union employee. Knowledge of the statutory prohibition itself is not necessary. See United States v. Bloch, 696 F.2d 1213, 1216 (9th Cir. 1982).

G. TENTH CIRCUIT

Willfully as used in 29 U.S.C. §186(d) denotes that conduct which is intentional, or knowing, or voluntary, as distinguished from accidental, and it "is employed to characterized conduct marked by careless disregard whether or not one has the right so to act . . ." Korholz v. United States, 269 F.2d 897, 903 (10th Cir. 1959).

9-132.630 Transactions Requiring Only Proof of a "Willfull" Violation on or after October 12, 1984--29 U.S.C. §186(d)(2)

Most criminal prosecutions under 29 U.S.C. §186 involve the actual or contemplated payment of labor union officials and employee representatives directly by persons who act in the interest of employers without transmittal of things of value through labor organizations, welfare and pension benefit trusts, or labor management cooperation committees. Very few criminal prosecutions have arisen from the failure of employers and union officials to collect union dues, employee benefit trust contributions and labor management committee payments in accordance with the requirements of 29 U.S.C. §186(c)(4) through (c)(9). Therefore, criminal violations which do not involve the latter kinds of transactions and which occur on or after October 12, 1984, are similar to all 29 U.S.C. §186 violations which occurred prior to that date. Conviction for such violations requires only proof of a general intent that the defendant acted "willfully" in violation of 29 U.S.C. §186(d)(2). See USAM 9-132.620, supra.

It is the expressed intention of the Congressional sponsors that such violations of the statute, which are not covered by the specified category of offenses described in the 1984 amendment at 29 U.S.C. §186(d)(1), continue to require proof of general criminal intent without proof of bad purpose or a specific intent to violate the law. Employer payments made directly to union officials and employee representatives are more likely to

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involve self-dealing and abuse of position by the individual participants to collective bargaining and thereby justify the continued use of the mens rea standard under existing law. See S. Rep. No. 98-83 on S. 336, Senate Committee on Labor and Human Resources, 98th Cong., 1st. Sess. 13 (1983); S. Rep. No. 98-225 on S. 1762, Committee on the Judiciary, 98th Cong., 1st. Sess. 297-299 (1983).

9-132.640 Transactions Requiring a Statutory Specific Intent and a "Willfull" Violation on or after October 12, 1984--29 U.S.C. §186(d)(1)

Effective October 12, 1984, 29 U.S.C. §186(d)(1) provides:

Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsection (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection....

Therefore, in addition to proof of willful conduct as described at USAM 9-132.620, supra, a criminal conviction for violations of 29 U.S.C. §186 which occur on or after October 12, 1984, and arise from the failure to comply with the restrictions in 29 U.S.C. §186(c)(4) through (c)(9) requires proof that the defendant who participates in the transaction acted with a specific intent to benefit himself/herself or other persons who he/she knew were not entitled to benefit from the transaction. In theory, a non-corrupt failure to comply with the restrictions in subsection (c) which govern the collection from employers of union membership dues, employee benefit trust contributions, and payments for labor-management cooperation committees thereby resulted in a violation of subsections (a) and (b) and could have subjected the participants to criminal liability under law in force prior to October 12, 1984. See discussion at USAM 9-132.540 through 9-132.590. Therefore, in view of the felony penalty which the 1984 amendment imposes upon conviction for violations involving more than \$1,000 in value, the 1984 amendment also requires that the transaction was undertaken with the specific intent set forth in 29 U.S.C. §186(d)(1).

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However, in the absence of evidence that the participants in the violation intended to corruptly benefit themselves or other persons by means of a transaction which was ostensibly undertaken for one of the purposes permitted by subsections (c)(4) through (c)(9), civil actions to enjoin violations of the statute are available to the United States and private litigants under 29 U.S.C. §186(e). See S. Rep. No. 98-83 on S.336, supra, at 2, 13, and 18, in which the Senate Labor Committee articulated its view that the civil injunctive remedy is sufficient to achieve the statutory objective of ensuring compliance with subsections (c)(4) through (c)(9) with respect to non-corrupt violations. It should be noted that although the committee bill had proposed an amendment 29 U.S.C. §186(e) which was not ultimately enacted, the purpose of the proposal was to only affirmatively state the existing authority of the United States to civilly restrain violations of the statute. Consequently, the additional element of proof required for criminal conviction in no way affects the existing civil remedy.

Moreover, Congress' inclusion of the specific intent requirement in 29 U.S.C. §186(d)(1) as an additional element of proof which is separate and distinct from the requirement of a "willfull" violation should underscore the Congressional intent that other willful violations of the statute which do not pertain to the special category of offenses described in 29 U.S.C. §186(d)(1) shall continue to require only proof of general criminal intent under 29 U.S.C. §186(d)(2). See S. Rep. 336, supra, at 13; USAM 9-132.630, supra.

9-132.650 Punishment - 29 U.S.C. §186(d)

The criminal penalty for any violation of the statute which occurs prior to October 12, 1984, is limited to a misdemeanor carrying a maximum of one year's imprisonment and \$10,000 fine.

Effective October 12, 1984, 29 U.S.C. §186(d)(1) and (d)(2) provide:

Any person who [criminally violates 29 U.S.C. §186] shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than \$10,000, or imprisoned for not more than one year, or both.

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The felony penalty may be imposed upon conviction of violations (payment, receipt, request, agreement, etc.) which occur on or after October 12, 1984, and where the actual or contemplated amount of the transaction exceeds \$1,000 in value. Actual or contemplated payments of \$1,000 and below continue as misdemeanors.

Because the 1984 amendment affect only the criminal penalty and burden of proof in regard to certain types of offenses while leaving the other substantive provisions of the statute unchanged, each payment or request for separate payment remains a separate violation of 18 U.S.C. §186(a) and/or (b) as under existing law. Therefore, care should be taken to insure that separate payments of \$1,000 or less are aggregated in a single felony count only where the multiple transfers contemplated by the defendant are clearly parts of one transaction, installments of a prearranged amount, or are the result of a single scheme. See discussion at USAM 9-132.810, infra.

9-132.700 CONSPIRACY AND AIDING AND ABETTING

9-132.710 Conspiracy

As noted above, 29 U.S.C. §186(a) and (b) have the dual purpose of protecting employers against extortion and of insuring honest representation to employees. Because employers are in a "protective class" it has been argued that they cannot conspire with union officials to violate 29 U.S.C. §186, just as a woman who simply consents to being transported across a state line for the purpose of sexual intercourse is not a co-conspirator to violate the Mann Act. See Gerbardi v. United States, 287 U.S. 112, 123 (1932). However, because the statute is not limited to extortion, but is also aimed at assuring collective bargaining at arms length, the Second Circuit in United States v. Annunziato, 293 F.2d 373, 380 (2d Cir. 1961), held that "...an employer who makes or agrees to make a payment to an employee representative forbidden by 29 U.S.C. §302 is engaged in a criminal enterprise jointly with the recipient. He is not simply and solely a member of the class whom the statute aims to protect; he is likewise a member of a class whose activities the statute aims to curb."

It should be noted that Annunziato, supra went on to hold that, even if a conspiracy is not alleged, the agreement for payment and its acceptance would be evidence that the parties were jointly engaged in a criminal enterprise. They would thus be considered co-conspirators so that a declaration of one co-conspirator in furtherance of the conspiracy would be admissible evidence in the prosecution of either for the substantive offense. Id. at 380.

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9-132.720 Aiding and Abetting

In Brennan v. United States, 240 F.2d 253 (8th Cir. 1957), a defendant was convicted both of conspiring with others to violate 29 U.S.C. §186(a) and of aiding and abetting a violation of 29 U.S.C. §186(b). The defendant was neither an employer nor a representative of employees. His/her argument on appeal was that he could not have been:

properly convicted of both giving and receiving the same money at the same time and that it was clearly the intent of Congress to punish givers under subsection (a) and receivers under subsection (b). It was clearly not the intent of Congress to punish givers for violating or aiding and abetting them to violate subsection (b); nor was it the intent of Congress to punish receivers for violating subsection (b) and also for conspiring with the givers, or aiding and abetting them to violate subsection (a).

Brennan, supra at 253. The court answered that it is "only when the person is the paying employer or recipient representative, one or the other, that the statute prohibits prosecution for aiding and abetting a conspiracy with the other."

18 U.S.C. §2(b), provides that:

Whoever willfully causes an act to be done which if directly performed by him or another would be offense against the United States, is punishable as a principal.

This provision was used in connection with 29 U.S.C. §186 in United States v. Inciso, 292 F.2d 374 (7th Cir.), cert. denied, 368 U.S. 920 (1961). There, the defendant was convicted of causing the union of which he was an officer to receive unlawful payments under 29 U.S.C. §186. For a period of time before the violation, the union and the employer had engaged in negotiations for a health and welfare trust fund, and the evidence showed that Inciso knew that the trust had to comply with 29 U.S.C. §186(c) if it were to be valid. However, he devised a different plan and caused payments to be made to the union under it. Because no payments were made to Inciso he could not be charged under 29 U.S.C. §186(b), but because he caused payments to be made to a "representative" of employees (the union), he was chargeable as a principal under 18 U.S.C. §2(b).

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9-132.730 Venue

Venue under 29 U.S.C. §186 may be established in the jurisdiction where the unlawful payments were paid or in the jurisdiction where they were received or accepted. The deposit of corporate employer's checks in conduit company's bank account located in the district of trial and collection from the account by the defendant union official was held sufficient to establish venue. United States v. McMaster, 343 F.2d 176 (6th Cir. 1965). The United States Court of Appeals, Fourth Circuit, has significantly broadened venue for 29 U.S.C. §186 offenses in holding that venue with respect to 29 U.S.C. §186 payments lies in any district where interstate or foreign commerce is affected by an employer's payment to a union official who represents workers in an industry affecting such commerce within the meaning of 29 U.S.C. §186. This theory of venue, which is similar to that used in Hobbs Act (18 U.S.C. §1951) prosecutions, was accepted at trial because the actual payments had been completed outside the venue of the district where the trial took place. United States v. Billups, 692 F.2d 320 (4th Cir. 1983).

9-132.800 INDICTMENT

9-132.810 Sufficiency

It has been pointed out earlier that 29 U.S.C. §186(a) charges four distinct offenses, ranging from payments to a "representative of one's employees employed in an industry affecting commerce," (29 U.S.C. §186(a)(1)), to payments to an officer or employee of a labor organization "with intent to influence him in respect to any of his actions . . . as a representative of employees . . ." (29 U.S.C. §186(a)(4)). In United States v. Donovan, 339 F.2d 404 (7th Cir. 1964), it was held that an indictment which did not specify under which subparagraph of 29 U.S.C. §186(a) the defendant was charged was insufficient to inform him of the nature of the charges against him. The court found that an indictment charging that the defendant was both an "official of Local 755" and a "representative of the employees" of the payor did not enable him to determine whether he was being charged as a union official under 29 U.S.C. §186(a)(2) or §186(a)(4) or as a "representative of employees" under 29 U.S.C. §186(a)(1).

This result was questioned by the Second Circuit in United States v. Fisher, 387 F.2d 165 (2d Cir. 1967), where the defendant claimed that an information charging him with accepting payments while he was an "officer, employee and representative of a labor organization" was duplicious under the Donovan rationale. The court said, "we would have serious doubts about following Donovan," but did not resolve the issue

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because a bill of particulars was furnished to defendant which left no doubt that he/she was being charged in his/her capacity as a union officer.

Another issue frequently raised involves the interstate commerce aspect of the statute. As discussed above, the test under certain of the subparagraphs of 29 U.S.C. §186(a) is whether the employees, not the employers, are employed in an industry affecting commerce. In United States v. Psoinos, 282 F. Supp. 473 (D.Mass 1968), (an extremely strict decision by Judge Wyzanski) the defendant employer was charged with making a payment to the business representative of a union. The court noted that 29 U.S.C. §186 made it unlawful for an employer to pay money

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce.

It then noted that the indictment only charged that the employers of the employees were engaged in interstate commerce. The flaw, therefore, was that there was no allegation that the employees who the business agent's union sought to represent were themselves employed in an industry affecting commerce. Without such an allegation there is no offense charged under the statute.

An indictment need not be so specific as to name the particular industry affecting commerce involved. United States v. Ricciardi, 357 F.2d 91 (2d Cir. 1966); United States v. DiSalvo, 251 F. Supp. 740 (S.D.N.Y. 1966). In Ricciardi, the court quoted the following from United States v. Varlack, 225 F.2d 665, 670 (2d Cir. 1955), where the court was discussing a Hobbs Act indictment:

The question before us, however, is not whether the indictment filed is, in all respects, the best that could have been drafted but rather, whether the omissions alluded to so completely denuded the charges of so much information data as to deprive appellant of his right to be apprised of the charge he was required to meet and to be protected against being tried twice for the same offense. This test is a practical one and one which may be met despite the fact that the indictment could have been made more definite and certain.

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With this statement in mind, the Ricciardi court held that, if the defendant had doubts about what the particular industry was, he could have moved for a bill of particulars.

In United States v. Waterman Dock Co., 131 F. Supp. 956 (D.P.R. 1955) the defendant claimed that a 29 U.S.C. §186 indictment must negative the exceptions of 29 U.S.C. §186(c) in order to allege a crime. The court said that the exception relied on was set up in a separate clause of the statute and the ingredients constituting the offense could be accurately and clearly defined without reference to the exception. Such exceptions, said the court, were therefore matters of defense and must be shown by the defendant. Id. at 957. See also United States v. Borland, 311 F. Supp. 622 (D. Del. 1970).

Because the 1984 amendments expose the defendant to a felony or misdemeanor penalty for each violation of the section depending on whether the value involved "in any violation" falls above or below \$1,000, care should be taken to properly allege each violation in a manner which is consistent with the statutory scheme intended by Congress. In this regard each actual or contemplated transfer of money or other thing of value is a separate violation of 29 U.S.C. §186(a) and/or §186(b). See, e.g., United States v. Alaimo, 297 F.2d 604 (3d Cir. 1961) which upheld that it is proper to charge in separate counts each receipt of payment from the same employer made over a period of several months. The Alaimo court noted that:

. . . each time the defendant received a check from the company he was doing what the statute forbade.

. . . we think it quite reasonable that Congress should have provided for a separate punishment each time an employee representative places a price upon two weeks of labor peace

Id. at 605-06. The result is the same where all payments are made pursuant to a single agreement. United States v. Cohen, 384 F.2d 699 (2d Cir. 1967); see also United States v. Keegan, 331 F.2d 257 (7th Cir. 1964); United States v. Piasecki, 300 F.2d 152 (3d Cir. 1962); United States v. Boffa, 513 F. Supp. 444 (D. Del. 1980), aff'd 688 F.2d 919 (3d Cir. 1982); United States v. Boylan, 620 F.2d 359 (2d Cir. 1980). Accordingly, for violations which occur on or after October 12, 1984, each payment or receipt of payment above \$1,000 in value exposes the defendant to a separate felony penalty.

Nevertheless, the government may also elect to aggregate multiple payments between the same parties in a single count although each payment

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constitutes a separate violation. See, e.g., United States v. Korholz, 269 F.2d 897 (10th Cir. 1959) which held that an employer's 13 separate payments on 8 different bank loans for a single union official was properly charged as an aggregate amount despite the fact that any one of the transactions would have constituted a crime; see also United States v. Inciso, 292 F.2d 374 (7th Cir. 1961) where the aggregate of payments received by a union official from 22 different employers was charged in 22 counts.

However, because of the prejudice which could arise from aggregating separate payments of \$1,000 or less, as for example, by charging three \$500 payments in a single felony count, care should be taken to ensure that such violations are aggregated in a single felony count only where the multiple transfers contemplated by the defendant are clearly parts of one transaction, installments of a pre-arranged amount, or the result of a single scheme. See, e.g., United States v. Billingslea, 603 F.2d 515, 520 (5th Cir. 1979) and cases cited therein which distinguished acts undertaken as part of a continuous course of larcenous conduct as contrasted with isolated acts of theft which may not be aggregated to reach the amount needed to support a felony based on value of the property taken. There appears to be no discussion of this issue in the legislative history of the 1984 amendment.

Failure to allege a "willfull" violation in the indictment is reversible error. The government is not permitted to amend the indictment to correct the deficiency after it has been returned. See United States v. Fischetti, 450 F.2d 34 (5th Cir. 1971). Moreover, with respect to violations which occur on or after October 12, 1984, and arise from the failure to comply with the requirements of subsections (c)(4) through (c)(9), the specific intent required by 29 U.S.C. §186(d)(1) should be expressly alleged in the indictment as an element to be demonstrated in the government's case-in-chief. See USAM 9-132.640, supra.

9-132.820 Variance

Once the sufficiency of the indictment is established the major problem left is one of variance between the proof at trial and the facts alleged in the indictment. The most common problem occurs where the indictment alleges payment or receipt of "money" and the proof indicates that some substitute for money, in fact, changed hands. In United States v. Lippi, 190 F. Supp. 604 (D. Del. 1961), the court held that a fatal variance existed where receipt of "money" was alleged, but the proof indicated that the employer had paid the premium on insurance policies for the defendant. In United States v. Korholz, 269 F.2d 897 (10th Cir.), cert. denied, 361 U.S. 929 (1959), however, the proof showed that an employer paid a debt owed by the defendant to a bank, although the indictment had alleged receipt of "money."

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The court held that, because the gist of the offense was payment of money in violation of the statute and the record showed that the bank acted as the agent of both parties in the transaction, the mere failure of the indictment to set forth each step of the transfer of funds did not create a fatal variance. See United States v. Holt, 333 F.2d 455 (2d Cir. 1964); United States v. Roth 333 F.2d 450 (2d Cir.), cert. denied, 380 U.S. 942 (1964). As a rule, the indictment should charge receipt of some "other thing of value" whenever the proof will show receipt of anything other than cash.

In United States v. Lanni, 466 F.2d 1102 (3d Cir.), the court found that a fatal variance was not created where the indictment charged direct receipt of unlawful payments by the defendant-union official and the proof at trial showed indirect payments through a third party conduit. See also United States v. McMaster, 343 F.2d 176 (6th Cir. 1965) (failure of indictment to charge payments routed through third party conduit held not a fatal variance). However, contrast United States v. DeBrouse, 652 F.2d 383, 389 (4th Cir. 1981) where the indictment charged that a third party received employer payments as a "nominee" of the defendant union official. The court held that it was not a fatal variance to fail to prove that the "nominee" acted as a conduit or held the payment on behalf of the union official where the conviction could be sustained on the theory that the value to the union official of being able to confer a benefit on a third party was a receipt of a "thing of value" prohibited by 29 U.S.C. §186. See USAM 9-132.230 and USAM 9-132.350.

In United States v. Kaye, 556 F.2d 855, 863 (7th Cir. 1977) defendant was charged with receiving unlawful payments while serving both as a "representative of employees" (29 U.S.C. §186(a)(1)) and as "an employee of a labor organization" (29 U.S.C. §186(a)(2)). The court held that the prosecution was not required to show both that defendant was acting as a business agent and performing the duties of union officer when he received the unlawful payments.

9-132.830 Sample Indictments Under 28 U.S.C. §186

1. The following is a typical indictment designed to cover the case in which the defendant union officer is actually a representative of the employer making illegal payment:

THE GRAND JURY CHARGES:

That on or about the _____ day of _____, 19____, in the _____ District of _____ the defendant _____, (Business manager, president, etc.) of _____ (name of union), being a representative

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of the employees of _____ (name of company) who were employed in an industry affecting commerce, did unlawfully, willfully and knowingly request, demand, receive and accept and agree to receive and accept the payment of money in the amount of _____ from _____ (employer).

All in violation of Section 186(b)(1) and (d), Title 29, United States Code.

2. The following is a form for the indictment of an employer who makes a payment to the officer of a union which does not represent his/her employees in violation of 29 U.S.C. §186(a)(2):

THE GRAND JURY CHARGES:

That on or about the ____ day of _____, 19 __, in the _____ District of _____ the defendant _____, being the agent of an employer _____ (name of company), did unlawfully, willfully and knowingly pay and deliver and agree to pay and deliver money in the amount of _____ to _____, an officer of a labor organization, to wit, _____ (business manager, president, etc.) of _____ (name of union), which sought to represent and would have admitted to membership the employees of _____ who were employed in an industry affecting commerce.

All in violation of Section 186(a)(2) and (d), Title 29, United States Code.

3. The following indictment was drafted for use in a case in which the employer (Maurice Bellows) made a payment to a third party (Joseph Fischetti) who was not an officer or employee of a labor organization in order to avoid his obligations under a contract. The third party brought into an arrangement an officer (Donald Gillette) of a union (the Teamsters) which did not represent and was not seeking to represent any of Bellows' employees; however, Gillette was a delegate to the Miami Building and a Construction Trades Council, which held the contract. The purpose of the payment was to induce Gillette to assist in removing the contract from the council's files, and the indictment was framed so as to charge him under the language of 29 U.S.C. §186(a)(4) and Fischetti as an aider and abettor under 18 U.S.C. §2:

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THE GRAND JURY CHARGES:

1. That on or about January 27, 1969, in the Southern District of Florida, defendants JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE unlawfully, willfully and knowingly requested delivery of money in the amount of eighteen thousand dollars (\$18,000) from Maurice G. Bellows, an agent and representative of Bellows Development Corp., an employer, with intent to influence defendant DONALD F. GILLETTE, an officer and employee of a labor organization engaged in an industry affecting commerce, to wit, Local 769 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in respect to his actions, decisions and duties as a representative of employees.

All in violation of Section §186(b)(1) and (d), Title 29, United States Code, and Section §2, Title 18, United States Code.

9-132.900 SAMPLE JURY INSTRUCTIONS UNDER 29 U.S.C. §186

Following are the actual instructions given in United States v. Peter W. Weber, 437 F.2d 327 (3d Cir. 1970), pertinent to the Taft-Hartley portion of that case.

I shall now discuss with you the provisions of 29 U.S.C. §186 of the Labor-Management Reporting and Disclosure Act as it is applicable to Counts I through IV of this indictment. That statute is an Act passed by the Congress of the United States. Counts I through IV allege that the defendant, Weber, a representative of employees of the Price Company, whose employees were engaged in an industry affecting commerce, unlawfully, willfully and knowingly did request, demand, receive, and accept money from the H. C. Price Company on four separate occasions, each occurrence being the subject of a separate count in this indictment.

The statute in its applicable parts reads that:

"It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value -

". . . to any representative of any of his employees who are employed in an industry affecting commerce . . .";

"It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any

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money or other thing of value prohibited by the subsection . . ." that I have read.

In order to find the defendant, Weber, guilty with respect to the alleged Price Company payments, you will have to find that the following five elements have been established beyond a reasonable doubt:

(1) That H. C. Price Company was an employer and that Harold Price, Al Overton, and Roy Burgess were officials and agents of the company;

(2) That the defendant, Weber, was an official of Local 325 and was a representative of H. C. Price's employees at the time of each payment;

(3) That the employees of the H. C. Price Company were engaged in an industry affecting commerce;

(4) That the defendant, Weber, requested, received, demanded, or accepted money from the H. C. Price Company; and

(5) That the defendant, Weber, requested, received, demanded, or accepted money with knowledge

(a) that he was receiving or accepting money, and

(b) that the person who was giving him the money was an employer or acting in behalf of the employer of employees whom he represented.

In order to convict the defendant of the charges in Counts I through IV, it is imperative that the jury believe, beyond a reasonable doubt, the testimony of the officials of the H. C. Price Company that the defendant was paid the sum of \$3,500 by Ray W. Burgess, now deceased.

If you find that Ray Burgess, with or without the knowledge of the defendant, was himself keeping the money instead of making the alleged \$3,500 payments to the defendant, you must render a verdict of not guilty on Counts I through IV.

Ladies and gentlemen, I shall now define certain terms for you.

The term "employer" as used in this Section refers to anyone who acts as an employer directly or indirectly or as an agent of an employer. If you believe the testimony of the government's witnesses that the H. C. Price Company was a firm employing operating engineers from Local 825 to lay their pipeline, you may properly conclude that they are an "employer" within the terms of the statute.

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Further, you may find that Harold C. Price, Bob Shivel, Al Overton, and Ray Burgess were agents of the Price Company and as such acted in its behalf.

The term "representative" as used in this Section refers to any union official, who is empowered, authorized, or designated in any way, directly or indirectly, by any employee or group of employees to represent them in any matter relating to their wages or hours, or working conditions, by standing in the place of such employee in responsible dealings with the employer involving the above labor matters.

In other words, if you find that the defendant, Weber, represented Operating Engineers in his dealings with the Price officials, you may find that under the law Weber was a representative. In making this determination, you may take into consideration Weber's position in Local 825 as a business agent during the time the alleged payments were made. Further, you may take into consideration the testimony of Albert Overton that the defendant, Weber, was the representative of the Price employees during the period the payments were made.

As to the term "interstate commerce," if you believe the testimony of the government's witnesses that the employees of the H. C. Price Company, who were represented by the defendant, Peter W. Weber, were employed in the construction of pipelines to transport and distribute natural gas for the Texas Eastern Transmission Corporation with principal offices in Houston, Texas, and the Algonquin Gas Transmission Company with principal offices in Boston, Massachusetts, you may conclude that these employees were in an industry affecting commerce. In making this determination, you may consider that the natural gas products originated in Texas, flow through the pipeline into New Jersey, for final consumption in New York and other northern States.

You may also conclude that the employees of the H. C. Price Company were in an industry affecting commerce if you find that a labor dispute during the construction of their project would have burdened or obstructed commerce or tended to burden or obstruct commerce or the free flow of commerce.

In other words, if the defendant, Weber, called a strike for any reason legitimate or illegitimate, and this shutdown would directly obstruct commerce, in that the natural gas flowing into the New Jersey area from Texas would obviously be halted, you may conclude that the employees of the Price Company were in an industry affecting commerce. The strike may never happen; it is sufficient, though, that if it did it would obstruct the free flow of interstate commerce.

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I now would like to tell you something about this statute so you will know the kind of conduct which the law prohibits.

This statute outlaws all payments between an employer and the union representative of his/her employees. There are certain instances in which payments are exempted from the prohibitions of this statute. However, in the case before you, I have decided as a matter of law that these exceptions have not become the subject of any factual controversy and, therefore, need not be considered in your deliberations.

Now, I have told you all payments between the employer and the union representative are outlawed. The mere request, or demand, or receipt, or acceptance of any sum of money by a union representative violates this statute. Lawyers call a criminal provision such as this statute *malum prohibitum*, which in simple English means wrong because forbidden by the statute. This means in the case before you that the government does not have to prove that the defendant, Weber, had the intent to violate this law or that the defendant acted in willful disregard of the law. The government need only prove beyond a reasonable doubt that the defendant acted in a knowing fashion in that when he/she demanded, requested, or accepted money he/she knew he/she was the union representative for the employees employed by the Price Company.

For instance, if you believe the government's evidence that the defendant, Weber, asked Burgess for \$10,000 the government does not have to prove in addition that Weber intended to violate the law, but only that Weber willfully asked for this money with the knowledge that the Price Company was an employer of Operating Engineers and that he, Weber, represented them as their union leader and bargaining agent. The statute is violated by a simple request. It is also violated by the receipt or acceptance of the payment. If you find that the government has proven beyond a reasonable doubt either that the defendant asked for money or took money, then you may find the defendant guilty. If the government has not proven either one of these beyond a reasonable doubt, you must return a verdict of not guilty on each of these first four counts.

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9-133.000 29 U.S.C. §501(c): EMBEZZLEMENT OF UNION ASSETS; 18 U.S.C. §664; EMBEZZLEMENT OF EMPLOYEE BENEFIT PLAN ASSETS

9-133.010 Investigative Jurisdiction: 29 U.S.C. §501(c) and 18 U.S.C. §664

By a Memorandum of Understanding dated February 16, 1960, between the Secretary of Labor and the Attorney General, criminal matters arising under 19 U.S.C. §501(c) are investigated by the Federal Bureau of Investigation. The Memorandum permits different arrangements to be made by the Departments of Justice and Labor on a case-by-case basis. A similar Memorandum of Understanding of February 9, 1975, makes the same delegation with respect to criminal matters arising under 18 U.S.C. §664.

However, effective October 12, 1984, the Labor Department may also investigate criminal violations related to the regulation of employee pension and welfare plans which are subject to Title I of the Employee Retirement Income Security Act (29 U.S.C. §§1001-1144) without further delegation of investigative authority by the Justice Department. 29 U.S.C. §1136, as amended by the Comprehensive Crime Control Act of 1984, §805. Therefore, Labor Department investigators now have the statutory authority to investigate violations of 29 U.S.C. §664 which they formerly exercised on a case-by-case basis under the 1975 Memorandum of Understanding. Because the FBI and the Department of Labor have concurrent jurisdiction in these cases, each investigative agency should notify the appropriate U.S. Attorney's Office or the Organized Crime and Racketeering Section Strike Force at the earliest possible stage of an investigation. Such investigations should be closely monitored to avoid duplication of investigative effort.

9-133.020 Supervisory Jurisdiction

Questions in regard to the Labor Embezzlement statutes should be directed to the Organized Crime and Racketeering Section, Criminal Division, (FTS) 633-3666.

9-133.030 Policy--Concurrent Federal-State Jurisdiction

In any matter which is a violation of 29 U.S.C. §501(c) or 18 U.S.C. §664 as well as a violation of state criminal law, the U.S. Attorney is authorized to determine after investigation whether the matter should be referred to local authorities for prosecution or whether it warrants

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federal prosecution. When such matters are referred to local authorities, the Federal Bureau of Investigation should be advised of the referral and requested to determine the status of the local prosecution 90 days after referral. In the event local authorities fail to take any action upon such a referral within 90 days, the U.S. Attorney should then initiate federal prosecution.

9-133.040 Legislative History: 29 U.S.C. §501(c)

The Senate Select Committee on Improper Activities in the Labor and Management Field, popularly known as the McClellan Committee, discovered widespread misuse and mismanagement of union funds during its investigation prior to passage of the Labor-Management Reporting and Disclosure Act of 1959. See H.R. REP. No. 741, 86th Cong., 1st Sess. 8 (1959), Interim Report. The committee discovered that specific abuses ranged from negligent management of union property to deliberate use of union funds to finance illegal enterprises.

By its passage of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA) (sometimes referred to as the "Landrum-Griffin Act," for two of its Congressional sponsors), the Congress asserted federal jurisdiction over the regulation of the internal financial affairs of labor unions and over the conduct of union officers in their official positions. Congress cited, as a basis for assertion of the jurisdiction, the impact which the vast sums that pass through union treasuries have on the nation's economy. See generally 29 U.S.C. §401, "Congressional Declaration of Findings, Purposes, and Policy." The belief that union members should be entitled to the same protection they would have if their money was in the care of a bank, an insurance company, or other institution in which funds are held in a fiduciary capacity led Congress to enact the legislation and to provide criminal liability for misuse of union funds. 29 U.S.C. §501(c).

For further legislative history, see 105 CONG. REC. 816, 6048, 13125, 14175, 14395, 14519, 14540, 16435, 16653 (1959); S. REP. No. 86-187, 86th Cong. 1st Sess. (1959); H.R. REP. No. 86-741, 86th Cong., 1st Sess. (1959); H.R. No. 86-1147, 86th Cong., 1st Sess. (1959).

9-133.050 Constitutionality

Congress asserted its power to legislate in this area to accomplish the objective of a free flow of commerce, and the constitutionality of 29 U.S.C. §501(c) has been affirmed in a number of cases. For example,

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Lawson v. United States, 300 F.2d 252 (10th Cir. 1962), recognized the constitutional power vested in Congress to regulate labor-management matters affecting commerce and held that the criminal remedies provided in 29 U.S.C. §501(c) of the Act bear a reasonable relation to the nefarious conditions which Congress found to exist and sought to remedy.

The contention that 29 U.S.C. §501(a) and (c) were unconstitutional because they were an improper delegation of power to the federal courts which is unwarranted under Article III of the Constitution was rejected in United States v. Decker, 304 F.2d 702 (6th Cir. 1962). The court declared that it is "late in the day to question the power of Congress to regulate the affairs of labor unions which function as a part of, and have an effect upon, interstate commerce" and found nothing in the Constitution which would forbid Congress from protecting the rights of members of unions against the kind of thievery involved in Decker.

In United States v. Haverlick, 195 F. Supp. 331 (N.D.N.Y. 1961), aff'd 311 F.2d 229 (2d Cir. 1962), a motion to dismiss the indictment on the ground that the statute was unconstitutional was denied. The court declared that the underlying theory of the section seems to be that the power of a labor organization to bargain collectively in matters affecting commerce, which power is now regulated by statute, would be lessened by the misuse of abuse of its funds. It also rejected the contention that 29 U.S.C. §501(c) is an unlawful intrusion upon the rights reserved to the states, holding that state authority relative to enforcement of similar state laws has not been impaired or diminished.

9-133.100 EMBEZZLEMENT STATUTES

9-133.110 Embezzlement of Union Assets: 29 U.S.C. §501(c)

29 United States Code, Section 501(c) reads:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

In order to establish a violation of 29 U.S.C. §501(c) the government must allege and prove the following essential elements:

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A. That the entity embezzled from is a labor organization within the meaning of 29 U.S.C. §402(i) and §402(j) (i.e., a labor organization engaged in an industry affecting interstate commerce).

B. That the defendant is either an officer of the labor organization within the meaning of 29 U.S.C. §402(n) or is directly or is indirectly employed by the labor organization.

C. That the defendant perpetrated some type of unlawful and unauthorized taking of any of the moneys, funds, securities, properties or other assets of the labor organization.

By enacting 29 U.S.C. §501(c), Congress established "a new Federal crime whose scope extends beyond common law embezzlement." See United States v. Nell, 526 F.2d 1223, 1232 (5th Cir. 1976). The new crime can be accomplished in any one of the four ways: (1) embezzling, (2) stealing, (3) unlawfully and willfully abstracting, or (4) unlawfully and willfully converting. The statute retains the common law meaning of these terms. Woxberg v. United States, 329 F.2d 284 (9th Cir. 1963), cert. denied, 379 U.S. 823 (1964). When employed herein, the term "embezzlement" may denote either the common law meaning of the term or, more generally, any act which constitutes a violation of 29 U.S.C. §501(c). The meaning intended will appear from the context.

There is considerable overlapping in the terms employed in the statute. Historically, drafters of embezzlement statutes have been concerned that either the common law or inadequate drafting has often permitted wrongdoers to avoid conviction by escaping through the breaches created by the limited proscription of a technical term. As the Supreme Court stated: "The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances." See Morissette v. United States, 342 U.S. 246, 247 (1952). By employing four different and broad terms in 29 U.S.C. §501(c), Congress sought to avoid this problem. In order to enforce the fiduciary responsibility of union officers, Congress intended that technical common law distinctions among various types of crimes were not to be rigidly applied. See United States v. Harmon, 339 F.2d 354 (6th Cir. 1964), cert. denied, 380 U.S. 944 (1965).

9-133.120 Embezzlement of Welfare Pension Plan Assets: 18 U.S.C. §664

18 United States Code, Section 664 reads:

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Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or any fund connected therewith, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

As used in this Section, the term, "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of Title 1 of the Employee Retirement Income Security Act of 1974.

For violations occurring before January 1, 1975, the applicable statute is the Welfare and Pension Plans Disclosure Act of 1962, 29 U.S.C. §301 et seq. For violations occurring on or after January 1, 1975, the applicable statute is Title I of ERISA, codified at 29 U.S.C. §§1001-1144.

In order to establish a violation of 18 U.S.C. §664, the government must allege and prove the following essential elements:

A. That the entity whose funds are depleted is an employee welfare or pension plan within the meaning of the Welfare and Pension Plans Disclosure Act (29 U.S.C. §301 et seq., prior to January 1, 1975) and/or the Employee Retirement Income Security Act (29 U.S.C. §1001 et seq., after January 1, 1975);

B. That the defendant (who may be any person, either by virtue of a fiduciary capacity or otherwise) fraudulently depleted the funds of the plan.

9-133.130 Comparison of 29 U.S.C. §501(c) and 18 U.S.C. §664

29 U.S.C. §501(c) and 18 U.S.C. §664 are "like" statutes with "parallel" language. They were passed for a "similar purpose," and their prohibitory language "should be given similar interpretation and be applied to similar types of conduct." See United States v. Andreen, 628 F.2d 1236, 1242 (9th Cir. 1980). Thus, most of the discussion of 29 U.S.C. §501(c) which follows is equally applicable to 18 U.S.C. §664, with three principal areas of difference:

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A. Whereas 29 U.S.C. §501(c) applies to a "labor organization" (see USAM 9-133.210 infra), 18 U.S.C. §664 applies to welfare or pension benefit plans or funds "connected therewith" as defined in the statute and regulations. See USAM 9-135.000 et seq.;

B. 18 U.S.C. §664 expands the lists of assets to specifically include "premiums" and "credits" (see USAM 9-133.240 infra); and

C. Whereas 29 U.S.C. §501(c) sets out who is liable under its provisions (see USAM 9-133.220 infra), 18 U.S.C. §664 applies to "any person."

9-133.200 ELEMENTS OF THE OFFENSE

9-133.210 Labor Organization

The first element which must be alleged and proved with respect to each and every count of the indictment under 29 U.S.C. §501(c) is that the entity whose assets were allegedly embezzled was a "labor organization" within the meaning of the LMRDA. This definition consists of two parts and is contained in 29 U.S.C. §402(i) and (j).

29 U.S.C. §402(i) provides that labor organizations must be engaged in an industry affecting commerce and divides them into two broad categories: first, organizations in which employees participate and which exist for the purpose of dealing with employers concerning the terms and conditions of employment; and, second, the so-called intermediate bodies not necessarily composed of employees or dealing with employers.

Regulations issued by the Secretary of Labor amplify this definition. 29 U.S.C. §451 (1982). Concerning labor organizations in the first group, they state that, in determining whether a labor organization exists for the purpose of collective bargaining and the administration of a collective agreement, "consideration will be given not only to formal documents, such as its constitution or bylaws, but the actual functions and practices of the organizations as well." 29 C.F.R. §451.3(a)(2) (1982). Accordingly, informal employee committees which regularly meet with management to discuss problems in employment relations are considered "labor organization," although they do not have a formal structure.

The so-called intermediate bodies are described in both 29 U.S.C. §402(i) and the applicable regulation. 29 C.F.R. §451.4 (1982). Subparagraph (i) of 29 U.S.C. §402 lists four such groups, while the

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regulations more specifically describe the various bodies indicating their functions and the particular union with which they are usually affiliated. For example, "conferences" are formed by Teamsters locals; "general committees" are formed by railway unions. Furthermore, the regulations point out that such intermediate bodies as the departments of the AFL-CIO (e.g., the Building and Construction Trades Department) are labor organizations within the meaning of the Act.

9-133.211 Labor Organization in an Industry Affecting Commerce

The second fact of the definition is contained in 29 U.S.C. §402(j), which provides that a labor organization shall be deemed to be engaged in an industry affecting commerce if:

A. It is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

B. Although not certified, it is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

C. It has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph A or B; or

D. It has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph A or B as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

E. It is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a state or local central body.

9-133.212 Exempted Labor Organizations

Only a few types of trade union organizations are exempted from the coverage of LMRDA. They are:

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A. State and Central Bodies. Under the Code of Federal Regulations, a "state or local central body" is an organization that:

1. Is chartered by a federation of national or international unions; and
2. Admits to membership local unions and subordinate bodies of national or international unions that are affiliated with the chartering federation within the state or local unions or subordinate bodies directly affiliated with the federation in such territory; and
3. Exists primarily to carry on educational, legislative or coordinating activities.

The term does not include organizations of local unions or subordinate bodies (1) of a single national or international union; or (2) of a particular department of a federation or similar an association of national or international unions. 29 C.F.R. §451.5 (1982).

B. Completely Local Unions. Independent local unions which deal with employers not engaged in industries affecting interstate commerce. They are also assumed to be exempt from the coverage of LMRDA. However, as stated at 29 C.F.R. §451.2:

In accordance with the broad language used and the manifest congressional intent, the language will be construed broadly to include all labor organizations of any kind other than those clearly shown to be outside the scope of the Act.

C. Government Employee Unions. 29 C.F.R. §451.3(a)(4) states, in the pertinent part:

(4) In defining 'employer,' section 3(e) expressly excludes the 'United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.' A labor organization composed entirely of employees of the governmental entities excluded by section 3(e) would not be a labor organization for the purposes of the Act with the exception of a labor organization composed of employees of the United States Postal Service which is subject to the Act by virtue of the Postal Reorganization Act of 1970. (A labor organization is subject to Title VII of the Civil

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Service Reform Act if it is composed entirely of employees of the agencies which are set forth in section 7103 of that Act.) However, in the case of a national or international labor organization composed both of Government locals and nongovernment or mixed locals, the parent organization as well as its mixed and nongovernment locals would be 'labor organizations' and subject to the Act [LMRDA]. In such case, the locals which are composed entirely of Government employees would not be subject to the Act, although elections in which they participate for national officers or delegates would be so subject.

In a case involving a public school teacher's union local, it was held that even though the union's charter admitted private school teachers, and the union's parent body chartered locals representing private school employees, the local in question was not subject to the LMRDA because it had never sought and was not seeking to represent the public employees. See Wright v. Baltimore Teachers Union, 369 F. Supp. 848 (D. Md. 1974). See also Local 1498, AFGE v. AFGE, 522 F.2d 486 (3d Cir. 1975).

As stated in 29 C.F.R. §451.3(a), Postal Unions are subject LMRDA, see 39 U.S.C. §1209, but other federal public employee unions composed entirely of federal employees are subject only to the Civil Service Reform Act, see, e.g., 5 U.S.C. §§7120, 7134 and 29 C.F.R. §§207,108.

9-133.220 Persons Covered by 29 U.S.C. §501(c)

29 U.S.C. §501(c), by its terms, applies to any person who is an officer or who is directly or indirectly employed by a labor organization 29 U.S.C. §402(n) defines an "officer" as "any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body."

Prior to the passage of the Act, the Supreme Court in NLRB v. Coca Cola Bottling Co., 350 U.S. 264 (1956), had held that the term "union officer" as used in the Taft-Hartley Act applies only to those so designated in the union's constitution. This meant that persons who performed the functions of officers but were not so designated were not covered by the Taft-Hartley Act. Congress feared that, without such a definition the court's interpretation of the term "union officer" might also determine the coverage of the LMRDA over union officials, allowing a

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union to rewrite its constitution so as to have only a single officer, thus permitting officials who perform the duties of vice-president, secretary, treasurer, business agent, organizer, manager, or member of an executive board or other union governing body to escape the bill's sanctions. S. REP. No. 187, 86th Cong., 1st Sess. 95 (1959).

In Writz v. National Maritime Union of America, 399 F.2d 544 (2d Cir. 1968), the court dealt with the issue of whether National Maritime Union "patrolmen" are "officers" within the meaning of the LMRDA. Patrolmen are responsible for the adjustment of grievances and the enforcement of collective-bargaining agreements between the union and various employers. In holding that the patrolmen were officers, the court reasoned: (1) that they were treated as officers by the Union's constitution; and (2) that their duties were not purely ministerial.

As indicated above, 29 U.S.C. §501(c) applies not only to union officers but also to anyone who is directly or indirectly employed by a union. The legislative history of the LMRDA indicates that Congress intended 29 U.S.C. §501(c) to apply to "any person having any direct or indirect functions in connection with the money or property of a labor organization. 105 CONG. REC. 1327, 85th Cong., 2d Sess. (1958).

In United States v. Capanegro, 576 F.2d 973 (2d Cir.), cert. denied, 439 U.S. 928 (1978), a lawyer retained by the union was convicted under 29 U.S.C. §501(c) for the fraudulent billing and receipt of payments for alleged legal fees incurred while representing individual union members. On appeal, the defendant claimed he was not employed by the union within the language of 29 U.S.C. §501(c) because (1) he was an "independent contractor" and not an "employee;" and (2) he was not a corrupt "insider," the traditional focus of embezzlement statutes. The court rejected these claims, holding that 29 U.S.C. §501(c) has a broad reach which extends beyond technical common law definitions of "employees" and "embezzlement," to include independent contractors and any others "employed" by the union.

9-133.230 Activities Prohibited

As indicated above, 29 U.S.C. §501(c) is a broad, hybrid statute, which can be violated in any one of four ways. Taken together, the language "would seem to cover almost every kind of a thing, whether by larceny, theft, embezzlement, or conversion." See United States v. Bane, 583 F.2d 832, 835 (6th cir. 1978), cert. denied, 439 U.S. 1127 (1979). Therefore, to avoid definitional problems and achieve maximum flexibility, the statute can and should be pleaded as a whole, conjunctively. In rejecting an appeal based upon the failure of an embezzlement indictment to allege a fiduciary relationship, the First Circuit found that the:

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. . . failure to do so, it seems to us, makes very little difference to either party. As far as the government is concerned, we cannot imagine facts constituting embezzlement which would not also, absent a fiduciary relationship, make out unlawful abstraction or conversion. As far as the defendant is concerned, he had been placed in jeopardy with respect to all means of committing the offense by the proper manner of substitution in the indictment of the conjunctive 'and' for the statutory disjunctive 'or'.

Colella v. United States, 360 F.2d 792, 800 (1st Cir.), cert. denied, 385 U.S. 829 (1966).

9-133.231 Embezzle

The first method by which 29 U.S.C. §501(c) may be violated is "embezzlement." Embezzlement is broadly defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. Woxberg v. United States, 329 F.2d 284 (9th Cir. 1963), cert. denied, 379 U.S. 823 (1964); Groves v. United States, 343 F.2d 850 (8th Cir. 1965); United States v. Andreen, 628 F.2d 1236 (9th Cir. 1980).

To prove a violation of 29 U.S.C. §501(c) by means of embezzlement it is generally necessary to show (1) that the accused occupied the designated fiduciary position (i.e., that he/she was an officer or was directly or indirectly employed by the union); (2) that the property embezzled is embraced within the meaning of the statute (i.e., the moneys, funds, securities, property, or other assets of the union); (3) that the property came into the possession or care of the defendant by virtue of his/her employment, so that no trespass was committed in taking it; (4) that the defendant's dealing with such property constituted a fraudulent conversion or appropriation of same to his/her own use or the use of another; and (5) that the defendant intended to deprive the owner of the use of the property. See United States v. Powell, 294 F. Supp. 1353 (E.D. Va. 1968).

Since embezzlement statutes were designed to reach those persons who convert property of which they have lawful possession, their application is limited to cases in which there is a fiduciary relationship. However, since 29 U.S.C. §501(c) sets forth three other ways of committing the offense and names the persons covered by the statute, for practical purposes it is necessary to allege or prove the existence of a fiduciary

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relationship between the defendant and the union where the government attempts to prove a violation of 29 U.S.C. §501(c) by one of those three means. See Doyle v. United States, 318 F.2d 419 (8th Cir. 1963).

Embezzlement is complete whenever the misappropriation is made, United States v. Harmon, 339 F.2d 354 (7th Cir. 1965), cert. denied, 380 U.S. 944 (1966). The possibility that a loan will be repaid in the future is not a defense to a person who improperly converted to his/her own use the proceeds of the loan by fraudulently inducing disbursement of the loan. See United States v. Waugneux, 683 F.2d 1343, 1359 (11th Cir. 1982). The possibility of future recovery of funds does not preclude liability. United States v. Daley, 454 F.2d 505, 510 (1st Cir. 1972) (18 U.S.C. §664). Where a fraudulent conversion is otherwise established, a demand for the money or other property alleged to have been embezzled is not necessary. See Dobbins v. United States, 157 F.2d 257 (D.C. Cir. 1946), cert. denied, 329 U.S. 734 (1947). No demand need be shown where the accused has fled, Agar v. State, 176 Ind. 234, 94 N.E. 819 (1911), or where the time for payment of the money or return of the property is definitely fixed. Vars v. International Brotherhood of Boilermakers, 320 F.2d 576 (2d Cir. 1963). However, if money has been entrusted and if the time for such repayment or return is indefinite, People v. Ephraim, 77 Cal. 29, 245 P. 769 (1926), or if a conversion is not established by other proof, Commonwealth v. Stone, 187 Pa. 225, 144 A.2d 614 (1958), aff'd, 395 Pa. 584, 150 A.2d 871 (1959), the prosecution must prove a demand.

If money or property is entrusted to the recipient to use for a certain purpose, he/she may be guilty of embezzlement if he/she uses it for another purpose, even though he/she derives no direct personal benefit. See, e.g., United States v. Harmon, supra. He/she may be found guilty if he/she fraudulently appropriates it to the use of another. However, a district court held it was not a violation of 29 U.S.C. §501(c) for a defendant to divert funds of one local to another, closely related local. United States v. Silva, 517 F. Supp. 727, 737-38 (D. R.I. 1980), aff'd, 644 F.2d 68 (1st Cir. 1981). Compare, United States v. Santiago, 528 F.2d 1130 (2d Cir. 1976), which affirmed the conviction of a welfare plan trustee under 18 U.S.C. §664 for conversion "to his own use or to the use of another" based on his/her transfer of welfare plan monies to his union's treasury for purposes unrelated to the welfare plan. The intention of the accused at the time of the taking to restore the money or other property embezzled will not relieve the act of its criminal nature. Hancey v. United States, 108 F.2d 835 (10th Cir. 1940). This is so even though the defendant may have sufficient property to make restoration.

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9-133.232 Steal

As indicated above, Congress intended that each of the terms employed in 29 U.S.C. §501(c) retain its common law meaning; however, in various federal statutes the words "stolen" and "steal" have been given broader meanings than larceny at common law. See United States v. Trospen, 127 F. 476 (S.D. Cal. 1904), ("steal" from the mail); United States v. Adcock, 49 F. Supp. 353 (W.D. Ky. 1943), (interstate transportation of "stolen" automobile); Crabb v. Zerbst, 99 F.2d 562, 565 (5th Cir. 1938), ("embezzle, steal or purloin" property of the United States). In Crabb, Judge Holmes said:

[S]tealing having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word purloin.

supra, at 565.

9-133.233 Unlawful and Willful Conversion

"The concept of unlawful conversion encompasses the use of property, placed in one's custody for a limited purpose, in an unauthorized manner or to an unauthorized extent." United States v. Andreen, 628 F.2d 1236, 1241 (9th Cir. 1980). In Morissette v. United States, 342 U.S. 246, 271 (1952), the Court, in attempting to define the term "conversion," said:

Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. To steal means to take away from one in lawful possession without right with the intention to keep wrongfully. Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use, money rightfully taken into one's custody without any intention to keep or embezzle it merely by comingling it with the custodian's own, if he was under a duty to keep it separate and intact.

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As a practical matter, however, as indicated in USAM 9-133.230, supra, it is unclear what, if anything, this term adds to the list of ways one may violate 29 U.S.C. §501(c), except to eliminate the necessity of alleging and proving the existence of a fiduciary relationship between the defendant and the union. Still, at least one court has found such a distinction. In United States v. Harmon, 339 F.2d 354 (6th Cir. 1964), cert. denied, 380 U.S. 944 (1965), the defendant union officer contended that, although the words "embezzles" and "converts" are used in the disjunctive in the statute, they are nevertheless synonymous, and that the union's checking account was a chose in action representing a debtor-creditor relationship between the union and the bank and was, therefore, intangible property not capable of conversion or embezzlement. The court, in rejecting this argument, pointed out that conversion has an even wider application than embezzlement and that Congress recognized that there was a difference between the terms by including both in the statute. It concluded that funds from the bank account were subject to conversion.

An "unlawful and willful conversion" is, of course, not the same as a civil conversion. To render a converter guilty under a criminal statute, there must exist an intent on the part of the accused to fraudulently deprive the owner of the use of his/her property. Thus, felonious or fraudulent intent marks the broad distinction between civil conversion and criminal conversion. See Hubbard v. United States, 79 F.2d 850, 853 (9th Cir. 1935).

As noted in USAM 9-133.231, above, possibility of repayment is not a defense to conversion of the proceeds of a loan. See United States v. Wuagneux, 683 F.2d 1343, 1359 (11th Cir. 1982).

9-133.234 Unlawful and Willful Abstraction

This is the fourth way one may commit an offense under 29 U.S.C. §501(c). The term "abstraction" was discussed at length in United States v. Northway, 120 U.S. 327, 334 (1886), where the defendant was indicted for abstracting the moneys and funds of a bank. The Court stated that the word "abstract":

Is not a word settled technical meaning like the word "embezzle" It is a word, however, of simple popular meaning without ambiguity. It means to take or withdraw from, so that to abstract the funds of the bank . . . is to take and withdraw them from the possession and control of the bank. [In addition] in

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order to constitute the offense it is necessary that the money should be [taken] from the bank without its knowledge and consent with the intent to injure or defraud it or to deceive some officer of the bank.

No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. Abstraction may be done under color of loans, checks and the like. It thus appears that whenever the crime of embezzlement is committed, so also has there been an abstraction, United States v. Breese, 131 F. 915 (W.D. N.C. 1904), rev'd on other grounds, 143 F. 250 (1906), but the converse is not necessarily true.

9-133.240 Assets of a Labor Organization

Embezzlement under 29 U.S.C. §501(c) may be accomplished by the use of "any of the moneys, funds, securities, property, or other assets of a labor organization." Generally, this listing of assets has been broadly interpreted by the courts. In United States v. Robinson, 512 F.2d 491 (2d Cir.), cert. denied, 423 U.S. 853 (1975), the court found that National Maritime Union application forms or "Group I" status were union property under 29 U.S.C. §501(c). The court held that "the statute does not require that the property be of any particular value" and "the fact that union funds were not depleted does not remove the case from the reach of the statute." Id. at 494, 495. Rather, it was enough that the defendants "utilized the property of the union in a way which benefited themselves and not the union." Id. at 495. Robinson involved union officers' misuse of union property (job classification forms) in return for corrupt payments received by the officers. This case has supported subsequent prosecutions involving corrupt payments made in return for union membership applications, work permit forms, and other union property used in securing membership or work referrals.

Two cases under a related statute, 29 U.S.C. §481(g) (outlawing union-funded promotions of candidates for union offices), further illustrate the broad scope of these definitions. That statute uses the phrase "no moneys," which, if anything, would be narrower than the inclusive list in 29 U.S.C. §501(c). Even so, in one case it was held that, "[t]he use of union's hall by incumbent Morales . . . constituted the use of union facilities for personal campaign purposes [29 U.S.C. §481(g)] does not require an actual cash outlay by a union to establish a violation. The "logos" of the union, the credit and goodwill of the union, together with the time of the union secretary, constitute assets of a labor organization." See Brennan v. Sindicato Empleados de

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Equipo Pesado, Etc., 370 F. Supp. 872, 879 (D. P.R. 1974); see also Marshall v. Local Union 20, International Brotherhood, 611 F.2d 645 (6th Cir. 1979) (the violation of the Act was not mitigated by the minimal amount of the expenses).

In several cases, defendants have argued that forged checks are not union assets, since under commercial law doctrines the drawee bank pays its own funds, not those of its depositor, when it honors a forged check. In United States v. Mitchell, 625 F.2d 158 (7th Cir. 1980), the court rejected this argument, holding that (1) "the checks themselves were property of the union" and (2) the bank debited the union's account based on the forged check and "the fact that those reductions were temporary (pending repayment by the bank) did not exonerate the defendant." Id. at 160; see also United States v. Miller, 520 F.2d 1208 (9th Cir. 1975); United States v. Daley, 454 F.2d 505 (1st Cir. 1972) (prosecution under 18 U.S.C. §664); United States v. Maxwell, 588 F.2d 568 (7th Cir. 1978), cert. v. denied, 444 U.S. 877 (1979).

However, these expansive terms are still limited by certain principles of ownership and control. In United States v. DeLillo, 421 F. Supp. 1012 (E.D. N.Y. 1979) (an 18 U.S.C. §664 case), a benefit plan fund had sold land under the condition that the purchaser used money obtained by a mortgage to pay certain debts of the fund. Defendant, president of the purchasing company, misappropriated the mortgage money. The district court dismissed the indictment on the grounds that no fund asset was involved because the fund "had no equitable or possessory interest" in the money. Id. at 1014.

It should be noted that 18 U.S.C. §664, the "companion" embezzlement statute for benefit plans, contains an even broader list of "assets": "any of the moneys, funds, securities, premiums, credits, property, or other assets." The addition of "premiums" should include insurance and other premiums. The addition of "credits" has aided prosecution for the theft of "receivables" such as contributions due and owing to an employee benefit plan which are converted to the use of an employer or other collection agent. 18 U.S.C. §664 mirrors the language of 18 U.S.C. §656, which protects the "credits" of any federally connected bank. Under 18 U.S.C. §656, "credits" was broadly defined to include debts due, any obligation or promise to pay money, or other forms of direct promises to pay. See Theobald v. United States, 3 F.2d 601 (8th Cir. 1925); United States v. Smith, 152 F.2d 542, 544, 545 (W.D. Ky. 1907).

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9-133.250 Fraudulent Intent

In any 29 U.S.C. §501(c) or 18 U.S.C. §664 prosecution, the government has the burden of establishing fraudulent intent to deprive the union or benefit plan of the use of its assets. Such intent usually cannot be proven directly, but must be inferred from circumstantial evidence. See United States v. Gibson, 675 F.2d 827, 833 (6th Cir.), cert. denied, 103 S. Ct. 305 (1982); United States v. Stubin, 446 F.2d 457, 461 (3d Cir. 1971); United States v. Sullivan, 498 F.2d 146, 150 (1st Cir.) cert. denied, 419 U.S.C. 993 (1974); Taylor v. United States, 320 F.2d 843, 849 (9th Cir. 1963), cert. denied, 376 U.S. 916 (1964). To the extent that such evidence is directed to the defendant's state of mind, two critical elements of that state of mind in an embezzlement case are (1) belief in authorization and (2) belief in benefit to the union. However, in a chain of cases that has created serious confusion and disagreement among the circuits, several courts have elevated one or both of these evidentiary facts to the level of ultimate facts, and additional elements of the offense. Thus, some circuits seem to require proof of lack of union benefit (or no good faith belief in union benefit), others require proof of lack of authorization (or no good faith belief in authorization), while others combine the two requirements in different ways. Three Ninth Circuit cases provide extensive discussion and analysis of the holdings of the different circuits. See United States v. Thordarson, 646 F.2d 1323, 1335-36 n.24 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); United States v. Andreen, 628 F.2d 1236, 1241-3 (9th Cir. 1980); United States v. Marolda, 615 F.2d 867, 868-870 (9th Cir. 1980). The following is a list of the holdings of those circuits which have dealt with the issue:

A. FIRST CIRCUIT - Lack of union benefit is required, even if the use is unauthorized;

Colella v. United States, 360 F.2d 792, 804 (1st Cir.), cert. denied, 385 U.S. 829 (1966);

B. SECOND CIRCUIT - See discussion in United States v. Marolda, 615 F.2d 867, 869 n.5 (9th Cir. 1980)

1. If there is a good faith belief in union benefit and good faith belief in authorization or ratification, then there is no offense.

United States v. Ottley, 509 F.2d 667, 671 (2d Cir. 1975);

United States v. Santiago, 528 F.2d 1130, 1133-4 (2d Cir.), cert. denied, 425 U.S. 972 (1976).

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United States v. Snyder, 668 F.2d 686, 691 (2d Cir. 1982).

2. Authorization is not, by itself, a defense, where expenditure lacks proper union purpose.

United States v. Dibrizzi, 393 F.2d 642, 645 (2d Cir. 1968);

United States v. Capanegro, 576 F.2d 973, 980 (2d Cir.), cert. denied, 439 U.S. 928 (1978).

C. FIFTH CIRCUIT - "In unauthorized use cases the government need only prove lack of proper authorization and fraudulent intent . . . In cases involving authorized use, however, the government must also prove that the defendant lacked a good faith belief that the expenditure was for the legitimate benefit of the union."

United States v. Dixon, 609 F.2d 827, 829 (5th Cir. 1980) (emphasis added, citations omitted);

United States v. Nell, 526 F.2d 1223, 1232 (5th Cir. 1976).

But see United States v. Durbin, 632 F.2d 1297 1300 (5th Cir. 1980) ("Since the government thoroughly established appellant's fraudulent intent to deprive the local of its funds, we find it unnecessary to characterize this case as one of either authorized or unauthorized use.")

D. SIXTH CIRCUIT - 29 U.S.C. §501(c) may be violated by an authorized use, if the government proves fraudulent intent and lack of a good faith belief in union benefit.

United States v. Gibson, 675 F.2d 825, 675 F.2d 825 (6th Cir.), cert. denied, 103 S. Ct. 305 (1982);

United States v. Bane, 583 F.2d 832, 836 (6th Cir. 1978), cert. denied, 439 U.S. 1127 (1979).

E. EIGHTH CIRCUIT - "If the government establishes fraudulent intent and lack of proper authorization, it should not also be saddled with an additional burden of proving lack of benefit to the Union." A showing of benefit is not relevant. The question of authorized use is not reached.

United States v. Goad, 490 F.2d 1158, 1165-6 (8th Cir.), cert. denied, 417 U.S. 945 (1974).

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F. NINTH CIRCUIT - In a case of unauthorized use, lack of benefit is not an element which must be proven by the prosecution, and benefit is not, by itself a defense. See States v. Andreen, 628 F.2d 1236 (9th Cir. 1980) (18 U.S.C. §664 prosecution).

Under 29 U.S.C. §501(c) the government need not allege or prove either lack of authorization or lack benefit to the union; it need only establish fraudulent intent to deprive the union of the funds, and the actual conversion of the funds. However, lack of authorization, lack of union benefit, and the defendant's good-faith belief in those conditions, "are likely to bear on the issue of fraudulent intent," and in some cases, may be "crucial." See United States v. Thordarson, 646 F.2d 1323, 1331-37 (9th Cir.), cert. denied, 454 U.S. 1055 (1981).

G. DISTRICT OF COLUMBIA CIRCUIT - Where the use to which the money is converted is itself unlawful, neither, authorization nor benefit are defenses.

United States v. Boyle, 482 F.2d 755 (D.C. Cir.), cert. denied, 414 U.S. 1076 (1973).

The imposition of additional, artificial elements over the existing intent requirement of 29 U.S.C. §501(c) creates a difficult and confusing situation for courts and juries. For this reason, the most recent and sensible trend has been toward using these "elements" as factors to be considered, not requirements. As the Fifth Circuit has stated, "[a]lthough courts have grappled with distinctions between authorized and unauthorized use cases . . . , it is clear that fraudulent intent to misuse the funds is the cornerstone of the crime in either context." See United States v. Durnin, 632 F.2d 1297, 1300 (5th Cir. 1980). And in United States v. Thordarson, *supra*, the Ninth Circuit held that lack of authorization and lack of union benefit are not elements of the offense.

9-133.251 Lack of Authorization

Where lack of authorization must still be shown, or where it is an important evidentiary question, the evidence must be examined with care. First, it has been held that lack of authorization is only relevant if the defendant "had actual knowledge that the expenditures were not properly authorized." United States v. Dixon, 609 F.2d 827, 829 (5th Cir. 1980). See also United States v. Bane, 583 F.2d 832, n.8 (6th Cir. 1978), cert. denied, 439 U.S. 1127 (1979). However, a technical authorization is not necessarily adequate. "Authorization which is improperly or fraudulently obtained is also treated as lack of authorization." See United States v.

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Dixon, supra, at 829 n.3. In Brink v. DaLesio, 496 F. Sup. 1350 (D. Md. 1980), modified on other grounds, 667 F.2d 420 (4th Cir. 1981), the court found that, "[a] number of factors are relevant to the court's inquiry concerning the validity of an authorization." Id. at 1357. That decision and others provide the following list of factors:

A. "[T]he authorization must be obtained through the procedures specified in the union constitution and bylaws." Brink v. DaLesio, supra, at 1357-58 (citations omitted). See, e.g., United States v. Goad, supra, at 1161 ("this general resolution cannot be read as rescinding the specific constitutional provision requiring Executive Board approval of salary increases");

B. "[T]he proposal must be presented in an understandable manner so that there is some assurance that consent was "knowingly and intelligently given." Voting procedures must be adequate to guarantee "the right of a meaningful vote." Brink v. DaLesio, supra, at 1358 (citation omitted);

C. "[T]he timing of the authorization is critical . . . §501 prohibits general exculpatory provisions . . . [and] . . . [i]f the purported authorization is obtained subsequent to the actual expenditure, the Court must determine whether it is a legitimate ratification or an ineffective exculpatory provision." Brink v. DaLesio, supra, at 1358 (citations omitted);

D. "[L]ack of authorization may be shown if the diversion is substantially inconsistent with the fiduciary purposes and objectives of the union funds or pension plan, as set forth by statutes, bylaws, charters, or trust documents which govern uses of the funds in question." United States v. Ford, 632 F.2d 1354, 1366 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981) (18 U.S.C. §664). However, the court need not instruct the jury on specific bylaws alleged to have been violated. United States v. Tham, 665 F.2d 855 (9th Cir. 1981), cert. denied, 102 S. Ct. 2010 (1982);

E. Finally, the amount of payments or other appropriations may "so far exceed the norm that fraud, mistake, or duress can be inferred," See Brink v. DaLesio, supra, at 1362; United States v. Andreen, supra, at 1245.

If the defendant asserts as a defense his/her good faith belief that the expenditures were authorized or benefitted the union or benefit plan, he/she must show that he/she had this belief at the time he/she acted to expend the union's or employee benefit plan's funds. This is especially true where the defendant asserts a good faith belief that the union or benefit plan "would ratify" his/her action. With respect to labor

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organization funds, in order to promote the normal procedures of prior authorization, prompt accounting, and expenditure of funds in the common interest of the union membership, see H.R. REP. No. 741, 86th Cong. 1st Sess. 8, reprinted in 1959 U.S. CONG. & AD NEWS 2430, it appears certain that the defendant must have had a good faith belief, at the time he/she caused the money to be expended, that the expenditure would be ratified, and ratified within a reasonable time. Thus, the official who expends money in a situation where there is insufficient time to obtain a union authorization for the expenditure, but does so with a good faith belief that the union would have, at the time he/she spent the money, approved and later ratified the expenditure, is protected. On the other hand, the official who expends funds without authorization, believing that the expenditure would not be approved either prior to or within a reasonable time thereafter, but believes that at some time in the future the union would be convinced to ratify the expenditure, is not protected.

Several considerations are relevant to the question whether the defendant believed in good faith that the expenditure would have been ratified if he/she had presented it to the union. These include: the union's past experiences with the particular kind of expenditure in question: the possible domination of the union by the official, see United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), modified on other grounds, 439 F.2d 1198, cert. denied, 402 U.S. 953 (1971). United States v. Ferrara, 451 F.2d 91, 96 (2d Cir. 1971), cert. denied, 405 U.S. 1032 (1972); the nature of the expenditure; the opportunity for prior authorization; the delay in seeking ratification; false entries in the union records as to the true purpose of the expenditure, see United States v. Brill, 350 F.2d 171 (2d Cir. 1965), cert. denied, 382 U.S. 973 (1966); Colella v. United States, supra, at 798; the denial of receipt or failure to account, Doyle v. United States, 318 F.2d 419, 424 (8th Cir. 1963); expenditures contrary to specific directions, Taylor v. United States, 320 F.2d 843, 848 (9th Cir. 1963), cert. denied, 376 U.S. 916 (1964); and the union's bylaws and constitution, United States v. Goad, 490 F.2d 1158, 1165 (8th Cir.), cert. denied, 417 U.S. 945 (1974).

With respect to theft of employee benefit plan funds under 18 U.S.C. §664, belief in authorization may take into account the defendant's knowledge of his/her duties with respect to benefit plan assets under the plan agreement, trust documents, action of the trustees, and statutes. See United States v. Andreen, 628 F.2d 1236 (9th Cir. 1980); United States v. Snyder, 668 F.2d 686, 690 (2d Cir. 1982).

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9-133.252 Lack of Benefit

In labor union prosecutions under 29 U.S.C. §501(c) a body of case law dealing with "lack of union benefit" has developed. As with lack of authorization, the issue here is actually defendant's good faith belief in a union benefit. See United States v. Ottley, 509 F.2d 667, 671 (2d Cir. 1975); United States v. Bane, 583 F.2d 832 836 (6th Cir. 1978), cert. denied, 439 U.S. 1127 (1979). "Whether or not the expenditure did, in fact, legitimately benefit the union is relevant both to the defendant's good faith belief therein and his fraudulent intent." United States v. Bane, supra, at 836. The Sixth Circuit, has approved a "primary purpose" test by which the trier of fact can determine a defendant's good faith belief in a union benefit. United States v. Gibson, supra, at 828-829. However, at least one court has noted as a "troublesome issue" such use of evidence of lack of benefit "when the members themselves have authorized union officials to expend union funds for non-union purposes." See United States v. Goad, 490 F.2d 1158, 1165-6 (8th Cir.) cert. denied, 417 U.S. 945 (1974).

9-133.300 VENUE

Embezzlement is a continuing offense which, under 18 U.S.C. §3237(a), "may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." In Re Richter, 100 F. 295, 298 (E.D. Wisc. 1900); United States v. Walden, 464 F.2d 1015, 1018 (4th Cir.), cert. denied, 409 U.S. 867 (1972). Thus, for example, venue may lie in the district where the accused had a duty to account, People v. David, 269 Ill. 256, 110 N.E. 9 (1915), the district where the act of conversion took place, State v. McCann, 167 S.C. 393, 166 S.E. 411 (1932), the district where the union office is located, In Re Richter, supra, the district where the depository bank is situated, even though the accused may have drawn a check upon this account and delivered it to a personal creditor of his/her in another district. People v. Keller, 79 Cal. 612, 250 P. 585 (1926), the district where the defendant receives possession of the property embezzled. State v. Allen, 21 S.D. 121, 110 N.W. 92 (1906), finally, the place where the defendant formed the intent to embezzle the funds is suitable for venue purposes, Rhodes v. Commonwealth, 145 Va. 893, 134 S.E. 723 (1926).

9-133.400 THE INDICTMENT

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9-133.410 Sufficiency

An indictment under 29 U.S.C. §501(c) which charges the facts constituting the crime in the words of the statute, or in words of equivalent meaning, is sufficient, since the words of the statute themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense. Colella v. United States, 360 F.2d 792, 800 (1st Cir.), cert. denied, 385 U.S. 942 (1966).

As indicated above, 29 U.S.C. §501(c) specifies various ways in which the crime of embezzlement of the funds of a labor organization can be perpetrated. The pleading may allege commission of the offense by all of the methods cited in the statute if the indictment uses the conjunctive "and" where the statute uses the disjunctive "or," since the defendant would then be placed in jeopardy with respect to each and every method of committing the offense. Id. But if the indictment alleges two or more methods in the disjunctive, it fails to inform a defendant which of these methods he/she is charged with having employed and is, therefore, insufficient. United States v. Donovan, 339 F.2d 404, 407-408 (7th Cir. 1964), cert. denied, 300 U.S. 975 (1965). Where the prosecution charges that the defendant committed a violation of the statute by one means (e.g., embezzlement) a further prosecution in which it is claimed that the same conduct constitutes a violation by a different means (e.g., stealing) would, of course, be barred. Cf. Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189 (1970); United States v. Selage, 175 F. Supp. 439 (S.D. N.Y. 1959). See 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §125 (1982).

It has been held under statutes dealing with embezzlement from banks (e.g., 18 U.S.C. §656) that if the offense is set out in the language of the statute, omission from the indictment of the means by which the offense was committed does not render the indictment insufficient. United States v. Fortunato, 402 F.2d 79 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969); United States v. Bearden, 423 F.2d 805 (2d Cir. 1970).

The indictment must describe the property in language which is sufficiently definite to identify it and show that it was of the type subject to embezzlement under the statute, i.e., the "securities, property or other assets of a labor organization." All that is necessary, in this respect, is that the property be described with sufficient certainty to enable the court to determine that the property is, as a matter of law, the subject of the crimes alleged in the indictment, and to enable the jury to discern that the property proved to have been taken is the same as is mentioned in the indictment. See United States v. Jones, 69 F. 973, 982 (D. Nev. 1895).

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Since the value of the property or amount of money embezzled is not an element of a violation of 29 U.S.C. §501(c), there is no absolute requirement that an allegation of value be made. See United States v. Ciongoli, 358 F.2d 439 (3d Cir. 1966); Hoback v. United States, 284 F. 529, 532 (4th Cir. 1922). However, it is better practice to do so, and even if the proof shows that less than the amount charged in the indictment has been embezzled, there would not be a fatal variance. Cf. United States v. Woodiska, 147 F.2d 38 (2d Cir. 1945).

The indictment must allege the ownership of the property embezzled. See Commonwealth v. Nichols, 206 Pa. 352, 213 A.2d 105 (1965). The purpose of charging ownership is to show that title or ownership is not in the defendant, to give notice to the defendant of the particular offense for which he/she is called to answer, and to bar a subsequent prosecution for the same offense. See Ford v. United States, 3 F.2d 104, 105 (5th Cir. 1925).

Since 29 U.S.C. §501(c) mentions the type of entity covered by the statute (i.e., a labor organization), and since the term "labor organization" is defined by statute, the indictment should allege that the entity embezzled from was a labor organization within the meaning of 29 U.S.C. §§402(i) and 402(j), that is, a labor organization engaged in an industry affecting commerce. United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), modified on other grounds, 439 F.2d 1198, cert. denied, 402 U.S. 953 (1971).

As a general rule, in an indictment under a statute proscribing only embezzlement, the agency or fiduciary capacity of the accused should be clearly stated. Moore v. United States, 160 U.S. 268 (1895). However, where, as in 29 U.S.C. §501(c), the offense can be committed by means other than embezzlement, a fiduciary relationship need not be alleged. Thus, in Colella v. United States, 360 F.2d 792, 799 (1st Cir.), cert. denied, 385 U.S. 942 (1966), the court stated that "[e]mbezzlement . . . carries with it the concept of a breach of fiduciary relationship"

The court further states: "It seems to be clear that Congress intended to continue to predicate the embezzlement method of committing the new federal crime of embezzlement upon a breach of a fiduciary responsibility." Id. at 799 N.4.

The court also observed:

We see no reason why, if the Government wishes to preserve for itself the opportunity to prove that the

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new Federal composite crime established by Section 501(c) was committed by the means of traditional embezzlement, it should not set forth in the indictment a sufficient allegation as to fiduciary relationship.

But failure to do so makes little difference. Id. at 799-800.

If the government wishes to allege a fiduciary relationship, a mere general statement that the accused acted in a fiduciary capacity is a legal conclusion and, without further specification, is insufficient. See Soute v. Godwin, 101 N.H. 252, 139 A.2d 630 (1958). Similarly, the mere allegation that the defendant was an employee of the union does not satisfy the requirement. Colella v. United States, *supra*. The fiduciary relationship should be set out in reasonable detail, specifying, for example, that the defendant was entrusted with control over the expenditure of funds.

An essential element of the offense under 29 U.S.C. §501(c) and similar statutes is that the act charged was committed with criminal intent, Morissette v. United States, 342 U.S. 246 (1951), and the indictment would be defective if it failed to allege such intent. See, e.g., Jordan v. United States, 284 F. Supp. 758 (D. Mass. 1968). In Doyle v. United States, 318 F.2d 419 (8th Cir. 1963), the court held that an indictment which follows the language of 29 U.S.C. §501(c) is sufficient in this respect, reasoning that criminal intent is inherent in the terms "embezzles" and "steals" and that the term "willfully" implies an evil purpose. Accord, United States v. Duff, 529 F. Supp. 148, 152-153 (N.D. Ill. 1981).

Care should be taken to avoid unnecessary allegations. In United States v. Marolda, 615 F.2d 867 (9th Cir. 1980), the court held that where the indictment charged the union officer with acting "without proper authorization and without benefit to said Local," the government must prove those elements, even though they may not be necessary elements of a 29 U.S.C. §501(c) offense. Although the Ninth Circuit later held that those factors are not elements of the offense, the court cited Marolda without criticizing its holding with regard to the variance issue. See United States v. Thordarson, 646 F.2d 1323, 1334 (9th Cir.) cert. denied, 545 U.S. 1055 (1981).

9-133.420 Sample Indictment--Under 29 U.S.C. §501(c)

29 U.S.C. §501(c) applies not only to those individuals who are officially designated as "officers" of a labor organization but also to

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those individuals who perform the functions of president, vice president, secretary, treasurer or other executive functions of the labor organization. In addition, 29 U.S.C. §501(c), by its terms, applies to individuals who are employed directly or indirectly by the labor organization from which they are charged with embezzling.

A sample indictment under 29 U.S.C. §501(c) might be drafted as follows:

Count I

THE GRAND JURY CHARGES:

1. On or about January 3, 1983, in the () District of () and elsewhere, the defendant () while an officer, that is, President of (name of union) a labor organization engaged in an industry affecting commerce as defined by Sections 401(i) and 402(j), Title 29, United States Code, did embezzle, steal and unlawfully and willfully abstract and convert to his/her own use and the use of another the moneys, funds, securities, property, and other assets of said labor organization in the amount of \$_____.

9-133.430 Sample Indictment--18 U.S.C. §664

Following is a suggested form for an indictment under 18 U.S.C. §664:

THE GRAND JURY CHARGES:

On or about January 3, 1983, in the () District of (), the defendant () embezzled, stole, and unlawfully and willfully abstracted and converted to his/her own use, the approximate sum of \$_____ of the moneys, funds, securities, premiums, credits, property and other assets of (name of welfare benefit plan or pension benefit plan), subject to the provisions of Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §§1001 et seq.), and of a fund or funds connected therewith, said (name of WBP or PBP) having been established and maintained by (name of employer(s)).

In violation of Title 18, U.S. Code, Section 664.

9-133.500 EVIDENCE

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9-133.510 Admissibility

Any otherwise admissible evidence may be received if it tends to show the character of the property embezzled, Dowdy v. State, 64 S.W. 253 (Tex. 1928), its amount or value, Challenor v. Commonwealth, 209 Va. 789, 167 S.E.2d 116, its identity and ownership, Reeves v. United States, 15 F.2d 734 (D.C. Cir. 1926), including the status of the owners of the property, State v. Hattrem, 141 Or. 371, 13 P.2d 618 (1932), its possession by defendant and the character in which he/she held it, the acts constituting the conversion, and the intent with which the act was consummated.

At a trial for embezzlement, evidence of the defendant's financial condition at or immediately prior to the time of the alleged embezzlement is admissible. Cf. Holland v. United States, 348 U.S. 121 (1954); Bulloch v. State, 10 Ga. 47 (1851); Masters v. United States, 157 F.2d 260 (D.C. Cir. 1914). Evidence that, during a period in which a defendant has allegedly been guilty of embezzling money from the union which employed him/her the defendant spent money considerably in excess of his/her known income or made large bank deposits has been held admissible in a prosecution under 29 U.S.C. §501(c). See Hansberry v. United States, 295 F.2d 800 (9th Cir. 1961). In another case, however, defendant was cross-examined at length about his union expense account, with respect to which no irregularities were charged in the indictment. This line of questioning showed a free spending practice, including entertainment expenses, and the government concluded with a summary question, which defendant answered in the affirmative, which told the jury that over an eighteen-month period he had charged to his local more than \$19,000 on his expense account. The court held that this cross examination was too irrelevant, highly prejudicial and that it tainted the proceeding and so reversed the conviction. See United States v. Green, 400 F.2d 847 (6th Cir. 1968).

It has been held that evidence of a defendant's failure to make crediting entries of money received from customers and of his/her retaining such money at times other than those when the embezzlement charged was committed is admissible to establish a scheme for procuring the employer's money. See State v. Carmean, 126 Iowa 291, 102 N.W. 97 (1905).

In a prosecution under 29 U.S.C. §501(c) evidence that defendant exercised, almost single-handedly, control over the activities of his/her union is admissible to negate the anticipated defense contentions that the

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expenditures in question were authorized and for the benefit of the union; however, this may not be sufficient by itself to vitiate the authorization. See United States v. Silverman, 430 F.2d 106, 123 (2d Cir. 1970).

9-133.520 Weight and Sufficiency

The government must prove criminal intent beyond a reasonable doubt. See Morrisette v. United States, *supra*. Intent to embezzle is a state of mind which can be made to appear from circumstantial as well as direct evidence. Taylor v. United States, 320 F.2d 843 (9th Cir. 1967), *cert. denied*, 376 U.S. 916 (1968); United States v. Moore, 427 F.2d 38 (5th Cir. 1970), United States v. Hartsough, 54 L.C. 11516 (1966); United States v. Powell, 294 F. Supp. 1353 (E.D. Va. 1968). It may be manifested by various acts, such as making false entries, United States v. Brill, 350 F.2d 171 (2d Cir. 1965), *cert. denied*, 382 U.S. 973 (1966), denying receipts of money, failing to account for money, rendering false accounts, Doyle v. United States, 318 F.2d 419 (8th Cir. 1963), practicing any form of deceit, absconding with money, actually expending money for one's own use contrary to directions, Taylor v. United States, *supra*, or otherwise diverting the course of money to make it one's own. If an act forbidden by law is intentionally done, or there is a fraudulent conversion, or it appears that the defendant did not confess to taking money until he/she was found out and charged, an intent to embezzle may be inferred. Agnew v. United States, 165 U.S. 36 (1897).

With respect to proof of the conversion itself, the mere making of false entries in books of account is not sufficient, regardless of defendant's fraudulent intent at the time of making such false entry. See Commonwealth v. Shepard, 83 Mass. (1 Allen) 575 (1861). But depositing funds of another in one's own account, together with the making of incorrect entries and the failing to turn the owner's funds over to him/her at a time when obligated to do so, is sufficient evidence of conversion, and it is not necessary for the government to show what becomes of the money after it is embezzled. See Doyle v. United States, 318 F.2d 419 (8th Cir. 1963).

9-133.600 JURY INSTRUCTIONS

The following is a suggested charge under 29 U.S.C. §501(c). It has been compiled from various cases construing the elements of this and similar statutes. Also included is a suggested charge for those cases

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where the defendant raises the defense that the expenditures which he/she is charged with making were authorized or ratified by the union.

9-133.610 Jury Instructions for Substantive Violation of 29 U.S.C.
§501(c)

The indictment is based upon the Labor-Management Reporting and Disclosure Act of 1959. 29 U.S.C. §501(a) specifies that officers of unions occupy positions of trust and it is their duty to hold union money and funds in trust for the members of the union.

Section 501(c) of Title 29, United States Code, which is a provision of the same act, makes it a crime when an officer or an employee of a labor organization "embezzles, steals or unlawfully and willfully abstracts or converts to his own use or the use of another any of the moneys, funds or other assets" of such labor organization.

In order to sustain the charge under each count, the government must establish beyond a reasonable doubt that the defendant was either an officer or that he/she was directly or indirectly employed by a labor organization within the meaning of the statute. If you find beyond a reasonable doubt that the defendant was either a constitutional officer or was a person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, or was a member of its executive board or similar governing body, then I charge you that as a matter of law the defendant was an officer within the meaning of section 501(c) of Title 29 United States Code. If you find beyond a reasonable doubt that the union in question was a labor organization engaged in an industry affecting interstate commerce which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment, then I charge you that as a matter of law the union was a labor organization within the meaning of Section 501(c) of Title 29 United States Code. I charge you that the term "industry affecting interstate commerce" means any activity, business or industry in commerce or in which a labor dispute would obstruct commerce or the free flow of commerce.

As used in this section, the term "embezzles" means the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. See Woxberg v. United States, 329 F.2d 284 (9th Cir. 1963).

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As used in the statute the term "steal" means any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, Crabb v. Zerbst, 99 F.2d 562, 565 (5th Cir. 1938).

"Abstracts" as used in section 501(c) Title 29 United States Code means to take or withdraw from the possession and control of a labor organization moneys or funds belonging to it without lawful right or authority to do so, United States v. Northway, 120 U.S. 327, 334 (1886).

"Converts" as used in Section 501(c) Title 29, United States Code means to apply the moneys or property of a labor organization for the use, benefit or profit of a person not lawfully entitled thereto. See Hubbard v. United States, 79 F.2d 850, 854 (9th Cir. 1935).

In order to find a violation of the section, it is not required that all four means be employed. A violation is committed under the act whether one embezzles, steals, abstracts, or converts the moneys of the union to his/her own use.

You will note that the acts charged in the indictment are alleged to have been done "unlawfully" and "willfully." You are instructed that "unlawfully" means contrary to law. See Higbes v. United States, 338 F.2d 651 (1st Cir. 1964).

An act is done willfully if done voluntarily and purposely and with the specific intent to do that which the law forbids. That is to say with bad purpose, either to disobey or to disregard the law. See Colella v. United States, 360 F.2d 792, 800 (1st Cir. 1965), cert. denied, 385 U.S. 942 (1966). Specific intent may be defined as follows: A person who knowingly does an act which the law requires to be done, intending with bad purpose either to disobey or to disregard the law may be found to have acted with specific intent. An act or failure to act is "knowingly" done if it is done voluntarily and intentionally and not because of mistake, accident or other reason.

9-133.620 Defense of Authorized Expenditure: Lack of Union Benefit

To constitute a violation of 29 United States Code Section 501(c) where the expenditure of union funds is not authorized, there are four essential elements which must be proved beyond a reasonable doubt: One, the embezzlement, theft or unlawful and willful abstraction or conversion to his own use or the use of

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another of; two, the moneys, funds, or other assets of; three, a labor organization of which; four, the defendant is an officer or employee.

Where the expenditure of union funds was authorized, the United States must in addition prove beyond a reasonable doubt: First, a fraudulent intent by the defendant to deprive the union of its funds; and second, a lack of good faith belief by the defendant that the expenditure was for the legitimate benefit of the union.

United States v. Gibson, 675 F.2d 825, 828-29 (6th Cir.), cert. denied, 459 U.S. 972 (1982).

With respect to determining the primary purpose of the defendants expenditures, you are instructed as follows:

If the primary purpose [of an expenditure] was to conduct union business the fact that the defendant obtained personal enjoyment does not make the expenditure of funds or use of the union property a violation of the statute.

On the other hand, if the primary purpose of . . . [an expenditure] was to provide enjoyment or social entertainment for the defendant, the fact that union business was incidentally transacted does not excuse a violation of the statute.

Your determination of the primary purpose of each . . . [expenditure] in question must be based upon the evidence, these instructions and your own knowledge and experience.

United States v. Gibson, *supra*, at 828-29. See also United States v. Bane, 583 F.2d 832, 836-37 (6th Cir. 1978), cert. denied, 439 U.S. 1127 (1979).

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9-134.000 18 U.S.C. §1954: EMPLOYEE BENEFIT PLAN KICKBACKS

9-134.010 Investigative Jurisdiction: 18 U.S.C. §1954

By a Memorandum of Understanding dated February 9, 1975, between the Secretary of Labor and the Attorney General, criminal matters arising under 18 U.S.C. §1954 are investigated by the Federal Bureau of Investigation. The Memorandum permits different arrangements to be made by the Departments of Justice and Labor on a case-by-case basis.

However, effective October 12, 1984, the Labor Department may also investigate criminal violations related to the regulation of employee pension and welfare plans which are subject to Title I of the Employee Retirement Income Security Act (29 U.S.C. §§1001-1144) without further delegation of investigative authority by the Justice Department. 29 U.S.C. §1136, as amended by the Comprehensive Crime Control Act of 1984, §805. Therefore, Labor Department investigators now have the statutory authority to investigate violations of 18 U.S.C. §1954 which they formerly exercised on a case-by-case basis under the 1975 Memorandum of Understanding. Because the FBI and the Department of Labor have concurrent jurisdiction in these cases, each investigative agency should notify the appropriate U.S. Attorney's office or Organized Crime and Racketeering Section Strike Force at the earliest possible stage of an investigation. Such investigations should be closely monitored to avoid duplication of investigative effort.

9-134.020 Supervisory Jurisdiction

Questions concerning 18 U.S.C. §1954 should be directed to the Labor Unit of the Organized Crime and Racketeering Section, Criminal Division.

9-134.030 Legislative History

As of January 1, 1975, the Employee Retirement Income Security Act of 1974 (ERISA) essentially repealed the provisions of the Welfare and Pension Plans Disclosure Act (WPPDA) except as to any conduct or events which occurred prior to that date. See 29 U.S.C. §1031(a)(1) and (b). This affects the jurisdiction and scope of 18 U.S.C. §1954 by substituting certain ERISA jurisdictional definitions for those contained in the WPPDA. See 29 U.S.C. §1031(a)(2)(C). In regard to violations occurring prior to January 1, 1975, with respect to plans covered by WPPDA (or occurring prior to the date for certain plans for which the Secretary of Labor has postponed the applicability of ERISA, see 29 U.S.C. §1031(b)(2); however,

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reference will continue to be made to jurisdictional definitions under WPPDA despite the absence of any reference in 18 U.S.C. §1954 to the WPPDA.

Section 1954 of Title 18 was enacted in 1962 as part of a package of proposals amending and strengthening the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA). At the time of the 1958 legislation, Congress had uncovered numerous instances in which individuals who had served in a fiduciary capacity with or had provided services to welfare and pension plans had blatantly abused their positions for selfish purposes. 104 Cong. Rec. 7203-07 (1958); Subcommittee on Welfare and Pension Funds, Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. (1956), hereinafter cited as the Douglas Report; S. Rep. No. 1440, 85th Cong., 2d Sess. 10-11 (1958). The original WPPDA attempted to curb these abuses in employee welfare and pension benefit plans by requiring publication of financial information. The respective Houses of Congress passed S. 2888, 85th Cong., 2d Sess. (1958) and H.R. 13507, 85th Cong., 2d Sess. (1958). The Senate bill was by far the stronger of the two as it contained criminal sanctions against kickbacks and embezzlement and afforded the Secretary of Labor broader investigative power as well as wider latitude in the promulgation of interpretive regulations. Because of strong opposition to the Senate bill in the House of Representatives, however, the conference committee, with the reluctant concurrence of Senate conferees, recommended passage of what was essentially the House measure. 104 Cong. Rec. 17, 963-64 (1958).

The Welfare and Pension Plans Disclosure Act Amendments of 1962, 76 Stat. 35 (1962), were intended to remedy the more glaring deficiencies of the 1958 legislation. The purpose of section 1954 was to prohibit bribery of individuals in a position to influence any aspect of a welfare or pension plan.

In hearings before the Senate Subcommittee on Labor in 1961, Senator Douglas read into the record a summary of the 1956 Douglas Report. Hearings on S.1944 Before Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 87th Cong., 1st Sess. at 47-105 (1961), hereinafter cited as 1961 Senate Hearings. At the invitation of its chairman, Senator Douglas gave similar testimony before the House Special Subcommittee on Labor. Hearings on H.R. 7234, 7235 and 7040 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 87th Cong., 1st Sess. at 337-407 (1961), hereinafter cited as 1961 House Hearings. The Douglas Report and the Congressional investigation revealed numerous conflict-of-interest situations in which "insiders" had profited at the expense of a plan and its beneficiaries. Payments from individual union members were routinely skimmed off by some administrators in classic instances of embezzlement. Union officials secured positions as employees of the plans

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receiving high fees for doing little, if any, work. Some plans gave insurance brokers unbelievably lucrative contracts without soliciting bids for other agencies. Furthermore, these same plans permitted the broker to switch companies or to cancel and negotiate new agreements with the same carrier, enabling the broker to derive the traditionally higher first-year fee. As might be expected, the individuals allowing brokers such latitude were rewarded. In one case, a union leader gained control of an insurance company to which the plan's business was quickly transferred. Another common practice was for trustees and administrators of welfare and pension funds to receive kickbacks from persons or institutions to whom high risk loans had been granted. See generally, Douglas Report. Although most of the illustrations upon which Congress depended had been uncovered by investigation prior to 1958, disclosures under the WPPDA had demonstrated that the same pattern of activity continued unabated. See 1961 House Hearings at 15 (statement of Secretary Goldberg).

Throughout the hearings on 18 U.S.C. §1954, members of both Houses

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referred to the criminal provision as banning conflict-of-interest situations, but a close reading of their remarks shows that section 1954 was not intended to eradicate all self-dealing. The law prohibits only the receipt of bribes and graft. See 108 Cong. Rec. 1732 (1962) (remarks of Congressman Roosevelt); 1961 House Hearings at 15 (remarks of Secretary Goldberg) and at 398 (remarks of Senator Douglas).

Clearly, the administration and Congress realized that in the usual situation the true nature of the graft or bribe would be disguised. Often the payment would be made to a third person unconnected with the welfare or pension plan. The payment could come as a loan to an individual from a bank in which the plan had made a large time deposit, or as part interest in a business. See S. Rep. No. 898, 87th Cong., 1st Sess. 15 (1961) (letter of August 16, 1961, from Assistant Attorney General Miller to Senator McNamara). The original immunity provision of former 18 U.S.C. §1954(b), now repealed by section 225 of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, was included "in view of the clandestine and secretive methods which have been developed by parties to kickbacks and payoffs within the prohibitions of this section." See S. Rep. No. 908 at 11.

Furthermore, the administration successfully recommended to the Senate that the categories of persons subject to the statute be enlarged. See S. Rep. No. 908 at 13-14 (1961); 1961 Senate Hearings at 5-7. These suggestions were incorporated in S. 2520 reported out by the Senate, and the stricter Senate version of 18 U.S.C. §1954 was adopted by the conference committee and enacted into law. H. Rep. No. 1417, 87th Cong., 2d Sess. (1962).

9-134.050 The Statute

Section 1954, Title 18, United States Code, presently reads:

§1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.

Whoever being--

- (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension plan; or
- (2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

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(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than \$10,000, or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension plan, respectively, subject to any provision of title 1 of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974. See 29 U.S.C. §1002(4) and (16).

[Note: For conduct occurring prior to January 1, 1975 (or prior to the effective date for certain plans for which the Secretary of Labor has postponed the applicability of ERISA), the following language applies:

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act as amended, and (b) "employee organization" and "administrator" as defined respectively in sections 3(3) and 5(b)(1)(2) of the Welfare and Pension Plans Disclosure Act, as

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amended. See former 29 U.S.C. §302(3) and §304(b).]

18 U.S.C. §1954 prohibits attempts to buy favor and sell influence in connection with welfare and pension plans covered by WPPDA or title I of ERISA. Officers, counsel, agents and employees of the plan, the employer, the employee organization or an organization which provides benefit services to the plan as well as administrators and custodians of a plan or persons providing benefit services to a plan are prohibited from soliciting or agreeing to receive certain payments. Similarly, it is illegal for any person to promise, offer or make the prohibited payments to any of those individuals named above. Any payment which can be characterized as a fee, kickback, commission, gift, loan, money or "other thing of value," is illegal, if the transaction is in the nature of a bribe (done with the specific intent to influence or be influenced) or graft (made or received because the individual is associated with the plan). A transaction may contravene the graft provisions of 18 U.S.C. §1954 where the payment was not made to influence future acts or even because of past actions. It is only necessary that the payment was made because a person in the prohibited class performed certain duties for a welfare or pension plan. Bona fide disbursements for services actually performed or goods actually received in the regular course of business are excepted from the statute.

9-134.100 WELFARE AND PENSION PLANS COVERED UNDER 18 U.S.C. §1954

9-134.110 WPPDA

Where the suspect conduct or events concerning a particular plan occurred prior to January 1, 1975 (or prior to the effective date for certain plans for which the Secretary has postponed the applicability of ERISA, see 29 U.S.C. §1031(b)(2)), the provisions of the WPPDA govern whether or not that plan comes within the scope of 18 U.S.C. §1954. See 29 U.S.C. §302 and §303.

18 U.S.C. §1954 applies to all plans subject to the WPPDA, 29 U.S.C. §§301-309. Under 29 U.S.C. §302(a)(1) "employee welfare benefit plans" include all plans established by an employer and/or an employee organization which are communicated or their benefits described in writing to employees and which provide medical, surgical, hospital, accident, disability, death or unemployment benefits to participants and their beneficiaries whether through insurance or otherwise. The definition of "employee pension benefit plan" in 29 U.S.C. §302(a)(2) is identical, except that it covers plans furnishing retirement benefits through insurance or annuity contracts and profit sharing plans which provide benefits at or after retirement.

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Some plans which fall within the definitional section are not plans covered by the 1958 Act. As a jurisdictional requirement, there is a necessity that the plan be:

. . . established or maintained by any employer or employers engaged in commerce or in any industry affecting commerce or activity affecting commerce or by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce or by both.

See 29 U.S.C. §303(a).

Certain types of plans, otherwise within the definition, are expressly excluded from the 1958 Act, as amended, and the criminal penalties of 18 U.S.C. §1954. See 29 U.S.C. §303(b)(1)-(4); 18 U.S.C. §1954. Welfare and pension benefit plans covering fewer than twenty-six participants, 29 U.S.C. §303(b)(4), or plans administered by the federal government or a state government, a federal or state subdivision, agency or instrumentality are not covered by the Act. See 29 U.S.C. §303(b)(1). Likewise excluded are plans "established and maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability insurance laws." See 29 U.S.C. §303(b)(2). One law review article has suggested that welfare and pension benefit plans offering benefits only slightly greater than those necessary to qualify under workmen's compensation laws or unemployment compensation disability laws should be excluded under this provision. Note, The Welfare and Pension Plans Disclosure Act--Its History, Operation and Amendment, 30 GEO. WASH. L. REV. 682, 700 (1962). Although there is no legislative history on the question, the view expressed in the article flies in the face of the word "solely" used in 18 U.S.C. §303(b)(2). Finally, 18 U.S.C. §202(b)(3) excepts plans established by fraternal benefit societies, and charitable and civic organizations which do not represent members in the course of collective bargaining and meet certain other requirements of the Internal Revenue Code, 26 U.S.C. §§501-504.

9-134.120 ERISA

In cases subject to ERISA (see 29 U.S.C. §1031(a)(1), (a)(2)(C), (b)(1) and (b)(2)), reference must be made to 29 U.S.C. §1002(1), (2), and (3) and §1003 in order to determine whether the particular plan in question comes within the scope of 18 U.S.C. §1954.

For example, the ERISA definition specifically broadens the scope of

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employee welfare benefit plans to include plans providing vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services, or any benefit described in 29 U.S.C. §186(c) other than pension plans. See 29 U.S.C. §1002(2); USAM 9-135.000 et seq.

Certain types of plans are expressly excluded from the coverage of ERISA and the criminal penalties of 18 U.S.C. §1954. The exclusions are set forth in 29 U.S.C. §1003. For example, plans with fewer than 26 participants are covered by ERISA but were not formerly covered by WPPDA.

9-134.200 PERSONS LIABLE

In order for there to be a violation of 18 U.S.C. §1954 a person specifically described in 18 U.S.C. §1954(1)-(4) must be the proposed or actual recipient of a bribe or graft payment. Such persons generally must hold a position of the type specified (agent, officer, etc.) and be affiliated with (1) an employee benefit plan, (2) the employer, (3) the employee organization or (4) an organization providing services to a plan. 18 U.S.C. §1954(4) also encompasses persons who provide services to plans in their personal capacities independently of any formal organization. On the other hand, any person may violate 18 U.S.C. §1954 as a principal by making or agreeing to make an illegal payment to one or more persons within the class of proscribed recipients. Finally, other individuals may incur criminal sanctions under 18 U.S.C. §1954 for aiding and abetting or conspiring to violate the statute. See 18 U.S.C. §2, 371.

In United States v. Provenzano, 615 F.2d 37 (2d Cir. 1980), defendant was convicted of conspiracy to pay a kickback to a union pension and welfare fund trustee in exchange for favorable action on a proposed mortgage loan to be funded by the pension and welfare fund. The Court found that the conspiracy offense had been shown by proof that defendant had knowingly joined a group which agreed to make the improper payments under 18 U.S.C. §1954, even though members of the conspiratorial group also intended to receive part of the kickback. Since conspiracy was charged, it was also not necessary for the government to prove that such payments were actually offered or made. See United States v. Provenzano, supra, at 44.

9-134.210 Status and Affiliation of the Recipient

Welfare and pension plans may be established and administered in a great variety of ways. See, generally, Note, Pension Plans and the Rights of the Retired Worker, 70 Colum. L. Rev. 909 (1970). A plan may be a self-administered, independent entity with its own staff of employees and a

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coterie of specially retained counsel and agents. The reasons which prompted Congress to include the individuals associated with the plans themselves are abundantly clear. 18 U.S.C. §1954(1)-(4) especially when read in light of the legislative history, evidence a clear intent to cover persons affiliated in any manner with all plans subject to the WPPDA or title I of ERISA no matter how administered. See USAM 9-135.000, et seq.

The legislative history indicates that, in describing the persons subject to the 1962 amendments of the WPPDA, Congress did not intend that the definitions employed be given a narrow technical meaning. For example, Senator McNamara, Chairman of the Senate Committee, argued against the proposal that only the activities of persons who stood in a technically fiduciary capacity should be restricted:

What we deal with here is more than technical and goes beyond those considerations which are termed as 'fiduciary' and the like.

This involves the hopes and expectations of the majority of our people.

A trust fund depleted by connivance and corruption can shatter the lives of all too many people.

* * *

I trust we will provide the means to wipe out such individual tragedy by the enactment of this bill.

See 108 Cong. Rec. 1924 (1962); see also 108 Cong. Rec. 1931 (1962) (remarks by Senator Javits). It is against this background of Congressional concern that the status of the recipient must be defined.

9-134.211 Employee Benefit Plan Operational Personnel-Subsection (1)

A. ADMINISTRATOR

"Administrator" under ERISA is defined at 29 U.S.C. §1002(16) as follows:

(A) The term "administrator" means -

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

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(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other persons as the Secretary may by regulation prescribe.

A plan sponsor may be the employer, the union or a joint board of trustees depending on the type of plan involved. See 29 U.S.C. §1002(16)(B).

This definition clears up some of the ambiguities of the WPPDA definition of "administrator" and provides a procedure for determining who the administrator is in cases where none has been designated. Compare, WPPDA definition at former 29 U.S.C. §304(b).

In United States v. Romano, 684 F.2d 1027 (2d Cir. 1982), the administrator of the Fulton Fish Market Welfare and Pension Trust Funds was convicted under 18 U.S.C. §1954 for receiving television sets as gifts from Republic National Bank in return for directing the Deposit of Fund monies into saving accounts at Republic. The Second Circuit noted that the broad language in 18 U.S.C. §1954 is intended to "reach all fiduciaries who profit (other than by their regular compensation) as a result of their decisions to invest union pension funds." See United States v. Romano, supra at 1064.

B. OFFICER

"Officers" of employee benefit plans are covered by section 1954. However, unlike other labor statutes, neither ERISA nor WPPDA specifically defines the term "officers." At the very least an officer, as distinguished from an employee, holds an executive position calling for the exercise of independent judgment. See Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949); Flight Equipment and Engineering Corp. v. Shelton, 103 So.2d 615, 623 (Fla. 1958). Although the term "officer" is not expressly defined in ERISA, ERISA's reference to the Labor Management Relations Act (LMRA) of 1947 may mean that the restrictive definition of "officer" used in the latter act may be applied under 18 U.S.C. §1954 inasmuch as Congress did not expressly specify the more liberal definition found in the Labor Management Reporting and Disclosure Act (LMRDA) of 1959. Compare, ERISA (29 U.S.C. §1002(12)); NLRB v. Coca Cola Bottling Co., 350 U.S. 264 (1956) (LMRA definition of officer means "constitutional officer"); and LMRDA definition (29 U.S.C. §402(n)). However the precise definition of "officer" applicable to each of the statute's four subsections is not crucial. An individual whose position within an organization fails to

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conform to a restrictive interpretation of the term "officer" will almost always qualify as an "employee" or "agent," terms found in all four subsections, or as a person providing benefit plan services.

C. TRUSTEE

A "trustee" within the meaning of 18 U.S.C. §1954 would appear to be a person named as such within a legal document creating or modifying the trust. Under ERISA all assets of "employee benefit plans" are required to be held in trust subject to the exceptions stated in 29 U.S.C. §1103. For example, the Department of Labor may exempt certain welfare plans from the "trust" requirements of ERISA. See 29 U.S.C. §1103(b)(4).

Those welfare and pension plans which are funded by employer contributions and which are maintained by employers and employee organizations as the result of collective bargaining are also required by other federal law to be administered as trusts. See Section 302(c)(5)-(8) of the Labor Management Relations (Taft-Hartley) Act (29 U.S.C. §186(c)(5)-(8)). As exceptions to the general prohibition against employer payments to labor organizations and entities controlled by employee representatives, employer contributions to welfare and pension benefit plans sponsored by labor organizations are permitted if contributions are paid to a trust which is equally administered by employers and employee representatives. For other structural requirements of these plans, see generally, 29 U.S.C. §186(c)(5) and USAM 9-132.550 et seq.

D. COUNSEL

In United States v. McCarthy, No. 68 Cr. 467 (S.D.N.Y. 1970), aff'd sub nom. United States v. Russo, 442 F.2d 498 (2d Cir. 1971), the district judge charged the jury that "counsel" in 18 U.S.C. §1954 meant, "counsel in the broader sense of an advisor, one who recommends a course of action to the Fund." Transcript at 1692. No portion of the charge is available in any published decision.

In United States v. Friedland, 660 F.2d 919 (3rd Cir. 1981), attorneys who served as general counsel for a pension plan were convicted under 18 U.S.C. §1954 for receiving corrupt payments from a prospective borrower from the plan. The court in Friedland held that a jury's finding that defendants were legal counsel to the plan, whom the trustees consulted at all meetings and on an ad hoc basis, but who had no actual authority over plan investments, was sufficient to bring them within the scope of 18 U.S.C. §1954. There was no need for an additional finding, the court said, that they actually exercised their influence or took any actions with respect to the fund in order for them to be convicted of receiving a kickback "because of" their decisions, actions, or other duties relating to

the plan. Solicitation or acceptance of the payment because of their status as counsel, which gave the defendants at least ostensible power or apparent authority to exercise influence over the investments by plan fiduciaries, was sufficient to constitute a violation. See United States v. Friedland, supra, at 925-927.

E. AGENT

Legal authorities contemplate a situation in which an "agent" has the power to affect his/her principal's legal relationships with third persons, usually by binding his/her principal to contracts with a third party. In the two cases construing the meaning of "agent" in 1954, both consider whether individuals were agents for purposes of Subsection (1) of the statute. United States v. Russo, supra, at 502, held that an individual was an agent even though the individual did not represent the plan in any dealings with third parties. The principal defendant, Wenger, a private CPA, served as an auditor and financial advisor to a Teamster pension fund. In the latter capacity, Wenger investigated the financial condition of individuals and concerns applying to the fund for loans. Wenger was indicted for accepting payment from loan applicants while acting as an agent of the fund. The Second Circuit upheld the jury's determination of guilt in the following passage:

Wenger asserts supported by Russo, that he was an independent CPA and was not employed by, nor was he an agent of, the Fund. However, Wenger's status was a jury question which was resolved against him. More than ample evidence supports his relationship to the Fund as 'counsel, agent.' In rendering advice to the Fund on a regular basis, including giving the Fund advice regarding the financial status of potential borrowers, Wenger established an agency relationship with the Fund, and therefore, became a member of the class to which the statute is addressed, whether or not he could also properly be described as 'counsel' to the Fund.

See United States v. Russo, 442 F.2d at 502.

In a district court case, however, the question of an individual's status as agent was determined with far stricter attention to the legal principals of agency. United States v. Marroso, 250 F. Supp. 27 (E.D. Mich. 1966). In Marroso, the single defendant was an investment broker who represented persons applying, again, to a Teamsters pension fund. Marroso intimated mightily that he held a great deal of influence with officials of the fund. The government charged that Marroso was the fund's agent and acting in its behalf when he collected his "finder's fees" from loan

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applicants. The district court, however, granted defendant's motion for a judgment of acquittal, noting that there was not express agency and that Marroso did not render himself an agent by his own statements. At the very least the court held there had to be a manifestation of consent by the fund, but this the government had failed to prove. Id. at 30, citing Appleby v. Kewanee Oil Co., 279 F.2d 334 (10th Cir. 1960); Kelly v. United States Steel Corp., 170 F. Supp. 649 (W.D. Pa. 1959); Restatement (Second) of Agency, §221 (1958).

F. EMPLOYEES

"Employees" of entities mentioned in all four subsections of the statute are prohibited from engaging in the activities prohibited by 18 U.S.C. §1954. The question of the definition of an employee is not an easy one. The traditional distinction made by the common law between employers and servants on one hand and independent contractors on the other was for the purpose of determining the employer's vicarious liability for his/her employee's torts. The test was one of the "control" exercised by the employer over the independent contractor. This test has been rejected by courts in determining who are employees entitled to the protection of the National Labor Relations Act. See NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124 (1944). On the other hand it has been acknowledged by the Supreme Court in determining whether individuals were entitled to protection of the Fair Labor Standards Act (Goldberg v. Whittaker House Cooperative, Inc., 366 U.S. 28 (1961)), and the Social Security Act (United States v. Silk, 331 U.S. 704 (1947)).

Both the common law definition of "employee" and the simpler dictionary definition of the term include a large number of persons in a position to influence the operation of a benefit plan through their day-to-day work for the plan itself, the employer, employee organization or another organization rendering benefit plan services. This approach excludes the attorneys, financial advisers, accountants and other consultants who work only irregularly on welfare and pension benefit plans. Such persons, however, are described as agents, counsel, and persons providing benefit plan services.

9-134.212 Employer Personnel-Subsection (2)

During Congressional consideration of 18 U.S.C. §1954 there arose a question as to whether sufficient problems existed with plans financed and administered solely by an employer to warrant inclusion in the statute. The Department of Justice voiced the opinion that because "the character of the administration of the fund was not a causative factor in the known abuses . . . all funds should be covered by the proposed legislation."

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See S. Rep. No. 908, 87th Cong., 1st Sess. 16 (1961). It might be noted that the great majority of plans are unilaterally administered by the employer. In 1962, 91 percent of the plans were administered by employers, 2 1/2 percent by unions and 6 1/2 percent by employees and unions. See 108 Cong. Rec. 1938 (1962) (statement of Senator Douglas).

9-134.213 Employee Organization Personnel-Subsection (3)

Subsection (3) of section 1954 applies to persons affiliated with an "employee organization." See 29 U.S.C. §1002(4). Unions participate with employers in the management of collectively bargained employee welfare and pension plans and unilaterally maintain plans funded by their own members. Therefore, union leaders and others associated with benefit plans are natural targets of bribery attempts, and their conduct is subject to the restrictions of section 1954. Because unions are political entities, a union leader may utilize his/her control over welfare and pension plans to win concessions on other union matters. See Lambos, Policing the Trustee: The Law Governing Labor-Management Employee Benefit Funds, Symposium on Labor Relations Law 611, 623 (Slovonko ed.) (1961). If such a union leader received a demonstrable quid pro quo for a decision affecting a welfare and pension plan, such action could be a violation of 18 U.S.C. §1954. Even where union personnel do not participate in the management of welfare and pension plans they may act as bargaining agents for their members in negotiating the terms of welfare and pension plans and enforcing the terms of the plan against employers. Such power is subject to corruption and is subject to the strictures of 18 U.S.C. §1954. For example, a union president and trustee of a union-affiliated pension and welfare plan were convicted of conspiracy to violate 18 U.S.C. §1954 in United States v. Uzzolino, 651 F.2d 207 (3rd Cir. 1981). In that case the violation consisted of an agreement to receive cash from an employer in exchange for the defendant's efforts in assisting the employer to avoid paying an \$80,000 outstanding debt to the pension plan and making delinquent contributions to the welfare program.

In United States v. Palmeri, 630 F.2d 192 (3rd Cir. 1980), one of the principal defendants was a business representative and employee of a union local whose members were covered by particular welfare and pension plans. The business representative would contact various banks and arrange for favorable personal loans from the banks in exchange for the defendant's promises to attempt to arrange for the union affiliated employee benefit plans to deposit their funds in the banks. Defendant was convicted, despite the fact that the defendant held no official position with the plan. On appeal defendant argued that section 1954 applies only to persons maintaining a fiduciary relationship with an employee benefit plan and who by their direct actions can exert a degree of influence over the plan.

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Since defendant was neither an employee nor a trustee of the employee benefit plan, defendant argued, the proscriptions of 18 U.S.C. §1954 could not extend to him. The court rejected defendant's limited application of the statute in stating:

The more reasonable construction of the statute is one that includes within the regulated class all persons who exercise control, direct or indirect, authorized or unauthorized, over the fund . . . It also discourages behavior . . . that undermines the purposes of the act but is undertaken by persons with no official position with respect to the fund. United States v. Palmeri, supra at 199, 200.

9-134.214 Provider of Benefit Plan Services-Subsection (4)

The early drafts of section 1954 submitted to the Eighty-seventh Congress circumscribed the activities of persons providing benefit plan services to employee benefit plans but not those of individuals associated with organizations providing such services. See S. 1944, 17(a); H.R. 7234, 17(a); H.R. 7235, 17(a); H.R. 8723, 17(a). The Department of Justice first suggested that section 1954 encompass organizations providing benefit plan services. See 1961 Senate Hearings at 5-7.

The final Senate Bill, S. 2520, 17(e) adopted this suggestion although the House bill, H.R. 8723, 17(a) did not reflect the recommendation. The Senate version prevailed at the conference committee. See H. Rep. No. 1417, 87th Cong., 2d Sess. 13 (1962). The effect of subsection (4), therefore, is to include "the representatives of an organization, such as an accounting firm or an investment broker, providing services to the plan." S. Rep. No. 908, 87th Cong., 1st Sess. 11 (1961). Generally, subsection (4) constitutes a catch-all, apparently intended to hold accountable persons not included in the first three subsections whose conduct should be restricted.

Individuals who are "employees" or "agents," etc. of entities described in the first three categories of recipients may also be a person described in subsection (4), as, for example, a plan administrator who acts as insurance broker for the plan and also receives commissions for the sale of insurance to the same plan. For a discussion of the arguable effect of section 1954 on compensation of plan fiduciaries by parties whose interests are adverse to the plan, see USAM 9-134.320.

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9-134.300 PROHIBITED TRANSACTIONS

A. For purposes of proving a receipt or demand under section 1954, an actual or contemplated payee listed in section 1954 must knowingly:

1. Receive or agree to receive or solicit
2. Any fee, kickback, commission, gift, loan, money or thing of value
3. Because of or with the intent to be influenced
4. With respect to any of his/her actions, decisions, or other duties
5. Relating to any question or matter concerning the plan.

B. For purposes of proving a payment or offer, any person must knowingly:

1. Give or offer or promise to give or offer
2. Directly or indirectly
3. Any fee, kickback, commission, gift, loan, money or thing of value
4. Prohibited by this section (18 U.S.C. §1954).

C. For purposes of charging an offer or payment "prohibited by this section," there is precedent for alleging the transaction in terms of "because of and with the intent to influence" the prohibited recipient although the underlined words nowhere appear in the statute. See, e.g., United States v. Berger, 433 F.2d 680 (2d Cir. 1970), affirming conviction for conspiracy to pay a union official and plan trustee (S.D.N.Y. 68 Cr. 631); United States v. Provenzano, 615 F.2d 37, 43-44 (2d Cir. 1980), affirming conviction for conspiracy to pay plan trustee (S.D.N.Y. 77 Cr. 889); United States v. Corrado, 307 F. Supp. 513, 514 (S.D.N.Y. 1969) (conspiracy to influence pension plan agent). A similar statutory construction of the phrase "prohibited by this section" has been used under 29 U.S.C. §186 with respect to employer bribery of union officials. See United States v. Ferrara, 458 F.2d 868, 873 at n.5 (2d Cir. 1972), where the object of a conspiracy to receive bribery payments was predicated on the recipient's "intent to be influenced" although the statute expressly imposes only an "intent to influence" on the payor. For alternative constructions of "prohibited under this section" under 29 U.S.C. §186(b)(1); compare, United States v. Bloch, 696 F.2d 1213, 1216 (9th Cir.

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1982), where a bribery violation was said to require only that the recipient receive payments with knowledge of the payor's intent to influence the recipient and United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir. 1980), where the court stated by way of dictum that the fact that 29 U.S.C. §186(a)(4) imposes a scienter requirement on the maker of the payment does not impose a corresponding requirement of an "intent to be influenced" on the taker of the payment. See USAM 9-132.340.

However, in United States v. Alan Sarko (unreported decision) 81 Cr. 50054 (E.D. Mich.), an indictment charging an employer-payor as a defendant "with intent to influence" the receipt was dismissed for failure to state a crime under 18 U.S.C. §1954. Under the theory that the phrase "prohibited by this section" refers back to the operative elements imposed in the recipient, the court held that the government must charge and prove the recipient's corresponding "intent to be influenced." Since the "recipient" was a union official cooperating with the FBI at the time of the offense, the indictment had not also charged the recipient's "intent to be influenced." The court relied on the statement in Boylan, supra, to the effect that "prohibited by this section" does not impose on both sides of a bribery transaction a specific intent which the statute expressly imposes on one side only. The result in Sarko could have been easily avoided if the indictment had also charged the payor with making the prohibited payment "because of" the recipient's actions, duties, and decisions relating to a plan matter. Because the "graft" portion of 18 U.S.C. §1954's operative language requires only knowledge of a nexus between the prohibited payment and the recipient's actual or apparent actions, duties, or decisions, the issue of whether the maker of a "bribery" payment must act with "an intent to influence" or merely make the payment with knowledge of the recipient's "intent to be influenced" is effectively avoided. For a discussion of the differences between "bribery" and "graft" see USAM 9-134.320, supra.

The preceding discussion is not meant to imply that 18 U.S.C. §1954 necessarily requires a mutuality of intent, that is, a requirement for every transaction that the maker and the recipient of the prohibited payment both acted with the same culpable state of mind. In United States v. Romano, 684 F.2d 1057, 1062-64 (2d Cir. 1982), a pension fund administrator and his co-conspirators were convicted under 18 U.S.C. §1954 for their receipt of television sets for their personal use from a bank which offered such gifts or an equivalent amount of cash on a non-preferential basis to the sponsors, rather than the owners, of all new accounts at the bank. In return, the conspirators caused the plan to deposit its funds in the bank. In holding that 18 U.S.C. §1954 reaches "conflict-of-interest" payments as well as corrupt "kickback" arrangements, the court implies that the payor's apparent good faith in giving a thing of value which the statute forbids the recipient to receive is no defense to

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the prohibited receipt. Accord, United States v. Arroyo, 359 U.S. 419, 423-24 (1959) (mutuality of intent not required under 29 U.S.C. §186(a)(1) and (b)(1)).

Where there is a meeting of the minds by the prospective payor and the contemplated recipient, but no transfer of the thing of value occurs, the inchoate transaction may form the basis of a substantive 18 U.S.C. §1954 violation on both sides in the form of an "offer or promise to give or offer" and an "agreement to receive." Conspiracy to violate 18 U.S.C. §1954 can embrace confederates on both sides of the transaction because neither side of the transaction is solely within a protected class. See, e.g., United States v. Berger, *supra* (conspiracy that payors would pay within an intent to influence and that recipients would receive with intent to be influenced).

Of course, the conspiracy may also be confined to confederates on one side of the transaction. United States v. Provenzano, 615 F.2d 37, 44 (2d Cir. 1980) (conspiracy to offer or promise payment to plan trustee in return for loan approval did not require proof that plan trustee was offered the kickback). In United States v. Uzzolino, 651 F.2d 207, 212-214 (3d Cir. 1981), it was held that a union official's acquittal of substantive 18 U.S.C. §1954 counts charging the defendant with both the receipt and agreement to receive kickbacks was not inconsistent with the defendant's conviction for conspiracy to receive prohibited payments where the acquittal could be explained in terms of the government's failure to prove an actual receipt following the substantive "agreement to receive." Accordingly, the court had no occasion to determine whether a substantive charge of "agreement to receive" standing alone would preclude a charge of conspiracy to receive payments prohibited by 18 U.S.C. §1954 under the so-called Wharton Rule. For a discussion of the Rule and its application in bribery and graft cases under 18 U.S.C. §201, see United States v. Previte, 648 F.2d 73, 76-81 (1st Cir. 1981).

The transactions are illegal whether the thing offered, solicited, or transferred is clothed as a "fee, kickback, commission, gift, loan, money" or can otherwise be classified as a "thing of value." However, the Department has stated for the record that ordinary social and business gratuities will not be prosecuted. See S. REP. No. 908, 87th Cong., 1st Sess. 15-16 (1961).

In the main, these terms should be given their common sense meaning. However, it should be noted that a straight-forward loan, conforming generally to the terms of other arm-length transactions is a poor case under 18 U.S.C. §1954. At a minimum, the government must prove beyond a reasonable doubt that the loan was made "because of" the recipient's position in respect to such funds. The case would be virtually impossible

if the defense demonstrated that the lender customarily made similar loans to persons whose favor he/she was not courting. In deciding whether a particular loan violates 18 U.S.C. §1954 the interest, due date, security and other terms of the transaction must be considered.

It was held in a case decided under 29 U.S.C. §186 that when a corporation paid a premium and union officer's life insurance policy, the indictment should charge receipt of "a thing of value" rather than money. See United States v. Lippi, 190 F. Supp. 604 (D.Del. 1961). However, the Tenth Circuit upheld an indictment charging payment of money under the same statute where the money was in fact paid to the union officer's creditor because the gist of the transaction was the payment of money. See Korholz v. United States, 269 F.2d 897 (10th Cir.), cert. denied, 361 U.S. 929 (1960).

9-134.305 Payments to Third Parties

Situations may arise under 18 U.S.C. §1954 and similar statutes where a third person, at the direction of the individual whose favor is sought, becomes the ultimate recipient of the money or thing of value. The Department's position is that section 1954 encompasses such "third party beneficiary" transactions. For example, in United States v. Palmeri, *supra*, at 205, the court affirmed the conviction of a benefit plan trustee who had assisted a union official to obtain a bank loan as part of the trustee's role in a kickback scheme involving the deposit of plan assets in the bank. The trustee received no personal loans under the scheme for himself. Although the union official had also been charged with receipt under 18 U.S.C. §1954, the defendant's conviction was reversed on appeal because of the government's failure to prove the official's knowing participation in the kickback scheme. Nevertheless, because the trustee was aware of the corrupt connection between the loans and plan deposits, the trustee's solicitation of a thing of value for the union official violated 18 U.S.C. §1954. See also United States v. Cariello, 536 F. Supp. 698, 705-06 (D. N.J. 1982) (post-conviction motion).

Moreover, in analogous prosecution under 19 U.S.C. §186, conviction for requesting a prohibited "thing of value" has been upheld with respect to third-party payments even where the third party is completely outside the class of statutory recipients. One theory supporting this position is that payment to a third party or an organization is a "thing of value" because there is a certain "value" in the power to confer benefits on others. The decision of the United States Court of Appeals, Fourth Circuit, in United States v. DeBrouse, 652 F.2d 383, 387-388 (4th Cir. 1981) is the first decision to uphold application of this theory under 19 U.S.C. §186 in the case of a union official who demanded that an employer

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pay salary to a third party for services not performed. [The salary payment would have violated section 186 if paid to the union official directly because it fell outside the statutory exception for bona fide salary.] The union official, however, received no pecuniary benefit, directly or indirectly, from the third party. On the other hand, in United States v. Scotto, 641 F.2d 47, 57 (2d Cir. 1980), the Court of Appeals, Second Circuit, expressed doubt whether "mere goodwill" which a union official might derive from the delivery of political campaign contributions from employers to third-party politicians is properly the receipt of a "thing of value" under 29 U.S.C. §186(b)(1).

Of course, when a payment is made to a third person under circumstances which permit a showing that the statutory principal did in fact receive some direct or indirect benefit, either money passed through the third person as a conduit or the value of having money or property held for the principal's use, there is no need to utilize the "third party beneficiary" approach discussed above. See, e.g., United States v. Pecora, 484 F.2d 1289 (3d Cir. 1973) (profits from testimonial dinner to which employer contributed held for the union official's use); and United States v. Lanni, 466 F.2d 1102 (3d Cir. 1972) (salary for "no show" employee held for union official's use or on his behalf).

9-134.310 Bribery and Graft

18 U.S.C. §1954 prohibits both bribery and graft. Blakey, Welfare and Pension Plans Disclosure Act Amendments of 1962, 38 NOTRE DAME LAW. 263, 284, n. 167 (1963). Bribery requires a specific intent to influence or be influenced in the performance of actions, decisions or duties relating to questions covering welfare and pension plans. On the other hand, graft encompasses payment to or acceptance by an individual of something of value because of his/her action, decisions or duties but without demonstrable intent to influence or be influenced. See generally, United States v. Romano, 684 F.2d 1057, 1063-64 (2d Cir. 1982) (discussion of corrupt "kickbacks" versus "conflict-of-interest payments"); United States v. Friedland, 660 F.2d 919, 925-27 (3d Cir. 1981) (discussion of bribery and graft under 18 U.S.C. §1954 in relation to cases under 18 U.S.C. §201 et seq.

9-134.311 Specific Intent for Bribery

In providing specific intent to influence or be influenced under 18 U.S.C. §1954, and other bribery statutes, the chronology of events is extremely important. Unless the offer, acceptance, solicitation, agreement, promise, or payment occurred before completion of the act to be

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influenced, bribery cannot be proven. See United States v. Cohen, 387 F.2d 803, 805-06; United States v. Barash, 365 F.2d 395, 399 (2d Cir. 1966); United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966) (cases decided under 18 U.S.C. §201 et seq.). However, if the alleged illegal agreement, promise, solicitation, acceptance or receipt occurs when the action, duty or decision to be influenced is only partially complete, and the payor believes this, sufficient specific intent exists. See United States v. Barash, 412 F.2d 26, 33 (2d Cir. 1969) (IRS auditor bribed after audit conducted).

Evidence of earlier acts of bribery may be considered by the jury as evidence of defendant's intent and purpose at the time of the alleged transaction. See, e.g., United States v. Russo, supra, at 501 (conspiratorial acts prior to effective date of 18 U.S.C. §1954. As in any instance where the government must establish a defendant's state of mind, the proof of specific intent under 18 U.S.C. §1954 is likely to be circumstantial. This can cause major problems where the evidence of a defendant's knowledge of the purpose of the improper payments is not clearly established by the government. In United States v. Palmeri, 630 F.2d 192 (3d Cir. 1980), various union and benefit plan officials were convicted under 18 U.S.C. §1954 for receiving favorable personal loans from banks in return for deposits of monies from pension and welfare funds affiliated with the union. One of the defendants, a union business agent, was a major beneficiary of the scheme to get personal loans, although the defendant was not involved in the negotiations with bank officials concerning the deposits. In reversing the defendant's 18 U.S.C. §1954 conviction the Third Circuit found that the government had failed to produce any evidence, "tending to prove [the business agent's] knowledge of participation in the scheme. That he benefitted from the loans is clear; what is unclear is his knowing participation in it." United States v. Palmeri, supra at 206. In short, the government failed to establish the requisite connection between the defendant's receipt of the bank loans and his knowledge that the loans were the result of the defendant's confederates' scheme to deposit benefit plan funds in the lending bank. For the converse situation, see United States v. Berger, supra, at 684, where a defendant's participation in the negotiation of the underlying plan matter (a proposed pension plan loan) was not accompanied by knowledge of the co-conspirators' scheme to pay the plan trustee for the co-conspirator's favorable action.

9-134.312 Extortion Defense to Bribery

The success of an extortion defense against a charge of improper payment under 18 U.S.C. §1954 is thought to depend upon whether the individual is accused under the bribery or the graft provision. Extortion

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has been described as a viable defense to an 18 U.S.C. §201 bribery to the extent the mental state generated by duress is thought to be inconsistent with a specific intent to influence. However, such a defense has been held unavailable under the "gratuity" portion of 18 U.S.C. §201 because of the absence of a requirement of specific bribery intent on the part of the payor. See United States v. Barash, supra at 412 F.2d 29. It is clear that the defendant has the burden of presenting evidence of extortion or economic coercion and that no instruction on the defense can be given until the defendant has satisfied this burden. See United States v. Umans, supra, at 368 F.2d 730; United States v. Kabot, 295 F.2d 848, 854 (2d Cir. 1961) cert. denied, 369 U.S. 803 (1962).

9-134.313 Graft

Although the graft enjoined by 18 U.S.C. §1954 does not require the specific intent to influence or be influenced, it does require a nexus between the offer, agreement or payment prohibited and the "actions, decisions or other duties" of the individual connected with the welfare or pension plan. However, the graft portion of 18 U.S.C. §1954 does not demand that the payment be made in contemplation of any specific favor.

In United States v. Friedland, 660 F.2d 919 (3d Cir. 1981), the defendants, legal counsel to a pension plan, were convicted under 18 U.S.C. §1954 for receiving payments from a prospective borrower from the plan. Alluding to the fact that the plan trustees had retained authority over loan approvals, the court rejected defendants' contentions that their conviction under 18 U.S.C. §1954 required proof of a demonstrated capacity to control or influence the issuance of loans as fiduciaries or that they actually took some action in exchange for the kickback. In rejecting these arguments the court analogized the "because of" or graft portion of 18 U.S.C. §1954 to the "gratuity" provision of 18 U.S.C. §201(g). The court stated:

. . . [so] long as appellants were counsel to the Fund, and received the kickback (a) because of that status, which gave them at least ostensible power to exercise influence, or (b) with the purpose of exercising the influence they either actually or ostensibly had over decisions regarding the fund, then they need not be shown to have actually exercised such influence . . . When counsel to an employee pension fund take a kickback for the stated purpose of exercising their influence over the fund, then their actions come within the "because of" prong of §1954.

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United States v. Friedland, supra, at 926-27 (emphasis added).

Although the court in Friedland framed its conclusion in terms of the graft portion of section 1954, taking a kickback "for the stated purpose of exercising influence over the fund," it may be argued, also evidences an "intent to be influenced with respect to any of [the recipient's] actions, duties or decisions" relating to a plan matter. See e.g. United States v. Arroyo, 581 F.2d 649, 652-55 (7th Cir. 1978) approving an instruction under 18 U.S.C. §201(c) to the effect that "in return for being influenced" requires only a representation that the thing of value solicited or received is for the purpose of influencing the defendant's action; United States v. Myers, 692 F.2d 823, 840-842 (2d Cir. 1982) ("playacting" or a false representation by the bribe recipient that he/she would keep his/her corrupt promise to act is not a defense to "being influenced" under 18 U.S.C. §201(c) or a predecessor statute which required receipt "with the intent to have his action . . . influenced").

Proof of the connection between the payment and the recipient's position with a welfare or pension fund will be circumstantial and the government may appeal to the common sense of the jury. Cf. United States v. Ryan, 232 F.2d 481, 482 (2d Cir. 1956) (per curiam) (case under 29 U.S.C. §186). The connection is not established and liability under section 1954 may not be founded solely on the fact that the recipient thought he/she was receiving payments because the payors "liked him or thought he needed the money." Only if the defendant knows that the thing of value received is the result of his/her actual or apparent relationship to a benefit plan matter may he/she be convicted under section 1954. United States v. Palmeri, 630 F.2d 192, 205-206 (3d Cir. 1980); United States v. Friedland, supra at 927.

There are specific circumstances and situations where use of the section 1954 graft provision may be particularly appropriate. For example, where the payment or offer of payment occurs after the completion of the decision or act to be influenced, graft should be charged. Where the payment or offer of payment is not the primary motivating factor for a particular decision or act (such as a tip or gratuity for an action which would have been taken in the regular course of the recipient's duties), the graft provisions may be most appropriate. Finally, the graft prong may be employed where the transaction is extortionate (payment made as a result of coercion or fear imposed upon the payor) and in transactions where the payment or offer of payment is being charged. See discussion of United States v. Sarko, supra, at USAM 9-134.300.

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9-134.314 Bribery and Graft Distinguished

Under section 1954, bribery includes all the elements of graft plus the specific intent to influence or be influenced. Generally then, graft is an included offense to bribery. Although both bribery and graft may be charged in the indictment even if based on the same act, the act will support conviction and sentence on only one count. See United States v. Umans, supra, at 730.

Care, however, should be taken to ensure that a person participating in a scheme to steal or embezzle funds from a plan is not indicted under section 1954 merely because he/she takes a share in the proceeds of the crime. In such a situation, a violation of 18 U.S.C. §664 should be charged. On the other hand, there may be situations where a fund fiduciary is bribed to convert the fund's assets to the use of another and the fiduciary can be indicted under both provisions.

9-134.315 General Criminal Intent for Section 1954

When proceeding under an indictment drawn to the provisions of section 1954, the government must prove general criminal intent. See, United States v. Berger, 433 F.2d 680, 684 (2d Cir. 1970); United States v. Romano, 684 F.2d 1057, 1063 n.2 (2d Cir. 1982). Specific intent to disobey or disregard the law is not required.

The Second Circuit approved the following instruction in United States v. Berger, supra, at 684.

I have used the words "knowingly, unlawfully, willfully." An act is done knowingly if it is done voluntarily and purposefully and not because of accident, negligence or other innocent reason. An act is willful if it is done knowingly and deliberately.

One defendant had challenged the instruction as failing to charge the specific intent necessary for conviction under section 1954. However, the Second Circuit held the quoted instruction "sufficient to inform the jury of the state of mind required to establish guilt," noting that "[f]urther instruction on 'specific intent' was unnecessary." Id. at 684. The indictment had charged the particular defendant in separate conspiracies whose objects were framed in terms of both bribery and graft, namely, that the payor-defendants "would unlawfully, willfully and knowingly . . . give . . . because of and with intent to influence the actions, decisions and other duties" of the respective recipients.

In Romano the court equated an instruction requiring a "specific

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intent to do something the law forbids" with a "corrupt intent to be influenced in the deposit of the union's pension funds." United States v. Romano, *supra*, at 1064 n.3. Accordingly, the court's statement that section 1954 does not require a "corrupt intent" appears to have been directed at the draft portion or "because of" clause in the statute. *Id.* at 1063 n.2. However, it should be noted that the only "bad purpose" specified in section 1954 is the requirement that the bribe recipient possess an "intent to be influenced with respect to his actions, decisions, or other duties" relating to plan matters. Unlike bribery of public officials under 18 U.S.C. §201(b) and (c), Congress has not included in section 1954 the word "corruptly" or any other language denoting knowledge of the wrongfulness of one's acts as opposed to knowledge of the factual circumstances required by the statute.

9-134.320 The Exception

Section 1954 contains the following clause intended as an exception to its general provisions:

Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

The exception was apparently intended to insure that individuals who actually did perform work for welfare and pension plans could receive legitimate compensation. A hypertechnical reading of the statute without the exception might bar fees or commissions in the form of salaries to actual employees "because of" actions, decisions and other duties as such employees. To arrive at such a conclusion, however, one would have to construe the draft provision of section 1954 as a malum prohibitum enactment, which it clearly is not.

There are a small number of instances where an illegal payment might be disguised as a legitimate salary or commission. For example, if a welfare fund were financed solely by the employer who chose a professional administrator to process claims, the employer could conceivably offer a bonus to the administrator for ignoring certain claims. So too the legislative history of section 1954 revealed several instances where union officials who had chosen a particular fund's insurer were paid unreasonable

fees by the insurer allegedly for promoting the fund and handling minor administrative chores. Douglas Report at 32-35; 108 Cong. Rec. 1943-44 (1962) (remarks of Senator Douglas).

The exception does, however, provide some guidance concerning the type of arguably illegitimate payments disguised as compensation which can be successfully prosecuted. Competing bills in the 87th Congress contained an exception for "usual salary or compensation for necessary services performed in the regular course of his duties." S. 1944; H. R. 7235, 87th Cong., 1st Sess. (1961). However, in testimony before the House Subcommittee on Labor, Sidney Yagri, legislative counsel for the International Brotherhood of Teamsters, opposed the narrowness of the exception, voicing a fear that determination of usual salaries and necessary services would lead to federal regulation of the welfare and pension plans. 1961 House Hearings at 233-34. Therefore, Mr. Yagri proposed that the only test should be whether the services were actually performed. To a considerable extent, as the present section 1954 indicates, Congress saw fit to adopt Mr. Yagri's suggestions. The salary or compensation does not have to be "usual," although it must be "bona fide;" the services do not have to be "necessary," they merely have to be performed. The meaning of "bona fide" has received no judicial construction and is, in fact, a term more common to civil than criminal law. At the very least, however, as used in section 1954, it contemplates that the payment be made in good faith for services performed and that the salary not be a disguised kickback. Thus, the level of remuneration may still be examined not to determine if it is somewhat excessive, but rather to show that it must represent more than compensation paid in good faith for work performed or goods and facilities furnished.

The discussion to this point and the legislative history impliedly assume that any payment of compensation to an individual come from the plan itself, the employer or employee organization responsible for the plan or an individual or organization which provides benefit plan services. These, of course, are the four basic categories of fiduciaries enumerated in subsections (1)-(4) of section 1954. There is absolutely nothing in the legislative history to support the contention that an administrator, counsel or agent of the plan, employee, union or organization providing services to the plan, can be paid by a third party seeking some preference from the plan. The exception itself requires that the payment be for "goods or facilities actually furnished or for services actually performed in the regular course of his duties" (emphasis added). A fiduciary representing the plan in negotiations with a third party cannot receive compensation from the third party allegedly for representing the fund and claim the benefit of the statute. Such an interpretation of the exception would vitiate the statute. Ruff, Welfare and Pension Plans: The Role of the Federal Prosecutor, 12 SANTA CLARA L. REV., 480, 497, n. 78 (1972).

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Situations may arise where a plan fiduciary or other person whose primary loyalty is owed to the plan receives or solicits compensation from a person whose interests may be adverse to the plan such as a service provider seeking to do business with the plan or a borrower seeking a loan of funds from the plan. For a discussion of the effect of section 1954 on the independent broker who, while under contract with a benefit plan to locate investments and potential borrowers, is secretly paid an amount beyond the normal "finder's fee" and deliberately fails to disclose to the plan the additional compensation from the borrower and the nature of the adverse relationship, see C. Ruff, 12 SANTA CLARA L. REV., *supra* at 497-501. Without disclosure of the adverse relationship and compensation, the resulting payment is arguably not bona fide compensation received in the regular course of the broker's duties as agent for his primary principal, the plan. With respect to the question of what constitutes "bona fide compensation . . . for services actually performed in the regular course of [the recipient's] duties," the following federal statutory provisions may be relevant:

A. Duties imposed on benefit plan fiduciaries as interpreted under Title I of ERISA (29 U.S.C. §1104);

B. Duties imposed on union (employee organization) officials by 29 U.S.C. §501(a);

C. Prohibited transactions involving benefit plans as interpreted under Title I of ERISA (29 U.S.C. §1108).

As with the similar clause in 29 U.S.C. §186 excepting certain payments to union representatives from the criminal penalties of the section, the burden of going forward is upon the defendant who must introduce evidence tending to bring himself/herself within the exception. United States v. Gibas, 300 F.2d 836, 838-39, (7th Cir.), cert. denied, 371 U.S. 817 (1962); United States v. Alaimo, 191 F. Supp. 625, 628-29 (M.D. Pa.), aff'd, 397 F. 2d 604 (3d Cir. 1961), cert. denied, 369 U.S. 817 (1962); United States v. Fabrizio, 193 F. Supp. 446, 449-50 (D. Del. 1961). If the defendant fails to fulfill this burden, he/she is not entitled to an instruction on the exception. United States v. Gibas, *supra*, at 838-39. If the defendant introduces some evidence, the government then must negative the exception with proof beyond a reasonable doubt. United States v. Fabrizio, *supra*, at 449-50.

9-134.400 VENUE

9-134.410 Venue For Illegal Giving

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Where a defendant is charged with giving an illegal bribe or graft payment, venue lies only in the district where the actual transfer took place and not in any other district where acts preparatory to the payment may have occurred. Krogmann v. United States, 225 F.2d 220 (6th Cir. 1955); venue for conspiracy to bribe or attempted bribery may be laid in districts where preparatory acts were committed. Id. (dictum); Goodloe v. United States, 88 U.S. App. D.C. 102, 188 F.2d (1950), cert. denied, 342 U.S. 819 (1951).

Supreme Court cases decided at the turn of the century and involving the predecessor of 18 U.S.C. §3237(a) have at least established the venue when illegal payments other than checks or negotiable paper are transmitted through the mails. Either the place of mailing or the place of receipt is the correct venue to prosecute the "continuing act" of payment. Benson v. Henkel, 198 U.S. 1 (1905) (venue lies at place of mailing currency, or at its destination); see In re Palliser, 136 U.S. 257 (1890) (venue lies at the place where the contract--the illegal inducement--was received; whether it also lies at place of mailing not decided by court). Finally, the Second Circuit held in a recent bribery case that placing a \$3,000 check in the mails in the Southern District of New York by itself established venue to try the sender there, although the check was sent to New Jersey and all other significant contacts were in New Jersey. United States v. Ellenbogen, 365 F.2d 982, 989 (2d Cir. 1966), cert. denied, 386 U.S. 923 (1967). The Ellenbogen court did not discuss the identity of the depositing or payor bank or "ownership" of the checks as have the cases establishing venue for illegal receipt. Cases discussing the venue for illegal receipt of monies, discussed immediately below in the text, have held that when the illegal payments are in the form of checks, venue may be a factor of the complexities of the banking process. See, Burton v. United States, 196 U.S. 283 (1905); United States v. Johnson, 337 F.2d 180 (4th Cir. 1964), aff'd, 383 U.S. 169 (1966). Application of these cases, discussed next in the text, to venue of payment offenses is unclear particularly in view of the Second Circuit's decision in United States v. Ellengoben supra.

9-134.420 Venue for Illegal Receipt

The preeminent case on venue for receipt of illegal payment by checks is Burton v. United States, 196 U.S. 283 (1905). However, its authority has been severely undercut by a Fourth Circuit decision, United States v. Johnson, 37 F.2d 180 (4th Cir. 1964), aff'd, 383 U.S. 169 (1969). The Supreme Court decision did not consider the issue of venue. In Burton, the government charged a United States Senator with accepting compensation for representing an individual before a government department. Checks to the Senator were drawn upon a Missouri bank, and mailed to Washington, D.C., where they were received and deposited in a District of Columbia bank. The Supreme Court reversed the conviction because the Eastern District of Missouri, the place of trial, was not the proper venue. Rather, the court

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ruled that venue lay in Washington, D.C., since under the then existing law title passed to the District of Columbia bank when it accepted the check.

In United States v. Johnson, *supra*, a Congressman was charged with accepting payments in violation of the conflict of interest statute, 18 U.S.C. §281. Three of the checks in question were drawn on a Florida bank and deposited in Maryland banks. Although the Fourth Circuit held that under Maryland law, title never passed to the Maryland institution, the Congressman was tried and convicted in the federal district court for Maryland.

This result would also follow under the Uniform Commercial Code now adopted by most jurisdictions. The U.C.C. was adopted by Maryland after the transactions at issue. Under Section 4-213 of the U.C.C., title to check or draft does not pass until the bank on which the check is drawn or by which the draft is accepted has paid the item in cash or posted it to the account of the drawer, or made a settlement of the check or draft in a manner specified by the section. U.C.C. §4-213(1). Until final payment is made by the payor bank, the arrangements between banks participating in the process of collection and the arrangements between the person depositing the check and depository bank are only provisional. U.C.C. §4-213(2),(3).

The Fourth Circuit found venue in Maryland by holding that "receiving" could be a "continuous act," and that payment had been "received" in Maryland. Thus, the Fourth Circuit rejected change of ownership as the only test and further held that acceptance was a continuous crime, contrary to the Supreme Court's express ruling in Burton, *supra*. On three other checks which were drawn on a Maryland bank, delivered in the District of Columbia, and then deposited in a Maryland bank, the court held venue to be in Maryland under the ownership test of United States v. Burton, *supra*. The Fourth Circuit implied that the receipt began when the check comes into a defendant's custody and continued until he cashed it.

The Court of Appeals, Fourth Circuit, has significantly broadened venue for 29 U.S.C. §186 (Taft-Hartley) offenses in holding that venue with respect to Section 186 payments lies in any district where interstate or foreign commerce is affected by an employer's payment to a union official who represents workers employed in an industry affecting such commerce. This theory of venue, which is similar to that used in Hobbs Act (18 U.S.C. §1951) prosecutions, was accepted at trial because the actual payments had been completed outside the venue of the district where the trial took place. United States v. Billups, 692 F.2d 320, 331-33 (4th Cir. 1982).

9-134.430 Venue for Other Acts Prohibited by Section 1954

Finally, the remaining verbs in the statute defining the criminal

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activity, "agrees to receive or solicits, . . . offers, or promises to give or offer," may present venue problems. If, as will be seen below, giving and offering may be construed as separate crimes, if the acts take place in different districts there may be a different venue for each substantive crime. United States v. Michelson, 165 F.2d 732, 734 (2d Cir.), aff'd, 335 U.S. 469 (1948). The only case considering venue for a term other than "give" or "receive" contained in section 1954 was In re Palliser, supra, which considered the venue for "offering." The court noted that when an offer was made by mail, venue was, if anything, more firmly established in the district of receipt, than in the district where deposited in the mails.

9-134.500 THE INDICTMENT

9-134.510 Multiplicity and Duplicity

A question may arise as to whether an individual who holds more than one position mentioned in subsections (1)-(4) of section 1954 commits more than one crime with a single receipt of money. A Seventh Circuit case held that receipt of money as a representative of employees and as a union officer constituted two crimes under 29 U.S.C. §186 and that any single count charging receipt in both capacities was duplicitous. United States v. Donovan, 339 F.2d 404 (7th Cir. 1964). Both the Second and Third Circuits have noted their reluctance to follow the Donovan decision in cases also decided under 29 U.S.C. §186 but found the immediate cases before them "distinguishable." United States v. Fisher, 387 F.2d 165, 169 (2d Cir. 1967), cert. denied, 390 U.S. 953 (1968); United States v. Ricciardi, 357 F.2d 91, 99 (2d Cir.), cert. denied, 384 U.S. 924 (1966).

A similar problem occurs when an individual, for example, promises or offers a bribe and later concludes the contemplated transaction. There is authority under other statutes for the proposition that offering an illegal payment does not merge into the actual payment and that consequently two crimes may be charged. United States v. Michelson, supra at 733; United States v. Barnes, 431 F.2d 878, 879 (9th Cir. 1970), cert. denied, 400 U.S. 1024 (1971); United States v. Lubomski, 277 F. Supp. 713, 717 (N.D. Ill. 1967) (dictum). It has also been held that under an appropriate statute, agreeing to receive and receipt of an illegal payment are distinct crimes. Burton v. United States, 202 U.S. 344, 377 (1906); Egan v. United States, 52, App. D.C. 384, 388, 287 F. 958, 962 (1923); United States v. Ricciardi, 40 F.R.D. 135, 136 (S.D.N.Y. 1965), aff'd, 357 F.2d 91 (2d Cir.), cert. denied 384 U.S. 942 (1966). As the Supreme Court stated in a case involving conviction for possession and sale of intoxicants during Prohibition,

[t]here is nothing in the Constitution which prevents Congress from punishing separately each step leading to

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the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.

Albrecht v. United States, 273 U.S. 1, 11 (1927).

Charging multiple crimes for a single payment under section 1954 is inadvisable because of the Supreme Court's decision in Prince v. United States, 352 U.S. 322 (1957). Although 18 U.S.C. §2113(a) prohibits both entering a federally insured bank with intent to commit robbery and robbery of such a bank, the Court held that the former offense merged into the latter once the bank was robbed. The Court stated,

[i]t was manifestly the purpose of Congress to establish lesser offenses. But in doing so, there was no indication that Congress intended also to pyramid the penalties.

Id. at 327. The Court found that the Congress intended only to punish attempted robberies as severely as completed robberies. Id. at 328. The legislative history demonstrates no Congressional intent to "pyramid the penalties." Rather, the Department of Justice indicated that the proliferation of terms in the statute was designed, in view of difficulties encountered with 29 U.S.C. §186, "to avoid similar interpretative problems by more explicit statutory language." S. Rep. No. 908, 87th Cong., 1st Sess. 14 (1961) (August 1, 1961, letter from Assistant Attorney General Miller to Senator McNamara).

Recent cases under 29 U.S.C. §186 have indicated an extreme reluctance upon the part of federal courts to dismiss indictments as duplicitous because a single count charges that a defendant acted in more than one capacity, United States v. Fisher, supra at 169; United States v. Ricciardi, 357 F.2d at 99; but see United States v. Donovan, supra, at 407-08, or committed more than one of the acts enumerated in the statute. United States v. Ricciardi, 40 F.R.D. 135 (S.D.N.Y. 1965), aff'd, 357 F.2d 91, 97 (2d Cir. 1966); United States v. DiSalvo, 251 F. Supp. 740, 743 (S.D.N.Y. 1966); see also United States v. Lubomski, supra at 716-19 (case decided under 18 U.S.C. §201). The cases give various reasons for refusing to dismiss the indictments for duplicity, including the following arguments: (1) although separate crimes could be charged, if the crimes are all contained in the same statute, the prosecution may charge the crimes in the conjunctive without duplicity, United States v. Ricciardi, 40 F.R.D. 135 (S.D.N.Y. 1965); United States v. Lubomski, supra; (2) because the defendant can only be sentenced once and there is no chance he/she will be placed twice in jeopardy, any error is favorable to him/her, United States v. DiSalvo, supra; United States v. Ricciardi, 40 F.R.D. 135 (S.D.N.Y. 1965); United States v. Lubomski, supra; (3) the charge was clear to the defendant and any error did not prejudice his defense. United States v. Fisher, supra; United States v. Ricciardi, 357 F.2d 91 (2d Cir. 1966).

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Whatever the problems in splitting up a single transaction, it is clear that each payment is a separate transaction and a separate crime. Defendants commonly argue under 29 U.S.C. §186 and 18 U.S.C. §201 that payments made to gain or retain favor represent a continuing course of conduct and thus constitute only one crime. The argument, however, has been rejected wherever raised. The courts uniformly hold that Congress intended to prohibit each individual payment. E.g., United States v. Cohen, 384 F.2d 699 (2d Cir. 1967) (per curiam); United States v. Keegan, 331 F.2d 257 (7th Cir.), cert. denied, 379 U.S. 828 (1964); United States v. Alaimo, 297 F.2d 604 (3d Cir. 1961), cert. denied, 369 U.S. 817 (1962).

9-134.520 Sufficiency and Variance

Cases decided under 29 U.S.C. §186 and 18 U.S.C. §201 indicate the specificity with which the elements must be charged. As a constitutional minimum, any indictment must charge each element of the crime to protect the accused from double jeopardy and enable the defendant to prepare an adequate defense. Russell v. United States, 369 U.S. 749, 763-64 (1962). The following enumerated elements of the crime must all be included within the indictment. See below. Where there are several possible descriptions of a person's position, the illegal act, or the form of payment, these descriptions should all be alleged in the conjunctive. Where a crime can be committed in a variety of ways, it is permissible to charge commission in the words of the statute, substituting the conjunctives "and" for the disjunctive "or" contained in the statute. E.g., Crain v. United States, 162 U.S. 625, 635-36, (1896); Morrison v. United States, 124 U.S. App. D.C. 330, 331-32, 365 F.2d 521, 522-23 (1966); Driscoll v. United States, 356 F.2d 324, 331-32 (1st Cir. 1966), vacated, 390 U.S. 202 (1968).

A. It must be alleged that the welfare and pension plan is "a plan subject to the provisions of the Welfare and Pension Plans Disclosure Act," or "any provision of Title I of the Employee Retirement Income Security Act." This allegation may be made in the words of the statute and it is necessary to give any factual basis for the conclusion. See United States v. Silverman, 430 F.2d 106, 111 (2d Cir. 1970).

B. The defendant or the person with whom the defendant dealt must occupy a position within subsection (1)-(4) of the statute.

In United States v. Kaye, 556 F.2d 855, 863 (7th Cir. 1977), defendant was charged with receiving unlawful payments while serving both as a "representative of employees" (186(a)(1)) and as "an employee of a labor organization" (186(a)(2)). The court held that the prosecution was not required to show both that defendant was acting as a business agent and performing the duties of union officer when he received the unlawful payment.

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C. The act of receiving, agreeing to receive, soliciting, giving, offering, or promising to give or offer must be stated.

In United States v. Lanni, 466 F.2d 1102 (3d Cir.), the court found that a fatal variance was not created where the indictment charged direct receipt of unlawful payments by the defendant-union official and the proof at trial showed indirect payments through a third party conduit. See also United States v. McMaster, 343 F.2d 176 (6th Cir. 1965) (failure of indictment to charge payments routed through third-party conduit held not a fatal variance). Conversely, in United States v. DeBrouse, 652 F.2d 383, 389 (4th Cir. 1981) the indictment charged that a third party received employer payments as a "nominee" of the defendant union official. The court held that it was not a fatal variance to fail to prove that the "nominee" acted as a conduit or held the payment on behalf of the union official where the conviction could be sustained on the theory that the value to the union official of being able to confer a benefit on a third party was a receipt of a "thing of value" prohibited by 186.

D. The method of payment whether a fee, kickback, commission, gift, loan, money or thing of value must be alleged.

E. The intent with which the accused acted must be alleged.

F. There must be a general allegation that the payments were made and received "with respect to his (the payee's) action, decision, and other duties relating to questions and matters concerning the plan." Indictments returned under the section generally include a brief description of the "question and matter concerning the plan" and such inclusion is probably the better practice although not mandated by any decisional law. It has been held, in a case involving bribery of a government official that the "duties and acts" purportedly influenced do not have to be described. United States v. Kemmel, 188 F. Supp. at 738-39.

Because bribery is an offense requiring a particular specific intent, reference to that intent must be completely unambiguous. One court has held that the words "with intent to influence" must appear in the indictment and struck down an indictment which utilized instead the phrase "make opportunity for." United States v. Bowles, 183 F. Supp. 237 (D. Me. 1958) (case decided under 18 U.S.C. §201). Where graft is charged the phrase "because of" should be inserted in the indictment.

As a practical matter any indictment under section 1954 should allege language for both bribery and graft. This should be done to allow the jury to convict for the graft offense in the event the proof of specific intent for bribery is insufficient at trial. In any indictment under 1954, whether for graft or bribery or both, general intent should also be

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for graft or bribery or both, general intent should also be alleged. See United States v. Berger, supra at 684, and discussion at USAM 9-134.315.

Of course, every step and detail of the transaction need not be alleged in the indictment. More often than not, if the court thinks additional information necessary, it may be supplied by a bill of particulars. Where only the receipts of illegal payments were charged in an indictment under 18 U.S.C. §201, the Second Circuit held the indictment was sufficient despite its failure to name the payors, since the government had agreed to furnish their names in a bill of particulars. United States v. Roberts, 408 F.2d 360 (2d Cir. 1969) (per curiam). In two cases decided, under 29 U.S.C. §186 two circuit courts of appeals held indictments sufficient which specified payments directly to the defendants. corporation and creditor, respectively United States v. McMaster, 343 F.2d 176 (6th Cir.), cert. denied, 382 U.S. 818 (1965); Korholz v. United States, supra, 269 F.2d 897; but cf. United States v. Lippi, supra.

9-134.530 Bill of Particulars

One of the reported cases under 18 U.S.C. §1954 deals with a defendant's request for a bill of particulars. United States v. Corrado, 307 F. Supp. 513 (S.D.N.Y. 1969). The district court was somewhat disturbed about Department of Justice press releases and noted that "a defendant is entitled to at least as many particulars as are given to the press—and that a defendant is owed more than that." Id. at 516. The government was required to furnish the following particulars: Count I (conspiracy to violate 1954 and 18 U.S.C. §1952), whether the defendant himself directly or indirectly offered a bribe; what action the defendant intended to influence; the amount of money given or promised; the names of persons other than the defendant who also promised or offered the bribe; the time and place of the transfer or offers; when the defendant joined the conspiracy; the names of all unindicted co-conspirators and a description of overt acts committed by the defendant. Count II (a substantive violation of 18 U.S.C. §1952 which the decision mistakenly identifies as a substantive violation of 18 U.S.C. §1954) the manner and time of the defendant's travel as alleged in the count; a description of the position held by the individual to be bribed; the acts performed by the defendant in offering or giving the bribe; the acts of any defendant or co-conspirator in distributing the proceeds of the bribe charged in the count. Count III (a substantive violation of 18 U.S.C. §1954) the places where the defendant met with other defendants or co-conspirators; other unspecified particulars which the government had agreed to furnish.

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9-134.540 Sample Indictment

The following is a simple indictment drawn under 18 U.S.C. §1954 for conduct occurring after the effective date of ERISA (January 1, 1975):

INDICTMENT

THE GRAND JURY CHARGES:

1. At all times material to this Indictment the _____
_____ Plan (hereinafter the "Plan") was an
employee [welfare or pension] benefit plan established and maintained by _____
_____ (hereafter the "Union"), an employee
organization[s] [or by an employer or by both an employee organization and
an employer(s)] within the meaning of and subject to Title I of the Employee
Retirement Income Security Act of 1974, as amended (hereafter ERISA) (29
U.S.C. §§1001-1144);

2. At all times material to this Indictment, the Union was an employee
organization which represented employees engaged in commerce and in an
industry and activity affecting commerce as those terms are defined in
ERISA (29 U.S.C. §§1002-1003).

3. At all times material to this Indictment, the defendant, _____
_____, was [trustee and agent] or the Plan;

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4. At all times material to this Indictment, the defendant, _____, was an [officer, agent, and employee] of the Union some of whose members were covered by the Plan;

5. On or about _____, in the _____ District of _____, and elsewhere, the defendant _____, did knowingly and unlawfully solicit and receive a fee, kickback, commission, gift, money and thing of value, that is the sum of _____, from _____ because of and with intent to be influenced in respect to his/her actions, decisions and other duties relating to questions and matters concerning the Plan, that is _____ (the deposit of Plan funds).

All in violation of Title 18, United States Code, Sections 1954 and 2.

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9-134.600 JURY INSTRUCTIONS

Sample instructions drawn under 18 U.S.C. §1954 and ERISA (post January 1, 1975, conduct) in relation to the sample indictment at USAM 9-134.540.

GOVERNMENT'S REQUESTED INSTRUCTION NO. 1

The indictment in this case charges the defendant, _____, with a violation of Section 1954, Title 18, United States Code. Shortly, I will discuss the elements of the crime in some detail. Very briefly, however, Section 1954 prohibits certain people connected with pension or welfare plans from accepting kickbacks because of their decisions, actions or duties concerning the plan with which they are associated. The statute also prohibits these individuals from accepting kickbacks with intent to be influenced with respect to any of their actions, decisions or duties concerning the plan with which they are associated. The defendant in this case has been doing both of these things in relation to the _____ Plan. This discussion was not intended as an analysis of the crime here in question, nor was it intended to advise you precisely of what you must find beyond a reasonable doubt to convict the defendant. I shall attempt a more precise analysis now.

GOVERNMENT'S REQUESTED INSTRUCTION NO. 2

I will instruct you with respect to the elements which the government must prove in order to establish the violation charged in Count I, of this indictment.

Three elements must be proved beyond a reasonable doubt in order to establish the offense charged in this indictment.

First, it must be proved that the _____ Plan was an "employee pension or welfare benefit plan" within the meaning of the statute at the times mentioned in the indictment.

Second, it must be proved that the defendant, _____, occupied a position within the meaning of the statute, in relation to either an employee benefit plan or an employee organization having members covered by such plan, at the times mentioned in the indictment.

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Third, it must be proved that the defendant, _____, in the _____ District of _____ did unlawfully and knowingly receive or solicit the sum mentioned in Count I of the indictment as a fee, kickback, commission, gift, money or thing of value because of or with intent to be influenced with respect to his/her actions, decisions or other duties relating to questions and matters concerning the _____ Plan.

GOVERNMENT'S REQUESTED INSTRUCTION NO. 3

As I pointed out earlier, one of the elements of this offense is that the _____ Plan was an employee [pension or welfare] benefit plan within the meaning of the statute. If you find beyond a reasonable doubt that the _____ Plan satisfied both of the following requirements, then I instruct you as a matter of law that the _____ Plan was an employee benefit plan within the meaning of this law.

First, you must determine whether the _____ Plan was established or maintained by an employee organization representing employees engaged in commerce or in any industry or activity affecting commerce [and/or by an employer or employers engaged in commerce or in an industry or activity affecting commerce]. (29 U.S.C. §1002, 1003(a)).

Second, you must determine whether the Plan was a "plan, fund, or program" "established" or "maintained" by a party or parties described above for the purpose of providing [_____] benefits for its participants. (29 U.S.C. §1002(1), (2)).

An employer, as I have used the term, is defined by law as "any person acting directly as an employer or indirectly in the interest of an employer, in relation to an employee benefit plan, and includes a group or association of employers acting for an employer in such capacity." (29 U.S.C. §1002(5)).

The term "employee organization" is also defined in the statute. It means, among other things, "any labor union . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to the employment relationships." _____ is an employee organization if it meets this definition. (29 U.S.C. §1002 (4)).

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Now I have stated that the employees represented by the employee organization were engaged in commerce or in an industry or activity affecting commerce. These are technical requirements. I instruct you as a matter of law that the commerce element of the offense is satisfied if you believe the testimony of the government witnesses concerning the interstate shipment of materials used by contractors and employees or the intended and actual uses of the facilities constructed or to be constructed in interstate commerce. This concludes my discussion of what you must find concerning the establishment or maintenance of the employee benefit plan. (See United States v. Gibas, 300 F.2d 836, 839 (7th Cir.), cert. denied, 371 U.S. 817 (1962)).

GOVERNMENT'S REQUESTED INSTRUCTION NO. 4

The second element of the offense is that the defendant, _____, was a trustee or agent of the employee benefit plan or that he was an officer, agent or employee of an employee organization some of whose members were covered by the employee benefit plan. I have already instructed you what you must find to conclude that the Plan in question is an employee benefit plan and that _____ is an employee organization.

As used in this statute, an "officer," is an individual who holds an executive position calling for the exercise of independent judgment. I instruct you as a matter of law that if you find that _____ held such a position as the _____ of (employee organization), and the office of _____ was described as such in the (employee organization's) constitution, then he was an "officer" of _____ within the meaning of the statute. (NLRB v. Coca Cola Bottling Company, 250 U.S. 264, 269 (1956); Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949). [See, 29 U.S.C. §1002(12) and reference to Labor Management Relations Act.]

As used in this statute, an "employee" is an individual who works for another person or institution. An employee of [employee organization] would include an individual working for a salary in a position whereby he/she could influence the operations of the [welfare or pension benefit] plan through his/her day-to-day work for the employee organization.

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As used in this statute, an "agent" is a person whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between the principal and third persons. In determining whether the defendant, _____, was an agent of either the _____ Plan or [Employee Organization] you may consider whether he/she, in fact, affected legal transactions involving the _____ Plan or [Employee Organization]. 1 F. Mechem, Agency §36 (2d ed. 1914).

It is not necessary that you find from the proof that the defendant, _____, was the one who had the authority to and actually did make the final decision on the approval of the (the plan matter). It is sufficient if you determine that he/she was in a position to give evaluation, advice, and recommendation which, though not controlling in the final sense, would have some influence on the final decision or decisions. United States v. McCarthy, No. 68 Cr. 468 (S.D.N.Y. 1970) transcript at 1692-93 (as modified), aff'd sub. nom., United States v. Russo, 442 F.2d 498 (2d Cir. 1971).

As used in this statute, a "trustee" is a person named as such in a legal document whose obligation and function is to enter into investment and other business transactions for the sole benefit of a [pension or welfare benefit] plan and its beneficiaries. I instruct you as a matter of law that if you find that _____ was named as a trustee in a legal document which created or modified the _____ Plan, then he/she was a trustee within the meaning of the statute.

It is sufficient if you find that the defendant, _____, occupied any one of the above positions during the period covered by the indictment. It is not necessary that he/she have held an official position with the Plan or exercised the final authority over the operations of the Plan. It is sufficient if you conclude that the defendant, _____, occupied any one of the above positions and either exercised control, direct or indirect, authorized or unauthorized, over the Plan, or that he/she had actual or ostensible power to exercise influence over the affairs of the Plan. United States v. Palmeri, supra at 630 F.2d 199-200; United States v. Friedland, supra at 660 F.2d 926.

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GOVERNMENT'S REQUESTED INSTRUCTION NO. 5

In order to convict the defendant you must not only find beyond a reasonable doubt that the _____ Plan was a employee [pension or welfare] benefit plan within the meaning of the statute and that the defendant occupied one of the positions mentioned above, but you must also find that on or about each of the dates mentioned in the respective counts, the defendant, _____, unlawfully and knowingly received or solicited the sum of \$ _____ mentioned in the indictment as a fee, kickback, commission, gift, money or a thing of value from _____ because of or with intent to be influenced with respect to his/her actions, decisions and other duties relating to questions and matters concerning the _____ Plan, that is, (depositing or causing the deposit of _____ of the Plan's monies with the Bank of _____).

It is sufficient if you determine that the defendant received the (thing of value) because of his/her actions, decisions or other duties relating to questions and matters concerning the Plan or that he/she received the (thing of value) with the intent to be influenced with respect to such action, decisions, or other duties. The phrase "because of" in the indictment refers to graft and the phrase "with the intent to be influenced" refers to bribery. You need not conclude that the defendant committed both bribery and graft in order to convict him/her. You may elect as to which way the crime was committed.

Furthermore, you need not find that the defendant was actually influenced or took any specific action in regard to the (deposit of Plans funds) [Plan matter] to find that he/she received the (things of value) because of his/her actions, decisions, or other duties relating to the (deposit of Plan funds) so long as such influence was the purpose of receiving the (thing of value). It is sufficient if you find that the defendant occupied any of the positions which I have described to you and received the (thing of value) (1) because of that status, which gave him/her at least ostensible power to exercise influence over Plan matters or (2) with the purpose of exercising the influence he/she either actually or ostensibly had over decisions regarding the Plan. United States v. Friedland, supra at 660 F.2d 926.

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GOVERNMENT'S REQUESTED INSTRUCTION NO. 6

You will find that the acts charged in this indictment are alleged to have been done "unlawfully" and "knowingly." I instruct you that "unlawfully" means contrary to law and that to do an act unlawfully means to intentionally do something which is contrary to law. An act is "knowingly" done, if done voluntarily and intentionally and not because of mistake, accident or other innocent reason. See United States v. Berger, 433 F.2d 680, 684 (2d Cir. 1970) where the jury was also charged with respect to "wilfully" that [a]n act is willful if it is done knowingly and deliberately.

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9-135.000 29 U.S.C. §1001 ET SEQ.: EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

This statute, enacted on September 4, 1974, is a comprehensive codification of Federal law pertaining to employee benefit plans (formerly pension, health and welfare and other fringe benefit funds). The Act is divided into four titles. The first sets forth the Congressional findings, definitions and coverage. The second, of primary interest here, contains provisions relating to benefit rights, regulations for operation of funds, reporting and disclosure requirements, vesting and funding requirements, fiduciary standards, and provisions for criminal and civil enforcement of these requirements. The third deals with revisions of the Internal Revenue Code and contains only one segment, that dealing with prohibited transactions, which may be useful as an enforcement tool. The final title creates a Pension Benefit Guaranty Corporation to provide termination insurance for all pension plans covered by the Act.

9-135.010 Investigative Jurisdiction

Investigative jurisdiction for criminal violations under the Act is assigned to the Department of Labor and the Federal Bureau of Investigation. Pursuant to a Memorandum of Understanding entered into between the Departments of Justice and Labor the Federal Bureau of Investigation will investigate violations of 29 U.S.C. §1111 (prohibition against holding office in or being employed by a benefit plan after conviction of certain crimes) and 29 U.S.C. §1141 (use of fraud or force to interfere with benefit plan rights). The Department of Labor will investigate violations of 29 U.S.C. §1131 (benefit plan reporting, disclosure, and retention of records by benefit plans) and of course has jurisdiction to investigate all civil violations.

9-135.020 Supervisory Jurisdiction

Supervisory jurisdiction over ERISA violations rests with the Labor Unit, Organized Crime and Racketeering Section.

9-135.030 Nature of the Act

The Act is basically civil in nature and is a reflection of Congress' desire to protect plan beneficiaries and participants by establishing much more comprehensive reporting and disclosure requirements than were

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previously required. Moreover, Congress for the first time has granted the Secretary of Labor broad civil litigating authority to enforce and protect the rights of beneficiaries in Federal District Courts. The Act provides direct access to the Federal Courts by participants and beneficiaries. The Secretary is also given authority to intervene in any civil suit filed by beneficiaries under the Act. Further, ERISA preempts state law in the employee benefit plan area.

9-135.040 Effect ERISA On Certain Title 18 Crimes

It should be kept in mind that the criminal provisions of the Act took effect on January 1, 1975. Accordingly, all activities which took place prior to January 1, 1975, must be charged under the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §301 et seq. Further, ERISA amends Sections §664, §1027 and §1954 to Title 18, United States Code, effective January 1, 1975, to reflect changes in definitions and jurisdictional terms effected by the enactment of ERISA and the repeal of the Welfare and Pension Plans Disclosure Act (WPPDA) on that date.

9-135.100 PROTECTION OF BENEFIT RIGHTS

9-135.110 18 U.S.C. §1002 - Definitions

This Section contains many other definitions but the following three are essential to providing jurisdiction, both under ERISA and 18 U.S.C. §664, §1027 and §1954. These definitions set forth those plans which are covered by the Act.

A. The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . (a) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or daycare centers, scholarship funds, or prepaid legal services, or (b) any benefit described in 29 U.S.C. §186(c) (other than pensions on retirement or death, and insurance to provide such pensions).

B. The terms "employee pension benefit plan" and "pension plan" mean

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any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program . . . (a) provides retirement income to employees, or (b) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan or the method of distributing benefits from the plan.

C. The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

It should be noted that the definition of "employee welfare benefit plan" is much broader than that of the corresponding definition includes funds for vacation benefits, apprenticeship and other training programs, day care centers, scholarship funds and prepaid legal services, all of which were not covered prior to January 1, 1975. Also, plans with less than 25 participants are now covered. As new benefit plan purposes are added by Congress to 29 U.S.C. §186(c), dealing with benefit plans jointly administered by labor unions and employers, such benefit plans become subject to ERISA under 29 U.S.C. §1002(1)(B).

When an investigation is conducted involving various types of plans, care should be taken to check the regulations issued by the Secretary of Labor, pertaining to a specific type of plan to ensure that the Secretary, by regulation, has not exempted the plan from certain requirements of the Act. For example, the Department of Labor has taken the position that certain welfare arrangements are not considered plans under ERISA. Multiple employer welfare arrangements (sometimes called multiple employer trusts) which do not involve collective bargaining arrangements with unions, present particular problems in determining whether a welfare benefit plan has been established. By regulation the term "employee benefit welfare plan" does not include group insurance if the sole functions of the employer are, without endorsing the program, to permit an insurer to publicize a program to employees, to collect premiums through payroll deductions, and to remit the premiums to the insurer, and the employer does not contribute premiums to the insurer or make a profit from the program. 29 C.F.R. §2501.3; see also, Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982); Cf. 29 U.S.C. §1144, as amended by Pub. L. 97-473, (1983).

The Secretary of Labor also has the power to classify by regulation certain deferred income arrangements as welfare benefit plans rather than pension benefit plans. 29 U.S.C. §1002(2)(b). For example, certain types of severance pay plans are classified by regulation as welfare rather than

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pension plans. 29 C.F.R. §2510.3 (1981).

9-135.120 29 U.S.C. §1003 - Coverage Exemptions

Except as provided in 29 U.S.C. §1003(b) and in 29 U.S.C. §§1051, 1081 and 1101 (relating to participation, vesting, funding and fiduciary responsibilities), ERISA applies to any employee benefit plan if it is established or maintained . . . (a) by an employer engaged in commerce or in any industry or activity affecting commerce; or (b) by an employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (b) by both. The provisions of ERISA do not apply to any employee benefit plan where:

A. Such plan is a governmental plan, as defined 29 U.S.C. §1002(32);

B. Such plan is a church plan, as defined in 29 U.S.C. §1002(33), with respect to which no election to be covered has been made under 26 U.S.C. §410(d);

C. Such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

D. Such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

E. Such plan is an excess benefit plan, as defined in 29 U.S.C. §1002(36), and is unfunded.

The exemption from coverage of governmental plans is worthy of note. "Governmental plan" is defined at 29 U.S.C. §1002(32) and includes any plan maintained by the United States, any state or political subdivision or by any agency or instrumentality of these entities. It should also be noted that Parts 2 and 3 of the Act relating to participation, vesting and funding apply only to pension benefit funds.

9-135.200 REGULATORY PROVISIONS

9-135.210 Reporting and Disclosure: 29 U.S.C. §§1021-1031 Part I

This part contains all provisions pertaining to reports required to be filed with the Secretary of Labor, the information which must be contained therein, and the times for filing. The Administrator of each benefit plan

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is required to provide each participant of the plan a summary plan description and a description of the benefits provided by the plan. He^{she} is also required to file summary and full plan descriptions with the Secretary of Labor, to file any changes in the plan when they occur, an annual report, and a termination report.

Information required to be filed in the annual report is much more detailed and comprehensive than that which was required under the WPPDA. For example, party-in-interest transactions are required to be reported in full. The Act also requires that the annual report be certified by an independent qualified public accountant and if it is a pension benefit plan, it must contain an actuarial report by an enrolled actuary. Both of these reports are made a part of the annual report and the CPA and actuary are subject to the fraud and false filing provisions found at 29 U.S.C. §1131 and in 18 U.S.C. §1027. Information which must be contained in the annual report is spelled out in 29 U.S.C. §1023.

Section 1027 of Title 29, United States Code, requires that all records necessary for verification of the annual report must be kept for 6 years. For example, remittance forms submitted by an employer are records required to be kept under 29 U.S.C. §1027. Falsification of such records by any person is a violation of 18 U.S.C. §1027. United States v. S & Vee Cartage, 704 F.2d 914 (6th Cir. 1983).

9-135.220 Participation and Vesting: 29 U.S.C. §§1051-1061 Part II

This part applies only to pension benefit plans. It sets forth minimum requirements for participation in a benefit plan by an employee, how, when and to what extent an employee's rights and contributions vest, and survivor benefit requirements. It requires that employers keep accurate employment records so that a plan participant and the Secretary can verify years of service accrued. These record-keeping requirements are not subject to the criminal misdemeanor reporting violations applicable to records and reports required in Part I, but are subject to the deprivation of rights by fraud, 29 U.S.C. §1141, and to the false record violations found in 18 U.S.C. §1027.

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9-135.230 Funding: 29 U.S.C. §1081-1086 (Part III)

This part only applies to pension benefit plans. It requires that all pension plans subject to its coverage be funded according to specific standards. Failure to maintain records or falsification of records necessary to verify funding if done to defraud beneficiaries, may subject a person to the provisions of both 29 U.S.C. §1141 and 18 U.S.C. §1027.

9-135.240 Fiduciary Responsibility: 29 U.S.C. §§1101-1114 (Part IV)

This part applies to all benefit plans with certain technical exceptions. It requires that all benefit plans be established and maintained by a written instrument, that all assets of the plan be held in trust and that the assets of a plan are never to inure to the benefit of an employer. It sets up and imposes fiduciary standards on all individuals who manage or control assets of a plan as well as setting forth liabilities for breach of fiduciary duties.

29 U.S.C. §1106 contains a list of prohibited transactions which bar conflict of interest or party-in-interest deals involving fund assets. Violations of the prohibited transactions are subject to a five percent excise tax and if not corrected within an appropriate period of time to a 100% tax.

29 U.S.C. §1111 bars individuals convicted of enumerated crimes from holding office or being employed by a benefit plan and creates a misdemeanor for violations of its provision. This part also requires that all individuals who handle plan assets be bonded and provides a six-year statute of limitations for civil suits for breach of fiduciary duties. Persons who violate the record-keeping provisions in order to defraud beneficiaries are subject to 29 U.S.C. §1141. 5

9-135.250 Administration and Enforcement: 29 U.S.C. §§1131-1144 (Part V)

This part contains two criminal provisions and provides for civil enforcement in federal court by a participant or beneficiary, and by the Secretary of Labor. It makes any employment benefit plan an entity which can sue or be sued and grants federal jurisdiction for civil cases under the Act regardless of the amount in controversy.

It grants litigating authority to the Secretary of Labor, subject to the direction and control of the Attorney General. The Secretary is also granted very broad investigative authority.

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9-135.251 Reporting and Disclosure Misdemeanor - 29 U.S.C. §1131

29 U.S.C. §1131 provides that:

Any person who willfully violates any provision of Part I of this subtitle, pertaining to reporting and disclosure, or any regulation or order issued under any such provision, shall upon conviction be fined not more than \$5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding \$100,000. [emphasis added]

This section relates only to reporting and disclosure as required by the statute (29 U.S.C. §§1021-1031), or required by Department of Labor regulation or order issued pursuant to the statute.

The gravamen of the offense is the willful omission to perform reporting or disclosure. Therefore, it should be noted, for example, that breach of fiduciary duty in Title I of ERISA, without more, is not a crime under the section.

Examples of violations include:

A. The omission or refusal to file with the Labor Department annual financial reports (5500 series), plan descriptions, summary plan descriptions (29 U.S.C. §1024);

B. The omission or refusal to publish summary plan descriptions to participants (29 U.S.C. §1024); and

C. The omission or refusal to furnish information concerning benefits to pension plan participants (29 U.S.C. §1025).

See, e.g., United States v. Douchey, 79 Cr. 56 (D. Nebraska) (no reported opinion) which was the first prosecution under 29 U.S.C. §1131 for failure to provide a summary plan description and a statement of benefits to plan participants.

Another type of violation under the section is the failure to maintain records from which reports and other required documents can be verified and checked (29 U.S.C. §1027).

In this regard, see, United States v. Sante Nicolia, 79 Cr. 2045 (E.D.N.Y.) (no reported opinion) where a guilty plea was accepted for failure to maintain "accurate" records under a similar WPPDA provision on

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the basis of facts indicating a falsification of records. Guilty pleas to similar charges also have been accepted under 29 U.S.C. §1131. See, United States v. Koclanes, 81-40016-01 (S.D. Ill.). Note, however, that in United States v. Sullivan, 618 F.2d 1290 (8th Cir. 1980) failure to maintain "accurate" records was found to be an inappropriate basis to charge falsification of a record under the LMRDA (29 U.S.C. §439).

The probable standard to prove the requisite mental state, "willful violation," in a violation of 29 U.S.C. §1131 is reckless disregard of the law by analogy to United States v. Budzanoski, 462 F.2d 443 (3rd Cir. 1972) (LMRDA leading case). See 29 U.S.C. §1028 (available defense based upon good faith reliance on regulation).

The penalty for violating 29 U.S.C. §1131 is maximum imprisonment up to 1 year and \$5,000 fine for an individual, or both. The fine for a non-individual is \$100,000. A conviction under 29 U.S.C. §1131 expressly bars the convicted individual from service with an employee benefit plan or as a consultant to the plan under 29 U.S.C. §1111 for five years following final conviction or end of imprisonment.

9-135.252 Coercive Interference

29 U.S.C. §1141 provides that:

It shall be unlawful to any person through the use of fraud, force, violence, or threats of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, under the provisions regarding reporting, participation and vesting, funding or fiduciary standards provided by the Act, 29 U.S.C. §1201, or the Welfare and Pension Plans Disclosure Act. Any person who willfully violates this Section shall be fined \$10,000 or imprisoned for not more than one year, or both.

29 U.S.C. §1141 is the counterpart of 29 U.S.C. §530 which prohibits interference with a union member's rights by force, violence or threats thereof. 29 U.S.C. §530 does not contain a fraud provision and there is no law to provide guidance for this provision. However, it would appear that anyone who willfully falsifies records pertaining to the funding,

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participation or vesting requirements of a plan which would defraud a participant's right to draw his/her benefits, or have them vest will be in violation of this section. So, too, will the employer who willfully transfers or fires an employee for the purpose of defrauding that individual of his/her benefit rights. Here again, care must be taken to spell out in detail just which of the victim's rights or entitlements is the subject of the fraud.

29 U.S.C. §1141 covers the exercise of any rights to which an employee benefit plan participant or beneficiary is or may become entitled to under:

- A. The plan (plan agreement), or
- B. ERISA, Title I (29 U.S.C. §§1001-1144), or
- C. 29 U.S.C. §1201 (IRS Procedures), or
- D. WPPDA (29 U.S.C. §§301-309) a pre-January 1975 right.

Despite the protection of WPPDA rights, it should be noted that the actionable offense is limited to post-January 1975, interference with such WPPDA rights.

The gravamen of the offense is the actual or attempted interference by any person with exercise of the above rights by means of the willful use of actual or threatened force or violence, or fraud. See, for example, the conduct described in sample indictment, USAM 9-135.300, infra.

A 29 U.S.C. §1141 conviction expressly bars the convicted individual from service with an employee benefit plan or as a consultant to the plan under 29 U.S.C. §1111.

9-135.300 SAMPLE INDICTMENT

A sample indictment illustrating 29 U.S.C. §1131 and §1141 charging language follows:

The Grand Jury Charges:

Count One

On or about _____, in the District of _____,
_____, being an administrator of an employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974, Title 29,

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United States Code, Sections §1001 et seq. did willfully fail to furnish to _____, a participant and beneficiary of said plan, a statement of benefits accrued, as required by Section 1025(a) of the aforementioned Act.

In violation of Title 29, United States Code, Sections §1025(a) and §1131.

Count Two

On or about _____, in _____, _____ did willfully and knowingly fail to make, keep and maintain records of the _____ [Plan] in sufficient detail so as to accurately explain and verify the necessary information and data required to be filed with the Secretary of Labor, by the _____ [Plan], and employee welfare benefit plan subject to the provisions of Title I of the Employee Retirement Income Security Act of 1974; in that he, ^{/she} as administrator of the plan [for example] failed to record a _____ payment made by _____ into the _____ receipts ledger and bank deposit books, reflecting payment to the Plan; all in violation of Title 29, United States Code, Sections 1027 and 1131.

Count Three

On or about _____, in _____, _____, defendant, willfully did restrain, coerce, and intimidate, attempt to restrain, coerce and intimidate, and cause to be restrained, coerced and intimidated, through the use of fraud, force and violence and the threat of the use of force and violence, a participant and beneficiary of the [Name of the Plan] for the purpose of interfering with and preventing the exercise of rights to which he ^{/she} and may have become entitled under the Plan and Title I of the Employee Retirement Income Security Act of 1974, as amended, that is: the defendant in his ^{/her} communications with the beneficiary [for example] misrepresented the amount of retirement benefits then due and owing to the beneficiary and accompanied such misrepresentation with threats of violence to his person.

In violation of Title 29, United States Code, Section 1141 and Title 18, United States Code, Section 2.

9-135.400 PLAN TERMINATION: PENSION BENEFIT GUARANTY CORPORATION: 29
U.S.C. §§1301-1381

The Act creates this public corporation to insure pension benefits. It is authorized to charge premiums and to provide benefits upon failure or

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termination of pension plans. While the corporation is granted broad investigative and litigative authority only that provision which requires the corporation to furnish information of criminal misconduct to the Department of Justice is worthy of note.

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9-136.000 29 U.S.C. §439 AND 18 U.S.C. §1027: LABOR REPORTING AND RECORD KEEPING

9-136.010 Investigative Jurisdiction: 29 U.S.C. §439

See USAM 9-136.100—9-136.160

The Memorandum of Understanding of February 19, 1960, between the Secretary of Labor and the Attorney General delegates investigative authority with respect to labor reporting provisions (29 U.S.C. §§431-441) to the United States Department of Labor. The Memorandum of Understanding does not exist for the benefit of potential or actual defendants and has no restrictive effect on a grand jury investigation concerning possible embezzlement of union funds. In re Grand Jury Subpoena Upon Local 806, Teamsters, 384 F. Supp. 1304 (E.D. N.Y. 1974).

The Act furnishes the Department of Labor with broad investigatory and visitorial powers when "necessary" to determine whether any person has or is about to violate the Act. 29 U.S.C. §521. The Labor Department's administrative subpoena power does not depend on the existence of reasonable or probable cause. See Wirtz v. Teamsters Local 197, 218 F. Supp. 885 (D. Conn.), aff'd, 321 F.2d 445 (2d Cir. 1963); United States v. Budzanoski, 462 F.2d 443, 451 (3d Cir. 1972). While the Labor Department may use this authority in order to maintain civil actions for injunctive and other appropriate relief with respect to reporting violations (29 U.S.C. §440), evidence gathered during the course of such investigations and which warrant consideration for criminal prosecution under the Act or other Federal law must be furnished to the Department of Justice. 29 U.S.C. §527.

Where a Labor Department investigation which has been conducted to discover whether a reporting or record-keeping violation has occurred simultaneously develops an embezzlement based on the same factual situation, reinvestigation of the embezzlement by the Federal Bureau of Investigation can result in unnecessary expense and duplication of function. This situation may also result in practical difficulties with respect to the production of witness statements under 18 U.S.C. §3500 and in regard to admissions and confessions by the accused. Depending on the facts of a given case and the stage of a particular investigation, therefore, the U.S. Attorney should determine the best method of achieving successful completion of the case. For example, if the parallel embezzlement case has been substantially completed as the result of the reporting investigation, the Department of Labor may be authorized to complete the embezzlement investigation. On the other hand, if fresh investigation which does not parallel the reporting violation is necessary, the Federal Bureau of Investigation should be assigned to the embezzlement matter.

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9-136.020 Investigative Jurisdiction--18 U.S.C. §1027

By a Memorandum of Understanding dated February 9, 1975, between the Secretary of Labor and the Attorney General, criminal matters arising under 18 U.S.C. §1027 are investigated by the Federal Bureau of Investigation. The Memorandum permits different arrangements to be made by the Department of Justice and Labor on a case-by-case basis.

However, effective October 12, 1984, the Labor Department may also investigate criminal violations related to the regulation of employee pension and welfare plans which are subject to Title I of the Employee Retirement Income Security Act (29 U.S.C. §§1001-1144) without further delegation of investigative authority by the Justice Department. 29 U.S.C. §1136, as amended by the Comprehensive Crime Control Act of 1984, §805. Therefore, Labor Department investigators now have the statutory authority to investigate violations of 18 U.S.C. §1027 which they formerly exercised on a case-by-case basis under the 1975 Memorandum of Understanding. Because the FBI and the Department of Labor have concurrent jurisdiction in these cases, each investigative agency should notify the appropriate U.S. Attorney's office or Organized Crime and Racketeering Section Strike Force at the earliest possible stage of an investigation. Such investigations should be closely monitored to avoid duplication of investigative effort.

9-136.030 Supervisory Jurisdiction

Questions in regard to the labor reporting and record-keeping statutes should be directed to the Labor Unit of the Organized Crime and Racketeering Section, Criminal Division.

9-136.100 RECORD-KEEPING AND REPORTING VIOLATIONS UNDER LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (LMRDA) 29 U.S.C. §439

The Congressional policy which is evident both in the statutory scheme and the legislative history of the LMRDA is that of self-help on the part of better informed labor organization members. It was thought that the members, with information in hand, could prevent questionable practices in the first instance, call their leaders to account through the electoral process (which is also protected under 29 U.S.C. §481 et seq.) if necessary,

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or ultimately recover damages and secure other appropriate relief in the courts for breaches of fiduciary duty under 29 U.S.C. §501(b). The integrity of the informational process, however, is supported by criminal penalties.

29 U.S.C. §439(a) covers failure to comply with duties imposed by the reporting subchapter (29 U.S.C. §§431-441) listed in USAM 9-136.110 infra.

9-136.110 Duties Imposed by 29 U.S.C. §439(a)

9-136.111 Initial Information Report

Every labor organization must file with the Department of Labor an initial information report (LM-1). 29 U.S.C. §431(a). The report must include information pertaining to the dues, membership qualifications, meetings, elections, collective bargaining, strikes, participation in benefit plans, and other organizational data. The LM-1 is filed with a copy of the union's constitution and bylaws within 90 days after the union first becomes subject to the Act, e.g., election of provisional officers. 29 U.S.C. §437(a). The President and Treasurer, or corresponding principal officers, are personally responsible for filing as signers of the reports. 29 U.S.C. §439(d). Changes in information are reported annually in the financial report (LM-2).

9-136.112 Annual Financial Reports

Every labor organization must file with the Department of Labor an annual financial report (LM-2). 29 U.S.C. §431(b). The report must include information pertaining to:

- A. Assets and liabilities at beginning and end of fiscal years.
- B. All receipts and their sources.
- C. Salaries, allowances and disbursements (direct and indirect) to any officer, and to any employee whose receipts were \$10,000 or more during the fiscal year.
- D. Loans (direct and indirect) to any officer, employee or member in amounts of \$250 or more to each during fiscal year. Note: Loans to officers and employees may not exceed \$2,000 total indebtedness on the part of any individual under criminal penalty. 29 U.S.C. §503(a).

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E. Loans (direct and indirect) to any business enterprise. This should not be confused with loans to the labor organization from employers prohibited by 29 U.S.C. §186.

F. All other disbursements by the organization not excluded by Labor Department regulation.

The LM-2 is filed within 90 days after the close of the labor organization's fiscal year. 29 U.S.C. §437(b). The required time of filing begins the period applicable for the statute of limitations. Therefore, the reporting statutes may be useful prosecutive devices where a misapplication of organization funds in violation of 29 U.S.C. §501(c) is already time barred, but the statute of limitations for an accompanying reporting violation has not yet run. The President and Treasurer, or corresponding principal officers, are personally responsible for filing as signers of the report. 29 U.S.C. §439(d). A simplified financial report (LM-3) may be filed by labor organization with annual receipt under \$30,000. The report must reflect cash flow over organization's fiscal year rather than any particular accounting method.

9-136.113 Availability Of Reports To Members

Every labor organization must make available to members information required to be contained in the initial information report (LM-1) or the annual financial reports (LM-2 or LM-3). 29 U.S.C. §431(c). The willful failure to comply with members' requests for such information (usually a copy of the report itself) should not be confused with the failure of the organization and its officers to permit members, for just cause, to examine the underlying books, records and accounts necessary to verify such reports. The latter is redressed by civil action only. 29 U.S.C. §431(c). In any event, the member may obtain copies of organization reports from the Department of Labor at Washington, D.C. or at its Regional Offices. 29 U.S.C. §435.

9-136.114 Reports Of Financial Transactions By Labor Personnel

Officers and employees of labor organizations must report certain transactions to the Department of Labor in financial report LM-30. 29 U.S.C. §432(a). The LM-30 is filed annually within 90 days after close of the individual's fiscal year in which the transaction occurred. 29 U.S.C. §437(b). Exclusively clerical and custodial employees need not file. 29 U.S.C. §432(a). Filing is required only where the office or employee or his/her immediate family held financial interest or engaged in financial transactions with:

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A. Any employer whose employees his/^{her} organization represents or is actively seeking to represent. Benefits received as a bona fide employee and goods or services purchased in the regular course of business at market prices are excluded. 29 U.S.C. §432(a)(1), (2), (5).

B. Any business a substantial part of which consists of dealing with the business of an employer (whose employees his/^{her} labor organization represents or is actively seeking to represent. 29 U.S.C. §432(a)(3).

C. Any business any part of which consists of dealing with his/^{her} labor organization. 29 U.S.C. §432(a)(4).

D. Payments or other things of value received from any employer or a labor relations consultant to an employer by the individual or his immediate family are required to be reported subject to the exceptions found in 29 U.S.C. §186(c). 29 U.S.C. §432(a)(6). Note: Although 29 U.S.C. §186(c)(1) excludes employer payments to employees whose established duties include acting openly for such employer in labor relations or who perform services for such employer, union officers who are also employees of labor relations consultant firms may not avoid disclosure of payments received by them by way of this exception. Independently contracted labor consultants stand in a different category from the employers making payments to their regular employees under 29 U.S.C. §186(c)(1). United States v. McCarthy, 300 F. Supp. 716, 720-721, aff'd, 422 F.2d 160, 164 (2d Cir. 1970).

Income from or transactions in stocks, bonds, and securities need not be reported if part of bona fide investments in securities traded on an exchange registered under the Securities Exchange Act of 1934, shares subject to Investment Company Act of 1940, or securities subject to the Public Utility Holding Company Act of 1935. 29 U.S.C. §432(b). Other income from or holdings of securities not described under this exclusion are not required by the Department of Labor to be reported if unrelated to the individual's status as a labor organization and insubstantial (transaction under \$1,000 or income under \$100). See, Form LM-30 instructions.

No attorney in good standing is required to include in the LM-30 report any information lawfully communicated to him/^{her} by any client in the course of a legitimate attorney-client relationship. 29 U.S.C. §434. Under LMRDA, independently contracted legal counsel for labor organizations also fall within the definition of employee. 29 U.S.C. §402(f). For a discussion of the Fifth Amendment privilege, see, United States v. McCarthy, supra and USAM 9-136.120.

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9-136.115 Reports Of Financial Transactions By Employers

Employers must report certain transactions to the Department of Labor on an annual financial report (LM-10). 29 U.S.C. §433(a). The LM-10 is filed within 90 days after close of employer's fiscal year in which the transactions occurred. 29 U.S.C. §437(b). Associations of employers also must file. See 29 U.S.C. §402(e). The President and Treasurer or corresponding persons authorized to perform principal executive functions of the employer are personally responsible for the filing of LM-10 reports and for any statement in the report they know to be false as signers of the report. 29 U.S.C. §433(a) and §439(d).

A. An employer or his/her agent must report a promise, agreement, loan, or payment, directly or indirectly, or money or other thing of value (including reimbursed expenses) to any labor organization, or to any officer, employee, or other representative of a labor organization. Payments and loans by banks, insurance companies, and other credit institutions need not be reported. 29 U.S.C. §433(a)(1)(A). Also excluded are payments exempted from criminal liability under 29 U.S.C. §186(c), i.e., dues check offs, bona fide compensation for services, sales of commodities in the regular course of business, etc. 29 U.S.C. §433(a)(1)(B). Payments to persons in the categories listed in 29 U.S.C. §433(a)(1) may also subject the employer to criminal liability provided the payee is also (a) a representative of the employer's own employees; or (b) a labor organization or officer or employee of a labor organization which would at least admit the employer's own employees to membership; or (c) an officer or employee of any union whom the employer intends to bribe. 29 U.S.C. §186(a)(1, 2, and 4). See discussion of United States v. McCarthy, supra in USAM 9-136.120.

B. An employer or his/her agent must report a payment to his/her employees in order to persuade other employees to exercise or not exercise, or as the manner of exercising, their right to organize and bargain collectively (e.g., anti-union committees). 29 U.S.C. §433(a)(2) requires the disclosure of a payment made criminal by 29 U.S.C. §186(a)(3). See, United States v. McCarthy, supra and USAM 9-74.630. Reporting of the payment is not required, however, if the employer has already disclosed the persuader payment to his/her other employees. 29 U.S.C. §433(a)(2).

C. An employer or his/her agent must report any expenditure for the purpose of interfering with his/her employees right to organize and bargain collectively in a manner which would also be an employer unfair labor practice under 29 U.S.C. §157 and §158(a). 29 U.S.C. §433(a)(3) and (g). 29 U.S.C. §433(f) provides that nothing in 29 U.S.C. §433 shall be construed as amending or modifying rights protected by the so-called "free speech clause" contained in 29 U.S.C. §158(c). See, 29 C.F.R. §405.7.

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D. An employer or his/her agent must report any expenditure for the purpose of obtaining information concerning the activities of employees or of a labor organization in connection with a labor dispute involving the employer. 29 U.S.C. §433(a)(3). Expenditures for information gathered solely for use in conjunction with administrative and arbitral proceedings or criminal and civil litigation are expressly excluded from disclosure. 29 U.S.C. §433(a)(3). Labor dispute is specifically defined by the Act. 29 U.S.C. §402(g).

E. An employer or his/her agent must report an agreement or arrangement with a labor relations consultant for the purpose of persuading employees with respect to the exercise or non-exercise of their right to organize and bargain collectively. 29 U.S.C. §433(a)(4). Although the persuader activity may be protected speech under 29 U.S.C. §158(c), it still must be reported. Wirtz v. Fowler, supra. Labor relations consultant is specifically defined in 29 U.S.C. §402(m).

F. An employer or his/her agent must report an agreement or arrangement with a labor relations consultant for the purpose of obtaining information concerning the activities of employees or of labor organizations in connection with a labor dispute. 29 U.S.C. §433(a)(4). Information gathered for litigation is again excluded from disclosure.

G. An employer or his/her agent must report any payment pursuant to the agreements required to be reported as described in the preceding two paragraphs. 29 U.S.C. §433(a)(5).

Note: Care should be taken to sufficiently allege which of the particular kinds of transactions or payments were not reported. In United States v. Heinze, 361 F. Supp. 46, 56 (D. Del. 1973), a corporate treasurer was charged with having aided and abetted the employee corporation in having failed to file a report under 29 U.S.C. §433(a) showing payments to a labor relations consultant. The count was dismissed for failure to apprise the defendant of which of the "four different and distinct payments" were charged under 29 U.S.C. §433. Although only 29 U.S.C. §433(a)(5) speaks of "payments" to "labor relations consultants", the possible factual overlapping of "expenditures" to be disclosed under 29 U.S.C. §433(a)(3) and payments pursuant to "agreements" under 29 U.S.C. §433(a)(4) and (a)(5) calls for specificity.

9-136.116 Reports Of Agreements By Consultants

Labor relations consultants must periodically report to the Department of Labor certain agreements and arrangements with employers on Form LM-20. 29 U.S.C. §433(b). The LM-20 report is filed within 30 days after entering into the agreement or arrangement. 29 U.S.C. §433(b). The President and

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Treasurer or corresponding officer of a consultant firm are personally responsible for filing such reports and for any statement in the report which he/she knows to be false as a signer of the report. 29 U.S.C. §439(d).

Specific terms and conditions of agreements must be reported where an object is to:

A. Persuade employees in respect to the exercise or non-exercise of their right to organize and bargain collectively, or

B. Obtain information for employers concerning employee or labor organization activities in connection with a dispute. Information gathered solely for litigation is excluded. 29 U.S.C. §433(b).

9-136.117 Reports Of Receipts And Disbursements By Consultants

Labor relations consultants must file with the Labor Department annual reports of receipts and disbursements made pursuant to the above persuader or informational agreements and arrangements on Form LM-21. 29 U.S.C. §433(b). The LM-21 report is filed within 90 days after close of the fiscal year in which payments were made under such agreements and arrangements. 29 U.S.C. §437(b).

The following are exemptions from reporting requirements for both periodic and annual reports by consultants:

A. Persons not parties to the agreements or arrangements need not report. 29 U.S.C. §433(d). The Labor Department takes the view that persons who have undertaken activities at the behest of another with knowledge or reason to believe that the work is undertaken as the result of an agreement or arrangement with an employer are "indirect parties" required to file. 29 C.F.R. §406.1(d).

B. Persons who only give or agree to give advice to employers need not report. 29 U.S.C. §433(c). But, 29 U.S.C. subsection 433(b)(A) expressly requires the disclosure of receipts from employers on account of labor relations advice or services.

The Fourth Circuit has held that the statutes require the reporting by an attorney of all income and expenditures from all employer clients in connection with labor relations advice and services if the attorney has acted or received any payment as a persuader from any employer during the reporting period. Douglas v. Wirtz, 353 F.2d 30, 32 (4th Cir. 1965). The Fifth Circuit on the other hand has confined disclosure to receipts from only those employers for whom the attorney performed persuader activity, expressly declining to follow the Fourth Circuit holding. See also, Price

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v. Wirtz, 412 F.2d 647 (5th Cir. 1969), reversing in part, Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966).

C. Persons who only represent or agree to represent an employer before courts and administrative bodies in labor matters need not report. 29 U.S.C. §433(c).

D. Persons who only negotiate or agree to negotiate for an employer in collective bargaining need not report. 29 U.S.C. §433(c).

E. Regular officers or employees of an employer in connection with services rendered as such regular officer, supervisor, or employee need not report. 29 U.S.C. §433(e).

F. Attorneys need not report communications covered by a legitimate attorney client relationship. 29 U.S.C. §434. 29 U.S.C. §434 has been held not to preclude the filing of a report, but may be invoked only as to specific information contained in the report. Activities not covered with confidentiality of the attorney-client privilege include the name of the client, the receipt and fees pursuant to the arrangements and the general nature of activities on behalf of the employer-clients. Wirtz v. Fowler, supra, 372 F.2d 333.

9-136.118 Surety Company Reports

Surety companies must file with the Labor Department annual reports describing fidelity bond experience for employees and fiduciaries of labor organization and employee benefit plans on Form S-1. 29 U.S.C. §441. S-1 reports are filed within 150 days after close of surety's fiscal year. Labor Department regulation specifically extends the time for filing beyond the statutory requirement of 90 days. 29 U.S.C. §441 and §437(b); 29 C.F.R. §409.3.

Disclosure is required of losses reported by the following organizations under both contracts of faithful discharge (less than criminal culpability) and under "honesty" contracts (involving losses by reason of acts of fraud and dishonesty) on the part of:

A. Officers, agents, stewards, representatives and employees who handle funds and other property of labor organizations (or trusts in which a labor organization is interested), provided the union's assets and annual receipts exceed \$5,000 in value. 29 U.S.C. §502.

B. Fiduciaries and persons who handle funds or other property of an employee benefit plan after January 1, 1975. See, 29 U.S.C. §1112 for coverage limitations.

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C. Administrators, officers and employees who handle funds or other property of employee pension or welfare benefit plans prior to January 1, 1975. See 29 U.S.C. §308(d) for coverage limitations.

9-136.119 Maintenance Of Records From Which Reports Are Prepared

Every person or organization required to file any of the above reports must maintain records on the matters required to be reported for five years after the filing of such reports. 29 U.S.C. §436. "Persons" includes both the collective and corporate entities required to file and individual signers of the reports. See 29 U.S.C. §439(d). United States v. Ottley, 509 F.2d 667, 672, n. 8 (2d Cir. 1975). United States v. Chittenden, 530 F.2d 41 (5th Cir. 1976). Labor organization records in particular must be kept available for examination by members pursuant to civil action (see 29 U.S.C. §431(c)) and by Labor Department compliance officers (see 29 U.S.C. §521). The location of labor organization records is specifically required to be reported on Form LM-2 and is attested to by the signatures of the President and Treasurer. This information can be helpful in overcoming the defense by such persons that such records are in fact maintained under the control of counsel, accountants and other persons on whom they argue reliance. See also, In re Vankoughnet, 184 F. Supp. 819 (E.D. Mich. 1960), in regard to service of process on labor organization custodians.

Records required to be maintained must provide in sufficient detail necessary basic information and data from which the reports filed may be verified, explained or clarified, and checked for accuracy and completeness. Specifically included in this category by the statute are vouchers, worksheets, receipts and applicable resolutions. 29 U.S.C. §436. Although 29 U.S.C. §436 has been said not to prescribe a particular form of bookkeeping system for labor organizations, the system adopted by the union is minimally required to maintain:

A. Accurate, contemporaneous records reflecting all union receipts and disbursements (e.g., checks and vouchers),

B. Supporting documents reflecting the entry of transactions into the union's accounts and their reproduction into the annual financial statements (e.g., receipt and disbursement journals); and

C. Any interim annual financial records that can serve to check that annual report (e.g., audit records). United States v. Budzanoski, 462 F.2d 443, 450 (3rd Cir. 1972).

Proof of what records are in fact required to be maintained may consist of the use of Labor Department expert witnesses charged with the administration of the Act. Budzanoski, supra, at 331 F. Supp. 1201, 1205

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and 1207 (W.D. Pa. 1971). It can be argued further that 29 U.S.C. §436 imposes on unions and their officers the duty to create and preserve required records. 29 U.S.C. §436 set forth a duty to "maintain . . . and keep . . . available" these records. Maintain can be variously defined to include not only to continue or keep in existence, but to begin or commence as well. BLACK'S LAW DICTIONARY (4th Ed. 1951). To construe the word maintain as meaning only the preservation of existing records would defeat the purpose of the Act which is to give anyone reviewing the records an accurate picture of all financial operations the union has undertaken. Budzanoski, supra, at 462 F.2d 450. See also, United States v. Chittenden, supra.

The provisions of 29 U.S.C. §436 and §439(a), however, do not punish the failure to keep "accurate" records, merely the failure to maintain records at all. In United States v. Sullivan, 618 F.2d 1290, 1298 (8th Cir. 1980), the Court rejected the Government's argument that false entries in a union's strike expense journal equated to a failure to make and preserve any record whatsoever of strike expenses. Falsification of union records should be confined under 29 U.S.C. §439(c). See USAM 9-136.150.

9-136.120 Fifth Amendment Privilege

In United States v. McCarthy, 298 F. Supp. 561 (S.D. N.Y. 1969), post-trial motions denied, 300 F. Supp. 716, aff'd on other grounds, 442 F.2d 160 (2d Cir. 1970), appeal dismissed, 398 U.S. 946, McCarthy was both an employee of a labor organization and the secretary-treasurer of a labor relations consultant firm. During the period of time in which he received a salary from the consultant firm, a partner in the consultant firm worked for employers who dealt with McCarthy's union. McCarthy, supra, at 298 F. Supp. 562. McCarthy was subsequently charged with receiving payments from an employer through a labor consultant in violation of 29 U.S.C. §186 and failing to file a report under 29 U.S.C. §439 and §432, disclosing payments received from a labor relations consultant to an employer. See 29 U.S.C. §432(a)(6).

In dismissing the failure to file counts, the District Court concluded that the reporting requirements of 29 U.S.C. §432 were aimed at "a group inherently suspect of criminal activities" and that their "central object" was to compel disclosures from which the target union officers would face real and appreciable hazards of self-incrimination. McCarthy, supra, 298 F. Supp. 566. Accordingly, the court held that for union officers like McCarthy, the Fifth Amendment privilege provides a full defense to prosecution for failure to file citing Marchetti v. United States, 390 U.S. 39 (1968).

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In so holding, the District Court rejected the Government's argument that 29 U.S.C. §432 is broader than 29 U.S.C. §186 and requires the reporting of innocent conduct which cannot subject the officer of prosecution (e.g., the receipt of payments from employers whose employees have no representative relationship with the officer's union and which are made without the specific intent to bribe the officer). The Court of Appeals, Second Circuit, subsequently expressed doubt as to whether McCarthy would have risked incriminating himself under 29 U.S.C. §186 by reporting in that none of the consultant's clients had contracts with McCarthy's union [and no bribery under 29 U.S.C. §186(a)(4) was apparent; ed.]. McCarthy, supra, at 422 F.2d 163. To date no reported decision has tested either the District Court's holding in the light of subsequent refinements of the Marchetti-Grosso doctrine, see, e.g., California v. Byers, 402 U.S. 424 (1971), or the non-criminal conduct alluded to by the Second Circuit. Likewise, no subsequent litigation has tested whether employers as well as union officers and consultant middlemen are within the class of those "inherently suspect" of criminal activities.

McCarthy was convicted, however, of failing to disclose payments from a labor consultant in an officer report later filed with the Labor Department. McCarthy's self-incrimination privilege was held not to preclude prosecution for filing a false report or failing to disclose a material fact under 29 U.S.C. §439(b). The District Court maintained that filing waived the privilege as to details. McCarthy, supra, at 298 F. Supp. 567. The Second Circuit went further to express doubts as to existence of the privilege, Id. See USAM 9-136.140 (False Reports).

9-136.130 Willfulness

A showing of willfulness under 29 U.S.C. §439(a) requires only that the defendant acted in reckless disregard of the law, not that he knowingly violated the statute or acted with evil intent or bad motive. United States v. Budzanoski, supra, at 331 F. Supp. 1205 and 462 F.2d 452. The statutory purpose underlying the false record provisions of 29 U.S.C. §439(c) and the record-keeping provisions of 29 U.S.C. §439(a) are identical. The fiduciary duty of union officers toward members to abstain from making false entries in the union books and records upon which annual reports depend, for example, should not be diminished by permitting any lesser standard of care by such officers in their preserving those books and records. In the only published opinion for a prosecution for failing to maintain union records, the Second Circuit has said that the element of willfulness is sufficiently established by proof either that the officer-defendant either knew of his fiduciary responsibilities in general and the record-keeping requirement in particular and ignored them, or consciously avoided learning of them. United States v. Ottley, supra, at 509 F.2d 673.

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It should be noted that while the record-keeping requirements for tax purposes may differ from those required by the Act, the exclusion of defense evidence indicating the Internal Revenue Service's approval of existing record-keeping has been held to be error where, "in close case", intent was the chief issue before the jury. Ottley, supra, at 509 F.2d 674.

Indicia of willfulness in respect to recordkeeping may include:

A. Prior admonitions by labor compliance officers and others charged with administration of the Act.

B. Signature of union officer on LM-1 report which spells out the record-keeping requirements above the signature and contains a statement that the signatory has verified information contained in the report. See, United States v. Bath, 504 F.2d 456, 460 (10th Cir. 1974).

C. Entries in union minutes and records pertaining to record-keeping requirements. United States v. Ottley, supra, at 509 F.2d 673.

D. Attendance at labor organization seminars, conferences, etc., where requirements of Act were discussed.

E. Prior compliance with record-keeping requirements for previously filed reports.

9-136.140 29 U.S.C. §439(b): False Statements And Omissions Of Material Fact In Filed Reports And Documents

Criminal responsibility is not limited to those who physically prepare the reports or to the collective entities in whose name reports are prepared. The signer of an organization report is personally responsible for knowingly false statements contained if he/^{she} is:

A. A labor organization officer signing under 29 U.S.C. §431; or

B. An employer officer signing under 29 U.S.C. §433; or

C. A labor relations consultant signing under 29 U.S.C. §433, 29 U.S.C. §439(d).

Both affirmatively false statements and omissions of material fact which render the information contained in the reports false, misleading and incomplete are covered.

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9-136.141 Materiality

The issue of whether the fact represented or omitted in a report is a material fact is for the Court to decide rather than the jury. United States v. Franco, 434 F.2d 956, 961 (6th Cir. 1970). Under general principles of law, a fact is material if "its existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question . . ." John Hopkins University v. Hutton, 422 F.2d 1124, 1129 (4th Cir. 1970), citing Restatement (second) of Torts, §538(2)(a). With respect to false statements to Government agencies generally (18 U.S.C. §1001), those circuits requiring a showing of materiality have defined a material fact as one which has a "natural tendency to influence, or is capable of influencing . . . a determination to be made" or "one which could affect or influence the exercise of a Governmental function." United States v. Quirk, 167 F. Supp. 462, 464 (E.D. Pa.), aff'd., 266 F.2d 26 (3d Cir. 1958). Whether or not the fact actually influenced the decision maker is not an element of materiality. United States v. Goberman, 458 F.2d 226, 229 (3d Cir. 1972); United States v. Clearfield, 358 F. Supp. 564, 574 (E.D. Pa. 1973).

Accordingly, in determining the materiality of the represented or omitted fact the Court must consider its potential effect both on union members who are entitled to all information necessary for them to take effective action in regulating their organization's affairs; Budzanoski, supra at 462 F.2d 449; and representatives of the Labor Department who are authorized to verify and check the reports for accuracy and completeness. See 29 U.S.C. §436 and §521.

9-136.142 Commission Of Offenses

The manner of committing offenses may include:

A. Affirmative misrepresentations on the face of the report. For example, the affirmative statement on the LM-2 report that "strike expenses" had been paid to "members" when in fact such expenditures had been made to hire pickets. United States v. Bath, 504 F.2d 456, 459 (10th Cir. 1974).

B. Partially true entries on the face of the report. For example, the listing of an officer salary as \$10,150 when in fact only \$9,100 was the authorized salary for the reporting period. United States v. Oates, 467 F.2d 129, 132 (3d Cir. 1972).

C. The knowing inclusion of disbursements in categories on the reports which fail to reflect the true purpose of the expenditure. For example, the inclusion of clearly personal expenses, properly reportable as "disbursements to officers" on the LM-2 report, under the heading "office

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and administrative expense." United States v. Ferrara, 451 F.2d 91, 96 (2d Cir. 1971). See also, United States v. Silverman, 430 F.2d 106, 116 at n.8 (2d Cir. 1970). This is not to say that the mere listing of a particular disbursement under a particular category of the report rather than a more appropriate category will result in a violation or that any such particular listing is required by way of proof. The thrust of 29 U.S.C. §439(b) is rather that the defendant knew that a particular disbursement as recorded failed to reflect the true purpose of the disbursement. United States v. Bath, *supra*, at 504 F.2d 459.

D. The partial omission of data which would have rendered the report accurate and complete. For example, the failure of the LM-2 report to disclose all withdrawals from union funds which could be characterized as loans to officers. United States v. Franco, 434 F.2d 956, 959 (6th Cir. 1970).

E. The omission of all data from which a particular transaction could be disclosed. For example, a union officer's leaving a blank in the report is equivalent to an answer of "none" or a statement that there are no facts required to be reported thereby belying the officer's verification on the form that the information is true, correct and complete. United States v. McCarthy, *supra* at 422 F.2d 162.

9-136.143 Knowledge

For a prosecution under 29 U.S.C. §439(b), unlike those under 29 U.S.C. §439(a) and §439(c) which require proof of willfulness, the culpable state of mind required is knowledge that a statement made in a report is false or knowledge that a material fact has been omitted. Bath, *supra*, at 504 F.2d 460; Ferrara, *supra* at 451 F.2d 97; United States v. Improto, 542 F. Supp. 904 (E.D. Pa. 1982). The signature of an officer on the required report together with a statement that the signer has examined the contents has been said to give rise to the inference that the officer knew of its contents. Bath, *supra* at 504 F.2d 460.

The reporting and record-keeping provisions of the Act have been construed to be malum prohibitum misdemeanors which require only that the defendant acted in reckless disregard of the law, not that he knowingly violated the statute or acted with evil intent or bad motive. Budzanoski, *supra*, at 331 F. Supp. 1205 and 462 F.2d 452. In respect to a malum prohibitum statute the word knowingly has been held to import only a knowledge of the existence of the facts in question, where those facts are such as to bring the act or omission within the prohibition of the law. The word does not require as part of its meaning that there be knowledge that such act or omission is in fact prohibited by law. Cf., United States v. Keegan, 331 F.2d 257, 261 (7th Cir. 1964). Relying on authorities cited in

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Budzanoski, supra, the following instruction has been approved in regard to false statements knowingly made to firearms dealers:

In order to find the defendant knowingly made a false statement [on the pertinent form], the jury is not required to find that the defendant actually read the form or had it read to him, if the jury finds from the evidence beyond a reasonable doubt that he acted with reckless disregard of whether the statements made were true or with a conscious purpose to avoid learning the truth. United States v. Thomas, 484 F.2d 909, 912 (6th Cir. 1973), cert. denied, 415 U.S. 924; United States v. Sarantos, 455 F.2d 877, 880 (2d Cir. 1972).

9-136.144 Reliance On Others

Where a defendant attempts to meet the intent element with the defense of reliance on his accountant or other professional who prepared a document containing misrepresentations or omissions of material facts, the defense is available only when the defendant has fully disclosed to the professional all relevant information with which the professional must prepare the document. Bath, supra, at 504 F.2d 460, United States v. Oates, 467 F.2d 129, 132 (3d Cir. 1972). In Oates reliance on the accountant who prepared the LM-2 form was not a defense since the accountant testified there were no union records of a particular bank account, which made it impossible to file a factual report. It had been shown the defendant union officer had created the undisclosed account or knowingly permitted it to exist and had drawn funds from it. In Bath the defendant officer supplied the union accountant with information which was partially accurate and partially false. Since the defendant offered no evidence to prove the accountant had relied solely on the accurate information, the jury was free to believe that the accountant relied on the false information and disbelieve the defendant's good faith reliance on the accountant.

Compare, United States v. Spingola, 464 F.2d 909, 911 (7th Cir. 1972) where the evidence indicated that the untimely filing of the LM-2 report had been due primarily to the inability of the union's staff to bring accounting records up to date. Exclusion of testimony that the officers were not directly involved in keeping the union's accounts and that the defendant was incapable of updating the records or preparing the reports himself was held to be error.

9-136.150 29 U.S.C. §439(c): False Entries In Books And Records Required To Be Kept Under 29 U.S.C. §436

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29 U.S.C. §439(c) speaks in terms of false entries in books, records, reports and statements required by the Act to be kept. Because 29 U.S.C. §439(b) deals more specifically with false "reports" filed with the Labor Department, however, the word "report" in connection with false entries under 29 U.S.C. §439(c) is understood to refer to underlying records and documents required to be kept by 29 U.S.C. §436. Accordingly, prosecution under 29 U.S.C. §439(c) requires:

A. Filing of the pertinent report by a labor organization (29 U.S.C. §431), union officer or employee (29 U.S.C. §432), employer or labor consultant (29 U.S.C. §433);

B. The existence of a record related to a receipt, disbursement, transaction, payment, agreement or arrangement, etc., required to be reported;

C. The retention of the record from which a particular transaction, as reflected in the report, can be verified, explained or clarified, and checked for accuracy and completeness in compliance with 29 U.S.C. §436, (see discussion of the scope of 29 U.S.C. §436 supra); and

D. The false entry in the required record.

9-136.151 Practical Scope Of Responsibility

Because more persons generally have access to the underlying records than to the report itself, the corresponding scope of liability is greater as a practical matter. Accordingly, criminal responsibility may attach to:

A. Officers (such as the union president and secretary), who as persons with responsibility for filing reports, also have responsibility for maintaining accurate and complete supportive records in compliance with 29 U.S.C. §436.

B. Persons who prepare the record in question with knowledge of the falsity of the entry (e.g., a bookkeeper transfers data from a voucher he knows to be false to the union case disbursements journal).

C. Persons who, although without any responsibility for filing reports or the maintenance of underlying records, cause false entries to be made in such records (e.g., a union member submits a voucher he knows to be false from which false entries are made in the union books of account prepared by an innocent intermediary).

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9-136.152 Willfulness

As noted in connection with 29 U.S.C. §439(a) (USAM 9-136.130), 29 U.S.C. §439(c) requires only that the defendant have acted in reckless disregard of the law, not that he knowingly violated the statute or acted with an evil intent or bad motive. Budzanoski, supra, at 331 F. Supp. 1205 and 462 F.2d 452. Accordingly, it has been held that where the actual use of a check is for a purpose other than shown by an entry in a union case disbursements journal and the entry was made either at the direction of the defendant or because the defendant by his act or omission to act has led the union bookkeeper to believe that the check was used for the purpose actually recorded, the defendant intentionally causes a false entry in violation of 29 U.S.C. §439(c). United States v. Haggerty, 419 F.2d 1003, 1006-1007 (7th Cir. 1969), cert. denied, 397 U.S. 1064 (1970).

In Haggerty, supra, the Court rejected the contention that proof of willfulness required a finding that the defendant's motivation for the false entry was to hide his embezzlement. The Court instead concluded that a:

deliberate purpose to conceal, by an entry on the union records, the disbursement of union funds for a purpose not yet authorized by the union is sufficient for finding of willfulness. Haggerty, supra 419 F. 2d. at 1008.

Such concealment and the desire to avoid examination of the transaction could be properly inferred from the fact that the underlying documents, which could explain the true purpose of the disbursement, had not been turned over by the defendant to the union bookkeeper. Haggerty, supra, 419 F.2d at 1006. Consequently, the false entry conviction was allowed to stand independently of the jury's acquittal of the defendant for the embezzlement which had been charged as part of the same transaction. Whatever the finding as to the embezzlement may have been, the making of a false entry is not "rendered innocent by the expectation that the union [would] eventually ratify the disbursement and make further concealment unnecessary." Haggerty, supra, 419 F.2d at 1008.

9-136.160 29 U.S.C. §439(c): Concealment, Withholding Or Destruction By Any Person Of Records Required To Be Kept

29 U.S.C. §439(c) speaks of the concealment, withholding or destruction of books, records, reports or statements required to be kept under the reporting provisions of the Act. The elements of willful "concealment, withholding, or destruction" may often be difficult to prove. However, those persons (i.e., president and treasurer) who are charged with the primary responsibility under 29 U.S.C. §436 for maintaining the books and

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records which underlie reports which they filed can be held accountable for simple failing to maintain such records under 29 U.S.C. §436 and §439(a). Accordingly, cautious pleading dictates alleging concealment, etc., under 29 U.S.C. §439(c) in the alternative with failure to maintain under 29 U.S.C. §439(a).

Persons such as union members who, although they do not have direct, personal responsibility for maintaining underlying books and records, may be held accountable for concealment, withholding or destruction under 29 U.S.C. §439(c). They may also be aiders and abettors of persons who are held directly responsible for records maintenance under 29 U.S.C. §436 and §439(a).

9-136.170 Sample Indictment: Falsification Of Records

A sample indictment might be drafted as follows:

COUNT ONE

The Grand Jury charges:

1. At all times material to this Indictment, _____ was a labor organization engaged in an industry affecting commerce within the meaning of Sections 402(i) and 402(j) of Title 29, United States Code

2. On or about _____, in the Northern District of Illinois, Eastern Division, _____, the defendant herein, did willfully make and cause to be made a false entry in a record of _____ required to be kept by Sections 436 and 431 of Title 29, United States Code, that is, [for example] the Executive Board meeting minutes _____, dated _____, concerning _____.

In violation of Title 29, United States Code, Section 439(c).

9-136.200 18 U.S.C. §1027: FALSE RECORDS AND REPORTS IN CONNECTION WITH AN EMPLOYEE BENEFIT PLAN

18 U.S.C. §1027 prohibits the filing of false statements and the concealment of facts in relation to documents required by Title I (29 U.S.C. §§1001-1114) of the Employee Retirement Income Security Act of 1974 (ERISA) and the Welfare and Pension Plan Disclosure Act of 1962, 29 U.S.C. §§301-309 (WPPDA). For violations occurring prior to January 1, 1975, the applicable jurisdictional statute is the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §301 et seq. See 29 U.S.C. §1031. In addition to establishing standards of conduct and responsibility for plan fiduciaries, ERISA and WPPDA attempt to protect the interests of participants and beneficiaries of

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employee benefit plans by requiring the disclosure and reporting of financial and other information.

9-136.210 Plans Subject To The Disclosure Laws

Plans existing prior to January, 1975 are subject to WPPDA. 29 U.S.C. §303 provides for the coverage of any employee welfare or pension benefit plan if it is established or maintained by any employer(s) engaged in commerce, or in any industry or activity affecting commerce, or by any employee organization(s) representing employees engaged in commerce or in any industry or activity affecting commerce or by both. See 29 U.S.C. §302(1) and §302(2). Certain types of plans are expressly excluded from coverage of WPPDA, however, as set forth in 29 U.S.C. §304(b) (1-4).

Plans in existence after January, 1975 are covered by ERISA. See USAM 9-135.000. Provisions in 29 U.S.C. §1002 as to covered plans are similar to those in 29 U.S.C. §302 except that ERISA expands the definition of employee welfare benefit plan and employee pension benefit plan. It should be noted that the WPPDA exemption for plans under 25 participants has been abolished for ERISA plans. Also note that 29 U.S.C. §§1051 et seq. (relating to funding) apply only to pension benefit plans. See USAM 9-135.000 et seq.

9-136.220 Parties Responsible To Report And Disclose

A. WPPDA: 29 U.S.C. §§304-306. The WPPDA requires the "administrator" to publish a description of the plan (D-1) and an annual financial report (D-2) under 29 U.S.C. §304(1). The administrator is the person (or persons) designated by the provisions of the plan other collective bargaining agreement with responsibility for ultimate control, disposition, or management of money received or contributed. In the absence of such a specific designation, any person(s) who is actually responsible for such control, disposition, etc., of money received or contributed (irrespective of whether such control, disposition, or management is exercised directly or through an agent or trustee designated by such person) is responsible. See, Hales v. Winn-Dixie Stores, 500 F.2d 836 (4th Cir. 1974), and Wirtz v. Gulf Oil Corp., 239 F. Supp. 483 (D.C. Pa. 1965).

B. ERISA: 29 U.S.C. §§1002(16)(A)(B), 1021, 1024. Section 1021 of ERISA requires the "administrator" (29 U.S.C. §1002(16)(A)), or where he is not designated, the plan sponsor (29 U.S.C. §1002(16)(B)), to file a summary plan description, plan description, modifications and changes to these plan descriptions (29 U.S.C. §1022), and an annual report (29 U.S.C. §1023) with the Secretary of Labor (29 U.S.C. §1024).

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9-136.230 Elements Of An Offense

The following elements of a crime charged under 18 U.S.C. §1027 must be proven by the Government:

A. An Employee Pension or Welfare Benefit Plan which is covered by WPPDA (29 U.S.C. §§301-309) if prior to January 1, 1975; or covered by ERISA Title I (29 U.S.C. §§1001-1144) if after January 1, 1975.

B. The principal may be any person. The class of principals is not limited to fiduciaries of the plan. Principals may be, for example, a beneficiary who knowingly submits a false claim, a service provider who knowingly submits an inflated billing, a borrower who knowingly submits a false loan application, or an employer who knowingly submits a false remittance statement in connection with contributions to a plan. Note also that under 18 U.S.C. §2(b) any person who knowingly causes a false statement or omission of a required fact to be made or omitted by an innocent intermediary is culpable as a principal for purposes of 18 U.S.C. §1027. See, e.g., United States v. Haggerty, 419 F.2d 1003 (7th Cir. 1969) (LMRDA analogy), where the union officer defendant caused a bookkeeper to make a false entry by leading him to erroneously believe that a particular expenditure was for the purpose recorded.

C. The statute covers any document which is required by ERISA Title I (or WPPDA) (for first plan year after January 1975; see 29 U.S.C. §1031(b)(2) and 29 C.F.R. §2520.104-2) to be:

1. Published, e.g. Annual Report Form 5500, Plan Description EBS-1, Summary Plan Description furnished to plan participants (29 U.S.C. §1024, §1026). See, for example, United States v. Tolkow, 532 F.2d 853 (2d Cir. 1976) where a trustee of a welfare plan failed to disclose a party-in-interest transaction (50% shareholder in borrower's firm) on the annual financial report signed by the trustee. Note that a signature following a verification statement on a report form has been held prima facie proof of knowledge of the report's contents in Tolkow, supra. See also, United States v. Santiago, 528 F.2 1130 (2d Cir. 1976) where an administrator falsified an annual financial report as to the amount of contributions made to the welfare fund by furnishing the accountant who prepared the report with false totals.

2. Kept as part of plan records. For example, by analogy to the record-keeping provisions of LMRDA, this includes all intermediate financial records which verify the reports filed with the Labor Department or the documents published to participants of the information required to be certified to the plan administrator (29 U.S.C. §1027). See, United States v. Budzanoski, 462 F.2d 443 (3d Cir.

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1972) and 29 U.S.C. §436. The provisions of 29 U.S.C. §1027 expressly include vouchers, worksheets, receipts and applicable resolutions. Such supporting records must be kept for six (6) years after the filing or the certification of the filed or certified documents or after the date that such documents would have been filed but for exemptions or simplified reporting requirements.

A document need not be generated within the plan. For example, false remittance statements supplied by an employer to the plan whereby he underreports the hours worked by employees or the number of employees eligible for participation and the contributions owed to the plan have been the subject of successful prosecution under 18 U.S.C. §1027. See, United States v. S & Vee Cartage Co., 704 F.2d 914 (6th Cir. 1983) where the employer corporation, the chief officer, and the sole shareholder were convicted of 18 U.S.C. §1027 violations, conspiracy, and scheme to defraud pension and welfare funds of contributions, and to defraud the employees of benefits obtainable by use of the mails in violation of 18 U.S.C. §1341. See also, United States v. Sante Nicolia, 79 Cr. 204S (E.D.N.Y.) where a similar scheme resulted in a guilty plea to record-keeping violation.

3. Certified to the plan administrator. Certain information, needed by the plan administrator to file reports and operate the plan in accordance with ERISA Title I, must be furnished to the plan administrator and its accuracy must be certified by the insurance carriers, banks, and plan sponsors (employers, unions, Taft-Hartley trusts, etc.) which do business with the plan within 120 days after the end of the plan year (or as provided by DOL regulations) (29 U.S.C. §1023(a)(2)).

4. The final element is a false statement or representation of fact, known to be false, or a knowing concealment, cover-up or failure to disclose a fact required by ERISA, Title I [or WPPDA-pre 1975] to be disclosed or which is necessary to check a required report or information required to be certified. In United States v. Santiago, 528 F.2d 1130 (2d. Cir. 1976) the court upheld a jury instruction to the effect that mere knowledge on the part of the plan administrator of the falsity of the statements which he caused to be made on the annual financial report was sufficient as to this element. Accord, United States v. S & Vee Cartage, supra, which approved the following jury instruction:

An act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident . . .
A statement or representation is 'false' . . . if untrue when made, and then known to be untrue (by the person

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making it or causing it to be made) or made with reckless indifference as to its truth or falsity or with a conscious purpose to avoid learning the truth.

In the United States v. Tolkow, 532 F.2d 853 (2d Cir. 1976) the court concluded in effect, however, that a modified "willful" state of mind was required for a plan trustee charged with "knowingly failing to disclose" a prohibited transaction on the annual financial report. The court noted the statute's similarities to the disclosure requirements under LMRDA and held that "knowingly" required proof of a "voluntary conscious failure to disclose without ground for believing that such non-disclosure is lawful or with reckless disregard for whether or not it is lawful." The Tolkow court cited the defendant's concern with whether the plan had previously loaned money to the party-in-interest as strong circumstantial evidence that he knew that such loans were required to be disclosed. In neither case was proof required that the defendant had actual knowledge of the duty to disclose or of the specific requirements of ERISA, Title I or 18 U.S.C. §1027.

9-136.240 Practical Considerations

The penalty for a 18 U.S.C. §1027 violation is a maximum of 5 years imprisonment or \$10,000 fine, or both. Note that the penalty for bribery or graft in connection with an employee benefit plan payment under 18 U.S.C. §1954 is lower (3 years and/or \$10,000 fine). 18 U.S.C. §1027 complements 18 U.S.C. §1341 where the false statement is part of a scheme to defraud and mails used in furtherance of the scheme. A false entry or concealment is some evidence of criminal intent where the entry pertains to transactions charged as theft or corrupt payment; e.g., United States v. Brill, 350 F.2d 171 (2d Cir. 1965) (LMRDA analogy). An 18 U.S.C. §1027 conviction expressly bars the convicted individual from service with a benefit plan or as a consultant to a benefit plan under 29 U.S.C. §1111.

9-136.250 Sample Indictment

THE GRAND JURY CHARGES:

COUNT ONE

From on or about _____, through and including on or about _____, in the _____ District of _____, and elsewhere, the defendants _____, in documents required to be kept by Title I of the Employee Retirement Income Security Act of 1974 (hereafter E.R.I.S.A.), 29 U.S.C. §§1001 et seq., that is, in records with respect to employees sufficient to determine benefits due or which may become due to such employees, and from which the annual

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reports of such plans could be verified, explained, clarified and checked, kept by the _____ Fund, _____, an employee pension benefit plan, made and caused to be made false statements and representations of fact, knowing them to be false, and knowingly concealed, covered up, and failed to disclose facts the disclosure of which is required by Title I, E.R.I.S.A., in that, the defendants _____ did not correctly report the actual hours worked by employees of _____ in monthly remittance statements submitted by the plan.

All in violation of Title 18, United States Code, Sections 1027 and 2.

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9-137.000 29 U.S.C. §530 - DEPRIVATION OF RIGHTS BY VIOLENCE

29 U.S.C. §530 provides for the protection of the rights granted to union members and reads as follows:

It shall be unlawful for any person through the use of force or violence or threat of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

9-137.010 Investigative Jurisdiction

The Federal Bureau of Investigation has investigative jurisdiction over possible violations of this statute.

9-137.020 Supervisory Authority

Questions regarding criminal violations of this statute should be referred to the Labor Unit, Organized Crime and Racketeering Section.

9-137.100 RIGHTS OF MEMBERS

The rights granted to members of labor organizations include the rights listed below. A prevention of or interference with or retaliation for the exercise of any of those rights, by force or violence, or the threat of force or violence, will constitute a violation of 29 U.S.C. §530. United States v. Kelley, 545 F.2d 619 (8th Cir. 1976).

A. Equal Rights (29 U.S.C. §411(a)(1))

Every member of a labor organization shall have equal rights and privileges within such organization to:

1. Nominate candidates (see also 29 U.S.C. §481(e)),
2. Vote in elections or referendums,

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3. Attend membership meetings, and
4. Participate in deliberation and voting upon the business of the meeting.

All the above are subject to reasonable rules and regulations in the organization's constitution and bylaws. Note, however, that the rights protected under this provision and 29 U.S.C. §530 are not limited to those exercised solely at a union meeting or within the confines of the union hall. See, United States v. Kelley, supra.

B. Freedom of Speech And Assembly (29 U.S.C. §411(a)(2))

Every member of any labor organization shall have the right to:

1. Meet and assemble freely with other members,
2. Express any views, arguments, or opinions, and
3. Express his views upon any candidate or business before the meeting of the union.

All the above are subject to the organization's reasonable rules as specified in the subsection. Note, however, that the rights protected under this provision and 29 U.S.C. §530 are not limited to those exercised solely at a union meeting or within the confines of the union hall. See, United States v. Kelley, supra.

C. Dues, Initiation Fees And Assessments (29 U.S.C. §411(a)(3))

Except in the case of a federation of national or international organizations, the rates of dues and initiation fees payable by member of the organization in effect on the date of enactment of the Act (September 14, 1959) shall not be increased and no assessment shall be levied except:

1. In the case of a local labor organization, by majority vote by secret ballot of the members in good standing, at a membership meeting, after reasonable notice of intention to vote thereon, or by a majority vote by secret ballot in a membership referendum.

2. In the case of a labor organization at any level of organization (i.e., district, state, national) except federations and local unions by a majority of delegates at a regular convention, or at a special convention held upon not less than 30 days notice, by a majority vote by secret ballot of members in a referendum, or pending

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the next regular convention, by a majority vote of members of the executive board, pursuant to authority contained in the Constitution.

D. Protection Of The Right To Sue (29 U.S.C. §411(a)(4))

No labor organization shall limit the right of any member to:

1. Institute an action in court (e.g., 29 U.S.C. §§412, 464(a), 501(b)) or before an administrative agency (e.g., challenging election procedures, 29 U.S.C. §482);

2. Appear as a witness in a judicial, administrative or legislative proceeding;

3. Petition any legislature; or

4. Communicate with any legislator.

All the above are subject to certain requirements with respect to exhaustion of internal union remedies.

E. Safeguards Against Improper Disciplinary Action (29 U.S.C. §411(a)(5))

Except for non-payment of dues, no member of a labor organization shall be fined, suspended, expelled or otherwise disciplined unless:

1. He ^{/she} has been served with written charges,

2. Given a reasonable time to prepare his ^{/her} defense, and

3. Afforded a full and fair hearing.

F. Right To Copies Of Collective Bargaining Agreements (29 U.S.C. §414)

Any employee may inspect and may obtain a copy of a collective bargaining agreement if his ^{/her} rights are affected by such agreement.

G. Right To Inspect Reports (29 U.S.C. §431(c) and §461(b))

Every labor organization required to submit a report under 29 U.S.C. §431(a) and (b) (initial and annual financial statements) and under 29 U.S.C. §461(a) (similar reports for unions in trusteeship) shall make the information contained in such reports available to all its members.

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H. Right To Inspect Books (29 U.S.C. §431(c) and §461(b))

Any member may for just cause inspect books, records and accounts in order to verify reports made under 29 U.S.C. §431 and §461. This right is also enforceable by civil action of the member.

I. Right To Know Of Provisions Of The Act (29 U.S.C. §415)

Every labor organization shall inform its members concerning the provisions of the Act.

J. Right Of Candidates For Union Office To Have Campaign Literature Distribution (29 U.S.C. §481(c))

Every local labor organization shall have the duty to comply with any reasonable request to distribute campaign literature for any bona fide candidate at the candidate's expense, and to refrain from discrimination for or against any candidate with respect to the use of the membership lists and with respect to the distribution of campaign literature of candidates.

K. Right Of Candidates For Union Office To Inspect Membership Lists (29 U.S.C. §481(c))

Any bona fide candidate may, once within 30 days prior to the election, inspect a list of members who are subject to union-security agreements, which list must be maintained and kept at the principal office of the organization.

L. Right Of Candidates To Have Observer At The Polls (29 U.S.C. §481(c))

Any candidate shall have the right to have adequate safeguards to insure a fair election including the right to have an observer at the polls of an election and at the counting of the ballots.

M. Right To Be A Candidate (29 U.S.C. §481(e))

Every member in good standing shall be eligible to be a candidate and hold office (subject to 29 U.S.C. §504 and reasonable qualifications uniformly imposed).

N. Right Regarding Candidate (29 U.S.C. §481(e))

Every member in good standing shall have the right to have a reasonable opportunity for the nomination of candidates, to vote for or otherwise support candidates, and to have the prescribed notice of election.

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O. Right To Vote For Removal Of An Officer Guilty Of Serious Misconduct (29 U.S.C. §481(h))

The Branch of Elections and Trusteeship, United States Department of Labor, may require, after an administrative hearing, that a special vote for removal be held where it finds that the Constitution and bylaws of the union do not provide for adequate procedures for the removal of officers guilty of serious misconduct.

P. Right To Recover Damages To The Union (29 U.S.C. §501(b))

Any member may sue to recover damages or secure an accounting or other appropriate relief when an officer has violated his fiduciary duties under 29 U.S.C. §501(a) and the labor organization refuses to bring such an action.

9-137.200 ELEMENTS OF PROOF

Few cases are carried to final prosecution under this statute. The basic question is whether the violence or threats arose from union related matters, or whether the dispute resulted from personal antagonisms. See, United States v. Roganvoch, 318 F.2d 167 (7th Cir. 1963), cert. denied, 375 U.S. 911 (1963). Since this section applies to all persons, violent confrontations between members of a union can be prosecuted under this statute if the motive or intent behind the violence was to deny or limit one member's protective rights. The same is true with respect to acts of non-members. In such instances, it is unnecessary to prove that the defendant member or non-member had any connection with union officers or officials, or that the violence was directed or encouraged by union officials. See, United States v. Bertucci, 333 F.2d 292 (3d Cir. 1964), cert. denied, 379 U.S. 839 (1964).

9-137.300 BASIS FOR FEDERAL JURISDICTION

The statute can be used as a basis for Federal jurisdiction in a labor dispute involving violence. Examples of investigations conducted under this statute are:

A. Karen Silkwood - killed in a car mishap on the way to a meeting in which she purportedly was to assert one of her protected rights.

B. Jimmy Hoffa - disappeared, one explanation being that his disappearance was a result of his attempt to assert his protected rights as a union member.

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9-137.400 SAMPLE INDICTMENT

COUNT ONE

The Grand Jury charges:

1. THAT at all times material to this Indictment, _____ was a labor organization engaged in an industry affecting commerce, as those terms are defined in Section 402 of Title 29 of the United States Code.

2. THAT at all times material to this Indictment, _____ was a member of _____.

3. THAT on or about _____, in the _____ District of _____ and elsewhere, _____ and _____, the Defendants herein, and others both known and unknown to the Grand Jury unlawfully and willfully did, through the use of force and violence, and threats of the use of force and violence restrain, coerce and intimidate, and attempt to restrain, coerce and intimidate, _____ for the purposes of: [for example] interfering with and preventing _____ from exercising rights to which the said _____ was then and there entitled under the provisions of Sections 411(a)(1) and (2) of Title 29 of the United States Code, that is: the equal right and privilege to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings of the said labor organization; and the right to express views, arguments and opinions as to the said labor organization; and, the right to express at meetings of the said labor organization views upon business properly before such meetings; in that, on or about _____, the said Defendants did threaten and assault _____ for the purpose of (a) retaliating against _____ for having made a speech on _____ before the general membership of _____ wherein _____ had expressed his/her views, arguments and opinions on union business to the effect that _____ and (b) interfering with and preventing _____ from making speeches on the same topics before future meetings of the general membership of _____ beginning with the meeting on _____.

ALL in violation of Section 530 of Title 29 of the United States Code and Section 2 of Title 18 of the United States Code.

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9-138.000 29 U.S.C. §§504 AND 1111 PROHIBITION AGAINST CERTAIN PERSONS
HOLDING OFFICE AND EMPLOYMENT WITH LABOR ORGANIZATIONS,
EMPLOYER ASSOCIATIONS, EMPLOYEE PENSION AND WELFARE PLANS,
AND AS LABOR RELATIONS CONSULTANTS

Both 29 U.S.C. §§504 and 1111 are similar in providing that a person who has been convicted of specified crimes is prohibited from serving in specified capacities following conviction, or the end of imprisonment for such conviction, for a maximum period of thirteen (13) years in the case of a judgment of conviction entered after October 12, 1984, and a maximum period of five (5) years in the case of a judgment of conviction on or before October 12, 1984. Both sections give the convicted person similar means of obtaining relief from the disabilities imposed, namely, an exemption following a hearing, a full restoration of citizenship rights revoked as a result of the conviction, or in the case of judgments of conviction entered after October 12, 1984, a reduction by the sentencing court of the period of disability from the maximum of thirteen (13) years to a shorter period which may not be less than three (3) years. Both sections carry identical penalties for violations arising from prohibited service: 1) for judgments of conviction entered after October 12, 1984, a maximum of five (5) years' imprisonment and \$10,000 fine; 2) for judgments of conviction entered on or before October 12, 1984, a maximum of one (1) year's imprisonment and \$10,000 fine.

Differences between the disability imposed by reason of judgments of conviction entered before and after October 12, 1984, arise because of amendments to both statutes which are contained in the Comprehensive Crime Control Act of 1984, §§802-804; Pub. L. No. 98-473, October 12, 1984. New categories of disqualifying convictions and prohibited positions which were added by the 1984 amendments and therefore apply only in the case of judgments of conviction entered after October 12, 1984, are noted throughout the chapter below. Citations to legislative history materials are set out at USAM 9-138.040, infra.

9-138.010 Investigative Jurisdiction

By a Memorandum of Understanding dated February 16, 1960, between the Secretary of Labor and the Attorney General, criminal matters arising under 29 U.S.C. §504 are investigated by the Federal Bureau of Investigation. The Memorandum permits different arrangements to be made by the two Departments on a case-by-case basis. A similar Memorandum of Understanding of February 9, 1975, makes the same delegation with respect to criminal matters arising under 29 U.S.C. §1111.

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In regard to issues concerning the appropriateness of a grant of a certificate of exemption under 29 U.S.C. §§504 or 1111, investigation is conducted by Labor Department compliance officers under the supervision of the Solicitor of Labor, Washington, D.C.

9-138.020 Supervisory Jurisdiction

Questions concerning 29 U.S.C. §§504 and 1111 should be directed to the Labor Unit of the Organized Crime and Racketeering Section, Criminal Division. As noted below in connection with exemption proceedings before the United States Parole Commission, where the prosecuting attorney or other representative of the U.S. Attorney's office is unable to appear in person before the Commission, the prosecuting office may appear through the Labor Unit, Organized Crime and Racketeering Section, as its representative. See USAM 9-138.410-9-138.412.

9-138.030 Consultation Prior to Prosecution

Prior to instituting grand jury proceedings, as well as seeking an indictment, or filing an information, under either 29 U.S.C. §504 or 29 U.S.C. §1111, consultation is required with the Criminal Division through the Labor Unit of the Organized Crime and Racketeering Section. Because the underlying purpose is to eliminate undesirable persons from the labor movement in the case of 29 U.S.C. §504 or from access to or management of the assets of an employee benefit plan in the case of 29 U.S.C. §1111, a procedure of notification prior to proceeding with criminal prosecution has been adopted by the Criminal Division in certain cases. In the absence of a clear demonstration of a knowing and intentional violation of either statute, the disqualified person and the responsible person(s) who permit(s) the disqualified person to serve in violation of either statute are notified and given the opportunity to vacate the prohibited position and avoid prosecution. This policy furthers the remedial purposes of the statute and has generally resulted in compliance by the affected individuals. Following consultation with the Criminal Division, the procedure need not be used where available evidence indicates that the evidence indicates that the affected individuals were aware that the disqualified person's service was prohibited by reason of conviction at the time such service was rendered.

Upon learning of the conviction of an officer or disqualified employee of a labor organization, labor consultant firm, or employer association, etc., in the case of 29 U.S.C. §504, or a benefit plan officer, employee, fiduciary, or consultant, etc., in the case of 29

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U.S.C. §1111, or upon notification that an individual is in violation of these statutes, the Criminal Division gives notice of the disqualification by delivery through the case investigator or by certified mail. In the case of 29 U.S.C. §504, the individual in violation and the chief executive officer of his/her business firm, or local and international labor organizations, respectively, are notified of the violation and advised that prosecution will be initiated unless the prohibited relationship is terminated. In the case of 29 U.S.C. §1111, the individual in violation and the benefit plan administrator/trustees or the chief executive officer of the affected business firm are given similar notice and advice.

In order to effectuate this procedure, all U.S. Attorneys and Strike Forces are requested to forward to the Labor Unit, Organized Crime and Racketeering Section, copies of the judgment and sentence for any officer, fiduciary, or employee of a labor organization, employee benefit plan, labor relations consultant firm, or employer association, etc., who is convicted in their district. The following information should also be furnished: address of the convicted individual, the name of the chief executive officer of the affected organization and the organization's address, and the name of the benefit plan administrator, trustee, etc., and his/her address.

9-138.040 1984 Amendments: Legislative History

A substantial portion of the legislative history of the 1984 amendments is summarized in the following three Senate committee reports: S. Rep. No. 98-225 on S.1762, Committee on the Judiciary, 98th Cong., 1st Sess. 297-299 (1983); S. Rep. No. 98-83 on S.336, Committee on Labor and Human Resources, 98th Cong., 1st Sess. (1983); and S. Rep. No. 97-497 on S.1785, Committee on Labor and Human Resources, 97th Cong., 2d Sess. (1982). The Department of Justice's views on the legislation were expressed by D. Lowell Jensen in his capacity as Assistant Attorney General of the Criminal Division in testimony before the Senate Committee on Labor and Human Resources. Hearing on S.336 before the Senate Subcommittee on Labor, 98th Cong., 1st Sess. 96-116 (March 15, 1983) and Hearing Before the Senate Subcommittee on Labor on S.1785, 97th Cong., 2d Sess. 64-94 (Feb. 3, 1982).

9-138.100 MECHANICS OF 29 U.S.C. §504

9-138.110 Prohibited Capacities Specified

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A. The convicted individual may not serve in any labor organization (29 U.S.C. §§402(i) and 402(j)) as any of the following:

1. Consultant or Adviser: Service in as a "consultant or adviser to a labor organization" is prohibited only as the result of judgments of conviction entered after October 12, 1984. This category of prohibited service expands the scope of 29 U.S.C. §504 beyond the narrower category of "labor relations consultant" to a labor organization. See discussion below and 29 U.S.C. §402(m).

2. Officer (29 U.S.C. §401(n));

3. Director;

4. Trustee;

5. Member of any executive board or similar governing body: This may include advisory bodies whose actions are subject to final approval by the membership and is not limited to boards vested with executive authority to act. See Brown v. United States, 381 U.S. 437 (1965).

6. Business Agent;

7. Manager;

8. Organizer;

9. Employee: Persons convicted on or before October 12, 1984, are permitted to perform exclusively clerical or custodial (i.e., janitorial) services by reason of the exception for such services which were eliminated by the 1984 amendments. Although no cases have expressly interpreted the terms "clerical" or "custodial," prosecution has resulted from findings that convicted persons were in fact holding responsible positions in labor organizations while occupying nominally clerical or other ministerial positions. See United States v. Scaccia, 514 F. Supp. 1353 (N.D. N.Y. 1981) (performance as de facto business manager results in probation revocation); see also United States v. John J. Felice, Jr., Cr. 82-179 (N.D. Ohio indictment returned September 20, 1982) which resulted in conviction for prohibited service and extortion committed while serving as an "office clerk."

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"Custodial" fairly clearly refers to "janitorial" services. For "custodial" to refer to "one entrusted with the care and possession of a thing" (e.g., as used in connection with the Federal Bankruptcy Act) would appear to defeat the remedial purposes of 29 U.S.C. §504. For a person to exercise "custodial" duties over the union affairs in more than a ministerial sense would result in such functions falling within the definition of an officer's position under 29 U.S.C. §402(n). See Wirtz v. National Maritime Union of America, 399 F.2d 544, 552 (2d Cir. 1968). A basic distinction is made in some cases between handling paper work in a secretarial or ministerial manner and the making of administrative or policy decisions. Cf. Edwards v. United States, 123 F.2d 465, 466 (2d Cir. 1941).

10. Representative in any capacity of a labor organization: The addition of the term "representative in any capacity" as part of the 1984 amendments prohibits persons convicted after October 12, 1984, from serving as union shop stewards, for example, without regard to whether service in the position can be considered as service by an "employee" of the union or whether it otherwise falls within the description of positions covered under prior law.

B. The convicted person may not serve as a labor relations consultant or adviser to a person engaged in an industry or activity affecting commerce. A labor relations consultant is any person who, for compensation, advises employers or labor organizations on labor-management matters. See 29 U.S.C. §409(m). The addition of the term "adviser" to a person engaged in an industry or activity affecting commerce as part of the 1984 amendments implies that persons convicted after October 12, 1984, are also prohibited from advising labor unions and employers on labor-management relations without compensation on a volunteer basis.

C. The convicted person may not serve as an officer, director, agent, or employee of any group or association of employers dealing with any labor organization.

A person convicted on or before October 12, 1984, is permitted to perform exclusively clerical or custodial duties with such employer associations by reason of the exception for such services which was eliminated by the 1984 amendment.

D. A person convicted after October 12, 1984, may not serve with any corporation or association engaged in an industry or activity affecting commerce in a position whose duties involve "specific collective bargaining authority or direct responsibility in the area of labor-management relations." The 1984 amendment more clearly states the

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prohibition under prior law against a convicted person serving an employer as an in-house "labor-relations consultant."

E. A person convicted after October 12, 1982, may not serve as shareholder or responsible employee of an organization which is substantially devoted to providing goods or services to a labor organization. A literal interpretation of this provision could disqualify a convicted person from merely holding shares in a publicly held corporation which does a substantial part of its business with labor unions. However, the intent of Congress appears to be more narrow, namely, that convicted persons should not be permitted to exercise substantial influence, directly or indirectly, over labor union affairs. S. Rep. No. 98-83, Senate Committee on Labor and Human Resources, 98th Cong., 1st Sess. at 9, 14. Accordingly, enforcement of this provision should be restricted to those convicted persons whose positions of ownership or control of such service provider organizations enable them to knowingly influence the affairs of the labor unions with which such organizations deal.

F. A person convicted after October 12, 1984, may not serve in any capacity which involves decision making authority or control over labor union property, except to the extent such authority or control arises from his/her status as an individual union member.

9-138.120 Disabling Crimes

No individual may serve in the above capacities (USAM 9-138.110, supra) if convicted of the following crimes, or conspiracy to commit such crimes, or crimes in which any of the following crimes is a necessary element. See Postma v. Int'l Brotherhood of Teamsters, 229 F. Supp. 655, 658 (N.D. N.Y. 1964), aff'd, 337 F.2d 609 (2d Cir. 1964). Persons convicted after October 12, 1984, are expressly prohibited from service as the result of conviction for attempt to commit the crimes listed in 29 U.S.C. §504(a).

In construing the scope of crimes included in 29 U.S.C. §504, the courts have uniformly held the section to be remedial other than penal in nature. In the context of civil litigation under the statute, at least, this has meant that the courts will liberally construe the breadth of the prohibited crimes so as to effect the Congressional purpose to remove those guilty of serious crimes from union office. See Serio v. Liss, 300 F.2d 386, 389 (3d Cir. 1961); Postma, supra, 229 F. Supp. at 658. In one of the two criminal prosecutions under the statute, the court indicated that the interpretation should result "in a rational scheme and give

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dimension to the purging action of 18 U.S.C. §504." United States v. Priore, 236 F. Supp. 542 (E.D. N.Y. 1964).

A. Robbery.

B. Bribery has been held to include a union officer's conviction for his/her receipt of payments from an employer in violation of 29 U.S.C. §186(b)(1) where such payments were made with the intent to influence the officer in respect to his/her actions, decisions, or duties as a union officer or labor representative in violation of 29 U.S.C. §186(a)(4). Hodgson v. Chain Service Restaurant, 355 F. Supp. 180, 186 (S.D. N.Y. 1973), accord, Gillette v. United States, 444 F. Supp. 793 (S.D. Fla. 1976).

It should be noted, however, that Chain Service Restaurant, supra, dealt with a payment under 29 U.S.C. §186(a)(4) as charged in the indictment and proven at trial. The court very carefully discussed the specific intent element required under that subsection. 29 U.S.C. §186(a)(1-3), on the other hand, are mala prohibita and require no specific bribery intent. Accordingly, where the facts sufficiently warrant in prosecutions of labor officers and employees under 29 U.S.C. §186(b), consideration should be given to alleging the solicitations, receipt, etc., in terms of payments made in violation of 29 U.S.C. §186(a)(4) so as to invoke the sanction of 29 U.S.C. §504.

C. Extortion for purposes of 29 U.S.C. §504 is not limited to convictions for extortion under state or common law. The obstruction of commerce by extortionate conduct in violation of the Hobbs Act is extortion. Postma, supra. Union employment following a state conviction for conspiracy to commit extortion was a violation of 29 U.S.C. §504 even though the conspiracy was punishable only as a misdemeanor. See United States v. Priore, supra.

D. Although a larcenous type crime, embezzlement specifically requires proof that the defendant occupied a fiduciary position with respect to property entrusted to his/her care. See Lippi v. Thomas, 298 F. Supp. 242, 248 (M.D. Pa. 1969).

E. For purposes of 29 U.S.C. §504, the term grand larceny encompasses a wide range of larcenous type crimes. A state conviction for conspiracy to cheat and defraud, although not larceny at common law, has been held to be equivalent to grand larceny under 29 U.S.C. §504. See Berman v. Teamsters Local 107, 237 F. Supp. 767 (E.D. Pa. 1964). Particular reliance has been placed on the Congressional trend to broaden the so-called federal larceny statutes (e.g., 18 U.S.C. §§641, 656; 29

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U.S.C. §501(c)) to include a wide range of offenses not historically included in the term larceny. Id. at 237 F. Supp. 773. Accordingly, misapplication of bank funds in violation of 18 U.S.C. §656 has been held to be grand larceny for purposes of U.S.C. §504. See Lippi v. Thomas, supra. Conviction for the state crime of obtaining money by false pretenses has been held to be "functionally identical" to grand larceny, despite common law differences between the two crimes. See Illario v. Frawley, 426 F. Supp. 1132, 1140 (D. N.J. 1977).

Where the defendant's own conduct underlying the conviction does not disclose participation in the actual theft, however, there is difficulty in stretching the Berman equivalency test to reach larceny-related crimes such as possession or concealment of stolen property. See, e.g., 18 U.S.C. §§641, 659, 662, 1708, 2113, 2313, 2317. Although conviction under these statutes generally requires proof of the defendant's knowledge that the goods have been stolen and the he/she possessed the fruits of that larceny, proof of the identity of thief is immaterial to proof of the crime. The possessor need not be the thief. Accordingly, a union employee's guilty plea to possession of goods stolen from an interstate shipment under 18 U.S.C. §659 rather than to one of the modes of larceny under the same statute has been held not to have resulted in conviction for "grand larceny" under 29 U.S.C. §504. See Suckart v. Levi, Civ. No. 75-127 (N.D. Ohio, August 1, 1975).

In order to distinguish grand larceny from petty larceny, both state and federal classifications may be considered. Cf. Serio v. Liss, supra, 300 F.2d at 390; Berman, supra, 237 F. Supp. at 770, n.4. A state's classification of a larceny statute as misdemeanor rather than a felony does not render 29 U.S.C. §504 inapplicable. Cf. United States v. Priore, supra.

Some federal larceny statutes such as 18 U.S.C. §659, for example, attach no label to the gradations based on monetary amounts but rather impose felony penalties where value exceeds a specified amount. While the attaching of disability under 29 U.S.C. §504 would not depend on the distinction between penalties, evidence of a Congressional intent to distinguish between grand and petty larceny in enacting a particular statute would control the applicability of the statutory bar.

F. Burglary.

G. Arson.

H. Violation of narcotics laws. Under federal law, the term "narcotic drug" is narrowly defined as "opium, coca leaves, and opiates"

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or preparations which are derived from or chemically identical to those substances. See 21 U.S.C. §802(16). A similar definition contained in 26 U.S.C. §4731 was in effect at the time 29 U.S.C. §504 was enacted. Depressant or stimulant substances, such as amphetamines, barbiturates, and hallucinogens, fall under a different category of controlled substances and many were not classified as dangerous drugs until passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970. See 21 U.S.C. §801 et seq.

I. Murder.

J. Rape.

K. Assault with intent to kill, infra.

L. Assault which inflicts grievous bodily injury. The language chosen for the latter two classes indicates that Congress obviously sought to prohibit from holding office only those individuals who had successfully accomplished a serious battery or who had attempted a battery with the most serious intended application of force. The Senate Bill, which was later amended by the House and in conference, would have disqualified anyone convicted of "assault with intent to inflict grievous bodily harm." S. Rep. No. 187, 86th Cong., 1st Sess. 2, reprinted in 1959 U.S. CONG. & A.D. NEWS 2366.

By inclusion of assault with intent to kill, Congress appears to have intended that attempted murder should give rise to the 29 U.S.C. §504 disability even though attempts to commit the other specified crimes were not expressly included in the statute until October 12, 1984. Voluntary manslaughter, which involves the intentional causation of death but without malice or premeditation, is similarly equivalent to "assault with intent to kill."

In Serio v. Liss, supra, the union employee had been convicted of "atrocious assault" in New Jersey. The issue of whether the conviction was covered by 29 U.S.C. §504 was undisputed and the court, without analysis, assumed that the assault had inflicted grievous bodily injury. See Serio v. Liss, supra, 300 F.2d at 390.

M. Criminal violations of subchapter III (§§431-441) or subchapter IV (§§461-466) of chapter 11 (LMRDA) of Title 29, United States Code. These disqualifying crimes include:

1. Labor union officers and employees, employers, labor relations consultants, and surety company officers who have been

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convicted of reporting and record-keeping violations under 29 U.S.C. §439. See USAM 9-136.100 - 9-136.160.

2. Officers and trustees of labor unions, placed in trusteeship by their parent organizations, who have been convicted of reporting and record-keeping violations under 29 U.S.C. §461.

3. Any person who has been convicted in connection with voting irregularities in unions under trusteeship or in connection with the improper handling of trusteeship organization monies in violation of 29 U.S.C. §463. See USAM 9-139.600.

Convictions under other criminal provisions of the Labor Management Reporting and Disclosure Act are not expressly made disqualifying crimes. See, e.g., 29 U.S.C. §502 (bonding), 29 U.S.C. §503 (loans exceeding \$2,000). Convictions under 29 U.S.C. §501(c), of course, are equivalent to embezzlement or grand larceny. A conviction for extortionate picketing, 29 U.S.C. §522 would be extortion. A conviction under 29 U.S.C. §530 may also fall within other violent disqualifying offenses such as assault, murder, etc.

N. Any felony involving abuse or misuse of a person's position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan.

As part of the 1984 amendments, this category of disabling crimes applies only to persons convicted after October 12, 1984. Unlike most of the other disabling crimes listed in the statute, this ground for disqualification is limited to felonies committed while the person holds a particular position. A conviction for other classes of disabling crimes may be a misdemeanor and need not involve union or benefit plan office. See United States v. Priore and Lippi v. Thomas, *supra*. This category of disabling crime, however, must have involved the misuse of the position to seek or obtain unlawful enrichment at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan. Congress intended to ensure that anyone who "feloneously aggrandizes himself or others to the detriment of those he has the obligation to serve . . ." is removed from his/her position or office. S. Rep. No. 98-83, Senate Committee on Labor and Human Resources, 98th Cong., 1st Sess. 14 (1983).

Moreover, this category differs from other enumerated crimes in that the statutory language does not describe any particular common law crime or statutory offense, but instead, describes conduct which may

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characterize the commission of several federal or state felonies. In this regard, the new category is consistent with the liberal construction of the statute that favors inclusion of non-listed crimes where the conduct which Congress intended to prohibit, or functionally equivalent conduct, can be determined to have been committed by the convicted person. See Illario v. Frawley, 426 F. Supp. 1132, 1140 (D. N.J. 1977) (charge of obtaining money by false pretenses held equivalent to grand larceny despite common law differences between the two crimes).

9-138.130 Constitutionality of Establishing Disability

Current or former membership in the Communist Party is no longer a basis for prohibited service under 29 U.S.C. §504. This portion of the statute has been declared an unconstitutional bill of attainder by the Supreme Court. See United States v. Brown, 381 U.S. 437 (1965).

However, the disability in both 29 U.S.C. §§504 and 1111 which prohibits service after conviction of specified crimes has been held not to violate the constitutional prohibition against bills of attainder or ex post facto laws even when applied to convictions occurring before the date when each statute was enacted. See Postma v. Int'l Bro. of Teamsters, 337 F.2d 609, 610 (2d Cir. 1964) (29 U.S.C. §504); Presser v. Brennan, 389 F. Supp. 808 (N.D. Ohio 1975) (29 U.S.C. §1111). Therefore, Congress could have properly made all of the 1984 amendments of each statute fully applicable to judgments of conviction which had been entered on or before October 12, 1984, the effective date of the amendments. Instead, Congress chose to apply only those 1984 amendments which relate to disability pending appeal. Comprehensive Crime Control Act of 1984, §804(a). See Commencement and Length of Disability at USAM 9-138.150 et seq. Accordingly, although it had the constitutional authority to do so, Congress chose not to impose the disabilities arising from the remaining 1984 amendments, such as the 13-year bar, felony penalty, etc., to judgments of conviction for which any disability already had taken effect under prior law because the conviction had been finally sustained on appeal before October 12, 1984, or because no right of appeal existed on October 12, 1984. Comprehensive Crime Control Act of 1984, §804(b).

State legislation similar to 29 U.S.C. §504 which disqualifies convicted person from union office in particular industries has been held by the Supreme Court to be constitutionally sound and not preempted by federal law. De Veau v. Braisted, 363 U.S. 144 (1960) (N.Y. Waterfront Commission statute barring all felons from office in waterfront industry unions); Brown v. Hotel Employees Local 54, 104 S. Ct. 3179 (1984) (New Jersey Casino Control Act barring persons convicted of specified crimes

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and having organized criminal associations from service in casino industry unions). The holding in Brown v. Hotel Employees is further supported by the Congressional statement in chapter 22 of the Comprehensive Crime Control Act of 1984 to the effect that states may also enact legislation to regulate service in local labor unions which are subject to federal regulation if such state laws are part of a comprehensive statutory scheme to eliminate the threat of pervasive racketeering activity in certain industries and which apply equally to employers, employees, and collective bargaining representatives. Pub. L. No. 98-473, §2201; see remarks of Congressman Hughes, Daily Cong. Rec. (Oct. 10, 1984), H. 12075-76.

9-138.140 Disability of "Conviction"

For purposes of both 29 U.S.C. §§504 and 1111 "judgment of conviction" under federal law includes a plea, the verdict or findings, and the adjudication and sentence. See Fed. R. Crim. P. 32(b)(1). The government has successfully argued that a state court's suspension of the imposition of sentence and placement of the defendant on probation is a conviction for purposes of 29 U.S.C. §504 despite the contrary conclusion under state law. See Laborer's International Union of North America, AFL-CIO, Local 42 v. William F. Smith, Attorney General, Civil No. 81-0313-C(5). (E.D. Mo. unpublished opinion filed Sept. 22, 1981). Under federal law the suspension of the imposition of a sentence is a sentence. See Korematsu v. United States, 319 U.S. 432, (1943); 18 U.S.C. §3651. Moreover, in the case of state procedures which defer final sentencing pending appeal, the trial court's judgment order from which an appeal could be taken would appear to mark the commencement of disability for convictions occurring after October 12, 1984, in view of the 1984 amendments' imposition of disability "from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal." See 29 U.S.C. §504(c)(1) and §1111(c)(1). A judgment of conviction entered following a plea of nolo contendere is a conviction for purposes of 29 U.S.C. §504. Local 1516, International Longshoremen's Association v. United States, 471 F. Supp. 685 (D. Ala. 1978).

9-138.150 Commencement and Length of Disability

9-138.151 Conviction on or before October 12, 1984

For judgments of conviction which are entered on or before October 12, 1984, the disability commences on the date of the judgment of the trial court where no appeal is taken. If an appeal is taken, the date

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on which the judgment of conviction is finally sustained on appeal marks the beginning of disability.

However, for persons whose judgments of conviction were entered on or before the effective date of the 1984 amendments and were pending appeal or subject to a right of appeal on that date, special provision is made for the commencement of disability. Convicted persons who would have been prohibited from holding certain positions, except for the fact that their convictions were pending appeal or were subject to a right of appeal on October 12, 1984, are disqualified effective October 12, 1984, from service in those same positions for five (5) years following the date of judgment in the trial court or end of imprisonment. Violation of the statute by such persons continues to be punished as a misdemeanor. Disqualification of these particular persons and the accompanying escrow provision are the only 1984 amendments which apply to judgments of conviction entered on or before October 12, 1984. Comprehensive Crime Control Act, §804.

The length of disability may be a maximum of five (5) years after the commencement of the disability where no imprisonment results from conviction. Where imprisonment is imposed as a result of conviction, the length of disability will include the period of imprisonment served after the commencement of the disability and an additional five years after the end of such imprisonment. Imprisonment which results from the revocation of a probated sentence or revocation of parole from the original sentence extends the period of disability from the end of such imprisonment. See Matter of L.J. Graham, U.S. Board of Parole, Application L-19, February 12, 1965.

"Imprisonment" has been judicially construed to include the period of parole following conviction and custodial confinement. By looking to both federal and state construction of "imprisonment," the Third Circuit has held that a union business agent was not entitled to hold office and draw back pay where less than five years had elapsed since the agent was relieved of the conditions of state parole. See Serio v. Liss, supra.

The United States Parole Commission, which Congress has vested with the power to grant exemptions from the statute's prohibition, however, takes the position that "imprisonment" refers only to the period of actual confinement and that the disability commences upon release from confinement whether or not such release is accompanied by parole. Matter of John Milton Nolan, U.S. Board of Parole, Application L-18, April 26, 1965. While acknowledging that cases relating to the parole statutes have treated parole as an "extension of the prison walls," a majority of the Board pointed to remarks by the Congressional sponsors of the Act who had

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discussed the five-year period in terms of release from prison and to the absence of any Congressional intent to treat parolees differently from probationers. Matter of Nolan, supra.

9-138.152 Conviction after October 12, 1984

For judgments of conviction entered after October 12, 1984, the resulting disability commences on the date of the judgment of the trial court and may continue for a maximum of thirteen (13) years after the latest date listed below:

A. Date of the judgment of the trial court if no imprisonment results, whether or not there is an appeal;

B. Last date of imprisonment on the original sentence; or

C. Last date of imprisonment where the imprisonment results from revocation of the probated sentence or revocation of parole. See Matter of L.J. Graham, United States Board of Parole, Application L-19, February 12, 1965.

A 1984 amendment of 29 U.S.C. §504 expressly provides with respect to convictions after October 12, 1984, that a period of parole is not considered a part of a period of imprisonment. 29 U.S.C. §504(c)(2). This provision is in accord with Department of Justice policy with respect to convictions on or before October 12, 1984, supra.

With respect to disqualification resulting from judgments of conviction entered after October 12, 1984, the convicted person may petition the state or federal sentencing court for a reduction of the maximum thirteen (13) year period of disability which is imposed on the date judgment is entered in the trial court. In no event may the court reduce the period of disqualification to less than three (3) years. See discussion at USAM 9-138.310. In the event a person's conviction is reversed on appeal, the disability which became effective as a result of the conviction no longer applies and the person is no longer barred from assuming the positions from which he/she was previously disqualified as a result of the conviction.

9-138.160 Removal of Prohibition

The prohibitions of both 29 U.S.C. §§504 and 1111 may be lifted prior to expiration of the period of disability if the convicted person's

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citizenship rights, having been revoked as a result of the disqualifying conviction, have been fully restored or the convicted person has obtained an exemption from the disability in order to serve in a prohibited capacity.

9-138.161 Restoration of Rights Lost by State Crimes

Most of the states have provided for the loss of certain state civil rights and privileges such as those pertaining to voting, holding of state office and professional licenses, etc. Most states have also provided for the restoration of these lost "citizenship rights" either by virtue of a pardon (by a governor or other pardoning authority) or by operation of the so-called automatic restoration statutes upon the occurrence of specified conditions (e.g., discharge from probation). The diversity of the manner of restoration and the time periods after which restoration can occur were considered by Congress during its debate of the Act. CONG. REC. S10981-5 (daily ed., June 12, 1958). There is little doubt that Congress intended that state restoration procedures, however diverse, should control 29 U.S.C. §504 with respect to those citizenship rights which a state itself had taken away by virtue of conviction in that state.

One federal court found that a certificate of relief from civil disabilities issued by a state court to a union officer at the time of the officer's sentencing after conviction in state court for conspiracy to commit labor bribery did not operate to remove the 29 U.S.C. §504 prohibition. The court reasoned that because the certificate did not fully restore all of the defendants' citizenship rights, the 29 U.S.C. §504 bar could not be lifted. See 29 U.S.C. §504(a)(A). The court also found that the state certificate was not consistent with the scheme of relief under 29 U.S.C. §504(a)(B) in that the state certificate was intended to serve as an aid to rehabilitation and, under 29 U.S.C. §504(a)(B), the United States Parole Board must make a conclusive finding that the defendant has been rehabilitated before lifting the disability. See Nass v. Local 348, Warehouse Production, Sales and Services Employees, 503 F. Supp. 217 (E.D. N.Y. 1980), aff'd without opinion, 657 F.2d 264 (2d Cir. 1981).

9-138.162 Restoration of Rights Lost by Federal Crimes

With respect to convictions for federal crimes, however, it can be said that Congress intended that a person may be relieved of the 29 U.S.C. §504 disability only by way of presidential pardon, or a Certificate of Exemption issued by the United States Board of Parole. Accordingly, a

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Florida resident convicted in a federal district court, for example, may not argue for purposes of 29 U.S.C. §504 that his/her citizenship rights have been fully restored merely because a Florida statute has operated to restore the lost state civil rights. This is so even though a Florida statute had previously operated to take away those state civil rights by virtue of the federal conviction. The reasoning is twofold.

First, although a federal conviction does not carry with it any broad revocation of federal citizenship rights in general, Congress has enacted several statutes which remove certain federal rights or privileges upon conviction for specified offenses. For example, convicted felons may not possess certain firearms (18 U.S.C. §925), or serve on a federal jury (28 U.S.C. §1861), or hold federal offices (see list at DeVeau v. Braisted, supra, at 363 U.S. 159). A state may not "fully restore" these lost federal citizenship rights which the state has not taken away. Viverito v. Levi, 395 F. Supp. 47, 48 (N.D. Ill. 1975) (holding that an employee of a welfare benefit plan who had been convicted in federal court of conspiracy and embezzlement was not restored to all citizenship rights lost by reason of the federal conviction by operation of an Illinois probation statute). Second, Congress may not be deemed by its enactment of 29 U.S.C. §504 to have delegated to the several states the Presidential power to pardon for federal crimes. See In re Pocchiaro, 49 F. Supp. 37 (W.D. N.Y. 1943); United States v. Donofrio, 450 F.2d 1054 (5th Cir. 1971), rev'd. on other grounds, 450 F.2d 1056 (5th Cir. 1972).

9-138.163 Certification of Exemption

The disqualification imposed by 29 U.S.C. §504 may be lifted prior to expiration of the period of disability if the United States Parole Commission determines, after an administrative hearing, that the convicted person's service in a particular prohibited capacity is not contrary to the purposes of the Labor Management Reporting and Disclosure Act. See 29 U.S.C. §§401 and 504(a)(B); 29 C.F.R. Part 4. Effective November 1, 1986, the Parole Commission's responsibilities with respect to applications for exemption are transferred to the courts as part of sentencing reforms contained in the Comprehensive Crime Control Act of 1984. See USAM 9-138.410 et seq.

9-138.170 Permitting Service in Violation of 29 U.S.C. §504

A. With respect to disqualified persons convicted on or before October 12, 1984, no labor organization or any officer of such organization shall knowingly permit any person to assume or hold any

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office or "paid" position prohibited under 29 U.S.C. §504. Individual officers are therefore subject to imprisonment and fine for permitting others to serve in violation of 29 U.S.C. §504.

Superior officers at higher levels of organization in a labor union are subject to prosecution along with officers of the prohibited person's own "labor organization," i.e., local, district or state council, regional conference, or international (national) organization. See 29 U.S.C. §402(i). Generally the international president is made responsible for the conduct of affairs at subordinate levels of organization by the international organization's constitution and bylaws. Accordingly, both the international president and the immediate superior officer of the prohibited person are notified of their responsibilities under 29 U.S.C. §504. See USAM 9-138.030.

B. With respect to disqualified persons convicted after October 12, 1984, no person shall knowingly hire, retain, employ, or otherwise place any other person to serve in any capacity in violation of 29 U.S.C. §504(a). The 1984 amendment continues the duty of labor organizations and their responsible agents from permitting service by convicted persons while also expressly imposing the same duty on employer associations, corporations, and labor consulting firms and the responsible agents of such organizations. The term "person" is broadly defined to include all such entities. 29 U.S.C. §402(d). The 1984 amendment also makes clear that permitting prohibited service is not confined to service in "offices and paid positions," as under prior law, but extends to service in all prohibited capacities.

9-138.180 Intent

29 U.S.C. §504(b) requires for criminal prosecution that a convicted person willfully serve in a prohibited capacity. Organizations and individuals are responsible for willfully and knowingly permitting a disqualified person from serving in a prohibited capacity. See USAM 9-138.170, supra. Although no cases interpreting the scope of a willful or knowing violation have arisen in connection with 29 U.S.C. §504, it is suggested that willful prohibited service may be established by proof of the following.

A. Notification of the statutory provisions and consequent penalties on the record at the time of sentencing with respect to those already holding or likely to hold prohibited employments in the future.

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B. Service of written notice of the statutory provisions over the signature of the Assistant Attorney General. See USAM 9-138.030.

C. Notification given by the investigating agent, compliance officer, or prosecuting Assistant U.S. Attorney.

The procedure which has been used by the Criminal Division to provide an individual with the opportunity to vacate his/her prohibited position prior to prosecution for willful service has been alluded to by the court in Presser v. Brennan, 389 F. Supp. 808, 816 (N.D. Ohio 1975). As noted, both the international president and the immediate superior officer of the disqualified individual are also given notice.

9-138.200 MECHANICS OF 29 U.S.C. §1111

9-138.210 Prohibited Capacities Specified

An employee benefit plan is statutorily defined to include welfare or pension benefit plans or plans which are both types of plans. 29 U.S.C. §1002 (1-3). These include plans established by an employer alone, or by both employers and employee organizations jointly, and even if these plans existed prior to January 1, 1975, and the effective date of Employee Retirement Income Security Act of 1974. See USAM 9-135.000 for coverage and exclusions from coverage.

The convicted individual may not serve in any of the following capacities in any employee benefit plan:

- A. Administrator. See 9 U.S.C. §1002(16).
- B. Fiduciary. See 29 U.S.C. §1002(21).
- C. Officer.
- D. Trustee.
- E. Custodian.
- F. Counsel.
- G. Agent.

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The terms officer, trustee, custodian, counsel and agent are not statutorily defined by ERISA. The designation of these officers appears to have been taken from the class of benefit plan officials who are prohibited from engaging in transactions outlawed by 18 U.S.C. §1954. 18 U.S.C. §1954 in turn applied to plans covered previously by the Welfare Pension Plan Disclosure Act of 1962 (29 U.S.C. §301 *et seq.*) whose provisions ERISA replaces. Accordingly, resort may be had to those judicial interpretations of the scope of these offices under WPPDA and 29 U.S.C. §1954. See, e.g., United States v. Russo, 422 F.2d 498, 502 (2d Cir. 1971), cert. denied, 404 U.S. 1023; United States v. Marroso, 250 F. Supp. 27 (E.D. Mich. 1966). In any event it is anticipated that the problem of determining into which of these prohibited capacities a convicted individual may fall, apart from the plan's designation of him/her as such, may be practically resolved by resort to the Act's broad definition of fiduciary as one having any discretionary authority with respect to the management of plan assets, or the general administration of the plan, or one who has authority to render investment advice. See 29 U.S.C. §1002(21).

H. Employee of an employee benefit plan.

I. Representative in any capacity of any employee benefit plan:

This category of prohibited service applies only to persons disqualified by judgments of conviction entered after October 12, 1984. The term clearly denotes prohibition against service by convicted persons who operate as implied as well as express agents of the plan.

J. Consultant (or adviser) to an employee benefit plan.

Both the convicted individual and organizational entity are prohibited from serving as a consultant to any employee benefit plan. "Consultant" is expressly defined as any person who, for compensation, advises or represents a plan or who provides other assistance to a plan concerning the plan's establishment or operation. 29 U.S.C. §1111(c)(2). "Person" is defined to include individuals and organizational entities at 29 U.S.C. 1002(9). Therefore, the addition to subsection (a)(2), as part of the 1984 amendments, of the phrase "including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan" appears to only support the scope of this prohibited capacity under prior law.

The 1984 amendment's addition of the "adviser" to a benefit plan as a separate prohibited capacity apart from the category of a compensated "consultant" implies that convicted persons are disqualified from serving

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as consultant-advisers even on a non-compensated, volunteer basis. The Senate Labor Committee's report explains that convicted persons had been hired as consultants and advisors to "the very plan in which they were disqualified from holding a position." The individuals were then moved back into positions of power within the plan once the disqualification period ended. S. Rep. No. 98-83 on S. 336, 98th Cong., 1st Sess. 14 (1983).

K. Any capacity that involves decision making authority or custody or control of moneys, funds, assets, or property of an employee benefit plan.

This comprehensive category of prohibited service applies only to persons disqualified by judgments of conviction entered after October 12, 1984.

9-138.220 Disabling Crimes

No individual may serve in the capacities set forth in USAM 9-138.210, if convicted of the following substantive crimes, conspiracy to commit such crimes, attempts to commit such crimes, or any crime in which any of the foregoing is an element.

The legislative history indicates that Congress modeled 29 U.S.C. §1111 on 29 U.S.C. §504, but deliberately expanded the list of crimes included in 29 U.S.C. §504 to assure adequate protection to participants and beneficiaries. S. Rep. No. 93-127, 93rd Cong., 2d Sess. 3, reprinted in 1974 U.S. CODE & AD. NEWS 4870. 29 U.S.C. §1111 generally expands the scope of prohibited offenses to include (1) attempts and (2) crimes in which the specified crimes are an element similar to the judicial construction placed on 29 U.S.C. §504 by Postma v. Int'l Bro. of Teamsters, supra. The Congressional sponsors of ERISA appear to have emphasized the need for even greater protection for benefit plans than that afforded to labor organizations "because of the large funds involved and the attendant great risk of loss affecting a large number of persons." S. Rep. No. 93-127, supra. Accordingly, the courts will undoubtedly continue to liberally construe the scope of specified crimes to effect the statute's remedial purpose.

A. 29 U.S.C. §1111 carries over most of the substantive crimes specified in 29 U.S.C. §504: robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, murder, rape, assault with intent to kill. Assault which inflicts grievous bodily injury, however, has been omitted from 29 U.S.C. §1111. Additional substantive crimes included are listed below.

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B. Fraud may present one of the broadest classes of prohibiting crimes in that many federal crimes require proof of an intent to defraud or a scheme or artifice to defraud. See, e.g., 18 U.S.C. §§471 and 472 (making and uttering forged securities of the United States); 18 U.S.C. §2314 (interstate travel to defraud and transportation of forged transportation of forged securities). Fraud in its common law meaning also covered forgery, the crime of uttering, and all manner of cheats.

C. A felony violation of federal or state law involving substances defined in 21 U.S.C. §802(6). 29 U.S.C. §1111, unlike U.S.C. §504, disqualifies those convicted in connection with all the federally controlled substances as scheduled in 21 U.S.C. §812 and is not limited to narcotic drug violations.

D. Kidnapping.

E. Perjury.

F. Crimes described in 15 U.S.C. §80a-9(a)(1). This category specifically disqualifies any persons who within the past ten years has been convicted of a crime involving the purchase or sale of a security or arising from such person's conduct as a broker, dealer, investment advisor, etc., and who is therefore also prohibited from serving with investment companies.

G. Any criminal violation of ERISA. See USAM 9-135.000. While misdemeanor reporting and record-keeping violations under ERISA (after January 1, 1975) are covered offenses, misdemeanor reporting and record-keeping offenses under the Welfare Pension Plans Disclosure Act (29 U.S.C. 308(a)) prior to January 1, 1975, are not prohibiting crimes under 29 U.S.C. §1111. A felony conviction for falsified reports and records relating to benefit plans under 18 U.S.C. §1027 is covered even though it occurred prior to January 1975.

H. A violation of any subsection of 29 U.S.C. §186. Unlike 29 U.S.C. §504, 29 U.S.C. §1111 is not limited to a 29 U.S.C. §186(a)(4) "bribery." See Chain Service Restaurant, supra.

I. 18 U.S.C. Chapter 63, §§1341-1343: Mail and wire frauds.

J. 18 U.S.C. §874: Kickbacks from employees at federal public works.

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K. 18 U.S.C. §1027: Falsified benefit plan reports and records. See USAM 9-136.200 et seq.

L. 18 U.S.C. §1503: Obstruction of justice in connection with a juror or federal court officer.

M. 18 U.S.C. §1505: Obstruction of proceeding before federal agencies and Congressional committees.

N. 18 U.S.C. §1506: Theft or alteration of federal court records; false bail.

O. 18 U.S.C. §1510: Obstruction of federal criminal investigations.

P. 18 U.S.C. §§1512-1513; 1515: Conviction for tampering with or retaliating against a witness, victim, or an informant under 18 U.S.C. §§1512 and 1513 after October 12, 1982, may result in disqualification under 29 U.S.C. §1111 if the underlying conduct required for conviction is equivalent or functionally identical to conduct which was formerly required for conviction in such cases under the obstruction of justice crimes, supra, which are listed in 29 U.S.C. §1111. See Berman v. Teamsters Local 107, 237 F. Supp. 767 (E.D. Pa. 1964) and Illario v. Frawley, 426 F. Supp. 1132 (D. N.J. 1977).

Q. 18 U.S.C. §1951: See USAM 9-131.000.

R. 18 U.S.C. §1954: See USAM 9-134.000.

S. Any criminal conviction under LMRDA: 29 U.S.C. §§439, 461, 463, 501(c), 502, 503, 504, 522, 530. See USAM 9-136.000, 9-136.960, 9-136.300, 9-136.961, 9-136.962, 9-136.810, 9-136.700 respectively.

T. Any felony involving abuse or misuse of a position in a labor union or employee benefit plan. For judgments of conviction entered after October 12, 1984, a new ground for disqualification was added to 29 U.S. §§504 and 1111. See discussion at USAM 9-138.120, supra.

9-138.230 Constitutionality of Establishing Disability

See USAM 9-138.130, supra.

9-138.240 Disability of "Conviction"

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See USAM 9-138.140, supra.

9-138.250 Commencement and Length of Disability Resulting from Conviction

The terms "conviction" and "convicted" are defined in the same manner as under 29 U.S.C. §504. See USAM 9-138.140, supra. The commencement and duration of the disability under 29 U.S.C. §1111 is governed by provisions which are identical to those under 29 U.S.C. §504 in regard to judgments of conviction entered before and after October 12, 1984. See 9-138.151 and 9-138.152, supra.

9-138.260 Removal of Prohibition

9-138.261 Certification of Exemption

The disqualification imposed by 29 U.S.C. §1111 may be lifted prior to expiration of the period of disability if the United States Parole Commission determines, after an administrative hearing, that the convicted person's service in a particular prohibited capacity is not contrary to the purposes of Title I of the Employee Retirement Income Security Act. See 29 U.S.C. §1111(a)(B); 29 C.F.R. Part 4. Effective November 1, 1986, the Parole Commission's responsibilities with respect to applications for exemption are transferred to the courts as part of sentencing reforms contained in the Comprehensive Crime Control Act of 1984. See USAM 9-138.410 et seq.

9-138.262 Restoration of Rights Lost by Conviction

Relief by full restoration of lost citizenship rights is treated in the same manner as under 29 U.S.C. §504. See USAM 9-138.160, 9-138.161, 9-138.162, supra.

9-138.270 Permitting Service in Violation of 29 U.S.C. §1111

No person, which includes corporate and collective entities, 29 U.S.C. §1002(9), may knowingly permit any other person to serve in any of the above prohibited capacities. As part of the 1984 amendments of 29 U.S.C. §1111, the term "permit" was replaced by the words "hire, retain, employ, otherwise place" without any apparent change in meaning.

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9-138.280 Intent

A person who intentionally serves, and persons who intentionally and knowingly permit such person to serve, in a prohibited position are subject to criminal penalties under 29 U.S.C. §1111(b). No decision has yet arisen which specifically interprets these elements of intent. Reference to Departmental procedures for notice of disqualification was made with respect to this issue in Preser v. Brennan, supra, 389 F. Supp. at 816.

In the case of benefit plans, Departmental procedures call for notice to the prohibited individual and to the plan administrator and/or plan trustee who are usually responsible for the individual's service.

9-138.300 REDUCTION

9-138.310 Proceedings for Reduction of Thirteen-Year Period of Disability Resulting from Convictions after October 12, 1984.

In regard to disqualification which results from judgments of conviction entered by the trial court after October 12, 1984, a new means of relief from the disability became available under both 29 U.S.C. §§504 and 1111. A convicted person may apply to the federal or state sentencing court for a reduction of the thirteen-year disability period, which is imposed from the date of judgment by operation of the statutes. The court cannot reduce the disability period to less than three years.

Considerations of due process may require that the disqualified person be allowed to apply for such a reduction at any time during the period of disqualification, particularly where a person is convicted of a disabling offense prior to the commencement of service in a prohibited capacity and without notice of the disability. If the provision were construed to confine the application for reduction to the date on which sentence was imposed, undue advantage would be given to the person who is convicted while holding office and who is therefore more likely to be aware of the effect of conviction.

This construction of the reduction provision is also consistent with the primary means of relief under existing law which permits the disqualified person to apply to the United States Parole Commission at any time during the period of disqualification for an administrative exemption from disability. Moreover, once the Parole Commission's responsibilities

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with respect to applications for exemption are transferred to the sentencing courts on November 1, 1986 (see USAM 9-138.410 et seq.) a petition for reduction of disability to a period which is less than or equal to the period transpired since conviction will be substantially the same request for relief as an application for exemption from disabilities.

Accordingly, treatment of a request for reduction of the length of disability on the same basis afforded applicants for exemption facilitates the assertion that the convicted person bears a similar, if not identical, burden in applying either for reduction or exemption, namely, that he or she has already been substantially rehabilitated at the time of the application and therefore can be trusted to not endanger the organization in which he or she seeks a position. See also Nass v. Local 348, Warehouse Production Employees Union, 503 F. Supp. 217, 220 (E.D. N.Y. 1980) aff'd without opinion, 657 F.2d 264 (2d Cir. 1981), holding that relief from disability by restoration of lost citizenship rights under state law is measured by the same standard by which an exemption application is adjudged.

9-138.400 EXEMPTION

9-138.410 Proceedings for Exemption Before the U.S. Parole Commission

Both 29 U.S.C. §§504 and 1111 provide that any person otherwise prohibited from holding certain positions may apply to the Parole Commission for a determination that such person's service in such position would not be contrary to the purposes of (1) LMRDA (29 U.S.C. §401 et seq.) in the case of 29 U.S.C. §504 or (2) ERISA (29 U.S.C. §1001 et seq.) in the case of 29 U.S.C. §1111 employments. Prior to issuing or denying the application a Certificate of Exemption, the Board is required to hold a hearing in accordance with the Administrative Procedure Act (5 U.S.C. §§556-557). Notice of these proceedings for the purpose of appearance must be given to the state, county, or federal prosecutive officials in the jurisdiction where the applicant was convicted. The substantive determination of the Board is expressly made final by both statutes and is not appealable.

9-138.411 Continued Service Pending a Board Determination

The Departmental position in respect to persons holding a prohibited position under either 29 U.S.C. §§504 or 1111 is that these persons must

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vacate their prohibited positions as soon as practical following the obtaining of knowledge of the disqualification. They are not entitled to continue to occupy the prohibited position pending an exemption determination by the Parole Board.

This position is supported with respect to 29 U.S.C. §1111 by Presser v. Brennan, supra, where it was held that a trustee's continued service with a benefit plan, pending the Board's determination, would be inconsistent with the intention of 29 U.S.C. §1111. Due process required no predisqualification hearing for individuals. Id. 389 F. Supp. at 814-815, n.4. (Presser also held that the retroactive application of 29 U.S.C. §1111 to convictions sustained prior to the passage of ERISA did not violate any due process right of a plan trustee. Id.) Compare, Greenberg v. Brennan, Civ. No. 74-1822 (E.D. N.Y. March 20, 1975) where it was held that a full-time auditor for a benefit plan could not be required to vacate his position prior to the Parole Board's hearing where a contemplated 6-9 month delay in obtaining a hearing would deny the applicant employee procedural due process in the application of 29 U.S.C. §1111.

With respect to corporations and partnerships, however, the court in Presser noted that 29 U.S.C. §1111 expressly provides for continued service by such entities with a benefit plan until the Parole Board has determined such service would be inconsistent with the intention of 29 U.S.C. §1111. This is not to say, however, that an individual who acts as a consultant to a benefit plan, as part of his/her firm's service as a consultant, for example, may not be immediately compelled to terminate his/her individual services for such plan.

9-138.412 Parole Board Regulations

The rules and regulations of the Board governing exemption applications are set out at 28 C.F.R. §§4.1-4.17 (as amended, 41 Fed. Reg. 3853, January 27, 1976) for 29 U.S.C. §504 and 28 C.F.R. §§4a.1-4.17 (as amended, supra) for 29 U.S.C. §1111. Primary responsibility for appearing at the hearing, offering evidence, taking exceptions to any hearing examiner's findings, and presenting supplemental argument before the Board rests with the Solicitor of Labor. See 28 C.F.R. §§4.11, 4a.11, 4.14, 4a.14.

In the case of federal convictions, the prosecuting attorney or other representative of the U.S. Attorney's office which prosecuted the applicant are permitted to appear and participate. Where this is not feasible, the prosecuting office may appear through the Labor Unit,

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Organized Crime and Racketeering Section, as its representative. In some cases, the U.S. Attorney or prosecuting attorney, upon coordination with the Government Regulations and Labor Section, may offer his/her reasons why the applicant should be granted or denied an exemption by affidavit.

Factor used by the Board in deciding whether an applicant is entitled to an exemption include:

- A. The character and gravity of the disqualifying offenses;
- B. The nature of the position for which the exemption is sought;
- C. The extent to which the applicant has rehabilitated himself/herself by conduct subsequent to his/her disqualifying acts. See Matter of Meyer Kleinberg, United States Board of Parole, Application P-6, (June, 1975) and cases cited therein. The applicant has the burden of proof and the standard is higher than that set for release on parole.

Under the amended regulations, the Board may specify a time in which deficiencies in the application must be remedied. Failure to do so in the prescribed time will result in the application being deemed withdrawn. See 28 C.F.R. §§4.6, 4a.6. A withdrawal, like a full denial of the exemption, precludes the applicant from making an application again within the following year. See 28 C.F.R. §§4.16, 4a.16.

9-138.420 Proceedings for Exemption Before the Sentencing Court after November 1, 1986

Effective November 1, 1986, the forum in which to apply for an exemption from disability under 29 U.S.C. §§504 and 1111 is changed from the United States Parole Commission to the state or federal sentencing court. The effect of the transfer is to give the sentencing court jurisdiction to hear applications for both reduction of the thirteen-year disqualification period which arises from convictions occurring after October 12, 1984 (see USAM 9-138.310, supra) and exemption from any 29 U.S.C. §§504 or 1111 disability for service in a prohibited capacity.

Exemption applications are to be entertained by the "sentencing judge" in the case of federal convictions and, on motion of the Justice Department, the federal court in the district where a state or local offense which resulted in the disabling conviction was committed. There is no similar removal provisions for reduction proceedings in the case of disqualifying state convictions; they are confined to the "sentencing court." However, the removal of exemption proceedings to federal district

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court is exercised at the discretion of the Justice Department. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Chapter II, §§229, 230 and 235. Accordingly, consultation with the supervisory section of the Criminal Division is encouraged in such cases. See USAM 9-138.020, supra.

9-138.500 CIVIL ACTIONS

A civil action to remove a fiduciary of an employee benefit plan for violation of 29 U.S.C. §1111 may be brought by the United States Department of Labor, or by a benefit plan participant, beneficiary or fiduciary. See 29 U.S.C. §§1109(a) and 1132(a)(2). Civil actions litigated by the Department of Labor are subject to the direction and control of the Civil Division, U.S. Department of Justice. See 29 U.S.C. §1132(j).

Civil actions against the Department of Justice for declaratory judgment, injunction, etc. with respect to 29 U.S.C. §§504 and 1111 are coordinated with the Labor Unit of the Organized Crime and Racketeering Section, Criminal Division.

9-138.600 ALTERNATIVE RELIEF TO U.S.C. §504 AND 29 U.S.C. §1111

A significant practical application of 29 U.S.C. §504 occurred in connection with the prosecution in United States v. Scaccia, 514 F. Supp. 1353 (N.D. N.Y. 1981) where a union business manager was convicted in 1975 for embezzlement and was imprisoned for two months and placed on probation for 58 months. One of the conditions of probation was to "refrain from violation of any law." Subsequent investigation determined that the defendant was performing the duties of union business manager in violation of 29 U.S.C. §504. Rather than pursuing prosecution under 29 U.S.C. §504, probation was revoked upon a finding that the probationer's violation of 29 U.S.C. §504 was a violation of the above probation condition.

There is also authority for imposing specific conditions of probation that an individual not hold union office. United States v. Barraso, 372 F.2d 136 (3d Cir. 1967); Berra v. United States, 221 F.2d 590 (8th Cir. 1955), aff'd on other grounds, 351 U.S. 131 (1956) (pre-29 U.S.C. §504 case).

Removal from union office also has been effected under the RICO forfeiture statute. See 18 U.S.C. §1963; United States v. Rubin, 559 F.2d 975, 990-993 (5th Cir. 1977).

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9-138.700 RECEIPT OF SALARY PENDING APPEAL

Although disqualification resulting from judgments of conviction entered after October 12, 1984, takes effect on the date of judgment in the trial court and continues throughout the pendency of any appeal, certain convicted persons may be entitled to receive salary while the conviction is on appeal. A convicted person who has been disqualified from office or other position in a labor organization or in an employee benefit plan and who has "filed an appeal" from the disabling conviction is entitled to have any salary he or she would have earned, but for the disqualification, placed in escrow for the duration of the appeal or the period of time during which such salary would be due, whichever is shorter. Reversal of the disabling conviction would permit payment of the escrow monies to the formerly disqualified person. 29 U.S.C. §§504(d) and 1111(d), as amended.

The Senate Labor Committee's report specifies that the escrow provision is intended to apply only to the unexpired term of office or position which the disqualified person holds at the time of conviction. The report also states that if the convicted person seeks to gain elective office in a labor union during the pendency of his/her appeal and is prohibited from service by the disability, compensation may not be made and no salary may be placed in escrow. S. Rep. No. 98-83 on S. 336, 98th Cong., 1st Sess. 15-16 (1983). Moreover, although the statute provides that the payment of salary into escrow "shall continue" during the period of appeal or period for which "salary would be otherwise due," nothing in the statute expressly precludes a labor organization or employee benefit plan from terminating the convicted person's prohibited employment or lawfully removing the convicted individual from a prohibited office independently from the statutory disqualification. Under such circumstances, salary would not be "otherwise due" and required to be placed into escrow.

It should be noted that the escrow provision and the legislative discussion of that measure omit any reference to prohibited offices and positions listed in 29 U.S.C. §§504 and 1111 other than those "in labor organizations" and "in employee benefit plans." Preservation of "salary" in anticipation of ultimate exoneration on appeal does not appear to be available to convicted persons who are disqualified while holding positions in all other prohibited categories, for example, employer association and corporate labor relations personnel, labor relations consultants, and employee benefit plan consultants. Presumably the intention of Congress is that such employer personnel can be shifted to

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other responsibilities in their organizations and that independently contracted persons have other sources of income unlike the union officer or benefit plan employee.

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9-139.000 MISCELLANEOUS LABOR STATUTES

9-139.100 45 U.S.C. §151, ET SEQ. - THE RAILWAY LABOR ACT (RLA)

The RLA provides in 45 U.S.C. §152, Tenth, that:

It shall be the duty of any United States Attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

The RLA provides in 45 U.S.C. §152, Tenth, for prosecution to insure the enforcement of the Act. In addition to conferring specific authority on the United States Attorney for enforcing the RLA by criminal prosecution, the reference to "all necessary proceedings for the enforcement of" that section has been interpreted to give the United States standing to bring civil proceedings to enjoin violations of the Act. Florida East Coast Ry. Co. v. United States, 348 F.2d 682, 685 (5th Cir. 1965), aff'd sub. nom., Railway Clerks v. Florida East Coast Ry. Co., 384 U.S. 238, 242 n.4 (1966). However, as one court noted: "This provision cannot be construed as burdening the Department of Justice with the duty of representing every employee, or group of employees, who may assert rights under the Act." Cepero v. Pan American Airways, 195 F.2d 453, 459 (1st Cir. 1952), cert. denied, 359 U.S. 1005 (1959). If it is determined that a matter merits civil enforcement under 45 U.S.C. §152, Tenth, the Civil Division should be contacted before any action is taken.

9-139.101 Investigative Jurisdiction

Where criminal violations of the RLA are suspected, investigative jurisdiction rests with the Federal Bureau of Investigation.

9-139.102 Supervisory Jurisdiction

Supervisory jurisdiction concerning criminal enforcement of the RLA rests in the Labor Unit of the Organized Crime and Racketeering Section.

Supervisory jurisdiction concerning civil enforcement under the RLA rests in the Civil Division of this Department.

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9-139.103 Authorization for Criminal Prosecution

As a matter of policy, prosecutions as well as requests for investigation concerning violations of 45 U.S.C. §152, Tenth should be declined unless they contain allegations of egregious carrier interference with employee rights tantamount to actual or threatened violence, or involve prohibited payments to employee representatives. This policy is instituted primarily as a result of United States v. Winston, 558 F.2d 105 (2d Cir. 1977), wherein the Second Circuit reversed a conviction under 45 U.S.C. §152, Tenth.

In Winston, defendants, owners and operators of a small airline charter service, were charged with conspiracy to violate the Railway Labor Act by conduct which would have been at most an unfair labor practice in an industry other than the railway or airline industries under federal law. Accordingly, under this prosecution policy, the mere commission of an unfair labor practice is insufficient to justify criminal prosecution under the Railway Labor Act, absent the presence of one or more of the aggravating factors described above.

This policy change has the effect of treating the parties to airline and railway labor disputes for purposes of criminal prosecution in the same manner as parties in labor disputes in other federally regulated industries.

This policy does not apply to civil litigation under 45 U.S.C. 152, Tenth as supervised by the Civil Division.

9-139.104 Declinations of Criminal Prosecution

In declining prosecution with respect to complaints alleging violations of 45 U.S.C. §152, Tenth, it may be appropriate to advise the complainant that redress may be available to him through private civil litigation. Alleged violations of the RLA have generally been litigated by either labor organizations on behalf of their members, see, Virginia Ry. Co. v. System Federation No. 40, 84 F.2d 641 (4th Cir. 1936), aff'd 300 U.S. 515 (1937); Texas and N.O.R.R. Co. v. Railway Clerks, 33 F.2d 13 (5th Cir. 1929), aff'd 281 U.S. 548 (1929); contra, I.A.M. Lodge 2201 v. Air Indies Corp., 73 Lab. Cas. 14,467, 86 L.R.R.M. 2076 (D. P.R. 1973); or by the employees themselves as private individuals. See, Brady v. TWA, Inc., 223 F. Supp. 361, 365 (D. Del. 1963), aff'd 401 F.2d 87, cert. denied, 393 U.S. 1048; Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1970); Griffin v. Piedmont Aviation, Inc., 384 F. Supp. 1070 (N.D. Ga. 1974).

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9-139.120 Applicability of RLA

Neither the National Labor Relations Act (NLRA) nor its amendments under the Labor Management Relations Act of 1947 (Taft-Hartley) (29 U.S.C. §§141-188) apply to employers and individuals employed by employers subject to the RLA. See 29 U.S.C. §§152(2)(3), 182; Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co., 105 F. Supp. 794 (D. Minn. 1952), aff'd in part and vacated in part on other grounds, 215 F.2d 126; Bruno v. Northeast Airlines, Inc., 229 F. Supp. 716 (D. Mass. 1964). The rights and duties involved in the relationship between such an employer and his employees are solely governed by the provisions of the RLA.

9-139.130 "Carrier"

Criminal sanctions under the Act apply only to carriers, their officers and/or agents. 45 U.S.C. §151, First, defines the term "carrier" as including railroads, express companies and sleeping car companies subject to the Interstate Commerce Act (ICA) (49 U.S.C. §1, et seq.) and any subordinate support facilities of any railroad company. See also 29 C.F.R. §1201.1. 45 U.S.C. §151 makes certain exclusions from the definition of "carrier," i.e., interurban electric railways and railways used exclusively in the mining of coal.

The ICC is given the authority in 45 U.S.C. §151, First, to determine and certify to the National Mediation Board (NMB) whether a particular transportation facility is a "carrier" for purposes of the RLA. See also 29 C.F.R. §1201.2 and §1201.3.

The NMB accepts the decision of the ICC as long as it is based on subsequent evidence and is not arbitrary and capricious. See, e.g., Shields v. Utah, Idaho Cent. R. Co., 305 U.S. 177 (1938) (sets forth some of the factors the ICC considers in making its determination); Chicago, S.S. & S.B.R.R. v. Fleming, 109 F.2d 419 (7th Cir. 1940) (ICC may determine whether a railroad is subject to the RLA).

By virtue of 49 U.S.C. §1,(1) (2), neither the ICA nor the RLA apply to United States carriers who are located or perform transportation solely outside of the United States or its territories. Air Line Dispatchers Ass'n v. NMB, 189 F.2d 685 (D.C. Cir. 1951), cert. denied, 342 U.S. 849; Air Line Stewards & Stewardesses v. TWA, 173 F. Supp. 369 (S.D.N.Y. 1959), aff'd 273 F.2d 69, cert. denied, 362 U.S. 988. 49 U.S.C. §1, (2)(a) also makes it clear that wholly intrastate transportation facilities are excluded from the coverage of the ICA and the RLA.

Under 45 U.S.C. §§181, 151, 152, 154 and 163 are made applicable to carriers by air so long as they are either engaged in interstate or foreign commerce, or transporting United States mail.

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9-139.131 "Common Carrier"

As already noted, 45 U.S.C. §151, First, incorporates 49 U.S.C. §§1, et seq., (the Interstate Commerce Act) (ICA) by reference. The ICA defines "common carrier" subject to the Act as one engaged in transportation:

[F]rom one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the States.

This definition is essentially reiterated in the definition of "commerce" contained in 45 U.S.C. §151, Fourth.

By virtue of 49 U.S.C. §1, (1) (3), neither the ICA nor the RLA apply to United States carriers who are located or perform transportation solely outside of the United States or its territories. Air Line Dispatchers Ass'n. v. WMP, 189 F.2d 685 (D.C. Cir. 1951), cert. denied, 342 U.S. 849; Air Line Stewards & Stewardesses v. TWA, 173 F. Supp. 369 (S.D.N.Y. 1959), aff'd, 273 F.2d 69, cert. denied, 362 U.S. 988. 49 U.S.C. §1, par. (2)(a) also makes it clear that wholly intrastate transportation facilities are excluded from the coverage of the ICA and the RLA.

9-139.132 "Carrier By Air"

On April 10, 1936, the RLA was amended to include "carriers by air." See 45 U.S.C. §181. Under 45 U.S.C. §181, 45 U.S.C. §§151, 152, 154 and 163 are made applicable to carriers by air so long as they are either engaged in interstate or foreign commerce, or transporting United States mail for or under a contract with the United States government. 45 U.S.C. §182 specifically makes the definition of "carriers" in 45 U.S.C. §151, First, wholly applicable to air carriers. The primary effect of this is to bring any related support facilities and services of such air carriers within the coverage of the RLA. Note, the RLA does not apply to United States air carriers located in foreign countries entirely outside the United States and its territories. Air Line Dispatchers Ass'n. v. NMB, supra; see, Air Line Stewards & Stewardesses v. TWA, supra.

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9-139.133 "Employee"

To be covered by the RLA, employees must be in the service of a carrier and their work must bear a direct relationship to the transportation activities of the carrier. ILA v. North Carolina State Ports Authority, 370 F. Supp. 33 (E.D.N.C. 1974), aff'd 511 F.2d 1007; Pan Am v. United Brotherhood of Carpenters, 324 F.2d 217 (9th Cir. 1963), cert. denied, 376 U.S. 964.

Since the RLA does not apply to United States carriers located solely on foreign soil, it also does not apply to the employees of such carriers, Air Line Dispatchers Ass'n v. NMB, supra.

9-139.140 The Key Section of the RLA (45 U.S.C. §152)

45 U.S.C. §152, Third and Fourth, provide the most appropriate basis for criminal prosecution under the Act. 45 U.S.C. §152, Third, precludes the carrier from interfering in any way with its employees' choice of representative. Examples of interference which might be actionable when accompanied by violence (see USAM 9-139.103, infra) include:

A. Threats of reprisal by a carrier if an employee votes for a union;

B. Questioning by a carrier of employees concerning how they intend to vote;

C. Pretext discharges or disciplinary actions and/or solicitation/collection by a carrier of employees' election ballots.

45 U.S.C. §152, Fourth, prohibits any and all carrier interference with the rights of its employees generally to organize and select a collective bargaining representative. This provision is broader than 45 U.S.C. §152, Third, in that it applies to all organizational activity, even where there is no actual election pending or even available.

45 U.S.C. §152, Fourth, also proscribes the use of the funds of a carrier "in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining . . ." This subsection is the important counterpart of 29 U.S.C. §186 which covers similar type payments by employers not in the railroad and airline industry. However, unlike 29 U.S.C. §186(b), 45 U.S.C. §152, Fourth, does not make it a substantive offense for union or employee representatives to demand and/or accept such payments. Therefore, in order to prosecute this sort of conduct on the part of such a representative, resort must be had to the conspiracy or aiding and abetting

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statutes. See 18 U.S.C. §§371, 372. Note, there is a proviso to 45 U.S.C. §152, Fourth, which permits a carrier to furnish free transportation to its employees while engaged in the business of a labor organization. Although there is no case law on point, this proviso should be strictly construed as a narrow exception to the broad prohibition of section 45 U.S.C. §152, Fourth, discussed in the previous paragraph.

9-139.150 Criminal Provision and Sanction of the RLA (45 U.S.C. §152, Tenth)

45 U.S.C. §152, Tenth, makes any willful failure or refusal on the part of a carrier or its agents to comply with the provisions set forth in the Third, Fourth, Fifth, Seventh and Eighth paragraphs of 45 U.S.C. §152 a misdemeanor. Many actions on the part of a carrier which constitute criminal violations of the RLA would only be unfair labor practices if the NLRA, 29 U.S.C. §§152, et seq., were applicable. Under the NLRA such actions would only subject the employer to cease and desist orders and/or back pay awards.

Only two carriers have ever been indicted under the RLA. The first indictment, United States v. Taca Airways Agency, Inc., Cr. No. 24270 (E.D. La. 1952), resulted in a nolo contendere plea by the carrier and dismissal of the charges against two representatives of the carrier. The second case, United States v. Winston, 558 F.2d 105 (2nd Cir. 1977), involved a violation of §2 of the Act which makes it a criminal offense for a railroad or airline to influence its employees regarding employee representation or unionization. The convictions were dismissed because the requisite intent to violate the RLA was not established.

9-139.160 Intent

After United States v. Winston, 558 F.2d 105 (2nd Cir. 1977), the government is left with a high standard in proving criminal intent to violate the RLA. The Second Circuit held that more than mere knowledge of unlawful conduct was required to establish the defendant's intent. The court stated, "They must be found to have acted voluntarily and intentionally to violate a known legal duty." Id. at 109. The proper test of the defendants' conduct is whether the defendants would have taken the same action in the absence of the Act's restrictions. Id. at 110. The Winston case differs from other cases involving malum prohibitum offenses in which a "reckless disregard" standard has been applied to the "willfulness" element. See, United States v. Illinois Cent. R. Co., 303 U.S. 239, 242 (1938); United States v. Bishop, 412 U.S. 346 (1972); Korholz v. United States, 269 F.2d 897 (10th Cir. 1959).

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9-139.180 NMB Employees As Witnesses

In many instances criminal prosecutions under the RLA may require testimony from employees of the NMB who handled the particular representation dispute, etc., in behalf of the NMB. In order to preserve what it deems to be a neutral position between carriers and unions or employees, the NMB may be hesitant in some cases to allow its employees to testify or produce records in response to subpoenas. See 29 C.F.R. §1208.7 and IAM v. National Mediation Board, 425 F.2d 517 (D.C. Cir. 1970). Accordingly, where access is desired to NMB witnesses and records, coordination should be made through the Labor Unit of the Organized Crime and Racketeering Section.

9-139.200 29 U.S.C. §§201-219 - FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938 (FLSA) was the culmination of executive efforts to fashion a national policy directing the payment of a standard minimum wage with overtime compensation to employees engaged in interstate commerce or in the production of goods for interstate commerce. The FLSA also imposed restrictions on the use of child labor and required employers to maintain accurate records available for government inspection. The Fair Labor Standards Act represented the last piece of New Deal legislation, and, indeed, one of that era's most significant in economic effect and duration. Now in its fifth decade, the FLSA was expanded in its coverage of employees and wage provisions through four amendatory acts. Today, sixty percent of the nation's wage and salary workers are covered by the FLSA. The current provisions of the Fair Labor Standards Act are contained in 29 U.S.C. §§201-219.

The Fair Labor Standards Act (FLSA) provides a national minimum hourly wage (29 U.S.C. §206), mandatory overtime compensation (29 U.S.C. §207), and restrictions on the employment of minors (29 U.S.C. §212). The FLSA also requires employers to maintain accurate employee records in accordance with the Act's provisions (29 U.S.C. §211). To ensure employer compliance with these requirements, both civil and criminal sanctions were provided. 29 U.S.C. §215, lists the prohibited acts under the FLSA. 29 U.S.C. §216(a), provides a criminal misdemeanor penalty for violations of U.S.C. 29 U.S.C. §215. 29 U.S.C. §216(b) provides for an employer's civil liability to an employee for wage or overtime violations under 29 U.S.C. §215. Broad injunctive relief, to curtail any practice which would constitute a violation of the minimum wage, overtime, or record-keeping provisions of the FLSA, or to obtain affirmative, remedial action is available under 29 U.S.C. §217.

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9-139.201 Investigative Jurisdiction

Investigations or criminal cases arising under 29 U.S.C. §215 and §215(a) are conducted by the Wage and Hour Division of the Department of Labor. Complaints of violations of the Act should be referred to the administrator of the Wage and Hour Division of the Department of Labor.

9-139.202 Supervisory Jurisdiction

The Labor Unit of the Organized Crime and Racketeering Section has supervisory jurisdiction over criminal cases arising under the Act. Consultation with the Labor Unit of the Organized Crime and Racketeering Section, Criminal Division, is no longer required prior to criminal prosecution of wage and hour violations of the Fair Labor Standards Act (29 U.S.C. §§201-219). The current practice of the U.S. Department of Labor, which has investigative jurisdiction under the Act, is to refer criminal violations directly to U.S. Attorneys' offices in most cases. Of course, the Labor Unit of the Organized Crime and Racketeering Section may be consulted at any stage of the investigation and/or prosecution.

9-139.210 Criminal Provisions

As noted, the basic criminal enforcement provision of the Act is 29 U.S.C. §216(a). 29 U.S.C. §216(a) provides that:

Any person who willfully violates any of the provisions of Section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

A brief review of this section, and its construction with other sections of the FLSA follows.

9-139.211 "Willful Violation"

Under the Fair Labor Standards Act, criminal prosecution is limited to situations where the government can show a willful violation of 29 U.S.C. §215 by the employer. The willful intent element of the offense is satisfied if the prosecution can prove that the employer merely intended the acts which subsequently resulted in the FLSA violation. Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir. 1951), cert. denied, 342 U.S. 876 (1951). In Nabob, *supra*, the Tenth Circuit upheld the conviction under 29 U.S.C. §216(a) of the defendant-employer for failing to pay overtime compensation to employees and for failing to maintain accurate records in accordance with FLSA requirements. Interpreting the intent requirement of 29 U.S.C. §216(a), the Tenth Circuit noted that the term "willful," when



U.S. Department of Justice

Executive Office for United States Attorneys

replaced by 7-13-84

Washington, D.C. 20530

June 29, 1984

TO: Holders of United States Attorneys' Manual Title 9
FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: Supervisory Jurisdiction

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of USAM 9-139.202.

AFFECTS: USAM 9-139.202

The following replaces USAM 9-139.202:

9-139.202 Supervisory Jurisdiction

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used in penal statutes proscribing mala in se offenses, generally required proof of malice, bad purpose, or evil mind. However, those statutory offenses which denounce acts not in themselves wrong do not require criminal intent in their commission. Id. at 480. Thus, an offense under 29 U.S.C. §216(a) is committed "if the [questionable] act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally, or by ordinary negligence." Id. at 480.

The Nabob decision is supported by earlier cases. In an Eighth Circuit case, where an employer, without sufficient inquiry, adjusted an employee's time card to reflect the employer's perception of employee hours actually worked, no showing of bad purpose or evil intent to circumvent the FLSA record-keeping provision was required to sustain the conviction under 29 U.S.C. §216(a). Hertz Drivurself Stations, Inc. v. United States, 150 F.2d 923 (8th Cir. 1945). See also, United States v. Heilig, 137 F. Supp. 462 (D. Md. 1956). The Hertz court, however, did note its surprise that the "criminal fist of the Fair Labor Standards Act" was applied to a relatively minor error of an employer who had no intent or design to cheat his employee. Hertz, supra, at 929.

These decisions construe and apply liberally the remedial provisions of the FLSA. Briefly, willfulness under 29 U.S.C. §216(a) is equated with volitional conduct. The view of 29 U.S.C. §216(a) as a general intent offense is supported by the prevalent interpretation of those statutes which penalize certain acts, not criminal in themselves but frustrative of a national policy, by imposing relatively minor penalties on violators. See, Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960).

The Nabob decision severely limited the defenses available to an employer in a 29 U.S.C. §216(a) prosecution. Since the government is required to show only that the defendant deliberately and voluntarily did that act which constituted the FLSA violation, neither a good faith intent to adhere to the FLSA nor an incorrect interpretation of the Act is a valid defense. Thus, an employer's reliance on an accountant's advice regarding payments to employees in accordance with the Act is immaterial to the commission of the offense. United States v. Heilig, 137 F. Supp. 461 (D. Md. 1956). Even where wage payments and leave time demonstrably "averaged out" to FLSA standards, an employer's conviction under 29 U.S.C. §216(a) was sustained for failure to maintain accurate records for employee hours. United States v. Heilig, supra. However, in situations where an employer relies upon the absence of any objection by the Department of Labor to employer practices known to government investigators after periodic inspections of company records, the employer may be entitled to an acquittal due to his reliance on the inferred approval of the Labor Department. United States v. Ewald Iron Co., 47 F. Supp. 67 (W.D. Ky. 1946). Where the FLSA provisions are circumvented by wage or hour

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agreements between employer and employee which do not result from collective bargaining, or other specifically exempted categories, the lack of employee objection to the procedure will not serve to prevent a willful violation by the employer. Darby v. United States, 132 F.2d 928 (5th Cir. 1943). Under the Nabob decision, it appears that only where the questionable conduct is due to negligence does a valid defense exist. Thus, where an underpayment occurs, the defendant would be required to show a bookkeeping error or some other internal, unexpected failure which resulted in the violation.

9-139.212 Chargeable Violations

The purpose of 29 U.S.C. §216(a) was to punish an employer's illegal course of conduct rather than punish separately each breach of a statutory duty owed to individual employees. For example, whether the failure to pay a minimum wage to several employees in the same work class over a period of time constitutes one continuous lapse in an employer's obligations under the FLSA, or whether each underpayment to individual employees is a separate offense will be determined by the singleness of the employer's thought, purpose, or design in committing the violations. See, United States v. Universal Credit Corp., 344 U.S. 218 (1952). In Universal Credit Corp., the Supreme Court affirmed the dismissal without prejudice of a 32-count indictment where each count charged a separate wage, overtime or record-keeping violation in each week during a 20-week period. Since the violations resulted from one managerial decision, only one course of illegal conduct arose under 29 U.S.C. §216(a) rather than a separate offense for each work week or each duty owed to a single employee. Id. at 224. Accordingly, the consolidation by the trial court of the indictment into three counts, each alleging a different kind of violation (minimum wage, overtime compensation, and record-keeping) under 29 U.S.C. §215 and §216(a) was correct. In view of Universal Credit, the draftsman of an indictment for an FLSA violation should use a "single impulse" test to determine whether a series of acts should be aggregated into one course of conduct, or whether each breach of a duty to individual employees resulted from wholly distinct managerial decisions with respect to each aggrieved employee, thereby requiring the offenses to be charged separately.

9-139.213 False Information Violations

With respect to the filing and record-keeping provisions of the FLSA, the filing of false reports or making false representations regarding material information are prohibited acts under 29 U.S.C. §215. Where the defendant makes a false report or representation to a Labor Department official during a preliminary investigation authorized under the FLSA, and prior to the affirmation of Labor Department jurisdiction, the false report must be prosecuted under 29 U.S.C. §216(a). United States v. Moore, 95 F.

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Supp. 226 (S.D. Fla. 1951). Similarly, in false receipt cases, where an employer fabricates a receipt purporting to show that he/she has paid restitution to an employee under the FLSA, prosecution should proceed under 29 U.S.C. §216(a). However, false statements regarding restitution made in a letter or stipulation, or false written statements claiming current FLSA compliance, should be prosecuted under the general fraud statute, 18 U.S.C. §1001.

Where the jurisdiction of the Labor Department has been alleged and established, false reports or representations can be prosecuted under 18 U.S.C. §1001 or 29 U.S.C. §216(a). In either situation, the false statement must be material and relevant to the FLSA investigation. Rolland v. United States, 200 F.2d 678 (5th Cir. 1953). Finally, under 18 U.S.C. §1001, it must be shown that the false statement or document related to an employee covered by the FLSA. United States v. Moore, 185 F.2d 92 (5th Cir. 1950).

In these matters, the Department of Labor will give consideration to the amount of money involved in the false report before referral to the Justice Department. The Labor Department will not recommend false statement cases to the Department where the employer acted in collusion with a willing employee.

9-139.214 First Offense Exemption

Under 29 U.S.C. §216(a), first offenders are subject only to a monetary fine. Upon proof of a prior conviction under the FLSA, 29 U.S.C. §216(a) authorizes imposition of a fine and/or imprisonment for a maximum of six months. To obtain second offense sentencing, it has been held that the indictment or information must allege the prior offense. United States v. Modern Reed and Rattan Co., 159 F.2d 656 (2d Cir. 1947). In Modern Reed and Rattan Co., *supra*, the presentation to the jury of the prior offense allegation in the indictment was prejudicial error requiring reversal of defendant's conviction. Due to the conflicting views of the Second and Eighth Circuits, it is recommended that reference be made to the special offender sentencing procedure under 18 U.S.C. §3575, where a prior offense prosecution exists under 29 U.S.C. §216(a).

The majority of FLSA violations are uncovered by Labor Department investigators acting upon employee-filed complaints. Because the employer violations frequently involve small amounts and are relatively brief in duration, the prohibited acts are usually enjoined through a consent decree initiated by the Labor Department under 29 U.S.C. §217 rather than criminally presented under 29 U.S.C. §216(a). However, where the consent decree is subsequently violated, a question arises as to whether the employer's non-compliance with the court order triggers the applicability

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of the second offense sentencing provision in 29 U.S.C. §216(a) when FLSA criminal prosecution results. An ancillary question is whether the enforcement powers of a Federal court under 18 U.S.C. §401(3), to fine or imprison for contempt, are limited by the first offense exemption of 29 U.S.C. §216(a).

It was decided that the imposition of an injunction or consent decree for violations of the FLSA was not a first offense for purposes of 29 U.S.C. §216(a). See, United States v. Dasher, 51 F. Supp. 805 (E.D. Pa. 1943); United States v. Ridgewood Garment Co., 44 F. Supp. 435 (E.D.N.Y. 1941). There was no unanimity, however, as to whether a district court's contempt power under 18 U.S.C. §401, when exercised because of subsequent FLSA violations, is limited by 29 U.S.C. §216(a).

In United States v. B & W Sportswear, 53 F. Supp. 785 (E.D.N.Y. 1943) and in United States v. P & W Coat Co., 52 F. Supp. 792 (E.D.N.Y. 1943), the defendants were found guilty of criminal contempt of court orders which directed compliance with the FLSA. In each case, it was held that the imposition of a prison term for disobeying the court order would circumvent the intent of Congress to not impose a jail sentence under 29 U.S.C. §216(a) where no prior FLSA conviction was shown. Since the government chose to prosecute the defendant's acts as contempts under 18 U.S.C. §401(3), rather than first offenses under 29 U.S.C. §216(a), the punishment for criminal contempt of the court injunction was limited to a fine.

A different and more recent view of the power of a court to enforce its orders holds that it is the affront to the integrity of the court, rather than the substantive violation, which is being punished. To preserve orderly judicial proceedings, therefore, it is imperative that the courts' punishment power to fine or jail not be restricted unless expressly limited by Congress.

In United States v. Fidanian, 465 F.2d 755 (5th Cir. 1972), cert. denied, 409 U.S. 1044 (1972), the defendant signed a consent decree requiring compliance with the FLSA. After a year of repeated FLSA violations, the defendant was convicted of civil and criminal contempt of the court-ordered consent decree and imprisoned for six months. The Fifth Circuit held that although the defendant's act constituted both an indictable offense and a contempt, this concurrence did not limit the inherent power of the Federal courts to punish contempts under 18 U.S.C. §401(3). *Id.* at 757. Rather than punishing the FLSA violation, the court was simply vindicating its own order.

Similarly, the Third Circuit has rejected any restrictions on the contempt power when applied to violations of court orders arising from FLSA violations. Citing Fidanian, *supra*, the Third Circuit, in Mitchell v.

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Fiore, 470 F.2d 1149, 1154 (3d Cir. 1972), held that the punishment for criminal contempt does not reach the first offender shielded by 29 U.S.C. §216(a), but only those who violate court orders.

The currency and logic of the Fidanian and Mitchell decisions diminish the authority of the earlier restrictive views of B & W Sportswear and P & W Coat Co., supra. Therefore, where questions arise concerning the extent of a court's power to enforce violations of its orders in FLSA matters, it should be assumed that 29 U.S.C. §216(a) does not inhibit the full exercise of the court's authorized power under 18 U.S.C. §401(3).

9-139.220 Alternative Enforcement Measures

As previously noted, remedial actions against FLSA violators can be directed by the Labor Department under 29 U.S.C. §217 which provides broad injunctive relief. The decree can either enjoin a certain practice or direct that some affirmative action be taken through the issuance of a "negative injunction." The latter form of the decree typically orders an employer to "not refuse to pay claimed back-wages or overtime compensation," although the double negative phraseology is generally acknowledged as immaterial to the lawfulness of the injunction. See Fleming v. Alderman, 51 F. Supp. 800 (Conn. 1943); Mitchell v. Chambers Construction Co., 214 F.2d 515 (10th Cir. 1954). Due to the generally minor nature of most FLSA complaints filed, it is recommended that 29 U.S.C. §217 be employed routinely through the Labor Department. Where an employer consistently violates a decree or consent judgment, or where the FLSA violations are sufficiently aggravated, criminal sanctions can be pursued under 18 U.S.C. §401 or 29 U.S.C. §216.

Consultation with the Labor Unit of the Organized Crime and Racketeering Section, Criminal Division, is no longer required prior to criminal prosecution of wage and hour violations of the Fair Labor Standards Act (29 U.S.C. §201-219). The current practice of the U.S. Department of Labor, which has investigative jurisdiction under the Act, is to refer criminal violations directly to U.S. Attorneys' offices in most cases. Of course, the Labor Unit of the Organized Crime and Racketeering Section may be consulted at any stage of the investigation and/or prosecution.

9-139.230 Restitution

Following conviction under 29 U.S.C. §216(a) for a monetary violation, every effort should be made to secure restitution as a condition of sentence. Thus, probation may be conditioned with the requirement that the defendant make restitution. Postponement of sentencing pending restitution is an alternative procedure. In this regard, see 18 U.S.C. §§3651, et seq., and United States v. Berger, 145 F.2d 888 (2d Cir. 1944). In no instance, however, should voluntary restitution by the defendant be

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regarded as a quid pro quo for dismissal of a criminal action. Finally, as a matter of policy, the court imposition of a fine accompanied by a suspension of an amount equal to the delinquent back-wage payments, pending restitution, should be opposed as without support by federal or state case law, notwithstanding the broad sentencing powers of the federal judiciary.

9-139.300 29 U.S.C. §162 - INTERFERENCE WITH NATIONAL LABOR RELATIONS BOARD AGENT

Under 29 U.S.C. §153, the National Labor Relations Board (NLRB) was "continued" as the agency of the United States entrusted with primary oversight in the area of labor-management relations. The jurisdictional basis for the NLRB and the rest of the Labor-Management Relations Act, 1947 (29 U.S.C. §§141 et seq.), including 29 U.S.C. §162, is the commerce power of Congress. See, e.g., 29 U.S.C. §141.

Under 29 U.S.C. §162, it is a misdemeanor to willfully resist, prevent, impede or interfere with any member of "the Board" or any of its agents or agencies in the performance of their statutory duties. See 29 U.S.C. §153(a). Any obstruction of the investigative or adjudicative processes of the NLRB at any stage of the proceedings is covered by the provisions of 18 U.S.C. §1505 which pertain to the obstruction of proceedings before federal departments and agencies. See Rice v. United States, 356 F.2d 709 (8th Cir. 1966). However, with the exception of 18 U.S.C. §1505, the officers, agents and activities of the NLRB are not covered by the general statutes pertaining to assaults on federal officers and obstruction of justice. See 18 U.S.C. §§1111, 1111-1114, 1501-1510.

9-139.310 Conduct Prohibited

There is not much of a guideline as to the kinds of conduct covered in 29 U.S.C. §162. The statute fails to define any of its terms. Moreover, there are no reported criminal cases and only a few civil cases which discuss or interpret 29 U.S.C. §162. Only two of the civil suits are noteworthy. In S. Buchsbaum & Co. v. Beman, 14 F. Supp. 444, 448 (D.C. Ill. 1936), the court noted that the terms of 29 U.S.C. §162 should not be given an application beyond their plain meaning. In Bemis Pro. Bag Co. v. Feidelson, 13 F. Supp. 153 (W.D. Tenn. 1936), the court stated that 29 U.S.C. §162 did not make it a crime against the United States for an employer to discharge an employee.

In cases where force or violence is involved, the case law under 18 U.S.C. §111 and §§1111-1114 (assaults on federal officers) may supply guidance by analogy in interpreting the provisions and application of 29 U.S.C. §162. However, it should be noted that by its terms 29 U.S.C. §162 is broader in scope and applies to forms of interference not involving force or violence.

It may also be of value to refer to the case law under 18 U.S.C. §§1501-1510 which relates to assaults or interference with certain other federal agents and obstruction of justice. 18 U.S.C. §§1505, 1510, which concern obstruction of proceedings before federal departments and agencies

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and obstruction of criminal investigations, would appear to provide a rather pertinent analogy for interpreting 29 U.S.C. §162.

9-139.320 Penalty

Violators are subject to a fine of not more than \$5,000 and/or imprisonment for not more than one year.

9-139.330 Interrelationship With Other Federal Criminal Statutes

Certain conduct violative of 29 U.S.C. §162 may also constitute or indicate violations of other federal criminal statutes. For example, false statements made to an officer or agent of the NLRB may constitute violations of 18 U.S.C. §1001 (false statements to federal agencies) and/or 18 U.S.C. §1505 (obstruction of proceedings before federal departments and agencies) as well as of 29 U.S.C. §162.

9-139.340 No Previous Prosecutions

There is no indication that any prosecutions have taken place under this statute.

9-139.400 18 U.S.C. §844 - USE OF EXPLOSIVES WHEN A LABOR DISPUTE IS INVOLVED

Title XI of the Organized Crime Control Act of 1970 amended Title 18, United States Code, by adding Chapter 40 containing sections 841 through 848 governing the importation, manufacture, distribution and storage of explosive materials and creating certain Federal offenses pertaining to the unlawful use of explosives. Title XI greatly broadens federal authority pertaining to explosives--connected offenses. At the same time, Congress has expressly disclaimed any intent to occupy the field to the exclusion of state law on the same subject matter.

In 1982 18 U.S.C. §844 was amended to further broaden federal authority by prohibiting the use of fire to achieve certain unlawful objectives already set forth in the statute with respect to explosives. Prior to the amendment, the use of explosives or an explosive device had to be involved for a 28 U.S.C. §844 violation to have occurred. Anti-Arson Act of 1982, Pub.L. No. 97-298 (effective October 12, 1982). See H.R. REP. No. 97-678, 97th Cong., 2d Sess.

9-139.401 Jurisdiction

Federal jurisdiction is based upon some relationship to or affect upon interstate or foreign commerce. 18 U.S.C. §841 defines key terms including "interstate or foreign commerce."

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9-139.410 The Offense

The elements are the same as in any other prosecution under 18 U.S.C. §844.

9-139.420 Interrelationship With Other Federal Criminal Statutes

In the labor context, i.e., where a labor union or dispute is involved, actions by union officials, members or agents which violate any of the provisions of 18 U.S.C. §844 may also constitute or indicate violations of the following statutes.

A. 18 U.S.C. §1951 - extortion directed at an employer or firm where other than legitimate labor union objectives are demanded. See United States v. Enmons, 410 U.S. 396 (1973) and United States v. Green, 350 U.S. 415 (1956).

B. 29 U.S.C. §501(c) - use of union funds to finance a bombing, etc. See United States v. Boyle, 482 F. 2d 755 (D.C. Cir. 1973).

C. 29 U.S.C. §439(c) - falsification of labor union records to either generate the funds necessary to finance activity which would violate 18 U.S.C. §844, or coverup the true purpose for which union funds were expended.

D. 18 U.S.C. §664 - use of funds taken from a jointly administered pension or health and welfare fund to finance activity which would violate 18 U.S.C. §844. Cf., United States v. Boyle, 482 F.2d 755 (D.C. Cir. 1973).

E. 18 U.S.C. §1027 - falsification of pension or health and welfare fund records to either generate the funds necessary to finance activity which would violate 18 U.S.C. §844, or coverup the true purpose for which these funds were expended.

9-139.500 15 U.S.C. §1281 AND §1282 - DESTRUCTION OR DAMAGE TO PROPERTY IN INTERSTATE COMMERCE

On September 13, 1961, Public Law 87-221 was signed by the President and became effective immediately. 75 Stat. 466, 15 U.S.C. §§1281, 1282. This statute specifically forbids the willful destruction or injury to property moving in interstate or foreign commerce while such property is in the control of a common or contract carrier. The law is limited to rail, motor vehicle, and air carriers. Water transport is not included since offenses involving cargo aboard certain vessels are already proscribed by

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18 U.S.C. §2275. See 117 Cong Rec. H13748 (daily ed. Aug. 7, 1961) and H.R. REP. No. 727, 87th Cong., 1st Sess. 2, note 1 (1961).

No prior federal law covered damage to cargo as such, except for damage inflicted during transportation by water. Embezzlement, theft and concealment of certain goods and chattels, as distinct from damage to same, was prohibited. 18 U.S.C. §659. Coverage has been limited to damage, destruction, or wreck of the carriers' property, 18 U.S.C. §31 and §1992, and entry onto carrier property to commit certain specific felonies, 18 U.S.C. §2117. Commercial passenger-carrying motor vehicles operating in commerce and their cargoes were protected only from those acts of damage or destruction which were committed with either an intent to endanger human safety, or with a reckless disregard of human safety. 18 U.S.C. §33.

In large part, changed methods of freight transportation prompted the new legislation. The traditional method of shipping automobiles by rail was in enclosed boxcars; thus, it was quite difficult to damage such cargo without violating existing federal laws. Destruction of, or injury to, the property would either involve damage to or a wreck of the carrier's property, 18 U.S.C. §32, §1992, or, at least, a breaking of the boxcar seal, 18 U.S.C. §2117. Modern methods now being utilized by the railroads provide for open storage of the automobiles on board special flatcars or on highway-transport trailers aboard the flatcar, either of which invite depredations to the cargo which would rarely cause damage to the carrier's equipment itself. While most states have criminal laws which would pertain to such vandalism, such state laws were often rendered useless by technical and jurisdictional problems. Many of such problems originated in the fact that local investigative facilities were inadequate for cases involving interstate commerce.

Accordingly, this legislation was proposed to provide an adequate federal criminal statute. Although including every kind of cargo which can be carried by any of the specified means of transport, the legislation was suggested and heavily supported by the rail industry for the express purpose of combatting numerous instances of vandalism and sabotage which had occurred in the transportation of new automobiles from the point of manufacture to dealers. (Two specific instances were noted in the legislative reports wherein more than 200 new automobiles shipped on open flatcars had been damaged by acid sprayed on them while in transit. See H.R. REP. No. 727, 87th Cong., 1st Sess. 3.

9-139.501 Investigative Jurisdiction

The Federal Bureau of Investigation has investigative responsibility over offenses under this Act. 5 U.S.C. §300. See 117 CONG. REC. 13749 (daily ed. Aug. 7, 1961).

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9-139.510 Effect of the Act

The Act, which is in two sections, is set forth below.

A. 15 U.S.C. §1281 provides:

(a) It shall be unlawful for any person willfully to destroy or injure any property moving in interstate or foreign commerce in the possession of a common or contract carrier by railroad, motor vehicle, or aircraft, or willfully to attempt to destroy or injure any such property;

(b) Whoever violates subsection (a) of this section shall be fined not more than \$5,000 or imprisoned not more than ten years, or both;

(c) To establish the interstate or foreign commerce character of any property involved in any prosecution under this section, the waybill or similar shipping document of such property shall be prima facie evidence of the place from which and to which such property was moving.

B. 15 U.S.C. §1282 provides:

A judgment of conviction or acquittal on the merits under the laws of any state or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, shall be a bar to any prosecution under this Act for the same act or acts.

15 U.S.C. §1281(a), as indicated above, is not limited in scope as to kind of property covered, mode of carriage (excepting water transport covered under 18 U.S.C. §2275) or by any distinction between a common or contract carrier. 15 U.S.C. §1281(c) is an evidentiary provision; in proving the interstate or foreign aspects of the crime, the waybill or shipping documents furnish prima facie evidence of origin and terminus of the goods. This provision is virtually identical with that found in 28 U.S.C. §659. See, Baltimore & Ohio R.R. Co. v. United States, 217 F. Supp. 918, 924 (D. Md. 1963).

15 U.S.C. §1282 of the statute bars federal prosecution where, in other than federal courts, defendants have been convicted or acquitted after trial on the merits of the act or acts which would also be essential to a federal prosecution. Compare, Petite v. United States, 361 U.S. 529

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(1960). The sole difference between this section and similar provisions found in sections 659, 1992 and 2117 of Title 18, United States Code, is that the instance section includes within its purview prosecutions under the laws of the District of Columbia, possessions of the United States, and the Commonwealth of Puerto Rico, not mentioned in the other cited sections. It is, therefore, clear that 15 U.S.C. §1281 and §1282 do not preempt existing state and local law enforcement, which may be adequate in many instances.

9-139.520 Jurisdiction

Although there are no reported cases interpreting 15 U.S.C. §1281(a), the language of this section would seem to indicate that a jurisdictional prerequisite for this federal crime is "property moving in interstate or foreign commerce." This interpretation is supported by the doctrine that criminal statutes are to be strictly construed. Therefore, federal jurisdiction may be absent in those fact situations where interstate or foreign commerce has not yet begun or has terminated. It should also be noted that the "commerce" which the statute speaks of only exists during that span of time that the required carrier has custody and control of both the cargo and carrying vehicle.

9-139.530 Venue

The statute does not contain a specific venue provision. Therefore, the general venue provision of 18 U.S.C. §3237(a) is applicable. In most instances, the district in which the damaging acts occurred, would be the preferred district for prosecution.

9-139.540 Application

Although there have been some investigations undertaken under 15 U.S.C. §1281, the Department's records fail to indicate any indictments or reported prosecutions. Research has located one case which cites this statute solely in relation to a particular evidentiary issue. See, Baltimore & Ohio R.R. Co. v. United States, *supra*. Therefore, the case law under the related statutes noted above will have to serve as the principal guide in any prosecutions under 15 U.S.C. §1281.

Insofar as criminal intent is concerned, a problem arises under this statute where the goods in question are transported in a closed carrier vehicle. Where an attack on such a vehicle incidentally destroys or damages the goods within, it may not be clear that the subject willfully intended to destroy or injure the shipment itself. In other words, proving the actual object or objects of the destructive attack may pose problems. Of course, as already noted, there are other federal criminal statutes which might be available in such a situation.

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15 U.S.C. §1281 has a limited application for two reasons. State criminal statutes may be available to adequately handle the situation. Secondly, other more appropriate federal criminal statutes may be available (e.g., the federal firearms statutes).

9-139.600 29 U.S.C. §463 - LABOR ORGANIZATION UNDER TRUSTEESHIP

Investigative responsibility for this statute is with the Department of Labor.

The statute, which applies to situations where a subordinate body of a labor organization is placed in trusteeship, provides that delegates from the organization under trusteeship (e.g., a local) to any convention or election (e.g., by an international union) must be democratically elected by all eligible members by secret ballot. Any other method of delegate selection renders their votes a nullity. It also provides that funds of the organization under trusteeship may not be transferred to the international or other level of the labor organization. Exceptions are that normal per capita tax and assessments payable by organizations not under trusteeship may continue to be collected by superior levels of the labor organization, and the assets of the organization under trusteeship may be distributed in accordance with that organization's constitution and bylaws upon dissolution.

A willful violation may result in imprisonment for one year and/or \$10,000 fine.

9-139.700 OTHER

9-139.710 29 U.S.C. §502 - Bonding of Officers and Employees of Labor Organizations

Primary investigative responsibility for this statute is with the Department of Labor.

The statute requires that all officers, employees and certain representatives of a labor organization (except those whose property and annual receipts do not exceed \$5,000) or of a trust in which a labor organization is interested be bonded to provide protection against loss by reason of acts of fraud or dishonesty on their part directly or through connivance with others, if they handle funds or other property of the organization. Any person who is not bonded shall not be permitted to exercise control over a union's assets. While no designation is made as to who is responsible for permitting an unbonded individual to handle assets, the fiduciary standards imposed in 29 U.S.C. §501(a) indicate that

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officers, agents and shop stewards and others, regardless of title, in a position of authority may be liable.

Willful violations are punishable by up to one year and \$10,000.

9-139.720 29 U.S.C. §503 - Loans to Union Officers and Payment of Fines

Primary investigative responsibility for this statute is with the Department of Labor.

The statute prohibits a labor organization from making loans which in the aggregate exceed \$2,000 to any one officer or employee. It also prohibits the payment by a labor organization of any fine imposed upon its officers or employees for willful violations of the LMRDA.

Officer of a labor organization includes all elected officials, any person with authority to perform the functions of an elected official or any other executive functions. The term is to be given a broad definition and may include any person in a position of authority to direct or substantially influence membership actions. See, Wirtz v. NMU, 399 F.2d 544 (2d Cir. 1968). Employee does not include union members who are not actually employed by the union.

A willful violation may result in imprisonment for one year, a \$5,000 fine, or both.

9-139.730 18 U.S.C. §1231 - Transportation of Strikebreakers

This provision prohibits any person from:

(1) Willfully transporting any person in interstate or foreign commerce who is employed or will be employed to obstruct or interfere by force or threats with peaceful labor picketing by employees, or employees' exercise of organizational or collective bargaining rights; or

(2) Traveling or knowingly being transported in interstate or foreign commerce for the purpose of obstructing or interfering by force or threats with any of the above-enumerated employee activities.

The legislative history makes clear that 18 U.S.C. §1231 was enacted to deal with professional strikebreakers who were hired by employers to physically interfere with pickets and other lawful labor activity by employees. Thugs and strongarms had been recruited by employers for this

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purpose through so-called detective agencies purportedly retained to protect the employer's property. The importation of persons into the state for any purpose other than such disruptive activity, however, is not covered by 18 U.S.C. §1231. S. REP. No. 1420, 74th Cong., 1st Sess. (1935); H.R. REP. 2431, 74th Cong., 2d Sess. (1936); Hearings on S. 2039 Before the Subcomm. No. 1 of the House Comm. on the Judiciary, 74th Cong., 2d Sess., p. 2 (1936). Debate in the Senate makes clear, moreover, that an employer's bringing of "scab labor" into the state in order to take the place of employees already on strike is not affected by the Act. See 91 CONG. REC. S14105 (daily ed. August 22, 1935) (remarks cf. Senators Borah and Byrnes).

In 1938, the Act was amended to impose penalties on those transported in addition to employers. While the words "by force and threats" were added to clarify the prior reference to obstruction and interference generally, no substantive change in respect to the activities covered was intended. S. REP. No. 75th Cong., 1st Sess. (1937).

Common carriers are specifically exempted from the application of this statute. However, due to the absence of any statutory definition of the term "common carrier," problems may arise as to whether a person is or is not a member of this exempted class for purposes of this statute. See e.g., by way of analogy, definitional sections in 18 U.S.C. §831 and 49 U.S.C. §1. (3).

The penalties for violating this statute are a fine of not more than \$5,000 and/or imprisonment for not more than two years. Because there has only been one successful prosecution under the statute in an unreported case in the Southern District of Florida, it is recommended that the Labor Unit, Organized Crime and Racketeering Section, be consulted before prosecution is initiated under this statute.

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